GENDER: 'DEVELOPMENTS' IN AUSTRALIAN LAW

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I INTRODUCTION

Straight after the acclaimed *Mabo*[1] decision First Australian Michael Mansell identified the development as a Trojan horse for his People with the catch-phrase 'The Court Gives an Inch but Takes another Mile'.[2] Can this same criticism be made of developments in gender laws over the last 20 years? This article critically assesses the way the law, in particular case law, has managed gender over the last two decades. My intention in reviewing 'developments' in gender law is not to belittle exclamations of joy but to reveal what the 'revolution does not do'.[3] In doing so it is possible to critically assess the way power operates through law. As Rothwell points out when assessing whether change is revolutionary or haunted by the past it is important to focus on what is left out or deferred 'to comprehend what the revolution leaves in place.'[4]

Unlike the troubled development of native title law and the absence of any recognition of First Australian sovereignties following *Mabo*,[5] gender law has developed considerably since the 1990s.[6] However it still has a way to go. This is because the law regulates gender to restrict passing, it imposes controls over gender 'authenticity', it regulates gender subject to an embargo on gay marriage, and it re-institutes a sexist gender binary at the same time as it purports to abandon that binary. Therefore unlike Mansell's assessment of *Mabo*, the situation with gender has changed to be more like two steps forward and one back, as opposed to 'gives an inch and takes a mile'.

Why these cases and statutes? The cases and statutes considered below have been included because they are regarded as 'developments' in the law of gender. It is

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1 *Mabo v Queensland* (1992) 175 CLR 1.

2 Michael Mansell, 'Perspectives on Mabo: The High Court Gives An Inch But Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin* 94.

3 Phillip Rothwell, 'Unfinished Revolutions: Gaps and Conjunctions' (2012) 37(2) *Signs* 271, 271.

4 Ibid.

5 Chief Justice Robert French, 'Lifting the Burden of Native Title – Some Modest Proposals for Improvement' (Speech presented to Native Title Users Group, Adelaide, 9 July 2008); Susan Griffiths, 'Denial By Deflection: The implementation of illusory rights in the denial of First Nation sovereignties' (2014) 2 *Griffith Journal of Law & Human Dignity* 330; Aileen Moreton-Robinson (ed), *Sovereign subjects: Indigenous sovereignty matters* (Allen & Unwin, 2007); SBS, 'Native title laws failing: leaders', *World News*, 30 May 2012 <http://www.sbs.com.au/news/article/1654893/Native-title-laws-failing-leaders>; Damien Short, 'The Social Construction of Indigenous "Native Title" Land Rights in Australia' (2007) 55 *Current Sociology* 857.

6 See the cases discussed below; Commonwealth, Royal Commission On Human Relationships, *Final Report* (1977).

recognised that the law covered in this article may not be representative of the extent of developments in the legal regulation of gender. A comprehensive critique would require research into amongst other places the day-to-day practices of law across policing, magistrates courts, trials in lower courts and quasi-legal situations where bureaucrats exercise decision-making power according to 'law'. Still, the law that is reviewed here provides a snapshot of the broad trajectory of the legal construction of gender.

In this article gender refers to the ways in which people live their lives subject to norms, institutions, conventions, and laws that impose expectations based on beliefs about biological sex. For this reason it is not strictly concerned with women, rather the ways in which the law constructs gender. This means the article necessarily grapples with sexuality to the extent it is tethered to gender by the law. In the course of establishing that the law advances two steps forward and one back this article begins by framing gender as a social construction as opposed to a biological or cultural essence. Theorising gender in this way is consistent with the view of many who work in social theory whether or not that is a dominant paradigm. Attention is then turned to the significance of social construction for law and why a failure to understand social construction has led to at best a contradictory approach to gender and at worst to the reproduction of gender hierarchy. This is followed by a review of 'developments' in the law dealing with gender over the last two decades to argue that welcome advances still leave gender discrimination in place.

II THEORISING GENDER AS A SOCIAL CONSTRUCTION

Western thought about gender has been plagued by two dichotomies. One dichotomy regards gender as a male/female binary and the other seeks to explain difference according to a nature/nurture binary. Both dichotomies have been widely condemned as problematic and yet they persist as fundamentals in academic literature, common parlance, media, and law.[7] In *Re Kevin* Chisholm J considered literature condemning these binaries but misunderstood social construction which attempts to critique and transcend the justifications for those binaries.[8] Unfortunately Chisholm J assumed social construction was unnecessary to the pleaded issues before the Court. Instead his Honour thought that social construction meant abandoning sex altogether:

> It is probably impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities, not medical niceties, and most people are clearly male or clearly female …[9]

[7] See generally, Allan Ardill, *Sociobiology and Law* (PhD Thesis, Griffith University, 2008) <https://www120.secure.griffith.edu.au/rch/items/14656573-04df-f6f3-dab9-b37f50f0c65c/1/>.
[8] *Re Kevin* (2001) 28 Fam LR 158.
[9] *Re Kevin* (2001) 28 Fam LR 158**,** 164 [17], quoting Douglas K Smith, 'Transsexualism, Sex Reassignment Surgery and the Law' (1971) 56 *Cornell Law Review* 963, 694–5 (the quotation incorporates part of the original author's note 9 but otherwise omits citations).

It is true that social construction treats gender as a regulatory fiction. This does not however mean it is irrelevant to a case where the law classifies sex. Social construction critically assesses gender classification as much as the explanations for binary difference. Amongst other things social construction sheds light on why the law regulates as it does and how this reproduces gender. So what is social construction?

Social construction emerged in the 1980s with an understanding that nature/biology versus nurture/culture debates were ideological, reductionist, essentialist, and fruitless. Haraway explains that social construction is associated with Second Wave feminism arising as a counter to the dominance of biological essentialist/determinist theories of the 1950s and 60s, and in the wake of 'Simone de Beauvoir's 1940s insight that one is not born a woman.'[10] The idea that there are gender specific behaviours or universal principles of sexuality over time and across cultures was increasingly regarded as an extraordinary claim.[11] Instead, according to Kennelly et al:

> … gender has come to be viewed by social scientists as a socially constructed institutional arrangement, with gender divisions and roles built into all major social institutions such as the economy, the family, the state, culture, religion, and the law, that is, the gendered social order. "Gendered behaviour," in this conceptualization, refers to the ways people act based on their position within the gender structure and their interaction with others, rather than as a result of hormonal input or brain organization. We "do gender" and participate in its construction, but it is also something that is done to us as members of a gendered social order.[12]

Although social construction grew out of cultural construction it should not be confused with it.[13] Social construction assumes that biology does not determine gender while recognising that biology cannot be severed from gender any more than culture.[14] The beauty of this conceptualization is that it abandons the nature nurture dichotomy and with it the concept of a 'coherent inner self, achieved (cultural) or innate (biological)', and instead treats gender as a 'regulatory fiction'.[15] Social construction regards gender as the result of interaction between biology, culture, individual, place, and history.[16] An interaction that may never be fully understood but what may be understood are the ways

[10] Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge, 1991) 133–7.

[11] Julia Epstein and Kristena Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity,* (Routledge, 1991) 3; A Solomon-Godeau, 'Male Trouble' in *Constructing Masculinity,* M Berger, B Wallis, and S Watson (eds), (Routledge, 1995) 71.

[12] Ivy Kennelly, Sabine Merz and Judith Lorber, 'What is Gender?' (2001) 66(4) *American Sociological Review* 598, 600 (references omitted).

[13]Carol Vance, 'Social Construction Theory and Sexuality' in *Constructing Masculinity,* M Berger, B Wallis, and S Watson (eds), (Routledge, 1995) 47.

[14] Gill Jagger, 'The New Materialism and Sexual Difference' (2015) 40(2) *Signs* 321, 326.

[15] Haraway, above n 10, 135.

[16] Talia Mae Bettcher, 'Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance' (2014) 39(2) *Signs* 383, 387; Linda Nicholson (ed), *Feminist Contentions: A Philosophical Exchange (Benhabib, Butler, Cornell, Fraser),* (Routledge, 1995) 3.

in which gender difference 'becomes a product of boundary-making practices in the intra-action between the material and the discursive'.[17] Therefore the focus of social construction shifts to the ways in which power operates through gender.[18] So how is power to be analysed in the regulation of gender?

Of the many approaches that have developed to assess power since the post-structural turn,[19] this article adopts Feminist Standpoint Theory[20] and Intersectional Critique.[21] There are several reasons for this choice. The first is that these two approaches are similar despite different origins as they both necessarily seek to change the way power operates unlike those inspired by Foucault's genealogical approach or Derrida's discourse analysis.[22] For instance, while Foucault's way of reading power involves an assessment of the '*problematizations* through which being offers itself to be, necessarily, thought – and the *practices* on the basis of which these problematizations are formed', it is not necessarily aimed at change.[23] By contrast with discourse analysis Feminist Standpoint Theory seeks to understand and change 'inappropriate essentializing of women and men' and 'concerns … how to understand the intersectionality of race, class, gender, and other structural features of societies'.[24] Similarly, Intersectional Critique is concerned with 'targeting the forces that create the outcomes, not just their static products', namely 'white male dominance'.[25]

[17] Jagger, above n 14, 337.
[18] Bettcher, above n 16, 390.
[19] See generally, the collection of articles in (2007) 10(1) *Postcolonial Studies;* Terry Eagleton, *The Function of Criticism: From the spectator to post-structuralism* (Verso, 1991); Bruce Parry, *Postcolonial Studies: A Materialist Critique* (Routledge, 2004).
[20] Often attributed to Dorothy Smith and Sandra Harding, but see generally: Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14(3) *Feminist Studies* 575; Sandra Harding, *The Science Question in Feminism* (Cornell University Press, 1986); Nancy Hartsock, 'The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism' in Sandra Harding and Merrill Hintikka (eds), *Discovering Reality: feminist Perspectives on Epistemology, Metaphysics, and Philosophy of Science* (Reidel, 1983), 283–310; and Dorothy Smith, *The Everyday World as Problematic: A Feminist Sociology* (Northeastern University Press, 1987).
[21] Often attributed to Kimberle Crenshaw in K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139. See also Patricia Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought' (1986) 33(6) *Social Problems* 14; Leslie McCall, 'The Complexity of Intersectionality' (2005) 30(3) *Signs* 1771; Chandra Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1986) 12(3) *Boundary 2* 333; and Shuddhabrata Sengupta, 'I/Me/Mine – Intersectional Identities as Negotiated Minefields' (2006) 31(3) *Signs* 629.
[22] See Nick Mansfield, *Subjectivity: Theories of the self from Freud to Haraway* (Allen & Unwin, 2000) 5, 10, 39, 59-60 138, 184.
[23] Michel Foucault, *The Use of Pleasure, The History of Sexuality: Volume 2,* R Hurley (Trans) (Penguin Books, 1985) 11 (emphasis in original).
[24] Sandra Harding and Kathryn Norberg, 'New Feminist Approaches to Social Science Methodologies: An Introduction' (2005) 30(4) *Signs* 2009, 2011.
[25] Catharine A MacKinnon, 'Intersectionality as Method: A Note' (2013) 38(4) *Signs* 1019, 1023.

There is no intention here to be dismissive of the vast respected scholarship that has followed Foucault and Derrida, such as the work of Butler,[26] amongst many others, rather it is a question of the suitability of method in terms of the subject matter and the objective of this article.[27] The subject matter and objective of this article coincide around addressing legal power through the legal construction of gender and its intersections with marriage, family, sexuality, and transgender bodies.[28] Why these intersections and not others, such as race and class, is because 'the most extreme cases of reality enforcement tend to occur where there is a maximal intermeshing of oppressions' and this tends to be around the transgender body.[29] This is not to trivialise other areas of law that feature as intersections such as violence against women. On the contrary, what the law says about the transgender body also speaks to other intersections as this article will show below.

For present purposes what is important is recognising as Mackinnon has that while the law 'truly gets it' at times, in the main the 'law is replete with missed intersectional opportunities.'[30] As will be shown below, Australian law has not understood intersectionality, and even if it did, it would not be able to address it short of transformation which is at the heart of Feminist Standpoint Theory ('*FST*') and Intersectional Critique ('*IC*') as opposed to Foucault's genealogy.[31] Both of these more critical approaches 'attempt to understand how, in a networked world, each of our individual circumstances connects to form larger patterns of oppression and liberty.'[32] They 'embrace the complexities of compoundedness' by recognising individual struggles not as singular issues but part of a system that reifies oppression as anomalous while importing 'a descriptive and normative view of a society that reinforces the status quo'.[33]

Unlike legal positivism, FST and IC assume that both the parties to a dispute as well as the way the law approaches that dispute are moments of power inequality. For this reason they are referred to collectively below as FST despite their genealogical differences. In order to understand power inequality without contributing to it or to be able to address it requires two steps using FST. The first is to consider the power relations from the vantage-point of the most marginalised group according to an intersectional analysis of the situation.[34] The second step is for the lawyer, legislator, or judge to reflect on their privilege in relation to that particular situation. It follows that in the review of the cases and law below this article, unlike orthodox legal analysis:

[26] See, eg, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990).
[27] Sinisa Malešević, "Rehabilitating Ideology after Poststructuralism" in Sinisa Malešević and Iain MacKenzie (eds.) *Ideology After Poststructuralism* (Pluto Press, 2002) 99.
[28] Patricia Collins, 'Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Where's the Power?' (1997) 22(2) *Signs* 375, 376.
[29] Bettcher, above n 16, 395.
[30] MacKinnon, above n 25, 1022.
[31] Crenshaw, above n 21, 148.
[32] Sengupta, above n 21, 637.
[33] Crenshaw, above n 21, 166–7.
[34] Harding and Norberg, above n 24, 2011.

> … prioritizes "studying up" – studying the powerful, their institutions, policies, and practices instead of focusing only on those whom the powerful govern. By studying up, [we] can identify the conceptual practices of power and how they shape daily social relations.[35]

In moments of adjudication this means questioning how power was exercised as a moment of discretion taking into account the relative power of the participants (the judge and the parties) and recognising that privilege impairs the capacity to read power. As Sprague contends, to do otherwise, and to pretend privilege is not involved 'is, from this perspective, intellectually irresponsible, as well as politically naive.'[36] Because gender hierarchies are continuously reproduced and legitimised through the legal system together with a myriad of social practices and institutions, including the self, law must justify itself in this capacity.[37] To justify means being faithful to positive law on some occasions and on others to draw upon natural law. Always discretionary, regardless of apparent constraints, this inevitably leads to contradiction.[38] Not important by itself, contradiction can reveal the ways in which power is exercised.

So for example, Fletcher observes that in the struggle over reproduction men may have failed to force women to continue pregnancy they have succeeded in managing when a women may opt of pregnancy.[39] Similarly, while women have won rights to participate in public, private responsibility persists on individual women once children are born.[40] This means amongst other things that as men have gained more rights to children following birth, women are still primarily accountable for child-rearing within a labour structure that expects men to provide financial care and women to provide actual care.[41]

A reading of recent Australian law shows not only the contradictory nature of gender regulation it also reveals the ways in which gender is subject to heterosexist structures while lurking in the background is a fear of the homosexual. This includes the use of stereotypes to reach decisions regarded as advances, strict control over gender passing and authenticity when liberalising law, and the reproduction of a gender binary while dismissing it at the same time. What this critique shows is that the law is able to impress the values of equality while at the same time actually reproducing inequality in terms of gender. Each claim is fleshed out below.

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35 Ibid.

36 Joey Sprague, 'Comment on Walby's "Against Epistemological Chasms: The Science Question in Feminism Revisited": Structured Knowledge and strategic Methodology' (2001) 26(2) *Signs* 527, 534.

37 Mansfield, above n 22, 6–7.

38 Duncan Kennedy, 'Freedom and Constraint in Adjudication' (1986) 36 *Journal of Legal Education* 518.

39 Ruth Fletcher, 'Legal Forms and Reproductive Norms' (2003) 12 *Social & Legal Studies* 217, 234, 235.

40 Ibid 235.

41 Ibid.

III CONTRADICTION

Contradiction is fundamental to law and turns up whenever you scratch below the surface.[42] Of particular relevance to gender, Sharpe claimed in his sustained research on transgender jurisprudence that:

> While law portrays itself as certain, predictable, coherent and ordered and views the transgender body as the locus of dissonance, ambiguity and contradiction, [instead] it is the body of law, not transgender bodies, that more accurately fits that description.[43]

More than a decade later Sharpe's assessment holds true as the cases discussed show. What matters about contradictions though, is the capacity for them to reveal something about the ways power manifests. For instance several scholars[44] welcomed the High Court approach to gender taken in *AB v Western Australia*[45] asserting that it, 'provides us with a compelling reminder of the law's capacity to engage and champion legislative recognition of changes in how society views itself.'[46] The decision was also regarded as 'a defining moment', that it 'represents a significant advancement in administrative law', and:

> [i]t provides decision-makers with greater clarity about when transsexuals should be legally recognised as their chosen sex rather than the sex of their birth, particularly in circumstances where there has been no gender reassignment surgery.[47]

This positive assessment is understandable given the long struggle to achieve this much. Not only was the biological determinism of *Corbett*[48] left behind, the legal emphasis on surgery was starting to look vulnerable. Regardless, that decision and the complex Australian legislative framework also raise scope for concern.[49]

Amongst other things, it will be shown below, that this decision abandons the gender binary only to reimpose it by turning to social stereotypes in an attempt to regulate

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[42] See, eg, Lon Fuller, 'Reason and Fiat in Case Law' (1946) 59 *Harvard LR* 376; Robert W Gordon, 'Paradoxical Property' in J Brewer and S Staves (eds) *Early Modern Conceptions of Property* (Routledge, 1995) 95; Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard LR* 1685.

[43] Andrew Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law,* (Cavendish Publishing, 2002) 4.

[44] See eg, Laura Grenfell and Anne Hewitt, 'Gender Regulation: Restrictive, Facilitative or Transformative Laws?' (2012) 34 *Sydney Law Review* 761, 761, 778; Olivia Rundle, 'High Court interprets WA provisions for legal recognition of reassigned gender' (2012) February *Australian Health Law Bulletin* 182, 184; Penelope Scheffer and Julia Tonkin, 'Legal Recognition of Gender: When is a man a man?' (2012) 20 *Australian Journal Administrative Law* 16.

[45] *AB v Western Australia* (2011) 244 CLR 390.

[46] Scheffer and Tonkin, above n 44, 16.

[47] Ibid 18.

[48] *Corbett v Corbett* [1971] P 83.

[49] See generally, Grenfell and Hewitt, above n 44; Mary Keyes, 'The formal recognition of sex identity' (2014) 28 *Australian Journal of Family Law* 266.

flippant as opposed to genuine passing. In addition, the legislation considered in that case, while regarded as progressive, is also restrictive. Across Australia this same legislation regulating gender is not only complicated by jurisdiction, it is written to maintain the prohibition on gay marriage and to restrict gender passing.[50] Amongst other things *AB v Western Australia* illustrates that incremental improvement to the law is embedded into a regime that already discriminates systemically. Commenting on this phenomenon, Fletcher points out that as social struggles are won, legal forms make that 'social development more palatable by integrating it into an already existing pattern of regulation.[51] That pattern of regulation privileges patriarchy and heterosexuality.

Another form of contradiction concerns the discretion and willingness of law to do justice in individual moments and refuse it in others. This tends to occur in situations where gender and sexuality are tethered. A notable example is the prohibition against marriage equality and its place in social reproduction. While the law has decriminalised homosexuality, taken steps toward equality on several legislative fronts, and recognised gay families in case-law, it has also regressed following the 2004 Howard government amendments to the *Marriage Act 1961* (Cth) and a myriad of state laws buttressing that Act.[52] Following the legal advances and shifts in public opinion supporting marriage equality, and apparently concerned with that trend,[53] the Howard government expressly reduced marriage to that between a man and a woman.[54] So it was no real surprise later that the High Court struck down the *Marriage Equality (Same Sex) Act 2013* (ACT) when it decided *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

In a unanimous decision the High Court ruled that the Territory marriage equality law was inconsistent with the Commonwealth law according to s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). The judgement commenced with a declaration that the case would be decided according to law not morality, and '[t]he only issue which this Court can decide is a legal issue.'[55] It followed that there was no scope for ending discrimination in the matter before the court. Nor was there scope for the possibility that because the Commonwealth law was concerned with marriage between a man and a woman, a state or territory law would not be inconsistent if it regulated same sex

[50] See Keyes, above n 49, 275.

[51] Fletcher, above n 39, 233.

[52] *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 32B(1)(c), 32B(2)(c), 32D(3), 32DA(1)(d), 32DA (2)(d), 32DC(3); *Births, Deaths and Marriages Registration Act* (NT) s 28B(1)(c); *Births, Deaths and Marriages Registration Act 2003* (Qld) s 22; *Sexual Reassignment Act 1988* (SA) s 7(10); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28A(1)(c); *Births, Deaths and Marriages Registration (Amendment) Act 2004* (Vic) ss 30A(1), 30C(3), 30E(1), 30F(6); *Gender Reassignment Act 2000* (WA) s 15(3).

[53] Michael Kirby, 'Marriage Equality: What Sexual Minorities Can Learn From Gender Equality' (2013-4) 34 *Adelaide Law Review* 141, 144.

[54] *Marriage Amendment Act 2004* (Cth), s 3, Sch 1, item 1. See also, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31459-65; Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004, 26503-73.

[55] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 452.

marriage. Instead, the Commonwealth law was exhaustive of marriage law rendering the entire ACT law inconsistent and of no legal effect.[56] The High Court reasoned that 'if the federal Parliament can make a national law providing for same sex marriage, and has provided that the *only* form of marriage shall be between a man and a woman, the two laws cannot operate concurrently'.[57]

Parkinson and Aroney identify an important contradiction concerning this case. They point out that while the result was unsurprising following the Howard amendments, it was achieved through surprising reasoning. What was surprising was that 'the court based its decision on a premise' that none of the parties (the Commonwealth, the Australian Capital Territory nor the amicus curiae, Australian Marriage Equality) had argued.[58] In other words the High Court did not need to consider whether the Constitution would allow parliament to legislate for marriage equality to decide the case as it was pleaded. It merely needed to determine whether the ACT law was inconsistent with the *Marriage Act* and to what extent.

Therefore the High Court went beyond what it needed to decide when it declared that the marriage power in the constitution included the capacity for same-sex marriage. As a result the High Court struck down the Territory law recognising same sex marriage and on the other hand it declared that under the Australian Constitution, in s 51(xxi), '"marriage" is a term which includes a marriage between persons of the same sex'.[59] This shows that the Court was determined to appear to be concerned with equality while at the same time dismissing it in the case at hand.

A contradiction because the Court claimed it was restricted by law and unable to produce equality. Instead equality was a matter for the legislature not the Court. Yet, as will be shown later, in cases where sexuality was not as important such as *AB v WA* and *Norrie*, unlike the decision here, the Court exercised discretion to afford a beneficial interpretation of the particular statutes to achieve justice.[60] These contradictions reveal the discretion involved during the exercise of power in situations governing social reproduction.

Despite the liberalisation of law in relation to sexuality, in this instance the law was shown to be reticent in terms of ending marriage discrimination. Even if Federal Parliament does legislate to end marriage discrimination, this will not automatically remove restrictions contained in the various state acts prohibiting a change of gender

[56] Ibid 453.

[57] Ibid 454 (original emphasis).

[58] Patrick Parkinson and Nicholas Aroney, 'The territory of marriage: Constitutional law, marriage law and family policy in the ACT same sex marriage case' (2014) 28 *Australian Journal of Family Law* 160, 161

[59] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 463.

[60] *AB v Western Australia* (2011) 244 CLR 390, 397, 402; *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490, 495. Both discussed below.

where a person is married.[61] This will depend on the will of each state parliament. The pervasive, subtle and insidious network of laws, policies and procedures will remain despite any change to the *Marriage Act* and, notwithstanding the optimism recently expressed by the Human Rights Commission.[62] Afterall, marriage has historically been identified as both a site of privilege in terms of property and class and a site of oppression for women. In this sense same-sex marriage risks reproducing 'norms of family formation that feminist, decolonial, and antiracist movements have fought to dismantle for centuries'.[63] As Spade argues:

> Terms like "marriage equality" … expose the limitations of the framework. Marriage is fundamentally about inequality—about privileging and incentivizing certain family structures and making those who live outside them more vulnerable. Single-axis demands for equality in lesbian and gay rights politics, then, come to look more like demands for the racial and class privilege of a narrow sector of lesbians and gay men to be restored so that they might pass their wealth on as they choose when they die, shield it from taxation, call the police to protect it, and endorse or join invading armies to expand it.[64]

Until latent sexism, homophobia, and transphobia are understood and addressed systemically, the law will reproduce them. In particular, in situations such as gender recognition and parenting disputes where the law harbours at best difficulty in grappling with the gender sexuality nexus, and at worst a fear of homosexuality. These situations are considered next in the course of a review of cases regarded as developments.

IV STEREOTYPING GENDER

A Sexism

With the exception of *U v U*[65] the cases reviewed below were all regarded as steps forward in terms of gender. Although this case is not an example of progress it illustrates the presence of sexist stereotyping in Australia's highest court. In *U v U* the primary-carer mother was not allowed to relocate to her home country at the behest of an application

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[61] *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 32B(1)(c), 32B(2)(c), 32D(3), 32DA(1)(d), 32DA (2)(d), 32DC(3); *Births, Deaths and Marriages Registration Act* (NT) s 28B(1)(c); *Births, Deaths and Marriages Registration Act 2003* (Qld) s 22; *Sexual Reassignment Act 1988* (SA) s 7(10); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28A(1)(c); *Births, Deaths and Marriages Registration (Amendment) Act 2004* (Vic) ss 30A(1), 30C(3), 30E(1), 30F(6); *Gender Reassignment Act 2000* (WA) s 15(3).

[62] Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights, National Consultation Report,* 2015, 2 <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual>.

[63] Dean Spade, 'Intersectional Resistance and Law Reform' (2013) 38(4) *Signs* 1031, 1041-2.

[64] Ibid 1042.

[65] *U v U* (2002) 191 ALR 289.

by an abusive father who did not want responsibility for parenting. The High Court found that the mother was selfish for wanting to relocate to pursue her career in India. Even though she was prepared to meet the costs of travel for the father to visit the child in India, she would earn a large professional income (rather than being unemployed in Australia), and the child would benefit from relationships with the mother and father's extended family as opposed to virtual isolation from extended family members by remaining in Australia. The High Court held that it was free to impose whatever it considered was in the best interests of the child. According to Hayne J:

> … it would confine the Court's inquiry to what the parents suggested would be in the best interests of the child, regardless of whether those suggestions were informed, even wholly dictated, by the selfish interests of one or other of the parents.[66]

And this was not an anomalous component of the reasoning in *U v U* because sexism was also present in the joint judgement of Gummow and Callinan JJ:

> The appellant's primary focus is on her own emotional needs and not those of the child, whereas the respondent is more "child-focused". The mother is a highly intelligent and articulate woman. During the relationship she was assertive.[67]

These stereotypes about the mother's character were otherwise unsubstantiated.[68] There was no corresponding assessment of the father's character and in circumstances where there was evidence of his violence toward the mother. The use of stereotypes in this way can be shown to be present in cases even where the decision is regarded as appropriate or an advance. *Re Kevin*[69] is one such case.

B Recognising Social Sexism

This case was regarded[70] as an escape from the shadow of biological determinism cast by *Corbett v Corbett*.[71] In *Re Kevin* the court considered whether a post-operative female to male transsexual was a man for the purposes of Australian marriage law. As mentioned

66 Ibid 326.
67 Ibid 300.
68 Ibid 296 (Gaudron J).
69 (2001) 28 Fam LR 158.
70 Jake Blight, 'Transsexual Marriage: Meaning of the Term "Marriage"' (2002) 27(2) *Alternative Law Journal* 92; Donna Cooper, 'For Richer for Poorer, in Sickness and in Health: Should Australia Embrace Same-Sex Marriage?' (2005) 19 *Australian Journal of Family Law* 153; Grenfell and Hewitt, above n 44; Margaret Otlowski, 'What is the harm in it anyway?: Re Kevin and the recognition of transsexual marriage' (2002) 16 *Australian Journal of Family Law* 146.
71 *Corbett v Corbett* [1971] P 83.

above, Chisholm J carefully reviewed the literature and critically assessed the reasoning in *Corbett* only to reinscribe gender stereotypes.

Although Chisholm J recognised the deficiency of biological determinism he dismissed the salience of social construction and this meant his reasoning would necessarily reproduce gender according to stereotypes.[72] In the absence of social construction any turn away from the biological is a turn to the cultural. In either case essentialising according to gender stereotypes is inevitable, even where the turn is toward a biosocial[73] compromise.[74] Only social construction avoids essentialising gender according to stereotypes because it rejects the biology culture dichotomy, sees gender as complex, dynamic, and fundamentally about the power of labelling.

Recall that Chisholm J mentioned social construction only to dismiss it as synonymous with suggesting the abolition of gender altogether, and on the basis that each 'party made submissions on the basis that Kevin is either a man or a woman.'[75] True this was the way the case was pleaded. However, it was pleaded this way not just because Kevin wanted to be recognised by the state as a man, but because the law could not hear him in any other way, and especially once social construction was rejected. For Kevin the desirability of achieving legal recognition as a man through stereotypes based on a gender binary cannot be questioned. Only Kevin knows what it is like to be Kevin.

What can and should be questioned is the way the law constructed gender here. Not only did it construct gender using sexist stereotypes, it also fixed gender. Yet it is well known that gender behaviours are fluid and not fixed. In other words:

> … what is masculine for a scientist in a high-tech corporation and in an inner-city gang have little to do with one another … What is considered feminine and womanly for one group of women … is simply an untenable description of women in other cultures ... Beyond that, of course, there is no one gender role for any given person. The same woman might be a vicious litigator and a nurturing mother. The cut-throat financial trader might be a tender caretaker to his dying lover.[76]

Gender varies according to stereotypes in different ways in different contexts. Yet the approach taken in *Re Kevin* and endorsed on appeal in the full federal court universalises and naturalises a fixed notion of gender according to sexist stereotypes.[77] At first instance

[72] *Re Kevin* (2001) 28 Fam LR 158**,** 163-4 [17].
[73] See, eg, J Richard Udry, 'Biological Limits of Gender Construction' (2000) 65(3) *American Sociological Review* 443.
[74] Barbara Risman, 'Calling the Bluff of Value-Free Science' (2001) 66(4) *American Sociological Review* 605, 606-8.
[75] *Re Kevin* (2001) 28 Fam LR 158, 163-4 [17].
[76] Risman, above n 74, 607.
[77] *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1, 56-7.

the court accepted the subjective evidence of Kevin,[78] his medical and psychiatric histories,[79] and the 'evidence of 39 witnesses'.[80] The evidence provided by the 39 witnesses comprised of 23 family and friends of Kevin and 16 others who were either his work colleagues or acquaintances.[81] To illustrate the nature of the non-medical and psychiatric evidence consider the following three examples extracted from the 35 paragraphs mentioned by the Judge:

> He would physically defend them, at school and elsewhere, after his father had left the family home. He did some of the physical tasks his father had done, such as mowing the lawns and doing household repairs. His mother gave him "boys' presents" such as footballs and cars, and made boy's clothing for him.[82]

And:

> He was harassed at times at school because of his male attitude and appearance. He wore a jacket of the type worn by boys, and students mocked him, saying he was a girl, and asking why he dressed like that. Arguments would sometimes develop into fighting, at which he was adept. …[83]

And quoting Kevin's father-in-law:

> … my singular impression of him has been that he is definitely masculine in his thinking and manner. This opinion was formed particularly by my observations of Kevin in his interaction with Jennifer …, his aptitude in respect of home maintenance and building work and …"[84]

Clearly, these observations and witness anecdotes are structured around a sexist gender binary. Indeed Chisholm J concedes as much yet still accepted them as evidence that Kevin was regarded as a man:

> A list of the things they noticed might suggest a stereotypical view of being a man. Perhaps it is, for example, a heterosexual model. Not all men might fit that stereotype. There are no doubt different ways of being a man. But these witnesses are not constructing models or trying to formulate criteria. They are describing what they see in Kevin. And what they see is a man.[85]

[78] *Re Kevin* (2001) 28 Fam LR 158, 165 [22] – 168 [38]
[79] Ibid 168 [39] – 169 [46].
[80] Ibid 169 [47] - 172 [66].
[81] Ibid 169 [47] - 172 [66].
[82] Ibid 166 [25].
[83] Ibid 166 [26].
[84] Ibid 171 [61].
[85] Ibid 172 [69].

On the contrary, the witnesses were constructing a model of gender and they were formulating criteria for that gender model. They were reproducing a sexist gender binary whether that was known to them or not. In addition, as Bennett contends, the irony is that turning to cultural recognition has the capacity to undermine the importance of a transsexual person's subjective experience, by 'bringing … extensive and intrusive legal interrogatory pressure to bear on their lives, and the requirement that they conform to narrow, stereotypical models of sex.[86]

Justice Chisholm accepted as evidence what he need not have emphasised given the strength of the documentary evidence. This documentary evidence provided suitable evidence of how Kevin was regarded since he 'was eligible to receive an Australian passport showing his changed name and stating his sex as male', 'has been treated as a man for a variety of legal and social purposes, including his employer, Medicare, the Tax Office and other public authorities, banks, and clubs'.[87] By remaining trapped within a nature/nurture polarisation the reasoning in *Re Kevin* fails to grasp the subtle but crucial difference between social construction and cultural construction with the result that sexist stereotypes were normalised, naturalised and reproduced. What Lukacs would describe as reification.[88] Reification is an ideological process whereby something created by human action is treated instead as a product of nature – it becomes so normal it is said to take on a life of its own appearing to be something else.[89]

It must be conceded, however, that from Kevin's perspective and the standpoint of other transgender people who choose to conform to or acquiesce to gender stereotypes, the decision is a success. As Currah points out, gender stereotypes 'have powerful social and legal effects, effects that are both enabling and disempowering.'[90] For Currah gender essentialism is not only coercive it also provides scope for helpful legal strategies:

> … despite academic desires to deconstruct and [at 33] move away from notions of essentialism in legal discourse, identity-based claims remain more intelligible in the way they link identities to bodies, and so often produce better results.[91]

The point being made is that opposing gender essentialism in every situation will have negative effects for some trans people and would have produced injustice in cases where applicants successfully argued the authenticity of their gender.[92] Still this aspect of the law

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[86] Theodore Bennett, 'Transsexualism and the Consideration of Social Factors Within Sex' (2013-4) 34 *Adelaide Law Review* 379, 380.

[87] *Re Kevin: Validity of Marriage of Transsexual (2001)* 28 Fam LR 158, 167.

[88] See generally, Georg Lukacs, *History and Class Consciousness: Studies in Marxist Dialectics,* Translated by R Livingstone (Merlin Press, 1971).

[89] Ibid 83 and further forward.

[90] Paisley Currah, 'The Transgender Rights Imaginary' (2003) 4 *Georgetown Journal of Gender & Law* 705, 715.

[91] Paisley Currah, 'Gender Pluralisms: Under the Transgender Umbrella' (2005) 1 *Feminist and Queer Legal Theory Convergences and - An Uncomfortable Conversation* 18, 32-3.

[92] Spade, above n 63, 1039.

remains controversial and is considered later. For present purposes it should be clear that the law does embrace sexist stereotypes.

On appeal the Full Family Court affirmed the reasoning of Chisolm J.[93] The Court accepted the proposition that 'marriage is a matter of status and is not for the spouses alone to decide'.[94] Also, 'it affects society and is a question of public policy', and therefore 'it appears to us to be clearly relevant to receive evidence as to how Kevin and Jennifer are perceived by the community in which they live'.[95] Therefore, by not critically assessing the evidence admitted at first instance the gendered stereotypes have been embraced. To date no Australian court has found it necessary to question the stereotypes accepted as *evidence* in *Re Kevin*.

V REPRODUCING A GENDER BINARY

If *U v U* and *Re Kevin* drew upon sexist stereotypes to construct gender, more recent cases have reproduced a gender binary while dismissing it at the same time. This is what happened in *AB and AH v Western Australia*, a case concerning gender reassignment for the purposes of Western Australian law.[96] There two people identified by their birth certificates as female, lived as men and had undergone 'gender reassignment procedures'. The two men had decided not to have a hysterectomy because neither considered it necessary to their sense of male identity, both were infertile while receiving testosterone therapy, both had suffered the effects of surgery in the past, and both believed that their internal organs might be beneficial for phalloplasty surgery in the future. Section 14(1) of the *Gender Reassignment Act 2000* (WA) allowed a person to apply to the Gender Reassignment Board for the issue of a recognition certificate of their 'corrected' gender but the Board refused to grant certificates for the sole reason that each applicant had retained a female reproductive system. The State Administrative Tribunal allowed appeals from those refusals and the Court of Appeal of the Supreme Court of Western Australia set aside those decisions and reinstated the decisions of the Board.

In allowing the appeal and declaring that the certificates should have been issued, the High Court held that for the purposes of the *Act* the physical characteristics by which a person was identified as male or female were confined to external physical characteristics. Again, much of this decision is to be applauded. The High Court rejected the strict biological test laid down by *Corbett* and noted the discrimination endured by people

[93] *Attorney-General for the Commonwealth v Kevin* (2003) 30 Fam LR 1.

[94] Ibid 56.

[95] Ibid.

[96] *AB v Western Australia* (2011) 244 CLR 390; *Gender Reassignment Act 2000* (WA).

caught within an imposed gender binary, and importantly rejected the notion of a gender tipping point used by the Full Court.[97]

This otherwise careful argument suffers from normative/hegemonic stereotypes about masculinity and sexuality. A fully functional man was taken to be one capable of penile penetration and a fully functional woman of being penetrated by a penis.[98] Still, the High Court deserves credit for making it clear that fully functional was not a requirement of the *Act*. Rather, '[t]he options thus provided by the *Act* do not lend support for a view that a person must take all possible steps, including with respect to their sexual organs, to become as male or female as possible'.[99] Nor did the *Act* require any notion of bodily sufficiency. This approach is preferable despite the stereotypes about functional gender and sexuality in reaching that conclusion. It was also welcome because the High Court used a purposive and beneficial interpretation of the Western Australian law.[100]

What is of concern about the decision is threefold. Firstly, the decision did not address the problem of sexist stereotypes posed by *Re Kevin*. This was despite the fact that *Re Kevin* was mentioned in the Full Court of the Supreme Court of Western Australia and before the High Court. The Full Court treated *Re Kevin* as an authority for the proposition that Australian law recognises post-operative as opposed to pre-operative transsexuals[101] and the High Court regarded it as representing the importance of social recognition.[102] Secondly, by not questioning the use of social recognition the High Court reproduced a gender binary despite claiming to abandon it.

According to the High Court the real inquiry in this case concerned the adoption of a gender lifestyle required by s 15(1)(b)(ii).[103] Section 15(1)(b)(ii) should be read with s 3 to concern the way others might identify the person:

> The question it raises is what gender the person exhibits to other members of society, by reference to the gender characteristics they now have and to their lifestyle. That conclusion would be reached by reference to the person's appearance and behaviour, amongst other things. It does not require detailed knowledge of their bodily state.[104]

In rejecting 'sufficiency' the High Court preferred social recognition, '[that] is to say, by reference to what other members of society would perceive the person's gender to be'.[105]

97 *AB v Western Australia* (2011) 244 CLR 390, 403-4.
98 Ibid 404.
99 Ibid 404.
100 Ibid 396-7.
101 *Western Australia v AH* (2010) 41 WAR 431, 432; 450.
102 *AB v Western Australia* (2011) 244 CLR 390, 393.
103 Ibid 403.
104 Ibid 405.
105 Ibid 405.

By turning to social recognition not only is there the propensity for reinforcing sexist stereotypes, as noted above, it undermines the importance of self-identification. In addition, this approach reproduces a gender binary. It reproduces a binary based on contemporary stereotypes whether sexist or not. The High Court accepted the gender binary as constructed by the Board and uncontested by counsel for Western Australia.[106] It referred specifically to the finding of the Board that the men were male because:

> They have undergone clitoral growth and have the voices, body shapes, musculature, hair distribution, general appearance and demeanour by virtue of which a person is identified as male. They have acquired characteristics that are consistent with being male, and inconsistent with being female, to the extent that only an internal medical examination would disclose what remains of their female gender characteristics. Insofar as what remains of their female gender characteristics has been altered to such an extent that it no longer functions, it is no longer a female gender characteristic.[107]

By contrast with contemporary gender norms and stereotypes, what was considered masculine among elites of the 18th century, wigs, make-up, and tights, is today seen as unique to that time, class and culture. The point is that gender is dynamic and not universal. As such the law reproduces a gender binary based on contemporary norms and stereotypes about gender at the same moment it pronounces the binary as coercive.

Thirdly, *AB v Western Australia* framed transgender people within a medical/scientific regime because the *Gender Reassignment Act 2000* (WA) requires an applicant to have undergone a 'reassignment procedure'.[108] A 'reassignment procedure' is defined as '… a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person', and the expression 'gender characteristics' is defined as, '… the physical characteristics by virtue of which a person is identified as male or female'.[109] Before a gender certificate can be issued by the Board it must be satisfied that the applicant:

> (i) believes that his or her true gender is the gender to which the person has been reassigned' and (ii) has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and (iii) has received proper counselling in relation to his or her gender identity.[110]

Therefore it is unsurprising that the High Court noted and accepted the type of evidence presented to the tribunal was of a scientific medical nature:

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[106] Ibid 406.
[107] Ibid 400.
[108] *Gender Reassignment Act 2000* (WA) s 14.
[109] Ibid s 3.
[110] Ibid s 15(1)(b).

> Each identified as a male from an early age and was diagnosed as suffering from a gender identity disorder, or gender dysphoria. The *Diagnostic and Statistical Manual of Mental Disorders*, to which the Tribunal referred (32), explains that the term "gender dysphoria" denotes "strong and persistent feelings of discomfort with one's assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex" (33).[111]

Just why this medical/psychiatric threshold is imposed by law-makers to recognise a change of gender identity is deeply connected with the topic of gender passing and homosexual panic which are pursued later. For now it is necessary to point out that this threshold has several undesirable consequences.

To begin with it classifies transgender people as abnormal rather than normal and only cured by surgical and psychiatric intervention according to law. It re-asserts the notion of a gender binary in the sense that male and female are normal and transgender is abnormal. While this may be appropriate for some transgender people it is offensive to others. Here 'transgender' is distinguished from 'cisgender' since the latter denotes 'people who are born with a psychological sex identification that is congruent with their physiological sex identity markers';[112] whereas 'transgender' is used here to include intersex, transsexual and transgender people.[113] The medicalisation and legal regulation of gender identity inevitably means that 'the issues raised by intersex or transgender persons who claim nonbinary identities have typically been backgrounded within Australian law.'[114] For example, it may exclude 'those trans women's subcultures where sex work is a dominant presence, genital reconstruction surgery will not necessarily be a desired goal, since this may well cause the loss of a crucial source of income.'[115] Because sex reassignment, counselling and legal procedures are expensive, it exacerbates the intersections between transgender discrimination and race and class. Intersections the law is not good at reconciling as shown below.

In its most recent decision in this area of law, in *Registrar of Births Deaths and Marriages (NSW) v Norrie* ('*Norrie*'), the High Court commenced its judgement with the declaration that '[n]ot all human beings can be classified by sex as either male or female'.[116] At issue here was whether it was within the Registrar's power to record in the New South Wales Register that the sex of the respondent, Norrie, was, as she said in her application, 'non-

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111 *AB v Western Australia* (2011) 244 CLR 390, 399. Notes (32) & (33) respectively were: (32) *AB & AH v Gender Reassignment Board (WA)* (2009) 65 SR (WA) 1, 10 [63]; (33) American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed (text rev) (2000), 535.

112 Bennett, above n 86, 397.

113 Theodore Bennett, '"No Man's Land": Non-Binary Sex Identification in Australian Law and Policy' (2014) 37(3) *UNSW Law Journal* 847, 852-3.

114 Ibid 854.

115 Bettcher, above n 16, 401.

116 *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490, 492 (French CJ, Hayne, Kiefel, Bell and Keane JJ).

specific' under the *Births, Deaths and Marriages Registration Act 1995* (NSW). In another laudable decision, the High Court said this 'question should be answered in the affirmative'.[117]

It was a laudable decision because it did justice for Norrie when the *Act* appeared to presume a gender binary and yet the High Court chose not to defer to the NSW Parliament instead preferring a beneficial interpretation of the *Act*. The *Act* referred to 'opposite sex' in s 32A and made no mention of the term 'transgender' that featured in amending legislation inserting that word into Part 3A of the *Anti-Discrimination Act*, but did not do so in the *Act* at hand.[118] Before analysing the reasoning it is useful to consider the facts.

Amongst other things, the *Births, Deaths and Marriages Registration Act 1995* (NSW) provided for in its objects 'the recording of changes of sex' in registers 'for recording and preserving information' about 'changes of name and changes of sex in perpetuity'.[119] Pursuant to s 43(1) of the *Act*, the Registrar is compelled to maintain registers containing 'registrable events' and s 4(1) provides that a change of sex is a registrable event. Because

Norrie was not born in NSW section 32DA allowed such a person to apply to register that person's sex. Amongst other jurisdictional thresholds, under s 32DA(1) registration is possible provided the person is 'not married', and 'has undergone a sex affirmation procedure'. Notably the expression 'perpetuity' in the objects and 'not married'[120] throughout the *Act* is aimed at preventing passing and maintaining heterosexual marriage respectively, both points that are considered properly later.

The key phrase for present purposes was 'sex affirmation procedure' which is defined as 'a surgical procedure involving the alteration of a person's reproductive organs carried out: (a) for the purpose of assisting a person to be considered to be a member of the *opposite* sex, or (b) to correct or eliminate ambiguities relating to the sex of the person.'[121] Norrie sought to be registered as 'non-specific' and initially the Registrar approved the application in writing. Later, however the Registrar took a different position advising Norrie that her Recognised Details (Change of Sex) Certificate was invalid and a Change of Name Certificate was re-issued recording Norrie's sex as 'not stated'. Norrie applied for a review of the decision in the Administrative Decisions Tribunal of New South Wales which found that even though Norrie did not identify as a man or woman or believe that the sex affirmation procedure had resolved her gender ambiguity, the *Act*

[117] *Norrie* (2014) 250 CLR 490, 493.
[118] Ibid 498.
[119] *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 3(c), (d).
[120] Ibid s 32DA(1)(d), s 32DC(3).
[121] Ibid s 32A (emphasis added).

only provided for registration according to a gender binary. Therefore it was not open to the Registrar to register Norrie's sex as 'non-specific'.[122]

An appeal to the Court of Appeal NSW was successful and so the Registrar appealed on two grounds.[123] The first ground was that the *Act* assumed a gender binary and if an intermediate category was intended it would have been expressly provided. The Registrar pointed to amending legislation which had expressly inserted the word 'transgender' into Part 3A of the *Anti-Discrimination Act*, but did not do so in Part 5A of the *Act* at hand.[124] The second argument was a policy based proposition that to include another category for registration would create 'unacceptable confusion'.[125]

Despite the binary restriction implicit in s 32, the High Court was able to do justice in the circumstances of the case. To achieve this result the Court relied on four propositions. The first was that 'a sex affirmation procedure is defined by reference to its purpose, not its outcome', adding that s 32DA(1)(c) 'does not refer to a "successful" sex affirmation procedure'.[126] This followed the approach already taken in *AB v Western Australia.*[127] Secondly, the Court held that the function of the Registrar is a restricted and limited decision-making role that excludes 'the resolution of medical questions or the formation of a view about the outcome of a sex affirmation procedure'.[128] Thirdly, the Court held that although s 32DA is headed 'Application to register change of sex', s 32DA(1) expressly provided 'for the registration of the person's sex' rather than 'a change of sex'.[129] Had it not been for this specific detail the Norrie case may well have had a different outcome. Although the fourth proposition relied on by the High Court tended to clinch justice for Norrie because 1996 amendments to the *Act* at hand also amended the *Anti-discrimination Act 1977* (NSW). Those amendments recognised 'transgender persons' in the latter *Act* as persons of 'indeterminate sex', without introducing this category into the *Act* under consideration.[130] This allowed the High Court to rule that there was 'express legislative recognition of the existence of persons of "indeterminate sex"'.[131] In doing so the High Court accepted part of the Norrie submission 'that it would be to record misinformation in the Register to classify her as male or female'.[132] However, the High Court ruled that the Norrie contention that 'registration of categories of sex

122 *Norrie v Registry of Births, Deaths and Marriages (NSW)* [2011] NSWADT 102, [54].
123 *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145.
124 *Norrie* (2014) 250 CLR 490, 498.
125 Ibid.
126 Ibid 495.
127 (2011) 244 CLR 390, 403-4.
128 Ibid.
129 Ibid.
130 *Norrie* (2014) 250 CLR 490, 495.
131 Ibid 496.
132 Ibid 498.

such as "transgender" and "intersex" is within the scope of the Registrar's powers under s 32DC' went 'too far'.[133] Rather:

> The Registrar's submission that the Act recognises only male or female as registrable classes of sex must be accepted. But to accept that submission does not mean that the Act requires that this classification can apply, or is to be applied, to everyone.[134]

The High Court ruled the Registrar should not have refused to register the change as 'non-specific' preferring Norrie's sex as 'not stated'.[135] The *Act* may be construed to recognise that a person's sex is indeterminate, but it was unnecessary to contemplate the existence of specific categories of sex 'given that the Act recognises that a person's sex may be neither male nor female'.[136] In other words the gender binary stands unless that is unacceptable to a particular person in which case the Registrar can register that person as 'non-specific' provided this is in accord with s 32DC.[137] So on the one hand the High Court was able to recognise gender diversity and able to reject the universal application of a gender binary. On the other hand it reasserted a gender binary that excluded non-binary gender categories. Lastly, the fact that *Re Kevin* was raised in argument[138] and not reviewed leaves unquestioned the capacity for the reproduction of a gender binary according to stereotypes as it was back in 2001 when *Re Kevin* was decided.

VI GENDER SEXUALITY NEXUS

So far the law has been shown to be at best contradictory when dealing with gender. It declares an allegiance with equality while simultaneously managing to discriminate against those who do not fit a heterosexist ideal. In particular the law has drawn upon sexist stereotypes when it abandoned biological determinism, and it re-imposed a gender binary while declaring the gender binary to be discriminatory. The preceding analysis has also mentioned problems the law has with homosexuality, and when grappling with gender sexuality intersections, and these issues are addressed now.

A Gender and Homosexuality - phobia to discrimination

In *Re Kevin* Chisholm J declared 'the case does not raise any issue about homosexual relationships and marriage', adding in the footnote that Ormrod J had not determined the *Corbett* case using a biological test with a fear of homosexuality lurking in the background.[139] It can be added that homophobia alone cannot explain the decisions in

133 Ibid.
134 Ibid.
135 Ibid 501.
136 Ibid 499.
137 Ibid 498.
138 By counsel for the Registrar, *Norrie* (2014) 250 CLR 490, 492.
139 *Re Kevin* [2001] 28 Fam LR 158, 164 [20].

the cases above. It is also likely that homophobia is dwarfed by an historical fear of gender passing.[140] Gender passing would render the law impotent as a regulatory regime so crucial to a society characterised by hierarchy on the basis of gender.[141] However, it is also improbable to assert that homophobia is altogether absent in Australian law.

Homophobia might be expected to linger in Australian law given the relatively short span of time since the abolition of homosexuality.[142] Around the same time the last Australian state was resisting the decriminalisation of homosexuality the Family Court heard *Re A and J* (1995) 19 Fam LR 260. The case was not a legal development and is only mentioned to benchmark homophobia as well as the centrality of heterosexual patriarchy at that time. In contrast with *U v U* discussed above, where the primary carer mother sought to relocate to resume her career, here the father sought to relocate to South Australia to save the cost of paying rent following the sale of the matrimonial home in Ballarat.[143]

Following their separation the parents shared equally the parenting of their child until the father sought to relocate prompting each parent to seek custody. The trial judge found that the mother's lesbian relationship was not a negative factor. Still the child needed to have the balancing role of a 'husband figure' for the benefit of his 'emotional development', because in the circumstances, that tipped the balance in what was otherwise an evenly balanced case.[144] Here homosexuality was unnatural but tolerable provided the boy had the natural balancing influence of a heterosexual patriarchal figure. If the situation is reversed the discrimination is made more apparent since if it were the lesbian mother moving interstate it is unlikely she would get primary responsibility for the child for the sake of 'balanced emotional development'.[145] Instead, as happened in *U v U*, the mother is more likely to be seen as 'selfish'.[146] Whereas here the father's decision to relocate was seen as reasonable despite its deleterious effects on the child in terms of changing environments and severing the close relationship the child would have with his mother.[147]

Arguably family law has moved away from this culture but discrimination in the domains of transgender law and marriage law persist. As Keyes explains, 'every jurisdiction except the Australian Capital Territory' prevents a change of sex to be registered where the

[140] See generally, R Trumbach, 'London's Sapphists: From Three Sexes to Four Genders in the Making of Modern culture' in Epstein and Straub (eds), above n 11, 112–41.
[141] J Shapiro, 'Transexualism: Reflections on the Persistence of Gender and the Mutability of Sex' in Epstein and Straub (eds), above n 11, 270.
[142] Australian Human Rights Commission, *Resilient Individuals*, above n 62, 63.
[143] *Re A and J* (1995) 19 Fam LR 260, 270: 'The husband was able to secure accommodation in South Australia at little or no cost.'
[144] Ibid 265.
[145] Juliet Behrens, 'U v U: The High Court on Relocation' (2003) 27 *Melbourne University Law Review* 572, 577–8.
[146] Patricia Easteal, Juliet Behrens and Lisa Young, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14(3) *Australian Journal of Family Law* 234, 240.
[147] *Re A and J* (1995) 19 Fam LR 260, 270.

person is already married arguably to avoid offending the heterosexual requirement in the *Marriage Act*.[148]

In 2002 Sharpe wrote that the law remained homophobic in particular areas of law such as marriage.[149] As recently as 2011, in *AB v Western Australia*, the High Court confined the scope of the decision so it would have no bearing on same-sex marriage. Wanting the case to stand for no more than a beneficial interpretation of a Western Australian statute, the High Court cited New Zealand authority for the proposition that 'whilst courts could deal with some legal situations involving the reassignment of gender, they could [at 397] not make a declaration as to the gender of a person which would bind persons who were not parties to the proceedings.'[150] Instead, legislation would be necessary.[151] Similarly, in 2014, in *Norrie,* in wholly rejecting the Registrar's 'confusion' argument the High Court noted the centrality of the Commonwealth *Marriage Act*:

> The submission made on behalf of the Registrar that … unacceptable confusion would ensue if the Act recognised more than two categories of sex or an 'uncategorised' sex should be rejected. The difficulty foreshadowed by this argument could only arise in cases where other legislation requires that a person is classified as male or female for the purpose of legal relations. … The chief, perhaps the only, case where the sex of the parties to the relationship is legally significant is marriage, as defined in the fashion found in s 5(1) of the *Marriage Act 1961* (Cth).[152]

Norrie also shows that the law is less concerned with gender stability when heterosexual marriage is not at stake.

Therefore, while the law develops the law also entrenches heterosexual marriage whether by judicial discretion, or by virtue of the Commonwealth *Marriage Act* and the corresponding exceptions contained in the State laws regulating gender recognition. In case this criticism is thought of as picking the low-hanging fruit, the fact is that the so-called homosexual advance defence still exists in some jurisdictions and according to the Australian Human Rights Commission many administrative, legal and policy areas still need significant reform.[153] Therefore, if the law is no longer homophobic, it still participates in discrimination with the normative effect that inevitably has on homophobia throughout society.[154]

148 Keyes, above n 49, 275.
149 Sharpe, above n 43, 5.
150 *AB v Western Australia* (2011) 244 CLR 390, 396-7, citing McMullin J in *Re T* [1975] 2 NZLR 449, 452-3.
151 Ibid 397.
152 *Norrie* (2014) 250 CLR 490, 500.
153 Australian Human Rights Commission, *Resilient Individuals*, above n 62, 64-6.
154 See, eg, Brenna Harding, 'Same-sex Citizenry: The growing pains of a teenage daughter' (2013) 1(1) *Griffith Journal of Law & Human Dignity* 55; Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31463 (Michael Organ MP).

B Gender Sexuality Intersections

Re A and J was also an example of the law's inability to grapple with intersectionality. There the mother was discriminated against as both a woman and a lesbian. Seven years later when *Re Patrick*[155] was decided the Family Court was conscious of avoiding discrimination on the basis of sexuality. Consequently, *Re Patrick* was applauded as 'remarkable in that it signalled a break with the well-documented international legal non-recognition of lesbian nonbiological parents.'[156] Again the law was seen as progressive. This time because it recognised the legitimacy of homosexual families[157] but at the same time it was also a loss for lesbian women generally and in particular Patrick's parents. Like *Re A and J*, the gender sexuality intersection proved insurmountable.

In *Re Patrick* the court privileged patriarchy and stereotyped the lesbian parents as irrational. Under the rubric of the best interests of the child, Guest J recognised an increasing parental role for the sperm donor against the wishes of the parents.[158] The birth mother and co-parent had brought proceedings to restrict contact between the sperm donor and the child to twice a year after falling out with him over a consent agreement.[159] While the sperm donor sought to incrementally increase his contact from fortnightly Sunday contact to ultimately include overnight stays, alternate weekends and half of school holidays by the time the child was three.[160] As a question of law Guest J was required by the *Family Law Act* to do what was in Patrick's best interests according to s 60E.[161] To determine the best interests of Patrick the Court had to consider the matters specified in s 68F(2) together with any relevant matters in s 60B.[162] In short, this required consideration of:

> (b) the nature of the relationship of the child with each of the child's parents and with other persons; [and] … (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs …'.[163]

Section 60B aims to promote a child's relationship with both parents unless that is likely to be contrary to the child's best interests. As the law stood s 60B was superfluous here

155 *Re Patrick* (2002) 28 Fam LR 579.
156 Deborah Dempsey, 'Donor, Father or Parent? Conceiving Paternity in the Australian Family Court' (2004) 18
International Journal of Law, Policy and the Family 76, 76 (original references omitted).
157 *Re Patrick* (2002) 28 Fam LR 579, 650 [323].
158 Ibid 653-4 [336].
159 Ibid 583 [5].
160 Ibid 582 [4].
161 *Family Law Act No 53 of* 1975 as amended, taking into account amendments up to Act No 159 of 2001, 8 Nov 2001.
162 *Re Patrick* (2002) 28 Fam LR 579, 590 [40].
163 *Family Law Act No 53 of* 1975, s 68F(2).

since the mother's partner, whom Guest J correctly recognised as 'co-parent',[164] could be contrasted with the sperm donor for the purposes of applying the relevant criteria in s 68F(2).[165] Despite this, Guest J opted to name the sperm donor as 'father' contrary to the wishes of the mother and her partner:

> … the donor (to whom I shall refer as the father, which is not a statement of law) entered into an agreement with the mother and the co-parent to provide genetic material for the purpose of artificially inseminating the mother.[166]

Three factors seemed to influence this discretion. The first factor was the importance placed on the agreement between the parties. The second factor was Guest J's desire to respect diverse forms of family. [167] The third factor was Guest J's empathy for the sperm donor coupled with a privileging of the importance of biology:

> To be Patrick's biological father in the circumstances as found by me and yet denied by bare statutory definition appropriate nomenclature as one of his 'parents' in my view sits awkwardly with the provisions of an Act which regulates family law in this country. It falls seamlessly from the expert evidence … that the mother and her committed lesbian partner in their homo-nuclear relationship are the child's 'parents', but that a similar and appropriate recognition is not accorded to the biological father.[168]

Justice Guest spoke of the donor's suitability as a role model in the future development of Patrick commenting that 'the child bears his genetic blue print', he has 'actively, solicitously and patiently contributed to his conception,' and despite hostility from the mother 'considerable credit should be accorded to the father for his patience and sensitivity'.[169] Justice Guest added that the statutory failure to appropriately recognise the donor's biological status as a parent was nevertheless ameliorated by the best interests of the child.[170] However, this emphasis on the sperm donor's role necessarily being in the best interests of the child was and is a view mandated more by patriarchal ideology about what is normal and natural than it is mandated by the *Act*. Had the parents been a heterosexual couple Guest J would not have regarded the donor as a father. Once that election was made it elevated the status of the sperm donor in terms of applying statutory criteria, it threatened the status of the actual parents, and it had a bearing on the characterisation of the evidence.

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164 *Family Law Act No 53 of* 1975, s 60H(4) deemed Patrick to be the child of the biological mother and her partner.
165 *Re Patrick* (2002) 28 Fam LR 579, 590 [40], citing *Re B and B: Family Law Reform Act 1975* (1997) FLC 92–755 at [9.54].
166 Ibid 581 [2].
167 Ibid 645 [300], 652 [330].
168 Ibid 647 [307].
169 Ibid 638 [263], 640 [274], 640 [275].
170 Ibid 647 [308].

Justice Guest also had to weigh up contradictory evidence remarking that 'given the antithetical evidence of the parties in their … affidavits, credibility would be an important issue for my determination.'[171] He was mindful that he would need to 'make appropriate allowance for any anxiety or tension that a witness may understandably experience when giving their evidence.'[172] Unfortunately, the way Guest J framed the case treating the donor as a father contrary to the wishes of the actual parents coloured his assessment of the evidence. Under the circumstances Guest J did not 'make appropriate allowance for any anxiety or tension' he perceived in the co-parents.

The reason for this was that a key concern for many feminist lesbian households is the battle to live independently of patriarchal norms and control. As Millbank pointed out before this case was heard:

> Lesbians have generally appeared in litigation defensively, almost exclusively as mothers defending their fitness in child custody proceedings with ex-husbands or in welfare proceedings brought against them by the state. Through 1995 and 1996, a number of cases appeared in which women were the litigants, using the courts to seek access to benefits or rights from former partners (such as spousal or child support) or from the state (such as marriage or adoption rights). … all of these actions are about contesting meaning; the meaning of family.[173]

Patriarchal norms and control may be invisible to men unaware of the ubiquity and apparent naturalness of this power, but that power is all too obvious for those on the receiving end of it.

Justice Guest did not understand the lived oppression experienced by lesbian parents.[174] Although he did acknowledge this briefly, it is clear throughout the judgement as a whole that he had a limited understanding of the gravity of this aspect of the case.[175] As Crenshaw points out, in cases where there are competing marginalised interests courts generally speaking have not been able to grapple with the intersectional complexity.[176] *Re Patrick* is unfortunately a good illustration.

Justice Guest disregarded the relevance of sexuality to the conflict and how that might impact on the evidence and behaviour of the co-parents. He declared '[t]he issue of their homosexuality is, in my view, irrelevant',[177] and the case before him was 'not dissimilar

171 Ibid 591 [44].
172 Ibid 591 [44].
173 Jenni Millbank, 'Which, then, would be the "husband" and which the "wife"?: Some Introductory Thoughts on Contesting "the family" in Court' (1996) 3 *Murdoch University Electronic Journal of Law* 1 – 11, at 2 (references omitted).
174 Crenshaw, above n 21, 140.
175 *Re Patrick* (2002) 28 Fam LR 579, 597 [77].
176 Crenshaw, above n 21, 148.
177 *Re Patrick* (2002) 28 Fam LR 579, 651 [325].

from that arising in traditional heterosexual family disputes and decided daily by the Court' and 'It is not unique'.[178] Yet not only was the power differential based on gender and sexuality central to the case, the Judge's subjectivity concerning the gender sexuality intersection determined the outcome. The sperm donor was privileged on the basis of his gender and the discrimination based on the sexuality of the parents was ignored.

This explains why the co-parents were condemned by the judge for making 'philosophical and ideological bases upon which [they] predicated their case'.[179] At the same time the donor was not regarded as presenting an ideological argument that a family is better off having a fatherly figure. The co-parents, however, were being 'irrational' and 'ideological' defying patriarchal authority while the sperm donor was:

> … calm and reasoned in the giving of his oral evidence … I found him to be both credible and persuasive. ... He was not controlled by dogma, did not search for hidden motives, but applied himself consistently with the best interests of Patrick as the paramount consideration.[180]

This is apophatic - the denial that sexuality was important but ultimately the case turned on sexuality and its intersection with gender. This appears to be a recurrent theme in cases dealing with the parental rights of lesbian mothers in Australia and elsewhere; A declared judicial denial of the relevance of sexuality that proves to be a material factor in those decisions.[181]

In *Re Patrick* this meant that the mother and her partner's understandable fears, and lived reality, that their family was subordinated in a patriarchal world were interpreted as 'philosophical and ideological'.[182] Their endeavours to shelter their marginalised but healthy family from an imposing sperm donor asserting the rights of a traditional father[183] were treated as 'irrational',[184] even though the mother's narrative had the support of expert witnesses.[185] From a lesbian feminist standpoint it was no less plausible to regard the donor's submission[186] as ideological.[187]

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178 Ibid 651 [326].
179 Ibid 599-600 [88].
180 Ibid 595 [64].
181 See, eg, Suzanna Danuta Walters, 'From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, why Can't a Woman Be More Like a Fag?)' (1996) 21(4) *Signs* 830; Susan Boyd, 'What is a "Normal" Family? C v C (A Minor) (Custody: Appeal)' (1992) 55 *Modern Law Review* 269, 271.
182 *Re Patrick* (2002) 28 Fam LR 579, 599 [88].
183 Ibid 639 [270]: 'They, but in particular the mother, have been obsessed with the fact that he is not to have any role in Patrick's life in a natural, ordinary, parental and fatherly manner.'
184 Ibid 595 [63], 597 [73], 603 [102], 616 [158], 621 [183], 638 [266], 639 [270].
185 Ibid 618 [168], 619 [169]-[175], 620 [179]-[180], 625 [205] – 626 [209].
186 Ibid 598 [78]: 'From what I have both heard and read, it is doubtless true that children can be happily raised within a homo-nuclear family, but the difference here is that the father desires and has always desired to play an active and fatherly role in the life of his son.'

Indeed a FST approach would have had an ethical advantage because it would oblige the Judge to reflect on his own privilege relative to those involved in the case and to take account of the asymmetrical power between a man and two women who were by comparison multiply disadvantaged.[188] It would have meant that the evidence was assessed by means other than intuition according to a privileged standpoint. Had the evidence been assessed this way it would have been possible to concur with the mother, the experts, and the literature[189] to read *Re Patrick* as a story where the sperm donor progressively demanded (perhaps bullied using manipulation) more influence in the child's life.[190] Importantly, it would have been an approach consistent with the Judge's promise 'to make appropriate allowance for any anxiety or tension' on the part of the witnesses. By ignoring the power differential, Guest J found that the parents were 'icy', 'mistaken', 'irrational', 'ideological', 'risible', 'unreasonable', 'fanciful' and less reliable witnesses than the donor.[191] While the donor was commended for his 'patience and sensitivity', 'goodwill', 'sacrifice and concession' and his application was 'carefully considered', and he was a 'sensitive', 'precise and credible' witness, 'not controlled by dogma' and he was 'calm and reasoned'.[192]

The FST argument being made here is that ultimately the judge had to choose between two rival views of family given that it was clear that Patrick was prospering within his lesbian family structure.[193] What *Re Patrick* shows is that on an alternate reading informed by FST, a patriarchal view of the gender sexuality nexus was imposed onto an otherwise healthy lesbian family with devastating consequences.[194]

Judges will continue to struggle with gender sexuality intersections so long as they discount power as a relevant factor. These situations will rarely involve an absence of power even if this is not immediately apparent. Only Feminist Standpoint Theory and Intersectional Critique are capable of grappling with this intersection without exacerbating or reproducing inequality of power. Another place where power deserves more scrutiny concerns the state's right to control gender authenticity and gender passing. Here the right to determine the categories and to decide who is in and who is not is taken for granted rather than justified as legitimate or necessary.

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187 Asha Achuthan, Ranjita Biswas, Anup Kumar Dhar, *Lesbian Standpoint* (Sanhati, 2007) 39-45; Margaret Davies, 'Lesbian Separatism and Legal Positivism' (1998) 13 *Canadian Journal of Law and Society* 1, 16-17.

188 Allan Ardill, 'Australian Sovereignty, Indigenous Standpoint Theory and Feminist Standpoint Theory: First Peoples' Sovereignties Matter' (2013) 22(2) *Griffith Law Review* 315, 325-29, 332-37.

189 Boyd, above n 181; Danuta Walters, above n 181; Millbank, above n 173.

190 *Re Patrick* (2002) 28 Fam LR 579, 597 [75]: 'She saw his contact with Patrick as being 'intrusive' upon her relationship with the co-parent "… *because he's enacting a parental role"* and then went on to add that he was utilising contact to collect affidavit material for court purposes.'

191 Ibid 591 [47], 592 [48], 595 [64], 597 [73], 599 [88], 603 [102], 638 [263], 639 [272], 640 [275].

192 Ibid 580, 595 [64], 597 [73], 601 [99], 603 [102], 638 [263], 640 [275], 640 [278].

193 *Family Law Act No 53 of* 1975, s 68F(2).

194 Phil McCrory, 'Obituary Dwayne Campbell 1960-2002', *Anarchist Age Weekly Review No 512* (online) 19-25 August 2002 <http://ainfos.ca/02/aug/ainfos00298.html>.

VII PASSING AND AUTHENTICITY

A consistent theme in the cases analysed, and implicit in the statutes, is the control over gender passing and a concern with gender authenticity, even when liberalising the law.[195] This control is not unique to law since people must pass according to gender norms, not just transgender people.[196] But the stakes are higher for transgender people with discrimination, economic disadvantage, and violence against trans-people arguably the worst of any group in society.[197] In addition, because 'trans people are constructed as frauds' by law and popular culture, 'some trans people respond by appealing to gender realness.'[198] Therefore it is important to respect self-determination and individual autonomy even if it seems at odds with the abolition of a coercive gender binary.[199]

While the High Court has mentioned the importance of individual gender subjectivity it also continues to enforce coercive gender stability.[200] Australia is no different to other jurisdictions in this respect and as others have observed there is a judicial concern with passing and authenticity whether that is mandated by statute or not.[201] Trumbach has shown that since the 1700s the law has maintained a gender binary hierarchy, and that policing sexuality was a necessary incidence to that objective.[202] Gender and sexuality have been inextricably and historically bound because men have sought to control women's sexuality and because homophobia has had a bearing on gender authenticity and passing.[203] So too have race and class had a bearing on gender in terms of miscegenation in both the United States[204] and Australia.[205] Gender therefore is policed both directly and indirectly. Direct regulation enforces a binary and restricts passing while

195 *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32B; Births, Deaths and Marriages Registration Act 1996 (Vic), s 30A; Sexual Reassignment Act 1988 (SA), s 7; Births, Deaths and Marriages Registration Act 2003 (Qld), s 23; Gender Reassignment Act 2000 (WA), s 17; Births, Deaths and Marriages Registration Act 1999 (Tas), s 28A; Births, Deaths and Marriages Registration Act 1996 (NT), s 28B; Births, Deaths and Marriages Registration Act 1997 (ACT), s 24.

196 Judith Shapiro, 'Transexualism: Reflections on the Persistence of Gender and the Mutability of Sex' in Epstein and Straub (eds), above n 11, 257.

197 Australian Human Rights Commission, *Resilient Individuals*, above n 62, 15; Currah, above n 91, 23-4.

198 Bettcher, above n 16, 398.

199 Currah, above n 91; Laura Langely, 'Self-determination in a gender fundamentalist state: Toward legal liberation of transgender identities' (2006-2007) 12 *Texas Journal on Civil Liberties and Civil Rights* 101.

200 *AB v Western Australia* (2011) 244 CLR 390, 402.

201 See generally, L Camille Herbert, 'Transforming Transsexual and Transgender Rights' (2008-9) 15 *William and Mary Journal of Women and the Law* 535; Langely, above n 199.

202 Randolph Trumbach, 'London's Sapphists: From Three Sexes to Four Genders in the Making of Modern culture' in Epstein and Straub (eds), above n 11, 112, 129–30.

203 Sharpe, above n 43, 133.

204 Keith Sealing, 'Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation' (1999-2000) 5 *Michigan Journal Race & Law* 559.

205 Raymond Evans, *Fighting Words: Writing about Race* (University of Queensland Press, 1999) 42, 43, 75, 81-2, 131, 153-58, 161-62, 206, 212; Commonwealth, Royal Commission Into Aboriginal Deaths In Custody, *National Report* (1991) vol 2, [10.7.12]; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986), Chapter 3 [25].

indirect regulation tends to be concerned with factors intersecting with gender such as class, race and sexuality.

It is policed indirectly because the law has historically connected gender with other indices of privilege and disadvantage.[206] If there are to be categories at all and ones involving the allocation of resources, or privileges, then the law can be expected to resist passing.[207] Capitalist production has been based on power and work privileges for hetero men and the privatisation of family (reproduction, child-rearing, aged-care, etc.) as the concern of women.[208] If people are able to pass between genders then hetero-male privilege is threatened. Since the early days of capitalism, this fear of passing meant that if individuals went back and forth between genders they were guilty of sodomy.[209]

A fear of gender passing remains present in the new millennium too. It is implicit in the reasoning in all the transgender cases. For example in *Re Kevin* Chisholm J alludes to the concern with authenticity remarking:

> It shows him living a life that those around him perceive as a man's life. They see him and think of him as a man, doing what men do. They do not see him as a woman pretending to be a man. They do not pretend that he is a man, while believing he is not.[210]

To require gender authenticity is one way of controlling gender passing. Another way is to pronounce the undesirability of allowing passing at individual whim and this form of judicial control was clear in *Re Kevin*:

> … it may not be a legitimate solution to the problem to say, in effect, that the law should simply recognise at any given time whatever sex a person chooses.[211]

And:

> … it would be wrong for marriage law to embrace a definition that would make one's sex a matter of personal preference or choice. One of the reasons that the three-point biological criterion in *Corbett* has found favour is, I think, that it provides a permanent and clear answer to the question whether a transsexual is a man or a woman, and avoids any risk that the law might enable a person to change from a man to a woman at will. This is also, I think, why some judges have been

206 Patricia Yancey Martin, 'Gender As Social Institution' (2003-4) 82(4) *Social Forces* 1249, 1263.
207 Paisley Currah, 'The Transgender Rights Imaginary' (2003) 4 *Georgetown Journal of Gender & Law* 705, 718.
208 Shulamith Firestone, *The Dialectic of Sex: The case for Feminist Revolution* (Granada Publishing, 1972).
209 Randolph Trumbach, 'London's Sapphists: From Three Sexes to Four Genders in the Making of Modern culture' in Epstein and Straub (eds), above n 11, 120.
210 *Re Kevin* (2001) 28 Fam LR 158, 172 [68].
211 Ibid 219 [280].

> reluctant to incorporate "psychological" criteria, lest the person's sex vary according to his or her feelings or beliefs at particular times. [212]

Since *Re Kevin* was decided extra-legal developments have taken place. Firstly, an increasing volume of popular culture exploring trans issues has loosened the grip of the binary hegemony even if the bulk of that literature is simplistic/stereotypical, and what Hutson describes as a single-story cisgender patriarchal narrative.[213] Secondly, international standards[214] have been developed, the Human Rights Commission has produced the Sex Files Report[215] and Resilient Individuals,[216] and the Commonwealth has introduced administrative Guidelines.[217] Collectively these promote self-identification and the de-emphasis of gender except where otherwise necessary.[218] However, Bennett explains that while '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.'[219] Spade too recognises that there will be occasions where sex will matter.[220] For example measures to protect women from violence, where there is an epidemiological difference in the provision of services based on sex, and for affirmative action. In other words sex might be recorded where the need comes from the person rather than to serve state bureaucracy or surveillance.[221]

De-emphasising sex, according to Bennett, 'would be in keeping with the general trajectory of Australian law', and adding:

> 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][222]

Yet despite this trend toward gender de-emphasis both statutes and case law control passing and encourage gender 'authenticity'.

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212 Ibid 221 [293].

213 Emma Hutson, 'Passing: Beyond the Single Story Narrative' (Paper presented at the Trans Studies Now Conference 2015, University of Sussex, Brighton, 12th June 2015) 3.

214 *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) ('*Yogyakarta Principles*') Principles 1D, 3B, 6F, 19.

215 Australian Human Rights Commission, *Sex Files: The legal recognition of sex in documents and government records, The sex and gender diversity project Concluding Paper*, 2009.

216 Australian Human Rights Commission, *Resilient Individuals*, above n 62.

217 Australian Government Guidelines on the Recognition of Sex and Gender (July 2013) <http://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>.

218 Bennett, above n 113, 865, quoting *Sex Files Report,* 3.

219 Ibid 864.

220 Dean Spade, 'Documenting Gender' (2007-8) 59 *Hastings Law Journal* 731, 808.

221 Bennett, above n 113, 863-4; Spade, above n 220, 819.

222 Bennett, above n 113, 863. Original note read: [108] (2014) 250 CLR 490, 500 [42].

In *AB v Western Australia* the High Court noted that the 'Tribunal was mindful of the possibility that the appellants could not be said, with absolute certainty, to be permanently infertile'.[223] However, the Tribunal's concern about passing was addressed because it 'accepted that the reversion rate of female to male transsexuals was rare'.[224] The Tribunal accepted that the appellants had done 'everything medically available', short of hysterectomy and phalloplasty, 'so as to be identified as male'.[225] Therefore the Tribunal did not impose the extra requirement that 'each [appellant] go even further and undergo a hysterectomy in these circumstances' because that 'would seem to serve the purpose only of requiring further proof of their conviction'.[226]

Clearly the Tribunal was conscious of needless scrutiny of passing and authenticity. Unlike the Western Australian Court of Appeal which overturned the Tribunal's decision authenticity was central.[227] There the majority implied a need for authenticity into s15(1)(b):

> On the view which I take of the meaning to be given to "physical characteristics", it would extend to all of those characteristics which have a bearing upon the identification of the applicant as either male or female. Many of those characteristics would not be visible to the casual observer, especially if the applicant is clothed. The terms of the Act provide no basis for restricting the characteristics properly taken into account to those that might be seen by the casual observer or bystander.[228]

This approach suspends individual privacy in favour of a public right to know some 'truth' about that person's nakedness and internal biological state. It constructs gender according to a truth fraud dichotomy.

Even though both appellants appeared as men and lived as men this was insufficient. According to the Chief Justice the relevant physical characteristics required by the *Act* could not be met by the applicants in this case:

> Each of AB and AH, possess none of the genital and reproductive characteristics of a male, and retain virtually all of the external genital characteristics and internal reproductive organs of a female. They would not be identified, according to accepted community standards and expectations, as members of the male gender.[229]

223 *AB v Western Australia* (2011) 244 CLR 390, 399.
224 Ibid 400.
225 Ibid 400.
226 Ibid 400.
227 *Western Australia v AH* (2010) 41 WAR 431.
228 Ibid 457 [110] (with whom Pullin JA concurred).
229 Ibid 458 [115] (with whom Pullin JA concurred).

While for Pullin JA although both AB and AH each had 'a number of physical characteristics which by community standards would be associated with members of the male gender' this would not be sufficient. Instead:

> … identification according to community standards requires all relevant information to be considered. The word "identify" means to recognise or establish or prove to be as asserted ... In my opinion, information about not only external but also internal physical characteristics is relevant to such identification.[230]

Authenticity is not mentioned in the *Act*.[231] The only mandatory 'commitment' to gender comes from the requirement that an applicant for a gender reassignment certificate has undergone a medical procedure.[232] Otherwise the *Act* requires that the Board is satisfied about an applicant's belief in their true gender, that the applicant has adopted that gender lifestyle, and has received 'proper counselling in relation to his or her gender identity.'[233]

The WA Court of Appeal held that a purposive reading of the Act was not helpful and instead what mattered was a balancing of all the relevant factors indicative of one gender rather than another.[234] Future intentions did not matter rather the current state of physicality.[235] From these propositions it followed for the Majority that because each person still had the 'external genital appearance and internal reproductive organs', 'associated with membership of the female sex' but for the effects of testosterone treatment, they could not be regarded as men according to 'community standards'.[236]

The High Court preferred a purposive construction in over-turning the decision of the Court of Appeal.[237] It said that it was generally accepted that 'that beneficial and remedial legislation is to be given a "fair, large and liberal" interpretation'.[238] However, even though the *Act* here was intended to alleviate 'suffering and the discrimination' which may be experienced 'by providing legal recognition of the person's perception of their gender', 'a person's belief about their gender is but one requirement'.[239] The High Court pointed out the *Act* required as a minimum that an applicant for a gender recognition certificate had undergone medical treatment 'to evidence the commitment by the person to the gender to which the person seeks [at 403] reassignment.'[240] In other words, there ought not be a fear of casual passing or the imposition of additional thresholds of

230 Ibid 460 [125].
231 See especially *Gender Reassignment Act 2000* (WA), s 15.
232 Ibid s 14(1).
233 Ibid s 15(1)(b).
234 *Western Australia v AH* (2010) 41 WAR 431, [103], [105]
235 Ibid [106].
236 Ibid [114]
237 *AB v Western Australia* (2011) 244 CLR 390, 402.
238 Ibid.
239 Ibid.
240 Ibid 402-3.

authenticity if a person has endured the ordeal of sustained medical intervention. According to the High Court an absence of commitment to a gender was the problem for the applicant two decades earlier in *Secretary, Department of Social Security v SRA.*[241] Presumably casual passing and authenticity were no longer important other than the minimum required by the legislature under statute. Here the minimum requirement under s 14 was for medical procedures aimed at gender reassignment read with s 15(1)(b). As mentioned earlier the *Act* is silent as to the need to facilitate social control over authenticity because s 15(1)(b) states:

> (b) the Board is satisfied that the person —
>
> (i) believes that his or her true gender is the gender to which the person has been reassigned; and
>
> (ii) has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and
>
> (iii) has received proper counselling in relation to his or her gender identity.

Despite this, and the fact that the High Court had held that a beneficial and purposive interpretation was warranted, the need for social recognition was read into s 15(1)(b). The High Court said that social recognition concerns the way others might identify the person and in doing so rejected the notion of a tipping point of physical characteristics required by the Court of Appeal majority.[242]

This means that social recognition will be used to police authenticity and control passing. Perhaps a better way to give effect to a beneficial interpretation would be to drop social recognition because it is not expressly required by s 15 anyway. Instead s 15 requires the applicant to believe in their gender, adopt the lifestyle and gender characteristics, and have received 'proper' identity counselling. All matters between the applicant and their health professionals. What this shows is that until the state and the courts abandon the regulation of gender, legal reasoning will inevitably be plagued with the need to justify why individual liberty should not prevail and instead why the law should supervise gender normativity.

VIII CONCLUSION - RECONCILING DEVELOPMENTS

Unlike the revolution in law that was the *Mabo Case,* and the subsequent backlash and regression of law affecting native title, the situation with gender over the last 20 years has been different. Gender law has slowly but surely improved at the margins. Arguably its

[241] Ibid 403, citing (1993) 43 FCR 299.
[242] Ibid 403.

revolutionary moments were legislative in the form of the *Family Law Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth) and since then reform has been incremental as this article has shown. However, gender law still has a long way to go. This is because the law regulates gender to restrict passing by requiring social recognition, it imposes controls over gender 'authenticity', it regulates gender subject to an embargo on gay marriage, and it re-institutes a sexist gender binary at the same time as it purports to abandon that binary.

This criticism, that advances in law are incomplete, can be levelled at 'advances' in cases such as *Re Kevin*[243] (abandoned biological determinism), *Re Patrick*[244] (apparent recognition of diverse family forms), *AB v Western Australia*[245] (rejection of the gender binary), and *Norrie*[246] (recognition that gender binary does not apply to all people).

There are two reasons why the law advances and at the same time leaves justice incomplete. The first reason is that reform is embedded into a structure that systemically discriminates on the basis of patriarchy. In other words the law will continue to closely regulate gender identity because amongst other things, political economy is based on power and work privileges for men and the privatisation of family (reproduction, child-rearing, aged-care, etc.) as the concern of women. If people are able to pass between genders the privilege of belonging to one gender as opposed to another would collapse. It also means that even if the Commonwealth prohibition on gay marriage is removed it is unlikely that homophobia and a fear of passing can be extricated from the regulation of gender. Related to this is the second reason. The second reason is that until the law understands and embraces the notion that gender is a social construction it will inevitably reproduce gender hierarchy.

Therefore unlike Mansell's assessment of *Mabo*, the situation with gender has changed over the last 20 years to be more like two steps forward and one back, as opposed to 'gives an inch and takes a mile'.

243 *Re Kevin* (2001) 165 FLR 404.
244 *Re Patrick* (2002) 28 Fam LR 579.
245 *AB v Western Australia* (2011) 244 CLR 390.
246 *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490.