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TRANSSEXUALISM AND THE CONSIDERATION OF SOCIAL FACTORS WITHIN SEX IDENTIFICATION LAW

Abstract

The law relating to sex identification has undergone a period of rapid change across the last forty years. Facets of contemporary Australian law have abandoned the use of biologically-focused tests in favour of a new multifactorial approach that considers multiple biological, psychological and social factors when determining the legal sex identity of a transsexual person. Although this course of development has increased legal recognition of the psychological sex identification of transsexuals, this article argues that legal consideration of social factors has the capacity to harden into a restrictive vector of normative control. This article warns that such consideration is potentially problematic because it may undermine the importance of a transsexual person's subjective experience of their sex identity, bring extensive and intrusive legal interrogatory pressure to bear on their life-histories and social lives, and require them to conform to narrow, stereotypical models of sex before legal recognition is awarded.

I Introduction

In October 2011, the High Court of Australia's decision in *AB & AH v Western Australia*[1] granted the applications made by two transmen[2] to be issued with recognition certificates that legally identify their sex as male. Judicial consideration was given to the fact that both applicants had been on hormone therapy for years and had their breasts surgically removed, and the Court placed emphasis on the social recognition of the applicants' sex as being male. Notably, however, neither applicant had undergone surgical sex reassignment of their genitalia. This decision stands in stark contrast to one made forty years earlier in *Corbett v Corbett*,[3] in

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1 (2011) 244 CLR 390.

2 Transsexuals who are born biologically female but who self-identify and live as male are known as 'transmen'; similarly transsexuals who are born biologically male but who self-identify and live as female are known as 'transwomen'.

3 [1971] P 83.

which Ormrod J emphasised strict biological criteria relating to genitalia, gonads and chromosomes as the only relevant considerations for identifying a person's legal sex identity. Whereas in 1971 Ormrod J decided that a transwoman remained legally male even though she had replaced her male genitalia with surgically constructed female genitalia, in 2011 the High Court decided that the transmen before the Court were legally male even though they not only lacked surgically constructed male genitalia but also retained female genitalia.

Clearly, the law relating to sex identification has altered significantly in just forty years. Underpinning this change is the ongoing broadening of the focus on biological factors inherited from Ormrod J's conceptualisation of legal sex identity as existing strictly in biological terms. However, this article is more concerned with where the development of sex identification law is heading, rather than where it has come from. As Australian sex identification law moved away from the narrow focus on biology, it initially shifted towards a model encompassing consideration of both biology and psychology. Now, however, some areas of the law have shifted again, towards a broad test encompassing consideration of multiple factors including biology, psychology, social recognition, lifestyle and personal history. This development appears prima facie to chart a progressive course away from the reductive application of narrow rules to transsexual bodies, and towards the holistic legal analysis of complete transsexual subjects. However, legal change in this area should not be read uncritically as a simple 'opening up' of the law that in all ways increases the access of transsexuals to legal recognition of their psychological sex identity. Rather, this article argues that although the once largely insurmountable biological-based legal barriers have been abandoned, judicial consideration of social factors could erect new legal barriers to recognition because it has the capacity to operate in restrictive and normative ways.

This article works through this argument in two parts. Part II tracks the development of Australian law around sex identification for transsexuals, demonstrating how it has moved from a narrow focus on biological factors to a wider focus on multiple factors, including social factors. In doing so, Part II addresses the key cases and statutes that have marked this development across the last forty years, and specifically focuses on the increasing emphasis on social factors in these sources of law. Part III unpacks this article's core critique about the consideration of social factors within sex identification law. It argues that even though these factors are less strict than the traditional biological factors, they still have the capacity to diminish the access of transsexuals to legal recognition of their psychological sex identity and to lead to inequitable outcomes. It identifies and engages with three specific areas of concern, warning that legal consideration of social factors could lead to the undermining of the importance of transsexuals' own psychological sex identifications and subjective experiences, the bringing of extensive and intrusive legal interrogatory pressure to bear on their lives, and the requirement that they conform to narrow, stereotypical models of sex.

II Developments in Sex Identification Law

The law regarding the legal recognition of the psychological sex identification of transsexuals is bound up with developments in medical technology. Although

medical efforts to 'change' the sex of human patients began from around the early 1900s,[4] the development of effective antisepsis, less dangerous and more effective anaesthetic, and more complex medical treatments and techniques, meant that sex reassignment procedures became more widely available from the 1950s onwards.[5] The exact types of procedures that individual patients choose to undergo varies, but may include the amputation of sex-specific born biological structures (such as through mastectomy, penectomy and vaginectomy), the surgical construction of new sex-specific biological structures (such as through breast implantation, phalloplasty and labiaplasty), and the sex-specific aestheticisation of appearance (such as through facial feminisation surgery). In conjunction with these surgical options, regular hormone dosages (ie, oestrogen for transwomen and testosterone for transmen) are typically used in the medical treatment of transsexuals, and can significantly alter their bodies in terms of hair growth, fat distribution, and genitalia size and function.[6]

A *Strict Biological Criteria*

Corbett v Corbett[7] is the first major case in the Western common law tradition that Australian law has drawn upon to decide whether or not these sex 'change' medical treatments affect a transsexual person's legal sex identity. Ormrod J was required to determine whether April Ashley Corbett, a transwoman, could be considered a 'woman' for the purpose of marriage law (wherein marriage was defined as only being possible between a 'man' and a 'woman'). April had been born biologically male but had received hormone therapy for a number of years, lived and socialised as a woman, had both her penis and testicles removed and had a vagina surgically constructed in their place. In the course of deciding that April's marriage was invalid because both April and her husband were legally 'male', Ormrod J declared that the criteria for falling within the definition of 'woman' 'must … be biological' in nature.[8] He determined that the law should utilise three biological criteria to

4 Joanne Meyerowitz, 'Sex Change and the Popular Press; Historical Notes on Transsexuality in the United States, 1930–1955' (1998) 4 *GLQ: A Journal of Lesbian and Gay Studies* 159, 161.

5 Vern L Bullough, 'Legitimizing Transsexualism' (2007) 10 *International Journal of Transgenderism* 3, 4. It is important to flag a terminological issue here. Although widely referred to as 'sex reassignment surgery', surgical procedures intended to alter the biological sex characteristics of transsexual patients have also recently begun to be referred to as 'sex affirmation surgery': see, eg, Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (2009). Although the reasoning behind this terminological shift is laudable — it recognises the persistence and centrality of a transsexual person's psychological sex identification over and above their born biology — I have not adopted it in this article because the law treats such surgeries as important factors to be considered when it comes to *changing* the legal sex identification of transsexuals.

6 See, eg, the list of changes hormone treatment made to the transmen applicants in *Western Australia v AH* (2010) 41 WAR 431, 437 [7], 438 [11].

7 [1971] P 83.

8 *Corbett v Corbett* [1971] P 83, 106.

decide sex: chromosomal, gonadal and genital.[9] If congruency is found between these three factors then Ormrod J argued that this 'determine[s] the sex for the purpose of marriage accordingly'.[10] The fact that April no longer had male genitalia was irrelevant, these criteria were to be judged in relation to born biology and thus April's subsequent sex reassignment surgery did 'not affect her true sex'.[11]

As the first detailed and comprehensive engagement of modern UK law with the issue of sex identification, *Corbett v Corbett*[12] was destined to be an important precedent. It was cited favourably and applied in *R v Tan,*[13] a criminal law case wherein it was necessary to determine whether a transwoman was a 'man' under statute law relating to prostitution. In applying the strict biological criteria from *Corbett v Corbett*,[14] the Court rejected 'without hesitation' the submission that if a person 'had become philosophically or psychologically or socially female, that person should be held not to be a man' under the law.[15] Despite the fact that *Corbett v Corbett*[16] is not binding precedent in Australian law, and despite the contemporary legal departures from the biological criteria set up by Ormrod J, its influence continues even today. Although it is no longer cited favourably and its approach to sex identification is no longer followed, the mere fact that a case decided forty years ago in a different jurisdiction continues to even be discussed is testament to its importance in this area of law.[17] Contemporaneous legal positions and arguments are still jurisprudentially framed as oppositional in relation to the restrictive biological model contained in *Corbett v Corbett*.[18]

Just as important as the jurisprudential effect of *Corbett v Corbett*[19] was the practical legal effect of Ormrod J's test with regards to transsexual subjects. When 'all the external social indicia of a human relationship [fall] away, melted by the discovery of a genetic pattern, marked before birth, but demonstrable only by peering down a microscope',[20] the ultimate result is that a transsexual person is powerless to display their psychological sex identity in social, psychological or (contemporaneous) biological terms that impact on legal decision-making. Tobin

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9 Ibid. That is, a 'man' must have XY chromosomes, testes, and a penis and testicles, whereas a 'woman' must have XX chromosomes, ovaries, and a vulva, vagina and (possibly) uterus.

10 Ibid.

11 Ibid 104.

12 [1971] P 83.

13 [1983] QB 1053.

14 [1971] P 83.

15 *R v Tan* [1983] QB 1053, 1064.

16 [1971] P 83.

17 See, eg, *Secretary, Department of Social Security v 'SRA'* (1993) 43 FCR 299; *AB & AH v Western Australia* (2011) 244 CLR 390.

18 [1971] P 83.

19 Ibid.

20 Michael Kirby, 'Foreword' in H A Finlay and William Walters, *Sex Change: Medical and Legal Aspects of Sex Reassignment* (H A Finlay, 1988) [viii].

describes Ormrod J's strict born biological criteria as a 'doctrine of immutability', because a subject is legally fixed forever in the sex assigned to them by their biology at birth, and criticises its 'far-reaching and pernicious effects for transsexual people and their families'.[21] It is self-evident that this legal approach negates the access of transsexuals to legal recognition of their psychological sex identity. Sex reassignment procedures, hormone therapy, socialisation and psychological identification may be meaningful life projects for transsexual subjects but, under this test, they have no impact on their legal treatment. Transsexual subjects may have significantly altered their bodies and their lives, but *Corbett v Corbett*[22] denied them any legal recognition of these changes by trapping them within rigid, legal sex identifications pre-ordained at their birth.

B *Psychological and Anatomical Harmony*

Australian law broke with Ormrod J's strict biological criteria in *R v Harris and McGuinness,*[23] a case that adopted a slightly broader legal test that was reliant upon psychological self-identification in addition to looser biological criteria. This case was concerned with two transwomen charged with prostitution-based criminal offences. An element of the statutory charges each transwoman faced was that they were 'a male person' at the time of the relevant conduct. Importantly for the decision, whilst both Harris and McGuinness were born biologically male and identified and lived socially as women, Harris had undergone genital sex reassignment surgery whereas McGuinness had not. In a 2:1 decision, the majority refused to follow *Corbett v Corbett* and decided that Harris was no longer legally male.[24] Mathews J, in her leading judgment (with which Street CJ agreed), declared that: '[t]he time, then, has come when we must, for the purposes of the criminal law, give proper legal effect to successful reassignment surgery undertaken by transsexuals'.[25] In giving legal effect to such surgeries, Mathews J emphasised their impact on the sexual and procreative capacities of reassigned transsexuals — she noted that such sex reassignment surgery

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21 Harper Jean Tobin, 'Against the Surgical Requirement for Change of Legal Sex' (2006–2007) 38(2) *Case Western Reserve Journal of International Law* 393, 404.

22 [1971] P 83.

23 (1988) 17 NSWLR 158.

24 However, Carruthers J approved of and followed *Corbett v Corbett* [1971] P 83 in his dissenting judgment. In response to evidence about Harris' and McGuinness' psychological identification as women, he concluded, at [158], that:

> The law could never countenance a definition of male or female which depends on how a particular person views his or her own gender. The consequence of such an approach would be that a person could change sex from year to year despite the fact that the person's chromosomes were immutable …
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> [T]he position is more complex in the case of transsexuals who have undergone reassignment surgery such as the appellant Lee Harris. In essence, the surgery in her case involved the removal of the penis and the creation of a cavity which was intended to act as a substitute vagina. However, such surgery combined with "her" hormone therapy and "her" psychological attitude to her gender cannot possibly, to my mind, override the congruence of the chromosomal, gonadal and genital factors which are all male.

25 *R v Harris* (1988) 17 NSWLR 158, 181.

'permanently deprives the [patient] of the capacity to procreate or to have normal heterosexual intercourse in her original sex'[26] — as well as their appearance — such surgery 'generally produces a person who bears the external features of [the other sex]'.[27] The overall goal for such surgery, and the key factor that should be given effect by the law, is that 'the body is brought into harmony with the psychological sex'.[28] Although McGuinness psychologically identified as being female, her failure to undergo sex reassignment surgery constituted a failure to establish this harmony, and her psychological sex identification was held to be an insufficient basis by itself for legal recognition to be granted to her female sex identity.[29]

The next major Australian case to deal with sex identification law was *Secretary, Department of Social Security v SRA*.[30] This case was concerned with determining whether a transwoman fell under the ordinary meaning of the word 'woman' for the purposes of determining her entitlement to a pension based on being the 'wife' of an invalid pensioner. Sharpe identifies the legal shift away from strict biological criteria to a model based on 'psychological and anatomical harmony' as finding purchase in this case.[31] Indeed, the Court in *Secretary, Department of Social Security v SRA*[32] ultimately seems to approve of and apply the approach taken in *R v Harris and McGuinness*.[33] However, in the course of deciding that SRA was not entitled to such a pension, Lockhart J departed from the specifics of Mathews J's wording from *R v Harris and McGuinness*[34] when he noted that:

> The principal difficulty which I have in this case is … the recognition of a pre-operative transsexual as being a member of the adopted sex for the purposes of the law … [S]uch a person has not *harmonised her anatomical sex and her social sex*; they are not in conformity. She still has the genitals of a man.[35]

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26 Ibid 180. The concern here that Mathews J displays for 'normal' sex as well as for 'heterosexual intercourse' is obviously problematic in that it devalues alternative sexualities and enshrines normative heterosexuality in a privileged position.

27 Ibid.

28 Ibid.

29 Ibid 181. A plight which Mathews J had 'the greatest sympathy for', but she felt that she could not adopt psychological sex identification as the only criteria for legal recognition because it 'would create enormous difficulties of proof', it 'would be vulnerable to abuse by people who were not true transsexuals at all', and 'it could lead to a trivialisation of the difficulties genuinely faced by people with gender identification disharmony'.

30 (1993) 43 FCR 299.

31 Andrew Sharpe, 'From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence' (2001) 8(1) *eLaw Journal: Murdoch University Electronic Journal of Law* [7] <http://www.murdoch.edu.au/elaw/issues/v8n1/sharpe81.html>.

32 (1993) 43 FCR 299.

33 (1988) 17 NSWLR 158.

34 Ibid.

35 *Secretary, Department of Social Security v 'SRA'* (1993) 43 FCR 299, 326 (emphasis added).

Although Lockhart J's judgment addressed psychological sex identification at numerous points, and appears to place great emphasis on it in addition to biological factors, this passage subtly but importantly alters the wording of Mathews J's concept of 'biological and psychological harmony' by replacing it with 'anatomical and social harmony'. Although nothing within the decision turns on the distinction between 'psychological' and 'social', the wording of Lockhart J's judgment prefigures what this article identifies as the rise of social factors as important legal considerations in sex identification law. This is made most clear in an additional comment he made as an introductory obiter dicta remark: '[s]ex is not merely a matter of chromosomes, although chromosomes are a very relevant consideration. Sex is also partly a psychological question (a question of self-perception) and partly a social question (how society perceives the individual)'.[36]

Although not yet marking a full turn towards the multifactorial approach that was to be adopted in Australian law, this test of biological and psychological harmony greatly mitigated the harshness of Ormrod J's strict biological criteria. Transsexual subjects could now be legally recognised as a sex other than their born biological sex. The doctrine of immutability had been replaced, but whilst the law now allowed individuals to be reallocated across the male or female legal sex identification divide, it still utilised strict criteria to control such reallocations. Both *R v Harris and McGuinness*[37] and *Secretary, Department of Social Security v SRA*[38] required transsexuals to undergo sex reassignment surgery before granting legal recognition of their psychological sex identification. This surgical requirement sets up practical barriers for transsexual subjects who cannot afford such extensive procedures, who are medically unable to undergo major surgery (due to illness, age or likely medical complications), who do not want to run the physical risks involved, or who simply feel that such surgery is unnecessary for them to identify with their psychological sex identity.[39]

C *Multifactorial Approach*

The turn of the century was accompanied by a significant shift in Australian law's treatment of the sex identification of transsexuals. The landmark decision in *Re Kevin: Validity of Marriage of Transsexual*[40] not only stands as authority for the explicit rejection of *Corbett v Corbett*[41] in relation to Australian marriage

36 Ibid 325.

37 (1988) 17 NSWLR 158.

38 (1993) 43 FCR 299.

39 Indeed, 'many transsexual, transgender, and gender nonconforming individuals find comfort with their gender identity, role, and expression without surgery': The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed, 2012) 54.

40 (2001) 165 FLR 404.

41 [1971] P 83.

law,[42] but also stands for the adoption of a multifactorial approach to determining sex that encompasses a wide variety of considerations. In the course of finding that Kevin, a transman who had undergone partial sex reassignment surgery,[43] was 'male', Chisholm J concluded that:

> To determine a person's sex for the purpose of the law of marriage, all relevant matters need to be considered … [R]elevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex.[44]

An appeal to the Full Federal Court in *Attorney-General (Commonwealth) v Kevin*[45] was dismissed. In relation to the argument on appeal that Chisholm J had erred in taking social factors into account when determining Kevin's sex, the Full Court found that Chisholm J was 'correct in paying attention to the evidence as to social and cultural factors',[46] and that it was 'clearly relevant to receive evidence as to how Kevin and [his wife] are perceived by the community in which they live'.[47] In a new twist on the law relating to sex identification, in additional to biological and psychological factors the law now accepted that 'society's perception of [a] person's sex provides relevant evidence as to the ordinary, everyday meaning of the words "man" and "woman"', and thus whether or not a transsexual fulfils the criteria to have their psychological sex identity legally recognised.[48]

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42 Indeed, Chisholm J could not be more explicit when he states in *Re Kevin: Validity of Marriage of Transsexual* (2001) 165 FLR 404, 474–5 [326], that:

> I see no basis in legal principle or policy why Australian law should follow the decision in *Corbett*. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to developments in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society.

43 Whilst Kevin had removed his internal female genitalia, such as his uterus and ovaries, he had not had male genitalia surgically constructed.

44 *Re Kevin: Validity of Marriage of Transsexual* (2001) 165 FLR 404, 475 [329].

45 (2003) 172 FLR 300.

46 *A-G (Cth) v Kevin* (2003) 172 FLR 300, 336.

47 Ibid 329.

48 Ibid 330.

Around the same time period, a slew of State and Territory legislation codified sex identification law relating to birth certificates and other legal documentation.[49] The requirements they set out vary from jurisdiction to jurisdiction, but can be divided into two broad categories: the sex reassignment surgical requirements in the Australian Capital Territory, Northern Territory, Queensland, Tasmania, Victoria and New South Wales, and the multifactorial requirements in Western Australia and South Australia. The requirements for the former group of jurisdictions are narrowly focused on whether or not a transsexual person has undergone a sex reassignment procedure.[50] These requirements seem to be a pared back version of the psychological and anatomical harmony test; they mostly jettison the psychological requirements but retain the focus on sex reassignment surgeries as being sufficient to grant legal recognition of a transsexual's psychological sex identity. The requirements for the latter group of jurisdictions are more numerous and more detailed, and refocus legal consideration on factors that had previously been overlooked.

The *Gender Reassignment Act 2000* (WA) was highly influenced by the *Sexual Reassignment Act 1988* (SA), to the extent that they share identical wording in certain sections because parts of the earlier Act were copied wholesale into the later Act. Both jurisdictions require that an applicant for a recognition certificate (a certificate that functions as 'conclusive evidence' that the applicant is the sex noted in the recognition certificate)[51] has received counselling[52] and that they have undergone a 'reassignment procedure'.[53] The important issue for this article, however, is the additional requirement that the governing body (a magistrate in South Australia, or the Gender Reassignment Board in Western Australia) must be satisfied that the applicant:

- believes that his or her true sex (SA) or gender (WA) is the sex (SA) or gender (WA) to which the person has been reassigned; and

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49 See, eg, the *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 2005* (NT); *Births, Deaths and Marriages Registration Act 2003* (Qld); *Births, Deaths and Marriages Registration Act 1999* (Tas); *Births, Deaths and Marriages Registration Act 1996* (Vic); *Births, Deaths and Marriages Registration Act 1995* (NSW); *Gender Reassignment Act 2000* (WA). The early forerunner of this kind of legislation was the *Sexual Reassignment Act 1988* (SA).

50 To use Queensland as an example, under s 23(4)(b)(i) of the *Births, Deaths and Marriages Registration Act 2003* (Qld) all that is needed for a successful application to change one's birth certificate sex identification is an application accompanied by statutory declarations from two doctors verifying that the person has undergone sexual reassignment surgery. 'Sexual reassignment surgery' is defined by sch 2 of the same Act to mean 'a surgical procedure involving the alteration of a person's reproductive organs'.

51 *Sexual Reassignment Act 1988* (SA) s 8; *Gender Reassignment Act 2000* (WA) s 16.

52 *Sexual Reassignment Act 1988* (SA) s 7(8)(b)(iii); *Gender Reassignment Act 2000* (WA) s 15(1)(b)(iii).

53 *Sexual Reassignment Act 1988* (SA) s 4; *Gender Reassignment Act 2000* (WA) s 14(1).

- has adopted the lifestyle and has the sexual (SA) or gender (WA) characteristics of a person of the sex (SA) or gender (WA) to which the person has been reassigned.[54]

The first limb of this test simply replicates the familiar legal requirement that an applicant's psychological sex identification must be in 'harmony' with the biological criteria required by the law, but the second limb of this test introduces social factors as new legal considerations. Consideration of 'lifestyle' clearly extends the relevant legal factors beyond the mere biology and psychology of a transsexual applicant, as does the requirement relating to sexual or gender characteristics because it is statutorily defined as meaning 'the physical characteristics by virtue of which a person is *identified* as male or female'.[55]

In *AB & AH v Western Australia*[56] the High Court defined what, exactly, these new considerations comprised. This case concerned two transmen who had made unsuccessful applications to receive recognition certificates under the *Gender Reassignment Act 2000* (WA). In deciding whether or not previous adjudicating bodies (including the Gender Reassignment Board, the State Administrative Tribunal and the Western Australian Court of Appeal) had correctly applied the relevant statute law, the High Court decided the legal meaning of the 'lifestyle' and 'gender characteristics' statutory considerations. With regards to the 'lifestyle' requirement, the High Court noted that:

> The word 'lifestyle' refers to the characteristic manner in which a person lives and reflects a collection of choices which that person makes. It has both a private and a public dimension. Many lifestyle choices made by a person are observable by other members of society, by reference to how that person lives and conducts himself or herself. The first enquiry … may therefore also direct the attention of the [governing body] to a social perspective.[57]

With regards to 'gender characteristics', the High Court decided that:

> The question whether a person is identified as male or female, by reference to the person's physical characteristics, is … largely one of social recognition. It is not intended to require an evaluation by the [governing body] of how much of a person's body remains male or female. Rather, the [governing body] is directed … to the question of how other members of society would perceive the person, in their day-to-day lives.[58]

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54 *Sexual Reassignment Act 1988* (SA) s 7(8)(b)(i)–(ii); *Gender Reassignment Act 2000* (WA) s 15(1)(b)(i)–(ii).

55 *Sexual Reassignment Act 1988* (SA) s 3; *Gender Reassignment Act 2000* (WA) s 3 (emphasis added).

56 (2011) 244 CLR 390.

57 *AB & AH v Western Australia* (2011) 244 CLR 390, 403 [28].

58 Ibid 405 [35].

Legal consideration of these social factors marks a distinct departure from the jurisprudential history discussed above. Various contemporary sources of law have embraced a multifactorial approach that seems to broadly consider transsexual subjects and their lives rather than reductively focusing solely on transsexual bodies. In this legal development Whittle identifies a shift from 'essentialist' legal tests, where the law employs 'tests that look to one essential feature' and assigns a legal sex identity accordingly, to a 'cluster' approach, where the law 'looks to a group of similar features that suggest' the allocation of a legal sex identity.[59] With the introduction of additional factors for consideration, each individual factor becomes relatively less important to the entire decision-making process. Under this new 'cluster' approach, biology remains a factor to be taken into account, but is stripped of its power to solely determine the outcome of legal decision-making.

III Problems with the Use of Social Factors

A general trend that cuts across many of the changes made within sex identification law in the last forty years is the opening up of legal consideration from the narrow confines of born biological criteria to a variety of other considerations, including contemporaneous biology (caused by hormonal and surgical treatments), psychological identification and social factors. By no means, however, is this multifactorial approach the only, or even the dominant, legal test in Australia. The multifactorial approach has only been wholeheartedly adopted within marriage law and within Western Australian and South Australian law regarding sex identifying documentation.[60] Other areas of sex identification law have different foci. The prerequisites required to change the sex noted in a birth certificate in other jurisdictions retain a narrow focus on biological criteria: typically just requiring evidence of undergoing sex reassignment surgery.[61] Recent changes to the federally-administered passport sex identification policy mean that passport criteria now rely on the professional judgment of medical practitioners. All that a transsexual needs to change the sex identity noted on their passport is a letter from a medical practitioner (registered

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59 Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (Cavendish Publishing Limited, 2002) 10–11.

60 And perhaps also in the law regarding social security. See, eg, *Scafe v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2008) 100 ALD 131, [21] ('*Scafe*') wherein the Tribunal decided that:

> There is much to be said for the view that, in reaching a conclusion as to the gender of an individual, consideration should be given to and a determination made in light of all the characteristics of that person, including behavioural and psychological matters and social circumstances. The individual should be evaluated as a complete human being, taking into account their full range of behaviour, physiology, psychology and any other relevant features and characteristics.

61 See, eg, the *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 2005* (NT); *Births, Deaths and Marriages Registration Act 2003* (Qld); *Births, Deaths and Marriages Registration Act 1999* (Tas); *Births, Deaths and Marriages Registration Act 1996* (Vic); *Births, Deaths and Marriages Registration Act 1995* (NSW).

with the Medical Board of Australia) supporting the fact that they have 'had, or [are] receiving, appropriate clinical treatment for gender transition'.[62] Obviously, the law in these areas has no regard for social factors, and is far more responsive to issues of medical treatment and practice.

My contention, however, is that important parts of sex identification law in Australia are trending towards the multifactorial approach,[63] and, as a result, it is important to subject this trend to close analytical scrutiny. The multifactorial approach, as the names suggests, takes into account a number of factors about a transsexual person's life, mind and body. My intention in this article, however, is just to scrutinise the use of social factors within the multifactorial approach. The consideration of biological and psychological factors are also key parts of the multifactorial approach but will not be addressed in detail here. Such factors have already received high levels of judicial and academic attention by virtue of having been relevant legal considerations for a much longer time.

It is tempting to locate a linear pattern of liberalising legal progression in the shift from biological essentialism to the multifactorial approach. The immutability of Ormrod J's narrow biological criteria, and the insurmountable barriers it set up to the legal recognition of a transsexual's psychological sex identity, has given way to a broad approach that considers a variety of factors and that is, on the whole, far less restrictive. However, my concern, and the major contention of this article, is that the introduction of social factors as relevant legal considerations could generate new barriers for transsexuals seeking legal recognition of their psychological sex identity that could be applied in inequitable ways. These factors, depending on how they are used by future courts and legal decision-makers, have the capacity to harden into a restrictive vector of normative legal control by becoming not simply an additional set of legal factors to consider but an additional set of legal requirements that transsexuals must overcome. This article constitutes a warning about possible future progress in this legal area; it aims to reveal the hidden dangers that litter this area of legal development by modelling some of the problematic ways in which the law could end up utilising these social factors. This argument is necessarily somewhat speculative, but it is not, however, purely hypothetical. Particular reference will be made to *Re Kevin: Validity of Marriage of Transsexual*[64] to demonstrate that the way these social factors have already been employed indicates that they may trade in restrictive and highly normative understandings about sex that are problematic for transsexuals seeking legal recognition of their psychological sex identities.

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62 Australian Passport Office, *Sex and Gender Diverse Passport Applicants* (2011) Australian Government Department of Foreign Affairs and Trade <https://www.passports.gov.au/Web/SexGenderApplicants. aspx>.

63 This is especially evident in the way the High Court read social factors into the statutory requirements of the *Gender Reassignment Act 2000* (WA) in *AB & AH v Western Australia* (2011) 244 CLR 390.

64 (2001) 165 FLR 404.

The specific problems to be discussed in this part are threefold. Firstly, how the consideration of social factors undermines the importance of transsexuals' own psychological sex identifications and subjective experiences. Secondly, how these factors bring extensive and intrusive legal interrogatory pressure to bear on transsexuals' lives. Finally, how the implementation of these factors into legal decision-making could require that transsexuals conform to narrow, stereotypical models of sex.

A *Devaluation of Transsexual Experience or Identification*

Transsexualism is a profoundly personal experience, in the sense that it is defined by a person's strong and ongoing psychological identification with the sex other than their born biological sex,[65] as well as in the sense that surgical and medical treatment of transsexualism is undertaken to mitigate the subjective distress and anxiety that their incongruent sex identification can cause to some transsexuals.[66] The law around sex identification, however, relates to thoroughly public categories. Cruz argues that legal sex identities 'should be understood as relationships among classes of people',[67] and even Ormrod J recognised that '[t]he fundamental purpose of [this area of] law is the regulation of the relations between persons, and between persons and the state or community'.[68] The multifactorial approach radically refocuses the law's basis for assigning individuals to these public legal sex identities by placing less emphasis on the private, personal experience of the transsexual seeking legal recognition of their psychological sex identity, and by placing more emphasis on society's experience of that person's public expressions of their transsexualism.

If the law employs 'male' and 'female' as public categories that govern social relationships, what role should a transsexual person's private experience and self-identification have in deciding their legal sex? The legal shift away from biological essentialism in favour of the multifactorial approach also marks a shift away from the transsexual as the sole site of legal consideration and onto extraneous issues such as how that person's sex identity is perceived by others. Whatever else one has to say about *Corbett v Corbett*,[69] it should at least be noted that Ormrod J's sole concern was with the biological experiences and reality of April Ashley Corbett. In sharp contrast, Chisholm J in *Re Kevin: Validity of Marriage of Transsexual*[70] almost

65 Isis Dunderdale, 'The Human Rights of Transexuals' (1992) 17 *Alternative Law Journal* 23, 23.

66 Tobin, above n 21, 399. Tobin comments that '[f]or many trans people, [sex reassignment surgery] is essential to achieving peace of mind and a successful life in their authentic gender; the alternative is constant anxiety, social maladjustment, depression, and the danger of suicide'.

67 David B Cruz, 'Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex' (2011) 46 *Harvard Civil Rights–Civil Liberties Law Review* 51, 54.

68 *Corbett v Corbett* [1971] P 83, 105. This passage is even cited favourably, and reproduced in its entirety, in *R v Harris* (1988) 17 NSWLR 158, 180.

69 [1971] P 83.

70 (2001) 165 FLR 404.

seems to sideline Kevin by considering and extracting copious amounts of evidence not about Kevin's own sex identification but about other witnesses' experience of Kevin and what sex identity they allocated to him. Chisholm J considered evidence from 39 witnesses about how Kevin is socially 'referred to and treated', from individuals or organisations such as his fellow employees, his step-family, his childhood friends, and various clubs.[71] Chisholm J treats this evidence as important because:

> It shows [Kevin] as perceived by those involved with him in his family, at work, and in the community … 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.[72]

Chisholm J's rhetoric here seems laudable, his intent is to consider Kevin in the fullness and richness of his life and its context. However, legal consideration of these social factors could potentially be very problematic if applied to cases that are unlike Kevin's.

Drawing legal focus away from the transsexual person and placing importance on the opinions and reactions of other people relatively devalues the importance of that transsexual person's subjective experience and exposes the success of their legal claim to the whims of those around them. Consideration of social factors raises the concern that a transsexual person's 'self-perception [can be] potentially trumped by the perceptions of others in the legal determination of sex itself'.[73] Imagine a transman not unlike Kevin who lived in a small, conservatively-minded country town where the majority of the population was (for some reason or another) ideologically-inclined against transsexualism, believing perhaps that it was simply an immoral 'lifestyle' choice, a debilitating psychopathology or a 'sin' against a particular deity. If the community around this transman perceived him as an immoral, sick or sinful *woman*, rather than as a man, then the application of social recognition as a relevant legal consideration would damage that transsexual's claim for legal recognition of his male sex identity. That a transsexual person's access to legal rights and benefits could be held hostage by the potentially bigoted attitudes of those around them is a strong argument for placing little, if any, legal weight on social recognition of their sex identity. Placing too much weight on the consideration of the social recognition of a transsexual's sex identity 'might be viewed as creating a legal space for the [possible] reproduction of oppression of a marginalised group'.[74]

A similar argument can be made with another thought-experiment. Imagine a transman who, despite his best efforts to the contrary during transitioning, still

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71 *Re Kevin: Validity of Marriage of Transsexual* (2001) 165 FLR 404, 412 [37].

72 Ibid 417 [68].

73 Andrew Sharpe, 'Thinking Critically in Moments of Transgender Law Reform: *Re Kevin and Jennifer v Attorney-General for the Commonwealth*' (2002) 11 *Griffith Law Review* 309, 324.

74 Ibid 325.

physically appears to be female to those around him. Despite doing everything in his power to alter his behaviour and appearance, the people in his life still see him 'as a woman pretending to be a man'.[75] This thought-experiment reveals two problematic issues with the legal consideration of social factors. Firstly, consideration of social factors takes determinative power away from the transsexual whose life and rights are most profoundly affected by the legal question being decided and places that power in the hands of other people who, whilst possibly having a theoretical interest in the upholding of male or female as social categories generally, have no direct interest at stake in the determination of that transsexual's legal sex identity. Despite the liberalising gloss of the multifactorial approach considering transsexual subjects and lives holistically, these social factors could potentially be employed in profoundly disempowering ways. Secondly, rather than providing a transsexual seeking legal recognition of their psychological sex identity with another avenue to demonstrate the legal validity of their sex identity, the legal consideration of social factors could instead be simply setting up an additional requirement based on 'passing'. Being widely socially recognised as another sex is difficult; successful 'passing' requires onerous and ubiquitous displays of sex-appropriate biology, affect and clothing (all of which are inflected by normative understandings about sex — as discussed below). Kevin's ability to effectively and consistently display masculinity to his friends, family and community cannot speak for the (in)ability of other transsexuals to perform the complex task of unambiguously blending into the social fabric as a member of their psychological sex identity.

Taking the focus away from a transsexual person and placing it on society also devalues that person's subjective experience of their sex identity. Such a factor should be of fundamental importance not only in determining whether their psychological sex identity should be legally recognised but also in weighing up other factors under legal consideration. An underlying concern within Martin CJ's judgment in *Western Australia v AH*,[76] before the case reached the High Court, was the fact that the two transmen seeking recognition certificates retained their internal female reproductive organs, including their uterus and ovaries which, if they ceased hormone treatment, could possibly regain functionality. Whilst Martin CJ made it clear that 'functionality or fertility is not the sole determinant of any application for a recognition certificate', he also noted that their possible capacity to still 'bear children' in the future was 'not irrelevant to the process of evaluation which falls to be undertaken'.[77] This anxiety over legally allowing for the creation of a 'pregnant man' is underpinned by a normative conception that gestation and parenting is, always and essentially, 'female' or 'feminine' work. Subjective, non-legal accounts from transmen who have become pregnant, or who have born children either during or soon after transitioning, dispute this normative association. It was reported by More that such transmen make efforts to maintain their male sex identities, and communicate their masculinity to others, including medical personnel, despite their

75 *Re Kevin: Validity of Marriage of Transsexual* (2001) 165 FLR 404, 417 [68].

76 (2010) 41 WAR 431.

77 Ibid 458 [112].

pregnancy.[78] They also tend to characterise their feelings towards their unborn children as paternal rather than maternal.[79] A transman named Ben, when talking about the possibility of becoming pregnant again, told More that he 'wouldn't be less of a man because of it'.[80] The point is that a transsexual subject's own experience of their sex identification is an important source of meaning that should be heavily legally weighted. Relying on normative cultural accounts of things like parenthood fails to appreciate the subjective accounts of transsexuals, whose own meanings about issues related to sex identification may contest and even directly contradict these normative accounts. While Martin CJ saw the transmens' capacity for pregnancy and childbirth as fundamentally inconsistent with their masculinity, it could very well be that these capacities could be subjectively considered by a transman to support, rather than undercut, their masculinity, because it gives them the subsequent opportunity to engage with their biological child as a 'father'. The law should be sensitive and respectful towards the subjective experiences and accounts of the transsexuals whose lives are regulated by this area of law, rather than devaluing them in the course of considering wider social factors under the multifactorial approach.

B *Intrusive Legal Interrogatory Pressure*

The biological criteria employed by Ormord J in *Corbett v Corbett*[81] narrowly engaged with transsexual subjects; legal focus was turned solely and specifically towards a small set of biological markers during a small temporal frame (ie, birth and soon after birth). The legal turn towards the multifactorial approach drastically increases the scope of this focus, potentially proliferating the sites at which transsexual subjects are interrogated by the law and increasing the level of legal scrutiny over their lives. Transsexual subjects may need to work harder than ever to achieve legal recognition of their psychological sex identity, in order to satisfy an increasingly wide-ranging legal analysis that draws on their entire life-histories and social connections as evidentiary sources.

The jurisprudential seeds for this broad focus on the life history of transsexuals were laid as early as *Corbett v Corbett*.[82] There is more than a hint of irony in the declaration from Ormrod J that 'the relevant facts must now be stated *as concisely as possible*',[83] given that he spent the next seven pages of his judgment tracking April Ashley Corbett's life from her birth in Liverpool, through her years in the Merchant Navy, to her stint as a 'female impersonator' at a cabaret in Paris, and finally to the details of her romance with her husband (including full extracts of letters to each

78 Sam Dylan More, 'The Pregnant Man — An Oxymoron?' (1998) 7 *Journal of Gender Studies* 319.

79 Ibid 322.

80 Ibid 324.

81 [1971] P 83.

82 Ibid.

83 Ibid 89 (emphasis added).

other).[84] The irony only deepens with the realisation that Ormrod J considers all this material to be legally irrelevant, because it is not based solely around genitals, gonads and chromosomes. This kind of unnecessary legal recounting of the fine details of transsexuals' lives recurs in other cases. Although proposing a test based strictly on harmony between biological and psychological factors, Mathews J in *R v Harris*[85] segues part of her judgment into a consideration of Harris' evidence that her mother had wanted her to be born a girl instead and 'used to dress her, as a child, in her sisters' clothes', and that Harris had spent her work life in stereotypically feminine jobs, including being 'a hairdresser and a seamstress'.[86] These narrative details, although legally unnecessary and technically irrelevant to the ultimate decisions in these cases, provide authorising accounts about the authenticity of transsexual lives: they purport to show unbroken patterns of historical identification and behaviour that support transsexuals' contemporaneous legal claims about their psychological sex identity. They operate as background notes to these legal judgments that, whilst perhaps not determinatively influencing the decisions, position the sex identity claims of the transsexuals before the courts as sympathetic and authentic.

The discussion of transsexual life-histories in sex identification law becomes problematic when, under the multifactorial approach, they shift from the background into the foreground of legal consideration, possibly providing restrictive models of how 'proper' transsexual lives need to progress in order for sex identity claims to be successful. The consideration of Kevin's life history in *Re Kevin: Validity of Marriage of Transsexual*[87] provides a good example. Chisholm J works through the evidence about Kevin's childhood, adolescence and life in extreme detail, making the following observations:

> [F]or as long as he could remember, Kevin has perceived himself to be male. When he was a very young child his mother tried to persuade him that he was a girl and that he should behave as a girl … [but] he continued to believe he was a boy. He wore boys' clothes whenever he could. He refused to play with girls' toys.[88]
>
> Kevin was the oldest of four children: he had three sisters. He saw his relationship with them as being that of an older brother. 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.[89]
>
> Some family photographs are striking: at age three, with pistols; at age eight, with a soccer ball and trophy. Most remarkable is a photograph of Kevin aged about 15

84 Ibid 89–96.

85 (1988) 17 NSWLR 158.

86 Ibid 161–2.

87 (2001) 165 FLR 404.

88 Ibid 410 [24].

89 Ibid 410 [25].

> or 16, with his sisters. They are wearing pastel coloured dresses and sandals. He is wearing dark trousers and shoes, and what looks like a boy's shirt. To my eye, despite the shoulder length hair, he looks as much like a boy as a girl.[90]
>
> In late 1994 he commenced work with his present employer. Throughout his employment there he generally presented as a male, wearing trousers and shirts to work.[91]

As part of his legal consideration of 'all relevant matters' in deciding Kevin's legal sex identity,[92] Chisholm J delves into and considers all the obscure minutiae of Kevin's life: what chores he performed at home, what toys he played with as a child, what kind of shirts he and his sisters wore during his adolescence, what kind of pants he wore to his workplace seven years ago, etc. This kind of legal analysis *ad nauseum* extends interrogatory pressure into wide-ranging aspects of a transsexual subject's person and life. No longer is it just their bodies that are under intense legal scrutiny, so too are their childhoods, their adolescences, their sartorial choices and their workplaces. The notion of 'legal consideration of social factors' could merely be a neutral epithet placeholding for the law's self-grant of an exceedingly intrusive level of oversight (and control) over transsexual lives.

This vast increase in the scope and intensity of the legal interrogation of transsexual lives that the multifactorial approach brings to sex identification law is problematic in and of itself. It is important, however, to spend some further time unpacking the issues that this raises.

Firstly, the proliferation of social factors as relevant legal considerations correlatively proliferates the various sites through which transsexual subjects must demonstrate their masculinity or femininity to the law. Their life histories, social recognition and entire past catalogue of gendered displays take on evidentiary importance. As evidence, they can be used either to support or undermine their claims for legal recognition of their psychological sex identity. This becomes a concern for those transsexual subjects who, unlike Kevin, may have a chequered past filled with late-blooming or inconsistent sex-appropriate behaviour. Where does this leave the transman who played with 'girls' toys when he was three years old? What about the transwoman who looked like a 'boy' in her old family photographs? What about the transman who only started dressing in 'male' clothes later in life? The use of these social factors as legal considerations has the possibility to leverage significant and lifelong pressure on transsexuals to perform sex-appropriate behaviour, and display sex-appropriate appearance, during every single moment of their entire lifetime. Furthermore, there is the capacity for evidence of sex-inappropriate behaviour or appearance to be dredged from the most remote recesses of a transsexual's life-history and brought forward in opposition to their claim for legal recognition of their psychological sex identification.

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90 Ibid.

91 Ibid 411 [27].

92 Ibid 475 [329].

The concern is that the law's broad preoccupation with a transsexual's life-history will coalesce into a legal investigation into whether particular transsexual subjects conform with an ideal transsexual life-narrative, the content of which is informed by the experiences of those transsexuals who fit the 'classic transsexual pattern' and not those whose current psychological sex identity has previously surfaced (or been expressed) either ambiguously or sporadically throughout their life. Not all transsexuals will be able to fulfil this. As Lawrence recognises with regards to transwomen, not all individuals follow the '"classic" transsexual pattern' of being 'extremely feminine as children [and] extremely feminine as adults' and seeking sex reassignment surgery and hormone treatment early in life.[93] Others may only seek medical treatment 'in their 30s, 40s, 50s, or even later, after having lived outwardly successful lives as men', and their life-histories may show that they 'were not especially feminine as children … [or] as adults, either'.[94] There is the potential here for the law to differentially privilege certain models of transsexuality over and above others and thus to function restrictively. Such a legal move would run counter to the prevailing trends in the medical treatment of transsexualism. The current edition of The World Professional Association for Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* reports that 'many adolescents and adults presenting with gender dysphoria do not report a history of childhood gender conforming behavior',[95] and promotes an inclusive understanding of gender identity that recognises it as a unique experience not necessarily bound to social norms.[96]

Secondly, the construction of numerous, onerous legal hurdles for transsexuals to overcome in order to achieve legal recognition of their psychological sex identity is undercut by the blatant legal double-standard it imposes; sex only becomes something that needs to be legally achieved when someone is transsexual and not when they are cisgendered.[97] Cruz's observation that '[m]ost people do not experience their sex or gender being legally called into question or contested',[98] reveals a fundamental hypocrisy at the core of sex identification law. The various tests that the law requires transsexual subjects to fulfil before being legally recognised as their psychological sex identity do not have to be fulfilled by cisgendered subjects in order for them to be legally recognised as the sex with which they psychologically identify. Under the law, recognition of psychological sex identity is something that must be achieved, with reference to various considerations and criteria, but it is only something that transsexuals must achieve. This same point can be argued in relation to any legal considerations relating to sex identification;

93 Anne A Lawrence, 'Autogynephilia: A Paraphilic Model of Gender Identity Disorder' (2004) 8(1) *Journal of Gay & Lesbian Psychotherapy* 69, 70.

94 Ibid.

95 The World Professional Association for Transgender Health, above n 39, 12.

96 Ibid 9.

97 The word 'cisgendered' refers to people who are born with a psychological sex identification that is congruent with their physiological sex identity markers.

98 Cruz, above n 67, 66.

it is equally valid as an argument against the biological essentialism of Ormrod J as it is against the multifactorial approach adopted by Chisholm J. The adoption of the multifactorial approach does, however, exacerbate the situation because it is particularly egregious for the law to proliferate the considerations that transsexuals must fulfil when the cisgendered are not required to fulfil any. To illustrate this point take, for example, biological criteria. Under the psychological and anatomical harmony test in *R v Harris and McGuinness*,[99] a transwoman is required to demonstrate that she has female genitalia before being legally recognised as female. In contrast, a cisgendered woman who 'lost these [biological] features by accident, or had them removed for medical reasons' retains her legal identification as female and any legal rights gained thereby.[100] Under the multifactorial approach, this inequality is extended to a wider variety of social factors as well. The cisgendered woman who plays with 'boys' toys, who dresses in 'boys' clothes and who enacts a stereotypically masculine social role (whilst maintaining a female psychological sex identification) does not run the risk of being denied legal recognition of her female sex identity and her resultant legal status and rights. Sex identification law constructs recognition of psychological sex identity as something that transsexuals must strive for and achieve, yet the legal recognition of a cisgendered person's psychological sex identity is something that does not need to be achieved and that cannot even be 'failed' out of by sex-inappropriate displays. The broader variety of ways in which the multifactorial approach requires transsexuals to struggle to achieve legal recognition of their psychological sex identity extends this inequality by broadening the gap between the growing scope of the legal interrogation of transsexual lives and the accommodating approach the law takes to the legal recognition of cisgender sex identity.

C *Conformity with Sex Stereotypes*

The concerns outlined within the last two sections of this article relate to matters of legal content: that is, consideration of social factors seems to add additional, new restrictive criteria to sex identification law. In this section, I want to add to these concerns by highlighting a further problem about legal methodology: that is, consideration of social factors also seems to set up further restrictions through the processes involved in applying and testing these factors. The problem here is that the practical process of judicially considering these social factors could devolve into mere capitulation with (and reification of) normative understandings of male or female that trade in restrictive models of sex and gender. In considering the life-history of a transsexual and the social recognition of their sex identity, legal logic and decision-making becomes susceptible to being drawn into the application of 'outdated concepts of ideal "men" and "women" and of normative masculinity, femininity, and sexuality'.[101]

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99 (1988) 17 NSWLR 158.

100 Tobin, above n 21, 425.

101 Tey Meadow, '"A Rose is a Rose": On Producing Legal Gender Classifications' (2010) 24 *Gender & Society* 814, 815.

This broad point is best highlighted by the Western Australian and South Australian statutory requirement that before a transsexual person can receive a recognition certificate they must satisfy the decision-maker that they have 'adopted the lifestyle … of a person of the sex (SA) or gender (WA) to which the person has been reassigned'.[102] In addition to constructing an additional legal criterion for transsexuals to fulfil, that is, that they have to prove that they have adopted a particular lifestyle, the methodology for identifying and deploying a coherent account of what exactly constitutes a male or female 'lifestyle' is also highly problematic. This legal criterion cannot practically be employed without recourse to reductive, normative and ultimately stultifying conceptions about what constitutes masculinity and femininity, or else it would have no substantive content as a test. The requirements of this test have yet to be given any legal specificity in case law, but typical understandings of what would constitute a sex-appropriate 'lifestyle' would associate it with normative understandings about things such as a person's name, their sartorial choices, their (non-)use of makeup or jewellery, their hobbies, their (non-)involvement in domestic labour, their (non-) involvement in sport, their type of job, their affect, their sexual expression, etc. How is a court to weight the fact that a transman wears skirts occasionally? Or that a transwoman is heavily involved in playing rugby? Legal decision-makers could only possibly weight these factors by internalising broader cultural conceptions of sex-appropriate behaviour, such as those that conceive of skirt-wearing as a 'feminine' activity and playing contact sport as 'masculine'.

The practical implementation of this legal test has the potential to import highly restrictive understandings of normative behaviour into the law. By considering social factors, the imposition of legal fantasies that 'rely not only on concepts of what men and women are but also on notions of what they are meant to do'[103] could force transsexuals to choose between conforming with normative models of sex or gender or failing to be granted legal recognition of their psychological sex identity. Transsexuals who display 'incorrect', ambiguous or simply unorthodox sexed-behaviour risk legal delegitimisation of their psychological sex identity.

Re Kevin: Validity of Marriage of Transsexual[104] provides an example of a case in which these theoretical concerns have been translated into legal reality. In an illuminating close analysis of the culturally specific gender dynamics at play in the decision, Aizura argues that Kevin's success at enacting a normative Australian stereotype of masculine sex identity played 'an important role in presenting him as a sympathetic public subject, of value to the community'.[105] Indeed, Chisholm J takes pains to collect and collate evidence for what appears to be the singular purpose of

102 *Sexual Reassignment Act 1988* (SA) s 7(8)(b)(ii); *Gender Reassignment Act 2000* (WA) s 15(1)(b)(ii).

103 Tey, above n 101, 830.

104 (2001) 165 FLR 404.

105 Aren Z Aizura, 'Of Borders and Homes: The Imaginary Community of (Trans)Sexual Citizenship' (2006) 7 *Inter-Asia Cultural Studies* 289, 299.

portraying Kevin as an authentic 'Aussie bloke'. His judgment extracts evidence showing that Kevin:

- was part of a nuclear family, having both a wife and children;[106]
- played numerous sports such as rugby, soccer and cricket;[107]
- went on fishing trips;[108]
- moved and danced like a man;[109]
- had a 'bachelor-like', Spartan home;[110] and,
- was very practical and handy around the house, as he was skilled at both landscaping and household repair work.[111]

Kevin's ability to enact this 'Aussie bloke' identity is strategically legally valuable; by drawing on the weight of cultural narratives around (Australian) masculinity Kevin submerges the potential reading of his sex identity as that of a 'gender freak'[112] by tapping into a 'mythical space of normality',[113] both in terms of general Australian-ness and in terms of specific sex-appropriate behaviour as inflected by cultural custom.

Whilst the legal consideration of social factors may not have been problematic for Kevin (indeed, a strong argument could be made that consideration of such factors bolstered the strength of his claim for legal recognition of his psychological sex identity), it would be highly problematic for transsexuals generally if Chisholm J's line of reasoning was to be extrapolated to other cases. The kind of masculinity embodied by Kevin is not only dated, it is also highly restrictive. It fixes certain types of behaviours, certain clothing, certain choices and certain ways of living in the world as fundamentally and essentially sexed, and this article's concern is that these social practices will harden into legal requirements or guidelines that trap transsexuals into narrowly confined modes of authorised living. It is easy to envisage situations in which the realities of transsexual lives could contravene stereotypical cultural ideals of sex-appropriate behaviour. Take, for example, a transwoman who identifies as a lesbian. Dominant cultural understanding about femininity that link being female to androphilia, thus creating a nexus between

106 *Re Kevin: Validity of Marriage of Transsexual* (2001) 165 FLR 404, 412 [38].

107 Ibid 415 [55].

108 Ibid.

109 Ibid 415–16 [56]–[59].

110 Ibid 416 [59].

111 Ibid 416 [59]–[60].

112 Aizura, above n 105, 299.

113 Ibid 301.

sex and heteronormativity, are contravened here. The lesbian transwoman may fail to display (hetero)normative female behaviour, raising legal questions about how exactly this should be weighted in determining whether to grant legal recognition of her sex identification.[114]

This issue should be regarded as being symptomatic of law's broader essentialising of sex. The mere fact that there are any legal requirements that must be fulfilled before granting a person's wish to alter their legal sex identity demonstrates the law's complicity in constructing and maintaining sex identity categories, and the law's use of both biological and psychological legal requirements demonstrates its commitment to conceptualising fundamental differences between 'male' and 'female' bodies and minds. Legal consideration of social factors threatens to take this one step further: it runs the risk of legal decision-making committing the law to essentialist understandings about fundamental differences between 'male' and 'female' social identities, lives and lifestyles as well. Normative understandings about sexed embodiment have historically limited the access of transsexuals to legal recognition of their psychological sex identity and have required them to drastically change their bodies (such as through surgery). In a similar way, normative understandings about the sex-appropriateness of social identities and life-histories could limit the access of transsexuals to legal recognition and require them to drastically alter their lifestyles and lives.

IV Conclusion

This article is a caution, a warning sign indicating that the jurisprudence of sex identification law has approached difficult terrain that requires careful navigation. Part II detailed the shift from the biological essentialism of *Corbett v Corbett*[115] towards the multifactorial approach, as endorsed in marriage law and in Western Australian and South Australian statute law. This expansion of the relevant factors for legal consideration has increased the access of transsexuals to legal recognition of their psychological sex identity by jettisoning the insurmountable biological criteria, and it also prima facie seems to allow the law to holistically account for complete and contextualised transsexual subjects. However, this legal shift also raises the concern that, upon closer analysis, the multifactorial approach may set up new legal barriers that could be applied inequitably to deny such recognition. Part III crystallised this concern into specific arguments about how the legal consideration of social factors

114 This very situation was considered in *Scafe* (2008) 100 ALD 131, where the Tribunal was tasked with deciding whether a lesbian transwoman who had undergone long-term hormonal therapy, but who had not undergone genital sex reassignment surgery, was female at law. Unfortunately, the Tribunal chose not to address the issue of the legal weight to be given to social factors, as it puzzlingly chose to follow the psychological and anatomical harmony approach from *Secretary, Department of Social Security v 'SRA'* (1993) 43 FCR 299 even though it seemed to endorse the multifactorial approach and explicitly stated that it thought there were 'grounds for distinguishing the circumstances and reasoning' of this case from *'SRA'*: *Scafe* (2008) 100 ALD 131, [29].

115 [1971] P 83.

about a transsexual's life could operate in disempowering and disenfranchising ways. Whilst these arguments were predominantly speculative, that is they identified *potentially* problematic areas within the jurisprudence, they were also grounded in the particular problems and approaches that have arisen from statute and case law that employs the multifactorial approach, with specific reference being made to *Re Kevin: Validity of Marriage of Transsexual*.[116] Through its engagement with these problems, this article identifies a number of pitfalls inherent in the multifactorial approach, and provides a cautionary note about the need to proceed carefully and deliberately in both the development and the application of this area of law.

Sex identification law regulates a matter of intense concern for a small and highly marginalised group of people. As such, its development and application should occur on a principled basis, and should proceed with a high degree of clarity and coherence. This area of law has changed rapidly and extensively across the last forty years, and the multifactorial approach is one key contemporaneous trend in legal thinking. However, it is difficult to determine whether or not this latest development constitutes a positive step for transsexuals seeking legal recognition of their psychological sex identities. What is needed in this area of law now is not further development but further clarification. It is imperative to resolve the problems associated with the multifactorial approach so that it becomes clear whether these legal changes increase or decrease legal access, construct or dismantle legal restrictions, and ultimately progress or simply alter the law.

116 (2001) 165 FLR 404.