

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL AND KEANE JJ

NSW REGISTRAR OF BIRTHS, DEATHS AND
MARRIAGES

APPELLANT

AND

NORRIE

RESPONDENT

NSW Registrar of Births, Deaths and Marriages v Norrie
[2014] HCA 11
2 April 2014
S273/2013

ORDER

1. *Set aside paragraph 3(b) of the order of the Court of Appeal of the Supreme Court of New South Wales made on 14 June 2013 and, in its place, order that the respondent's applications dated 26 November 2009 be remitted to the NSW Registrar of Births, Deaths and Marriages for determination in accordance with the reasons of this Court.*
2. *Appeal otherwise dismissed.*
3. *Appellant to pay the respondent's costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

J K Kirk SC with K M Richardson for the appellant (instructed by Crown Solicitor (NSW))

D M J Bennett QC with A J Abadee for the respondent (instructed by DLA Piper Australia)

K L Walker with E A Bennett for A Gender Agenda Inc, as amicus curiae (instructed by Human Rights Law Centre)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

NSW Registrar of Births, Deaths and Marriages v Norrie

Statutes – Interpretation – Registrar's power to register a "change of sex" under *Births, Deaths and Marriages Registration Act* 1995 (NSW) – Respondent underwent sex affirmation procedure – Respondent applied for registration of change of sex under Act – Whether Registrar has power to register change of sex to "non-specific".

Words and phrases – "change of sex".

Births, Deaths and Marriages Registration Act 1995 (NSW), ss 32A, 32DA, 32DB, 32DC, 32J.

1 FRENCH CJ, HAYNE, KIEFEL, BELL AND KEANE JJ. Not all human beings can be classified by sex as either male or female¹. The *Births, Deaths and Marriages Registration Act 1995* (NSW) ("the Act") expressly recognises that a person's sex may be ambiguous². It also recognises that a person's sex may be sufficiently important to the individual concerned to warrant that person undergoing a sex affirmation procedure to assist that person "to be considered to be a member of the opposite sex"³. When a person has undergone a sex affirmation procedure, s 32DC of the Act empowers the Registrar to register a change of sex of the person upon an application by that person.

2 The question in this appeal is whether it was within the Registrar's power to record in the Register that the sex of the respondent, Norrie⁴, was, as she said in her application, "non-specific". That question should be answered in the affirmative.

3 It is convenient to begin an explanation of the reasons why that is so by referring to the material provisions of the Act while summarising the circumstances of Norrie's application to the Registrar.

The Act and the application

4 The Act provides for the registration of births, deaths and marriages. Section 6 of the Act provides that the Registrar is to "establish and maintain the registers necessary for the purposes of this Act".

5 The objects of the Act, stated in s 3, include "the recording of changes of sex". Pursuant to s 43(1) of the Act, the Registrar must maintain a register of "registrable events". Section 4(1) provides that a change of sex is a registrable event.

1 *Corbett v Corbett* [1971] P 83 at 100; *Bellinger v Bellinger* [2003] 2 AC 467 at 472 [5]-[6]; *AB v Western Australia* (2011) 244 CLR 390 at 402 [23]; [2011] HCA 42.

2 Section 32A(b).

3 Section 32A(a).

4 The respondent uses, and these reasons use, the personal pronouns "she" and "her" to refer to the respondent.

French CJ
Hayne J
Kiefel J
Bell J
Keane J

2.

6 The provisions of the Act relating to the registration of a change of sex are contained in Pt 5A. They are engaged by an application made by an adult or, in respect of a child, by its parent or guardian. Part 5A of the Act was inserted by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) ("the 1996 Amending Act"). The 1996 Amending Act made provision for the alteration of the Register to record a change of sex in the case of persons born in New South Wales⁵.

7 The Act was further amended by the *Courts and Crimes Legislation Amendment Act 2008* (NSW) to address the situation of people who were not born in New South Wales. This amendment added ss 32DA to 32DD and s 32J to Pt 5A of the Act. This case concerns an application made under these provisions.

8 Section 32DA provides that a person whose birth was not registered in New South Wales may apply to register that person's sex. Sub-section (1) is in the following terms:

"(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."

9 Norrie was born in Scotland with male reproductive organs. In 1989 she underwent a "sex affirmation procedure".

5 Sections 32B to 32D.

3.

10 A sex affirmation procedure is defined in s 32A as:

"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."

11 Norrie considered that the surgery did not resolve her sexual ambiguity. She applied on 26 November 2009 for her sex to be registered under the Act as "non-specific".

12 Section 32DB of the Act requires that an application under s 32DA be accompanied by:

"statutory declarations by 2 doctors, or by 2 medical practitioners ... verifying that the person the subject of the application has undergone a sex affirmation procedure".

13 In conformity with s 32DB, Norrie's application was accompanied by statutory declarations from two medical practitioners. Each medical practitioner stated that Norrie had undergone a sex affirmation procedure. Each also stated, in a pro forma sentence in the declaration, that he supported the application of Norrie to have her birth record altered showing the sex now to be non-specific. Despite the provision in the statutory declaration for a statement of support, it had no apparent statutory significance as it was neither required nor provided for by the Act or the regulations made under the Act.

14 Section 32DC of the Act provides for the determination of an application under s 32DA in the following terms:

- "(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.

French CJ
Hayne J
Kiefel J
Bell J
Keane J

4.

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

15 Four points should be noted in respect of these provisions. First, a sex affirmation procedure is defined by reference to its purpose, not its outcome. Section 32DA(1)(c) does not refer to a "successful" sex affirmation procedure.

16 Secondly, the function of the Registrar is principally that of recording in the Register information provided by members of the community. Section 32DB makes express provision for the verification of an aspect of the information to be provided. Further, s 32DC(1) confers a limited and specific decision-making power on the Registrar. While the Registrar may require such particulars "relating to the change of sex as may be prescribed by the regulations", neither the Act nor the regulations suggest that the Registrar's function extends to the making of any moral or social judgments; it certainly does not extend to the resolution of medical questions or the formation of a view about the outcome of a sex affirmation procedure.

17 Thirdly, s 32DA is headed "Application to register change of sex"; but s 32DA(1) expressly authorises an application by a person "for the registration of the person's sex" rather than "a change of sex". Further, the modes of determination of an application under s 32DA provided by s 32DC, which involve either registration or refusal of registration of a "change of sex", are not precisely congruent with the express terms of s 32DA(1). It is tolerably clear, however, and it was not disputed, that s 32DC speaks of the registration of, or refusal to register, a "person's change of sex" on the basis of a legislative assumption that this first registration in New South Wales of an applicant's sex may differ from an earlier record (made outside New South Wales) of that person's sex. On that basis, an application under s 32DA for the registration of the sex of a person for the first time in New South Wales falls to be determined under s 32DC by a registration of, or a refusal to register, the person's change of sex.

18 Fourthly, the 1996 Amending Act, which introduced Pt 5A (but not including ss 32DA to 32DD and s 32J) into the Act, also amended the *Anti-Discrimination Act 1977* (NSW) by adding to that Act definitions of "recognised transgender person" (a person "the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995*") and "transgender person" (which is defined to include a person "who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex"). These definitions in the 1996 Amending Act are part of the context in which Pt 5A of the Act was enacted. Accordingly, the provisions

5.

of Pt 5A are to be applied in a context of express legislative recognition of the existence of persons of "indeterminate sex".

19 Section 32J of the Act provides that registration of a person's sex under Pt 5A is effective to deem the person to be of that sex. Importantly, it has that effect subject to other New South Wales laws. It relevantly provides:

- "(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." (emphasis added)

The Registrar's decision

20 In response to Norrie's application, the Registrar wrote to her on 24 February 2010 approving her application. The Registrar also approved an application by Norrie for the registration of a change of name. The letter of 24 February attached a "Recognised Details (Change of Sex) Certificate" and a Change of Name Certificate, each of which recorded Norrie's sex as "not specified". Later, the Registrar wrote to Norrie again, this time advising her that the Recognised Details (Change of Sex) Certificate was invalid. Norrie's Change of Name Certificate was re-issued recording Norrie's sex as "not stated".

21 Norrie lodged an application for review of the Registrar's decision in the Administrative Decisions Tribunal of New South Wales ("the Tribunal").

The course of proceedings

The Tribunal

22 The issue before the Tribunal was whether it was open to the Registrar under s 32DC of the Act to register an applicant's sex as "non-specific". The Registrar argued that his powers were confined to registering a person's sex as either "male" or "female"⁶.

6 *Norrie v Registry of Births Deaths and Marriages* [2011] NSWADT 102 at [38], [91].

French CJ
Hayne J
Kiefel J
Bell J
Keane J

6.

23 The Tribunal found that, as a matter of fact, Norrie does not identify as male or female, but as "non-specific"⁷, and that she considers that identifying herself as male or female would be a false statement⁸. Nevertheless, the Tribunal concluded that it was not open to the Registrar to register her sex as "non-specific"⁹. In this regard, the Tribunal proceeded on the footing that "the Act is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female ... [T]he Registrar does not have the power under section 32DC of the Act to register a change of sex by a person to 'Non specific'"¹⁰.

24 Norrie appealed to the appeal panel of the Tribunal, which dismissed her appeal¹¹.

The Court of Appeal

25 Norrie appealed to the Court of Appeal of New South Wales, which allowed her appeal and ordered that the decision of the Tribunal be set aside and that the matter be remitted to the Tribunal for determination¹².

26 The Court of Appeal remitted the matter to the Tribunal because it held that the Act contemplated that Norrie might be assigned to a specific category of sex other than male or female such as "intersex", "transgender" or "androgynous"¹³. Whether the Tribunal should take that course was a matter

7 *Norrie v Registry of Births Deaths and Marriages* [2011] NSWADT 102 at [5].

8 *Norrie v Registry of Births Deaths and Marriages* [2011] NSWADT 102 at [95].

9 *Norrie v Registry of Births Deaths and Marriages* [2011] NSWADT 102 at [54].

10 *Norrie v Registry of Births Deaths and Marriages* [2011] NSWADT 102 at [98]-[99].

11 *Norrie v Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53 at [20].

12 *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [207].

13 *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [200]-[205], [257], [288]-[290].

7.

which would depend upon findings of fact which had not yet been made as to Norrie's specific sex classification¹⁴.

27 The Registrar appealed to this Court pursuant to special leave granted on 8 November 2013. It was a condition of the grant of special leave that the Registrar pay Norrie's costs in this Court and that the order for costs made in her favour by the Court of Appeal not be disturbed.

The arguments in this Court

28 The Registrar submitted that the Court of Appeal strayed too far from the text of the Act in reaching its conclusions. It was said that the Act does not contemplate a range of categories of sex, additional to the "opposite" sexes of male and female. In particular, the definition of "sex affirmation procedure" in s 32A suggests a process of seeking to become male or female, given that s 32A(a) states that the sex affirmation procedure is carried out for the purpose of "assisting a person to be considered to be a member of the opposite sex"; and to speak of the opposite sex is necessarily to speak only of male or female. Further, the Registrar submitted, it is reasonable to expect that an intention to recognise another category of "sex" would have been expressly stated in the Act. In this regard, the definition of "transgender" in Pt 3A of the *Anti-Discrimination Act* does refer to a person being of an "indeterminate" sex; but, significantly, this language was not used in Pt 5A of the Act.

29 The Registrar also argued that unacceptable confusion would flow from the acceptance of more than two categories of sex given that s 32J of the Act affects the operation of other laws which assume the binary division of sex. This particular argument will be addressed after the submissions made on behalf of Norrie have been summarised.

30 Norrie submitted that the purpose of the Register is to state the truth about matters recorded in the Register to the greatest possible extent. If the Act proceeded on the assumption that every person was male or female, then s 32A(b) would be superfluous because any change of sex would fall within the scope of s 32A(a). A sex affirmation procedure described in s 32A(b) of the Act, the purpose of which is to "correct or eliminate ambiguities relating to the sex of the person", was said to be predicated upon legislative recognition that not

14 *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [203]-[205], [277]-[278].

French CJ
Hayne J
Kiefel J
Bell J
Keane J

8.

everyone may be classified as male or female. In this case, the sex affirmation procedure, which is a precondition of an application under s 32DA, was carried out, but Norrie's sex remained ambiguous so that it would be to record misinformation in the Register to classify her as male or female. There is evident force in this submission.

31 Norrie's counsel went further, arguing that, as the Court of Appeal accepted, Norrie might more accurately be assigned to a category of sex such as "intersex" or "transgender". On this view, the expression "change of sex" in s 32DC does not mean changing from one sex (male or female) to another (female or male): a reference to change of sex simply means an "alteration" of a person's sex so that registration of categories of sex such as "transgender" and "intersex" is within the scope of the Registrar's powers under s 32DC. This further argument goes too far; it should be rejected.

32 The Registrar's submission that the Act recognises only male or female as registrable classes of sex must be accepted. But to accept that submission does not mean that the Act requires that this classification can apply, or is to be applied, to everyone. And there is nothing in the Act which suggests that the Registrar is entitled, much less duty-bound, to register the classification of a person's sex inaccurately as male or female having regard to the information which the Act requires to be provided by the applicant.

Additional categories of sex

33 As a matter of the ordinary use of language, to speak of the opposite sex is to speak of the contrasting categories of sex: male and female¹⁵. Yet given the terms of s 32A(b) and the context in which it is to be construed, the Act recognises that a person's sex may be indeterminate.

34 Norrie's application to the Registrar and the Registrar's determination did not give rise to an occasion to consider whether Pt 5A contemplates the existence of specific categories of sex other than male and female, such as "intersex", "transgender" or "androgynous". It was unnecessary to do so given that the Act recognises that a person's sex may be neither male nor female.

35 The Registrar's initial determination of Norrie's application was right. The appropriate record of her change of sex was from "male" (as it may be taken to have previously been recorded outside of New South Wales) to "non-specific".

15 *Bellinger v Bellinger* [2003] 2 AC 467 at 483 [59], 488-489 [76].

To make that record in the Register would be no more than to recognise, as the Act does, that not everyone is male or female and that the change to be registered was from an assumed registered classification outside of New South Wales as a male to, as Norrie's application put it, non-specific.

Ambiguities and indeterminacy

36 The Registrar's submission must be rejected at the point at which it insists that the Registrar is required to decide whether he or she is satisfied (let alone that it has been demonstrated objectively) that, despite an application showing persisting ambiguity in the sex of the applicant following a sex affirmation procedure, the applicant's sex should be recorded in the Register as being either male or female. The registration of a change of sex records the facts supplied by the application so long as the application is supported in accordance with s 32DB.

37 The provision of the Act which acknowledges "ambiguities" and the context of the 1996 Amending Act, which referred to persons of "indeterminate sex", are a sufficient indication that the Act recognises that, as this Court observed in *AB v Western Australia*¹⁶, "the sex of a person is not ... in every case unequivocally male or female."

38 There is nothing in the text of the Act which gives support to the view that the Registrar must initiate, much less resolve, a dispute concerning matters of fact and expert opinions presented to the Registrar under ss 32DA and 32DB. Such a role would not be consistent with the provisions of the Act which charge the Registrar with the role of establishing and maintaining the registers by recording information provided by members of the community.

39 There may be occasions when the Registrar is prompted by the circumstances of an application to address a concern as to whether an application to record a state of affairs in the Register is made in good faith. But this is not such an occasion. There is no suggestion that Norrie's application was not made in good faith. Norrie had undergone a sex affirmation procedure and verified that fact as required by s 32DB of the Act. Norrie's application was not deficient in terms of the information required by the Act. The opinions of the medical practitioners required by s 32DB were to the same effect as Norrie's own statement. The material before the Registrar (and the Tribunal) was to the effect

16 (2011) 244 CLR 390 at 402 [23].

French CJ
Hayne J
Kiefel J
Bell J
Keane J

10.

that the sex affirmation procedure had not eliminated the ambiguities relating to Norrie's sex. In these circumstances no question was raised by Norrie's application which required the Registrar to pursue or resolve any further issue.

40 It was open to the Registrar, in the exercise of the power conferred by s 32DC, to register Norrie's change of sex by recording the change from classification as male to non-specific. Moreover, there was no reason for the matter to be remitted to the Tribunal to make further findings of fact in order for the matter to be finally determined.

Section 32J

41 The submission made on behalf of the Registrar that, given s 32J of the Act, unacceptable confusion would ensue if the Act recognised more than two categories of sex or an "uncategorised" sex should be rejected.

42 The difficulty foreshadowed by this argument could only arise in cases where other legislation requires that a person is classified as male or female for the purpose of legal relations. For the most part, the sex of the individuals concerned is irrelevant to legal relations. In this regard, s 8(a) of the *Interpretation Act* 1987 (NSW) provides that "[i]n any Act or instrument ... a word or expression that indicates one or more particular genders shall be taken to indicate every other gender". The chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage, as defined in the fashion found in s 5(1) of the *Marriage Act* 1961 (Cth)¹⁷.

43 As the Registrar acknowledged, the circumstance that s 32J operates subject to other laws of New South Wales serves to ensure that where another Act does differentiate between male and female it will prevail over s 32J so that an individual is not left in a "legal no-man's land". The Registrar during the course of argument did not identify any particular statute which could not be construed so as to operate as intended in respect of a person whose sex was recorded in the Register as "non-specific".

44 The Registrar's argument from inconvenience should be rejected.

17 *In the Marriage of C and D* (1979) 28 ALR 524; *Bellinger v Bellinger* [2003] 2 AC 467 at 483 [58].

Conclusions and orders

45 The Court of Appeal went beyond the scope of Norrie's application to the Registrar and the issue as to the Registrar's power under s 32DC raised by the Registrar's refusal to record her sex as "non-specific". While the Court of Appeal did not proceed without encouragement from Norrie's counsel¹⁸, it was neither necessary nor appropriate for it to accept that encouragement. It would have been sufficient for it to determine the issue raised by the determination of Norrie's application and the appeal from the Tribunal to hold that the Tribunal erred in answering the question as to the Registrar's power under s 32DC on the basis that the Act is predicated on the assumption that "all people can be classified into two distinct and plainly identifiable sexes, male and female."¹⁹

46 The Act does not require that people who, having undergone a sex affirmation procedure, remain of indeterminate sex – that is, neither male nor female – must be registered, inaccurately, as one or the other. The Act itself recognises that a person may be other than male or female and therefore may be taken to permit the registration sought, as "non-specific".

47 Accordingly, the orders of the Court of Appeal should be varied to the extent of setting aside the order of the Court of Appeal remitting the matter to the Tribunal, and ordering that Norrie's applications to the Registrar of 26 November 2009 should be remitted to the Registrar for determination in accordance with these reasons. Otherwise, the appeal should be dismissed.

48 In accordance with the conditions subject to which special leave was granted, the order as to costs made by the Court of Appeal should not be disturbed, and the Registrar must pay Norrie's costs of the appeal to this Court.

18 *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [205]-[206].

19 *Norrie v Registry of Births Deaths and Marriages* [2011] NSWADT 102 at [87].