

‘NO MAN’S LAND’: NON-BINARY SEX IDENTIFICATION IN AUSTRALIAN LAW AND POLICY

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I INTRODUCTION

In the recent case of *New South Wales Registrar of Births, Deaths and Marriages v Norrie*,¹ the High Court held that the New South Wales (‘NSW’) Registrar has the power to record the sex of a person in the Register as ‘non-specific’ rather than ‘male’ or ‘female’. In reaching this conclusion, the unanimous judgment of the five member bench opened with the bold statement that ‘[n]ot all human beings can be classified by sex as either male or female’.² This decision received widespread media reportage,³ and has been described as a ‘landmark ruling’.⁴

The decision in *NSW Registrar v Norrie* is important because it calls into question the binary male/female understanding of sex that western law and

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1 (2014) 250 CLR 490 (*NSW Registrar v Norrie*).

2 Ibid 492 [1] (The Court) (citations omitted).

3 See, eg, ‘Gender Ruling: High Court Recognises Third Category of Sex’, *ABC News* (online), 3 April 2014 <<http://www.abc.net.au/news/2014-04-02/high-court-recognises-gender-neutral/5361362>>; Helen Davidson, ‘Third Gender Must Be Recognised by NSW after Norrie Wins Legal Battle’, *The Guardian* (online), 2 April 2014 <<http://www.theguardian.com/world/2014/apr/02/third-gender-must-be-recognised-by-nsw-after-norrie-wins-legal-battle>>; Paul Bibby and Dan Harrison, ‘Neither Man Nor Woman: Norrie Wins Gender Appeal’, *The Sydney Morning Herald* (online), 2 April 2014 <<http://www.smh.com.au/nsw/neither-man-nor-woman-norrie-wins-gender-appeal-20140402-35xgt.html>>.

4 Jennifer Germon, ‘Norrie’s Gender Win Brings Us Closer to Knowing Who We Are’, *The Conversation* (online), 4 April 2014 <<https://theconversation.com/norries-gender-win-brings-us-closer-to-knowing-who-we-are-25250>>.

culture have long been ‘deeply committed to’.⁵ However, *NSW Registrar v Norrie* is not alone in doing this; there have been a series of recent developments in Australian law and policy that are beginning to create space for sex identities beyond the male/female binary in areas relating to birth certificates, passport documentation, government record keeping and anti-discrimination legislation. These developments come after decades of trenchant academic critique about the pernicious effects that the restrictive male/female binary has had on sex and gender diverse people.⁶ In particular, law’s reliance on this binary has been criticised for ignoring the biological and lived realities of such people,⁷ marginalising non-binary sex identities,⁸ and trading on normative conceptions of male/female bodies, sexualities and lives to unfairly restrict access to rights and recognition.⁹ However, whilst the general trend of recent developments in Australia is to move beyond the male/female binary, different areas of law and policy have done so in different ways. Some developments have moved beyond the binary by recognising a ‘third’ sex, others by recognising multiple additional sexes and others by de-emphasising the use of sex as an identification category altogether.

This article charts and evaluates these three different approaches to moving beyond the male/female binary, and in doing so develops the argument for strategically blending these approaches in a way that is focused on providing better outcomes for sex and gender diverse people. This argument is worked

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- 5 Anne Fausto-Sterling, ‘The Five Sexes: Why Male and Female Are Not Enough’ (1993) 33(2) *The Sciences* 20, 20. Kolbe notes that the ‘categorization of persons into only two unchangeable and generally “opposite” sexes is a fundamental principle of the legal system as well as of society’: Angela Kolbe, ‘Intersex, a Blank Space in German Law?’ in Morgan Holmes (ed), *Critical Intersex* (Ashgate, 2009) 147, 147. For a historical analysis of the problematic and contested notion of sex in Western society, see Alice Domurat Dreger, *Hermaphrodites and the Medical Invention of Sex* (Harvard University Press, 1998).
 - 6 In keeping with the terminology used in recent reports from the Australian Human Rights Commission and the ACT Law Reform Advisory Council, this article will use the phrase ‘sex and gender diversity’ to refer to the range of experiences and expressions of sex/gender beyond the normative, traditional binary: Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (2009) 8 (‘*Sex Files Report*’); ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT*, Report No 2 (2012) 32 (‘*Beyond the Binary Report*’).
 - 7 See, eg, David B Cruz, ‘Getting Sex “Right”: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship’ (2010) 18 *Duke Journal of Gender Law & Policy* 203; Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books, 2000).
 - 8 See, eg, Jo Bird, ‘When Sex Means “Condition” or “Impairment”: Evaluating the Human Rights of Transgender and Intersex Peoples’ (2001) 5 *Southern Cross University Law Review* 1; Terry S Kogan, ‘Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other”’ (1997) 48 *Hastings Law Journal* 1223; James McGrath, ‘Are You a Boy or a Girl? Show Me Your REAL ID’ (2009) 9 *Nevada Law Journal* 368; Dean Spade, ‘Documenting Gender’ (2008) 59 *Hastings Law Journal* 731.
 - 9 See, eg, Julie A Greenberg, ‘Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience’ (2002) 39 *San Diego Law Review* 917; Tey Meadow, ‘“A Rose Is a Rose”: On Producing Legal Gender Classifications’ (2010) 24 *Gender and Society* 814.

through in the next three Parts. In Part II, this article introduces the range of sex and gender diversity that exists in contemporary Australia, and demonstrates how law and policy have historically failed to provide a framework for recognising non-binary identities. In Part III, this article links recent developments in law and policy to the three different approaches towards moving beyond the binary, and also evaluates these approaches. In Part IV, this article argues that a blended approach that focuses on providing better outcomes for sex and gender diverse people is the most appropriate pathway for future development.

At the outset it is important to address an issue of terminology. Legal discourse has traditionally been plagued by slippages between the terms ‘sex’ and ‘gender’,¹⁰ as they are utilised in varying and inconsistent ways across the case law, statute law and commentary around sex and gender diversity.¹¹ For ease of expression, this article will use the term ‘sex’ to broadly gesture towards biology and ‘gender’ to broadly gesture towards social/psychological identity. However, in relation to legal designations of a person’s identity, this article will refer to ‘sex’, as this is what law usually claims it is identifying, recording and/or using to differentiate between classes of person.

II THE MALE/FEMALE BINARY

As Namaste recognises, ‘most people in Western societies assume that there are only two sexes (males and females) and two genders (men and women)’.¹² There is also an assumption that sex and gender will unproblematically line up, with male genders mapped onto male-sexed bodies and female genders mapped onto female-sexed bodies.¹³ These ideas about sex/gender are probably based on most people’s personal experience of their own ‘male’ or ‘female’ identity, an experience that is commonly underpinned by an unambiguous and lifelong congruence between their binary sex and their binary gender. This experience of sex/gender, labelled ‘cisgender’, has historically been socially endorsed and (re)produced as the normative ideal, and legal power has worked to ‘regulate and normalise’ those who transgress it.¹⁴ In doing so, typically ‘[c]ourts and

10 Sharon Cowan, ‘“Gender Is No Substitute for Sex”: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity’ (2005) 13 *Feminist Legal Studies* 67, 72.

11 Eg, the *Sexual Reassignment Act 1988* (SA) and *Gender Reassignment Act 2000* (WA) are similar legislation despite the altered nomenclature.

12 Vivian K Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (University of Chicago Press, 2000) 144.

13 Jessica Knouse, ‘Intersexuality and the Social Construction of Anatomical Sex’ (2005) 12 *Cardozo Journal of Law & Gender* 135, 135–6.

14 Andrew N Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish Publishing, 2002) 173.

administrative agencies make two demands of bodies – that they be legible as male or female, and that they be so designated and classified'.¹⁵

Australians have traditionally been compelled by policy to live in one of these two binary categories. For example, the Australian Human Rights Commission recently reviewed how sex information was recorded in official documentation in Australia, including in both 'cardinal documents', such as birth certificates, and secondary documents, such as passports and driver's licences.¹⁶ In their 2009 *Sex Files Report*, the Commission found that 'Australia's identification system largely operates on a binary system where the only options available for sex identity are male or female',¹⁷ and that there was 'very little scope for a person to identify as other than male or female'.¹⁸ The possibilities for non-binary identification were confined mainly to an 'indeterminate' record on the birth certificates of stillborn infants, and passport policies which allowed an 'X' to be recorded only in the rare circumstance where a person could provide 'a birth certificate which states the person's sex as indeterminate'.¹⁹

Much Australian legislation has historically been framed in ways that cater to a binary model of sex/gender and this tendency persists today. The most notable example of this is undoubtedly the *Marriage Act 1961* (Cth), which controversially defines 'marriage' in section 5 as being 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. Statutory language is also frequently framed in binary ways, even if it does not explicitly mention male/female or man/woman. Statutory sections referring to sex often include phraseology that refers to the 'opposite' or the 'other' sex,²⁰ and as the High Court noted in *NSW Registrar v Norrie*: 'As a matter of the ordinary use of language, to speak of the opposite sex is to speak of the contrasting categories of sex: male and female'.²¹

Traditionally, the common law around sex identification has also been steadfastly committed to the male/female binary. In *R v Harris*, the existence of a category of sex identification other than male or female was explicitly rejected.²² In this case, a submission was made to the NSW Court of Criminal Appeal that,

15 Chinyere Ezie, 'Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination – The Need for Strict Scrutiny' (2011) 20(1) *Columbia Journal of Gender and Law* 141, 160.

16 *Sex Files Report*, above n 6, 13.

17 Ibid 27.

18 Ibid 13.

19 Ibid 27.

20 Eg, in WA alone the binary-conforming phrase 'opposite sex' is used in several statutes: see *Artificial Conception Act 1985* (WA) s 3(2)(a); *Court Security and Custodial Services Act 1999* (WA) s 30(1); *Equal Opportunity Act 1984* (WA) ss 8, 18(3), 27(1); *Gender Reassignment Act 2000* (WA) s 3 (definition of 'reassignment procedure'); *Human Reproductive Technology Act 1991* (WA) s 23(1)(c)(ii).

21 (2014) 250 CLR 490, 499 [33] (The Court) (citations omitted). However, the Court did hold that statutory language that refers to 'sex' without a qualifier such as 'opposite' may recognise that a person's sex can be 'indeterminate', but this depends on the exact terms of the relevant section as well as its context.

22 (1988) 17 NSWLR 158.

where a person underwent medical or surgical sex reassignment treatment to alter their sex from male to female, or vice versa, but not to a sufficient extent for them to be legally recognised as the other sex, it was ‘open for the Court to say that there is a third state’ that they could fall into.²³ Justice Carruthers dismissed this submission as ‘lack[ing] substance’,²⁴ whilst Mathews J commented that there was ‘no place in the law for a “third sex”’, because ‘[s]uch a concept ... could cause insuperable difficulties in the application of existing legal principles’ and ‘would also relegate transsexuals to a legal “no man’s land”’.²⁵ Similar considerations motivated the rejection of such a possibility in the United Kingdom case of *W v W (Physical Inter-Sex)*, in which Charles J opined that if a person were recognised as neither male nor female for the ‘purposes of marriage ... such a result would create as many problems as it solved ... by creating a third category the boundaries of which would not be clear’.²⁶

The common law has countenanced the idea of non-binary sex identification on only one occasion, in the now overtaken *In the Marriage of C and D (falsely called C)*.²⁷ In that case, Bell J was tasked with determining the validity of a marriage between a cisgender woman and a person born with ambiguous sex who identified and lived as male. Favourably citing and applying the then current legal test of sex from *Corbett v Corbett (otherwise Ashley)*²⁸ – which focused solely on a person’s biological anatomy at birth – Bell J found that because the husband had been born with ambiguous sex markers the husband was ‘not in fact ... a male but a combination of both male and female’.²⁹ As a result, Bell J held that ‘the husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word ... could not have taken place and does not exist’.³⁰ Given this case’s close reliance on *Corbett v Corbett*, which has long since been abandoned by the common law,³¹ it is of dubious authority today. At the NSW Court of Appeal level, Beazley ACJ commented in *Norrie v NSW Registrar of Births, Deaths and Marriages* that if similar facts were to ever ‘arise again for determination, the outcome would depend upon the terms of any relevant legislation and any scientific or medical evidence that may be adduced’, rather than upon the application of this now outmoded legal test.³²

Despite this evidence of Australian law and policy’s traditional reliance on the male/female binary, whilst the ‘legal system has an interest in maintaining

23 Ibid 170 (Carruthers J).

24 Ibid.

25 Ibid 194.

26 [2001] Fam 111, 144.

27 (1979) 35 FLR 340.

28 [1971] P 83 (‘*Corbett v Corbett*’).

29 *In the Marriage of C and D (falsely called C)* (1979) 35 FLR 340, 344.

30 Ibid 345.

31 *R v Harris* (1988) 17 NSWLR 158; *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299; *Kevin v A-G (Cth)* (2001) 165 FLR 404.

32 (2013) NSWLR 697, 724 [134] (‘*Norrie v NSW Registrar*’).

only two sexes, our collective biological bodies do not'.³³ Not all bodies are or remain clearly and unambiguously sexed as male or female. It is estimated that one to two per cent of people 'are born with sexual features that vary from the medically defined norm for male and female',³⁴ and in the year 2011 alone Victorian hospitals reported about 40 cases of infants who were born with 'physical or biological conditions that mean [they] cannot be said to be exclusively male or female'.³⁵ Variation from the cisgender ideal is not confined simply to sex, with some people 'existing outside the binary' by claiming gender identities that are at odds with the congruent binary model,³⁶ such as no gender, a third gender, a blended male/female gender or a gender that differs from their sex. For example, the Australian Research Centre in Sex, Health and Society's 2007 *Tranznation* report collected data in a survey which included a question asking participants 'what word (or words) they preferred to be used to describe their current gender identity'.³⁷ Alongside the more traditional 'male' and 'female' terms, responses also included '[b]i gendered', 'agendered', 'androgynous', 'transgender', 'genderqueer transboi' and 'butch'.³⁸

Whilst there are multitudes of ways that people experience and describe their sex/gender,³⁹ Greenberg sets out three major categories of variation from the cisgender ideal: intersex, transsexualism and transgenderism.⁴⁰ First, an intersex person is someone 'with a congenital condition whose sex chromosomes, gonads, or internal or external sexual anatomy do not fit clearly into the binary male/female norm'.⁴¹ That is, the sex of an intersex person at the time of their birth is not unambiguously male or female. Secondly, a transsexual person is someone 'whose gender self-identity does not match the sex assigned at birth'.⁴² A transsexual person may seek to bring their sex into congruence with their gender by undergoing various medical or surgical treatments to alter their biological characteristics, such as breast implantation or a penectomy for a

33 Fausto-Sterling, 'The Five Sexes', above n 5, 31.

34 Julie A Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York University Press, 2012) 2.

35 Department of Health (Vic), *Decision-Making Principles for the Care of Infants, Children and Adolescents with Intersex Conditions* (2013) 1.

36 Kyla Bender-Baird, *Transgender Employment Experiences: Gender Perceptions and the Law* (University of New York Press, 2011) 2.

37 Murray Couch et al, *Tranznation: A Report on the Health and Wellbeing of Transgendered People in Australia and New Zealand* (Australian Research Centre in Sex, Health & Society, 2007) 21 ('Tranznation').

38 Ibid.

39 Sally Hines, 'What's the Difference? Bringing Particularity to Queer Studies of Transgender' (2006) 15 *Journal of Gender Studies* 49.

40 Greenberg, *Intersexuality and the Law*, above n 34, 2.

41 Ibid 1.

42 Ibid 2.

transsexual person whose sex is male but whose gender identity is female.⁴³ Thirdly, the category ‘transgender’ is used as ‘an umbrella term that encompasses anyone who transgresses sex or gender boundaries’, including ‘transsexuals, transvestites, or others whose dress or behavior fails to conform to gender norms’.⁴⁴ Rather than denote a specific type of sex/gender identity, transgenderism is a very broad, catch-all category that ‘accommodate[s] people who identify as both, neither, or something other than male or female’.⁴⁵

Bolstered by vocal spokespeople, a burgeoning activist cohort and ongoing academic attention, intersex, transsexual and transgender people have become increasingly visible in contemporary society.⁴⁶ As Spade recognises, ‘[i]n the last two decades, the public discourse about trans identities and trans rights has changed significantly’, with increased media coverage of such issues and ‘[e]merging trans political formations ... institutionalizing by creating new nonprofit organizations and professional associations focused specifically on trans issues’.⁴⁷ Correlatively, it is also apparent that

medical, psychological and social developments relating to sexual identity ... evidence an increasing understanding, not only in science and medicine but also in the law and in other professional disciplines, that sexual identity is not dependent solely upon physical characteristics and is not necessarily unambiguous.⁴⁸

43 It has been argued that transsexual people should be understood as being intersex on the basis of a medical theory that speculates that the cause of transsexualism can be located in the biology of the brain. This theory posits that a transsexual person is someone whose ‘brain sex’ is different from the rest of their body’s physical sex markers, a difference which causes them to adopt a ‘gender’ that is incongruent with their phenotype. This theory has its supporters: see, eg, Karen Gurney, “‘More? You Want More?’ ... Of Course I Do! Transsexualism and Birth Certificates – Changing Records or Attitudes?” (2005) 8 *Flinders Journal of Law Reform* 209; Karen Gurney, ‘Sex and the Surgeon’s Knife: The Family Court’s Dilemma ... Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics’ (2007) 33 *American Journal of Law & Medicine* 625; Rachael Wallbank, ‘*Re Kevin* in Perspective’ (2004) 9 *Deakin Law Review* 461. However, it is far from definitively proven. This article will proceed on the basis that intersex and transsexual experiences of sex and gender diversity are separate and distinct. Regardless of any purportedly common basis in biology, the categories of intersex and transsexualism reflect very different lived realities and have given rise to overlapping but distinct academic discourse and legal treatment.

44 Greenberg, *Intersexuality and the Law*, above n 34, 2.

45 Sharpe, above n 14, 2.

46 See especially, Greenberg, *Intersexuality and the Law*, above n 34, chs 7–10. In particular, recent years have proven ‘trans, transgender and Intersex lobby groups’ to be ‘visible, active and effective’ at representing and championing sex and gender diversity: Wallbank, above n 43, 471.

47 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press, 2011) 13.

48 *Norrie v NSW Registrar* (2013) NSWLR 697, 733 [182] (Beazley ACJ).

In the face of this growing visibility and recognition of sex and gender diversity,⁴⁹ Cowan has identified that the onus has been placed on law and society to develop a ‘framework that does not compel subjects to live in one of two categories, and does not attempt to “freeze” sex and gender’.⁵⁰

In responding to this challenge, over the previous few decades Australian law and policy have taken substantial steps towards ‘thawing’ sex/gender by creating multiple pathways for people to alter their legal sex identification. Statutory frameworks now exist in every state and territory under which people who meet certain (usually medical or surgical) criteria may change the sex recorded on their birth certificate, and common law tests regarding the sex of a person for the purposes of criminal law, social security law and marriage law have been markedly relaxed and now allow for someone born biologically male to be legally identified as female, and vice versa.⁵¹ However, whilst legal developments over the previous few decades have focused on the issue of allowing movement across the male/female binary, less attention has been paid to allowing movement outside this binary. Accordingly, the transsexual litigant who wishes to alter their binary-conforming legal sex identification to fit their binary-conforming gender has figured strongly in law’s response to sex and gender diversity, but the issues raised by intersex or transgender persons who claim non-binary identities have typically been backgrounded within Australian law. This legal trend mirrors the general trend that Bender-Baird identifies ‘in many academic studies that only focus on transsexual people, leaving other transgender identities and experiences unexplored’.⁵² Although ‘legal institutions have been slow to acknowledge’ scholarship which ‘recogni[s]es the complex and nonbinary nature of sexual categories’,⁵³ a wave of recent developments in Australian law and policy has begun to create space for non-binary sex identification. It is to these recent developments that this article now turns.

49 However, as Namaste recognises, it should be noted that whilst ‘there is certainly an increased visibility of some transsexual and transgendered people in the English speaking United States’, some marginalised sections of the sex and gender diverse community, such as ‘the MTF transsexual in prison who cannot access hormones; the seropositive transsexual who cannot find a surgeon willing to perform sex reassignment surgery; the fifteen-year-old female who identifies as a man, who wants hormones, and who is without resources’, have not been included in this growing recognition and perhaps ‘are more invisible than ever’: Namaste, above n 12, 268.

50 Cowan, above n 10, 93.

51 For contemporary overviews of these legal areas, see Laura Grenfell and Anne Hewitt, ‘Gender Regulation: Restrictive, Facilitative or Transformative Laws?’ (2012) 34 *Sydney Law Review* 761; Theodore Bennett, ‘Transsexualism and the Consideration of Social Factors within Sex Identification Law’ (2014) 34 *Adelaide Law Review* 379.

52 Bender-Baird, above n 36, 10.

53 Julie A Greenberg, ‘The Roads Less Traveled: The Problem with Binary Sex Categories’ in Paisley Currah, Richard M Juang, and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press, 2006) 51, 63.

III MOVING BEYOND THE BINARY

In the last few years, Australian law and policy has begun to recognise sex identities other than male/female in areas such as birth certificates, passport documentation, government record keeping and anti-discrimination legislation. This recognition has not, however, proceeded in a consistent way, as different areas of law and policy have adopted different approaches to recognising sex and gender diversity. Roughly speaking, three types of approach are evident: the first recognises a ‘third’ category of sex, the second recognises multiple additional categories of sex, and the third de-emphasises the use of sex as a category altogether. This Part focuses on each of these approaches in turn, identifying the developments in Australian law and policy that are in line with each approach and also evaluating the appropriateness of each approach as a pathway for future developments.

A A ‘Third’ Sex

Even if we were to acknowledge that ‘[m]illions of people are transgendered and cannot easily be categorized as either male or female’,⁵⁴ and also accept that ‘gender and sex are not truly binaries’ and ‘treating them as such [is] antiquated’,⁵⁵ it is still not readily apparent what course of development Australian law and policy should take to account for this. Chau and Herring pose the pertinent and troublesome question: ‘if we are not rigidly to require every person to be placed in the male or female box what alternatives are there?’.⁵⁶

One approach would be to create an additional category of identification beyond male/female: a ‘third’ sex that could account for any variation from the binary. This kind of approach was advocated by the Australian Human Rights Commission in their 2009 *Sex Files Report*, where they recommended that a ‘person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and records’.⁵⁷ This recommendation was picked up on in late 2011 when the Department of Foreign Affairs and Trade announced a number of changes to its passport policies. Currently, passports can be issued with sex identifications of ‘M (male), F (female) or X (indeterminate/unspecified/intersex)’, with the ‘X’ identification available as long as the relevant person can provide a letter from a medical practitioner certifying that they are intersex.⁵⁸ This recommendation was also picked up in 2013 when the Federal

54 Greenberg, ‘Deconstructing Binary Race and Sex Categories’, above n 9, 918.

55 McGrath, above n 8, 405.

56 P L Chau and Jonathan Herring, ‘Defining, Assigning and Designing Sex’ (2002) 16 *International Journal of Law, Policy and the Family* 327, 355.

57 *Sex Files Report*, above n 6, 3.

58 Department of Foreign Affairs and Trade (Cth), *Sex and Gender Diverse Passport Applicants: Revised Policy*, Australian Passport Office <<https://www.passports.gov.au/web/sexgenderapplicants.aspx>>.

Government released the *Australian Government Guidelines on the Recognition of Sex and Gender*.⁵⁹ The *Government Guidelines* are a set of guidelines relating to sex identification and record keeping that apply to ‘all Australian Government departments and agencies’.⁶⁰ They came into force on 1 July 2013 and are intended to be fully implemented by 1 July 2016.⁶¹ The *Government Guidelines* differentiate between sex and gender, and set out that the ‘preferred Australian Government approach is to collect and use *gender* information’, whereas ‘[i]nformation regarding sex would ordinarily not be required’.⁶² Importantly, they require that where sex/gender information is collected and recorded, ‘individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified)’.⁶³

This ‘third’ sex approach is also echoed in the High Court’s recent decision in *NSW Registrar v Norrie*. This case concerned an application made by Norrie May-Welby to the NSW Registrar of Births, Deaths and Marriages to alter the sex recorded on her⁶⁴ birth certificate to ‘not specified’. The relevant background was that Norrie had been born biologically male but had undergone ‘sexual reassignment surgery involving castration and the creation of a semi-functioning vagina’ and currently ‘identified as having a non specific gender identity’.⁶⁵ The Registrar initially approved the application, but later notified Norrie that this was an error and amended the sex on Norrie’s birth certificate from ‘not specified’ to ‘not stated’. Norrie applied for review of the Registrar’s decision, and the Registrar defended their decision on the basis that they did not have the legal power under the *Births, Deaths and Marriages Registration Act 1995* (NSW) to alter the record of a person’s sex to something other than ‘male’ or ‘female’. Both the NSW Administrative Decisions Tribunal and the Appeal Panel of the Administrative Decisions Tribunal found that the Registrar lacked the relevant

59 Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013) (*‘Government Guidelines’*) <<http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>>.

60 Ibid 2.

61 Ibid 8.

62 Ibid 3 (emphasis in original).

63 Ibid 4.

64 I have followed the convention adopted by the High Court to refer to Norrie using female pronouns, despite Norrie’s self-identification as neither male nor female: *NSW Registrar v Norrie* (2014) 250 CLR 490, 496–7 [23] (The Court). The lack of readily available language to refer to sex/gender non-specific individuals reflects the naturalisation of the male/female binary by ‘refus[ing] other possibilities’: Fausto-Sterling, ‘The Five Sexes’, above n 5, 20–1. Queer activists have developed alternative language to accommodate sex and gender diversity by ‘offer[ing] a third option for those who do not fit in the gender binary’, including gender-neutral pronouns such as *hir* (instead of his or her) and *zhe* (instead of he or she): Bender-Baird, above n 36, 158.

65 *Norrie v NSW Registrar* (2013) 84 NSWLR 697, 702 [6] (Beazley ACJ).

legal power.⁶⁶ However, the NSW Court of Appeal unanimously found that the Registrar did have the relevant power,⁶⁷ and the High Court unanimously upheld this decision (but with substantially different reasoning from the Court of Appeal).⁶⁸ Whilst the High Court accepted the Registrar's submission that 'the Act recognises only male or female as registrable classes of sex', they also held that this 'does not mean that the Act requires that this classification can apply, or is to be applied, to everyone'.⁶⁹ Rather, because the 'Act recognises that a person's sex may be indeterminate',⁷⁰ it also 'recognises that a person may be other than male or female and therefore may be taken to permit the registration sought, as "non-specific"''.⁷¹

Despite the differences in wording, these recent developments in passport policy and birth certificate law are conceptually similar: 'X' and 'non-specific' both operate as a third category of sex identification with sufficient breadth to incorporate everything other than male or female. As a response to the reality that '[s]ome people cannot or do not identify as either male or female' for a variety of reasons,⁷² the creation of such a category has been championed by those who argue that it is a 'more inclusive way of modelling sex and gender' because 'it provides a broader set of possibilities' for identification.⁷³ The visible presence of a 'third' space or possibility is said to upset the naturalised logic of the male/female binary but to do so gently because whilst it 'challenges the rigidity of the gender binary system, [it] does not prevent people identifying as male or female'.⁷⁴ However, Kogan identifies a radical, rather than merely supplementary, potential of a 'third' sex, explaining through the example of the introduction of a third category of restroom that

The very existence of a restroom labeled 'Other' forces all persons, especially those who choose to use the restrooms labeled 'Men' or 'Women,' to question their default assumptions about sex and gender. The category 'Other' forces all to question not only who should be entering the new door, but also to wonder who and what belongs inside the doors labeled 'Men' and 'Women,' an issue heretofore always taken for granted.⁷⁵

66 *Norrie v Registry of Births Deaths and Marriages* [2011] NSWADT 102, [98]–[99] (Member Montgomery); *Norrie v Registrar of Births, Deaths and Marriages (GD)* [2011] NSWADTAP 53, [29], [37] (Magistrate Hennessy, Deputy President Fitzgerald and Member Schwager).

67 *Norrie v NSW Registrar* (2013) 84 NSWLR 697, 737 [200] (Beazley ACJ), 752 [274] (Sackville AJA), 753 [281], 754 [287] (Preston CJ of LEC).

68 *NSW Registrar v Norrie* (2014) 250 CLR 490, 493 [2], 501 [45]–[46].

69 *Ibid* 498 [32].

70 *Ibid* 499 [33].

71 *Ibid* 501 [46].

72 *Sex Files Report*, above n 6, 32.

73 Surya Monro, 'Beyond Male and Female: Poststructuralism and the Spectrum of Gender' (2005) 8(1) *International Journal of Transgenderism* 3, 15.

74 *Ibid*.

75 Kogan, above n 8, 1253.

A 'third' sex category could therefore be considered to be both progressive and transgressive. Self-identification within such a category can be used to 'challenge the destructive history caused by our culture's adoption of a dimorphic sex/gender division', and oppose traditionally oppressive male/female dichotomies.⁷⁶ An 'X' or 'non-specific' category can thus work to undo the pernicious effects that law's focus on binary sex identification has had on sex and gender diverse people.

However, there are a number of problems with utilising a 'third' sex model. One of the major criticisms of the male/female binary is that it fails to account for the sheer amount of variety that exists in people's sex/gender and this drawback may not be satisfactorily addressed by the simple addition of a 'third' sex. Categories such as 'X' and 'non-specific' still reductively gloss over difference despite broadening the possibilities of sex identification from two to three. This is because the 'broadness' of a 'third' sex category 'ignores the differences within transsexual and transgendered communities' by 'collapsing the different ways of identifying as transgendered and living one's life'.⁷⁷ Such a category simultaneously encompasses but also conflates the disparate experiences of sex and gender diverse people without recognising and valuing the differences between their identities and experiences. Identifying as having no sex is very different from identifying as being intersex. Indeed, the experience of intersex itself 'covers a wide range of conditions' and 'it would be misleading to group all of these into one heading',⁷⁸ let alone collate 'intersex' with the equally broad category of 'transgender' experiences.

Rather than validating and recognising alternative experiences of sex/gender, the addition of an indiscriminate 'X' or 'non-specific' category also 'has the potential to reify notions that transgender people are not, in fact, men or women', and accordingly 'dehumanize or "other" them'.⁷⁹ This raises the concern that the creation of a 'third' sex category could be used as 'a way of purifying' instead of challenging 'the existing two sexes by allowing people who are anatomically "impure" to be assigned otherwise'.⁸⁰ Instead of working to 'disrupt gender binarism', a 'third' sex could simply then become a 'segregated, ghettoized category' that contains and delimits sex and gender diversity in order

76 Ibid 1246–7.

77 Namaste, above n 12, 42–4.

78 Chau and Herring, above n 56, 355–6.

79 Bender-Baird, above n 36, 37.

80 Gina Wilson, *On Norrie v NSW Registration of Births, Deaths and Marriages* (22 June 2013) Organisation Intersex International Australia <<http://oii.org.au/22681/norrie-v-nsw-registrar-of-births-deaths-and-marriages/>>.

to preserve normative ideals of male/female.⁸¹ Rather than the progressive and transgressive potential that Kogan saw, a ‘third’ sex category may ‘protect [the] “first” and “second” categories from becoming analytically muddled or contaminated’ and may also ‘imply ... that [the] “first” and “second” categories are inviolable and unproblematic’.⁸² It is possible that the law could become less rather than more sensitive to difference because it would be tempted to resolve cases involving sex and gender diversity by simply shunting all variation from the cisgender ideal to the catch-all ‘third’ category. As such, the existence of a third category may undermine the claims of intersex or transsexual people who desire to be legally identified as male or female, rather than as ‘X’ or ‘non-specific’.

At a practical level, the indiscriminate shepherding of the range of sex and gender diversity into a ‘third’ category also fails to address one of the key underlying problems in law’s engagement with sex identification: the creation of a ‘third’ sex ‘in no way resolves the issues around male and female assignments’ within the law.⁸³ The same difficult questions that law has grappled with when determining the criteria a person needs to meet to be able to change their legal sex identification from male to female, and vice versa, would also apply here. Should movement across these three legal sex identification categories be on the basis of self-identification, medical opinion and/or social recognition?⁸⁴ Should some form of medical examination, medical treatment and/or surgery be a prerequisite for legal identification as ‘X’ or ‘non-specific’? The increase in the number of legal identification categories from two to three says nothing about what criteria should be used to assign people to this new category, and the criteria that govern admission to this third category would presumably have to be just as carefully calibrated as the ‘male’ and ‘female’ categories.

For these reasons, the shift in some areas of Australian law and policy to recognise sex and gender diversity by instituting a ‘third’ sex identification category may not prove to be the most satisfactory approach. The creation of a ‘third’ sex retains the dominance of the male/female binary but tacks on an additional, indiscriminate identification category that may serve to delimit and marginalise, rather than recognise and validate, sex and gender diversity.

81 Evan B Towle and Lynn M Morgan, ‘Romancing the Transgender Native: Rethinking the Use of the “Third Gender” Concept’ (2002) 8 *GLQ: A Journal of Lesbian and Gay Studies* 469, 485. Knouse warns that the introduction of a ‘third’ sex category will cause a new binary method of thinking to ‘emerge’, one that privileges ‘the absolute sexes’ (male and female) over the ‘ambiguous sex’ (‘X’ or ‘non-specific’): Knouse, above n 13, 153.

82 Towle and Morgan, above n 81, 484–5.

83 Wilson, above n 80.

84 *Beyond the Binary Report*, above n 6, 40–2.

B Multiple Sexes

If, as Chau and Herring identify, the male/female binary ‘unreasonably restricts people’s sexual identity into one of two sexes, it becomes hard to deny that restricting people to three identities is open to identical objections’.⁸⁵ One solution to this issue would be to multiply the number of legally recognised identities to account for a broader scope of sex and gender diversity. Instead of two or three sex categories, why not more? Fausto-Sterling, in her well-known article ‘The Five Sexes: Why Male and Female Are Not Enough’, was an early advocate for the idea that not only two but even three sex categories would be insufficient to recognise the realities of sex and gender diversity.⁸⁶ Instead, she argued that ‘biologically speaking, there are many gradations running from female to male; and depending on how one calls the shots, one can argue that along that spectrum lie at least five sexes – and perhaps even more’.⁸⁷ Fixed binary or ternary models of sex/gender could be replaced by a plurality of identifications. This plurality could be envisaged as a ‘spectrum, with standpoints which would include female and male as well as a range of (probably) less common, but socially viable, other-gendered positions’.⁸⁸ It could be fixed at a certain number of points, or it could be open to change and development so that as new identities emerge there would be scope for them to be ‘named and [to become] social categories’.⁸⁹

This kind of approach to moving beyond the binary model of sex is embodied in Acting Chief Justice Beazley’s decision in *Norrie v NSW Registrar* when the case was before the NSW Court of Appeal. In this decision, Acting Chief Justice Beazley’s identification of an ‘increasing medical, psychological and social recognition that “sex” or “gender” is not a straightforward notion reflecting only a “male” and “female” sex’ underpinned the conclusion that the Registrar had the power to record sex identifications other than male/female.⁹⁰ Acting Chief Justice Beazley even suggested some alternative non-binary sex identifications that could be recorded, such as ‘intersex’, ‘androgynous’ and ‘transgender’.⁹¹ This line of reasoning was not supported by the High Court’s decision on appeal, as the Court found that it ‘was unnecessary’ to consider whether the Act ‘contemplates the existence of specific categories of sex other than male and female ... given that the Act recognises that a person’s sex may be neither male nor female’.⁹²

85 Chau and Herring, above n 56, 356.

86 Fausto-Sterling, ‘The Five Sexes’, above n 5.

87 Ibid 21. Fausto-Sterling ultimately acknowledges that ‘sex is a vast, infinitely malleable continuum that defies the constraints of even five categories’.

88 Monro, above n 73, 19.

89 Ibid.

90 *Norrie v NSW Registrar* (2013) 84 NSWLR 697, 734 [184].

91 Ibid 738 [205].

92 *NSW Registrar v Norrie* (2014) 306 CLR 585, 499 [34].

This ‘multiple sexes’ approach has only found limited purchase in other areas of Australian law and policy. In their 2012 *Beyond the Binary Report*, the Australian Capital Territory (‘ACT’) Law Reform Advisory Council took the view that ‘the available categories for the registration of a person’s sex should be any of female, male, intersex and indeterminate’, and that birth certificates should also be able to show ‘a person’s sex as “unspecified”, in circumstances where a person is in the process of changing their identity from one sex and gender to another (“transitioning”), or does not identify as having a sex’.⁹³ Ultimately, however, when ACT government policy in this area changed in early 2014 it only allowed for a ‘third category – indeterminate/intersex/unspecified’ on birth certificates.⁹⁴

The advantage of having multiple additional categories over merely a third category is that it has the scope to encompass a variety of identifications whilst retaining the specificity to both validate and differentiate between various experiences of sex and gender diversity. However, the capacity of a pluralist model to be more sensitive to the range of sex and gender diversity induces its own problems. In previous hearings of *NSW Registrar v Norrie*, various possible sex identifications were raised by the parties beyond even those specifically endorsed by Acting Chief Justice Beazley’s multiple sexes approach, including ‘neuter’ and ‘eunuch’.⁹⁵ Because of the ‘extraordinary diversity of cross-gender practices, identities, and beliefs about gender within gender nonconforming communities’,⁹⁶ we are left with the difficult issue of exactly how many sex identification categories other than ‘male’ and ‘female’ the law should recognise. In February 2014, when popular social networking website Facebook allowed its users to identify their sex/gender as something other than male or female, they offered 56 different options, including ‘agender’, ‘pangender’ and ‘two-spirit’.⁹⁷ If a pluralist model committed Australian law and policy to recognising each and every such idiosyncratic form of sex identification it would quickly descend into incoherence, and yet there would need to be a compelling and principled basis for extending legal recognition to some sex identifications and not others. In *Norrie v NSW Registrar*, Beazley ACJ used medical, psychological and social recognition as a barometer to determine whether or not a sex identification category should be legally recognised. This test is flawed, however, as it fails to

93 *Beyond the Binary Report*, above n 6, 36, 38.

94 Simon Corbell, ‘Recognition for Sex and Gender Diverse Community Members’ (Media Release, 20 March 2014) <http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/corbell/2014/recognition-for-sex-and-gender-diverse-community-members>.

95 *Norrie v NSW Registrar* (2013) 84 NSWLR 697, 702 [6].

96 Paisley Currah, ‘Gender Pluralisms under the Transgender Umbrella’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press, 2006) 3, 5.

97 Peter Weber, *Confused by All the New Facebook Genders? Here’s What They Mean*. (21 February 2014) Slate <http://www.slate.com/blogs/lexicon_valley/2014/02/21/gender_facebook_now_has_56_categories_to_choose_from_including_cisgender.html>.

acknowledge the role of legal recognition as a vehicle for social visibility, requiring sex identities to become widely known and accepted before legally validating them but simultaneously disavowing their prior legal non-recognition as a substantial contributing factor to their social invisibility. Such an approach also holds legal recognition of sex and gender diversity hostage to public whims and professional interests. Over the last decade there has been a push to relabel 'intersex' as Disorder of Sexual Development ('DSD'), which has been criticised as reflecting a re-medicalisation of intersex.⁹⁸ The issue here is that increasing medical engagement with intersex might constitute a form of increasing recognition, but this might be recognition as a diagnosable medical pathology rather than as a viable social identity.

At a practical level, having multiple additional categories of sex identification fails, as a third category does, to address the underlying problem of how law should assign individuals to these categories. The mere existence of identification categories such as 'intersex' and 'transgender' does nothing to clarify the criteria that should be employed in order to determine the status of someone who seeks to be legally identified within these categories or within the categories of male/female.⁹⁹ Indeed, the proliferation of sex identifications could instead multiply such legal problems as law would presumably have to police the borders of these additional categories as well.

The approach of instituting multiple additional sex identification categories has only gained very limited traction in Australian law and policy, and its further expansion may not be justified. Whilst recognising multiple sexes may both validate and be sensitive towards the variations within sex and gender diversity, it would be difficult to limit the extent of legal recognition on a principled basis, and such an approach would not resolve the assignment issues that have plagued sex identification law.

C De-Emphasising Sex

If moving from a 'two-"sex"' model ... [to] a 10-sex (or 20 or 30) model does not in itself resolve these kinds of problematic issues,¹⁰⁰ then an alternative method of accommodating sex and gender diversity could involve the reduction of the importance of sex identification altogether. Fausto-Sterling, in an about-face from her previous suggestion in 'The Five Sexes: Why Male and Female

98 See, eg, Alice D Dreger and April M Herndon, 'Progress and Politics in the Intersex Rights Movement: Feminist Theory in Action' (2009) 15 *GLQ: A Journal of Lesbian and Gay Studies* 199.

99 Indeed, in *Norrie v NSW Registrar* (2013) 84 NSWLR 697, Beazley ACJ makes the observation that 'Norrie will need to take care in specifying the "sex" that she contends should be registered', because although Norrie's lawyer described her as 'intersex' Beazley ACJ was of the opinion that 'Norrie is not an intersex person': at 738 [206]. However, no criteria were provided for determining who qualifies as being 'intersex'.

100 Myra J Hird, 'Gender's Nature: Intersexuality, Transsexualism and the "Sex"/"Gender" Binary' (2000) 1 *Feminist Theory* 347, 358.

Are Not Enough’,¹⁰¹ later argued that a more effective measure to provide legal protection for sex and gender diverse people would be the ‘easy step’ of ‘eliminat[ing] the category of “gender” from official documents’.¹⁰² It is questionable how ‘easy’ such a step would be, but it would provide for the formally equal distribution of rights and obligations because everyone, regardless of their sex/gender, would fall within the same category of ‘person’. If the legal importance of sex identification categories was removed, then space would be created for people to identify as and how they wish without fear of incurring some form of legal obligation or being denied some form of legal right. There would be no requirement for people to live ‘subjectivities without “gender” or “sex”’ – a possibility that is ‘difficult to imagine, let alone practise’.¹⁰³ Instead, this approach would work to “dis-establish” gender from the state ... by attempting to stop the state’s use of “sex” as a marker of identity on identification documents; and by ending the state’s reliance on sex as a legal category to distribute resources’.¹⁰⁴

The de-emphasis of sex identification categories would be in keeping with the general trajectory of Australian law. Most legal areas have been largely untroubled by the increasing visibility of sex and gender diversity because the preceding decades have also experienced a concerted legal push within many Western countries to ‘equalize the position of men and women’.¹⁰⁵ A person’s legal sex identification is no longer relevant to issues such as whether or not they can vote or own property, and, as a result, it ‘is significantly less important now than it has been at any other time in history’.¹⁰⁶ In recent years only ‘rarely have the courts had to address the definition of male and female’ and definitively assign a person to one category or the other.¹⁰⁷ Indeed, in *NSW Registrar v Norrie*, the High Court recognised that ‘[f]or the most part, the sex of the individuals concerned is irrelevant to legal relations’, and that ‘[t]he chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage’.¹⁰⁸ Radical though it may seem, ‘calls for the “end” of “sex”/“gender”’ as a system of legal identification and categorisation refocus attention on a critical underlying issue:¹⁰⁹ what exactly is the ‘nature of the state’s interest in having children registered as either male or female at the time of birth’

101 Fausto-Sterling, ‘The Five Sexes’, above n 5.

102 Anne Fausto-Sterling, ‘The Five Sexes, Revisited: The Varieties of Sex Will Test Medical Values and Social Norms’ (2000) 40(4) *The Sciences* 18, 23. In this article, she described the suggestions in her earlier work as being ‘written with tongue firmly in cheek’: at 19.

103 Hird, above n 100, 359.

104 Currah, ‘Gender Pluralisms under the Transgender Umbrella’, above n 96, 24.

105 Chau and Herring, above n 56, 341.

106 Greenberg, above n 34, 48.

107 Chau and Herring, above n 56, 341.

108 (2014) 250 CLR 490, 500 [42] (The Court).

109 Hird, above n 100, 359.

and continuing to identify them through these sex categories for the rest of their lives?¹¹⁰

Whilst the importance of sex to legal relations between persons may have diminished, there remain a number of areas in which a person's sex identification 'is extremely important: it dictates who you can marry, what school you can attend, which sporting team you can play for, and, if all goes terribly wrong, the prison in which you will be incarcerated'.¹¹¹ Other social institutions that rely on sex identification include facilities and services such as bathrooms and locker rooms, university dormitories, homeless shelters, and insurance, as well as possibilities for employment and placement in sectors such as the military.¹¹² Commentators have identified a number of state interests that purportedly justify identifying, officially recording and/or discriminating on the basis of sex, including safety (especially the prevention of rape), comfort, the protection of national security, and protection against fraud.¹¹³ There may also be situations where the state wishes to grant or allocate 'different rights, privileges or duties ... upon members of each sex',¹¹⁴ such as to provide for 'affirmative action and other programs focused on remedying the long-term effects of oppression of women and transgender people', or to provide protective legislation around issues such as discrimination.¹¹⁵ Such programs require some system of sex identification as a basic prerequisite for their existence.¹¹⁶ Sex identification information may also need to be collected for the purposes of epidemiological medical research, effective governmental planning or service provision, and 'accurate monitoring of different sexes' participation in public activity.'¹¹⁷

Another state interest that has been identified as being served by binary sex identification is the promotion of procreation and a traditionally heterosexual 'morality and family life',¹¹⁸ particularly in relation to marriage law. The 'spectre of homosexuality' is a background figure that haunts the jurisprudence around sex and gender diversity,¹¹⁹ the looming presence of which drives both law and 'society's perceived need to police the binary sex and gender divide'.¹²⁰ As the 'religious and moral origins' of these homophobic attitudes recede into the past,

110 Alexander Morgan Capron and Richard D'Avino, 'Legal Implications of Intersexuality' in Nathalie Josso (ed), *The Intersex Child: Pediatric and Adolescent Endocrinology*, Vol 8 (Karger, 1981) 218, 219.

111 Grenfell and Hewitt, above n 51, 761.

112 Julie Greenberg, Marybeth Herald and Mark Strasser, 'Beyond the Binary: What Can Feminists Learn From Intersex and Transgender Jurisprudence?' (2010) 17 *Michigan Journal of Gender & Law* 13, 31–2; Ezie, above n 15.

113 Ezie, above n 15; Spade, 'Documenting Gender', above n 8.

114 Capron and D'Avino, above n 110, 219.

115 Spade, 'Documenting Gender', above n 8, 815; Ezie, above n 15, 196–8.

116 Spade, 'Documenting Gender', above n 8, 814–15.

117 *Beyond the Binary Report*, above n 6, 43.

118 Capron and D'Avino, above n 110, 220.

119 Sharpe, above n 14, chs 5–6; Grenfell and Hewitt, above n 51.

120 Greenberg, *Intersexuality and the Law*, above n 34, 54.

‘the time is drawing near’ when such concerns will be rejected as ‘arcane’,¹²¹ not to mention discriminatory and heterosexist. In the meantime, they provide the least convincing rationale for the retention of sex identification requirements in law and policy areas.

Despite the interests that have been identified as being served by the existence of systematic legal sex identification, the Australian federal government recently adopted a policy approach that de-emphasises sex identification. As discussed above, the *Government Guidelines*, which were introduced in 2013, require that where sex/gender information is collected and recorded, ‘individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified)’,¹²² a requirement that broadly accords with the ‘third’ sex approach. However, the *Government Guidelines* also explicitly require that

all departments and agencies that collect sex and/or gender information should closely examine whether such information is necessary to perform their specific function or for broader government statistical or administrative purposes. Where such information is not necessary, this category of information should be removed from forms or documents.¹²³

This de-emphasis requirement is in keeping with the Australian Human Rights Commission’s recommendation in the *Sex Files Report* that ‘[w]here possible, sex or gender should be removed from government forms and documents’.¹²⁴

There are substantial practical limitations on the de-emphasis approach contained in the *Government Guidelines*. The *Government Guidelines* only apply ‘to Commonwealth Government agencies, not State or Territory agencies or the private sector’, and no ‘enforceable complaints mechanism’ exists for non-compliance.¹²⁵ They also have no binding legal force on federal law, such as in relation to marriage law which explicitly relies on the male/female binary. The *Government Guidelines* remain conceptually significant, however, because they constitute a commitment to the de-emphasis of legal sex identification as an inclusive strategy for sex and gender diverse people, as well as an acknowledgement that the current system of sex identification may go beyond what is justifiable and necessary given the functions it performs. They are an initial step not towards the total abolition of sex as a legal identification category – indeed as discussed above they even recognise a ‘third’ sex – but towards the reigning in of the scope of its reach.

121 Fausto-Sterling, *Sexing the Body*, above n 7, 113.

122 Australian Government, above n 59, 4.

123 Ibid 5.

124 *Sex Files Report*, above n 6, 3.

125 Attorney-General’s Department (Cth), Submission No 75 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, 3–4.

The *Government Guidelines* pick up on the idea that while legal sex identification might have a justifiable role in determining some issues, such as prison allocation and protecting certain classes of people from discrimination, it may be that it can be removed from other legal areas with little to no negative effect. One example of this is the recording of sex in official documents to be used for identity verification. The presence of sex as a category on identifying documents ‘creates difficulties and dangers’ for sex and gender diverse people ‘attempting to cash checks, or entering age-restricted venues: the person’s trans identity is exposed every time ID is shown’.¹²⁶ Yet numerous commentators have questioned whether recording sex on such documents even provides any value as a method of determining a person’s identity for security purposes.¹²⁷ Ezie describes sex as a ‘fatally imprecise’ identifier, ‘given the sheer variety of bodies (for example, stocky, lanky, curvy, flat-chested) and genders (for example, masculine, feminine, androgynous) that exist’ within the male and female categories.¹²⁸ More accurate indicators of identity – including eye colour, fingerprints, facial recognition, retinal scans, and blood type – could readily be used as alternatives in such documents.¹²⁹ The record of sex on identity documents could thus be causing problems for sex and gender diverse people without providing any general social benefit in the form of added security, and the removal of this record, or its replacement with an alternative indicator of identity, is therefore warranted.

In addition to the limited extent that sex identity could or should be de-emphasised, there is another possible drawback to this approach. It could be the case that instead of creating room for sex and gender diversity, de-emphasising sex as an identification category may instead render such diversity invisible or illegitimate. In addition to any legal rights and obligations that may flow from it, the legal recognition of a person’s sex identity is also profoundly symbolic. Having one’s sex recorded as ‘intersex’ or ‘transgender’ on a birth certificate or other document could have a powerful personally validating and socially authorising effect. As one of the participants in the *Tranznation* survey reported: ‘having their documents legally changed meant that “no one (could) question” their status as their preferred gender’.¹³⁰ This is because such documents establish ‘the facticity of sex’: they ‘are central in naming and sexing the subject’.¹³¹ Whilst this sexing process has historically worked restrictively by denying recognition to sex and gender diverse people, it could potentially also work to empower such people by reflecting and authoritatively establishing their sex

126 Spade, *Normal Life*, above n 47, 12.

127 See, eg, Ezie, above n 15; McGrath, above n 8; Spade, ‘Documenting Gender’, above n 8.

128 Ezie, above n 15, 191.

129 Fausto-Sterling, ‘The Five Sexes, Revisited’, above n 102, 23; Spade, ‘Documenting Gender’, above n 8, 806–7; McGrath, above n 8, 370.

130 *Tranznation*, above n 37, 58.

131 Namaste, above n 12, 260.

identity if it recognised and ‘named’ non-binary sex identities. The de-emphasis of sex identification altogether runs the risk of re-entrenching the binary, as ‘male’ and ‘female’ sex identifications already carry substantial sociocultural weight that is not provisional on their recognition by law.

The de-emphasis of sex as an identification category thus provides a promising path of legal development, but only to a limited extent. Whilst sex identification can be removed from a number of legal and policy areas in order for sex and gender diversity to manifest without penalty, there may be valid and justifiable reasons for retaining legal sex identification in other legal areas for the purposes of providing safety, comfort, affirmative action and protection. Undoubtedly, there is scope for sex to be de-emphasised within law, but it would be much more difficult (and possibly even undesirable) to erase it altogether.

IV A BLENDED APPROACH

Of the three approaches to recognising sex and gender diversity that were set out in the previous Part, it appears that the ‘third’ sex approach has so far gained the most traction in terms of recent developments in Australian law and policy. This does not necessarily mean, however, that this approach provides the most appropriate pathway for future developments. Whilst this article has identified a number of benefits and detriments in each of the three approaches outlined above, it has not and will not engage with questions about which approach most accurately or authentically reflects the ‘reality’ of sex/gender. It should be kept in mind that any legal approach to identifying and categorising people on the basis of sex is thoroughly artificial. Legal and administrative systems should not be understood merely as being ‘responsible for sorting and managing what “naturally” exists’.¹³² As noted by Chisholm J in *Kevin v Attorney-General (Commonwealth)*, ‘the task of the law is not to search for some mysterious entity, the person’s “true sex” and use this as the basis of identification and classification.’¹³³ Legal frameworks of sex identity are not mirrors held up to society but are instead sorting mechanisms: they are a ‘manifestation of the law’s impulse to use categories and draw lines to understand and simplify complex concepts’.¹³⁴ But whilst these sorting mechanisms may simplify and categorise, they do not do so aimlessly. When ‘law defines an identity class, it does so ... for some purpose or purposes’,¹³⁵ and legal sex identities should be understood as

¹³² Spade, *Normal Life*, above n 47, 32.

¹³³ (2001) 165 FLR 404, 425.

¹³⁴ Grenfell and Hewitt, above n 51, 761.

¹³⁵ David B Cruz, ‘Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex’ (2011) 46 *Harvard Civil Rights – Civil Liberties Law Review* 51, 63 (emphasis altered).

sets of relationships constructed between classes of persons by the law in order to be 'practical' and 'forward-looking'.¹³⁶

If sex identity categories are artificial divisions that law puts to work in managing populations and distributing 'security and vulnerability' in society,¹³⁷ then we could attempt to calibrate these categories in ways that acknowledge the difficulties faced by sex and gender diverse people and minimise the suffering that they face.¹³⁸ Sex and gender diverse people report poorer health ratings than the general Australian population;¹³⁹ the overwhelming majority (87.4 per cent) report stigma or discrimination on the basis of gender;¹⁴⁰ they face harassment in the workplace and risk termination of their employment if they are 'outed';¹⁴¹ they are particularly vulnerable to violence and sexual violence in institutional settings such as prisons;¹⁴² and they are disadvantaged by administrative systems that inequitably distribute 'life chances'.¹⁴³ Providing better outcomes for sex and gender diverse people should be the central focus of any law and policy developments around sex identification.

As such, when determining which of the three approaches discussed in the preceding Part provides the most appropriate pathway for future developments, the evaluation should not turn on which approach provides the 'best' conceptual understanding of sex/gender. The core concern should be what these approaches can do for intersex, transsexual and transgender people in terms of providing benefits or protections and removing disbenefits or discrimination. However, as Kirkland reminds us, it 'is uninteresting and unhelpful to say simply that law's categories are *per se* good or bad, liberating or oppressive' on the basis of a generalised analysis, and we should instead engage with how these categories may actually work to help or hinder people in specific cases.¹⁴⁴ It would be a mistake, therefore, to individually evaluate each of the three approaches at a theoretical level without considering whether a blend of the best aspects of these approaches could provide the best outcomes for sex and gender diverse people in a practical sense. Instead of searching for one 'perfect' unified theory of how the

136 Ibid 54.

137 Spade, *Normal Life*, above n 47, 32.

138 The High Court recognised in *AB v Western Australia* (2011) 244 CLR 390 that these concerns were the motivation behind the introduction of the *Gender Reassignment Act 2000* (WA): at 402 [25] (The Court).

139 *Transnation*, above n 37, 24.

140 Ibid 60.

141 See Bender-Baird, above n 36.

142 Richard Edney, 'To Keep Me Safe from Harm? Transgender Prisoners and the Experience of Imprisonment' (2004) 9 *Deakin Law Review* 327.

143 Spade, *Normal Life*, above n 47, ch 4.

144 Anna Kirkland, 'Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory' (2003) 28 *Law & Social Inquiry* 1, 5 (emphasis in original).

law should try to ‘make sense’ of sex and gender, we could instead adopt an approach that lets ‘many flowers bloom’.¹⁴⁵

What would it look like if we were to blend these approaches with a view to providing better outcomes for sex and gender diverse people? A blended approach could de-emphasise sex as a legal identity category as much as possible, up to but not exceeding the point that is justifiable by the legitimate interests of the state, and beyond this could also include ternary or pluralistic models of sex identification in areas where there is a compelling need to identify, record and/or discriminate on the basis of a person’s sex. This would maximise the legal space available for sex and gender diverse people by removing the identification and recording of sex in areas where the law does not have a persuasive reason for determining someone’s sex. However, it would also acknowledge that ‘the “truth” of sex always threatens to impose itself ... whenever sex actually matters’,¹⁴⁶ and accommodates this by ensuring that where law continues to engage with sex, it does so in a way that recognises and validates sex and gender diversity. Such an approach could also strategically entrench sex identification in certain ways in specific areas of the law in order to provide benefits or protections to sex and gender diverse people.

The simultaneous de-emphasis of sex and creation of a ‘third’ sex category in the *Government Guidelines* provides an example of this kind of blended approach, and the value of this approach can be seen when the *Government Guidelines* are considered in conjunction with the recent *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). This Act amended the *Sex Discrimination Act 1984* (Cth) to specifically prohibit discrimination on the basis of ‘gender identity’ and ‘intersex status’.¹⁴⁷ Under these amendments, ‘gender identity’ is defined broadly to mean ‘the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth’.¹⁴⁸ The wording typically found in state and territory anti-discrimination legislation that refers to the ‘other’ or ‘opposite’ sex has been deliberately avoided in this definition,¹⁴⁹ as the definition was intended to ‘recognis[e] that a person may not identify as either male or female’.¹⁵⁰ ‘Intersex status’ is defined as meaning ‘the status of

145 Paisley Currah, ‘The Transgender Rights Imaginary’ (2003) 4 *Georgetown Journal of Gender and the Law* 705, 720.

146 Sharpe, above n 14, 117.

147 *Sex Discrimination Act 1984* (Cth) ss 5B and 5C.

148 *Sex Discrimination Act 1984* (Cth) s 4 (definition of ‘gender identity’).

149 Indeed, a number of the 2013 amendments specifically replaced the previous binary wording of ‘opposite sex’ with the non-binary wording of ‘different sex’: see *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) items 16, 36, 42.

150 Explanatory Memorandum, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth) 12.

having physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male'.¹⁵¹ The purpose of separating out 'intersex status' from 'gender identity' as a separate ground of discrimination protection was to recognise that 'being intersex is a biological condition, not a gender identity', and to not require an intersex person to have to 'identify as either male or female in order to access protections' under the Act.¹⁵²

An interesting feature of these amendments is the limited nature of the recognition that they offer to sex and gender diversity. Whilst non-binary sex/gender identities are acknowledged as lived realities that make people vulnerable to discrimination, at the same time that this legal recognition is extended to encompass protection from discrimination, it is also explicitly limited to mere protection from discrimination. When Mark Dreyfus, the then Attorney-General for the Commonwealth, gave the second reading speech for the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, he stressed that whilst the proposed Act was intended to 'acknowledge [the] reality' of sex and gender diversity in Australia it does 'not create a third sex in any sense'.¹⁵³ This standpoint was reinforced in the Explanatory Memorandum for the Act which also specified that the legal recognition of 'intersex status' as a basis for anti-discrimination protection 'is not intended to create a third sex in any sense'.¹⁵⁴

One possible way to understand these amendments would be to critique them for extending legal protections to sex and gender diverse people on the basis of their biological realities and personal experiences whilst simultaneously disavowing that these constitute a meaningful identity by denying them full legal recognition. Sharpe contends that Australian anti-discrimination law around sex and gender diversity has a history of producing such 'myriad and contradictory effects',¹⁵⁵ and that this is the result of 'contradictory legal desires' to both 'fix the categories of sex' and 'regulate positively beyond those legally constituted categories'.¹⁵⁶ By recognising 'gender identity' and 'intersex status' as grounds for protection from discrimination, the law extends its power to 'those bodies that constitute the "beyond" or "outside" necessary to the formation of legal subjecthood'. This serves to delineate the boundaries of the male/female binary

151 *Sex Discrimination Act 1984* (Cth) s 4 (definition of 'intersex status').

152 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 12.

153 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2894 (Mark Dreyfus).

154 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 12.

155 Sharpe, above n 14, 171.

156 *Ibid* 159 (citations omitted).

that law privileges as the centre of this subjecthood.¹⁵⁷ Whilst they undoubtedly provide welcome new legal protections and channels for recourse for sex and gender diverse people, the progressive nature of these new amendments could therefore still be questioned.

However, these amendments could be understood in a different way. They passed both Houses of the Commonwealth Parliament on 25 June 2013, just days before the commencement of the *Government Guidelines* on 1 July 2013. In a context in which policy was moving towards the de-emphasis of sex identification categories, the explicit coverage of 'intersex status' and 'gender identity' within anti-discrimination law entrenches sex and gender diversity within the legislative framework. Such a move ensures that the suffering faced by sex and gender diverse people is specifically recognised and protected against, despite the potential implications of the policy shift away from governmental recording of sex. Furthermore, the legislation imposes no legal burdens or obligations on sex and gender diverse people: it is purely beneficial. This governmental double gesture – towards both de-emphasising sex identification in policy and entrenching multiple sex identification categories in law – offers what is possibly the best practical outcome for transsexual, intersex and transgender people. Whilst sex and gender diverse people are freed from identifying a binary sex on government documents, they are simultaneously explicitly protected from any discrimination they may suffer from living a non-binary sex/gender within society.¹⁵⁸ In this way, the blended approach that is evident here provides the most benefit for sex and gender diverse people.

It is beyond the scope of this article to set out in fine detail how every area of law and policy could be calibrated under a blended approach in order to provide better outcomes for sex and gender diverse people. My intention here is to provide a guiding principle for further developments in this area, not to construct an exact blueprint. I am not concerned that a blended approach could lead to a person having their sex recognised (or not recognised) in different ways across various areas of law and policy. It is not the case that any incongruities in sex identification would 'necessarily pose a problem ... for the state ... [whose] policies can accommodate any number of logical contradictions'.¹⁵⁹ Discrepancies and inconsistencies between different legal regimes of sex

¹⁵⁷ Ibid.

¹⁵⁸ Spade convincingly argues that anti-discrimination legislation does not automatically equate to freedom from discrimination because the effectiveness of such laws can be hampered by inadequate enforcement and restrictive judicial readings of the protection they offer, and because such laws typically only target and assign blame to individuals instead of addressing systemic inequalities: Spade, *Normal Life*, above n 47, 81–3. Whilst such legislation is a promising start, more is needed to address the problems faced by the sex and gender diverse population. Alongside legal reform, Bender-Baird advocates for a cultural shift away from transphobia, including more 'public dialogue and a greater awareness of transgender people and their lived experiences', as part of an overall strategy to end discrimination: Bender-Baird, above n 36, 137.

¹⁵⁹ Currah, 'The Transgender Rights Imaginary', above n 145, 712.

identification might cause sex to be ‘unstable on the documents of transgender people who are directly impacted by [these] inconsistent policies’,¹⁶⁰ but this is justifiable if law and policy in these areas is animated by the purposive goal of providing better outcomes for sex and gender diverse people. In any event, this goal would provide a structured underlying rationale for any disparity that may arise in future developments.

V CONCLUSION

As sex and gender diversity becomes increasingly socially recognised, Australian law and policy will continue to be faced with the issue of how to deal with the biological and social realities of intersex, transsexual and transgender people who live and experience sex identities outside the male/female binary cisgender framework. Whilst the previous decades have seen law demonstrate an increasing openness to allowing people to transition across the male/female binary, only in the last few years has a new trend begun to emerge for the creation of legal space outside this binary. However, in order to accommodate sex and gender diversity, different areas of law and policy have developed in different directions, with some developments recognising a ‘third’ sex, others recognising multiple additional sexes, and others de-emphasising the use of sex as an identification category altogether. This article has charted and evaluated these alternative approaches, finding that each one has its own benefits and detriments. Rather than contending that any one particular approach is the best way forward, this article has argued for a strategic blending of these approaches centred around the core concern of providing better outcomes for sex and gender diverse people. With this approach in mind, the most appropriate pathway for future developments is the de-emphasis of sex as a legal category in areas where there is no persuasive state interest in it being identified and/or recorded, coupled with the recognition of a third sex or multiple sexes in areas where there is such an interest or where sex identification is used to provide benefits or protections to sex and gender diverse people.

Kennedy’s description of the earlier NSW Court of Appeal’s decision as being ‘momentous in terms of opening up space within legal discourse for a reassessment of how we define sex and gender’,¹⁶¹ is also applicable to the High Court’s ultimate decision in *NSW Registrar v Norrie*. However, this case should be understood in context as being merely one part of a contemporary and ongoing reassessment of sex and gender in a number of areas of Australian law and policy around issues such as birth certificates, passport documentation, government record keeping and anti-discrimination legislation. The general

¹⁶⁰ Spade, ‘Documenting Gender’, above n 8, 803.

¹⁶¹ Aileen Kennedy, ‘Gender Identity: Reassessing the Definition of Sex and Gender’ (2013) 38 *Alternative Law Journal* 186, 186.

trajectory of recent developments in these areas suggests that the key issue is no longer questioning whether space should be opened up for non-binary sex identities, but rather determining how such space should be opened up. Whatever the exact pathway taken in future developments, it seems increasingly unlikely that Australian law and policy will continue to leave non-binary sex identities stranded in ‘no man’s land’.¹⁶²

¹⁶² *R v Harris* (1988) 17 NSWLR 158, 194 (Mathews J).