Court of Appeal
New South Wales

Medium Neutral Citation: **Norrie v NSW Registrar of Births, Deaths and Marriages [2013] NSWCA 145**

Hearing Dates: 12 November 2012

Decision Date: 31/05/2013

Before: Beazley ACJ at [1];
Sackville AJA at [208];
Preston CJ of LEC at [281]

Decision: 1. Appeal allowed;

2. Order 2 of the Appeal Panel be set aside;

3. In lieu thereof:

(a) Set aside the decision of the Tribunal dated 16 March 2010;

(b) Order the matter be remitted to the Tribunal for determination;

(c) Order the respondent pay the appellant's costs of the appeal.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords: INTERPRETATION - Births, Deaths and Marriages Registration Act 1995, s 32DC - whether the Registrar's power under s 32DC to register change of a person's "sex" is limited to registering a change from male to female or female to male.

ADMINISTRATIVE LAW - jurisdiction, Administrative Decisions Tribunal Act 1997, s 119(1) - whether question of law.

INTERPRETATION - extrinsic material - whether regard could be had to second reading speeches, dictionary definitions, academic material and other Acts.

EVIDENCE - proof - judicial notice - whether regard could be had to extrinsic material in the interpretation of the statute.

Legislation Cited: Administrative Decisions Tribunal Act 1997
Anti-Discrimination Act 1977
Births, Deaths and Marriages Registration Act 1995
Child Protection (Offenders Registration) Act 2000
Children's Services Regulation 2004
Combat Sports Regulation 2009
Conveyancing Act 1919
Court Security Act 2005
Courts and Crimes Legislation Amendment Act 2008
Crimes (Administration of Sentences) Regulation 2008
Crimes (Forensic Procedures) Act 2000
Crimes Act 1900
Crimes Act 1914 (Cth)
Defence Forces Retirement Benefits Act 1948 (Cth)
Evidence Act 1995
Fair Work Act 2009 (Cth)
Gender Reassignment Act 2000 (WA)
Higher Education Funding Act 1998 (Cth)
Industrial Relations Act 1996
International Criminal Court Act 2002 (Cth)
Interpretation Act 1987
Landlord and Tenant (Amendment) Act 1948

Law Enforcement (Powers and Responsibilities) Act 2002
Marriage Act 1961 (Cth)
Maternity Leave (Commonwealth Employees) Act 1973 (Cth)
Privacy and Personal Information Protection Act 1998
Racial Discrimination Act 1975 (Cth)
Sex Discrimination Act 1984 (Cth)
Succession Act 2006
Superannuation Act 1922 (Cth)
Terrorism (Police Powers) Act 2002
Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996
Transport Employees Retirement Benefits Act 1967

Cases Cited:

AB v Western Australia [2011] HCA 42; 244 CLR 390
Aktiebolaget Hassle v Alphapharm Pty Ltd [2002] HCA 59; 212 CLR 411
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27
Attorney-General (Cth) v Kevin [2003] FamCA 94; 172 FLR 300
Australian Communist Party v Commonwealth [1951] HCA 5; 83 CLR 1
Australian Education Union v Department of Education and Children's Services [2012] HCA 3; 86 ALJR 217
Australian Gas Light Co v Valuer-General (1940) 40 SR (NSW) 126
Aytugrul v The Queen [2012] HCA 15; 86 ALJR 474
Baini v The Queen [2012] HCA 59; 87 ALJR 180
Brown v Repatriation Commission (1985) 7 FCR 302
Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56; 87 ALJR 131
Cody v J H Nelson Pty Ltd [1947] HCA 17; 74 CLR 629
Coleman v DPP [2000] NSWSC 275; 49 NSWLR 371
Collector of Customs v Agfa Gevaert Ltd [1996] HCA 36; 186 CLR 389
Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 322; 43 FCR 280
Cooper Brooker (Wollongong) Pty Ltd v Federal Commissioner of Taxation [1981] HCA 26; 147 CLR 297
Corbett v Corbett [1971] P 83
Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450
Deputy Commissioner of Taxation v Clark [2003] NSWCA 91; 57 NSWLR 113
Gattellaro v Westpac Banking Corporation [2004] HCA 6; 78 ALJR 394
Gerhardy v Brown [1985] HCA 11; 159 CLR 70
Gibb v Federal Commissioner of Taxation [1966] HCA 74; 118 CLR 628
Harrison v Melhem [2008] NSWCA 67; 72 NSWLR 380
Holland v Jones [1917] HCA 26; 23 CLR 149
Hope v Bathurst City Council [1980] HCA 16; 144 CLR 1
In the marriage of C and D (falsely called C) [1979] FLC 90-636; 35 FLR 340
Industry Research and Development Board v Bridgestone Australia Ltd [2001] FCA 954; 109 FCR 564
IW v City of Perth [1997] HCA 30; 191 CLR 1
Kevin v Attorney-General (Cth) [2001] FamCA 1074; 165 FLR 404
Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32; 241 CLR 390
Maunsell v Olins [1975] AC 373
Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW [2005] FCAFC 154; 145 FCR 523
Monis v The Queen [2013] HCA 4, 87 ALJR 340
Moyna v Secretary of State for Work and Pensions [2003] 1 WLR 1929
Norrie v Registry of Births, Deaths and Marriages [2011] NSWADT 102
Oceanic Life Ltd v Chief Commissioner of Stamp Duties [1999] NSWCA 416; 168 ALR 211
OV v Members of The Board of Wesley Mission Council [2010] NSWCA 155; 79 NSWLR 606
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
R v Gee [2003] HCA 12; 212 CLR 230
R v Harris & McGuiness (1988) 17 NSWLR 158
R v Henry [1999] NSWCCA 111; 46 NSWLR 346
R v Lavender [2005] HCA 37; 222 CLR 67
R v Peters (1886) 16 QBD 636
Re Secretary, Department of Social Security and "HH" [1991] AATA 94; 23 ALD 58
Registrar of Titles (WA) v Franzon [1975] HCA 41; 132 CLR 611
Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16; 86 ALJR 494
Screen Australia v EME Productions No 1 [2012] FCAFC 19; 200 FCR 282
Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mouratidis [2012] FCAFC 29
Secretary, Department of Social Security v "SRA" [1993] FCA 573; 43 FCR 299
Thomas v Mowbray [2007] HCA 33; 233 CLR 307
Timbury v Coffee [1941] HCA 22; 66 CLR 277
Victims Compensation Fund v Brown [2003] HCA 54; 77 ALJR 1797
Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation [2008] FCA 983, 170 FCR 318
Waters v Public Transport Corporation [1991] HCA 49; 173 CLR 349

	Western Australia v AH [2010] WASCA 172; 41 WAR 431 Woods v Multi-Sport Holdings Pty Ltd [2002] HCA 9; 208 CLR 460
Texts Cited:	Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Vol 1 (1985) D C Pearce & R S Geddes, Statutory Interpretation in Australia, 7th ed (2011) LexisNexis Butterworths D K Smith, "Transsexualism, Sex Reassignment Surgery, and the Law" (1971) 56 Cornell Law Review 963 J A Greenberg, Intersexuality and the Law: Why Sex Matters (2012) New York University Press J D Heydon, "Developing the Common Law", in Gleeson, J T and Higgins, R C A (eds) Constituting Law, Legal Argument and Social Values (2011) Federation Press J L Taitz, "Confronting Transsexualism, Sexual Identity and the Criminal Law" (1992) 60 Medico-Legal Journal 60 M Aronson, B Dyer and M Groves, Judicial Review of Administrative Action (2009) Lawbook Co M D Kirby, "Medical Technology and New Frontiers of Family Law" (1986-87) 1 Australian Journal of Family Law 196 Macquarie Dictionary, 4th ed (2005) R Wilson, "Life and Law: The Impact of Human Rights on Experimenting with Life", (1985) 17(3) Australian Journal of Forensic Sciences 61
Category:	Principal judgment
Parties:	Norrie (Appellant) NSW Registrar of Births, Deaths and Marriages (Respondent)
Representation:	Solicitors: DLA Piper (Appellant) Crown Solicitor's Office (Respondent) Counsel: D M J Bennett QC; A J Abadee (Appellant) K M Richardson (Respondent)
File Number(s):	CA 2012/61881

DECISION UNDER APPEAL

Before:	Magistrate N Hennessy, Deputy President, K Fitzgerald, Judicial Member, J Schwager, Non-Judicial Member
Date of Decision:	29/11/2011
Medium Neutral Citation:	Norrie v Registrar of Births, Deaths and Marriages (GD) [2011] NSWADTAP 53
Court File Number(s):	103077

HEADNOTE

[This headnote is not to be read as part of the judgment]

On the review of a decision by the Registrar of Births, Death and Marriages not to register the appellant's (Norrie) sex as "*non specific*" under Pt 5A of the *Births, Deaths and Marriages Registration Act* 1995 (the Act), the Administrative Decisions Tribunal held that the Registrar's power under Pt 5A, s 32DC was confined to a registration of a person's sex as either "*male*" or "*female*". The Appeal Panel of the Administrative Decisions Tribunal affirmed the decision of the Tribunal.

On appeal to the Court of Appeal on a question of law pursuant to the *Administrative Decisions Tribunal Act*, s 119(1) Norrie contended that the Appeal Panel erred in law in its construction of s 32DC of the Act, in holding that:

(i) the Registrar could only register a change of a person's "*sex*" from male to female or female to male;

(ii) the precondition in s 32DA that a person undergo sex affirmation surgery as defined in s 32A was only satisfied if the person underwent the surgical procedure for the purpose of being more definitively regarded as "*male*" or "*female*"; and

(iii) as a matter of law, it was not open to the Registrar to register the appellant's sex as "*non specific*".

The grounds of appeal raised a number of ancillary questions relating to the proper approach to statutory construction.

Appeal allowed:

(1) By the Court: The Appeal Panel erred in law in construing s 32DC(1) of the *Births, Deaths and Marriages*

Registration Act 1995 as limiting the Registrar's powers to registering a person's sex as only "*male*" or "*female*".

(2) By the Court: As a matter of construction of s 32DC, the word "*sex*" does not bear a binary meaning of "*male*" or "*female*": [200], [242], [287], [291].

Considered: *In the marriage of C and D (falsely called C)* [1979] FLC 90-636; 35 FLR 340; *R v Harris & McGuiness* (1988) 17 NSWLR 158; *Secretary, Department of Social Security v "SRA"* [1993] FCA 573; 43 FCR 299; *Kevin v Attorney-General (Cth)* [2001] FamCA 1074; 165 FLR 404; and *AB v Western Australia* [2011] HCA 42; 244 CLR 390: [129]-[164].

(3) Per Beazley ACJ (President of the Court of Appeal) and Preston CJ of LEC: The Registrar's power under s 32DC to register a change of a person's "*sex*" is not limited to registering a change from male to female or female to male [187]-[188], [200], [291], [291]-[303]. Per Sackville AJA: Section 32DC empowers the Registrar, at least in some circumstances, to register a change of sex of a person from male or female to a category that is neither male nor female: [257], [274].

(4) By the Court: The Appeal Panel erred in law in concluding that it was not open to the Registrar to register Norrie's sex as "*non specific*": [205]; [274], [281]-[282].

(5) By the Court: It will be a matter for the Tribunal, upon remittal, to determine if it is satisfied that a person's sex may be registered as "*non specific*": [205]; [275], [281]-[282], [306].

(6) By the Court: The proper construction of s 32DC, having regard to the meaning of "s*ex*" as used in the statute, is a question of law: [62], [64], [210]; [304], [305]. Errors of law and errors of fact discussed at [52]-[63], [304].

Considered: *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126; *Industry Research and Development Board v Bridgestone Australia Ltd* [2001] FCA 954; 109 FCR 564; *Aktiebolaget Hassle v Alphapharm Pty Ltd* [2002] HCA 59; 212 CLR 411. *Collector of Customs v Agfa-Gevaert Limited* [1996] HCA 36; 186 CLR 389; *OV v Members of The Board of Wesley Mission Council* [2010] NSWCA 155; 79 NSWLR 606 *; Screen Australia v EME Productions No 1* [2012] FCAFC 19; 200 FCR 282; *Hope v Bathurst City Council* [1980] HCA 16; 144 CLR 1.

(7) Whether the precondition of sex affirmation surgery satisfied discussed: [195]-[199] per Beazley ACJ and [244] per Sackville AJA. The text and context of the word "*sex*" in the definition of "*sex affirmation procedure*" do not limit the sex affirmation procedure to only the male or female sexes: [298]-[302]: per Preston CJ of LEC.

(8) The extent to which the Court may have regard to extrinsic material, including second reading speeches, dictionary definitions and academic material, in the construction of a statute discussed: [69]-[70], [83], [84]-[85], [103]-[104] per Beazley ACJ, [227] per Sackville AJA, [281]-[282] per Preston CJ of LEC.

Considered: *Interpretation Act 1987*, s 34; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; 87 ALJR 131; *R v Peters* (1886) 16 QBD 636; Dennis C Pearce & Robert S Geddes, *Statutory Interpretation in Australia*, 7th ed (2011) LexisNexis Butterworths. *Coleman v DPP* [2000] NSWSC 275; 49 NSWLR 371; *Evidence Act* 1995 (NSW) s 144; *Gerhardy v Brown* [1985] HCA 11; 159 CLR 70; *Gattellaro v Westpac Banking Corporation* [2004] HCA 6; 78 ALJR 394; *Regina v Henry* [1999] NSWCCA at 111; 46 NSWLR 346; *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; 208 CLR 460; *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307; *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474 at [21]; *Timbury v Coffee* [1941] HCA 22; 66 CLR 277; *Australian Communist Party v Commonwealth* [1951] HCA 5; 83 CLR 1; *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* [2008] FCA 983; 170 FCR 318.

(9) The extent to which other legislation is relevant to the construction of a statutory provision discussed: [123], [195] per Beazley ACJ, [269]-[273] per Sackville AJA, [281]-[282] per Preston CJ of LEC.

Considered: *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; 87 ALJR 131; *Harrison v Melhem* [2008] NSWCA 67; 72 NSWLR 380

JUDGMENT

1 **BEAZLEY ACJ**:

Introduction

2 This is an appeal brought by the appellant (Norrie) from the decision of the Appeal Panel of the Administrative Decisions Tribunal (the Tribunal): *Norrie v Registrar of Births, Deaths and Marriages (GD)* [2011] NSWADTAP 53.

3 The Appeal Panel affirmed the decision of the Tribunal, constituted by Judicial Member Montgomery, that the Registrar of Births, Deaths and Marriages (the Registrar) did not have power under the *Births, Deaths and Marriages Registration Act* 1995 (the Act), s 32DC to register a change of sex by a person from the sex recorded on the Register to 'non specific' or 'not specified': *Norrie v Registry of Births, Deaths and Marriages* [2011] NSWADT 102.

4 The present appeal is brought on a question of law pursuant to the *Administrative Decisions Tribunal Act* 1997, s 119(1). For the reasons which appear below, I consider that the appeal should be allowed and the matter remitted to the Tribunal for determination in accordance with law.

5 Finally, by way of introductory matters, I have adopted the name Norrie to identify the appellant and I have used the personal pronouns "*she*" and "*her*" when referring to Norrie.

Essential background matters

6 Norrie was born in Scotland as a male and in 1989 underwent sexual reassignment surgery involving castration and the creation of a semi-functioning vagina. In her evidence, Norrie said that she undertook the surgery to eliminate the

ambiguity in relation to her sex. She identified that ambiguity to be that although she was born with male reproductive organs, she identified as having a non specific gender identity. Her application to the Registrar was for her sex to be registered as "*non specific*". Norrie contended that the surgery had not resolved her ambiguity in relation to her sex. In the Tribunal and the Appeal Panel, in addition to the term "*non specific*", various other terms were used, including "*intersex*", "*androgynous*", "*neuter*", "*eunuch*" and "*third sex*".

7 On 26 November 2009, Norrie made two applications to the Registrar: the first to register a change of name pursuant to s 27 of the Act; and the second to register a change of sex pursuant to s 32DA of the Act.

8 On 24 February 2010, the Registrar wrote to Norrie approving both applications. The letter attached new Change of Name and Recognised Details (Change of Sex) Certificates, which recorded Norrie's sex as "*not specified*". On 16 March 2010, the Registrar wrote to Norrie informing her that the Recognised Details (Change of Sex) Certificate was invalid and had been issued in error. The Registrar also informed her that the Change of Name Certificate remained valid. The reissued Certificate had, however, been altered so that the entry "*not specified*", in relation to "*sex*", had been replaced with the words "*not stated*".

9 On 26 March 2010, Norrie lodged an application for review of the Registrar's decision in the Tribunal. The application was dismissed and Norrie appealed to the Appeal Panel, which also dismissed the application.

10 The question of law raised by the appeal is whether, on the proper construction of the Act, the Registrar's power under s 32DC to alter the record of a person's sex on the Register is confined to an alteration from "*male*" to "*female*", or from "*female*" to "*male*", or whether there is power to change the sex recorded to some other specification.

11 Norrie submitted that the relevant statutory provisions do not confine registration to only "*male*" or "*female*" and in fact readily accommodate recognition of a sex which is neither male nor female. Norrie further submitted that the registration of "*non specific*" gender was compatible with the language and purpose of the legislation.

Legislative framework

***Births, Deaths and Marriages Registration Act* 1995**

12 The Act is, relevantly, an Act to provide for the registration of births, deaths and marriages. The objects of the Act are provided for in s 3 and include:

> "(c) the registration of changes of name and the recording of changes of sex"

13 Section 4 is the "*Definition*" provision of the Act. The term "*sex*" is not defined in the Act. The word "*intersex*" is not a term used in the Act, nor, for that matter, is there any provision for the identification of "*sex*" as "*non specific*" or "*not specified*".

14 The Registrar is required to maintain a register or registers 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*". Part 3 of the Act provides for the registration of births. Part 3 provides for the notification of births, both in respect of children born in New South Wales: s 12, and for children who are to become resident in the State: s 13. The Births, Deaths and Marriages Registration Regulation 2006 (repealed), cl 4 specified the information required to be given to the Registrar in respect of the birth of a child, including the sex of the child.

15 A birth is registered under the Act by the Registrar making an entry in the Register, including of the particulars required by the regulations: s 17(1). However, s 17(2) permits the Registrar to register a birth, notwithstanding that the particulars are incomplete. Counsel for the Registrar informed the Court that s 17(2) was sometimes used to register the birth of a child with a congenital intersex condition, with no sex being stated on the Register. This was to accommodate parents' wishes until some longer term decision was made in respect of the sex of the child.

16 Part 3, Div 4, s 20 of the Act is entitled "*Alteration of details after birth registration*" and provides for the addition of "*registrable information*" in a person's birth registration. "*Registrable information*" is defined to mean "*information that must or may be included in the Register*". However, s 20(3) provides that when used in the section, "*registrable information does not include information relating to a person's change of sex*".

Part 5A

17 An application for the registration of a change of sex is dealt with in Pt 5A of the Act. Part 5A, encompassing ss 32A-32J, entitled "*Change of sex*", applies where a person has undergone a "*sex affirmation procedure*". It is the relevant Part of the Act for the purposes of these proceedings.

18 Part 5A was inserted into the Act by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act* 1996 (repealed), which also amended the *Anti-Discrimination Act* 1977, to which reference is made below. At that time, it

made provision for the registration of a change of sex for persons whose birth was registered in New South Wales. Persons not born in New South Wales did not come within these provisions. This was changed by amendments introduced into Pt 5A by the *Courts and Crimes Legislation Amendment Act* 2008. The purpose of the amendments was described by the Agreement in Principle Speech as providing a "*means for transgender people who were born overseas to have their change of sex legally recognised in New South Wales*".

19 The *Courts and Crimes Legislation Amendment Act* replaced the phrase "*sexual reassignment surgery*" in ss 32A, B and C with the phrase "*sex affirmation procedure*", which is defined in s 32A. Sections 32G and H were omitted by the amending Act whilst ss 32DA-32DD and s 32J were inserted into the Act.

20 The question in issue in these proceedings is the scope of the Registrar's powers under s 32DC to register a person's change of sex, in this case upon application made by a person under s 32DA. Section 32DC has to be read in the context of the other provisions of Pt 5A and in particular, the definition of "*sex affirmation procedure*" in s 32A. The relevant provisions of Pt 5A are as follows.

21 Section 32A defines "*sex affirmation procedure*" as follows:

> "***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."

22 Under the succeeding sections of Pt 5A, application can be made to alter or add the sex on the register of a person's birth. As Norrie was not born in New South Wales and her birth was not registered in this State, the relevant provision, which is the provision in issue in the proceedings, is s 32DA. Section 32DA provides:

> "**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 ..."

23 Norrie satisfies each of the provisions of s 32DA.

24 Section 32DB provides that the following supporting documentation is to accompany an application under s 32DA:

> "**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."

25 The statutory declarations of Dr Kearley and Dr Schultheiss lodged in compliance with s 32DB both supported a change in the registration of Norrie's sex to "*non specific*".

26 The Registrar, in determining an application made under s 32DA, may make or refuse to make an alteration to the record of the person's sex pursuant to s 32DC. Section 32DC provides:

> "**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."

27 The effect of the registration of a change of sex on the Register is provided for in ss 32I and 32J of the Act, which provide:

> "**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.
> ...
> **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."

28 Whilst Norrie's application for the alteration of the Register was made under the Act and it is the construction of that Act that is in issue, Norrie also referred to the provisions of the *Anti-Discrimination Act* and the *Crimes (Forensic Procedures) Act* 2000. The terms said to be relevant to the construction of s 32DA are set out below.

***Anti-Discrimination Act* 1977**

29 As noted at [18] above, the *Anti-Discrimination Act* was also amended by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act*. The *Anti-Discrimination Act* was amended so as to insert definitions of the terms "*recognised transgender person*" and "*discrimination on transgender grounds*". Relevantly, s 4 defines "*recognised transgender person*" to mean:

> "... a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* or under the corresponding provisions of a law of another Australian jurisdiction."

30 Part 3A of the *Anti-Discrimination Act* deals with discrimination on transgender grounds. Section 38A provides the following definition of a transgender person:

> "**38A Interpretation**
>
> A reference in this Part to a person being transgender or a transgender person is a reference to a person, whether or not the person is a recognised transgender person:
>
> (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." (emphasis added)

***Crimes (Forensic Procedures) Act* 2000**

31 The *Crimes (Forensic Procedures) Act*, s 3(1) defines a "*recognised transgender person*" as:

> "... a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* or under the corresponding provisions of a law of another Australian jurisdiction."

32 Section 3(6) also defines a transgender person for the purpose of the *Crimes (Forensic Procedures) Act* in the same terms as the *Anti-Discrimination Act*, s 38A.

33 It can be noted at this point that although the *Anti-Discrimination Act*, s 38A and the *Crimes (Forensic Procedures) Act*, s 36 refer to a person of "*indeterminate sex*", the term is not defined in either Act.

History of the proceedings

Decision of the Tribunal

34 On 26 March 2010, Norrie, pursuant to the Act, s 56, lodged an application for review of the Registrar's decision to the Tribunal. Pursuant to the *Administrative Decisions Tribunal Act*, s 63, the Tribunal's power on the review was to decide what the correct and preferable decision was, having regard to the material before it, including any factual material and any applicable written or unwritten law.

35 The Tribunal, at [1], stated that there were two related decisions of the Registrar before it for review:

> "(a) the decision that a 'recognised details certificate', previously issued to the Applicant on 11 February 2010 and specifying the Applicant's sex as 'Not specified', was invalid and was issued in error; and
>
> (b) the decision that a 'change of name certificate', previously issued to the Applicant on 11 February 2010 and specifying the Applicant's sex as 'Not specified', should be replaced by a new change of name certificate dated 16 March 2010 which specifies the Applicant's sex as 'Not Stated'."

36 The Tribunal stated, at [2], that in order to determine whether those decisions were the correct and preferable ones, it was necessary to consider the preliminary issue whether the Registrar had power under s 32DC of the Act to register a change of sex of a person to "*non specific*" or "*not specified*". This, in the Tribunal's consideration, turned upon the preliminary issue whether the word "*sex*" used in the legislation means "*male*" or "*female*" or had some more expansive meaning. The Tribunal concluded that the Registrar only had power to register a person's sex as "*male*" or "*female*": see the Tribunal's reasons at [99].

37 During the course of its reasons, the Tribunal made a number of observations as to the underlying factual matters

relating to the application. These matters were summarised by the Appeal Panel, at [9], in its determination of Norrie's appeal from the Tribunal's decision and it is convenient to adopt the Appeal Panel's summary of those matters:

> "(1) Norrie's application for a change of sex was accompanied by the necessary supporting documentation;
>
> (2) on the 'Statutory Declaration to Register a Change of Sex' dated 26 November 2009, Norrie records her sex at birth as 'male' and applies to register a change of sex as 'Non Specific'. This statutory declaration is in the form approved by the Registrar under section 32DA of the Act;
>
> (3) statutory declarations sworn by Drs Kearley and Schultheiss in support of Norrie's application to register a change of sex both support the registration of a change of sex showing the sex to be 'Non Specific' and declare that Norrie has undergone a sex affirmation procedure. These statutory declarations are in the form approved by the Registrar under section 32DB of the Act;
>
> (4) the Respondent does not dispute that the Applicant has undergone a surgical procedure and **there is medical evidence before the Tribunal that establishes that the Applicant would meet the legislative requirements to register a change of sex from male to female; and**
>
> (5) **the Applicant does not identify as either male or female but as 'non specific'**." (emphasis added)

38 The Tribunal made no finding as whether Norrie had undergone a sex affirmation procedure within the meaning of s 32A(a) or s 32A(b).

39 The Tribunal determined, at [100], that the decisions made by the Registrar "*were the correct and preferable ones and they should be affirmed*" and ordered that "[*t*]*he decisions under review are affirmed*". The Tribunal considered that the law in New South Wales was predicated upon the assumption that persons could be classified into two distinct and identifiable sexes, namely, that of male and female. The Tribunal concluded that the construction of the Act urged by Norrie was not consistent with the numerous legislative provisions that were premised upon the binary notion of sex as meaning "*male*" and "*female*": see at [87] and [94]. The Tribunal also considered that the construction for which Norrie contended was not consonant with the common law.

40 The Tribunal acknowledged, at [96], that this view may be out of step with current social, medical and scientific views. Nonetheless, at [97], the Tribunal considered that it was improbable that Parliament would have intended that the amendments to the Act effected by Pt 5A to have the outcome for which Norrie contended.

Decision of the Appeal Panel

41 Norrie appealed to the Appeal Panel on a question of law pursuant to the *Administrative Decisions Tribunal Act*, s 113(2)(a). The questions of law posed for the Appeal Panel's determination were:

> "(1) Did the Tribunal err by following an incorrect procedure that is, by failing to determine as a question of fact the appellant's subjective purpose in undergoing the surgical procedure defined in the Act as a 'sex affirmation procedure'?
>
> (2) Did the Tribunal misconstrue s 32DC when it found that the powers of the Registrar when registering a person's change of sex under that provision are limited to recording 'male' or 'female' in the sex field?" (at [18])

42 During the course of the appeal hearing, Norrie also applied for leave to appeal on the merits of the application: see the *Administrative Decisions Tribunal Act*, s 113(2)(b). This application was rejected because it was made without notice to the Registrar and because the Tribunal had only determined the preliminary question of the Registrar's powers and had not reached the stage of making a decision as to the merits of the application: see Appeal Panel's reasons at [38]. However, it should be noted that the effect of the Tribunal's decision on the preliminary question was to finally determine Norrie's application. That is to say, as the Tribunal determined that Pt 5A only permitted a person's sex to be registered as male or female, Norrie's application could not succeed even if considered on the merits.

43 In her argument on the questions of law, Norrie contended to the Appeal Panel that her circumstances came within the second limb of the definition of "*sex affirmation procedure*" in s 32A(b) and that although she had undergone surgery for the purpose specified in para (b), the surgery had not been successful in the sense that it had not resolved her ambiguity in relation to her sex. The Appeal Panel, at [20], rejected this argument on the basis that the Tribunal's failure to determine Norrie's subjective purpose in undertaking the sex affirmation procedure was not an error of law. The Appeal Panel stated:

> "The Tribunal asked itself the right question, that is, assuming the pre-requisites to exercising the power under s 32DC had been met, whether the scope of that power included registering a person's sex as 'not specified'. The Tribunal was determining a preliminary issue, namely the scope of the power in s 32DC. **Having decided that the scope of that power was limited to registering a change of sex from male to female or from female to male, it followed that the Registrar had made the correct, indeed the only available, decision**." (emphasis added)

44 The Appeal Panel next considered the meaning of "*sex affirmation procedure*" in s 32A, noting that that provision was a definition section and that definitions were not to be treated as substantive provisions: see *Gibb v Federal Commissioner of Taxation* [1966] HCA 74; 118 CLR 628 at 635. The Appeal Panel considered that that principle, and the fact that the Tribunal was considering a preliminary question of law, meant that Norrie's argument as to the meaning of "*sex*" in s 32A was superfluous. The Appeal Panel, nonetheless, addressed that question "*for*

completeness". For the reasons I give below, I do not consider that the meaning of "*sex*" in s 32A is superfluous. However, at this point, I will do no more than refer to the Appeal Panel's findings.

45 The Appeal Panel rejected Norrie's submission that whilst "*sex*" in s 32A(a) meant "*male*" or "*female*", s 32A(b) was drafted so that the word "*sex*" extended to a sexual identity which could be neither. The Appeal Panel stated, at [22], that such an interpretation was:

> "... contrary to a basic tenet of statutory construction - that where the legislature uses the word ('sex'), especially in a single provision, it should be given the same meaning: *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452 per Hodges J."

46 The Appeal Panel stated, at [23], that the use of the word "*opposite*" in s 32A(a) suggested that gender was binary, that is, either male or female. In the Appeal Panel's reasons, s 32A(b), read in the context of s 32A(a), meant that the surgery was carried out to alter the person's reproductive organs so that the person may be considered more definitively as either male or female.

47 The Appeal Panel next considered, at [24], the limits of the Registrar's powers under s 32DC. In doing so, it observed that the determination of the ordinary meaning of the word "*sex*" was a question of fact which was for the Tribunal to determine. However, the scope of the Registrar's power in s 32DC, which was to be determined by construing the words of the section context, was a question of law: *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137; *Collector of Customs v Agfa Gevaert Ltd* [1996] HCA 36; 186 CLR 389 at 395; *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 at 1935.

48 Norrie contended before the Appeal Panel that the Tribunal had misconstrued the meaning of the words in a number of ways. The central arguments were that once an applicant had satisfied the preconditions specified in s 32DA, the Registrar was obliged to register the change of sex requested, and that the Tribunal had erred by reading into s 32DA, after "*change of sex*", the words "*from male to female*" or "*from female to male*".

49 The Appeal Panel rejected both arguments. As to the first, the Appeal Panel, at [28]-[29], held that the question in issue was not whether the pre-conditions had been met but what was the scope of the Registrar's powers under s 32DC. As to the second of these arguments, the Appeal Panel held, at [35], that the Tribunal had not read words into s 32DC but had construed the words "*change of sex*" in accordance with their ordinary meaning, namely, a change from male to female or vice versa.

50 The other arguments upon which Norrie relied were also rejected by the Appeal Panel.

The appeal to this Court

51 Norrie submitted to this Court that on the findings of fact upon which the matter proceeded in the Tribunal and before the Appeal Panel she did not identify as either male or female. Norrie argued that that left her in the position where the best description of her sexual status was "*non specific*". Against that background, Norrie contended in her notice of appeal that the Appeal Panel erred:

(1) In its construction of s 32DC of the Act, by holding that the Registrar could only register a change of a person's "*sex*" from male to female or from female to male, but not from male or female to a designation that is neither specifically male nor female;

(2) In its construction of s 32DA of the Act, by holding the section could only be satisfied if an applicant had undergone a surgical procedure for the purpose of being more definitively regarded as either "*male*" or "*female*" but not for the purpose of correcting the ambiguity between the physical characteristics and the individual's sex identity; and

(3) In holding that as a matter of law, it was not open to the Registrar to register the appellant's sex as "*non specific*".

Meaning of question of law

52 As I have earlier stated, the jurisdiction of the Court on this appeal is limited to questions of law: *Administrative Decisions Tribunal Act*, s 119(1). As the Federal Court stated in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 322; 43 FCR 280 at 287:

> "Distinctions between a question of fact and a question of law can be elusive. The proper interpretation, construction and application of a statute to a given case raises issues which may be or involve questions of fact or law or mixed fact and law."

53 The Court in *Pozzolanic* nonetheless suggested, at 287, that there are five general propositions as to whether a question of law or fact is at issue:

> "1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law.

2. The ordinary meaning of a word or its non-legal technical meaning is a question of fact.

3. The meaning of a technical legal term is a question of law.

4. The effect or construction of a term whose meaning or interpretation is established is a question of law.

5. The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law." (citations omitted)

54 The second and third propositions are supported by the statement of Jordan CJ in *Australian Gas Light Co v Valuer-General* at 137:

> "The question what is the meaning of an ordinary English word or phrase as used in the Statute is one of fact not of law. This question is to be resolved by the relevant tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence; although evidence is receivable as to the meaning of technical terms; and the meaning of a technical legal term is a question of law."

55 In *Collector of Customs v Agfa-Gevaert Limited* [1996] HCA 36; 186 CLR 389, the High Court observed, at 396, in relation to the *Pozzolanic* propositions:

> "Such general expositions of the law are helpful in many circumstances. But they lose a degree of their utility when, as in the present case, the phrase or term in issue is complex or the inquiry that the primary decision-maker embarked upon is not clear."

56 In particular, the High Court questioned the distinction drawn in *Pozzolanic* between the second and fourth propositions:

> "With respect this distinction seems artificial, if not illusory. The meaning attributed to individual words in a phrase ultimately dictates the effect or construction that one gives to the phrase when taken as a whole and the approach that one adopts in determining the meaning of the individual words of that phrase is bound up in the syntactical construction of the phrase in question. In *R v Brown* [1996] 1 AC 543 at 561 [1996] 1 AC 543 at 561, a recent House of Lords decision, Lord Hoffmann said:
>
> > "The fallacy in the Crown's argument is, I think, one common among lawyers, namely to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence ... This is not the way language works. The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole."
>
> If the notions of meaning and construction are interdependent, as we think they are, then it is difficult to see how meaning is a question of fact while construction is a question of law without insisting on some qualification concerning construction that is currently absent from the law."

57 It was unnecessary for the High Court in *Agfa-Gevaert* to resolve that issue. It was sufficient, for the purposes of that case, in order for a reviewable question of law to arise for determination, "*for a phrase to be identified as being used in a sense different from that which it has in ordinary speech*": see at 397.

58 In *Industry Research and Development Board v Bridgestone Australia Ltd* [2001] FCA 954; 109 FCR 564. Lindgren J (Branson and Mansfield JJ agreeing) stated, at [54]:

> "In the present case, the facts have been found and what is left is a choice as to which of two suggested meanings of the words of the statute is to be applied to those facts. That choice is not a matter of discretion; the statute truly bears only one of the two suggested meanings; the choice made will be correct or incorrect in law ... These considerations show that a question of law is involved."

His Honour then referred to the obiter remarks of the High Court in *Agfa-Gevaert* set out above at [56].

59 In *Aktiebolaget Hassle v Alphapharm Pty Ltd* [2002] HCA 59; 212 CLR 411, Gleeson CJ, Gaudron, Gummow and Hayne JJ, citing *Agfa-Gevaert*, stated, at [36], that "[*t*]*he notions of meaning and construction are interdependent*" and that the meaning of a particular word in the legislation "*must be affected by the other words and syntax of the whole of* [*the provision*]." See also Kirby J at [138].

60 In *OV v Members of The Board of Wesley Mission Council* [2010] NSWCA 155; 79 NSWLR 606, the New South Wales Court of Appeal applied *Agfa-Gevaert*: see [2]-[8] and [27]-[31]. Allsop P (as his Honour then was) commented that the High Court's decision in *Agfa-Gevaert*:

> "... should not be taken as denying the conceptual distinction between the ascertainment of semantic meaning (interpretation) and determining legal effect or legal content (construction) of a legal text. The processes can be seen to be distinct in terms of legal theory and function. What the High Court stated was that their inter-relationship in the process of ascription of meaning to a legal text meant that for the purpose, at least, of distinguishing between questions of law and fact, the distinction was illusory."

61 In *Screen Australia v EME Productions No 1* [2012] FCAFC 19; 200 FCR 282 the Full Federal Court also applied the High Court's statement in *Agfa-Gevaert* as to the interdependency of meaning and construction, observing at [41], that the "*clearly considered dicta*" of the High Court had been followed in *OV v Members of The Board of Wesley Mission Council* and cited with approval in *Aktiebolaget Hassle v Alphapharm*: see [39]-[42]. The Court concluded, at [42]:

> "Where there is uncertainty as to the meaning of a statutory word or expression, as here, the process of construction raises a question of law.

62 The High Court's obiter remarks in *Agfa-Gevaert* and their approval in *Aktiebolaget Hassle v Alphapharm* indicates that it cannot be said that the ordinary meaning of a word or its non-technical meaning is a question of fact, at least as a stand alone proposition. Rather, when the Court is engaged in a task of statutory construction, it is required to have regard to the language used by Parliament and the context in which it is used. That task involves a question of law.

63 Further, as was explained, correctly in my opinion, by Mark Aronson, Bruce Dyer and Mathew Groves, *Judicial Review of Administrative Action* (2009) Lawbook Co at 213:

> "Misunderstanding the governing law has always been an error of law in its own right, and that should include misunderstanding the legal meaning of a statutory term, ordinary or special. Misunderstanding is the error, and that can occur in relation to ordinary as well as technical terms. In other words, the proper meaning of *any* legal term should itself be a question of law ... If it is error of law to stray beyond the boundaries of an ordinary meaning, then fixing the ordinary meaning must surely itself be a question of law."

64 The central issue on the appeal relates to the scope of the power of the Registrar to make an entry as to a person's sex in the Register. That question raises the proper construction of s 32DC having regard to the meaning of "*sex*" as used in Pt 5A, and on the authorities and commentary discussed, is a question of law.

Principles of statutory construction

65 The primary task of the Court in determining the proper construction of a statute is to determine the meaning of the provision "*by reference to the language of the instrument viewed as a whole*": see *Cooper Brooker (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; 147 CLR 297 at 320; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69]. In *Project Blue Sky* the plurality stated, at [78], "*the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have*". The context and purpose of the legislation are involved in this task.

66 In *Baini v The Queen* [2012] HCA 59; 87 ALJR 180 Gageler J observed, at [42], that in the task of statutory construction, context is to be considered at the outset and not only at some later stage if it is considered that ambiguity might arise. His Honour added the "*modern approach to statutory interpretation*" used "*context*":

> "... in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ... one may discern the statute was intended to remedy."

See also *Monis v The Queen* [2013] HCA 4, 87 ALJR 340 at [309].

67 In determining the mischief to which the statute was directed the Court may have regard to other judicial decisions that may indicate the relevant mischief: see *AB v Western Australia* [2011] HCA 42; 244 CLR 390 at [10]. However, the authorities stress that the matter remains one of statutory construction.

68 The *Interpretation Act* 1987, s 33 provides that a statute is to be given a construction that promotes the purpose or object underlying the Act in preference to a construction that would not promote that purpose or object. The primary source for determining purpose, is again, to be discerned from the express terms of the legislation. As Kirby J observed in *R v Lavender* [2005] HCA 37; 222 CLR 67 at [94], the Court's duty is to ascertain and give effect to the legislative purpose as expressed in the language of the provision: see also *Australian Education Union v Department of Education and Children's Service*s [2012] HCA 3; 86 ALJR 217 at [26]; *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16; 86 ALJR 494 at [22]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [47].

69 However, in determining the legislative purpose, the Court is not confined to the terms of the legislation only. Section 34(1) provides that consideration may be given to extrinsic material that may be capable of assisting in ascertaining the meaning of the provision but only for the following purposes:

> "(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or
>
> (b) to determine the meaning of the provision:
>
> (i) if the provision is ambiguous or obscure, or
>
> (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable."

70 Recourse to such material under s 34(1)(b)(ii) is, however, permitted only where the purpose cannot be determined from the words of the statute or inference from its text and structure: see *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; 87 ALJR 131, where French CJ and Hayne J stated, at [25]:

> "Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, **where appropriate, reference to extrinsic materials** [emphasis added]. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect ... to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' ..." (original emphasis; citations omitted)

71 In the same case, Keifel J, at [89], referred to the legitimacy of resorting to extrinsic materials. Her Honour noted, however, that it was important:

> "... to bear in mind the purpose of doing so and the process of construction to which it is directed. That purpose is, generally speaking, to identify the policy of the statute in order to better understand the language and intended operation of the statute."

72 Her Honour warned that:

> "An understanding of legislative policy by these means does not provide a warrant for departing from the process of statutory construction and attributing a wider operation to a statute than its language and evident operation permit."

73 The requirement that a statutory provision must be construed having regard to its context and legislative purpose, is reinforced by the canon of construction that remedial and beneficial legislation is to be given a liberal construction, rather than a "*literal or technical*" one that is "*unreasonable or unnatural*": *IW v City of Perth* at 12. See also *AB v Western Australia* at [24], where the Court stated:

> "It is generally accepted that there is a rule of construction that beneficial and remedial legislation is to be given a 'fair, large and liberal' interpretation." (citations omitted)

74 In making those remarks, the Court in *AB* referred to the similar approach taken in respect of legislation involving human rights. See *Waters v Public Transport Corporation* [1991] HCA 49; 173 CLR 349 where Mason CJ and Gaudron J stated, at 359:

> "... the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose."

75 In the present case, as I indicate below, the Registrar accepted that Pt 5A is beneficial legislation and that the principles stated in *IW v City of Perth* apply.

Extrinsic material

76 Both parties relied extensively upon extrinsic material in aid of the respective constructions of the Registrar's power for which they contended. That material was: (i) the second reading speech to the amending legislation; (ii) dictionary definitions; (iii) academic material said to be authoritative on the question of gender identity; (iv) other State and Federal legislation; (v) and case law dealing with legislation where the word 'sex' was used and was the subject matter of the decision.

The Second Reading Speech

77 The Second Reading Speech is specifically designated as material to which regard may be had for the purposes of subs (1): see *Interpretation Act*, s 34(2)(f). However the Speech may only be used in the manner prescribed in s 34(1)(a) and s 34(1)(b) of that Act for the purpose stated by the High Court in the *Certain Lloyd's Underwriters* case.

78 On its express terms, Part 5A permits the Registrar to register a person's sex that corresponds with that person's sexual or gender identity at the time of seeking the registration. The registration is subject to the pre-condition of having undergone sex affirmation surgery. The Act prescribes the manner in which that precondition is to be established, namely, by a statutory declaration by two medical practitioners that the person has undergone the surgery. However, in empowering the Registrar to register a person's sex, Pt 5A does not specify that a person's "*sex*" may only be, or is to be, registered as "*male*" or "*female*". Nor does it state that there are other kinds of sexual identity that may be registered. Accordingly, it is legitimate in this case to have regard to the Second Reading Speech, as it is not apparent from the legislation itself whether the word "*sex*" is used in the traditional sense of "*male*" and "*female*" or whether it has a wider meaning.

79 In the Second Reading Speech, the Minister stated that the amendments to the Act were to provide for the legal recognition of post-operative transgender persons and, in particular, to:

> "... enable a person who was born in this State and has undergone sexual reassignment surgery to apply for a new birth certificate showing their new sex."

80 To this extent, the Second Reading Speech stated no more than what was expressly provided for in the Act. However, the Registrar submitted that both the title of the amending Bill: *viz*, the Transgender (Anti-Discrimination and Other Acts Amendment) Bill and the second reading speech supported his submission that the word "*sex*" was used in a binary sense in the legislation. This was because a transgender person is a person who has the physiological characteristics of one sex and the psychological characteristics of the other sex.

81 This submission built upon the Registrar's primary submission that the word "*sex*" was a word of ordinary English usage and this was reflected in the following portion of the Second Reading Speech, to which regard could be had:

> "... The Government believes it is appropriate to introduce this [bill because] transgender status is a question of gender identity, and not sexual preference ...
>
> It is ... proposed that 'transgender' be the term used to identify the basis of a complaint under the [*Anti-Discrimination*] *Act*. This includes 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** ...
>
> The term 'transgender' in the [Anti-Discrimination] legislation has therefore been used to refer to all transgender persons, regardless of whether they have undergone surgical intervention. ... This definition is not intended to cover persons who cross-dress or who have adopted the 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**." (emphases added)

82 There is an immediate difficulty with the Registrar's reliance on these passages in that that part of the Second Reading Speech was directed to the amendments to the *Anti-Discrimination Act* and not to the Act. The provisions of the former Act use different language from that used in Pt 5A. In addition, reliance on the emphasised portions of the Second Reading Speech would have the vice of using the language of the second reading speech: *viz*, "*member of the one sex*"; "*and member of the other sex*" in substitution for the language of the statutory provision under consideration. Those expressions are not used in Pt 5A. To use the Second Reading Speech in that way would offend the principles stated in the *Certain Lloyd's Underwriters* case.

83 However, the Second Reading Speech provides some assistance in understanding the underlying policy to the introduction of Pt 5A in that it demonstrates that the Parliament recognised that there were persons who may not fit within what I will describe as a traditional sex or gender identification of "*male*" or "*female*". Parliament thus had seen the need to provide, in two significant ways, for such persons, first by making provision for the registration of the person's sex and secondly by enacting anti-discrimination legislation dealing with discrimination in relation to those persons.

Dictionary definitions

84 Where a word is not defined in legislation, recourse to dictionary definitions is an accepted technique in the task of statutory construction. As Lord Coleridge observed in *R v Peters* (1886) 16 QBD 636 at 641:

> "... dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in the ordinary sense, and we are therefore sent for instruction to these books."

See also *Coleman v DPP* [2000] NSWSC 275; 49 NSWLR 371 at 373-5.

85 However, as Dennis C Pearce & Robert S Geddes, *Statutory Interpretation in Australia*, 7th ed (2011) LexisNexis Butterworths noted, at [3.30], the use of a dictionary to enable the ordinary meaning of a word to be identified must not result in the words used in the statute being abandoned in favour of some other synonymous word or expression. Nor can the meaning of a word as a matter of ordinary English usage override the necessity to construe the statutory language in context.

86 In *Secretary, Department of Social Security v "SRA"* [1993] FCA 573; 43 FCR 299, Black CJ referred to the dictionary definitions of the words "*female*", "*woman*" and "*sex*" to ascertain their meaning as a matter of ordinary English usage. As at 1993, being the date of the Court's determination in *SRA*, the *Oxford English Dictionary* provided the following relevant meanings for the word "*sex*":

> "1. a. Either of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc, esp of the human race) viewed collectively.
>
> ...
>
> 3. a. The distinction between male and female in general. In recent use often with more explicit notion: The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned."

87 The *Macquarie Dictionary* definitions of "*sex*" included:

> "1. The character of being either male or female: *persons of different sexes.*
>
> 2. The sum of the anatomical and physiological differences with reference to which the male and the female are distinguished, or the phenomena depending on these differences."

88 Whilst the definition of "*sex*" contained in the most recent edition of the *Macquarie Online Dictionary* has not changed, the following definition is to be found in the current version of the *Oxford English Dictionary*:

> "1 a. Either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions; (hence) the members of these categories viewed as a group; the males or females of a particular species, esp. the human race, considered collectively.
>
> b. In extended use, esp. as **the third sex.** A (notional) third division of humanity regarded as analogous to, or as falling between, the male and female sexes; spec. that consisting of: (a) eunuchs or transsexuals ..."

89 The extended usage in (b) is noted to date from 1821 in the works of Lord Byron: see *Don Juan*, Canto V xxvi, 148 and Canto IV lxxxvi, 114.

90 The difference in the current definition in the *Oxford English Dictionary* from that in the 1993 version referred to in *SRA* is twofold. First, the definition in 1(a) varies from that given in 1993, in that there is a reference to "*the two main categories*" as compared to the earlier reference to "*the two divisions*". Secondly, an entirely new definition has been inserted in 1(b), giving recognition to a usage of the word "*sex*" that encompasses sexual identity that is not confined to "*male*" or "*female*".

Academic material

91 Norrie also urged upon the Court a range of academic and other material which dealt with the question of sexual identity. In particular, the following publications were provided to the Court for its consideration: Julie A Greenberg, *Intersexuality and the Law: Why Sex Matters* (2012) New York University Press; Justice Michael Kirby CMG, "Medical Technology and New Frontiers of Family Law" (1986-87) 1 *Australian Journal of Family Law* 196; and an extract entitled "*Intersex*" from *Wikipedia*.

92 A question arose during the course of the argument as to the authoritative status of this material. Senior Counsel for Norrie indicated that any challenge to the status of the material was a matter for the Registrar to raise. I do not consider that the matter is so simple. The Court must be satisfied that there is a basis upon which it is entitled to receive and rely upon such material.

93 The circumstances in which the Court is entitled to use extraneous material was considered in *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307. That case concerned the validity of anti-terrorism legislation whereby interim control orders could be made in relation to a person: see Criminal Code (Cth), s 104.4. In the course of considering that question, Heydon J identified five different groups of facts that may have to established in particular litigation: see at [614]. These groups were: (i) facts in issue or relevant to facts in issue; (ii) facts going to the constitutional validity of statutes; (iii) facts going to the construction of non-constitutional statutes; (iv) facts going to the construction of constitutional statutes; and (v) facts that relate to the content and development of the common law. For present purposes, it is only necessary to consider the first and third group of his Honour's classification.

94 Facts in the first group are required to be proved in accordance with the ordinary rules of evidence, including the rules relating to judicial notice. In so far as facts in the first group were to be established as a matter of judicial notice, his Honour observed, at [619], that the common law doctrine of judicial notice was narrow and itself involved two categories. The first was where judicial notice was taken of facts, without inquiry. Such facts had to be "*open and notorious*". As to the second, where judicial notice was taken of facts after inquiry, the inquiry was to be based on the "*common knowledge of educated* [*persons*]" as revealed in "*accepted writings*", "*standard works*" and "*serious studies and inquiries*": *Australian Communist Party v Commonwealth* [1951] HCA 5; 83 CLR 1 at 196. See also *Holland v Jones* [1917] HCA 26; 23 CLR 149 at 153, where judicial notice was described in similar terms. Reference to a medical text is an example of an inquiry that may be made for the purposes of the second type of judicial notice: see *Timbury v Coffee* [1941] HCA 22; 66 CLR 277 at 283-284. Heydon J concluded, at [619], that "*matters judicially noticed at common law must be indisputable*".

95 Heydon J observed, at [635], that there was authority for the proposition that facts within the third group could be relied on by the Court, although not proved under the rules for the admissibility of evidence: see *Gerhardy v Brown* [1985] HCA 11; 159 CLR 70 at 141-142 per Brennan J; *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; 208 CLR 460 at 479 per McHugh J. Heydon J noted that there was authority to the same effect in respect of facts within the fourth and fifth group.

96 The issue in *Gerhardy v Brown* was whether a State Land Rights Act was inconsistent with the *Racial Discrimination Act* 1975 (Cth). Brennan J, at 141, observed that ordinarily, questions of law did not involve factual considerations, or at least the consideration of facts that were not notorious and beyond dispute. His Honour observed, however, that the case before the Court was an exception. As his Honour explained, it was necessary for the Court to understand the circumstances in which the State Act was intended to operate. The facts with which his Honour was dealing were facts within Heydon J's third category.

97 In that context, Brennan J said, at 141-142:

> "There is a distinction between a judicial finding of a fact in issue between parties upon which a law operates to establish or deny a right or liability and a judicial determination of the validity or scope of a law when its validity or scope turns on a matter of fact. When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants."

98 Heydon J's five categories might also be characterised as adjudicative facts (the first category) and legislative facts (the other categories). In his extra curial writing, Heydon J has observed that legislative facts could relevantly be sourced from legislative facts accepted in other cases and from standard works of reference or other writings of experts on the physical, medical, social and other sciences: Justice John Dyson Heydon, "Developing the Common Law", in Gleeson, J T and Higgins, R C A (eds) *Constituting Law, Legal Argument and Social Values* (2011) Federation Press, at 96.

99 In *Woods v Multi-Sport Holdings* McHugh J identified legislative facts as facts that help the court to determine the content of law and policy. His Honour noted that such facts "*generally relate to the law making function of the judicial process*". His Honour then dealt with the circumstances in which the court could have recourse, including through the judges' own research, to extraneous material in determining the validity and scope of legal rules and principles. McHugh J said, at [65]:

> "As Brennan J pointed out in *Gerhardy v Brown*, a court that in considering the validity or scope of a law 'is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties'. Whether the law is a Constitution, a legislative enactment or a principle or rule of the common law or equity, the 'validity and scope of a law cannot be made to depend on the course of private litigation' ...as the learned author of *Cross on Evidence* has pointed out, '[i]t is clear from the cases that judges have felt themselves relatively free to apply their own views and to make their own enquiries of social ethics, psychology, politics and history where relevant without requiring evidence or other proof'." (citations omitted)

100 In *Woods v Multi-Sport Holdings*, Callinan J, was more cautious, stating, at [162]-[163], that the Court should be cautious in informing itself of legislative facts and should only do so when necessary and only if satisfied that the material to which it was having regard was "*reliable and necessary*". Notwithstanding this caution, the law has long accepted that such facts could be determined by the Court after inquiry from sources other than facts proved in accordance with the rules of evidence. A question arises, however, whether proof of such facts is now governed solely by the *Evidence Act* 1995, s 144.

101 Section 144 provides:

> "**144 Matters of common knowledge**
>
> (1) Proof is not required about knowledge that is not reasonably open to question and is:
>
> (a) common knowledge in the locality in which the proceeding is being held or generally, or
>
> (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
>
> (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
>
> (3) The court ... is to take knowledge of that kind into account.
>
> (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced."

102 In *Gattellaro v Westpac Banking Corporation* [2004] HCA 6; 78 ALJR 394, Gleeson CJ, McHugh, Hayne and Heydon JJ stated, at [17]:

> "In New South Wales there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment of the *Evidence Act 1995* (NSW), s 144."

This statement was approved by French CJ, Hayne, Crennan and Bell JJ in *Aytugrul v The Queen* [2012] HCA 15; 86 ALJR 474 at [21]; Justice John Dyson Heydon, *Cross on Evidence*, 8th ed (2010) LexisNexis Butterworths at [3160]. See also *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346 per Spigelman CJ at [66].

103 Both as a matter of construction of s 144 and having regard to the comments of the High Court, it is likely that the better view is that facts that are acted upon by the Court, other than those that are in issue between the parties, are governed by s 144. Even if this is not correct and proof of legislative facts fall outside s 144(1)(b), the requirements for proof at common law and under the section are essentially the same. In either case, the Court would be entitled to have regard to authoritative texts and legislative facts accepted in other cases.

104 There is one possible difference in the test stated in s 144 and the common law. Section 144 requires that the knowledge of which judicial notice may be taken, is "*not reasonably open to question*". This may not be as stringent as the common law test if, as Heydon J stated, facts judicially noticed at common law must be "*indisputable*". But on

either test, the Court could, in a case like this, act upon knowledge or take notice of facts, that were the subject of authoritative texts, even in developing areas of science, medicine or technology. For example, it is unlikely that science has heard the last word in gene technology. That would not, in my opinion, prevent a court from having regard to material relating to that topic so as to understand the legislative purpose of enacting legislation relating to that subject matter, provided it was accepted that the material was the work of a respected expert in the field. It is likely that studies relating to gender or sexual identity fall into the same category, particularly, but not only, insofar as such studies examine the psychological aspects of sexual identification.

105 That brings me to the material to which the Court was referred and, in particular, to Professor Greenberg's material. The Court was not told who Professor Greenberg was, or her area of expertise. The extract of the publication "*Intersexuality and the Law, Why Sex Matters*" provided to the Court contained no information about her. Presumably, a *Google* search may have revealed what the Court needed to know to determine whether it was an authoritative work.

106 As it turns out, my concern as to this matter was allayed by the extensive reference to Professor Greenberg's work by Chisholm J in *Kevin v Attorney-General (Cth)* [2001] FamCA 1074; 165 FLR 404 where it was accepted as authoritative. There was another problem with Norrie's reliance on Professor Greenberg's work in that the Court was provided with various pages from different chapters which it was said should be read. Below is a reference to what would seem to be relevant from the material provided.

107 Professor Greenberg observed in her introduction that the topic of intersexuality has moved from being a relatively obscure medical topic to being the focus of examination across a range of academic disciplines, including psychology, history, anthropology and medical ethics. She also observed that the meaning or ambit of the term "*intersex*" is not necessarily settled. She also points out that an intersex condition is not necessarily apparent at birth. She suggests, however, that "*most experts agree*" that 1 to 2 per cent of the population are born with sexual features that vary from the medically defined normal for "*male*" and "*female*".

108 Professor Greenberg also pointed out that the term "*transgender*" and "*transsexual*" are not the subject of a uniform or settled usage. As she explained, the word "*transgender*" is often used as an umbrella term to mean persons who transgress gender boundaries. When used in that sense, it would include transsexuals, transvestites or others whose behaviour fails to conform to gender norms. She also made reference to studies of intersex children which indicated that gender identity does not necessarily develop in concert with sexual anatomy.

109 For the purposes of her work, Professor Greenberg defined "*intersex*", at 1:

> "... in its broadest sense to include anyone with a congenital condition whose sex chromosomes, gonads, or internal or external sexual anatomy do not fit clearly into the binary male/female norm."

110 Professor Greenberg added that "[*s*]*ome intersex conditions involve an inconsistency between a person's internal and external sexual features*". She also noted, at 11, that medical experts now recognise "*at least eight attributes contribute to a person's sex*", including chromosomal sex, physiological attributes, assigned sex and gender of rearing, as well as gender identity.

111 As previously mentioned, Norrie also referred to an article by Justice Michael Kirby, "Medical Technology and New Frontiers of Family Law". In that article, his Honour drew upon case law and other sources, some of which are discussed in these reasons and all of which cover the same ground. I have not found it necessary, therefore, to separately consider his Honour's writing on this topic.

112 Norrie also referred to the following entry in *Wikipedia*, which states:

> "Intersex, in humans and other animals, is the presence of intermediate or atypical combinations of physical features that usually distinguish female from male. This is usually understood to be congenital, involving chromosomal, morphological, genital and/or gonadal anomalies ..."

113 The strengths and weaknesses of a collaborative encyclopaedia such as *Wikipedia* are well-known by those in the community who frequently access the Internet. It is not necessary in these reasons to determine the circumstances in which, or the principles governing when, the Court may have regard to entries in it. It is sufficient to note that the information in *Wikipedia* was to the same effect as the other material to which the Court was referred.

114 It is apparent from this material that questions of sexual identity are more complex than the characterisation of persons being "*male*" or "*female*".

Other legislation

115 Both parties relied upon the provisions of the *Anti-Discrimination Act*, which were introduced at the same time as Pt 5A of the Act. The Registrar also relied upon other New South Wales and Commonwealth legislation with which, he contended, Pt 5A was intended to be read harmoniously.

116 The provisions of the *Anti-Discrimination Act* introduced at the same time as Pt 5A are set out above at [29]-[30]. Norrie submitted that the reference in the interpretation provision s 38A(c) to a person being of "*indeterminate sex*" indicated that the New South Wales Legislature had recognised that a person's sex need not be either male or female but that a person may be neither. The Registrar submitted, however, that it was apparent from s 38A that the Legislature had used the binary meaning of sex in the Act, as was evident from the use of expressions "*opposite sex*" in paras (a) and (b) and "*particular sex*" in para (c). The Registrar submitted that it was to be presumed that legislation amending both the *Births, Deaths and Marriages Registration Act* and the *Anti-Discrimination Act* used the words "*transgender*" and "*sex*" consistently in each.

117 There are circumstances in which a court will construe legislation in the same way as, or so as to be consistent with, other legislation. Such cases involve an application of the pari materia rule. In *Harrison v Melhem* [2008] NSWCA 67; 72 NSWLR 380 Mason P, at [131], stated the operation of the rule in the following terms:

> "There is a principle of statutory interpretation supporting a presumption that a legislature intends to attach the same meaning to the same words when used in a subsequent statute in a similar connection (*Lennon v Gibson & Howes Ltd* [1919] AC 709 at 711-712; *Ramaciotti v Federal Commissioner of Taxation* (1920) 29 CLR 49 at 53; Pearce & Geddes, *Statutory Interpretation in Australia* 6th ed, Butterworths, Sydney, 2006 at §3.36)."

118 The extent to which a word, or words, used in one statute can be construed as having the same meaning as a word or words used in another statute was the subject of comment by Kiefel J in the *Certain Lloyd Underwriters* case. The Court of Appeal in that case had considered that the two statutes in that case formed part of a statutory scheme. Kiefel J accepted that both statutes were directed to the same common purpose and used the same terminology. However, her Honour stated that unless the operation of each statute depended upon the other, there was no basis to construe them together: see at [94]-[104].

119 Whilst the Registrar did not argue that the two pieces of legislation formed a common scheme, the argument encompassed the notion that the amended provisions of each Act were directed to a similar end, namely, the recognition of transgender persons in specified circumstances. It was submitted, therefore, that the word "*sex*" should be construed in the same way in each piece of legislation.

120 Part 5A recognised that the Registrar may register the sex of a person where that person has undergone surgery for one or other of the reasons specified in s 32A. To this extent, it recognises that a person may wish to be a member of the opposite sex, or may have ambiguities in relation to their sex. The purpose of the *Anti-Discrimination Act* Pt 3A, Div 5 was to make unlawful vilification on the ground that a person was a transgender person: see s 38S and s 38T. The interpretation provision of s 38A provided that a transgender person was a person was a person who "*has identified as a member of the opposite sex*" or was a person "*of indeterminate sex*". The *Anti-Discrimination Act* thus provides protection, inter alia, to persons who are of indeterminate sex who identify as a member of a particular sex.

121 Part 5A does not depend for its operation on the *Anti-Discrimination Act*, Pt 3A, Div 5, nor does it interact in any way with that Act. The connection between the two legislative enactments was their concurrent enactment and their recognition that not all individuals are, or live as if they were, of the sex that accords with their anatomical sexual structure. In this regard, both enactments recognised that there are persons whose sex may not be "*male*" or "*female*". This indicates an increasing legislative recognition that "*sex*" is not necessarily a binary construct. However, the meaning of the word "*sex*" in each Act must bear the meaning that the legislature intended in that Act. As the Acts are not interdependent, the word "*sex*" in the *Anti-Discrimination Act* and, in particular, the fact that it is used in several places as part of the phrase "*opposite sex*", does not determine the meaning of "*sex*" in Pt 5A.

122 I have referred above to my understanding of the purpose of the legislation. The Registrar contended that the purpose of Pt 5A permitting the registration of a change of sex was to confer a legal status upon a person so that person was "*a person of the sex so registered*" subject to any law of the State: see s 32J. In this regard, the Registrar identified the relevant "*mischief*" to which Pt 5A was directed as being to ensure that a person would be treated, for the purposes of the larger body of the laws of the State which operate on the assumption that sex is binary, in accordance with the person's changed sexual status as entered on the Register of Births, Deaths and Marriages. The Registrar submitted that it would be contrary to the purpose of the Act, namely, the clarification of an applicant's legal status, to enable the registration of a person's sex as "*non specific*", which is not a status recognised in any other State law.

123 The Registrar identified a range of New South Wales legislative provisions premised on a binary construction of "*sex*" as follows: *Crimes Act* 1900, s 61H; *Crimes (Forensic Procedures) Act* 2000, s 3; *Law Enforcement (Powers and Responsibilities) Act* 2002, s 32(7) and s 32(11); *Terrorism (Police Powers) Act* 2002, Sch 1(5); *Court Security Act* 2005, s 10; *Child Protection (Offenders Registration) Act* 2000, s 12F(2); Crimes (Administration of Sentences) Regulation 2008, cl 22, cl 23, cl 31, cl 43(2) and cl 182; Children's Services Regulation 2004, s 36(3); *Transport Employees Retirement Benefits Act* 1967, s 23(4)(a); *Industrial Relations Act* 1996, s 55(4); *Landlord and Tenant (Amendment) Act* 1948, s 62(t); *Conveyancing Act* 1919, s 34(1), s 76; Combat Sports Regulation 2009, cl 38;

Privacy and Personal Information Protection Act 1998, s 53(7A); and the *Succession Act* 2006, s 54.

124 The Registrar also identified the following Commonwealth Acts which are premised on the existence of a male and female sex only: *Marriage Act* 1961 (Cth); *Defence Forces Retirement Benefits Act* 1948 (Cth); *Higher Education Funding Act* 1998 (Cth); *Superannuation Act* 1922 (Cth); *Fair Work Act* 2009 (Cth) and the *Maternity Leave (Commonwealth Employees) Act* 1973 (Cth); *International Criminal Court Act* 2002 (Cth); *Sex Discrimination Act* 1984 (Cth) and the *Crimes Act* 1914 (Cth).

125 The Registrar contended that if "*sex*" was construed to include a status outside the male or female dichotomy, Norrie would fall outside the purview of these various statutes. The Registrar argued that this was of particular importance because the intention of some of the legislation was to protect and benefit the individual and, more generally, was for the benefit of society. The Registrar submitted, therefore, that it could not have been Parliament's intention to allow a person to be registered other than as "*male*" or "*female*" pursuant to the provisions of Pt 5A of the Act.

126 It is useful to refer to some of this legislation to demonstrate the point that the Registrar sought to make:

(1) The *Crimes Act*, s 61H defines "*sexual intercourse*" for the purposes of serious sexual offences contained in that Act as "*sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person*". The Registrar pointed out that a person with a "*non specified*" sexual status, but with a surgically constructed vagina, would fall outside these provisions insofar as they relate to the penetration of the vagina.

(2) The *Court Security Act*, s 10(2)(f) requires a search of persons to be conducted by a security officer of the same sex, and if a same-sex security officer is not available, the Act empowers another person (in the company of a security officer) of the same sex to conduct the search.

(3) The Crimes (Administration of Sentences) Regulation, cl 43(2) provides that an inmate must not be strip-searched by or in the presence of a person of the opposite sex, except in the case of an emergency.

(4) The *Industrial Relations Act*, s 55(4) provides that adoption leave is leave taken by male or female employees.

(5) The *Landlord and Tenant (Amendment) Act*, s 62(5)(t) places certain limits on the giving of a notice to quit to a tenant in protected premises where the landlord "*who, being a male, is of or over the age of sixty-five years or, being a female, is of or over the age of sixty years*" subject to satisfaction of certain other requirements in the paragraph.

(6) The *Conveyancing Act*, s 76 provides:

> "In the construction of a covenant, or proviso, or other provision implied in a deed by virtue of this or any other Act words importing ... the masculine gender shall be read ... as extending to females ..."

127 Insofar as Commonwealth legislation is concerned, it is sufficient to note that the *Higher Education Funding Act* provides that grants made under that Act are to be made equally available to male and female students. The *Superannuation Act* makes a number of distinctions between male and female pensioners. The *International Criminal Court Act* was enacted to facilitate Australia's obligations under the Rome Statute of the International Criminal Court. Art 7, cl 3 of the Rome Statute, which is reproduced in Sch 1 to the *International Criminal Court Act*, provides:

> "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

128 I will return to these arguments when considering the text of the statutory provisions themselves.

The case law

129 The question of a person's sexual identity and/or change of sex has arisen for consideration in a number of cases. Each related either to different statutory provisions or the common law and thus any comments made have to be read in the context in which the case was decided. It is convenient to deal with the case law in chronological order.

***In the marriage of C and D (falsely called C)* [1979] FLC 90-636; 35 FLR 340**

130 *In the marriage of C and D (falsely called C)*, the Court was concerned with whether a marriage between a female and a husband who had been diagnosed as "*a true hermaphrodite*" was void: see at 342, 343. Bell J, at 345, found that "*the husband was neither man nor woman but was a combination of both*". The consequence of this finding was that no marriage could have taken place because a marriage under the *Marriage Act* was the "***union of a man and a woman***" (emphasis added): see at 345.

131 In coming to this conclusion, his Honour followed the English decision of *Corbett v Corbett* [1971] P 83 at 106, where Ormrod J identified the question in issue in that case as being "*what is meant by the word 'woman' in the context of a*

marriage". Ormrod J concluded that for the purposes of determining whether parties had been validly married, the test to apply in determining whether a person was a male or a female, was to ascertain the person's sex by reference to the person's:

> "... chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention."

132 Ormrod J remarked that "*real difficulties, of course, will occur if these three criteria are not congruent*", although that was not a difficulty which concerned his Honour on the facts of that case.

133 The decision in *Corbett* became the subject of increasing criticism as variances in a person's sexual identity became more understood. This caused Sir Ronald Wilson to observe that the effect of the decision in *Corbett* was to ignore the fact that the "*wife*" in the marriage had undergone sex reassignment surgery: Sir Ronald Wilson, "Life and Law: The Impact of Human Rights on Experimenting with Life", (1985) 17(3) *Australian Journal of Forensic Sciences* 61. This caused Sir Ronald to observe, at 80:

> "... Medicine has outstripped the law. [The wife] represented as successful a change of sex as can be imagined yet any legal significance attaching to her post-surgery condition was denied ... the decision signals the need for a greater flexibility in the law to enable it to come to grips with current reality freed from bondage to displaced historical circumstances."

134 *Corbett* no longer represents the law and the decision remains of historical interest only. Should facts such as arose in *In the Marriage of C and D*, arise again for determination, the outcome would depend upon the terms of any relevant legislation and any scientific or medical evidence that may be adduced.

***R v Harris & McGuiness* (1988) 17 NSWLR 158**

135 In *Harris & McGuiness* the Court was dealing with two questions on a case stated by a judge of the District Court. The questions arose out of the prosecution of the appellants in that each "*being a male person* [*attempted*] *to procure the commission by any male person of, any act of indecency with another male person*", contrary to the *Crimes Act*, s 81A (now repealed). The appellants had been found guilty of the charges. The questions stated, insofar as they are relevant to this matter, were:

> "(a) Can a third sex exist for the purposes of legislation in New South Wales which is drafted in terms of male and female.
> (b) If the law recognises a third sex, that of transsexual, how is it to be determined." (at 163)

136 It became unnecessary for the Court to determine those questions, as Mathews J (with whom Street CJ agreed) decided, at 194, that the criteria to be considered in determining a person's sex for the purposes of New South Wales Law included that a person:

> "... through medical intervention ... has assumed the external genital features of the opposite sex, thereby bringing those genital features into conformity with the person's psychological sex."

137 As the appellant Harris had undergone a sex affirmation procedure so as to acquire female physiological characteristics and therefore satisfied those criteria, the appellants could not be guilty of an offence under s 81A. However, in an obiter comment, Mathews J observed, at 194:

> "... I think I should comment that I can see no place in the law for a 'third sex'. Such a concept is a novel one, which could cause insuperable difficulties in the application of existing legal principles. It would also relegate transsexuals to a legal 'no man's land'. This I think, could only operate to their considerable detriment."

***Secretary, Department of Social Security v "SRA"* [1993] FCA 573; 43 FCR 299**

138 In *Secretary, Department of Social Security v "SRA"* the Full Court of the Federal Court was concerned with the question whether a pre-operative male to female transsexual was qualified to receive a wife's pension under the *Social Security Act* 1947 (Cth). Section 37(1)(a) of that Act provided:

> "37(1) Subject to this Part, a woman ... who is the wife of-
> (a) an age pensioner or an invalid pensioner ...
> ... is qualified to receive a wife's pension."

139 The Full Court held that the respondent was not a woman who was the wife of an invalid pensioner within the meaning of the Act and was thereby not qualified to receive the pension. In reaching this conclusion, the Full Court considered the meaning of the undefined terms "*woman*" and "*female*" in the Act.

140 The term "*woman*" was not defined in the Act. However, "*wife*" was defined to mean, unless a contrary intention appeared, "*a female married person*". "*Husband*" was defined to mean "*a male married person*". "*Married person*", included a "*de facto spouse*", which was defined as "*a person who is living with a person of the opposite sex, to whom he or she is not legally married*".

141 Black CJ stated, at 301-302:

> "In providing for an entitlement to what is called a 'Wife's Pension' the Act thus reflects **the ordinary notion that there are two sexes, each being 'the opposite sex' of the other**, and that a wife is a female married person and a husband is a male married person ... the words 'woman' and 'female' and the expression 'opposite sex' are not defined [in the Act]. The words are of course ordinary English words.
>
> In ordinary English usage words such a 'male' and 'female', 'man' and 'woman' and the word 'sex' relate to anatomical and physiological differences rather than to psychological ones." (emphasis added)

142 Black CJ, after having regard to the Dictionary definitions of these terms, continued, at 303:

> "Although the *Social Security Act* is concerned with social policy, and being remedial legislation should not receive a narrow or pedantic construction the settled rules of construction apply and ordinary words used in the Act should receive their ordinary and natural meaning unless, in accordance with the accepted rules of statutory construction, there is good reason to prefer some other meaning.
>
> There is no occasion to depart in this case from the ordinary meaning of the words used in the Act and it would be going well beyond the ordinary meaning of the words in question to conclude that a pre-operative male to female transsexual, having male external genitalia, is a 'woman' for the purposes of the *Social Security Act* and may be a 'wife' as that expression is defined in the Act. I do not consider that the language used in the Act allows primacy to be given to psychological factors and certainly not to the virtual exclusion of anatomical factors." (citation omitted)

143 Black CJ, at 303, considered that this view was in conformity with *Harris & McGuiness* in that the Court there had "*rejected the view that the law should ... treat biological factors as entirely secondary to psychological ones*". It followed on this approach that the respondent was not eligible for a wife's pension under the Act: see at 305. Nonetheless, his Honour recognised that a post-operative male to female transsexual would have qualified for the pension under the Act. His Honour also accepted that there had been developments in the language as it applied to transsexuals.

144 As his Honour observed, at 304:

> "... In a case such as the present the question is of course one of statutory interpretation and in considering the possible application of words such as 'woman' and 'female' to a post-operative male-to-female transsexual it is appropriate to consider how the language has developed in its application to transsexual persons.
>
> Whatever may once have been the case, the English language does not now condemn post-operative 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. The operation that brought about the change in external genital features would be referred to as a sex change operation."

145 Lockhart J gave consideration to the meaning of terms that had become part of the language of sexuality but which his Honour considered were frequently misunderstood. In this regard, his Honour observed, at 315:

> "Transsexuals are frequently confused with transvestites, homosexuals or intersexuals (hermaphrodites and pseudo-hermaphrodites).
>
> ...
>
> An intersexual is a person with gonads or genitalia of both sexes, whereas transsexuals have the biological bodies and functions of a normal member of their initial sex. Transsexuals are not hermaphrodites, nor are hermaphrodites transsexuals." (citation omitted)

146 In reaching the same conclusion as the Chief Justice on the appeal, Lockhart J stated, at 325-326:

> "Sex is not merely a matter of chromosomes, although chromosomes are a very relevant consideration. Sex is also partly a psychological question (a question of self perception) and partly a social question (how society perceives the individual).
>
> The words 'woman' and 'female' are substantially synonymous. A woman is an adult female human being. In my opinion a woman or a female, as those terms are generally understood in Australia today, includes a person who, following surgery, has **harmonised psychological and anatomical sex**. A male-to-female transsexual, following reassignment surgery, is a woman and a female. ... A male-to-female transsexual is no longer capable of procreation but she is no longer of her original sex. Functionally she is a member of her new sex and capable of sexual intercourse. She does not have the gonadal factor of the presence of ovaries; but she does have, albeit artificially implanted, a vagina. Likewise her secondary sex characteristics are those of her new female sex. She is psychologically a woman, a person who is convinced that she is a woman. A transsexual who has undergone successful sex reassignment has an apparently normal female anatomy and she will feel convinced that she belongs to her new sex and that she has achieved an integrated identity by adopting the physical characteristics of the female to her psychological nature." (emphasis added)

***Kevin v Attorney-General (Cth)* [2001] FamCA 1074; 165 FLR 404**

147 *Kevin v Attorney General (Cth)* involved the question of the validity of a marriage between a female and a person who had been through a full process of transsexual reassignment surgery so as to acquire the physical characteristics of a male. The Attorney General argued that the husband, 'Kevin', was not a man for the purposes of the law of marriage. Chisholm J analysed with some care the formation and development of a person's gender. This analysis is uncontroversial and provides a useful background to the question of sex or gender identification.

148 At [216]-[223], Chisholm J considered the "*normal processes of sexual development and identification*", including the stages *in utero* when sex differentiation first occurs and how the sex/gender of the foetus then developed. His Honour noted, at [220], that newborn babies are routinely identified as girls or boys, that is, as a female or male, shortly after birth, on the basis of inspection of the genitals. His Honour further noted, at [221], that in the case of transsexuals, there was no doubt at birth about a baby's sex on the basis of an inspection of the baby's genitals. The issue of a transgender person's sex or gender usually only arose at a later stage and sometimes would lead to a request for medical attention.

149 His Honour continued, at [222], that except in the case of sexual ambiguities apparent at birth, that is, ambiguities in the baby's genitalia, a child is identified as a boy or girl at birth. Chisholm J emphasised, however, that there was:

> "... now evidence to the effect that the process [of the determination of sex] may not be completed at birth, since relevant developments in the brain occur during a period following birth."

150 Evidence of those matters had been given by a number of experts in the proceedings before his Honour. One such expert, Professor Gooren, a specialist endocrinologist, explained that disorders could occur in the process of sex differentiation. In the case of transsexuals, Professor Gooren stated that the decision to recommend both hormonal and sex affirmation surgical procedures was:

> "... based on the conclusion of a thorough psychodiagnostic process that concludes that a disorder has occurred in the process of sexual differentiation and that the person will benefit from [such procedures]." (at [223])

151 Senior Counsel for Norrie referred to the judgment at [224]-[225], where Chisholm J made reference to those individuals who were "*not unambiguously male or female*" from a biological point of view. In this regard, his Honour referred to the evidence of Professor Greenberg, upon whose work Norrie sought to rely in this case, relating to persons who, in the medical terminology used in *Kevin*, were described as "*intersex*". Relevantly for present purposes, Chisholm J stated that Professor Greenberg's evidence explained that such persons may have "*chromosomal variations from the norm, ambiguities in the gonads or genitalia, and variations in the production of hormones*". His Honour noted, at [229], in accordance with the evidence before him, that transsexuals "*do not have any of the incongruities or ambiguities*" that occurred physiologically in an intersex person. What distinguished transsexuals from intersex individuals was a "*discontinuity between their mental state - psychology - and their physical state - biology*".

152 On appeal, the Full Court of the Family Court, in upholding Chisholm J's decision, accepted, at [326], that the evidence before his Honour was sufficient for him to find that there was a biological basis for transsexualism and that there was no reason to exclude the psyche as one of the relevant factors in determining sex and gender: *Attorney-General (Cth) v Kevin* [2003] FamCA 94; 172 FLR 300.

***AB v Western Australia* [2011] HCA 42; 244 CLR 390**

153 *AB v Western Australia* was concerned with the *Gender Reassignment Act* 2000 (WA). Under the Act, a person who had undergone a reassignment procedure could apply to the Gender Reassignment Board for the issue of a recognition certificate. The purpose of the certificate was to enable the applicant to register the certificate with the Registrar of Births, Deaths and Marriages, who was required to alter the register to reflect the sex stated in the certificate: s 17(1). A precondition to applying for a certificate from the Board was, relevantly, that the person had undergone a reassignment procedure. Pursuant to s 15 of the Act, before issuing the certificate, the Board had to be satisfied, inter alia, that the applicant believed his or her true gender was the person's reassigned gender and had adopted the lifestyle and gender characteristics of that gender.

154 A "*reassignment procedure*" was defined in s 3 as follows:

> "... a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics"

155 The term "*gender characteristics*" was defined to mean "*the physical characteristics by virtue of which a person is identified as male or female*".

156 AB and AH had each applied for a recognition certificate pursuant to the *Gender Reassignment Act*, s 14 that they had undergone a gender reassignment procedure and was each of the sex stated on the certificate. AB and AH had been born with female gender characteristics but identified as male from an early age and had been diagnosed with gender dysphoria, a condition defined in the English Oxford Dictionary as "*persistent dissatisfaction with or distress relating to one's anatomic sex*". AB had commenced testosterone therapy in 2004 and undergone a bilateral mastectomy in 2005. AH had commenced testosterone therapy in 2006 and undergone a bilateral mastectomy in 2007, with a further related surgical procedure in 2007. This was the extent of the surgical procedures undergone by both applicants. Both retained a female reproductive system.

157 The Board refused to grant the certificates, as both applicants retained a female reproductive system, which the Board considered was inconsistent with being male and for that reason, was "*inconsistent with being identified as male*". The Board considered that there were adverse social and legal consequences if the appellants were issued with certificates whilst they still had the capacity to bear children.

158 Before the Western Australia Court of Appeal: *Western Australia v AH* [2010] WASCA 172; 41 WAR 431, Buss JA (dissenting), identified, at [202]-[203], the purpose of the *Gender Reassignment Act* to be the provision of a mechanism whereby persons suffering from gender dysphoria could have their reassigned gender legally recognised. Buss JA concluded, at [197], that the Act's reference to gender characteristics as meaning the "*physical characteristics by virtue of which a person is identified as male or female*" was a reference to a person's external physical characteristics. Thus, the fact that the applicants each retained a female reproductive system did not mean that each had not undergone a reassignment procedure as defined in the Act. This conclusion was based on a variety of factors: see [198]-[206]. In particular, his Honour considered, at [206], that had the Legislature intended that a reassignment procedure, for the purposes of the Act, required more than the alteration of a person's external genitals, it would have used different language than was used in the definition provision. His Honour's dissenting approach prevailed in the High Court.

159 The central issue for determination in the High Court was the proper construction of s 15(1)(b)(ii). That section required that the Board be satisfied that the person applying for the recognition certificate had adopted the lifestyle and gender characteristics of the person's reassigned gender. The Court (French CJ, Gummow, Hayne, Kiefel and Bell JJ) at [2], agreed with Lockhart J in *SRA*, at 398, that:

> "... gender should not be regarded merely as a matter of chromosomes. It is partly a psychological question, **one of self-perception**, and partly a social question, how society perceives the individual." (emphasis added)

(Note: Lockhart J used the term "*sex*" and not "*gender*" in the passage to which the High Court referred.)

160 The High Court held, at [23]:

> "The general approach of Buss JA is to be preferred. It gives effect to the evident purpose of the legislation and is consistent with its terms. **It is an approach that gives proper weight to the central issue with which the legislation grapples: that 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." (emphasis added)

161 The High Court observed, at [26], that s 14 of the Act contained the minimum condition for a recognition certificate, that is, that the applicant has undergone a medical or surgical procedure to alter their genitals or other gender characteristics. Their Honours then noted, at [31]:

> "Section 14(1) cannot be taken to require a particular level of success in achieving the gender characteristics of the opposite sex. Such an approach was considered in *R v Harris*, in relation to a male to female transsexual. However, as Lockhart J observed in *SRA*, a male to female transsexual after surgery is no longer a functional male, but a female to male transsexual is in a different situation. Even successful surgery cannot cause him to be a fully functional male. An approach to the requirements of s 15(1)(b)(ii) which has regard to the extent to which a person obtains gender characteristics of the gender to which they identify would therefore operate differentially and unfairly. Such an effect cannot be taken to have been intended in legislation such as this, which is of a remedial and beneficial kind." (citations omitted)

162 At [33], in respect of the definition of "*reassignment procedure*", the Court said:

> "On one view the definition of 'reassignment procedure' might suggest a concern with the result achieved by the surgical procedure. **The words 'so that the person will be identified as a person of the opposite sex' may be thought to connote a level of certainty of identification as male or female.** However, ss 14(1) and 15(1)(b)(ii) may be read together in a more harmonious way, by attributing the purposive aspect of s 14(1) to the person. Section 14(1) may be understood to require that the person undertakes a reassignment procedure with the intention that he or she may be identified by others as being of the gender to which he or she seeks reassignment. Furthermore, s 14(1) requires only that the medical or surgical procedure *alter* the genitals and other gender characteristics of a person. It does not require that the person undertake every procedure to remove every vestige of the gender which the person denies, including all sexual organs." (emphasis added; citation omitted)

163 The Court also stated, at [36]:

> "The concern of s 15(1)(b)(ii) may be taken to be whether a transsexual person's appearance and behaviour in the conduct of their life would be accepted by other members of society as conforming to the gender to which the person seeks reassignment. That is what is intended by the phrase 'is identified as male or female' in the s 3 definition of 'gender characteristics'. Such an understanding of the operation of s 15(1)(b)(ii) is consistent with the objects of the Act, **which are to facilitate the acceptance of a person, as being of the gender to which they are reassigned, within society so that they may fully participate within it. No point would be served, and the objects of the Act would not be met, by denying the recognition provided by the Act to a person who is identified within society as being of the gender to which they believe they belong and otherwise fulfils the requirements of the Act**." (emphasis added)

164 Relevantly, the Court added, at [38]:

> "The Act contains no warrant for implying further requirements, such as potential adverse social consequences, to which the Board had regard, or community standards and expectations, to which the majority in the Court of Appeal referred ... Considerations of policy and an understanding of the extent to which society is accepting of gender reassignment are matters which may be taken to have been considered when the Act was passed. The Act reflects the policy decisions taken. The objectives of the Act, and their social and legal consequences, are to be met by reference to its stated requirements. Those requirements, including those of s 15(1)(b)(ii), are to be given a fair and liberal interpretation in order that they achieve the Act's beneficial purposes."

The common law meaning of the word "*sex*"

165 The Registrar contended that, based on this case law, the following propositions emerged for the purposes of the common law:

(a) the ordinary English meaning of the word "*sex*" is the quality of being male or female: *SRA* at 301, 302 per Black CJ;

(b) the law is based on an assumption that there are only two sexes, male and female: *SRA* at 313 per Lockhart J;

(c) there is no "*third sex*" recognised at common law: *Harris & McGuiness* at 194 per Mathews J;

(d) it is "*impractical*" and would cause "*insuperable difficulties*" to abandon the two sex assumption at law: *Re Secretary, Department of Social Security and "HH"* [1991] AATA 94; 23 ALD 58 at [13]; *Harris & McGuiness* at 194;

(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*": *Kevin* at [119], [315] per Chisholm J.

166 The Registrar submitted, therefore, that the correctness of the Tribunal's and the Appeal Panel's construction of the word "*sex*" in Pt 5A as meaning "*male*" and "*female*" was reinforced by the common law's understanding and application of the word. The Registrar sought to distinguish *AB* on the basis that in those proceedings there was no dispute as to whether "*sex*" was other than male or female and, instead, that the Court's reasoning assumed a binary classification of "*sex*": see [1], [7], [10], [22], [31], [33], [34].

Consideration

167 The question of law raised by the appeal was the proper construction of s 32DC and in particular the meaning of the word "*sex*" in that provision. Both parties recognised that the Registrar's power, in the sense of what could be recorded in the Register, depended upon the answer to that question. If the word "*sex*" meant only "*male*" or "*female*", the Registrar had no power under s 32DC to register a change of sex to anything other than male or female. Conversely if the word "*sex*" in the Act was not confined to those meanings, what could be entered into the Register was likewise not confined. The appeal does not raise for resolution the question of the sexual identification that may be entered on the register or what terms may be used for the purposes of recording a person's sex on the register if the construction for which Norrie contended is correct.

168 Norrie's central submission was that the Registrar's power to change a person's sex from what was recorded on the Register was not limited to registering a person's sex as being either "*male*" or "*female*". Norrie relied upon the absence of a definition within the Act for the term "*sex*" and the fact that the language providing for an application to alter the Register was neutral in the sense that s 32DA did not specify that the alteration must be to either "*male*" or "*female*". Norrie further submitted that if it was the intention of the Legislature to limit the Registrar's power to change the specification of a person's sex to simply that of "*male*" to "*female*" or "*female*" to "*male*", the legislature could have explicitly imposed that limitation by including words in the legislation that required that outcome. At the heart of this submission was the notion that the language of the Act and Regulation did not confine the selection to "*male*" or "*female*" only. Norrie contended that her submission was supported by the definition of "*sex affirmation procedure*" (set out above at [21]), which involved two separate and distinct purposes for the carrying out of such a procedure.

169 On Norrie's argument, the first purpose was, as specified in para (a), "*for ... assisting a person to be considered to be a member of the opposite sex*". Norrie accepted that the language of "*opposite sex*" in para (a) indicated that the purpose was to achieve the status of either male or female. In contrast, para (b) provides that a sex affirmation procedure may be carried out to "*correct or eliminate ambiguities relating to the sex of the person*". Norrie submitted that the reference to "*ambiguities relating to the sex of a person*" indicated that the legislature recognised that a person may not be unambiguously "*male*" or "*female*" and that the purpose of para (b) was to ensure that a person may undergo a surgical procedure to correct or eliminate any ambiguity as to the person's sex.

170 Norrie submitted that that had occurred in this case, in that she had had surgery to correct or eliminate the ambiguities relating to her sex, but that the surgery had failed in that the ambiguity remained. Norrie also submitted that para (b) recognised that an individual may not conform to conventional attitudes that one is either a male or a female.

171 The Registrar's submission focussed on the absence of any definition in the Act of the terms "*sex*" or "*change of sex*",

so that, in accordance with the principles of statutory construction, those words were to be given their natural and ordinary meaning unless a contrary intention was indicated by the Act itself: *Cody v J H Nelson Pty Ltd* [1947] HCA 17; 74 CLR 629 at 64 per Dixon J; Pearce & Geddes at [2.24]. The Registrar submitted that here, not only was there no such contrary intention, the Act and, in particular, the use of the phrase "o*pposite sex*" in s 32A(a), evidenced an intention by the Legislature to use the word "*sex*" in its ordinary meaning. In this regard, the Registrar submitted, as the Tribunal found and the Appeal Panel confirmed, "*sex*" meant "*male*" and "*female*" only and "*change of sex*" meant a change from one to the other. The Registrar relied upon the meaning the Full Court in *SRA* gave to the term "*sex*" in its construction of the term "*woman*". In making this submission, the Registrar did not challenge the Appeal Panel's finding that the Act was "*beneficial legislation*".

172 The Registrar also contended that the Appeal Panel had been correct in applying another basic tenet of statutory construction, namely, that when the Legislature has used a word in an Act, it is taken to be given the same meaning throughout the Act and that this is particularly so where the word is used multiple times within a single provision: see *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452 per Hodges J. See also *Registrar of Titles (WA) v Franzon* [1975] HCA 41; 132 CLR 611 at 618 per Mason J; *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* [2005] FCAFC 154; 145 FCR 523 at 539.

173 The issue in the present case relates to the scope of the Registrar's power under s 32DC of the Act. That in turn depended upon the meaning of the word "*sex*" as used in Pt 5A of the Act: see at [167] above. The Registrar's argument may be summarised as involving the following propositions. First, as a matter of ordinary English usage, "*sex*" meant "*male*" or "*female*". Secondly, in the context of the Act as a whole, "*sex*" was used in that binary sense. Thirdly, it is a basic tenet of statutory construction that words used in a statute bear the same meaning throughout. In particular, reliance was placed upon the fact that the word "*sex*" was used in other provisions in Pt 5A where it could only bear a binary meaning. Next, the Registrar relied upon the statutory landscape whereby conduct in a variety of circumstances was premised upon persons being either "*male*" or "*female*". Finally, the Registrar relied upon the various authorities discussed above in which the word "*sex*" was held to have a binary meaning in a variety of statutory contexts.

174 It is convenient to deal with each of these propositions in turn.

175 The Registrar's first proposition was that the term "*sex*" in the legislation bore a binary meaning of "*male*" and "*female*". It was part of the Registrar's argument that this was the ordinary meaning of the word and that the determination of the ordinary meaning was a question of fact. However, as I have already explained above, at [62] and [64], this Court's task is to determine the meaning of the word in the statute, which is a question of law. In doing so, the Court is nonetheless required to ascertain what meanings the word has and whether the Legislature used the word in a particular way.

176 Questions of the meaning of words and their usage involve an understanding of the function of language and the way it develops. Whilst the Court has no expertise in that matter, it can be readily accepted that language is a means of communication of observations, ideas and emotions. It provides a basis upon which a body of knowledge can be organised, classified and understood. As ideas and knowledge develop, so does language. This is a reflection that language is a dynamic process that develops, evolves and changes. Sometimes, words fall into disuse as other words take their place. The word "*hermaphrodite*" may well be an example, as it appeared from the material presented to this Court that the word may be falling into disuse and the word "*intersex*" is being used, at least interchangeably, if not completely in substitution for, that term.

177 When language is in a state of evolution, new or extended meanings may not and, indeed are unlikely to have, immediate or universal acceptance. Although the evolution of language may be driven by medical, scientific or technical advancements, such advancements are not always the subject of complete community acceptance. This is particularly so when advancements relate to matters of human sexuality and reproduction or other matters that are considered to fall within a moral framework. Matters such as gender identity and sexual preferences are often overlain with social, moral and religious considerations that may vary widely in different segments of the community. The law's role in the regulation of such matters may itself be controversial or, at the least, influenced by the different views within the community on such matters. Sir Ronald Wilson adverted to this in the passage quoted at [133] above.

178 If 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.

179 However, the fact that particular language may be in a state of evolution and that a changed or extended meaning may not have universal acceptance, does not mean that the traditional meaning of the word must be taken as the meaning of the word as a matter of common usage. Indeed, the evolutionary status of a particular word in the language may mean that a particular word no longer only bears its traditional meaning or that the traditional meaning reflects the

common English usage of the word.

180 One of the resources upon which the Registrar relied was the dictionary definition of "*sex*" in the *Macquarie Dictionary*. However, a dictionary is not a manual of the ordinary usage of a word. It is reference work for the meaning of words and usually includes other information, including the etymology of a word. Thus the fact that there is a dictionary definition of "*sex*" as meaning the male and female gender is not necessarily a statement that that is its ordinary meaning or that there are no other relevant meanings.

181 The entry in the *English Oxford Dictionary* indicates there is a recognised usage of the word "*sex*" which is not confined to its binary meaning. Whether that means that, as a matter of ordinary English usage, the word "*sex*" no longer bears a binary meaning, is a different question and is not resolved by there being more than one meaning attributed to the word in at least one of the standard reference dictionaries. Nor is the meaning of a word in legislation necessarily determined by reference to a single source, even if the source is a standard work such as the *Macquarie Dictionary*. As I have already stated, the question of law to be determined is the meaning of "*sex*" in Pt 5A and s 32DC in particular, as a matter of the proper construction of the Act.

182 The medical, psychological and social developments relating to sexual identity reflected in the literature, case law and dictionary definitions and the statutory changes over the last two decades discussed above, evidence an increasing understanding, not only in science and medicine but also in the law and in other professional disciplines, that sexual identity is not dependent solely upon physical characteristics and is not necessarily unambiguous. This is reflected in the definition of "*sex affirmation procedure*" in s 32A(b).

183 For the reasons which follow, I am of the opinion that "*sex*" as used in Pt 5A is not used in the sense of "*male*" and "*female*", as the Registrar contended. As the primary tenet of statutory construction directs attention to the text of the legislation and the context in which the legislative provision was enacted, the Court's task is to begin with the terms used by the legislature in the legislation in question. The second and third propositions in the Registrar's argument, which raise overlapping considerations, may be seen as being directed to this principle.

184 The context in which Pt 5A came to be inserted into the Act was a recognition that there has been increasing medical, psychological and social recognition that "*sex*" or "*gender*" is not a straightforward notion reflecting only a "*male*" and "*female*" sex. The Second Reading Speech evidences a legislative recognition that a person's sex may not be unambiguously male or female. This is directly reflected in the terms of the amended legislation in its reference in s 32A(b) to "*ambiguities*" in a person's sex. It is also relevant to note that in its terms, Pt 5A does not confine the recognition or identification of sex or gender to "*male*" and "*female*". The only reference in Pt 5A that points to "*sex*" being used in that sense is in s 32A(a). But even in that case, the reference is not to "*male*" or "*female*". The language used is the "*opposite sex*".

185 Accordingly, to the extent that the Registrar argued that words used in legislation should be given the same meaning, it is to be remembered that that tenet of construction is subject to any clear indication to the contrary in the provisions of the statute. The word "*sex*", in s 32A(a) is used in the composite phrase "*opposite sex*". As the word "*opposite*" qualifies the word "*sex*", in that provision, it is apparent that the Legislature used the word "*sex*" in the phrase "*the opposite sex*" in s 32A(a) in a binary sense.

186 However, that is the only occasion in the Act where that is so and that itself is an indication that the word "*sex*" elsewhere in the legislation, does not, or at least may not, bear a binary meaning. When regard is then had to the language of s 32A(b), where the word "*sex*" is not only unqualified, but the provision expressly recognises the existence of sexual ambiguities, the proper construction of the word "*sex*" in Pt 5A and s 32DC in particular, points to a meaning that is not confined to "*male*" and "*female*".

187 Accepting that for the moment, when the definition of "*sex affirmation procedure*" in s 32A is transposed into s 32DA(1)(c), that section will require one of two things. Either, a person will have undergone a surgical procedure involving the alteration of a person's reproductive organs carried out for the purpose of assisting a person to be considered to be a member of the opposite sex. Or the person will have undergone a surgical procedure involving the alteration of a person's reproductive organs to correct or eliminate ambiguities relating to the sex of the person. A person who satisfies the legislative pre-condition of having undergone surgery, whether by reference to the first or second limb of s 32A, is entitled to apply for the registration of the person's "*sex*".

188 If a person satisfies each of the pre-conditions in s 32DA(1), including the pre-condition in par (c) of having undergone a sex affirmation procedure, the person "*may apply to the Registrar ... for the registration of the person's sex in the Register*". The word "*sex*" in that phrase is unqualified. In particular, there is no reference to registration of the "*opposite sex*" of that which the person was prior to surgery or to the registration of a sex according to the person's post-surgery anatomical features. The section facilitates the registration of a person's sex, whatever that may be. It is apparent, therefore, from the terms of s 32DA, that where the Legislature intended for the word "*sex*" to be qualified, it

used language that reflected that intention. Accordingly, I am of the opinion that there are sufficient indications in the language used by Parliament that when the word "*sex*" was not so qualified in Pt 5A, the Legislature did not intend that it bore a binary meaning such as is reflected in the use of the phrase "*opposite sex*".

189 The Registrar's fourth proposition relied upon existing legislation and the historical and social context in which such legislation was drafted. This legislation is referred to above at [123]-[124]. The underlying contention to the Registrar's argument was that there would be significant ramifications if a person was registered with a sex other than "*male*" or "*female*".

190 As is apparent from the discussion above, the recognition of gender identity extending beyond the binary form of "*male*" and "*female*" is relatively recent and legislative recognition of that has occurred in the context of increasing medical, scientific and social awareness to which I have referred. To date, the legislative changes in this State have been confined to anti-discrimination laws and statutory registration requirements, such as the provisions of the *Births, Deaths and Marriages Registration Act* presently under consideration. The *Gender Reassignment Act* of Western Australia also deals with the recognition, for registration purposes, of a change of sex.

191 There has not yet been a general adoption by the Legislature of the wider conception of sex and gender discussed in these reasons. That does not necessarily mean that the word "*sex*" in Pt 5A is to be given the same meaning as in a range of legislation predicated upon a binary notion of "*male*" and "*female*". Section 32DA does not fall into the category of case discussed in *Harrison v Melhem*, nor did the Registrar suggest that it did. However, the narrow operation of the principle discussed in that case indicates the unlikelihood that s 32DA should be construed so as to be consistent with other legislation in which "*sex*" is used in a binary sense. Any difficulties caused by the existence of such legislation, where a person does not identify with either sex, is a matter for consideration by the legislature and/or law reform bodies. In any event, Pt 5A makes provision for the concern that the Registrar raised. Section 32J provides for the effect of registration of a change of sex. Section 32J(1) states that a person is of the sex that is registered, "*subject to any law of New South Wales*". Accordingly, if a person became subject to a law which, properly construed, referred to "*sex*" in its binary meaning, the application of the Act to a person who was not registered as "*male*" or "*female*" may depend upon a person's anatomical status. Whether that is so will depend upon the application of the particular Act, properly construed, to the particular circumstances of the case.

192 That leaves the final matter upon which the Registrar relied, namely, the meaning given to the word "*sex*" by courts in a range of legislation in which the word appears. In particular, the Registrar relied upon the statement of Mathews J in *Harris & McGuiness*, at 194, as authority for the proposition that "*sex*" was a binary construct. Norrie submitted, however, that the view expressed by Mathews J was distinguishable from this matter in two ways. First, in that her Honour's remarks were made in the context of a person who did not want to be characterised as being a "*third sex*". Secondly, her Honour was negating the existence of a third sex with respect to legislation drafted in terms of male and female, which was different from the legislation currently under consideration. Norrie's submission, in this regard, was based in part on the fact that the approach taken in *Harris & McGuiness* was consistent with the medical, scientific and social knowledge of the time. Further, *SRA* did not consider the position where sex reassignment surgery was "*unsuccessful*", in the sense that after the surgery the person fails to identify with her new sex as Norrie contends is her position. In addition, as is pointed out at [88], [90] above, there has been a change or development of the dictionary definition of the word "*sex*" since *SRA* was decided.

193 The Registrar also relied upon the meaning that was given to the word "*sex*" in *SRA* discussed above at [141]-[142]. However, as the High Court observed in *AB*, the question remains a matter of statutory construction. The legislation in *SRA* was different, in that the legislation here recognises sexual ambiguity. Further, the legislation in the other authorities to which the Registrar referred was not sufficiently close to the terms used in the relevant provisions of Pt 5A to be of assistance in determining the meaning of the word "*sex*" in s 32DA. Nonetheless, the case law has clearly recognised that sexual identification is no longer a recognition of "*male*" or "*female*" in the traditional sense. To that extent, it provides support for the proposition for which Norrie contends.

194 The matters that I have dealt with thus far related to the first issue on the appeal. Before expressing my conclusion, it is necessary to deal briefly with the second ground of appeal. The third ground of appeal is dealt with below at [205].

195 In the second ground of appeal, Norrie contended that the Tribunal erred in its construction of s 32DA in holding that s 32DA could only be satisfied if an applicant had undergone a surgical procedure for the purpose of being more definitively regarded as either "*male*" or "*female*", but not for the purpose of correcting the ambiguity between physical characteristics and a person's sex identity.

196 The Registrar submitted that this question did not arise for determination. He submitted, first, that a "*sex affirmation procedure*" within the meaning of the Pt 5A was a pre-condition to an application for change of sex under s 32DA. Secondly, the subjective intention of a person undergoing a "*sex affirmation procedure*" was irrelevant to the proper

construction of the statutory provision. And, thirdly, Norrie had undergone a "*sex affirmation procedure*" within the meaning of s 32A and would satisfy the requirements for a change of sex from male to female: s 32DA.

197 There was no issue that Norrie underwent a sex affirmation procedure and thus satisfied the pre-condition to making an application under the Act for the registration of her sex. However, the evidence did not establish whether the procedure undertaken fell within the meaning of paras (a) or (b) of the definition of "*sex affirmation procedure*" in s 32A. Nor was there any medical evidence, nor an express finding by the Tribunal, that regardless of whether the surgical procedure fell within (a) or (b), the surgical procedure was successful or whether it failed and in either case, what it meant to say that surgery was successful or that it failed.

198 Attention was given to this question in *AB v Western Australia* in respect of the requirement in s 14 of the *Gender Reassignment Act* that a person had undergone reassignment surgery before being entitled to apply for a recognition certificate. The Court observed, at [14], that s 14(1) of the *Gender Reassignment Act* could not be taken "*to require a particular level of success in achieving gender characteristics of the opposite sex*". Those remarks were made in the context of reassignment surgery designed to enable a person to identify as a member of the "*opposite sex*". The Court noted, at [26], that the requirement that a person undergo reassignment surgery was the minimum condition for a recognition certificate. However, the Court observed, at [33], that on a harmonious reading of the Act and ss 14 and 15 in particular, s 14 was not concerned with the result of the surgery. Rather, it was concerned with the fact that the surgery had been undertaken.

199 In this case, the Tribunal commented, at [5], that "[*t*]*he evidence also establishes that* [*Norrie*] *does not identify as either male or female but as 'non specific*'", which at least recognised that on the material before it, Norrie's **claimed** sexual identification following surgery was "*non specific*". However, there was scant evidence on these matters and the Tribunal's remarks were made in the context that it was considering a preliminary question of law. I would only comment that there is nothing in the Act to indicate that the legal and administrative processes available and required under Pt 5A become inapplicable should the surgical procedure fail, in the sense that, following surgery, a person did not identify as a member of the opposite sex, or alternatively, the surgery did not eliminate or correct a persons' sexual ambiguity.

Conclusion

200 It follows from what I have said that I consider that the word "*sex*" in Pt 5A of the Act does not bear a binary meaning of "*male*" or "*female*" and that a person is entitled to have an entry in the Register of a sex other than either of those two identifiers. There are other sexual identifications that may be registered. That leads to the next critical consideration as to the proper outcome of the appeal.

201 The *Administrative Appeals Tribunal Act*, s 120 provides that the Court may make such order as it thinks appropriate having regard to its determination. As there has been no determination by the Tribunal of the factual issue, I am of the opinion that this Court should order that Norrie's application should be remitted to the Tribunal for determination in accordance with law. This will mean that the legislation should be applied on the basis that it is not confined to registration of sex as only male or female.

202 In dealing with the merits of the application, it will be necessary to deal with Norrie's application for her sex to be recorded in the Register as "*non specific*" or such other specification as the Tribunal may permit to be considered. I should, however, say something about the way the matter was dealt with by the Tribunal at the initial hearing. It will be recalled that the Registrar had issued a certificate recording Norrie's sex as "*not specified*". Not only did this not accord with the terms of Norrie's application and supporting documentation, the registration of a person's sex as "*not specified*" does not seem, as a matter of ordinary English, to be a registration of a person's sex at all. It is, or at least could easily be understood to be, a statement that the sex of the person was not recorded or "*not stated*", as the Registrar had said on the re-issued certificate. In that regard, it would not be different from there being no entry at all as to a person's sex.

203 The question for the Tribunal will be whether there is evidence to support an entry in the register of Norrie's sex as "*non specific*". "*Non specific*" has a dictionary meaning of "*not specific; not restricted in extent, effect; something lacking in specificity, definiteness or precision*": *Oxford English Dictionary*. Norrie's identification with being neither male nor female may well appropriately be described in terms of this definition. Whether that is the identification of "*sex*" within the meaning of the Act is another and more vexing question.

204 The material before the Court did not indicate that any specific term has come into common usage to describe a person with Norrie's sexual or gender identity, that is, as someone who does not identify with being male or female. The medical certificates Norrie lodged with her application for change of sex supported her description of sex as "*non specific*". Whether that will be sufficient evidence on a hearing of Norrie's application will be a matter for her legal

advisors to assess and for the Tribunal to determine.

205 Whether the Tribunal, on whatever material it has, will be satisfied that a person's sex might be registered as "*non specific*", will also be a matter for its determination, having regard to the case then advanced before the Tribunal. As I have concluded that the word "*sex*" in the Act is not confined to "*male*" or "*female*", it is likely that other appropriate identifications such as "*intersex*", "*androgenous*", or "*transgender*", being words that appear to be recognised designations of sexual identity, may be registered, subject to the applicant satisfying the pre-condition of having undergone sex affirmation surgery. It will be for the Tribunal to determine whether a person's sex may be so registered. Likewise, in this case, it will be for the Tribunal to determine whether, within the terms of the Act, a sex described as "*non specific*", that is, a sex that is not precise or definite, may be registered. The Tribunal's determination will depend upon the terms of the application made and the evidence before it in support of the application. For the reasons given, therefore, the third ground of appeal that it was not open to the Registrar, as a matter of law, to register Norrie's sex as "*non specific*", should be upheld.

206 I should make one final observation. On the argument on the appeal, Norrie's Senior Counsel used the language of "*intersex*" to describe Norrie's sexual identity. There are two problems with this. First, Norrie did not make an application to the Registrar that her sex be registered as "*intersex*". Secondly, from the understanding of the term "*intersex*" I have gleaned from the material, it would seem that Norrie is not an intersex person, although Professor Greenberg's work indicates there is some fluidity around the language relating to these matters. Norrie will need to take care in specifying the "*sex*" that she contends should be registered.

207 Accordingly, I propose the following orders:

1. Appeal allowed;

2. Order 2 of the Appeal Panel be set aside;

3. In lieu thereof:

(a) Set aside the decision of the Tribunal dated 16 March 2010;

(b) Order the matter be remitted to the Tribunal for determination;

(c) Order the respondent pay the appellant's costs of the appeal.

208 **SACKVILLE AJA**: I have had the advantage of reading the judgment of Beazley ACJ (the President of the Court of Appeal) in draft. I gratefully adopt her Honour's analysis of the facts, the legislation and the arguments presented on the appeal.

209 I wish to state my own reasons for concluding that the Appeal Panel of the Administrative Decisions Tribunal erred in its construction of s 32DC of the *Births, Deaths and Marriages Registration Act* 1995 ("*the Act*"). In what follows I use the same abbreviations as in Beazley P's judgment.

Preliminary Matters

210 It is convenient to record a number of matters at the outset.

(1) The appeal to this Court is against a decision of the Appeal Panel of the Tribunal: *Norrie v Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53. The appeal is on a question of law, as provided by the *Administrative Decisions Tribunal Act* 1997, s 119(1). I agree with Beazley P that the appeal to this Court involves a question of law.

(2) The Appeal Panel affirmed a decision by the Tribunal, constituted by a Judicial Member: *Norrie v Registry of Births, Deaths and Marriages* [2011] NSWADT 102. The Tribunal so constituted affirmed a decision of the Registrar that s 32DC of the Act does not permit the Registrar to register a change of sex to "*non specific*" or "*not specified*" and that therefore the purported registration of a change of sex by Norrie to "*not specified*" was invalid: [2011] NSWADT 102, at [99], [100].

(3) Norrie in fact applied for the registration of a change of sex to "*non specific*". It was the Registrar who initially used the designation "*not specified*".

(4) The Appeal Panel interpreted the Tribunal's reasons as assuming, but not finding, that Norrie met the conditions for the exercise of the Registrar's power, conferred by s 32DC of the Act, to determine an application for change of sex: [2011] NSWADTAP 53, at [20]. The Appeal Panel was content to proceed on the basis that Norrie had satisfied the preconditions stated in s 32DA, including the requirement in s 32DA(1)(c) that an applicant must have undergone a "*sex affirmation procedure*" as defined in s 32A. However, it affirmed the Tribunal's decision on the ground that, although the preconditions may have been satisfied, the Registrar's power under s 32DC is limited to registering a

change from the female sex to the male sex or *vice versa*. It follows, according to the Appeal Panel, that s 32DC on its correct construction does not authorise the Registrar to register a change of sex from male (or female) to a sex that is "*not specified*" or "*not specific*": at [33], [35], [37].

(5) It is not clear that the Appeal Panel correctly interpreted the Tribunal's reasons. The Tribunal found (at [5]) that the Registrar:

> "does not dispute that [Norrie] has undergone a surgical procedure, and there is medical evidence ... that establishes that [Norrie] would meet the legislative requirements to register a change of sex from male to female."

This passage suggests that the Tribunal found that Norrie satisfied the statutory preconditions and that Norrie had undergone a "*sex affirmation procedure*" prior to lodging the application for registration of a change of sex. Neither the Tribunal nor the Appeal Panel considered which paragraph of the definition of "*sex affirmation procedure*" Norrie had satisfied.

(6) Nothing appears to turn on the Appeal Panel's interpretation of the Tribunal's reasons for the purposes of the appeal to this Court. The appeal to this Court was argued on the basis that Norrie had satisfied all statutory preconditions, including having undergone a sex affirmation procedure. The issue that was debated on the appeal was whether, accepting that Norrie had satisfied the preconditions in s 32DA of the Act, the Appeal Panel had erred in law in deciding that the Registrar does not have power to register a change of sex from male (or female) to "*non specific*" or "*not specified*".

(7) Norrie's notice of appeal identifies the errors of law said to have been committed by the Appeal Panel (see at [51] above). Norrie's principal contention, mirroring ground 1 in the notice of appeal, is that the Appeal Panel erred in law in construing s 32DC of the Act as authorising the Registrar to accede to a change of sex only from male to female, or female to male. Mr Bennett QC, who appeared with Mr Abadee for Norrie, submitted that s 32DC empowers the Registrar to register an application to register a person's change of sex from male (or female) to a sex that is neither male nor female.

(8) The function of this Court on an appeal on a question of law is not to review findings of fact. In this case, the Tribunal made only limited findings relating to Norrie's physiological characteristics (pre- and post-operative) and to her psychological attitude to her sexual identity. I do not mean this as a criticism, since the medical evidence before the Tribunal was scanty.

(9) The key findings of fact by the Tribunal were as follows:

-
- Norrie does not identify as male or female but as "*non specific*" (at [5]);
- Norrie probably perceives herself and is perceived by others to be of non-specific sex (at [95]);
- Norrie may experience difficulties associated with a requirement that she specify her sex as either male or female (at [95]); and
- Norrie considers that identifying as male or female is the equivalent of making a false statement (at [95]).
-

(10) The absence of detailed evidence and findings as to Norrie's precise circumstances and as to the medical justification for recognising a sex that is neither male nor female may be significant for the future conduct of the proceedings, should Norrie establish that the Appeal Panel erred in law (as in my opinion it did). The paucity of evidence before the Tribunal may also raise an issue as to how far this Court can have regard to external sources of information concerning the taxonomy of sexual identity.

The Question of Law

211 Ground 1 of the notice of appeal to this Court is as follows:

> "The Appeal Panel erred in law in construing s 32DC of the *Births, Deaths and Marriages Registration Act 1995* by holding that the Registrar could only register a change of a person's '*sex*' from male to female or female to male, but not from male or female to a designation that is neither specifically male nor female."

212 It is important to appreciate the basis for the Tribunal's decision and the Appeal Panel's affirmation of that decision. The Tribunal concluded (at [99]-[100]) that the Registrar had correctly refused to register the change of sex sought by Norrie, because the Registrar has no power under s 32DC of the Act to register a change of sex by a person to "*non specific*" or "*not specified*". However, the basis for this conclusion was that the word "*sex*", whenever used in Part 5A of the Act, means either the male sex or the female sex and can have no more expansive meaning (at [93]). In the Tribunal's view (at [94], [98]):

> "the construction urged by [Norrie] is not consistent with the numerous legislative provisions that are premised on a binary division between the sexes into 'male' and 'female'...
>
> [The] Act is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female."

213 The Appeal Panel endorsed (at [32]) what it said was the Tribunal's conclusion that:

> "Parliament would not have intended the enactment of Part 5A would create a '*third legal sex*' with the result that persons so registered would fall outside the legislative provisions that are premised on a binary division between the sexes into '*male*' and '*female*'".

Thus the Appeal Panel held (at [35]) that the Tribunal had correctly:

> "interpreted the words '*change of sex*' in context and concluded that their ordinary meaning was a change from male to female or vice versa".

214 The Appeal Panel rejected (at [38]) an application by Norrie for leave to extend the appeal to a review of the merits of the Tribunal's decision. One ground given for rejecting the application was that:

> "The Tribunal was determining a preliminary legal issue. It did not reach the stage of making a decision about the merits of the application".

215 Norrie's argument in this Court was that the Appeal Panel had erred in construing Part 5A of the Act as adopting a binary classification of sex. That error, so it was argued, was the very basis of the Appeal Panel's decision and warranted this Court setting it aside.

The Legislation

216 Part 5A was introduced into the Act by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act* 1996 ("*1996 Act*"), Sch 2, cl 4. The 1996 Act came into force on 1 October 1996, nine months after the principal Act commenced. As Beazley P has explained (at [18] above), Part 5A was subsequently amended by the *Courts and Crimes Legislation Amendment Act* 2008 ("*2008 Act*").

217 Part 5A, as inserted by the 1996 Act, included a definition of "*sexual reassignment surgery*" in s 32A. That definition corresponds precisely to the current definition of "*sex affirmation procedure*" in s 32A, which the 2008 Act substituted for the earlier definition.

218 Section 32B of the original Part 5A provided that a person over the age of 18:

> "(a) whose birth is registered in New South Wales;
> (b) who has undergone sexual reassignment surgery; and
> (c) who is not married".

could apply to the Registrar for "*alteration of the record of the person's sex in the registration of the person's birth*". The Registrar was to determine an application under s 32B by making the alteration or refusing to make it: s 32D. Those provisions remain in the legislation, except that the expression "*sexual reassignment surgery*" has been replaced by "*sex affirmation procedure*".

219 The 2008 Act introduced into Part 5A a provision enabling a person who was not born in New South Wales, but who has lived in the State for at least one year, to apply to the Registrar for the registration of the person's sex in the Register: see now s 32DA of the Act. Among the preconditions that must be satisfied is the requirement that the applicant has undergone a "*sex affirmation procedure*": s 32DA(1)(c). Section 32DA refers only to an application for the registration of the applicant's sex in the Register and does not refer to the application as one for the registration of a change of sex. However, s 32DC(1) states that the Registrar is to determine an application under s 32DA "*by registering the person's change of sex or refusing to register the person's change of sex*".

Background

Information Beyond the Evidence

220 I have referred to the paucity of evidence before the Tribunal and the Appeal Panel. As Justice Heydon has pointed out in an illuminating article, courts are not necessarily limited in their inquiries to the evidence called by the parties: J D Heydon, "Developing the Common Law" in J T Gleeson and R C A Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) Ch 5. Even in relation to "*adjudicative facts*", which Justice Heydon defines as facts in issue or relevant to a fact in issue, a court may rely on its knowledge of such matters as the use of the English language, elementary mathematical principles and simple physical and scientific facts (at 96).

221 In relation to "*legislative facts*", which include those which help a court determine what a rule should be, a court may rely on a wider range of knowledge. Justice Heydon gives examples of a court taking into account repeated findings

made by courts in earlier cases, even though the findings themselves are not generally admissible as evidence (at 116-117). He also gives examples of courts relying on expert literature in fields such as medicine and psychology on issues such as causation, foreseeability of psychiatric injury and the dangers of identification evidence (at 118-120). While urging caution in the use of legislative facts (at 124-127), Justice Heydon recognises that, subject to requirements of procedural fairness, reliance on legislative facts is sometimes "*both necessary and inevitable*" (at 136).

222 In determining the extent to which New South Wales courts can take into account matters outside the evidence adduced by the parties, s 144 of the *Evidence Act* 1995 must be considered. It provides as follows:

> "(1) Proof is not required about knowledge that is not reasonably open to question and is:
>
> (a) common knowledge in the locality in which the proceeding is being held or generally, or
>
> (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
>
> (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
>
> (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
>
> (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced."

223 Section 144 displaces the common law doctrine of judicial notice: *Gattellaro v Westpac Banking Corporation* [2004] HCA 6; 204 ALR 258, at [17], per Gleeson CJ, McHugh, Hayne and Heydon JJ; *Aytugrul v R* [2012] HCA 15; 286 ALR 441, at [21], per French CJ, Hayne, Crennan and Bell JJ. The Australian Law Reform Commission, which proposed the enactment of s 144, said that the section is intended to give effect to a "*wide view*" of the general knowledge that courts, even without evidence on the topic, may take into account: Law Reform Commission, *Evidence,* Vol 1 (Report 26, Interim), at [974], [977]. The Law Reform Commission expressly recognised (at [974]) that courts can take into account facts without proof, not only in relation to the process of making findings about facts in issue, but also in the process of formulating and developing the common law.

224 Section 144 does not confer an unlimited discretionary power on a court to take into account unproven facts that might bear on the issues to be resolved. Thus in *Gattellaro v Westpac,* the High Court held that it was not open to the New South Wales Court of Appeal to take notice of the "*fact*" that a bank used a standard form of guarantee. In *Aytugrul v R,* the High Court declined to take notice of published research suggesting that some ways in which DNA statistics are presented carry greater persuasive potential than others. The plurality did so (at [21]) because knowledge of the proposition asserted could not be said to be "*not reasonably open to question*" or capable of verification by reference to a document the authority of which could not reasonably be questioned.

225 Nonetheless, there are cases in which s 144 has been given a broad interpretation. In *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* [2008] FCA 983, 170 FCR 318, for example, French J (at [116]) took notice of the disadvantage experienced by women practitioners in the legal profession as a matter of "*common knowledge ... generally*" within the meaning of s 144(1)(a). His Honour did so in a case where the issue, as in the present case, was one of statutory construction.

226 The Court was referred in argument to material concerning the conditions known as intersexuality and transsexuality. This was not done in order to enable the Court to make a policy judgment to assess the merits of a proposed modification to a common law rule. Rather the material was provided as information necessary to construe and apply Part 5A of the Act. The material included a recent work by Professor Julie Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York University Press, 2012).

227 I do not think that this Court can take into account all of the scientific and factual information contained in the book. A good deal of this information cannot be said, in the absence of specific evidence on the point, to be "*not reasonably open to question*" or capable of verification in the manner contemplated by s 144(1)(b) of the Evidence Act. But certain basic information about intersexuality and transsexuality seems to me to fall within the category of knowledge that is not reasonably open to question or, alternatively, is capable of verification by reference to Professor Greenberg's work as a document the authority of which (on these issues) cannot reasonably be questioned. This conclusion is reinforced by the fact that much the same information has been recounted and accepted previously by courts in Australia and other common law jurisdictions.

Intersexuality and Transsexuality

228 Professor Greenberg defines "*intersex*" broadly to include (at 1):

> "anyone with a congenital condition whose sex chromosomes, gonads, or internal or external sexual anatomy do not fit clearly into the binary male/female norms".

She states (at 1-2) that there are a variety of intersex conditions:

> "Some ... involve an inconsistency between a person's internal and external sexual features. For example, some people with an intersex condition may have female appearing external genitalia, no internal female organs, and testicles. Other people with an intersex condition may be born with genitalia that do not appear to be clearly male or female .... Some people ... may also be born with a chromosomal pattern that does not fall into the binary XX/XY norm".

Norrie appears not to be an intersex person. But the existence of intersexuality is a matter to be taken into account in the construction of Part 5A.

229 Professor Greenberg also notes (at 11) that medical experts recognise that at least eight attributes contribute to a person's sex, including:

> "genetic or chromosomal sex, gonadal sex (reproductive sex glands), internal morphologic sex (seminal vesicles, prostate, vagina, uterus, and fallopian tubes), external morphologic sex (genitalia), hormonal sex (androgens or estrogens), phenotypic sex (secondary sexual features such as facial hair or breasts), assigned sex and gender of rearing, and gender identity".

This knowledge is not new: see Comment, "Transsexualism, Sex Reassignment Surgery, and the Law" (1971) 56 *Cornell LR* 963, at 965. Lockhart J identified similar factors in *Secretary, Department of Social Security v "SRA"* (1993) 43 FCR 299, at 316, a case decided before the enactment of Part 5A of the Act.

230 It has been known since ancient times that some people have both male and female physiological characteristics such as reproductive organs, although until relatively recently they were usually known as hermaphrodites: *Secretary v "SRA"*, at 313, per Lockhart J, and sources cited there. Intersexuality is not the same as transsexuality (sometimes known as gender dysphoria syndrome and so described by the High Court in *AB v Western Australia* [2011] HCA 42; 244 CLR 390); JL Taitz, "Confronting Transsexualism, Sexual Identity and the Criminal Law" (1992) 60 *Medico-Legal Journal* 60, at 61, 63; *Secretary v "SRA",* at 315. A transsexual at birth has the sexual organs of a male or female but does not identify as a member of the sex that was assigned at birth: J Greenberg, at 2; *Secretary v "SRA",* at 313-314, 315, per Lockhart J. In this sense, the term includes pre-operative, post-operative and non-operative transsexuals.

231 The term "*transsexual*" can have a narrower meaning. In *Kevin v Attorney-General (Commonwealth)* [2001] FamCA 1074; 165 FLR 404, Chisholm J used "*transsexual*" to mean (at [12]):

> "a person who has some or all of the physical or biological characteristics of one sex, but who experiences himself or herself as being of the opposite sex, and has undergone hormonal and surgical treatments to change some of the physical characteristics in order to conform more closely to the opposite sex."

Chisholm J's judgment in *Kevin v Attorney-General* contains a detailed examination of the state of medical knowledge as at 2001 relating to both intersexuality and transsexuality (see particularly at [216] ff). Although *Kevin v Attorney-General* post-dated the 1996 Act, it is noteworthy that Chisholm J described the biological characteristics of inter-sex persons as "*not **unambiguously** either male or female*": at [224], [228].

Some Case Law

232 Most of the case law relating to the classification of sex is concerned with the legal position of transsexuals. The well-known and much criticised case of *Corbett v Corbett* [1971] P 83, for example, decided that a post-operative male to female transsexual could not validly contract a marriage with a male. Ormrod J considered that a person's sex is fixed unalterably at birth. Accordingly, he held that a male could not change his sex even if he underwent an operation to remove testicles and construct an artificial vagina and thereafter lived as a woman.

233 In the course of his judgment (at 100-102), Ormrod J examined medical evidence relating to transsexuality and intersexuality (he used the term "*inter-sex*"). The evidence showed that some people exhibit discrepancies in the physiological characteristics that in 1971 were regarded as the principal criteria for determining a person's sex: chromosomal sex, gonadal sex and genital condition. The evidence indicated that such people could properly be classified as inter-sex. Ormrod J expressed no final view as to the appropriate classification of a person whose physiological characteristics relating to sexual identity were not congruent. Ormrod J noted that the experts disagreed as to whether people whose physiological characteristics were congruent, but whose psychological or hormonal factors were "*abnormal*", should also be classified as inter-sex.

234 An issue arose in Australian in 1979 as to the validity of a marriage entered into by an intersex person: *In the Marriage of C and D (falsely called C)* (1979) 28 ALR 524. Bell J found that a person (described as the "*husband*") who went through a form of marriage with a woman was a "*true hermaphrodite*". The husband had a normal female sex chromosome complement, but also had both male and female gonads. The husband, who had been raised as a male, had undergone surgery to "*correct*" external sex organs (apparently including the construction of a small penis and the removal of breasts). Bell J held (at 528) that the marriage was void because the husband "*was neither man nor woman but was a combination of both*".

235 *Corbett v Corbett* and *In the Marriage of C and D* have generated a great deal of critical comment in journals and elsewhere. In Australia, the commentary includes articles by two eminent jurists: M D Kirby, "Medical Technology and New Frontiers of Family Law" (1986) 1 *Aust J of Family Law* 196, at 197-200; R Wilson, "Life and Law: The Impact of Human Rights on Experimenting with Life" (1985) 17 *Aust J of Forensic Sciences* 61, at 79. Anticipating the terminology employed by Chisholm J in *Kevin v Attorney-General,* Justice Kirby referred to surgical intervention as a means to help determine "an **ambiguous** sexual identification". He discussed *In the Marriage of C and D* in that context.

236 The significance of these cases for present purposes is not the correctness or otherwise of the actual decisions. Courts in Australia have declined to follow the reasoning in *Corbett v Corbett* insofar as it suggests that sexual identity is determined purely by chromosomal or biological characteristics at birth and is therefore unchangeable thereafter: *Secretary v "SRA",* at 303-304, per Black CJ; at 325, per Lockhart J; *Kevin v Attorney-General,* at [120], [160], per Chisholm J. The significance of *Corbett v Corbett* and *Marriage of C and D* (and later cases discussed at length in *Secretary v "SRA"* and *Kevin v Attorney-General*) is that they demonstrate that long before enactment of the 1996 Act, medical and legal opinion in Australia recognised the conditions known as intersexuality and transsexuality. More particularly, it was recognised that intersex persons are not unambiguously male or female and that they may be regarded, for certain purposes at least, as neither male nor female.

Construction of Part 5A of the Act

Textual Analysis

237 The task of construction of Part 5A of the Act must begin with the text of the legislation. The critical provision is s 32DC(1), which provides that:

> "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".

The term "*sex*" and "*change of sex*" are not defined in Part 5A.

238 If Part 5A contained no provisions elucidating the meaning of "*sex*", the construction of s 32DC(1) would no doubt depend on the ordinary meaning to be given to the word. That, however, would not necessarily lead to the conclusion that s 32DC uses the word "*sex*" in a binary sense.

239 In *Secretary v "SRA",* Black CJ (with whom Heerey J agreed) accepted (at 301) that in ordinary English usage, there are two sexes, male and female, and that the differences relate to anatomical and physiological characteristics, rather than psychological ones. Nonetheless, Black CJ considered that the use of the word had changed sufficiently to conclude (at 304) that:

> "the English language does not now condemn post-operative male-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".

The Chief Justice took into account (at 305) the growing awareness in the community of the position of transsexuals and a perception that a post-operative male to female transsexual could appropriately be described as female in ordinary English usage. Thus, in his view, the word "*wife*" was apt to include a post-operative male to female transsexual, where the person otherwise satisfied the statutory definition of "*wife*". (See also at 325-326, per Lockhart J.)

240 It is at least arguable that the word "*sex*" and the expression "*change of sex*" in Part 5A, as a matter of current terminology, are apt to include, respectively, intersex persons and a person's change from male or female to intersex (a category that is neither male nor female). In support of this argument it can be said that intersexuality has been sufficiently recognised by the medical and legal authorities to the point that an intersex person, if that person so chooses, can properly be classified as neither a male nor a female. On this basis, for example, a person who is registered at birth as a male, but who is subsequently (whether in consequence of surgical intervention or otherwise) shown to be intersex, could successfully apply to the Registrar under Part 5A to register a change of sex from male to intersex.

241 If this argument were accepted, a separate question might arise as to the classification open to a person who is registered at birth as a male or female (or is regarded as such in the person's previous place of residence), but who undergoes a sex affirmation procedure and subsequently wishes to identify as neither a male nor female. It would not necessarily follow from the recognition of an intersex person as neither male nor female that the ordinary usage of the word "*sex*" in Australia has developed to the point where the sex of a person in the position I have described (which broadly corresponds to Norrie's circumstances) can be classified as non specific, indeterminate or some similar

description.

242 I do not think it is necessary to determine whether an argument based simply on the changing linguistic use of the word "*sex*" should be accepted. In my opinion, the text of Part 5A of the Act contains clear indications that "*sex*" is not used exclusively in the binary sense attributed to it by the Appeal Panel. The indications are found in the definition of "*sex affirmation procedure*" in s 32A:

> "**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**." (Emphasis added.)

(As I have noted, this definition has formed part of Part 5A since its introduction in 1996, although the defined expression was originally "*sexual reassignment surgery*".)

243 The definition in s 32A clearly recognises two things:

- a person may have "*ambiguities relating to the sex of [that] person*"; and
- a surgical procedure involving alteration to the person's reproductive organs might be necessary or appropriate "*to correct or eliminate*" the ambiguities.

244 That being so, the definition is consistent with the word "*sex*" in Part 5A, unless the context suggests otherwise, encompassing not only males and females, but persons whose sex is "*ambiguous*". The statutory language implies that the "*ambiguities relating to the sex*" of some people will persist unless and until they have surgery to correct or eliminate the ambiguities. The language also implies that a person may have surgery to correct or eliminate ambiguities, yet still retain the ambiguities after surgery. In this respect it is significant that paragraph (b) of the definition does not refer to **successful** surgery. Indeed, the appeal was argued on the basis that the precondition in s 32DA(1)(c) of the Act is satisfied if a surgical procedure is undertaken for the purpose of correcting or eliminating the ambiguities, regardless of whether the surgery achieves (or is capable of achieving) its objective. This approach is consistent with the construction given by the High Court to s 14(1) of the *Gender Reassignment Act* 2000 (WA) ("*GR Act*") a broadly equivalent provision, in *AB v Western Australia* [2011] HCA 42; 244 CLR 390, at [33].

245 Part 5A does not define "*ambiguities*". The dictionary definitions of the related word "*ambiguous*" include:

> "1. Indistinct, obscure, not clearly defined...
> 5. Doubtful, as regards classification; indeterminate" (*Oxford English Dictionary)*
> "2. of doubtful or uncertain nature; difficult to comprehend, distinguish, or classify...
> 3. lacking clearness or definiteness; obscure, indistinct" (*Macquarie Dictionary*).

It is not a strained interpretation of "*ambiguities relating to the sex of [a] person*" to understand it as referring at the very least to physiological characteristics widely accepted by medical authorities as justifying classification of a person's sex as neither male nor female. It may have a wider meaning.

246 This reading of Part 5A of the Act is not negated by the reference to "*the opposite sex*" in paragraph (a) of the definition of "*sex affirmation procedure*". Paragraph (a) is concerned with a surgical procedure to assist a male to be considered as a female or a female to be considered as a male. The expression "*opposite sex*" is apposite in that context.

247 Paragraph (b) of the definition is concerned with a different kind of surgical procedure: one designed to correct or eliminate ambiguities relating to the sex of the person. Paragraph (b) eschews any reference to the "*opposite sex*". The reason is presumably that the drafter recognised that a surgical procedure to correct or eliminate ambiguities relating to the sex of a person does not (or at least may not) involve a change of sex from male to female or *vice versa*. Such a procedure could be designed, for example, to change or facilitate a change of a person's sex from the ambiguities of intersex to either male or female. It is noteworthy that paragraph (b) of the definition avoids the pronouns "*him*" or "*her*".

248 I should add that, apart from paragraph (a) of the definition of "*sex affirmation procedure*", Part 5A of the Act does not use the expression "*opposite sex*". This was true of Part 5A as originally enacted and it remains true of Part 5A as amended by the 2008 Act. The use of the expression "*opposite sex*" in s 32A accordingly provides no warrant for a binary interpretation of the word "*sex*" in Part 5A, except where it is used in combination with the adjective "*opposite*".

249 In my view, there is a further consideration that supports this construction of Part 5A of the Act. The 1996 Act, which introduced Part 5A into the Act, explicitly recognised the concept of "*indeterminate sex*". This recognition is certainly not conclusive as to the meaning of "*sex*" in Part 5A, but it constitutes an acknowledgement by Parliament, in the very legislation that introduced Part 5A, that sex is not necessarily always to be regarded as a binary concept.

250 The long title of the 1996 Act was as follows:

> "An Act to amend the *Anti-Discrimination Act 1977* to make discrimination and vilification on transgender grounds unlawful; to amend the *Births, Deaths and Marriages Registration Act 1995* to provide for the recognition of a change of sex...".

251 The 1996 Act inserted Part 3A into the *Anti-Discrimination Act* 1977, under the heading "*Discrimination on transgender grounds*": 1996 Act, Sch 1, cl 4. Part 3A made it unlawful for employers and others to discriminate in certain ways against a person "*on transgender grounds*". Part 3A contained the following definition (s 38A):

> "A reference in this Part to a person being transgender or a transgender person is a reference to a person ...
> (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. (Emphasis added.)

252 This definition explicitly recognised that a person may be of "*indeterminate sex*" and that some persons of indeterminate sex (not necessarily all) may identify as a member of a "*particular sex*" by living as a member of that sex.

253 In my view, s 38A of the *Anti-Discrimination Act* can be taken into account to a limited extent in the construction of Part 5A of the Act. The definition is a clear indication that the word "*sex*", when used in legislation intended to facilitate a change of sex by a person whose sexual identity is uncertain, is not necessarily to be understood in a binary sense. Taking s 38A into account in this limited way does not, in my opinion, involve any inconsistency with the reasoning of the majority in *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; 293 ALR 412.

AB v Western Australia

254 Part 5A of the Act is in different terms to the GR Act considered by the High Court in *AB v Western Australia.* In that case, the appellant was a post-operative female to male transsexual. The issue was whether the appellant satisfied the requirements of the issue of a registration certificate as a male under the GR Act. The answer depended on whether the appellant had the:

> "gender characteristics of a person of the gender to which the person has been reassigned",

as required by s 15(1)(b)(ii) of the GR Act. The expression "*gender characteristics*" was defined to mean:

> "the physical characteristics by virtue of which a person is identified as male or female".

255 The High Court unanimously held that the appellant had the requisite gender characteristics even though he retained a female reproductive system. The Court considered (at [22], [23]) that the word "*identified*" in the definition of "*gender characteristics*" supported a construction that confined the inquiry to the appellant's external physical characteristics and did not include internal characteristics, such as organs associated with gender at birth. Since the appellant had the observable physical characteristics of a male person, the statutory criterion was satisfied.

256 The High Court did not need to decide whether the GR Act incorporated a binary concept of sex or gender. However, it is clear enough that the Court took the view that it did: see at [1], [29], [31], [33]. The Court interpreted the GR Act in this way because the statutory language contemplated that a recognition certificate could be given only to someone who identified as either male or female. So much was clear from the definition of "*gender characteristics*". It was also clear from the definition of "*reassignment procedure*" in s 3 of the GR Act, which differs substantially from the definition of "*sex affirmation procedure*" in s 32A of the Act. I do not think that *AB v Western Australia* is in any way inconsistent with what I consider to be the proper construction of s 32DC of the Act.

Additional Considerations

257 For the reasons I have given, I think that the better interpretation of s 32DC of the Act, when construed in its legislative context, is that it empowers the Registrar, at least in some circumstances, to register a change of sex of a person from male or female to a category that is neither male nor female. An example could be a person who is registered in New South Wales at birth as a male or female (or is so registered in the person's place of origin), but who subsequently ascertains that the correct medical classification of the person's physiological characteristics is intersex. If such a person wishes to invoke the Act, it is necessary for the person to undergo a sex affirmation procedure, since that is a statutory precondition. But if that precondition is satisfied and the person wishes to register a change of sex to intersex (or some other appropriate designation), in my view s 32DC of the Act, read in its statutory context, permits the Registrar to accede to the application.

258 While I consider this to be the better construction of s 32DC, I recognise that the language, both as originally drafted and in its current form, does not unequivocally compel the construction I favour. It is possible, for example, to read paragraph (b) of the definition of "*sex affirmation procedure*" as incorporating an assumption that a person is either male or female, even if ambiguities make it difficult to determine into which category the person fits. The reference to a procedure to "*correct or eliminate*" ambiguities could be read, without necessarily doing violence to the language, as assuming that a person's true sex is either male or female. This appears to be the effect of the differently worded legislation considered in *AB v Western Australia*.

259 However, there are two further reasons why the legislation should be construed to permit the Registrar to register a change of sex from male or female to a category that is neither.

260 The first is that the legislation, including the reference to "*ambiguities*", should be construed having regard to the longstanding recognition by medical and legal authorities that at least intersex people can be and for certain purposes should be classified as neither male nor female. Statutory language needs to be interpreted against well-established advances in scientific knowledge that undercut traditional assumptions, in this case about the binary nature of sexual classification or identification. In part, as Black CJ pointed out in *Secretary v "SRA",* it is a matter of the changed meaning of apparently straightforward terms over time. But it is also a matter of construing the words Parliament has used against the background of a generally (if only relatively recently) accepted understanding of previously neglected or misunderstood conditions.

261 As I have sought to explain, both medical and legal authorities accepted long before the 1996 Act that not all people fit within the binary model of sexual classification. If the language of Part 5A of the Act can readily be interpreted as proceeding on the basis of that acceptance - as in my view it can - that interpretation should be adopted.

262 The second reason is that construing Part 5A of the Act as adopting a binary classification of sex gives insufficient weight to the injunction in s 33 of the *Interpretation Act* 1987 or to the approach to construction taken by the High Court in *AB v Western Australia*. Section 33 of the Interpretation Act provides that:

> "In the interpretation of a provision of an Act ..., a construction that would promote the purpose or object underlying the Act ... (whether or not that purpose or object is stated in the Act ...) shall be preferred to a construction that would not promote that purpose or object".

263 In *AB v Western Australia,* the High Court said (at [24]) that the Western Australian provision equivalent to s 33 of the Interpretation Act was relevant to the task of construing the GR Act. The Court continued:

> "Moreover, the principle that particular statutory provisions must be read in light of their purpose was said in *Waters v Public Transport Corporation* to be of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation 'the courts have a special responsibility to take account of and give effect to the statutory purpose'. It is generally accepted that there is a rule of construction that beneficial and remedial legislation is to be given a 'fair, large and liberal' interpretation." [Citations omitted.]

264 Care must be taken not to overstate the proposition stated in this extract. As was said by Brennan CJ and McHugh J in *IW v City of Perth* [1997] HCA 30; 191 CLR 1, at 12, the object of legislation must be understood by reference to the language of the statute. A liberal interpretation is not a passport to an "*unreasonable or unnatural*" construction of the statutory language. The essential question is the meaning of the relevant words used by Parliament: *Victims Compensation Fund v Brown* [2003] HCA 54; 201 ALR 260, at [33], per Heydon J (with whom McHugh ACJ, Gummow, Kirby and Hayne JJ agreed).

265 The objects of the Act include providing for "*the recording of changes of sex*" (s 3(c)). This statement of purpose does not make it clear what kinds of changes of sex will be permissible under the legislation. Nonetheless, as I have said, the Act explicitly acknowledges that some people experience ambiguities in relation to their sexual identity and are prepared to undertake drastic surgical procedures to correct or eliminate the ambiguities or to assist them to be considered members of the opposite sex. The legislation sets up procedures to enable a person to apply to alter the record of that person's sex. The legislation is remedial in the sense that it enables those who do not comply, or who do not see themselves as complying with the traditional binary classification to alter the record to accord with the reality of their sexual classification or to their perception of that reality.

266 The High Court in *AB v Western Australia* was dealing with legislation that addresses similar issues, but is drafted differently from the Act. Even so, the language used by the High Court (at [25]) can readily be adapted to describe the purpose of Part 5A of the Act. Part 5A acknowledges the difficulties facing people whose sexual identity is ambiguous and seeks to alleviate their suffering. It does so by providing for the official recognition of a sexual identity despite the disconformity between that identity and the social-historical record of their sex.

267 The language of Part 5A of the Act and s 32DC in particular is consistent with permitting people who are distressed because they do not wish to be recorded as either male or female to be registered as neither, provided that they fulfil the statutory preconditions. In my view, it advances the purpose of the legislation to construe s 32DC in this way.

Consequences of Registration of a Change of Sex

268 The registration of a change of sex to a category that is neither male nor female has legal consequences under the law of New South Wales for the person concerned. Section 32I of the Act provides that a person whose record of sex is altered under Part 5A

> "is, for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered".

269 As Beazley P has explained (at [126] above) much legislation in New South Wales is clearly drafted on the basis that sex is a binary concept and that, accordingly, for the purposes of that legislation there are only two sexes. I agree with Beazley P that the possible consequences of the registration of a person as neither male nor female cannot dictate the construction of s 32DC of the Act. There are three reasons why this is so.

270 First, the process for registration of a change of sex is initiated by the person concerned lodging an application for the change to be registered. No one is compelled to seek registration of a change of sex. It is a matter for the applicant to consider whether the benefits of registration as neither male nor female outweigh the possible drawbacks of not being able to take advantage of benefits or protections available under statute only to males or females.

271 Secondly, beneficial State legislation that is based on a binary classification of sex will not necessarily be interpreted in a way that excludes a person whose sex is registered as neither male nor female. It is possible, for example, that legislation drafted on that basis would be interpreted as applicable to everyone, even those whose sex is registered as neither male nor female. This may give rise to other issues of classification, but each enactment must be construed by reference to its own language and purpose. It cannot be assumed that all the legal consequences of registration of a change of sex to neither male nor female will be unfavourable to the person registering the change.

272 Thirdly, proper construction of Part 5A of the Act also depends on its own language. No doubt if the consequences of a particular construction were clearly absurd, a court would examine the language to determine whether it is so intractable that the absurdity is unavoidable. There is, however, nothing absurd in leaving the judgment as to the merits of registering a change of sex to the person concerned.

273 Section 32I of the Act cannot and does not purport to have consequences for Commonwealth laws. The construction of Commonwealth legislation will be determined independently of s 32I: see *Secretary v "SRA",* at 306, per Black CJ.

Disposition of the Appeal

274 For the reasons I have given, the Appeal Panel erred in construing s 32DC of the Act so as to preclude the Registrar from registering a change of sex from male or female to a category that is neither male nor female. In my view, the Registrar has power under s 32DC to register a change of sex of this kind.

275 This conclusion does not necessarily establish that Norrie is entitled, as a matter of law, to require the Registrar to accept her application to change her sex from male to "*non specific*" (or any other term designating her sex as neither male nor female). Both the Tribunal and the Appeal Panel based their decision on an erroneous construction of s 32DC of the Act. Neither considered the merits of Norrie's application to register the change of sex as "non specific". As the Appeal Panel said when rejecting Norrie's application for it to deal with the merits of the Tribunal's decision, the latter decided a preliminary legal question and did not address the merits of the application.

276 The appeal to this Court is on a question of law under s 119(1) of the ADT Act. As the plurality in *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390, made clear (at [90]) the nature of an appeal is determined by the language of the statute providing for the appeal. Where the legislation provides for an appeal on a question of law, the existence of a question of law is not merely a qualifying condition to the right of appeal. The question of law alone is the subject matter of the appeal: *Brown v Repatriation Commission* (1985) 7 FCR 302, at 304, *per curiam; Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mouratidis* [2012] FCAFC 29, at [69], per Flick J.

277 The Tribunal in the present case did not make the findings of fact that are (or may be) needed to determine whether Norrie's application for a change of sex should have been accepted by the Registrar. No finding has been made, for example, that medical opinion recognises that the sex of a person who was born a male in all physiological respects, has undergone a sex affirmation procedure and now identifies as neither male nor female should or can be regarded as neither male nor female. The Tribunal merely found (at [11]) that two doctors swore statutory declarations that supported registration of a change of sex by Norrie to "*non specific*". The statutory declarations do not disclose the doctors' reasoning processes or whether their opinions (which are not clearly stated) are soundly based.

278 Nor has the Tribunal made any findings of fact as to the appropriate classification of Norrie's sex, assuming that she

can be regarded as neither male nor female. Such findings might be important on the question of whether Norrie's application for her sex to be registered as "*non specific*" should have been accepted by the Registrar.

279 Since the Appeal Panel erred in law and the error was decisive to the outcome of the appeal to it, the matter should be remitted for determination according to law. That will require the Appeal Panel to reconsider the appeal on the basis that s 32DC of the Act, as a matter of construction, permits the Registrar, in an appropriate case, to register a change of sex from male or female to a sex that is neither male nor female. The Appeal Panel may be disposed, if there are no insuperable procedural obstacles to doing so, to accord Norrie an opportunity to adduce further evidence bearing on the factual issues that now arise. This may be the appropriate course since both the Tribunal and Appeal Panel considered that they were resolving a preliminary legal issue and not the merits of the application. But the question of whether further evidence should be permitted is a matter for the Appeal Panel or the Tribunal, depending on what course the proceedings now take.

280 I agree with the orders proposed by Beazley P.

281 **PRESTON CJ of LEC**: I have had the advantage of reading in draft the judgments of Beazley ACJ (the President of the Court of Appeal) and Sackville AJA. I agree with the conclusion that the statutory power to register a person's change of sex is not limited to registering a person's sex as only male or female and that the Appeal Panel and Tribunal erred in law in concluding otherwise. I also agree that the matter should be remitted to the Tribunal for determination and with the other orders proposed by Beazley P.

282 Whilst I agree with the reasons given by Beazley P and the additional reasons given by Sackville AJA for these conclusions, I wish to add some observations about the construction of s 32DA and s 32DC of the *Births, Deaths and Marriages Registration Act 1995* ('the Registration Act').

283 The power of the Registrar under s 32DC(1) is "to determine an application under section 32DA". This power to determine the application may be exercised in one of two ways, either by "registering the person's change of sex" or by "refusing to register the person's change of sex". The reference to a "change of sex" in either case is a reference to the sex which the person has applied to be registered in the person's application under s 32DA.

284 An application under s 32DA may be made by a person who satisfies each of the criteria in s 32DA(1)(a) to (e). One of the criteria is that the person "has undergone a sex affirmation procedure" (para (c)). A "sex affirmation procedure" is defined in s 32A to mean:

> 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.

285 A person who has undergone a sex affirmation procedure and satisfies the other criteria in s 32DA(1) may apply to the Registrar for "the registration of the person's sex in the Register". The reason for this language is that the person's sex would not have previously been recorded in the Register. The person, in order to be eligible to make an application under s 32DA(1), would not have had the person's birth registered under the Registration Act or a corresponding law (s 32DA(1)(e)) or been married (s 32DA(1)(d)) and hence had the person's sex recorded as a particular of those registrable events. The person's application under s 32DA(1) enlivens the power of the Registrar under s 32DC(1) to register the person's sex in the Register. The sex that can be registered as the person's sex is the sex the person applies to have registered under s 32DA(1).

286 The question of critical importance in this case is whether the sex a person can apply under s 32DA(1) to have registered as the person's sex is limited to only male or female. The answer depends on the meaning of the word "sex" in the phrase "person's sex" in s 32DA(1).

287 In my view, the sex which a person can apply under s 32DA(1) to have registered as the person's sex in the Register is not limited to only male or female. The words "the person's sex" are general words. Where a statute uses general words, they are to be given their ordinary meaning, unless the statute indicates an intention to depart from its ordinary meaning: *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 647; *Maunsell v Olins* [1975] AC 373 at 382. The Registration Act, and Part 5A in particular, do not indicate an intention to depart from the ordinary meaning of the word "sex". There is no statutory definition of "sex", "a person's sex" or "the person's sex", or "a person's change of sex" or "the person's change of sex". The context in which the words are used also do not indicate a legislative intention to use the words in a specialised sense.

288 Where a statute uses words in their ordinary sense, absent a contrary intention, the statute is to be construed as 'always speaking', so that the words are to be interpreted in accordance with their current meaning. The language of the statute is regarded as ambulatory, embracing changes that occur in the subject matter: *R v Gee* [2003] HCA 12;

(2003) 212 CLR 230 at 241 [7]. In this way, although the connotation of the language stays the same, its denotation may differ over time: *Deputy Commissioner of Taxation v Clark* [2003] NSWCA 91; (2003) 57 NSWLR 113 at 145 [139].

289 Here, Parliament has chosen to use language, regarding a person's sex, of such generality that a court should interpret the statutory provisions regulating the making and approving of applications for the registration of a person's sex in the Register on the basis that the intention of the statute is that the denotation of the words and the application of the provisions may vary over time. Indeed, the amendment of the Registration Act to include Part 5A which allows persons who undergo a sex affirmation procedure to have their change of sex recorded in the Register, reveals a legislative intention to accommodate changes in the ordinary meaning of the concept of a person's sex.

290 The necessary enquiry is, therefore, of the current, ordinary meaning of the concept of a person's sex. As Beazley P has carefully narrated, the current meaning of the concept of a person's sex has extended beyond only the two traditional categories of male and female and now includes, at least, a further category regarded as falling between the male and female sexes, increasingly referred to as intersex. An intersex individual, according to Professor Greenberg (referred to by Beazley P at [109]), includes a person "with a congenital condition whose sex chromosomes, gonads, or internal or external sexual anatomy do not fit clearly into the binary male/female norm".

291 The consequence of this change in the ordinary meaning of the concept of a person's sex is that a person who satisfies the criteria in s 32DA(1)(a) to (e) can apply to the Registrar for the registration of the person's sex in the Register not only as male or female, but also any other category of sex that falls within the current meaning, such as intersex, and the Registrar would have power under s 32DC to determine the person's application under s 32DA by registering the person's change of sex in the Register to be the sex applied for.

292 The Registrar's submission, that the current, ordinary meaning of the concept of a person's sex is limited to only male or female, is therefore not accepted.

293 The Registrar also submitted, however, that Part 5A of the Registration Act evinces an intention to limit the sex which a person can apply to have registered, and the Registrar can register as the person's sex, to only male or female. I do not agree.

294 First, s 32DA(1) of the Registration Act does not so limit the sex which a person may apply to have registered as the person's sex in the Register. The language used is general - the person may apply "for the registration of the person's sex in the Register". This contains no limitation. Nor is this general language limited by the language of the criteria in s 32DA(1)(a) to (e) which must be satisfied in order for the person to be eligible to make the application. It is true that the person must have undergone a sex affirmation procedure (s 32DA(1)(c)). However, 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 the purpose or the result of the sex affirmation procedure. Indeed, the definition of "sex affirmation procedure" in s 32A does not mandate that any particular result occur, let alone a successful result occur, only that a particular surgical procedure be undertaken. For example, a person who undergoes a surgical procedure within the definition in s 32A of "sex affirmation procedure" that would enable the person's sex to be registered as female is not precluded by either the definition of "sex affirmation procedure" or the terms of s 32DA from applying under s 32DA(1) for the registration of the person's sex as a category of sex other than female.

295 Secondly, the definition of "sex affirmation procedure" in s 32A does not lead to a limitation on the sex which a person can apply under s 32DA to have registered as the person's sex in the Register. As I have noted, it demands a procedure, not a result. The procedure is "a surgical procedure involving the alteration of a person's reproductive organs". That procedure is required to be carried out for a purpose: either for the purpose of assisting a person to be considered to be a member of the opposite sex (para (a)) or to correct or eliminate ambiguities relating to the sex of the person (para (b)).

296 There is no requirement, however, that the surgical procedure be successful in the sense that either of these purposes be achieved. For example, a surgical procedure, although carried out for the purpose of assisting a person to be considered a member of the opposite sex, may not result in that person being considered (by others or by themselves) as a member of the opposite sex. This does not mean, however, that the person has not undergone a sex affirmation procedure. The person could still apply under s 32DA(1) for registration of the person's sex in the Register. The sex to be registered as the person's sex could be the sex which the purpose of the surgical procedure was to assist the person to be considered to be a member of, or the sex which the purpose of the surgical procedure was to assist the person to be considered no longer a member of, notwithstanding it was unsuccessful in achieving either of these purposes.

297 Similarly, a surgical procedure, although carried out to correct or eliminate ambiguities relating to the sex of the person, may not achieve that result. Ambiguities relating to the sex of the person may remain after the surgical

procedure has been carried out. This does not mean that the person has not undergone a sex affirmation procedure within the definition in s 32A; on the contrary, the person has undergone such a procedure. The person can still apply under s 32DA(1) for the registration of the person's sex in the Register, notwithstanding the failure of the surgical procedure to correct or eliminate the ambiguities relating to the sex of the person. Again, the sex which the person can apply under s 32DA(1) to have registered as the person's sex in the Register is not dependent on the success of the surgical procedure.

298 Thirdly, the text and context of the word "sex" in the definition of "sex affirmation procedure" do not limit the sex affirmation procedure to only the male or female sexes. It is true that the language in para (a) of "assisting a person to be considered to be a member of the opposite sex" suggests a binary classification of male and female. The language of "opposite sex" is only meaningful if the sexes referred to are male or female.

299 However, the language in para (b) is not so restricted, referring to "ambiguities relating to the sex of the person". The words "sex of the person" do not presuppose any pre-existing category of sex or that the sex can only be male or female. Further, the word "sex" is not limited by any adjective, including one such as "opposite", which implies a binary classification of sex. The word "ambiguities" is of wide meaning. The concept of "ambiguous" involves "2. of doubtful or uncertain nature; difficult to comprehend, distinguish, or classify" and "3. lacking clearness or definiteness; obscure; indistinct", *Macquarie Dictionary,* 4th ed (2005). The ambiguities relating to the sex of the person may mean it is not possible to classify the person as male or female. Finally, the connecting phrase "relating to" is of wide operation: *Oceanic Life Ltd v Chief Commissioner of Stamp Duties* [1999] NSWCA 416; (1999) 168 ALR 211 at [56]. It does not specify or confine the nature of the relationship between "ambiguities" and "the sex of the person".

300 Together, these words and the connecting phrase in para (b) create an expression of wide meaning. Individually or together, they do not limit the sex of the person to only being male or female, either before or after the surgical procedure is carried out.

301 The example given by the Appeal Panel in its judgment, and adopted by the Registrar in submissions, of surgery 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, may be one example that falls within para (b) of the definition of "sex affirmation procedure". However, it does not exhaust the field of surgical procedures that could fall within para (b).

302 The difference in language, both text and context, between para (b) and para (a) of the definition of "sex affirmation procedure" makes inapplicable the tenet of statutory construction relied upon by the Registrar, that where the legislature uses the same word "sex" in the statutory provision, it should be given the same meaning.

303 Part 5A of the Registration Act, therefore, does not limit the concept of a person's sex that can be registered to only male or female.

304 The consequence is that the Appeal Panel (and the Tribunal and the Registrar) were in error in construing the power in s 32DC(1) as limiting the Registrar to registering a person's change of sex as only male or female. An error in the construction of the statutory provision granting the power to register a person's change of sex is an error on a question of law: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 322; (1993) 43 FCR 280 at 287. This is so notwithstanding that the determination of the common understanding of a general word used in the statutory provision is a question of fact. The Appeal Panel (and the Tribunal and the Registrar) erred in determining that the current ordinary meaning of the word "sex" is limited to the character of being either male or female. That involved an error on a question of fact. But the Appeal Panel's error in arriving at the common understanding of the word "sex" was associated with its error in construction of the effect of the statutory provision of s 32DC (and also of s 32DA), and accordingly is of law: *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 10.

305 The error is, therefore, one which founds appellate intervention in an appeal on questions of law.

306 I agree the matter should be remitted to the Tribunal for determination of Norrie's application. This will involve making factual findings on the appropriate classification of Norrie's sex to be registered under s 32DC of the Registration Act.

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Amendments

04 Jun 2013	Typographical error	Paragraphs: 282