



PANDORA'S BOX

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2000

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Contents

Foreword	2
Editor's Note	3

Progress in the Status of Women: Internationally and in Australia

Susan Halliday and Sabina Lauber.	4
Natasha Stott Despoja	20
Marilyn Lake.....	27

Inter-Country Adoption

Susanna Lobez	39
---------------------	----

Rape

Sarah McCosker	47
Annie Cossins	80

Indigenous Family Violence

Hannah McGlade	86
----------------------	----

Prostitution

Belinda Carpenter	104
-------------------------	-----

WATL and Blake Dawson Waldron Paper Competition – Finalists' Abstracts

Cubby Fox.....	116
Johanna Gibson	117
Nicky Jones.....	117
Helen McEniery	118
Suzanne Marlow	119

Foreword

I have attended a number of the annual breakfasts organised by WATL and been impressed by the vitality of the members and the ability of WATL to generate wider interest in its activities than its natural membership base at the TC Beirne School of Law at the University of Queensland.

The annual publication of “Pandora’s Box” is another means by which WATL achieves its objects. “Pandora’s Box” publishes articles which may focus on issues particularly affecting women, but are truly of general interest to the legal profession and the wider community – or should be.

I congratulate the editors of “Pandora’s Box” in bringing together a collection of articles in this year’s publication which are not only of current interest, but will serve as a valuable resource in future years for evaluating progress made in those issues.

The Honourable Justice Debra Mullins
Supreme Court of Queensland

Editor's Note

Violence, rape and prostitution... The cheery WATL symbol adorning the front cover belies the darkness of some of the issues discussed in *Pandora's Box* 2000. Heavy reading it may be at times but, we believe, worthwhile reading.

This year *Pandora's* assembles a wide variety of styles from authors with some very different backgrounds. We have also included for the first time, not only the winning entry from the WATL Blake Dawson Waldron student paper competition, but also abstracts from the other entries in recognition of the scholarship displayed in the quality of entries received.

We would like to thank the tireless executive of WATL who provided constant support and guidance, and to extend our gratitude also to those who took the time to contribute and lend their perspective to *Pandora's Box*.

Emerging from their efforts is a journal which serves as a thought-provoking reminder that "women's issues" are far from dead issues, and also a weighty tome to throw at anyone who suggests that an organisation called "Women and the Law" is anachronistic in the year 2000!

So, be challenged, be engaged, be informed, be enraged...

Enjoy Pandora's Box 2000!

Kate Deere

Megan Hirst

Suzanne Marlow

Beijing Plus Five – views from the negotiating rooms.

Susan Halliday* and Sabina Lauber^{†‡}

Introduction

“Is there anyone who is in favour of rape, sexual slavery, enforced prostitution, forced pregnancy or sterilisation? Does anyone support their use as weapons of war? If not, why should there still be brackets round these paragraphs on the last day of these negotiations? ... Excuse me if I am naïve – but I am frankly baffled by the inability to reach agreement on this language among countries which I know support all these measures and proposals – countries which are themselves taking action to implement them.”¹

These words, delivered by Dr Nafis Sadik, Executive Director of the United Nations Population Fund, on the last day of the Beijing Plus Five Special Session, summed up the frustrations of over 4,000 government and non-government delegates attending the event. On the last afternoon when the General Assembly should have been adopting the outcomes of the Special Session, delegates were still entrenched in the difficult and protracted negotiations that had marked the Beijing Plus Five review process.

Not until the morning after the close of the Special Session, was a final document agreed to. Negotiations had gone through the last day, Friday 9 June 2000, into the night and concluded at 5am on Saturday. A weary but colourful tribe of delegates poured out of the United Nations building as the sun rose and clambered into bed for a few hours sleep before a specially convened General Assembly adopted the Outcomes Document.

* Federal Sex Discrimination Commissioner

[†] Director (A/g), Sex Discrimination Unit, Human Rights and Equal Opportunity Commission

[‡] Commissioner Halliday and Ms Lauber attended the Beijing Plus Five Special Session as independent advisers to the Australian Delegation. Ms Lauber also attended the PrepCom as an adviser to the Australian Delegation.

¹ Statement by Dr Nafis Sadik, Executive Director of the United Nations Population Fund to the Special Session of the United Nations General Assembly on the Fourth World conference on Women, United Nations, New York, 9 June 2000. Available on www.un.org/ga/webcast/statements

The United Nations General Assembly Special Session was formally called *Women 2000: Gender, Equality, Development and Peace in the 21st Century*. It was convened to review the progress achieved in the five years since the adoption of the *Platform for Action* in Beijing in 1995 (BPFA), hence the unofficial, yet widely used title “Beijing Plus Five”.

There were a number of advances in women’s rights made at Beijing Plus Five, despite disturbing pressures from several delegations to backtrack on previously agreed standards. However, the gains were hard fought and the missed opportunities and losses were at times devastating. Overall the process was chaotic and there is no doubt that some government delegations would have returned to their capitals and heavily criticised the United Nations’ system.

This article seeks to evaluate the Beijing Plus Five conference by recognising it as part of the broader international process of human rights standard setting. This process suffers from inevitable limitations born of vast differences between governments, political systems and cultural priorities. It is questionable whether these limitations can ever be transcended.

Despite these challenges, the traditional tools of international law, such as diplomacy, shame and consensus, can be strategically used, as they so aptly were at the Beijing Plus Five conference, to produce valuable outcomes for women.

This article examines the gains made and losses endured during the negotiations, as well as the significant contribution that delegate interaction made to the process. In addition, the consistent lobbying and involvement of non-governmental organisations will be reviewed in order to reflect the vital contribution they made. The article then moves on to briefly examine the limitations of international processes in setting standards for the rights of women. Having accepted the limitations and taken on board the realities of unique global meetings such as this, it is argued that women can and have effectively utilised such a process to bring about real change.

Background

The original 1995 Beijing Conference was one of the largest global conferences ever held. Some 17,000 participants attended including 6,000 delegates from 189 countries, over 4,000 representatives of

accredited non-governmental organisations, a host of national civil servants and 4,000 media representatives. More than 30,000 people also participated in the NGO Forum that was run simultaneously.

There is no doubt that this extraordinary presence at the Beijing Conference played a significant role in bringing about the gains in the BPFA. The BPFA obliged governments to look at twelve Critical Areas of Concern as priorities for action:

1. Women and poverty
2. Women and education and training
3. Women and health
4. Violence against women
5. Women and armed conflict
6. Women and the economy
7. Women in power and decision-making
8. Institutional mechanisms for the advancement of women
9. Human rights of women
10. Women and media
11. Women and environment
12. The girl-child

In several of these areas, the BPFA introduced new text into the international arena, thereby creating new global standards for women. In particular, the text pertaining to violence against women was seen as a valuable step forward when compared to other major United Nations documents on this issue.²

In addition, the Beijing Conference facilitated the largest ever participation of non-governmental organisations (NGOs) at a United Nations World Conference. Some 400 NGOs holding permanent consultative status with the Economic and Social Council (ECOSOC) were joined by another 2,500 NGOs especially accredited to attend.³ The views and lobbying of the NGOs strongly influenced the final Document negotiated and reaffirmed the place of civil society in international governance.

² Lee, "Violence Against Women: Reflections on the Past and Strategies for the Future – an NGO Perspective" (1997) 19 *Adel LR* 45.

³ Amnesty International, *Report on the Fourth World Conference on Women*, IOR 41/30/95, 22.

Like New York in 2000, Beijing was a place of hard fought battles. On their return from Beijing, Australian participants reported mixed feelings.⁴ However, the Beijing achievements should never be underestimated. In the words of Janet Hunt:

“The achievement of the Conference was that so many signed on to the Platform... If even half of the Platform was seriously implemented, it would be a huge step forward for women around the world.”⁵

Unfortunately, ‘serious implementation’ of the BPFA was not followed through by all the governments that had officially adopted the document.

As a non-treaty process, the World Conferences on Women are conducted under the auspices of the Committee on the Status of Women (CSW). This is a United Nations body made up of representatives of governments, generally delegates from government missions to the United Nations.

These Conferences bring together Nation States and Observers⁶ to negotiate and adopt, by consensus, documents of review and commitment. The notion of consensus negotiation brings an interesting element to the process and the outcomes. Effectively, an objection by a single delegation can limit language that the remainder of the world has agreed to. With Observers such as the Holy See (the Vatican) having full negotiation rights, more controversial issues around the rights of women are often unlikely to become part of the final documents emerging from such conferences.

However, the element of consensus gives a final negotiated Document increased strength. As text that has been hard fought for, amended, traded, bartered and then adopted by all Nations, it can be skillfully used by international lawyers, women’s groups and NGOs to fight for the full implementation of the rights enunciated.

⁴ See for example, Australian Feminist Law Journal 1996, issue 6; Lee, “Violence Against Women: Reflections on the Past and Strategies for the Future – an NGO Perspective” (1997) 19 *Adel LR* 45.

⁵ Hunt “Reflections on Beijing” (1996) 6 *Australian Feminist Law Journal* 39, 40.

⁶ The phrase ‘Nation States and Observers’ makes the distinction between Nations that are members of the United Nations with a seat in the General Assembly and those that are not members. Observers include recognised Nations that are not members of the United Nations, such as Switzerland. Observers do not have a seat in the General Assembly and hence do not have United Nations voting rights. At World Conferences such as Beijing Plus Five, Observers may be granted full negotiation rights.

Beijing Plus Five Special Session (Women 2000)

The primary aim of the Beijing Plus Five Special Session was to accelerate the implementation of the BPFA through a process of review and appraisal. From 5 to 9 June 2000, 180 Nation States and Observers gathered to negotiate and adopt a Political Declaration⁷ to reaffirm the responsibility of governments to implement the BPFA and an Outcomes Document⁸ to review and strengthen the BPFA.

Negotiations started in March 2000 when the CSW met in New York as the Preparatory Committee (PrepCom) for the upcoming Special Session.⁹ The draft Political Declaration and draft Outcomes Document prepared by the United Nations Secretariat were opened to negotiation.

As is traditional at United Nations negotiations, Nation States negotiate in blocs. At the PrepCom there were three main negotiating blocs – the European Union, the G-77 (including China) and JUSCANZ. Australia, along with Japan, the USA, Canada, New Zealand, Norway, Switzerland, Iceland, Liechtenstein and the recently joined Republic of Korea form the negotiating bloc JUSCANZ. Bloc negotiation strengthens strategic alliances and builds strength from numbers. It also serves to make negotiations more efficient, limiting voices to three, rather than 180.

The downside of negotiating in blocs is that a number of voices must be diluted in order for the common voice of the bloc to be formed and heard. During the PrepCom, JUSCANZ members spent many days together, negotiating the Outcomes Document draft text before a common JUSCANZ voice could be presented to the PrepCom. Difficult battles ensued over issues of strategic national interest, with the views of particular countries clearly in conflict with the interests of other JUSCANZ members. The JUSCANZ members negotiating

⁷ UN Doc A/S-23/2, paragraph 56.

⁸ Review and appraisal of progress made in the implementation of the 12 critical areas of concern in the Beijing Platform for Action, and Further actions and initiatives for overcoming obstacles to the implementation of the Beijing Platform for Action, UN Docs A/S-23/2/Add.2 as amended by A/S-23/AC.1/L.1/Add. 1-42.

⁹ Committee on the Status of Women, 44th Session (2000). The PrepCom was chaired by Christine Kapalata (Tanzania) and adopted several resolutions that set out the framework for review: CSW draft resolution E/CN.6/1999/L.2/Rev.1, Preparations for the Special Session of the General Assembly, <http://www.un.org/events/ref39.htm>

the draft text experienced much tension in order to finally present under the guise of a united group.

Balancing the tension that emerged whilst delegates sought to protect their national interests were the valuable opportunities for creative additions to the original text and the supportive cross country relationships developed.

By the end of the PrepCom it was evident that the three months allocated to negotiate the Beijing Plus Five draft document was inadequate. Intercessional negotiations between the PrepCom and the June 2000 Special Session enabled the negotiations to continue, largely through diplomats based at the Missions to the United Nations in New York. The result of these intercessionals however was an Outcomes Document that was substantially different and somewhat limited compared to the idealistic terms that had been negotiated earlier in March.

The “watering-down” process continued at the New York Special Session in June 2000. In hindsight, a longer period of PrepCom negotiation would have allowed for more strategy and planning, and an all round better result.

The limited period of time particularly hindered the G-77. This substantial negotiating bloc, comprising diverse nations from all over the world, could not reach substantive agreement on all the issues before them. By the time the Special Session commenced in June, the G-77 had broken down into regional negotiating blocs which included the Southern African Developing Countries (SADC), the Southern Latin American Countries (SLAC), the Caribbean Countries (CARICOM), Pacific nations, the Islamic countries and Asia. The negative outcome was that this added a significant number of extra voices to the debate; the positive outcome was that these voices were more representative of the constituents within the given regions.

With the breaking down of the G-77, strategic negotiations became possible between like-minded nations such as JUSCANZ, EU, SLAC and CARICOM. This greatly assisted progress in the larger negotiation rooms, with these countries acting as a large, yet unofficial, bloc on many issues. However, alongside this cooperation lay the decision by several countries to negotiate independently. This was particularly the case with the Holy See and several Islamic nations including Pakistan, Saudi Arabia, Egypt, Sudan, Algeria and Iran. While these negotiating

Nation States and Observers generally echoed similar views on the text, they did so in a strategic way, utilising separate voices, thus creating the impression that substantial resistance existed when only a handful of countries actually disagreed.

The strong association between several Islamic countries and the Holy See was publicly noted by experienced diplomats, several of whom commented that they had never before seen such a close alliance between these groups. The presence of the Holy See, exercising full negotiation rights, had been criticised by many NGOs at the Beijing Conference.¹⁰ While the Holy See's status as an observer rather than an NGO is legally uncontentious,¹¹ it again drew significant criticism from many participants at Beijing Plus Five. No other independent seat of religious power enjoys such privilege at United Nations negotiations.

Gains Made and Losses Endured

There are several ways of assessing the Beijing Plus Five process. It is inevitable that many will focus purely on the Outcomes Document to establish the advances made, or the lack thereof. However, throughout the PrepCom and the actual Special Session it became evident that the gains from this process extend beyond the final text.

This discussion reviews the gains and losses made in three areas: firstly in the Outcomes Document, secondly, in the role of NGOs and thirdly, the value of the Plenary Session at which the General Assembly met to hear members report on their progress since Beijing in 1995. These three distinct parts of the Beijing Plus Five process bring into play three distinct tools of international law. Properly understood, these tools and the gains they bring can continue to be used to effectively implement and advance current standards of women's rights.

¹⁰ Otto "Holding up Half the Sky, but for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women" (1996) 6 *Australian Feminist Law Journal* 7.

¹¹ Kuntz "The Status of the Holy See in International Law" (1952) 46 *American Journal of International Law* 308.

1. The Outcomes Document

The Political Declaration, negotiated at the PrepCom in March 2000 and adopted by the Special Session in June 2000, strongly reaffirms that governments have the responsibility to implement the BPFA. The BPFA to this day remains the crucial reference point for governments, with respect to their obligations regarding the rights of women.

The Outcomes Document builds on this reaffirmation and strengthens the BPFA in many areas. Designed essentially as a review document, the Outcomes Document has four parts:

- I. Introduction
- II. Achievements and obstacles in the implementation of the twelve critical areas of the Platform for Action
- III. Current challenges affecting the full implementation of the Beijing Declaration and the Platform for Action
- IV. Actions and Initiatives to overcome obstacles and to achieve the full and accelerated implementation of the Beijing Platform for Action

It was agreed at the PrepCom that the Special Session would be undertaken on the basis of the BPFA and that the original Beijing Platform would not be renegotiated. This agreement became a crucial element during the later stages of negotiations when several countries utilised their heads of delegations as key negotiators to attempt to reject gains that had been made in 1995. In such instances, usually accompanied by tense disagreement on contentious issues, the Chair of the negotiations adopted the exact language contained in the BPFA.

Sexual orientation

By far the most contentious issue at the negotiations was the attempt to include text using the term "sexual orientation". Hard fought but lost at the 1995 Beijing conference,¹² the issue was put back on the agenda by JUSCANZ, the EU, Southern Africa and several Latin American countries. Acknowledging that any gains in this area were unlikely, these Nation States wanted at a minimum, recognition in Part II of the

¹² Otto "Lesbians?: Not in My Country" (1995) 20(6) *Alternative Law Journal* 288.

document that some governments had, since Beijing, enacted legislation to eliminate discrimination on the basis of sexual orientation. Attempts were also made to include text and strategies to combat violence against lesbians. A tense stand off in the small hours of the morning on the final day evidenced just how far away Nation States were from having “sexual orientation” on the agenda. In fact, conservative Nation States made it clear that if a reference to sexual orientation found its way into the Outcomes Document, they would refuse to adopt the document in its entirety. All references were ultimately dropped and the status quo of the BPFA maintained.

Health

Several gains were made in the area of health, reflecting the strong commitment of Nation States such as the USA, Canada and a number of European and African countries. The concept of women’s health throughout the life-cycle became a major focus of the Outcomes Document. Provisions relating to health now go beyond the BPFA by focusing on the gender aspects of the HIV/AIDS pandemic as well as other diseases such as malaria and tuberculosis. The situation of the girl-child affected by HIV/AIDS is specifically addressed, as an infected person, care provider and orphan.

Women’s right to control their sexuality, including sexual and reproductive health was included in the document, despite staunch opposition from several conservative Nation States and the Holy See. In addition, strategies regarding women’s and men’s access to safe, effective, affordable and acceptable methods of family planning, including information and services are included. Vigorous debates around the issue of abortion took place, with several Nation States attempting to incorporate the language of the 1999 International Conference on Population and Development Plus Five (Cairo Plus Five) into the Outcomes Document. This more progressive text was ultimately over-ruled and only the BPFA language was retained.

In line with the life-cycle approach, the Outcomes Document specifically addresses aging, stressing the need for programs for healthy, active aging, aimed at ensuring the independence, equality, participation and security for older women. The need to promote women’s and girl’s mental health is also recognised, as is its

integration into health care services and programs. The Outcomes Document also acknowledged the need for gender sensitive training of health workers in order to recognise and properly address gender-based violence.

Globalisation

Gains included the recognition of the gendered impact of globalisation and a commitment to ensure equal access to social protection. Equal participation of women in macroeconomic decision making was also included. However, some 'developed' Nation States were accused of showing little support for eliminating the identified negative effects of globalisation on women. This issue impacted on the free trade agenda of many nations and there was little support for text that could impact on progressing international trade negotiations. Predictable reluctance to support firm commitment to increasing overseas development aid was also shown. References to this issue inevitably became shrouded in words of vague commitment.

Violence

Considerable progress was made in strengthening standards in the area of violence against women and girls. The framework for discussion has been expanded to focus on the need to promote an environment that does not tolerate violence against women and girls. Governments have now committed to undertake research into the root causes of violence against women and girls and to establish legislation to handle criminal matters relating to this violence. However, a disappointingly narrow understanding was adopted on government accountability for violence against women and girls perpetrated by non-state actors.

More specific provisions were introduced to address issues not directly mentioned in the BPFA, such as marital rape, crimes committed in the name of honour and passion, racism and racially motivated violence against women and girls. New measures were created to mainstream gender into national immigration policies in order to recognise gender related persecution and violence when assessing grounds for granting refugee status and asylum.

Trafficking in women and girls was viewed in a holistic manner,

addressing the root causes of the phenomenon and developing a comprehensive anti-trafficking strategy including legislative and preventative measures, exchange of information, assistance, protection and reintegration of victims, plus the prosecution of offenders. The Document also introduced the idea of not prosecuting women and girl victims of trafficking for illegal entry or residence in the country, into which they were trafficked.

CEDAW

Unfortunately there was significant reluctance to link the Outcomes Document with the standards of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Some of the debates even failed to acknowledge the obligations several Nation States under CEDAW. Despite this reluctance, the Outcomes Document encourages Nation States to sign and ratify the Optional Protocol to CEDAW adopted in 1999 as well as the Rome Statute of the International Criminal Court.

Hard fought text on inheritance and property rights was included, as well as access to housing. However, language on labour rights was disappointingly weak and there is little reference to existing standards already developed by the International Labour Organisation in the Outcomes Document.

There is no doubt that several gains were made. But important battles remain for future negotiations. The challenge now is to use the gains that have been made and bring about their implementation. Consensus documents on international human rights standards can be used as valuable statements of international and domestic commitment. Unfortunately women and NGOs often favour the more well known but less detailed CEDAW.

2. The role of NGOs

A high number of delegations, particularly JUSCANZ delegations, contained representatives from NGOs. These NGO representatives used their delegation membership to transmit the wishes of civil society from their own countries to the delegations. The Australian delegation had three NGO delegates - from Soroptimists International, the Australian Federation of Business and Professional Women and the

Young Women's Christian Association. The genuine involvement in depth and participation of the NGOs on the Australian delegation and many other delegations clearly demonstrated the entrenched role of civil society in the United Nations system today.

However, while quite firmly entrenched in the United Nations system, the role of NGOs nevertheless continues to be controversial, and difficult for some Nation States that would prefer more limited and highly regulated participation.

NGO participation in the Special Session was determined at the March 2000 PrepCom where it was decided that NGOs with ECOSOC consultative status, NGOs that had participated at the 1995 Beijing conference and other NGOs, could all participate. Initially at the PrepCom NGOs had access to the negotiation floor. Significant difficulties arose with a large number of representatives from single issue right-to-life groups flooding and aggressively lobbying negotiation rooms. Many delegates consequently made complaints of harassment to UN officials. The result of this unprecedented behaviour was that all NGOs not included in government delegations were denied access to the negotiation floor; their access allowed from the viewing gallery only. No NGO access was allowed to the small negotiation groups that had been assigned the more controversial provisions.

NGOs held meetings throughout the PrepCom and the Special Session. Australian NGOs met daily for briefings facilitated by a government funded NGO coordinator. The presence of this coordinator allowed for a much better flow of information and interaction with government delegates than would have otherwise been possible. In addition, alternative NGO reports were made available by regional representatives and NGO caucuses on the 12 critical areas of the BPFA negotiated their own additions to the Outcomes Document. Comprehensive lobbying by NGOs ensured that several NGO initiatives found their way into the final Outcomes Document.

Intense NGO lobbying regarding issues of early and forced marriage and honour crimes took place prior to and during the PrepCom, and the Special Session. This strategic lobbying undoubtedly contributed to these issues becoming a strong part of the final Outcomes Document.

The powerful, albeit often invisible role of NGOs in negotiating human rights standards at the international level, caused some controversy during negotiations. Several Nation States passionately

opposed language that strengthened and ensured the place of NGOs within the human rights system. Despite this opposition, several provisions of the Outcomes Document acknowledge the important complementary and autonomous role of NGOs in progressing women's human rights.

NGOs have clearly found a valuable and effective place in systems of international governance. They have access to and a willingness to use the valuable tools of lobbying, information exchange and 'shaming' to bring about consistent future growth in women's rights.

3. Attendance at the Plenary Session

The Plenary Session held in the General Assembly Chamber allowed governments to make short presentations on their achievements, challenges and obstacles over the past five years of implementation of the BPFA.

The quality of the presentations was mixed, with some governments presenting hollow self-congratulations, while others delivered inspirational messages of genuine change. African nations focused on the tragedy of HIV/AIDS as a barrier and immense challenge in the achievement of human rights for women. United Nations agencies reported frankly and honestly on what they saw to be achievements and obstacles, often amidst much cheering and applause. A small number of NGOs were also invited to give oral statements to the General Assembly.

The value of these Plenary Sessions lies not so much in the actual words spoken, but in the fact that governments from across the globe are called upon to report on human rights progress. The process requires governments to account for their action, or inaction, by exposing them to the judgment and criticism of other governments, the United Nations and NGOs.

Armed with the tools of diplomacy, strategic questioning and 'shaming', the Plenary Session can provide a useful mechanism for advancing the rights of women. Plenary Sessions are inevitably shadowed by a number of diplomatic functions, cocktail parties and valuable lobbying opportunities in the cafeteria and toilet waiting queues. Governments attending Plenary Sessions often seek a positive response from their domestic NGOs and the media. It is a valuable time for encouraging commitment and change from participating delegates.

Feminism and International Processes

Since the revolutionary article “*Feminist Approaches to International Law*” in 1991¹³, many writers have added to the critique of international law and the place of women within it.¹⁴ This scholarship has provided valuable impetus for an understanding of the way that international legal systems and processes exclude women’s issues.

The recognition of women’s rights from the United Nations system has generally been achieved through the “add women and stir” approach.¹⁵ Due to much criticism of the inadequacies of this approach and the results that ensue, the United Nations has moved towards a growing commitment to mainstreaming.¹⁶ This commitment was evident in the Outcomes Document and was extended to governments at the domestic level also.

However, the processes used at the recent Beijing Plus Five conference demonstrated just how far we are from a genuine understanding of women, and women’s issues, by the United Nations system. The masculinised ‘war of words’ that too often resembled a traditional battlefield was at odds with the reality of women’s lives that could benefit so greatly from this conference. Sadly, in the small hours of the morning during the final rounds of negotiation, it became all too clear who had the real power in many Nation States. In contrast to the colourful clothes that had filled the negotiating rooms, the sea of tailored, dark grey suits became obvious as the deeply controversial issues came up for negotiation.

With only eleven female ambassadors to the United Nations in New York, out of over 160 countries, and few women in senior positions at the United Nations itself, it is evident that the Beijing Plus Five

¹³ Charlesworth, Chinkin & Wright “Feminist Approaches to International law” (1991) 85 *American Journal of International Law* 613.

¹⁴ See for eg, Mathew, Otto and Walker “Feminist Interventions in International Law: Reflections on the Past and Strategies for the Future” (1997) 19 *Adel LR* 1, especially the references provided in footnote 4; Dallmeyer (ed) *Reconceiving Reality: Women and International Law* (American Society of International law), Washington DC 1993; Chinkin “Feminist Interventions into International Law” (1997) 19 *Adel LR* 13.

¹⁵ Chinkin “Feminist Interventions into International Law” (1997) 19 *Adel LR* 13, 18.

¹⁶ Chinkin “Feminist Interventions into International Law” (1997) 19 *Adel LR* 13, 18.

conference was underpinned by a structure that overwhelmingly thrives on the experiences of men. If one was to ask, can the mere presence of women at such a conference, or the mere subject matter of women's rights, ensure a genuine advancement for women around the world, the answer in the year 2000 would have to be – not yet.

It is reflections such as these that caused Diane Otto to comment on the results of the Beijing Conference:

“Extending to women the rights that men currently enjoy is not enough. It is not enough because it does not challenge the underlying social, political and economic institutions that reproduce gender hierarchies. It is also not enough because it does not redress the inequitable access to rights that differently situated women (and men) have... Challenging that power is not simply a matter of cajoling more women into participating in the existing systems. There remains a long haul before us while we learn, through our resistance, how to challenge power on terms other than those prescribed, and therefore controlled, by the dominant regimes.”¹⁷

May Lamont, an NGO adviser to the Australian Government Beijing Plus Five delegation raised similar challenges on her return, expressing the dispossession she felt as a woman at the meeting:

As a member of the female sex, it was my body that was under the most minute scrutiny; my body that was the subject of claim, ownership and control. I went from anger to despair, especially as the negotiators from some of the more conservative and repressive forces were women.¹⁸

Conclusion

While women should continue to engage in the international system to fight for the advancement and implementation of women's human rights, there is also a need to question and expose the structural barriers and mindsets that marginalise the real experiences of women and hence, real advancements for women around the globe.

The limitation that must be accepted about the international system is that international law in its many forms can only offer a partial response to women's perspectives.¹⁹ A thorough understanding of this

¹⁷ Otto “Holding Up Half the Sky, but for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women” (1996) 6 *AFLJ* 7, 28.

¹⁸ *Women's News*, Newsletter of the Commonwealth Office of the Status of Women, Issue 14, August 2000, 6

¹⁹ Mathew, Otto & Walker “Feminist Interventions in International Law: Reflections on the Past and Strategies for the Future” (1997) 19 *Adel LR* 1, quoting a presentation by Hillary Charlesworth at p 4.

limitation, as well as an understanding of the diverse tools available to effectively exploit international law, is the key to effectively using these processes. Often couched in the language and systems familiar to governments and dominant structures, international law is a valuable mechanism when seeking change in these areas.

However, as independent advisers to the Australian Beijing Plus Five delegation, it is our view that other strategies should be used outside the international law system to examine women's experiences and, in turn, challenge the mindsets that deny their recognition. These should include activities at the grass roots of women's lives that acknowledge the diversity and reality of their experiences, activities that target domestic laws and governments, and academic analysis and discussion. The role of NGOs and national human rights institutions, such as the Australian Human Rights and Equal Opportunity Commission, in these other strategies are crucial. Over time, these strategies will create legitimate and systematic change at the domestic level, which hopefully will permeate the international level to inform and strengthen the processes there.

Visions for the Future: Address to the Global Forum of Women Political Leaders

Natasha Stott Despoja*

Editor's Introduction

This paper was presented by the Senator earlier this year in Manilla, at the Regional preparatory Forum for the Beijing Plus Five Women's Conference.

* * * * *

Events such as this provide an invaluable opportunity for women to share ideas and listen to each other's experiences. Today, I am presenting the perspective of a younger woman involved in politics and will provide a brief snapshot of my nation's record on women's representation. Of course, it is equally important for us to set goals, and in setting out my 'vision for the future', based on an analysis of the present, I hope to give you all some ideas as to what those goals could be.

Women and Power:

The diversity of women represented here reflects the diversity of issues each faces. Cultural, political and economic differences all alter the circumstances in which we seek access to decision-making processes.

However, there are common issues we all face, and also a common future challenge, which the increasing integration of nations under globalisation forces us all to consider and confront.

The story of women's participation in politics over the past century has been about gaining access to the institutions of power in our societies. In most cases, this has been confined to the gaining of suffrage, and representation in national political institutions.

* Senator Natasha Stott Despoja is the Deputy Parliamentary Leader of the Australian Democrats.

Women and Votes:

I come from a State (South Australia) which, in 1894, was among the first in the entire world to grant women the right to vote and to stand for Parliament. Our national legislature followed soon after granting women's suffrage to all women (except Aboriginal women in some States) in 1902.

In 1902, we lead the world yet, when we review our progress at the beginning of the 21st century the numbers are lacking: Today 22.3% of Australia's federal parliament is made up of women. This statistic breaks down to approximately to a rate of 15.5% participation by women in the House of Representatives and 30.3% in the Senate.

Although Australia's participation rate for women is double that of the international average, we still have a way to go. Certain areas such as representation of women in the executive power must be addressed. At present Australia has only one woman federal cabinet minister. Australia has had 30 male Prime Ministers in a row, the odds of this work out at about 1 in two thousand million! For those women here representing countries with older systems of governments, the odds are even more extreme. Either politics is not very scientific or not a very good bet for women!

Australia

I stand before you as one of those female members of the Australian Commonwealth Parliament and from a nation with 40 000 years of history, a country rich in indigenous heritage and culture with one of the longest continuous democracies in the world, and yet one perceived as relatively young.

Australia is, in some ways, coming of age. In addition to the Sydney 2000 Olympics, Australians are looking towards the national celebration of the Centenary of Federation in January 2001 marking the hundredth anniversary of the year the old colonies became a federation. Milestones, additional to New Years, which provide Australians with another focus of debate on what kind of nation we want to become; what they envisioned Australia to represent at the beginning of a new century. It is hoped that the Olympics and our Centenary of Federation will assist in creating a sense of unification in Australia, to a greater degree than the turning of the new century.

We are a country confronting our own challenges as we move into the next century. This means facing our future by acknowledging our past. This includes addressing past wrongs as well as celebrating our successes, in particular, acknowledging the injustices suffered and still being suffered by Australia's indigenous people. Achieving meaningful reconciliation between indigenous and non-indigenous Australians must be a priority, along with equal rights, in every sense, for Australian women.

Changing face

The face of Australian politics is changing and I am proud to be a part of this. As the youngest-ever woman to enter our nation's Parliament, I look forward to the day when other young women are chosen by an electorate that has already shown it wants true representation of all sectors of the population.

That is not to say that all elements of Australian political life welcome this sea change – and it is occurring (other young women were elected to our Lower House at the last Federal Election) – but there will come a time when our communities will demand that all their interests are represented and that gender equity is standard. I believe we are approaching that time.

Democrats

I belong to the Australian Democrats, the only Australian political party (with parliamentary Party status) to have had, at one time, more women members of parliament than men, and in our 23 year history, we have had four women leaders. Currently, our leadership team is all female – I am Deputy to the Leader, Senator Meg Lees.

I know that in a vast majority of nations and societies, the goal of gaining power remains elusive, and we have a long way to go before we reach anything approximating parity of representation. The battles that women before us had to start are just beginning in many societies.

In Australia, the challenge for many women now is to hold onto their hard-won gains in the face of conservative opposition: One Australian union leader described the late 90s in Australia as an 'age of anxiety' for women, those of us resisting the reversal of vital reforms could do with a few more sisters in decision-making bodies.

I do believe that critical mass will make a difference – that more women, or equal numbers of women, in decision-making bodies will make a difference to policy and ultimately lead to decision-making and policies which better reflect the concerns and interests of women.

Research conducted in the US by Susan Carroll, found that female legislators, even those not prepared to call themselves feminists, were more likely to support the introduction and retention of State programs and entitlements of benefit to women.

Women's rights are critical

Women are the largest universally discriminated-against group. For every girl or young woman who receives an education and is able to realise her potential, there are dozens who will never be given that opportunity.

As we enter the 2000s, women have the illusion of equality because they have made gains. They can – in Australia for example – make many choices about how they live, work and dress; and they can have taken up all the responsibility of those choices.

It often means many times the workload of women of earlier generations even if the conditions have improved.

We rejoice in our gains but we know that all women do not share in them, locally or globally. We know that women are vulnerable in the workplace, under represented in decision making and in the home and sometimes elsewhere, vulnerable to the violence and anger of men.

We need to remind ourselves of the facts and figures about these matters, which show us – and those who need to be shown – that there is a long way to go in improving the status of women.

We are vulnerable to backlash in good or bad economic times. Women are not free to make all the decisions concerning our bodies.

I know that in political life, the numbers of women in law-making bodies have not yet made the crucial difference we need. Women in politics are viewed and treated differently from men. They are demonised and trivialised. Women survive in politics without their personal lives being made an issue. If women in comparatively powerful positions, such as MPs have these issues how much more difficult are the public lives of women in less powerful positions?

But it is not women's issues anymore. Society needs the full input of its citizens. The community has everything to gain from women achieving equality.

GenerationX

This new century will see my generation, so called Generation X, serve out their professional apprenticeships and become the establishment, the opinion makers and leaders of the opening decades of the new century.

Generation X and the following technosavvy Generation Y or 'Écho boomers' are known for their streetwise consumerism and consideration of access to computers as a birth right. The young women of these generations will introduce a new set of rules when they gain numbers in powerful institutions. The way that we operate and see the world is different and changing.

Young women today are relatively at ease with change, perceiving it as an inevitable, integral and, hopefully, positive part of life, whether an Xer or an Echo boomer. I see this capability as a great asset for the future of women's leadership – in formal public roles, in the business world, in domestic settings and as active community participants.

Education is a key. In Australia, this generation is the most highly educated group. We comprise approximately thirty percent of Australia's population and are the first generation in Australia to have 50% female university students. *This trend is growing even stronger in the following generation.*

These younger generations see no gender differences when it comes to deciding who should wield political power and act as their representatives. They do not have a problem with women holding these positions.

These generations, particularly the younger, so-called Generation Y, are sophisticated consumers, consuming media and technology with as much ease as their Pepsi.

These characteristics; the availability of global experiences and the technological tools that are available to these young people, are already having a political effect. Young women today are taking on new forms of political activity. Today, women – in addition to

continuing to strive for participation and representation in traditional institutions of power – are participating in the construction of the new power institutions of the century. Young women are now interacting daily with colleagues and peers across the globe through the internet, participating in the many forms of inter-linking media, using email networks and setting up their own web-sites.

Unlike the power institutions of last century women are participating while the rules are being constructed for these new institutions. They are using the education they gained alongside the boys and applying it for their own ends.

Young women today are setting up their own women friendly businesses, flexible to the needs of women, they are educating themselves and critically rejecting aspects of the current status quo and practicing their politics through the lifestyle they pursue.

For the leaders of this century the personal is political. These are the new rules of the new millennium we are here to discuss and write.

The women leaders of the future will be from generations which practice politics in a hyper-local and global sense simultaneously.

Hyper-local:

Hyper-local is the community-based politics so many women are familiar with. It's local identity and local links – the practical application of the adage 'think global act local'.

As the world gets smaller and smaller, we all become increasingly focused on the hyperlocal places and communities in our lives. This is the arena where women often have the greatest potential to make change. In the developing world, in particular, the local community is where so many women are starting to make a real difference. I note that one of the workshops of this conference will focus on such a development – the use of micro-credit to assist families and communities through the economic empowerment of women.

We will need the hyper-local to balance the global – volume of information that will confront us through the vastness of global interactions. We will contend with levels of information that will be of such volume that it will be little more than noise.

Nevertheless, women will be there – leading.

I think this is the way we must think about women's leadership for this century. Women must lead our community both globally and locally and simultaneously. We must conceptualise our feminism in these terms.

Power this century is global, consumer, and technological.

Women must not just be visible on the web – they must be prominent. We must also ensure that women are represented in the international decision-making bodies which will shape our world this century.

We need women on the ICJ, in any International Criminal Court, in the WTO, the ILO and NGOs.

Conclusion

I speak of generation X and globalisation and super technology, but I acknowledge that none of these matter as much as clean drinking water in some societies. What does it mean to a woman with no control of her fertility, watching her children suffer hunger and thirst, in danger from war and natural disasters, to hear of such advances?

These women put peace and the basic means of survival above anything, and the progress of women in legislative bodies and other institutions around the globe may seem but a mockery of their desperate status.

Wars tear social fabric apart, and women and children are the first and the last victims. A world in which women had equal say would never lose sight of this truth.

The environment must be safe-guarded to ensure that the earth continues to nourish her children, a world in which women had equal say would never lose sight of this nurturing need.

That is why the status of women everywhere affects women everywhere.

A future that sees more women in decision-making is our best hope of equality of opportunity and determined action against poverty.

Despite everything that women have endured and are still enduring their achievements are great and should be celebrated. This forum is a great opportunity in which to do just that.

Dealing with Sexual Difference: 100 Years of Feminist Reform*

Marilyn Lake[†]

During the last 100 years, feminist activism in support of women's rights has moved away from protectionist reforms predicated on the significance of sexual difference in women's lives towards the ideal of non-discrimination, towards the assumption that equality requires that all people be treated in the same way, without distinction. The problem is that in a political/legal system whose paradigmatic figures – the liberal individual, the citizen and the worker – though masquerading as neutral are in fact masculine in conception, the granting of equality has all too often rested on woman's disavowal of her sexual difference and her capacity to fill the part of an honorary man.

Women's claims thus come to seem paradoxical: we must assert the significance of sexual difference, while refusing sexist discriminations. But the dilemma for feminist politics goes even deeper, as Joan Scott has pointed out in her study of French feminism *Only Paradoxes to Offer*:

In the age of democratic revolutions, 'women' came into being as political outsiders through the discourse of sexual difference. Feminism was a protest against women's political exclusion; its goal was to eliminate 'sexual difference' in politics, but it had to make its claims on behalf of 'women' (who were discursively produced through 'sexual difference'). To the extent that it acted for 'women', feminism produced the 'sexual difference' it sought to eliminate.¹

The sexual difference produced by Australian feminism 100 years ago represented women as violable and men as violators, women as powerless and men as powerful. In making claims on behalf of such women, it is arguable that feminists helped to produce the vulnerable bodies they then sought to protect and govern.

* This article first appeared in the *Alternative Law Journal* (1999) vol. 24 no.6, pp265-278. It is reproduced here with permission.

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¹ Scott, Joan Wallach, *Only Paradoxes to Offer French Feminisms and the Rights of Man*, Harvard University Press, Cambridge, 1996, pp.3-4.

A vote for protection

In 1903, following the achievement of women's right to vote and stand for election to the federal parliament, Vida Goldstein formed the Women's Federal Political Association in Victoria to guide the exercise of women's new political power. Women should use the vote, she said, 'to protect themselves and their children'. Post-suffrage feminists interpreted their mission as a protective one. Emphasising the vulnerability of women and girls at the hands of predatory men, they embarked on the project of establishing a maternalist welfare state to free the female sex from exploitation and secure their status as inviolable self-governing citizens.

Turn-of-the-century feminists conceptualised women's subordination as a matter of 'degradation'; reforms were necessary to secure women's self-respect. A major goal, symbolically as well as actually, was to raise the age of consent, which Rose Scott called the 'age of protection'. In 1891, in Victoria, the Woman Movement claimed credit for legislation which raised the age from 12 to 16 years, a pattern soon followed in other colonies. As Scott reported with satisfaction: 'In West Australia women had the vote a year when they got the age of protection for young girls changed from 14 to 16 and that is one of the first steps [enfranchised] women take'.² As president of the post-suffrage Women's Political Education League in New South Wales, Scott campaigned long and hard for the age of consent in that State to be lifted to 17 years, but had in the end to settle, in 1910, for 16. The platform of Vida Goldstein's Women's Federal Political Association called, unsuccessfully, for the age in Victoria to be further raised to 21 years.

In New South Wales, the Women's Political Education League claimed credit for several pieces of protective legislation passed during the first decade of the century: the *Juvenile Smoking Suppression Act* (1903), the *Infants' Protection Act* (1904), the *Neglected Children and Juvenile Offenders' Act* (1905), the *Police Offences Amendment Act* and the *Prisoners' Detention Act* (both 1908) as well as the *Crimes (Girls' Protection) Amendment Act* (1910).

Increased 'protection' also meant increased surveillance and intervention in family life by the state – as some working class and

² Scott, Rose, 'Why Women Want the Vote', Scott papers, Mitchell Library, ML MSS 38/38.

Aboriginal mothers soon would learn. In 1909, for example, new legislation in New South Wales extended the *Neglected Children and Juvenile Offenders Act* to specifically provide for the creation of a 'Board for the Protection of Aborigines' authorised to remove Aboriginal children from their mothers and control them if they were deemed to be neglected. A further amendment in 1915 extended its powers providing that:

The Board may assume full control and custody of the child of any aborigine, if after due enquiry it is satisfied that such a course is in the interest of the moral or physical welfare of the child.

The Board may thereupon remove such child to such control and care as it thinks best.

The parents of such child so removed may appeal against any such action on the part of the Board to a Court as defined in the *Neglected Children and Juvenile Offenders Act*, 1905, in a manner to be prescribed by regulations.

Policies of protection could reinforce the subordination of those they were intended to benefit, but the maternalist sense of the vulnerability of children was strong.

Child welfare, declared Ada Bromham, the independent feminist candidate for Claremont in the 1921 Western Australian elections, was 'the woman reformer's foremost plank'.³ The establishment of separate Children's Courts, first introduced in South Australia, was a matter of particular pride and in feminists' own accounts of their work on behalf of children, South Australia held pride of place. The pioneering path laid down by Caroline Clark and Catherine Spence in establishing the 'boarding out system' which enabled impoverished but respectable (white) mothers to keep their children with them, had been followed by the formation of the State Children's Council. Subsequent developments were elaborated in a glowing tribute by the Women's Non-Party Association of South Australia to the extent of the regulatory apparatus they had achieved in the 1920s:

From the work so begun has grown the present State Children's Department with its numerous foster-mothers, its Receiving Homes, reformatories, Children's Courts and the great army of officials, inspectors, probation officers, matrons and others who carry on this magnificent work . . . The Mothers' School, now known as the Mothers' and Babies' Health Association has carried on its work along the lines of similar child welfare

²² *West Australian* 12 February 1921.

societies which are now well established throughout the world. There are now 42 centres for weighing babies in the Metropolitan area, as well as several pre-natal clinics.⁴

The better protection of women and children was also the goal of the newly appointed women police officers.

During World War 1, most Australian States had responded to the pressure of women's organisations to make such appointments for the first time. Policewomen, said the *Woman Voter*, journal of the Women's Political Association, were required so that they might patrol the streets and make arrests when necessary, 'but more particularly to act as guardians of women and young people, who frequently get into trouble because there is no motherly person at hand to warn and advise them in moments of danger'.⁵ By 1924 there were ten women police at work in South Australia, whose 'preventive and protective work' was also praised by *Dawn*, the journal of the Women's Service Guild in Western Australia. Their official duties were to:

1. To patrol streets, parks and open places and to deal with loitering and soliciting.
2. To undertake observation of theatres, dance halls, cinemas, show grounds, railway stations, markets.

Protection necessitated observation and supervision. One effect of inter-war feminists' maternalist orientation was their outspoken opposition to the specific oppressions suffered by Aboriginal women, especially their sexual abuse at the hands of white men and the removal of their children by the agencies of the state. In Western Australia, they were successful in having a Royal Commission appointed in 1933 to enquire into these abuses, and as witnesses they supported the courageous Aboriginal women, who also came forward to protest at the loss of their children.

The rights of wives and mothers

Post-suffrage feminists also emphasised, however, the importance of enhancing women's capacity for self-protection. The key strategy here was to secure women's economic independence and as most women worked as mothers and housewives, feminist campaigns between the

⁴ South Australian Women's Non-Party Association, 'Women's Work for Child Welfare in South Australia', League of Women Voters papers, MS SRG 116, South Australian Archives.

⁵ *Woman Voter*, 10 March 1913.

wars focused on achieving the economic independence of the married woman. For while women depended on men they were, in effect, 'sex slaves'. The entry of single women into paid work simply highlighted what labour organiser Jean Daley called 'the slavery of the married woman'. Women across classes and parties came together in the 1920s in support of their three plank program of motherhood endowment, childhood endowment and equal pay.

To dismantle the family wage, paid to men as breadwinners, another means of supporting those dependents needed to be put in place. Hence the joint proposals for motherhood and childhood endowment, which labour women and non-party feminists argued for before the Royal Commission, appointed in 1927, to enquire into their feasibility. As one witness, Lena Lynch, secretary of the Women's Central Organising Committee of the New South Wales branch of the Labor party explained:

In the Industrial Court women and children are not recognised as individuals at all, they are just appendages to men . . . endowment recognises the women citizens and the child. It is an individual right which is passed over by the Court.⁶

Women, like men, had a right to an individual income, and workers should be paid the rate appropriate to the job, and not the sex of the worker. Labour organiser Muriel Heagney envisaged that this new basis of wage fixation would lead to a revolutionary change in the relationship between the sexes. But it was no to be. The Royal Commission declined to recommend what they too saw as a revolutionary change in family relations entailing a radical challenge to the power of men. A Minority Report supported a scheme of childhood endowment, but it too drew the line at motherhood endowment: 'the idea of treating the wife as a separate economic unit on the pay-roll of the state' would, in by-passing the husband, introduce 'a very powerful solvent' into 'family life as we know it'.⁷

Another strategy to secure a measure of economic independence for married women was Jessie Street's proposal that legislation be passed requiring men to allocate the appropriate portion of their family wage to their wives, to its intended beneficiaries. She spelt out the

⁶ Royal Commission on Child Endowment, Commonwealth Parliamentary Papers 1929, Minutes of Evidence, p. 923.

⁷ Royal Commission on Child Endowment, above, Majority and Minority Reports, pp. 1343-4, 1392.

degradation of the wife's position under existing law in an interview on Radio 2GB:

She is not entitled to any money, for housekeeping or for any other purpose. The husband may order all the supplies for the house itself. Indeed he may even order or buy his wife's clothes and she has no cause for complaint. So long as he houses, clothes and feeds her at a standard in keeping with his income, he need not give her a penny piece, and she can do nothing about it.

Do you mean to say that a wife is not entitled to enough money to even buy her own clothes and other personal necessities?

This is just what I do mean.

*She-is-not-entitled-to-any-money-whatever-for-any-purpose-whatsoever.*⁸

In the 1940s, Street also proposed that legislation be passed to ensure women's ownership of household savings. Neither proposal was successful.

The difficulty entailed in having men acknowledge the value of women's distinctive household labour was made clear in the response by the Professor of Public Administration at the University of Sydney, F.A. Bland, to a suggestion by a group called the Wives' and Mothers' Union that the 'vast army of unpaid workers' should be remunerated by the state. For them the logic of their claim was evident:

No sane person can ignore the claim of wives and mothers if only as essential workers who perform such a multitude of vital household tasks and who also risk their lives in motherhood and are responsible for bringing into existence, maintaining and caring for the most important product of mankind – human beings.

Professor Bland said that such proposals caused him 'great hilarity': 'Services can have an economic value only when they are marketed. The services of wives and mothers cannot be marketed – they are above all price'.⁹

Increasingly it became clear that women would only achieve economic independence by following men into the labour market and transforming their demand for economic independence into one for equality – equality of access, conditions and wages in the workforce.

⁸ Jessie Street Radio Broadcast, 1 November 1936, NLA, Street papers NLA MS 2683/3/641-3.

⁹ *Daily Telegraph*, 29 January 1943.

This discursive shift is evident in Muriel Heagney's pivotal text *Are Women Taking Men's Jobs?* published in 1935, in which she defended women's right to work in the context of Depression-generated attacks on women's (especially married women's) employment. Pointing to the nonsense of the claim that women were taking men's jobs in a country in which there was such a high level of sex segregation in the labour market, Heagney, nevertheless, reiterated the argument that women, as individuals, as taxpayers and voters had the same right to work as men.

Political claims made on the basis of women's difference, in particular, terms of their status as mothers, began to rebound on women, locking them into dependence and subordination. The discourse on the rights of children seemed only to undermine the rights of mothers. They were said to be out of place in the paid workforce; in 1932 the New South Wales government passed legislation banning the employment of married women as teachers and lecturers. At the same time their newly won custody rights over their children were rendered conditional on their devotion to motherhood. One of the most hard fought campaigns for women's rights between the wars was to secure recognition of married women's custody rights in law. But the victory, when it came, was a double-edged sword.

In New South Wales, the Emilie Polini case, in which a court had denied a mother custody of her child and thus the right to take her overseas while she worked as an actress, led to a massive feminist mobilisation involving some 70 women's organisations representing around 70, 000 women. In his ruling, Justice Harvey had made his reasons for denying custody to Polini clear. Although she was a 'gifted and successful actress' with not 'a breath of suspicion' against her character, her failing was that she 'had never allowed her maternal affection to interfere with the call of her profession'. In pursuing her profession, she had forfeited her rights as a mother. He explained that if Polini

were settling down in a home in Australia I should be of the opinion that it was clearly a case in which the custody of the child should be shared between them turn and turn about.¹⁰

¹⁰ Radi, Heather, 'Whose Child?' in Judy Mackinolty and Heather Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788-1979*, Hale and Iremonger, 1979, p.128.

The resultant campaign, which included the staging of a play by J.C. Williamsons called *Whose Child?* written by feminist leader Millicent Preston Stanley (the first woman to be elected to the New South Wales parliament in 1925) finally achieved equal custody rights for women in 1934, but it was not the victory feminists had hoped for. As Heather Radi has noted in her study of this case, the Act denied that any right resided in the mother as mother:

It formally acknowledged that a mother's wishes should count equally with a father's, but it explicitly stated that the welfare of the child was the 'first and paramount consideration'.¹¹

The child's rights compromised those of the mother. And it seemed that a child had a right to expect different commitments from a mother than a father. A mother's right of custody was conditional not on her being a good citizen like a man, but on being a good woman: white, married, chaste and economically dependent on a husband. The priority accorded to children's welfare, in part the outcome of feminists' own efforts, served to lock women into an ever more demanding 'role'. Feminists continued to insist, however, that motherhood should not lock women into a degrading dependence on men. Thus from the 1940s, 'child care' began to be articulated as a new right, conceptualised as the pre-condition for women's equal participation in the workforce and public life.

Equality through non-discrimination

In the late 1940s international feminists, including Australian Jessie Street, became active participants in the drafting of the Charter of the United Nations and the Universal Declaration of Human Rights, documents that enshrined equality as a matter of non-discrimination. Article 2 of the Universal Declaration of Human Rights declared:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This guarantee would be used by activist campaigning in Australia for women's and Aboriginal rights during the 1950s and 1960s. Feminists campaigned for both causes within this framework. For example, in 1949, the United Associations (UA) in Sydney wrote repeatedly to the

¹¹ Radi, Heather, above.

Kempsey Council on the north coast protesting against the exclusion of Aborigines from the public swimming pool. This action, they said, violated every principle of the UN Charter. As the UA explained to the Town Clerk, its members had:

concerned themselves with this matter because one of the Objects of our Association is the removal of discriminations which operate unjustly against individuals. In this we ally ourselves with that clause of the UN Charter which affirms 'there shall be no discrimination on account of race, colour, creed or sex'.

The reply from the Aboriginal Welfare Board unwittingly highlighted the logical connection between the principle of non-discrimination and policies of assimilation, assuring the UA that in furtherance of its 'policy of assimilation' it was anxious that 'Aboriginal children should have every opportunity in association with other children and ... it was felt their attendance at the baths afforded an excellent opportunity in this regard'.¹²

Eight years later, in 1957, veteran campaigner for Aboriginal rights, Mary Montgomerie Bennett published her book *Human Rights for Australian Aborigines* to 'publicise the principles of the Universal Declaration of Human Rights which do not apply to Aborigines' and feminist, Jessie Street, helped launch the petition for the referendum to make Aboriginal welfare a federal responsibility. The wording of the preamble to the petition, written in her hand, echoed the United Nations emphasis on non-discrimination:

believing that many of the difficulties encountered today by Aborigines arise from the discrimination against them in two sections of the Commonwealth Constitution, which specifically exclude Aborigines from the enjoyment of their rights and privileges enjoyed by all other Australians. . .

In this conceptual framework there was no room for recognition of the constitutive nature of sexual and cultural difference; equality would be achieved by treating all Australians, Aboriginal and non-Aboriginal, men and women, as abstract individuals, alike.

Thus campaigns for women's rights in the 1950s and 1960s increasingly focused on the goal of non-discrimination in the public domain – at work, on Boards and Commissions, in the constitution of

¹² CL Scrimgeour to Minister for the Interior, 6 September 1949, and to Aboriginal Welfare Board, 4 October 1949, Aboriginal Welfare Board to UA 18 October 1949, UA papers, ML MSS 2160/Y791.

juries, in government and the professions and importantly, in that quintessentially Australian institution, the public bar.

In 1951, the United Associations asked candidates in the forthcoming federal election, among other things, whether they would agree:

- To grant women equal pay, status and opportunity in the Commonwealth Public Service, thereby giving an impetus to outside bodies to follow suit.
- To rescind sec. 49 of the Commonwealth Public Services Act and sec. 170 of the Commonwealth Bank Act, 1945, both of which forbid the employment of women after marriage regardless of their ability.
- To hold a Referendum to provide for a Blanket Bill giving women equal rights, status and opportunity with men and stipulation that any sex discriminations embodied in any laws or regulations be invalid.¹³

In New South Wales, feminists achieved a measure of equality with their admission (but not on the same terms as men) to jury service in 1951 and the granting of equal pay for State public servants in 1958; there was a further triumph with the removal of the marriage bar in the Commonwealth Public Service and banks in 1966.

One place in which many Australian women experienced the most blatant discrimination was in that paradoxically men's only public space, the public bar, where State laws prevented women being served alcohol. During the late 1960s and into the 1970s, women took direct action in occupying bars and demanding to be served on the same basis as men. The first such action, which created remarkable media interest, occurred in Brisbane at the Regatta Hotel when Merle Thornton and Ro Bognor chained themselves to the footrail and asked to be served a beer. They pointed out that the law effectively discriminated against women as citizen/workers, as 'journalists who can't pick up bar gossip; [as] businesswomen who can't make contacts in the bar; [as] women at various conferences and meetings who can't adjourn to the bar with the others'. Thornton elaborated on the meaning of their action, by pointing out that the 'protection' of women also subordinated them and she condemned legislation that set out 'to protect women who don't want to be protected'. It was 'a principle of prime importance', she said, 'that all normal adult citizens, irrespective of race or sex, should be treated exactly in the same way under the same law'. 'There is wide agreement on this principle', she added,

¹³ UA to candidates, 12 April 1951, UA papers, ML MS 2160/Y789.

‘which is incorporated in the United Nations Charter of Human Rights’.¹⁴

The principle of equality as non-discrimination was further implemented in the Commonwealth Arbitration Court’s equal pay decisions in 1969 and 1972, and in the anti-discrimination legislation passed in the various States from the 1970s and the federal parliament in 1984. But the limited effects of these undoubted gains for women point out the limitation of non-discrimination as a strategy, of a politics aimed at bringing about equality solely by treating everyone in the same way. As earlier feminists had realised, women as sexually embodied citizens, had distinctive experiences and suffered distinctive harms as mothers, wives, domestic drudges and as the victims of sexual assault. Hence the need for legislative and other reforms that also address domestic violence, rape, unwanted pregnancies, women’s excessive workloads and women’s relative poverty.

In 1947, when feminists sought to amend the Draft Declaration of Human Rights to write in rights specific to women, they were rebuffed by those who insisted that the rights so defined must be ‘universal’ in nature, able to apply to all individuals without distinction. Feminists wanted, for example, the Declaration to specifically recognise ‘the rights of mothers’; they wanted, in a radical challenge to political tradition, to inscribe the mother not as a figure in need of protection, but as a rights-bearing citizen. They were unsuccessful and had to accept Article 25’s positioning of mothers, alongside children, as persons in need of special care and assistance. In the debate, the Canadian delegate, Mr Smith, took the opportunity to ridicule the idea that breast-feeding mothers might have rights. Yet had the idea of the mother as a right-bearing citizen won acceptance, then the experience of all those mothers, Aboriginal and non-Aboriginal, who had their children taken away in the 1950s and 1960s might have been different. Had the idea that mothers had rights gained currency, then maybe the authorities who apparently thought little of taking women’s children from them, often without the women’s knowledge, let alone consent, might have been rather more cautious. To this day, the mother remains one of the few figures not to be acknowledged as a rights-bearing political subject; unlike the worker, the child, the indigenous person,

¹⁴ Thornton, Merle, *Women are Members of the Public*, pamphlet, 1965; ‘Women in Chains’, *Woman’s Day*, 10 May 1965; *Telegraph*, 5 April 1965.

the national minority, the woman, 'the mother', has no rights recognised in international covenants or conventions.

The challenge for activists and law makers interested in advancing the rights of women remains a philosophical as well as a political challenge. It is a challenge posed by paradox, that is, the necessity of refusing sexist discrimination, while demanding acknowledgement of sexual difference, but in such a way as to prevent sexual difference becoming the ground for the political subordination that defines relations of protection.

Dancing with Social Workers: The International Adoption Process*

Susanna Lobez†

Editors' Introduction

Susanna Lobez's experience of the process of international adoption led her to question the immense hurdles to adoption and conversely society's lack of interest in the capabilities of biological parents.

* * * * *

Any day now we'll be expecting again. This time I'll be expecting a daughter. She won't be expecting me. She won't look anything like me or my husband or her brother. She won't have heard my heartbeat or voice for nine months.

She's already born, far away and in unhappy circumstances. We should get a photograph of her in the next few weeks and later this year we'll be flying off to meet her and bring her home.

I'm one of many Australians currently experiencing a pregnancy of at least two years, waiting for our children who have been orphaned or abandoned in foreign countries. There are a handful of us now, wishing and hoping and planning and dreaming about our Chinese daughters. They'll be the first babies coming to Australia from China under new arrangements negotiated between our governments.

Go back two years. Our baby boy, born with the help from IVF is one year old. After a couple more IVF attempts, we figure maybe it's only one miracle birth per couple. I'd already made inquiries about adopting a child from overseas. It had actually been in my mind for years. I'd

* This article originally appeared in the Sunday Age 25 June 2000, and has been reproduced with permission.

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also made inquiries about local options. Local adoptions are rare indeed.

So we turned up, one freezing night in June 1998 for an information night at the Victorian Department of Human Services Intercountry Adoption Service. We had lots of fantasies. A South American baby perhaps...we have several Chilean friends. Or an African child saved from some horrible fate at the hands of rebels. We were in a hurry. We'd heard about two or three year waits for inter-country adoptions and we wanted a fast-track approach. I remember thinking...they don't know how motivated I am and how fast I can move through procedures.

At the information night, we were in a conference room with perhaps 50 other couples. Most were in their late 30s or early 40s. At the coffee break, we saw a couple we knew and all tactfully avoided the issue of infertility. I felt almost reluctant to admit that we'd been in the lucky 20 per cent of IVF and our baby boy was with a babysitter, at home, asleep.

The ICAS social workers stressed there is absolutely no adoption outside the system. They talked about the countries with which Australia had inter-country adoption arrangements. Fifteen was far fewer than I'd imagined. They briefly touched on the potential difficulties associated with bringing up a child of different genes, ethnic background and culture and called on an experienced adoptive parent to speak about his journey to pick up his Romanian child. They outlined the process that lay ahead for those who wished to proceed. I was undaunted and excited. My husband a little less so. To me, it seemed entirely logical. They have children who are unwanted and have no one who can offer them a family life. We have empty homes. Australia prides itself on its multi-cultural successes. This is multiculturalism in microcosm.

We registered our interest, paid an initial fee and then lodged our official application on October 2, 1998, with another fee. We'd been told education groups were the net stop on the path and waited anxiously to be told when we could start. Finally at the end of January 1999 we were fitted into an education group of 13 couples who would meet for three Fridays. The sessions were compulsory for both partners. It was touch and go whether my husband would be able to extricate himself from work by lunchtime. He did though, occasionally running in late with bulging briefcase and tie askew.

I'll say one thing for potential inter-country adoptive parents. If you're going to be thrown into an encounter group, they cushion the fall. After the first day, I told my sister I felt we'd make some long-term friends out of that group of 26. If you landed in a strange Australian city and wanted a small assortment of interesting bods to make friends with, you could do worse than sign up for an inter-country adoption class.

We'd all been through some major life disappointments and were of a similar age. Most were two-career couples, most had travelled and learned to love other countries and cultures and we all (have to) believe that parental love, creativity and effort can overcome difficulties caused by a rough start in a child's life. Of course, some people take to workshop-type environments better than others. I'm sure my husband wasn't alone in thinking he'd rather have had a couple of lever arch files of printed material sent to him and a quiz afterwards.

We talked together about the terrors of infertility. One particularly honest woman said she'd felt oppressed by pregnant women who, it seemed to her, pointed their bulging stomachs at her. We sniffled through videos and stories about families for whom adoption is a happy beginning. We rolled our eyes together at occasional glimpses of bureaucratic stepping stones ahead. Silently we wondered whether our relationships would stand up to the stress of such long family-making and intense social worker scrutiny.

We discussed grief; about miscarriages and failed IVF attempts and the grief of babies and children whose parents die or abandon them. For people who are prepared to crawl over broken glass for the privilege of parenting, it was tough learning – imagining a tiny baby who gets so used to being neglected, he just gives up trusting after a while, and doesn't allow himself to attach to another person.

Around this time we began going to functions with adoptive families, to talk and learn more. I heard one story about a couple of Ethiopian infants found huddled in a drain pipe. The older sibling, about three years old, was holding on to her baby brother trying to comfort him. I cannot retell the story without weeping. I don't know whether it's being a parent already or the anticipation of mothering a forlorn child, but I find it increasingly difficult to watch television stories about neglected or abused children or read about babies with HIV who are abandoned in a specially designed window of an African orphanage.

During this long and winding gestation period, I found myself hypersensitised. I got emotionally caught by the tragic media story of the birth mother who on a contact visit, was alleged to have abducted her son from his adoptive parents and hurt him. I saw articles and heard programs that related to adoption everywhere. I watched my son's cartoon *Lambert the Sheepish Lion* with fresh interest – (it's the one where the baby lion is delivered by the stork to a lamb-less sheep, who refuses to give him up).

I pondered why adoption seems to have become so politically incorrect. Media coverage seems remorselessly to focus on the search-for-the-biological mother-child angle. Maybe it's the nation's sensitivity about Aboriginal children removed from families. I began to get the impression that many people see adoption, *prima facie*, as theft of children. Suspicions are voiced about how the children end up in orphanages. One colleague wondered why I didn't just send all the money we'd spent on this adoption process to an orphanage or aid agency in some underdeveloped country. And for sure, the costs of the whole exercise could have sponsored dozens and dozens of children.

Perhaps I'm overconfident about my parenting skills, but to me it seemed that we have more to give than simply money. I want to mother again. I want my son to have a sibling. My life would have been so much poorer without my brother and sister. And I figured with the immigration and population debate as it stands, it will be a win-win scenario. Helping increase our population at no cost to my fellow taxpayers. Helping ease another country's overpopulation. A neat equation. A modest result. And the joy and satisfaction of seeing a child born into unfortunate circumstances flourish. OK, so that last part is selfish.

After the adoption classes, we faced some mammoth tasks and a lengthy assessment process. Well, no one said this adoption path was for the faint-hearted. We had to write life stories following questionnaires, which ran to about 15 pages. The idea is that the social worker, who is later contracted by the department to assess us as prospective adoptive parents and draft a homestudy, has a starting point. A 10,000-word starting point!

It occurred to me, as I delved as required, into my parent's parenting practices and family philosophies and my early life, education and emotional highs and lows over 40 years, that nobody, but nobody

would know me as well as this social worker. I hoped she wouldn't be a judgmental type in a designer suit. I hoped she wouldn't find so many career changes disconcerting. I wondered whether she'd appreciate humour. I decided not to risk it and did a last minute edit.

We were also obliged to attend country information nights run by various adoptive parent groups. These groups, independent from the government authorities, provide specific country information to help us narrow down which countries we thought would best suit our circumstances. All 15 countries with which the department has arrangements have different criteria and conditions. Some allocate more readily to childless couples. Some specify practising Christians. Some countries have very few girls available. Some seem to have no children available at present or only to people of that country's ethnic background.

And, of course, inter-country adoption programs only function when the nation's affairs are running smoothly. The program with Fiji for instance, which was providing only a trickle of children to Australia, has no doubt been staunch by current events. Ironically, having been told that Fiji was not a viable adoption option, we were holidaying in Fiji last year, when local news informed us that a newborn baby had been abandoned in a ladies room at a cinema about 100 metres from our hotel room. It made me think...

After distilling information coming at us thick and fast from the department, the parent groups and friends overseas, we asked to be evaluated for India, Thailand and China even though we were told no one can say when the China program will begin, and not many Indian agencies are accepting files and it could be a very long wait for a Thai girl. A little downhearted, I prepared three country projects demonstrating, in cut-and-paste format, some understanding of the history and culture of India, Thailand and China. After eight weeks of research, and overdose of old *National Geographics* and a miasma of marker-pen fumes, I had multi-cultural fatigue and still not much cause for optimism.

Meanwhile, we paid some more money and prepared another batch of documents detailing – and I mean detailing – our financial affairs, our health and medical history and a kind of family tree specifying where relatives were born, whether they'd been seriously ill and if applicable, with what they had died. I recall being conscious that some in my family tree died too young and noted that they possibly would have

survived, given today's medical treatments. Then we met our assigned social worker. I made sure all the cupboard doors were shut, prepared some homemade snacks and dressed to impress. My husband was in his suit from work and I told him not to change, just in case she was the formal type.

I shouldn't have worried. She was great. Relaxed and casual with a sense of humour and a creative bent, just like us. Good job too, since we spent several hours each week for a few weeks drinking coffee and talking. She met us together and separately and added a session when our son was awake and active. She inspected our home for child-traps and dangers and looked at a few photos of our life together. She even took an interest in our dog and how child-friendly she was.

I recall pondering why no one was so interested in our parenting skills and aptitude before the birth of our son. Just not enough social workers to go around, I guess. Anyway our social worker was undeniably thorough, pleasant and supportive and when I read the lengthy draft report she'd prepared for the department, I felt happy. She'd started with tact and said I seemed younger and more energetic than my age. I loved her for it and for the tick of confidence she gave us, our relationship and our home. I mean you never know, do you, how you compare as a couple, or as parents to a standard? Benchmarking and best practice are, as yet, foreign concepts to the realm of parenting. It was the most probing and personal examination of our lives and we'd passed and felt like kids after exams were over.

So from the Australian side of the process, we were close to being approved as potential adoptive parents, about a year after we'd registered our intent. We still had to find a country that would take our file and offer us at least cautious optimism that we would receive an allocation of a child young enough to be like a natural sibling for our son and in reasonable time, like before our son dons school uniform.

India looked at once hopeful and bleak. There was some inconsistent information around and the fact that Indian friends in Mumbai told us they knew of children facing abandonment was cause for much angst and frustration. Surely having me as a mother is a better prospect weighed up against homelessness or death, I thought to myself. Thailand was allocating mostly older children and mostly boys. And the China program was in its sixth year of negotiations.

Since 1993, the Victorian Department of Human Services and the Commonwealth Attorneys-General Department and Immigration

Department had been engaged in delicate manoeuvrings with China. Of course, China has been allocating thousands of babies and children to parents in the United States, in Canada, in Europe for years. But every country has its own bureaucratic and regulatory idiosyncrasies. One of ours was that an adoption, local or inter-country, is not finalised until a year after placement with a family, during which time welfare supervision is provided. Twelve months later an Australian court determines the finalisation of the adoption. This was unacceptable to Chinese authorities. So, as well as diplomatic letters being exchanged with Beijing in March 1999, negotiations required an amendment to our Family Law Act to satisfy the China Centre for Adoption Affairs that the adoption is finalised before the child leaves China.

So we waited. On ICAS advice we paid to have our file prepared and sent to Thailand although no one could give us much hope that we'd get a daughter in under two years. And we waited more, occasionally meeting up with our adoption class buddies who were all waiting, too. It was now close to 18 months since we'd gone to the information night and registered our intent to adopt.

Then as the millennium ticked over, the China program was quietly finalised and we were now part of a small guinea-pig group of Australians whose files had been sent to China. Having gained approval in Australia, there was now the Chinese approval to pursue. The paper chase hotted up in February as we rushed about getting a long list of documents together to be certified, notarised, authenticated and then translated into Chinese.

We had to have all kinds of blood tests and medical exams, have accountants prepare statements of assets, liabilities and weekly expenditure and provide letters from our employers. We had to hustle together original certificates of our births and our marriage and get a police crime check. We were asked to provide a range of photographs of our home and of ourselves and were required to write a personal letter to the Chinese Central Adoption Authority explaining eloquently, but succinctly, who we were, why we should be considered as parents for one of their children and what kind of life we would offer her. We had about two weeks to do all this.

And speaking personally, I respect the Chinese authorities for being so diligent and thorough. If they are to let their children go, to grow up in another culture then they have the right to be exacting. I'm sure there are many things about Australia that they are ideologically opposed to,

so let them dissect the lives of prospective foreign parents to pieces. And let them chose carefully to which home each child will go.

Adoption is a rollercoaster of hopes and disappointments. You need to be resilient and have a sturdy relationship. Now though, with an allocation from China (we hope) weeks away, it's close enough and real enough that I can dream about our daughter. I can talk to our son about his new baby sister and show him on the plastic globe where we'll go to get her.

So often now my mind flits to China. Mothers Day was particularly poignant. I know somewhere in some southern province, a baby girl has suffered. She has lost or been abandoned by her parents. She may have been left to die placed, like an offering, on the steps of an orphanage. If she survives that, she may face several months in an under-resourced, crowded orphanage, with few toys and little stimulation. She won't see those black and white brain-activating mobiles over her crib. She won't hear the childrens' poems I recorded for my son's rest time. She won't have parents lavishing love and songs and games on her. She probably will not even be taken outside the orphanage until they bring her to our hotel room later this year.

Then, as I understand it, she'll be handed to us, perfect strangers. We may have 10 minutes to ask the orphanage worker a few questions through a translator. It's unlikely we'll get to learn anything about her parents or to visit the orphanage and see how her life has been. I hope by then to have just a few words in a language she may have heard, to have a little song ready with familiar sounds. My husband is currently sampling some Chinese music.

So will we be able to overcome a disadvantaged first eight or 12 months? Some orphanage babies from some countries we are told, don't cry. They've tried communicating their needs. Nothing happens. So they learn to give up. What do I make of the recent spate of articles and opinions, stressing the profound bond between biological parent and child, said to be the pathway to personhood? When you think about it, all adoptive parents are step-parents and poor old step-parents get a bit of bad press.

It's a leap of faith, I guess. I imagine the face of my Chinese daughter. I will her to have my strength. It won't be long. Darling ... Mummy's coming ...

A Comparative study of the law on rape in South Africa and Australia

Sarah McCosker*

Rape is a crime that is not comparable to any other form of violent crime. Unlike other crimes against the person, rape not only violates a victim's physical safety, but their sexual and psychological integrity. It is a violation that is not only marked by violence, but by a form of 'sexual terrorism'.

South African Law Commission,
Sexual Offences Discussion Paper, 65

The boundary of the body itself is broken by force and intimidation, a chaotic but choreographed violence.
Dworkin, Life and Death, 23

1. Introduction

Since the 1970s, and in particular over the last decade, rape laws have been the subject of increasing international attention, with the atrocities of Rwanda and the Bosnian wars leading to the recognition of rape as both a crime against humanity and a war crime. The heightened international debate has precipitated movements towards formulating new definitions, so as to encompass forms of sexual assault hitherto unrecognised as 'rape'. This climate of change highlights the unique nature of rape, as reflected in the covering quote: '*Rape is a crime that is not comparable to any other form of violent crime*'. Its uniqueness seems to lie in its capacity to bring into question a complex interplay of sociological, historical and cultural issues. In addition, it is a crime where gender issues and questions of language assume particular importance, stimulating changes in legal discourse to reflect new norms, new attitudes and new realities. The crime of rape thus seems particularly apt as a topic for a comparative study pertaining to women and the law. This paper focuses on two countries which are in the process of changing their rape laws – South Africa and Australia.

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This duo constitutes an interesting subject of comparative analysis for a number of reasons. Firstly, while broadly within the common law legal family, South Africa may also be regarded as an example of a hybrid legal system, a complicated amalgamation of Roman-Dutch and English law. Secondly, while rape remains an important problem in Australia, in South Africa it has been characterised as ‘an *epidemic* problem of violence against women’,¹ to the extent that women’s organisations are calling for ‘the declaration of a national emergency to combat rape’.² Some sources state that a woman is raped every 36 seconds.³ Research comparing South African crime ratios with Interpol ratios for 89 member states revealed that South Africa remains in an ‘undisputed first place’ as far as reported cases of rape are concerned.⁴ Interestingly, research revealed that South Africa’s lawyers are looking to Australian law for guidance on the definition of rape, thus suggesting a catalytic relationship between the laws of the two countries.

Patently, any discussion of rape law will necessarily raise a myriad of issues. As a full examination of rape laws clearly exceeds the scope of this paper, I have omitted a discussion of the substantive rape law of each nation to permit me to concentrate on a number of key topical issues.⁵ In particular, the discussion focuses upon major definitional changes, and the increasing legal emphasis upon gender issues, such as the law on rape of males, same-sex rape and transsexual rape. Other problematic issues concern the revision of evidentiary rules, and changing attitudes towards sex-industry workers.

¹ South African Law Commission, *Sexual Offences Discussion Paper*, 7.

² Activists say that ‘a declaration of national emergency would release funds to help rape victims in the same way that emergencies are declared to help victims of natural disasters: This kind of violence is a kind of ongoing national emergency, unlike a flood which comes once in a blue moon’. Michelle Friedman, Director, African Gender Institute, U.Cape Town (UN Wire, 3/8/1999).

³ International Planned Parenthood Federation.

⁴ SA Police Central Information Management Centre (CIMC) 1994 ratios, *Quarterly Report on Rape and Attempted Rape*.

⁵ While resources are widely available for Australian law on rape, difficulties have been encountered in accessing current South African law on rape. While some secondary materials have been found on the internet, the most useful source has been the South African Law Commission’s Discussion Paper on Sexual Offences, which provides an extensive coverage of South African law. It must also be noted that at the time of writing, some of Queensland’s laws on rape have changed. I have endeavoured to incorporate these changes into the discussion.

2. Rape Law

2.1 Australia

At present there is no unified law on rape in Australia, there being important differences between the Code jurisdictions of Queensland, Western Australia, Tasmania and the Northern Territory and the common law jurisdictions of New South Wales, Victoria, South Australia and the Australian Capital Territory.

- Australian Capital Territory - *Crimes Act* 1900
- Commonwealth - *Crimes Act* 1914, *Criminal Code Act* 1995
- New South Wales - *Crimes Act* 1900
- Northern Territory - *Criminal Code Act* 1983
- Queensland - *Criminal Code* 1899, *Criminal Code Act* 1995
- South Australia - *Criminal Law Consolidation Act* 1935
- Tasmania - *Criminal Code* 1924
- Victoria - *Crimes Act* 1958
- Western Australia - *Criminal Code* 1913

Despite common themes, it is apparent that ‘jurisdictions in Australia still operate under eight different sets of sexual offence laws. There are marked differences in terminology and definitions. In some jurisdictions, the basic offence is “rape”, in others it is “sexual assault” or “sexual intercourse/penetration without consent”. Conduct that may amount to the basic offence in some jurisdictions may in others only constitute indecent assault. The reformulation of what is “lack of consent” has led to variations in the circumstances which can negative consent’.⁶ In recent years, reform of this important area of the criminal law has shifted to the national agenda.⁷ Since the 1970s, all States and Territories have placed extensive focus on the reform and operation of their sexual offences law. The collective result has brought Australia international recognition as a country which acknowledges, and seeks to address, the problem of sexual violence.⁸ Although the history of

⁶ *Model Criminal Code, Part 5, 1.*

⁷ *Ibid, ii.*

⁸ *Id.*

reform has been somewhat chequered and varied between jurisdictions, common features are discernible, as will be seen below.

Definition of Rape in Australia

At common law, rape was carnal knowledge of a female, who was not the accused's wife, without her consent.⁹ The offence has now been renamed in the ACT, NSW, the NT and WA. In the ACT and NT it is "sexual intercourse...without consent".¹⁰ In NSW it is "sexual assault",¹¹ and in WA it is "sexual penetration"¹². However, it is still called 'rape' in Queensland, South Australia, Victoria and Tasmania. The fundamental elements of the offence of rape are sexual intercourse, absence of consent, and the requisite mental element. Consistent with other common law crimes, there must be a physical element or *actus reus* (guilty deed), and a mental element or *mens rea* (guilty mind). However, the way these elements are articulated differs between jurisdictions (see appendix), as does the definition of the crime. Although the differences are often subtle, they are worth examining as they belie different attitudes towards the offence. In NSW, "sexual assault" is defined as occurring where "any person...has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse".¹³ The maximum penalty is 14 years imprisonment¹⁴, the same as in WA, where sexual penetration is defined as 'any person who sexually penetrates another person without the consent of that person'.¹⁵ Tasmania defines the offence as occurring where "any person ... has sexual intercourse with another person without that person's consent",¹⁶ the maximum penalty being 21 years imprisonment.¹⁷ Victoria's definition provides that the perpetrator must "intentionally penetrate another person without that

⁹ *Papadimitropoulos v The Queen* (1957) 98 CLR 249.

¹⁰ *Crimes Act* 1900 (ACT), s92D; *Criminal Code* (NT), s192(3).

¹¹ *Crimes Act* 1900 (NSW), s611.

¹² *Criminal Code* (WA), s325.

¹³ *Crimes Act* 1900 (NSW), s611.

¹⁴ *Crimes Act* 1900 (NSW), s611.

¹⁵ *Criminal Code* (WA), s325.

¹⁶ *Criminal Code* (Tas), s185.

¹⁷ *Ibid*, s389 (3).

person's consent while being aware that the person is not consenting or might not be consenting".¹⁸ The maximum penalty in Victoria is 25 years imprisonment.¹⁹ However, in the NT, Qld and SA, the sentence is much harsher – imprisonment for life.²⁰ SA possesses an interesting variation on the NSW definition, adding the qualification that the perpetrator must know that the other person does not consent or "being recklessly indifferent as to whether that other person consents to sexual intercourse".²¹ In the ACT, the definition of sexual intercourse without consent is very similar to the South Australian definition of rape, although the ACT maximum penalty is lesser – 12 years imprisonment, 14 if the accused acted in company.²² In Queensland, the offence was phrased in terms of "carnal knowledge",²³ while the Northern Territory simply provides for "sexual intercourse with another person without the consent of the other person".²⁴ It is thus apparent that there is a spectrum of sentencing in Australia, ranging from 12 years to life. Furthermore, 'there are wide variations between the ways sexual acts are defined by state legislation. This confusion is echoed in terms of the gender of the victim'.²⁵ What then to deduce from this morass of differing definitions? How does South Africa compare?

2. 2 South Africa

The current law regulating rape is the *Sexual Offences Act* which came into force in 1957 (during the apartheid period), and was subsequently amended by the present government. Examination of South Africa's rape laws is timely, given the current climate of change. The South

¹⁸ *Crimes Act* 1958 (Vic), s38(2)(a).

¹⁹ *Ibid*, s38(1).

²⁰ *Criminal Code* (NT), s192(3); *Criminal Code* (Qld), s347; *Criminal Law Consolidation Act* 1935 (SA), s48.

²¹ *Criminal Law Consolidation Act* 1935, s48.

²² *Crimes Act* 1900 (ACT), ss92D(1), (2).

²³ *Criminal Code* (Qld), s347: It is a prescribed sexual offence for the purposes of the *Criminal Law (Sexual Offences) Act* 1978. At the time of writing, the definition of rape in Queensland has expanded.

²⁴ *Criminal Code* (NT), s192(3).

²⁵ Crome, Sarah, et al. "Male Rape Victims: Fact and Fiction" *The Law Institute Journal* Jan 1999, Vol. 73: 1 At 60.

African Law Reform Commission has argued that the existing legislation on sexual offences needs ‘a complete overhaul’,²⁶ and proposes the adoption of one comprehensive new sexual offences Act.²⁷ The Commission handed recommendations, including a draft Bill, to Justice Minister Penuell Maduna late last year. The proposed Bill is now a matter for public debate.²⁸

Definition of rape in South Africa

In recent years, the definition of the crime of rape has been the subject of significant criticism and debate.²⁹ Currently, the offence consists of a man having unlawful intentional sexual intercourse with a woman without her consent.³⁰ Under the draft Bill, any person convicted for rape shall be liable to imprisonment for a period “not exceeding 999 years”.³¹ The essential elements of the crime of rape are intention; unlawfulness; sexual intercourse; with a woman; without her consent – thus broadly similar to the position in Australia. To secure a conviction, the State must prove all these elements beyond a reasonable doubt. Unlike the general trend in Australia, “sexual intercourse” presupposes penetration of the female sexual organ by a male’s penis, and precludes intercourse per anum, oral penetration and the insertion of foreign objects into the orifices of the body.³² As in Australia, the general rule in South Africa is that in addition to an unlawful physical condition (*actus reus*), criminal liability requires an unlawful mental condition (*mens rea*), for a ‘crime is not committed if the mind of the person doing the act in question be innocent’.³³ This again reflects the common law’s emphasis on both a physical act and a mental element. Thus intention is an element of the offence. An interesting difference between South African and Australian rape law is that, in South Africa, 20 special courts have been created to deal with rape. These courts will be equipped with the required infrastructure for appropriately hearing and managing sexual offence cases, such as

²⁶ *Discussion Paper* (ix).

²⁷ *Ibid.*, (v).

²⁸ Stuart, Brian “Draft Bill Gets Tough On Rape” *Daily News From South Africa*, 1.

²⁹ Hall, C, “Rape: The Politics of Definition”. (1988). *SALJ* 67.

³⁰ Milton, *South African Criminal Law and Procedure, Volume II* (3rd ed), 439.

³¹ Stuart, Brian, 1.

³² *Discussion Paper*; 69.

³³ Per Solomon JA in *R v Wallendorf* (1920) AD 383 at 394.

witness cubicles with one-way glass, closed-circuit television facilities and separate waiting rooms for victims.³⁴ This is an initiative which Australian courts should consider following.

3. Topical issues and proposed changes

3.1 Changing definitions

In recent years, the definition of the offence has been undergoing substantial revision in both Australia and South Africa. The expansion of the definition may broadly be seen in relation to three elements of rape: the physical element of sexual penetration, the gender of the parties involved, and the issue of consent and previous sexual history.

3.1.1 ‘Penetration’

The definition of “penetration” has seen significant change in Australian jurisdictions over the past decade, and is still the subject of much debate. In all jurisdictions, there has been a shift away from viewing the penis as the sole object of penetration and the vagina as the sole target of violence.³⁵ A useful discussion of the issue of penetration is provided by the ‘Model Criminal Code, Chapter 5: Sexual Offences Against the Person’,³⁶ which argues that ‘the definition of sexual penetration forms the centrepiece of the most serious sexual offences in the Model Criminal Code’.³⁷ The definition of the physical element of rape at common law was penetration of the vagina by the penis. When rape became a statutory offence, the narrow definition was reflected in the legislation. Other acts of non-consensual penetrative conduct were dealt with as other offences. For example, digital penetration or forced oral sex was “indecent assault”, while penile penetration of the anus was simply “buggery”. In all jurisdictions there have been two major changes to the common law definition

³⁴ Cooperation Agreements Aimed at Expanding the Number of Existing Courts Dealing with Rape and Sexual Violence, 1; Deputy Minister Gillwald, “Address to Parliament in the Debate on the Incidence of Rape”, 26 October 1999.

³⁵ Sharpe, Andrew. “Attempting the “Impossible”: The Case of Transsexual Rape”. *Criminal Law Journal* 21, Oct. 1997, 23-31.

³⁶ (May 1999). Prepared by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.

³⁷ *Ibid*, at 9.

concerning penetration: firstly, ‘there has been an expansion of the types of physical conduct which may constitute the basic offence’ and secondly, there has been ‘an adoption of gender-neutral terminology so that both men and women can be offenders and victims’.³⁸ In NSW, SA, WA, the NT and the ACT, the basic offence has been redefined in wide terms to cover: (a) penetration by the penis of the vagina, anus and mouth; (b) penetration of the vagina or anus by any other part of the body or object; (c) fellatio; (d) cunnilingus. In other states, however, the definition of penetration is not so broad. In Victoria, the basic offence covers only (a) and (b), while Tasmania still only provides for (a). Until recently, in Queensland rape consisted only of penile penetration of the vagina, so that penetration of the anus, or penetration by an object, fellatio and cunnilingus did not amount to rape, but could only be prosecuted under the lesser offence of indecent assault. However, at the very time this paper was written, the current law in Queensland changed to create an expanded definition which includes these extra forms of penetration. This overall expansion of “penetration” in Australian law reflects the fact that ‘penetration of the mouth by the penis ... is for many women (and men who are victims) as bad as vaginal rape’.³⁹ Despite the liberalisation of rape laws, discrepancies are still evident in terms of sentencing: under present law, forced oral sex is a sexual assault with a maximum penalty of 14 years imprisonment – less than the maximum penalty for penetration by a finger or hand. This does not accord with many women’s views of the relative seriousness of the conduct.⁴⁰ The Taskforce also argues that ‘the question of digital penetration is ... a vexed one’, pointing out that in the Rape Law Reform Evaluation Project, 11 out of 18 Victorian judges interviewed thought that the inclusion of digital penetration in the definition of rape “devalued” or “trivialised” the “real offence”.⁴¹ Additionally, an interesting question is whether the penetration has to be of a sexual nature: penetration of a woman’s vagina for a non-sexual purpose, for example to remove drugs, was considered to fall within the definition of “sexual intercourse” in s5 of the *Criminal Law Consolidation Act 1935* (SA), in the recent case of *R v Abraham*.⁴²

³⁸ *Id.*

³⁹ *Discussion Paper 68.*

⁴⁰ Taskforce on Women and the Criminal Code, p 91.

⁴¹ Heenan, Melanie and McKelvie, Helen: *Evaluation of the Crimes (Rape) Act 1991 Executive Summary*, at 72. Cited at 91.

⁴² (1998) 70 SASR 575 (CCA).

This is reflective of changing perspectives on rape, whereby it is increasingly seen less as a 'sexual' act than as an act of violence.

In South Africa the position contrasts starkly with Australia. Rape is 'committed by a man having intentional unlawful sexual intercourse with a woman without her consent. Non-consensual anal or oral penetration does not constitute rape in common law, although it can constitute indecent assault. Sexual intercourse is restricted to the penetration of the vagina by the penis'.⁴³ This thus represents the former position in Australia and, in particular, Queensland law until recently. The South African Law Commission explains that under current law, 'the penetration of other orifices by the penis is not rape, nor is the penetration of the vagina with something other than the penis'.⁴⁴ Furthermore, 'anal or oral intercourse with a woman without her consent is punishable as indecent assault, as held in the case of *S v M*'.⁴⁵ However, there appears to be gathering momentum for change. Like reform trends in Australia, the focus is upon the concept of *penetration*: 'the essence of the Commission's proposal on rape centres around "unlawful sexual penetration"'.⁴⁶ Sexual penetration is defined very broadly by the Commission to include the penetration 'to any extent whatsoever' by a penis, any object, or part of the body of one person, or any part of the body of an animal of the vagina, anus, or mouth of another person'.⁴⁷ This broader definition is thus similar to that proposed in the Australian Model Criminal Code. Two notable differences in the South African proposals are the further extensions to include penetration of an animal, and "simulated sexual intercourse", the Commission arguing that 'even simulated sexual intercourse under coercive circumstances can constitute rape'.⁴⁸ This is one instance where South African law seems to be more progressive than Australian law. An interesting development in South Africa has been the proposal to add that rape will be an offence 'when committed ... by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus'.⁴⁹ This reflects the rapid growth of

⁴³ *Discussion Paper*, (v).

⁴⁴ *Ibid*, at 72.

⁴⁵ 1990 (1) SACR 456 (N).

⁴⁶ *Discussion Paper*, (vi).

⁴⁷ *Id*.

⁴⁸ *Id*.

⁴⁹ *Criminal Law Amendment Act 1997*. Schedule 2, Section 51, Part 1.

HIV/AIDS in South Africa, and the highly unfortunate fact that many men believe that sex with a virgin will cure the disease.⁵⁰

3.1.2 Objects

Another issue related to the definition of the physical element of rape is whether sexual penetration can be by 'objects'. Previously, all Australian jurisdictions except Tasmania and Queensland provided for the penetration by objects in their definitions of rape. At the time of writing, Queensland's law has changed to 'include penetration by an object or body part'.⁵¹ In New Zealand, 'both penile rape and rape with an object share a maximum penalty of 20 years'.⁵² Critic Christine Cameron, in 'A Feminist Critique of the Distinction between Penile Rape and Rape with an Object',⁵³ cites an anecdote highlighting attitudes towards rape with an object; when the New Zealand Minister of Justice, The Hon. Douglas Graham, was asked why sentencing initially differed between penile rape and rape with an object, he replied that the justification was that '[it]'s very hard to become impregnated by a bottle; there is a difference'.⁵⁴ This comment reveals the underlying attitudes towards rape, demonstrating again that the original rationale for prohibiting rape was premised on the prevention of unwanted pregnancy – a rationale now significantly changed. Cameron argues that 'the use of the penis as a weapon in rape is qualitatively no different from the use of a bottle or hand. Further, other forms of attack may be worse than traditional rape. Penetration by bottles or pieces of wood may be 'more painful, offensive and disfiguring than penetration by a penis'⁵⁵ and may involve a risk of psychological harm greater than that involved in penile penetration'.⁵⁶ In South Africa, the definition as yet does not make a reference to objects, although this is recommended by the Law Commission. The requirement of sexual intercourse currently excludes the 'possibility of

⁵⁰ Peters & Wolper, *Women's Rights Human Rights*, 148.

⁵¹ May 10, 2000, *The Courier Mail*.

⁵² Cameron, *Auckland University Law Review* Vol. 7, 1992-1995. 647-663 at 647.

⁵³ *Id.*

⁵⁴ Television interview, 18 June 1992, cited at 645.

⁵⁵ Hesketh, Salas and Horsmann, National Council of Women of New Zealand, *Submission on the Rape Law Reform Bill (No.2)*, JL/85/42 (1984) 1, cited by Cameron at 654.

⁵⁶ Cameron, 654.

penetration by means of other instruments, for example sticks and bottles'.⁵⁷ However, they pose the question:

Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self? All acts of sex forced on unwilling victims deserve to be treated as equally grave offences in the eyes of the law, for the avenue of penetration is less significant than the intention to degrade.⁵⁸

It is likely that this extension will be made in the near future in South Africa if the Sexual Offences Bill is passed.

3.2 Gender Issues

The second main definitional expansion involves an increased focus upon gender issues; this raises three key questions. Under existing law in Australia and South Africa,

1. Can a man be raped?
2. Can a woman be raped by a woman, or a man by a man?
3. Can a transsexual person be raped?

3.2.1 Rape of males by women

The offence of rape has traditionally been gender specific. However, although the primary focus has been 'rape offences against women and children', in fact, 'a substantial number of victims are adult males'.⁵⁹ Lesbian, bisexual and transgender women consulted by the Taskforce on Women and the Criminal Code have argued that the law should recognise that women can and do commit sexual assaults and rapes of women, men and children.⁶⁰ The Taskforce also states however that 'some women are uncomfortable with the idea of women being charged with rape, even though women can (and have been) charged with rape under the existing law in Queensland'.⁶¹ In their article

⁵⁷ *Discussion Paper* at 72.

⁵⁸ *Legal Aspects of Rape* at 30, citing S Brownmiller *Against Our Will* 1976 at 370.

⁵⁹ Crome, Sarah, Marita McCabe, and Lindsay Ford: 'Male Rape Victims: Fact and Fiction' *The Law Institute Journal*, Jan 1999, Vol. 73: 1. P-60-65, at 60.

⁶⁰ *Discussion Paper* at 92; Taskforce Consultation with Lesbian, Bisexual and Transgender Women on 27 May 1999

⁶¹ at 92

“Male Rape Victims: Fact and Fiction”, commentators Crome, McCabe and Ford question whether ‘our laws apply equally to male victims, or whether they are being left to languish under outmoded laws, procedures and social biases’.⁶² They assert that while ‘this question is plagued by rhetoric, hunches and bad statistics, the answer seems to be a definite “yes”’.⁶³ Critiquing existing legislation, the authors point out that ‘there is limited legal consensus on definitions of male sexual assault’.⁶⁴ They state that Victoria has ‘a liberated and effective definition of rape, in terms of both its global assessment of the crime and its broad but clearly-stated parameters. It is not sex-specific and is sufficient to encompass a variety of violating sexual acts against adult males’.⁶⁵ Noting that NSW, WA and the ACT have comparable legislation, they contend however that ‘other states have shortcomings in their ability to deal with cases of rape of men’, arguing that ‘Queensland and Tasmania take very traditional and limited views of sexual crimes, a fact that is heralded by the title to the relevant Division of the Qld Act: “Assaults on *Females* and Abduction”’.⁶⁶ [emphasis added] Indeed, Queensland’s rape laws previously were specifically drawn to cover “female” or “women” victims, meaning that offences against men had to be treated as lesser crimes. Similarly, ‘Tasmania limits rape to non-consensual “sexual intercourse” by a penis ... meaning that rape by other parts of the body or by objects would not be caught’.⁶⁷ One of the key factors highlighted by their article is that ‘assessment of the incongruities and deficiencies in all Australian state and territory laws indicates that there are issues relevant to the under-reporting of male rape and subsequent failures with its prosecution’.⁶⁸ Another key issue is that ‘the concept of consent also requires review and elaboration of its boundaries to include the very different experiences of adult male victims of sexual assault’.⁶⁹

⁹⁵ *Law Institute Journal*, Jan 1999. Vol. 73:1. 60-65. 60.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Crome, 61.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Ibid.*, at 60.

¹⁰² *Id.*

How then does South African compare? One source suggests that as many as ‘one in five men is a victim of rape’⁷⁰ in South Africa. Despite this, the current legal position is that ‘a man cannot be raped and a woman cannot commit rape’.⁷¹ However, a woman acting as an accomplice of a man who commits rape can, on that basis, be convicted of rape.⁷² Increased attention has been given to the need for reforms to include rape of men; however, as the Law Commission notes, ‘sexual assault of a man in the form of forced anal penetration is also often described as “rape” in common parlance’, although it would be punishable as ‘indecent assault, or assault with intent to do grievous bodily harm’.⁷³ This highlights an important discrepancy between what is generally *perceived* to be “rape”, and what actually amounts to rape within statutory definitions. A common problem shared with Australia in this regard is the low rate of reporting of male rape; ‘with [a] broader definition of rape, the impact on the incidence of reported rape could be dramatic. But it is precisely because of the current narrow definition of rape that no statistics on male rape exist. People who work with victims of violence have indicated that male rape is not generally reported by male victims, but that a severe problem exists’.⁷⁴ The Law Commission states that it is ‘acutely aware that the vast majority of victims of sexual violence are children (of both sexes) and women, while the majority of perpetrators are men. Without losing sight of this fact, the Commission nevertheless approaches its task from a gender neutral basis and accepts that men can be, and are, victims of sexual violence’.⁷⁵ However, it also acknowledges that ‘evidence is anecdotal and no reliable statistics are available at present’.⁷⁶ The proposed Sexual Offences Bill includes a gender neutral definition of rape, by which both men and women may be victims or perpetrators. It remains to be seen whether this Bill will be passed.

⁷² Press Statement by the Deputy Minister Ms. Cheryl Gillwald, 26 October 1999.

⁷³ *Discussion Paper*, 73; citing Milton, *South African Criminal Law and Procedure Volume II* 449.

⁷⁴ *R v M* 1950 4 SA 101 (T).

⁷⁵ *Discussion Paper*, 73.

⁷⁶ *Id.*

⁷⁷ *Ibid.*, 3.

⁷⁸ *Id.*

3.2.2 Homosexual & Lesbian Rape

Another key issue concerning gender and rape law is that of the approach towards same-gender rape in South Africa and Australia – that is, rape by a man of a man or by a woman of a woman. Since the commencement of the reform period in the 1970s, ‘all Australian jurisdictions have repealed laws proscribing homosexual conduct between consenting adults’.⁷⁷ Thus, the offence of “sodomy” has now been mostly eliminated. Where provisions are gender-neutral it would appear that same-gender rape is legally covered. However, despite these legislative changes, some uncertainty and debate still remains regarding same-sex rape. The majority of jurisdictions continue to draw a distinction between heterosexuality and homosexuality by way of, for example, a higher age of consent for sexual contact between two males.⁷⁸ Diane Hamer in her article “The Invention of the Dildo” explores these uncertainties. She argues that ‘crimes of a sexual nature can be divided into two categories: in the first are those which are illegal if one party consents and the other doesn’t, but legal if they both do. Rape belongs here. Secondly, there are activities which are illegal whether or not both parties consent’.⁷⁹ The major offence within this second category is male homosexual sex which used to be illegal. It is interesting to note that an alternative verdict for rape in the NT is sexual intercourse or gross indecency between males in public or in private: s27. Under s124(5) of the Tasmanian *Criminal Code*, consent is not a defence to anal intercourse. Thus, from this perspective, ‘male homosexuality ... is ... a “victimless crime” – criminal even though both parties consent’.⁸⁰

Hamer examines a case which ‘raises broader questions about the operation of the law in relation to lesbians and gay men’,⁸¹ that of Jennifer Saunders, who dressed as a man in order to have sex with two females. The sensationalisation of the crime in the press, with false allegations that she had strapped on a false penis in order to have sex, reveals the attitudinal differences towards heterosexual rape and homosexual rape. Hamer argues that ‘the production of (her) “crime” ... was made possible through the convergence of pre-existing

⁷⁷ *Model Criminal Code* 15.

⁷⁸ *Id.*

⁷⁹ *Australian Gay & Lesbian Law Journal*. Vol. 2, Spring 1992. 41-54.

⁸⁰ *Ibid*, 53.

⁸¹ *Ibid* 42.

discourses around female criminality on one hand and lesbianism on the other. The effect of such a convergence was to construct Jennifer as a criminal because she was a lesbian'.⁸² This case, as well as the recent conviction of several gay men for assault, 'clearly demonstrates the refusal of the courts to recognise consent in homosexual trials compared to its liberal application in heterosexual offences'.⁸³ Hamer argues that such a refusal 'exposes the highly ideological operation of the law'.⁸⁴ This is significant as it demonstrates that the law does not operate in a vacuum, but rather within a web of contextual factors such as social, cultural, moral and ideological norms.

Should specific legislative recognition be given to same-gender rape?

The above considerations raise an important question: 'should there be a special form of sexual penetration upon which offences specifically directed towards the prohibition of same-gender sexuality may be constructed?'⁸⁵ Should a Code include specific offences directed at sexual contact between two persons of the same gender? Already in Australia, 'some jurisdictions have special sexual offences that apply only to sexual contact between two males. As in NSW, those offences may be founded upon a special definition of sexual penetration [or] create a separate age of consent for sexual contact'.⁸⁶ Debate still rages upon this issue. A number of arguments have been made 'in support of the special prohibition of same gender sexual contact, whether absolutely, or in a way that imposes a higher age of consent, or higher penalties for offences, or a limitation on defences'.⁸⁷ Firstly, 'the teaching of a number of religions that homosexuality is a sin'... or 'intrinsically immoral'; secondly, that 'many persons find the idea of sexual contact between two persons of the same gender intrinsically repugnant'; and thirdly, that certain common gay male forms of sexual contact are dangerous with regard to infectious diseases'.⁸⁸ These arguments all stem from certain moral and social attitudes towards

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Model Criminal Code*, 15.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

homosexuality. Arguments against special prohibition of same-gender sexual contact are that ‘many Australians do not subscribe to a religious or moral belief that there is anything intrinsically wrong with homosexuality’;⁸⁹ that many people are totally untroubled by homosexuality; and that ‘to the extent that disease is a concern, offences should be created to punish all persons who endanger others by way of exposure to a serious disease. The gender of the perpetrator and of the victim is irrelevant to such an offence’.⁹⁰ Furthermore, the criminal law should not discriminate against persons with a particular sexual preference. It is submitted that these latter arguments are obviously more sound. It is interesting to note that the Committee concluded that ‘the Model Criminal Code should *not* contain specific offences relating to homosexual conduct, but simply adopt a gender-neutral approach, so that equal protection extends to male and female victims, and equal punishment to male and female perpetrators’.⁹¹ Overall, they put forward the view that ‘gays and lesbians should be subject to the offences in the Code just as heterosexuals will be, no more and no less’.⁹²

In South Africa, same-sex rape is still not covered by the current definition. However, a clear attitudinal shift is evident from the *National Coalition for Gay and Lesbian Equality* case,⁹³ in which the Constitutional Court declared the common law offence of sodomy unconstitutional. More importantly, under the proposed Sexual Offences Bill, the offence of sodomy is eliminated, so that the offence of “sexual penetration” will apply to both male and female victims. The Law Commission ‘proposes the repeal of the common law offence of rape and its replacement with a new gender-neutral statutory offence’.⁹⁴ The Commission’s proposals on a gender-neutral definition of rape also cover ‘anal penetration under coercive circumstances’.⁹⁵ Although no information was found regarding lesbian rape, the Law Commission points out that ‘most of the respondents want to include

⁸⁹ *Id*

⁹⁰ *Ibid*, 17

⁹¹ *Ibid*, 19

⁹² *Ibid*, 17

⁹³ 1999 1 (SA) 6 (CC)

⁹⁴ *Sexual Offences Discussion Paper*, (vi).

⁹⁵ *Ibid*, (vi)-(vii).

non-consensual homosexual intercourse and ‘forced lesbian activity’ in the definition of rape’.⁹⁶ While some commentators have argued that ‘the law’s concern is with public order and the maintenance of the institution of the family’,⁹⁷ as Hamer points out, the approach of the law to homosexuality suggests that ‘the way the law functions [is] as an ideological support to a certain conception of public order, public interest and public policy’.⁹⁸ It appears that ‘underpinning all this is a notion that homosexuality is contrary to public interest and standards of decency’.⁹⁹ This particular conception is based upon the fact that what is in the ‘public interest’ is based upon certain norms, norms which often exclude minorities. How is the law to respond when the very ‘norms’ upon which it has operated for centuries are rapidly undergoing a period of social change, and when attitudes to same-gender relationships are being rapidly revised? The preceding discussion regarding the way in which gender issues are increasingly having an impact on rape laws thus leads to an even more difficult question – that of how to deal with ‘transgender’ rape.

3.2.3 Transsexual and transgender rape

As seen in the preceding section, a major shift has occurred to redefine rape so that it covers rape of a male by a female. However, what to do where definitional difficulties are taken a step further – where the very definition itself of ‘male’ or ‘female’ is cast into question? The legal position regarding transsexual or transgender people remains uncertain in Australia, with few cases emerging to provide guidance. This tenuous position is explored by Andrew Sharpe in his article “Attempting the ‘Impossible’: The Case of Transsexual Rape”.¹⁰⁰ He argues that ‘despite a recent burst of legislative and common law activity, the possibility of securing a conviction for the rape of transsexual persons...remains unguaranteed in four Australian states’.¹⁰¹ In particular, problems arise in jurisdictions where the gender-specific nature of the offence continues to require a ‘female’ victim, or that penetration be of the vagina. As a result, where the victim is a male-to-female transsexual, the legal status of her sex

⁹⁶ “The Invention of the Dildo”, 87.

⁹⁷ *Ibid*, 53.

⁹⁸ *Ibid*, 54.

⁹⁹ *Id*.

¹⁰⁰ *Criminal Law Journal*, Feb. 1997, Vol. 21. 23-31.

¹⁰¹ *Ibid*, at 23.

and/or genitalia emerges as a factor capable of precluding a conviction.¹⁰² Victoria, Queensland and the Northern Territory are unique among the Australian jurisdictions in recognising transsexual rape. They have each redefined penetration of the ‘vagina’ so that it includes both the external genitalia and a “surgically constructed vagina”.¹⁰³ Importantly, this does *not* mean that the law therefore recognises the “legal sex” of the person; it simply recognises the ‘status of transsexual genitalia’ and does not purport to make any implied determination as to the ‘sex’ of a male-to-female transsexual.¹⁰⁴ This approach was made clear from the NSW case of *Harris and McGuiness*,¹⁰⁵ where the court had to determine whether a male-to-female transsexual was a male within the meaning of the (now repealed) s81A of the *Crimes Act*. The court rejected the biological formula (sex is determined at birth) stipulated in the landmark English decision of *Corbett v Corbett*,¹⁰⁶ preferring instead the approach of the American court in *Re Anonymous*,¹⁰⁷ whereby sex is determined by anatomical and psychological harmony.¹⁰⁸ However, in *R v Cogley*,¹⁰⁹ the Victorian Court of Criminal Appeal held that a person’s sex was ‘a question of fact to be determined by the jury’; this ruling introduces an element of doubt into the prosecution of any offences against transsexuals.¹¹⁰

The ACT and SA have enacted legislation which gives some recognition of a change of sex to post-operative transsexuals. However, it seems that the situation is further problematised by the differentiation between married and unmarried male-to-female transsexuals – yet another instance where the law on rape still appears to be predicated on the notion of marriage. Sharpe points out that while ‘unmarried or divorced male-to-female transsexuals are legally capable of being raped ... in South Australia and New South Wales, married transsexuals ... remain potentially incapable of being raped’.

¹⁰² *Id.*

¹⁰³ *Crimes Act* 1958 (Vic), s35; *Criminal Code Act* 1995 (Qld), Sch 5; *Criminal Code Act* 1983 (NT), s1.

¹⁰⁴ Sharpe, at 24.

¹⁰⁵ (1988) 17 NSWLR 158; 35 A Crim R 146.

¹⁰⁶ [1971] P 83; [1970] 2 WLR 1306.

¹⁰⁷ 293 NYS 2d 834 (1968) NSW.

¹⁰⁸ Sharpe, at 26.

¹⁰⁹ (1989) VR 799.

¹¹⁰ *Taskforce on Women and the Criminal Code*, at 93.

That is, ‘in the present context, a male-to-female transsexual who has undergone full sex reassignment surgery yet who remains married to a biological woman cannot be recognised as female in law, and is therefore potentially incapable of being raped’¹¹¹ – it is, a case of the “impossible” rape. Sharpe explains: ‘in those States where the possibility of securing a conviction for transsexual rape remains equivocal, the equivocality arises because the “crime” may, in some sense, be impossible to commit’.¹¹² No information has been able to be located regarding the current position of transsexual people under South African criminal law. This absence of information is interesting in itself; it may perhaps be attributed to lack of reporting, or even to the lower incidence of cases, given fewer medical resources available to perform the necessary surgery. It is submitted, however, that South African law would be likely to look towards Australian law as it starts to address this emerging potential inadequacy of existing rape law.

3.3 Consent and previous sexual history

The type of evidence which may be admitted in a rape case remains a problematic issue in both South Africa and Australia, and brings into question the interrelationship between criminal law and the law of evidence. The admissibility of sexual history evidence has met with vehement criticism, and is discussed at length by Elisabeth McDonald in “Her Sexuality as Indicative of His Innocence: The Operation of New Zealand’s ‘Rape Shield’ Provision”.¹¹³ Although specifically referring to New Zealand’s legislation, it also provides useful insights into Australian law. It appears that the rationale for calling evidence of sexual history is essentially three-fold: firstly, it may be useful in determining whether or not consent had been given by the victim. Secondly, it could be useful where the evidence ‘goes to dispel jurors’ expectations about the complainant’s sexual naivety or preferences’.¹¹⁴ Thirdly, it may support an allegation that the

¹¹¹ Sharpe, 24.

¹¹² *Ibid*, 28.

¹¹³ *Criminal Law Journal*, Vol. 18, 1994, 321-336.

¹¹⁴ *Ibid* at 323 For example where the complainant is young, the defence may wish to introduce evidence to explain her familiarity with sexual terms: (*T* (unreported, High Court Greymouth Registry, T 2/92, 29 July 1993), p1), or to prove information “as to the sexual precocity of the complainant as compared with the image the jury may have of a normal 12 year-old” (*R* (unreported, High Court Napier Registry, T 29/92, 8 October 1992), 1).

complainant has fabricated the story, to determine whether or not the victim has a 'reputation for veracity'. Thus, evidence that the prosecutrix has a general reputation for untruthfulness is admissible.¹¹⁵ McDonald argues that some of the decisions concerning the admissibility of sexual history evidence 'may still be informed by traditional views of women's sexuality and credibility'.¹¹⁶ She points out that the major objection to defence tactics in rape cases was 'the emphasis frequently placed upon the complainant's prior sexual history and her general propensity in sexual matters. The law of evidence treated her past sexual activity as relevant to her credibility ... even when it had no direct bearing on the alleged incident itself'.¹¹⁷ McDonald contends that 'sexual history evidence allows juries to make verdict choices based on rape myths' which has the deleterious dual effect of 'increas(ing) the chances of the defendant being acquitted and the likelihood of the complainant being dissatisfied with the trial process'.¹¹⁸ These "rape myths", she argues, fall into three groups. (1) that 'women precipitate rape by their appearance and behaviour (the "she asked for it" myth); (2) the idea that 'women actually desire to be raped (the "she said no but she really meant yes" myth), and (3) that 'women, motivated by revenge, blackmail, jealousy, guilt or embarrassment, falsely claim they have been raped after consenting to sexual intercourse (the "she is lying" myth).¹¹⁹ Although McDonald acknowledges that these myths are more often recognised today for what they are, she argues that 'there is no doubt that many men, and women, still think they are statements of truth'.¹²⁰ Even more significantly, she contends that 'these myths have

¹¹⁵ *R v Hanrahan* [1967] 2 NSWLR 717.

¹¹⁶ McDonald at 321.

¹¹⁷ *Id.* Despite the 1977 amendment to the *Evidence Act* 1908 (NZ), which inserted s23A, and the subsequent amendment of this section in 1985, the Institute of Criminology and the Department of Justice found that 'no clear principles governing the exercise of the judge's discretion under s23A had evolved'(321). Similar sections have been inserted into the Australian legislation, though varying somewhat in wording and emphasis: *Evidence Act* 1958 (Vic), s37A; *Crimes Act* 1900 (NSW), ss409B and 409C; *Criminal Law (Sexual Offences) Act* 1978 (Qld), s4; *Evidence Act* 1929 (SA); *Evidence Act* 1906 (WA), s36A and s36B; *Evidence Act* 1910 (Tas), s102A; *Evidence Ordinance* 1971 (ACT), s76G; *Sexual Offences (Evidence and Procedure) Act* 1983 (NT), s4.

¹¹⁸ McDonald at 322.

¹¹⁹ *Ibid.*, at 323.

¹²⁰ *Id.*

unfortunately also informed the legal system's approach to rape law and procedure and they are still found in the writings of academics, the decisions of judges, and the arguments of defendants in rape trials'.¹²¹ It thus appears that patriarchal attitudes still continue to inform legal decisions in New Zealand and Australia; it seems that the recent changes to Queensland law, unveiled in May 2000, aim to address some of these concerns about evidence in rape trials. It has been argued that the new laws 'will boost the power of judges to prevent offensive, harassing or irrelevant cross-examination of vulnerable witnesses'.¹²² In South Africa, the proposed Sexual Offences Bill does away with the cautionary rule which provides that the testimony of victims of sexual abuse is not trustworthy. Existing information on the current position in South Africa is not accessible; however, the experience of Shahieda Issel, a South African activist, seems to exemplify the situation: "The colonel had assault (sic) me so terribly that my leg was broken. But the police [blamed me]...In court, police officer Van der Merwe said of me: Your Honour, this lady claims to be a lady, but she is no lady at all".¹²³

Double standards? Sexual History and Prostitutes

The question of evidence going towards a 'reputation for veracity' holds particular relevance for sex workers, or prostitutes, as discussed by Meredith Carter and Beth Wilson in "Rape: good and bad women and judges".¹²⁴ In particular they draw on *R v Hakopian*¹²⁵, a 'case

¹²¹ *Id.* In this view she is supported by N. Naffine's in "Windows on the Legal Mind: The Evocation of Rape in Legal Writings" (1992) 18 *MULR* 741.

¹²² *The Courier Mail*, 10 May, 2000.

¹²³ *Women's Rights, Human Rights*, cited at 116.

¹²⁴ *Alternative Law Journal* Vol.17, 1992. 6-9.

¹²⁵ Country Court of Victoria, August 1991; *R v Hakopian* 9, 10 and 11 December 1991, Supreme Court of Victoria, Appeal Division, Court of Criminal Appeal. Crockett, Southwell and Teague JJ. Hakopian had engaged the services of a 28 year old woman who had worked for some months as a street prostitute. An agreement was reached that she would provide oral and vaginal sex for \$90, which Hakopian paid her. He took to her his workshop in East Kew, and she provided oral intercourse for some 15 to 20 minutes, following which she stopped, telling him it had gone on too long. At this point he became angry, and she said she wanted to leave. He then produced a knife and threatened her with it, forcing her to continue the oral intercourse. This constituted the offence of rape with aggravating circumstances: Carter and Wilson, at 6.

... remarkable for several reasons', not least of which is the leniency of the sentencing by the Supreme Court - only four and half years, with a minimum sentence of two and half years. More importantly, certain statements of the judges and the defence barrister raised a storm of comment; these were to the effect that 'the victim's employment in the sex industry was a factor relevant to the mitigation of sentence'.¹²⁶ The particularly contentious comment was that of Justice Jones, who in regard to the psychological effect of sex on victims, said that 'I do not think that applies to sex workers' and that 'the crime ... is not as heinous as when committed, say, on a happily married woman living in a flat in the absence of her husband when the miscreant breaks in and commits rape upon her'.¹²⁷ He also found Hakopian to be a hardworking man whose wife and sons remained devoted to him, and made the surprising observation that 'I accept you are not a violent man...'.¹²⁸ This approach, whereby the court focused on the good character of the accused as a potentially mitigating factor, was also taken in an earlier case, *R v Harris*.¹²⁹ The authors argue that the most likely explanation for this approach 'is redolent of judicial sexism and double standards'.¹³⁰ Although 'at pains to point out that courts do not apply one law for prostitutes and another for chaste women', Justice Jones commented that offences such as those under consideration do not have the same impact on prostitutes. As Carter and Wilson point out, 'this is obviously contradictory'.¹³¹ It echoes the comments made in *Harris*: 'prostitutes are of course by their very trade ... very subject to the crime of rape ... However they go into it, they embark on their trade knowing the dangers and accepting them, and in those circumstances ... the crime ... is not as heinous as when committed, say, on a happily married woman'.¹³² Thus, 'there has obviously been a dramatic change in community attitudes to rape in general and to the rights of workers in the sex industry, a change which has not been reflected in the attitudes expressed by the sentencing judges'.¹³³ The recent decriminalisation of prostitution in Queensland may lead the

¹²⁶ *Id.*

¹²⁷ *Ibid*, 8.

¹²⁸ *Ibid*, 7.

¹²⁹ Unreported, 11 August 1981.

¹³⁰ Carter and Wilson, at 7.

¹³¹ *Ibid* 8.

¹³² *Id.*

¹³³ *Ibid*, at 6.

way to further attitudinal change. The preceding discussion thus illustrates that although the law may specifically provide for fair treatment of victims, in practice the situation is marred by the discretion of the judges. Justice Elizabeth Evatt, President of the Australian Law Reform Commission, has suggested that 'a female judge would be unlikely to have made the same decision', and called for the appointment of women to the judiciary.¹³⁴ This demonstrates that the courts in Australia remain very much the province of male judges, and as such are still unrepresentative. These difficulties also highlight that rape law places into question difficult issues of attitudes, moral beliefs and preconceptions. Again, information is lacking on the position in South Africa, but some insight is provided by writers Peters and Wolpers, who argue that 'women in Africa...are divided clearly into "good" and "bad". This division is reflected in the belief that all single, unattached women in the cities are prostitutes, and in the frequent attempt by governments to expel single women back to rural areas, sometimes with orders to get married'.¹³⁵

4. Comparison & Evaluation

What general trends and similarities in South African and Australian rape laws may be discerned from the preceding discussion?

4.1 Co-ordination & uniformity

There is a clear need for greater uniformity of rape laws in Australia, given the differences which remain between Australia's eight jurisdictions. The authors of the Model Criminal Code state that 'there are even stronger arguments for a national approach. An area of criminal law as important as sexual offences should apply uniformly throughout the country, in fairness to both victims and those charged with offences'.¹³⁶ Greater uniformity would allow for 'easier provision of advice to victims and defendants, wherever they may reside' and would also 'ensure that the same laws, evidentiary rules and penalties apply'.¹³⁷ In South Africa also there are calls for codification of rape laws, so as to better align common law principles

¹³⁴ *Ibid.*, at 9.

¹³⁵ Peters & Wolper Women's Rights, Human Rights, at 306.

¹³⁶ *Model Criminal Code*, at 2.

¹³⁷ *Id.*

and legislation. Thus, it seems that greater coordination of rape laws is a common goal of both nations.

4.2 Towards a broader definition of rape

Both Australia and South Africa have displayed greater liberality in defining penetration and consent, as reflected in current Australian legislation, and in the proposed new South African Sexual Offences Bill. In formulating its proposed changes, South Africa has turned to foreign jurisdictions for guidance; most interestingly, the bulk of the examples referred to in the Law Commission's Discussion Paper are from Australia. Thus, it appears that Australian law is actively serving as a model for South African legislative change. The Paper examines 'the trends in a number of foreign jurisdictions' to 'broaden the definition of rape', arguing that 'the progressive development on rape law reform in ... these countries is instructive and informative'.¹⁶⁸ In particular, the Commission notes that in other jurisdictions, legislative changes to the definition of rape have been characterised by three key shifts:

- a) A 'shift in emphasis away from the perception of rape as an offence against 'public morals' towards a perception of an offence against the personal dignity and sexual autonomy of the complainant'¹³⁹;
- b) A 'shift in focus away from the 'sexual' element of the crime towards the element of 'violence'¹⁴⁰ - perhaps the most significant change in recent years.¹⁴¹ The authors of the *Model Criminal Code* state that sexual offences have come to be viewed in terms of violence.¹⁴² This in turn signals an important change in the underlying rationale for rape law – no longer premised on the undesirability of unwanted pregnancy or sex outside

¹³⁸ At 88.

¹³⁹ *Legal Aspects of Rape in South Africa*, at 29, cited at 89 of the Discussion Paper.

¹⁴⁰ *Id.*

¹⁴¹ This is certainly the approach being taken broadly in all Australian jurisdictions, perhaps begun by NSW's 1981 remodelling of the rape offence as 'sexual assault', to 'reflect the violent rather than the sexual nature of the offence' Bronitt, Simon. "The Direction of Rape Law in Australia: Towards a Positive Consent Standard" in *Criminal law Journal*, Vol.18 (1994), 249-253 at 249.

¹⁴² *Model Criminal Code* 1.

marriage, but rather upon the fact that it constitutes a violent violation of human rights. This trend is echoed in South Africa, as suggested from Deputy Minister Gillwald's assertion that 'I think that our society misunderstands the nature of rape; it is generally considered a sexual act, an act that somehow shames its victim ... Rape is an act of violence ... an infringement of our individual human rights'.¹⁴³ However, despite this common recognition of violence, it may be argued that in South Africa differing cultural attitudes towards marriage and pregnancy may mean that unwanted pregnancy and sex before marriage still inform existing rape laws.

- c) A 'shift away from the question of whether or not the complainant had consented to the sexual act towards the question of whether the accused had used force in order to have sex with the complainant'.¹⁴⁴ This change of emphasis is highly significant, as it suggests important shifts in court attitudes towards the victims of rape.

It therefore seems that that these broad trends in Australia and other jurisdictions are looked upon favourably in South African law, and will be given more specific recognition if the *Sexual Offences Bill* is passed later this year.

4.3 Changing societal norms

As shown, rape laws are complicated by gender issue; many of the most contentious and topical issues concerning rape today relate to rape 'outside the norm', such as homosexual rape or transsexual rape. The fact that increased pressure has been brought to bear upon legal definition of rape in Australia is testimony to the radically changing attitudes towards gender and sexuality during the last thirty years, and in particular over the last decade. This legislative revision can be attributed to a number of factors. Firstly, a 'more liberal attitude toward sexual roles and behaviour during the early 1970s led to a general community perception that sexual offence laws, which had remained virtually unchanged for centuries, were archaic and

¹⁴³ "Address to Parliament in the Debate on the Incidence of Rape and other Forms of Violence Against Women", 26 October 1999.

¹⁴⁴ *Legal Aspects of Rape in South Africa*, at 29, cited at 89 of the Discussion Paper.

inadequate. Secondly, the 'women's movement was instrumental in highlighting deficiencies in the operation of rape laws and pushing for legislative change'.¹⁴⁵ Both of these factors have led to a revision of social 'norms'. However, same-gender rape and other such issues remain highly controversial, due to societal debate about homosexuality and transsexuality. The absence of information about these issues in relation to South African criminal law suggests that to a certain extent, they remain a 'silenced' area in both societal and legal discourses. This constitutes an important distinction between South African and Australian law on rape.

Also, it is clear that the court composition in both South Africa and Australia remains dominated by Caucasian males, thus affirming the common legal ancestry of the two nations as essentially patriarchal. The courts are highly unrepresentative and thus there remains the strong potential for a masculine ideological bias, especially in relating to evidentiary issues. As cases such as *R v Hakopian* demonstrate, court decisions often lag behind attitudinal changes in society. Thus, it seems that as concepts such as 'gender' and 'sexuality' continue to be reframed, so too will the legal approaches to rape.

5. CONCLUSION

It is apparent from the preceding discussion that the issue of rape is 'undoubtedly one of the most sensitive in the criminal law, with debate on law reform often dominated by the apparent tension between the rights of the accused and the rights of the victim'.¹⁴⁶ Clearly, it represents a rapidly changing field of law, both on an international and national scale. On certain levels, the current law in South Africa and Australia differs greatly, with South African rape law largely reflecting much of the previously existing Australian law. However, despite ongoing debate, it is apparent that South African law is on the brink of change, with the government expressing a commitment to reform existing rape laws.¹⁷⁷ If the Sexual Offences Bill is passed this year,

¹⁴⁵ *Model Criminal Code*, 1.

¹⁴⁶ *Ibid*, at 4.

¹⁸⁰ A clear indication of this commitment is in the Gender Policy Statement of the Department of Justice in March 1999, which 'takes a critical look at some of the ways in which the legal system fails women and how this results in severe injustices', in particular acknowledging 'systemic inequalities, resulting from centuries of legalised injustice against women' *Discussion Paper*, 8.

South African rape law will become much more closely aligned with Australian law.

Clearly, moves towards reform of rape law will continue to be problematised by the fact that rape is a crime which carries 'emotive and sexist baggage'.¹⁴⁸ Legislative change in both Australia and South Africa thus needs to be accompanied by more liberal attitudes towards gender and sexuality, 'the development of a human and children's rights culture, changes in attitudes towards children and women',¹⁴⁹ and a revision of existing evidentiary rules regarding rape. Regrettably, this paper has only been able to explore some of the key aspects of South African and Australian rape laws, demonstrating that rape is a difficult topic which defies simple analysis. It raises a web of interconnecting legal, moral, cultural and social issues, and brings into question the relationship between national and international law. It is this multi-dimensional nature of rape which makes the assertion quoted at the outset of this paper ring true: '*Rape is a crime that is not comparable to any other form of violent crime*'.¹⁵⁰ It is to be hoped that this discussion has elucidated some of the problematic areas of rape law in South Africa and Australia, and highlighted the unique nature of the crime of rape as a topic for comparative analysis.

¹⁴⁸ Carter, Meredith. "The 'very ancient crime of rape'". *Alternative Law Journal*, Vol. 15 1990, 283.

¹⁴⁹ *Discussion Paper*, 14.

¹⁵⁰ *Ibid*, 65 .

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Reflections on Rape Law Reform: Where to From Here?

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Since the early 1980s feminists have been involved in the tedious and technical process of reforming rape laws in Australia. Tedious because what is self-evident about the need for rape law reform has not always been self-evident to lawyers, judges and parliamentarians. And technical because unless we got it right there would always be some defence barrister or judge who would find a loophole in the reforming legislation. Nonetheless, feminist work on reforming rape laws has had notable and far-reaching successes: from re-defining sexual offences to encompass oral rape and rape by objects to prohibiting the admission of a woman's sexual history into evidence to reforming warnings that can be given by judges about delay in complaint and lack of corroboration to protecting the confidentiality of a complainant's counselling notes it would be easy to conclude that our work has been done. But some recent cases challenge the extent to which the adversarial system has become a more suitable forum for the conduct of sexual assault trials as a result of these reforms. In fact, these cases mean that we need to think about whether, in changing the rules, we failed to address the extent to which entrenched prejudicial views about women would override the objectives of the reforming legislation.

A few years ago I accompanied a sexual assault counsellor to court in order to assist her with a claim of privilege in relation to the counselling notes of a sexual assault complainant. While she spoke to the prosecutor, three barristers standing close by exchanged anecdotes about a sexual assault case as if they were talking about how to win a game of football. The case involved a complainant who had a psychiatric history. The defence barrister in the case boasted about how the complainant had continually cried during cross-examination until the point when the trial was briefly adjourned. They laughed. 'It must your way with women,' one of them said. 'Yeah,' said the defence barrister, 'but before she completely broke down I managed to get her

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to admit that she'd been committed to a psychiatric hospital several times.' 'So just another fantasy in her head then,' said the other. 'Yeah, they're all the same,' said the defence barrister and all three nodded knowingly. Because they would know wouldn't they?

And therein lies our problem: the belief that all women are the same. 'They all make it up.' 'Probably led him on.' 'I mean look at the way she was dressed.' 'What did she expect, if she went home with him?' 'Yeah, she looks like she'd be into a bit of rough sex.' 'Well, a woman who sleeps around will sleep with anyone, won't she?' These are the attitudes that make explicable all the in-roads that have been made into some of the reforms listed above.

For example, rape shield provisions, which are possibly the most significant achievement of all sexual assault law reforms to date, were aimed at preventing the defence from exploiting the myth that a woman's sexual disposition or history means she's likely to consent to sex with anyone at anytime to undermine a complainant's credibility. A recent High Court case, *Bull v R* [2000] HCA 24 (11 May 2000) which concerned the rape shield provisions under the Western Australian *Evidence Act*, demonstrates how sexual assault law reforms are being circumvented by reference to the same mythologies that have dogged the sexual assault trial for centuries. In *Bull's* case, the trial judge had refused to admit evidence of a telephone conversation concerning the complainant's alleged sexual fantasies on the grounds that to do so would have admitted evidence of her sexual disposition in contravention of s 36BA which prohibits the admission of such evidence.¹ This meant that, at trial, the jury were only aware that the complainant had voluntarily gone to Bull's house after an invitation by telephone but were not aware of the contents of the conversation. The complainant gave evidence that at the house she had been handcuffed, raped (including rape with a frozen tube of toothpaste) and sexually humiliated over a three-hour period. However, Gleeson CJ and Kirby J avoided the statutory prohibition under s 36BA by arguing that evidence of her alleged sexual fantasies could not be properly characterised as evidence going to disposition because it was fundamentally relevant to the issue of consent (and had to be admitted in the 'interests of justice'), and thus only *incidentally* revealed the

¹ This provision states: "In proceedings for a sexual offence, evidence relating to the disposition of the complainant in sexual matters shall not be adduced or elicited by or on behalf of a defendant."

complainant's disposition. Such a conclusion, however, was only possible if Gleeson CJ and Kirby J believed that there is a certain 'type' of woman who indiscriminately sleeps around and then cries rape. This, it appears, is the type of woman against whom the three accused men in *Bull's* case should have been protected. In fact, for there to be a logical connection between the evidence about the complainant's alleged sexual fantasies and consent it "must be bridged by stereotype (that 'unchaste' women lie and 'unchaste' women consent indiscriminately), otherwise the propositions make no sense" (*R v Seaboyer* (1991) 83 DLR (4th) 193 at 218 per L'Heureux-Dube J).²

The decision is alarming for a number of reasons since it carves out a method by which the objectives underpinning rape-shield provisions in other jurisdictions can be effectively undermined (in particular those provisions that place an absolute ban on the admission of evidence concerning sexual disposition and history); it assumes without analysis that Bull's version of the telephone call is reliable hearsay evidence; it opens the way for the defence to introduce further unreliable evidence about the complainant's disposition, and it has again entrenched common law notions about 'unchaste' women who sleep around and the relevance of such notions to the issue of consent.

For example, how do we know that the conversation took place in the way alleged by Bull? Recently, in a completely different context, the High Court was at pains to prevent the admissibility of hearsay evidence of an accused's confession in circumstances where the only other suspect to the crime told police that Lee (the accused) had confessed the attempted armed robbery to him (*Lee v R* [1998] HCA 60 (30 September 1998)). Yet the unsubstantiated allegations commonly made by accused men who deny rape is the very type of unreliable evidence that the High Court should have been alive to in *Bull's* case in the way it was in *Lee's* case. However, the High Court seemed unaffected by the dangers that the trial judge highlighted in *Bull's* case: that the accused had attempted to blacken the complainant's reputation by making allegations about her sexual disposition – in short, depicting her as a slut.

² Whilst McHugh, Gummow and Hayne JJ also agreed that evidence of the telephone conversation had been erroneously excluded by the trial judge they did so for other, highly technical reasons to do with the *res gestae* exception.

These types of prejudicial views are not confined to adult sexual assault trials. In child sexual assault cases (where because consent is not a fact in issue, the main fact in issue will usually be whether the sexual abuse actually took place), judges feel compelled to look for a motive for lying. Because that's what girls do, don't they? According to Smart J in *V* (1998) 100 A Crim 488 at 501), when a girl cannot get her own way with her father she will pay him back by falsely alleging he sexually abused her; where there has been a history of animosity between a girl and the accused she will resort to allegations of sexual abuse as a payback; where there has been a custody battle between the accused and the girl's mother or arguments over money or property then a girl will, perhaps under the influence of her mother, make an allegation of sexual assault (*V* (1998) 100 A Crim 488 at 501, per Smart J). Indeed, the assumption that where there has been a history of animosity or difficulties between the complainant and accused then it is more likely than not that the allegation is false precludes the occurrence of sexual abuse in such circumstances, even though dysfunctional family and other relational dynamics might be more the norm than otherwise in situations in which a child has been sexually abused. The preoccupation with finding a motive for lying in *V*'s case and other recent NSW Court of Criminal Appeal cases has seen a return to the routine enunciation of the corroboration warning in child sexual assault trials despite the fact that the mandatory common law corroboration warning was abolished in 1985 in NSW. Indeed, such a trend heralds a return to the common law days when sexual assault complainants were categorised as a class of unreliable witnesses (Cossins, (in press)).

The type of mindset expressed by Smart J in *V* is also the mindset that makes explicable the view of the High Court in *Crofts v R* (1996) 186 CLR 427 that the jury should have been warned about the significance of a six year delay in complaint. But what exactly *is* the significance of a six-year delay? What is the source of the miscarriage of justice that the High Court envisaged in *Crofts* because the trial judge failed to give the common law delay in complaint warning even though he had complied with the legislation that had reformed that warning in Victoria?³ According to the High Court's 'ordinary human experience', the six year delay was suggestive, not of a sexually

³ See s 61(1), *Crimes Act* 1958 (Vic).

abused and traumatised child, but a girl who had fabricated the allegations because the delay was so long, so inexplicable, and so unexplained. Indeed, the power of the mindset that girls commonly lie about being sexually abused appears to have even overridden the Court's recognition of the fact that the delay had been explained at trial (Cossins, 1999). However, victim report studies show that, rather than a complaint of child sexual abuse being easy to make, the vast majority of victims never disclose the abuse. In Australia, for example, Fleming (1997) reported that only 10% of child abuse victims reported the abuse to the police, a doctor or other agency such as a sexual assault service. A few years ago, the NSW Sexual Assault Committee (1993) found that only 34% of adult sexual assault victims reported the assault to police. Yet all that the 90% of child victims and the 66% of adult victims who delay their complaint can expect is the presumption that their delay means fabrication. This common law position has existed for several hundred years at least since the time of Henry II when women were inveigled to 'go at once and while the deed is newly done, with hue and cry, to the neighbouring townships and there show the injury done to her to men of good repute – the blood her clothing stained with blood, and her torn garments'. The more things change, the more they stay the same.

But the reality is otherwise: victims do not report either because they feel guilty, they think it is useless reporting to the police particularly if they are assaulted by a husband or partner, they fear retaliation, they think they will not be believed by the police, they do not want friends or family to find out, they are worried about going to court, they believe they will be blamed or they are unsure whether the incident would be regarded as sexual assault (NSW Sexual Assault Committee, 1993: 27-28). The truth appears to be that rigours of the criminal justice system, including the adversarial nature of a trial, the onus and standard of proof and cross-examination more often work to deter victims and parents of victims from making or proceeding with complaints, rather than the frivolous belief that women and girls make such complaints at the drop of a hat.

This brief summary of some of the recent developments that have affected sexual assault law reforms in Australia suggests that, in future, feminists need to consider the limitations of the context in which such reforms are made. In other words, I think it is necessary to consider whether the constraints of the adversarial system are such that sexual assault law reforms are either doomed to a finite lifetime, or are

inherently restricted in terms of achieving their reform objectives because of the adversarial system's preoccupation with ensuring defendant's are protected from lying women and girls under the guise of the fair trial principle. Unfortunately, that principle is applied in such a way that the adversarial system, rather than achieving a balance between the interests of justice between accused and complainant, is prejudicially weighted against the sexual assault complainant. As well thought-through as they have been, some feminist reforms do not appear to have fundamentally shifted this balance in a significant or a permanent way. If it's back to the drawing board I think we need to devise an entirely different system for the prosecution of sexual assault offences. Anyone interested?

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Aboriginal family violence, trauma, healing and intervention: a personal account

Hannah McGlade*

I would like to share in this paper, my own understandings and history with respect to the issue of Aboriginal family violence and trauma. I undertake this task as part of my own healing process – one in which I have chosen to stop following the rules of dysfunctional families, principally that we must not *'talk about the destruction that is going on in families'*.¹

As a child and young woman I witnessed and experienced abuse, often of a severe or serious nature. I subsequently became aware of, and thought that I understood, the prevalent theories of domestic violence, especially as a budding feminist and employee of a women's refuges. I learnt about patriarchy, the domination of the male culture and the disempowerment of women, about abuse by a spouse or partner and the cycle of violence. With hindsight, however, I learnt nothing about myself and my own experiences of abuse and violence.

In recent times, Aboriginal people and communities have rejected the concept of domestic violence on the basis that it does not adequately describe and address the violence that is occurring in communities across Australia. As a recent draft policy report by the WA Domestic Violence Prevention Unit explains:²

Aboriginal people feel that the current mainstream approach to domestic and family violence focuses too narrowly on the spouse type relationship, the idea of male domination ('patriarchy') and reliance on the criminal justice system. It does not address the underlying issues of culture or history or the needs of family and community, of education and healing.

Instead, people have adopted the use of the concept of family violence or family fighting as being a more accurate and useful description. On

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¹ Hodgson, Maggie 'Body, Mind and Spirit: Native Community Addictions, Treatment and Prevention', in 'Popular Justice and Community Regeneration – Pathways of Indigenous Reform', (ed) Hazlehurst, K. 1995 at p 190.

² WA Women's Policy Office, 'Domestic Violence Prevention Unit, *'Aboriginal Family Violence Strategy'*, Draft No4, May 200 at p9.

a positive note, this more accurate perception and identification of the problem has also meant that healing, and intervention measures, of a culturally appropriate manner, are in the process of being developed and implemented.

Violence

In more recent times, there has been some commentary and public awareness raised, particularly by Aboriginal women, about the extent and nature of family violence or fighting occurring in Aboriginal communities. However, *'There has been little systematic research concerning the extent to which Aboriginal women experience male violence'*.³ This issue became apparent in the late 1980's and early 1990's following the establishment of the Royal Commission into Aboriginal Deaths in Custody, set up by Parliament to look at the deaths, predominantly male, occurring in police and prison custody. Aboriginal women such as Marcia Langton and Judy Atkinson sought to also draw attention to the comparatively crippling levels of violence being perpetuated against Aboriginal women.⁴

Of course, the often *'hidden'* nature of family fighting means that its true extent will never be fully known. According to Lincoln and Wilson, *'This dark figure of violence is little known and is a picture that could never emerge by studying police or imprisonment records alone ... Violence is seen as endemic in much of Aboriginal Australia'*.⁵ Recent statistics reported upon by the Western Australian Aboriginal Justice Council, however, are useful in shedding some light. They find, consistent with earlier and national studies, that Aborigines are a *'highly victimised'* section of the WA community.⁶ A study of 1997 police reports showed that Aboriginal people were 4.6 times more likely to be a victim of violence than non-Aboriginal

³ Cunneen, Chris and Kerley, Kate 'Indigenous Women and criminal justice: Some comments on the Australian situation', in *'Perceptions of Justice'*, (ed) Hazlehurst, Kayleen at p 86.

⁴ Cited above at p 86.

⁵ Lincoln, Robyn and Wilson, Paul 'Aboriginal Criminal Justice: Background and Foreground', in *'Crime and the criminal justice system in Australia: 2000 and beyond'*, Chappell, Duncan and Wilson, Paul (ed.), 2000, Butterworths, NSW at p213.

⁶ Aboriginal Justice Council, *'Our mob, our justice, keeping the vision alive'*, AJC, 1999, Perth see p23.

people. Three quarters of all Aboriginal victims were Aboriginal women, and this can be compared with less than half for non-Aborigines. Aboriginal people were six times more likely to be a victim of assault, with Aboriginal women being twelve times more likely to be a victim of assault than non-Aboriginal women. Aboriginal women were also two and a half times more likely to be a victim of assault than Aboriginal men. In the majority of assault cases (53%) against Aboriginal women, the offender was known to the victim, and in 69% of those cases, the offender was the spouse or partner. Aboriginal women were also eight times more likely to be a victim of homicide than non-Aboriginal women and Aboriginal men was four times more likely to be a victim.

These statistics are consistent with those that emerged from an earlier study by the Crime Research Centre of UWA.⁷ Hospital and police reports were examined and showed that Aboriginal people were grossly over-represented – half of all the reported cases involved Aboriginal people, 90% of whom were Aboriginal women. They concluded on the basis of this research that Aboriginal people were 45 times more likely to be a victim of family violence than non-Aboriginal people. The study also confirmed that the nature of the violence was different for Aboriginal people as it was often of a more severe nature, and Aboriginal victims were more likely to have serious injury resulting from the violence.

Importantly, Aboriginal family violence is not concerned solely with spousal abuse, although this may often be the case. According to research by Blagg, *'The scope of potential family violence victims is wide'* and can include aunts, uncles and cousins. Importantly, the abuse of children is also included and so too is the more commonly recognised *'elder abuse'*.⁸

This can be partly explained by reference to the fact that Aboriginal culture is strongly centred on the family and kinship generally and violence and abuse is thus likely to also impact on that wider family. Aboriginal people, in comparison to non-Aborigines generally, have extended, rather than nuclear family arrangements and Aboriginal households, by reason of culture and economic circumstances will include more family members, such as grandparents, possibly cousins,

⁷ Cited in above at p 25.

⁸ Blagg, Harry, *'Crisis Intervention in Aboriginal Family Violence, Summary Report'* Crime Research Centre of UWA, Commonwealth, 2000 at p5.

uncles and aunties, spouses or partners and other relatives in need. The issue of homelessness amongst Aboriginal people is relevant here, Aboriginal people are far more likely to be faced with homelessness: *'Over half the homeless families in Western Australia are Indigenous ... and the proportion of Indigenous families in housing stress (13.4%) is almost seven times that of non-Indigenous families'*.⁹ It may often be the case then, that one household is made up of at least two or even three related families.

The concept of family violence, by recognising the wider scope of victims, embraces those victims also and realistically includes their experiences and needs. I was primarily abused by my mother and I have personally been able to locate and understand my own abuse within the concept of Indigenous family violence. Although for most of my life I would never have described my childhood as abusive, or called myself an abused child, I do now. Granted, many victims of abuse will deny their experiences in order to cope psychologically. However, the domestic violence model was the primary model of abuse that I had learnt about, and child abuse was seen somewhat separately and commonly known in terms of sexual abuse.

When is a beating a matter of simple discipline, and when does it become child abuse? As a child I was beaten with all sorts of instruments – ropes, water hoses, wooden spoons, belts. Sometimes it was less controlled, a heavy saucepan flying through the air and a backhand in the face. As siblings, we fought amongst each other and the house was sometimes a little war zone. I can remember, as a 12 year old, my younger brother pinning me to the wall and punching me in the face, causing severe facial swelling and bruising. My mother put us in the car and drove to our father's house (who had little time for us since marrying again), and went mad out the front of his house, chopping up his nice new lawn with a tomahawk. She was also angry at me, telling me not to walk too close to her because people might think that she had done that to me.

There was serious emotional and physical neglect, in addition to outright abandonment. A constant shuffling to and from new homes, childrens' homes, other institutions and substitute families. Some of

⁹ McGlade, Hannah and Purdy, Jeannine, *'From theory to practice, or what is a homeless yamatji grandmother anyway?'*, 1998 (11) Australian Feminist Law Journal 135.

these places were strange homes indeed. All sorts of rules, no love, sometimes perversion and child abuse. For many years the abuse perpetuated within institutions was kept hidden within the Aboriginal and wider community. Well known Nyungar statesman, Rob Riley, broke the silence and shattered the myths about one such well known institution, Sister Kate's. At a NAIDOC week opening in the early 1990's, held at the former institution subsequently returned to the Aboriginal community and re-named Mangurri, he told his story of child abuse. Sadly he did not live much longer and took his own life. I was only briefly (I think), a child resident of the former Sister Kate's. I slept next to a little girl, she must have been all of eight years old. She screamed every night. Amongst the children it was believed that she was being sexually abused by the 'housefather'. We kept this terrible secret to ourselves, there was no-one to tell. The same man attempted to abuse me, unsuccessfully; I knew what his intentions were and I forcefully let him know that he would not get away with it. But he did, I guess. I have wondered what happened to that little girl who slept next to me, did she survive that abuse? We children were witness to that abuse, and it is something that I have never forgotten.

When I was living with my mother, I saw her assaulted on a number of occasions by men: fathers, stepfathers and others. Like many Aboriginal women, she was not a passive person in the dynamic and would fight back, sometimes instigating violence herself. As a woman though, her strength was not comparable and I do not recall her being a 'victor' of these fights. What did it mean to me as a child to see my mother being thrown across a room by a violent man? Myself and my siblings screamed with terror, I thought my mother would be killed and who would look after us then?

My sister, who strongly identified with my mother, went on to become a victim herself, sustaining serious physical abuse and the hands of her partners. Oftentimes the whole family would become hostage to the latest violent crisis between herself and her spouse. For example, on one occasion my former brother in-law approached the family home following my sister's escape from the violence. At this stage she had only begun to acknowledge what had been occurring, previously there had been outright denial. The restraining order did not deter him as he became enraged and beat down the door of the house. I attempted to hide the children in the back of the house, hysterical children are very difficult to hide. I could hear the cries from the front of the house and

feared that my mother was being killed. She was not, in fact, and with the aid of her elderly partner (a former lightweight champion boxer), had managed to overcome her son in law who hobbled away with injuries requiring hospitalisation.

I was cleaning up the pools of blood from the floor when the police finally arrived. There was little they could do or say, they were never of much help and treated us with indifference or even hostility. The following day, though, up to 10 police came to the home and took my mother away in the paddy van, arresting her on charges of aggravated bodily harm. Our family who were victims of family violence, had become criminals. The court hearing was scheduled many months later and my sister had returned to her partner by this stage, even giving ambivalent evidence in the court case. Fortunately, there was an acquittal by a jury.

I was traumatised by this violence and realised this, some time later when a cat jumped through my window, knocking down the curtain. My automatic response was to hit to the floor. There were no services in the Aboriginal community that we could go to for help or counselling.

This incidents, and many others, took place close to ten years ago, yet the after-effects continue. Only a year ago my brother had his ear bitten off by the man I write about. Again, he was charged. This has meant nothing to him, except perhaps as some sort of disqualification to career possibilities – like many offenders he was – and perhaps still is, a respected member of the community.

Having witnessed both my mother and sister suffer violence from men, I made a pact with myself that it would '*never happen to me*'. Although I never had a relationship that was marked by serious physical violence I was assaulted by men a number of times. Once quite seriously by a policeman - several blows to the head and an attempted strangulation in front of a crowded room. My low self esteem, a consequence of my childhood, meant that some abuse was inevitable. I had also incorporated the abuse that had been perpetrated against me and would at times myself become physically abusive and even violent.

I never could understand the abuse and violence that had surrounded me since childhood, and which had been perpetrated by my mother (a woman) and men, by reference to patriarchy and the domination of women by men. Like many other Aboriginal people, I have been able to understand it by reference to the destructive forces of colonisation

and racism. As the Aboriginal lawyer Pat O'Shane stated in the 1970's, '*racism is the greatest problem ... sexist attitudes did not wipe out whole tribes of our people; sexist attitudes are not slowly killing our people today – racism did, and continues to do so!*'.¹⁰ However, it is readily acknowledged now that colonisation did not impact on Aboriginal men and women in the same way, it also entailed the widespread rape and abuse of Aboriginal women. Aboriginal women were, and are to this day, objectified in a sexually derogatory way. These stereotypes

implied that all Aboriginal women were 'available' for prostitution; white men could thus assuage themselves of possible guilt for rape, disease, or the children they left in their wake.¹¹

Many Aboriginal women will say that these stereotypes remain prevalent, even today, in some form or another. This raises the question, what effects has this, does this, abuse have on the psyche of Aboriginal women? I cannot say I am aware of any research which has looked into this issue.¹² Some Aboriginal women, my mother included, perhaps sought marriage to white men in the belief that it would bring them some kind of standing or respectability. Instead many had frustration, isolation, and eventual nervous breakdowns.

Aboriginal families throughout Australia, including my own family, have been torn apart by the racist policies of successive colonial governments. The Human Rights and Equal Opportunity Commission, in their National Inquiry into the separation of Aboriginal and Torres Strait Islander Children for their families, found that:

Indigenous families and communities have endured gross violations of their human rights. These violations continue to affect Indigenous people's daily lives. They were an act of genocide, aimed at wiping out Indigenous families, communities and culture.¹³

¹⁰ O'Shane, Pat 'Is There any Relevance in the Women's Movement for Aboriginal Women?', *Refractory Girl*, 12, 1976.

¹¹ McGrath, Anne '*Born in the Cattle*', Allen & Unwin, 1987, Sydney at p69.

¹² Koori lawyer Larissa Behrendt is currently researching popular images of Aboriginal woman, and such research will undoubtedly throw much needed light on the issue: cited in *The Australian* newspaper, May 2 2000 at p16.

¹³ HREOC, '*Bringing them home, A guide to the findings and recommendations of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families*'. 1997, Canberra, at p33.

HREOC documented a history that had been suppressed, denied and ignored by the dominant white culture. This uncovering of such a past has invoked a strong response, one that fills the pages of newspaper letters to the editor columns and endless commentary arising from the Prime Minister's refusal to apologise on behalf of the nation for such shameful actions. Most recently, the government has denied the extent of the removal policies claiming that the HREOC finding that '*not one Indigenous family has escaped the effect ... [and that] Most families have been affected in one or more generations by the removal of one or more children*'¹⁴ to be untrue and an exaggeration. The Federal government's response was even supported by the State premier, Richard Court, who is the adopted father of a young Aboriginal woman whose own mother, Elaine Wallam, was removed from her family and institutionalised at a young age at the Marribank mission.¹⁵

The effects of the removal of Aboriginal children from their families are severe and continue to impact on the current generation. They were described as follows by the WA Aboriginal Legal Service:¹⁶

- Feelings of being alienated from their own people, combined with not fitting into the wider white community;
- Feeling bewildered or confused as to the reasons and circumstances of removal;
- Feelings of enormous grief at being separated from parents or children;
- Feelings of loss or deprivation and great sadness that a childhood in missions, institutions, and/or foster care lacked a loving and caring environment;
- Feelings of hopelessness and disappointment arising from thinking they will die without ever being able to resolve or overcome the pain of separation from families;
- A lack of necessary life skills due to being raised in the rigid institutional atmosphere of missions or orphanages;

¹⁴ Above at p4.

¹⁵ See Channel nine, 'A Current Affair' program, 14 June 2000.

¹⁶ Aboriginal Legal Service of WA '*Telling Our Story*', ALSWA, 1995 at pp3-4.

- Difficulties in imparting Aboriginal culture to their own children;
- Difficulties in forming intimate relationships and trusting friendships;
- Major mood fluctuations and depression;
- A tendency to use alcohol or other substances as a method of coping with the pain and grief; and
- Being unable to cope with, and in society.

I have written of and now understand more fully my own family history.¹⁷ My grandparents were forced to hide away from their own families and communities, living an isolated existence in order to keep their marriage and family intact. It would have been a very difficult life. The Nyungar culture and language was suppressed by my great grandmother, Ethel Woyung, who never overcame her fears for her own and that of her family's security and safety. Granny, who loved us children fiercely, kept her Nyungar language and culture to herself. My mother, by contrast, sought to reclaim her Aboriginality. I therefore grew up with very mixed, uncertain messages about being Nyungar.

The education system and the culture of my early childhood were rife with racial prejudice. Multiculturalism had not yet been heard of and racism was commonplace. Aboriginal people were stigmatised, '*that's where the Abo's live*', I can remember some schoolboys calling out as they passed my home one day. I had only one friend as a child, an Egyptian girl, and mostly kept to myself. The school made little or no attempt to promote Aboriginal people and culture in a positive light and there were incidents of discrimination from the teachers themselves. I know from my school age nephew's own experiences, that this often remains the case to this day. Aboriginal children, as part of their day to day '*education*', are racially vilified and discriminated against by both fellow students and teachers.¹⁸ Only recently has

¹⁷ McGlade, Hannah, 'Doubtful Island' in '*Essays in Australian Reconciliation*' (ed.) Grattan, Michelle, Bookman Press, 2000, Victoria.

¹⁸ Racial discrimination is prohibited by legislation, but Aboriginal people have had far too few wins under the legislative framework. There is a denial on the part of the legal 'gatekeepers', Race Discrimination Commissioners and their administrative assistants, to acknowledge the racist history of the country and its current perpetuation: 'Reviewing Racism: HREOC and the RDA', 4 (4) *Aboriginal Law Bulletin* 12.

Aboriginal studies been introduced into the state school system curriculum, despite the public objections of prominent figures, such as a parliamentary senator who objected to such inclusion on the basis that Aboriginal people were *'too low on the civilisation spectrum'*.¹⁹

Clearly then, family violence in the Aboriginal community is about so much more than the oppression of women by men, of patriarchy and male domination. As the Aboriginal and Torres Strait Islander Health Strategy Report details:

*Family violence has its origins in institutionalisation, incarceration, loss of role, loss of parental and role models, low self-esteem, alienation, overt and covert discrimination, theft of land and loss of culture and language, loss of economic independence and enforced dependence on welfare, powerlessness, high levels of imprisonment, alcohol and drug abuse, poverty, high unemployment levels and low education attainment, and a childhood separation from parents ...*²⁰

Trauma and healing

The experience of colonisation for Indigenous Australians has been individual, family and community trauma over multiple generations.²¹

Just as the level and nature of violence within Aboriginal communities and families is slowly being recognised, so too are the psychological effects of that violence. As Judy Atkinson and Coralie Ober explain, many Aboriginal people, as a result of both past and present trauma, suffer from a medical or psychological condition known as *'post traumatic stress disorder'*.²² They say, though, that this condition can be better described, in terms of the Aboriginal experiences, as *'dispossession disaster trauma'*. The symptoms of trauma are serious and include:

a numbness of spirit, a susceptibility to anxiety, depression or rage, a sense of helplessness/powerlessness, a heightened apprehension about the

¹⁹ See note 17.

²⁰ Atkinson, Judy and Ober, Coralie *'We Al-Li 'Fire and Water': A Process of Healing* in *'Popular Justice and Community Regeneration – Pathways of Indigenous Reform'*, (ed) Hazlehurst, K. 1995 at p 203.

²¹ Clarke, Colleen, Harnett, Paul, Atkinson, Judy, Shochet, Ian, *'Enhancing Resilience in Indigenous People: The Integration of Individual, Family and Community Interventions'*, 23 (4) *Aboriginal and Islander Health Worker Journal*, 1999 at p6.

²² See n20 at p201.

physical and social environment, a preoccupation with death, a retreat into dependency and a general loss of ego function. ²³

Apart from the work of Atkinson, there is too little knowledge of the psychological effects of trauma on Indigenous families. This is perhaps not surprising considering that the study of psychological trauma itself has '*a curious history*' marked by both '*periods of active investigation*' and '*periods of oblivion*'.²⁴ It must be remembered too, that whilst there is a growing awareness on the part of the mental health professionals of the needs of Indigenous people, it is still the case that these mental health needs '*have only recently begun to be systematically addressed*'.²⁵ There have, however, been some real insights offered into the experience of trauma from an Indigenous perspective. Trauma, with respect to Aboriginal people, is not limited and cannot be located '*within a discrete place or time*', rather, it demands consideration of:

The universality of experience, with the entire population exposed to the collective traumatisation of colonisation and its aftermath; the persistence of traumatisation through continuing prejudice and manifest disadvantage of the group as a whole; and, retraumatisation through widespread exposure to the social and behavioural sequelae including racism, poverty, substance abuse and violence.²⁶

In my own case, and that of many other Aboriginal children, there is the additional specific trauma arising from isolated or repeated childhood abuse.²⁷ One of the primary psychological defences an abused child may resort to is that of '*disassociation*' this allows the child to ignore the pain, and pretend it is not happening. This approach, though, may become a '*fundamental principle of personality organisation*', and one that results in a fragmented – rather than healthy integrated personality.²⁸ Also, the abused child cannot believe his or her parent/s to be bad, because this primary attachment must be kept intact at all costs. The child instead develops '*an inner sense of badness*' and an identity which is '*contaminated and stigmatised*'. This

²³ See n20 at p 209.

²⁴ Herman, Judith, '*Trauma and Recovery. The aftermath of violence – from domestic abuse to political terror*', Basic Books, 1992, USA at p7.

²⁵ Hunter, Earnest, 'Considering trauma in an Indigenous context', *Aboriginal and Islander Health Worker Journal*, v22, n5, 1998 at p 12.

²⁶ Above at p14

²⁷ See note 24, chapter 5 'Child Abuse'.

²⁸ See n24 at p 102.

can sometimes be masked by an abused child's attempts to be 'good'.²⁹

Adulthood does not bring freedom for the abused child because childhood abuse '*forms and deforms the personality*'.³⁰ Close relationships in the adult life are '*driven by the hunger for protection and care and are haunted by the fear of abandonment or exploitation*'.³¹ One of the saddest aspects of childhood abuse is the adult repetition of the abuse and trauma. The abused child '*is still a prisoner of her childhood; attempting to create a new life, she re-encounters the trauma*'.³² Thus abused children are significantly more likely to be repeatedly victimised in their adult lives. The inner sense of badness remains and the victim is likely to denigrate and blame themselves for repeated abuse. A dissociative coping style, learnt in childhood, means that dangerous or abusive situations may not be fully appreciated.

Many people would be surprised to know of my own history of childhood abuse as the '*dysfunctional survival responses*' usually prevent a person abused as a child from achieving long term positive outcomes, such as educational attainment, employment and social competence.³³ I adopted the '*over achieving*' style as a way of coping with my abuse, and consistent with many other abused children, '*considerable occupational success*', in my case as a lawyer and teacher. However, these high achievements are not appreciated as they should be – abused children feel such achievements to be somehow unauthentic and unreal, and on the part of '*a performing self*'.³⁴

By contrast to myself, my brother developed serious drug problem from an early age and had regular encounters with the police. My sister chose alcohol and found repeated violence in her personal relationships. I had no readily identifiable problems, except a problem with absent mindedness, Magoo, my brother named me, after the bumbling and chaotic old cartoon man. We siblings rarely spoke of our childhoods, and denied its effect upon us. If anything, it had made us 'tough', something to be proud of, almost. My brother would bring it

²⁹ See n24 at p103.

³⁰ See n24 at p96.

³¹ See n24 at p111.

³² See n24 at p110.

³³ See n21 at p7.

³⁴ See n24 at p105.

out in anger when fighting with my mother, and my sister and I thought him to be immature for doing so, he really should grow up, we'd say.

It wasn't until I turned 30 that I saw my childhood abuse and its effect upon me. Psychologically, emotionally and spiritually I knew that I was not really a happy and healthy person and there was something very wrong inside. According to my trauma textbook, the timing was perfect: the '*defensive structures*' formed in childhood become '*increasingly maladaptive*' and will often break down '*in the third or fourth decade of life*'.³⁵ My adult psychology, personality and behaviour was still that of an abused child. I sought some counselling and for the first time ever spoke of my childhood and subsequent traumas, some of which I have touched upon in this paper. The counsellor tested me for posttraumatic stress disorder and according to the results I had a condition which was symptomatic and even clinical. Later on that day I cried – something I rarely do – for my loss.

One of the most common responses to abuse and trauma is denial and suppression. This was certainly my way of dealing with my own history. Immersing myself in work, social justice causes and other escapist behaviours left me with no time at all to even see my own trauma, let alone address it. When trauma is suppressed, denied and ignored though, it is driven:

further into our souls and it colours all aspect of our life. Without healing, it will destroy the human soul as any illness left untreated will in time cripples and kill the body.³⁶

Most importantly, there is the possibility for healing and the invaluable work being done by women such as Judy Atkinson, shows the importance of storytelling to the healing process.³⁷ Traumatized people start the healing process when they reclaim their past, and their trauma stories '*of loss, grief and the pain of severed relationship with self, other and the community in which we live*'.³⁸ Healing or talking circles, where such stories are shared with others who have had similar experiences is a part of this process. In Perth the Yorgum Aboriginal organisation provides an invaluable Aboriginal counselling service for adults and children traumatised by family violence and abuse. I have

³⁵ See n24 at p114.

³⁶ See n21 at p6.

³⁷ See Atkinson, Judy '*Lifting the Blankets, the transgenerational effects of trauma in Indigenous Australia*', Thesis paper, June 2000.

³⁸ See n21 at p6.

found this service a very friendly one, and the counselling offered of a culturally appropriate and high standard, with real knowledge about Indigenous trauma and its effects.³⁹

Intervention

There are some intervention services being established in the metropolitan area. At present, however, the dire needs of Aboriginal families in the Perth area are not being adequately met.

Substantial research and consultation by the Crime Research Centre of UWA has resulted in the recommendation of a number of family violence crisis intervention strategies and models. These strategies and models:⁴⁰

- Work through the existing community structures and are focussed on family violence as a community service and not simply a criminal justice problem;
- They should be coordinated regionally to acknowledge Aboriginal mobility; and
- They should be based on sound knowledge of the dynamics, cultural and social, of the particular locality.

A number of core structures are envisaged as part of the models. They include a Family Crisis Intervention Team, composition and shape varying according to locality. The teams would directly intervene in crisis situations and assist with coordinating community responses. It was recommended that the teams would be managed by a new Aboriginal Family Violence Unit, located within the state Domestic Violence Prevention Unit, and be overseen by a management committee with representatives from relevant Aboriginal organisations.

Approaches focussed on criminalisation are not appropriate, but it is still important to address the legal needs of women and children living with violence. Aboriginal women are seriously disadvantaged by the

³⁹ The service is co-ordinated by Nyutunga Phillips and is located at the Mangurri Aboriginal Corporation in Queens Park.

⁴⁰ Blagg, Harry, '*Crisis Intervention in Aboriginal Family Violence, Strategies and Models for Western Australia*', Crime Research Centre of UWA, Commonwealth, 2000 at pp2-3.

legal system, and even by the specialist Aboriginal legal support services, the various Aboriginal Legal Services. This issue was canvassed by the Australian Law Reform Commission in 1994 whereupon they recommended the establishment of separate Aboriginal women's legal and advocacy services.⁴¹ The approach of the Commonwealth to this recommendation has been a disappointment though; it has determined that funding for Aboriginal women's legal services be made to the women's legal services, established by non-Aboriginal women. In some places, such as Darwin, the Top End Women's Legal Service (TEWLS) works closely and equitably with Aboriginal women and have developed important outreach projects which visit remote communities for the purpose of assisting women with legal matters, and also with education and support of community projects such as crisis centres.⁴² In Perth, however, the Women's Legal Service has been marked by a history of conflict and although the Aboriginal women's committee managed to establish an Aboriginal women's court officer position, this is no longer available.

Some services are now being established in Perth. For example, under the City of Cockburn '*Moorditj Yoka*', Aboriginal family violence outreach service, Aboriginal women are provided with culturally appropriate support, information, advice and counselling. The service, which is run by Aboriginal women, help women affected by family violence with accommodation, counselling, court assistance, referrals and other required follow-ups.⁴³

There have also been suggestions concerning improvement of the police response to Aboriginal family violence. A number of recommendations were made with respect to this matter by the WA Chief Justice and reaffirmed by the Aboriginal and Torres Strait Islander Social Justice Commissioner. They included the following:⁴⁴

- Increased and better training of police officers in Aboriginal awareness;

⁴¹ ALRC '*Equality before the Law: Women's Access to the Legal System*', Report no. 67 Interim, Commonwealth of Australia, 1994 at p 57.

⁴² Dowling, A and Halliday, K 'Developing a remote area women's legal service' 4 (25) *Indigenous Law Bulletin* 25

⁴³ This service caters to the Coolbellup area and is located at the Coolbellup Community Centre, Cordelia Ave, Coolbellup.

⁴⁴ Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner '*Indigenous Deaths in Custody 1989 to 1996*', Commonwealth, Sydney at p xxiii.

- Victims of abuse be referred as quickly as possible to relevant helping agencies;
- Promotion to depend on satisfactory completion of training in these aspects of policing;
- Mechanisms to be developed by the Police Department to ensure that only suitable police officers are posted to communities with substantial Aboriginal populations.

Conclusion

There is a growing awareness of Aboriginal family violence and its specific nature. This is occurring on the part of non-Aboriginal community, and is reflected by developments such as recent Commonwealth funding commitments and national strategies to combat family violence in Indigenous communities.⁴⁵ Just as, or even more importantly, there is a growing awareness of the extent of family violence within Aboriginal communities and a greater willingness to address, and not deny, the problem. I am fortunate to be a part of this growing process of awareness, understanding and healing.

⁴⁵ Minister for Aboriginal and Torres Strait Islander Affairs 'Pilot Studies to stop Indigenous family violence', press release, 26 November 1999 at http://www.atsia.gov.au/content/m...s/MCATSIA_workingGroup261199.html

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Re-thinking Prostitution: feminism, sex and the self

Dr. Belinda J. Carpenter*

Introduction

Prostitution is a difficult issue for feminists. Are prostitutes victims of exploitation, the most honest of women or powerful agents of sexual liberation? Are clients perverts or just acting naturally? I have argued elsewhere (Carpenter 2000) that the feminist choice between support or critique of the prostitute is predicated upon the victim/agent dichotomy. Similarly, feminist avoidance of the client is founded upon assumptions underlying the sex/gender distinction. Such a dichotomous way of understanding this complex issue of gender, does not give feminists the tools to take the debate into the 21st century. In this paper, through the use of feminist philosophy and political contract theory, I want to suggest a different way of thinking about the prostitute and the client that will offer viable practical and theoretical solutions. In order to achieve this, my paper will do three things. First, because of the ubiquitous nature of these dualisms, comprehending and reconfiguring them requires we briefly traverse the organisation of modern liberal democracies. Second, these theoretical reconfigurations will be applied to the issue of prostitution. Third, the policy implications for prostitution will be briefly explored.

Positioning the Natural and Constructing the Subject

The current organisation of modern liberal democracies is supported by a conjectural history of its “twin birth” in the seventeenth century: the human subject and the body politic. This new relationship between government and its citizens assumed that natural relations were to be left behind in nature. This is for three reasons. First, because natural relations (love, emotional ties) are considered to impinge upon a subject’s ability to make rational decisions. Second, because “natural differences between men, such as age or talents, are irrelevant to their

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political equality” (Pateman 1989:121). Third, because the public sphere of modern liberal democracies is understood to rest upon the private/natural sphere.

One problem with such an ideal is the natural relation for women between their embodiment and the private sphere. Theoretically, she can never make the transition from the mythical state of nature to the body politic as a woman. “She *becomes* nature” (Gatens 1988:61). The natural relation of women to the private sphere and to the body positions them as rationally incapable of entering the public sphere in the same manner as men. The reason is that, in modern liberal democracies, rationality is perceived as antithetical to embodiment. This relationship between embodiment and irrationality becomes a double-edged sword for women. Not only do women, as the embodiment of the private sphere, represent all that is antithetical to rational government, but they also are considered to be situated within the private sphere because of their embodiment. It is argued that women have a bodily centered subjectivity. For women, their (unruly) body is the source of their subjectivity.

Following the same logic, men’s bodies do not lead to irrationality in the same manner because men are positioned as disembodied, not embodied. Men regulate their bodies and enter the public sphere as rational, disembodied beings. Moreover, the ability to transcend one’s body and the private sphere is a prerequisite for the ability to be a self-determining agent. “The agency of this subject is closely connected to its ability to separate from itself and dominate nature” (Gatens 1991:5). Moreover, because of men’s ability to transcend the natural and the embodied, the source of men’s subjectivity is to be found in their minds. The result is that men’s embodiment does not present the threat to their rationality that embodiment does for women.

The ideal of access to universal freedom, however, means that women cannot be excluded from the benefits of political participation, so the idea is promoted that women can be taught to control their unruly bodies—something that men naturally do. Feminists have tended to place their faith in this idea that gender can transcend sex, that the body can be controlled by the mind. This perpetuates the belief that the acquisition of a sense of self, appropriate to the tasks of a modern subject is a process of consciousness that affects (and is relevant to) only the mind. As such, it clearly utilises the masculine ideal of the acquisition of a sense of self, and is thus supported by the idea that the

public sphere is constructed of disembodied individuals. It accepts the belief that access to freedom and equality necessitates a rational (disembodied) subject.

Women's bodies are thus perceived as central to women's subjectivity in a way in which men's bodies are not. Women's bodies are unable to be transcended by women's minds in the same manner as men transcend their bodies (by positioning them as property) because women's bodies are the source of women's sense of self, whereas men's bodies are peripheral to their sense of self. Such transcendence/disembodiment is positioned as the prerequisite for access to the rationality that underpins political equality and universal freedom. Disembodiment (as that demanded of, and experienced by, men) becomes a logical impossibility for women (who cannot transcend themselves), but it is also a myth for men.

Men are not disembodied. They experience disembodiment, however, because what are perceived as men's natural characteristics are the same as those required of the modern subject (body as property). Thus, although the public sphere is not conceived of as about natural relations, it becomes associated with men and what are considered their natural attributes. It is also defined against women's natural attributes. The conclusion is that women must transcend their natures to gain access to the rationality that underpins all contracts, while men utilise their natures. This does not mean, however, that women are denied access to the public sphere and to political participation. Rather, it is to argue that women are accepted only as women.

Such a recognition indicates the intimate connections between the conceptualisation of the modern subject and the organisation of modern liberal democracies. The significance of men's bodies are seemingly erased because they are positioned as irrelevant in the rational sphere of contract and to his sense of himself. Yet, male bodies are the central maker of the capacity to be a citizen. Conversely, women's bodies are pre-eminent in the rational sphere of contract and to her sense of self. This impacts on all relations between men and women. Prostitution represents a particularly interesting situation, however, because it is both sex (private) and work (public).

Prostitution: Sex and Work

The prostitute and the client bring to the prostitution contract certain expectations about the mechanics of the contract and the tasks to be performed. They bring with them their relations to their bodies and to the bodies of the other—each constrained by a historical configuration in and through modern liberal democracies. They also bring with them, however, the possibility of disrupting the script of prostitution, given that it is a creation and (re)creation of possibilities that they embody.

When prostitutes have sex with a client they often state that they “switch off.” Such distancing strategies have been identified by Millet (1973), McLeod (1982), Perkins and Bennett (1985), Perkins (1991), and Hatty (1992). Frequently, in this feminist literature, there is the assertion from a prostitute that:

The things you can be thinking of when you’re having sex with a client are so ridiculous—like I’m thinking how many calories I’ve had that day or something totally the opposite. I’m definitely not thinking about sex. The nearest you come to thinking about sex is the money. You’re usually thinking, “It’s twenty pounds, oh good!” It sounds a bit mercenary but you’re usually thinking “This will meet that bill.” That’s usually the closest you’ll come to thinking about the act (McLeod 1982:39).

It is claimed by Pateman (1988:207) that such distancing strategies are integral to the prostitute’s retaining her sense of self, as “womanhood is confirmed in sexual activity, and when a prostitute contracts out use of her body she is thus selling herself in a very real sense.” It is clear, however, that the prostitute, as a woman, is motivated to switch off from the sexual use of her body for different reasons than men assert their capacity for disembodiment. Certainly, this ability of prostitutes to switch off occurs despite the assertion in political theory and philosophy that women are incapable of such a relation to their bodies. For the prostitute, however, it is the close relation between her sense of self—her embodiment and sex—that compels her to disassociate from her body during sex in the prostitution contract. Rather than offering the client her embodied self, she attempts to offer only the raw meat of her body and, thus, sexual access rather than sexual self. In this regard, Dee articulates the prostitute’s disassociation between her sense of self and the sex act:

If anything a prostitute treats herself like a chair for someone to sit on. Her mind goes blank. She just lies there. You become just an object. A lot of clients say, “Respond, it doesn’t seem normal just lying there.” After a while it becomes just

a normal thing. Most of them know—they understand it would be physically impossible (in McLeod 1982:39).

Despite this final assertion from Dee, McLeod (1982:84) maintains that “nearly all the men I interviewed complained about the emotional coldness and mercenary approach of many prostitutes they had contact with.” The intimation here is that clients desire a replication of the sexual script they have come to expect in private sexual relations. Clients expect her embodiment—which is her sense of self—as a juxtaposition for his disembodiment. However, as McLeod and many of the prostitutes she interviewed recognised, “there is a strain in maintaining this emotional self-protection” (McLeod 1982:41):

They say sometimes; “What’s on your mind?” Generally you think to yourself—you hope the contraceptive doesn’t break, you hope they pay you and you hope to hell they hurry up. It sounds awfully cold but you have to be like that otherwise it would get to you and crack you up. You try not to let it (Julie in McLeod 1982:41).

Such comments from prostitutes also assert the close affiliation between representations of the self and one’s internal relation to it, and the differences between men and women in this regard. While the prostitute justifies her disassociation of sex from self for protection, the client’s disassociation is explained in terms of an unemotional, quick, and easy servicing of the body.

The prostitute’s attempt at disembodiment during sex with clients is not part of the script for the client. How clients deal with this is not well documented, though it is possible that even a disassociated bodily transaction serves its purpose of ownership and servicing for the client—given the relationship between women, body, and potential property, and between access to prostitution and continued disembodiment. Prostitution, while attempting to present a different view of sex—emotionally detached, businesslike—cannot disrupt the need for bodies to be present. Nevertheless, prostitution does not necessarily confront men with their embodiment because, certainly in the public sphere, the relationship between their sense of self and their body as property continues. There is the recognition that their body is central to the contract, but this does not necessitate the instigation of a relationship of embodiment. In fact, given the notion of prostitution as regulator of the body, a relationship other than one of property would make being a client difficult to sustain. As such, prostitution should be understood as the exemplar of men’s positioning in the public sphere,

and not as the (socialised, yet natural) outcome of men's sexual needs. The selling of sex in the public sphere as work is the preferred explanation, by feminists and libertarians, for the prostitute's form of disembodiment. This is, however, clearly only part of the explanation. Switching off must also be related to her recognition of the relationship between her commodity (her sexual body) and her sense of self (as sexual body). This must exemplify both her positioning as a specific type of worker in the public sphere (a woman), and her status as the object of the prostitution contract, in a manner in which other contracts between men and women cannot.

Similarly, prostitution does not, in and of itself, instigate a relationship to his body other than one of property. It is recognised, however, that challenging this relationship would undermine the current justification for the provision of prostitution. Understanding prostitution to provide men with a legitimate way of regulating their bodies, allows men to perpetuate, rather than challenge, the notion of body as property because he positions both his body, and the body of the prostitute, as (his) property.

(Re)Knowing the Prostitute

The creation of modern liberal democracies brought with it certain assumptions about the positioning of women and their appropriate place within the private sphere. Prostitutes may appear to have challenged the positioning of women in the public sphere, but a closer look reveals that their positioning is based on their embodiment. Prostitutes have not been granted a status in the public sphere as one capable of entering into a public contract. They have been denied the status of civil individuals because they are women. Thus the claim that prostitution is work like any other thus both hits and misses the mark. For women, the prostitution contract, like any contract, denies them an equality with men. It is thus work like any other for women. Such an assertion undermines the neutrality of contract and makes evident its sexual specificity. Utilising the status of contract does not enable natural relations to dissipate. Prostitution uses those very characteristics to justify its existence.

Choosing to be a whore is thus both a recognition of the status of all women (thus gaining an advantage from it) and its denial (claiming to be a worker, rather than a prostitute, is one example). This way of

knowing translates into the idea of prostitution as a practice of the self. Women choose to sell sex because they are only ever embodied in the public and private spheres. Thus, while prostitutes may choose to sell sex for various reasons, their positioning in a society that constantly demonstrates to them that their biggest earning potential focuses on their embodiment, plays a major part in their choice. Prostitutes use this knowledge to their advantage—they literally and overtly sell their bodies in a practice of the self implicit in all sexual encounters to which women are a part. Moreover, as argued above, prostitutes gain meaning about themselves through this process at the same time that their embodiment allows this activity to be a viable alternative.

It must therefore be acknowledged that denying the object of the sale in public discourse also denies the subjectivity of the prostitute. Her agency is enmeshed in her ability to see herself as the object of the contract. As both object and subject of the sale, she is neither a victim nor an agent. In fact, it is the prostitute's ambivalent status as both object and subject of contract that enables her disembodiment and her self protection. It also should be recognised that the notion of disembodiment is both an unrealizable goal for the prostitute as well as a necessary and realizable capacity given her positioning as a bodily centered self. Switching off during the servicing of the contract, while unable to challenge either her sexual specificity or embodiment in prostitution, gives her access to the status of rationality—as worker. Prostitutes recognise their embodiment in contract and distance their sense of self from the sexual use of their bodies. However, their bodily centered subjectivity—their equation of sex with self—may also explain the personal cost involved in being a prostitute. Clearly, an important intervention into prostitution as a result of this way of knowing her would be to assert the sexual specificity of prostitution. Moreover, such a refocusing of attention must clarify the sexual specificity of the other body in the contract.

(Re)Knowing the Client

When men buy sex, they offer two explanations for their purchase, and both rely upon the reality of their disembodiment. Either he is a private citizen exercising his right to do in private what he chooses and/or, he is involved in a public contract that comes with its own laws and regulations. His experience and status of disembodiment is assured in both cases. In the public sphere, the provision of prostitution

perpetuates his capacity for disembodiment. In the private sphere, the natural ordering of sex does not challenge his experience of body as property.

Clearly, both the secrecy surrounding the client of the prostitution contract and the confidentiality required of the prostitute maintain a silence that is central to the persistence of bought sex. Rather than appealing to prudery and/or morality as the reason for this silence, however, I have suggested that it is owing to the recognition of his sexual specificity. Legislators, policymakers, the media, and parliamentarians are acutely aware of his sex, of his body. Prostitution is recognised as central in the regulation of the body of the modern subject. It enables him to present as disembodied and rational in contract. Prostitution, however, is capable of revealing the substance of the disembodied individual in the public sphere—not only his sexual specificity but also his access to rationality through sex. While perpetuating his disembodiment, prostitution, also displays its bodily foundation. This demonstrates, on the one hand, the arbitrary relationship between disembodiment and rationality for men, while simultaneously illustrating the ways in which the very organisation of modern liberal democracies maintains this relationship.

To issue a challenge to such a way of knowing men, and, thus, to the legitimisation of prostitution, requires confronting men with the social and arbitrary nature of their relationship to their bodies. It requires acknowledging that there is no disembodied agency that precedes and directs an embodied exterior—that there is no active mind that inscribes the natural, passive body with social lessons. Neither is the embodied exterior predetermined by some interior essence such that one's natural attributes and characteristics are the result of a realisation of the truth of one's sex. Instead, it is to argue that consciousness is an effect of the inscription of the flesh, and that this "inscription is the result of power actively marking bodies as social, inscribing them with the attributes of subjectivity" (Grosz 1990:63).

His reality of disembodiment, perpetuated by his relationship of control over his body, can thus be characterised as a cultural, rather than a natural, relation, and an explanation for behaviour that has little to do with the natural (and thus unchanging) urgings of his body. This must unsettle his relation to himself and his understanding of his relation as client as more to do with his status than his needs and/or desires. This is not to argue that the needs and desires that currently

explain his purchase are somehow false, but rather to suggest that they are not immutable. They are the result of the way in which his body is positioned rather than being a repercussion of the uncontrollability of his body. They are the product of his quest for rationality rather than the result of his loss of rationality.

Disrupting the Dualisms

Selling sex is one choice that is offered to women in and through their construction as women in the dualistic conception of reality that is the basis of modern liberal democracies. This conceptual and political reality is both meaningful and arbitrary, as the issue of prostitution demonstrates. On the one hand, prostitutes, as part of that reality, have internalised the relationship between the public sphere and work, rationality and disembodiment. On the other hand, they must recognise their lack of status in this sphere as one that is clearly related to their embodiment as women. Prostitutes (perhaps like all women) recognise that their position as embodied is both relevant and irrelevant to their status and their acquisition of selfhood in the public and private spheres. This dual recognition is also evident in her response to this ambiguous status. To be embodied and disembodied simultaneously is both her protection from this ambiguity and her assertion of status as a worker in the public sphere.

In contrast, buying sex, in and of itself, is only ever a perpetuation of the fraternity of the social contract. For men, buying sex not only asserts their status and rights, but a configuration of the self in need of bodily servicing. Buying sex not only confirms their status but (re)produces it at the same time that it dissolves the relationship between buying sex, and embodiment and irrationality. Men must be challenged to assert a new configuration of the self that does not rely upon this availability of women.

The practical implications of such a disturbance to each of the dualisms would differ greatly from current policy recommendations. With regard to the prostitute, better paying jobs for women in a broader range of occupations would be a policy recommendation, but equally essential would be a community awareness education program to give information about prostitution as the servicing of the subject. Interviews with prostitutes about the reality of their jobs and their lives, their status in the public sphere, and the ways in which they deal with the specifics of their choice would require a wide hearing. Rather

than focus on their difference from other women in the community, their normalcy as women would be stressed. A focus on her experience of agency through prostitution could be compared with the ways in which women access agency in what are perceived as victimized occupations, lives, and/or backgrounds. Moreover, it should be acknowledged that such an experience of agency is as socially significant as her conceptualisation as powerless. This is very different from the recommendations of recent policy documents that have tended to focus on her status as (psychological or economic) victim and, to that end, advocated a larger, more encompassing and accessible welfare system. Knowing her as victim needs to be balanced with her experience as agent, which can be achieved in various ways: through her recognition of a double standard in legislation, through the act of sex in prostitution; through internalization of the label of victim; or, through an experience of danger or violence from clients. It would also be important to problematize the argument, popular within the prostitution position, that either the nature of the exchange or the sexual specificity of the job are irrelevant to understanding the reality of prostitution. It has been demonstrated here that the reality of prostitution is premised upon these facts. The sexual specificity of the selling and the buying of sex is owing to the organisation of prostitution through the public/private split, and the significance of this dualism in our perception of the natural attributes of men and women.

Policy recommendations for the client that would be initiated from this theoretical reconfiguration would, like previous policy recommendations, focus on community education. While men would need to be specifically targeted to create an awareness of the implications of their paid sexual leisure for both themselves and women, the community would have to be informed that buying sex is not the result of a modifiable sex urge but a rational choice that is planned often months in advance. The community would have to be convinced that buying sex perpetuates men's lack of responsibility over natural urges rather than being a means of regulating these urges without harm.

Understanding this relationship between buying sex and its current justification is the significant difference that a reconfiguration of the mind/body, public/private, rational/irrational dichotomies can offer. As has been argued, the relationship between men and women is played out in dramatic form within prostitution, but this relationship is part of

the organisation of modern liberal democracies and not the cause of prostitution. Because prostitution is based on, and constituted through, the dualisms of public and private, social and sexual, mind and body, gender and sex, it can only reinforce his current configuration of self. It is to this relationship between men's minds and bodies, and not to men's relations with women, that this reconfiguration takes feminism.

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WATL and Blake Dawson Waldron Paper Competition 2000

Abstracts

Editors' Introduction

Every year the Women and the Law Society holds a student paper competition at the University of Queensland, with the winning paper published in Pandora's Box. This year the quality of the finalists' papers was of such an outstanding level, that the editors and the WATL executive felt them all to be deserving of inclusion. To this end, brief abstracts of each of these papers follow.

* * * * *

Expose on the Inability of International Law to Protect Women's Human Rights **Cubby Fox**

International law has failed women. It has failed to obtain equal rights for women and now fails to protect them from human rights abuses. Fundamental human rights "common to all man" are not common to all women, especially in developing countries. The chasm between protection of human rights and the promotion and protection of women's human rights appears to be growing.

The focus of my essay was broad, from the establishment and maintenance of fundamental rights for women worldwide to prosecution of breaches, and evolution of opportunity and choice as a matter of course for every woman and man. Foremost, international law should incite change as to women's status and legitimate expectations, and secondly, provide the final bastion in the struggle for enforcement of women's rights.

Two case studies were presented: honour killings in Pakistan and rape as a weapon of war. Such cases are an affront to the Universal Declaration of Human Rights and legal, ethical and moral standards worldwide. International enforcement of women's human rights can

occur in two ways. Firstly states, and the men and women within them can be educated on the universality of human rights and their applicability to all women. Secondly, international law must have the power and ability to prosecute human rights violators.

Human rights – a woman's right?

Engaging the Law

Johanna Gibson

The principle focus of my paper is to describe the limits of Australian legal systems and to preserve the integrity of indigenous laws, rather than their conscription, beyond such systems. Specifically, the paper addresses the impact of mainstream legal principles upon indigenous women and the particular issues of culture and gender experienced. The necessarily procedural nature of engaging legal institutions and communities is critically discussed, indicating the need for specialist services for indigenous women that are authorised and determined by the community itself. This paper is aware of the danger of a white advocacy or paraphrasing of such needs, and instead emphasises self-determination of individuals' needs through indigenous collectives, rather than the pre-determination of those issues by mainstream services.

The French 'Affair of the Veil': in law, in politics and in society

Nicky Jones

This paper is an analysis of *l'affaire du foulard* or the 'affair of the veil' in France, the general name for a series of confrontations emerging in 1989 and again in 1993-95 between Muslim schoolgirls, who were insisting on their right to wear the Islamic headscarf, also known as the *hijab* or *foulard*, while at school, and authorities from the secular education system and schools, who were prohibiting them from attending classes whilst wearing it.

Prolonged discussion in the media brought the *affaire* to national and international attention in 1989. The unusually heated and divisive nature of the ensuing public debate was in part due to the importance and the profoundly personal nature of many of the principles and policies being argued: the roles of religion and secular education, Republicanism and French identity, the status of women and the veil in Islamic doctrine and practice, immigration and multiculturalism, and the rights of Muslim citizens, particularly Muslim girls, in light of France's international obligations. Interestingly enough, the divisions did not follow conventional party or religious lines, nor were they a straightforward opposition of Republican secularists against exponents of religion. According to French daily newspaper *Le Monde*, the debate varied depending on the person or the principle being discussed, or on whether one was considering the present or the future.

This paper will discuss these issues in the context of the *affaire du foulard* and will consider the ways in which the *affaire* is a particular problem for Muslim women, although it is also a broader problem for religious minority groups and, for this reason, an important issue of concern to the international community. Several questions will be addressed: What were the circumstances of the *affaire*? What other factors were involved? What were the relevant policies and legislation? What rights were involved and how should these rights be determined in a liberal democracy such as France? Finally, what are the policy implications of the *affaire du foulard* both for France and for the international community?

Bioethics and International Law: Current Deficiencies and Future Hope **Helen McEniery**

The legal framework to guard against possible human rights abuses associated with advances in biomedical science is struggling to keep up. Most nations either do not have legislation dealing with the social implications of developments in medical technology, or have legislation that is not comprehensive. This demands rapid national and international discourse and action. National laws are required to

prevent the abuse of human rights, and international regulation is required to ensure uniformity.

General axioms of international law are not sufficient to deal with specific problems created by advances in biological science. International attempts to deal with the issue, namely the European Bioethics Convention and the UNESCO Declaration, are riddled with significant shortcomings. Nevertheless, these instruments should be viewed as important first steps to promote international debate in the quest for a binding international convention. They can serve as useful tools to give world leaders guidance on what national responses would be appropriate, particularly in countries that are yet to legislate on the issue. UNESCO, as the premier international organisation in the field of science, culture, communication and education has the legal clout to negotiate codification of an international instrument advancing technology, public health and human rights.

Aboriginal Labour Market Status: Why and Where Next?

Suzanne Marlow

It remains a quietly and conveniently forgotten fact that government policy in the late 1980's and much of the 1990's set out to achieve indigenous employment levels equal to those for other Australians by the year 2000.

Jenny Prior, ATSIC Commissioner for North Queensland, June 2000.

White Australia's treatment of this land's original inhabitants has left many of them dispossessed, disillusioned and in dire economic circumstances. As a result Aboriginal statistics consistently record drastically worse levels on social indicators such as health, life expectancy, educational attainment, incarceration rates, and unemployment than the non-indigenous population. It is widely recognised that the many social and economic problems faced by indigenous Australians are interdependent and labour market status is at the core of these spiralling outcomes.

This paper examines the extent of Aboriginal labour market disadvantage, the reasons behind low indigenous employment status, and analyses the efficacy of existing remedial policies and programs.

From this analysis it is possible to suggest reform of labour market programs and policies and also of the current data collection methods, on which policy decisions rely.

The indigenous people of Australia appear in all labour market data to be at a severe disadvantage compared with the rest of the population. The historical, locational and cultural reasons behind these compounded circumstances are all inter-related and a holistic approach to remedying this disadvantage must be taken. Poor labour market status is at the core of socio-economic disadvantage. Thus refining existing indigenous labour market policies, and improving education and training must continue to advance if Aborigines are ever to compete on an even footing within the broader Australian labour market. At pace however, it seems as if we are aiming for equality of opportunity and outcome by the year 3000.



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