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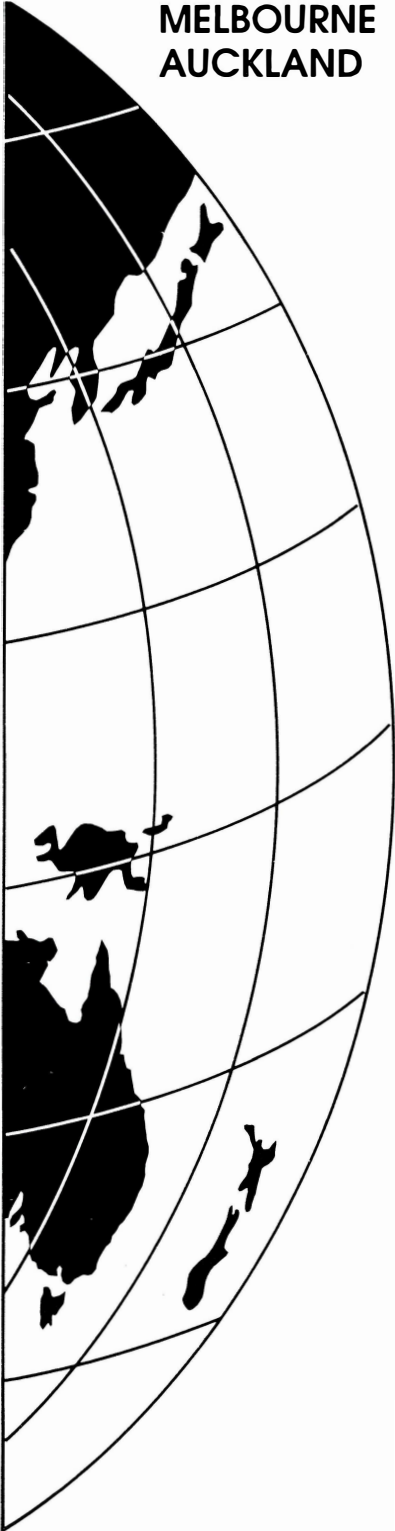
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Please contact Gerry Pennisi, Partner, on **(07) 3229 4388**

Brisbane Office:

4th Floor, Santos House
215 Adelaide Street
Brisbane Qld 4000

Tel: (07) 3229 4388
Fax: (07) 3229 7981

Maleny Office:

Maple Street
Maleny

Tel: (074) 94 2436
Attended Friday

contents

EDITORIALpage 5

TRAFFICKING IN WOMEN:
AUSTRALIA'S ROLE IN THE EXPLOITATION OF FILIPINO WOMEN *Sabina Lauber*page 5

HOW MUCH CAN THIS WOMAN TAKE? *Susan Harris*page 12

SEXING THE SHARIA- ISLAMIC LAW OR CULTURAL CONSTRUCT? *Dahlia Eissa* page 19

PARENTING AND LEGAL PRACTICE: INCOMPATIBLE? NEARLY! *Zoe Farmer* page 24

QUEENSLAND ABORTION LAW *Robyn Mills* page 27

LEGALISATION OR DEGRADATION *Natalie Hamilton* page 32

SOLE PRACTICE IN PADDINGTON *Rhonda Penny* page 37

WOMEN IN MEDIATION *Bernadette Rogers* page 39

PRO-WOMAN AND PRO-LIFE *Ruth Mortimer* page 41

WOMEN AND THE LAW page 43

Editorial

"Political correctness", and its effects on those who attempt to speak what they perceive to be "The Truth", is currently a popular inclusion in features, editorials and books, and highlights the shrill pitch of moral panic in society. Interestingly, and unsurprisingly, fingers have been pointed at "feminism" as one of the principle initiators in what is being defined as the latest attack on liberties of thought and speech.

We do not wish to canvass the relative merits of freedom of speech- it has been discussed *ad infinitum*. Rather, we argue that such claims do not reflect the multiplicity of beliefs encompassed within what is falsely unified as a singular and didactic feminism. There is no one understanding of what it is to be "woman", "feminist", "empowered", "oppressed", just as there is no one understanding that may be claimed as "The Truth". Thus, we believe it to be of the utmost importance to respect those voices which speak from a position that is alien to our own. To quote Jacqueline Jago, editor of last year's Pandora's Box, "How can I protest the historical silence of women, which is the fountain of so much of our suffering, even as I tell other women to be quiet? Dissent should make a pariah of no woman". We hope this respect is the light by which you read the following articles.

Welcome to *Pandora's Box 1995*, the second in what WATL hopes will become a tradition in our organisation. *Pandora's Box* follows the pattern of all Women and the Law publications and events, providing a forum where issues relating to women and their participation in the law can be presented and debated. In recognition of the plurality of experience, we have included articles discussing problematic, or largely unrecognised areas of the law as they effect women. The viewpoints expressed in these articles do not necessarily reflect those of the editors, nor do they reflect any official position adopted by WATL as a corporate entity. Copyright remains with the authors, and italicised introductions are the interpretations of the editors.

We extend particular thanks to the WATL President, Dahlia Eissa for her seemingly never-ending drive, enthusiasm and support- Dahlia, you continue to be an inspiration to WATL members and associates. A big thank you to our house-mate Tina Fricke, who has not complained about the tap tap tapping of the keyboard late into the night, and who is always ready with a cup of coffee and sympathetic murmurings.

We gratefully acknowledge Nicol Robinson and Kidd, Gadens Ridgeway and the Queensland Law Society for their moral and financial support.

We hope you enjoy Pandora's Box, September 1995.

Kristin Natalier and Alan King
Editors

Trafficking in Women:

Australia's Role in the Exploitation of Filipino women

Sabina Lauber, a lawyer with the Australian Law Reform Commission, recently returned from a conference in Manila on the sexual exploitation of women, where she presented a paper on Australian and International laws affecting Filipino women in Australia. In this paper she draws together her views on the Philippines sex industry, from information gathered in the Philippines and Australia, discussions at the conference and discussions with women in the industry.

Long since the eradication of overt slavery, a more subtle form of slavery of women continues. The trafficking of women is a transnational and systematic phenomenon that exploits women. Women are trafficked within countries (rural to urban areas for prostitution) and to other countries (mail order brides, migrant employment etc) to provide sexual services and cheap domestic labour. The supply of such services is generally from developing nations. The demand for such services is often from industrialised nations. At the core of this phenomenon are issues of sexuality, power between the genders and power between wealthy and poor nations.

In this paper I examine the sexual exploitation of Filipino women being trafficked as prostitutes or mail order brides in an attempt to establish the real causes for exploitation.¹ Although the discussion focuses on women, it is equally relevant to children in the sex industry. Indeed, many of the women being trafficked are still children. I focus specifically on Australia's involvement in this sexual exploitation. I go on to establish the international legal obligations of Australia and the Philippines to protect the rights of trafficked women and argue that current efforts to do so are inadequate. Some current laws help to facilitate rather than end the exploitation of women.

Sex Tourism and Prostitution

The Philippines is fast becoming the sex capital of the world and Australian men have demonstrated their enthusiasm for its offerings. Australians make up a sizeable proportion of tourists to the Philippines seeking sexual services. Many Australians also profit from the Philippine sex industry by organising sex tours from Australia or by running bars in the Philippines which employ prostitute women.²

The reasons behind the Sex Industry

My discussions with women in the Philippines indicated a complex web of reasons for the extent of the industry and the high involvement of foreign men. Poverty is only a part of the picture. Developing countries have been a source of human and natural materials for developed societies since colonisation began. This supply has been entrenched in transglobal economic exchange through foreign debts and the blind pursuit of economic development.³

The Philippine government's readiness to encourage foreign military presence on its shores played a large role in initially fuelling the sex industry. American and Philippine leaders signed the RP-US Military Base Agreement on March 14, 1946, giving the Americans "unhampered use" of 23 military facilities throughout the Philippines for 99 years.⁴ These bases became crucial stopping points for troops during the Vietnam War and continued to be a focal point for soldiers on Rest and Relaxation. A highly profitable sex industry formed around the bases to meet the demand generated by the US military.⁵ Although illegal, the sex industry based on R&R was directly regulated by the authorities. The Philippine and the US base authorities jointly managed sexual health clinics where the focus was on the provision of safe sexual organs rather than women's health. "Clean" women were given coloured cards to show to potential clients. This was effectively American sexual colonisation of the Philippines

in which the Philippine authorities facilitated the prostitution of women as a goodwill gift to improve foreign relations.

When the US bases closed, the sex industry shifted its focus to sex tourists. Angeles city, which was once a favourite sexual playground for the nearby military base, is now dominated by Australians. It is estimated that up to 80% of the bars and hotels in this city are managed by Australians. Still littered with ash and debris from the Mt Pinatapu eruption, the area offers little of the natural beauty found in other parts of the Philippines. However, shuttle buses regularly take tourists directly from Manila airport to Angeles. For the men who wish to go on to beach resorts, Angeles provides women for “hire” as a holiday mate.

Tourism is a major source of foreign dollars for the Philippines. Income generated from tourism amounted to US\$ 2.12 billion in 1993, being a 26.79% increase on receipts in 1992.⁶ Clearly the Asian-Pacific governments know the value of the sex industry and maintain a vested interest in ensuring it continues. For example, in October 1980, the Deputy Prime Minister of Thailand, Boonchoo Rojanasthian told provincial governors to encourage tourism by developing scenic spots and encouraging “certain entertainments which some of you might find disgusting or embarrassing because they are related to sexual pleasures”.⁷

These attitudes to prostitution must be seen in the social and ideological context of the Philippines where 90% of the population is Catholic and a woman’s role is still considered to be that of domestic labourer and reproducer. The Church generally shunned the topic of prostitution and stigmatises the women in the industry. The power of Catholicism in politics means that prostitution is rarely considered to be an important issue at the political level and little genuine analysis of the problem occurs. Economic modernisation demands that Filipino women become part of the productive labour force without the necessary social and political changes to facilitate this new role. The result is that many women are thrown into income options which are exploitative.⁸

However, while all of these factors have contributed to the “supply side” of the industry, it cannot survive without sufficient demand. As long as society accepts male rights over women’s bodies and as long as men have a desire to hold power in sexual situations, this industry will continue to flourish.⁹ It is no coincidence that as women’s rights and the rights of sex workers in industrialised nations become entrenched and enforceable, the rights of women in developing nations are at greater risk from increased sex tourism and other forms of trafficking.

Laws and Conditions

Prostitution in the Philippines can be found in many forms. Prostituted women work under the guise of “entertainers”, “hostesses”, or “guest relations officers” in bars, nightclubs, massage parlours, karaoke bars, beer houses, restaurants or on the streets. Most hidden are the women working in Casa (brothels) who have generally been sold into debt bondage by their families.

Technically, prostitution or soliciting prostitution is illegal in the Philippines. However, the law is rarely enforced. Authorities turn a blind eye to what occurs, and often use the opportunity to illicit bribes or free sex from the women. In my discussions with a “streetwalker”, she told me of her frequent experiences of violence with the police. “They want money or sex- they often beat the women if they refuse” she said. While we were talking, a well known policeman drove past, in civilian clothing, looking for streetwalkers. “Joyful”, as he is known, had been responsible for several beatings of prostituted women and caused three women to have miscarriages while in detention over the last three months.

Where the law is enforced, it is the women, not the male managers profiting from the trade or clients buying sex, who are targeted. Streetwalkers can be charged under the vagrancy laws. When establishments are raided, only women are taken by the police and often paraded before the media in scanty costumes.¹⁰ In addition, it is well known that graft and corruption are commonplace in the Philippine administration and law enforcement agencies. This poses enormous problems for effective law reform.

Despite the illegality of prostitution, many Philippine laws have de facto legitimised the industry. Special taxes on “entertainment” establishments, food and alcohol tax, health cards for the women, etc, ensure that the government obtains its share of the profits. However, nothing exists to allow the women to enforce labour standards, minimum wages or legal rights. Studies in the Philippines show that many workers are paid as low as one third of the minimum wage stipulated for waiting, cashiering and dancing.¹¹

Prostituted women are particularly vulnerable to health problems. These include sexually related diseases, AIDS, threats endangering physical safety from clients and police, pregnancy, abortions and most commonly, mental health or stress related illnesses. Catholicism bans all forms of contraception and abortion. This is compounded by the lack of bargaining power many prostituted women have with clients to negotiate safe sex.

The availability of health care is vital. However, the health care provided must be holistic and for the benefit of the women, rather than to protect potential clients.¹² The focus on keeping women free of sexually transmittable diseases is inadequate. Support, counselling and drug rehabilitation are essential for the self-esteem and empowerment of the women. They are rarely provided.¹³

Mail Order Brides

The “mail order bride” industry is part of the international industry that traffics women from developing countries to industrialised countries. Like prostitution, it is too simplistic to say that this phenomenon is caused merely by poverty. It is also too simplistic to say that the industry is part of a natural urge for companionship. Like other forms of sex trafficking, the mail order bride industry is based on a mix of gender, class and ethnic subordination.

Internationally, Asian-Pacific brides dominate the mail-order bride market, although women from Eastern Europe are increasing in participation.¹⁴

Australian men are active participants in this industry. In 1979, 490 Filipinos came to Australia as brides. In 1986 this had risen to 2100 and continues to increase.¹⁵ Many of these marriages have been successful. However, the unsuccessful marriages have left some disturbing legacies.

* Since 1980 there have been 27 recorded deaths, disappearances and suicides of Filipino women and children in Australia. Based on the figures we do have, Filipino women are 5.6 times more likely to be the victim of spousal homicide than women in the general Australian population.¹⁶ These figures are based on reported cases, and should not be interpreted as comprehensive.

* A high rate incidence of violence, which refers to violence against women by a male partner in a relationship, is known to occur in some Australian-Filipino marriages. Again, exact figures are unknown.

* Images of Filipino women that are promoted in Australia are often negative and contribute to an environment that discourages these women from asserting their legal and human rights.

* Newly sponsored Filipino women often lack access to and knowledge of legal and community services in Australia. Where they do use such services, concern has been raised about sexism and racism prevalent in law enforcement agencies.

* Several cases of serial sponsorship have come to light, where an Australian man sponsors several spouses or fiancées to Australia, and where the relationships are often characterised by violence.

These are not a series of isolated and circumstantial incidents, but a systematic social phenomenon based on the structural imbalance of power between men and women.

The reasons behind the industry.

The reasons behind the industry must again be seen as two-fold- there are supply side factors and demand side factors.

On the supply side, women enter the industry in the hope of a better life, of love and of opportunities. This avenue is actively encouraged by the tradition of exporting Filipinos abroad. Migration is an economic strategy for bringing in foreign dollars and successful “brides” have been called the “heroes of the Filipino economy, whose remittances...have become a reliable and sizeable contribution to the nation’s welfare”.¹⁷

The demand side factors are less publicised. Gender and ethnic stereotypes of Filipino women present them as submissive, erotic and exotic. It is no coincidence that the rise in demand for Asian-Pacific wives coincides with the increasing assertiveness of Western women. Australian agencies “selling” mail order brides promote this supposed difference between Filipino and Australian women as a key selling point.¹⁸

From the first moment that a man writes to a potential mail order bride, he is in a position of power. He continues to be so when his Filipino fiancée arrives and when he discovers that she is in fact educated and assertive. The threat of deportation or the shame of a failed marriage in a Catholic community ensure that he will often continue to hold this power.

Any reform to this area must involve the cooperation of nations demanding and supplying mail-order brides or the problem will just move elsewhere. The Philippine government attempted to ban advertising for wives and matchmaking agencies in 1990. Since the attempted ban, the demand for Chinese women for mail order brides has risen.¹⁹

of Australia and the

Australia and the Philippines have signed and ratified several international conventions and other instruments that protect women. As parties to these instruments they are bound to comply with the obligations in them, which may include making these obligations into domestic law. Unfortunately, international law is difficult to enforce and although some action may already have been taken, more is required.

One of the most important of these instruments is the Convention on the *Elimination of All Forms of Discrimination Against Women*. Article 6 imposes obligations on States to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women. The CEDAW monitoring committee stated that “in addition to established forms of trafficking, there are new forms of sexual exploitation such as sex tourism, the recruitment of domestic labour from developing countries to

work in developed countries and organised marriages between women from developing countries and foreign nationals".²⁰ They also noted that these practices put women at special risk of violence and abuse. States who are parties to this convention are required to regularly report to the monitoring committee on their progress in meeting their obligations. These reports are a valuable information source for women's pressure groups.

The *Declaration on the Elimination of Violence against Women*, although not binding, represents a clear expression of the intention of States to act against all types of violence against women. That document defines violence to include trafficking in women and forced prostitution, as well as physical and psychological violence.²¹ The Declaration calls on States to use due diligence to investigate and punish acts of violence against women.²²

Article 8 of the *International Covenant on Civil and Political Rights* prohibits slavery, servitude and forced labour. This can be interpreted to include trafficking and prostitution forced by social and economic circumstances. Because Australia and the Philippines have accepted the First Optional Protocol under this covenant, individuals in those countries may bring complaints of violation of their rights to the International Human Rights Committee. Various Australians have already taken complaints to Geneva under this protocol, and forced the Australian government to make changes to domestic laws to uphold particular human rights.²³

The *Convention on the Elimination of all Forms of Racial Discrimination* imposes an obligation on signatory States to guarantee the right of all individuals, regardless of race, colour, national or ethnic origin to equality before the law, notably in the enjoyment of the right to security of the person and protection by the State against violence and bodily harm. The Convention has been made law in Australia in the Race Discrimination Act and is overseen by the Human Rights and Equal Opportunity Commission.

These instruments clearly indicate that Australia and the Philippines have an obligation under international law to protect Filipino women from trafficking, forced prostitution and other forms of violence, physical or psychological, within their own nations and from the acts of their nationals.

What needs to be Done

The exploitation of women through trafficking can only be stopped through international cooperation to restrict both the demand and supply of women. Attempts by individual nations to deal with only one aspect have brought merely band-aid solutions that will shift the problem to other shores.

Poverty is only one aspect of the problem. It is certainly vital to improve the social and economic conditions in countries of supply. However, the problem has its roots in the power differential between wealthy nations and poor nations and gender inequality. Poverty alleviation must be coupled with programs to directly empower women and provide them with broader choices in their own societies. Simultaneously, the opportunities for exploitation by men must be limited and demand curtailed.

The current structure of Filipino laws against prostitution and their enforcement attempts to restrict the supply of prostitute women by punishing women. A blind eye is turned to clients and the pimps who supply the precious foreign dollars. Little attempt is made to restrict demand.

Despite the significant amount of financial benefit that the Philippine government obtains from the sex industry, very little money is fed back into social and economic services for women. These are desperately needed to provide viable alternatives for women in the Philippines. Most importantly, a re-

examination of traditional values about women is required. Only through this will the exploitation of Filipino women be recognised as a serious domestic issue by the government.

Several excellent reports and papers already have been written on the phenomena of sex trafficking by Filipino women. Unfortunately they have been ignored by the authorities.²⁴

The solution to this problem requires equal attention to the demand side. This is where Western nations, such as Australia must step in. Australia is clearly under international obligations to protect human rights of women and prevent Australian nationals from infringing these rights. Some work has been done to assist Filipino women in Australia to enforce their legal rights in situations of domestic violence.²⁵ However, little has been done to prevent Australian men engaging in and profiting from sex tourism and mail order brides.

To effectively tackle this problem, Australia needs to actively pursue legal and social reform in the following areas:

- * investigate and legally sanction Australian networks that promote and organise sex tours to the Philippines
- * set up legal and educational programs to halt the eroticisation of Filipino women and racism
- * actively encourage Filipino authorities to prosecute Australians in breach of the human rights of Filipino women. This could include cooperation between the Australian and Philippine police forces
- * shut down mail order bride agencies in Australia
- * re-direct Australian aid to the Philippines to assist exploited women.
- * enforce the Child Sex Tourism legislation which makes it illegal under Australian law to engage in child sex overseas.²⁶

Some of Australia's most effective efforts would be through the encouragement of the Philippine government to act against this exploitation. Despite considerable pressure from women's groups, this has not been forthcoming. During the Philippine President Fidel Ramos' recent visit to Australia, there was a strong reluctance to discuss this issue in any substance.²⁷ The few media comments made focused mainly on child sex tourism and ignored the wider issue of women's exploitation. Clearly, Senator Gareth Evans and president Ramos were meeting to discuss business and trade between their countries, each hoping to increase the amount of foreign dollars flowing into their respective countries, irrespective of cost.

Conclusion

The trafficking of women is about sexual exploitation which occurs on an international scale. It is a complex problem with supply and demand working together to fuel a massive sex industry. This industry is particularly evident in the Philippines, where the sexual exploitation of its women brings in significant foreign income so that it is tolerated and sometimes encouraged.

Australians are significant users of Philippine sexual services, thereby breaching human rights of these women. Australia has obligations under International and Australian law to prevent and punish such actions.

However, the methods of tackling this issue involve a comprehensive program which halts demands as well as supply. Governments have tended to deal only with the supply side, which has often been completely ineffective or merely shifted the problem to another area.

The need for foreign dollars and international trade is not an excuse for ignoring the human rights of Filipino women. Nor is the overactive male libido. Australia and the Philippines have obligated themselves to enforce human rights in international conventions. Now is the time for them to put their money where their mouths are.

ENDNOTES

1. I would like to acknowledge the input and information of the women at the Australian-Philippine dialogue held in Manila from July 1 to 3 1995. This paper is about their lives, experiences and suffering. In particular, I thank Aida Santos for her excellent and informative work and the Women's Education, Development, Productivity and Research Organisation (WEDPRO) for its invaluable research.
2. The term 'prostituted women' is favoured by many women's groups in the Philippines to describe a woman providing sexual services, as it reflects society's unjust social and economic structures which push them into poverty and prostitution.
3. See eg S. Lauber, "Economy over Environment?- Japan and International Environmental Law" (1993) *Japanese Studies*, 37; Centre for Women's Resources, *Economic Growth in 1994- At Whose Expense?* 1995 Manila.
4. N. Dano, "A Historical Look at Filipino Sexuality and the Rise of Prostitution" (1995) 9:2/3 *Kasama* 11.
5. Eddy Meng, "Mail Order Brides: Guilded Prostitution and the Legal Response" (1994) 28:1 *University of Michigan Journal of Law Reform* 229.
6. Department of Tourism, *Visitor Arrivals to the Philippines Report*. (1993) Manila.
7. Srisang (ed), *Caught in Modern Slavery: Tourism and Child Prostitution in Asia*. End Child Prostitution in Asian Tourism (ECPAT), 1990, 40.
8. See Notes from the UNEconomic and Social Council, *Seminar on Action Against Traffic in Women and Forced Prostitution*. 1992.
9. E. Evatt AO, *Legal Responses to Child Prostitution and Tourism*. Speech given at ECPAT Conference 10 November 1992, Melbourne.
10. See, for eg, J. Scheer, "Crackdown on sex bars" *Sydney Morning Herald* 26 July 1995; WEDPRO, *From Manila, Angeles and Olongapo to Cebu and Davao: The continuing Lives of women in the "Entertainment " Industry*. Quezon City, Metro Manila, 1994, 17 (WEDPRO Report).
11. R. Ofreneo & R. Pineda-Ofreneo, *The Sex Sector: Prostitution and Development in the Philippines , a Research Report*. Quezon City, Manila, Philippines, March 30 1993.
12. WEDPRO Report Ibid 21.
13. The WEDPRO Report found a high drug and alcohol use among prostituted women in the Philippines (p34) and stressed the need for effective counselling on personal issues. Evidence exists to show that a significant number of prostituted women in the Philippines have experienced traumas like rape or incest in their lives (p 56).
14. Meng Ibid 197.
15. Ibid 210.
16. Ibid.
17. Ibid ft 42.
18. eg Ken Blanch, "The marriage makers- Brides queue for an Aussie" *Sunday Mail*, 19 March 1995, Brisbane.
20. CEDAW Monitoring Committee, General Recommendation no 19, 1992.
21. Article 2.
22. Article 4.
23. For example, see *Toonen vs Australia* (1994) 1 PLPR 50 (the Tasmanian gay rights case)
24. See for eg WEDPRO Report; Aida Santos, *Picking Up the Pieces of Women's Lives: Prostitution and Sexual Exploitation in Asia-Pacific*, submitted to the World Health Organisation May, 1995.
25. ALRC Report No 69(1), *Equality Before the Law: Justice for Women*. Sydney 1994.
26. Crimes (Child Sex Tourism) Amendment Act 1994 (Cth). No prosecutions have been made under this Act.
27. President Ramos visited Australia in August 1995.

HOW MUCH CAN THIS WOMAN TAKE?

Sue Harris is an Arts/Law student currently completing Honours in Government and English. She is the Women and the Law Breakfast Convenor and winner of the Women and the Law Student Paper Competition, 1995. In her winning paper, she discusses the shortcomings of international legislation with reference to the Ariel Dorfman play, Death and the Maiden

What is't to me, when you yourselves are cause,
If your pure maidens fall into the hand
Of hot and forcing violation?
Shakespeare, Henry V, III.iii.19-21.

1. Introduction: Enter Paulina Salas

Ariel Dorfman's intense theatrical presentation of one woman coping with a history of state sponsored violence against her person in *Death and the Maiden*, raises many questions of relevance to international humanitarian law (IHL) - the gendered experience of violence, the instruments of justice in a civil conflict, prospects for resolution of civil conflicts, and general questions of truth, justice, forgiveness and revenge.¹

The plot of the play is simple, involving only three characters. It involves the collision of the public and private faces of a country's painful transition to democracy ("a country that is probably Chile"), as experienced by a lawyer, Gerardo, appointed by the new government to head a Truth Commission investigating human rights violations leading to death during the dictatorship, and his wife, Paulina, who experienced systematic rape and torture at the hands of the secret police.

The confrontation arises when Gerardo brings home a man, Dr Miranda, whom his wife recognises as her torturer of fifteen years ago. For Paulina, her husband's "democratic process" is insufficient to exorcise her own personal nightmare and, confronted with the Doctor she is convinced is the Schubert-playing rapist of her blindfolded internment, she embarks on her own trial.

My basic thesis in this paper is that the play demonstrates that IHL has failed in its task regarding non-international armed conflict, particularly given that the legislation itself excludes any real or credible protection to women (the majority of civilian victims) because the instruments fail to recognise the gendered nature of the violence women face. I shall assess the treatment of Pauline's experience of rape as torture in the play with reference to the current state of IHL on the subject in terms of what possible redress she could have. In conclusion I shall offer some prescriptions and recommendations as to how to rectify the lacunae in the law that the play puts, so to speak, in the spotlight.

2. "She is entirely in your power". Rape, and Rape as Torture

Paulina has two main problems making out a case against Doctor Miranda under IHL. The first problem is with the legislation itself being unclear as to whether an individual rape in a non-international armed conflict constitutes a grave breach, and therefore an enforceable offence. Implicit in this analysis is that the public/private distinction operates so that her rape might not be seen as an integral part of her torture, due to a lack of understanding of the gendered experience of violence. Finally, there are problems with Paulina's evidence, and gender-specific problems with her credibility as a witness for a victim of rape, which I shall touch on only briefly.

3 Paulina's Experience

It becomes painfully obvious that Paulina's experience has everything to do with her gender, everything to do with power over her as a woman. Throughout the play she mimics what the men said to her during the torture sessions, and the emphasis on threats of sexual violence and gender-based abuse is startling - "You hungry? You wanna eat? I'll give you something to eat, sweet cunt, I'll give you something really filling so you can forget you're hungry." (24)

Given Paulina's description of the psychological effects of her torture, including rape, we must firstly assess why rape is not viewed as torture, but as an inevitable, if unfortunate, result of conflict. It is because the act is seen as the result of a loss of sexual self-control, bad, yet understandable in the circumstances. It is not as seen as a potent instrument of oppression. The possible psychological ramifications are glossed over. As Miranda Stewart points out: "Only acts which are seen by men as aberrations receive legal sanction."²

3.1 The Legislation

We turn to our first problem to ascertain whether the psychological ramifications of rape as torture have merited any attention in the relevant international legislation. The results are puzzling for the somewhat obscure manner in which the problem is addressed. Paulina's redress regarding rape in non-international armed conflicts is dealt with by Common Article 3 which prohibits "violence to life and person...cruel treatment and torture...[and] outrages on personal dignity, in particular, humiliating and degrading treatment". The applicability to rape seems obvious, but there is no specific mention of rape.

Leading commentator Jean Pictet emphasises that Article 3 was not in any case intended to be exhaustive.³ Article 3 is further supplemented by Article 4(2)(e) and Article 6 of Protocol II. However, Protocol II only applies to a limited case of civil conflict, and arguably would not apply to most of today's civil conflicts, and probably not Paulina's situation.⁴

Can rape be considered a grave breach under the Geneva Conventions in the light of these provisions? A war crime properly so-called is any grave violation of the laws of war, to which criminal responsibility then attaches. The crucial significance of designating an offence a grave breach is that a signatory State is both obliged and empowered to punish war crimes, and most States are signatories to the Geneva Conventions, including Chile. The list of grave breaches includes inter alia "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health..." Under this article, "inhumane treatment" is an action which causes "great injury" to a person's "human dignity". It seems self-evident that rape could come under several of those headings, particularly if "suffering" was interpreted by the courts to encompass more than purely physical suffering.⁵ However, we should note that Article 147 of the Fourth Convention specifically states that rape does not constitute "torture" as defined, except in exceptional circumstances.

The upshot is this: almost every provision in the Conventions and the Protocols could be liberally construed to protect women, as the obligation to grant protected persons humane treatment is the "leitmotif" of the legislation, as Khushalani grants.⁶ However, over and above this, there are specific provisions that state that women should be protected from rape, and it can be extrapolated from the tenor of the language used in these specific provisions that rape constitutes "inhumane" treatment.

Inhumane treatment of a person in war is defined as a grave breach of the Geneva Conventions and Protocols. Thus, logically, rape is a grave breach under Article 147. Therefore, rape could easily be

considered a war crime, and the legislation should probably be interpreted that way by a court. We can denote this approach as the "logical conclusion" theory.

Gardam warns against placing "undue reliance" on this line of logic. She points out that the fact that rape is specifically referred to in Article 27, but not in the articles defining grave breaches "militates against a broad interpretation".⁷ I agree that if one uses the 'contextual' type of treaty interpretation, the conclusion above is possible, but not if the textual approach is utilised; in the sense that there is not a clear intent on the part of the drafters to make it explicit that rape is a crime of violence, a weapon of torture, and is a war crime. My problem with the aforementioned orthodox is that the "logical conclusion" theory relies on far too many extrapolations and assumptions for comfort.

In terms of the specific provisions on women providing evidence of customary international law, the overwhelming and consistent state practice to the contrary is a problem. Moreover I have a problem in that most of the specific provisions are couched in terms of "honour" or even "family honour", for example Art. 27, para 2, Convention IV, Art 75 and 76, Protocol I.

Whilst the inalienable right of women to retain their dignity and honour in all circumstances during periods of armed conflict is no doubt important,⁸ and the term may well characterise a wide variety of unacceptable behaviour, I regard with suspicion the implication that rape is an attack on a woman's "honour" as opposed to a physical attack. Rape is not analogous to stealing your enemy's flag, for example. At the risk of appearing pedantic or overly sensitive to linguistic connotations, I think the term inappropriate and euphemistic.

I am supported in this reaction by Judith Gardam. She writes: "...the designation of rape as an attack on women's honour has far more to do with how men perceive rape than how women do themselves. Women experience rape as torture, and it should be recognised as such by the legal regime."⁹

3.2 Summary and Criticisms

In essence, I feel most commentators are making connections in the legislation based on their own view of the nature of rape as a public, violent, psychologically devastating act. That is the sort of thinking which has resulted in such positive change in the view of rape as a crime against humanity. But there is neither the linguistic nor contextual basis for this reading of the Geneva Conventions, and the time has not yet come where we can rely on either consensus or good intentions in this matter.

It is also a relative problem. No legislative sleight of hand is needed to know that non-consensual medical experimentation, or apartheid are war crimes, to point to two obvious examples. There is a danger in interpretations like Khushalani's that claim to find solutions within the current legislation, indeed with statements from the United States State Department that the problem is solved.¹⁰ The danger is that the impetus to really clarify the position international law is going to take on rape, the opportunity to spell out the past problems, the ability to give the offence an increased status are impeded.

3.3 Evidence

There are always evidentiary problems with rape, and with the added trauma of armed conflict, the ability of women to both report rape and testify will be even more difficult. Paulina of course was blindfolded throughout her torture, and bases her initial identification of Miranda on his smell, voice and skin (20,32,37). Her husband's reaction and the ambiguity of the play itself is testament as to how difficult it is for a woman to be believed (29), how in terms of proof and credibility, everything is stacked against her. Blindfolded, Paulina with a gun in her hand is a potent new symbol of justice.

4. "Or is your famous Investigating Commission going to do it?": Questions of Enforcement

The ever-present problem with international law is invariably enforcement. Most of the literature surveyed for this paper is in agreement on one point: that gender-related violence, especially rape, is seen as inevitable and goes largely unpunished.

Even in traditional international wars, in the Nuremburg Charter for example, rape is not mentioned, and no formal charges were made at the Nuremburg Trials, although evidence of mass rape was entered as evidence of general crimes against humanity. In Japan, it was not until 1993 that the government officially acknowledged that in the period 1932-46 there was wholesale abuse of "comfort women",¹⁵ as the thousands of women forced into prostitution during the World Wars were known, and compensation claims are only now being lodged. Most enforcement of punishment of rape by soldiers that has occurred has been achieved by internal military discipline.¹²

The international community clearly has a credibility gap when it comes to prosecuting acts of rape, even mass rape, during times of armed conflict.. If the War Crimes Tribunal set up to investigate crimes in the former Yugoslavia can create a precedent that such acts will not be tolerated by the international community,¹³ our present legal instruments might be considered an adequate defence in the future.

If this is not achieved, or if it is achieved on the basis that only mass rape is a war crime, there will have to be a serious examination of the basis of the treatment of women in international law. In light of Nuremburg, even if this flaunted optimum state of affairs comes to pass, we should not rest easy. It will be extraordinarily difficult to satisfy the charge that reform to international law will not in any way address what has been called "the great normality of rape as part of gender oppression."¹⁴

Given that this is the case for even mass rape in international conflicts, what hope does Paulina have? She is already in a setting of widespread and ingrained discrimination against women even in times of peace - as Amnesty puts it "women are in double jeopardy."¹⁵ Paulina would be unlikely have an adequate hearing by her own domestic system.

The only other systemic attempt to enforce IHL and HR law in internal conflicts has been bodies like the Truth Commission in the play set up by new regimes. Paulina states her case against Gerardo's Commission with great persuasive force - firstly she objects to the means, pointing out that abstract legal principles have to deal with facts like "what court of law?"(30) and argues that those judging will be the same Justices who supported the previous regime.

Secondly, Paulina feels the ends are irrelevant to her needs - she wants the "real, real truth."(31). Although Paulina has dreamed of her revenge for so long and toys with the idea of raping her torturer (with a broomstick if necessary), she decides all she wants is a confession (35) and real repentance (52). Her views are given credence in the play, echoing Ronald Dworkin's reaction to call of the Mothers of the Plaza de Mayo in Argentina for the prosecution of all torturers and murderers in the military ranks. He concludes they are right:

Not because they are entitled to vengeance, but because the best guarantee against tyranny...is a heightened sense of why it is repulsive. Trials that explore and enhance the idea that torture can have no defence may encourage that sense. Allowing known torturers to remain in positions of authority, unchallenged and uncondemned, can only weaken it.¹⁶

The play presents two views: Gerardo's observation that "people can also die from an excessive dose of the truth"(44), juxtaposed with Paulina's cry that "We're going to suffocate from so much equanimity!"(30) Death and the Maiden does however intrinsically present one idea as uncontested, and that is "the need to put into words what happened to us."(39)

5. "What do we lose by killing one of you?": Conclusions and Prescriptions

I have argued that a shocking lacuna exists if not in international law itself, then certainly in its application. It seems that the international community needs to make a commitment. As has been noted by leading feminist lawyers: "If violence against women were considered by the international legal system to be as shocking as violence against people for their political ideas, women would have considerable support in their struggle."¹⁷

This point is made so much clearer by the play. There is no doubt whatsoever that Paulina could face serious legal penalties for what she does to the Doctor - deprivation of liberty, assault, and so on. Irony abounds in that she was in fact tortured for Gerardo's name, which had she been broken, would have meant he "would have been one of the names that some other lawyer was investigating"(25) but even Gerardo, "the voice of civilisation"(41), her husband, is not willing to pursue justice for her. Where was her protection?

Unfortunately, in the development of Paulina's character, one does get that sinking, inevitable, feeling that the legal system may be a fundamentally unsuitable way to deal with a Paulina's experience, no matter how many reforms are made. What does she lose? It is this strong recognition of a sense of futility that the play gives us that might prompt the development of a system where Paulina need never fear headlights or Schubert again. As Richard Devlin states in a very dramatic way:

I would argue that we have become desensitised to the horror of law, that law, and we who work in the legal system, have constitutionalised violence; and that we have imbricated within our laws what Hannah Arendt has called "the banality of evil".¹⁸

"You be reasonable." says Paulina, "They never did anything to you."(22)

Part of my rationale for using the play is to assess whether the play illustrates the logic of these complex legal situations in a way which casts new light on what sort of law is desirable to "construct the defences of peace in the minds of men".¹⁹ I am thus testing the ultimate conclusion that Barbara Eckstein comes to in her extremely illuminating work, *The Language of Fiction in a World of Pain: Reading Politics as Paradox*.

Eckstein decides that the literary works she analyses are important because of their ability to produce complicity in the reader, or in our case, the observer. Her apposite comments are worth presenting at some length. She writes:

Whatever the face of leadership a moment demands, the fact remains, I would argue that power - the power to heal that the world requires - arises from wounds born of identity with victims and complicity with victimizers. While shame hangs its head and guilt seeks forgiveness, complicity acts to undo what is done. The value of fiction I have discussed here lies in its ability to understand and elicit complicity in an age of uncertainty. Those of us who love art are tempted to claim for it the powers of salvation. It will comfort us, cure us, drive us to righteous action, provide us with hope. I am not certain that this fiction does

any of these things...The work of Kundera [et cetera]...cannot make us act as responsible citizens in the world. But if we do act, we will do so with a better understanding of politics because of them.²⁰

In the light of the complicity that *Death and the Maiden* produces, perhaps we are better able to answer Jean-Paul Sartre's famous quandary:

Happy are those who died without ever having had to ask themselves: "If they tear out my fingernails, will I talk?" But even happier are others, barely out of their childhood, who have not had to answer that other question: "If my friends, fellow soldiers and leaders tear out an enemy's fingernails in my presence, what will I do?"²¹

In the face of Paulina's suffering, what will we do?

ENDNOTES

1 Even this basic premise has some problems. It is worth noting that the various productions of the play itself and the Polanski movie serve as a useful case study in reception theory regarding modes of production actually manifestly affecting the content of the play. The Broadway production for example which sought to depoliticise the play almost entirely illustrates that *Death and the Maiden* in some ways a limit case in terms of a play which is ripe for analysis in terms of IHL. Despite this recognition, it is my conclusion that the text of the play in and of itself is adequate for a fruitful analysis.

2 Miranda Stewart, "Rape in War", 1993: 115.

3 Aydelott, *ibid*, 609: Pictet states: "However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it comes." He is obviously not contemplating rape. Qtd in Khushalani, *op cit*, 41.

4 Gardam, "Gender and Non-Combatant Immunity" 1993: 362

5 *Ibid* at 612.

6 Khushalani, *op cit*, 1982: 69.

7 Gardam, "Gender and Non-Combatant Immunity", 1993: 362

8 This is the basic premise of Yougindra Khushalani's text, *Dignity and Honour of Women as Basic and Fundamental Human Rights*, *op cit*: ix.

9 Judith Gardam, "Gender and Non-Combatant Immunity", 1993: 360.

10 See Meron, *ibid*, 427

11 Kathleen Mahoney, "Women and the War in Bosnia - Do They Have Rights?" Australian National University, 3 May 1994.

12 For example, during World War II, there were 971 court-martial convictions for American soldiers for the crime of rape. Of that total 52 were executed, and another 18 were executed for a combined rape/murder charge. One may be unsure of the internal mechanisms of military justice and disapprove of the punishment meted out, but it is certainly clear that only a disciplined force can and will enforce the law - thus internal military discipline should not be unduly relied upon but encouraged when found. 16 One recent exception to this norm of military justice is Bosnian Serb militiaman Borislav Herak, who was sentenced to death by firing squad last year by the Bosnian court after admitting he had raped sixteen Muslim women, and killed eleven of them. Also sentenced to death was Sretko Damjanovic who was found guilty of killing five people and raping two women. In that case, Lieutenant General Phillippe Morillon, UN military commander for Bosnia, argued that they should have been taken before the international war crimes tribunal, not left to Bosnia, and that the men should have been granted amnesty in order to promote peace. See James O. Jackson, "Unfinished Business" *Time Magazine*, June 20, 1994, 18.

13 It has been pointed out that the risk of appearing "hypocritical and/or imperialistic" in such matters is substantial. See Elizabeth L. Pearl, "Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victors' Justice?" 1993: 1404

14 Miranda Stewart, *op cit*: 116.

15 Amnesty International. *Human Rights are Women's Rights*. 1995: 5. Note that Dorfman has included some interesting statements by Miranda in the play which indicate misogyny, eg the Nietzsche quote p.12, the challenge to Gerardo's manhood p.40, and the "sick woman" theme p.53, and he also seems to have an odd relationship with his mother p.39 and 48. Paulina

herself bemoans the fact that "All my life, I've always been much too obedient." p.46 We can note also that the play went through four male actors in the Santiago production because they couldn't bear to be treated that way by a woman, even on stage.

16 Dworkin, R. *Nunca Mas*, 1986: xxvii

17 Hilary Charlesworth, Christine Chinkin and Shelley Wright. "Feminist Approaches to International Law." *The American Journal of International Law*. 85, 1991; 629.

18 Devlin, in K.E Mahoney and P. Mahoney eds. *Human Rights in the Twenty-First Century: A Global Challenge*, 1993: 998.

19 Pictet, *International Dimensions of Humanitarian Law*.

1988; foreword, iii. We should note that other playwrights are also in their own way throwing up interesting material for IHL, for example, Brian Friel, Wole Soyinka, Jean Genet and Gilo Pontecorvo, as well as of course, Shakespeare.

20 Barbara Eckstein, *The Language of Fiction in a World of Pain: Reading Politics as Paradox* 1990 181-2.

21 Sartre, J. "Introduction" *Allegory*.: 15.

SEXING THE SHARI'A - ISLAMIC LAW OR CULTURAL CONSTRUCT?

Throughout the history of Islamic jurisprudence, cultural constructs of the rights of women have been adopted by legal scholars as the basis upon which the scriptures of the Koran must be interpreted. These constructs define women as sexually dangerous and subordinate to men and have resulted in the prevalence of laws in Muslim countries that discriminate against women. Dahlia Eissa, President of Women and the Law, explores how such constructs are inconsistent with true Islamic principles and how Islamic jurists have greatly deviated from the legal scriptures of the Koran in order to maintain the subordination of women.

Islam is continually facing attack from the West on the basis that its culture is fundamentalist, stagnant and archaic. One aspect of this is the apparent legalised discrimination against women. Muslim countries do implement laws that treat women as subordinate to men and often do not enact laws in order to protect women, but this tendency has no basis in Islamic law. It is the product of a culture that subjugates women and a school of jurisprudence that has ignored the express legal doctrines of the Koran in favour of cultural constructs of gender roles that differentiate between the legal entitlements that are to be accorded to men and women. The most obvious manifestation of this is found in laws or the absence of laws that are based on the sexual instincts of men and women. This paper will illustrate the nature of these laws and how they deviate from the scriptures of the Koran.

Islamic law, according to Muslims, is expressly devised by God, or Allah. The two primary sources of law are the Shari'a, containing the express laws of God, and the Sunnah, containing the pronouncements and practices of the Prophet Mohammed. The two secondary sources of law, ijma and qiyas,¹ are processes of interpretation to formulate laws accommodating the changing needs of society. Islamic law has been adopted to varying degrees in different Muslim countries.² However, "Islamic law" as implemented in most of these countries deviates greatly from true Islamic principles with respect to the rights of women. "Equality is the most prevalent theme in the [Koran], yet throughout the history of Islamic jurisprudence the spirit of Islam and the express laws laid down in the Koran have been ignored in favour of cultural constructs. These constructs embody the assumption that men and women are not equal beings and form the basis for the deviation from true Islamic principles in the constitutions of Saudi Arabia and Iran⁴ and the laws and regulations enacted by those and other Muslim countries.

This paper looks specifically at the laws of veiling and segregation, adultery and polygamy. These laws are the products of a culture that views women as sexually dangerous and intellectually inept, subordinate to men who are more rational and intellectually rigorous beings. Islamic jurisprudence has internalised these cultural values and requires complete revision in this respect.

In Islam, legal interpretation in light of contemporary circumstances was conducted until the tenth century when it was repudiated by the clergy.⁵ From then on jurists were only permitted to expound on existing law which comprised not only that taken directly from the Koran, but also those laws interpreted in light of seventh, eighth, ninth and tenth century circumstances and adopting the cultural constructs of those times. The mass of interpretation that did take place in the first few centuries of Islam was in the hands of deeply conservative male scholars, whose decisions have remained largely unchanged.⁶ These scholars strongly adhered to notions of role differentiation between men and women, based on apparent psychological and physiological differences⁷ - notions that characterise all societies today. Furthermore, pre-Islamic customary law continued to be applied and was adopted within the Islamic legal framework⁸ These same ideas and values are prevalent in the Muslim world today and traditional notions of gender are still used to differentiate between men and women and their legal rights.

It was Islam that outlawed the practice of female infanticide, gave women the right to own property, entitlements to inheritance and the right to be educated; rights women in the West would not acquire until the nineteenth century.⁹ Despite this, we have a Muslim world that has created two classes of citizen: men who benefit from the provisions of Islamic law and justice and women who do not.¹⁰ The most visible manifestation of this has been the forced veiling and segregation of women in Iran and Saudi Arabia.

Within weeks of the Ayat Allah Khomeini coming to power in Iran in 1979, all women were ordered to wear *hegab*, or the veil. The law mandated that a woman's head must be covered, except for the oval of her face, and that her entire body be covered except for the hands up to the wrist.¹¹ Women who failed to wear a veil in public were subject to a punishment of up to 74 lashes.¹² Since the death of Khomeini in 1989, President Rafsanjani has taken a much more lenient approach to the wearing of *hegab*. However, this relaxed atmosphere was met with a clamp down by hard-line extremists who pummelled and beat women for inadequate veiling.¹³ Thus, a much publicised crackdown in June of 1993 saw hundreds of women, deemed to be in violation of the dress code, arrested and flogged.¹⁴ By July, the government mobilised its military strength to combat this cultural corruption in response to the extremist outcry.¹⁵

The situation in Saudi Arabia is much the same. The country's personal status laws force women to wear *hegab*, with their ability to walk freely in the streets of their country severely curtailed by the moral police.¹⁶ These laws are based on the cultural belief that women use their sexuality to attract and lure men,¹⁷ threatening the social order.

The Koran states that both men and women are to lower their gaze and guard their modesty in public.¹⁸ There is nothing in the Koran that indicates that a dress code of complete veiling must be legally enforced in an Islamic state and there is most certainly nothing that points to criminal sanction and punishment for non-compliance. Some prominent legal scholars are of the opinion that there is no injunction in the Koran requiring women to veil their heads at all.¹⁹ They contend that the veil does not have its roots in the Koran but in pre-Islamic times when veiling signified social status. Before long Muslim scholars, all men, pronounced that no Muslim woman could reveal any part of her body except to her immediate family.²⁰ Thus, the strict requirements of veiling are based on traditional notions of protecting society from female sexuality and not on the legal scriptures of the Koran. Today the veil is used to hide and oppress women and inhibit their capacity to interact fully in society to the same extent that men do. It "is an expression of the invisibility of women on the street, a male space par excellence."²¹

This same desire to protect society from women's dangerous sexuality underlies the strict legalised segregation of men and women in Iran and Saudi Arabia.²² These laws are also based on a desire to deny women's access to the public sphere. Muslim extremists believe that a woman's role is to bear, nurture and educate children- this does not involve her in the public sphere. These have been the sentiments of Islamic scholars for more than 1300 years and have no foundation in the Koran whatsoever. Extremist propaganda, arrests and floggings are the means by which the governments of Saudi Arabia and Iran attempt to convince women that veiling and segregation is mandated by the Koran when it is arguable that one would expect them to enjoy automatic authority among Muslims and not depend on the positive laws or harsh police enforcement tactics to obtain compliance.²³

A further expression of the desire to contain women's sexuality can be found in the laws of *zina*, meaning adultery or fornication. In Saudi Arabia, *zina* is considered the most serious of crimes, punishable by stoning, beheading or shooting,²⁴ and in Iran by stoning, crucifixion or amputation.²⁵ In these countries is that these punishments are disproportionately meted out to women,²⁶ as a result of traditional notions of protecting family honour. The family's honour depends on the honour of its

women and a woman's honour depends upon her being chaste. If a woman fails to maintain her honour, the shame can only be wiped out in blood, as the common Arab saying goes.²⁷

Thus, for a man to be able to ensure that his women are chaste, in Iran, Saudi Arabia, Pakistan, Egypt, Algeria and Morocco, he is often able to take the law into his own hands and deliver the punishment for zina himself. In these countries it is not uncommon for a man, having killed his wife, to plead that she committed adultery, thereby establishing a defence to the crime, without any real proof of the allegation.²⁸ In Iran, men are legally permitted to murder their wives for adultery without fear of punishment and those who kill their unmarried daughter or sister for having pre-marital relations may only be liable to two month's imprisonment.²⁹ The same has been known to occur in Egypt,³⁰ while in Saudi Arabia the killings go completely unnoticed by the authorities.³¹

While zina is an offence in Islam,³² the laws apply equally to both men and women, and the offences can only be proved in a court of law by the testimony of four witnesses.³³ Under no circumstances can a person take the law into her or his own hands and take the life of another human being. Furthermore, unproven accusations are very serious crimes in Islam, to be severely punished.³⁴ The purpose of such laws is to protect the institution of the family and therefore both men and women are required to keep sexual relations within the boundaries of marriage. The laws are based upon the notion that a woman's sexuality is dangerous and that men must protect their family honour from such danger by all means.

These laws contravene the basic principles of natural justice espoused throughout the Koran,³⁵ and are more akin to pre-Islamic tribal law, the enforcement of which was essentially the responsibility of the individual who had suffered injury.³⁶ This tradition has continued throughout the history of Islam, a husband, father, brother, uncle or grandfather being the injured party in the context of zina.

At the core of the concept of female sexuality is that women are insatiable and this must be controlled. However, there is a major flaw in this theory because women are also treated as devoid of any sexual drive. Men on the other hand are considered to be endowed with a sexual drive that may require more than one partner to relieve their souls from sexual tension. This theory underlies the practice of polygamy in Muslim countries. "Polygamy entitles the male not simply to satisfy his sexuality, but indulge it to saturation without taking women's needs into consideration, women being considered merely 'agents' in the process."³⁷

Almost all Muslim countries permit a man to take up to four wives and consider this legally permissible in Islam. This is based on Chapter 4, verse 3 which states: "Marry women of your choice, two or three or four; But if ye fear that ye shall not be able to deal justly with them, then only one to prevent you from doing injustice". However, those who have deemed that polygamy is permitted in Islam have failed to place the verses in context. It is accepted in Islamic jurisprudence that each verse is authoritative unless contravened by a later verse, illustrating the change in Islamic law that took place during the time of the Prophet. A former ordinance is often repealed by a later ordinance.³⁸ Thus, we must have recourse to Chapter 24, verse 129 which states: "Ye are never able to be fair and just as between women even if it is your ardent desire", and Chapter 33, verse 4 which states: "God has not made for any man two hearts in his one body". It is clear from these two verses in the Koran that polygamy is not permitted, because its requirements cannot possibly be fulfilled; that is, no man is capable of treating his wives equally and fairly. Despite this, traditional scholars have interpreted the two latter verses as merely amounting to recommendations towards monogamy.³⁹

Not only is polygamy contrary to the spirit of equality espoused in the Koran, but it is also contrary to the principle that the family is central to Islam and all laws are based on the protection of this institution. Most sociologists will tell us that polygamy increases marital disharmony and familial instability,

making its effects incongruent with Islam.⁴⁰ In fact according to an old Moroccan proverb one way to debase a woman is to bring another into the house.⁴¹ Legal scholars who have looked at the verses in context and have regard to the spirit of Islam have come to the conclusion that the earlier verse reflected the Prophet's hesitance to outrightly prohibit customary practices. Later verses in the Koran often overrule earlier verses indicating that time was required to generate acceptance of the new laws. It is this more progressive interpretation of the Koran that has been adopted by Tunisia⁴² and Turkey,⁴³ outlawing polygamy as contrary to Islamic law.

Thus, Islamic law with respect to the rights of women has been interpreted in light of cultural beliefs pertaining to sexuality. Female sexuality is dangerous and therefore women must have their instincts inhibited and their ability to corrupt men curtailed. Men's sexuality is also perceived to be a threat to the Muslim order, but not in the same sense. Rather than being perceived as an evil threat, it is treated as a natural instinct which the Islamic structure must accommodate. The result has been that legal scholars have deviated greatly from genuine Islamic principles and therefore laws in Muslim countries are characterised by concepts of gender differentiation completely foreign to Islam.

The Koran treats women as autonomous intellectual beings. Islamic jurists do not. One can only remind them of Chapter 16, verse 116: "But say not - for any false thing that your tongues may put forth, - "This is lawful, and this is forbidden", so as to ascribe false things to God. For those who ascribe false things to God, will never prosper".

Endnotes

- 1 Ijma represents the consensus among Muslim scholars on specific legal issues and qiyas is a process of analogical or syllogistic reasoning. David S. Powers 1992. "On Judicial Review in Islamic Law" in *Law and Society Review*. 26(2):315-341. p318.
- 2 Most Muslim countries have adopted a predominantly secular legal system, limiting the application of Islamic law to family and criminal matters.
- 3 Nayer Honarvar 1988. "Behind the Veil: Women's Rights in Islamic Societies" in *Journal of Family Law*. 6:355. p.361.
- 4 Article 10 of the 1992 Basic Law of Saudi Arabia states that "Arab and Islamic values" are to underlie legislative enactments in the state, and Principles 4, 10 and 20 of the Constitution of the Islamic Republic of Iran state that "Islamic standards and moral concepts" are the basis upon which laws will be formulated in that state. Thus, these constitutions provide a means sanctioning the legal subordination of women based on cultural constructs.
- 5 Abdul Ghafus 1989. "Islamization of Laws in Pakistan" in *Studies in Islamic Law, Religion and Society*. (H. S. Bhatia, ed) New Delhi: Deep and Deep Publications. 145-155. pp.146-147.
- 6 "In the Name of Eve" in *The Economist*. August 6-12, 1994. 10-12. p.10.
- 7 Tamilla F. Ghodsi 1994. "Tying a Slipknot: Temporary Marriages in Iran" in *Michigan Journal of International Law*. 15:645-686. p.655.
- 8 Noel Coulson and Doreen Hinchcliffe 1978. "Women and Law Reform in Contemporary Islam" in *Women in the Muslim World*. (Lois Beck and Nikkie Keddie, eds.) Massachusetts: Harvard University Press.
- 9 Ghodsi, op cit., p.654.
- 10 Haleh Afshar 1987. "Women, Marriage and the State in Iran" in *Women State and Ideology: Studies From Africa and Asia*. (Haleh Afshar, ed.) p.8.
- 11 Alexandra J. Zolan 1987. "The Effect of Islamization on the Legal and Social Status of Women in Iran" In *Third World Law Journal*. 183. p.189.
- 12 ibid.
- 13 Nesta Ramazani 1993. "Women in Iran: the Revolutionary Ebb and Flow" in *Middle East Journal*. 47(3):409-428. p.422.
- 14 See "Crackdown on Improperly Dressed Women a -Duty": Rafsanjani. Agence France Presse. June 22, 1993. Available in LEXIS, Nexis Library, ALLWLD File.
- 15 Ann Elizabeth Mayer 1994. "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" in *Michigan Journal of International Law*. 15(2):307-404. p.391.
- 16 ibid., pp.336-337.
- 17 Zolan, op cit., p.186.
- 18 Chapter 24, verses 30 and 31.

- 19 *ibid.*, p.657.
- 20 *ibid.*
- 21 Fatima Mernissi 1987. *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society*. Indiana: University of Indianapolis Press. p.150.
- 22 Gelareh Asayesh 1991. "Iran: The Rules of Courtship" in *Toronto Star*. Feb. 4:31.
- 23 Mayer, *op cit.*, p.390.
- 24 Amnesty International Report. 1993. 162.
- 25 Iran: "Pattern of Cruelty and Inhumanity" *Condemned by Amnesty*. *Inter Press Service*, May 13, 1987. Available in LEXIS, Nexis Library, Inter Press Service File.
- Amnesty International 1987. *Iran: Violations of Human Rights, Documents Sent By Amnesty International To The Government of the Islamic Republic of Iran*. pp.63-65.
- 26 *op cit.*
- 27 Nawal El-Saadawi 1980. *The Hidden Face of Eve*. London: Zed Books. p.27.
- Vern L. Bullough et al., 1988. *The Subordinate Sex: A History of Attitudes Towards Women*. p.117.
- 28 For example, Article 418 of the Moroccan Penal Code grants extenuating circumstances to a man who kills his adulterous wife.
- 29 Haleh Afshar 1984. "Muslim Women and the Burden of Ideology" in *Women's Studies International Forum*. 7(4):247-250. p.249.
- Behnaz Pakizegi 1978. "Legal and Social Positions of Iranian Women" in Beck and Keddie, eds., *op cit.*, 216-226. p.222.
- 30 El-Saadawi, *op cit.*
- 31 Jean P. Sasson 1993. *Princess*. London: Bantam Books.
- 32 Chapter 24, verse 2.
- 33 Chapter 24, verses 6-9.
- 34 Chapter 24, verses 4, 11-20.
- 35 See Chapter 4, verses 58, 65, 105 and 135.
- Chapter 5, verses 8 and 44.
- Chapter 7, verse 29.
- Chapter 16, verse 90.
- Chapter 57, verse 25.
- 36 Mohammed Muslehuddin 1989. "History of Islamic Law" in H. S. Bhatia, ed., *op cit.*, 17-31. p.18.
- 37 Mernissi, *op cit.*, p.47.
- 38 Muslehuddin, *op cit.*, p.27.
- 39 A. Yusuf Ali. 1983. *The Holy Qur'an*. Maryland: Amana Corp. p.197.
- 40 Mernissi, *op cit.*, p.48.
- 41 *ibid.*
- 42 Code of Personal Status 1957.
- 43 Coulson and Hinchcliffe, *op cit.*, p.40.

PARENTING AND LEGAL PRACTICE: INCOMPATIBLE? NEARLY!

Zoe Farmer, currently a solicitor in the legal department of Matilda Fuel Supplies, outlines some of the problems and strategies of combining a legal career and motherhood.

As a practising solicitor with four young children, one born during my studies, two during my articles, and one after my admission in 1992, I have been invited to offer readers some insight into the options available to, and the hurdles which face, the 'mother-in-law'. My own effort, which included a stint as a single mum, is one of which I am quite proud. However, I am still amazed at the stories of other women's achievements with small offspring in tow. Examples abound to inspire those who may be doubting that it can be done! I am also aware that I and many other mothers feel that we are constantly teetering on the edge of disaster and really have very few answers when it comes to a formula for making it all work. Despite not exactly being able to come up with a formula, I have learnt (usually by my mistakes) that you can make it easier on yourself. I have confined this article to the matters which particularly affect mothers who practice law. There is information in abundance on the general combination of home and career and much of great value to lawyers. Read, read, read!

Perhaps for some readers my topic may seem a little irrelevant at this time in their lives. But that can change quite quickly and maybe even quite accidentally! Also, those mums already in practice do not have the time to devote to the meetings, submissions and lobbying necessary for change. We would appreciate help from those who can. You may find yourself one day reaping the benefits gained.

So what should you consider? Part-time work is often an attractive idea for mums. However it is not always easy to come by. The agencies do not often list vacancies for part-time positions and employers often don't even consider the possibility of a part-timer. Your contacts will be very important in trying to track down such work. A colleague (who is, incidentally, very keen on lawyers having a part-time option) pointed out to me that there may be some validity to the reluctance on employers' parts to take on part-timers: a keen employee with her sights set on partnership will often work 50-60 hours a week for a 40hr/week salary. Contrast this with the part-timer being employed (and paid for) 30hrs/week. She very likely will only do 30 hours as that is all the time she has available to commit to that aspect of her life. However, if you are trying to sell yourself as a part-timer don't forget that you may be able to take work home or use remote access facilities to work from home.

There are several hitches to avoid if you decide that a solicitor's life is the one for you and you want time out to care for a family. Articles of clerkship presently have a built in difficulty which I consider a major problem: The rules relating to admission of solicitors provide that articles must be served on a full-time basis for a continuous period of two years. Two problems here- (a) full-time; (b) continuous. Part-time work cannot be condensed and counted as the equivalent amount of full-time service. For example, six months at 20 hours per week cannot be treated as three months full-time. I say "what you consider" as the Solicitors Board is not bound to aggregate your broken terms. You must go with cap in hand and ask! I approached the Board before I took leave with the first of my children born during articles. "No", the Very Important Man told me. "We won't tell you now what period of time off might be reasonable. When you come up for admission you will come before a different Board and we will not bind a future Board"! Just the answer I was looking for - complete uncertainty! Clearly this rule must be changed to accommodate part-time work and parental leave rights.

A position as a judge's associate instead of a years service in articles has the circuit requirements which could be hard on a mum. A far less significant difficulty, but something I found to be of relevance,

was that it was not possible to afford a decent maternity and breast-feeding wardrobe on my salary as an articulated clerk- you may need heavy subsidies for this cost!

Articles and/or associateship having been completed with a minimum of babies, you should be able to treat yourself to a couple and chug along quite happily in a position of your choice as an employed solicitor. A number of women recommend government positions (as either a solicitor or counsel) for security and helpful work practices for lawyer-mums. One great advantage of the public service is that there are policies in place which accommodate women's needs. Some large firms also have policies and this greatly assists in removing uncertainty and quelling feelings of freakishness as pregnant lawyer! Also the public service and large firms are better equipped to deal with a staffing reshuffle to accommodate the expectant mum.

The community legal centres offer a very supportive and flexible work environment for mums and one that is dealing with the legal, cutting edge: submissions on legislative change, writings on issues of great importance to minority groups and women, and lots of client work. The down-side is that the pay is not terrific as funding does not permit. A truly wonderful workplace, though!

Corporate positions can be less taxing than the pressure of the city-law-firm workplace competition. Hours are often kinder, and the pay comparatively high. (please don't mention these things to my boss, though!)

The next major hurdle for the mothering solicitor comes when she seeks a partnership interest. Unfortunately babies and part-time work are seen by many existing male partners as incompatible with partnership. In 1992 a colleague who had newly been elevated to partnership in an established medium sized city firm became pregnant. When she proposed part-time work to her fellow partners she was told that it was not possible to do litigation work part-time. Such was the disagreement over this point that she and the firm parted company prior to the arrival of her baby.

Sadly the position has probably not changed a great deal since then. A woman who was to become a partner in a city firm earlier this year became pregnant before her partnership could be finalised. She was not elevated. Whilst the existing male partners were happy for her to return part-time to her position as a senior associate and seem to agree that one baby should not prohibit her rise to partnership sometime down the track, they are still not ready to commit themselves. One difficulty is that they perceive that she won't stop at one baby (despite the fact that she has said she will), and although they could cope with the disruption this once, a second time would be a bit too much. So it seems that the problem is a baby which she hasn't had and doesn't intend to have! This does seem a little tough!

It's not always the men who give part-time female solicitors/would be partners a hard time either. Male partners' spouses often make the part-time women the scapegoat for their husband spending more time at the office. Their logic runs thus: If she (the part-timer) worked more, he would work less. Not true, of course, but a myth that the men are happy to go along with!

One solution to these partnership issues is to have your own practice: There is no-one to answer to or to be jealous of you. There are a number of women who are enjoying this flexibility and combining law and family life quite successfully in this way.

If the bar is calling you and you would like to be a mum too, then I would advise you to establish your practice first, then juggle some part-time work in with your child care. The competition at the bar is extremely fierce and a considerable effort is required to build up your reputation. I fear trying to do this

part-time, whilst meeting the demands of a young child, may be an almost impossible task. There are currently only several mothers of young children at the bar, and they are managing to make the most of remote access facilities and home offices. So, although you won't have many colleagues in the same boat, you will find some with valuable experience to share.

Whatever direction is chosen, one major problem that lawyer-mums face is that of isolation. As law is so competitive and dynamic it is of great importance to have a finger on the pulse at all times. Unfortunately, time constraints do not permit many mothers to join in the activities which maintain this contact. Mothers are under-represented in all associations and committees, including the Women Lawyers Association. One lovely group called Mothers-in-Law meet informally and fairly irregularly to help each other stay in touch during times of heavy family commitments.

Another way to stay in touch with colleagues and keep up with legal happenings at times when you need to drop right out of the workforce is to do courses. I completed the last year of my degree when my eldest daughter was of kindy age. Later I able to complete my practice course and my practice management course during two maternity leave breaks. More ambitious mums have undertaken masters degrees! This can taken all the way, and the university become the focus of your career if the academic life suits you. Although some academics put in very long hours, they do have flexibility in the timing of those hours. This leaves the legal academic mum free to collect kids from school and spend some time with them before putting in more hours after their bedtime, for example.

Wrapping it all up then: Don't have a baby during articles, associateship, your first year at the bar, or when you plan your rise to partnership. Do keep up your contact with colleagues, push for a part-time option if you think that will work for you, learn to use remote access facilities (typing helps), be creative, and give yourself as many options as possible. Also, take some general advice that assists all career carers: lower your housekeeping standards (or have someone else maintain them), ditch an unsupportive spouse (far more trouble than even having six kids could ever be!), chuck out anything that won't tolerate the washing machine, and learn to love take-aways. Good Luck!

QUEENSLAND ABORTION LAW

Robyn Mills is librarian of the Children by Choice organisation. Here, she outlines the provisions and significant case law relating to the procuring of abortion under current Queensland law.

The criminal provisions outlawing abortion in Queensland are contained in the Criminal Code Act (1899), which was largely the work of Sir Samuel Griffith, then Chief Justice of Queensland, and later first Chief Justice of the High Court of Australia. Initially he compiled a Digest of the Criminal Law in Queensland, drawing extensively from a draft code of criminal law which had been prepared by a group of eminent British jurists in the late 1870s. His document was introduced into Queensland parliament and became law in 1899. It covered not only the offences with which persons can be charged, but also the defences, justifications and excuses available at law to persons charged with an offence. It is only through the defence to the crime that women gain access to abortion (much the same as self defence or provocation are defences for assault).

In June 1995, the Queensland Government passed criminal legislation that changed the wording and section numbers of the provisions pertaining to abortion, but not the intent. This legislation will not come into force until it is proclaimed; this is expected to happen in 1996. In the meantime, the 1899 legislation remains applicable. The following Sections of the Criminal Code Act 1899 (Qld) outlaw abortion in Queensland:

Section 224: Attempts to procure abortion

Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for fourteen years.

Section 225: The like by women with child

Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime, and is liable to imprisonment for seven years.

Section 226: Supplying drugs or instruments to procure abortion

Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour, and is liable to imprisonment for three years.

The defence to unlawful abortion is also a Section of the Criminal Code:

Section 282: Surgical operations

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.

In May 1985 the Queensland police under the Bjelke-Petersen government raided the Greenslopes Fertility Control Clinic which had opened in 1976 and had undergone political pressure since that time. Police interrogated women and took away 20,000 confidential patient files to be copied and

studied. In June 1985, the Full Court ruled that the search warrants used by the police in the raid on the clinic were invalid, and ordered the files be returned.

The then Director of Prosecutions, Mr Des Sturgess, made a public plea for any person dissatisfied with the Greenslopes clinic to come forward. A 21-year-old mother of three children made a complaint about a termination of pregnancy performed in January 1985. As a result, Doctors Bayliss and Cullen were charged with procuring an illegal abortion contrary to Section 224 of the Criminal Code, and inflicting grievous bodily harm.

The presiding judge at that trial, R v Bayliss and Cullen (1986), was Judge McGuire. He based his ruling on the celebrated English case R v Bourne (1939) and a Victorian ruling by Justice Menhennitt in R v Davidson (1969).

R v Bourne:

In the English case, a respected London obstetrician, Dr Bourne, performed an abortion openly and without charge to terminate the pregnancy of a 14-year-old girl who had been raped. Dr Bourne was charged under section 58 of the Offences Against the Person Act (1861) which is substantially a combination of the Sections 224 and 225 of Queensland's Criminal Code. The word "unlawfully" is used in that section as it is in Queensland's Criminal Code, and this clearly means that in some circumstances abortions must be lawful. The presiding judge, Macnaghten J, had to decide what justification(s) would render an abortion lawful. He drew upon Section 1 of the Infant Life (Preservation) Act 1929 (UK) which provides:

... any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes the child to die before it has an existence independent of its mother, shall be guilty of a felony ... of child destruction ...

That Section provided a defence where the act which caused the death of the child "was done in good faith for the purpose only of preserving the life of the mother". This, of course, is virtually the same terminology that is used in Section 282 of the Queensland Criminal Code. Macnaghten J. then had to interpret the term "preserving the life of the mother". In his direction to the jury, he said:

Those words ought to be construed in a reasonable sense, and, if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are entitled to take the view that the doctor ... is operating for the purpose of preserving the life of the mother.

R v Davidson:

In the Victorian case, R v Davidson (1969), Justice Menhennitt defined the meaning of "unlawful" as it appears in Section 65 of the Crimes Act 1958 (Vic.) by reference to what is lawful. He settled on the principle of "necessity" which provides that an act which would usually be a crime can be excused if:

- a) It was done to avoid otherwise inevitable consequences;
- b) The consequences would have inflicted irreparable evil;
- c) That no more was done than was reasonably necessary; and
- d) That the evil inflicted by the act was not disproportionate to the evil avoided.

This principle contains two elements, one of necessity and one of proportion, which require that a pregnancy poses a certain danger to a woman's health before its termination will be lawful. (Cica, p39)

Menhennitt J. detailed the circumstances in which an abortion could be lawfully performed:

... the accused must have honestly believed on reasonable grounds that the act done by him was:

- a) necessary to preserve the woman from a serious danger to her life or physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of pregnancy would entail; and
- b) in the circumstances not out of proportion to the danger to be averted.

For abortion to be unlawful the prosecution has to prove beyond reasonable doubt that the medical practitioner lacked this honest belief. (R v Davidson at 672)

R v Bayliss and Cullen:

In the Queensland case, Judge McGuire expressed the firm opinion that R v Davidson represents the law in Queensland with respect to Sections 224 and 282. The Criminal Code (Qld) s 282 provides the accepted defence to a charge of unlawful abortion under s 224. It would appear from the stance taken by Judge McGuire that a prosecution under s 224 will fail unless the Crown can prove the abortion was not performed upon the unborn child 'for the preservation of the mother's life' and was not 'reasonable having regard to the patient's state at the time and to all the circumstances of the case'.

In the Court proceedings, Judge McGuire stated:

"... It would be wrong indeed to conclude that Bourne equates to carte blanche. It does not. On the contrary, it is only in exceptional cases that the doctrine can lawfully apply. This must be clearly understood. The law in this State has not abdicated its responsibility as guardian of the silent innocence of the unborn. It should rightly use its authority to see that abortion on whim or caprice does not insidiously filter into our society. There is no legal justification for abortion on demand."

Judge McGuire indicated that the present abortion law in Queensland was uncertain, and that more imperative authority, either the Court of Appeal or Parliament, would be required to effect changes to clarify the law. At the conclusion of the trial, Doctors Bayliss and Cullen were found not guilty on both counts.

Thus, the basis for legal abortion in Queensland rests on this decision. It has never been subjected to appellate scrutiny and it has been described as a "flimsy precedent". (Liddy, p20)

Since the 1985 police raid on the Greenslopes clinic, many Queensland women will travel to New South Wales to obtain an abortion in the belief that this will ensure greater confidentiality or because they believe that abortion is illegal in Queensland. (Ripper, p84). In addition, there is disparity between situations where according to the law an abortion would (or probably would) be lawful, and situations where such an abortion is actually available to a woman seeking termination of her pregnancy. Sometimes the discrepancy denies women lawful abortions. In Queensland, most private and possibly all public hospitals have restrictive policies on the provision of abortion services, making access to abortion very difficult even in circumstances where the abortion is medically indicated.

A recent national survey of women's experience of access to abortion indicated that for many women, the experience of obtaining an abortion was surrounded with hostility and secrecy and accessibility was difficult either through a lack of services or because health care providers were unwilling to give women information they needed to directly access those services. Access was determined by place of residence, access to information and access to money (Ripper, p86).

What is a potentially liberalising factor in access to abortion is the non-enforcement of the criminal law affecting abortion. (Cica, p47) With the exception of the charges laid against Bayliss and Cullen in Queensland, prosecutions effectively ceased in Australia in the early 1970s, a reason why the case law is so under-developed. The crime of abortion is not regarded as a serious problem with the police only responding to specific complaints. This is partly due to the politically divisive nature of the issue. Historically, governments in Australia have tended not to actively engage in the issue of abortion, regarding it as politically unwise.

Queensland Premier, Mr Wayne Goss, labelled the Queensland Criminal Code abortion provisions as 'repugnant' and 'obnoxious'. (The Australian, 17 May 1993 "Goss criticises abortion law but refuses to act" pp1-2) However, when the Queensland Government had an ideal opportunity to recommend repeal of this legislation in its review of the Criminal Code, it excluded from the Review those sections which relate to abortion (Sections 224, 225 and 226).

The Review was intended to bring Criminal law in Queensland up-to-date with current social values: "Community attitudes and ideals have changed substantially in the 90 years since the Criminal Code was introduced. The Criminal Law should reflect contemporary attitudes and ideas of the society in which that law has to operate." (*First Interim Report of the Criminal Code Review Committee*, p2). Despite the fact that the overwhelming majority in the community support abortion law repeal (as shown by the 1990 AGB:McNair Survey of Community Attitudes towards Abortion), it appears that Queensland will have legislation on abortion into the next millenium that has been, to all intents and purposes, unchanged since 1899.

Section 224 [Attempts to procure abortion] will be replaced by Section 184 of the Criminal Code Act 1995 (Qld):(1) A person must not, with intent to procure a female person's miscarriage -

- (a) unlawfully administer to her or cause her to take a poison or other noxious thing; or
- (b) unlawfully use force; or
- (c) unlawfully use other means.

Maximum penalty - 14 years imprisonment.

Crime - unlawfully attempting to procure an abortion.

- (2) It is immaterial whether or not the female is pregnant.

Section 225 [The like by women with child] will be replaced by Section 185 [Attempt by female to procure her own abortion]:

- (1) A female person must not, with intent to procure her own miscarriage -
 - (a) unlawfully administer to herself a poison or other noxious thing; or
 - (b) unlawfully use force; or
 - (c) unlawfully use other means; or
 - (d) unlawfully permit a thing or means mentioned in paragraph (a), (b) or (c) to be administered or used to her.

Maximum penalty - 7 years imprisonment.
Crime - unlawfully attempting to procure own abortion.

(2) It is immaterial whether or not the female is pregnant.

Section 226 [Supplying drugs or instruments to procure abortion] will be replaced by Section 186:

(1) A person (the "first person") must not unlawfully supply to, or procure for, someone else anything the first person knows is intended to be unlawfully used to procure a female person's miscarriage.

Maximum penalty - 3 years imprisonment.
Crime - unlawfully supplying a thing to procure an abortion.

(2) It is immaterial whether or not the female is pregnant.

The defence of Section 282 [Surgical operations] may be taken to be replaced by Section 53 [Surgical operations and medical treatment]:

(1) A person is not criminally responsible for performing or providing in good faith and with reasonable care and skill a surgical operation or medical treatment on a person for the patient's benefit, or on an unborn child to preserve the mother's life, if the performance of the operation or the provision of the medical treatment is reasonable, having regard to the patient's state at the time and all the circumstances.

Children by Choice Association Inc. agrees with these words of Catherine MacKinnon (1991):

"Laws relating to abortion make women criminals for a medical procedure only women need, or make others criminals for performing a procedure on women that only women need, when much of the need for the abortion procedure as well as barriers to access to it have been created by social conditions of sex inequality." ("Reflections on sex equality under law", p1319)

"When the daily practice within a country becomes remote from the law applicable to that practice, a major danger is created for the stability and for the general mental health of the society". (Casamajor)

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Many of these references are available from the Children by Choice Association Library. Phone 07 3357 9933 or 1800 177 725 for further information on this and related topics or to make an appointment to use the Library.

Legalisation or Degradation

Natalie Hamilton has been involved in the sex industry in Victoria since 1979 and over recent years in Queensland, and has been both a sex worker and operated sex industry businesses. Ms Hamilton has been President of SQWISI (Self-Health for Queensland Workers in the Sex Industry) since 1992. SQWISI is a community based organisation funded by the government for the delivery of HIV/STD education and welfare services to the sex industry. Because SQWISI is government funded, the views expressed in this article are those of Ms Hamilton and do not necessarily represent SQWISI's views. In this article, she examines the deleterious effect of current Queensland legislation on sex industry practises.

Prostitution is deemed to be the world's oldest profession. For millennia governments around the world have sought to eradicate this trade. None have succeeded.

In 1992 the Goss government passed an Act of Parliament designed to severely restrict the sex industry in Queensland, and impose severe penalties on those who do not comply. These laws are the most draconian ever imposed in the sex industry throughout Australia's history. They were ill-conceived, and should be revoked.

Summary of the Laws

The 1992 Prostitution Laws Amendment Act makes all forms of sex work illegal except for a single sex worker operating entirely on their own, from their own home. Under these laws brothels and escort agencies are illegal. It is illegal for two sex workers to work co-operatively, even from separate premises. It is illegal for a solo sex worker to employ a receptionist, or a minder, or a driver- even for their own protection. Soliciting for business is illegal, and so is advertising for business. So, in theory these private workers can exist, but only if they can make clients aware of their presence telepathically! (Thankfully not all the advertising avenues have been closed- the sex industry is not noted for its psychics!)

Penalties for breaches of the Act are severe and include up to seven years imprisonment, and massive financial penalties with sweeping powers to seize assets.

The sex industry of course employs men, women and transgenders, but the vast majority of sex workers are women. Traditional disempowerment of women, particularly in relation to matters pertaining to their sexuality, is one probable reason that historically, sex workers have been unable to attain justice for themselves through laws governing the sex industry. Another certain reason is the fear of stigmatisation that prevents sex workers from self-identifying and campaigning together as a pressure group. But even without an organised voice, the sex industry needs current legislation as a pressing matter of social justice. Queensland's current laws have had many unintended (but definitely foreseeable) side effects- notably to the health and safety of sex workers. And because most of the workers are women, and many of them mothers, there have also been effects on these workers' family lives, with possible implications for the welfare and even safety of their children.

WHY? WHY? WHY?

Prior to the introduction of these laws, the C.J.C conducted an exhaustive inquiry into prostitution in Queensland. Their recommendation was for regulations that would allow for legal sex industry businesses. There was considerable support for a legalised framework. SQWISI, The Council of Civil Liberties, Women's Legal Service, the Police Commissioner of the day, Noel Newnham, Queensland's police officers¹, Queensland's leading sexual health clinic, and even Queensland's own Health

Department and the Health Minister of the day, Keith McElliot believed the industry should be legalised. Experts in many fields affected by sex industry laws all supported the introduction of a regulated and legal sex industry.

But neither were these laws a concession to public opinion. Every major public opinion survey taken since the C.J.C. report was released, including the C.J.C.'s own surveys, clearly indicated public support for a legal and regulated sex industry.

So why did the government go against the advice and even against public opinion? One of the government's stated objectives with this package of laws is to "reduce the incidence of prostitution and discourage the acceptance of prostitution" Seemingly in conflict with this, another of their stated objectives is to "maintain public health with particular reference to sexual health". These laws seem ill equipped to achieve either of these objectives. Firstly, there is no evidence that harsh laws will reduce the incidence of prostitution and even Goss admitted that criminal sanctions could never eradicate the sex industry. Elsewhere in Australia, governments are seeking to raised health and safety standards for the sex industry through industry regulations and through improving the image of the sex industry. They are doing this as part of their public health initiatives, and also to improve the circumstance of people working in the sex industry. These governments believe that this cannot be achieved by sending the industry underground. And certainly it won't be achieved through discouraging public acceptance of sex work and sex workers. Sex workers are already stigmatised and marginalised- amplifying this will only compound the problems.

VIOLENCE – GOSS' CONTRIBUTION TO OCCUPATIONAL SAFETY STANDARDS

Since the introduction of these laws there has been a marked increase in cases of rape, bashings, robberies and assaults against sex workers. Two years ago on the Gold Coast a worker recently turned private was murdered. Not so long ago in Cairns a private worker was abducted by a client and held prisoner for four days. Under these laws private workers are denied the opportunity for adequate protection, and men with a mind to commit violence are aware of that.

For this industry, current evidence and history shows that there is safety in numbers. In the past brothels usually employed minders, escort agencies usually employed drivers, and private workers worked together to ensure each others' safety. These options are now illegal, and this situation is entrenching workers into a position of vulnerability. This government's Prostitution Act is an invitation to violence against workers!

SAFE SEX – IF IT'S NOT ON...IT'S NOT ON!...OR IS IT?

Over the last decade in Queensland and elsewhere in Australia it became common practice for organised forms of prostitution to enforce condom usage (If it's not on...it's not on). Condoms were supplied by employers, their usage was compulsory, and as a back-up, the brothel or agency required that the staff have regular HIV/STD check-ups. Elsewhere in Australia where brothels have been legalised, this is even required by law.

Further to this, new entrants to the sex industry were trained on how to check clients for signs of disease, how to put on a condom, and how to deal with difficult clients who did not want to wear one at all (believe it or not, there are still plenty of them around!).

Now in Queensland, workers are isolated from those influences. Even if workers are aware of the risks to their health, they can come under considerable pressure from the client to practise unsafe sex. The economic pressures on these workers are appreciable. Often, clients may offer them extra not to use a condom, or may refuse to pay if he is compelled to wear one. The worker may feel desperate and under pressure, and simply acquiesce (After all, this guy probably doesn't have any health nasties- he is a business man/family man/married man- it'll be OK just this once). The power dynamics between clients and solo workers overwhelmingly favour the client. These laws are having an impact on the health of sex workers. The possible consequences of the community could be devastating.

LEGAL LOOPHOLES AND THE CONSEQUENCES

The new laws have given birth to a new concept in the Queensland sex industry- the introduction agency. These are club-style premises that the clients can visit where they will be introduced to a number of girls (or guys). Ostensibly, the owners and receptionists of these premises have no knowledge that their staff are sex workers. They cannot know (under the current laws operators and receptionists can only be liable if they knowingly participated in the provision of prostitution). No conversations take place on the premises that promise or imply prostitution. Once introduced, the client and the worker leave the premises and then prices and services can be discussed. The workers may keep their own private unit nearby, but more often they have a motel room where business can be consummated.

This system is fraught with problems. SQWISI and other health service providers have no access to these sex workers through these businesses because from the operator's point of view they are not sex workers. These girls do not advertise so they cannot be accessed that way – word of mouth referral is SQWISI's only means of access. The competition between girls is immense. The girls that don't use condoms are a lot more popular than the ones that do practice safe sex. Further, many of these girls are new to the industry and have never used condoms at all, not even in their private sex lives. So many of them will have no real idea of the risks that they are taking.

These girls may be even more vulnerable to risks of violence than private workers. The operators of these introduction agencies have no idea where the girls take their clients (after all, the girls are not supposed to be sex workers so why would they take the clients anywhere?). Over the past twelve months one introduction agency alone has had three separate incidents of violence against their staff that were so severe the police will be charging perpetrators with attempted murder- if they ever find them. But these were only some of the worst incidents. There were and are many other attacks, most of which will go unreported.

Escort agencies are a more familiar form of sex industry business. Those that haven't been closed down are trying to operate using the same legal technicality. They instruct their staff (wink, wink, nudge, nudge) to provide companionship service only to the clients (and if we find out that you are providing sex we will have no choice but to sack you!!). So for these workers similar problems are arising. Agencies don't know or care whether safe sex is being practised, SQWISI has only limited access to these workers, and it is likely that many workers are taking risks. Drivers are not being employed by these agencies because that increases the agency's exposure to legal action. Again, sex workers are being placed at risk.

STREET WALKING, ADVERTISING AND TELEPATHY

Advertising sex industry services now is difficult, expensive and technically illegal. Telepathy has never been a reliable way of getting clients, so it should come as no surprise that numbers of street workers have significantly increased since the introduction of the new laws. For part-time or itinerant

workers who may otherwise have opted to do brothel work, the streets are the only way to get clients without the advance preparation of arranging phones and advertising. Even for fulltime workers these expenses can be prohibitive.

Street walking has its own inherent problems for residents, businesses and the workers. The risk of violence is enormous – all street workers have encountered it, or have come close. These workers are such easy targets for thieves, rapists and other assorted undesirables. Very few street workers ever report these offences to the police through fear of prosecution themselves, even when they have been victims of quite savage attacks. These are also broader community issues of condom disposal and disturbance to residents and local businesses. Given a broad enough range of legal alternatives very few workers would choose the dangerous and often degrading option of street work.

THE BEST POLICING MONEY CAN BUY

The policing of these laws has been rigorous. Queensland's new Prostitution Task Force has the honour of being the best funded and best-equipped anti-prostitution squad ever in Australia's history. For the first year they had a budget in excess of \$900 000. Since these laws came into effect most of Queensland's brothels and escort agencies have been closed. Those remaining are awaiting outcomes of court actions that will probably result in their closure. And its not just the owners who have been charged- workers, clients, drivers, receptionists have also been prosecuted. The police action hasn't been restricted to organised businesses. Even pairs of workers (working together for security) have been charged and convicted. Ironically, as some businesses are closed, others open, usually with operators less experienced in the sex industry, and probably less sensitive to the needs of the workers.

At the same time the police force is claiming that they are under-staffed and under-resourced to fight real crime. The public may think that police turn a blind eye to prostitution, and only prosecute occasionally or in special circumstance, but these laws are being enforced and prioritised despite the fact that the public clearly think that police have better things to do than enforce morality.

UNDERGROUND AND UNDERWORLD

The result of these laws has been to drive the sex industry underground. They have made al workers in the sex industry feel alienated fro the legal process and the community as a whole. This has made the job harder for health education organisations such as SQWISI. SQWISI has found workers harder to access, whether they be legal operators or illegal- and sometimes when contact is made, the find some workers distrustful of an organisation they feel is "quasi-government".

This same suspicion has also created monumental difficulties for policing in the areas of child prostitution, drug offences and co-ercion. These laws actually encourage the involvement of organised crime, as small time criminals are filling the vacuum left by the closure of mainstream operators. Unlike mainstream sex industry operators, these operators are difficult for the police to identify (they often use workers to "front" for them), and are notoriously unconcerned for the welfare of the workers.

LEGALISATION OR DEGRADATION

Adults should have the right to choose their employment. Even the existing laws recognise that, otherwise private sex work would also be illegal. Sex workers must be allowed to work with dignity. Sex work is not degrading, but being forced into vulnerable isolation is degrading; being forced onto the streets in degrading; or being forced to work illegally for unscrupulous employers is degrading. In short, these laws are degrading!

Sex workers should be able to choose the circumstances of their work. They must be given the right to work safely, the right to work elsewhere that at home, and the right to work with others. If they choose, sex workers should be able to work for organised, legal establishments. Under a legalised system establishments could be forced to adhere to standard business practises in respect of working conditions and occupational health and safety.

CONCLUSION

Queensland is currently the only state in Australia taking a repressive stand on prostitution. Victoria, the A.C.T., the N.T. and W.A. have all legalised prostitution, and N.S.W. has decriminalised it (legalisation pending). South Australia is currently debating criminalisation. Only Queensland and Tasmania maintain harsh legal sanctions, and in Tasmania at least, the laws are given low level enforcement priority. In Queensland, most informed opinion holds that the sex industry should be legal and regulated for the benefit of the workers and also for society as a whole. Goss however, seems stubbornly committed to the opposite course. Sex workers are being attacked, raped and even murdered, and still the government remains intransigent.

The community would also benefit from a regulated sex industry. If legalised, the police could get back to their real work- that of protecting the community. Further, we could introduce regulations to ensure occupational health and safety standards and sound working practices for this industry. Perhaps the single most compelling reason to remove these laws is the very serious public health implication that would result from the sex industry not being committed to safe sex. The problems faced by the sex industry must be addressed or they will inevitably spill over into the wider community.

Moreover, legislation of the sex industry is a matter of justice. Regulation of morality has no place in the Criminal Code of the 1990's. Sex workers must be given every opportunity to work safely and with dignity. Legalisation is the only way this can be achieved.

P.S. Write to your local member of Parliament and demand that these laws be revoked. We need your support. Thanks!

ENDNOTES

1 John O'Gorman, the spokesman for the Police Union revealed that a survey conducted by the Police Union demonstrated that a majority of police officers support the legalisation of the sex industry.

SOLE PRACTICE IN PADDINGTON

Rhonda Penny is a sole practitioner, enjoying the benefits of a Paddington-based practice when she has the leisure. Prior to this role, she worked in litigation in a small and busy city firm, and is a past President of the Women Lawyers Association. In this article she writes about the challenges and benefits of being a sole practitioner.

I started practice in Paddington two years ago. I set up from scratch- we had absolutely no precedents at all. The office that I have is actually 26 square metres, which is a fairly small amount of space. Into that space we have fitted my office, a small vestibule area and a reasonably well-sized work area where we can in fact house two staff, although one of them would be a bit cramped.

The office was originally a barber shop which had a wonderful view of Hong Kong harbour on one of the walls. It's now corporate grey and black with pine furniture. When I set up we had a very empty hard drive on the computer and a very small library. A friend from CCH lent me a series of CCH loose leafs, mainly on family law and conveyancing. These were proudly displayed in my book case. I think I even have a photo of myself sitting in front of them.

Before studying law I was a teacher in a special school for ten years. After that I had spent about seven years working as a consultant for the Education Department where I travelled fairly extensively throughout Queensland.

There are a lot of skills, mainly people skills, which I have developed as a consultant and as a teacher. These have been very helpful in my practice as a lawyer.

My previous career and work experience was a big asset in setting up practice because it meant that I already knew a large number of people who have given me work since I've been in practice. A lot of this has been Wills and Estates work, as well as some conveyancing, family law and litigation. This helps when you set up a practice because you really need a client base which is the hardest, and most time consuming thing to do. It was also helpful to be up in Paddington because I have lived in the Bardon area for approximately eighteen years and while I wasn't necessarily well known in Bardon, I did have enough contacts to keep me going.

Since I have been in private practice for myself in the suburbs I have discovered that the order of work that comes through one's door is principally family law, conveyancing, personal injuries, wills and estates, some commercial litigation and crime. I generally refer any commercial work to a colleague of mine in town.

Unfortunately, there are not a lot of women in business these days. I do have some female business clients, but I have found that approximately half the work I do is in Family Law. I think that it's unfortunate that female practitioners seem to get typecast as family lawyers. However, there is nothing wrong with being a family lawyer and there's nothing wrong with attending the Family Law Court. As far as the courts around Brisbane go, the Family Law Court, for a practitioner, is a fairly friendly place- it's probably the least conservative of the courts (although still fairly conservative). Family law can be satisfying if, as a legal practitioner you wish to help, assist and support women, as this is an area where women do need help. I mainly give general advice on separation or impending separation, property settlement, custody and access matters. We shouldn't underestimate the value of this because you'll often find that women are being bullied by their husbands who don't always tell them the whole story.

We really are in a position to help them and after spending an hour with them they are generally extremely relieved. There is a lot of personal satisfaction in this.

When I was working for a firm, there were a lot of things which I took for granted, although I no longer do. These are fairly simple things such as cleaning the office, vacuuming the carpet, dusting the eaves and getting under chairs to remove cobwebs. Make sure you can clean out cupboards! Every year I find that I have to organise the steam cleaning of the carpet. I've discovered that there are some things that secretaries don't like doing- for example, defrosting the fridge. In addition, I have to do other jobs such as weekly washing of tea towels and assembling new equipment. I've also had to assemble a new paper shredder, of which we are extremely proud. Imagine a small practice in Paddington being so sophisticated as to have a paper shredder!!

On a more serious note, sole practitioners do have many diverse roles and they do wear many hats. The most obvious role is that of solicitor- it is clearly the most important because it is the job that produces the income that pays the bills. In addition, I've found that one must be a book-keeper to keep up the trust accounting and general accounting, paying the bills and paying staff. When staff leave advertisements need to be placed. Then one has to select and train staff. In addition, I have had to organise the buying of my equipment. I'm not very practical and I'm not very technical, and I find these things very difficult (the best advice anybody gave me was to hire somebody to do the book-keeping, particularly as I've discovered my book-keeper is also a bit of a technician).

In conclusion, I've decided to give an overview of the hardest aspects, the most irksome aspects, and the best aspects of the job. The hardest aspect is the diversity of responsibilities one has. There are a huge range of tasks to do, some of which I have never done before.

The second hardest aspect is the loneliness. One does feel extremely alone, even in busy and entertaining Paddington. There are not a sufficient number of colleagues around to bounce ideas off. One has to organise lunches in order to have social contact. It's not always easy to organise a working lunch- on average I go out to lunch every six weeks.

The other difficult aspect is realising that the buck really stops here. When you are in sole practice you have total responsibility- there is no partner or senior partner to whom you can refer the responsibility.

For me, the most irksome aspects of the job is chasing clients who don't pay their bills. I find this very difficult, but it is a task that most people in the office find difficult, and is almost impossible to give to anybody else to do.

On the other side of the ledger, the best aspect of the job is—and you hear it many times—being your own boss is great and it can be fun! It's been very satisfying creating something from nothing. Now that it's working I think it's fun, and it's incredibly creative watching the practice grow and develop.

It's terrific not being a cog in the male dominated wheel of the downtown legal world. It's terrific not feeling used up by a system over which you have no control. Last but not least, it's terrific not being told what to do by a male boss whom you suspect is not as competent as you are.

It's a life that I can recommend, but it's one that I think you need a reasonable amount of experience behind you to do. Good luck!

WOMEN IN MEDIATION

Queensland Law Society's Bernadette Rogers canvasses gendered differences in communications and the significance such differences have in the adoption of alternative dispute resolution procedures.

Attendance at any training course, conference or a quick check of the lists of any community mediation service will suggest that mediation is a process that is more attractive to women than men. Given that conflict is common to all, it is interesting to speculate in whether there is a developing trend towards the feminisation of mediation- and if so why? Have women sold themselves short by accepting the “soft option”- continuing the trend of women dominating the “nurturing” professions- and left the intellectual rigours of black letter law and litigation to men? Or is there something in the philosophy of mediation, with its emphasis on the power of participants to reach their own agreement, without necessarily being restricted to the boundaries defined by rights, that means women are more comfortable with an interest-based process and less likely to resist acknowledging its worth?

Mediation, if one ignores the formal definitions, is simply a process or set of rules designed to ensure that the participants in a conflict situation deal with it in a structured way. It will force them to start at the beginning and work systematically towards the end, rather than starting with what the outcome should be and then justifying the stance. It requires the participants to be open minded when considering the causes of the conflict and therefore more lateral when considering possible solutions. It requires them to accept ownership of the dispute, because any outcome is dependent on the participants themselves being able to negotiate with the other side and reach their own agreement, rather than having an umpire tell them what the outcome will be. Stated simply, mediation is designed to encourage the participants to base their negotiations on their interests rather than their rights.

Edward de Bono talks about the three areas of development when dealing with conflict, moving from dogma through logic to perception (*I Am Right and You Are Wrong*. Penguin, 1991). Society is still coming to grips with dealing with perceptions. These eras are reflected in the strategies for dealing with conflict. Starting with a power base (I am stronger, therefore might will prevail) to a rights base (I am entitled to this outcome because the law/custom/contractual agreement has defined this right) to an interest base (for our mutual interests to be satisfied, we will need to work together to reach an outcome).

Most negotiations will contain an element of all three approaches, although in differing proportions. But is there anything in these approaches that makes them more natural or appealing for one gender than the other?

Consider the difference sense of self ascribed to men and women: “A man’s sense of worth is defined through his ability to achieve results...A woman’s sense of self is defined through her feelings and the quality of her relationship.” (John Gray: *Men are from Mars and Women are from Venus*)

While acknowledging the dangers of generalisations based on gender, it can be argued that men will be more attracted to a process which defines and determines rights and prescribes an outcome which is objective to the participants. On the other hand, women will be more comfortable with a process that allows participants to explore their feelings and interests and reach a consensual agreement, fosters future relationships and is based on subjective results.

The strategies are also closely tied with communication styles. Power is based on a dictate style that is likely to say “you will”. Right correlates with an argumentative style of communication exemplified by the de Bono title of “I am right and you are wrong”. Perception is dependent upon acceptance of the “shared meaning” definition of communication (Hugh Mackay: *Why Don't People Listen*, Pan, 1994).

It can be readily seen that developing a shared meaning is more difficult than engaging in argument or dictating terms. This is because a shared meaning involves establishing a relationship between speaker and listener that allows them to explore the meaning of a statement or action and confirm that it means the same thing to both sides. How does this relate to the difference in communication styles between men and women?

For most women, the language of conversation is primarily a language of rapport: a way of establishing connections and negotiating relationships...For most men, talk is primarily a means to preserve independence and negotiate and maintain status in a hierarchical social order (Deborah Tannen: *You Just Don't Understand*, Balantine Books, 1990)

Looking at this distinction it can be argued that women will be more comfortable with a communication style that promotes a shared meaning and men will be more at home in adopting a position and bringing others to the realisation that it is the right one.

Finally, consider the way men and women deal with conflict:

To most women, conflict is a threat to connection, to be avoided at all costs. Disputes are preferably settled without direct confrontation. But to many men, conflict is the necessary means by which status is negotiated, so it is to be accepted and may even be sought, embraced and enjoyed (Tannen, 1990).

It is understandable then, that the litigation system, which was developed by men, is based on adversarial principles that use language to establish facts and determine that there must be a winner and a loser after a contest has been fought. However, for some men and many women, the development of processes that allows a dispute to be settled without direct and public confrontation simply reflects their preferred way of dealing with conflict.

There is no right or wrong approach, there are only different approaches. As usual the answer appears to lie not in the continuing with a right/truth based or interest/perceptions based dichotomy, but in acknowledging that conflict management depends on matching the best available process with a dispute.

Simplistically, it can be argued that the disputes which result from the exploitation or breach of the accepted morals of our society will require a rights-based adjudication. We can expect this service to be available and that it will efficiently deal with the conflict that arises. Similarly, where there are disputes which can be resolved by the participants accepting responsibility for their own outcome and working towards resolution in a co-operative way, the mediation process should be considered. It is important that this option is also available.

When a particular process or negotiation style is not working, trying harder or doing the same thing better is not the answer. Trying something different may be.

It is not a case of those involved in conflict management having the luxury of choosing the process with which they are most comfortable, but rather ensuring individuals are skilled enough to provide a range of ADR options for their clients.

This means regardless of gender we all have a responsibility to increase our ADR arsenal..

PRO-WOMAN AND PRO-LIFE

Ruth Mortimer is currently studying part-time towards a Bachelor of Arts, majoring in Studies in Religion and Mathematics. She is involved in Feminists for Life and the Pro-life Society, and is active in the issues of free education, East Timor, Third World development and women's roles in religion. She is concerned with freedom of speech in the abortion debate- all views have the right to be expressed, especially those we disagree with. In this article, Ms Mortimer canvasses issues that are not often discussed in the abortion debate.

It is commonly assumed that to be a feminist is to be pro-choice. Contrary to this opinion, there are a growing number of feminists such as myself who are pro-life. This alignment has a long history in the feminist movement. At the first women's rights convention held at Seneca Falls, The Declaration of Sentiments and Resolutions was adopted. This called not only for women's suffrage, but also rejected abortion. Ideologies have changed within mainstream feminism but pro-life feminists continue to be involved and active in groups such as Feminists for Life.

I personally empathise with the desire of pro-choicers for self-determination and control of reproduction. In fact, I would be fully in agreement, save that I do not believe that a foetus is less than human. Thus, I see abortion as inconsistent with the feminist tenets of non-violence and equality for all people. Linked to this is the issue of ownership- women have fought against their categorisation as "property"- I believe the assumption that women have the right to decide the fate of an unborn person is equivalent to this attitude.

For this reason, while understanding the importance of self-determination, I do not accept that self-determination is possible or justified through abortion. Thus, pro-life feminism's basic tenet is that women cannot liberate themselves through abortion; society, not the pregnant woman, needs to be reconstructed to adapt to the fact that women become pregnant, and children need care.

We believe it is important to alleviate the problems in society that cause women to seek abortions, as well as to reform supports for pregnant women and children such as child-care, maternity leave, education, and the restructuring of employment environments. These are not easy solutions. They will take time, money and effort. We believe that by diverting time and energy into abortion rights, the struggle for legal and social equality has been de-emphasised.

The broader social issues surrounding women, pregnancy and children mean that legalisation is not as easy as merely removing abortion from the Criminal Code. Repeal of laws restricting abortion will not address, and may in fact contribute to the following issues.

If abortion law is repealed, this will not solve the issue of parental violence and negligence against children. Nor does it solve problems of male and societal irresponsibility, and may actually limit choices available to women. Sidney Callahan, Professor of Psychology at Mercy College, New York, writes: "ready abortion legitimises male irresponsibility and...even more male detachment and lack of commitment...Why should the state provide a system of day-care or of child-rearing? Permissive abortion, granted in the name of women's privacy and reproductive freedom, ratifies the view that pregnancies and children are a women's private, individual responsibility." ("Abortion and the Sexual Agenda", in *Commonweal*, April 25, 1986).

It is rarely acknowledged that without additional legislation and changes in social attitudes, there will be no protection against partners offering abortion and then withdrawing support, or bosses sacking women who refuse to have an abortion, or parents abandoning their teenagers who do not give in to the pressure to get rid of "it". In these ways, instead of feeling empowered by their abortion choices,

women are being confronted with pressure from others and experiencing a sense of powerlessness at not being able to bring their child into the world. Sallie Tisdale, a registered nurse in an abortion clinic, told the American magazine, *Harpers*: “women who have the fewest choices of all exercise their right to abortion the most.” (“We do abortions here”, Oct 1987, p70).

Abortion assumes new dimensions for all the feminists when sex-selection comes into play. Most of us would argue against an abortion being obtained simply for the reason that the foetus is female. But in third world countries, such as India, feminists are against abortion for this very reason. If a child is “unwanted” because it is female, is this reason any less valid than disruption to a career? How will the law deal with discrimination on the basis of ability, sex, intelligence, etc.?

In recognising prevailing attitudes towards women, pro-life feminists perceive abortion as part of the “playboy philosophy” that sees women as exploitable commodities to be used for male convenience and profit. Julie Loesch-Wiley notes that “abortion is part of the female-body-as-recreational-object-syndrome. The idea is that a man can use a woman, vacuum her out, and she’s ready to be used again”.: (*National Review*, Feb 27 1987, p.38). It is interesting to note that the Playboy Foundation has been one of the biggest financial contributors to the cause of abortion rights, with abortion fundraisers held at the Playboy mansion. Hugh Hefner, founder of the Playboy empire, claimed that, “Playboy had more to do than any other company with Roe v Wade. We supplied the money for those early cases and actually wrote the *amicus curiae* [brief] for Roe.” (*Life Advocate*, Aug 1993, p.156).

Definitional issues are not addressed in this debate. Definitions of “wantedness”, and “co-ercion” will need to be drawn up, as well as procedures to express these mind sets. Another issue is deciding how late a legal abortion can be procured - right up to birth? In this case, we are implying that a doctor can change an inhuman foetus into a human being simply by inducing early labour. Definitions invoked in this debate, such as “unwanted”, “disadvantaged”, “small”, reflect language used by men to negate the personhood of women.

Lastly, pro-life feminists are concerned about the physical and psychological effects of abortion on women. Studies on both the physical and psychological effects of abortion are readily available; such as the following from Japan, a country which has had the most experience with legal abortions since they were established in World War Two. The study found the following complications experienced by women after abortions; 9% were subsequently sterile; 14% suffered from recurring miscarriages; 17% experienced menstrual irregularities; 20-30% reported abdominal pain, dizziness, headaches, etc; and there was a 400% increase in ectopic pregnancies (Reardon (ed); *Aborted Women, Silent No More*; 1987, Loyola University press, USA; p.104). We believe that such facts must be made available to women deciding to have abortions That women who have had abortions feel betrayed in this regard is evidenced by groups such as Women Exploited by Abortion in Australia. Such women have found little support from their pro-choice feminist friends who present abortion as “no big deal”.

Conclusion

In summary, pro-life feminists assert that abortion is not a liberating solution to the “problem” of pregnancy. We believe the abortion mentality is in opposition to the goals and values of feminism and that the emancipation of women will not be achieved through the abortion law reform. True liberation will result with an end to factors that mean having children is a liability, and an establishment of a society which welcomes both women and children, and accepts responsibility as a whole for their care.

Women and the Law

Women and the Law was established in 1993 as a result of growing concern over a number of highly publicised cases of judicial bias which highlighted the myth of equality before the law. Students of the University of Queensland saw the need for a group that would provide a forum for discussion and activism on issues of equality, particularly gender equality, before the law. This original concern has been extended in an attempt to address women's positioning within the Australian legal system, particularly within legal education and the profession.

WATL recognises that the fundamental premise that all people are to be treated equally before the law may be undermined by the practices and assumptions incorporated within the Australian legal system. WATL seeks to confront these inequities through raising people's awareness of the flaws within legal institutions and actively working to achieve reform.

We are involved in attempts to address the lack of representation of women's experiences within the University of Queensland law school curriculum. In 1993, WATL submitted a detailed report to the Australian Law Reform Commission on biased approaches to legal education within the University of Queensland law school. WATL called for, and achieved, the introduction of a feminist jurisprudence component in Jurisprudence I and Jurisprudence II, and was active in instituting the need for an Equal Opportunities Officer in the University of Queensland Law Society. WATL has also been involved in the Union submission to the review of the Law School and has published and distributed a package on the use of non-sexist language in legal education.

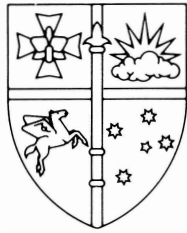
WATL also provides a forum for discussion of alternative viewpoints of legal and educational issues. 1994 witnessed the inaugural WATL Student Paper Competition, established to encourage the study of issues pertaining to women and their relationship with the law. Further, the annual publication of Pandora's Box has been widely praised within the profession. Additionally, the WATL newsletter Themis provides updated information on legal and political issues and events.

WATL recognises that the attainment of our goals is assisted by members of the academic and professional communities. The Women's Legal Breakfast provides an opportunity for students, academics and professionals to meet and continues to be an unqualified success. Previously, we have had the benefit of speeches from Dale Spender (1994) and Judge Helen O'Sullivan (1993). This year WATL hosted the Women and the Law Benefit Dinner, again allowing professionals and students to meet, while supporting the Women's Legal Service. These events provide an opportunity for the discussion of ideas, and enable students to benefit from the knowledge of professional members.

Additionally, WATL provides work experience with professional members, and moot and witness coaching for those involved in the UQLS competitions. These services allow students to benefit from others' experiences and encourage women students' participation in the profession, and in what are often dominated competitive events.

Ultimately, WATL continues to provide a forum for discussion of issues and strategies for the promotion of equality before the law and the promotion of women's access to, and participation in the legal system.

WATL would like to thank



Queensland Law Society

for their ongoing generosity and support

