



Sex, gender and law: Fighting for legal recognition

How the law looks at sex, the Norrie decision and where to next.

**15 August 2014
NACLC Conference, Alice Springs**

Overview



- Modern history of sex, gender and the law
- Norrie decision
- Applicability to other states.
- Further options for law reform
- International developments

Sex or Gender?



- Until recently neither defined in legislation
- Legal versus lay definition
- Law has developed in a manner that merges the two concepts.



What happened before Norrie?

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35 years of change



Corbett v Corbett
1971

R v Harris
1988

NSW laws recognise 'transgender'
1996

AHR C Sex Files
2009

X on Passports
2011

SDA Amendments
2013

ACT Law Reform
2014

Marriage of C & D
1979

Sec. DSS v SRA
1993

Kevin v AG
2001

AB v WA
2011

Fed Guidelines
2013

Norrie
2014

What was our starting point?



- *In the Marriage of C&D (falsely called C) [1979] 35 FLR 340.*
- Determine a person's sex for the purpose of marriage by reference to:

"chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention."

Following UK law



- Case followed UK law *Corbett v Corbett* [1971] P 83.
- This case looked at a marriage where the wife had undergone sex reassignment surgery and whether she was legally a woman:

Ormrod J concluded that for the purposes of determining whether parties had been validly married, the test to apply in determining whether a person was a male or a female, was to ascertain the person's sex by reference to the person's:

"... chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention."

Recognition of 'psychological sex'



- *R v Harris & McGuinness* (1988) 17 NSWLR 158.
- Had the opportunity to determine if law recognised a 'third sex', declined to explore this.
- A person born male who had undergone surgery could legally be recognised as female:
 - "... through medical intervention ... has assumed the external genital features of the opposite sex, thereby bringing those genital features into conformity with the person's psychological sex."

Social impressions count



- *Secretary, Department of Social Security v SRA* [1993] 43 FCR 299
"Sex is not merely a matter of chromosomes, although chromosomes are a very relevant consideration. Sex is also partly a psychological question (a question of self perception) and partly a social question (how society perceives the individual)..."

Questioning the binary



- *Kevin v Attorney General* (Cth) [2001] 165 FLR 404
 - Validity of a marriage between a female and a trans male
 - Recognition that some people are '*not unambiguously male or female*'
 - Full Court of the Family Court noted: "*It seems to us that the important thing about this judgment is that it clearly recognises that intersex persons can, in effect, choose their sex and marry*"
 - Full Court noted that there is a rebuttable presumption as to the accuracy of a birth certificate. A person may be male on a birth certificate but not male for the purposes of the marriage act.

How much surgery is enough?



- *AB & AH v Western Australia* [2011] 244 CLR 390.
- In WA a 'reassignment procedure' is a medical or surgical procedure.
- Applicant both underwent mastectomies and took hormones. Was it sufficient to be considered 'male'?

"the sex of a person is not, and a person's gender characteristics are not, in every case unequivocally male or female. As the definition of 'reassignment procedure' makes plain, a person's gender characteristics may be ambiguous."

Yay for beneficial legislation



- *AB & AH v Western Australia* [2011] 244 CLR 390.

The objects of the Act are to:

"facilitate the acceptance of a person, as being of the gender to which they are reassigned, within society so that they may fully participate within it."



The Norrie case

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Norrie



- 1961 - Born Scotland, male.
- 1989 – Sex affirmation procedure.
- After 1989 - Attempted to live as a woman but considered neither woman nor man – androgynous.
- 26 November 2009 - applied to the *NSW Registrar of Births, Deaths and Marriages* (**Registrar**) to register a change of sex under s32DA of the *Births, Deaths and Marriages Registration Act 1995* (NSW) (**Act**) from the category of male to "Non Specific" for a Recognised Details Certificate (**RDC**).

The law in NSW



- **BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT 1995 (NSW) - SECT 32B**

- **32B Application to alter [register](#) to record [change](#) of sex**

(1) A person who is 18 or above:

(a) whose [birth](#) is [registered](#) in New South Wales, and

(b) who has undergone a sex affirmation procedure, and

(c) who is not married,

may apply to the [Registrar](#), in a form approved by the [Registrar](#), for alteration of the record of the person's sex in the registration of the person's [birth](#).

What's a sex affirmation procedure?



- **BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT 1995 (NSW) - SECT 32A Definitions**

"sex affirmation procedure" means 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.

Registrar's powers



- **BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT 1995 (NSW) - SECT 32DC**
- **Decision to register change of sex**
- (1) The [Registrar](#) is to determine an application under section 32DA by [registering](#) the person's [change](#) of sex or refusing to [register](#) the person's [change](#) of sex.
- (2) Before [registering](#) a person's [change](#) of sex, the [Registrar](#) may require the applicant to provide such particulars relating to the [change](#) of sex as may be prescribed by the regulations.
- (3) A registration of a person's [change](#) of sex must not be made if the person is married.

It could have been so easy!



- On 24 February 2010, the Registrar approved Norrie's application and issued an RDC recording Norrie's sex as "Not Specified" rather than "Non Specific" as requested.
- On 16 March 2010, the Registrar without warning revoked this decision after receiving legal advice and wrote to Norrie:
 - advising that the RDC was issued *'in error and is invalid'* ;
 - advising that the Registrar *'does not have the power under the Act to issue certificates showing 'non-specified' (sic) in the sex field'*; and
 - issued an RDC recording Norrie's sex as "Not Stated".

The road is long and full of terrors



- April 2010 application to Administrative Decisions Tribunal
- May 2011 application dismissed: sex = male or female only.
- June 2011 appealed to the Appeals Panel of the ADT
- Nov 2011 appeal dismissed: sex binary as the word 'opposite' means it can only be male or female.
- January 2012 appealed to Court of Appeal NSW. Could appeal as we held the meaning of 'sex' was a question of law.
- May 2013 Court of Appeal found in favour of Norrie

Light at the end of the tunnel ...almost



- The main judgment of Beazley ACJ (with whom Sackville AJA and Preston CJ agreed):
 - consideration was given to the use of the word "sex" and the evolution of language;
 - the word "sex" in Part 5A of the Act does not bear a binary meaning of male or female;
 - Norrie's medical evidence supports an entry of 'Non Specific'.
- Remitted to the ADT to determine Norrie's initial application for a Certificate.

To the High Court we go



- In June 2013, the Registrar applied for special leave to appeal to the High Court of Australia.
- The High Court granted special leave on the basis of an undertaking from the Registrar that he would not disturb the costs order made by the Court of Appeal and pay Norrie's costs of the High Court appeal, irrespective of outcome.
- A Gender Agenda (**AGA**) was granted leave to appear as *amicus curiae* in the appeal but only to the extent of its written (not oral) submissions. AGA was represented by Allens Allens +Linklaters for the Human Rights Law Centre (Vic.).

High Court Judgement



- On 4 March 2014, the appeal was heard by five Justices of the High Court.
- In an 8 page judgment of the Court dated 2 April 2014, the High Court dismissed the appeal and ruled that:
 - *'Not all human beings can be classified by sex as either male or female';*
 - there is nothing in the Act that requires the Registrar to record someone's sex inaccurately as male or female;
 - to record someone's sex as non specific *'would be no more than to recognise, as the Act does, that not everyone is male or female';*

Third Sex or Intersex?



- There are two 'registrable classes of sex' – male or female
- The Act does not require that this classification must apply to everyone.
- The Act does not require the Registrar to register a classification inaccurately.
- Court does not appear to have recognised a third sex. Rather Norrie was not specifically male or female.
- Court refused to consider whether additional categories of sex, other than male or female could be recorded, such as 'intersex', 'transgender' or 'androgynous'.

Judicial considerations



- Justice Hayne noted that you can't proceed on an assumption that sex is binary.
- *Interpretation Act 1987* : a reference to one gender indicates a reference to every other gender
- *Anti-Discrimination Act 1977*: uses the word 'indeterminate' in regards to sex.
- The fact that other legislation appears to consider sex binary is not necessarily persuasive.
- The only legislation where the sex of the parties to the relationship is legally significant is marriage as defined in s.5(1) of the *Marriage Act 1961* (Cth).

What does this mean?



- The High Court's decision is binding upon all States and Territories in Australia, who seek to maintain a binary classification of sex within similar legislation.
- In NSW, people can now receive an RDC noting their sex as '*Non Specific*' which will be recognised in all Australian states and territories.
- Norrie will be considered has having a 'non-specific' sex for the purposes of, but subject to, any law of NSW.
- All legislation up to Norrie looked specifically at its own piece of legislation. Pure statutory construction.

What's next?



Broader ramifications



- Possible application in other states with similar legislation.
- Possible reinterpretation of 'sex' in the *Sex Discrimination Act*
 - *Note exceptions in the SDA for documents.*
 - *Section 109 challenges to state legislation.*
- Exploration of the words 'man' and 'woman' in the *Marriage Act*.
- The depathologisation of gender diversity?



Global developments

Indian Supreme Court



- Application by members of the Hijra community for legal recognition of a third sex.
- Case decided according to Human Rights principles. The ability to be recognised according to your own gender identity affects the following:
 - The right to equal recognition before, and protection of, the law;
 - The right to be free from discrimination on the grounds of sex;
 - The right to freedom of speech and expression; and
 - The right to life and liberty with dignity.
- Court declared that Transgender persons had the right to decide their self identified gender. Governments were ordered to grant legal recognition of their gender identity such as male, female or as third gender; any requirement that a person undergo surgery was declared illegal.

Global tour



- Germany recently passed a law allowing an x on birth certificates for children born intersex.
- Argentina fighting for eradication of legal sex/gender?
- European Court of Human Rights case of *Hämäläinen v Finland* 37359/09
- UN Free and Equal Campaign and recognition of sex and gender diversity.

Questions?

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