LAND COURT
OF QUEENSLAND

What's gender got to do with it?

Pride in Law 4th Annual Address

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This impressive building stands on land occupied by people for tens of thousands of years, if not longer, before my father arrived in Australia as a "10 pound Pom". As the daughter of a boat person, I respectfully acknowledge the traditional owners of the land and their elders and extend a warm welcome to indigenous people in attendance tonight.

I need to acknowledge my limitations in talking about this topic to members and supporters of Pride in Law. My day job involves disputes about land and natural resources. I am not called upon to make decisions about gender issues. I am in no position to advise how law might be reformed or the next legal barricade likely to fall, or to be erected. If you were hoping for an address of that nature, you will be sorely disappointed. I am grateful to my associate, Alice Killin, who has provided excellent research support, and provided me with her own perspective on my topic. I learnt so much from my discussions with her, and, also, with the many family members and friends I have imposed on recently.

I am apprehensive about discussing matters that will have an intensely personal dimension for some of you. I do not mean to cause offence and sincerely hope I do not.

I will be talking about the law, but mostly about language. I will discuss how judges have interpreted words like man and woman and sex and gender. How small changes in statutory language opened up debate about the meaning of such words. I am interested in the role that story-telling plays in changing the 'ordinary meaning' of words over time and in expanding our vocabulary. And how storytelling can frame our discussion, reinforce stereotypes, promote fear and hatred, or bring a different perspective that encourages understanding and acceptance.

So let me start with a story. It is an old story, 100 years old. It comes from a trial that started about this time of year in 1920. It is about a transgender man who was convicted of murdering his wife. The story was recently told, or should I say retold, by former DPP (NSW) Mark Tedeschi QC. He wrote a book called Eugenia. Although Eugenia lived under a number of identities and names, I will use Eugenia because that is the name of the book, which I commend to you. As well as retelling Eugenia's story, Mr Tedeschi records how the story was told the first time around. You are unlikely to be surprised by the hostile and sensationalist nature of the reporting, which included the following:

> "So it was that a pathetic figure, longing to be a man, because it knew itself no longer a woman, went nervously through the days, doubly afraid of the loneliness that all souls fear, and seeking sly means to win companionship, and to satisfy the fantastic curiosity of the ghoul that ruled it."[1]

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[1] Mark Tedeschi QC, *Eugenia: A True Story of Adversity, Tragedy, Crime and Courage* (Simon & Schuster (Australia) Pty Ltd, 2012) 234.

Having said I do not wish to offend, I know I have stretched the friendship with that quote. I chose it to demonstrate a point. The author's fear and distrust of a person who did not conform to expectations about women and men shouts at you from the page. This passage displays no attempt to understand Eugenia. It permits no empathy and entrenches the very alienation and loneliness it reports.

The journalist did not know how to classify Eugenia. They challenged the journalist's understanding of the words, 'woman' and 'man'. This classification dilemma has bedevilled the common law for decades.

The first common law decision to tackle this head on was *Corbett v Corbett*,[2] an English matrimonial case involving the validity of a marriage between a man and a transgender woman who had undergone what was then called a sex change operation. The case was decided in 1971 and is a decision of its time. Justice Ormrod, who heard the case, reasoned that a person's "true sex" is determined by biological factors, is fixed at birth, and cannot be changed.

In arriving at that conclusion, the Judge posed an important question - what is the purpose of the law in classifying people by sex? This was his answer:

> *"The fundamental purpose of law is the regulation of the relations between persons, and between persons and the state or community….legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant or an essential determinant of the nature of the relationship. Over a very large area the law is indifferent to sex."*[3]

He gave examples of when it is irrelevant, including the law of contracts (although that was not always so) and torts. Next, the Judge turned his attention to the nature of marriage. He determined that was essentially a relationship between a man and a woman, and the case must turn on whether the wife was a woman. Applying his narrow biological test, he concluded she was not and, the marriage was not valid.

The ordinary meaning of the word 'marriage' provided the context. If, when *Corbett* was decided, we did not understand marriage to be the union of a man and a woman in a heterosexual relationship, the question may never have arisen.

It did not arise in Australia for another 30 years, when Justice Chisholm of the Family Court was asked to consider the validity of a marriage between Jennifer and Kevin, a transgender man.[4] Although marriage was still then understood in the same way as Justice Ormrod characterised it, Justice Chisholm rejected Justice Ormrod's "true sex" reasoning. He accepted that a person's sex was not fixed at birth and could change. For that case, the relevant time to determine sex was the date of the marriage. Although he took into account biological factors as Justice Ormrod had done, he also considered Kevin's self-identification, how others perceived him, that family and friends accepted the

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2 [1970] 2 All ER 33; [1971] P 83.

3 Ibid 105.

4 *In Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

marriage, and the fact that he had undergone a full process of what Justice Chisholm called 'transsexual reassignment', involving hormone treatment and irreversible surgery.[5]

Although the case was ground-breaking in family law, Justice Chisholm was able to draw on other Australian cases that had recognised a change in the ordinary meaning of the words 'man' and 'woman'.

In *R v Harris and McGuiness*,[6] a 1988 decision, the NSW Court of Appeal decided the narrow biological test expounded in *Corbett* was not the only test to be applied in determining the question of sex in NSW. The Court said the other criterion to consider was "whether through medical intervention or otherwise, the person has assumed the external genital features of the opposite sex, thereby bringing those genital features into conformity with the person's *psychological* sex." Shortly afterwards, Justice Cummins applied the same reasoning in another criminal case in Victoria.[7]

For these cases, the criminal law context was important. Freed from the ordinary meaning of marriage, and its connotations of sex and heterosexuality, the NSW Court of Appeal applied a broader definition of sex that recognised psychological sex or more simply stated, how a person identifies. That was a significant advance on the reasoning in *Corbett*.

Nevertheless, it was only part of a more complex equation. The court k surgery was necessary to align a person's physical features, particularly their anatomical features, with their psychological sex.

These two Australian cases forged the path for legal recognition of trans-sexual people, as the word was then used. By that I mean, a person who has undergone sexual affirmation surgery.

The situation for a transgender person who had not undergone surgery was directly raised a few years later in the context of social security. In 1993, the Full Federal Court heard a case that originated in the Social Security Appeals Tribunal, when it accepted a claim by a transgender woman to be paid a wife's pension, as the wife of an invalid pensioner. The Administrative Appeals Tribunal affirmed that decision on appeal and it then came to the Full Federal Court on a question of law.

In *Secretary, Department of Social Security v "SRA"* [8] the Court rejected the reasoning in *Corbett*, approved of and applied the reasoning in *R v Harris and McGuinness*. The Court agreed sex is not fixed at birth, and accepted the relevance of psychological sex, how a person presents themselves, and how others perceive them. The Court also applied the NSW Court of Appeal's reasoning that surgery was a necessary requirement for a person's sex to be legally recognised.

Chief Justice Black adopted an orthodox approach to the legal question. He looked to the language of the *Social Security Act 1947* (Cth) and the ordinary meaning of particular words. He said this:

> *"considering the possible application of words such as "woman" and "female" to a post-operative male-to-female transsexual it is appropriate to consider how the language has developed in its application to transsexual persons.*

5 Ibid [330].
6 (1988) 17 NSWLR 158.
7 *R v Cogley* (Supreme Court of Victoria, Cummins J, 20 February 1989).
8 (1993) 118 ALR 487; [1993] FCA 573.

> *Whatever may have once been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery they no longer have."*[9]

Likewise, Lockhart J accepted that the terms "woman" and "female" were then generally understood in Australia to include a person who, following surgery, has harmonised psychological and anatomical sex."[10]

So in *SRA* the Court explicitly recognised the relevance of psychological factors. What it did not do is accord those factors either primacy over or equal status to anatomical factors.

SRA led strong medical evidence in her favour. This is what a psychiatrist told the Court:

> *"In answer to your specific question as to whether (the respondent) should be considered as a woman. Genetically, and anatomically she is "male", however, she dresses, and behaves as a woman. She considers herself a woman. It is not for me to decide what the court or the Department of Social Security chooses to consider someone - but I do think of, and treat (the respondent) as a woman. The fact that she has not had surgery to me is irrelevant. The aim of the surgery is to make somebody feel more comfortable with their body, not to "turn them into a woman". The surgery does not supply the patient with a uterus, nor with ovaries. It is purely and simply an attempt to allow the person's body to approximate how they feel within themselves. Thus, in my opinion, (the respondent) is no lesser (sic) woman for not having had surgery, nor would she be any more a woman for having had the surgery. It is my understanding that financial constraints are the only thing preventing surgery at this point."* [11]

The Full Federal Court did not adopt the psychiatrists' reasoning in determining the legal question. Chief Justice Black considered to do so would virtually exclude anatomical factors.[12] He thought a line had to be drawn somewhere and surgery provided the bright line.

Lockhart J said this:

> *"Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society. There is an increasing awareness today of the right to privacy, and the growing tolerances of a person's identity. But where the psychological sex and the anatomical sex of a person do not conform to each other it seems to me that the sex of a person must be determined by the anatomical sex…in my opinion, in Australia today, the ordinary understanding of a woman or a female does not include a transsexual who has not adopted the anatomical features of the sex which he or she seeks to achieve and thinks has been achieved.*

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9 Ibid [20]- [21].
10 Ibid [95].
11 Ibid [3].
12 Ibid [15].

> *I agree with the Tribunal that psychological sex is a critical consideration, but it is not the only consideration…Where the anatomical sex and the psychological sex have not harmonized I cannot accept that such a person falls within the ordinary meaning of the words "woman" and "female"".*[13]

Lockhart J expressed his regret in reaching the conclusion.[14] The Court clearly accepted SRA's genuine identification, and her acceptance by others as a woman. Chief Justice Black noted she had no financial incentive to bring the application, as SRA would receive less by way of social security support if she succeeded in her application.[15] Nevertheless, the Court perceived the ordinary meaning of woman and man did not encompass a transgender person who had not undertaken what was, by then, called sexual reassignment surgery.

Again, this question is unlikely to arise again because the *Social Security Act 1991* (Cth) was amended in 2009[16] to change the definition for relationships for social security purposes. The sex of members of a couple, whether married or not, is no longer relevant, except for armed services pensions for widows or widowers.[17]

Remember what Justice Ormrod said in *Corbett*? What is the law's purpose in classifying a person according to their sex? In a social security context sex, or gender, has nothing to do with it for nearly all benefits.

Around the same time, and in the decade that followed, most states reformed their legislation relating to birth certificates. South Australia led the way with the *Sexual Reassignment Act 1988*.[18] Later, Western Australia introduced the *Gender Reassignment Act 2000*. Both Acts allow a person to apply for a recognition certificate to record a change of sex on their birth certificate, but it was the Western Australian Act that ended up in the High Court.

In 2011, the High Court was called on to interpret the eligibility requirements for a recognition certificate in two cases heard together: *AB v Western Australia* and *AH v Western Australia*.[19] In both cases, the applicants were transgender men who wished to obtain a certificate to recognise their change of gender from female to male.

The Act required an applicant to have the "gender characteristics of the gender to which the person has been reassigned".[20] The cases hinged on what this meant, in particular about surgery. Both applicants had undergone some surgery. They identified as men, presented as men, and were accepted as men. The sole reason their applications had been refused was that they each retained female reproductive organs.

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13 Ibid [99].
14 Ibid [102].
15 Ibid [25].
16 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth) sch 6 pt 2 s 24.
17 *Social Security Act 1991* (Cth) s 4(2).
18 Repealed by *Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (SA) sch 1.
19 [2011] HCA 42.
20 *Gender Reassignment Act 2000* (WA) s 15(1)(b)(ii).

In a concise judgment, five Judges of the High Court opened by acknowledging that:

> *"For many years the common law struggled with the question of the attribution of gender to persons who believe that they belong to the opposite sex."*[21]

To be eligible for the recognition certificate, a person had to have undergone a 'reassignment procedure'[22] which is defined as:

> *"medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as a male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics."*[23]

The High Court decided the surgical procedure required by the Act need only alter a person's gender characteristics, and not remove every vestige of the gender that the person denies.[24] Importantly, they interpreted the Act from a social perspective. They said:

> *"The Act does not…contemplate some abstract evaluation of maleness or femaleness. Its objects suggest that the question…is to be approached from a social perspective, which is to say, by reference to what other members of society would perceive the person's gender to be."*[25]

Adopting that approach, the High Court allowed the appeals, and the applicants succeeded in their applications.

Although both self-perception and how others perceive a person had been accepted as relevant factors in other decisions, implicit in the High Court's reasoning was that these factors are as important as physical characteristics. That was quite an advance on the reasoning in *SRA*.

In *SRA*, the Federal Court did not have statutory provisions that supported a more expansive concept of gender, as the High Court had in *AB* and *AH*. Nevertheless, the outcome of *AB* and *AH* was not certain. It was open for the Court to read the Act more narrowly than it did. By interpreting the Act with reference to a social perspective, the Court accepted the Act reflected changes in social understanding and acceptance of transgender people, and about how the words 'man' and 'woman' might be used.

The High Court's use of the phrase 'the opposite sex' also reflected the language of the Act which presents a binary concept of sex and gender. Only a few years later, the High Court was asked to decide how the law should regard a person who rejects a binary classification.[26]

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21 *AB v Western Australia; AH v Western Australia* [2011] HCA 42 [1].
22 *Gender Reassignment Act 2000* (WA) s 14(1).
23 Ibid s 3.
24 *AB v Western Australia; AH v Western Australia* [2011] HCA 42 [33].
25 Ibid [34].
26 *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490; [2014] HCA 11.

In 2014, the High Court heard an appeal relating to an application by Norrie to have their birth certificate altered to record their sex as "non-specific".

Norrie's application was under the *Births, Deaths and Marriages Registration Act 1995* (NSW). That Act was amended in 2009[27] to allow a person to apply to alter the record of sex on their birth certificate if they had undergone a sex affirmation procedure.[28] Norrie had undergone surgery to transition from male to female but, after surgery, remained ambiguous about their gender. Hence their request to be registered as "non-specific".

Again, the High Court's reasoning is admirably concise and direct. It opens with these words:

> *"Not all human beings can be classified by sex as either male or female."*[29]

One argument made against Norrie's application was that the sex affirmation procedure was not successful. Norrie did not identify as a woman and, therefore, there should be no change to the registration of their sex as male. The High Court decided the outcome of the surgery did not matter. All the Act required was that Norrie had undergone a sex affirmation procedure, not that it had succeeded in resolving their ambiguity about gender.

Importantly, in deciding that the record to be altered to record Norrie's sex as non-specific, the Court relied on the definition of a sex affirmation procedure, which is:

> *"a surgical procedure involving the alteration of a person's reproductive organs carried out to correct or eliminate ambiguities relating to the sex of the person".*

The High Court said the recognition of sexual ambiguity in that definition allowed the Registrar to register Norrie's sex as "non-specific." To record Norrie's sex as either male or female would be inaccurate.[30]

The Court did not go so far as to interpret that Act to allow the Registrar to record other categories of sex such as 'transgender' or 'intersex'. It said the question did not arise because of its decision.[31]

That is by no means a comprehensive survey of relevant cases, but it is enough for tonight, I think. These are seminal cases that chart developments in the law dealing with sex and gender identity. More importantly for my purposes, they reflect an evolution in societal attitudes and illustrate how courts look to those attitudes when interpreting and applying the law.

Over a little more than 15 years, Australian courts decided that biological factors are not the only relevant factors in determining sex. They found that sex is not fixed at birth. They acknowledged that gender identity encompasses factors beyond the biological and anatomical. They accepted that a person's sex and gender identity may be ambiguous and remain so despite surgery or other medical intervention. They interpreted the law to allow gender ambiguity to be so recorded.

While the High Court accepted non-binary gender identification in Norrie's case in 2014, statutory reform had been in progress for some time. In Queensland, the *Anti-Discrimination Act 1991* was

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27 Amending Act came into force 27 February 2009.

28 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B.

29 *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490; [2014] HCA 11 [1].

30 Ibid [46].

31 Ibid [34].

amended in 2002 to the same end. The amendments also introduced a definition of gender identity that accepted a person may be of an indeterminate sex.[32] In 2013, the *Sex Discrimination Act 1991* (Cth) was amended to prohibit discrimination on the basis of inter-sex status or gender identity. [33] There are many other examples in Australia and in international law of legal recognition of and measures to protect transgender people and those who identify as non-binary.

Here I want to put the reasoning in these cases and the statutory language to one side and to focus on the human face of these developments. For each case to proceed a person had to commence and maintain a most risky and onerous form of storytelling. These people exposed their most intimate details on the record in a public forum. They invited surgeons, psychiatrists, psychologists, and lawyers to examine their most intimate selves, to advance their assertion of identity. They subjected their lives to an abstract debate within a legal context which, as the High Court acknowledged, had struggled with concepts of gender and how they should classify individuals whose identity was more complex or ambiguous than others.

How brave were those applicants? What a debt is owed to them? How many people have benefited and will benefit from their actions?

These precedents were hard won and at significant cost. Success, by and large, required surgical intervention, onerous in physical, psychological, and financial terms. Even if undertaken, surgery may not resolve a person's gender ambiguity, as Norrie demonstrated. And to require surgical intervention does not respect a person who has gender ambiguity or fluidity and is comfortable with it remaining so.

I credit each of the applicants in the cases I have discussed as the parents of the most recent round of statutory reforms. The WA and SA legislation about birth certificates is no longer interpreted to require surgery. In Tasmania and Victoria, their counterpart legislation does not require surgical intervention either.[34] Although the relevant Acts in NSW and Queensland still require surgery, I think it is only a matter of time before they, too, are amended to remove that threshold requirement. Fundamentally, the reforms that have already been made in other States, and the High Court's reasoning in Norrie's case, has unlocked gender from the binary conception of maleness and femaleness.

The Tasmanian and Victorian Acts have also enlarged the dictionary for sex and gender. In each State, the applicant can choose their sex or gender descriptor. The Registrar has only limited powers to refuse to register their choice. For example, because it is obscene or offensive or could not practicably be established by repute or usage because it is too long, or it consists of or includes symbols without phonetic significance.[35]

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32 *Discrimination Law Amendment Act 2002* (Qld) s 12(1).

33 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

34 *Births, Deaths and Marriages Registration Act 1999* (Tas); *Births, Deaths and Marriages Registration Act 1996* (Vic).

35 *Births, Deaths and Marriages Registration Act 1999* (Tas) s 3A; *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 4, 30A(2).

It seems to me this presages a change to the way words like 'man' and 'woman' and 'male' and 'female' will be used. These are words to describe a person's characteristics, but we have used those descriptions to classify a person. Given those descriptions are not always useful in describing a person's characteristics, the utility of those descriptions as classifications is questionable. The Tasmanian and Victorian Acts appear to accept that is so.

Other cultures have long had a more expansive and inclusive gender vocabulary than we have had in English. There are the fa'afafine of Samoa, the fakaleiti of Tonga, the pinapinaaine of Tuvalu and Kiribati, the mahu or rae rae of Tahiti and Hawaii and the vakasalewalewa of Fiji. The Maori people have the taahine, whakawahine and tangata ira tane, sometimes collectively referred to as the takataapui, a term that might also be used to describe a gender in itself. I have read about different or non-binary gender descriptors used by people from the Congo (Bangal), Siberia (the Chukchi) and by the Navajo (Nadleehi). Indigenous North Americans are credited with the term 'two spirit" which I understand to be an English translation of Nadleehi and the equivalent in other American languages.

A quick survey of internet sources reveals a healthy contest about the origin and meaning of some of these words. Their usage and meaning is evolving, in the same way as our language is expanding and changing. The point I wish to make is that other cultures have long had a more expansive, and therefore more inclusive, vocabulary for gender. In Western cultures we are only beginning to develop our language in that regard.

But it is happening and quite quickly. Our vocabulary is expanding to encompass an almost bewildering array of descriptors. My associate tells me that, in 2014, Facebook published a list of 58 descriptors for gender it would accept for a person's profile. Now, it is either female, male, or custom, where you can write whatever you want.

And it is not just gender descriptions that are evolving, the pronoun is also on the move. Again, we need only look slightly north of Australia, to Malaysia and Indonesia, to hear millions of people speaking languages without gendered pronouns. But in English, the non-gendered pronoun is traditionally considered to be a plural pronoun. I refer, of course, to the pronoun 'they'.

People have strong views about this pronoun. I come from the generation of feminists who used 'they' as a singular pronoun in order to de-gender language. An unidentified lawyer would not be referred to as 'he' as to do so was to make a gendered assumption when none was called for. It was controversial, at least in the 1980s, because it was considered ungrammatical. 'They' the grammarians would insist, is a plural pronoun.

Now its use as a singular pronoun has been extended in a different way to deal with gender. I have been counselled against using humour in this speech, but I cannot resist this one from Jes Tom, a non-binary stand-up comedian who quips: "I like when people call me 'they'. It makes me feel less lonely."[36]

[36] Shane O'Neill, "Five Nonbinary comics on this moment: 'I'm not some new buzzword'", *The New York Times* (Article, June 25 2020) <https://nyti.ms/31lcFVx>.

"They" was the Miriam-Webster word of the year in 2019, based on the number of lookups in the on-line dictionary. The editor-at-large, Peter Sokolowski, said:

> *"A pronoun like 'they' is one of the building blocks of the language. But with the non-binary usage, people are sensing that it means something new or different and they are going to the dictionary. When you see lookups for it triple, you know that 'they' is a word that is in flux…As a word lover, what's interesting in this story is to see that social factors play so directly into language change. That is something that we sort of know intuitively but we don't often see as clearly as we see it here."*[37]

I see many debates ahead about inclusive language. I am sure we have all encountered words that we are uncomfortable with. I take some encouragement from Natalie Wynn. Some of you will probably have encountered her excellent vlog "Contrapoints". In one of them she addressed language. She talked about a particularly clumsy attempt to use non-gendered language that I don't need to repeat in this address. She agreed it was inelegant and might offend. She spoke uncommon sense when she said that "sometimes it takes a while to settle on language that is both inclusive and usable."

So social attitudes are affecting language and the language is evolving quickly. The cases and legislation I have discussed demonstrate how those language changes are reflected in developments in the law. Those legal precedents and statutes, in turn, regulate what is acceptable by way of speech and conduct. So attitudes, language, law, and behaviour are connected in a kind of perpetual feedback loop.

So far I have not talked about resistance to this change in attitudes, language and the law. By doing so I do not mean to imply everything is rosy and there is no work to be done. That is plainly not the case. Issues of religion and some ideologies firmly rooted in a dualistic concept of gender are not sanguine about these developments (this is a shout out to the TERFS, of course, and for those of you who don't know who they are, they are Trans Exclusionary Radical Feminists).

Sport and single gender spaces are also hot topics. As with other movements, it seems that toilets are a matter of great concern to some. In preparing for this paper, I have encountered hateful commentary, particularly in social media, that rivals the opening quote about Eugenia.

Underlying some of that are some genuine concerns and issues that need to be taken seriously. But that can only happen productively in an environment that promotes respectful communication. Piling on to a post on Facebook is not that place. Yet in more traditional public forums, and in the Parliaments, the debate in Australia has been a bit more civil.

I think our recent referendum on marriage equality revealed a larger and more-wide spread support for same sex marriage, and for queer people generally, than many expected. When talking with a friend recently, she suggested this was because of a shift in societal attitudes in our adult lives that meant it became okay to talk about sex and sexuality. Positive representations of queer people are commonplace in our communities, in public life and in popular culture.

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[37] Amy Harmon, "'They' is the word of the year, Merriam-Webster says, noting its singular rise", *The New York Times* (Article, 10 June 2020) <https://nyti.ms/2LGS99m>.

Sufficient, respectful discussion can pave a path to acceptance. The recent amendments to the Victorian *Births, Deaths and Marriages Registration Act 1996* were first proposed in 2016. That Bill failed on a single vote.[38] Three years later it passed with a more generous margin of 26 to 14 votes.[39] In contrast, a similar reform mooted in the UK a couple of years earlier was torpedoed by narrow, sectional, ideological, disrespectful, and vitriolic fear mongering and has sunk without a trace.

So let's hope our discussion continues in a more civil, constructive and inclusive way. That is the key for me and other people like me who may be just embarking on a journey of discovery about gender issues.

For example, I know some young colleagues who want to raise their children in a non-gendered way. When I was a young feminist with three sons, I sought to teach them about respectful relations between men and women, to challenge assumptions about what men and women could or should do, and to expose my boys to a range of male role models, so they conceived masculinity in broad terms, not stereotypes. But I did not raise them in a non-gendered way and must confess that I do not know what that would entail. I think I will understand more if I feel I can ask questions and not be dismissed because I don't get something which appears self-evident to others.

A generational divide on an issue like this is hardly surprising. It arises from the experiences of the generations. My generation and older people are deeply immersed in a fundamentally gendered society. To embrace gender fluidity asks us to sweep away an ingrained means of perceiving and classifying one another. I identify with what one therapist said in a New York Times article: "Our brains fight fluidity. We like *this* or *that*."[40]

My associate directed me to a lovely illustration of this in an episode of Miriam Margolyes' Almost Australian. For those of you who don't recognise the actor's name, amongst her finer accomplishments is that she played Professor Sprout in the Harry Potter series. Miriam recently became an Australian citizen. In her TV series she undertook a 10,000 kilometre, two month journey to discover what it means to be Australian today.

In one episode she met the Sistergirls of the Tiwi Islands. I wish I could play an excerpt but, in my experience, this venue is not ideal for AV and I would likely display my lack of tech know-how in trying to make it work. So you will have to bear with me while I read it to you. In my paper, I have footnoted a link so you can watch it yourself.[41]

Miriam, who is, incidentally, a lesbian woman, asked the sistergirls whether they were all men transitioning to being women. They told her they were. Then this exchange followed:

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38 Victoria, *Parliamentary Debates,* Legislative Council, 6 December 2016, 6484-6485.

39 Victoria, *Parliamentary Debates,* Legislative Council, 27 August 2019, 2694.

40 Daniel Bergner, "The struggles of rejecting the gender binary", *The New York Times Magazine* (Article, 4 June 2019) <https://nyti.ms/2XoxGd5>.

41 ABC TV + iview, "Miriam Margolyes meets sistergirls in the NT | Miriam Marolyes: Almost Australian", *Facebook* (26 May 2020) <https://www.facebook.com/watch/?v=278345473313870>.

> *MM: "But you know to be a woman you are going to have to get rid of all that stuff" (she says pointing to their facial hair) "but I get whiskers on my chins and I have to pick them out with tweezers because that's what women do. So give yourselves a chance."*
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> *Sistergirl: "You know in our culture we respect that person regardless of the look. We don't look on the outside, it's the inside that you have to change."*
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> *MM: "So my telling you to shave is stupid of me. I should know that it is not what you look like outside, it's who you are and how you feel."*
>
> *Another sistergirl" "Yep. You know it's just like I am saying it's just there for decoration."*
>
> *MM: " I see. Well, I apologise. Now I understand."*

I want to pause for a moment to consider both the enquiry and Miriam's response to their answers.

Her enquiry does what so many of us do – it focuses on appearance. It is consistent with the early cases about physical attributes. It is also an important aspect of social acceptance.

The responses reminded me of what the psychiatrist said in SRA's case. She *was* a woman. Surgery did not make her more so.

There is still much work to be done to improve understanding, acceptance, and protection of people regardless of their gender identity. It requires us to take on a new gender paradigm. And that is where story telling comes in. If we approach this issue in the abstract, it is hard to facilitate understanding. It becomes an argument about classifications and where to 'draw the line' and what label we should apply.

I believe people learn at a deep personal level by hearing and telling stories. Stories open us up to different ways of perceiving our world and, in doing so assist us to take on board information, and to respond to another's feelings, in a way that an abstract or theoretical debate cannot. That does not mean we should not have the debate. It is necessary to do so in reforming and applying the law. However, stories can help us to frame the issues, set the tone for our discussion, and humanise the debate.

So let me end with a message of hope and encouragement by telling you about a different story. Let's move from Eugenia's story in early November 1920 to Roy's story, almost a century later, in October 2020. I am sure most of you read the piece in QWeekend a month or so ago written by Leanne Edmiston. It was entitled "Founding Father", subtitled "Just call me Dad". The abstract reads: "Roy is a transgender man, pregnant with his second child and in a controversial battle for legal recognition." The article then opens with this introduction:

> *"Cradling a hot cuppa atop his very pregnant belly, Roy smiles shyly as he talks about how much he's looking forward to becoming a father again. Any day now, the single transgender dad will birth his second son and be raising two children under two years old."*

The contrast in tone to Eugenia's piece could not be more stark. The older members of this audience will know what I mean when I say that this piece is New Idea meets gender fluidity. The introductory paragraphs set up relatable experiences in a neutral, non-judgmental way. Roy is relaxed at home,

having a cuppa, and excited about impending parenthood. The rest of the story is well written, informative, traverses a number of personal and legal issues and is never judgmental of Roy's desire to be recognised as the father of his children. It is the opposite of the storytelling about Eugenia. Its intention is empathetic, to promote understanding. Consistent with that intention, Ms Edmiston gives Roy the last word:

> *"I love Jack (and Jim) to bits and I'm super excited to be a dad, and feel very lucky, because not everyone who wants it can get it. It's not perfect by any means, but I feel very lucky to have them."*

I finished that article feeling I understood a bit about Roy as a person. In the abstract his application is rather confronting question of classification of a stranger. A single transgender man who has birthed children of whom he seeks recognition as their father. Personalised, it is a human and authentic story. It is about a person called Roy, who loves being a Dad, who is likeable, and almost familiar.

As the law stands now, the answer to Roy's request may be the same, however you look at his circumstances. But for the future, for reforms to the law, for changing societal norms, Roy's story has such power. How it is told is so important.

Members of Pride in Law have raised their hands to educate this inherently conservative profession about LGBTIQ+ issues.

That is your task. You have taken on a huge responsibility. Speaking up for a minority is always challenging. It is even harder when it is your own story you may have to tell, in order to increase understanding of a minority experience.

I read Jasmine O'Brien's speech to a Pride in Law event in February this year. If you haven't read it yet, do so. It is on the Pride in Law website and is a cracker. Yet it is Jasmine's generosity in sharing her story that has stayed with me in the weeks since I read it. It gave me a real insight about what that small word "transition" can mean in practice.

I must also say how impressed I was by the nominees for this year's Pride in Law award. They do important work in their workplaces, in the profession, and in the service of law reform. They all deserve to be celebrated.

In closing, to those of you who are members of Pride in Law, good on you for being open and active on these issues. I know this can take a personal toll, but I encourage you to use the power of language and of storytelling to increase understanding and acceptance of gender diversity in this profoundly deeply binary society. My generation still largely holds the reins of power and there is much for us to learn before we can, like Miriam Margolyes, say "Oh I see. I apologise. Now I understand."