

(The Gender Centre advise that this article may not be current and as such certain content, including but not limited to persons, contact details and dates may not apply. Where legal authority or medical related matters are cited, responsibility lies with the reader to obtain the most current relevant legal authority and/or medical publication.)

A Momentous Ruling For Sex and Gender Diversity

Appeals Court Recognises 'Sex Non-Specific' Annotation for Birth Certificates

by Emily Christie

Article appeared in Polare magazine: July 1995 Last Update: October 2013 Last Reviewed: September 2015



Norrie

On the 31st of May 2013, in a momentous ruling for sex and gender diversity, the N.S.W. Court of Appeal held that the word 'sex' is not limited to 'male' or 'female', being the first court in Australia to do so and overturning an A.D.T., Appeals Tribunal Decision in the process.

The Court of Appeal was only ruling on whether sex could mean something other than 'male' or 'female' and whether it was open to the Registrar to register Norrie's sex as 'non-specific'.

At the centre of the case is Norrie who does not identify as male or female. Norrie was born with male sex characteristics and underwent a sex affirmation procedure. Following this, Norrie applied to the N.S.W. Registry of Births, Deaths and Marriages for a gender registration as 'non-specific' under the new

section of the *Births, Deaths and Marriages Registration Act 1995 (NSW)* (Act) which allows persons who have undergone sex affirmation surgery to change their recorded sex. The application was initially successful but the Registrar revoked the certificate, arguing that 'sex' only meant 'male' or 'female'. This argument was upheld by the Administrative Decisions Tribunal and Appeals Panel. The N.S.W. Court of Appeal, however, disagreed.

The judgement has been described as landmark and groundbreaking, and with good reason. This is the first time a court has recognised we do not live in a binary world of male and female.

The court has not only been able to conceptualise a legally valid option outside the strict binary male and female, but also to hold that current legislation is perfectly capable of legally recognising people who do not identify as male or female.

What, then, does the decision mean?

Well, it means some things and it doesn't mean others. However, before we go into that, a word about terminology. Throughout the judgement the court used the phrase 'sex identity' when talking about Norrie's registered sex. 'Sex identity' in the judgement refers to what a person's legal sex is, as it is recorded on a birth certificate. It is not purely gender identity, nor is it purely based on a person's physical sex characteristics, rather it is a combination of both.

When it comes to birth certificates, the court has looked at both gender identity and sex markers to determine what the 'sex' identity is under the legislation. To what extent gender identity or physical characteristics are relied upon will generally depend on the wording of the legislation¹.

So, back to what the judgement means.

First, the judgement relates to Birth Certificates and Detail Recognition Certificates. A birth certificate is a cardinal document and, unlike your passport or driver licence, it is the source data for your identity and is relied upon by most other legislation. Each State of Australia also recognises the other States' certificates and so, should a person receive a certificate stating sex 'non-specific', this should be recognised by legislation across all states. This is what occurs with 'male' and 'female' on a certificate, so we would hope the same would occur with 'non-specific'.

The certificate can also usually be used to amend your sex on other documents and records (although in some cases a Passport can be used instead). As such, having 'non-specific' on your birth certificate could allow recognition as 'non-specific' in a whole range of situations. Just how many remains to be seen.

Second, the Judgement is about a very specific, narrow, set of facts. The Judges were very clear that they were only looking at the word 'sex' as it relates to people who have undergone sex affirmation surgery and have applied to have their recorded sex changed. The Judges did note that the word 'sex' in other legislation may also be interpreted in the same way, so it is possible that the Judgement will have flow on effects and it is to be hoped that it will pave the way for others to be able to argue they, too, are part of

this category, bringing me on to my next point.

Third, while it is possible that the court's decision will be followed with reference to other parts of the Act and other legislation, it will only affect people who personally identify as something other than male or female; that is, it's opt-in only and it takes into account gender identity. This case is the latest in a long line of policy development, law reform and court cases recognising the difference between gender identity and sex characteristics and the importance of the former with reference to legal recognition. This case does not change that history. Individuals with ambiguous sex characteristics who identify as male or female will continue to be recognised as male or female under law.

Fourth, it doesn't mean Norrie has a certificate saying sex 'non-specific' - yet. The Court of Appeal was only ruling on whether sex could mean something other than 'male' or 'female' and whether it was open to the Registrar to register Norrie's sex as 'non-specific'. The court answered 'yes' to both and so it's now up to the Administrative Decision Tribunal to take this ruling on and re-evaluate Norrie's application. Finally, there are some laws where sex is quite clearly meant to be interpreted as binary, which may become problematic for Norrie and others.

The most obvious is the Marriage Act. With marriage defined as being between a man and a woman, Norrie is left in a legal black hole, along with those born with intersex variations already legally recognised as neither male nor female in other jurisdictions.

The court acknowledged that there may be legislation that only allows for a binary interpretation of 'sex'. Interestingly, the court did not see this as a barrier to interpreting 'sex' as non-binary; rather, they noted that this may be an area requiring law reform, to ensure Norrie, and others who have similar problems aren't left without legal recognition or protection.

Equal recognition and protection under the law is a fundamental Human Right; but the law cannot protect you if it doesn't recognise you, it can only protect a legal fiction of you. It is imperative in such cases as these that we make the law fit the facts and not force the facts to fit the law. To have your identity, your own identity recognised in law, affords you the dignity and the respect that you deserve as a human being.

In our society, it is almost trite to say that sex and gender identity are important. It's vital we get it right.

Norrie's case is the latest development in what has been, and continues to be, a long and difficult fight for sex and gender diverse people. Victoria and Western Australia have allowed infants born with ambiguous sex characteristics to have an X on their birth certificate for a while now. In 2011 the Federal Government allowed individuals to have an X on their passport and permitted recognised transgender people to have their affirmed gender noted on the passport their affirmed gender without the need for surgery.

The Government is now expanding their Guidelines on the Recognition of Gender to all Federal Departments and Agencies, standardising the evidence required to change their gender identity on official documents. In the last few decades the Australian courts have been asked to consider a number of cases regarding sex and gender diversity. Through cases such as *A.B. v. Western Australia* [2011] H.C.A. 42 and *Kevin v. Attorney-General (Cth.)* [2001] FamCA 1074; 165 FLR 404 a body of jurisprudence is slowly being built that recognises that sex is not binary.

As I write this, Parliament is due to debate the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill which to protect against discrimination on the basis of sexual orientation, gender identity and intersex status. And so the struggle for recognition and equality continues.

Notes

[1] While detailed discussion is not possible here, it should also be recognised that term 'sex identity' itself is somewhat problematic or, at the very least, confusing for those of us very careful not to conflate the concepts of physical sex and gender identity. The appropriateness of the use expression into the future is an issue for trans, intersex and gender diverse people to grasp

Polare Magazine is published quarterly in Australia by The Gender Centre [Inc.](#), which is funded by the Department of Family & Community Services under the [S.A.A.P.](#) program and supported by the [N.S.W.](#) Health Department through the [AIDS](#) and Infectious Diseases Branch. Polare provides a forum for discussion and debate on gender issues. Unsolicited contributions are welcome, the editor reserves the right to edit such contributions without notification. Any submission which appears in Polare may be published on our internet site. Opinions expressed in this publication do not necessarily reflect those of the Editor, The Gender Centre [Inc.](#), the Department of Family & Community Services or the [N.S.W.](#) Department of Health.

The Gender Centre is committed to developing and providing services and activities, which enhance the ability of people with gender issues to make informed choices. We offer a wide range of services to people with gender issues, their partners, family members and friends in New South Wales. We are an accommodation service and also act as an education, support, training and referral resource centre to other organisations and service providers. The Gender Centre is committed to educating the public and service providers about the needs of people with gender issues. We specifically aim to provide a high quality service, which acknowledges human rights and ensures respect and confidentiality.