



Administrative Decisions Tribunal New South Wales

Medium Neutral Citation: **Norrie v Registry of Births Deaths and Marriages [2011] NSWADT 102**

Hearing Dates: 18 August 2010

Decision Date: 13/05/2011

Before: S Montgomery, Judicial Member

Decision: The decisions under review are affirmed.

Catchwords: Statutory construction - registration of change of sex - whether the term "sex" is limited to male and female - whether power to register a change of sex to "Non specific" or "Not specified"

Legislation Cited: Administrative Decisions Tribunal Act 1997
Births, Deaths and Marriages Registration Act 1995
Births, Deaths and Marriages Registration Regulation 2006
Transgender (Anti-Discrimination and Other Acts Amendment) Bill 1996

Cases Cited: Balog v Independent Commissioner Against Corruption (1990) 169 CLR 625
Corbett v Corbett [1971] P 83
In Re Kevin (Validity of Marriage of a Transsexual) [2001] FamCA 1074
R v Harris (1988) 17 NSWLR 159 per Matthews J at 194;
R v Harris and McGuinness (1989) 17 NSWLR 159
Re Secretary, Department of Social Security and "HH" (1991) 23 ALD 58
Secretary, Department of Social Security v SRA (1992) 118 ALR 467
W v W [2001] 2 WLR 674

Texts Cited: The Oxford English Dictionary
The Macquarie English Dictionary

Category: Principal judgment

Parties: Norrie (Applicant)
Registry of Births Deaths and Marriages (Respondent)

Representation: Applicant (In person)
T O'Keefe (Agent for Applicant)

D Shoebridge (Counsel for Applicant)
C Spruce (Counsel for Respondent)

File Number(s): 103077

REASONS FOR DECISION

- 1 The Applicant seeks a review of two related decisions made by the Registrar of Births, Deaths and Marriages ("the Registrar") on 16 March 2010:
 - (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".
- 2 In order to determine whether those decisions are the correct and preferable ones the Tribunal must consider the preliminary issue of whether the Registrar has power under section 32DC of the *Births, Deaths and Marriages Registration Act 1995* ("the Act") to register a change of sex by a person to "Non specific" or "Not specified".
- 3 That preliminary issue turns, in large measure, on the meaning of the word "sex" in the Act - specifically, whether "sex" means "male" or "female" or has some more expansive meaning. That is, whether or not the term "sex" has:
 - (a) a limited meaning of either male or female; or

(b) allows for a spectrum from male to female, including "non-specific".

4 The Respondent contends for the former meaning; the Applicant the latter.

5 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. The evidence also establishes that the Applicant does not identify as either male or female but as "non specific".

6 In these reasons I will adopt the female pronoun to refer to the Applicant, in accordance with what it understands to be the preference expressed by the Applicant at the hearing on 18 August 2010.

Factual background

7 I do not understand there to be any dispute as to the factual background. That background has been usefully set out by Ms Spruce, Counsel for the Respondent.

8 On 26 November 2009, the Applicant submitted two applications to the Registry:

(a) an application made under section 32DA of the Act to register a change of sex to "non specific"; and

(b) an application made under section 27 of the Act to register a change of name to "Norrie".

9 The change of sex application comprised the necessary supporting documents, a copy of which have been provided to the Tribunal.

10 On the "Statutory Declaration to Register a Change of Sex" declared by the Applicant on 26 November 2009, she records sex at birth as "male" and seeks to register a change of sex as "Non Specific". This statutory declaration is the form approved by the Registrar under section 32DA of the Act.

11 Statutory declarations sworn by Drs Kearley and Schultheiss in support of the Applicant'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 the Applicant has undergone a sex affirmation procedure. These statutory declarations are in the form approved by the Registrar under section 32DB of the Act and clause 9A(a) of the *Births, Deaths and Marriages Registration Regulation 2006* ("the Regulations").

12 The change of name application comprised the necessary supporting documents, a copy of which have been provided to the Tribunal.

13 On the "Statutory declaration to Register a Change of Name", the Applicant drew a line through the field "Sex (M/F)" and left the corresponding field blank.

14 Proof of identity documents provided with the applications to register a change of sex and change of name, state the Applicant's sex as male (original birth certificate sighted by Registry officers) and female (Australian and UK passports).

15 On 11 February 2010, Ms Karam, on behalf of the Registrar purported to determine the Applicant's application for a change of sex by registering the Applicant's sex on the Register as "Not specified". Ms Karam then, on behalf of the Registrar, purported to issue a recognised details certificate pursuant to section 32DD certifying the particulars contained in the entry made on the Register, including sex "Not specified".

16 Also on 11 February 2010, Ms Karam, on behalf of the Registrar purported to determine the Applicant's application for a change of name by registering the Applicant's name on the Register as "Norrie".

17 Ms Karam, on behalf of the Registrar then conducted a search of the Register and purported to issue a change of name certificate that certified the particulars contained on the Register in relation to the Applicant's change of name. The change of name certificate issued on 11 February 2010 recorded the Applicant's sex as "Not Specified".

18 12 March 2010, the Registrar sought legal advice from the Crown Solicitor on the power of the Registrar to issue a certificate under section 32DD of the Act which records the sex of a person as "Non specified" or any other term that is not "male" or "female". The Crown Solicitor provided oral advice to the Registrar on 12 March 2010 and written advice on 15 March 2010.

19 On 16 March 2010, the Registrar advised the Applicant of the decisions under review.

The legislative scheme

20 The objects of the Act are set out in section 3. The objects are to provide for:

(a) the registration of changes of name and the recording of changes of sex;

(b) the keeping of registers for recording and preserving information about, inter alia, changes of name and changes of sex in perpetuity; and

(c) the issue of certified information from the registers (section 3(c), (d) and (9)).

21 The Registrar must maintain a register or registers of registrable events: section 43(1). A registrable event means a

birth, adoption or discharge of adoption, change of name, change of sex, death or marriage: section 4.

22 The Register:

(a) must contain the particulars of each registrable event required under this Act, or another law, to be included in the Register (section 43(3)(a), and

(b) may contain such further information as the Registrar considers appropriate for inclusion: section 43(3)(b).

23 The Registrar's general functions are set out in section 6 of the Act. They are:

(a) to establish and maintain the registers necessary for the purposes of this Act (section 6(a));

(b) to maintain the integrity of the Register and to seek to prevent identity fraud associated with the Register and the information extracted from the Register (section 6(a1));

(c) to administer the registration system established by this Act and ensure that the system operates efficiently, effectively and economically (section 6(b)); and

(d) to ensure that this Act is administered in the way best calculated to achieve its objects (section 6(c)).

24 In addition, the Registrar may do the following:

(a) conduct an inquiry to find out whether a registrable event has happened or the particulars of a registrable event or whether particulars of a specific registrable event have been correctly recorded in the register (section 44);

(b) correct the register to reflect a finding made on inquiry or bring an entry about a particular registrable event into conformity with the most reliable information available to the Registrar of the registrable event (section 45);

(c) on application by a person with an adequate reason for wanting the information to which the application relates, search the Register for an entry about a particular registrable event (section 47); and

(d) on completing a search of the Register, issue a certificate certifying particulars contained in an entry in the Register about a particular registrable event (section 49).

25 A person's name may be changed by registration of the change under Part 5 of the Act: section 26. Section 4 of the Act provides that "change of name includes an addition, omission or substitution."

26 An eligible person may apply to the Registrar, in a form approved by the Registrar, for registration of a change of the person's name: section 27.

27 Before registering a change of name, the Registrar may require the applicant to provide evidence to establish to the Registrar's satisfaction the identity and age of the person whose name is to be changed, and that the change of name is not sought for a fraudulent or other improper purpose: section 30.

28 The Registrar registers a change of name by making an entry about the change of name in the Register including the particulars required by the regulations: section 31.

29 The requisite particulars are set out in clause 8 of the *Births, Deaths and Marriages Registration Regulation* 2006 ("the Regulations"), which provides that, for the purposes of section 31 of the Act, the following particulars are required:

(a) the sex and date and place of birth of the person whose change of name is being registered,

(b) the name of the person immediately before the change of name

(c) the name first given to the person after birth and any other name shown on the person's birth registration

(d) any other former names of the person

(e) the new full name of the person

(f) the full names of the parents of the person (as at the date of the person's birth or registration of the person's birth).

30 Section 32 provides that Part 5 of the Act does not prevent a change of name by repute or usage.

31 Part 5A of the Act deals with changes of sex. Part 5A (not including sections 32DA - 32DD) was inserted into the Act by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act* 1996 on 3 October 1996. The same Act also inserted Part 3A ('Discrimination on transgender grounds') into the *Anti-Discrimination Act* 1977. The second reading speech for the underlying Bill stated that its purpose was "to provide for the legal recognition of post-operative transgender persons", in particular "to enable persons who were born in this State and have undergone sexual reassignment surgery to apply for new birth certificates showing their new sex" (Hansard, Legislative Assembly, Minister Yeadon, 1 May 1996).

32 The *Courts and Crimes Legislation Amendment Act* 2008 inserted new sections 32DA - 32DD into Part 5A of the Act on 27 February 2009.

33 In so far as relevant, Part 5A provides:

32A Definitions

In this Part:

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

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

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

32B Application to alter register to record change of sex

(1) A person who is 18 or above:

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

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

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

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

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

32C Application must be accompanied by declarations by doctors

An application under section 32B must be accompanied by:

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

32D Alteration of register

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

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

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

32DA Application to register change of sex

(1) A person who is 18 or above:

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

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

...

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.

- 34 The Registrar is required by section 32DC(1) of the Act to determine an application made under section 32DA by either registering the person's change of sex or refusing to register the person's change of sex. Before registering a person's change of sex, the Registrar may require, pursuant to section 32DC(2), an applicant to provide such

particulars relating to the change of sex that are prescribed by clause 9A of the Regulation.

- 35 If the Registrar determines an application to register change of sex by registering change of sex, the Registrar must, on application by or on behalf of the person, issue a 'recognised details certificate' certifying the particulars contained in the entry in the Register: section 32DD of the Act.

Case Law

- 36 Neither "sex" nor "change of sex" are defined in the Act. To the extent there is any doubt about the proper construction of the terms, a construction that promotes the purpose or object underlying the Act should be preferred to a construction that would not promote that purpose or object: section 33 *Interpretation Act* 1987.
- 37 It is common ground that there are no authorities that have directly considered the issue of the meaning of the words "sex" or "change of sex" in Part 5A of the Act. However, the parties have each referred to a number of authorities which reveal that the courts have grappled for some time with the question of how to determine the legal status of transsexual and intersex persons. In my view, those cases highlight the complexity of the issue and the potentially far reaching implications of the particular construction.
- 38 The Respondent submits that the following propositions can be derived from the authorities to which it referred:
- a. the ordinary English meaning of the word "sex" is the quality of being male or female: *Secretary, Department of Social Security v SRA* (1992) 118 ALR 467 ("SRA") per Black CJ at 469,470;
 - b. the use by the legislature of the phrase "the opposite sex" reflects the ordinary notion that there are two sexes: *SRA* per Black CJ at 469;
 - c. the law is based on an assumption that there are only two sexes, male and female: *SRA* per Lockhart J at 481;
 - d. there is no "third sex" recognised at common law: *R v Harris* (1988) 17 NSWLR 159 per Matthews J at 194;
 - e. 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) 23 ALD 58 ("HH") at [13]; *R v Harris* per Matthews J at 194;
 - f. 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": per Chisholm J in *In Re Kevin (Validity of Marriage of a Transsexual)* [2001] FamCA 1074 at [119], [315];
 - g. there is no unanimity of medical opinion regarding the factors to be considered relevant to the determination of a person's sex: *HH* at [13];
 - h. where a person's legal sex has to be determined a number of factors have to be balanced against one another: Chisholm J in *Re Kevin* at [329];
 - i. 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 to have undergone a "sex change" in ordinary English: *SRA* per Black CJ at 472;
 - j. a male to female post-operative transsexual whose psychological sex and external genital features are in harmony is a "female" in ordinary English and is legally recognised as such; similarly a female to male post-operative transsexual whose psychological sex and external genital features are in harmony is a "male" in ordinary English and is legally recognised as such: *SRA* per Black CJ at 472;
 - k. However, psychological identification with a particular sex alone is insufficient to obtain legal recognition as that sex: *SRA* per Black CJ at 469-471 ; per Lockhart J at 481 ;
 - l. where the psychological sex and anatomical sex of a person are not in conformity, the sex of a person must be determined by their anatomical sex: *SRA* per Lockhart J at 481.
- 39 In contrast, Mr Shoebridge, Counsel for the Applicant, submits that the authorities do not address the fairly narrow question of statutory construction of Part 5A of the Act. Whatever the common law may say on the matter, the task before the Tribunal is to consider the terms of the statute in light of its purposes and in its statutory context.
- 40 While I agree with that submission to the extent that I agree that the task of the Tribunal is to construe the word "sex" in the Act, I do not agree that the common law is irrelevant to that task. As the full High Court observed in *Balog v Independent Commissioner Against Corruption* (1990) 169 CLR 625 at 635-6 "where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred". In my view, the Respondent's authorities do provide some assistance in the exercise that must be undertaken.

Extrinsic Materials

- 41 Mr Shoebridge submits that the terms of the statute allow for some genuine debate as to the exact meaning of the word "sex". As such, reference to extrinsic materials such as the second reading speech in Parliament is permissible: section 34 of the *Interpretation Act* 1987.

42 Mr Shoebridge referred to the second reading speech by Mr Yeadon when introducing the *Transgender (Anti-Discrimination and Other Acts Amendment) Bill* 1996 on 1 May 1996. Mr Yeadon said, inter alia:

"The term "transgender" in the legislation has therefore been used to refer to all transgender persons, regardless of whether they have undergone surgical intervention. This is considered necessary because the discriminatory conduct usually occurs as a reaction to a person's dress, behaviour and other characteristics being at variance with that person's original gender. Such discriminatory conduct should be unlawful whether or not there has been surgical intervention.

...

Before detailing the provisions of the bill dealing with the legal recognition I would like to repeat a quote contained in a judgment by Her Honour Justice Matthews in *Harris v McGuinness*, a 1988 judgment by the New South Wales Court of Criminal Appeal:

"Refusal to reclassify the sex of a post-operative transsexual seems inconsistent with the principles of a society which expresses concern for the privacy and dignity of its citizens. Failure to redefine sex in the case of the transsexual will create undue hardship for an otherwise troubled person. Society will lose nothing and transsexuals will gain the opportunity to lead normal lives if legal sex is determined not by chromosomes or anatomy of birth alone, but by present psychology and anatomy.

Today the transsexual is faced with the choice between equally undesirable alternatives. If he (or she) chooses to live within the sex to which he/she was born, he/she has in effect condemned him/herself to a perpetual masquerade. If he/she decides to seek medical reassignment, he/she subjects him/herself to the scorn and curiosity of society and the limbo of no legal sex identity. Both situations are appalling and are inconsistent with the professed enlightenment of our times".

43 Mr Shoebridge submitted that Parliament was not seeking to draw hard and fast biological lines in the application of the law. He argued that the Parliament was recognising that these laws were designed to allow people the opportunity to lead normal lives determined not by chromosomes or anatomy at birth alone, but by present psychology and anatomy. He submitted that if the focus of the enquiry was on the present psychology and anatomy of the Applicant, and the term "sex" was interpreted to allow that to be accommodated, then this would meet both the objects of the case and the spirit of the debate in Parliament when the key amendments were moved in 1996.

44 In contrast, the Respondent argues that neither section 34(1) of the *Interpretation Act* 1987, nor the common law of statutory interpretation, permits resort to a minister's speech to guide the meaning of legislation beyond identifying its purpose. Ms Spruce submits that, as the title of the *Transgender (Anti-Discrimination and Other Acts Amendment) Bill* indicates, the main purpose of the Bill was to amend the *Anti-Discrimination Act* to include discrimination on transgender grounds as a separate ground of discrimination. It also amended the Act. However, both extracts of the second reading speech relied upon by the Applicant were expressly stated by the Minister to be in explanation of the amendments being made to the *Anti-Discrimination Act* - not the Act.

45 Ms Spruce submits that the mischief to be remedied by the amendments made by the Bill to the *Anti-Discrimination Act* was not the same as the mischief to be remedied by the amendments made by the Bill to the Act. For example, it is an express requirement of the Act that a change of sex can only be registered by a post-operative transsexual. In contrast, under the *Anti-Discrimination Act* it is unlawful to discriminate against a transgender person, regardless of whether that person has undergone surgical intervention.

46 Ms Spruce submits that the passages from the second reading speech extracted by the Applicant do not assist in identifying the purpose of the amendments made by the Bill to the Act and therefore may not be used in the proper construction of the term "sex" in the Act.

47 I agree with Ms Spruce's submission that the passages from the second reading speech do not assist in this exercise.

Dictionary definitions

48 In the absence of a statutory definition, words must be given their natural and ordinary meaning, having regard to their context and the objects and purposes of the Act. The determination of the ordinary meaning of the word "sex" is a question of fact that falls to the Tribunal to determine. In this task, the Tribunal may be assisted by reference to dictionary definitions.

49 Ms Spruce has referred me to The Oxford English Dictionary for an a historical view of various definitions of the term "sex", when used as a noun and The Macquarie English Dictionary (Revised 3rd ed), which is a dictionary of current Australian English. The Macquarie English Dictionary defines "sex" as follows:

"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 female are distinguished, or the phenomena depending on these differences. 3. The instinct or attraction drawing one sex towards another, or its manifestation in life and conduct 4. Men collectively or women collectively: the fair sex 5. Colloquial sexual intercourse 6. Sexually stimulating or

suggestive behaviour: there is too much sex on TV - (verb) (t) 7. To ascertain the sex of. - phrase 8. Have sex Colloquial to have sexual intercourse."

- 50 Ms Spruce submitted that the ordinary meaning of the word sex, used in the relevant sense, is "the character of being either male or female", as per the Macquarie Dictionary.
- 51 Mr Shoebridge submitted that section 32A of the Act is explicit in recognising that sex is not simply binary. 32A(b) of the Act confirms that there exist "ambiguities relating to the sex of the person". He argued that if there are ambiguities in a person's sex that are amenable to surgical intervention, then it must logically follow that a person's sex can be ambiguous.
- 52 He points to the various Macquarie dictionary definitions of "ambiguous" and submits that the most relevant is that of: "lacking clearness of definiteness; obscure; indistinct."
- 53 In other words, he argues, a person's sex may be "non-specific".
- 54 I agree with Mr Shoebridge's submission that the Act recognises that a person's sex can be ambiguous. However, in my view it does not necessarily follow that the Act permits the registration of a person's sex as "non-specific".

The Applicant's case

- 55 Ms O'Keefe, who appeared as agent for the Applicant at the hearing, argued that a reference to 'sex' in the Act is not just a reference to male or female but may also be to a third option. She referred to the inclusion of intersex people, who can be legally recognised to be other than strictly male or female.
- 56 Further, she notes the reference in the Act to "correcting or eliminating ambiguities" and argues that this implies that there is a space between male or female, allowing for a person to be other than 100% male or 100% female. She says that there is no prohibition against ambiguity of sex in the Act, and indeed it explicitly recognises the possibilities of there being ambiguities, and of having those ambiguities corrected or eliminated. She contends that indeed, this categorisation applies to the Applicant. The Applicant had surgery to correct or eliminate any ambiguity about her being androgynous.
- 57 Ms O'Keefe argued that there are many ways in modern current English to refer to people who are not strictly male or female - Neuter, androgynous, eunuch, third sex, non specific sex. She contends that before her surgery the reality was that the Applicant was intersex, but biologically male. the Applicant had surgery to correct this, and is now, by self identification and community recognition, a eunuch.
- 58 Ms O'Keefe contends that the Births Deaths and Marriages register is intended to be an accurate record, in perpetuity, of the identity and personal particulars of individuals born or resident in NSW. A person's gender identity is an important part of their identity. She contends that the Respondent is urging a construction of the word "sex" that would preclude the Registrar from entering accurate details of the Applicant's identity. This construction will not allow the Registrar to accurately record the Applicant's particulars or those of other persons in this State.
- 59 Ms O'Keefe argued that section 32A of the Act confirms that a sex affirmation procedure includes not only changing a persons sex from one gender to another, but also correcting or eliminating ambiguities relating to the sex of the person. She points to the statutory declarations of Doctors Kearley and Schultheiss as evidence that as a result of the Applicant's sex affirmation procedure she is unambiguously neither male nor female, but rather has a sex status that has been affirmatively described as "non specific."
- 60 She says that there is no lawful cause preventing the recognition of the Applicant's sex as "Not Specified", and every reason to uphold the original decisions to issue the certification as requested, and to reject the Respondent's assertion that the Applicant's sex cannot possibly be other than male or female when that is the reality.
- 61 She contends that this case is not about the right to choose. It is about a medical reality and the right to have documents that reflect that medical reality.
- 62 In reference to the case of *In Re Kevin* the Applicant stated that the reality of her everyday life is that:
- (a) she has always had the perception of being of non specific sex;
 - (b) she is perceived by others to be of non specific sex;
 - (c) she has had a full process of sex reassignment, involving removal of sex-hormone producing organs and irreversible surgery, conducted by qualified medical practitioners;
 - (d) In appearance, characteristics and behaviour, she is perceived by family, friends and work colleagues as androgynous - that is, as a person of non-specific sex;
 - (e) she has been accepted as a person of non-specific sex for a variety of social and legal purposes, including her drivers licence, her St George Bank account and Centrelink.
- 63 The Applicant referred to the concluding paper of the Australian Human Rights Commission's sex and gender diversity project - *Sex Files: the legal recognition of sex in documents and government records* which states at paragraph 10.7

"10.7 Inclusion of an unspecified sex identity

The Commission recommends that a person over the age of 18 years should be able to choose to be noted as something other than male or female. This would mean that the definition of sex in relevant legislation, policies, guidelines and forms would need to include male, female or unspecified. Some people cannot or do not identify as either male or female. The removal of sex notations on all documents and records would be one way to ensure that people who do not identify as male or female are not excluded by Australia's identification system.

However, as outlined in section 7.3, there are some valid reasons for continuing to note sex or gender on some documents and records. Consequently, it is important to consider how to expand the options for sex identity to include all people who are sex and gender diverse.

There are already some documents where sex identity can be noted as something other than male or female. For example, this is the case with some birth certificates and passports as outlined in section 9. However, a notation of something other than male or female is usually only permitted in limited circumstances.

The Commission consulted about whether there is a better term than 'unspecified' as an alternative to male or female; however, this was the term that received the most support on the Sex Files blog."

64 The paper recommended:

" *Recommendation 5* : A person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records."

65 The Applicant referred to the "case" of " *Chris Somers* ", who was said to have had an Australian passport issued with an "X" in the "sex" field as the result of legal proceedings against the Commonwealth. No further details were provided in relation to that matter and it does not appear to be a reported decision.

66 In summary, Mr Shoebridge submitted that in light of the objectives of the Act and the whole of part 5A of the Act, but especially section 32A(a) of the Act, the term "sex" when used in the Act must have more than a binary meaning. He argued that Part 5A was inserted into the Act specifically to meet the emerging acceptance that a person's sex is not an immutable biological constant laid down from birth, but rather an ambiguous concept that may vary over time. He contends for a meaning of the term "sex" that allows for a spectrum from male to female, including "non-specific".

67 The Applicant contends that the decisions under review should therefore be set aside and the finding made that the 11 February 2010 decisions were the correct and preferable ones.

The Respondent's case

68 Ms Spruce provided an analysis of the case law dealing with the legal status of transsexual and intersex persons. She set out the principal authorities on how a person's legal sex is to be determined at common law commencing with the decision of Ormrod J in *Corbett v Corbett* [1971] P 83. *Corbett* concerned the gender of a male to female transsexual in the context of the validity of a marriage.

69 The Respondent concedes that the authorities referred to above are not directly relevant to the determination of the meaning of "sex" in Part 5A of the Act. However, Ms Spruce submitted that those authorities are useful for the following purposes:

- a. To illustrate the legal context in which Part 5A of the Act was enacted and its purpose;
- b. to explain the social and legal context in which a person's "sex" is to be determined at law;
- c. to indicate the criteria by which the Applicant's legal "sex" would be determined at common law, absent registration of a "change of sex" by the Applicant under Part 5A of the Act.

70 In *R v Harris and McGuinness* (1989) 17 NSWLR 159 the Court of Criminal Appeal declined to follow *Corbett* , drawing a distinction between a person's legal sex for the purpose of marriage law as opposed to the criminal law. The Court held that, for the purpose of the criminal law, sex was to be determined by a combination of psychological sex identification and physical attributes existing at the time of the commission of the alleged offence and not by classification based on chromosomal features fixed at birth.

71 One of the questions that the Court of Criminal Appeal was asked to determine in *Harris and McGuinness* (on a stated case from the court below) was "Can a third sex exist for the purposes of legislation in New South Wales which is drafted in terms of male and female". It was ultimately not necessary for the Court to answer that question. However, Matthews J observed:

"...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." (at 194).

72 Further, Matthews J expressly approved the decision of the Civil Court of the City of New York in *Re Anonymous* 293 NYS 2d 834 (1968) and quoted the following extract from the judgment of Judge Pecora in that case (at 837):

"It has been suggested that there is some middle ground between the sexes, a 'no-man's land' for those individuals who are neither truly 'male' nor truly 'female'. Yet the standard is much too fixed for such far-out theories. Rather the application of a simple formula could and should be the test of gender, and that formula is as follows: Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonised then the social sex or gender of the individual should be made to conform to the harmonised status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course such changes should be made only in those cases where physiological orientation is complete."

- 73 The approach of the Court in *Harris and McGuinness* was followed by the Administrative Appeals Tribunal in the case of *Re Secretary, Department of Social Security and "HH"* .
- 74 In "HH", the applicant applied to the Tribunal for review of a decision of the Social Security Appeals Tribunal to the effect that H should be treated as a woman for the purposes of the *Social Security Act 1947* and should therefore qualify for an age pension from the age of 60 years rather than 65 years. H was born a male and subsequently underwent sex reassignment surgery. Since that time H had lived and been known in the community as a woman. Neither "man" nor "woman" was defined in the *Social Security Act* .
- 75 The Administrative Appeals Tribunal affirmed the decision of the Social Security Appeals Tribunal. President O'Connor and Member Muller stated (at [13]):
- "It is impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities and most people are clearly male or clearly female. The time has come to arrive at some standard by which to test a person's sex. There is no unanimity of medical opinion regarding the factors to be considered relevant to the determination."
- 76 The Tribunal concluded that a number of factors were relevant to the determination of a person's sex. A requirement that all these factors agree was unrealistic and reliance on any single factor would be incomplete or would fail to provide a socially useful standard. However, in the case of person who had undergone sex reassignment surgery, the psychological factor, which concentrated on the individual's self-perception, could outweigh other factors, where the person's anatomy now conformed to that self-perception.
- 77 The Tribunal stated (at [23]-[25]):
- "Australian society has permitted sex reassignment surgery to take place. The law, in its turn, must acknowledge this fact and accept the medical decisions which have been made. It should also be borne in mind that such surgery is irreversible. A requirement that reassignment surgery be completed before the law recognises the reassigned sex of an individual protects the public against possible fraud and acknowledges that a irreversible medical decision has been made affirming the patient's psychological sex choice. The Tribunal is of the view that only those transsexuals who have undergone sex reassignment surgery should be classified for the purposes of the *Social Security Act* as their reassigned sex. This is a difficult area and the Department of Social Security will need to have (for ease of administration and to prevent fraud) workable and established criteria upon which to base its decision. ...
- 78 A similar result was reached by the Federal Court in *Secretary, Department of Social Security v SRA* . The Full Federal Court held that the respondent was not a "wife" for the purposes of the Act. The Court concluded that whilst a post-operative male to female transsexual could be a wife for the purposes of the Act, a preoperative male to female transsexual could not. In so finding, Black CJ considered the ordinary English meaning of a number of words, including "sex" and "sex change" (at 469-471):
- "In providing 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. As I have noted, some of the relevant words and expressions are defined for the purposes of the Act but the words 'woman' and 'female' and the expression 'opposite sex' are not defined. ...
- 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."
- 79 The Respondent also referred to the decision of Charles J in *W v W* [2001] 2 WLR 674. In that case, the respondent was an intersex person who was born with both male and female physical characteristics, but had subsequently had gender reassignment surgery to assist her to be considered a female. She then married the applicant, a male. The question before the Court was whether the marriage was void because it was not a marriage between a man and a woman.
- 80 Charles J held that in the case of an intersex person "the decision as to the whether the individuals involved are female (or male) for the purposes of marriage should be made having regard to their development and all of the factors listed

in *Corbetts'* case, namely... : (i) chromosomal factors; (ii) gonadal factors (i.e. presence or absence of testes or ovaries); (iii) genital factors (including internal sex organs); (iv) psychological factors; (v) hormonal factors, and (vi) secondary sexual characteristics (such as the distribution of hair, breast development, physique etc). Another way of putting this is that the decision as to whether the person is male or female for the purposes of marriage can be made with the benefit of hindsight looking back from the date of the marriage or if earlier the date when the decision is made."

- 81 His Honour concluded that the respondent was a female at the time of and for the purposes of her marriage to the applicant.
- 82 With respect to the Applicant's reference to the "case" of "*Chris Somers*", the Respondent noted an article published in the *West Australian* newspaper on 11 January 2003, which states that after several months of negotiation with the Department of Foreign Affairs and Trading, intersex person Alex MacFarlane was issued a passport identifying Alex as neither male nor female, but simply as X.
- 83 However, Ms Spruce contends that there is no requirement under the *Australian Passports Act* 2005 (Cth). that a person's "sex" be stated on their passport. Section 53(1) of that Act provides that "Australian travel documents must be issued in forms approved by the Minister". Section 53(2) stipulates that the name of the person to whom an Australian travel document is issued must appear on the document but no other particulars are required by the Act. Consequently, whether a person may record their sex on a passport as "X", or need record any sex at all, is a matter within the discretion of the Minister.
- 84 With respect to registration of a change of sex under the Act, Ms Spruce submits that the purpose the registration is not merely to enable a person who has had a "change of sex" to give expression to and obtain formal recognition of their self-identity. She argues that registration has a broader social purpose and broader consequences than those immediately felt by the individual.
- 85 She referred to section 32J of the Act which provides that a person who registers a change of sex under Part 5 is, for the purposes of, but subject to, any law of New South Wales, a person of the sex so registered. She argued that the effect of that section is significant. Registration is not merely a matter of publicly recognising a person's private sexual identity - it confers a legal status upon a person. It has the consequence that the individual who registers a change of sex is thereafter recognised by law as the sex registered for the purpose of all NSW laws, unless a contrary law provides otherwise.
- 86 Ms Spruce submits that the consequence of this is that the Applicant, in seeking to register her sex as "non-specific" or "not specified", is asking the Tribunal to recognise as a matter of law that in New South Wales there is (at least) a third (and possibly more) legal "sex"(es), in addition to "male" or "female".
- 87 At present, the law in New South Wales remains predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female. Ms Spruce concedes that that state of affairs may well be out of step, perhaps even significantly so, with current medical and scientific views. However, she submits that it is by no means unusual for the law to be out of step with medicine or science.
- 88 She further submits that the purpose of identifying a person's "sex" at law is fundamentally different from the purpose of identifying a person's sex medically or scientifically. As Mathews J stated in *R v Harris*, "the fundamental purpose of the law ... is the regulation of the relations between persons, and between persons and the state or community" (at 192).
- 89 Ms Spruce referred to a number of NSW and Commonwealth legislative provisions that are premised on a binary division between the sexes into "male" and "female". She argued that if the Applicant were to be registered under the Act as a sex other than male or female, she would fall outside those provisions. She contends that it cannot have been Parliament's intention, in enacting Part 5A of the Act, to allow persons to register a "third sex" but for those persons to immediately thereafter to find themselves in a legal no man's land. She further submits that many of the provisions referred to were enacted after the insertion of Part 5A into the Act in 1996 and that it would be surprising if Parliament, having created a mechanism for the legal recognition of a third sex, thereafter continued to legislate on the basis that there are only two sexes, male and female.
- 90 She further submits that, consequently, "it is impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities and most people are clearly male or clearly female": *HH* at [13].
- 91 For these reasons the Respondent submits the correct and preferable decision is that "sex" in Part 5A of the Act means "male" or "female" only and that Parliament did not intend, by the enactment of that Part, to create a third legal sex.

Consideration

- 92 As has been noted above, the issue for determination in this matter is whether the Respondent's decisions are the correct and preferable ones. This necessarily requires a determination of whether the Registrar has power under section 32DC of the Act to register a change of sex by a person to "Non specific" or "Not specified". This in turn raises

the preliminary issue of the meaning of the word "sex" in the Act - specifically, whether "sex" means "male" or "female" or has some more expansive meaning.

- 93 I have considered the arguments presented by each of the parties and it is my view that Parliament did not intend that "sex" in Part 5A of the Act would allow a more expansive meaning than "male" or "female". It is improbable that Parliament would not intended that the enactment of that Part 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".
- 94 For the reasons argued by the Respondent, it is my view that the construction urged by the Applicant is not consistent with the numerous legislative provisions that are premised on a binary division between the sexes into "male" and "female". Nor is it 'consonant with the common law'.
- 95 I accept that it is probable that the Applicant perceives herself, and is perceived by others, to be of non specific sex. I also accept that this reflects the medical reality. I also accept that the Applicant may experience difficulties associated with a requirement she specify her sex as either male or as female and that she considers that specification to be the equivalent of a false statement.
- 96 I have considered that report by the Australian Human Rights Commission that recommended that an adult should be allowed to choose to have an unspecified sex recorded on official documents and records and that this recommendation is consistent with the Applicant's case. However, as the Respondent has acknowledged, the state of the law may well be out of step with current social medical and scientific views.
- 97 The construction urged by the Applicant has very significant legal and practical implications. In my view it is improbable that Parliament would have intended that the Part 5A amendments would achieve the outcome that the Australian Human Rights Commission recommended and that the Applicant has asserted.
- 98 In my view the Act is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female. It does not allow a person to choose to have an unspecified sex recorded.
- 99 It follows, in my view, that the Registrar does not have the power under section 32DC of the Act to register a change of sex by a person to "Non specific" or "Not specified".
- 100 It also follows that the decisions made by the Registrar on 16 March 2010 were the correct and preferable ones and they should be affirmed.

Order

The decisions under review are affirmed.

I hereby certify that this is a true and accurate record of the reasons for decision of the Administrative Decisions Tribunal.

Registrar

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