



The formal recognition of sex identity

Mary Keyes*

*Until March 2014, it was widely assumed that a person's sex could only be recorded in the Australian state and territory Registers of Births, Deaths and Marriages as either female or male. This assumption is no longer accurate, following two significant developments. In March 2014, the Australian Capital Territory amended its Births, Deaths and Marriages Registration Act to allow the registration of a person's sex as unspecified, indeterminate or intersex. In April 2014, the High Court handed down its much anticipated decision in **NSW Registrar of Births, Deaths and Marriages v Norrie**, which interpreted the New South Wales Births, Deaths and Marriages Registration Act to allow the registration of a person's sex following sex affirmation surgery as 'non-specific'. This article describes the Australian legislation relating to registration of sex, and considers the implications of these developments, including the consequences for Australian marriage law, which continues to define marriage narrowly as the union of a man and a woman.*

Introduction

The formal recognition¹ of sex² identity through the registration of sex in the system of birth registration has recently undergone significant development in Australia.³ Until March 2014, it was generally assumed that sex could only be

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1 This article focuses on the formal aspect of the recognition of sex identity, particularly on recording sex in the Registers of Births, Deaths and Marriages. It does not address in detail other aspects of sex and gender identity.

2 In Australia, 'sex' and 'gender' are often differentiated. Sex generally refers to biological aspects of personal identity: Sex Discrimination Act 1984 (Cth) s 4 (definition of intersex status); Legislation Act 2001 (ACT) s 169B (definition of intersex person); Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records*, Human Rights and Equal Opportunity Commission, Sydney, 2009, p 7 (*Sex Files*). In this article, 'sex' is generally used in this sense. Gender is generally used to refer to other aspects of identity, especially to a person's subjective or socially constructed sense of identity: Sex Discrimination Act 1984 (Cth) s 4 (definition of gender identity); Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, Australian Human Rights Commission, Sydney, 2011, p 5. In recent cases, the courts have taken into account both biological and social factors in determining a person's sex: *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074 at [330] (aff'd in *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1; 172 FLR 300; (2003) FLC 93-127; [2003] FamCA 94 at [376]); *AB v Western Australia* (2011) 244 CLR 390; 281 ALR 694; [2011] HCA 42; BC201107621 at [35]-[39].

3 Other countries have recently changed their laws to allow recognition of sex identities other than male or female. A number of Asian countries, including Nepal, India, Bangladesh and Pakistan, have recently recognised a 'third sex', which includes both transsexual and intersex people. See, eg, M Bochenek and K Knight, 'Establishing a Third-Gender Category in Nepal: Process and Prognosis' (2012) 26 *Emory International L Rev* 11; *National Legal Services Authority v Union of India* AIR2014SC1863 (15 April 2014). Since November 2013, it has been possible to register a child's birth in Germany without nominating its sex

recorded in the Registers of Births, Deaths and Marriages as either male or female. This assumption is no longer accurate, as a consequence of two important changes. First, the Australian Capital Territory amended its Births, Deaths and Marriages Registration Act in March 2014 explicitly to allow, for the first time in Australia, the possibility of registering a person's sex as other than male or female. Less than a month later, the High Court handed down its decision in *NSW Registrar of Births, Deaths and Marriages v Norrie*,⁴ which interpreted the NSW Births, Deaths and Marriages Registration Act to permit the registration of a person's sex following sex affirmation surgery as 'non-specific'. These developments have immediate consequences for the possibility of registering sex as other than male and female throughout Australia. In turn, the formal recognition of sex identities other than male and female should lead to wider administrative, legal and social acceptance of sex diversity.

There is surprisingly little written on the formal recognition of sex identity in the registration of births in Australia,⁵ although the sex identity of transsexuals for the purposes of criminal law, social security law and marriage law has attracted considerable attention.⁶ This article contributes to that literature by considering the legal treatment of people whose sex identities are other than male and female. Part I describes the current system of registration of sex identity in the state and territory Births, Deaths and Marriages Registration legislation, including the 2014 amendments to the Australian Capital Territory Act which allow a person to be registered as other than male or female. This part also explains the High Court's decision in *NSW Registrar of Births, Deaths and Marriages v Norrie*, and explores the implications of this case for the registration of sex identities other than male and female in the other Australian jurisdictions. Part II considers the implications of the changes to the law described in Part I for the recognition of sex other than male and female in secondary identity documents. It also considers the implications of these changes for Australian marriage law, especially in the light of *Commonwealth v Australian Capital Territory*.⁷

as male or female, if the child's sex cannot be ascertained: Personenstandsgesetz § 22 para 3 (amended in 2013). In New Zealand, it is possible for a child to be registered at birth as being of indeterminate sex: Births, Deaths, Marriages, and Relationships Registration Act 1995 (NZ) ss 28(3)(a)(ii), 29(3)(a)(ii), 32(a)(ii). It is also possible in New Zealand for a person to apply to the Family Court for a declaration that their registered sex should be changed: *ibid*, ss 28, 29.

4 (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 (*Norrie*).

5 The main exceptions to this are the 2009 report of the Australian Human Rights Commission on the legal recognition of sex in documents and government records (Human Rights Commission, *Sex Files*, above n 2) and the 2012 report of the ACT Law Reform Advisory Council, 'Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT', Report 2, March 2012.

6 The literature is extensive. See, eg, M Otlowski, 'What is the Harm in it Anyway? *Re Kevin* and the Recognition of Transsexual Marriage' (2002) 16 *AJFL* 146; A Sharpe, 'The Transsexual and Marriage: Law's Contradictory Desires' (1997) 7 *Australasian Gay and Lesbian LJ* 1; M Otlowski, 'The Legal Status of a Sexually Reassigned Transsexual: *R v Harris and McGuinness* and Beyond' (1990) 64 *ALJ* 67.

7 (2013) 250 CLR 441; 304 ALR 204; [2013] HCA 55; BC201315603.

I Registration of sex identity in Australia

The birth certificate issued by the state and territory Registries of Births, Deaths and Marriages is the cardinal form of identity document for people born in Australia.⁸ It is heavily relied on in applications for other forms of identity documentation, as further discussed in Part II.A, and therefore it is fundamental in the formal recognition of identity. The registration of births is the responsibility of the state and territory registries.⁹ The separate legislation of the states and territories regulating birth registration¹⁰ is generally similar but not identical.¹¹ The system of birth registration is territorially confined. All births within the territory of each jurisdiction must be registered.¹² Births outside the territory of the jurisdiction can also be registered in two situations, but only if the birth has not been registered in another place. First, the birth of children who are born outside the territory but will reside in the jurisdiction can be registered in Australian states or territories, and second, the birth of children born on a flight or voyage which will disembark in an Australian state or territory can be registered.¹³

In Australia, a child's sex identity is recorded in the Registers of Births, Deaths and Marriages when their birth is registered. This is discussed in Part I.A below. A person's sex as it was registered at birth can be changed in two limited circumstances. First, a person's registered sex can be corrected in the register if it has been wrongly recorded. Second, a person's sex registered sex can be changed if they have had a sex reassignment or sex affirmation procedure or, in the Australian Capital Territory only, if they have had 'appropriate clinical treatment'.¹⁴ The circumstances in which a person's registered sex at birth can be changed are explained in Part I.B.

A Registration of sex at birth

In all eight jurisdictions, it is compulsory for the hospital where the child was born, or medical practitioners present at the child's birth, to notify the Registry

8 For people born outside Australia, the cardinal forms of identity document are citizenship certificates, and documents which evidence Australian visa status issued by the Federal Department of Immigration and Border Security: Human Rights Commission, *Sex Files*, above n 2, p 11. Formal recognition of sex by the Department of Immigration and Border Security is beyond the scope of this article.

9 The registries are established in each jurisdiction under the Births, Deaths and Marriages Registration Acts.

10 In all jurisdictions, the legislation is called the Births, Deaths and Marriages Registration Act. The legislation for each jurisdiction is referred to in the remainder of this article by the acronym BDMRA.

11 In the early 1990s, the Australian Attorneys-General agreed to cooperate in modernising their legislation relating to the registration of births, deaths and marriages and in attempting to reduce the differences between their laws. Model legislation was drafted in South Australia and was used by the other jurisdictions as the basis of legislation which was subsequently introduced. This means there is a degree of similarity in the legislation in the eight jurisdictions, but as is explained below there are also many points of difference.

12 Eg, BDMRA 1996 (SA) s 13(1); BDMRA 1999 (Tas) s 12(1); BDMRA 1996 (Vic) s 13(1).

13 Eg, BDMRA 1996 (SA) s 13(3), (4), (5); BDMRA 1999 (Tas) s 12(3), (4), (5); BDMRA 1996 (Vic) s 13(3), (4), (5).

14 BDMRA 2003 (ACT) ss 23(1)(c)(i), 23(2)(c)(i).

of the birth of a child,¹⁵ and it is compulsory for the parents to register the birth.¹⁶ In every jurisdiction except Tasmania and Western Australia, the Regulations stipulate what information must be supplied in notifying and in registering a birth. There are minor differences in those six jurisdictions as to the information that must be included in the notification and registration of births, but all six jurisdictions require the child's 'sex' to be notified and registered.¹⁷ In the Australian Capital Territory, the child's sex only has to be stated in the notification and registration of birth if it is 'determinable'.¹⁸ There are instances of registrars in other jurisdictions recording a child's sex as indeterminable, but this is rarely done, and usually only in the case of stillborn children whose sex cannot be ascertained.¹⁹

When registering a birth, the birth notification and birth registration forms require the nomination of the child's sex. Identification of sex at the time of birth is, for most children, solely based on a physical inspection of their genitals. Additional characteristics that may be relevant in determining the sex of an older child or an adult are rarely relevant in determining the sex of a baby. The details supplied by the parents in the application for registration are checked against the details supplied in the birth notification. In the event of a discrepancy between the sex notified by the hospital and the sex nominated by the parents, the medical assessment of the child's sex will prevail.²⁰

In the jurisdictions in which Regulations stipulate what information must be supplied, the Regulations only require that the child's 'sex' be notified or registered; sex is not defined and the Regulations do not state what categories of sex may be registered. It is the forms that are used to notify and register a birth that require the specific nomination of a child's sex. In most jurisdictions,

15 BDMRA 1997 (ACT) s 5(1); BDMRA 1995 (NSW) s 12(1); BDMRA (NT) s 12(1); BDMRA 2003 (Qld) s 5; BDMRA 1996 (SA) s 12(1); BDMRA 1999 (Tas) s 11(1); BDMRA 1996 (Vic) s 12(1); BDMRA 1998 (WA) s 12(2).

16 BDMRA 1997 (ACT) s 8(1); BDMRA 1995 (NSW) s 15(1); BDMRA NT s 15(1); BDMRA 2003 (Qld) s 8(1); BDMRA 1996 (SA) s 15(1); BDMRA 1999 (Tas) s 14(1); BDMRA 1996 (Vic) s 15(1); BDMRA 1998 (WA) s 15(1). The legislation allows a short period of time in which parents must register the birth. The 2014 amendments to the ACT BDMRA extended that period of time (which in the ACT was previously 60 days) to 6 months in the event that a child's sex at birth is difficult to ascertain so as to permit further investigation: *ibid*, ss 9, 10.

17 Births, Deaths and Marriages Registration Regulation 1998 (ACT) s 4(1)(b), 5(b); Births, Deaths and Marriages Registration Regulation 2011 (NSW) cl 4(a), 5(1)(a); Births, Deaths and Marriages Registration Regulations (NT) reg 2(c), 3(b); Births, Deaths and Marriages Registration Regulation 2003 (Qld) Sch 1 Pt 1.1(d); Births, Deaths and Marriages Registration Regulations 2011 (SA) reg 4(c), 5(c); Births, Deaths and Marriages Registration Regulations 2008 (Vic) reg 7(c). In Tasmania and Western Australia, neither the Acts nor the Regulations state what information must be supplied in notifying or registering a birth, and neither of these states publishes its birth registration forms. In Tasmania, the forms require that the parents nominate a child as being either male or female: Email from the Manager, Births, Deaths and Marriages, Department of Justice, Tasmania dated 18 June 2014, on file with author.

18 Births, Deaths and Marriages Registration Regulation 1998 (ACT) s 4(1)(b), 5(b).

19 Email from the Manager, Registrations, Queensland Registry of Births, Deaths and Marriages dated 19 March 2014, on file with author; Human Rights Commission, *Sex Files*, above n 2, p 15.

20 Email from the Manager, Registrations, Queensland Registry of Births, Deaths and Marriages Policy Officer dated 19 March 2014, on file.

these are not publicly available.²¹ Until very recently it was commonly perceived that the only options for registering a child's sex in Australia were female or male.²² Following amendments to the ACT Births, Deaths and Marriages Registration Act in March 2014, it is now possible to register a birth in that jurisdiction as male, female, unspecified, indeterminate or intersex.²³

The meaning of 'sex' in the Regulations is an issue of statutory interpretation. The Births, Deaths and Marriages Registration Acts, like the Regulations, do not define the term 'sex'; this ambiguity was the focus of the High Court's decision in *Norrie*.²⁴ This case concerned an application to have a person's sex recorded as 'non-specific'. The court held that the NSW Births, Deaths and Marriages Registration Act recognises that 'a person's sex may be indeterminate'²⁵ and that the Act empowers the Registrar to record a person's sex as non-specific.²⁶ *Norrie* is about recording a change to a person's registered sex after sex affirmation surgery,²⁷ not about registration of sex at birth, but it has obvious implications for the registration of sex at birth. The High Court stated that the NSW Act does not require that the classification of male or female 'can apply, or is to be applied, to everyone. And there is nothing in the Act which suggests that the Registrar is entitled, much less duty-bound, to register the classification of a person's sex inaccurately as male or female'.²⁸ In principle, this applies equally to the registration of sex at birth: a child's sex should not be registered inaccurately. Consequently, in the jurisdictions in which it is not specifically permitted by legislation — at the time of writing this article in October 2014, that is every jurisdiction except the Australian Capital Territory — *Norrie* implies that a child's sex should be

21 The forms for registering a child's birth are only publicly available in the Australian Capital Territory and Queensland. The Birth Registration Statement for the ACT is available at <<http://www.legislation.act.gov.au/af/2014-46/current/pdf/2014-46.pdf>> (accessed 17 October 2014). As explained below, this Statement was changed in 2014, following the amendments to the Births, Deaths and Marriages Registration Act 1997 (ACT) which were enacted in March 2014. The Queensland birth registration application form is available at <<https://publications.qld.gov.au/storage/f/2014-03-04T06%3A23%3A06.611Z/birth-registration-application-form.pdf>> (accessed 17 October 2014). It only permits the child's sex to be recorded as male or female.

22 The ACT Law Reform Advisory Council asserted in its 2012 report that the then current ACT 'birth notification and registration requirements limit the recording of a child's sex to the female/male binary, precluding the opportunity for parents to record a child's sex as "intersex": above n 5, p 34. In private communications from the Victorian Registry of Births, Deaths and Marriages to the author in March 2014, registry staff stated that the only options for registering a child's sex in Victoria were male and female (email from the Victorian Registry of Births, Deaths and Marriages Policy Officer dated 19 March 2014, on file). This communication was received before the High Court handed down its decision in *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 on 2 April 2014.

23 The Act and the Regulations do not specifically refer to this, but from 26 April 2014, the ACT Birth Registration Statement has permitted registration of a child as male, female, unspecified, indeterminate or intersex, to reflect recent changes to the legislation.

24 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184.

25 *Ibid*, at [33].

26 *Ibid*, at [35].

27 This is discussed in further detail below at Part I.B(2)(a).

28 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [32].

recorded as non-specific at birth, if that was accurate by reference to the ‘facts supplied by the application’.²⁹

Norrie is not about intersex status specifically, because the application that Norrie made to the Registrar was to have her³⁰ sex recorded as non-specific, and the High Court was at pains to emphasise that for that reason they were not deciding whether ‘specific categories of sex other than male and female, such as “intersex”, “transgender” or “androgynous”’ were contemplated by the NSW legislation.³¹ However, the court’s point that the Registrar should not record a person’s sex inaccurately implies that a child’s sex at birth could be registered as intersex, if that were an accurate characterisation.

In all but one jurisdiction, the Registrar can register a birth even though the details in the application for registration are incomplete.³² It is therefore possible in those jurisdictions which give the Registrar that ability, and which take the view that sex can only be recorded as male or female, that an intersex child may be registered with no sex being recorded.³³

B Changing the sex registered at birth

(1) Correction of the Register

The legislation in all jurisdictions empowers the Registrar to correct the Register in order to ‘bring the particulars contained in an entry about a registrable event into conformity with the most reliable information available to the Registrar of the registrable event’.³⁴ This would enable correction in the Register in all jurisdictions of the sex of a person whose birth was registered in the jurisdiction and whose sex was incorrectly attributed, nominated or registered at birth. Given the High Court’s view in *Norrie* that a person’s sex should not be recorded inaccurately,³⁵ the provisions enabling the correction of registered details should be able to be used in all jurisdictions to ensure that a person’s sex is accurately recorded.

Following the March 2014 amendments to the ACT Births, Deaths and Marriages Registration Act, a person whose birth is registered in the Australian Capital Territory,³⁶ can apply for a change to her or his recorded sex to intersex.³⁷ The term intersex is not defined in the Act; the definition in

29 Ibid, at [36].

30 The High Court referred to Norrie as ‘she’ and ‘her’, because it said that is how Norrie describes herself: *ibid*, at [2] n4.

31 Ibid, at [34].

32 Eg, BDMRA 1997 (ACT) s 11(2); BDMRA 1996 (SA) s 17(2); BDMRA 1999 (Tas) s 16(2); BDMRA 1996 (Vic) s 19(2). In Queensland, the legislation does not expressly give the Registrar such a power.

33 This was the observation made by counsel for the NSW Registrar in the appeal at the NSW Court of Appeal: *Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) 84 NSWLR 697; [2013] NSWCA 145 at [15].

34 BDMRA 1997 (ACT) s 40(1)(b); BDMRA 1995 (NSW) s 45(1)(b); BDMRA (NT) s 40(1)(b); BDMRA 2003 (Qld) s 42(2)(d); BDMRA 1996 (SA) s 42(1)(b); BDMRA 1999 (Tas) s 42(1)(b); BDMRA 1996 (Vic) s 43(1)(b); BDMRA 1998 (WA) 51(1)(b). Birth is a registrable event.

35 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [32].

36 BDMRA 1997 (ACT) s 24(1)(b).

37 BDMRA 1997 (ACT) s 24(1)(c)(ii).

the ACT Legislation Act would be applied.³⁸ This defines an intersex person as:

a person who has physical, hormonal or genetic features that are —

- (a) not fully female or fully male; or
- (b) a combination of male or female; or
- (c) not female or male.

This is established by a statutory declaration by a doctor or psychologist which certifies that the person is intersex.³⁹ The ability to change an intersex person's registered sex has the effect of correcting the Register.

(2) Change of a person's registered sex

In all eight jurisdictions, a person's sex,⁴⁰ as it is recorded in the Register, can be formally changed, subject to a number of requirements.⁴¹

(a) Change of sex following surgical, medical or clinical treatment

In all eight jurisdictions, a person's registered sex can be changed if the person has undergone sex affirmation or reassignment surgery. In two jurisdictions, it is also possible if a person has undergone medical procedures for sex reassignment. In the Australian Capital Territory alone, a person must only have undergone 'clinical' treatment.

Formal recognition of change of sex status was first permitted by legislation enacted in South Australia in 1988, and similar provisions have since been introduced in the legislation in the other seven jurisdictions. The system that applies in South Australia and Western Australia is somewhat different to that in the remaining jurisdictions. The decision whether to recognise the change of sex is made in South Australia by a Magistrate,⁴² and in Western Australia by the Gender Reassignment Board, a state government statutory authority.⁴³ In South Australia and Western Australia, the decision-maker issues a 'recognition certificate' which recognises the change in the person's sex, which the person can then use in applying to have the Register amended.⁴⁴ In the other six jurisdictions, the Registrar decides whether a change of sex will formally be recognised. If the person was born in the jurisdiction, the Registrars do not issue recognition certificates, rather, the change of sex is

³⁸ Legislation Act 2001 (ACT) s 169B.

³⁹ BDMRA 1997 (ACT) ss 25(1)(a)(ii), 25(2)(b)(ii).

⁴⁰ As noted above n 2, in Australia, biological aspects of identity are generally referred to as 'sex'. The legislation relating to sex affirmation or sex reassignment sometimes uses the term 'gender', especially in the WA legislation which is called the Gender Reassignment Act 2000 (WA).

⁴¹ In most jurisdictions, the relevant provisions are found in the Births, Deaths and Marriages Registration Act. In South Australia and Western Australia, separate legislation specifically deals with sex reassignment: Sexual Reassignment Act 1988 (SA), Gender Reassignment Act 2000 (WA).

⁴² Sexual Reassignment Act 1988 (SA) s 7.

⁴³ Gender Reassignment Act 2000 (WA) s 5.

⁴⁴ Sexual Reassignment Act 1988 (SA) ss 7, 10; Gender Reassignment Act 2000 (WA) ss 15, 17.

noted⁴⁵ or the record of a person's sex is altered⁴⁶ in the Register.⁴⁷

The circumstances in which a change to a person's sex can be recorded in the Register of Births, Deaths and Marriages are stipulated in the legislation. These circumstances are generally similar in the eight jurisdictions but there are several important differences.

Only one jurisdiction allows sex status to be changed in the Register without a surgical or medical procedure. Since March 2014,⁴⁸ a change to a person's registered sex may be made under the ACT legislation if 'the person believes their sex to be the sex nominated in the application' and has received 'appropriate clinical treatment for alteration of the person's sex'.⁴⁹ The application is made to the ACT Registrar-General of Births, Deaths and Marriages and must be supported by a statutory declaration by a doctor or a psychologist, confirming that the person has received appropriate clinical treatment.⁵⁰

In five jurisdictions, a change of the registered sex is only possible following sex reassignment or affirmation surgery.⁵¹ The application is made to the Registrar of Births, Deaths and Marriages and must be supported by statutory declarations by two doctors confirming that the person has undergone surgery.⁵² The requirement that a person has undergone surgery has also been applied in other areas of law as an essential criterion in determining whether a transsexual person is male or female.⁵³

In South Australia and Western Australia, the legislation allows a person's sex to be formally changed following either a medical or a surgical procedure

45 BDMRA (NT) s 28D(1); BDMRA 2003 (Qld) s 23(1), (2). In Queensland, if the change of sex is noted in the Register, the Registrar must re-register the person's change of sex: BDMRA 2003 (Qld) s 14(2).

46 BDMRA 2003 (ACT) s 26; BDMRA 1995 (NSW) s 32B; BDMRA 1999 (Tas) s 28A; BDMRA 1996 (Vic) s 30C(1).

47 In New South Wales and Victoria, people who were born outside the jurisdiction may apply for a recognised details certificate: see below at text to nn 82–84.

48 Until the 2014 amendments to the BDMRA 1997 (ACT), a change of sex could only be recognised in the ACT following sexual reassignment surgery.

49 BDMRA 1997 (ACT) s 24(1)(c)(i). The same applies for a child: *ibid*, s 24(2)(c)(i).

50 BDMRA 1997 (ACT) s 25(1)(a), 25(2)(b).

51 The Tasmanian legislation does not specifically state that a change to a child's sex can only be made following sex reassignment surgery (cf BDMRA 1999 (Tas) s 28A(1), which expressly requires that an adult must have undergone surgery in order to apply to have their registered sex changed) with s 28A(2), which does not expressly include this requirement. The Tasmanian Births, Deaths and Marriages Registration Regulations 2010 do not specify what documentation needs to be supplied in making an application on behalf of a child. The Registry website states that an application must be accompanied by statutory declarations by two medical practitioners confirming that the person has undergone sexual reassignment surgery: at <http://www.justice.tas.gov.au/bdm/sexual_reassignment> (accessed 17 October 2014).

52 BDMRA 1995 (NSW) s 32C(a); Births, Deaths and Marriages Registration Regulations (NT) reg 4A(b); BDMRA 2003 (Qld) s 23(4)(b); BDMRA 1999 (Tas) s 28B; BDMRA 1996 (Vic) s 30B(1).

53 In particular, in the areas of criminal law (*R v Harris and McGuinness* (1988) 17 NSWLR 158), social security law (*Secretary, Department of Social Security v SRA* (1993) 43 FCR 299; 31 ALD 1; 118 ALR 467; BC9305208 at 305) and marriage law (*Re Kevin* (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074; *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1; 172 FLR 300; (2003) FLC 93-127; [2003] FamCA 94).

‘to alter the genitals and other sexual characteristics of a person, identified by birth certificate as male or female’.⁵⁴ The legislation in both states recognises that the procedure may have been undergone outside the jurisdiction.⁵⁵ In South Australia and Western Australia, the application must be accompanied by the affidavit of a medical practitioner relating to the reassignment procedure.⁵⁶ In both states, the legislation gives the decision-maker discretion as to whether to recognise the change in sex, but the decision-maker may do so, in the case of an adult,⁵⁷ only if it is:

satisfied that the person —

- (i) believes that his or her true sex is the sex to which the person has been reassigned; and
- (ii) has adopted the lifestyle and has the sexual characteristics of a person of the sex to which the person has been reassigned; and
- (iii) has received proper counseling in relation to his or her sexual identity.⁵⁸

AB v Western Australia concerned the second of these three requirements, in particular, whether the applicants had ‘the gender characteristics of a person of the sex to which the person has been reassigned’. Both applicants had undergone bilateral mastectomies and hormone treatment; neither had had a hysterectomy. The High Court held that this requirement should be interpreted fairly and liberally, given the beneficial purposes of the Gender Reassignment Act,⁵⁹ and that the requirement concerned what gender ‘other members of society would perceive the person’s gender to be’.⁶⁰

In *Norrie*, the High Court commented that there may ‘be occasions when the Registrar is prompted by the circumstances of an application to address a concern as to whether an application to record a state of affairs in the Register is made in good faith’, although they said that *Norrie* was not such a case.⁶¹ The requirement that the applicant has undergone surgical or medical treatment⁶² hardly encourages any but the most determined of applicants.⁶³ In *AB v Western Australia*, the High Court noted that a person, by undertaking a medical or surgical procedure to alter their genitals or other gender

54 Sexual Reassignment Act 1988 (SA) s 3 (definition of reassignment procedure). The definition in the WA legislation is almost identical: Gender Reassignment Act 2000 (WA) s 3 (definition of reassignment procedure).

55 Sexual Reassignment Act 1988 (SA) s 7(2); Gender Reassignment Act 2000 (WA) s 14(1).

56 Sexual Reassignment Regulations 2000 (SA) reg 6(1)(b)(i); Gender Reassignment Regulations 2001 (WA) reg 4(1)(b)(ii).

57 In the case of a child, the principal consideration in deciding whether to grant a certificate recognising a change in sex in South Australia and Western Australia is whether this is in the best interests of the child: Sexual Reassignment Act 1988 (SA) s 7(9)(b); Gender Reassignment Act 2000 (WA) s 15(2)(b).

58 Sexual Reassignment Act 1988 (SA) s 7(8)(b). The language of the relevant WA provision is identical to that of the SA provision, except that the word ‘gender’ is used instead of sex and sexual: Gender Reassignment Act 2000 (WA) s 15(1)(b).

59 (2011) 244 CLR 390; 281 ALR 694; [2011] HCA 42; BC201107621 at [38].

60 *Ibid*, at [34].

61 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [39].

62 The SA and WA legislation provides that a recognition certificate may be cancelled ‘if it appears that the certificate was obtained by fraud or other improper means’: Sexual Reassignment Act 1988 (SA) s 10(1); Gender Reassignment Act 2000 (WA) s 19(1).

63 Otlowski noted the ‘serious and irreversible nature of reassignment surgery’: ‘The Legal Status of a Sexually Reassigned Transsexual’, above n 6, p 73.

characteristics, evidences their commitment to the changed sex.⁶⁴ In other words, the requirement of undergoing surgical or medical procedures operates as a reassurance that applications are genuine.⁶⁵ Any further requirement of good faith seems excessive or redundant, or both.

In the Australian Capital Territory, neither surgical nor medical treatment is a requirement. The applicant must only show that they have undergone ‘appropriate clinical treatment’.⁶⁶ Although the ACT Law Reform Advisory Council in its 2012 report on *Legal Recognition of Sex and Gender Diversity in the ACT* accepted that it was necessary to ensure that applications for recognition of a change of sex were genuine and made in good faith,⁶⁷ the council was unable to reach a view as to how that should be assessed and there is no such explicit requirement in the 2014 amendments to the ACT legislation.

In every jurisdiction except the Australian Capital Territory, the legislation does not allow a change to a married person’s sex to be registered.⁶⁸ This limitation is based on a concern that recognising a change of sex status for a married person would indirectly lead to the recognition of same-sex marriage, which would be inconsistent with the Marriage Act and its definition of marriage as a heterosexual union.⁶⁹ This issue has not been directly resolved. In dicta in *Re Kevin*, Chisholm J declined to express a concluded view because the issue had not been argued before him.⁷⁰ His Honour noted that the validity of a marriage is to be determined at the time of marriage, so a subsequent change to one party’s sex should not invalidate the marriage.⁷¹ In any event, the sex status of a person under state and territory law may not be determinative of their status for the purposes of federal law, including marriage law,⁷² so this concern may be misplaced.

In 2009, the Human Rights Commission recommended that the exclusion of married people should be removed, being in breach of Australia’s international obligations not to discriminate against a person on the basis of their marital

64 *AB v Western Australia* (2011) 244 CLR 390; 281 ALR 694; [2011] HCA 42; BC201107621 at [26]

65 ACT Law Reform Advisory Council, above n 5, p 40.

66 The term is not defined in the Act.

67 ACT Law Reform Advisory Council, above n 5, pp 40–2.

68 BDMRA 1995 (NSW) ss 32B(1)(c), 32DA(1)(d); BDMRA (NT) s 28B(1)(c); BDMRA 2003 (Qld) s 22; Sexual Reassignment Act 1988 (SA) s 7(10); BDMRA 1999 (Tas) s 28A(1)(c); BDMRA 1996 (Vic) ss 30A(1), 30C(3), 30F(6); Gender Reassignment Act 2000 (WA) s 15(3).

69 *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528; 240 ALR 399; [2007] FCAFC 140; BC200707248 at [68]–[69]; *State of WA v AH* (2010) 41 WAR 431; [2010] WASCA 172; BC201006404 at [22]; Sharpe, above n 6, p 12.

70 *Re Kevin* (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074 at [303].

71 *Ibid.* See likewise *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528; 240 ALR 399; [2007] FCAFC 140; BC200707248 at [68].

72 As explained further below, in *Re Kevin*, the husband’s sex had been changed to male in the Register following his sex affirmation surgery, but this was not one of the factors explicitly taken into account in determining whether he was a man for the purposes of the Marriage Act: see below at text to nn 140–143, referring to (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074 at [330].

status.⁷³ In 2009, the requirement that an applicant be unmarried was removed from the ACT legislation.

In Victoria, only adults can apply for a change in their sex to be recognised.⁷⁴ In the other jurisdictions, parents and guardians can apply for a change in a child's sex to be recognised.⁷⁵

Four jurisdictions only allow a change of sex status to be recorded for people born in the jurisdiction,⁷⁶ whose births will therefore be registered in the jurisdiction. The other four jurisdictions also allow a change of sex status to be formally recognised for people born outside the jurisdiction either if the person has a connection to the jurisdiction, or if the procedure was done in the jurisdiction. In Victoria and Western Australia, residence in the jurisdiction is sufficient;⁷⁷ in New South Wales, the person must both be resident in the jurisdiction and also be either an Australian citizen or permanent resident.⁷⁸ In South Australia, the sex reassignment procedure must have been performed in the jurisdiction,⁷⁹ which is also a sufficient connection for Western Australia.⁸⁰ In South Australia and Western Australia, the application is the same whether the person's birth is registered in the state or not: in all cases the person applies for a recognition certificate, which is conclusive evidence that the person 'is of the sex stated in the certificate'.⁸¹ In Victoria, if a person's birth is registered outside Victoria and that person has undergone sex affirmation surgery, they 'may apply to the Registrar for a document that acknowledges the person's name and sex'.⁸² These documents are called Recognised Details Certificates. In New South Wales, a person whose birth is not registered in the state but who has undergone sex affirmation surgery can apply to have their changed sex registered in the Register.⁸³ After their changed sex has been registered, the person may apply for a 'recognised details certificate'.⁸⁴

(i) Recognition of 'non-specific' sex

In all jurisdictions, the provisions which allow a person's changed sex to be recognised do not stipulate which sexes may be registered. The SA Sexual Reassignment Act refers to the person 'being of the sex to which the person

73 *Sex Files*, above n 2, p 30, referring to the International Covenant on Civil and Political Rights Arts 2(1), 26; the International Covenant on Economic, Social and Cultural Rights Art 2; the Universal Declaration of Human Rights Art 2; and the Convention on the Rights of the Child Art 2.

74 BDMRA 1996 (Vic) s 30A(1)(a).

75 BDMRA 1997 (ACT) s 24(2); BDMRA 1995 (NSW) ss 32B(2), 32DA(2); BDMRA (NT) s 28B(2); BDMRA 2003 (Qld) s 23(2); Sexual Reassignment Act 1988 (SA) s 7(3)(b); BDMRA 1999 (Tas) s 28A(2); Gender Reassignment Act 2000 (WA) s 14(2)(b).

76 BDMRA 1997 (ACT) s 24(1)(b), 24(2)(a); BDMRA (NT) ss 28B(1)(a), 28B(2)(a); BDMRA 2003 (Qld) s 22; BDMRA 1999 (Tas) ss 28A(1)(b), 28A(2).

77 BDMRA 1996 (Vic) s 30E(1)(a); Gender Reassignment Act 2000 (WA) s 15(1)(a)(i), (iii), 15(2)(a)(i), (iii).

78 BDMRA 1995 (NSW) ss 32DA(1)(a), (b), 32DA(2)(a), (b).

79 Sexual Reassignment Act 1988 (SA) ss 7(8)(a)(i), 7(9)(a)(i).

80 Gender Reassignment Act 2000 (WA) ss 15(1)(a)(i), 15(2)(a)(i).

81 Sexual Reassignment Act 1988 (SA) s 8(1); Gender Reassignment Act 2000 (WA) s 16(1).

82 BDMRA 1996 (Vic) s 30E(1).

83 BDMRA 1995 (NSW) s 32DC.

84 BDMRA 1995 (NSW) s 32DD.

has been reassigned'.⁸⁵ The Queensland legislation uses similar language.⁸⁶ The ACT provisions refer to 'the alteration of the record' of the person's sex.⁸⁷ In four jurisdictions, the legislation refers to at least one purpose of sex affirmation or reassignment surgery as being 'to assist a person to be considered as a member of the *opposite sex*',⁸⁸ a statement which has been relied on as indicating that the legislation recognises only male and female as registrable sexes.⁸⁹ The legislation in the jurisdictions that use the same phrase also provides that the person can apply 'to register a change to the person's sex'.⁹⁰

This ambiguity in the legislation was at the centre of the dispute in *Norrie*. As noted above, in April 2014, the High Court held that the NSW legislation should be interpreted to permit registration of a person's sex as non-specific.⁹¹ This case concerned the provision of the NSW Births, Deaths and Marriages Registration Act which allows people born outside Australia to apply for recognition of a change in their sex following sex affirmation surgery.⁹² *Norrie* was born in Scotland as a male. She underwent sex affirmation surgery in Scotland in 1989 and later moved to Australia. In 2009, she applied to the NSW Registrar of Births, Deaths and Marriages to register a change of sex to 'non-specific' and to register a change of name. In February 2010, the Registrar approved *Norrie*'s application and issued *Norrie* with a Recognised Details (Change of Sex) Certificate and a Change of Name Certificate. Both certificates recorded *Norrie*'s sex as 'not specified'. In March 2010, the Registrar informed *Norrie* that the Recognised Details (Change of Sex) Certificate was invalid, that it had been issued in error and that the Registrar lacked the power to record *Norrie*'s sex as non-specific. The Registrar reissued the Change of Name Certificate, and the reissued certificate noted *Norrie*'s sex as 'not stated', rather than 'not specified' (as it was noted in the certificates issued in February 2010).

Norrie applied for review of the decisions made in March 2010 to the NSW Administrative Decisions Tribunal, which held that the NSW Births, Deaths and Marriages Registration Act 'is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female. It does not allow a person to choose to have an unspecified sex

85 Sexual Reassignment Act 1988 (SA) s 4.

86 BDMRA 2003 (Qld) s 24(1), (2), (4).

87 BDMRA 1997 (ACT) s 23. The Victorian legislation is almost the same: BDMRA 1996 (Vic) ss 30A, 30E.

88 BDMRA 1995 (NSW) s 32A (definition of sexual affirmation surgery); BDMRA (NT) s 28A (definition of sexual reassignment surgery); BDMRA 1999 (Tas) s 3 (definition of sexual reassignment surgery). In Victoria, this is the only stated purpose of sexual reassignment surgery: BDMRA 1996 (Vic) s 4 (definition of sexual reassignment surgery). Emphasis added.

89 This is the interpretation taken by the Policy Officer of the Victorian Registry of Births, Deaths and Marriages to the author in email correspondence, dated 19 March 2014, on file. This correspondence was sent before the High Court handed down its decision in *Norrie*.

90 BDMRA 1995 (NSW) s 32B, 32DA; BDMRA (NT) s 28B; BDMRA 1999 (Tas) s 28A.

91 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184.

92 Births, Deaths and Marriages Registration Act 1995 (NSW) s 32DA.

recorded'.⁹³ Norrie appealed from this decision to the Appeal Panel of the NSW Administrative Decisions Tribunal which affirmed the tribunal's decision and dismissed the appeal.⁹⁴ Norrie then appealed to the NSW Court of Appeal which reversed the Appeal Panel's decision, holding that it was possible for the Registrar to record a person's sex as non-specific.⁹⁵ The Registrar appealed to the High Court which dismissed the appeal.

The issue in *Norrie* was whether the provisions of the NSW Births, Deaths and Marriages Registration Act empowering the Registrar to change the record of a person's sex⁹⁶ were limited to making a change from male to female or female to male, as the Registrar contended, or whether it was possible for the Registrar to register a person's sex as non-specific. The Registrar submitted that the reference in the legislation to one purpose of sexual affirmation surgery being to assist a person to be considered a member of 'the opposite sex' meant that the Registrar was limited to recording sex only as either male or female.⁹⁷ The court rejected that submission, holding that to record Norrie's sex as non-specific 'would be no more than to recognise, as the Act does, that not everyone is male or female'.⁹⁸

Following the High Court's decision in *Norrie*, it is clear the NSW legislation allows the Registrar to record a person's change of sex from male to non-specific, if the requirements of the relevant legislation are satisfied. For the same reasons, *Norrie* would permit the Registrar to record a person's change of sex from female to non-specific under the New South Wales legislation. The High Court stated that:

Norrie's application to the Registrar and the Registrar's determination did not give rise to an occasion to consider whether Pt 5A contemplates the existence of specific categories of sex other than male and female, such as 'intersex', 'transgender' or 'androgynous'.⁹⁹

Determining the consequences of *Norrie* for other Australian jurisdictions is a more complex task.¹⁰⁰ Three critical factors in the High Court's reasoning apply equally to the other Australian jurisdictions. First, the court stated that the role of the Registrar is to record information supplied by members of the community, appropriately verified in accordance with the requirements of the

93 *Norrie v NSW Registrar of Births, Deaths and Marriages* [2011] NSWADT 102; BC201155149 at [98].

94 *Norrie v NSW Registrar of Births, Deaths and Marriages* [2011] NSWADTAP 53; BC201155338.

95 *Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) 84 NSWLR 697; [2013] NSWCA 145.

96 Births, Deaths and Marriages Registration Act 1995 (NSW) s 32DC.

97 *Norrie v NSW Registrar of Births, Deaths and Marriages v Norrie* (No S 273 of 2013), Appellant's written submissions, at [23], at <http://www.hcourt.gov.au/assets/cases/s273-2013/Norrie_App.pdf> (accessed 17 October 2014).

98 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [35].

99 *Ibid*, at [34].

100 This is most significant for jurisdictions other than the Australian Capital Territory — as already noted, changes to the ACT BDMRA which were passed in March 2014 permit registration of a child at birth as indeterminate, unspecified and intersex, and also permit a person to apply to have the formal record of their sex changed to intersex. The ACT legislation does not specifically permit a person to have the formal record of their sex changed to unspecified or non-specific, so *Norrie* has some relevance in the ACT.

legislation;¹⁰¹ this applies in all jurisdictions. Second, the court relied on its observation in *AB v Western Australia* that ‘the sex of a person is not . . . in every case unequivocally male or female’,¹⁰² which the court identified as ‘the central issue with which’ the Gender Reassignment Act, the WA legislation which permits a person’s sex to be changed, grappled.¹⁰³ The provisions in the other Australian jurisdictions which permit a person’s recorded sex to be changed following sexual reassignment procedures address precisely the same central issue. Third, the court insisted that the Registrar should not record a person’s sex inaccurately.¹⁰⁴ These three important factors apply with equal force in all Australian jurisdictions, and imply that in all jurisdictions, the Registrars are empowered to register a person’s sex as non-specific.

On the other hand, it might be argued that the decision in *Norrie* should be limited to the terms and the history of the relevant NSW legislation. The provisions that were in issue in *Norrie* — namely, Pt 5A of the Births, Deaths and Marriages Registration Act — are broadly similar to the legislation of the other Australian jurisdictions relevant to the formal recognition of a change of sex status.¹⁰⁵ But the High Court placed emphasis on two factors which are not common to all Australian jurisdictions: the definition of sex affirmation surgery in the NSW Act, and the legislative context in which Pt 5A was introduced into that Act.

The High Court repeatedly referred to and relied on the second part of the definition of ‘sex affirmation procedure’ in the NSW Act,¹⁰⁶ which ‘acknowledges ambiguities’ in a person’s sex,¹⁰⁷ in justifying its conclusion that the Registrar was empowered to record a person’s sex as non-specific. This definition lacks exact equivalents in most of the other Australian jurisdictions. The NT and Tasmanian Acts contain exactly the same definition of sex affirmation¹⁰⁸ surgery as the definition in the NSW Act, which refers to one purpose of such surgery as being ‘to correct or eliminate ambiguities relating to the sex of a person’.¹⁰⁹ In the SA and WA Acts, a similar definition

101 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [1], [37].

102 *AB v Western Australia* (2011) 244 CLR 390; 281 ALR 694; [2011] HCA 42; BC201107621 at [23], cited in *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [16], [38].

103 *AB v Western Australia* (2011) 244 CLR 390; 281 ALR 694; [2011] HCA 42; BC201107621 at [23].

104 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [32].

105 Unlike the NSW legislation which was in issue in *Norrie*, the ACT, NT, Queensland and Tasmanian provisions only allow people who were born in the jurisdiction to apply to have a change of sex registered: above n 76. This difference is not material to the current discussion.

106 The Act defines a sex affirmation procedure to be ‘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’: BDMRA 1995 (NSW) s 32A (emphasis added).

107 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [37]. The court also referred to this provision explicitly at [1] and [33], and implicitly at [34] and [35].

108 This is the term used in the NSW legislation. In the Northern Territory and Tasmania, the term is sexual *reassignment* surgery: BDMRA (NT) s 28A; BDMRA 1999 (Tas) ss 3, 28A. The difference is not material for the purposes of this analysis.

109 BDMRA 1995 (NSW) s 32A. The equivalent definitions are in BDMRA (NT) s 28A; BDMRA 1999 (Tas) s 3.

of sex reassignment procedures is found, referring to the purpose of such procedures in correcting or eliminating ambiguities in sex ‘characteristics’, but in these two jurisdictions this part of the definition only applies to sex reassignment procedures involving children.¹¹⁰

The High Court also relied on the legislative history of the relevant provisions of the NSW legislation. The court noted that the legislation which introduced Pt 5A into the Act also amended the NSW Anti-Discrimination Act, particularly by expressly recognising ‘the existence of persons of “indeterminate sex”’.¹¹¹ The court stated that the provisions of Pt 5A of the NSW Births, Deaths and Marriages Registration Act ‘are to be applied in a context of *express legislative recognition* of the existence of persons “of indeterminate sex”’.¹¹² A similar context applies in the Australian Capital Territory,¹¹³ Tasmania,¹¹⁴ Victoria,¹¹⁵ and Western Australia.¹¹⁶

These two elements of the High Court’s reasoning in *Norrie* make the implications of this case obscure in terms of the effect of the decision in the other Australian jurisdictions, in none of which is found the combination of the definition of sex affirmation surgery and the exact legislative context that were referred to in the court’s reasons. In the earlier decision of *AB v Western Australia*, concerning the interpretation of the WA Gender Reassignment Act, the High Court noted that the statutory objects of this legislation were ‘remedial and beneficial’,¹¹⁷ and held that the provisions allowing a change to a person’s registered sex should therefore be ‘given a fair and liberal interpretation in order that they achieve the Act’s beneficial purposes’.¹¹⁸ The legislation in the other jurisdictions is very similar in content and effect to the WA legislation, and can be seen to give effect to the same beneficial purposes.¹¹⁹ For that reason, following *AB v Western Australia*, the provisions of the other jurisdictions permitting a change to a person’s registered sex should be interpreted fairly and liberally. Taking this into account, as well as

110 Definition of ‘reassignment procedure’ in Sexual Reassignment Act 1988 (SA) s 3; Gender Reassignment Act 2000 (WA) s 3.

111 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [18].

112 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [18] (emphasis added). The court stressed this point again at [33] and [37].

113 This is clearly the case following the March 2014 amendments to the Births, Deaths and Marriages Registration Act 1997 (ACT).

114 The long title of the Tasmanian BDMRA states that the Act’s purposes include ‘to provide for the rights of persons who have undergone sexual reassignment surgery’.

115 The purpose of the Victorian legislation which introduced the relevant provisions into the Victorian BDMRA is ‘to provide for the recognition of the sex of persons who have undergone sex affirmation surgery’: Births, Deaths and Marriages Registration (Amendment) Act 2004 (Vic) s 1.

116 The Gender Reassignment Act 2000 (WA) also amended the Equal Opportunity Act 1984 (WA) and the long title of the Gender Reassignment Act states that the purpose of the Act includes ‘to promote equality of opportunity, and provide remedies in respect of discrimination, on gender history grounds’.

117 *AB v Western Australia* (2011) 244 CLR 390; 281 ALR 694; [2011] HCA 42; BC201107621, at [5].

118 *Ibid.*, at [38].

119 The WA Gender Reassignment Act 2000 (WA) was based on the Sexual Reassignment Act 1988 (SA) and the provisions of those two statutes are very similar, so this argument applies strongly to the SA statute even though it contains no express statement of its objects. In relation to other jurisdictions, see above nn 114–115.

the abovementioned three factors identified in *Norrie* that apply in all Australian jurisdictions,¹²⁰ *Norrie* should be interpreted to allow recognition of non-specific sex under the provisions in the other jurisdictions.

(ii) Subsequent changes to registered sex

It is generally assumed that it is undesirable for people to change their sex more than once.¹²¹ In *Re Kevin*, Chisholm J referred to the need to avoid ‘any risk that the law might enable a person to change from a man to a woman at will’. His Honour suggested that the reason some judges had been reluctant to take into account ‘psychological criteria’ in determining a person’s sex was a concern that this would mean that a person’s sex might ‘vary according to his or her feelings or beliefs at particular times’.¹²²

In its Sex and Gender Diversity Project, the Australian Human Rights Commission received submissions which pointed out that a person’s sex identity may be fluid and may change over time.¹²³ The commission noted these submissions, but recommended that a person who seeks to have a change of sex recognised should be required to declare that they intend to identify as a particular sex ‘permanently’.¹²⁴ This suggestion has not been taken up explicitly, including in the Australian Passports Office’s Revised Policy on Sex and Gender Diverse Passport Applicants of 2011 and the 2014 amendments to the ACT Births, Deaths and Marriages Registration Act.

In all jurisdictions, the legislation does not explicitly anticipate or address the possibility of a subsequent application for recognition of another change of sex, after the record of a person’s sex has been formally changed. The requirement that the person has undergone sex affirmation or reassignment surgery that applies in the majority of jurisdictions obviously has the effect of severely restricting a person’s ability to change sex more than once.¹²⁵ There is no requirement of undergoing either medical or surgical procedures in the

120 Above text to nn 101–104.

121 For example, in *AB v Western Australia*, the WA Gender Reassignment Board refused to grant recognition certificates to the female to male transsexual applicants because the applicants, who had both had mastectomies and undergone hormone treatment but who had not had hysterectomies, retained the ability to bear a child: reasons of the board, cited by Martin CJ in *Western Australia v AH* (2010) 41 WAR 431; [2010] WASCA 172; BC201006404 at [27]. The decision of the board was ultimately overturned on appeal to the High Court.

The concern about changing sex more than once is related to the use of surgery as an essential criterion for recognising a change in sex, because surgery is permanent, irreversible and demonstrates the commitment of the person to the change of sex: see above at text to nn 63–65.

122 *Re Kevin* (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074 at [292].

123 *Sex Files*, above n 2, pp 39–40.

124 *Sex Files*, above n 2, p 32. The commission also recommended that a person should be able to request that their sex be recorded as unspecified (*ibid*, p 33), and noted that a person who could not establish the requirement of permanency could request that their sex be recorded as unspecified (*ibid*, p 40).

125 In *Re Kevin*, one of the factors that Chisholm J listed as justifying the conclusion that Kevin was a man at the time of his marriage was that the husband had undergone a ‘full process of transsexual re-assignment’, which involved ‘irreversible surgery’: (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074 at [330] (emphasis added).

Australian Capital Territory; the applicant must only have undergone 'appropriate clinical treatment'.¹²⁶ The issue as to whether subsequent changes to a person's registered sex should be legally recognised in the Registers is therefore most likely to arise in the Australian Capital Territory.

As the legislation allowing a change of recorded sex does not explicitly prohibit or limit a person from applying for a second or subsequent change of sex, assuming that the other requirements were satisfied, it would appear to be possible for a person to rely on the same provisions outlined above to apply for recognition of subsequent changes to their sex identity.

(b) The legal effect of recording a change of sex in the Register

If a change of sex is formally recorded, the Births, Deaths and Marriages Registration Act states that this change is effective 'for all legal purposes' within the jurisdiction in which the change is recorded.¹²⁷ In addition, in all the states and the Northern Territory,¹²⁸ the legislation attempts to recognise the effect of formal changes to a person's sex identity which have been recorded in the registries of the other Australian jurisdictions. The system applied for this purpose is, in all jurisdictions, unnecessarily unclear and incomplete, and gives insufficient recognition to formal changes to sex identity made in other jurisdictions.

Most jurisdictions based this aspect of their legislation on the SA Sexual Reassignment Act which, as explained above, leads to a change of sex being recognised by a Magistrate granting a 'recognition certificate'.¹²⁹ Western Australia is the only other jurisdiction which applies the same system of issuing a recognition certificate.¹³⁰ In the other jurisdictions, the change to a person's sex is recorded in the Register. The SA legislation recognises 'an equivalent certificate issued under a corresponding law' of the other states and territories,¹³¹ all of which have been prescribed under the Regulations.¹³² The NSW legislation also recognises 'recognition certificates' issued by other Australian jurisdictions.¹³³

The WA legislation states that a recognition certificate issued under a 'corresponding law' is to be given the same effect as a recognition certificate issued in that state.¹³⁴ However, the only corresponding law prescribed under the WA Regulations is the SA Act.¹³⁵ The Victorian legislation recognises the

126 BDMRA 1997 (ACT) ss 25(1)(a), 25(2)(b).

127 Eg, BDMRA 1995 (NSW) s 32I(1), 32J(1); BDMRA 2003 (Qld) s 24(4); Sexual Reassignment Act 1988 (SA) s 8(1); Gender Reassignment Act 2000 (WA) s 16(1).

128 As noted below, following the 2014 amendments, the ACT BDMRA does not address this issue at all: see below, text to n 138.

129 See above n 44.

130 As noted above, in New South Wales and Victoria, a person whose birth is not registered in the state may be issued with a recognised details certificate, which is similar.

131 Sexual Reassignment Act 1988 (SA) ss 3 (definition of corresponding law), 8(2).

132 Sexual Reassignment Regulations 2000 (SA) reg 5. The definition of corresponding law in the Sexual Reassignment Act 1988 includes the law of another country if it is declared by the regulations to be a corresponding law; at the date of writing in October 2014, no other country's law has been prescribed.

133 BDMRA 1995 (NSW) s 32I(2), 32J(2); Births, Deaths and Marriages Registration Regulation 2011 (NSW) cl 17.

134 Gender Reassignment Act 2000 (WA) s 16(2).

135 Gender Reassignment Regulations 2001 (WA) reg 3.

effect within Victoria of an interstate recognition certificate, which is defined to mean a certificate issued under the SA Sexual Reassignment Act, the WA Gender Reassignment Act, or any other prescribed law.¹³⁶ As at October 2014, no other law has been prescribed under the Regulations.

The legislation in the Northern Territory, Queensland and Tasmania recognises the changed sex of a person made under an interstate ‘recognition certificate’, but defines ‘recognition certificate’ so it is limited to people who have undergone sexual reassignment surgery.¹³⁷ This excludes people who have undergone a medical procedure, according to the requirements of the SA and WA legislation, as well as intersex people and people who have undergone appropriate clinical treatment, according to the requirements of the ACT legislation.

Following the 2014 amendments to the ACT Births, Deaths and Marriages Registration Act, the ACT legislation now makes no express provision for the effect to be given to formal recognition in another Australian jurisdiction of a change to a person’s sex.¹³⁸ This is inconsistent with the previous version of the ACT legislation, and should be remedied, in line with the recommendations set out below.

The existing provisions are unnecessarily complicated and unclear, with several jurisdictions giving limited or no recognition to changes that have been recorded in the registers of the other Australian jurisdictions. As noted, the legislation in most jurisdictions is similar and imposes strict requirements, so recognition of a formal change of sex by another Australian Registry should hardly be controversial. The legislation in all jurisdictions should also recognise that some jurisdictions allow a change of sex to be recorded when the person has not undergone reassignment surgery. The definition of a ‘recognised transgender person’ which is used in other legislation is simpler, clearer and more effective and this definition could be modified to improve this aspect of the law. The definition of a ‘recognised transgender person’ in the NSW Anti-Discrimination Act, as well as other legislation, is ‘a person the record of whose sex is altered under Pt 5A of the Births, Deaths and Marriages Registration Act 1995 or under the corresponding provisions of a law of another Australian jurisdiction’.¹³⁹

The provisions relating to the recognition of the alteration of a person’s recorded sex under the law of another Australian jurisdiction should be reformed in order to provide greater certainty and clarity and to ensure consistency in the treatment of a person’s sex identity within Australia.

A person’s registered sex identity may not be decisive when it comes to

136 BDMRA 1996 (Vic) s 4 (definition of interstate recognition certificate).

137 BDMRA (NT) ss 28A (definition of recognition certificate), 28J; BDMRA 2003 (Qld) s 24(1), (3) and Dictionary (definition of recognition certificate); BDMRA 1999 (Tas) ss 3 (definition of recognition certificate), 28H.

138 The previous ACT BDMRA, repealed in 2014, stated that an interstate recognition certificate was conclusive evidence that the person’s sex was as recorded in the certificate: BDMRA 1997 (ACT) s 29(2). The definition of an interstate recognition certificate was limited to people who had undergone sexual reassignment surgery: *ibid*, s 29(3). There are no equivalent provisions in the version of the Act enacted in March 2014.

139 Anti-Discrimination Act 1977 (NSW) s 4. The same definition is used in the Crimes (Forensic Procedures) Act 2000 (NSW) s 3(1) and the Crimes Act 1914 (Cth) s 23WA. See also Legislation Act 2001 (ACT) s 169A(3).

federal law. In *Re Kevin*, the NSW Registrar had issued the husband with a new birth certificate showing his sex as male, following sex affirmation surgery.¹⁴⁰ Although Chisholm J held that it was undesirable to define ‘man’ and ‘woman’ inconsistently in different areas of law,¹⁴¹ his Honour did not treat the husband’s recorded sex in the Register of Births, Deaths and Marriages as decisive for the purposes of determining his sex in order to determine the validity of his marriage. Indeed, his Honour did not even nominate a person’s registered sex as a relevant factor in determining a person’s sex for the purposes of marriage law.¹⁴² On appeal, the Full Court stated the birth certificate ‘creates no more than a rebuttable presumption as to its accuracy, so that if the Attorney-General can establish that Kevin is not a man for the purposes of the Marriage Act, the presumption created by the certificate is accordingly rebutted.’¹⁴³

(c) The ongoing relevance of sex identity

In *Norrie* the High Court observed that sex identity is ‘[f]or the most part... irrelevant to legal relations’.¹⁴⁴ This raises the question as to the ongoing relevance of recording and registering a person’s sex in the Registers of Births, Deaths and Marriages. Although the Human Rights Commission recommended in its influential report on *The Legal Recognition of Sex in Documents and Government Records* that it should not be compulsory for sex to be recorded in some identity documents,¹⁴⁵ it is generally accepted that sex should continue to be recorded in birth registration¹⁴⁶ and it is highly unlikely that the requirement to nominate sex will be removed from birth registration.¹⁴⁷

II Implications of the formal recognition of sex statuses other than male and female

The changes to the Australian law described in Part I have obvious implications for the recognition of sex identities other than male and female in at least two different areas. The first is the recording of a person’s sex in identity documents other than birth certificates, and the second is in the context of marriage law. This part considers these two areas in turn.

A Recording sex in other identity documents

Applications for identity documents generally require the applicant to nominate their sex, and most applications currently only permit the

140 (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074 at [34].

141 *Ibid.*, at [249].

142 *Ibid.*, at [330].

143 *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1; 172 FLR 300; (2003) FLC 93-127; [2003] FamCA 94 at [354]. The Full Court referred to BDMRA 1995 (NSW) s 49, which provides that a birth certificate is evidence of what is contained in it, but does not provide that this is conclusive evidence.

144 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 at [42]. See below, IIB.

145 Human Rights Commission, *Sex Files*, above n 2, pp 13–14; ACT Law Reform Advisory Council, above n 5, p 34.

146 ACT Law Reform Advisory Council, above n 5, p 34.

147 Part II.B below considers in detail the ongoing significance of a person’s sex, for the purposes of Australian marriage law.

nomination of sex as male or female. There is limited direct coordination between the various identity documents used in Australia, and a person's sex may be recorded differently in different identity documents. For example, as noted above, in most jurisdictions, in order for a person's changed sex to be recorded in the registers, they must have undergone sex affirmation or reassignment surgery,¹⁴⁸ but there is no such requirement in order to apply for a passport in a different sex.¹⁴⁹ Notwithstanding this lack of consistency, this section shows that there is nonetheless a level of indirect coordination between these systems and that the acceptance of sex diversity in one type of identity document can influence the treatment of sex diversity in others.

Many government agencies, at the federal, state and territory levels, as well as other organisations including universities and schools, issue documents that are used to establish and verify personal identity. These documents include passports, drivers' licences, photo identity cards, social security cards, Medicare cards and student cards. Applicants are almost invariably required to nominate their sex as either male or female in applications for these identity documents, with no other option, although most identity documents do not themselves indicate the sex of the person. Heavy reliance on birth certificates in verifying applications for other identity documents and the systems which enable verification of identity documents¹⁵⁰ together create a degree of consistency in identity documentation. For this reason, the formal recognition of sex identities other than male and female in the registration of sex identity, described in Part I, seems likely to lead to greater acceptance of options other than female and male in other identity documents.

The recognition of unspecified sex in the Australian Passports Office Revised Policy on Sex and Gender Diverse Passport Applicants of 2011¹⁵¹ demonstrates this type of influence. The Revised Policy directly influenced the 2014 amendments to the ACT Births, Deaths and Marriages Registration Act.¹⁵² The Revised Policy requires sex to be recorded in Australian passports, and permits sex to be recorded as male, female or 'x (unspecified)'. This is based on the International Civil Aviation Organisation's requirements for Machine Readable Travel Documents, which require a person's sex to be

148 Above, text to nn 49–60.

149 Australian Passports Office Revised Policy on Sex and Gender Diverse Passport Applicants: at <<https://www.passports.gov.au/web/sexgenderapplicants.aspx>> (accessed 17 October 2014)

150 The Commonwealth Attorney-General manages the Document Verification Service as part of the National Identity Security Strategy. The service electronically checks identity documents, including birth certificates, drivers' licences and passports, provided by individuals to government agencies against the information recorded by the agency that created the identity documents.

The eight Australian Registrars formally cooperate as the Australasian Registrars for Births, Deaths and Marriages. The NSW Registry operates a Certificate Validation Service on behalf of the Australasian Registrars, which permits private users to check personal information provided by individuals against information recorded in the Australian Registers of Births, Deaths and Marriages.

151 The Revised Policy was introduced in September 2011, in response to recommendations of the Human Rights Commission's *Sex Files* report, above n 2.

152 The ACT Law Reform Advisory Council referred in detail to the Revised Policy in its report which led to the 2014 amendments to the ACT BDMRA: above n 5, pp 38–40.

recorded, and allow a person's sex to be recorded as 'x (unspecified)'.¹⁵³ Under the Revised Policy, the requirements for establishing that a person's sex can be recorded as 'x' are simply that an applicant must provide a letter from a registered medical practitioner stating that the applicant is intersex.¹⁵⁴ These requirements were adopted in the amendments to the ACT Births, Deaths and Marriages Registration Act which allow a person to apply to have their sex recorded as intersex.¹⁵⁵

It is also important to note in this context the Australian Government Guidelines on the Recognition of Sex and Gender, published in July 2013 by the Commonwealth Attorney-General's Department.¹⁵⁶ These guidelines, which are expected to be introduced by Federal Government departments and agencies by 1 July 2016, require Federal Government departments and agencies to make 'x' ('Indeterminate/Intersex/Unspecified') available as an option for classification in Australian government records.

B The relevance of sex identity to marriage

In *Norrie*, the NSW Registrar of Births, Deaths and Marriages submitted that 'the law in most societies (including, implicitly, ours) is based on an assumption that there are only two sexes' and that 'it is impractical and would create insuperable difficulties to abandon the two-sex assumption at law'.¹⁵⁷ The High Court dismissed this argument, stating, as noted above, that sex identity is '[f]or the most part . . . irrelevant to legal relations'.¹⁵⁸

As the High Court went on to acknowledge, the 'chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage',¹⁵⁹ because the Marriage Act defines a marriage as being between a

153 International Civil Aviation Organisation, *Machine Readable Travel Documents*, Doc 9303, Vol 1, 2008, at <http://www.icao.int/publications/Documents/9303_p3_v1_cons_en.pdf> (accessed 17 October 2014). Several other countries now also allow applicants for a passport to nominate their sex as other than male or female, including New Zealand (which permits an applicant to nominate their sex as male, female or x (indeterminate/unspecified) and Bangladesh (which allows male, female or 'others'). See <<http://www.passports.govt.nz/Transgender-applicants>> and <[http://www.passport.gov.bd/Reports/MRP_Application_Form\[Hard%20Copy\].pdf](http://www.passport.gov.bd/Reports/MRP_Application_Form[Hard%20Copy].pdf)> (accessed 17 October 2014).

154 Revised Policy on Sex and Gender Diverse Passport Applicants, above n 149.

155 BDMRA 1997 (ACT) s 25(1), (2), following the recommendation of the ACT Law Reform Advisory Council: above n 5, p 40.

156 The Guidelines are available at <<http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>> (accessed 17 October 2014).

157 *NSW Registrar of Births, Deaths and Marriages v Norrie* (No S 273 of 2013), Appellant's written submissions, [31] available at http://www.hcourt.gov.au/assets/cases/s273-2013/Norrie_App.pdf

158 *Norrie* (2014) 250 CLR 490; 306 ALR 585; [2014] HCA 11; BC201402184 [42].

159 *Ibid*, at [42]. Sex identity may also be relevant in other areas of law, including criminal law and social security law, but a detailed discussion of these areas is beyond the scope of this article. For the purposes of state and territory law, if a person's changed status has been recognised under the relevant BDMRA, that will conclusively determine the question of their status for the purposes of that state and territory's law, and should be recognised in other states and territories, as explained above, at text to nn 127–138. The question may still arise if the person's changed sex has not been recognised under the relevant BDMRA, and if the issue concerns the application of Commonwealth legislation.

man and a woman.¹⁶⁰ The Marriage Act does not define the terms man and woman; they are to be given their ordinary meanings.¹⁶¹

There is only one reported Australian case concerning the validity of the marriage of an intersex person.¹⁶² The 1979 decision in *In the Marriage of C & D*,¹⁶³ in which Bell J held that a marriage between an intersex person and a woman was void on the basis, *inter alia*, that he was ‘neither man nor woman, but a combination of both’,¹⁶⁴ has been widely criticised.¹⁶⁵ In *Attorney-General for the Commonwealth v Kevin*, concerning the sex identity of a post-operative female to male transsexual for the purposes of marriage law, the Full Court of the Family Court stated in dicta that *In the Marriage of C & D* ‘was clearly wrong’.¹⁶⁶ The Full Court justified this conclusion on two bases. First, the court referred to the reasons set out in the judgment of Mathews J in *R v Harris & McGuinness*.¹⁶⁷ This is a criminal case concerning whether two male to female transsexual people were male for the purposes of NSW legislation. In Mathews J’s discussion of *In the Marriage of C & D*, her Honour referred to several criticisms of that case, quoting with approval an article by Bailey.¹⁶⁸ Bailey pointed out that in cases involving transsexual people, the issue is whether their transition from one sex to the other will be legally recognised — that is, whether they are male or female for the relevant legal purpose. In either case, the person would be *capable* of marrying as either a man or a woman,¹⁶⁹ depending on how the law treated their transition. Of course, this does not satisfactorily resolve the issue from the perspective of a transsexual person who wishes to marry, or seeks a declaration as to the validity of their marriage already contracted, because being legally classified as a woman when one wishes to marry a woman will prevent that person from marrying in Australia under the heterosexual definition of marriage.

As Bailey points out, the result of *In the Marriage of C & D* is that an intersex person is not capable of marrying *at all*,¹⁷⁰ because Bell J held that the husband was neither a man nor a woman. The second basis on which the Full Court in *Re Kevin* stated that *In the Marriage of C & D* was wrongly decided was that they stated that an intersex person was entitled to ‘choose

160 Marriage Act 1961 (Cth) s 5 (definition of marriage). See also Family Law Act 1975 (Cth) s 43(a).

161 (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074, 226, *aff’d* *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1 at 64–5; 172 FLR 300; (2003) FLC 93-127; [2003] FamCA 94.

162 In English law, note *W v W (Physical Inter-sex)* [2001] Fam 111; [2001] 2 WLR 674.

163 (1979) 5 Fam LR 636; 28 ALR 524; 35 FLR 340; (1979) FLC 90-636.

164 *Ibid.*, at Fam LR 640. The other basis on which the marriage was held to be void was that the wife laboured under a unilateral mistake as to the true identity of her husband, because she thought he was male whereas he was ‘a combination of both male and female’: 639.

165 R J Bailey, ‘Family Law: Decree of nullity of marriage of true hermaphrodite who has undergone sex change surgery’ (1979) 53 *ALJ* 659; H A Finlay, ‘Sexual Identity and the Law of Nullity’ (1980) 54 *ALJ* 115; R Wilson, ‘Life and Law: The Impact of Human Rights on Experimenting with Life’ (1985) *Aust Jnl of Forensic Sciences* 61 at 78–80.

166 *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1; 172 FLR 300; (2003) FLC 93-127; [2003] FamCA 94 at [205].

167 (1988) 17 NSWLR 158 at 176–7.

168 *Ibid.*, at 176–7, quoting Bailey, above n 165, at 660.

169 Above n 165, at 660.

170 *Ibid.*

their sex and marry'.¹⁷¹ This conclusion was justified by reference to the English case of *W v W (Physical Inter-sex)*.¹⁷² In *W v W*, Charles J emphasised that the wife had made a 'final choice to live as a woman', and the fact of her having made such a choice was evidently critical to his Honour's determination that she was a woman at the time of the marriage.¹⁷³ The husband in *In the Marriage of C & D* had been raised as a male,¹⁷⁴ had undergone surgery to remove his breasts and to 'correct his external sex organs'¹⁷⁵ before the marriage,¹⁷⁶ and he 'exhibited as a male'.¹⁷⁷ By reference to the factors that were identified as relevant to determining sex status for the purposes of marriage law in *Re Kevin*,¹⁷⁸ the husband in *In the Marriage of C & D* would probably be regarded as a man.

But if an intersex person had not finally chosen to live as a man or a woman, or if they wished their intersex status to be recognised, then the decision in *In the Marriage of C & D* is not incorrect. An intersex person who wishes to have their intersex identity recognised and respected remains incapable of marrying in Australia.

Twenty-five years after the decision in *In the Marriage of C & D*, the Australian law has yet to address the discrimination against intersex people in marriage law, as well as the discrimination against same-sex couples.¹⁷⁹ The formal recognition of intersex status in the Australian Capital Territory and of non-specific status in New South Wales place this issue squarely on the agenda. In *Commonwealth v Australian Capital Territory*, the High Court held that marriage, in s 51(xxi) of the Commonwealth Constitution refers to:

a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting, and defining mutual rights and obligations.¹⁸⁰

This definition excludes any reference to sex identity and is capable of extending to a marriage to which an intersex person is party. As noted above, the ACT legislation which was in issue in *Commonwealth v Australian Capital Territory* only purported to allow same-sex marriage. The court held that the marriage power permitted the Commonwealth to legislate for

171 *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1; 172 FLR 300; (2003) FLC 93-127; [2003] FamCA 94 at [231]

172 *W v W (Physical Inter-sex)* [2001] Fam 111; [2001] 2 WLR 674.

173 *Ibid*, at 147 (emphasis original).

174 (1979) 5 Fam LR 636 at 637; 28 ALR 524; 35 FLR 340; (1979) FLC 90-636.

175 *Ibid*, at Fam LR 637.

176 Bell J noted that the decision to surgically affirm the husband's identity as a male was taken by his treating doctors. His Honour noted that 'their opinion was that he should be transformed into a male rather than a female since he had for a considerable number of years been treated as a male': *ibid*, at Fam LR 639.

177 *Ibid*, at Fam LR 639.

178 (2001) 28 Fam LR 158; 165 FLR 404; (2001) FLC 93-087; [2001] FamCA 1074 at [330] *aff'd Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1; 172 FLR 300; (2003) FLC 93-127; [2003] FamCA 94 at [376].

179 The ACT Marriage Equality (Same Sex) Act 2013, which was struck down in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; 304 ALR 204; [2013] HCA 55; BC201315603, would only have permitted intersex people to marry other intersex people. Its definition of marriage related only to same-sex couples: s 3, and dictionary.

180 (2013) 250 CLR 441; 304 ALR 204; [2013] HCA 55; BC201315603 at [33].

same-sex marriage, particularly referring to the fact that marriage is defined in other countries to encompass same-sex unions.¹⁸¹ For similar reasons, it may well be that the Commonwealth has the power to legislate to allow the marriage of intersex people.

In *Commonwealth v ACT*, the High Court treated the acceptance of same-sex marriage in other countries as relevant to the meaning of marriage in the Commonwealth Constitution. While many countries now permit marriage between same-sex couples,¹⁸² the rights of intersex people to marry as such — that is, without being required to identify as male or female — remain very limited. However, in New Zealand, the definition of marriage inserted in the Marriage Act in 2013 states that marriage is ‘the union of 2 people, regardless of their sex, sexual orientation, or gender identity’.¹⁸³ There is no prohibition under NZ law on people from outside New Zealand marrying in New Zealand and there are reports of Australian intersex people marrying in New Zealand.¹⁸⁴ Such a marriage would almost certainly not be recognised in Australia, because of the definition of ‘marriage’ in the Marriage Act.¹⁸⁵

III Conclusion

The decision in *Norrie* and the recent changes to the ACT Births, Deaths and Marriages Registration Act are welcome developments. They demonstrate the law’s capacity, with the involvement of the Human Rights Commission, champions like *Norrie* and the acceptance of agencies such as the International Civil Aviation Organisation, to adapt to ‘increasing medical, scientific and social awareness’ relating to sex identity.¹⁸⁶ They form part of a consistent domestic and international trend¹⁸⁷ towards broader legal acceptance of sex and gender diversity, including the amendments to the Federal Sex Discrimination Act in 2013 to include intersex status as a ground of impermissible discrimination.¹⁸⁸ In addition to expanding the availability of options other than male and female in birth registration and subsequent changes to a person’s registered sex, these developments should lead to wider awareness and acceptance of sex identities other than male and female. They ought also to stimulate further reflection on the regulation of marriage in Australia and its exclusion of intersex people.

181 Namely, the evolving nature of marriage and the ability of same-sex couples to marry in other countries: see (2013) 250 CLR 441; 304 ALR 204; [2013] HCA 55; BC201315603 at [31]-[37].

182 Eg, Marriage (Same Sex Couples) Act 2013 (UK).

183 Marriage Act 1955 (NZ) s 2 (definition of ‘marriage’).

184 A Whitelaw, ‘Same sex couples head over the ditch for vows’, 25 August 2014, *Sydney Morning Herald*, at <<http://www.smh.com.au/national/samesex-couples-head-over-the-ditch-for-vows-20140824-3e8co.html>> (referring to the marriage of intersex advocate, Tony Briffa, and her partner).

185 Marriage Act 1961 (Cth) s 5.

186 *Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) 84 NSWLR 697; [2013] NSWCA 145 at [190].

187 See above n 3 and text to n 183.

188 Sex Discrimination Act 1984 (Cth) s 5C.