

NSW Registrar of Births, Deaths and Marriages v. Norrie: Implications for Sex Segregation Studies

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Abstract

The April 2014 High Court judgement in the case of *NSW Registrar of Births, Deaths and Marriages v Norrie* is the latest in a series of official acknowledgements that sex and gender are not binary differences, but rather positions along two different spectrums – one of physical difference, and one of personal and social identity. Through expanding the official range of sexes and/or genders recognised by law in Australia, this judgement has significant implications for the area of sex segregation studies, which has long relied on binary understanding of sex and/or gender when building segregation indices. With Norrie being granted the right to have their sex listed as non-specific, there are now at least four legally recognised categories of sex in Australia – female, intersex, male and non-specific.

Due to increasing awareness that there are numerous people who do not fit within binary constructions of sex and/or gender, governments are beginning to include a wider range of sex and/or gender categories when collecting data. This includes the 2013 Australian Government *Guidelines on the Recognition of Sex and Gender*, which state that by July 2016, all Australian Government departments are required to offer three options for sex when collecting data, rather than the existing two. This has obvious implications for sex and gender segregation studies, as we have long relied on binary understandings of sex and gender when modelling sex segregation. Because of these *Guidelines*, as well as the High Court judgements in both *NSW Registrar of Births, Deaths and Marriages v Norrie* and *AB v Western Australia*, it is imperative that sex segregation researchers develop and implement non-binary models of sex segregation.

Introduction

The April 2014 High Court judgement in the case of *NSW Registrar of Births, Deaths and Marriages v Norrie*¹ resulted in the ability of individuals to be legally recognised as being of non-specific sex. This decision by the High Court has significant implications for the collection of sex and/or gender based data in Australia, it provides a precedent for the inclusion of non-specific as a statistical category of sex alongside the existing categories of female, indeterminate/intersex/unspecified and male. These categories are recognised through

¹ Norrie was born Bruce Norrie Watson, and in 2010 officially changed their name to simply ‘Norrie’ (although they are sometimes referred to in the media as Norrie May-Welby). On the question of the correct pronouns to use when addressing or discussing Norrie, in personal correspondence Norrie stated that their “personal preference is for ‘she’ if most of the people in the particular context are ‘she’, or ‘they’” (Norrie 2014).

case law, Australian government guidelines, and by allowing Australians to hold passports denoting a person as having a sex of F, M or X (Australian Government 2013: 4).

As official data shifts to include a wider range of sex and/or gender options, this has significant follow-on effects for quantitative sex segregation studies, which cling strongly to ideas of binary sex and/or gender. Sex segregation methods such as index construction are used as a means to “reduce huge data arrays into simpler, more readily understandable numbers” (Grannis 2002: 69), through which we can examine “the processes of selection and exclusion that reflect and create gender inequalities” (Scott 2010: 223). Quantitative methodologists have long relied on binary difference as the primary location of measurement within segregation indices, whether the categories under examination are that of gender, sex, race or class (Grannis 2002: 69). By being able to include a wider range of sexes and/or genders in sex segregation modelling, sociologists will be better able to model equality in society, and to highlight areas in which segregation is high and should be addressed.

Sex and Gender

Within the field of sex segregation modelling, ‘sex’ and ‘gender’ are used interchangeably (see, for example, Charles 2003; Cohen 2004). Some of this confusion arises from the fact that when sex segregation first developed, sociologists did not tend to acknowledge differences between sex and gender. Sex segregation studies evolved out of racial segregation studies, where early models, such as Duncan and Duncan’s Index of Dissimilarity (also known as the Index of Similarity) measured racial segregation in terms of white/non-white people (Duncan and Duncan 1955: 210). Over the past 60 years, and aided by the feminist movement of the 1970s and 1980s, there has been a shift within sociology from the assumption that people are either male or female (with sex and gender seen as indistinguishable) to present distinctions between biological sex and culturally constructed, changeable gender (Woodward 2011: 22). These distinctions are not reflected in our existing models of segregation.

Gender is a “primary way of signifying relationships of power” in modern cultures (Scott 1988: 42), but until the coining of the term ‘gender’, many of the differences hitherto attributed to sexual difference were in truth a matter of social construction, with no necessary connection with biological sex (Scott 1988: 63). Many continue to not recognise the distinction between sex and gender. For example, official “categorical thinking in its commonest form takes a dichotomous classification of bodies as a complete definition of gender” (Connell 2012: 1675), thereby conflating sex with gender and vice versa. As outlined below, there are moves within Australian Commonwealth bodies to move to employing more nuanced understandings of both sex and gender. Although gender and sex are closely interconnected, for the purposes of this paper, I will focus mainly on sex due to its distinction as a statistical category “physical persons” (Scott 1988: 63).

Sex is used as a statistical category on many fundamental identification documents. The declaration of a person’s sex on identification documents such as birth certificates is an essential marker of a child as a legal citizen and a subject of human rights (Bird 2005: 79).

According to Bird, “one must have a recognisable, classifiable sex” to be traditionally “considered as human by the law” (2005: 66). As the case of Norrie shows, what is considered a “recognisable, classifiable sex” has shifted from only recognising male and female individuals within law to legally recognising a wider range of sexes.

Increased Awareness of Non-Binary Sexes and/or Genders

There are many examples of increasing official recognition of non-binary understandings of both sexes and genders. For example, in 2003, Alex MacFarlane was granted Australia’s first “X” passport (Butler 2003: np), meaning sex indeterminate/intersex/unspecified (Australian Government 2013: 4). Since 2007, people who do not identify as either male or female have been able to be denoted on official Nepalese documents (including the census) as “other”. India, Bangladesh and Pakistan recently all allow third-gender options on some official records and fundamental identification documents, such as ID cards, passports and voter registration documents (Bochenek and Knight 2012: np). From November 2013, parents of German new-borns of indiscriminate gender no longer need to identify, choose or select the gender of their new-born. Rather, these children can include their gender when they are older (Scherker 2013: np). Earlier in 2013, *hen* was added to the Swedish National Encyclopaedia as a “gender-neutral pronoun that can be applied to objects and people who don’t wish to specifically identify as male or female” (Bahadur 2013: np). All of these changes have significant implications for data collection related to sex segregation studies.

Furthermore, when examining sex rather than gender segregation, intersex individuals must be taken into account. The Organisation Intersex International Australia Ltd estimates that intersex people account for around 1.7% to 2% of all live births (Blackness et al. 2000: 151; Fausto-Sterling 2000: 53). This “makes intersex differences about as common as red hair” (Organisation Intersex International Australia Limited 2012: np). Critics of these estimates note that the definition of intersex they employ is too broad, as it defines intersex as any “individual who deviates from the Platonic ideal of physical dimorphism at the chromosomal, genital, gonadal, or hormonal levels” (Blackness et al. 2000: 161). Instead, argues Sax, the use of ‘intersex’ should be restricted to a medical definition covering “those conditions in which chromosomal sex is inconsistent with phenotype sex, or in which the phenotype is not classifiable as either male or female” (Sax 2002: 177). Regardless of the definition used, indeterminate/intersex/unspecified individuals should be included within sex segregation analysis as a distinct categorical variable in sex segregation studies, in order to better model sex segregation.

Australian Government Guidelines on the Recognition of Sex and Gender

By July 2016, indeterminate/intersex/unspecified is to be included as a distinct category of sex by all Australian Government departments and agencies, as outlined by the *Guidelines on the Recognition of Sex and Gender*. These *Guidelines*, published in July 2013, outline how data relating to sex and gender should be classified, collected and handled by Commonwealth Government bodies in Australia. All Australian Government departments

and agencies must align their current sex and/or gender data collection policies with these *Guidelines* by 2016. According to these *Guidelines*,

The Australian Government recognises that individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy or as an indeterminate sex and/or gender, and this should be recognised and reflected in their personal records (Australian Government 2013: 2).

These *Guidelines* recommend that “where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (indeterminate/intersex/unspecified)” (Australian Government 2013: 4).

The *Guidelines* are clear when it comes to distinguishing the difference between sex and gender, defining ‘sex’ as referring to “the chromosomal, gonadal and anatomical characteristics associated with biological sex”, while defining ‘gender’ as “part of a person’s personal and social identity. [Gender] refers to the way a person feels, presents and is recognised within the community. A person’s gender refers to outward social markers, including their name, outward appearance, mannerisms and dress” (Australian Government 2013: 3). Furthermore, the *Guidelines* state that “a person’s sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex and some people may identify as neither male nor female. People who are intersex may identify as male or female or as neither” (Australian Government 2013: 3).

Under these *Guidelines*, “sex reassignment surgery and/or hormone therapy are not pre-requisites for the recognition of a change of gender in Australian Government records” (Australian Government 2013: 4). This is in line with the High Court judgement in the 2011 case of *AB v Western Australia*, which stated that “physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially recognisable”, and that “social recognition does not require knowledge of a person’s remnant sexual organs” (Gerber 2012: 17). Thus, as a result of this judgement, reassignment surgery is now not necessarily required by Australian courts to make a ruling on the sex or gender of a person. The ruling in *AB v Western Australia* provided courts with the ability to judge people as “legally recognised as their chosen sex rather than the sex of their birth” (Gerber 2012: 18), which was an important precedent in the case of *NSW Registrar of Births, Deaths and Marriages v Norrie*. The ruling in *AB v Western Australia* also makes it possible for an increasing number of categories of sex to be included in Australian statistical collection in future.

A Summary of NSW Registrar of Births, Deaths and Marriages v. Norrie

In November 2009, Norrie made two applications to the New South Wales (NSW) Registry of Births, Deaths and Marriages under the *NSW Births, Deaths and Marriages Registration Act 1995* (hereafter, the *Act*). One application was to register a change of name to simply “Norrie”, and the other to register a change of sex to “non-specific” (Norrie v Registry of Births Deaths and Marriages 2011: 1). Born in Scotland in 1961, Norrie and family immigrated to Australia in 1969, and in April 1989, Norrie underwent male-to-female

reassignment surgery (Norrie 2011: np; 2013a: np). Around Christmas 1990, Norrie came to the conclusion that they wished to be neither male nor female, but rather neuter (Norrie 2013a: np; The Scavenger 2010: np).

As someone whose psychological self-image was as a gender neuter person and who had neither male nor female hormones or sex organs, in January 2010 doctors issued Norrie with a medical certificate stating that they were unable to determine Norrie as either male or female (The Scavenger 2010: np). On February 11, 2010, the NSW Registry of Births, Deaths and Marriages issued Norrie with a Recognised Details Certificate (hereafter Certificate) which stated Norrie's sex as not specified (Norrie v Registry of Births Deaths and Marriages 2011: 1). Following publication of an article about Norrie's sex not specified Certificate in the *Sydney Morning Herald* in March 2010 (Norrie 2013b: 10), the Registrar decided on March 16, 2010 that this Certificate was invalid and issued in error. In August 2010, Norrie brought their case against the Registry of Births, Deaths and Marriages before the Administrative Decisions Tribunal (Norrie v Registry of Births Deaths and Marriages 2011: Hearing Date).

The decision made by the Administrative Decisions Tribunal in May 2011 upheld the Registrar's invalidation of the sex not specified Certificate. The Tribunal stated that while neither 'sex' nor 'change of sex' are defined under the *Act* (Norrie v Registry of Births Deaths and Marriages 2011: 36), both case law and the "ordinary English meaning of the word 'sex'" refer to the "quality of being male or female" (Norrie v Registry of Births Deaths and Marriages 2011: 38). Moreover, "in the absence of a statutory definition, words must be given their natural and ordinary meaning" (Norrie v Registry of Births Deaths and Marriages 2011: 48). The Administrative Decisions Tribunal judged that "the decisions made by the Registrar on 16 March 2010 were the correct and preferable ones" regarding the invalidation of Norrie's sex not specified Certificate (Norrie v Registry of Births Deaths and Marriages 2011: 100). At this stage, on both their Australian and United Kingdom passports, Norrie's sex was listed as female (Norrie v Registry of Births Deaths and Marriages 2011: 14), though later in 2011 Norrie was granted an Australian X passport (Norrie 2013b: 10).

Norrie disagreed with the Tribunal's judgement, and in 2012 took the matter before the Court of Appeal of the Supreme Court of New South Wales. The main issue of this case was whether the Registrar "was confined to a registration of a person's sex as either 'male' or 'female'" (Norrie v NSW Registrar of Births Deaths and Marriages 2013: Headnote). Norrie's appeal was based on the understanding that "the word 'sex' does not bear a binary meaning of 'male' or 'female'" (Norrie v NSW Registrar of Births Deaths and Marriages 2013: Headnote). Noting that "both medical and legal authorities accepted long before the [*Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996*] that not all people fit within the binary model of sexual classification" (Norrie v NSW Registrar of Births Deaths and Marriages 2013: 261) and that "the statutory power to register a person's change of sex is not limited to registering a person's sex as only male or female" (Norrie v NSW Registrar of Births Deaths and Marriages 2013: 281), the Court of Appeal recommended that the Appeal should be allowed (Norrie v NSW Registrar of Births Deaths and Marriages 2013: Decision).

In 2014, the matter of Norrie's Recognised Details Certificate came before the High Court of Australia. The NSW Registrar of Births, Deaths and Marriages submitted that "the Court of Appeal erred in its construction in rejecting the binary construction and accepting that categories such as non-specific may be capable of being registered" on official documents (NSW Registrar of Births, Deaths and Marriages v. Norrie 2014). In the judgement on this case, the High Court determined that the NSW *Births, Deaths and Marriages Registration Act 1995* "does not require that people who, having undergone a sex affirmation procedure, remain of indeterminate sex... be registered, inaccurately, as one or the other. The *Act* itself recognises that a person may be other than male or female and therefore may be taken to permit the registration sought, as 'non-specific'" (NSW Registrar of Births, Deaths and Marriages v. Norrie 2014). Thus, Norrie won their case and the right to be registered as a person of non-specific sex, thereby expanding the range of sexes recognised by Australian law and subsequently official bodies such as the Australian Bureau of Statistics.

Conclusion: Implications for Sex Segregation Indices

The decisions in the cases of *NSW Registrar of Births, Deaths and Marriages v Norrie* and *AB v Western Australia*, as well as the Australian Government *Guidelines on the Recognition of Sex and Gender*, all have significant implications for sex segregation analysis in Australia, as all three establish a wider range of sex categories than the currently analysed categories of 'female' and 'male'. Under the *Guidelines*, data relating to sex and/or gender is to include the categories of 'female', 'male' or 'indeterminate/intersex/unspecified'. The ruling in *AB v Western Australia* sets the precedent for individuals to be "legally recognised as their chosen sex rather than the sex of their birth" (Gerber 2012: 18), and most recently, the ruling in the case of *NSW Registrar of Births, Deaths and Marriages v Norrie* establishes the legal category of non-specific sex. Therefore, Australian sex segregation researchers have at least four different categories of sex to include in their data collection and analysis – female, indeterminate/intersex/unspecified, male and non-specific. The recent trend for governments to recognise that sex and gender are positions on a spectrum rather than binary distinctions suggests that in future a wider number of categories of sex will be recognised and reported.

The recognition of four distinct categories of sex (as well as the possibility of the introduction of more categories) presents a challenge for present practitioners of mathematical sex segregation studies. No matter which sex segregation index sociologists employ – the Index of Dissimilarity/Similarity, the Karmel-Maclachlan Index, Marginal Matching, the Index of Association or others – all of these indices are limited by only measuring binary sex segregation. As all Australian departments are required to expand their current sex and/or gender data collection from F and M to F, M and X by July 2016, this moves us towards 'sex A/B/C' models of sex segregation, rather than our existing 'sex A/B' models. As the judgement in the case of *NSW Registrar of Births, Deaths and Marriages v Norrie* establishes non-specific as a category of sex, this moves us towards 'sex A/B/C/D'

models of sex segregation, if those of non-specific sex wish to be classified as different from those of indeterminate/intersex/unspecified sex.

Although I have identified four distinct categories of sex that should be collected in Australian statistics, not all of these categories will be included for all data sets, and there are those who will not wish to identify with any of these categories. It is not the role of a sex segregation analyst to categorise people as being of one sex or the other. Rather, our role is to analyse sex segregation based on self-identified and self-determined sex data – whether we collect it ourselves or draw from official publications. Thus, any non-binary model of sex segregation will ideally be designed in such a way as to easily include different numbers of sex categories depending on the data under examination. The main implication for sex segregation studies in Australia of the judgement in the case of *NSW Registrar of Births, Deaths and Marriages v Norrie* is the need to move away from binary models of sex segregation towards non-binary models.

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