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GRIFFITH JOURNAL  
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## CONTENTS

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GEOFFREY ROBERTSON QC	<i>JUDICIAL INDEPENDENCE: SOME RECENT PROBLEMS</i>	1
JULIAN BURNSIDE QC	<i>BORDERLINE JUSTICE: DIGNITY AND DECENCY OUTSIDE THE MARGINS</i>	36
BRENNA HARDING	<i>SAME-SEX CITIZENRY: THE GROWING PAINS OF A TEENAGE DAUGHTER</i>	55
JEREMY KANE	<i>SISTERGIRL INSIDE: DOUBLY COLONISED, DOUBLY TRAPPED THE DISCRIMINATING DECISION IN SINDEN V STATE OF QLD</i>	63
ANNE SUMMERS AO	<i>HER RIGHTS AT WORK: THE POLITICAL PERSECUTION OF AUSTRALIA'S FIRST FEMALE PRIME MINISTER</i>	93
THE HON MICHAEL KIRBY AC CMG	<i>PRIVACY PROTECTION AND MEDIA IN AUSTRALIA: UNFINISHED BUSINESS</i>	117

## SISTERGIRL INSIDE: DOUBLY COLONISED, DOUBLY TRAPPED

### The Discriminating Decision in *Sinden v State Of Qld*

JEREMY KANE\*

*That both trans people and Australia's First Peoples are incarcerated at rates higher than the general population requires that the unique needs of those inmates positioned at the intersection of these oppressions — sistergirls — receive greater attention by legal scholars, the legislature and the judiciary. By deconstructing and critiquing the QCAT decision Sinden v State of Queensland using an intersectional framework grounded in trans theory, the cisnormative and Eurocentric assumptions underlying the dismissal of Thalia Sinden's anti-discrimination claim will be brought to bear. In doing so it is argued the Queensland Corrective Services' Procedure — Transgender Offenders is cisnormatively discriminatory against trans inmates, and the tribunal's endorsement of that procedure itself compounded such discrimination by failing to account for the intersectional complexity of Sinden's identity. This case makes explicit many of the issues trans inmates face, the cisnormativity of the law, and the ways Anti-Discrimination legislation fails multiply-oppressed people in numerous ways.*

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## CONTENTS

I	INTRODUCTION.....	64
II	SITUATING SINDEN-AS-SISTERGIRL.....	68
III	THE DELIBERATE INDIFFERENCE OF QCS.....	71
IV	A POLICY OF DISCRIMINATION.....	73
V	INTERROGATING GENDER, ERASING SINDEN.....	76
VI	RATIONALISING DISCRIMINATION.....	78
	<i>A Fraudulent Fears</i> .....	78
	<i>B Dysphoric Assessments</i> .....	79
	<i>C Dangerously Sexed Bodies</i> .....	82
VII	CONCLUSION: BEYOND COMPENSATION.....	84

## I INTRODUCTION

Over the past few decades, the multitude of complex oppressions faced by trans inmates has increasingly drawn the attention of scholars and activists,<sup>1</sup> due to ways widespread experiences of discrimination and violence are magnified in the prison context.<sup>2</sup> Trans

<sup>1</sup> In this paper the term “trans” is deployed in line with Serano ‘to refer to people who (to varying degrees) struggle with a subconscious understanding or intuition that there is something “wrong” with the sex they were assigned at birth and/or who feel that they should have been born as or wish they could be the other sex.’: Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Seal Press, 2007).

<sup>2</sup> See generally, William Leonard et al (eds), ‘Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians’ (Monograph Series No 86, Australian Research Centre in Sex, Health and Society: La Trobe University, 2012). This is experienced in the family home, the workplace, in educational institutions, and in interactions with police: Arnold Grossman and Anthony D’augelli, ‘Transgender Youth: Invisible and Vulnerable’ (2006) 51(1) *Journal of Homosexuality* 111; Kimberly Stieglitz, ‘Development, Risk and Resilience of Transgender Youth’ (2010) 21(3) *Journal of the Association of Nurses in AIDS Care* 192; Van Yu, ‘Shelter and Transitional Housing for Transgender Youth’ (2010) 14(4) *Journal of Gay and Lesbian Mental Health* 340; Andrew Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish Publishing, 2002) 138–57; Mary Kelly, ‘(Trans)forming traditional interpretations of Title VII: “because of sex” and the transgender dilemma’ (2010) 17(1) *Duke Journal of Gender Law & Policy* 219; Lydia Sausa, ‘Updating College and University Campus Policies: Meeting the Needs of Trans Students, Staff, and Faculty’ (2002) 6(3–4) *Journal of Lesbian Studies* 43; Wayne Martino and Maria Pallotta-Chiarolli, *Being Normal is the Only Way to Be: Adolescent Perspectives on Gender and School* (University of New South Wales Press, 2005); Lydia Sausa, ‘Translating Research into Practice: Trans youth Recommendations for Improving School Systems’ (2005) 3(1) *Journal of Gay & Lesbian Issues in Education* 15, 16.

people have been found to be overrepresented in prison populations,<sup>3</sup> and in the context of systemic social, vocational, and economic marginalisation due to institutionally entrenched transphobia and cisnormativity,<sup>4</sup> this is not surprising.<sup>5</sup> Stripped of the little liberty they had prior to incarceration, they rely completely on the discretion of often-uninformed prison officials in having their medical needs met and their safety ensured. Despite this, policies such as the Queensland Corrective Services' *Procedure — Transgender Offenders* ('*Transgender Offenders*') house trans inmates genitocentrically — that is, based on their external genitalia — and categorically refuse to provide hormone therapies to inmates who fail to provide medical documentation demonstrating pre-incarceration diagnosis and treatment.<sup>6</sup> Due to the cisnormativity of these policies, trans inmates find themselves trapped in a 'prison-within-a-prison';<sup>7</sup>

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<sup>3</sup> In Canada, the rate of non-normatively gendered people committing offences was found to be 10 times that of the general population (Maxine Peterson et al, 'Transsexuals within the Prison System: An International Survey of Correctional Services Policies' (1996) 14 *Behavioural Sciences and the Law* 219 at 220). In both Canada and Britain trans people have been estimated to be twice as likely to be incarcerated than the cis population (Rebecca Mann, 'The Treatment of Transgender Prisoners, Not just an American Problem – A comparative Analysis of American, Australian and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a "Universal" Recommendation to Improve Treatment' (2006) 15 *Law & Sexuality* 91 at 110; Lindsey Poole, Stephen Whittle and Paula Stephens, 'Working with Transgendered and Transsexual People as Offenders in the Probation Service' (2002) 49 *Probation Journal* 227 at 229). In the US, the trans inmate population in California alone outnumbers the number one would expect on a national level — indicating a disproportionately high level of trans people being incarcerated. (George Brown and Everett McDuffie, 'Health Care Policies Addressing Transgender Inmates in Prison systems in the United States' (2009) 15 *Journal of Correctional Health Care* 280 at 282).

<sup>4</sup> "Transphobia" can be defined as, 'an irrational fear of, or aversion to, or discrimination against people whose gendered identities, appearances, or behaviours deviate from societal norms ... transphobia is first and foremost an expression of one's own insecurity about having to live up to cultural gender ideals', Serano, above n 1, 12; "Cissexual" ('cis') refers to non-trans peoples who have only ever experienced their subconscious and physical sexes as being more or less aligned: Ibid. "Cisnormative" thus refers to the default assumption that all peoples experience their subconscious sex and sexed body as being congruent. Such assumptions inevitably enact a form of trans-erasure: at 189–90.

<sup>5</sup> Many have linked the over-representation of trans peoples to the kinds of quality-of-life, or "poverty" crimes they are driven to in the face of an often unaccommodating and blatantly discriminatory society, coupled with the necessity to self-fund their often expensive sex affirmation therapies: Jake Blight, 'Transgender Inmates' (2000) 168 *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice* 1, 2; Peterson, above n 3, 219–20; Poole, Whittle and Stephens, above n 3, 229; Richard Edney, 'To Keep Me Safe From Harm? Transgender Prisoners and the Experience of Imprisonment' (2004) 9(2) *Deakin Law Review* 328, 328; Brown and McDuffie, above n 3, 282; Christine Peek, 'Breaking out of the prison hierarchy: Transgender prisoners, Rape, and the Eighth Amendment' (2004) 44 *Santa Clara Law Review* 1211, 1218–19; Darren Rosenblum, "'Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism' (2000) 6(2) *Michigan Journal of Gender & Law* 499, 502; Lori Sexton, Valerie Jenness and Jennifer M Sumner, 'Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons' (2010) 27(6) *Justice Quarterly* 837.

<sup>6</sup> "Genitocentricism" denotes the common (yet flawed and prejudicial) tendency throughout society to privilege a person's genitals as the definitive sex markers of one's sexed being, as opposed to, for example, the brain or "subconscious sex": Serano, above n 1, 24; Sharpe, above n 2, 42; Rachael Wallbank, 'Re Kevin: In Perspective' (2004) 9(2) *Deakin Law Review* 461, 464.

<sup>7</sup> Israel, Gianna E, 'Transsexual Inmate Treatment Issues' (2002) 97 *Transgender Tapestry* 1, 1; Rosenblum, above n 5, 501; Mann, above n 3, 104.

trapped in both a ‘notoriously macho’,<sup>8</sup> violently hierarchical environment,<sup>9</sup> where they are vulnerable to high levels of harassment, assault, and rape, and trapped in their bodies as their medical needs are ignored.<sup>10</sup>

Australia’s First Peoples comprise another small sub-section of the population disproportionately over-represented in the prison system,<sup>11</sup> to the extent that they have been described ‘as one of the most imprisoned groups in the world.’<sup>12</sup> As Edney importantly highlights, such rates ‘cannot be understood in the absence of those wider power relations that have shaped the nature of the colonial response to Aboriginal and Torres Strait Islander communities.’<sup>13</sup> The high levels of disadvantage experienced by Australia’s First Peoples,<sup>14</sup> and the ways that this leads to ‘an endless cycle of crime, arrest, and imprisonment’,<sup>15</sup> must be viewed as the legacy of invasion and colonisation.<sup>16</sup> Far from ‘post-colonial’,<sup>17</sup> contemporary Australian society continues to

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<sup>8</sup> Rudolph Alexander and Jacquelyn Meshelemiah, ‘Gender Identity Disorders in Prisons: What are the Legal Implications for Prison Mental Health Professionals and Administrators?’ (2010) 90(3) *Prison Journal* 269, 282.

<sup>9</sup> Rosenblum, above n 5, 523.

<sup>10</sup> Despite much contestation around the “wrong body” narrative, particularly in the ways it marks certain bodies as “right” and others as “wrong”, Prosser contends that ‘transsexuals continue to deploy the image of wrong embodiment because being trapped in the wrong body is simply what transsexuality feels like’: Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* (Columbia University Press, 1998) 69; see further Arlene I Lev, *Transgender Emergence: Therapeutic Guidelines for Working with Gender-Variant People and Their Families* (Hayworth Clinical Practice Press, 2004), 13; Gayle Salamon, *Assuming a Body: Transgender and Rhetorics of Materiality* (Columbia University Press, 2010), 52.

<sup>11</sup> The final report of the Royal Commission into Aboriginal Deaths in Custody found that in 1991, Australia’s First Peoples were 15 times more likely than other Australians to be incarcerated: Nick O’Neill, Simon Rice and Roger Douglas (eds), *Retreat From Injustice: Human Rights Law in Australia* (Federation Press, 2<sup>nd</sup> ed, 2004) 604. Despite recommendations to the contrary, that rate has steadily increased: Elliott Johnston, ‘The Royal Commission into Aboriginal Deaths in Custody: Looking forwards, looking backwards’ in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2<sup>nd</sup> ed, 2008) 9, 10; Don Weatherburn and Jessie Holmes, ‘Re-thinking Indigenous Over-representation in Prison’ (2010) 45(4) *Australian Journal of Social Issues* 559, 560.

<sup>12</sup> Richard Edney, ‘Indigenous Punishment in Australia: A Jurisprudence of Pain?’ (2002) 30 *International Journal of the Sociology of Law* 219, 229.

<sup>13</sup> *Ibid* 219.

<sup>14</sup> Such as lower life expectancy, alcohol and drug self-medication, poverty, child abuse and mental illness: Weatherburn and Holmes, above n 11, 564.

<sup>15</sup> *Ibid* 560.

<sup>16</sup> Encompassing the perpetration of mass homicide and genocide, the dispossession of lands, the forced removal of the Stolen Generations, slavery and unpaid wages, widespread rape, and overtly violent racist and discriminatory policies: Tracey Bunda, ‘Indigenous Australians and the legacy of European conquest: The ten years since 1977’ in Johnston, above n 11, 2; Larissa Behrendt, ‘Meeting at the Crossroads: Intersectionality, Affirmative Action and the Legacies of the Aborigines Protection Board’ (1997) 4(1) *Australian Journal of International Human Rights* 98, 98.

<sup>17</sup> As evidenced by the absence of a land treaty, the failure to fully recognise and respect Aboriginal Sovereignty in the Australian Constitution, and the refusal to accommodate Aboriginal laws and customs alongside the Australian legal system: Belinda Carpenter and Gordon Tait, ‘Health, death and Indigenous Australians in the Colonial System’ (2009) 1 *Australian Aboriginal Studies* 29, 37; Expert Panel on

structure, control and contain the lives of its First Peoples, who live in ‘many prisons’,<sup>18</sup> and have been ‘shut into the container-we-have-come-to-call-home’.<sup>19</sup> That heteropatriarchy and heteronormativity structure the ‘logics of colonialism’<sup>20</sup> is evidenced in the writings of Aboriginal and Torres Strait Islander women,<sup>21</sup> who have stressed the ways ‘racist-sexual oppressions are experienced simultaneously’<sup>22</sup> and are inextricable in structuring their subordination in unique and complex ways.<sup>23</sup> First Peoples have had their lands, customs, bodies, and spirits colonised by the logic of the Settler-state, which has fundamentally required as its ancillary the widespread imposition of colonising, heteropatriarchal epistemologies concerning sex and gender.<sup>24</sup>

Considering the deplorably high levels of discrimination, disadvantage, and incarceration experienced by both trans folk and First Peoples, it is not surprising that Thalia Sinden found herself before the Queensland Civil and Administrative Tribunal (QCAT) with claims that she had been discriminated against by Queensland Corrective Services (QCS) when they refused her access to health care in the form of hormonal therapies. It is also sadly not surprising that, in failing to fully account for Thalia’s intersectional identity as a *sistergirl*, coupled with the cisnormativity underlying the prison’s policy and the tribunal’s judgement, her application was ultimately dismissed. Taking Rosenblum’s call that research into trans prisoners take ‘full account of the combination of these identities’<sup>25</sup> seriously this paper aims to deconstruct the decision

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Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January, 2012) Recognise <<http://www.recognise.org.au/final-report>>; Irene Watson, ‘Aboriginal women’s laws and lives: How might we keep growing the law’ in Johnston, above n 11, 17.

<sup>18</sup> Melissa Lucashenko, ‘Many Prisons’ (2002) 28(1) *Hecate* 139.

<sup>19</sup> Watson, above n 17, 23; Lucashenko, above n 18, 140.

<sup>20</sup> Chris Finley, ‘Decolonizing the Queer Native Body (and Recovering the Native Bull-Dyke): Bringing ‘Sexy Back’ and Out of Native Studies’ Closet’ in Qwo-Li Driskill et al (eds), *Queer Indigenous Studies: Critical Interventions in Theory, Politics and Literature* (University of Arizona Press, 2011) 32, 33.

<sup>21</sup> European invasion ‘fundamentally altered’ the role understandings of gender played in pre-colonial Australia and the implementation of racist and misogynistic policies played a key part in the overall colonial project: Diane Bell, *Daughters of the Dreaming* (Spinifex Press, 2002) 42–5, 249; Watson, above n 17, 17–8; Jackie Huggins, *Sister Girl* (University of Queensland Press, 1998) 25, 31, 115.

<sup>22</sup> Huggins, above n 21, 109.

<sup>23</sup> Behrendt, above n 16, 104; Huggins, above n 21, 109; Watson, above n 17, 23; Lucashenko, above n 18, 142.

<sup>24</sup> Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (South End Press, 2005), 139.

<sup>25</sup> Rosenblum, above n 5, 555; including the works of Black Feminist scholars such as Crenshaw (Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ in Kimberle Crenshaw et al (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (New Press, 1995) 357, 358) and Collins (Patricia H Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (Unwin Hyman, 1990) 222) as well as their Aboriginal and

in *Sinden v State of Queensland* using an intersectional framework grounded in trans theory.<sup>26</sup> Firstly, by understanding the unique nature of Thalia's oppression as a sistergirl, it will become apparent that the tribunal's inability to comprehend the gravity of her discrimination reinforces the familiar critique that anti-discrimination laws render particular aspects of peoples' lives invisible.<sup>27</sup> Following this, it will be argued that the decision enacts a kind of discrimination, by 1) failing to fully question whether the QCS policy was itself discriminatory, 2) ignoring the obvious level of deliberate indifference demonstrated by QCS, 3) interrogating Thalia's gender and erasing her specific medical needs as a trans sistergirl, and 4) deferring to the evidence of "experts" to both interrogate the truth of Thalia's trans status as well as rationalise an ostensibly discriminatory policy. In light of the recent trans deaths in custody,<sup>28</sup> and the fact that Aboriginal and Torres Strait Islander *and* trans peoples find themselves frequently trapped within the carceral system,<sup>29</sup> it is imperative that prison officials, policymakers, and the legal system understand the irreducible challenges this severely marginalised and forgotten group face.

## II SITUATING SINDEN-AS-SISTERGIRL: A LIFE LIVED AT THE MARGINS

Although Sinden's First Nation status is referred to merely twice in the decision,<sup>30</sup> one cannot fully understand the context of her discrimination without taking into account her position with respect to broader mechanisms of domination.<sup>31</sup> Looking at aspects of identity in isolation is simplistic and renders invisible the unique experiences of those

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Torres Strait Islander counterparts, Huggins above n 22, 18; Watson above n 17, 109; Behrendt above n 17, 104.

<sup>26</sup> *Sinden v State of Queensland* [2012] QCAT 284.

<sup>27</sup> Kimberle Crenshaw, 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' in Katherine Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in law and gender* (Westview Press, 1991) 57.

<sup>28</sup> Notably sistergirl Veronica Baxter in 2009 (Community Action Against Homophobia, *Demand justice for Veronica Baxter* (2012) Community Action Against Homophobia <<http://www.caah.org.au/justice-for-veronica-baxter>>) and trans woman Catherine Moore in 1997: Catherine Renshaw, 'The Death of Catherine Moore: The Predicament of Transgender Prisoners' (1999) 3 *Australian Lawyers for Human Rights* 1.

<sup>29</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage Books, 1995) [trans of: *Surveiller et Punir* (first published 1975)] 277.

<sup>30</sup> *Sinden v State of Queensland* [2012] QCAT 284, [7], [20].

<sup>31</sup> Smith reminds us that, 'when indigeneity is not foregrounded, it tends to disappear in order to enable the emergence of the hybrid subject': Andrea Smith, 'Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism' (2009) 16(1-2) *GLQ: A Journal of Lesbian and Gay Studies* 41, 57.

whose lives are dominated by interlocking systems of oppression.<sup>32</sup> Trans scholars have likewise stressed the need to employ strategies that consider the ways racism, transphobia, and cissexism interconnect in producing the innumerable barriers facing trans people of colour,<sup>33</sup> as well as the ways economic marginalisation often accompanies the lives of trans people and how this complicates an identity that is often represented as and presumed to be white and middle-class.<sup>34</sup>

'Recognising that western definitions of transgender or gay do not reflect the culture and lived reality of Aboriginal and Torres Strait Island transgendered people,'<sup>35</sup> the self-determined identity "sistergirl" has become widely adopted by First Peoples who are gendered in non-normative ways.<sup>36</sup> 'Colonisation and missionary zeal have worked together to suppress and oppress Indigenous sexuality',<sup>37</sup> to the point that many now experience discrimination, stigma, and violence from their own families and communities.<sup>38</sup> Exclusion from traditional ceremonies and men's and women's business can impact negatively on their wellbeing in terms of loss of identity and culture,<sup>39</sup> and relocating to cities frequently brings with it the attendant challenges of racism

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<sup>32</sup> Collins, above n 25, 222, 225; Bell, above n 21, 109; Behrendt, above n 16, 100; Valerie Purdie-Vaughns and Richard P Eibach, 'Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities' (2008) 59(5) *Sex Roles* 377, 381; Ann Garry, 'Intersectionality, Metaphors, and the Multiplicity of Gender' (2011) 26(4) *Hypatia* 826, 827; Stephanie A Shields, 'Gender: An Intersectionality Perspective' (2008) 59 *Sex Roles* 301, 302.

<sup>33</sup> Collins, above n 25, 226.

<sup>34</sup> Leslie J Moran and Andrew N Sharpe, 'Policing the Transgender/Violence Relation' (2001) 13(3) *Current Issues in Criminal Justice* 269, 274, 277; Elias Vitulli, 'Racialized Criminality and the Imprisoned Trans Body: Adjudicating Access to Gender-Related Medical Treatment in Prisons' (2010) 37(1) *Social Justice* 53, 59; Katrina Roen, 'Transgender Theory and Embodiment: The Risk of Racial Marginalization' in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Routledge, 2006) 656, 658; Emi Koyama, 'Whose Feminism is it Anyway? The Unspoken Racism of the Trans Inclusion Debate' in Stryker and Whittle, above n 34, 702; Richard M Juang, 'Transgendering the Politics of Recognition' in Stryker and Whittle, above n 34, 713; Leslie Feinberg, *Transgender Liberation: Beyond Pink or Blue* (Beacon Press, 1999) 63.

<sup>35</sup> Kooncha Brown, 'Sistergirls' – Stories from Indigenous Australian Transgender People' (2004) 28(6) *Aboriginal and Islander Health Worker Journal* 25, 25.

<sup>36</sup> A fluid term encapsulating the sub-categories "sister" and "sistergirl", its deployment and definition is shaped by ongoing discussions that vary depending on context and geographical location, in line with the diversity of Aboriginal and Torres Strait Islander communities in Australia: Brown, above n 35, 25; Micheal Costello and Rusty Nannup, 'Report of the First National Indigenous Sistergirl Forum' (Report, Australian Federation of Aids Organisations, July 1999) 6; Gabi Rosenstreich and Sally Goldner, 'Inclusion and Exclusion: Aboriginal, Torres Strait Islander, Trans and Intersex Voices at the *Health in Difference Conference 2010*' (2010) 6(3) *Gay and Lesbian Issues and Psychology Review* 139, 143.

<sup>37</sup> Rosenstreich and Goldner, above n 36, 144.

<sup>38</sup> Costello and Nannup, above n 36, 4; Brown, above n 35, 25; Ruth Pollard (ed), *However you wanna see me, I'm just me: Stories from Aboriginal and Torres Strait Islander Gay Men, Lesbians, and Sistergirls* (AIDS Council of New South Wales, 2009).

<sup>39</sup> Costello and Nannup, above n 36, 7; Brown, above n 35, 25-26; Rosenstreich and Goldner, above n 36, 144.

perpetrated by potential employers as well as members from the LGBTQI community.<sup>40</sup> Experiencing widespread and high levels of discrimination and marginalisation on a daily basis, sistergirls' lives are commonly marked by unemployment, poverty, sex work, alcohol and substance abuse, HIV/AIDS, sexual assault, and domestic violence.<sup>41</sup>

Sinden does not identify as a sistergirl in the decision, however the term transgender was likely used for purely bureaucratic reasons,<sup>42</sup> due to the fact that failing to deploy the language of both the prison policy and the medical model of transgender would have greatly limited her chances of success.<sup>43</sup> Whilst not all sistergirls are necessarily trans,<sup>44</sup> Sinden's feelings of being a 'female person born in a male body',<sup>45</sup> coupled with her pronounced need to access the hormonal therapies requires that we take seriously Sinden's position as both trans *and* sistergirl — giving rise to the need to recognise the ways sex and gender differ.<sup>46</sup> As will be detailed, the scrutinising of Thalia's gender throughout the decision overshadowed her experiences of bodily dissonance and ultimately served to delegitimise her claim.

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<sup>40</sup> Rosenstreich and Goldner, above n 36, 144.

<sup>41</sup> Costello and Nannup, above n 36, 7–8; Brown, above n 35, 26; Rosenstreich and Goldner, above n 36, 144–5.

<sup>42</sup> Costello and Nannup, above n 36, 6.

<sup>43</sup> Indeed, Sinden's entire claim became predicated upon not only the recitation of language conforming to such a model, but also the opinions of so-called medical "experts" working within this model.

<sup>44</sup> Queensland Association for Healthy Communities, *Supporting Transgender and Sistergirl Clients: Providing Respectful and Inclusive Services to Transgender and Sistergirl Clients* (Queensland Association for Healthy Communities, 2008) 7.

<sup>45</sup> *Sinden v State of Queensland* [2012] QCAT 284,[7].

<sup>46</sup> When talking about sex in this paper we will utilise two different, yet interrelated concepts. First, "subconscious sex" refers to the sexed body one *psychically* (or *proprioceptively*) feels oneself to be: Serano, above n 1, 12; Prosser, above n 10, 73–80; Riki Wilchins, *Read my Lips: Sexual Subversion and the End of Gender* (Firebrand Books 1997) 142–3; Salamon, above n 10, 52. Second, "physical sex", commonly used as a noun, is here reconsidered and redeployed as a verb. Individuals are often sex-ed based on their sex markers or characteristics; whether those be so-called "primary sex characteristics" — often reduced to the genitalia but also with reference to naturalised, (bio)logical make-up (whether it be chromosomes, hormones, reproductive systems etc.) — or "secondary sex characteristics" — which describe those markers most commonly used socially to designate bodies either side of the rigid man-woman sexed binary: Serano, at 24–5. When talking about gender we refer to both "gendered identity" and "gendered attributes". Gendered identity refers to the various ways peoples feel and identify themselves as being and belonging to the categories female, male, both or something else: Serano, at 25; Kate Bornstein, *Gender Outlaw: On Men, Women and the Rest of Us* (Routledge, 1994) 40. Gendered attributes are those behavioural cues judged by attributers (reiterating the gendered binary) to be either masculine or feminine — and these include gendered styles, movements and protocols: Serano, at 26.

## III THE DELIBERATE INDIFFERENCE OF QCS

Trans inmates in the United States have had moderate success in challenging the conditions of their incarceration,<sup>47</sup> via the argument that the *deliberate indifference* of prison officials constituted the kind of *cruel and unusual punishment* prisoners are protected against under the Eighth Amendment of the U.S. Constitution.<sup>48</sup> The *International Covenant on Civil and Political Rights* and the *Convention Against Torture and Other Cruel, Inhumane or Degrading Punishment or Treatment*,<sup>49</sup> both ratified by Australia,<sup>50</sup> likewise denounce ‘cruel, inhuman or degrading punishment’,<sup>51</sup> the former of which is explicitly referenced in the preamble of the *Anti-Discrimination Act 1991* (Qld) (*‘Anti-Discrimination Act’*). Despite the *Standard Guidelines for Corrections in Australia (2004)* advising that prisoners are ‘not to be subject to harsh or degrading treatment, physical or psychological abuse’,<sup>52</sup> Groves has noted that this “right” is so imprecise in nature that decisions by corrective services departments are rarely scrutinised by the courts,<sup>53</sup> and Hawkins has noted that prisoners have virtually no rights at all, but rather ‘a variety of concessions or privileges which at the discretion of the administration are subject to forfeiture, revocation, or postponement.’<sup>54</sup> Nonetheless, viewing Thalia’s case via the prism of *deliberate indifference* — ‘a wanton disregard or informed failure to provide something which is required’ — highlights the incredibly cruel and unusual punishment she was forced to endure due to not merely

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<sup>47</sup> *Phillips v Michigan Department of Corrections*, 731 F Supp 792 (WD Mich, 1990); *De’Lonta v Angelone*, 330 F 3d 630 (4<sup>th</sup> Cir, 2003); *Sundstrom v Frank*, 2007 U.S. Dist. LEXIS (2007).

<sup>48</sup> Debra S Tedeschi, ‘The Predicament of the Transsexual Prisoner’ (1995) 5(27) *Temple Political & Civil Rights Law Review* 27, 28; Alexander and Meshelemiah above n 8, 27; Alvin Lee, ‘Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy’ (2008) 31(2) *Harvard Journal of Law & Gender* 447, 463.

<sup>49</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*‘ICCPR’*); *Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (*‘CAT’*).

<sup>50</sup> 13 August 1980 and 7 September 1989 respectively.

<sup>51</sup> *ICCPR* art 7; *CAT* art 16.

<sup>52</sup> O’Neill, Rice and Douglas, above n 11, 243; Guidelines modelled off the UN *Standard Minimum Rules for the Treatment of Prisoners*, opened for signature 30 August 1955 (entered into force 13 May 1977); Australian Institute of Criminology, *Standard Guidelines for Corrections in Australia*, 2004, 14.

<sup>53</sup> Matthew Groves, ‘International Law and Australian Prisoners’ (2001) 24(1) *University of New South Wales Law Journal* 17, 22–3.

<sup>54</sup> Gordon Hawkins, ‘Prisoners’ Rights: A Study of Human Rights and Commonwealth Prisoners’ (Occasional Paper No 12, Australian Human Rights Commission, 1986) 25–6.

the refusal of QCS to provide the treatments,<sup>55</sup> but also the discernible level of carelessness and inconsistency in attending to her serious medical needs.

Prisons often lack clear policies outlining the rights of trans inmates, particularly in terms of their access to medical care and their placement.<sup>56</sup> This was the situation Thalia faced when first entering the Wolston Park Correctional Centre in 1999, and it was not until 2007 that a policy dealing exclusively with “transgender offenders” was implemented.<sup>57</sup> This policy made clear that hormone treatment would never be provided to trans peoples who had not been receiving hormones prior to their incarceration. It also made clear that, unless trans inmates had amended the sexed mark on their birth certificate in line with s 24 of the *Births, Deaths and Marriages Registration Act 2003* (Qld) (which oppressively requires trans people to undergo self-funded and thus almost always cost-prohibitive “sex re-assignment” surgeries that alter the person’s reproductive organs),<sup>58</sup> a decision as to where in the sex-segregated prison system they would be housed is to be made, at the discretion of prison officials,<sup>59</sup> with regards to a number of factors.<sup>60</sup> Despite Thalia being incarcerated in an all-male, “protection” prison facility, there is no consideration of whether such placement was itself discriminatory.

Aside from the danger Thalia was exposed to due to such placement, what becomes most disturbing about the management of her healthcare is the fact that, at the time of the QCAT decision, Thalia had been permitted to take only the first half of what is fundamentally an inextricable, two part hormone treatment plan for *seven years*.<sup>61</sup> Such a plan essentially involves the administration of both an anti-androgen, which inhibits the body’s ability to produce testosterone, as well as an oestrogen-releasing drug. After diagnosing Thalia with “Gender Identity Disorder” (‘GID’) in August 2006, both of these were recommended by Dr Gale Bearman at the Brisbane Transgender Clinic, and the

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<sup>55</sup> Israel, above n 7, 1.

<sup>56</sup> Blight, above n 5, 4; Peterson, above n 3, 219; Brown and McDuffie, above n 3, 282.

<sup>57</sup> Queensland Corrective Services, *Procedure – Management of Transgender Offender*, 12 September 2007.

<sup>58</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 23, sch 2.

<sup>59</sup> Namely, the Assistant Director-General, Custodial Operations in consultation with the Senior Director, Offender Health Services.

<sup>60</sup> These include: a) The risk the offender may pose to the safety and security of the placement facility; d) the risk to the offender or to other offenders at the placement facility; e) the views of the offender’s treating medical practitioner or psychiatrist; i) the offender’s preference for accommodation in a male or female facility: Queensland Corrective Services, *Procedure – Management of Transgender Offender*, 12 September 2007.

<sup>61</sup> *Sinden v State of Queensland* [2012] QCAT 284, [78].

visiting GP prescribed the anti-androgen which she began taking.<sup>62</sup> All of this seemed to occur in line with the 2005 'specialised medical treatments' policy,<sup>63</sup> which unlike the 2007 "transgender offender" policy, implied that discretion may be exercised in considering whether to allow commencing hormonal therapies in prison. Despite this, QCS contended that this prescription was something of an administrative oversight, as the Health Services Coordinator had been 'on holiday' at the time, and 'visiting medical practitioners were not aware of prison policy and procedures.'<sup>64</sup> This lack of attention and consistency, which the decision maker did not believe was unusual, was compounded when the Health Services Coordinator refused to allow the oestrogen prescription to be administered until a review of the policy was finalised.<sup>65</sup> It was not until October 2007 that the first definitive statement provided that Thalia was 'not to commence taking female hormone therapy.'<sup>66</sup> At the time, Thalia had already been taking the anti-androgen hormones for over a year due to the blatant lack of attention her healthcare received by QCS, who continued to do nothing even after being put on notice by Dr Bearman in 2008 that doing so would put Thalia at risk of assault and suicide due to the attendant loss of strength coupled with her First Nation status.<sup>67</sup> Brushed aside as being merely 'odd' that Thalia continued on the anti-androgen,<sup>68</sup> the negligence flowing from QCS's discriminatory treatment of Thalia caused considerable levels of personal pain and suffering, including mental distress, skin rashes, lesions, nausea, and depression, and set Thalia's sex affirmation process back by five years.<sup>69</sup>

#### IV A POLICY OF DISCRIMINATION

Despite the Tribunal investigating the rationale for the policy (and eventually *accepting* that rationale) it was never directly questioned whether the policy was, in itself, a form of direct discrimination.<sup>70</sup> This is perplexing, because in response to Thalia's complaint

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<sup>62</sup> Ibid [19], [49].

<sup>63</sup> Stating: 'generally, hormone treatment will be provided to transgender offenders who have been receiving such treatment prior to being in prison. *In other circumstances* an offender may be referred for specialist review to a specialist service for example ... *transgender clinic*': *Sinden v State of Queensland* [2012] QCAT 284, [24] (emphasis added).

<sup>64</sup> Ibid [49].

<sup>65</sup> Ibid [48]–[49], [51]–[52].

<sup>66</sup> Ibid [53]–[54].

<sup>67</sup> Ibid [20].

<sup>68</sup> Ibid [56].

<sup>69</sup> Ibid [75], [78].

<sup>70</sup> Ibid [37].

that the Department had discriminated against her on the basis of her 'gender identity',<sup>71</sup> by refusing her access to the oestrogen hormone she had been prescribed, the department contended that its decision 'was not discriminatory but consistent with its transgender policy.'<sup>72</sup> Moreover, the notable absence of any consideration of the New South Wales decision *Lawarik* appears remiss.<sup>73</sup> In that case, Anna Lawarik's similar claim was rejected on the basis that the grounds for refusing to provide hormones was a 'medical decision',<sup>74</sup> and not an application of policy, which Lawarik had submitted.<sup>75</sup> The question of whether that policy (mirroring the QCS *Transgender Offenders* policy) was discriminatory was thus not fully dealt with in that decision, yet the Tribunal continually implied throughout that had the refusal been made according to the policy, answering such a question would have been a crucial issue requiring determination.<sup>76</sup>

A policy designed to limit the rights of trans inmates must be understood as a form of institutionalised, direct discrimination. The development of policies attending to the needs of such inmates is of the utmost importance, as the phenomenon of incarcerating a trans person is unique and requires careful attention and nuanced understanding.<sup>77</sup> However, the QCS policy works to cisnormatively erase such needs by actively othering and undermining trans claims to adequate healthcare. It is not surprising that Thalia contended that 'the Department's refusal of treatment was on the basis that the Applicant did not have a genuine medical need for the treatment, but rather it was a lifestyle choice for him [sic]', because this is precisely the way the hormone therapies are regarded in the policy. As Edney illuminates:

[I]t is often difficult for transsexual prisoners to document a prior prescription for hormones, either because of the practical difficulties and limitations imposed by incarceration, or because many transsexual prisoners are indigent and do not have private physicians willing to advocate for them.<sup>78</sup>

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<sup>71</sup> *Anti-Discrimination Act 1991* (Qld) s 7(m).

<sup>72</sup> *Sinden v State of Queensland* [2012] QCAT 284, [5].

<sup>73</sup> *Lawarik v Chief Executive Officer, Corrections Health Service* [2003] NSWADT 16.

<sup>74</sup> *Ibid* [63], [66], [68].

<sup>75</sup> *Ibid* [5].

<sup>76</sup> *Ibid* [63].

<sup>77</sup> Edney, above n 5, 329.

<sup>78</sup> Edney, above n 5, 334–5; Rosenblum further highlights; 'transsexuals are already dependent on medical caretakers throughout their lives for hormones': Rosenblum, above n 5, 508.

The lives of sistergirls are further marked by devastating economic marginalisation, which can be linked to the very crimes that lead to their incarceration, and such policies overlook the fact that they are very unlikely to have the support networks, let alone the resources, to obtain such evidence. The process of “coming out” for trans people of colour to themselves, their family, and their community can be a long and difficult process, as they may feel pressured to suppress one aspect of their identity in favour of another, which might be deemed more politically and culturally important.<sup>79</sup> Furthermore, ‘to obtain an official diagnosis, doctors often require trans people to conform to rigid and restrictive stereotypes, including white, heteronormative masculinity and femininity’.<sup>80</sup> Samiec raises the important point that receiving such treatment should be ‘viewed as beneficial for a transgender prisoner’s rehabilitative process and could conceivably result in a reduction in recidivism and consequently provide a better outcome for the community.’<sup>81</sup> On the other hand, the failure to provide hormones ‘has been linked to an increased risk of auto-castration, heightened clinical depression, behavioural difficulties, illegal drug use, and suicide attempts,’<sup>82</sup> as well as negatively impacting their overall health and wellbeing.<sup>83</sup>

Unlike the policy in New South Wales and Western Australia, which protects and respects the rights of trans inmates to be housed in the correctional facility appropriate to their identity, and mandates that officers address trans inmates in line with their preferred names and pronouns,<sup>84</sup> the Queensland policy leaves such important questions to the discretion of officials.<sup>85</sup> Placing trans people based on their genitalia (that is, genitocentrically) cisnormatively “reads” their external sex markers against their subconscious sex in favour of a legally-assigned sex non-consensually forced upon them from birth. Far from merely perpetuating textual violence, such genitalia-based placement puts trans inmates ‘at a significant risk of being beaten, raped or even

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<sup>79</sup> Rosenstreich and Goldner, above n 36, 143; Purdie-Vaughns and Eibach, above n 32, 385.

<sup>80</sup> Vitulli, above n 34, 55.

<sup>81</sup> Jenny Samiec, ‘Transgender Prisoners: A Critical Analysis of Queensland Corrective Services’ New Procedure’ (2009) 2(1) *Queensland Law Student Review* 32, 41.

<sup>82</sup> Israel, above n 7, 19; Lee, above n 48, 450; Brown and McDuffie, above n 3, 287.

<sup>83</sup> Rosenblum, above n 5, 547.

<sup>84</sup> South Australia policies also highlight the ‘importance of addressing transgender inmates in gender neutral or chosen pronouns’: Blight, above n 5, 5.

<sup>85</sup> Edney reminds us that the prison system, ‘vests correctional administrators with significant power over central aspects of prisoners’ daily lives’: Edney, above n 5, 328; Blight highlights that, ‘policy with unfettered discretion leaves transgender inmates in a vulnerable position’: Blight, above n 5, 4.

killed',<sup>86</sup> by both correctional officers and inmates.<sup>87</sup> The violence trans people face outside prison is magnified in an inescapable, hierarchical culture that 'subjugates the weak to the strong and equates femininity with weakness',<sup>88</sup> and First Nation inmates more generally have further been described as 'at risk'.<sup>89</sup> The suggestion such policies are not discriminatory against trans women and sisters alike is exemplary of the ways formal equality fails those most marginalised groups in our society, and actively works to erase their difference whilst ignoring the violence aimed at such difference.<sup>90</sup>

#### V INTERROGATING GENDER, ERASING SINDEN

The tribunal's endorsement of the QCS policy is evident in the decision from the outset, where the applicant is referred to as 'Derek Sinden, *also known as Thalia*'<sup>91</sup> and pronouns gendering Thalia as male are used exclusively when referring to her. Indeed, the pronounced concern throughout the entire decision to determine the legitimacy of Thalia's trans status with regards solely to her gendered identity and appearance ended up playing a major role in the dismissal of her claim. The cissexist refusal to accept trans women's gendered identities as being as legitimate as those of cissexual women represents not merely an entirely disrespectful interrogation and demand for the "truth" of trans to be grounded in stereotypically gendered assumptions about what constitutes gendered realness,<sup>92</sup> but also functions to ensure 'cissexual gender identities continue to be unquestionable';<sup>93</sup> leaving the gendered binary intact. As Thalia's anti-discrimination claim fundamentally depended upon the argument that she was treated less favourably on the basis of her *gender identity*,<sup>94</sup> the questioning of the legitimacy of her gender unavoidably gave rise to an underlying suspicion as to the legitimacy of that very claim. It further served to position the hormone therapies as nothing more than a cosmetic enhancement that will extrinsically re-sex Thalia's body to conform with her gendered identity, instead of properly acknowledging the intrinsic benefits these

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<sup>86</sup> Mann, above n 3, 105; Vitulli, above n 34, 62.

<sup>87</sup> Israel, above n 7, 1.

<sup>88</sup> Mann, above n 3, 105; Alexander and Meshelemiah, above n 8, 282; Rosenblum, above n 5, 523.

<sup>89</sup> Blight, above n 5, 5.

<sup>90</sup> Andrew Gilden, 'Toward a More Transformative Approach: The Limits of Transgender Formal Equality' (2008) 23 *Berkeley Journal of Gender, Law & Justice* 83, 96; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 7, 17.

<sup>91</sup> *Sinden v State of Queensland* [2012] QCAT 284, [1] (emphasis added).

<sup>92</sup> Serano, above n 1, 184.

<sup>93</sup> *Ibid* 188.

<sup>94</sup> *Anti-Discrimination Act 1991* (Qld) s 7(m).

therapies would have had in easing her feelings of cognitive dissonance and relieving her stress.<sup>95</sup> The way Thalia experienced her body is mentioned once at the beginning of the decision, and this is quickly overshadowed by a gendered investigation into her childhood, where we are told Thalia ‘describes being interested in wearing makeup, reading women’s magazines and being with girls and women in preference to male company.’<sup>96</sup> Further, Thalia’s appearance was scrutinised under the gaze of the decision maker and judged as “successfully” confirming her biographical narrative.<sup>97</sup> This passing-centricism, so often exhibited by cissexuals,<sup>98</sup> seeks to legitimate the gendered identities of trans peoples by evaluating their gendered performance against the benchmark of stereotypical, Eurocentric norms of “successful” femininity; once again marking the overwhelmingly cosmetic and superficial nature of the tribunal’s assessment of Thalia’s deeply serious claim.

Aside from this, the history we are given of Thalia’s situation tragically mirrors the lives of many sistergirls. Detained at a correctional facility at 16 years of age, Thalia experienced emotional hurt, anger, drug and alcohol abuse, and suicidal ideation as she struggled to manage both her cognitive dissonance and her non-normatively gendered identity in a society that remains overtly racist, cissexist, and transphobic.<sup>99</sup> Thalia’s battle with heroin addiction led to numerous convictions for quality-of-life crimes such as possession of a dangerous drug, breaking and entering, robbery, fraud, and assault, and her ceaseless, cyclical imprisonment meant that at the time of her claim she had spent at least 25 years (over half her life) in a so-called ‘correctional’ facility.<sup>100</sup> Over this time there is evidence Thalia sought counselling from prison health services, ‘became more focussed on his [sic] transgender feelings’,<sup>101</sup> and ‘spoke with another transgender inmate’,<sup>102</sup> yet the decision does not illuminate how helpful such counselling was, nor whether she had been refused hormones previously by correctional services officials.

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<sup>95</sup> Serano, above n 1, 27, 85, 189.

<sup>96</sup> *Sinden v State of Queensland* [2012] QCAT 284, [7].

<sup>97</sup> *Ibid* [78].

<sup>98</sup> Serano, above n 1, 176.

<sup>99</sup> *Sinden v State of Queensland* [2012] QCAT 284, [8].

<sup>100</sup> *R v Derek Lulu Sinden* [2005] QCA 414, [2]; *R v Derek Sinden* [2000] QCA 408 (de Jersey CJ).

<sup>101</sup> *Sinden v State of Queensland* [2012] QCAT 284, [10].

<sup>102</sup> *Ibid*.

## VI RATIONALISING DISCRIMINATION

The tribunal's elliptical acceptance of Thalia's 'self description of his [sic] *sexual identity issues*'<sup>103</sup> as being 'genuine' relegated Thalia's account to the place of a questionable, unverified autobiography, and immediately went on to corroborate her gendered story via the medical model of trans; predicating the truth of Thalia's trans status on whether the diagnosis of GID she received was *valid* and thus implicitly evaluating her deservedness of medical attention.<sup>104</sup> Indeed, merely four paragraphs are dedicated to detailing Thalia's thoughts, desires, and experiences,<sup>105</sup> and after confirming both her gendered past and present appearance with her treating psychologist and psychiatrist,<sup>106</sup> the tribunal proceeded to review evidence tendered by numerous "experts", including the QCS officials who developed the *Transgender Offenders* policy,<sup>107</sup> as well as several psychiatrists.<sup>108</sup> Despite the fact that none of these experts had come into contact with Thalia, the deferral to their testimony operated to throw her diagnosis of GID into question whilst at the same time rationalising the operation of the policy.<sup>109</sup>

*A Fraudulent Fears*

Implicit in the interrogation into, and corroboration of, Thalia's gendered past is the fear that Thalia's request for medical care was undergirded by an *ulterior motive*. Such a fear is indirectly rendered explicit via the expert evidence cited by the tribunal, whereby it was contended that 'the motivation of self-interest,'<sup>110</sup> by inmates, as opposed to 'an honest and genuine desire,'<sup>111</sup> can be used to 'improve their conditions',<sup>112</sup> and 'minimise the impact of...incarceration',<sup>113</sup> as 'once gender reassignment is underway, it is something that can be used to manipulate the penal

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<sup>103</sup> Ibid [11].

<sup>104</sup> As Vitulli notes, "These medical practitioners serve as gatekeepers who interpret the "legitimacy" – following the medical model of transsexuality – of trans people's knowledges, gender performances, and self-descriptions.": Vitulli, above n 34, 59.

<sup>105</sup> *Sinden v State of Queensland* [2012] QCAT 284, [7]–[10].

<sup>106</sup> Ibid [14]–[15].

<sup>107</sup> Namely, Fiona Rafter & Marlene Morrison: ibid [28]–[37].

<sup>108</sup> Namely, Drs Barrett, Grant and Bell: ibid [40]–[45].

<sup>109</sup> Vitulli contends that, "these "authorities" are racialised as normatively white, heteronormative, and "free" and therefore are set up in opposition to racialised and criminalised people." Vitulli, above n 34, 58.

<sup>110</sup> *Sinden v State of Queensland* [2012] QCAT 284, [35].

<sup>111</sup> Ibid [42].

<sup>112</sup> Ibid.

<sup>113</sup> Ibid [35].

system.’<sup>114</sup> Such reasoning becomes contradictory when viewed in light of the other major justification given for denying hormonal treatment considered later — that doing so would allegedly expose Thalia to harm from other prisoners.<sup>115</sup> More importantly, portraying trans prisoners as inherently devious, manipulative, and fraudulent not only serves to completely denigrate their legitimate claims to healthcare,<sup>116</sup> but further acts to buttress the historically entrenched, cisnormative presumption at law that trans desires are *a priori* suspicious.<sup>117</sup> Yet the recitation of this evidence by the tribunal must itself be viewed as a manipulative movement. Completely disconnected from the reality of Thalia’s situation, and yet implicating her by association, these “expert” opinions allowed the tribunal to conveniently undermine her claims to adequate healthcare without ever inquiring as to whether they held any real validity. Nothing specific to Thalia in the decision gives rise to such suspicions, yet when considered in light of her status as sistergirl, this silencing of Thalia allowed the tribunal to construct, view, and dismiss her claims along a racist and cissexist caricature of ‘innate deviancy’<sup>118</sup> and in turn endorsed the discrimination, prejudice, and violence sistergirls face more generally.

### B *Dysphoric Assessments*

This anxiety over trans fraud led the experts and tribunal to further speculate as to whether Thalia’s diagnosis was genuine. Much of the expert evidence marks the space of the prison as an ‘artificial environment’,<sup>119</sup> which might lead individuals to make ‘choices’ they would not ordinarily make,<sup>120</sup> and that as such, ‘extremely careful scrutiny is needed when assessing GID.’<sup>121</sup> Undermining Thalia’s diagnosis by Dr

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<sup>114</sup> Ibid [42].

<sup>115</sup> Ibid [68].

<sup>116</sup> As Israel notes, ‘The symptoms and behaviours accompanying ... gender dysphoria ... are frequently perceived by prison staff as a manipulative gesture on their part. In fact, malingering and misrepresentation by transgender persons is rare.’: Israel, above n 7, 19.

<sup>117</sup> In a number of the cases analysed by Sharpe, the court’s fears over trans fraud are palpable: Sharpe, above n 2. See for example: *Corbett v Corbett* [1970] 2 All ER 33; *Anonymous v Anonymous* 325 NYS 2d 499 (1971); *Rees v UK* (1986) 9 EHRR 56; *Secretary, Department of Social Security v SRA* [1993] 118 ALR 467; *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603; *S-T v J* [1998] 1 All ER 431. Stone critically highlights the ways trans peoples have often been judged by non-trans peoples, ‘as possessing something less than agency ... transsexuals are infantilized, considered too illogical or irresponsible to achieve true subjectivity’: Sandy Stone (1992) ‘The Empire Strikes Back: A Posttranssexual Manifesto’ 10(2) *Camera Obscura: Feminism, Culture and Media Studies* 150, 112.

<sup>118</sup> Vitulli, above n 34, 54.

<sup>119</sup> *Sinden v State of Queensland* [2012] QCAT 284, [43].

<sup>120</sup> Ibid [34].

<sup>121</sup> Ibid [42].

Bearman, such assessments allegedly require ‘multiple clinicians’ and corroborative information from family, friends and associates about the ‘individual’s behaviour’.<sup>122</sup> Furthermore, the experts contended that trans inmates should have to satisfy the “real life test” — that is, ‘live in the role of the opposite sex’ — prior to accessing hormones,<sup>123</sup> which is apparently difficult in prison due to the fact that ‘there is no opportunity, really, to live as a woman.’<sup>124</sup> Lastly, due to the lack of specialised transgender services ‘readily available in the outside community’,<sup>125</sup> and the removal ‘from community, work and support networks that might be relied upon,’<sup>126</sup> the prison is regarded as an inappropriate environment ‘for an individual to embark on a life changing decision.’<sup>127</sup>

By completely divesting trans peoples of authority over their bodies,<sup>128</sup> and evaluating their vocalised desires in terms of compliance with a normatively gendered narrative,<sup>129</sup> the medico-legal institution has always mandated that such individuals pass through several gates prior to being diagnosed with the highly contentious GID required to gain access to hormone therapies.<sup>130</sup> Contrary to Lee’s contention that arguments against deploying the medical model of trans are ‘largely irrelevant in the prison context,’<sup>131</sup> the immense amount of power and control exerted by the prison officials and doctors in determining the truth of trans desire, and the reliance of the law on such expert testimony, is made blatantly apparent in the decision. Requiring trans people to complete the “real life test” prior to accessing hormones has similarly been criticised by trans people, as it assesses their ability to perform and function according

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<sup>122</sup> Ibid [45].

<sup>123</sup> Ibid [43], [45].

<sup>124</sup> Ibid [36].

<sup>125</sup> Ibid [30].

<sup>126</sup> Ibid [34].

<sup>127</sup> Ibid [33].

<sup>128</sup> Vitulli, above n 34, 57, 59.

<sup>129</sup> Dean Spade, ‘Mutilating Gender’ in Stryker and Whittle, above n 34, 319; Joanne Meyerowitz, ‘A “Fierce and Demanding Drive’ in Stryker and Whittle, above n 34, 375; Serano, above n 1, 124.

<sup>130</sup> Many find the diagnosis oppressively restrictive and pathologising, whilst others fear that its removal would frustrate medico-legal claims to adequate healthcare. See Patricia Elliot, ‘Engaging Trans Debates on Gender Variance: A Feminist Analysis’ (2009) 12(1) *Sexualities* 5, 14–15; Lev, above n 10, 178; Prosser, above n 10, 106-108; Wallbank, above n 6, 473; Lee, above n 48, 450; Dean Spade, ‘Resisting Medicine, Re/modelling Gender’ (2003) 18 *Berkeley Women’s Law Journal* 15, 35; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV Text Revision* (American Psychiatric Publishing, 2000) 576.

<sup>131</sup> Lee, above n 48, 465.

to cissexual norms, can destroy relationships, and puts their safety at risk.<sup>132</sup> The argument that such a requirement would be impossible to fulfil whilst incarcerated predicates ideals of “real womanhood” on wholly extrinsic factors and conveniently ignores the fact that many trans women ‘consistently maintain their female identity year after year in an all-male prison.’<sup>133</sup> The insistence on collating numerous corroborative reports from family, friends, and colleagues places a colossal burden on individuals who have likely experienced severe levels of rejection, and like Thalia, may have spent the majority of their lives in prison. Indeed, the presumption that such support networks would exist outside prison, and that trans health services (which are limited in number and exist exclusively in capital cities) would be “readily available” appears completely detached from the everyday experiences of incarcerated trans people of colour and presumes a standard of middle-class whiteness.

The portrayal of the trans prisoner as inherently devious and/or confused about their “life choices” served to justify the intense interrogation and regulation called for by these experts, and retrospectively undermined the diagnosis made by Dr Bearman. It also placed the locus of blame solely with Thalia, instead of questioning the prison’s failure to undertake the kind of detailed assessments supposedly required, and the prison’s inability to ensure trans inmates have access to trans support networks to aid in their rehabilitation and mental wellbeing. Instead, the tribunal implicitly accepted the submission that QCS did not have the necessary resources, and in turn constructed the needs of trans people as something less than medically essential. Indeed, when Dr Bearman admitted that ‘had she had the luxury of the resource and time she would prefer to undertake a more in depth investigation,’ trans healthcare was figured as a kind of superfluity the prison system simply could not indulge. Despite the protracted inquiry into the difficulties of diagnosing inmates with GID, the decision-maker ultimately accepted that such questions were ‘after the fact’, as the department had already accepted that diagnosis.<sup>134</sup> Rather than accepting her trans status, this move by the decision-maker left the question mark over Thalia’s diagnosis completely intact,

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<sup>132</sup> This test often requires trans people to “live” as the opposite sex for 1–2 years and gain employment, volunteer work or study to test both to minimise often fictional “trans regrets” and to assess the cis communities acceptance of their ability to “pass” before prescribing hormones. See Viviane Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (University of Chicago Press, 2000) 199.

<sup>133</sup> Israel, above n 7, 3.

<sup>134</sup> *Sinden v State of Queensland* [2012] QCAT 284, [46]–[47], [70].

whilst enabling the rejection of her alternative claim of discrimination — that the department had failed to fully investigate whether there were ‘proper clinical grounds’ justifying the commencement of the oestrogen hormones.<sup>135</sup>

### C *Dangerously Sexed Bodies*

The last major ground used to rationalise the QCS policy was the contention that a medical procedure allowing inmates to (re)sex their bodies for the first time in prison would cause ‘operational issues within the prison environment’,<sup>136</sup> as it would disrupt the ‘security and good management’ of the entire facility.<sup>137</sup> Apparently, ‘an offender on the treatment would invariably be at a higher risk in an all male prison environment,’<sup>138</sup> because ‘there would be prisoners less understanding about what the individual is going through’,<sup>139</sup> and the effects of the hormone therapies ‘may entice other prisoners to engage in behaviour that might have the potential to threaten security.’<sup>140</sup> The literature is unanimous in finding that trans women are at an increased risk of assault and rape when they are placed according to their birth assigned sex,<sup>141</sup> however this must be viewed in connection with their non-normatively gendered expressions and identities, as opposed to the changes brought on by hormones. Trans inmates undergoing hormonal treatments have not reported an increase in violence,<sup>142</sup> and, in the case of *Sundstrom v Frank*,<sup>143</sup> such reasoning was refuted where the ‘prisoners showed that the denial of medical treatment would not rationally lead to a *reduction* in assaults.’<sup>144</sup> Viewing the transsexed body as inherently dangerous and threatening to security, both QCS and the decision-maker concluded that the visibility of sex markers such as breasts would inevitably lead to the destabilisation of the prison system, instead of inquiring as to whether sexual assault was *already* a daily occurrence for Thalia, and

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<sup>135</sup> Ibid [4], [74].

<sup>136</sup> Ibid [31].

<sup>137</sup> Ibid [36].

<sup>138</sup> Ibid [30].

<sup>139</sup> Ibid [36].

<sup>140</sup> Ibid.

<sup>141</sup> Tedeschi, above n 48, 43; Samiec, above n 81, 37; Edney, above n 5, 332; Blight, above n 5, 3; Peterson, above n 3, 224; Sydney Tarzwell, ‘The Gender Lines and Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners’ (2006) 38(1) *Columbia Human Rights Law Review* 167, 179.

<sup>142</sup> Brown and McDuffie, above n 3, 288.

<sup>143</sup> *Sundstrom v Frank*, 2007 U.S. Dist. LEXIS (2007).

<sup>144</sup> Alexander, above n 8, 280 (emphasis in original).

in turn avoided having to address *why* she had been placed in an all-male facility in the first place.<sup>145</sup>

Far from merely justifying the policy, this victim blaming *par excellence* became the key factor leading the tribunal to dismiss Thalia's anti-discrimination claim. Reducing the outcome of the hormonal treatments to a purely aesthetic change that would put the inmate and the correctional facility at risk,<sup>146</sup> and rejecting the applicant's hypothetical comparator,<sup>147</sup> the decision maker concluded that the Department would not have treated another inmate 'with a diagnosed medical condition, not life threatening, and whose treatment ... is likely to adversely impact on the good management and security of the prison,'<sup>148</sup> any differently.<sup>149</sup> Whilst this decision is exemplary of the ways anti-discrimination laws are overwhelmingly inadequate in protecting trans people, and accommodating the intersectional nature their oppression can take,<sup>150</sup> there is no room here for an extensive critique. Such a critique would highlight the problematic application of the landmark case *Purvis*,<sup>151</sup> and the way that the principle of viewing discrimination in light of 'surrounding circumstances' worked to completely subsume the very real damage caused by the discriminatory QCS policy.<sup>152</sup> It would further pinpoint the inevitable problems associated with the "comparator model" when applied to the incomparable experience of being trans, and the way a 'detriment based' model would have likely yielded a better outcome for Thalia.<sup>153</sup>

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<sup>145</sup> As Vitulli argues, 'the courts naturalize and normalize rape and assault in prisons, which become an institutionalized component of punishment behind prison walls; Vitulli, above n 34, 62.

<sup>146</sup> *Sinden v State of Queensland* [2012] QCAT 284, [68].

<sup>147</sup> *Ibid* [65]. The applicant contended that 'the appropriate comparator for determining if the applicant's treatment in the circumstances is less favourable, is another prisoner who doesn't have the attribute (gender identity) but has a medical condition diagnosed for the first time in prison, is referred to a medical practitioner and prescribed medication and permit to take the medication.'

<sup>148</sup> *Ibid* [68].

<sup>149</sup> *Ibid* [70].

<sup>150</sup> Gildden, above n 90; Richael Faithful, '(Law) Breaking Gender: In Search of Transformative Gender Law' (2010) 18(3) *American University Journal of Gender, Social Policy, and the Law* 45; Sharpe, above n 2, 142; See also Kelly, above n 2.

<sup>151</sup> *Purvis v New South Wales* (2003) 217 CLR 92; for critiques see further Jacob Campbell, 'Using Anti-Discrimination Law as a Tool of Exclusion: A Critical Analysis of the *Disability Discrimination Act* 1992 and *Purvis v NSW*' (2005) 5 *Macquarie Law Journal* 201; Kate Rattigan, 'Case Note: *Purvis v New South Wales* (Department of Education and Training) – A case for Amending the *Disability Discrimination Act* 1992 (Cth)', (2004) 28(2) *Melbourne University Law Review* 532.

<sup>152</sup> *Sinden v State of Queensland* [2012] QCAT 284, [63].

<sup>153</sup> O'Neill, Rice and Douglas, above n 11, 527.

## VII CONCLUSION: BEYOND COMPENSATION

The entirely discriminatory nature of the QCAT decision to dismiss Thalia's claim cisnormatively erased her identity and worked to justify both her negligent treatment by QCS and their *Transgender Offenders* policy. The compensation of \$20 000 calculated by the decision-maker appears wholly insufficient in light of the cruel and unusual punishment she was forced to endure and the damage this caused.<sup>154</sup> Nevertheless, in light of the absurdity of the tribunal's findings, the likelihood that an appeal may be successfully made out provides the perfect opportunity to not merely seek justice for Thalia, but for all trans inmates in Queensland. A finding that the QCS policy is in direct breach the *Anti-Discrimination Act* could conceivably lead to that policy being radically amended in order to appropriately meet the unique needs of trans inmates. The continued subjection of this devastatingly marginalised group to truly torturous conditions in prison is an issue that cannot continue to go erased and ignored.

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<sup>154</sup> *Sinden v State of Queensland* [2012] QCAT 284, [78].

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