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The Intersex View of Norrie's Case

A Thorough Legal Deconstruction and Conclusion

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This is an analysis of the N.S.W. Court of Appeal judgement on the matter of *Norrie v the N.S.W. Registrar of Birth, Deaths and Marriages*, in relation to intersex people.

Background

It is necessary to clarify at the outset that intersex is not the same thing as a non-binary identity, as is implied in many news reports. Intersex is primarily a matter of the body and of innate atypical physical sex characteristics. Some of us have identities that reflect our embodiment; many others have male or female identities. This is recognised in the government's new guidelines on the recognition of sex and gender which state that:

People who are intersex may identify their gender as male, female or X.

O.I.I. strongly opposes the view that assigning intersex children to experimental social categories would benefit them, and we are concerned by the use of intersex children's rights as a basis for arguments in respect of the rights of a non-intersex adult.

This acknowledgement was crucial to our support for the new guidelines. An X passport or identity is a choice for some of us, and should never be regarded as mandatory or inherent in our embodiment.

X passports have been with us for over a decade. Alex MacFarlane, the first recipient, was able to argue the case for an X passport on the basis of Alex's Victorian birth certificate, which did not specify a binary sex.

The issues at the heart of the Norrie case are, therefore, not new to us. They are also not priority issues, even though they generate significant interest (and concern about the creation of a third sex). Our priorities lie with the far more fundamental issues of bodily autonomy and integrity, and protection from discrimination.

The findings of the Court are less expansive than many may have thought. We believe they have no bearing on intersex people, and especially no relevance to intersex infants, children and adolescents. O.I.I. strongly opposes the view that assigning intersex children to experimental social categories would benefit them, and we are concerned by the use of intersex children's rights as a basis for arguments in respect of the rights of a non-intersex adult.

It is somewhat naive to assume that action on adult, transgender or gender diverse annotations on birth certificates will impact on the registration and treatment of intersex infants.

It is abhorrent that when the opportunity exists to act on concern for intersex children's rights the opportunity is not taken. Such an opportunity exists in the Senate enquiry into involuntary and coerced sterilisation, but the lack of such action on a fundamental intersex issue by any but a handful of intersex and intersex-inclusive L.G.B.T.I. organisations, and no human rights bodies, is a matter for deep regret.

Scope and Definitions

The finding is narrow and limited to transgender people who, in seeking to resolve ambiguities in respect of their "sex identity", have undergone gender affirmation surgery in order to resolve that ambiguity.

The question the Court of Appeal sent back to the Administrative Appeals Tribunal for resolution is: if a person undergoes gender affirmation surgery to resolve ambiguity in their "sex identity" and the surgery fails to achieve this, then what category, other than male or female, should that person be assigned to?

In handing down his judgement Justice Beazley noted in obiter that:

I should make one final observation. On the argument of the appeal, Norrie's Senior Counsel used the language of 'intersex' to describe Norrie's sexual identity. There are two problems with this. First, Norrie did not make an application to the Registrar that her sex be registered as 'intersex'. Secondly, from the understanding of the term 'intersex' I have gleaned from the material, it would seem that Norrie is not an intersex person, although Professor Greenberg's work indicates there is some fluidity around the language relating to these matters. Norrie will need to take care in specifying the 'sex' that she contends should be registered.

Also Sackville detailed how 'transsexual' has a distinct, and narrower, meaning:

... Norrie appears not to be an intersex person. But the existence of intersexuality is a matter to be taken into account.

... Intersexuality is not the same as transsexuality (sometimes known as gender dysphoria syndrome and so described by the High Court in *AB v Western Australia* [2011] H.C.A. 42). In this sense, the term 'transsexuality' includes pre-operative, post-operative and non-operative transsexuals.

The judgement throughout makes it clear that the laws being examined are laws with provisions for transgendered people albeit, as Sackville comments, taking "the existence of intersexuality" into account.

How intersex people in N.S.W. can change birth certificate details

There are no laws extant in N.S.W. that make meaningful provisions for intersex people. Intersex people are, however, able to change details on a birth certificate on the basis of an "administrative correction". Such corrections are permitted under specific circumstances under the Births Deaths and Marriages Act.

These provisions have been used by intersex people to correct entries when there has been a mistaken or no assignment at the time of birth. Norrie's argument was not based on such provisions, rather, the evidence was that Norrie was physically unambiguously male at the time of birth and that, over time, an ambiguity in Norrie's identity became apparent. "She identified that ambiguity to be that although she was born with male reproductive organs, she identified as having a non-specific gender identity" (Beazley).

To understand this matter it is important to know what the Court of Appeal can and cannot do. The Court can only make findings in matters of law; it cannot make findings in matters of fact.

In sending the matter back to the Administrative Appeals Tribunal (A.A.T.) it has not found that Norrie is, in fact, a person of a third sex or of indeterminate sex. It has found that the Tribunal can order the Registrar of Births, Deaths and Marriages to specify a sex other than male or female on a Gender Recognition Certificate.

It has done so in a situation where people have undertaken sex affirmation surgery, and that surgery has failed to reach an objective of satisfactorily male or satisfactorily female in the minds of the people undertaking the surgery to resolve ambiguity in their sex identity.

That the matter is an issue for transgender people who have undergone sex affirmation surgery was made clear by the Court many times, relying particularly on the *Births Deaths and Marriages Registration Act 1995 N.S.W. [sections 17-28]*. The Act states that a person who is eighteen or older, is an Australian citizen or permanent resident, who has lived for at least a year in N.S.W., who has undergone gender affirmation procedures, is unmarried and whose birth is not registered under the Act or a corresponding law may apply to the Registrar for registration of the person's sex in the Register.

The Anti-Discrimination Act says, inter alia:

38A. Interpretation

A reference ... to a person being transgender or a transgender person, whether or not the person is a recognised transgender person:

1. who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
2. who has identified as a member of the opposite sex by living as a member of the opposite sex, or
3. who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex, and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person".

Part (c) is sometimes thought to include intersex people. The Court of Appeal noted, however, that this part of the Anti-Discrimination Act was a protection against "discrimination on transgender grounds" and goes on to note that:

The definition is a clear indication that the word 'sex' when used in legislation intended to facilitate a

change in sex by a person whose sexual identity is uncertain, is not necessarily to be understood in a binary sense.

This places the issue as being one of identity and not of intersex status. In this regard, the judgement coincides with the Commonwealth government's new guidelines on the recognition of sex and gender, which similarly distinguish between 'indeterminate sex' and 'intersex' as follows:

Indeterminate: A person of indeterminate sex or gender is someone whose biological sex cannot be unambiguously determined or someone who identifies as neither male nor female.

Intersex: An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations. Environmental influences such as endocrine disruptors can also play a role in some intersex differences.

Conflating Sex and Gender

The Court of Appeal judgement's use of the words 'sex identity' is confusing given the efforts in the past to separate biological sex from one's lived sex role, the former being used to describe anatomies, the latter being gender roles.

The terms are not clarified in this judgement. Gender identity is referred to ten times, gender more than seventy times, with a reliance on the following provision:

For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

This makes no distinction between sex and gender, and is consistent with most Australian law.

For the Court of Appeal, the situation would be especially delicate given apparent contradictions in N.S.W. law in this matter. Birth certificates and recognition certificates indicate a person's sex. If such documents were to indicate one's gender in the sense of lived sex role then that part of a birth certificate or recognition certificate could not be completed until an individual was able to assert what that role might be. That is to say, no gender assignment is possible at the time of birth because there is no way to ascertain gender by physical inspection of a newborn.

Although the Court of Appeal was dealing with interpretations of the transgender provisions of the Births Deaths and Marriages Act and the Anti-Discrimination Act, the issue is the sex marker not the gender marker, and what an appropriate sex marker might be, although Norrie and the Court were clearly talking about gender identity.

The Court seems to resolve the issue by supposing sex and gender to be the same thing and the appellation on the cardinal documents, where the marker is 'sex' as being identical to that marker being seen as 'gender'.

The words 'sex identity' are used in the judgement in a way that seems to mean 'gender identity'.

For example in Section 195:

In the second ground of appeal, Norrie contended that the Tribunal erred in its construction of s 32DA in holding that s 32DA could only be satisfied if an applicant had undergone a surgical procedure for the purpose of being more definitively regarded as either 'male' or 'female', but not for the purpose of correcting the ambiguity between physical characteristics and a person's sex identity.

The lack of clarity between sex and gender in Australian law and in cases such as this one is especially poignant for intersex people, given that many of our issues and our lack of rights are contingent on our biological sex, irrespective of our gender identities or sexual orientations.

The complete lack of consultation with intersex people or organisations during the course of this judgement, together with our lack of representation, ran the very significant risk of causing collateral damage.

Where gender identity appropriates intersex, as appears to be the case in this matter, critical issues such as the involuntary sterilisation of intersex people, lack of appropriate medical and government services, non-consensual, appearance-related genital surgeries, lack of anti-discrimination protection, and uncertain status in areas such as marriage and superannuation entitlements are rendered invisible.

Sex-Affirmation Procedures and a Non-Binary Registration

Though the Court found (Section 200) that:

... it follows from what I have said that I consider that the word 'sex' in Pt 5A of the Act does not bear a binary meaning of 'male' or 'female' and that a person is entitled to have an entry in the Register of a sex other than either of those two identifiers ...

That entitlement is not unconstrained. The constraints are:

Sections [169-170]: 169 On Norrie's argument, the first purpose was, as specified in para (a), "for assisting a person to be considered to be a member of the opposite sex". Norrie accepted that the language of "opposite sex" in para (a) indicated that the purpose was to achieve the status of either male or female. In contrast, para (b) provides that a sex affirmation procedure may be carried out to "correct or eliminate ambiguities relating to the sex of the person".

Norrie submitted that the reference to "ambiguities relating to the sex of a person" indicated that the legislature recognised that a person may not be unambiguously 'male' or 'female' and that the purpose of para (b) was to ensure that a person may undergo a surgical procedure to correct or eliminate any ambiguity as to the person's sex.

In section 170 Norrie submitted that that had occurred in this case, in that she had had surgery to correct or eliminate the ambiguities relating to her sex, but that the surgery had failed in that the ambiguity remained. Norrie also submitted that para (b) recognised that an individual may not conform to conventional attitudes that one is either a male or a female.

If one accepts this argument, that section will still require two things.

Section 188. Either a person will have undergone a surgical procedure involving the alteration of a person's reproductive organs, carried out for the purpose of assisting a person to be considered to be a member of the opposite sex, or the person will have undergone a surgical procedure involving the alteration of a person's reproductive organs to correct or eliminate ambiguities relating to the sex of the person. A person who satisfies this legislative precondition of having undergone surgery is entitled to apply for the registration of the person's 'sex'.

Section 188. If a person satisfies each of the preconditions, including the precondition in para (c) of having undergone a sex affirmation procedure, the person "may apply to the Registrar ... for the registration of the person's sex in the Register". The word 'sex' in that phrase is unqualified. In particular, there is no reference to registration of the 'opposite sex' from the sex the person was prior to the surgery or to the registration of a sex according to the person's post-surgery anatomical features. The section facilitates the registration of a person's sex, whatever that may be. It is apparent, therefore, that where the Legislature intended for the word 'sex' to be qualified, it used language that reflected that intention. Accordingly I am of the opinion that there are sufficient indications in the language used by Parliament that when the word 'sex' was not so qualified the Legislature did not intend that it bore a binary meaning such as is reflected in the use of the phrase 'opposite sex'.

See also Sackville [Sections 257-258] which shows that, while there is a recognition that an intersex person may wish to obtain a correct designation, they are obliged to undergo 'affirmation' surgery.

257 ... the better interpretation of ... the Act, when construed in its legislative context, is that it empowers the Registrar, at least in some circumstances, to register a change of sex of a person from male or female to a category that is neither male nor female. An example could be a person who is registered in New South Wales at birth as a male or female (or is so registered in the person's place of origin), but who subsequently ascertains that the correct medical classification of the person's physiological characteristics is intersex. If such a person wishes to invoke the Act, it is necessary for the person to undergo a sex affirmation procedure, since that is a statutory precondition.

Given these constraints the Court of Appeal found:

Section 201. The Administrative Appeals Tribunal Act, s120, provides that the Court may make such order as it thinks appropriate having regard to its determination. As there has been no determination by the Tribunal of the factual issue, I am of the opinion that this Court should order that Norrie's application should be remitted to the Tribunal for determination in accordance with law. This will mean that the legislation should be applied on the basis that it is not confined to registration of sex as only male or female.

Though this might be thought to be creating a third sex, it may not. It simply creates a registration category that is neither male nor female but in the end is not descriptive of anatomical sex as the Court noted in Section 203.

203. The question for the Tribunal will be whether there is evidence to support an entry in the register of

Norrie's sex as 'non-specific'. 'Non-specific' has a dictionary meaning of: "not specific; not restricted in extent, effect; something lacking in specificity, definiteness or precision": [Oxford English Dictionary]. Norrie's identification with being neither male nor female may well appropriately be described in terms of this definition. Whether that is the identification of 'sex' within the meaning of the Act is another and more vexing question.

And finally [Section 205]:

205. Whether the Tribunal, or whatever material it has, will be satisfied that a person's sex might be registered as 'non specific', will also be a matter for its determination, having regard to the case then advanced before the Tribunal. As I have concluded that the word 'sex' in the Act is not confined to 'male' or 'female', it is likely that other appropriate identifications such as 'intersex', 'androgynous', or 'transgender', being words that appear to be recognised designations of sexual identity, may be registered, subject to the applicant satisfying the precondition of having undergone sex affirmation surgery. It will be for the Tribunal to determine whether a person's sex may be so registered. Likewise, in this case, it will be for the Tribunal to determine whether, within the terms of the Act, a sex described as "non specific", that is, a sex that is not precise or definite, may be registered. The Tribunal's determination will depend upon the terms of the application made and the evidence before it in support of the application. For the reasons given, therefore, the third ground of appeal, that it was not open to the Registrar, as a matter of law, to register Norrie's sex as 'non-specific', should be upheld.

Sackville noted in Section 279:

279. Since the Appeal Panel erred in law and the error was decisive to the outcome of the appeal to it, the matter should be remitted for determination according to law. That will require the Appeal Panel to reconsider the appeal on the basis that ... the Act ... permits the Registrar, in an appropriate case, to register a change of sex from male or female to a sex that is neither male nor female. The Appeal Panel may be disposed, if there are no insuperable procedural obstacles to doing so, to accord Norrie an opportunity to adduce further evidence bearing on the factual issues that now arise. This may be the appropriate course since both the Tribunal and Appeal Panel considered that they were resolving a preliminary legal issue and not the merits of the application. But the question of whether further evidence should be permitted is a matter for the Appeal Panel or the Tribunal, depending on what course the proceedings now take.

So Sackville indicated factual evidence as to one's physical anatomy evidence other than a simple declaration that a person sees him or herself as 'sex non-specific' must be put to the Tribunal. One would suppose this to be factual records that, as was noted throughout the trial, were sorely lacking. Norrie, for instance, produced no factual documentation to indicate an intersex anatomy despite claiming to be intersex during the course of these proceedings.

Conclusions

It is the view of O.I.I. Australia that the judgement in no way resolves the issues around male and female assignments. In many ways, a third sex category can be seen as a way of purifying the existing two sexes by allowing people who are anatomically 'impure' to be assigned otherwise.

So long as there is no legislative bar from doing so, it might be construed that intersex persons, having been subjected to non-consensual genital surgeries and who reject their assignment might, indeed, be so assigned whether they want to be or not. However ideal those who are not intersex might find such an outcome, intersex organisations strongly resist any such action.

Though the issue of unintended consequences was put to the Court by the Crown solicitor, little weight seems to have been given to it. For instance, if an assignment other than male or female is given, Norrie will no longer be able to marry in Australia. Similar issues apply in other legislation.

In many ways, this puts the cart before the horse. Rather than fixing legislation so that it is, by and large, sex-independent before playing around with sex categories, a sex category is being contemplated that has no legal standing beyond the Births, Deaths and Marriages Act.

In terms of the risk of collateral damage much depends on the decision of the Tribunal and the new designation(s) it creates.

O.I.I. Australia has long held the position that rather than creating a third sex category when the current two-sex system disadvantages half of our population and any further category will only further marginalise and stigmatise those assigned to it, all adults should have the right to not specify their sex. The need to specify one's anatomical sex should only ever be voluntary, and only where a legitimate reason to do so exists.

Ultimately, we can think of no good reason for sex to be on birth certificates at all.

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