IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 273 of 2013

BETWEEN:

NSW REGISTRAR OF BIRTHS, DEATHS AND MARRIAGES

Appellant

and

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NORRIE

Respondent

APPELLANT'S REPLY

(ANNOTATED)

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PART I: INTERNET CERTIFICATION

1. The Registrar certifies these submissions are suitable for publication on the internet.

PART II: REPLY

2. Norrie refers at RS [10] (and [48]) to various historical, judicial and legislative recognition of the potential ambiguity of sex for some persons, nowadays often referred to as persons with intersex conditions or intersex persons. The existence of such people has not been disputed by the Registrar, but that fact does not support Norrie's construction of the Act, for the reasons addressed in particular at AS [24]-[26], [32] and [48]-[52].

3. Further, although various definitions of "intersex" contained in legislation are referred to at RS [10.6], Norrie does not fall within any of them, as each of those definitions reflects the fact that being intersex is a congenital or "biological" difference a person is born with and is not a gender identity.[1] Norrie was born as a male and then underwent sexual reassignment surgery as an adult.[2] She has not previously submitted that she is an "intersex" person, and she did not apply to be registered as such,[3] yet it is now submitted at RS [39] that "'intersex' is another possible description" that could appropriately apply to her. This change illustrates the indeterminacy of the categories she contends for.

4. The use of language and categories in this area – and the choice/belief/orientation as to self-identification – are complex, subjective and contested matters. Norrie submits at RS [9] that the primary purpose of the statute "is to record the truth about those matters in so far as they concern that person". That presupposes clear categories exist. Further, if they do, then that requirement for truth would require registration of those categories (including, by implication, at birth) regardless of the views of the individuals (or parents) concerned. Yet there is good reason to think that many intersex persons would not wish that category to be recorded.[4]

5. There are a wide range of legislative policy approaches that may be adopted in order to recognise intersex people. Norrie refers to the position in the ACT (RS [10.6] and [39 fn 17]). That position is illustrative. Part 4 of the *Births, Deaths and Marriages Registration Act 1997* (ACT) ("the ACT Act") is in substantially the same terms as ss 32B-32D of Part 5A of the NSW Act. Intersex persons are recognised in ACT legislation[5] (where "intersex" is defined as being a genetic condition[6]) but are not expressly referred to in the ACT Act itself. The legal

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1 See also proposed submissions of A Gender Agenda ("AGAS") at [12]-[16]; contra RS [39]. Note definition of "intersex status" in s 4 of the *Sex Discrimination Act* 1984 (Cth) (as inserted by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act* 2013 (referred to at RS [10.6.1]); see in this respect the Explanatory Memorandum to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill* 2013 at para [15] ("The definition recognises that being intersex is a biological condition, not a gender identity"). See definition of "intersex person" in s 169B *Legislation Act 2001* (ACT). See also the proposed amendment of the definition of "intersex person" in s 169B *Legislation Act 2001* (ACT) to conform it to the definition used in the *Sex Discrimination Act* 1984 (Cth) (see *Births, Deaths and Marriages Registration Bill 2013* (ACT), Schedule 1 Part 1.2 cl [1.6] (referred to at RS [10.6.2])). The Explanatory Memorandum to the ACT Bill states that "an intersex person is a person who was born with reproductive organs or sex chromosomes that are not exclusively male or female" (see p 7 clause 14).

2 CA [6] (AB 125).

3 Noted by Beazley ACJ at CA [206] (AB 149); at CA [228] (AB 153) per Sackville AJA.

4 Note AGAS [17] and [61].

5 See for example, ss 6, 7, 49B(2), 53, 59 of the *Crimes (Forensic Procedures) Act 2000* (ACT); see ss 189, 250, 573, 592 of the *Children and Young People Act 2008* (ACT).

6 See s 169B *Legislation Act 2001* (ACT) (definition of "intersex person").

position of intersex persons has recently been addressed by the ACT Law Reform Advisory Council. It took the view that registration of a person's "sex" under the ACT Act – whether registration of a child's sex at birth or when altering the birth record of a person's sex – only allows for registration of either "male" or "female".[7] More importantly, the Council recognised the very real difficulties that arise here in considering any law reform with respect to recognition.[8] The consequent *Births, Deaths and Marriages Registration Bill 2013* (ACT) ("ACT Bill"), referred to at RS [10.6.2]-[10.6.3] would, if passed, insert provisions specifically dealing with intersex persons, but would not change the current position that the only categories of "sex" that may be registered are either "male" or "female".[9]

6. The example given at RS [16]-[17] in relation to an intersex person is misconceived. In that example, if the surgery undertaken meets the definition of a *sex affirmation procedure* in s 32A(b), which it appears it would, then the person may choose to apply for a change of sex from male to female to be recorded, but is not compelled to do so. How the person "identifies" or the "gender identity" of the person after the surgery is not to the point in terms of Part 5A in general or s 32A in particular (cf RS [17]-[18]; see also RS [19], [48]). The respondent's example conflates the concepts of "gender", "gender identity" and "sex" (as the Court of Appeal did – see AS [34]).[10] And it is not the case that the Act mandates that an intersex child must be recorded as either male or female in order for the birth to be registered. Where the sex of a child is not able to be determined, the Registrar has the power to register the birth with "incomplete particulars"(s 17(2)); that is, with no entry in relation to "sex". That particular can be supplied later.

7. The further examples at RS [18] do not take matters further. The first example given – of surgery carried out on an intersex person to "confirm[] that the person is half way between male and female" – would not meet the definition of a *sex affirmation procedure* in s 32A(b). It would not be carried out to *correct* or *eliminate* ambiguities, rather it would be carried out to *affirm or create* ambiguities. The second example – surgery said to be carried out because a male or female person "desires for some reason to become intersex" – is also misconceived. One cannot undergo surgery in order to *become* intersex, being a congenital condition.

8. There are certainly limits upon the extent to which a person's physical sex characteristics may be altered (see RS [21]). It will be a question of fact in a particular case whether a surgical procedure to alter a person's reproductive organs in fact meets the description of the procedures described in s 32A(a) or (b). Section 32A only requires a surgical procedure "involving the *alteration* of a person's reproductive organs" carried out for the purpose referred to in s 32A(a) or to correct or eliminate the ambiguities referred to in s 32A(b). Such a surgical procedure does not require that the person undertake every procedure to remove every vestige of the opposite sex (per s 32A(a)) or to eliminate every ambiguity (per s 32A(b)).[11] Yet that is no basis for suggesting that what the Parliament intended to permit was recognition of new sexual categories after surgical procedures which *produce* ambiguity (see contra RS [28]; CA [243]-[244]).

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7 *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*, (March 2012) at p 36.7, p 44.3.

8 *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*, (March 2012) at pp 28-50.

9 See cll 8-10, 14, Schedule 1, Part 1.1 cll [1.1]-[1.3], Schedule 1, Part 1.2 cl [1.6]; see also Explanatory Memorandum to ACT Bill, p 1, 4, 7-8. The proposed amendments would remove the requirement for "sexual reassignment surgery" as a prerequisite to alter the birth record of a person's sex and, in particular, an intersex person would not need to undergo any clinical treatment to alter the birth record of their sex.

10 At CA [11] (AB 125), [46] (AB 129), [76], [78] (AB 133), [83] (AB 134), [104] (AB 136), [108], [110] (AB 137), [152] (AB 142), [177], [184] (AB 146), [190]-[191] (AB 147), [204] (AB 149); esp at [184] (AB 146), [190]-[191] (AB 147), [204] (AB 149) per Beazley ACJ; see AGAS at [3]-[11] listing various definitions of these terms.

11 *AB v Western Australia* (2011) 244 CLR 390 at [33].

9. As to RS [22] and [49], the Registrar accepted below that the surgical procedure Norrie had undergone meant she met the legislative requirements to register a change of sex from male to female under s 32DA of the Act.[12] Whilst it is correct to say (RS [6]) that the appeal to the Court of Appeal proceeded on the basis that Norrie satisfied the requirement of having undergone a "sex affirmation procedure", that was in the context of the Registrar's acceptance just outlined. The ADT also found that Norrie does not "identify" as either male or female, but rather identifies as "non specific".[13] If a person in Norrie's position did not identify as female, they are not compelled to make such an application. At the time of Norrie's review application, she held both Australian and UK passports identifying her as female.[14]

10. The submissions at RS [23] do not support the proposition that the word "sex" is intended to have a different meaning in s 32A(b) to its binary meaning in s 32A(a). At a fundamental level, the Respondent has not addressed the point that the exercises of power provided for in Part 5A are only available following a surgical procedure for one of the two purposes specified in the definition of "sex affirmation procedure". In relation to the first purpose in s 32A(a), the reference to the term "sex" is binary, as it is used in the phrase "opposite sex". The notion of there being an opposite presupposes a pairing. The existence of twilight does not alter the distinction between night and day (cf RS [19]).

11. In relation to the second purpose in s 32A(b), a "sex affirmation procedure" cannot be undertaken to produce ambiguity or to change to the status of "intersex" (see AS [50]-[52]). It is a procedure carried out to *correct or eliminate ambiguities*. A central basis of the Court of Appeal's reasoning that "sex" in Part 5A extended beyond male and female was based on its erroneous assumption that a person could have a surgical procedure referred to in s 32A(b) and then apply for a "change of sex" under s 32DC *to* the sex of "intersex".[15] Norrie appears to accept that the Court of Appeal did so reason at RS [36]-[38], but does not provide an answer to the central flaw in the Court's analysis. The Registrar did not, and does not, submit that the existence of intersex people is wholly irrelevant to the construction of the Act (contra RS [24], [35], [48]). As the Respondent argues, the existence of intersex conditions has long been known. Such conditions may have lain behind the terms of s 32A(b). The Registrar's point (see AS [52]) is that, given one cannot undergo surgery in order to *change* to intersex, the registration category of "intersex" cannot have been contemplated by Parliament as a "sex" that could be *changed to* after a sex affirmation procedure.

12. Norrie suggests at RS [26] that prior to the enactment of Part 5A "*the law* recognised persons who did not fit within this exclusive binary classification". Yet, apart from the much criticised case of *In the Marriage of C and D*, she has not pointed to any relevant judicial decision giving legal effect to, or registration of, a separate category of sex.[16] Her invocation of *Bellinger v Bellinger* [2003] 2 AC 467 does not assist her argument; on the contrary.

13. Norrie suggests at RS [29]-[31] that the answer to the fact that registration of the categories suggested by the Court of Appeal would mean those persons would find themselves with no definable position under a broad range of statutory provisions lies in the fact that the "default position" under s 32J can be displaced. This submission does not answer the fact that the NSW legislation referred to at AS [39] – all premised on a binary division between the sexes

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12 ADT Reasons [5] (AB 51); CA [210(5)] (AB 150).
13 ADT Reasons [5] (AB 51).
14 ADT Reasons [14] (AB 52).
15 CA [205] (AB 149) per Beazley ACJ; at [240] (AB 155) per Sackville AJA, at [291] (AB 161) per Preston CJ of LEC.
16 AGAS [54] seeks to answer the "legal no-man's land" argument, manifest by *In the Marriage of C and D*, by reference to a Scottish case. Yet that case confirms that the law assumes a binary categorisation.

into "male" and "female" – illustrate the fact that the Parliament regularly draws distinctions between the sexes on a binary basis. There may of course be particular legislation which prevails over the default position created by s 32J of the Act, such that a person is taken to be a different sex to the sex registered under the Act for the purposes of that other legislation.[17] That possibility does not gainsay the point that the central object of the Act is to register particular categories of information. A construction of the Act that leads to the clear identification of what those categories are should be preferred.

14. In this respect s 8(a) of the *Interpretation Act 1987* (NSW) does not provide an answer to the Registrar's submissions regarding the consequences of s 32J of the Act.[18] There is no authority for the proposition that s 8(a) would permit many Acts couched in binary language to apply to persons who sex is recorded as other than male or female. There is no basis for the suggestion that s 8(a) is intended to do the radical work of recognising categories of sex that are not "male" or "female". It is not a registration or recognition provision. Rather, s 8(a) is a generic interpretation provision intended to deal with gender references not intended to have particular significance (and would encompass non-human legal persons).

15. The submission that Norrie only seeks registration of one additional category ("non-specific") as a "shorthand description" (RS [33]) does not answer the fact that the analysis of the Court of Appeal leaves the categories of "sex" effectively open-ended (see AS [43]). Further, Norrie elsewhere submits that "intersex" is another possible category that could appropriately apply to her (RS [39]). Norrie submits that there "should be no reason to fear that the Registrar will not have the means, in future cases, of discerning genuine applications from non-genuine case" (RS [34]). By what criteria? An applicant's "perception of their gender" or whether they genuinely "identify" as one sex or the other is not an eligibility criteria in an application under Part 5A (cf RS [34]). The medical opinion required in the statutory declaration required by s 32DB is only as to whether the applicant has "undergone a sex affirmation procedure". Norrie's submissions signally fail to address what criteria are to be deduced from the statutory provisions as to what other categories are to be recognised by the Registrar or the Tribunal, other than vaguely referring to "factual findings relating to Norrie's application, influenced as well, by medical opinion" (RS 32). As noted above, these matters are complex and highly contested. Norrie submits that it was no part of the Court of Appeal's role "to explore the outer limits of what might ... be recorded" (RS [32]). The complete absence of statutory guidance bespeaks very clear, well-established, binary limits.[19]

16. Whilst it is correct to say that the amendments to the *Anti-Discrimination Act* and the amendments to introduce Part 5A into the subject Act are not interdependent (RS [42]), the amendments were introduced at the same time and the second reading speech in relation to the amendments contains multiple references premised on the basis that there are only two sexes. Norrie also ignores (at RS [43]) the fact that while Parliament chose to include the term "indeterminate sex" in the definition of "transgender person" in s 38A of the *Anti-Discrimination Act*, Parliament did not include this as one of the possible registration outcomes permitted under Part 5A of the subject Act. At RS [43], she also ignores the fact that the concept of a "transgender" person in the *Anti-Discrimination Act* (which includes a

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[17] The application of s 61H of the *Crimes Act* (NSW) to a man who has a surgically-constructed vagina (but has not chosen to apply for a change of sex from male to female) may be one example – cf AGAS [52].

[18] Cf AGAS [49]-[51]; see AS [38]-[39].

[19] Registration of births in NSW has been required since at least 1855: see ss. 8, 21, 25 and Sch C of the *Births Deaths and Marriages Act of 1855*.

person of "indeterminate sex" who identifies as a member of a *particular* sex) involves the use of the term "sex" in a binary sense.[20]

17. In relation to the reference to "beneficial legislation" at RS [46] (also RS [17]), there are limits on the general rule of construction that such legislation ought to be given a liberal construction. In *AB v Western Australia*, at the same time as recognising that general rule of construction, this Court stated that in "construing such [human rights] legislation 'the courts have a special responsibility to take account of and give effect to the statutory purpose'".[21] A suggestion that implicitly there is a human right to recognition of some sex beyond male and female and/or that there was a statutory purpose to this effect is to beg the question at issue. In construing a statute "it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose".[22]

18. ***Submissions of AGA***. If AGA is given leave to be heard, then the following additional submissions are made in reply to those of its submissions which are distinctive. AGA contends that "intersex" ought not be allowed as a "sex" registration category at all,[23] noting that there is "no consensus as to what labels might be appropriate and what labels might not be" (AGAS [59]), and that most intersex people will self-identify and seek to be legally identified as male or female (AGAS [17] and [61]). AGA contends that only one additional registration category should be allowed and suggests that any one of three different variants could be adopted as that category: either "unspecified", "not specified" or "not stated".[24]

19. It is notable that, like Norrie, AGA fails to identify criteria from the statute indicating what further categories are to be recognised. AGA instead identifies the question as "what term ought to be used to record the sex of a person other than male or female", and says "this Court ought to determine the appropriate term to be used as a matter of statutory construction" (ASAS [29(b)]). That is a plea for judicial legislation in an area it concedes (indeed, submits) to be contested and complex in nature. As for its suggested category, it appears to concede that it in fact it is not a category at all, saying a term of the kind it suggests "does not seek to identify a 'third sex', but simply to indicate that the person's sex is not specified". That kind of term does not constitute registration of entry into (or confirmation of) a category, but an express statement that the sex has not been stated.[25] The Act provides for *registrations*. Much the same point may be made, incidentally, of Norrie's proposed category of "non specific", which suggests that there is no new "sex" (or that there has been no "change of sex" or that no sex has been *affirmed*) as the result of the sex affirmation procedure.

Dated: 30 January 2014

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20 See in particular s 38Q of the *Anti-Discrimination Act* referring to "opposite sex"; see further AS [59].
21 *AB v Western Australia* (2011) 244 CLR 390 at [24] (citation omitted).
22 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [28].
23 AGAS [59]-[61]; cf RS [39], and CA [205] (AB 149) per Beazley ACJ; at [240] (AB 155) per Sackville AJA, at [291] (AB 161) per Preston CJ of LEC.
24 See AGAS at [60].
25 A point Beazley ACJ made at CA [202] (AB 149) with respect to the term "not specified".