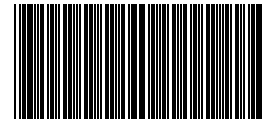




Filed: 2 October 2025 11:46 AM



D0002819Z1

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00243213

TITLE OF PROCEEDINGS

First Appellant	Student A by his tutor Peter Johnston
First Respondent	COUNCIL OF NEWINGTON COLLEGE ABN 71824382623
Second Respondent	Attorney General of NSW

FILING DETAILS

Filed for	Attorney General of NSW, Respondent 2
Legal representative	Karen Smith
Legal representative reference	
Telephone	0294749000

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (2025 09 24 Subs for AG.pdf)

[attach.]

IN THE SUPREME COURT
OF NEW SOUTH WALES
SYDNEY REGISTRY
COURT OF APPEAL

No. 2025/243213

Student A v. Council of Newington College & ors

Submissions for the Attorney General

Leave should be refused

1 Leave to appeal is required.¹ It is discretionary.² Two factors weigh against granting it:

- (1) The applicant's prospects of succeeding are poor, especially regarding the result of the case (see argument below). Grounds 1 and 2 in the Notice of Appeal, to the effect that 'youth' in the relevant trust deed 'refers to boys and young men' and was not 'used in a gender-neutral sense', are specific to the deed and raise no question of principle. Ground 3 relates to a ruling on evidence but a ruling in favour of the applicant would not have altered the result, making this an inappropriate vehicle for considering any broader issue. Ground 4 challenges the primary judge's refusal to use subsequent events to construe the deed but those events were not relevant to the particular question of construction posed by the case and would not have made a difference to the result; so, again, the case in an inappropriate vehicle.
- (2) The clear need for expedition notwithstanding, the appellant delayed lodging his notice of appeal for as long as possible.

Context; the matter before the Court

2 By s. 6 of the *Newington College Council Act 1922* ('the NCC Act'), the land described in Sch. 1 and Sch. 2 to that Act, which is at Stanmore, and certain other property, is vested in the first respondent ('the Council'). On the land, the Council operates a school

¹ *Gaynor v. Attorney General of New South Wales* [2020] NSWCA 48 at [15]–[18]; *Nanschild v. Pratt* [2011] NSWCA 85 at [26]–[34].

² *Collins v. The Queen* (1975) 133 CLR 120 at 122–123.

called ‘Newington College’ (‘the College’).³ By s. 12, the Council ‘may . . . formulate and adopt regulations with respect to the conduct of the school and the course of education and religious instruction to be followed therein’. By s. 13, the Council ‘shall hold all the property at any time vested in it by virtue of this Act upon trust to carry or cause to be carried into effect the regulations hereinbefore referred to and the general objects for which the said collegiate school was founded as set forth in the said indenture of trust of the twenty-third day of October, one thousand eight hundred and seventy-three’ (‘the deed’). By s. 14, ‘[s]ubject to any regulations to be so formulated as aforesaid, the council shall have the general management and superintendence of the affairs, concerns, and property of the said collegiate school’.

3 It is common ground that the operative provision of the deed is ‘the object of such School shall be to provide an efficient course of education for youth’.⁴

4 The issue before the primary judge was whether or not to make a declaration in these terms:⁵

the use of:

- (a) the land referred to in Schedules 1 and 2 of the NCC Act; and
- (b) any property, whether real or personal, which vested in Newington College pursuant to s 6 of the NCC Act;

for co-education would be a breach of the trust constituted by s 13 of the NCC Act.

5 The Court had to answer this question: On the proper construction of the deed, does ‘youth’ refer to both sexes or only males? The primary judge answered to the former effect,⁶ which accords with the ordinary meaning of the word ‘youth’ as it has been since time immemorial.⁷ Had his Honour held that ‘youth’ referred only to males then it would have been necessary for him to answer a second question: Does the deed, or anything else, preclude the Council from deciding that the efficient course of education to be provided to the College’s (male) students shall be a co-educational one? His Honour found it ‘unnecessary to deal with this issue’ and he was ‘unwilling to do so’.⁸ However, were his

³ Judgment below—*Student A v. Council of Newington College* [2025] NSWSC 534 (‘JB’)—at [2], [4] and [6].

⁴ JB [90]; Applicant’s Written Submissions (in the Court of Appeal), 12.9.2025 (‘AWS’) at [12] and [25].

⁵ JB [14] and [78].

⁶ JB [168].

⁷ *The Oxford English Dictionary* (‘OED’) traces ‘youth’, with a non-sexist meaning, to Old English: first edition, Vol. X, Part II, p. 77 (BLUE BOOK 4:1364); second edition, Vol. XX, pp. 773–774 (BLUE BOOK 4:1434–1435). See also the *New Shorter Oxford English Dictionary on Historical Principles*, Vol. I, p. xvi and Vol. II, p. 3753 (BLUE BOOK 4:1439 and 4:1441).

⁸ JB [167].

Honour's finding on the meaning of 'youth' to be overturned then it would become necessary to deal with this second question—hence the notices of contention.

The proper construction of 'youth' in the deed

- 6 The word 'youth' in the deed must be construed in context. To the extent that the deed gives more detail and context of the objects for which the College was founded, or the trust upon which the Council's property is held, it is in these passages:⁹

. . . And Whereas [at] the said Conference of the Aus[tralian] W. M. Church ['held in the York St. Church, Sydney in the month of February 1873'] . . . it was . . . resolved

That the whole of the Stanmore Estate be appropriated to Collegiate purposes

That all the money received under the provisions of the Will of the late Mr John Jones be appropriated to the erection of Collegiate Buildings one half of the proceeds of the Legacy being devoted to the purposes of a Wesleyan Theological Institution and the other half to a Collegiate School provided that in the latter a certain number of the children of Wesleyan Ministers labouring in N. S. Wales . . . should receive education from the age of Eight to Fourteen years or from Nine to Fifteen years for the amount of the allowances from the children's fund and the fund for the education of Ministers' children in accordance with the plan which prevails in the Kingswood and Woodhouse Grove schools in England . . .

Now this Indenture Witnesseth that for the purpose of carrying out the s'd resolutions and of declaring the uses trusts ends and purposes upon and for which the [trustees] hold the s'd lands The said parties hereto of the first and second parts . . . agree covenant and declare . . .

that [the trustees] shall stand seized of the said lands hereditaments and premises . . . Upon trust to permit the erection and maintenance thereon of a Wes. Theol. Institution and a Wes. Col. School . . .

That the object of such school shall be to provide an efficient course of education for youth . . .

Provided always that no other religious doctrines under any circumstances shall be taught or expounded in the said Institution or School than those which are contained in certain notes . . . reputed to be the notes of the Rev. John Wesley . . . and in the first four volumes of sermons [of] John Wesley, and in the Catechism of the W. Methodists . . . [of] 1784 . . .

and that the s'd Col. School shall be under the management and direction of the s'd Council of N. College . . .

That subject to such rules or orders as shall . . . be made by the said Conference the Theol. Tutor . . . of the said Institution may . . . determine and regulate the course of study to be pursued in the said Institution . . .

That the s'd [College] Council may subject to such rules and orders as af's'd determine and regulate . . . the course of study to be pursued in the s'd school and

⁹ BLUE BOOK 3:1113–1117 (partial handwritten copy); 5:1700–1704 (full handwritten copy) and 3:1131–1136 (typed copy). Paragraph breaks have been inserted for convenience of reading.

the terms conditions and regulations upon and subject to which the pupils thereof respectively shall be admitted and governed

Provided always . . . that certain of the children of Wesleyan Ministers laboring in N.S.W. shall receive education at the same W. Col. School from the age of eight to fourteen years, or from the age of nine to fifteen years for and in consideration of the amount of the allowances for that purpose from the children's fund and the fund for the education of Ministers' children in accordance with the plan adopted by the s'd Conference established in England . . . as the said allowances . . . shall . . . be fixed by the said Conference . . . and for whose board and education . . . no other fee or premium shall be demanded, and the children so to be educated shall . . . be selected or approved by the af's'd. Conference . . .

7 The evident approach taken in the deed was to state its object and purpose in broad terms ('to provide an efficient course of education for youth') and to empower the Council to run the school, including by 'determin[ing] and regulat[ing] . . . the course of study'. For the present purpose of construction, the following features of the deed are especially notable:

- (1) The deed was entered for 'the purpose of carrying out [certain] resolutions' of the Australasian Wesleyan Methodist Conference ('the Conference') passed in February 1873. This recitation in the deed was the culmination of the following: in 1872, the council of the predecessor school (located near Silverwater) resolved to recommend to the Sydney District of the Wesleyan Church and to the Conference that, *inter alia*, the land at Stanmore be 'appropriated to Collegiate purposes', that places be reserved for the 'sons of Wesleyan Ministers' ('for the amount of the allowance to boys from the Children's and Educational Funds') and that this be 'embodied in a deed';¹⁰ and, after the deliberations of the Sydney District,¹¹ the matter went to the Conference,¹² which passed a similar resolution—except that it now referred to 'the children of Wesleyan Ministers' and to 'allowances from the [Children's and Education Funds]'.¹³
- (2) The Council was empowered to decide upon the 'terms conditions and regulations upon and subject to which the pupils . . . shall be admitted'. That included power to decide whom to enrol. The fact that the deed addressed this issue by conferring power on the Council militates against concluding that the deed sought to prescribe its own policy on who might be enrolled.
- (3) The Council's power was subject to any rules and orders made by the Conference. Given that the deed sought to implement resolutions of the Conference (and, at least

¹⁰ JB [51]–[52].

¹¹ JB [53].

¹² JB [53].

¹³ JB [57].

practically, was drafted by agents of the Conference), there is no reason to read down the conferral of power on the Conference with some implied or weakly expressed limitation of the Conference's power. In particular, the deed should not be construed as limiting the Conference's power to decide upon co-education. Therefore, it should not be construed as precluding co-education.

- (4) However, the deed did, clearly and unambiguously, include one policy prescription on who could be enrolled as students: it contained the proviso that certain 'children' of Wesleyan ministers were to be enrolled on the favourable terms prescribed. This proviso militates against concluding that the deed included another (sexist) policy, ambiguously expressed, on who could be admitted.

In short, the deed was clear on the one enrolment policy it chose to prescribe and otherwise left the matter of enrolments to the Council and the Conference. In that context, the deed's statement of the trust's object and purpose should not be construed as including a policy of excluding girls or young women.

8 Rather, the deed's words should be given their ordinary meaning.

9 *The Oxford English Dictionary* ('OED'), originally called *A New English Dictionary on Historical Principles*,¹⁴ has the present benefit of being a dictionary compiled on historical principles, and is most useful to understanding the English language used in New South Wales in the 1870s. Both Volume X of the OED's first edition (1928)¹⁵ and Vol. XX of the second edition (1989)¹⁶ say that 'youth' is a noun and identify six senses. Some of the senses, for example '[t]he fact or state of being young' (Sense 1 a), are not applicable, although they do serve to confirm that the origin and essential meaning of 'youth' are linked to 'young', not 'male' or any equivalent of 'male'; derivative words, such as 'youthful', all refer to youngness, not maleness or any quality based on distinctions of sex.

10 It is common ground that the OED's fifth sense is the one used in the deed.¹⁷ It, and the examples quoted, are (in both editions):¹⁸

5. Young people (or creatures) collectively, the young. (With or without *the*; now always construed as plural.)

¹⁴ BLUE BOOK 4:1363.

¹⁵ OED, first edition, Vol. X, Part II, p. 77 (BLUE BOOK 4:1364).

¹⁶ OED, second edition, Vol. XX, pp. 773–774 (BLUE BOOK 4:1434–1435).

¹⁷ JB [95]; AWS [38].

¹⁸ First edition at Vol. X, Part II, p. 77 (BLUE BOOK 4:1364); second edition at Vol. XX, p. 774 (BLUE BOOK 4:1435).

Beowulf 66 Oð pæt seo ȝeoȝð ȝeweox. c 897 ÆLFRED *Gregory's Past. C.* Pref. 7 Eall sio ȝioȝuð ðe nu is on Angelcynne friora monna. c 1205 LAY. 15372, & inne Æstsaxe heore aðeleste ȝuȝeðe. *Ibid.* 19837 Bezst alre ȝeoȝeðe pa . . a pan dæȝen weore Ærður ihaten. 1538 STARKEY *England* (1873) 152 The yl and idul bringing up of youth here in our cuntrey. *Ibid.* 156 To ouerse the education of vthe. 1581 MULCASTER *Positions* xxxiii. (1888) 119 Youth from seuen till one and twenty, will abyde much exercising. 1599 SHAKS *Hen. V.* II. Chorus I Now all the Youth of England are on fire. 1656 HARRINGTON *Oceana* (1658) 204 The Elders could remember that they had been Youth. 1742 GRAY *Spring* 25 The insect youth are on the wing. 1818 BYRON *Juan* 1. Cxxv, The unexpected death of some old lady Or gentleman . . Who've made 'us youth' wait too—too long already For an estate. 1874 STUBBS *Const. Hist.* I. ii. 25 When there was peace at home, the youth sought opportunities of distinguishing . . themselves in distant warfare. 1883 *Century Mag.* XXVI. 292/1 There was a native innocence in the New York youth of both sexes that was pleasing to our pride.

Neither the definition, nor any of the quoted examples, gives any support for the proposition that 'youth' in this fifth sense refers only to males—or even primarily to males.

- 11 The only comfort that the applicant might get from the OED's various meanings of 'youth' is to be found in the sixth sense, the only definition that contains any distinction of sex. It, and the examples quoted, are (in both editions):¹⁹

6. a. A young person; *esp.* a young man between boyhood and mature age; sometimes, *esp.* in earlier use, more widely (see quotes.).

Formerly, sometimes (and still in dialect and vulgar speech) pleonastically qualified by *young*.

c 1250 *Gen. & Ex.* 2665 Bi ðat time ðat he was ȝuð, Wið faizered and strengthe kuð. a 1400 *Pistill of Susan* 230 He lift vp þe lach and leap ouer þe lake, þat ȝouthe. ?1580 W. HERGST (*title*) The Right Rule of Christian Chastie; profitable to bee read of all godly and vertuous Youthes of both sexe. 1583 STOCKER *Civ. Warres Lowe C.* I. 32 b, Accompanied with a multitude of women, young youths and children. 1599 SHAKS. *Much Ado* II. i. 40 He that hath a beard, is more then a youth: and he that hath no beard, is lesse then a man. 1605 TRESWELL *Journ. Earl Nott.* 32 A youth of ten yeares of age. 1611 *Bible* Susanna 45 The Lord raised vp the holy spirit of a young youth, whose name was Daniel. 1632 MILTON *L'Allegro* 95 The jocond rebecks sound To many a youth, and many a maid. 1687 [? W. PENN] *Reason. Toleration* 16 He ended his days a young Youth, in the 24th Year of his Age. 1711 HEARNE *Collect.* (O.H.S.) III. 263 W^{ch} was in the eleventh Year of his Age, and y^t he was then a very hopefull Youth. 1774 tr. *Chesterfield's Lett.* Kal May 1741, To-morrow . . you will attain your ninth year; so that, for the future, I shall treat you as a youth. 1805 *Ann. Reg., Chron.* 396/2 Two youths, one 14 and the other 8 years of age, sons of a poor man. 1837 DICKENS *Pickw.* xxxii, The pot-boy, the muffin youth, and the backed-potato man. 1881 *19th Cent.* May 780 Before she was twenty she wrote verses like other youths.

b. (*esp. college youth*) Applied technically to societies of bellringers. *Obs. exc. Hist.*

...

¹⁹ First edition at Vol. X, Part II, p. 77 (BLUE BOOK 4:1364); second edition at Vol. XX, p. 774 (BLUE BOOK 4:1435). The second edition, but not the first, featured 'a.' immediately after '6.'

In this sense, ‘youth’ refers to a single person (as in, for example, Hearne’s ‘W^{eh} was in the eleventh Year of his Age, and y^l he was then a very hopefull Youth’). The plural is ‘youths’ or ‘youthes’. This definition is not applicable to the collective usage of ‘youth’ in the deed. In any event, the reference to maleness is merely to note that the word, when used in this sense, refers especially to males. The definition does not exclude females. Indeed, the word ‘especially’ explicitly acknowledges that females are included within the main meaning of the definition, even though sometimes the word can be used such that it is referring only to males. Of the dictionary’s three example quotations that involve distinctions of sex (which most of the examples do not), two explicitly cover females: Hergst’s book on Christian Chastity (1580?) explicitly uses ‘Youthes’ to cover ‘both sexe’; and the 1881 reference to a particular female under 20 years of age—the quotation closest in time to 1873—explicitly grouped her with ‘other youths’ who wrote verses. Only the example from Milton—who wrote of ‘many a youth, and many a maid’—used ‘youth’ with a meaning confined to males. That shows that the term ‘youth’ can refer to a single person who is specifically male but not that ‘youth’ is confined to males. Ultimately, this single example from Milton—who correctly uses the term to refer to individuals, not a collective—does not assist the applicant.

12 Extracts from more than a dozen dictionaries were before the primary judge.²⁰ Almost all recognized that one sense of ‘youth’ referred to young persons collectively, without a distinction of sex. For the proposition that ‘youth’, in the sense of a collective of young people, has a meaning that is referable only to males, the applicant can point only to *Barclay’s Complete and Universal English Dictionary* (1848): ‘Young men used collectively’.²¹ Importantly, *Barclay’s* relevantly gave *only* this gendered meaning—it did not *add* it to the non-gendered meaning that the word plainly has always had, it omitted the non-gendered meaning—so *Barclay’s* definition is deficient or defective.

13 Undoubtedly, the predominant meaning of ‘youth’ covers both sexes. Whether or not *Barclay’s* definition is considered erroneous, it is an isolated example that does not make the term ‘youth’ ambiguous. It does not make ‘youth’ in the deed ambiguous.

14 Even if ‘youth’ were an ambiguous term, it would not follow that the primary judge was wrong to conclude that, in the deed, it had a non-gendered meaning. Something substantial would be needed to conclude that the deed used ‘youth’ in a way contrary to its usual and most common meaning, especially given that the deed was a legal instrument (and, as the primary judge noted, it was ‘common ground that the Deed would have been

²⁰ JB [76] and [77].

²¹ JB [77] and [96]; BLUE BOOK 1:2.

drafted by a skilled conveyancer, experienced in trust law in general and the drafting of deeds of trust in particular²²) and it would have been easy for its drafters to refer only to boys and young men if that was what they had intended. The fact, if it be the fact, that some people in the 1870s used the term ‘youth’ to refer only to males does not show that the drafters of the deed did; nor would it be a sufficient reason to construe the deed in the non-usual way for which the applicant contends.

15 The five matters advanced in the Applicant’s Written Submissions at [58]–[82] do not show that the deed used ‘youth’ in an exclusively male way:

- (1) The deed did not (as it might have) speak of ‘the new College as a continuation of the existing school at Silverwater’ (as the applicant puts it):²³ it recited that the old school (at Silverwater) would be ‘discontinued’.²⁴
- (2) The fact that the (new) College was begun as a boys’ school, and that some speeches, years after the deed was executed, referred to the College as a boys’ school, reflected a (perhaps tacit) decision of the Council constituted by the deed to commence the College as a boys’ school, not some confinement of the Council’s express power to decide whom to enrol; the failure of the Council to exercise its power until 2023 does not show a lack of power. The fact that only men could be admitted to the University of Sydney in the 1870s might say something poor about the University but does not mean that the deed had the purpose or effect of excluding girls from the College.
- (3) The fact that the deed required that some places at the College be reserved for ‘certain of the children of Wesleyan ministers’ and that these places be *funded* ‘in accordance with the plan adopted by the s’d Conference in England’²⁵ (and the deed recited an Australasian Conference resolution that places be reserved for the children of Ministers, which places were to be funded ‘in accordance with the plan which prevails in the Kingswood and Woodhouse Grove Schools in England’²⁶) did not mean that the College had to be male-only, even if those English schools were male-only.
- (4) The fact that in the 1870s and thereabouts the Church had been considering how to provide schooling for girls, and that it later ‘went down a different track’²⁷ (to

²² JB [118].

²³ AWS [59].

²⁴ JB [85] and [135]; BLUE BOOK 3:1114 (partial handwritten copy), 5:1701 (full handwritten copy) and 3:1133 (typed copy).

²⁵ BLUE BOOK 3:1117 (partial handwritten copy), 5:1704 (full handwritten copy) and 3:1136 (typed copy).

²⁶ BLUE BOOK 3:1113–1114 (partial handwritten copy), 5: 1700–1701 (full handwritten copy) and 3:1132 (typed copy).

²⁷ AWS [71].

establish the Methodist Ladies College in 1888), is a factor that supports giving ‘youth’ its ordinary meaning. The relevant point is that the issue had not been resolved by 1873.²⁸ That supports the conclusion that the deed was drafted to cater for the possibility of co-education, not that it was in 1873 decided to exclude girls forever. As the issue had not been resolved by the time the deed was prepared, it was sensible that the deed adopted the non-gendered term ‘youth’ and empowered the Council to decide, in future years, whom to enrol. (Of course, the fact that MLC was established in 1888 cannot help in the construction of the deed.)

- (5) Similarly, the fact that in the 1870s no secondary schools had been established for girls in NSW also militates in favour of the primary judge’s conclusion. It was an unfulfilled need that had been recognized. It provided all the more reason to frame the purpose of the College as one that permitted the enrolment of girls (if the Council so decided).

16 Even if these five matters advanced by the applicant were to be taken to weigh in favour of construing ‘youth’ as covering only males, they would not be enough to outweigh the ordinary meaning of ‘youth’ or the drafting history that saw references to the sons of Ministers and boys’ allowances changed to the children of Ministers and allowances. The Conference’s (non-gendered) resolution was cited in the deed and reflected in the operative provisions of the deed. The change of wording itself is evidence of a decision to change the wording. The change can be construed only as either pointless or having the purpose of referring in a non-sexist way to places at the College for the children of Wesleyan Ministers. The latter is much more likely and supports construing ‘youth’ in the ordinary way; otherwise, the deed would establish a boys’ school at which Wesleyan Minister’s daughters could be enrolled.

17 That the deed used ‘youth’ in a non-gendered way is so clear that it was not necessary to resort to newspapers articles and other extrinsic material to construe it. However, consideration of such material would not have made a difference. The applicant’s point was first to establish that ‘youth’ was ambiguous and then to resort to extrinsic material to show that the deed should not be construed in the obvious way. Even if the term were ambiguous, the Court would then need to resolve the ambiguity. Even if the extrinsic material on which the applicant sought to rely were weighed, the correct resolution—once all factors were considered—would be the one reached by the primary judge.

²⁸ JB [70]–[75], [134(3)], [141]–[142] and [148].

18 The applicant particularly relies on two examples from the 1870s. The first, if it can be considered at all,²⁹ is a report of parliamentary proceedings in April 1873 in which a member said that '[i]t was a libel upon the youth of New South Wales to say that we could not get men of ability to sit in Parliament without being paid'.³⁰ This reflects the fact that only men sat in parliament,³¹ not that only males constituted the population or the youth of NSW. The second is an article in which some character laments that 'the affections of the whole youth of the Commune' were appropriated 'by half a dozen belles'.³² Absent information about who the youth of the commune were (they might all have been male), this reveals nothing about the meaning of 'youth'. In any event, there is little prospect that resorting to any number of examples in newspapers and other lay sources would change the conclusion that in the deed 'youth' took its ordinary meaning.

19 The applicant also relies on the subsequent facts that the College was begun as a boys' school (1881) and that a girls school was established (1888), facts said to be relevant because of the 'ancient documents rule'. These facts, however, show no more than that decisions, or choices, were made to establish single sex schools in the 1880s. They are not evidence of a belief that co-education was not permitted at the College, let alone evidence that any such belief came from the terms of the deed. The primary judge was not wrong in his disposition of this point. It would have made no difference to the result.

20 The applicant's argument goes no further than pointing to reasons why the term 'youth' might be considered ambiguous and then (assuming ambiguity) pointing to factors said to weigh against construing 'youth' in the ordinary way. It does not take the necessary next step of showing that those factors justify construing 'youth' in the non-usual way for which the applicant contends. When that necessary step is taken, the result reached by the primary judge can be seen to have been correct.

21 The applicant's point that there is 'no reason' to think that those who entered the deed 'would have contemplated that the school they were establishing would be co-

²⁹ See *Bill of Rights 1689* (Eng), Art. 9; *R. v. Murphy* (1986) 5 NSWLR 18 at 25–39; *Parliamentary Privileges Act 1987* (Cth), s. 16; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332–337 (esp. 333); S. Frappell, 'Parliamentary privilege in New South Wales', paper delivered to the 38th Annual Course of the International Association of Law Libraries on Law Down Under: Australia's Legal Landscape, 28 October 2019, at 5–7 (accessible at <https://www.parliament.nsw.gov.au/lc/articles/Documents/Parliamentary%20Privilege%20in%20New%20South%20Wales%20-%20Stephen%20Frappell%20-%202019%20Law%20Down%20Under%20conference.pdf>).

³⁰ AWS [52] (see JB [98]).

³¹ JB [99].

³² AWS [52].

educational’³³ and ‘nothing to support’ concluding that they had in mind ‘ensuring that girls . . . would be educated at the new school’³⁴ does not address the true issue. It is to put imputed social prejudices ahead of the plain meaning of a legal instrument and to ignore the evidence (provided by the antecedent resolutions) that the drafters did contemplate providing schooling for girls and decided to permit (although not ensure) it. Even if some of the men of the 1870s were as narrow in their contemplations as the applicant would have it, ‘the limits of the drafters’ imagination’, to borrow from *Bostock v. Clayton County*, ‘supply no reason to ignore the [written] law’s demands.’³⁵ In any event, the true issue is whether or not, by the deed, they restricted the power of the Council regarding enrolments such that girls had to be excluded. The deed evinces no such purpose.

Notice of contention: Does the trust or law exclude girls from the College?

22 The conduct of the College’s affairs, including decisions on who will be enrolled, is entrusted by ss. 12 and 14 of the NCC Act to the Council (as it had earlier been by the deed). By s. 13, the trust property is to be held not only for the purpose identified in the deed but also ‘to carry or cause to be carried into effect the regulations’ made by the Council (albeit the regulations cannot violate the trust’s purpose).

23 Subject to the general law (including, for example, requirements set by the NSW Educational Standards Authority³⁶), the Council has power to decide how its students are to be taught. It can decide upon the nature of the accommodation to be built and occupied, upon co-curricular activities and upon the College’s teaching philosophy (for example, whether or not to prepare students for the International Baccalaureate). Even if the charitable trust purpose is, in effect, only for the benefit of boys (by way of providing them with an efficient education), it would be open to the Council to conclude that the best (most efficient) way to teach boys is in a co-educational way.

³³ AWS [79].

³⁴ AWS [86].

³⁵ *Bostock v. Clayton County* 590 U.S. 644 (2020), per Gorsuch J for the Court (Thomas, Alito and Kavanaugh JJ dissenting). If this Court permits, for convenience, the judgment included (par. 2): ‘Those who adopted the Civil Rights Act [of 1964] might not have anticipated their work would lead to this particular result [prohibiting employment discrimination because of homosexuality or being transgender]. Likely, they weren’t thinking about the many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give one answer and extratextual considerations suggest another, it’s no contest.’

³⁶ See the *Education Act 1990* and *Education Standards Authority Act 2013*.

24 There is nothing in the deed that qualifies ‘efficient course of education’ with something to the effect of ‘provided girls are absent’. There is nothing in the NCC Act that qualifies the Council’s powers to run the College with something to the effect of ‘provided girls are excluded’. There is nothing anywhere to the effect that the (male) students of the College are to be afforded all the incidents of the best possible education—except girls.

25 It is not necessary for the Court to inquire into the relative merits of single-sex and co-educational schools. It is sufficient to say that it is a question upon which minds might reasonably differ and that the Council has the power to decide the issue for the College. It has done so and nothing before the Court indicates that its decision was in breach of trust.

26 Nor is it necessary to inquire into the basis of the Council’s decision to introduce co-education.³⁷ The question posed by the declaration sought by the applicant relevantly went to the Council’s power, not to whether that power was properly exercised.

Conclusion

27 Leave to appeal should be refused, or the appeal dismissed, with costs.

24 September 2025



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³⁷ Cf. JB at [167].

I, Anthea Tomlin, a solicitor employed in the office of Karen Smith, Crown Solicitor for NSW, solicitor for the twenty-sixth respondent, hereby certify that these submissions are suitable for publication on the Supreme Court's website.

Dated: 3 October 2025

A handwritten signature in black ink, appearing to be 'AT', with a small dot to its right.

Anthea Tomlin