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Law

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‘ALL ABOUT THAT BASS’ AND PHOTOSHOPPING A MODEL’S WAIST: INTRODUCING BODY IMAGE LAW

MARILYN BROMBERG* AND CINDY HALLIWELL**

ABSTRACT

When women see images of extremely thin women, their body image may suffer as a result. Their poor body image can develop into an eating disorder. A handful of governments took action to try to stop models who have BMIs below a specific number from working and/or require a warning on photoshopped images (that modify models to make them appear thinner). The Authors of this article (“Authors”) created a term to apply to this newly developing area of law: Body Image Law. The Authors argue that there are some areas in which the actions that governments took in Body Image Law may be lacking: insufficient sanctions in some jurisdictions, using BMI solely to assess models’ fitness to work and a failure to address: (i) the tiny sample sizes that fashion designers provide to models to wear and (ii) using the term ‘plus size’ beside images of certain models. This is the first scholarly article known to the Authors to create a term that applies to this newly developing area of law.

I INTRODUCTION

A triumph in Body Image Law has occurred during the past decade. The triumph is that a handful of governments, including the Madrid Regional Government and the Italian, Australian, Israeli and French Governments, took action to try to stop models below a minimum BMI from modelling and/or required photoshopped photographs to contain a warning stating that they were altered. If one Googles the actions that these governments took, they can quickly find that they sent the media into a frenzy resulting in significant publicity. It’s not surprising that the media gave the actions that the governments took significant

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publicity: poor body image and eating disorders are a significant problem in Western societies that shows no signs of ending.

Do not be surprised that you have not yet heard the term Body Image Law. The authors of this article (“Authors”) created the term Body Image Law to apply to an area of law that recently developed. This area of law encompasses the bills, laws and government actions (such as establishing parliamentary inquiries and creating policies) that may help to improve the body image of the general public, and particularly of young people. The Authors believe that using the term Body Image Law may emphasise the importance of this field.

Body Image Law can include measures such as: (1) requiring people to have a minimum body mass index (“BMI”) to work as models; (2) requiring editors and other relevant people to post a warning on images of people who they have photoshopped to appear thinner; (3) forbidding the altering of images of the bodies of models to make them appear thinner; (4) requiring retailers to sell clothes that come in diverse sizes (including clothes in larger sizes); and (5) forbidding certain words from accompanying images of models or recommending that certain words do not accompany images of models e.g. a government policy that recommends that the words ‘plus size’ are not placed beside a model’s image.

Body Image Law is part Fashion Law¹ because it affects aspects of fashion models’ work. It is also part Health Law² because it involves trying to improve the health of the public, or more specifically, the body image among the general public. The next section of this article includes a discussion of the connection between health and body image.

Lawyers who practise Body Image Law may be able to advise people and businesses in the fashion, advertising and media industries (in addition to other industries) about whether they are following the laws in criminal proceedings or civil litigation in this area. They can also represent people (including models) and businesses in the industries in litigation that may occur

¹ Fashion Law involves Trademark Law, Copyright Law, Employment Law and Corporate Law, among other areas, see: M del Pilar Lopez and E Monge, ‘The Luxury of Fashion Law’ (2013) *World Intellectual Property Review* 83, 83.

² Health Law ‘embraces not only the practice of medicine, but also that of the non-medical healthcare professions, the administration of health services and the law’s role in maintaining the public health’: Jonathan Montgomery, *Health Care Law* (Oxford University Press, 2nd ed, 2003) 1, quoted in Ben White, Fiona McDonald and Lindy Willmott, *Health Law in Australia* (Lawbook Co, 2nd ed, 2014) 6.

because they breached the law. These lawyers can also advise governments on laws that they should consider passing in this area or modifications that they should make to existing law.

There is, currently, a paucity of peer-reviewed academic research in Body Image Law in Australia. For example, at the time of writing this article, the Authors found only one article that was published in an Australian peer-reviewed journal in this area.³ That article was published before a significant event in Body Image Law occurred: the French Government passed a law in this area.

However, the Authors will argue in this article that the relevant governments’ actions in Body Image Law may be inadequate in certain ways. This article will explain the connection between images, body image and eating disorders. It will then discuss the actions that several governments took in this area and some of the most important reasons why the governments’ actions may be insufficient: (1) inadequate sanctions in some jurisdictions; (2) problems with using BMI as a measurement tool; (3); they do not address sample sizes; (4) they do not address using the term ‘plus size’; and (5) other miscellaneous reasons.

II THE CONNECTION BETWEEN IMAGES, BODY IMAGE AND EATING DISORDERS

If one understands how images can be a factor which contribute to poor body image, then the importance of Body Image Law becomes clear. Body image ‘is defined as how people feel about the way they look and the way their body functions’.⁴ There appears to be a complicated link between poor body image and health problems. Health researchers have found that body image can impact upon health and well-being. For example, body image can prevent people from joining a gym or a sports team due to worry about how they look in exercise clothing. It can also impact upon whether people ‘restrain [their] eating’.⁵ A person often has a negative body image at the same time as engaging in behaviours that may increase their chance of developing a sexually transmitted disease.⁶ Poor body image can lower self-confidence,

³ See Marilyn Krawitz, ‘Beauty Is only Photoshop Deep: Legislating Models’ BMIs and Photoshopping Images’ (2014) 21 *The Journal of Law and Medicine* 859.

⁴ All Party Parliamentary Group on Body Image (UK) & Central YMCA, *Reflections on Body Image* (2012) 9.

⁵ Sarah Grogan, ‘Body Image and Health Contemporary Perspectives’ (2006) 11(4) *Journal of Health Psychology* 523, 525.

⁶ Sonya Satinsky et al, ‘My ‘Fat Girl Complex’: a Preliminary Investigation of Sexual Health and Body Image in Women of Size’ (2013) 15(6) *Culture, Health & Sexuality* 710, 711.

contribute to depression and cause additional physical and emotional problems.⁷ Studies of women have found that body image ‘may actually be a mediator of the association of overweight/obesity with outcomes such as depression and weight loss’.⁸

Eating disorders are characterised by disturbed eating behaviours and attitudes and have typical onset in adolescence. Anorexia nervosa, bulimia nervosa and eating disorders not otherwise specified are the three main categories. The lifetime prevalence of eating disorders among female adults in Australia is 16% with males comprising at least 10% of cases. Eating disorders have wide ranging physical impacts, including hypotension, bradycardia, gastrointestinal conditions, osteoporosis, electrolyte disturbances, hypoglycaemia, anaemia, growth retardation and cardiac arrhythmias. Mortality is elevated in all eating disorders, particularly anorexia nervosa.⁹

It was estimated that 914,000 people in Australia suffered from eating disorders in 2012.¹⁰ The corresponding cost, including caring for the people suffering, was approximately \$69 billion.¹¹

Different cultures and races have different definitions of beauty. During the past 50 years, the beauty ideal for women in Western countries has been very thin.¹² The media, advertisers and the fashion industry use very skinny models and they also use photoshop or similar programs to alter images to make women appear thinner.¹³ They may take extreme measures to alter images of women’s bodies. Relevantly, the American Medical Association discussed a photograph in which ‘a model’s waist was slimmed so severely, that her head appeared to be wider than her waist’.¹⁴ ‘Media images portraying slim models and representing the current beauty ideal of thinness, are ubiquitous in our society. We are presented with slim ideals on a daily basis’.¹⁵ Most people are unaware that an image that they looked at was photoshopped.¹⁶ Photoshopping is very common. Jessica Alba, Christina Hendricks,¹⁷ and Adele¹⁸ are examples of some of the celebrities whose images were photoshopped.

⁷ All Party Parliamentary Group on Body Image (UK) & Central YMCA, *Reflections on Body Image* (2012) 7.

⁸ Tilda Farhat, Ronald J Iannotti and Laura J Caccavale, ‘Adolescent Overweight, Obesity and Chronic Disease-Related Health Practices: Mediation by Body Image’ (2014) 7 *Obesity Facts* 1, 3.

⁹ Julie McCormack et al, ‘A Hub and Spokes Approach to Building Community Capacity for Eating Disorders in Rural Western Australia’ (2013) 21 *Australian Journal of Rural Health* 8, 8.

¹⁰ Lauren Gatt et al, ‘The Household Economic Burden of Eating Disorders and Adherence to Treatment in Australia’ (2014) 14(1) *BMC Psychiatry* 1, 1.

¹¹ *Ibid.*

¹² Reena N Glazer, ‘Women’s Body Image and the Law’ (1993) 43 *Duke Law Journal* 113, 114 - 115.

¹³ Krawitz, above n 3, 859. Also see this article for a definition of photoshopping.

¹⁴ Allison Clyne Tschannen, ‘An Argument for Incentivizing Voluntary Regulation of the Fashion and Modeling Industries’ (2014) 6(20) *Washington University Jurisprudence Review* 421, 452.

¹⁵ Esther K Papias and Kim AH Nicolaije, ‘Inspiration or Deflation? Feeling Similar or Dissimilar to Slim and Plus-Size Models Affects Self-Evaluation of Restrained Eaters’ (2012) 9(1) *Body Image* 76, 76.

¹⁶ Kerry C Donovan, ‘Vanity Fair: the Cost, Controversy and Art of Fashion Advertisement Retouching’ (2012) *Notre Dame Journal of Law, Ethics and Public Policy* 581, 589.

¹⁷ *Ibid* 583.

¹⁸ Tschannen, above n 14, 422.

A considerable body of research has found that when women see images of thin models, it negatively impacts their body image¹⁹ because women want to look similar to the models.²⁰ Women may feel that people will reject them if they are not thin.²¹ Health researchers have found that individuals who suffer from poor body image are more likely to develop eating disorders.²² There is a 'prominence of body image disturbance in eating disorders'.²³ When women focus on being thin as the ideal body type, it can cause them to have 'a distorted body image' and they may develop eating disorders.²⁴ 'Negative body image is one of many risk factors that can predict the development of eating disorders'.²⁵ People who suffer from Anorexia Nervosa have a 'distorted body image' and diet compulsively.²⁶ The DSM-5 states that 'body image disturbance [is] required for a diagnosis of anorexia nervosa.'²⁷ Children and teenagers 'are particularly vulnerable to messages and images conveyed through the mass media'²⁸ because many of them 'cannot discriminate between what they see and what is real'.²⁹

¹⁹ See, eg, Esther K Papiés and Kim AH Nicolaije, 'Inspiration or Deflation? Feeling Similar or Dissimilar to Slim and Plus-Size Models Affects Self-Evaluation of Restrained Eaters' (2012) 9(1) *Body Image* 76, 76; Kimberly Bissell and Amy Rask, 'Real Women on Real Beauty: Self-Discrepancy, Internalization of the thin ideal, and Perceptions of Attractiveness and Thinness in Dove's Campaign' (2010) 29(4) *International Journal of Advertising* 643, 644; Phillippa C Diedrichs, Christina Lee and Marguerite Kelly, 'Seeing the Beauty in Everyday People: a Qualitative Study of Young Australians' Opinions on Body Image, the Mass Media and Models' (2011) 8 *Body Image* 259, 259; Kelsi Herbert, 'A Cultural Shift Away from Unattainable Towards Realizable Beauty' (2014) 10 *Regent Journal of International Law* 159, 159.

²⁰ Kelsi Herbert, 'A Cultural Shift Away from Unattainable Towards Realizable Beauty' (2014) 10 *Regent Journal of International Law* 159, 159 - 161; Kimberly Bissell and Amy Rask, 'Real Women on Real Beauty: Self-Discrepancy, Internalization of the thin ideal, and Perceptions of Attractiveness and Thinness in Dove's Campaign' (2010) 29(4) *International Journal of Advertising* 643, 644.

²¹ Amanda M Czerniawski, 'Disciplining Corpulence: The Case of Plus-Size Fashion Models' (2012) 41(2) *Journal of Contemporary Ethnography* 127, 131.

²² PC Diedrichs, C Lee and M Kelly, 'Seeing the Beauty in Everyday People: a Qualitative Study of Young Australians' Opinions on Body Image, the Mass Media and Models' (2011) 8 *Body Image* 259, 259; women who worry about their body image are susceptible to developing eating disorders: Eric Stice et al, 'A Preliminary Trial of a Prototype Internet Dissonance-Based Eating Disorder Prevention Program for Young Women with Body Image Concerns' (2012) 80(5) *Journal of Consulting and Clinic Psychology* 907, 907. There is a strong link between self esteem and eating disorders: Nela Cicmil and Karin Eli, 'Body Image Among Eating Disorder Patients with Disabilities: a Review of the Published Case Studies' (2014) 11 *Body Image* 266, 267. 'Body image disturbance is widespread' among those suffering from eating disorders: Deborah Mitchinson, 'Disentangling Body Image: The Relative Associations of Overvaluations, Dissatisfaction, and Preoccupation with Psychological Distress and Eating Disorder Behaviors in Male and Female Adolescents' (2016) *International Journal of Eating Disorders* 1, 2.

²³ Deborah Mitchinson, 'Disentangling Body Image: The Relative Associations of Overvaluations, Dissatisfaction, and Preoccupation with Psychological Distress and Eating Disorder Behaviors in Male and Female Adolescents' (2016) *International Journal of Eating Disorders* 1, 1.

²⁴ Brittany N Beckner and Rachael A Record, 'Navigating the Thin-Ideal in an Athletic World: Influence of Coach Communication on Female Athletes' Body Image and Health Choices' (2016) 31(3) *Journal of Health Communication* 364, 365.

²⁵ Neva Piran, 'New Possibilities in the Prevention of Eating Disorders: The Introduction of Positive Body Image Measures' (2015) 14 *Body Image* 146, 148.

²⁶ Jan Wright, Christine Halse and Gary Levy, 'Preteen Boys, Body Image, and Eating Disorders' (2016) 19(1) *Men and Masculinities* 3, 7.

²⁷ American Psychiatric Association, DSM-5, *Feeding and Eating Disorders*, Fifth Edition.

²⁸ Anne M Morris and Debra K Katzman, 'The Impact of the Media on Eating Disorders in Children and Adolescents' (2003) 8(5) *Journal of Pediatrics and Child Health* 287, 288.

²⁹ Ibid.

In a research study, young women took a survey regarding their self-esteem. Then they spent thirty minutes looking through fashion magazines. The young women took the survey again and the majority of the women's self-esteem was lower.³⁰ Further, a study of female college students found that when they saw photographs of very skinny women, their 'body anxiety' increased.³¹

Seeing images of very skinny women in the media and in advertising can be a factor that causes poor self-esteem which can result in eating disorders. Consequently, some governments intervened to protect the vulnerable.

III A BRIEF SUMMARY OF THE MAIN ACTIONS OF SOME GOVERNMENTS IN THIS AREA

A handful of governments have taken a variety of actions to try to improve the body image among the general public in their country. Madrid's Regional Government and the organisers of Madrid's Fashion Week worked together to ban models with a BMI of less than 18 from modelling at Fashion Week in September 2006,³² because two supermodels died from eating disorders: Luisel Ramos and Ana Carolina Reston.³³ Ramos collapsed at the end of a Fashion Week show in Uruguay with a BMI of 14.5.³⁴ Reston, from Brazil, had a BMI of 13.4 when she died two years after being told that she was fat at a photo casting.³⁵ After the minimum required BMI was established for Madrid's Fashion Week, medical professionals attended Fashion Week to check the models' BMIs.³⁶

The Chamber of Fashion in Milan signed a document addressed to the Italian Government in which fashion designers agreed that their models would need to provide a medical certificate that stated that they had a BMI of 18.5 in 2006. The document also stated that models had to

³⁰ Sujata Moorti and Karen Ross, 'Introduction: Gender and the Plus Size Body' (2005) 5(2) *Feminist Media Studies* 237, 241.

³¹ Kimberly Bissell and Amy Rask, 'Real Women on Real Beauty: Self-Discrepancy, Internalization of the thin ideal, and Perceptions of Attractiveness and Thinness in Dove's Campaign' (2010) 29(4) *International Journal of Advertising* 643, 645.

³² Sarah Budow, 'Role-Modeling: How the Americans with Disabilities Act Blocks BMI-Based Hiring Bans in the United States' (2013) 20 *Cardozo Journal Law & Gender* 139, 149.

³³ Cassandra A Soltis, 'Dying to be a Supermodel: Can Requiring a Healthy BMI be Fashionable?' (2009) 26(1) *Journal of Contemporary Health Law & Policy* 49, 49.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Budow, above n 32, 149.

be at least 16 years old.³⁷ Politicians, doctors, models and stylists worked together on this initiative.³⁸

In 2009, Kate Ellis, the former Australian Minister for Youth, formed the National Advisory Group on Body Image (“Group”) to advise the Australian Government on actions that it could take to improve the body image among the general public. The Group created the Voluntary Industry Code of Conduct on Body Image (“Australian Code”).³⁹ The Australian Code states that the fashion industry should use models who ‘are clearly of a healthy weight’ and over 16 years old.⁴⁰ It also states that images should not be modified so that bodies look ‘unrealistic or unattainable through healthy practises’.⁴¹ The Australian Code further says that the relevant industries should ensure that photoshopped images state that they were altered and retailers should sell clothing in diverse sizes.⁴²

More recently, the Israeli Government passed *The Act Limiting Weight in the Modelling Industry (5772-2012)* (ISR) (“Israeli Photoshop Law”).⁴³ The Israeli Photoshop Law says that models must present their employer with a certificate from their doctor that states that they have a BMI of at least 18.5 in order to work. The doctor must have given the certificate to the model within three months prior to the model working.⁴⁴ The Israeli Photoshop Law also states that if someone photoshops an image to make the model appear thinner, the image must say that it was modified. The statement must be at least 7% of the image and it must be clearly visible.⁴⁵ The Israeli Government was the first in the world to pass a law in this area,⁴⁶ though other governments had tried beforehand, but failed.⁴⁷

³⁷ Ibid, 149-150.

³⁸ Barbara McMahon, ‘Catwalk Ban on the Skinny Model in Italy’, *The Guardian* (online), 3 December 2006 <<http://www.theguardian.com/world/2006/dec/03/italy.barbaramcmahon>>.

³⁹ Krawitz, above n 3, 864.

⁴⁰ Australian Government, *Voluntary Industry Code of Conduct on Body Image* The Butterfly Foundation <http://thebutterflyfoundation.org.au/wp-content/uploads/2012/12/A10-0361-YTH-Body-Image-Communication-Products_conduct_webaw.pdf>.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Kelsi Herbert, ‘A Cultural Shift Away from Unattainable Towards Realizable Beauty’ (2014) 10 *Regent Journal of International Law* 159, 164.

⁴⁴ Israeli Photoshop Law, ss 1, 2a.

⁴⁵ Ibid ss 2a, 2b.

⁴⁶ Krawitz, above n 3, 868.

⁴⁷ See, eg, the Healthy Media for Youth Act HR 4925, 111th Congress in the United States, as discussed in Marilyn Krawitz, ‘Beauty Is only Photoshop Deep: Legislating Models’ BMIs and Photoshopping Images’ (2014) 21 *The Journal of Law and Medicine* 859, 870.

In 2015, the French Government passed a law that is similar to the Israeli Photoshop Law (“French Photoshop Law”).⁴⁸ The French Photoshop Law states that ‘[c]ausing a person to seek excessive leanness by encouraging prolonged food restrictions which result in exposing the person to life-threatening danger or indirectly compromising their health’ is a criminal offence. It is punishable by one year imprisonment and a 10,000 Euro fine.⁴⁹ If someone modifies an image to make a model appear thinner, then a warning must accompany the image that states ‘edited photograph’. If a person does not ensure that the warning accompanies the modified image, they can receive a fine of 37,500 Euro or 30% of the amount spent on advertising.⁵⁰ A person cannot work as a model if they have a BMI lower than the one that the Higher Health Authority and the Health and Labour Ministers require.⁵¹ If a modelling agency earns money from employing a model who has a BMI less than the one required by law, its directors can face six months in prison and a 75,000 Euro fine.⁵² It is particularly significant that the French Government passed the French Photoshop Law, since Paris is one of the world’s fashion capitals.

The main action that the pertinent governments took in Body Image Law involves requiring models to have a minimum BMI. This article will discuss BMI in detail in section IVB.

The French Photoshop Law appears similar to the Israeli Photoshop Law, except that it involves specific criminal sanctions for breaching it. This article will discuss sanctions in section IVA. The French Photoshop Law does not state the size that a warning on a photoshopped image must be. It is possible that additional regulations may state this information. Otherwise, a French magazine editor could hypothetically make the warning so small that it would be difficult for readers to see, although one would hope that they would not breach the spirit of the clause in this way.

It makes sense that the Israeli Photoshop Law and the French Photoshop Law both contain complementary sections regarding models’ BMIs and manipulating or photoshopping images.

⁴⁸ ‘French MPs Back Ban on Skinny Catwalk Models’, *BBC* (online), 3 April 2015 <<http://www.bbc.com/news/world-europe-32174364>>.

⁴⁹ French Photoshop Law, Article L. 3232-11. The Authors note that the quote from the French Photoshop Law was taken directly from Ms Bianca Jolly’s translation from French to English. All references in this article to material from the French Photoshop Law were taken from Ms Jolly’s translation.

⁵⁰ French Photoshop Law, Article L. 2133-3.

⁵¹ French Photoshop Law, Article L. 7123-21.

⁵² French Photoshop Law, Article L. 7123-27.

If they just contained laws regarding models’ BMIs, then even if models are a healthy size, editors could easily edit their images so that models still appear to be an unhealthily thin size. Since the actions that the relevant governments took can impact upon the body image among the general public, it is crucial to scrutinise these actions and consider where they may be lacking.

IV SPECIFIC AREAS WHERE GOVERNMENT ACTION MAY BE LACKING

A *A Lack of Adequate Sanctions*

A problem with some of the actions that governments have taken in Body Image Law is that in some jurisdictions there are insufficient sanctions for people or businesses who do not comply. For example, people who breach the Israeli Photoshop Law do not face criminal charges. They could face civil lawsuits. A parent of a child who suffered from an eating disorder could sue the editors of a publication in which there was an image of a model who had a BMI under 18.5 if they think that the publication contributed to the poor body image of their child and led to her developing an eating disorder. It would be difficult to prove that the publication caused the child to develop poor body image.⁵³

One would not think that the parents would have evidence of the state of the child’s body image before seeing the publication (in order to compare it to the child’s body image after seeing the publication) to use as evidence in their litigation. The child may have looked at several publications that breached the Israeli Photoshop Law over a lengthy time period. It could be difficult to prove which one of the publications (if any) contributed to the child’s poor body image or that some of the publications partially caused it in addition to many other factors (e.g. that the child is a perfectionist, the child was bullied at school). Why might one image contribute to a child’s poor body image when another might not?⁵⁴ It could also be difficult to apportion quantum among the publications if a judicial officer finds that all of the publications contributed to the child’s poor body image. There could be access to justice issues that could prevent a parent from commencing such a lawsuit. If a parent sues a publication, the publication

⁵³ Herbert, above n 43, 166.

⁵⁴ Krawitz, above n 3, 868.

(as a company that makes a profit) may have the resources to hire an experienced legal team to act on its behalf. This is as opposed to a parent, who may not have the resources to hire an experienced legal team for litigation that lasts for a lengthy period. However, at the time of writing there is no evidence of a lawsuit having been brought under the Israeli Photoshop law, so the above must remain conjecture until such time as one is.

People and companies who breach the Australian Code do not face criminal sanctions, or arguably any sanction at all. This could be one of the reasons why in 2014, Australian fashion designer Alex Perry used a model at the Australian Fashion Week who was so thin that a magazine editor later called the model's agent and inquired about her health. Perry later apologised for using the model and his need to apologise could be interpreted as a public relations sanction.⁵⁵ This may also be one of the reasons why researchers found that only one of seven Australian magazines that they examined complied with the Australian Code fully, although most of the magazines complied with some of it. The researchers added that further research regarding the implementation of the Australian Code was necessary 'to track its adoption and impact'.⁵⁶

The French Photoshop Law appears to contain adequate sanctions if a person or company breaches it, although some may argue that the sanctions are too severe. Entities that breach the French Photoshop Law can be imprisoned. As stated previously, if someone modifies an image to make a model appear thinner and does not post a warning to accompany it, they will receive a fine only, not face possible imprisonment. This may be insufficient to act as a deterrent to the public, particularly if the relevant individual or company can easily afford to pay the fine that they would receive. It may be that a director of a French company that breached the Photoshop Law could be personally liable, if the corporate veil is pierced. However, consideration of such issues is beyond the scope of this paper.

Further, whether the criminal sanctions found in the French Photoshop Law are sufficient depend on the French police or a French Government body enforcing it. If the French police or

⁵⁵ Matthew Bamford, 'Fashion Label Owner Alex Perry Admits 'Serious Lapse of Judgement' by Using 'Too Skinny' Cassi Van den Dungen on Catwalk', *The Daily Telegraph* (online), 9 April 2014 <<http://www.dailytelegraph.com.au/news/fashion-label-owner-alex-perry-admits-serious-lapse-of-judgement-by-using-too-skinny-cassi-van-den-dungen-on-catwalk/story-fni0cx4q-1226878806177>>.

⁵⁶ Elizabeth Reid Boyd and Jessica Moncrieff-Boyd, 'Swimsuit Issues: Promoting Positive Body Image in Young Women's Magazines' (2011) 22(2) *The Health Prevention Journal of Australia* 102, 102, 104, 105.

a French Government body do not enforce the French Photoshop Law, then there may be no practical sanctions resulting from a breach. Enforcing the French Photoshop Law may be difficult: in particular, checking images on the internet to ensure that they contain the requisite warning if they were photoshopped. The French modelling industry is huge, and it would be difficult, if not impossible, for the French police or a French Government body to check the BMI of all French models for all photoshoots. Notwithstanding this, the mere existence of criminal sanctions may pressure the French fashion, advertising and media industries to comply with the law. It will also be important that the French Government sufficiently publicises the French Photoshop Law to ensure that the fashion, modelling and advertising industries are aware of it. This publicity is necessary because the French Photoshop Law requires industries to make significant changes to their long term practises. No evidence was found to suggest that the French Photoshop Law is being enforced or that its sanctions are having the desired effect at the time of writing this article. It is expected that such evidence will be available in the future.

B *Problems with Using BMI as a Measurement Tool*

One change that the industries mentioned will need to make is to check all models’ BMIs to ensure that they meet the minimum BMI that the government requires. The Israeli Photoshop Law, the French Photoshop Law and the actions that the Italian and Spanish Governments took use BMI as the sole measurement tool to decide whether models can work. This is another area in which the actions that they took may be lacking.

Medical practitioners worldwide use the BMI (which stands for Body Mass Index) as a measurement tool. BMI calculates weight in kilograms divided by height in centimetres squared.⁵⁷ The World Health Organisation (“WHO”) states that a person who has optimal health has a BMI between 18.5 and 24.9.⁵⁸ A BMI below 18.5 is considered underweight while a BMI equal to or above 25 is regarded as overweight.⁵⁹ The Israeli Photoshop Law requires models to have a minimum BMI of 18.5, the French Photoshop Law requires models to have a minimum BMI but does not state the number, the Madrid Regional Government requires

⁵⁷ World Health Organisation, *Obesity and Overweight Fact Sheet No.311* (January 2015) <<http://www.who.int/mediacentre/factsheets/fs311/en/>>.

⁵⁸ World Health Organisation, *Mean Body Mass Index (BMI)* (2015) <http://www.who.int/gho/ncd/risk_factors/bmi_text/en/>.

⁵⁹ World Health Organisation, *Obesity and Overweight Fact Sheet No.311* (January 2015) <<http://www.who.int/mediacentre/factsheets/fs311/en/>>.

models to have a minimum BMI of 18 and the Chamber of Fashion in Milan requires models to have a minimum BMI of 18.5.

Using BMI as the sole indicator of whether a model can work or not is contentious. It has been argued that using BMI as the sole indicator discriminates against naturally thin models.⁶⁰ The medical community has criticised the BMI by stating that it does not take into account many relevant factors, including: age, gender, bone density, body frame, race or nationality. It also fails to consider cartilage, water and muscle.⁶¹ BMI ‘frequently misclassifies’ the people who it measures.⁶² A 2012 study compared BMI with other health measures and found that applying the BMI incorrectly identified 30% of participants as obese.⁶³ BMI was also found to be problematic when assessing the elderly who lost both height and muscle mass due to their age.⁶⁴

When BMI was introduced as a standard measurement tool, it was designed to measure population health and it was not intended to be used on an individual level.⁶⁵ In addition, WHO cautions doctors who use BMI as a measurement tool. It states that BMI ‘should be considered a rough guide because it may not correspond to the same degree of fatness in different individuals’.⁶⁶

Some models who were required to have a minimum BMI to work added weights to their hair in order to have a higher BMI.⁶⁷ If another measurement tool for models is required in addition to the BMI, then it could be harder for models to cheat successfully. Admittedly, if models resort to cheating when there is a single health measurement that they need to pass, then they

⁶⁰ Herbert, above n 43, 161.

⁶¹ Budow, above n 32, 140.

⁶² Penelope J Goacher, Rod Lambert and Peter G Moffatt, ‘Can Weight-Related Health Risk be more Accurately Assessed by BMI, by Gender Specific Calculations of Percentage Body Fatness?’ (2012) 79 *Medical Hypotheses* 656, 656.

⁶³ Nirav R Shah and Eric R Braverman, ‘Measuring Adiposity in Patients: The Utility of Body Mass Index (BMI), Percent Body Fat, and Leptin’ (2012) 7(4) *PLoS ONE* <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0033308>>.

⁶⁴ *Ibid.*

⁶⁵ Sarah Budow, ‘Role-Modeling: How the Americans with Disabilities Act Blocks BMI-Based Hiring Bans in the United States’ (2013) 20 *Cardozo Journal Law & Gender* 139, 140. Population health is ‘the health outcomes of a group of individuals, including the distributions of such outcomes within the group’ – Paul Batchelor, ‘What Do We Mean by Population Health’ (2012) 40 *Community Dentistry and Oral Epidemiology* 12, 12.

⁶⁶ World Health Organisation, *Obesity and overweight Fact sheet No. 311* (January 2015) <<http://www.who.int/mediacentre/factsheets/fs311/en/>>.

⁶⁷ Jennifer Sky, ‘Are Models Being Forced Into Extreme Measures to Conceal Their Weight?’ on *Observer/ Style* 21 April 2015 <<http://observer.com/2015/04/young-models-are-not-to-blame-for-industry-pressure-to-be-thin/>>.

may try additional cheating tactics when there is a second. However, if models must pass a more holistic health assessment, it may become harder to cheat.

1 *Other Methods to Measure the Models*

Other medical measurements can be used in addition to the BMI to calculate models’ sizes to decide whether they are fit to work. These include: Body Fat Percentage, Waist to Hip and Waist to Height Ratios, waist measurements, CT Scans and MRIs.

Body Fat Percentage is a measurement which medical practitioners can find easily when they examine their patients. Body Fat Percentage considers more factors than BMI. It incorporates the width and size of an individual’s waist, hips, thighs, neck, biceps, forearm and wrist.⁶⁸ It also considers weight, height and gender.⁶⁹ Few studies have considered the relationship of Body Fat Percentage and ‘specific health outcomes’.⁷⁰ If a person has a very high Body Fat Percentage, then they are obese. If they have a very low Body Fat Percentage, then it may be difficult for their body to function.⁷¹ Body Fat Percentage has been found to be an accurate method of classifying someone as overweight in sport.⁷²

Another potential medical method to assess whether models should be allowed to work is Waist to Hip and Waist to Height ratios to determine where the body stores fat⁷³ and the risk of cardiovascular disease.⁷⁴ These methods consider fat distribution and content, such as visceral fat, which surrounds vital organs and can represent chronic health risks.⁷⁵ Another possible

⁶⁸ Health Status, *About the Body Fat Calculator* (2015) <<http://www.healthstatus.com/calculate/body-fat-percentage-calculator>>. For more information about Body Fat Percentage, see: Yuehjen E Shao, ‘Body Fat Percentage Prediction Using Intelligent Hybrid Approaches’ (2014) 5 *The World Scientific Journal* 1, 1; Phyo Kyaw Myint et al, ‘Body Fat Percentage, Body Mass Index and Waist-to-Hip Ratio as Predictors of Mortality and Cardiovascular Disease’ (2014) 100 *Heart* 1613, 1615.

⁶⁹ Health Status, *About the Body Fat Calculator* (2015) <<http://www.healthstatus.com/calculate/body-fat-percentage-calculator>>.

⁷⁰ Phyo Kyaw Myint et al, ‘Body Fat Percentage, Body Mass Index and Waist-to-Hip Ratio as Predictors of Mortality and Cardiovascular Disease’ (2014) 100 *Heart* 1613, 1615.

⁷¹ Yuehjen E Shao, ‘Body Fat Percentage Prediction Using Intelligent Hybrid Approaches’ (2014) 5 *The World Scientific Journal* 1,1.

⁷² E Jespersen et al, ‘Total Body Fat Percentage and Body Mass Index and the Association with Lower Extremity Injuries in Children: a 2.5 Year Longitudinal Study’ (2014) 48 *British Journal of Sports Medicine* 1497, 1497.

⁷³ Health Status, *About the Waist to Hip Ratio Calculator* (2015) <<http://www.healthstatus.com/perl/calc.cgi?calc=whr&snum=>>>.

⁷⁴ MP Ashwell, P Gunn and GS Gibson, ‘Waist-To-Height Ratio Is A Better Screening Tool Than Waist Circumference and BMI For Adult Cardiometabolic Risk Factors: Systematic Review and Meta-Analysis’ (2012) 13(3) *Obesity Reviews* 275, 276.

⁷⁵ *Ibid* 283.

method to assess whether models should be allowed to work is by measuring their waistlines; however, applying the aforementioned ratios will produce more accurate results.⁷⁶ Cancer Victoria states that waistlines of more than 80 cm for women and 94 cm for men increase a person's risk of cancer.⁷⁷

Other measurements which take into account multiple variables include CT scans and MRI's which can differentiate between fat and muscle. Dual-energy X-ray absorptiometry (DEXA) scans usually measure bone density.⁷⁸ However, these can also differentiate between bone, fat and muscle mass for accurate health readings.⁷⁹

Despite the criticisms of BMI and the existence of other measurement tools, BMI remains the simplest, cheapest and 'least invasive' method⁸⁰ to apply to models to decide whether they can work. BMI's simplicity makes it very efficient for the fashion industry to use. Doctors can calculate BMI on site at shows and castings, like at Madrid Fashion Week in 2006. Doctors can also examine models to check for eating disorders.⁸¹ BMI can be an early indicator that a person suffers from an eating disorder.⁸² However, it is possible to require the fashion, modelling and advertising industries to use a measurement in addition to the BMI.

A major issue in Body Image Law is forbidding models who appear very skinny from working. What if a model has a BMI that is considered healthy, but the model still appears extremely skinny - sufficiently skinny that when people look at the model, their body image is negatively affected? This is an important issue that may warrant further consideration. Since models currently have low BMIs, they can fit into very small sample sizes.

C *Does Not Address Very Small Sample Sizes*

⁷⁶ Cancer Victoria, *Be a healthy weight* <<http://www.cancervic.org.au/preventing-cancer/weight/bmi>>.

⁷⁷ Ibid.

⁷⁸ Shah and Braverman, n 63.

⁷⁹ Ibid.

⁸⁰ Department of Health and Human Services, Center for Disease Control and Prevention, *Body Mass Index: Considerations for Practitioners* <<http://www.cdc.gov/obesity/downloads/bmiforpractitioners.pdf>>.

⁸¹ Herbert, n 43, 161.

⁸² Budow, n 32, 140.

Fashion designers supply very small sample sizes to models to wear. Top designers prefer designing for very skinny bodies.⁸³ A sample size ‘is the one-off sample that designers usually produce for the runway, or red carpets, before they send into mass production’.⁸⁴ Sample sizes are typically size 0 in the United States and size 6 in Australia.⁸⁵ None of the actions that the relevant governments took address the issue of sample sizes being very small. This is another area where the actions that the relevant governments took may be lacking.

Models may not be hired if they do not fit into the sample sizes that designers provide.⁸⁶ This perpetuates an industry of extremely thin models. In order to remain thin and employable, some models eat tissues⁸⁷ and cotton balls dipped in orange juice to make them feel full.⁸⁸

In May 2012, all 19 editors of *Vogue* world-wide announced that they will no longer work with models who are under 16 or who appear to have an eating disorder.⁸⁹ The magazine also committed to encouraging designers to send clothes that do not require very thin models to be hired for photoshoots.⁹⁰

The Council of Fashion Designers in America thought about changing their sample sizes from 0 to 4 in 2012.⁹¹ This has not occurred to date. If governments require models to have a minimum BMI, then fashion designers may have no choice but to make their sample sizes larger. On the other hand, if governments require sample sizes to be larger, then the fashion industry would have to hire larger models. Researchers in France and Israel may consider investigating whether the sample sizes in these countries have become larger after the Photoshop Laws in each country were passed. Just as the relevant governments did not address

⁸³ Georgia Graham, ‘Former Vogue editor reveals models are eating tissues to stay thin in tell-all book’ *International Business Times* (online) 2 April 2013, <<http://www.ibtimes.com/former-vogue-editor-reveals-models-are-eating-tissues-stay-thin-tell-all-book-1165223>>.

⁸⁴ Penny Newton, ‘Sofia Vergara: ‘Sample Sizes are Insane!’ *Yahoo Lifestyle* (online) 6 June 2013, <<https://au.lifestyle.yahoo.com/fashion/trends/a/17500448/Sofia-Vergara-says-designer-sample-sizes-are-insane/>>.

⁸⁵ *Ibid.*

⁸⁶ Briana Domjen and Elle Halliwell, ‘Shock at the Parade of Strutting Skeletons at Australian Fashion Week’ *The Daily Telegraph* (online) 8 April 2014 <<http://www.dailytelegraph.com.au/entertainment/sydney-confidential/shock-at-the-parade-of-strutting-skeletons-at-australian-fashion-week/story-fni0evc9-1226877186365>>.

⁸⁷ Georgia Graham, ‘Vogue editor reveals models are eating tissues to stay thin in tell-all book’ *International Business Times* (online) 2 April 2013 <<http://www.ibtimes.com/former-vogue-editor-reveals-models-are-eating-tissues-stay-thin-tell-all-book-1165223>>.

⁸⁸ Amethyst Tate, ‘What is the cotton ball diet? New extreme weight-loss fad causing young girls to risk their health and their lives’, *International Business Times* (online), 21 November 2013 <<http://www.ibtimes.com/what-cotton-ball-diet-new-extreme-weight-loss-fad-causing-young-girls-risk-their-health-their-lives>>.

⁸⁹ Allison Clyne Tschannen, ‘An Argument for Incentivizing Voluntary Regulation of the Fashion and Modeling Industries’ (2014) 6(20) *Washington University Jurisprudence Review* 421, 435; Samantha Critchell, ‘Vogue bans models who are too skinny, underage’, *Today Style* (Online), 4 May 2012, <<http://www.today.com/style/vogue-bans-models-who-are-too-skinny-underage-2680405>>.

⁹⁰ Tschannen, above n 14, 435.

⁹¹ Kit Johnson, ‘Importing the Flawless Girl’ (2012) 12 *Nevada Law Journal* 831, 848.

the issue of extremely small sample sizes, they have not addressed using the term ‘plus size’ beside images of certain models.

D *Does Not Address the Term ‘Plus Size’*

The modelling and fashion industries may use models who are a healthy size and who look to be a healthy size. They may also refrain from photoshopping images to make models appear thinner. Yet, they may still add the words ‘plus size’ next to the images. There does not appear to be any law, government policy or government recommendation to discourage or forbid them from doing so. This is another area where the actions that the relevant governments took in Body Image Law may fall short.

The definition of ‘plus size’ in modelling is different from the cultural definition of ‘plus size’. ‘Plus size’ in modelling means over an American size eight and the modelling industry typically considers these models ‘fat’.⁹² For many people, the term ‘plus size’ ‘evokes controlling images of fat and lazy folk who sit glued to their television screens’.⁹³ They assume that ‘plus size’ clothes are only for overweight people, but that is untrue. ‘Plus size’ models do not reflect ‘plus size’ clothes.⁹⁴ ‘Plus size’ models are often the same or a similar size to the average person.⁹⁵ The average Australian woman weighs 71.1 kilos⁹⁶ and is a size 16 Australian (12 American).⁹⁷

In the opinion of the #drop the plus movement, a young woman who sees a photograph of a healthy woman with the label ‘plus size’ beside her ‘is in danger of believing that her own body is bigger than it should be and not normal’.⁹⁸ The woman may then develop poor body image.⁹⁹ If the young woman compares herself to the ‘plus size’ model and feels that they have similar bodies, it can have ‘deflating effects’.¹⁰⁰ ‘Plus size’ Australian model Robyn Lawley states that

⁹² Czerniawski, above n 21, 128.

⁹³ Ibid.

⁹⁴ Laurel Dawn Romeo and Young-A Lee, ‘Exploring Apparel Purchase Issues with Plus-Size Female Teens’ (2015) 19(2) *Journal of Fashion Marketing and Management* 120, 121.

⁹⁵ Czerniawski, above n 21, 128.

⁹⁶ Australian Bureau of Statistics, *4338.0 - Profiles of Health, Australia, 2011-13* (29 October 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4338.0main+features212011-13>>.

⁹⁷ Sharon Hayes, *Sex, Love and Abuse: Discourses on Domestic Violence and Sexual Assault* (Palgrave Macmillan, 2014) 89.

⁹⁸ #drop the plus (2015) <<http://droptheplus.org/>>.

⁹⁹ Ibid.

¹⁰⁰ Papias and Nicolaije, above n 15, 76.

the words ‘plus size’ do not ‘have any good connotation[s] to it’.¹⁰¹ Lawley is an American size 12.¹⁰²

Since a model who is ‘plus size’ is often the size of an average woman or close to the size of an average woman, it does not make sense to use the term to label models.¹⁰³ Arguably, the term ‘plus size’ should remain because ‘plus size’ models are currently larger than the average model.

Given that the term ‘plus size’ does not state whether the size is ‘plus’ in comparison to other models or in comparison to a member of the public, one can argue that the fashion, media and advertising industries should cease using it. Also, if the relevant industries start using models who have average sized bodies and who are not very thin, all models may be what is currently considered ‘plus size’. It would not make sense to give all models the ‘plus size’ label.

If the words ‘plus size’ cannot be used, then it is possible that instead other words that have a similar meaning may be used. If legislation is passed or an advisory opinion from a government is released that forbids using or recommends not using the words ‘plus size’, it should be relatively broad to ensure that other phrases with a similar meaning are not used as a substitute.

E *Other Miscellaneous Reasons*

There are other issues that indicate that the actions that the relevant governments took in Body Image Law may be lacking which are outside the scope of this article. Firstly, the actions do not address the widespread sale of magazines that encourage women (especially young women) to lose weight and to diet, which can negatively impact upon the body image of women in the general public.¹⁰⁴ Secondly, the Israeli Photoshop Law, the French Photoshop Law and the actions that the Madrid and Italian Governments took do not directly address educating the

¹⁰¹ Georgina Safe, ‘Model Robyn Lawley: “Don’t Call Me Plus Size”’, *Sydney Morning Herald* (online), 23 February 2014 <<http://www.smh.com.au/lifestyle/fashion/model-robyn-lawley-dont-call-me-plussize-20140222-339tf.html>>.

¹⁰² Laura Stampler, ‘Meet the First Plus-Size Model in *Sports Illustrated* Swimsuit Edition History’, *Time* (online), 5 February 2015 <<http://time.com/3697015/sports-illustrated-swimsuit-edition-plus-size-model-robyn-lawley/>>.

¹⁰³ *#drop the plus* (2015) <<http://droptheplus.org/>>.

¹⁰⁴ Kimberly Bissell and Amy Rask, ‘Real Women on Real Beauty: Self-Discrepancy, Internalization of the thin ideal, and Perceptions of Attractiveness and Thinness in Dove’s Campaign’ (2010) 29(4) *International Journal of Advertising* 643, 644. The authors note that the magazine *Cosmopolitan* in Australia banned articles about dieting: Elizabeth R Boyd and Jessica Moncrieff-Boyd, ‘Swimsuit Issues: Promoting Positive Body Image in Young Women’s Magazines’ (2011) 22(2) *Health Promotion Journal of Australia* 102, 102.

public about body image. Educating the public about body image may be thought to be separate from Body Image Law and something that a different ministry (such as education, as opposed to health) is responsible for.

Education targeting schools, ‘including primary, secondary, and university provide an excellent opportunity for accessing large inclusive groups of young people’.¹⁰⁵ The Butterfly Foundation in Australia educates and supports young people, parents and professionals who work with young people.¹⁰⁶ It offers courses to help build self esteem and a growing body of evidence suggests that ‘body image interventions have been shown to increase resilience to appearance-focused media’.¹⁰⁷ Unfortunately, the Butterfly Foundation will be subject to funding cuts, which will impact upon the support that it can provide.¹⁰⁸

V CONCLUSION

This article argued that the actions that governments took to date in Body Image Law may be lacking in certain respects. Notwithstanding this, one should applaud the governments’ efforts, because they have incited debate and provoked international discussion. The governments had sufficient gumption and dedication to be pioneers in this field. In particular, it would have been easy for the Israeli and French Governments – which took legislative action – to have stated instead that the fashion, media and advertising industries should self-regulate and fix the problem themselves. They could have refused to consider passing legislation.

This appears to be the stance of the Australian Government.¹⁰⁹ Admittedly, it may be difficult to deal with the ramifications of passing laws that could cost people their jobs (such as models) and could upset the key players in important, influential and profitable industries.

¹⁰⁵ Emma Halliwell, ‘Future directions for positive body image research’ (2015) 14 *Body Image* 177, 186.

¹⁰⁶ Butterfly Foundation for Eating Disorders, *Support for Australians experiencing eating disorders* (2015) <<http://thebutterflyfoundation.org.au/>>.

¹⁰⁷ Halliwell, above n 105, 187.

¹⁰⁸ Sophie Scott and Rebecca Armitage, ‘Eating Disorder Patients Left in the Lurch as Butterfly Foundation Helpline Faces Axe’, *ABC* (online), 16 May 2016

<<http://www.abc.net.au/news/2016-05-16/life-saving-helpline-for-anorexia-patients-set-to-be-axed/7412358>>.

¹⁰⁹ See, eg, Jessica Wright, ‘Skinny Models: Australia Welcomes Paris Ban’, *Sydney Morning Herald* (online), 19 March 2015

<<http://www.smh.com.au/lifestyle/fashion/skinny-models-australia-welcomes-paris-ban-20150319-1m36t7.html>>.

The debate and discussion that occurred due to the actions that the relevant governments took in Body Image Law could be instrumental to start the cultural change necessary in this area; encourage governments to modify the laws or actions that they took to improve them; encourage governments that have not taken action in this area to do so; encourage governments to work together to ensure that there are as few loopholes in this area as possible (such as models who have a very low BMI leaving one country that has a law in this area to work in another country that does not have such a law) and encourage researchers to provide important evidence based research to advise governments on the best actions to take in Body Image Law.

In the song ‘All about the Bass’, Meghan Trainor sings ‘I see the magazine workin’ that Photoshop/We know that shit ain’t real, come on now, make it stop’.¹¹⁰ It is difficult to advise governments on how to ‘make it stop’. Improving poor body image among the general public is a complex issue that contains several variables. For example, it requires the fashion, advertising and media industries to stop photoshopping women’s bodies to make them appear thinner. It also requires educating the public, and particularly young people, about body image.

The Authors acknowledge that they provided many criticisms of the governments’ actions in Body Image Law. They did not offer express recommendations because they want to wait until sufficient time has transpired since the Israeli Photoshop Law and the French Photoshop Law were passed so that they can learn from the experiences in those jurisdictions. One can infer some recommendations from this article (e.g. modify the Israeli Photoshop Law to include criminal sanctions for breaching it.) Providing express recommendations (particularly based on quantitative or qualitative research) is an important topic that is outside the bounds of this article - but ought to be the subject of future research.

¹¹⁰ See the lyrics published by Sony/ATV Allegro, <<http://www.azlyrics.com/lyrics/meghantrainor/allaboutthatbass.html>>.