

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No S273 of 2013

BETWEEN

**NSW REGISTRAR OF BIRTHS DEATHS
AND MARRIAGES**

Appellant

and

NORRIE

Respondent

**SUBMISSIONS ON BEHALF OF A GENDER AGENDA INC.,
SEEKING LEAVE TO APPEAR AS AMICUS CURIAE**



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Part I: PUBLICATION OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

Part II: TERMINOLOGY

2. It is necessary before commencing these submissions to explain some terms that will be used in these submissions, and were used in the decision below and in the submissions of the parties. A Gender Agenda Inc. (**AGA**) notes that some of the terms are contested and that the court below and the parties may use them differently. Some but not all are legally defined in legislation (and sometimes differently defined in Commonwealth and State legislation). Further, there may not be broad agreement in the general community, government bodies, the academic community, the medical community or the intersex and gender diverse communities as to the meaning and boundaries of some terms.¹ AGA has sought to identify the most common usage of the terms amongst these groups.
3. **"Biological sex"** refers to the biological indicators of sex, including chromosomes, hormones, genitals and reproductive organs.² Some of these can be altered and some cannot. Commonly, a person's biological sex is male or female, but naturally occurring variations in biological sex characteristics are such that some people have a combination of male and female characteristics or lack some common characteristics. Sometimes variation may arise due to medical intervention. Due to this variation, it is not correct to assume that every person can be categorised as either male or female. Some people may be neither, some people may be both — they may be described as of **"indeterminate sex"**,³ a broader term than "intersex", which is discussed below.

¹ See discussion in Australian Human Rights Commission, "Sex Files: The Legal Recognition of Sex in Documents and Government Records" (2009), at 7-8.

² See, eg, Commonwealth Attorney-General's Department, "Australian Government Guidelines on the Recognition of Sex and Gender" (July 2013), at 3; Mares, Newman, Warren and Cornish, *Clinical Skills in Infant Mental Health* (2005), 186.

³ See, eg, Commonwealth Attorney-General's Department, "Australian Government Guidelines on the Recognition of Sex and Gender" (July 2013), at 9; Victorian Equal Opportunity and Human Rights Commission and Transgender Victoria, "Guideline: Transgender People at Work – Complying with the *Equal Opportunity Act 2010* in Employment" (May 2013).

4. **"Gender"** refers to the cultural and social roles and behaviours expected of men and women:⁴ masculinity and femininity. An aspect of gender is **"gender presentation"** or **"gender expression"**, referring to how a person presents their gender to others, through clothing, hairstyles, mannerisms, voice and other behaviours.
5. **"Gender identity"** refers to a person's subjective identification as male, female, both or neither.⁵ It is different from gender. **"Sex identity"** is also sometimes used in this way.⁶
6. **"Sexual identity"** is a term that is sometimes used to refer to a person's **sexual orientation**, that is whether the person is sexually attracted to men, women, both or neither.⁷ It is also sometimes, but less commonly, used as an equivalent to "gender identity",⁸ and was used in that way by the Court below.⁹ Although that it is not its common usage in Australia, it has been used in that way in some academic literature,¹⁰ and its usage by the Court of Appeal should be understood as such, rather than as an error.¹¹
7. **"Sex affirmation surgery"** (in its ordinary usage, rather than as a defined legislative term) or **"sex reassignment surgery"** refers to surgical procedures carried out to alter a person's sexual and/or reproductive anatomy so that it no longer fully corresponds to the categories of "male" or "female", as the case may be. Generally such surgery is directed at aligning a person's body with his

⁴ See, eg, Mares et al, *Clinical Skills in Infant Mental Health* (2005), at 185.

⁵ See, eg, Victorian Equal Opportunity and Human Rights Commission and Transgender Victoria, "Guideline: Transgender People at Work – Complying with the *Equal Opportunity Act 2010* in Employment" (May 2013), at 7; Mares et al, *Clinical Skills in Infant Mental Health* (2005), at 185. Cf the legal definition of the term "gender identity" in s 4 of the *Sex Discrimination Act 1984* (Cth).

⁶ See, eg, Australian Human Rights Commission, "Sex Files" at 7-8.

⁷ For examples of this usage of "sexual identity" see, eg, Smith, Risse, Richters, Grulic and de Visser, "Sex in Australia: Sexual identity, sexual attraction, and sexual experience among a representative sample of adults" (2003) 27 *Australian and New Zealand Journal of Public Health* 138; Aids Council of New South Wales (ACON), "Gender and Sexual Identity", <http://www.acon.org.au/youth/Sexuality> (accessed at 22 January 2014).

⁸ For examples of this usage of "sexual identity" see, eg, use by the Royal Women's Hospital, "Sexual Identity and Orientation" <https://www.thewomens.org.au/health-information/sex-sexuality/our-sexuality/sexual-identity> (accessed at 22 January 2014).

⁹ CA at [205]-[206], [210], [233] (Appeal Book at 149, 150, 154).

¹⁰ See, eg, Taitz, "Confronting Transsexualism, Sexual Identity and the Criminal Law" (1992) 60 *Medico-Legal Journal* 60 (cited by the court below: CA at [230]).

¹¹ Cf Registrar's submissions at [34]-[35].

or her gender identity. Surgical interventions of this kind may include construction of breasts, removal of the penis, construction of a vagina, bilateral mastectomy, hysterectomy and phalloplasty (although the latter is not performed in Australia¹²).

8. "**Transsexual**" refers to persons who whose gender identity is different from the biological or anatomical sex with which they were born.¹³ That is, they identify as male when they were born with typical female sex characteristics, or as female when they were born with typical male sex characteristics. Transsexuals are not intersex persons because they were not born with congenital differences in biological sex. A transsexual may or may not have had sex reassignment surgery.
9. "**Transgender**" is a broader term used by persons whose self-identity does not unambiguously conform to that socially and culturally expected of a person with their biological or anatomical sex — ie a person whose self-identity and gender presentation does not conform unambiguously to conventional notions of masculinity or femininity.¹⁴ It can include transsexuals, but can also include, for example, persons who identify as female when their body is female or male when their body is male, but whose behaviour and appearance is not congruent with that socially expected of their sex, such as masculine or "butch" women, effeminate men or androgynous people. Transgender people may or may not have had medical intervention in relation to their sex characteristics.
10. "**Gender dysphoria**" is the medical diagnosis used in relation to transsexual persons. It denotes "strong and persistent feelings of discomfort with one's assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex."¹⁵ A diagnosis of gender

¹² As discussed in *AB v Western Australia* (2011) 244 CLR 390, at [15].

¹³ See, eg, Grenfell and Harris, "Gender Regulation: Restrictive, Facilitative or Transformative Laws?" (2012) 34 *Sydney Law Review* 761; Corrections Victoria, "Operating Guidelines for the Management of Prisoners with Intersex Conditions or Transsexualism" (2009), at 4.

¹⁴ See, eg, Commonwealth Attorney-General's Department, "Australian Government Guidelines on the Recognition of Sex and Gender" (2013), at 10; Office of the UN High Commissioner for Human Rights, "Fact Sheet: LGBT Rights – Frequently Asked Questions" https://unfe-uploads-production.s3.amazonaws.com/unfe-7-UN_Fact_Sheets_v6_-_FAQ.pdf (accessed at 21 January 2013).

¹⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, 2000), at 535, quoted in *AB v Western Australia* (2011) 244 CLR 390 at [14].

dysphoria is generally a necessary precursor to the carrying out of sexual reassignment surgery on a person who is not an intersex person.

11. "**Gender diverse**" is an umbrella term used to describe transsexuals, transgender people, cross-dressers, and other sex or gender variant or gender non-conforming people.¹⁶

12. "**Intersex**" is a term used to refer to persons who, due to congenital biological differences, have sex chromosomes, gonads or internal or external sexual anatomy that do not fit clearly into the male/female binary.¹⁷ Historically, intersex people were referred to as "hermaphrodites", "pseudo-hermaphrodites" or "true hermaphrodites", but that terminology is no longer in general usage.

13. AGA agrees with the Registrar that the congenital differences of an intersex person occur regardless of and prior to any surgical affirmation procedure.¹⁸ An intersex person is not transsexual and an intersex person does not have gender dysphoria. Intersex is a biological characteristic or set of characteristics, not a form of gender identity or sexual identity. That is, intersex persons have physical differences in reproductive parts such as the testes, penis, vulva, clitoris and ovaries; and may also have physical differences in secondary sexual characteristics such as muscle mass, hair distribution, breast development and stature. As a consequence of these differences, the person may have anatomical or biological features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male.

14. Chromosomal variations include:¹⁹

- a. the presence of XXY sex chromosomes (Klinefelter syndrome);
- b. a single X chromosome (Turner syndrome); and
- c. XYY chromosomes.

¹⁶ See, eg, Commonwealth Attorney-General's Department, "Australian Government Guidelines on the Recognition of Sex and Gender" (July 2013), at 9.

¹⁷ See, eg, Greenberg, *Intersexuality and the Law* (2012), at 1; "Australian Government Guidelines on the Recognition of Sex and Gender" (July 2013), at 9; World Health Organization, "Genomic Resource Centre - Gender and Genetics" <http://www.who.int/genomics/gender/en/index1.html> (accessed at 21 January 2014).

¹⁸ Registrar's submissions at [49].

¹⁹ Greenberg, *Intersexuality and the Law* (2012), at 13.

15. Gonadal variations include the presence of:²⁰
- a. ovotestes (a combination of ovarian and testicular tissue); or
 - b. one ovary and one testicle.
16. Hormonal variations include:²¹
- a. complete androgen insensitivity syndrome (CAIS), which causes an XY fetus to develop external female genitalia but not internal female reproductive organs;
 - b. 5 alpha reductase deficiency (5-ARD), which causes an XY fetus to appear female at birth, but at puberty the body may masculinise, including the descent of the testes and the development of a functional penis; and
 - c. congenital adrenal hyperplasia (CAH), where the person has XX chromosomes and ovaries, but the fetus' body is masculinised and the external genitalia may be more similar to male genitals.
17. Some of these differences are apparent at birth, where the infant's external genital organs are ambiguous, in which case surgery may be performed on the child within the first 18 months of life (although this is controversial and becoming less common). In some cases, however, the congenital difference is not detected until puberty, and surgery may be performed at this time. In still other cases, the difference is not detected until adulthood; again, surgery may then be performed. Most intersex persons will self-identify, and seek to be legally identified, as either male or female. But some will self-identify as both male and female; and others as neither male nor female.

Part III: BASIS OF INTERVENTION AND WHY LEAVE TO APPEAR SHOULD BE GRANTED

18. Leave to appear as amicus curiae is sought on the basis set out in the affidavit of Peter Hyndal, affirmed on 20 December 2013. AGA is an organisation that provides information, support and advocacy services to gender diverse and intersex communities at a national level. It also provides information and education about sex and gender issues to persons outside those communities.

²⁰ Greenberg, *Intersexuality and the Law* (2012), at 14.

²¹ Greenberg, *Intersexuality and the Law* (2012), at 14.

Its nature and functions are set out in more detail in paragraphs 5 to 10 of Mr Hyndal's affidavit. Of particular relevance to the present proceeding, AGA represents both intersex persons and gender diverse persons, making it uniquely qualified to make submissions in a case that involves both sets of issues. It has expertise and experience in this area, as demonstrated by the activities set out in paragraphs 11 and 12 of Mr Hyndal's affidavit.

19. There are three reasons why leave to appear as amicus should be granted.

20. **First**, the issues raised by this case are of importance to a wider group of people than the parties to the litigation. The availability of a designation other than "male" or "female" on a recognised details certificate under the *Births, Deaths and Marriages Registration Act 1995* (NSW) (the **Act**) is likely to have a particular impact on intersex persons in New South Wales, perhaps more than any other group in society, as a consequence of their biological, congenital differences from the male/female norm. AGA seeks to make submissions in relation to the way in which the Act operates, and should be construed, on behalf of intersex persons and gender diverse people that it represents.

21. Further, this Court's decision, although confined to the operation of the provisions relating to recognised details certificates, will necessarily apply also to applications to alter the Register of Births under Part 5A of the Act because the term "sex" is used throughout Part 5A and because the definition of "sex affirmation procedure" in s 32A is common to both "recognised detail certificates" and to alterations to the Register under Part 5A. The decision may also have implications for the initial registration of births, and for later corrections to the Register under s 45 of the Act, because the requirement to record a child's "sex" at the time of birth, which stems from the *Births, Deaths and Marriages Registration Regulations 2011* (NSW) (the **Regulations**), will be construed in light of the meaning of "sex" in the Act.

22. Finally, this Court's decision will be highly persuasive in the interpretation of other, similar legislation in other jurisdictions. Thus the rights and interests of intersex people throughout Australia may be affected by this proceeding.

23. Norrie is not an intersex person as that term is generally used. The factual record is relatively sparse, but indicates that Norrie was born a male and

underwent sexual reassignment surgery in 1989.²² She²³ was diagnosed as suffering from gender dysphoria.²⁴ There is no indication that Norrie had congenital biological differences in her chromosomes, gonads or other anatomy. Rather, Norrie identifies as having a non-specific gender identity²⁵ and, as a result of her surgery, she is of indeterminate sex. Norrie did not seek to be recognised as intersex in her application to the Registrar of Births Deaths and Marriages,²⁶ although the term “intersex” was used to describe her in the hearing before the Court below.²⁷

10 24. Further, putting aside the question of the appropriate terminology to describe Norrie, she does not represent persons affected by the issues raised in this matter. AGA, in contrast, represents many such persons. The views and interests of that broader group of intersex and gender diverse persons are not precisely aligned with the views and interests of Norrie.

20 25. As French CJ observed in *Wurridjal v Commonwealth*,²⁸ an amicus may be permitted to intervene where it is “in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer”. Significantly in that regard, AGA’s proposed submissions contend that a different terminology be used on recognised details certificates to reflect a person who is neither male nor female than the terminology advanced by Norrie. Norrie contends that “intersex” could be one “possible description”;²⁹ whereas AGA contends that “unspecified” (or similar) should be used, and that “intersex” is not appropriate. This is an important issue and one on which the Court ought to have the benefit of submissions from a broader perspective than is offered by the parties.

²² *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 (CA) at [6] (Appeal Book at 125).

²³ The terms “she” and “her” are used because AGA understands that that is Norrie’s preference where a gendered term is used.

²⁴ Appeal Book at 8 (File note); Appeal Book at 12 (File Note).

²⁵ CA at [6] (Appeal Book at 125); Norrie’s submissions at [5.2].

²⁶ Appeal Book at 5, requesting her sex to be recorded as “non specific”.

²⁷ CA at [206] (Appeal Book at 149).

²⁸ (2009) 237 CLR 309 at 312. See also *Levy v Victoria* (1997) 189 CLR 579 at 604-5, 650-652.

²⁹ Norrie’s submissions at [39].

26. **Second**, by reason of its expertise and experience (summarised in Mr Hyndal's affidavit) AGA is well placed to provide that broader assistance to the Court. That is particularly so given AGA's extensive experience in representing and dealing with the wider group of people who may be affected by the outcome of this proceeding. Drawing on this expertise, AGA's submissions offer the Court assistance with terminology and concepts, as set out in Part II above, in more detail than is offered in the parties' submissions.

27. **Third**, no prejudice would be occasioned to the parties should leave be granted. AGA's submissions are relatively brief and raise no new issues. The short time sought for oral argument, if granted, will not extend the hearing beyond the day for which it is listed. The parties will suffer no prejudice if AGA is granted leave to appear as amicus.

Part IV: APPLICABLE STATUTORY PROVISIONS

28. AGA agrees with the applicable statutory provisions set out in the Registrar's submissions, save that AGA would add ss 3, 6, 12, 14, 17, 20, 45 and 49 of the Act; and s 8(a) of the *Interpretation Act 1987* (NSW). These are set out in full in Annexure A.

Part V: SUBMISSIONS

29. These submissions address two issues:

- a. Does the Act permit the recording of a person's sex in the Register as other than male or female? AGA contends, like Norrie, that it does.
- b. If the answer to the first question is yes, what term ought to be used to record the sex of a person as other than male or female? AGA contends that the appropriate term is one of "unspecified", "not specified" or "not stated" (as an alternative to male and female). "Intersex" is not an appropriate term. Further, AGA contends that the appropriate term ought not be left as a matter to be determined by the Registrar or Tribunal on a case-by-case basis, leading potentially to a plethora of terms. Rather, this Court ought to determine the appropriate term to be used as a matter of statutory construction.

A. The legislative scheme

30. AGA contends, like Norrie, that the Act permits the recording in the Register of a person's sex as other than male or female. This turns principally on the construction of s 32DC, but construction of that section is informed by s 32A and s 32DA and must be undertaken with regard for the context of the Act as a whole and by reference to its objects and purposes.³⁰ Contrary to the Registrar's submissions at [52], the existence of intersex persons is not irrelevant to the construction of the term "sex" in Part 5A — such persons are an identifiable group intended by Parliament to benefit from the insertion of Part 5A and that intention is of central relevance to the construction of terms used in Part 5A.

31. Sections 32DA to 32DD make provision for registration of a change of sex for a person whose birth is not registered under the Act or the law of another State or Territory³¹ — that is, a person who was not born in Australia.

a. Section 32DA provides for the making of an application for "*the registration of a person's sex in the Register*". Notably, a person does not apply for the registration of a change of sex, but of their sex. A person may only apply under s 32DA if the person has undergone a "sex affirmation procedure" (amongst other requirements).

b. "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.*

(This requirement differs from the requirement considered by this Court in *AB v Western Australia*, which required a "*medical or surgical procedure*".³²)

³⁰ *AB v Western Australia* (2011) 244 CLR 390 at [10].

³¹ Section 32DA(1)(e); "corresponding law" in that section is defined in s 3 of the Act to mean a law of another State that provides for the registration of births; and "State" is defined to include a Territory.

³² In the Western Australian legislation, the preconditions to the grant of a recognition certificate were set out in s 15(1) of the *Gender Reassignment Act 2000* (WA). One of those preconditions

- c. Section 32DC provides that the Registrar must register or decline to register a person's "change of sex" where the person has applied for such a change under s 32DA.
 - d. Section 32DD provides for the Registrar to issue a certificate certifying the particulars contained in the entry in the register (a "recognised details certificate", as defined in s 32A). Notwithstanding that s 32DC provides for the Registrar to register a person's "change of sex" rather than their "sex", it is apparent from the definition of "recognised details certificate" in s 32A that the Act requires, and the Registrar issues, a certificate that certifies the person's sex (rather than that the person has changed sex).
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- 32. Sections 32B to 32D, 32E and 32F make similar provision for persons whose birth was registered in New South Wales. However, rather than issuing a recognised details certificate under s 32DD, the Registrar must issue a new birth certificate under s 32E.
 - 33. Part 5A of the Act was inserted into the Act by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) (the **Amending Act**). The term "change of sex" is not defined; nor is the term "sex".
 - 34. Notably, in relation to the registration of births, the Act does not require that the Register record the sex of a child born in New South Wales, nor that a birth certificate do so. Rather, the Act requires that a person giving notice of a birth must specify the particulars required by the regulations (ss 12(1), 14) and that the Registrar must include in the register the particulars required by the regulations (s 17(1)). Regs 4 and 5 of the Regulations provide that "sex" is one of the particulars to be provided and recorded under these sections.
 - 35. However, if the particulars available to the Registrar are incomplete the Registrar may register the birth on the basis of incomplete particulars: s 17(2). Thus if a child is born with an indeterminate sex it is possible for the Registrar to register the birth without the child's sex being specified, if the child's sex has not been provided as part of the particulars. In that case, the entry for "sex" in the
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was a 'reassignment procedure'. The term '*reassignment procedure*' was defined by s 3 to mean '*a medical or surgical procedure*.'

register would, presumably, remain blank. It would as a matter of fact be “unspecified”, even if that word were not used in the Register.

36. Although this case does not in terms address whether the Register of Births, and a birth certificate, might, at birth, record a sex other than male or female, AGA contends that the meaning of “sex” in Part 5A of the Act will be relevant in the interpretation of the term “sex” in the Regulations. That is, if the term “sex” in Part 5A is understood to permit the recording of a person’s sex as other than male or female, it is likely that the term “sex” in the Regulations will also be understood to permit the provision and recording of a child’s sex at birth as other than male or female.³³

B. Does the Act permit the recording of a person’s sex in the Register as other than male or female?

37. AGA supports the submissions made by Norrie on the first question, namely that the Act permits the recording of a person’s sex in the Register as other than male or female. The decision of the Court below was correct. Briefly, the reasons for this contention are as follows.

Reasons to interpret “sex” in Part 5A more broadly

38. As a matter of fact there are persons who do not fit into the male/female binary as it is generally understood. This is reflected in their biology and/or their anatomy. They are of indeterminate sex; and some self-identify as such. Thus their sexual characteristics and their self-identity align. Norrie is such a person. Other such persons are that subset of intersex persons who identify as other than male or female. A construction of the Act that is at odds with this reality ought not be preferred.³⁴
39. Further, the beneficial purpose of the Amending Act, which inserted Part 5A of the Act, was to permit people who have undergone sex affirmation surgery to obtain a certificate that reflects the alignment of their biology/anatomical sex

³³ Although not raised in this case, AGA contends that recording a child’s sex in this way could only be done with the consent of the child’s parents; such a designation could not be imposed by the Registrar.

³⁴ The Act’s objects include the keeping of registers for recording and preserving information: s 3(d). This ought to be understood as a reference to information that is correct. This is reflected in the injunction that one of the Registrar’s functions is to “maintain the integrity of the Register”: s 6(a)(1).

with their self-identity. A construction that permits a person whose biological sex is neither male nor female and who self-identifies as neither male nor female to obtain a certificate recognising that they are neither male nor female gives effect to the purpose of the Amending Act and ought to be preferred.³⁵

40. The text of s 32A of the Act reflects this factual state of affairs in its reference to “ambiguities relating to the sex of the person”.

41. As explained above, the Act in terms permits the Registrar to register a birth without recording the sex of the child; it thus contemplates that there may be persons for whom it is not appropriate to specify a sex. If this is so, it is difficult
10 to see any basis for using a word in the Register, and on a certificate, to denote that fact, such as “not specified”.

42. There is no reason to confine the phrase “change of sex” to a change from male to female or vice versa. Quite clearly a person may change from being of indeterminate sex to being either male or female — indeed it is this to which paragraph (b) of the definition of “sex affirmation procedure” in s 32A is principally directed. It is equally possible, albeit more rare, for a person to change from either male or female to being of indeterminate sex. This is Norrie’s circumstance.

No reason to confine “sex” to “male” and “female” only

20 43. There are no good policy reasons for requiring that all persons be legally classified as male or female under the Act. To the contrary, such an approach may have negative policy impacts. In particular, such a requirement may lead to the continued practice of routine surgical intervention on intersex infants and children to “normalise” their sex, which may violate the child’s right to bodily integrity and autonomy, particularly if it removes his or her future ability to have children.³⁶

³⁵ *Interpretation Act 1987* (NSW) s 33; and see *AB v Western Australia* (2011) 244 CLR 390 at [5], [21]-[23], [25], [31], [37]. Cf Registrar’s submissions at [37].

³⁶ See discussion in Greenberg, *Intersexuality and the Law* (2012), Chapter 2, especially at 32-35. That is not to say that surgical procedures can never be performed on intersex infants: there may be instances where surgical intervention on an infant is medically warranted. See also Commonwealth, Senate Community Affairs References Committee, “Involuntary or Coerced Sterilization of Intersex People in Australia” (October 2013) at 73-5; Victoria, Department of Health, “Decision-making Principles for the Care of Infants, Children and Adolescents with Intersex Conditions” (February 2013).

44. Further, various Australian institutions already recognise the fact that not all persons necessarily fit into the male-female binary. For example:

- a. By reason of the *Australian Government Guidelines on the Recognition of Sex and Gender*, all federal government departments and agencies now recognise individuals as either male, female or unspecified. This includes, for example, records for the purposes of the electoral roll and access to Medicare benefits. Neither sex reassignment surgery nor hormone therapy is necessary for recognition of a change of gender in Commonwealth records.³⁷
- 10 b. A person may receive a passport with an X (indicating unspecified) rather than an M or an F. This designation is permitted under the International Civil Aviation Organisation Standards. There is no requirement for surgical intervention, nor does the person need an amended birth certificate to obtain a passport with an X. However, the person must have had, or be receiving, "appropriate clinical treatment for gender transition to a new gender" or be an intersex person who does not identify with the sex assigned to them at birth.³⁸
- c. Persons convicted and sentenced to jail in New South Wales may be placed in a jail that does not accord with the sex recorded on their birth certificate.³⁹ Other States and Territories also have policies to
20 accommodate this.⁴⁰

³⁷ Commonwealth Attorney-General's Department, "Australian Government Guidelines on the Recognition of Sex and Gender" (July 2013), at 4.

³⁸ See Commonwealth Department of Foreign Affairs and Trade, Australian Passport Office, "Sex and Gender Diverse Passport Applicants: Revised Policy", <https://www.passports.gov.au/web/sexgenderapplicants.aspx> (accessed at 22 January 2014).

³⁹ New South Wales, Department of Corrective Services, "Operations Procedures Manual", at Part 7.3 (Management of Transgender Inmates) (2002) http://www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0004/294007/Sec-7.23-Management-of-Transgender-Inmates-v3.pdf (accessed at 22 January 2014).

⁴⁰ See, eg, Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007 (ACT), an instrument made under section 14 of the *Corrections Management Act 2007* (ACT); Corrections Victoria, "Operational Guidelines for the Management of Prisoners with Intersex Conditions or Transsexualism" (May 2009); Queensland Corrective Services, "Procedure – Transgender Offenders" (15 August 2008) http://www.correctiveservices.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmprotransgender.shtml (accessed at 21 January 2014).

45. The reasons given by the Registrar for confining the terms “sex” in Part 5A to male and female are unpersuasive, for the reasons given by Norrie in her submissions. To say that the Australian legal system is founded on a “deep-seated assumption of two sexes,”⁴¹ and that the binary assumption is “long-held” and “deeply ingrained”⁴² is to ignore both recent developments in law and policy in Australia and the fact of the existence, throughout history, of individuals who cannot be classified as wholly male or wholly female.

10 46. The Registrar’s submissions, including on legislative history and Parliament’s intention, also ignore the now relatively longstanding recognition of more than two genders in s 8(a) of the *Interpretation Act 1987* (NSW) at the time the Act was enacted. That section provides that “a word or expression that indicates one or more particular genders shall be taken to indicate every other gender”.⁴³

47. This is a modern formulation of the provision found in earlier interpretation legislation that “words importing the masculine gender shall include females”.⁴⁴ Provisions of this kind, although expressed in the language of gender, are clearly directed at (and have historically been understood to apply to⁴⁵) words associated with sex, in particular “male” and “female”. Section 8(a) indicates that Parliament had before 1996 already adopted a less rigid approach to sex and gender in legislation than the Registrar’s submissions suggest.

20 Legislation said to premise on a male-female binary

48. AGA agrees with Norrie that the existence of other legislation said to be premised on a male-female binary is no obstacle to the recognition under Part 5A that a person is neither male nor female. However, AGA’s submissions are somewhat different from Norrie’s submissions on this issue.

⁴¹ Registrar’s Submissions at [33].

⁴² Registrar’s Submissions at [29].

⁴³ This formulation was in the *Interpretation Act* as passed in 1987 and has not been altered. Other States and the Commonwealth make similar provision: see, eg, *Acts Interpretation Act 1901* (Cth) s 23(a); *Interpretation of Legislation Act 1987* (Vic) s 37(a). Cf *Acts Interpretation Act 1915* (SA) ss 26(a) and (ab), which provide that “every word of the masculine gender will be construed as including the feminine gender” and vice versa.

⁴⁴ See, eg, *Interpretation Act 1897* (NSW) s 21(a); *Imperial Acts Adoption Act 1834* (NSW) s 21.

⁴⁵ See, eg, *O’Brien v McCormick* [2005] NSWSC 619 at [45].

49. First, AGA contends that s 8(a) of the *Interpretation Act 1987* (NSW), quoted above, will permit many Acts couched in binary language to apply to persons whose sex is recorded as other than male or female.
50. Thus the Registrar's recitation of a selection of Acts that are said to be "premised on" a binary division between male and female, or to use the term "sex" in conjunction with "opposite sex", is insufficient to enable this court to conclude that each of those Acts necessarily requires the division of persons into the category of male and female in order to confer rights and liabilities. Each Act will need to be construed in light of the direction in s 8(a). For example, s 55(4) of the *Industrial Relations Act 1996* (NSW), which refers to "male and female employees" for the purposes of adoption leave, should be understood in light of s 8(a) of the *Interpretation Act* to include persons whose sex or gender is other than male or female. A similar approach would be taken to s 34(1) of the *Conveyancing Act 1919* (NSW) (which provides for the vesting of property in male and female heirs).
51. Further, to the extent that s 8(a) of the *Interpretation Act* is displaced by the terms of an Act, so that a reference to male or female is confined to males or females as the case may be, s 32J of the Act then has work to do. That section specifically contemplates that a person's recorded sex is their sex for the purposes of the laws of New South Wales, subject to those laws. Thus where a law requires that persons be classified as either male or female, a person whose sex is recorded as other than male or female under the Act will nonetheless be assigned a sex for the purposes of the other law.⁴⁶ This means that such persons' rights and liabilities under those laws of New South Wales that require classification as either male or female are not removed by the operation of Part 5A; rather, Part 5A, through the operation of s 32J, specifically recognises that other laws may prevail over the sex recorded pursuant to an application under Part 5A.
52. Section 61H of the *Crimes Act 1900* (NSW) (the **Crimes Act**), taken from the Registrar's submissions at [39] fn 19, may be used as an example. That section defines "sexual intercourse" for the purpose of Division 10 (which deals with offences of rape and sexual assault) to mean, inter alia, "*sexual connection*

⁴⁶ A process acknowledged in the Registrar's Submissions at [31(e)].

occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person".

- a. Because of the specific use of "female person" in relation to penetration of the genitalia, as opposed to "any person" in relation to penetration of the anus, it appears that s 61H displaces the operation of s 8(a) of the *Interpretation Act*, so that only a "female person" is to be captured.
- b. However, "female person" in the Crimes Act is to be interpreted in the context of that Act and is not necessarily confined to those who are recorded as female under the Act. It thus displaces or overrides s 32J of the Act.
- c. "Female person" is to be understood in the Crimes Act as referring to a person who has a vagina (including a surgically constructed vagina), even if that person's sex is recorded as male under the Act.
- d. For example, a male-to-female transsexual who has a surgically constructed vagina, but has not yet had her application for a change of sex under Part 5A processed by the Registrar, is nonetheless a "female person" for the purposes of the Crimes Act and is protected by its provisions. Protection from sexual assault under the Crimes Act does not turn on the person having her change of sex recorded under the Act.⁴⁷

53. A similar analysis applies in relation to Commonwealth laws (including the *Marriage Act 1961* (Cth)) and to the laws of other States and Territories that use binary language of gender. Each jurisdiction would of course be considered in light of its particular interpretation legislation.
54. On no view is it necessary to confine persons who are recorded in the Register as neither male nor female to a "legal no-man's land".⁴⁸ The approach adopted by the Family Court in *In the Marriage of C and D (falsely called C)*, invoked *in terrorem* by the Registrar, would not be followed today; and was not the way the

⁴⁷ In addition, a female-to-male transsexual who has not had his vagina removed surgically, but who has had a change of sex recorded under the Act, would be a female person for the purposes of the Crimes Act and thus penetration of that person's vagina would constitute "sexual intercourse" within the meaning of s 61H. This result is accommodated by s 32J.

⁴⁸ Registrar's Submissions at [14].

legal treatment of intersex persons was approached in the United Kingdom even prior to that decision.⁴⁹

C. What terminology should be used in recording of a person's sex in the Register as other than male or female?

55. AGA contends that the terminology to be used to record a person's "sex" in the Register and on a recognised details certificate is a matter of construction of s 32DD and arises (at least implicitly) on the grounds of appeal in this Court.

10 56. Each of the grounds of appeal in this court is directed to whether the Act authorises the use of a particular term on the birth certificate and thus each raises the question of what terminology the Act does and does not authorise. Further, the terminology is of considerable importance and ought not be left to the Registrar or the Tribunal. Rather, it ought to be determined by this Court.

57. If this Court holds that the Act permits the recording of a person's sex as something other than male or female, AGA contends that this Court should elucidate the construction of the term "sex", and the operation of s 32DD, in relation to the terminology to be used for a person who is recorded in the register as neither male nor female.

20 58. The Court below appeared to contemplate that a variety of terms may be appropriately used, on a case-by-case basis — that is, that there might be multiple sexes that could be recorded in the Register. The examples given by Beazley ACJ were intersex, androgynous and transgender, as well as non-

⁴⁹ See *Forbes-Sempill v Forbes-Sempill*, 29 Dec 1967, Court of Session Outer House, available to be examined in the National Archives of Scotland, CS258/1991/P892. AGA has located an unreported copy of the decision that can be made available to the court and parties. The case is discussed in Whittle, "Sex Changes"? Paradigm Shifts in 'Sex' and 'Gender' Following the Gender Recognition Act" (2007) 12(1) *Sociological Research Online*, at 4.1-4.5; and Barnes, "Gender Identity and Scottish Law: the Legal Response to Transsexuality" (2007) 11 *Edinburgh Law Review* 162 at 170-171.

The case concerned inheritance of a baronetcy. Ewan Forbes-Sempill had been raised as a woman but had as an adult obtained an amended birth certificate recording him as male. He had also married a woman. He stood to inherit the baronetcy, but his brother challenged his right to inherit, claiming Ewan was a woman. Lord Hunter held that a person had to be one sex or the other, and that sex was to be determined by reference to the sexual characteristics that prevail or predominate. He held that it was necessary to draw a firm line that leaves males on one side and females on the other. He concluded that Ewan was a "true hermaphrodite in whom the male characteristics predominate", based on the medical evidence and the evidence of Ewan's wife. He held that Ewan was male and entitled to inherit.

specific.⁵⁰ The Court of Appeal left the question of what terminology to use to the Tribunal in this case (and thus to the Registrar in future cases when he or she first determines an application under Part 5A).

59. There is, however, no consensus as to what labels might be appropriate and what labels might not be. Further, there might be some degree of confusion caused were a plethora of alternative terms to emerge in circumstances where the primary sex categories remain male and female. Thus AGA contends that, although the Act ought to be interpreted to permit a person to be recognised as other than male or female, it ought also be interpreted so as to require only one alternative to male and female. In this regard, AGA agrees with the Registrar that identification of the categories of registration ought not "be left to the Registrar's or Tribunal's assessment of changing linguistic practices or variable medical opinion".⁵¹ Rather, the term "sex" in the Act should be understood as referring to male or female (being the most common) or other (being less common but nonetheless permitted).

60. AGA further contends that the appropriate term to be used to recognise a sex other than male or female is "unspecified", "not specified" or "not stated".⁵² A term of this kind is clear and its meaning is unlikely to be contested. It covers anyone who is not identified as male or female. It does not seek to identify a "third sex", but simply to indicate that the person's sex is not specified. It is also consistent with the existing approach the Act takes to circumstances where certain particulars of a birth are not provided.

61. AGA contends that "intersex" ought not be used as the term for those who are recorded as other than male or female. That term has a particular meaning, as outlined above, and does not apply to all persons who might seek to record their sex as other than male or female. Most intersex people identify and live as male or female and have their sex recorded on the Register as such. Intersex is not another form of "sex identity", as suggested by Norrie⁵³ and Beazley ACJ.⁵⁴

⁵⁰ CA at [205] (Appeal Book at 149).

⁵¹ Registrar's submissions at [46].

⁵² If the abbreviations M or F are used, AGA contends that the abbreviation X is appropriate.

⁵³ Norrie's Submissions at [38].

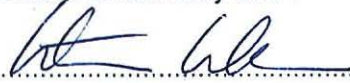
⁵⁴ CA at [205] (Appeal Book at 149).

62. Furthermore, AGA is concerned that, if intersex is used as the appropriate term in the context of Part 5A applications, it might be thought that Registrar should use that terminology for the register and on the birth certificates of all intersex children. To compulsorily identify a child as intersex on a birth certificate would be, AGA contends, inappropriate. It may lead to stigmatisation of, or discrimination against, the child whenever the birth certificate is produced. It may lead to an inappropriate focus on or curiosity about the child's physical sex characteristics, including genitals, by those to whom the certificate is produced.

Part VI: ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

10 63. Should leave to appear be granted, AGA estimates it would require 15-20 minutes for oral argument.

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ANNEXURE A TO A GENDER AGENDA'S SUBMISSIONS

All provisions are as at 29 October 2013 and have not been amended since that date.

Births, Deaths and Marriages Registration Act 1995 (NSW)

Section 3 Objects of Act

The objects of this Act are to provide for:

- (a) the registration of births, deaths and marriages in New South Wales, and
- (b) the registration of adoption information, and
- (c) the registration of changes of name and the recording of changes of sex, and
- (d) the keeping of registers for recording and preserving information about births, adoptions, deaths, marriages, registered relationships, changes of name and changes of sex in perpetuity, and
- (e) access to the information in the registers in appropriate cases by government or private agencies and members of the public, from within and outside the State, and
- (f) the issue of certified information from the registers, and
- (g) the collection and dissemination of statistical information.

Section 6 Registrar's general functions

The Registrar's general functions are:

- (a) to establish and maintain the registers necessary for the purposes of this Act and the Relationships Register Act 2010, and
- (a1) 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, and
- (b) to administer the registration system established by this Act and ensure that the system operates efficiently, effectively and economically, and
- (c) to ensure that this Act is administered in the way best calculated to achieve its objects.

Section 12 Notification of births

(1) When a child is born in the State, the responsible person must give notice of the birth to the Registrar in a form and manner required by the Registrar, specifying the particulars required by the regulations.

Maximum penalty: 5 penalty units.

(2) The notice must be given:

- (a) in the case of a child born alive—within 7 days after birth, or
- (b) in the case of a stillbirth—within 48 hours after stillbirth.

(3) When notice of a stillbirth is given, the responsible person must also give the Registrar, in a form and manner required by the Registrar:

- (a) a doctor's certificate certifying the cause of foetal death, or
- (b) if a doctor is of the opinion that it is impracticable or undesirable to certify the cause of foetal death at the time the notice referred to in subsection (2) (b) is given, a notice signed by a doctor stating the doctor's intention to complete such a certificate.

(4) The certificate or notice referred to in subsection (3) must be completed by the doctor responsible for the professional care of the birth mother at the birth or a doctor who examined the body of the stillborn child after the stillbirth.

(5) In this section:

responsible person means:

- (a) in the case of a child born in a hospital or brought to a hospital within 24 hours after birth—the chief executive officer of the hospital, or
- (b) if the child was not born in a hospital or brought to a hospital within 24 hours after birth, and a doctor or midwife was responsible for the professional care of the birth mother at the birth—that doctor or midwife.

Section 14 How to have the birth of a child registered

A person has the birth of a child registered under this Act by giving notice of the birth to the Registrar (the **birth registration statement**) in a form and manner required by the Registrar, specifying the particulars required by the regulations.

Section 17 Registration

(1) The Registrar registers a birth by making an entry about the birth in the Register including the particulars required by the regulations.

(2) However, if the particulars available to the Registrar are incomplete the Registrar may register a birth on the basis of incomplete particulars.

Section 20 Alteration of details after birth registration

(1) An application to the Registrar for the addition of registrable information in a person's birth registration:

- (a) must be made in writing, and
- (b) must include the information required by the Registrar, and
- (c) must, if the Registrar requires verification of the information contained in the application, be accompanied by a statutory declaration verifying the information contained in the application and any other evidence that the Registrar may require.

(2) This section is subject to section 18.

(3) In this section, **registrable information** does not include information relating to a person's change of sex.

Section 45 Correction of Register

(1) The Registrar may correct the Register:

- (a) to reflect a finding made on inquiry under Division 2, or
- (b) to bring an entry about a particular registrable event into conformity with the most reliable information available to the Registrar of the registrable event.

(2) The Registrar must, if required by a court, correct the Register.

(3) The Registrar corrects the Register by adding or cancelling an entry in the Register or by adding, altering or deleting particulars contained in an entry.

Section 49 Issue of certificate

- (1) On completing a search of the Register, the Registrar may issue a certificate:
 - (a) certifying particulars contained in an entry, or
 - (b) certifying that no entry was located in the Register about the relevant registrable event.
- (2) A certificate under subsection (1) (a) is admissible in legal proceedings as evidence of:
 - (a) the entry to which the certificate relates, and
 - (b) the facts recorded in the entry.
- (3) If the word "illegitimate", or any other word or expression referring to the fact that a child was born outside marriage, appears in an entry in the Register, that word or expression is not to be included in any certificate issued by the Registrar.
- (4) If requested to do so by an applicant, and authorised to do so under the *Adoption Act 2000*, the Registrar must issue a single certificate (an **adopted person's birth record**) certifying particulars contained in an entry relating to the birth of a person and particulars relating to a record sent to the Registrar under Chapter 7 of the *Adoption Act 2000* (or a memorandum under the former Acts) and registered under this Act.
- (5) If requested to do so by an applicant, and authorised to do so under the *Surrogacy Act 2010*, the Registrar must issue the applicant with a full birth record, being a single certificate that certifies particulars relating to the birth of a person registered under section 17 and particulars of a parentage order or discharge of a parentage order relating to the person registered by the Registrar under Part 4A.

Interpretation Act 1987 (NSW)

Section 8 Gender and number

In any Act or instrument:

- (a) a word or expression that indicates one or more particular genders shall be taken to indicate every other gender,
- (b) a reference to a word or expression in the singular form includes a reference to the word or expression in the plural form,
- (c) a reference to a word or expression in the plural form includes a reference to the word or expression in the singular form,
- (d) a reference to a person does not exclude a reference to a corporation merely because elsewhere in the Act or instrument there is particular reference to a corporation (in whatever terms expressed), and
- (e) a reference to a person does not exclude a reference to an individual merely because elsewhere in the Act or instrument there is particular reference to an individual (in whatever terms expressed).