

# Pandora's Box 2004



A Publication of the Women and the Law Society  
UNIVERSITY OF QUEENSLAND

# Pandora's Box

## 2004



Editors

Laura Cameron   Ruth Catts   Revel Pointon

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**Published by:   The Women and the Law Society (WATL)  
TC Beirne School of Law  
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St Lucia  
Qld 4072  
Australia  
Ph. (+61 7) 3365 7997**

**Printed by:       Willprint Pty Ltd  
28 Burke Sreet  
Wooloongabba  
Qld 4102  
Australia  
Ph. (+61 7) 3391 8900**

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## Editors' Note



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It is with pleasure that we present *Pandora's Box 2004*.

As you discover the contents, we hope that you will enjoy the challenging and entertaining discussion regarding matters relevant to women, justice and the law in 2004 and beyond.

We sincerely thank the contributors for their willingness to offer their important and different perspectives.

The articles investigate topics as varied as comparative terrorism laws, the boundaries of religious freedom, stolen wages, women in a developing East Timor and the Australian sex industry. There are also articles from legal practitioners that provide inspiration and reinforce the importance of careful examination of the social implications of the law and the way it is practised.

We hope this edition provides an indication of but some of the diverse and difficult issues that must be resolved within the legal system.

Editors

*Pandora's Box 2004*

Laura Cameron

Ruth Catts

Revel Pointon

## Foreword



**Oanh Thi Tran** was the President of WATL in 2003 and is currently Associate to the Honourable Justice Roslyn G Atkinson. Her ambition is to become a warm and wise woman of the law.

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Pandora – the first woman in Greek mythology – is said to have released all evils onto the world by disobediently opening a box. But I understand the myth of Pandora’s Box differently.

Imagine you are Pandora. (I always did as a child.)

Someone – a man, complacently arrogant in his power over you – gives you a simple box (you may, should you so desire, imagine that the box is ornate; I do not seek to constrain your imaginings), commanding you: ‘Do not open this box.’

‘Why not?’ you ask, reasonably – but he has already left.

It’s just you and the box.

You examine the box. It has a latch but no lock.

You shake the box.

You put the box down, determined to be obedient.

But then, you wonder why he didn’t tell you anything at all about the box – not what to do with it or why he gave it to you – he simply expects you to be obedient. ‘Incomprehensible,’ you think. So, you open the box.

The myth of Pandora is not about unleashing evils – it is about unthinking obedience. The so called evils Pandora unleashes are not plagues of locusts, but the discovery that she is an autonomous, questioning individual, deserving of explanations and reasons.

*Pandora’s Box* is an apt title for the journal of the Women and the Law Society. This year, no less than any other, Pandoras of many persuasions (and genders!) refuse to be blindly obedient. The editors have chosen excellent articles in which the authors ask important questions about anti terrorism legislation in Australia and secularism legislation in France; uncover injustices perpetrated by government and society in relation to stolen wages of Indigenous Australians and the treatment of women in East Timor; broaden our understanding of the world by providing a philosophical perspective of a woman with Kombu merri and Waka Waka connections; remind us of our duty to Justice; and celebrate a great Woman of the Law and questioner of the status quo – the honourable Justice Mary Gaudron.

The powerful and the dominant can silence and restrict the vulnerable, the marginalised and the unpopular. This is often done by means of law. But the law can also be an agent for social change. Without the rule of law, there would be no protection of the human rights of all persons – women and men, Indigenous and non Indigenous, of whatever religious, ethnic or cultural background, or sexual orientation, or political persuasion. In a diverse, democratic society, all perspectives must be not only tolerated, but welcomed.

As lawyers, we must be ever vigilant; we must be willing to listen to the voices of the vulnerable, the marginalised and the unpopular; speak for them where we must; but, more importantly, assist the vulnerable, the marginalised and the unpopular to speak for themselves so that they may be heard on their own terms.

Congratulations, WATL, for providing a forum in which to discuss the challenges ahead.

I am heartened to know that there are many Pandoras out there – willing to be curious individuals, demanding reasons and asserting human rights.





## The Practice of Law: Justice, or Just a Job?



**Julian Burnside QC** is a prominent barrister, human rights advocate and author. Julian joined the Bar in 1976 and took silk in 1989. He has acted in many high profile cases, including: the Australian Broadcasting Authority's 'cash-for comment' inquiry, the 1998 Waterfront Dispute, and the Tampa case. Julian was the architect of Lonely Planet's *From Nothing to Zero* letters from refugees in Australia's detention centres, and wrote the preface and explanatory essays. He is also the author of a children's book, *Matilda and the Dragon* and his new book, *Wordwatching*, is soon to be launched. Julian Burnside presented this paper, his Sir Ninian Stephen Lecture, at Newcastle University Law School on the 18th of March 2004.

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### Why Study Law?

Most actions have many causes, and the causes of human conduct are generally complex. Putting to one side my own reasons for enrolling in law school, my impression of my contemporaries is that they were motivated largely by an instinct for justice, and to a small but measurable extent by the lure of a large income. Those in whom the desire for money was greater were generally those who already enjoyed its privileges; those who most sought justice had often been stung by its absence.

Even allowing for this range of variation, many of my contemporaries involved themselves in the social justice issues of the time: equal rights for women; the war in Vietnam; inertia selling; bogus auctions and (great victories behind them) improved carparking for students.

Watching my contemporaries and others over the following decades a pattern emerged. The focus shifted gradually: as a substantial income became more likely, it became more desirable. Soon the impulse for justice was re cast as starry eyed idealism; the naïve privilege of youth. Serving the client's needs, no matter how venal, was in the ascendant; attending at the community legal service fell away. One by one we succumbed to takeovers or pleading summonses; disputes about wills or tax, broken limbs and broken promises. Since betrayal and cynicism were so much a part of daily work, betrayal of earlier ideals seemed almost natural.

Nevertheless, I share with Tom Stoppard the view that we are all born with an instinct for justice. In *Professional Foul*<sup>1</sup>, one of his characters

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<sup>1</sup> *Professional Foul* by Tom Stoppard was made into a TV film. Directed by Michael Lindsay-Hogg, it was first broadcast 24 September 1977.



tells of the child who in the playground cries 'It's not fair' and thus gives voice to 'an impulse which precedes utterance'. Our perception of justice may be blunted by exposure to its processes. At the start of a career as a law student, we see law and justice as synonymous; later we fall into cynicism or despair as clients complain that Law and Justice seem unrelated. We might remember the observation of Bismarck, in a different context, saying 'He who likes sausages or law should not see them in the making'. Little wonder that our early ideals are swamped by realities which would never have attracted us to Legal Process 101.

### **Early days**

The contest between idealism and venality need not end in a snarling stand off. An honourable compromise is always possible. For me, the secret lies in an observation made by Sir John Young, who was Chief Justice of Victoria when I was admitted to practice. In his welcome speech to newly admitted practitioners, he said something I have remembered ever since: partly because of its force, and partly because I heard it again every time I appeared to move someone else's admission to practice. He urged us to remember that '...in a solicitor's office, and in a barrister's chambers, every matter is important to someone'. I was encouraged when I heard those words, because my entry into the practice of law had been accidental, and the signs were not auspicious. I did not expect to be favoured with cases of importance.

Sir Ninian Stephen was part of the chain of accidents which led me to go to the Bar. In my final moot, Sir Alistair Adam presided, with Mr Justice Stephen (then of the Supreme Court of Victoria) and the moot master, Mr Bill Charles. Stephen J was leaning back with a characteristically contemplative look on his face, and was rolling his chair back and forth on its easy castors. Suddenly he disappeared, only to reappear a moment later at the bottom of the steps which gave access from the bench to the well of the court. To say that this was disconcerting for a budding advocate does not fully capture the moment. Once he had regained his proper position and his composure, I made a distinctly undergraduate observation about what had fallen from the Bench, and resumed my argument. I was heartened by the incident, because it showed something of the human fallibility of judges.

Later I had some luck in intervarsity mooting, and it was suggested that I should go to the Bar. For want of any better ideas, I agreed.

At the same time, I was given a biography of the great American trial lawyer, Clarence Darrow. He seemed like a fine role model. Darrow believed passionately in his client's cause and win, lose or draw his clients always knew Darrow had done his best. Not that this was wholly altruistic. A grateful client once gushed: 'Mr Darrow, how can I ever thank you?' His reply was immediate: 'Madam, since the Phoenecians invented money, there has been only one answer to that

question.’ If the administration of Justice is to command respect, it is essential that every client knows that their lawyer did as well as possible; and if the client thinks they have had a fair go, then the system has worked well.

Early years at the Bar taught me several useful things. First, you take the work offered, even if it is a long way from Clarence Darrow territory. This helps avoid starvation. Second, success generally does not come overnight. Not for me, in any event. I had no connections in the law. Appearances were infrequent and mostly unexciting. For the first few years, I imagined myself the victim of a defective phone, or perhaps of some dark conspiracy to keep briefs away from me. Most of my friends were doing better than I was. But spare time offers great opportunities. In the late 1970s I taught myself how computers work. Friends tolerated this as a harmless eccentricity. It turned out to be more useful than I could have imagined: by 1981, when the PC was introduced, I was quite proficient at using computers for litigation support. It came in handy later on.

More importantly, I started reading more biographies of lawyers: Marshall Hall, Rufus Isaacs, Patrick Hastings and many others. I read about their great cases and learned, vicariously, how cases are fought. Reading first hand accounts of great court battles helps inspire a sense that the legal system, for all its faults and detractors, serves a great and noble purpose. I also learned that many advocates had started at the Bar in unpromising ways: I cannot over emphasise how comforting that was as I plodded my way dimly into an uncertain future.

After a time, I found myself doing mostly taxation and company work. But when the takeovers boom of the early 1980s happened, I found myself quite busy (as did most people) and had the chance to watch some of the great advocates in action: Sher, Finkelstein, Merkel, Goldberg, Richter, Hughes, McPhee and many others. It was a privilege seeing real advocates at work. From time to time I had the good fortune to find myself briefed in interesting cases. Little by little I learned about the skills of the advocate. I still was not in Clarence Darrow territory, but at least I could see the path which led there.

More recently, I have been lucky enough to be briefed in some quite significant cases. The attempt by Archbishop Pell to suppress an exhibition of photographs by Andres Serrano in 1996; the dispute between the Maritime Union and Patrick Stevedores in 1998; the Broadcasting Authority's enquiry into ‘Cash for Comment’; the case of the Tampa asylum seekers: these were causes which had significance beyond the interests of the immediate combatants. These were not only interesting cases to be engaged in; they serve as a useful reminder: that the Law is an essential part of a properly functioning society; that the courts stand as an impartial guardian of the rights of the weak against the wishes of the powerful.

Almost always our legal system works well in this, its most essential function.

### **Justice and the rule of law**

It would be unwise however to be complacent about the rule of law in Australia. It is a remarkable thing that politicians, especially the present Prime Minister and the present Attorney General, seem to have no taste for the rule of law as an ideal. They are given to attacking the judiciary; and neither the present Attorney General nor his predecessor have shown any inclination to protect the judges who traditionally remain silent in the face of attack.

Consider the following matters:

- The Howard government's attacks on the High Court for its *Mabo* and *Wik* decisions;
- Senator Heffernan's outrageous attack on Justice Michael Kirby, an attack which was fuelled by the Prime Minister even as he pretended to have nothing to do with the matter;
- Mr Ruddock's regular attacks on the Federal Court in relation to refugee appeals. In particular, his suggestion that some activist judges were trying to 'deal themselves back into the judicial review game'; and Daryl Williams' conspicuous silence where he should have defended the courts;
- The government's repeated attempts to narrow the ability of the courts to review decisions of the Refugee Review Tribunal: a deeply flawed body which makes life and death decisions;
- The government's complete failure to help two of its citizens, David Hicks and Mamdouh Habib, held by our most powerful ally for more than two years, without charge or trial, in Guantanamo Bay. Our government seems unconcerned by such a flagrant failure of the rule of law;
- Perhaps most ominously, the Prime Minister's response to the passage of a Bill of Rights by the ACT parliament: he said it was a disturbing development because a Bill of Rights tends to interfere with the way government does business: that, after all, is the point of a Bill of Rights.

Any discussion of a Bill of Rights will quickly lead to a discussion of judicial activism: the favourite boo word of today's Conservatives; useful because of its unfixed content and pejorative connotations. In a constitutional democracy, the Constitution, including a Bill of Rights if one has been adopted, will limit the powers of Parliament. Someone has to determine whether Parliament has exceeded those limits. The Constitution gives that function to the courts.

Governments do not like their power to be limited. When a judge says that Parliament has gone beyond the limits set by the Constitution, frustrated governments are now inclined to attack the judges, by branding them as 'judicial activists'. This is particularly so where the limits are not obvious, or their ascertainment involves consideration of contemporary social conditions. Here, the competing considerations are clear: do the words of a Constitution have a single, fixed meaning for all time, or are they to be reinterpreted as Society evolves and unforeseen social conditions emerge?

The black letter view led to the discredited decision of the US Supreme Court in the Dred Scott case: seven of the nine Justices decided that the words '...all men are created equal...' in the Declaration of Independence did not refer to African Americans. The alternative position was captured perfectly by Oliver Wendell Holmes. He said:

*...A word is not a crystal, transparent and unchanging – it is the skin of a living thought, and changes its meaning according to the time at which, and the circumstances in which, it is used.*

This is not the occasion to enter upon that debate, but it is worth understanding that recent attacks on the courts have entirely overlooked the complexities which judges have to resolve and the subtlety of the process of resolution. It is worth noting the cowardice involved in attacking a group who traditionally do not seek to defend themselves publicly, more particularly when their traditional defender leads the attack. These attacks put the rule of law at risk.

### **Asylum Seekers**

It is specifically in the area of refugee appeals that the ideals of the rule of law come most obviously under attack. For that reason alone, anyone who values the rule of law should be concerned about developments in that area. But in that area, the problem has a different form: some laws are inherently unjust. The law which requires that asylum seekers who arrive in Australia without a visa should be detained indefinitely is an example of such a law. It is a law which is almost unthinkable if it applied to members of our own society: all Jews, for example, or all blond children.

Sophocles dealt with this difficulty in *Antigone*, nearly 2 ½ thousand years ago.

Polynices has been slain. King Creon has ordered that his body remain on the hillside where the dogs and vultures will devour it. Any person who removes the body to bury it will be put to death by stoning. Antigone is Polynices' sister. She proposes to bury his body, and captures simply the central moral point: 'He is still my brother'. Her sister Ismene, while sympathetic, fears to do what she knows is right. The argument is found in the following lines:

*ANTIGONE: I will not urge you, no nor, if you yet should have the mind, would you be welcome as a worker with me. No: be what you will; but I will bury him: well for me to die in doing that.*

*I shall rest, a one loved with him I loved, sinless in my crime; for I owe a longer allegiance to the dead than to the living: in that world I dwell for ever.*

*But if you will, be guilty of dishonouring laws which the gods have in honour established.*

*ISMENE: I do them no dishonour; but to defy the State, I have no strength for that.*

*ANTIGONE: Such be your plea, I will go to heap the earth above the brother whom I love.*

We sympathise with Antigone's instinct, and with Ismene's weakness. Her crime is discovered, and Antigone is taken before King Creon. She explains her actions in a way familiar to those who know the Natural Law theory of jurisprudence. Creon charges that she has broken the law he made, and she responds:

*Yes; for it was not Zeus who made that edict; not such are the laws set among men by the justice who dwells with the gods below; nor deemed I that your decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of to day or yesterday, but from all time, and no man knows when they were first put forth.*

*Not through dread of any human pride could I answer to the gods for breaking these. Die I must, I knew that well (how should I not?) even without your edicts. But if I am to die before my time, I count that a gain: for when any one lives, as I do, compassed about with evils, can there be anything but gain in death?*

*So for me to meet this doom is trifling grief; but if I had suffered my mother's son to lie in death a corpse unburied, that would have grieved me; for this, I am not grieved.*

*And if my present deeds are foolish in your sight, perhaps a foolish judge arraigns my folly.*

### **Human Rights**

Human rights law is an attempt to give direct legal force to the basic principles Antigone would have recognised immediately. All too often however the principles remain unenforceable: no more than position statements to ease the conscience of those whose human rights are never challenged.

Australia's attitude to human rights has been oddly equivocal. In the aftermath of the Second World War, and despite its remoteness and its small population, Australia took a leading role in the formation of the



great human rights conventions of the late 1940s. The process, inspired by events of the preceding decade which had “shocked the conscience of mankind” gave expression to a widely held view that the genocide of one group affected all members of the human family, that some rights were inherent in the condition of humanity, and that there were many in the world so vulnerable and powerless that the rest had to care for them without regard to national boundaries. It was an idea of great reach. Australia not only supported the adoption of the Declaration, it advocated that the rights enshrined in the Declaration should be enforceable, not merely a statement of hope or principle.

The Universal Declaration of Human Rights and the Geneva and Genocide Conventions were monuments built over the wreckage of war and infamy. They were the product of a vision of a world made new: a grand vision of life and hope and the possibility of better things. Australia played an admirable role in those days of hope.

At the same time, the Australian government was taking aboriginal children from their parents in pursuit of a well intentioned, but deeply flawed, social theory. More recently, our treatment of asylum seekers has been impossible to reconcile with any genuine commitment to human rights.

### **Law and a Just Society**

Plainly, strict adherence to the rule of law is necessary but not sufficient if we are to have a Just Society. John Rawls propounded an interesting, and straight-forward, test for a Just Society:

- A. Each person has an equal right to the most extensive scheme of equal basic liberties compatible with similar schemes for all;
- B. Social or economic inequalities must satisfy two conditions:
  - a. They must benefit the least advantaged members of the society; and
  - b. They must be attached to offices and positions open to all under conditions of fair and equal opportunity.

The Israeli philosopher Avishai Margalit built on this by posing the question: Will a Society which satisfies Rawls' test of a Just Society also be a decent society? Put differently, is a Just Society consistent with the presence of humiliating institutions? The question is important, especially where we are concerned with the rights of outsiders: people who are not members of the society in question. Rawls is concerned with the rules which members of a given society may adopt for the distribution of the goods of that society. Margalit's question tests a society by its institutions: a society which tolerates humiliating institutions is not a decent society, regardless whether those humiliating institutions have local, or more remote, consequences. That a society tolerates a humiliating institution tells about the decency

of that society even though that institution may be used to humiliate only outsiders.

What does Margalit's question mean? Imagine a village in which food aid is to be distributed. Each villager needs one kilogram of rice. A just distribution may be achieved by visiting each house in the village and handing out the appropriate number of rice parcels. An alternative means is to drive through the village and tip the rice parcels off the back of the truck, with police on hand to ensure that no one tries to take more than one package. Both methods result in an equal distribution, and thus satisfy Rawls' test. But the second method is humiliating. As Margalit says:

*The distribution may be both efficient and just, yet still humiliating. ... The claim that there can be bad manners in a Just Society may seem petty confusing the major issue of ethics with the minor one of etiquette. But it is not petty. It reflects an old fear that justice may lack compassion and might even be an expression of vindictiveness. There is a suspicion that the Just Society might become mired in rigid calculations of what is just, which may replace gentleness and humane consideration in simple human relations. The requirement that a Just Society should also be a decent one means that it is not enough for goods to be distributed justly and efficiently the style of their distribution must also be taken into account.*

On the face of it, a Society may contain humiliating institutions and yet be a Just Society. But Margalit propounds a twist. Of all the goods which must be equally distributed, the most fundamental is self respect. Self respect precedes other basic goods freedom of thought, speech and movement; food and shelter; education and employment because self-respect is necessary if a person's existence is to have any meaning at all. Without the possibility of self respect, a person's life has no point; pursuit of life's goals is a meaningless exercise.

Although Margalit is concerned about matters at a deeper level, any lawyer who has practised for a time will recognise the shape of his complaint; the legal system worked according to its rules, but the result was not just. The intricate machinery of the legal system, working perfectly, would satisfy King Creon but not Antigone.

If we are to pursue Justice, we must be prepared to question the laws we help administer. Let us look at some contemporary examples of the problem.

### **Indefinite detention**

Article 14 of the Universal Declaration of Human Rights provides that every person has a right to seek asylum in any territory to which they can gain access. Despite that universally accepted norm, when a person arrives in Australia without prior permission and seeks asylum,



we lock them up. This is so notwithstanding that they have not committed any offence by arriving in Australia without prior permission.

The Migration Act provides for the detention of such people until they are either given a visa or removed from Australia. In practice, this means that human beings - men, women and children - innocent of any crime are locked up for months, and in many cases years. They are held in conditions which are degrading and destructive.

The United Nations Human Rights Commission has described conditions in Australia's detention centres as 'offensive to human dignity'. The United Nations Working Group on Arbitrary Detention has described Australia's detention centres as 'worse than prisons' and observed 'alarming levels of self harm'. Furthermore, they have found that the detention of asylum seekers in Australia contravenes Article 9 of the International Covenant on Civil and Political Rights, which forbids arbitrary detention. Every responsible human rights organisation in the world has condemned Australia's treatment of asylum seekers. Only the Australian government and the Australian public are untroubled by our treatment of innocent, traumatised people who seek our help.

### **Baxter**

The Baxter detention centre, 4 hours north west of Adelaide, opened in August 2002. I first visited it in early March 2004. Stand outside, facing east: the view is a perfect Fred Williams landscape of dull grey green scrub on red sand, stretching away undimmed for miles to a rim of hills. Turn and face west: a 6 metre high electric fence which stretches away into the distance; 20 metres of no-man's land, then another tall and glittering line of wire and mesh; inside the second fence, a series of compounds made of uncompromising corrugated iron. The compounds are so designed that the inmates have no view except of the sky; more importantly, no one outside can see those locked inside.

Getting into Baxter is a long process: one week's notice; fill out a form, show appropriate ID. You are then escorted to an electronically controlled gate, through the gate and into a metal cage. After a time - five, ten, twenty minutes - the gate at the other end of the cage opens and you can enter a small demountable cabin; there you are searched and scanned; another security air lock and you are escorted across to the visitors' compound where you find the real tragedy, our hidden shame. Asylum seekers walk around as if still alive; they talk as if they still have a hold on rational thinking. They press hospitality on you: an irrepressible cultural instinct, like the unwilling twitching of a dying animal. But they are not wholly there: they are hollowed out, dried, lifeless things, washed up and stranded beyond the high water mark. Their minds are gone: shredded, destroyed by hopelessness and despair. Children are incontinent from stress; many inmates are

afflicted with blindness or lameness which has no organic origin: the bewildered mind's final, mute protest.

Mr Ruddock announced Baxter as Australia's 'family friendly' detention centre. Presumably that deceit was intended to distract our conscience. It is difficult to get there, so most Australians rely on the government's blandishments for their understanding of how we treat asylum seekers.

Mr Howard has made it clear that the mandatory detention system and the iniquitous Pacific Solution are designed to 'send a message'. What does this mean? It means that we treat innocent people harshly to deter others. The punishment of innocent people to shape the behaviour of others is impossible to justify. It is the philosophy of hostage-takers. Any Society which is prepared to brutalise the innocent in order to achieve other objectives has stepped into a moral shadow land.

### **Effects of detention**

The effect of indefinite detention is to diminish, if not to deny altogether, the self respect of asylum seekers. They are fed adequately, they are housed safely. But they are addressed by numbers rather than names; they are told in every way imaginable that they are unwelcome in this country; their life stories are contested in every detail, with a view to defeating their claims for asylum. They are treated in every way as if they are not quite human.

These circumstances produce behaviour which is utterly uncharacteristic but, according to psychiatrists, utterly predictable. They harm themselves, kill themselves and damage the environment in which they are held. The effect on children is particularly marked. They internalise the reason for their incarceration, reasoning: 'Bad people are locked up; I am locked up; therefore I am bad'. They fail to flourish, they regress into infantile behaviour. Pre pubescent suicide attempts, which are almost unheard of elsewhere, are common in Australia's detention centres. Adults see their lives as having no hope and no meaning. They become listless and depressed, or they become desperate and aggressive.

Beyond all these symptoms is the dominant theme reported by a huge majority of detainees – a feeling of abject hopelessness. They do not understand why they are locked up like criminals, even though they have committed no offence. At some deep level, they rationalise it as reflecting a deep unworthiness in themselves. Unfortunately, the government of John Howard has abandoned decency and justice in its treatment of asylum seekers to a degree which is almost incredible. A few examples may illustrate the problem.

### **Lock them up for ever**

Mr al Masri was a Palestinian from the Gaza Strip. He arrived in Australia in June 2001 and was placed in Woomera Detention Centre.

He applied for a protection visa, claiming to be a refugee. He was refused a protection visa and asked to be returned to the Gaza Strip. Although Mr al Masri was able to produce a passport, officers of the Department of Immigration were unable to return him. Five months passed and Mr al Masri remained locked up in Woomera. He applied to the court for an order releasing him from detention. The government resisted the application.

Here, I need to say something about the constitutional basis for mandatory detention under the Migration Act. The Australian Constitution entrenches the separation of powers. The three powers of governments – legislative, executive and judicial – are vested in the three different arms of government. The powers of one arm of government may not be exercised by another arm of government. Accordingly, the Parliament, established under Chapter I cannot exercise the powers of the executive government which is established under Chapter II. Courts established under Chapter III of the Constitution may not pass laws. Punishment is central to the judicial power. Only a Chapter III court can inflict punishment on a person. Locking a person up is generally regarded as punishment. However, the High Court has acknowledged that there are circumstances where detention is necessary for the discharge of an executive function. In those limited circumstances detention imposed directly and without the intervention of a Chapter III court will be constitutionally valid. This holds good only as long as the detention goes no further than can reasonably be seen as necessary to the executive purpose which it supports.

The Migration Act requires that all unlawful non citizens should be detained and should be held in detention until granted a visa or removed from the country. Mr al Masri's case presented a conundrum: he had been refused a visa but he could not be removed. The question then was: should he remain in detention? The trial judge held that Mr al Masri's continued detention was no longer valid. On appeal, the Full Federal Court agreed. A related case has since been heard in the High Court, on the same question. At every level up to and including the High Court, the government has argued that, in these circumstances, it can hold an innocent person in detention for the rest of his or her life. I do not know how the High Court will decide the matter.<sup>2</sup> What is profoundly important to recognise is that the government of a rich western democracy was prepared to advance an argument for holding an innocent person in prison for the rest of that person's life.

### **Harsh conditions**

There are other aspects of the mandatory detention system which bring into sharp relief the attitude of the current government to human rights

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<sup>2</sup> This case has since been decided. A copy of the judgment can be accessed at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2004/38.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2004/38.html)

issues. Woomera opened for business in December 1999. It was closed in September 2002. At its peak, it accommodated nearly three times as many people as it was designed for. Conditions in Woomera – physically and psychologically – were shocking. Until public pressure forced some measure of improvement, a woman having her period would have to queue for sanitary pads. Children held in Woomera typically developed enuresis: a colleague of mine described the haunting image of a 12 year old Afghan girl wandering around aimlessly in the dust at Woomera, wearing a nappy. On enquiry, it emerged that the child was incontinent from the stress of detention. Desperate acts of self harm were common.

On one occasion, detainees escaped from Woomera, only to be recaptured shortly afterwards. They were charged with escaping from immigration detention. The defence to those charges went like this: detention under the Migration Act is only valid so long as it does not constitute punishment. It will constitute punishment if it goes beyond what is reasonably necessary for the administrative purpose of processing a visa application and (if necessary) removal from the country. Conditions in Woomera go beyond anything that could be reasonably necessary for the purpose of visa processing and removal from the country. Accordingly, detention in such harsh conditions is not detention of the sort authorised by the Act, with the result that what they escaped from was not ‘immigration detention’ but some other, unauthorised, condition.

In order to produce evidence of the conditions at Woomera, subpoenas were issued to the Department of Immigration and ACM – the private prison operators who then ran all of Australia’s immigration detention centres<sup>3</sup>. The Department and ACM sought to have the subpoenas set aside. First, they said that the subpoenas were oppressive in their operation. For example, they said that it was oppressive to have to produce all of the ‘incident reports’ which the subpoenas sought. The contract between the Department and ACM requires ACM to keep ‘incident reports’ in respect of ‘incidents’ in the camp.

The government argued that it was oppressive to require them to produce all the incident reports because, they said, in the 2½ years since Woomera had opened, there were more than 6,000 incident reports filed: roughly 7 incidents every day. More importantly, the Department and ACM argued that the proposed defence could not succeed as a matter of law. This involved the proposition that no matter how harsh the conditions in Woomera might be, they were nevertheless lawful, and a court could not interfere. Because of the way in which the question arose, the government had to argue, and did argue, that even the harshest conditions of detention imaginable would nevertheless be lawful.

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<sup>3</sup> The contract has since been given to GSL (Australia) Pty Ltd, a Group Four Falck company.

It is interesting to stand back and reflect on the stance taken by the government in that case: innocent people may be held in the harshest conditions imaginable and nevertheless that detention will be lawful. Coupled with the argument in al Masri's case, those same innocent people might be held in unimaginably bad conditions for the rest of their lives and yet it will be lawful.

These are arguments worthy of the legal positivists of the Nazi regime. It is difficult to understand what has happened to the Australian polity that our Federal government is prepared to advance these arguments. The only explanation that occurs to me is that the media are not sufficiently interested in the detail or meaning of what the government is doing under the guise of 'border protection'.

### **Solitary confinement**

Officially, solitary confinement is not used in Australia's detention system. Officially, recalcitrant detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. I have viewed a video tape of one of the Management Unit cells. It shows a cell about 3 ½ metres square with a mattress on the floor. There is no other furniture; the walls are bare. A doorway, with no door, leads into a tiny bathroom. The cell has no view outside; it is never dark. The occupant has nothing to read, no writing materials, no TV or radio; no company yet no privacy because a video camera observes and records everything, 24 hours a day. The detainee is kept in the cell 23 ½ hours a day. For half an hour a day he is allowed into a small exercise area where he can see the sky. No court has found him guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention.

### **Taking a stand**

I learned, through the Tampa case, something I should have recognised earlier; that asylum seekers are confronted by unjust laws being implemented by a government which has lost touch with ordinary standards of decency. It had a profound effect on me. I knew that it was not possible to stay in Australia and do nothing about these outrages.

Taking a stand is not without its cost, but as Arundhati Roy has said<sup>4</sup>:

*A thing, once seen, cannot be unseen; and when you have seen a great moral crime, to remain silent is as much a political act as to speak against it.*

I was challenged on a social occasion by someone who should have known better.

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<sup>4</sup> Roy, Arundhati, *The Algebra of Infinite Justice* (2002).



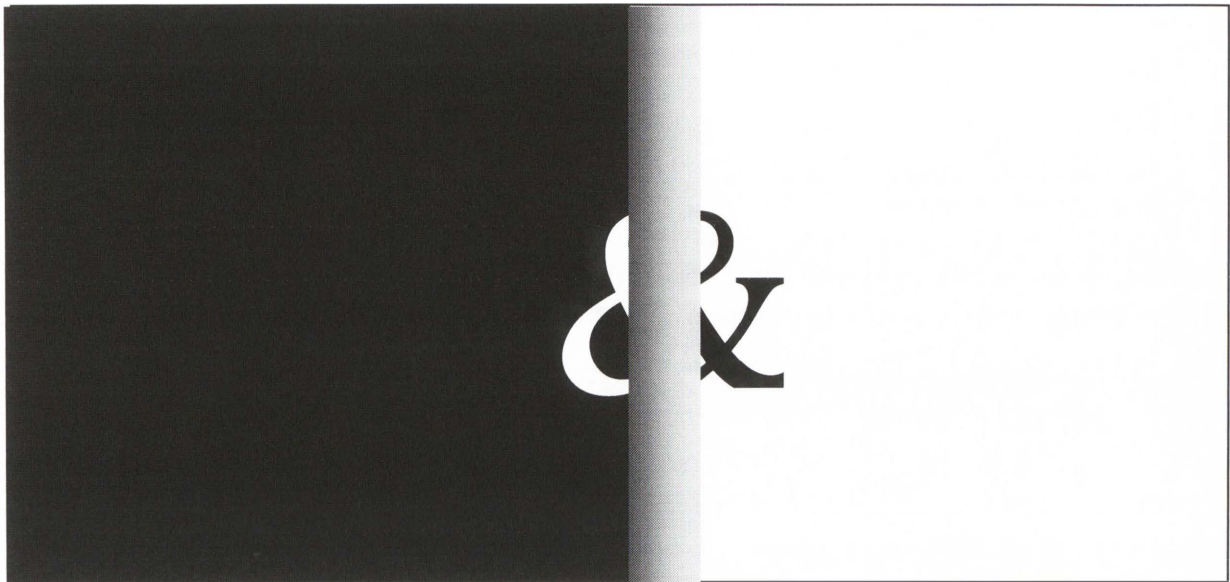
He asked: 'Do you think it appropriate that a barrister be so public about an issue?'

I replied: 'Do you think it appropriate to know about these things and remain silent?'

The practice of law offers many rewards. At its best, it plays a profoundly important role in achieving real justice. Every case is important to someone, and we serve the law by seeing that it is upheld and administered according to its own rules in every case. But there comes a time when to uphold the law is to betray Justice. Any society which legitimises the mistreatment of a defenceless group poses a great challenge for lawyers. We face a stark choice: we can lend ourselves to the enforcement of immoral laws, or help to resist them and perhaps change them. As lawyers, we cannot urge others to break the law, but we can speak out against those laws; we can help ameliorate their operation, and we can seek to invalidate them.

If Justice is the lawyer's vocation, we must not ignore its call when Justice is most threatened. A moral crime is all the worse when it is sanctioned by law. We can never forget that the worst excesses of the Nazi regime were carried out under colour of the Nuremberg laws. Those laws were administered by conscientious judges and practitioners, most of whom were doubtless attracted to study Law because they had an instinct for Justice. In their pursuit of Law, they failed Justice terribly. If we, who understand the law, cannot recognise a bad law for what it is, then who can? If we do not take a stand, who will?





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## The Philosophical Underpinnings of Aboriginal Worldviews



**Mary Graham** was born in Brisbane and grew up on the Gold Coast. On her paternal side she is a Kombu merri person and is also connected maternally with the Waka Waka group – both groups are from South East Queensland. Mary has lectured and tutored on subjects in Aboriginal history, politics and comparative philosophy at the University of Queensland and other educational institutions around the country. She is now a consultant on Aboriginal Law, Ethics and Governance.

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*The white man's law is always changing, but Aboriginal Law never changes, and is valid for all people.*

### Natural and Positive Law

This statement made by Mr Bill Neidjie is an observation that reveals one difference between positive and natural kinds of law. A system of natural law is one that is based on the way the real world is perceived to behave. For instance, the laws of physics describe how objects in the real world interact, so that physics can be seen to be a system of natural, physical law that never changes. If the laws of physical motion did change, we could expect to see the universe begin to fall apart before our eyes.

But just as it is possible to describe some of the ways in which the world seems to behave at a physical level, it may also be possible to describe some of the ways in which the world behaves at a non physical, or 'spiritual', level. Aboriginal Law is grounded in a perception of this psychic level of natural behaviour. In that view, Aboriginal Law 'never changes and is valid for all people', because it implicitly describes the wider emotional, psychological and perhaps cognitive states of the world to which all human beings are subject. This means that Aboriginal Law is as natural (and as scientific) a system of law as physics. On this basis alone, Aboriginal Law is a very important system to understand.

Aboriginal Law refers to a complex relationship between humanity and land that extends to cover every aspect of life; to that extent it is what theorists call a 'complex system', in that it explains both the observer and the observed. In that sense the Law is both a science and a religion, in Western terms. It is a religion in that it explains both the origins and meaning of the cosmos (including the observer) and it is a science in that it does so rationally, and with empirical support. To this extent, Aboriginal Law differs from modern Western ideas of 'positive law'.

Aboriginal Law is like a cognitive science or applied psychology – it doesn't deal with the actions of humans or the events which befall

them, but with what makes it possible for people to act purposively, and experience 'events'. That is to say, the perfectibility of human beings was never a concern for Aboriginal Law; rather this Law was/is always an attempt to understand what it is that makes us human. It was/is concerned with why and how it is that we act with purpose: where does this will come from? Why and how do we experience the events that occur in our lives? Why is the experience of one person different from that of another?

Over millennia this understanding of the human experience in Australia has given rise to a form of law which Justice Blackburn, in a Northern Territory Land Rights case, described as,

*a subtle and elaborate system highly adapted to the country in which the people lead their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a government of laws, and not of me, it is that shown in the evidence before me.<sup>1</sup>*

In this sense Aboriginal Law could be said to be both an action guide to living and a guide to understanding reality itself, especially in relation to land as the basis for all meaning.

At this level of conception, Aboriginal Law is comparable to Buddhism, which is also a psychology of life. There is however a major difference. Buddhism seeks an escape from normal, waking consciousness on the grounds that no matter how richly endowed; waking existence is an endless wheel of birth, suffering and death. By contrast, Aboriginal Law, which is located in land, celebrates life in all its ups and downs, using the 'downs' to point to moral formulae.

### **A View of the West from an Aboriginal Perspective**

There never was a paradise; neither an Indigenous one, a religious or moral one, futuristic, technological nor even a physical one. The hierarchical structure of many societies gives the impression that one is always on the way to some destination, to a better position, life or world. Although this is an illusion, Western people were (and still are) habituated to the notion of 'travelling', metaphorically, toward some great unknown where they hope that what might be waiting for them is, if not Heaven, then maybe, happiness, love, security, a theory explaining everything.

Throughout the whole historical period, from the birth of the state to the transformation of people into citizens of nations and members of ever changing class systems, social relations became even more disconnected, alienated and strained. This development was softened to some extent, and at the same time camouflaged by economic materialism, which ensured that people sought spiritual and psychological security through an identity based on ownership.

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<sup>1</sup> *Milirr pum v Nabalco Pty Ltd and the Commonwealth* (1971) FLR 141 at 267.

Throughout their history, the behaviour of Westerners has been consistent with that of a people who believe that they are quite alone in existence. This is also why the notion of spirit and the sacred gradually disappeared from their intellectual discourse (though not from their writing and poetry).

If a society makes the sacred simply a matter of personal choice or private concern for individuals, then the next logical step is for these metaphysical isolates to extend themselves physically (which is in reality an unacknowledged search for meaning), and ownership is physical extension by accretion.

But what is the sacred, this domain of spirit that has been lost to Western society? What does it consist of? Where does it reside? From an Aboriginal perspective, it resides in the relationship between the human spirit and the natural life force. When there is a breach between the two, or rather, when the link between the two is weakened, then a human being becomes a totally individuated self, a discreet entity whirling in space, completely free. Its freedom is a fearful freedom however, because a sense of deepest spiritual loneliness and alienation envelops the individual. The result is then that whatever form the environment or landscape takes, it becomes and remains a hostile place. The discreet individual then has to arm itself not just literally, but against its environment – which is why land is always something to be conquered and owned. Indeed the individual has to arm itself against loneliness and against nature itself – though not against ideas. It arms itself with materialism, ownership and possessiveness.

This is why economics generally has meant survival in Western society, not only in the practical sense, but also in the moral, psychological and spiritual sense too. Enter economic rationalism, with its 'law of the jungle' approach to the market dictatorship of societies, which has compounded the already existing global socio political crisis. These crises, and the inadequacy of economisation as a defence against meaninglessness, has ushered in a new search/struggle in the Western world for the true definition of identity or meaning – for the definition of human identity, that is, not political/nationalist identity. This raises again all those questions which many people thought had been answered: Why are we here? Why am I doing this job? Where am I going? What does this global crisis mean?

Many Australians of themselves and of their own society are currently asking these questions and many more. Developments of the last decade with regard to Aboriginal land rights/Native Title have highlighted the ambivalent relationship Australians have with land in this country, and their uncomfortable relationship with Aboriginal people. Many Australians, however, have seen this period as a chance to understand themselves and their country and the kind of society they want in the future for their children.

Part of the problem for Aboriginal people is modern Australia is working out ways in which we can continue carrying out custodial responsibilities to land and, at the same time, try to obtain control over the economic development of our communities without falling prey to the seductions of individualism.

The world is immediate, not external, and we are all its custodians, as well as its observers. A culture that holds the immediate world at bay by objectifying it as the Observed System, thereby leaving it to the blinkered forces of the market place, will also be blind to the effects of doing so until those effects become quantifiable as, for example, acid rain, holes in the ozone layer and global economic recession, have all done. All the social forces, which have led to this planetary crisis, could have been anticipated in principle, but this would have required a richer metaphysics.

Aboriginal people are not against economics or private ownership, but they ask that there be recognition that ownership is a social act and therefore a spiritual act. As such, it produces effects in the immediate world, which show up sooner or later in the 'external' world. What will eventually emerge in a natural habituated way is the embryonic form of an intact, collective spiritual identify for all Australians, which will inform and support our daily lives, our aspirations and our creative genius.

**The editors of Pandora's Box 2004 would like to thank Insight Publishing Pty Ltd for allowing us to reproduce a version of Mary's article which was first published in the February 2004 edition of Insight.**



## Unveiling Secularism: The Islamic headscarf and the new French Law



*Nicky Jones lived in Orleans, France for three years between 1993 and 1996. In 2001, she worked as an intern with the United Nations Office of the High Commissioner for Human Rights in Geneva. Nicky has recently submitted her PhD on legal and cultural aspects of the 'affair of the headscarves' cases in France. Her research was supervised by the School of Languages and Comparative Cultural Studies and the T.C. Beirne School of Law at the University of Queensland.*

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### Introduction

The new law on secularism and other events in France over the past eighteen months have returned the French '*affaire du foulard*' 'affair of the Islamic headscarf' to international media attention. However, the *affaire* and indeed secularism itself has been the subject of intense public debate and scrutiny in France since 1989, when several incidents formed the basis of legal action during the 1990s. This paper presents some of the earlier incidents in the 'affair of the headscarf' in France, and discusses the new law on secularism which came into force in most French public schools on 2 September 2004.

During 2003, there were several significant developments as far as government policy on secularism was concerned. A number of committees<sup>1</sup>, round tables<sup>2</sup> and commissions<sup>3</sup> were formed to consider the question of secularism or, more specifically, how secularism was to accommodate the Islamic headscarf in public schools.

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<sup>1</sup> A committee, convened by Jean-Louis Debré, president of the National Assembly, and composed of thirty members of the National Assembly, was formed on 4 June 2003 to consider 'the question of religious signs in school' and handed down its report on 5 December 2003. Jean-Louis Debré, 'Rapport No. 1275: Rapport fait au nom de la mission d'information sur la question du port des signes religieux à l'école,' Assemblée Nationale: Paris, 2003. Assemblée Nationale website: [www.assemblee-nat.fr/12/rapports/r1275-t1.asp](http://www.assemblee-nat.fr/12/rapports/r1275-t1.asp), as at 21 January 2004.

<sup>2</sup> A one-day Round Table was organised on 22 May 2003 by the ministerial Commission on Social, Family and Cultural Affairs to focus on 'Schools and Secularism today' and was attended by the media, government ministers (including Education Minister Luc Ferry), a representative from the Haut Conseil à l'Intégration, intellectuals, education authorities, student representatives, and experts on questions of integration. Assemblée Nationale: Commission des Affaires Culturelles, Familiales et Sociales, 'École et laïcité aujourd'hui,' 22 May 2003, Assemblée Nationale website: [www.assemblee-nationale.fr/12/dossiers/laicite\\_CR.asp#CR](http://www.assemblee-nationale.fr/12/dossiers/laicite_CR.asp#CR), as at 5 March 2004.

<sup>3</sup> The national human rights commission, the Commission Nationale Consultative des Droits de l'Homme, interviewed a number of academics and experts during October and December 2003, before producing an interim report entitled 'Secularism today'. Commission Nationale Consultative des Droits de l'Homme, 'La laïcité aujourd'hui', Commission Nationale Consultative des Droits de l'Homme: Paris, 2003, Documentation française website: [www.ladocumentationfrancaise.fr/brp/notices/034000728.shtml](http://www.ladocumentationfrancaise.fr/brp/notices/034000728.shtml), as at 5 March 2004.



The ongoing work of the various committees and the publication of their reports on secularism and the headscarf in public schools, together with the expulsion in September 2003 of two Muslim schoolgirls from their secondary school in Aubervilliers, near Paris, for refusing to remove their headscarves in school,<sup>4</sup> ensured that these issues continued to be the focus of extensive research and public debate well into 2004. One of the reports, reflecting the prevailing approach, concluded that the principle of secularism in schools must be updated and reaffirmed by legislation:

*the current legal regime which resulted from the Avis du Conseil d'État of 27 November 1989 and from its jurisprudence is not satisfactory. It does not respond to the confusion of school principals and teachers faced with this question which is increasingly claiming their time and attention.*<sup>5</sup>

### **The Stasi Commission**

Perhaps the best-known working group was the Commission to Consider the Application of the Principle of Secularism in the Republic, appointed by President Jacques Chirac in July 2003 and presided over by Bernard Stasi, a former French and European parliamentarian and currently Ombudsman for the Republic.

The Commission handed down its report in December 2003 and, in accordance with the President's request to formulate practical suggestions which could be implemented, the report offered a number of recommendations. The recommendation which attracted the most publicity was specifically directed at the problems arising from the 'affair of the headscarf.' The Commission recommended that a law on secularism be drafted to include the following provision:

*In respect for freedom of belief and for the particular nature of private schools, clothing and signs manifesting a political or religious<sup>6</sup> affiliation shall be prohibited in primary, lower secondary and secondary public schools.*<sup>7</sup>

The Commission explained that the provision was to apply to 'visible signs, such as large crosses, headscarves, or *kippas* [Jewish skull caps]'

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<sup>4</sup> Amelia Gentleman, 'Row over headscarves in schools reveals secular tensions', *The Guardian*, 25 September, 2003; also Philippe Bernard, "Ces musulmans de France hostiles au port du foulard à l'école," *Le Monde*, 13 October 2003.

<sup>5</sup> Jean-Louis Debré, 'Conclusions de la mission d'information de l'Assemblée nationale sur la question des signes religieux à l'école,' Assemblée Nationale: Paris, 2003. Assemblée Nationale website: [www.assemblee-nat.fr/12/dossiers/laicite.asp](http://www.assemblee-nat.fr/12/dossiers/laicite.asp), as at 21 January 2004.

<sup>6</sup> It is worth noting here that the original prohibition on religious signs in public schools was, at its origin, a prohibition on political signs and influences, with 'religious propaganda' excluded almost as an afterthought. In 2004, the political dimension has been lost and the focus appears to be almost entirely on prohibiting religious signs.

<sup>7</sup> Commission de réflexion sur l'application du principe de laïcité dans la République, 'Rapport au Président de la République,' Présidence de la République: Paris, 2003, Documentation française website: [www.ladocumentationfrancaise.fr/brp/notices/034000725.shtml](http://www.ladocumentationfrancaise.fr/brp/notices/034000725.shtml), as at 7 February 2004, at 58.

but would not extend to smaller ‘discreet signs’ such as medallions or pendants consisting of small crosses, stars of David, Hands of Fatima or miniature Qur’ans.<sup>8</sup>

It was this recommendation which formed the basis of a draft law adopted by the National Assembly at its first reading on 10 February 2004, and by the Senate on 3 March 2004.

### **New Law on Secularism**

The statute is entitled ‘Law applying the principle of secularism to regulate the wearing of signs or clothing manifesting a religious affiliation in primary, lower secondary and secondary public schools’ and it contains four articles. Article 1, which received extensive media attention, states that the following provision should be inserted into the Code of Education:

*Art. L. 141 5 1 – In primary, lower secondary and secondary public schools, the wearing of signs or clothing by which students visibly manifest a religious affiliation is forbidden. The internal regulations note that the commencement of disciplinary proceedings shall be preceded by dialogue with the student.<sup>9</sup>*

This article provides, in effect, that the headscarf, Jewish skullcaps and some Christian crosses will be prohibited in public schools, and that students wearing these religious signs will be liable to be suspended and even expelled. The Education Minister, Luc Ferry, has also speculated that beards or bandanas worn by students might also be prohibited if they appear to be ‘religious’: ‘As soon as anything becomes a religious sign, it will fall under this law.’<sup>10</sup>

Article 3<sup>11</sup> provides that the new Law should come into force in time for the start of the following school year, in September 2004, while article 4, which was added to the final draft at the last minute, requires that the law be evaluated one year after its entry into force. Clearly, the government wished to keep open its legislative and political options. After all, this debate has taken place before...

### **Events of the *affaire* in 1989**

On 18 September 1989, at the start of the new school year, three Muslim schoolgirls wore headscarves to their lower secondary school in Creil, north of Paris. The girls refused to remove them when asked to do so by the school principal and teachers, who interpreted this refusal

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<sup>8</sup> Commission de réflexion sur l’application du principe de laïcité dans la République, *ibid.* at p. 58-9.

<sup>9</sup> Article 1, Law No. 2004-228 of 15 March 2004 applying the principle of *laïcité* to regulate the wearing of signs or clothing manifesting a religious affiliation in primary, lower secondary and secondary public schools.

<sup>10</sup> Jon Henley, ‘Veil ban may extend to ‘religious’ beards’, *The Guardian*, 21 January 2004.

<sup>11</sup> Article 2 concerns the jurisdiction of the new law in France’s overseas dominions and territories.



as an attack on secularism in public education, and as a result the girls were immediately suspended.<sup>12</sup>

This situation attracted widespread media attention and over the following weeks there was heated debate in national newspapers such as *Le Monde*, *La Croix*, *Libération* and *Le Figaro* over the principle of secularism and the girls' rights to education and freedom of belief.

It was a different matter in the political domain. In the first weeks of the affair, there was no comment from mainstream political parties or individuals, who initially appeared to be paralysed by the events. Moreover, the divisions which were emerging did not appear to follow conventional ideological or policy lines:

*Each of them was divided, torn apart. From right to left, in the secular camp as in the camp of traditional opponents of secularism, internal confrontations were raging.*<sup>13</sup>

The same divisions were also splintering unions, teachers, parent and community associations and religious groups, including the Muslim community, in France.

On 9 October, following the intervention of the regional Education Officer, meetings with the parents and mediation on the part of local community associations, the three schoolgirls returned to school. The negotiations appeared to have identified a satisfactory compromise: the girls would wear their headscarves anywhere they wished within school grounds, including to sports classes and in school corridors, but in the classrooms they would lower the scarves to their shoulders.

### **Other 'headscarf cases'**

By late October, the affair was taking on a national dimension and, according to media reports, there appeared to be increasing numbers of students wearing the headscarf. Daily and weekly newspapers were running front page stories describing similar incidents which were taking place in other cities across France.<sup>14</sup> Thus, Muslim schoolgirls attending schools in Montpellier<sup>15</sup>, Marseille<sup>16</sup>, Avignon<sup>17</sup> and Lille<sup>18</sup>,

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<sup>12</sup> It is also worth noting that the original prohibition on religious signs in public schools was intended to provide a neutral space, free from distinctive or partisan influences and affiliations, in which all young students could meet and learn together.

<sup>13</sup> Françoise Gaspard and Farhad Khosrokhavar. *Le foulard et la République*, Éditions La Découverte: Paris, 1995, at p. 17.

<sup>14</sup> Françoise Gaspard & Farhad Khosrokhavar, *ibid.* at p. 14-5.

<sup>15</sup> 'Foulard: la contagion,' *France-Soir*, 21 October 1989.

<sup>16</sup> Élisabeth Chikha, 'Chronologie,' *Hommes et Migrations*, February-March 1990, no. 1129-30, at p. 1; also 'Faut-il laisser entrer l'Islam à l'école?' *Le Point*, 16 October 1989.

<sup>17</sup> Élisabeth Chikha, *ibid.*, at p. 2.

<sup>18</sup> Monique Glasberg, Vincent Albinet & François Wenz-Dumas, 'Le choc de l'Islam sur l'école de la République', *Libération*, 21 October 1989.

some of whom had been wearing their headscarves for months and even years previous to this, were finding themselves suspended or expelled.<sup>19</sup>

There was considerable confusion over whose responsibility it was to negotiate and resolve the various cases. President of France Plus Areski Dhamani called on Education Minister Lionel Jospin to draft a circular stating precisely what was and was not forbidden with regard to the headscarf.<sup>20</sup>

At this stage, although various Jewish, Christian and Muslim religious leaders were commenting publicly, there was still silence from most politicians. The exception to this was the extreme right wing Front National party which had immediately assumed an unequivocal position: 'Non au tchador' – 'No to the *chador*.'<sup>21</sup>

Then, ten days after they had agreed to the compromise with the school authorities, the three Creil girls breached the agreement by once again refusing to lower their headscarves in class.<sup>22</sup> The girls were again suspended, removed from their classes and taken to the school library.

According to one analysis, this was the point at which 'the dimension of this problem changed' and 'the *affaire* exploded, particularly in relation to the media.'<sup>23</sup> A number of protest marches took place in Paris, including one organised by Muslim religious groups to show support for the Creil schoolgirls,<sup>24</sup> followed a week later by another organised by moderate Muslim women's groups reaffirming their attachment to respect for individual freedoms and the values of secularism.<sup>25</sup>

On 25 October, Education Minister Jospin argued before France's lower house of parliament, the National Assembly, for a flexible interpretation of secularism and for the girls not to be expelled, on the basis that 'no one should be deprived of his or her right to an education.' He called for school principals to 'establish a dialogue with the parents and the students concerned to convince them to abandon these protests' but that, even in the event of a breakdown of negotiations, 'the child – whose education is the priority – must be accepted back into school.'<sup>26</sup> Jospin's position was supported by some members of his Socialist

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<sup>19</sup> Élisabeth Chikha, Above, n 16 at p.2.

<sup>20</sup> B.R., 'Laïcité: le voile de la discorde', *La Croix*, 18 October 1989.

<sup>21</sup> This appeared in an article in *Le Quotidien de Paris*, 18 October 1989, quoted in Françoise Gaspard & Farhad Khosrokhavar, above, n 13, at p.18.

<sup>22</sup> Françoise Gaspard & Farhad Khosrokhavar, *ibid*, at p.15.

<sup>23</sup> Fabien Collet, *La Laïcité, une doctrine de l'Éducation nationale*, unpublished thesis presented for the degree of DEA Administration publique, Université des Sciences Sociales de Grenoble, 1995, at p. 17.

<sup>24</sup> According to Gaspard, the protest was attended by a few hundred people: Françoise Gaspard & Farhad Khosrokhavar, above, n 13, at p. 21, while Chikha refers to the attendance of 'around six hundred fundamentalist Muslims': Élisabeth Chikha, above, n16 at p.3.

<sup>25</sup> Élisabeth Chikha, *ibid* at p.5.

<sup>26</sup> Élisabeth Chikha, *ibid*, at p.4. Interestingly enough, although he appeared to take the various issues and events of the *affaire* very seriously, Jospin also confided to colleagues in mid-October 1989 that he believed '[t]his is a fuss over nothing': Elisabeth Schemla, [no title], *Le Nouvel Observateur*, 9-15 November 1989, at p.33.

Party, including Prime Minister Michel Rocard, but he was criticised by other prominent members of the party.<sup>27</sup>

The disagreement was not limited to the Socialist Party. Many public school teachers also objected, calling on their colleagues not to allow students to wear the headscarf in class: 'To negotiate as you are doing by announcing that we will give in has a name: capitulation.'<sup>28</sup> Public debate on the *affaire* continued, amid renewed calls for the government to clarify the official position with regard to wearing the headscarf.<sup>29</sup>

On 4 November 1989, at least partly in response to the appeals, Jospin sought the opinion of the *Conseil d'État*, France's highest administrative court, whose function is to advise the government on legislative and administrative matters,<sup>30</sup> on whether 'the wearing of signs of affiliation to a religious community is or is not compatible with the principle of secularism.'

### **The *Avis du Conseil d'État***

After three weeks of deliberations, the *Conseil d'État* handed down its legal opinion, or *Avis*, on 27 November 1989. The *Avis* was based on the provisions of a number of constitutional and statutory texts in both French and international law, and was entitled 'The wearing of signs showing affiliation to a religious community (Islamic headscarf).'<sup>31</sup>

The *Conseil d'État* summarised its opinion in the following paragraph, perhaps the most significant section of the *Avis*:

*It follows from what has just been stated that, in schools, the wearing by students of signs by which they wish to manifest their affiliation to a religion is not by itself incompatible with the principle of secularism, insofar as it constitutes the exercise of freedom of expression and freedom of manifestation of religious beliefs but this freedom will not extend to allowing students to*

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<sup>27</sup> Such as Minister for Defence Jean-Pierre Chevènement, Socialist Party vice-president Henri Emmanuelli and former Prime Ministers Laurent Fabius and Pierre Mauroy: Bronwyn Winter, 'Learning the Hard Way: the debate on women, cultural difference and secular schooling in France', in John Perkins & Jürgen Tampke (eds.), *Europe: Retrospects and Prospects*, Southern Highlands Publishers: Manly East, 1995, 203-13, at p.204. Long-serving Socialist member of parliament Yvette Roudy also declared that wearing the headscarf 'is contrary to principles of secularism and religious neutrality at the heart of the public school': 'Le foulard à la carte', *L'Humanité*, 29 November 1989.

<sup>28</sup> Elisabeth Chikha, Above, n 16 at p.4.

<sup>29</sup> Gaspard and Khosrokhavar make the point that this was not really a novel question, and that in fact numerous schools had been handling situations such as this for years without controversy: Françoise Gaspard & Farhad Khosrokhavar, above, n 13, at p.21-2.

<sup>30</sup> The *Conseil d'État* has both a compulsory and an optional consultative function. In accordance with its optional consultative function, the government may seek the opinion of the *Conseil d'État* on a text, or submit a question posing a particular legal problem which the *Conseil d'État* is asked to clarify, as in the case of the *affaire du foulard*: 'Le rôle consultatif du Conseil d'État', *Conseil d'État* website: [www.conseil-etat.fr/ce/missio/index\\_mi\\_cg01.shtml](http://www.conseil-etat.fr/ce/missio/index_mi_cg01.shtml), as at 19 May 2003.

<sup>31</sup> *Conseil d'État* (Assemblée générale), 'Port de signe d'appartenance à une communauté religieuse (foulard islamique)' ('*Avis du Conseil d'État*'), No. 346893, 27 November 1989. *Conseil d'État* website: [www.conseil-etat.fr/ce/missio/index\\_mi\\_cg03\\_01.shtml](http://www.conseil-etat.fr/ce/missio/index_mi_cg03_01.shtml), as at 7 July 2002.

*display signs of religious affiliation which, by their nature, by the conditions in which they are worn individually or collectively, or by their ostentatious or protesting character, would constitute an act of pressure, provocation, proselytism or propaganda, would jeopardise the dignity or freedom of the student or of other members of the school community, would compromise their health or their safety, would disrupt the progress of teaching activities and the educational role of teachers, and finally, would disturb order in the school or the normal operation of the public service.*<sup>32</sup>

In summary, wearing the Islamic headscarf was not incompatible with secularism and could not, in isolation, result in suspension or expulsion of students. In accordance with the students' right to freedom of expression and freedom of conscience and belief, they could wear 'signs of religious affiliation' in school without compromising the principles of secularism and secular public education.

In addition to their rights, the *Conseil d'État* acknowledged the particular importance of students' responsibilities and obligations in relation to their schooling and the school community. Thus, students were entitled to exercise their rights and freedoms while at school, as long as they also respected their obligations to participate in classes and not to disturb teaching activities. The attitude and behaviour of students while at school was to be the most important issue, and this was to be negotiated on a case by case basis by the schools, not decided at a national level.

In doing so, the *Conseil d'État* was clearly indicating a preference for each matter to be resolved on a local level, rather than in accordance with a set of uniform national guidelines.

The *Avis du Conseil d'État* also gave schools the power to determine their own internal regulations on the wearing of religious signs, with due consideration to each school's 'particular situation' and to the principles of secularism and pluralism; the duty of tolerance and respect for others; and the obligation on each student to participate in all activities corresponding to schooling.<sup>33</sup>

School principals, already responsible for public order and the operation of their schools, as well as for the determination and application of the school's internal regulations, were granted the authority to exclude students from their schools where necessary and for the duration required to restore the school to its normal functions. The *Avis* also assigned to the Education Minister the authority to determine guidelines for the application of the principles articulated in the *Avis*.

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<sup>32</sup> Conseil d'État (Assemblée générale), *ibid.*, at p.400.

<sup>33</sup> Conseil d'État (Assemblée générale), *ibid.*, at p.401.

## **Consequences of the *Avis***

The *Avis du Conseil d'État* was greeted with mixed responses. It was criticised, on the one hand, for appearing to support teachers and students alike, affirming the respective positions of both Education Minister Jospin and the Creil principal and teachers, or at least not contradicting the public position of either side.<sup>34</sup>

There was also concern that the *Conseil d'État* had not attempted to define significant terms such as 'ostentatious,' 'provocative,' 'pressure,' 'provocation,' 'proselytism,' 'propaganda,' or even 'secularism,' despite the importance of these terms as the criteria by which a religious sign or a student's behaviour was to be assessed. There were no indications of how to determine which religious signs might be considered 'by their nature [...] ostentatious' or the circumstances in which they might constitute 'an act of pressure, provocation, proselytism or propaganda.' Rather, these terms appeared to allow for the possibility of conflicting or inconsistent interpretations on the part of school principals, teachers and Education Department authorities.

Following the publication of the *Avis du Conseil d'État*, some of the media and public interest in the affair began to subside. Cases continued to be dealt with on an individual basis and in accordance with the circumstances of each matter, and in the majority of schools 'a process of dialogue and a spirit of tolerance resulted in agreements which were acceptable to all parties.'<sup>35</sup>

## **1994 Events and the Bayrou Circular**

Following elections in March 1993, a conservative coalition assumed government in France and a new Education Minister, François Bayrou, was appointed. As one article noted, this electoral victory marked the point at which 'the official attitude toward Muslims [...] changed.' A year later, in September 1994, at the start of the school year, Bayrou 'ignited the controversy' by announcing in a magazine interview that he intended to ban the wearing of headscarves in public schools.<sup>36</sup>

It should be noted that the issue had never really gone away in schools located in areas with significant Muslim populations. During the 1993-94 school year, for example, a secondary school in Goussainville, a largely working class and immigrant-populated outer northern suburb of Paris, had been the site of violent protests and in June 1994, just before the summer holidays, the school amended its internal regulations to prohibit any form of headaddress.<sup>37</sup>

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<sup>34</sup> Bronwyn Winter, above, n 27 at p.204.

<sup>35</sup> Sebastian Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17(1) *Oxford Journal of Legal Studies* 43-74 at p.60.

<sup>36</sup> 'Ban on Islamic scarves renews debate', *The Tennessean*, 15 September 1994, at 3A.

<sup>37</sup> Bronwyn Winter, above, n 27 at p.205.



In September 1994, four schoolgirls arrived at the school wearing ‘full Islamic regalia’: black headscarves and long tunics. Following lengthy discussions and attempts at negotiation, the principal enforced the school’s internal regulation and the girls were expelled. This precipitated further demonstrations, with groups of Muslim students organising successive strikes and pickets, in which some teachers also became involved.<sup>38</sup> By late September, groups of between 200 and 300 students gathered on footpaths at the entrances to the school, preventing other students, particularly other Muslim students, from entering the school.<sup>39</sup>

Public attention returned once again to the affair of the headscarf. On 29 September 1994, Education Minister Bayrou issued a ministerial circular<sup>40</sup> with the unambiguous title: ‘Wearing of ostentatious signs in schools.’ Although the Bayrou circular did not identify the particular signs, it was obvious to school principals and teachers, in the context of ongoing media attention and continued legal action, that it was referring to the headscarf.

In this circular, Bayrou recommended that schools take a firm stand to prohibit unacceptable and ‘ostentatious’ religious emblems on the grounds that they separated some students from the body of the school community and thus were incompatible with the principle of secularism.

Bayrou’s circular warned that the ‘secular and national ideal [which] is the very essence of the Republican school’ and the foundation of its duty to provide civic education was under threat from

*the presence and the proliferation of signs so ostentatious that their signification is precisely to separate certain students from the common rules of the school. These signs are, in themselves, elements of proselytism, particularly when they accompany challenges to certain classes or certain subjects, when they involve the safety of students or when they lead to disruptions to the collective life of the school.*<sup>41</sup>

It should be recalled that according to the original terms of the 1989 *Avis du Conseil d’État*, ‘the wearing by students of [religious signs] is not by itself incompatible with the principle of secularism.’ Once these signs could be identified as ‘ostentatious’ or as constituting an act of proselytism, however, they could be prohibited.

Although the Bayrou circular referred to ‘ostentatious’ signs, it did not define what these might be, apart from explaining their divisive

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<sup>38</sup> Bronwyn Winter, *ibid.*, at p.205-6.

<sup>39</sup> Anne Fohr, ‘École: la déchirure’, *Le Nouvel Observateur*, 6-12 October 1994, 46-8, at p.47-8.

<sup>40</sup> Ministerial circulars are issued to government departments and personnel in order to explain and clarify the application of existing legislation or jurisprudence in that area.

<sup>41</sup> ‘Port de signes ostentatoires dans les établissements scolaires’, *Bulletin officiel de l’Éducation nationale*, No. 35, 29 September 1994, at p.2528-9.

function. In addition, it was unclear in what respects these ostentatious signs might function as ‘elements of proselytism’ in themselves. The definition, such as it was, however, appeared to be confirmed or strengthened when the signs accompanied certain behaviours: ‘challenges to certain classes or certain subjects,’ or other behaviours involving students’ safety or leading to disruptions in the school.

Thus, in the circular, the definition of signs to be banned had moved away from the original focus on religious signs, which might arguably invoke the protection of freedom of religion provisions in response, to purely ostentatious signs. This was a striking condemnation and indeed ‘re branding’ of the headscarf, effectively labelling it ostentatious and divisive and an element of proselytism in itself.

### **Bayrou’s Annexe: A Clear Rule**

Bayrou urged school principals to recommend to their schools’ governing boards that internal regulations be redrafted to prohibit ‘these ostentatious signs.’ For this purpose, Bayrou attached an annexe to the circular proposing a draft article which could serve as a model for schools’ internal regulations. According to the annexe:

*The wearing by students of discreet signs manifesting their personal commitment to beliefs, notably religious beliefs, is permitted in schools. But ostentatious signs, which constitute in themselves elements of proselytism or discrimination, are forbidden.*<sup>42</sup>

The annexe confirmed that the headscarf was now to be regarded as ostentatious in itself and, in addition, as an element of proselytism and even discrimination. Bayrou also stated in the annexe that, in addition to ostentatious signs, certain behaviours were to be prohibited:

*Also forbidden are provocative attitudes, failure to comply with the obligations of participation and safety, and behaviours likely to constitute pressure on other students, to disrupt the progress of teaching activities or to disturb order in the school.*<sup>43</sup>

The ministerial circular afforded support for those schools still wishing to ban the headscarf. A number of schools immediately incorporated the suggested guidelines of the Bayrou circular into their internal regulations (as became clear from the transcripts of subsequent legal cases), and then applied them.

### **‘Headscarf’ Legal Cases**

The legal cases which followed the expulsion of many Muslim schoolgirls for wearing the headscarf in school were significant because they were decided on the basis of the existing legislation relating to

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<sup>42</sup> *Bulletin officiel de l’Éducation nationale*, ibid.

<sup>43</sup> *Bulletin officiel de l’Éducation nationale*, ibid.

principles of secularism, freedom of religion and the rights and obligations of public school students. These principles, first articulated in the 1989 *Avis du Conseil d'État*, were examined and applied by the administrative courts, and their decisions in these cases effectively redefined the principles.

Although approximately 83 headscarf cases were decided by French administrative courts between 1992 and 2003 and are readily available to the public, the majority of these were heard in 1996 (38 cases) and 1997 (21 cases). Case numbers dwindled to two per annum in the years 1999, 2000, 2001 and 2002, with only three headscarf cases assessed by the courts in 2003.<sup>44</sup>

The range of outcomes in the busiest years of 1996 and 1997 was significant: in the overwhelming majority (around 83%) of these cases the Muslim students' expulsions were overturned by the administrative courts, while in the remaining cases (approximately 15% of the cases), student expulsions were upheld. It should be noted, however, that most of the cases in which the expulsions were overturned tended to involve a single student, while those cases in which the students' expulsions were upheld often involved a group of several students. Taking this factor into account, around 60% of students involved in the cases had their expulsions overturned and were restored to their schools, while a sizeable minority - 40% of students - were unsuccessful in their appeals and remained expelled from their schools.

### **Rationale for Decisions**

A relatively consistent set of principles emerged from the growing body of case law in the affair of the headscarf, principles which were based on the text of the *Avis du Conseil d'État* but were becoming more developed and more specific to particular circumstances.

The *Conseil d'État* had consistently maintained that wearing the headscarf was not by itself sufficient reason to expel a student.<sup>45</sup> At the same time, this principle was tempered by certain behaviours which, if engaged in by a student or by members of their family, could justify an expulsion. If a student wore the headscarf and, in addition, engaged in

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<sup>44</sup> The cases were located in the legal archives available on *Legifrance*, the Internet website maintained and recommended by the French government and legal institutions to provide access to legislation, regulations and case law. The key words used to obtain the approximately 83 cases analysed for this chapter were: "foulard" which yielded 77 cases; "ostentatoire" (68 cases); "laïcité" plus "prosélytisme" (28); "laïcité" plus "ostentatoire" (25); "signes religieux" (18); "laïcité" plus "ostentatoire" plus "prosélytisme" (23); and "pression" plus "provocation" plus "prosélytisme" plus "propagande" (19). Legifrance website: [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr), as at 14 August 2003.

<sup>45</sup> This principle was aptly illustrated in one 1995 case, in which the Strasbourg administrative tribunal held that the decision made by the director of education to confirm the expulsion of one student was based solely on her persistence in wearing her headscarf, rather than on any proof that her behaviour had constituted pressure or proselytism or that her wearing the headscarf had disturbed public order or interfered with school activities. It was held that the director of education had incorrectly applied the law, and the student's expulsion was overturned: Tribunal administratif de Strasbourg, No. 95216 95804, 3 May 1995.

particular activities or demonstrated particular behaviours, the student could be expelled and her expulsion was likely to be upheld by the administrative courts on appeal. Thus, an expulsion could be justified if the student had engaged in political acts or activism (including attempting to pressure or proselytise to other students), had disturbed public order in the school by distributing brochures<sup>46</sup> or circulating petitions to other students, or participating in protests,<sup>47</sup> or had breached her or his obligations to attend all classes or to obey a teacher's instructions.<sup>48</sup> Such acts would bring political or other public interests within the arena of the school, and as such were incompatible with secularism in public schooling.

### **Practical Vindication of the *Avis du Conseil d'État***

In its 1989 *Avis*, the *Conseil d'État* had not ruled definitively in favour of or against wearing the headscarf, an omission which was criticised by some for its apparent failure to provide uniform directions for action or to provide a clear verdict in support of any of the parties to the affair. Rather, the *Conseil d'État* identified existing legal provisions and extrapolated from these a set of guiding principles relating to secular education, freedom of religion and the rights and obligations of public school students. The *Conseil d'État* also pronounced in favour of caution by deciding that each case was to be determined according to its own merits and circumstances.

In practice, it appears that it was this flexibility and observance of key principles which enabled so many of the cases to be decided in favour of the Muslim girls and resulted in their expulsions being overturned.

Indeed, the cases to be addressed might arguably function as a sort of practical vindication of the *Conseil d'État*'s 1989 *Avis*. Even if one were to criticise the details of some of the decisions, or argue against the philosophy underlying the reasoning, in most of the circumstances where the students had done nothing but wear the headscarf, their expulsions were ruled unjustifiable and were overturned. In those cases where students' expulsions were upheld by the courts, for the most part, the students had at least participated actively in the events which led to their expulsion.

Overall, the cases reflect a trend on the part of the administrative courts towards keeping the students in school. The courts themselves appeared to have carried out the charge laid upon them by the *Conseil d'État* in 1989: to protect the religious freedom and the education of

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<sup>46</sup> Cour administrative d'appel de Lyon, No. 96LY02608, 19 December 1997.

<sup>47</sup> Conseil d'État, No. 170207 170208, 27 November 1996.

<sup>48</sup> Such as in one of the first cases in 1995, in which two students' expulsions were upheld on the basis that teaching had been seriously disturbed by their attitude and by the disruptive activities of the students and their father, and that the girls' actions in refusing to remove their headscarves in physical education classes constituted a breach of order in the school, since wearing the headscarf was held to be incompatible with the normal progress of physical education classes: Conseil d'État, No. 159981, 10 March 1995.

Muslim schoolgirls wearing the headscarf, as well as to uphold the principles of secularism by protecting the 'public order' which marked the limits of students' rights and by identifying and prohibiting unacceptable behaviours at school.

Under this regime, lengthy as the process sometimes was, there emerged from the body of case law a pattern of judicial protection of the Muslim students who had been excluded from schools simply for wearing the headscarf.

At the same time, the courts required the students to respect public order and to abide by their responsibilities to attend and participate in the life and work of the school, and students were penalised if these obligations were breached. In this way, the courts contributed to the negotiation of a working definition of secularism which encompassed both rights and duties.

A more narrowly defined or 'blanket' protection of secularism prohibiting the display of all religious symbols, such as that envisaged by Education Minister Bayrou in 1994, would not have facilitated the courts' attempts to respect the complex mesh of principles articulated in the *Avis*.

### **Conclusions: Secularism and the New Law**

The new law on secularism, which imposes a straightforward ban on wearing visible religious signs, will radically change the legal regime which has thus far governed the wearing of religious signs such as the headscarf. Under the new legislation, whether or not they engage in political or proselytising activities, disturb public order or disrupt teaching, Muslim students wearing the headscarf will be liable to expulsion from their school. In addition, the new law has potentially serious consequences for Jewish, Christian and indeed Sikh<sup>49</sup> students.

One of the most predictable results of the new law is that there will be extensive public protests against its application, as indeed there have already been against its enactment.<sup>50</sup> It is likely that the law will be enforced as the 2004-05 school year progresses, and that many students will be expelled for wearing religious signs in school and that, as occurred during the 1990s, their expulsions will give renewed energy to further protests and resistance.

In addition, it is probable that many students will be encouraged to pursue legal action to challenge the schools' decisions, although since

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<sup>49</sup> The ban would also extend to Sikh turbans: Jon Henley, 'French Sikhs threaten to leave country', *The Guardian*, 23 January 2004.

<sup>50</sup> In January 2004, tens of thousands of Muslims marched in protest against the proposed law on secularism in Paris, Marseille, Lille and other cities across France, while other protests were held in London, Berlin, Stockholm, Brussels, Cairo and Bethlehem: 'Mobilisation contre le projet de loi sur la laïcité', *Le Monde*, 17 January 2004; Jean-Paul Dufour, 'Forte mobilisation à Lille', *Le Monde*, 19 January 2004; Jon Henley, 'French MPs reappraise plan to outlaw veils', *The Guardian*, 20 January 2004; and 'France steps closer to Muslim headscarf ban', *The Guardian*, 30 January 2004.



their expulsions will be based on their breach of the new law, it will be difficult to mount a successful appeal against such a 'blanket ban.'

In any event, the new law on secularism upsets the delicate balance which French administrative courts, particularly the *Conseil d'État*, had worked to achieve throughout the 1990s. The new law also contravenes rights which secularism and the Republic are supposed to protect. As a consequence, the new law has significant implications for secularism itself.

This, then, is the challenge for modern secularism in contemporary France. It is clear from the recent events in France that secularism is still considered by many French people to be a fundamental element of their culture and law. It is equally clear that the questions which have arisen from the 'affair of the Islamic headscarf' over the past fifteen years have provided secularism with its greatest challenge in almost one hundred years. In late 2004, the response to the new law on secularism will be a significant indication of the directions this challenge will take, and will serve as a strong determinant of the future and success of secularism in the French Republic.



## Women and the Law: The Contribution made by the Honorable Mary Gaudron QC



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In the short time that is available to me, I have been asked to speak about the contribution that the Honourable Mary Gaudron Q.C. has made to women and the law. Other speakers today have outlined Mary's biography and catalogued her judicial achievements and it is not appropriate that I repeat them.

As I am presenting this paper in my capacity as President of Australian Women Lawyers, I am tempted to say that Mary's greatest and most effective contribution to women and the law is the fact that she has always been, and remains, our Patron. But this would be selfish as well as incorrect.

When speaking about women and the law, Mary has concentrated on five main themes – work practices, difference, equality, patronage and merit. I will look at each of these in turn.

### Work Practices

In 2002,<sup>1</sup> Mary highlighted the plight of women solicitors. She said:

*Let me turn to the hours young women solicitors are required to work in the large law firms. I have heard them described by a very senior male partner in one of our largest firms as 'inhuman.' If not inhuman, they are exploitative and indicative of incompetent practice management. The nature and probable consequence of the hours which young women solicitors are required or pressured into working is that they will leave the profession because of exhaustion, burn out and the inability to combine work with any sort of social or family life. Given the presumption that persons intend the natural and probable consequences of their acts, one is driven to conclude that large law firms are deliberately adopting*

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<sup>1</sup> 'Catch-22 for women lawyers' (Speech for the Women Lawyers Association of NSW, Sydney, 13 June 2002).

*work practices to ensure that a goodly number of women are driven from practice.*

Much is being done to address these work practices. For example, Victorian Women Lawyers (VWL) produced a ground breaking report in 2002 entitled 'Flexible Partnership – Making it work in Law Firms,' which set out a number of solutions to the problems that Mary alluded to. One of these was that:

*To assist retention of all lawyers, male and female, firms should establish a system and policies to equitably deal with the private needs of all lawyers seeking flexible work arrangements, which address the issues of status and career advancement.*

The report was well received and VWL are working hard to ensure that its recommendations are implemented.

Let me now turn to difference and equality.

### **Difference and Equality**

In her speech given to the Women Lawyers Association of Western Australis,<sup>2</sup> Mary spoke of the dangers inherent in asserting one's difference. She said that:

*There is a danger that women professionals who proclaim their differentness, even by separate association within their professional groups, will thereby be seen to be less serious, less professionally motivated than their male counterparts. Worse still, they may be seen as having an axe to grind, lacking professionalism and objectivity. To that extent they are vulnerable, and particularly if, as I have suggested, assertions of separateness engender male resentment.*

Despite these dangers, Mary has said that she had the distinct impression that most of the professional women with whom she had been associated over the years rejected the notion that they should be merely differently dressed counterparts of their professional male colleagues. But, as she noted, the question then emerges; what is our separate identity, what is our distinctive contribution to be?

An answer to this question has been suggested by Justice Warren (as she then was) of the Supreme Court of Victoria when she said that women provide:

*... a different perspective. .... They identify an issue quickly, focus on it and persuade rather than dictate. Mostly, women who work in the law are goal oriented. They readily identify their litigation goal, their judgment goal.*

*Women provide perspective. They search out the resolutions ...*

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<sup>2</sup> 'The Professional Woman – Her Separate Identity' (Perth, 26 October, 1989).

*Women have finely honed organisational skills ...*

*Women are adaptive and flexible ...*

*Women bring to the law a strong sense of method. This is borne out in the judgment writing of women in the superior courts. They approach judgment in a chronological manner with a strong sense of method and stepped analysis ...*

*Women bring a combination of typically feminine characteristics to the law: energy, patience, humour and insight. These characteristics they apply to their work and it has a ripple effect on colleagues, clients, staff and litigants as the case may be.*

*My list is not exhaustive. It is intended to highlight the difference that women bring to the law.<sup>3</sup>*

A further answer has been suggested by Justice Kirby when he said:<sup>4</sup>

*Women are not just men who wear skirts. They have a different life's experience. They sometimes have a different way of looking at problems. Occasionally, they demonstrate less combative tendencies – to 'kick heads' and to 'thump tables' – and more skills in conciliation and the rational resolution of disputes.*

While women are quite obviously different to men, Mary has pointed out that the skills of lawyering and persuasion are not found in the Y chromosome.<sup>5</sup>

In her speech to launch the Australian Women Lawyers in September 1997,<sup>6</sup> she highlighted the historical reluctance of women to acknowledge their difference. She said:

*It is, I think, a tribute to the women's movement, generally, and to the growing understanding that equality is a complex issue that membership of a women lawyers association or, even, participation in the activities of those associations is now regarded as professionally acceptable. It was not always so. Regrettably, it is not universally so even now.*

*Certainly 30 years ago in New South Wales, many of the women then entering practice rejected membership of the Women Lawyers' Association saying, 'I'm a lawyer not a woman lawyer and I have no intention of being identified as such.'<sup>7</sup> It was an attitude born of the belief that I then shared, namely, that once the doors were*

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<sup>3</sup> Hon. Justice Marilyn Warren, 'Promoting Difference' (Speech delivered at the Victorian Women Lawyers Achievement Awards Presentation Dinner, Melbourne, 15 May 2003).

<sup>4</sup> Justice Kirby, 'Women in the law – Doldrums or Progress?' (Speech presented to the Women Lawyers of Western Australia, Perth, 22 October 2003).

<sup>5</sup> Quoted in, above, n 4.

<sup>6</sup> Speech delivered at the launch of Australian Women Lawyers, Melbourne, 19 September 1997.

<sup>7</sup> On early women lawyers' reluctance to identify themselves as different by virtue of their sex, and on their silence when faced with their struggles, see Thornton, *Dissonance and Distrust: Women in the Legal Profession*, (1996) Oxford University Press, Melbourne, at p. 67-70.

*open, women could prove that they were every bit as good, and certainly no different from their male counterparts. The truth is that, in some respects, we are the same but, in others we are different. And when we admit that difference, when we assert our right to be different, we are going to be significantly better lawyers. Moreover, the legal profession is going to be a better profession and the interests of justice are going to be much better served.*

Mary then rehearsed the well known and depressing statistics which defy the 'it is only a matter of time' theory and establish the pyramidal nature of women's participation in the legal profession and asked:

*What went wrong? In a real sense, what went wrong was that, for all sorts of reasons, women did not really dare to be different from their male colleagues, did not dare to be women lawyers. To be different, to challenge the codes of conduct derived, as often as not, from rules developed on the playing fields of Eton for the male members of the British aristocracy, would have been to invite ostracism, perhaps even, the attention of the ethics committee; to assert that women were different with different needs would have been construed as an acknowledgement of incompetence; to question the bias of the law would have been to invite judgment as to one's fitness to be a member of the profession. And, thus, very many of us became honorary men. We thought that was equality and, on that account, we rightly deserved the comment of the graffitiist who wrote 'Women who want equality lack ambition'.*

She then went on to postulate that justice is only done if irrelevant distinctions are disregarded and if proper account is taken of the genuinely different needs and circumstances of those who come before the courts. She said:

*But of course, we are all different, with different talents and virtues, having different circumstances, different ethnic, social and economic backgrounds, and different needs. Equality is not blind to those differences; nor is it antipathetic to excellence, individualism or, even, the desire to be different. On the contrary, equality involves the recognition of genuine difference and, where it exists, different treatment adapted to that difference. So much is now established constitutional principle.<sup>8</sup> Surely it is not too much to hope that it will soon be the reality, if for no other reason than the failure to acknowledge and tolerate difference is, in truth, cruel oppression.*

*I welcome the formation of the Australian Women Lawyers because, it seems to me, that it is an acknowledgment by women lawyers, albeit, perhaps belatedly, that they are different and an assertion of their right to be so. I welcome it because, it seems to*

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<sup>8</sup> *Cole v Whitfield* (1988) 165 CLR 360; *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411. See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.



*me, to have implicit in it a demand that the legal profession take stock of itself and of those practices which have resulted in the under representation of women in important areas of legal practice and in the judiciary, not because women should have a larger share of the spoils of legal practice, but because they have the potential to improve the law and the administration of justice.*

In a speech that Mary gave in 1998 at the Victorian Bar Council's launch of the Equality of Opportunity for Women Report,<sup>9</sup> she noted that equality is the cornerstone of justice and of the judicial system. Witness, she said, the judicial oath to discharge the duties of office without 'fear, favour or affection.' She then set out the three broad matters that the Report was concerned with:

1. *Words and conduct which belittle and demean women – whether women generally, women barristers or some particular woman barrister.*
2. *An environment that is not friendly to women, particularly young women.*
3. *A pervasive male culture which excludes women from social and other collegiate activities.*

*These matters can be simply analysed. More often than not, demeaning conduct is simply the manifestation of ignorance bred of fear. An environment that is unfriendly to women is a manifestation of favouritism. And a pervasive male culture is neither more or less than an up market description of Australian mateship, or affection. And there you have it – fear, favour and affection – the trifecta for inequality and injustice.*

Although the Bars have not had the best track records, Mary has always held the belief that things would change. She said:<sup>10</sup>

*And the bars will change – they have no choice ... because their members demand it. That surely is the raison d'être of the Victorian Women Barristers' Association. Surely its mere existence proclaims that its members do not want to be just the counterparts of their male colleagues, not even distinguished by dress. Surely, it asserts that its members want to make their distinctive contribution as women, to the bar, to its practices, its professionalism and its sense of public responsibility; that its members wish to participate constructively and meaningfully as women, in the process whereby Australians enforce their claim to justice and equality. If that is the Association's aim, it could not, in my view, have come into existence at a better time.*

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<sup>9</sup> 'A Happy Coincidence of Self Interest and the Public Interest' (Speech delivered 9 October 1998).

<sup>10</sup> Speech delivered to the Women Barristers' Association of the Victorian Bar, Melbourne, 9 June 1994.

*If your aim is as I have surmised, you must expect that not all and, particularly, not all women barristers, can or will support you. This is as it should be. There is room for genuine difference as to what is involved in equality at the bar and as to how it should be pursued. Again, if your aim is as I have surmised, there will be friction and controversy. That is necessary for any progress. There will be suspicion and hostility. That is hardly new. It means only that, as ever, you have to be just that much better than the others. And one thing that is surely clear is that that's easy.*

And that brings me neatly to the topics of Patronage and Merit.

### **Patronage and Merit**

Mary spoke on the subject of patronage in 1994<sup>11</sup> and again in 2002,<sup>12</sup> giving it both barrels:

*And perhaps what is most troublesome, is the smoothing oil of patronage; patronage in introductions, patronage in recommendations; patronage in chambers; patronage in passing briefs and patronage in the selection of juniors. Patronage is something that needs further elaboration. Patronage is about perpetuating the status quo; about securing conformity, about protecting the prevailing ethos. Because that is its purpose and effect, it does not generally work for women. Worse still, it does not work in the interests of those who require the service of barristers. And it does not work in the public interest. Patronage means that merit is not the only criterion for success. It explains why, for some, mere incompetence is no handicap while, for others, merit is no guarantee of the success they deserve. ... Patronage is inequality; patronage is discrimination. And, ultimately, patronage is an insidious evil which works against the interests of justice.*

In her 1998 speech,<sup>13</sup> Mary conceded that there might be fields of endeavour in which 'merit' has a fair measure of legitimacy. But they can have no legitimacy, she said, if patronage or 'the Old Mates Act' also applies. She said:

*I have spoken previously about patronage. It is as well that I do so again. Patronage is about the creation of others in one's own image. ... It means too, that merit is not the only criterion of success and, thus, some succeed beyond their abilities. And like Newton's third law of motion which holds that for every action there is an equal and opposite reaction, for every one who succeeds beyond his ability, there's another who fails to achieve the success she deserves.*

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<sup>11</sup> Speech delivered to the Women Barristers' Association, Melbourne, 9 June 1994.

<sup>12</sup> Above, n 1.

<sup>13</sup> Above, n 9.

Mary is also quoted as saying that (with one notable exception<sup>14</sup>) ‘the debate around appointment by merit occurs when, and only when, a woman is considered for a particular position or office. [This is] clear evidence of a belief that women are inferior and ought to be treated as such.’<sup>15</sup> In a similar vein, others have claimed that men are often appointed on ‘mateship rather than merit.’<sup>16</sup>

In her 1998 speech,<sup>17</sup> Mary noted that women are disadvantaged, not because of any lack of merit, but because others are ignorant of their ability. The women lawyers of Australia have moved to address that ignorance (so far as it relates to the Bar) by drafting the National Equality of Opportunity Briefing Policy and by encouraging briefing agencies to adopt and implement it. It has been said that the policy ‘is an expression of briefing practices initiated by Mary Gaudron when she was Solicitor General of NSW during the 1980s.’<sup>18</sup>

I am honoured to inform you that, following consultations between myself and the managing partners of Mallesons Stephen Jaques, that firm has announced today that it has become the first national major law firm to adopt the National Equality of Opportunity Briefing Policy. Australian Women Lawyers are confident that other private law firms and briefing agencies will now follow Mallesons’ example.

### **Mary as the Team Coach**

Before I close, I would like to say something about Mary’s contribution to the women lawyers of Australia in her capacity as coach of the team.

There are moments in a women lawyer’s professional life, when the pervasive male culture becomes almost overwhelming. It is at these times when we can look back at Mary’s speeches and find the courage to keep going.

I will give you some examples. In 2002<sup>19</sup> Mary said:

*If we are to achieve the measure of success we deserve and make our own distinctive contribution to the law and justice, we must do it by ourselves. We must assert our difference. We must reject patronage and professional structures and create new ones. And I believe we can.*

*Change is inevitable. We must make it work for us and in the interests of justice. We should seize the opportunities which now present themselves. We must refuse to be exploited, demeaned*

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<sup>14</sup> The Attorney General The Hon Daryl Williams AM QC MP insisted that the appointment of Justice John Dyson Heydon to the High Court was an appointment made on merit.

<sup>15</sup> Jane Wilkinson, ‘Like a bird of paradise among the carrion crows’ (Paper presented at ‘An exploration of women leaders in the media and education’, AARE conference 2000, University of Sydney, 6 December 2000).

<sup>16</sup> Ibid.

<sup>17</sup> Above, n 9.

<sup>18</sup> ‘Bar Brief’ (NSW), No. 108, November 2003.

<sup>19</sup> Above, n 1.

*and humiliated. We need only dare to be different and have confidence in ourselves.*

This theme was echoed in Mary's farewell speech to Australian Women Lawyers in January last year:

*People have said to me 'why did you retire?', well the truth is, the best chance of getting a second woman on the High Court was for me to go. So ... we muffed it!*

*But the next appointment to the High Court will certainly be a woman . . . there will be women, and there must be women because we do make a difference.*

*We wouldn't be members of the Women Lawyers Association, and we wouldn't be here tonight unless we wanted to make a difference. And I want to thank you all because I believe you do want to make a difference and you will make a difference.*

*I want to thank the young people who have a lot of courage, grit and determination and who I know are going to make it. Women who succeed are just ordinary women. Ordinary women are every bit as good as the extraordinary man. Keep fighting; the battle is far from won I say to you young people. But we are going to keep pushing on.*

Mary, we are pushing, we are shoving and we WILL dismantle the barriers.

## **Conclusion**

In conclusion, I will draw upon what others have said of Mary.

Jocelyne Scutt, Tasmania's Anti Discrimination Commissioner, said that at the heart of Mary's legacy is her recognition that women lawyers have to dare to be different, to risk ostracism by challenging ancient, male codes of conduct.<sup>20</sup>

Professor Jenny Morgan, a leading feminist lawyer academic at the Melbourne University Law School, said that Mary has been of enormous importance because she has been so fearlessly outspoken on women's issues. She said that Mary courageously attacked the 'dishonesty' of the standard explanation for women not being granted silk in greater numbers – that it was a question of time and merit – and has identified how patronage governed the advancement in the law.<sup>21</sup>

Finally, Justice McMurdo, the President of the Queensland Court of Appeal said:

*...[her] legacy as a judge is not limited to her weighty contribution to Australian jurisprudence in her judgments. She has provided a role model to all Australian women and men, but especially young*

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<sup>20</sup> Ibid.

<sup>21</sup> Fergus Shiel, 'A different kind of Justice', *The Age* (Melbourne), 9 December, 2002.

women and girls. She has been proof that no doors are permanently closed, even if sometimes they do not seem very open. She has played an important educative role, not only in her judgments and in her significant speeches in the outspoken and forceful support of women lawyers and women judges, but also by educating the six male members of the High Court of Australia, both by her presence and her interaction with them, on and off the Bench.<sup>22</sup>

I simply say – you have been a great career coach and mentor for all of us. You have shown us that we can succeed, and that we can succeed, not despite our differences, but because of them. We can succeed as women and be proud of it.

In her speech on the occasion of her swearing in as a Justice of the High Court of Australia on 6 February 1987, Mary said:

*Whilst I am the first woman appointed to this Court, my appointment is the result of the courage, determination and professionalism of women who made their mark in the profession in days when the value of women's contribution had to be established.*

*Of the many women lawyers who were instrumental in advancing the status of women within the legal profession, Dame Roma Mitchell's contribution merits particular acknowledgment. ... My constitutional duty is to all Australians but I hope that consistent with and by reason of the discharge of that responsibility, I shall be able to contribute as effectively to the status of women lawyers as has Dame Roma.<sup>23</sup>*

Mary, you have done that ... and much, much more.

On behalf of the women lawyers in Australia and around the world – I thank you.



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<sup>22</sup> Justice Margaret McMurdo – President of the Queensland Court of Appeal, 'Speech Proposing a Toast to Retiring Justice Mary Gaudron' (Speech delivered at the Australian Women Judges Dinner, Sydney, 22 February 2003).

<sup>23</sup> High Court of Australia Transcript, Friday, 6 February 1987, p.28.



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# Building a Feminist Model of Transitional Justice: Women in East Timor



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*'A luta continua!'*

One of the bravest but least known acts during the Timorese resistance to Indonesian occupation occurred in November 1998 when over 20 Timorese women told their stories of sexual violence to crowds of hundreds at a public meeting in Dili. The stories were collated into an English language book called 'Buibere',<sup>1</sup> which means 'woman' in Mumbai, the second most common Timorese language after Tetum. It was written only in English, published in Australia, and was intended as an advocacy document for the international community. Since 1975, there had only been four short (but searing) reports from international NGOs about gender based persecution of women in East Timor, and no official United Nations ('UN') comment.<sup>2</sup> But the persecution, as described first-hand in these collected testimonies, was intense and focused on rape, torture and inhumane acts.<sup>3</sup>

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\* I would like to acknowledge my supervisors at ANU Pene Mathew, Andrew Byrnes and Hilary Charlesworth for their contribution and support. I would also like to acknowledge the following academics who have assisted me by sharing their writing and ideas – Catherine Scott, Hayli Millar, Nicola Henry, Elizabeth Stanley and Anita Roberts. Special thanks to Dr Tamara Somers and Kealani Tosh for their invaluable assistance with editing this paper.

<sup>1</sup> *Buibere*. Rebecca Winters, East Timor International Support Centre, Darwin, Australia, 1999.

<sup>2</sup> Amnesty International, *Women in Indonesia & East Timor*, AI Index ASA 21/51/1995, 13 December 1995; Miranda E. Sissons, *From One Day to Another: Violations of Women's Reproductive and Sexual Rights in East Timor*, East Timor Human Rights Centre: Melbourne, 1997; George Aditjondro, *Violence by the State Against Women in East Timor: A Report to the UN Rapporteur on Violence Against Women, Including its Causes and Consequences*, East Timor Human Rights Centre: Melbourne, 1997; Torben Retbøll, editor, *East Timor: Occupation and Resistance*, International Work Group for Indigenous Affairs: Copenhagen, 1998. Chapter 11: "The Feminine Face of Resistance." by Catherine Scott.

<sup>3</sup> Acts reported by the victims in *Buibere* committed by the Indonesian army included:

- raping a woman daily for four months
- raping of pregnant women
- raping many women and girls while on routine marches through rural areas, including a gang-rape of a seven-year-old in a field;
- raping women in front of their husband or father as a method of interrogation and punishment for their support of the resistance movement;

In November 2001, after East Timor achieved independence, the local women's rights NGO Fokupers released a second version of Buibere in Tetum at a public event, with many of the women who contributed stories to the book present. The second edition is intended to formally respect and honour the contribution of East Timorese women to independence and the high price they paid during the Indonesian occupation.

But at that event, an international observer reported that advocate Sister Maria Lourdes made the following points in her speech:

*'A luta continua!' she said, and described how the women of East Timor were still second class citizens in their own land. 'A luta continua!' and she described how girls still don't receive the same educational or employment opportunities as men. A luta continua!' and she told of domestic violence still rampant, women still serving as slaves in their own homes, women bought and sold like commodities under the tradition of bride price, and male leaders still unwilling to accept East Timorese women as equals. Ovation after ovation shook the hall.<sup>4</sup>*

Given the violent crimes outlined in the book, Sister Lourdes' speech is striking in that this commemoration event did not mark the end of violence against East Timorese women, just a new phase despite their independence.

In this paper I wish to present a feminist analysis of how international law has been responding to the challenge of post conflict East Timor, concentrating on the transitional justice process due to finish in 2004, and what its limitations have been thus far. My specific inquiry is to ask what model of transitional justice would have best delivered the justice and reconciliation outcomes that East Timorese women demand? Have recent developments in international law regarding gender based persecution been of benefit to this process in East Timor?

I argue that despite some important efforts to include women and their experiences into the justice mechanisms established in East Timor

- 
- chaining women in the sun without water; or indoors for 20 days in a row without food or water;
  - burning and electrocuting women's flesh with cigarettes and cattle prods, especially the breasts and genitals;
  - "shooting" women with unloaded guns;
  - forcing women into a water tank together with deadly snakes and crocodiles;
  - forcing women into a tiny box lined with steel spikes that could be charged with electric current;
  - keeping women in cages lined with human bones;
  - killing a woman's husband and dismembering his body before her;
  - taking photos of women stripped of their clothing and beaten;
  - forcing or deceiving women to receive shots of the chemical contraceptive, Depo-Provera; and
  - forcing women to "marry" soldiers and face sexual and domestic enslavement for years and bear their children.

<sup>4</sup> Curt Gabrielson. 2002, January 1. "East Timorese Women's Fight Against Violence." *International Council World Affairs Newsletter*. Online: <http://www.etan.org/etanpdf/icwa/cg-13.pdf>

since 1999, the main reaction of Timorese women to the UN and international law has been disenchantment. Key decisions about the transitional justice model have been determined primarily by the transfer of power between male elites, with very little democratic consultation. Key questions over what type of society East Timor should be in the future have been determined by reference to a limited and gendered focus on the personal and economic security of men in the society. As a Timorese editorial stated in mid 2001:

*Women have played a critical role in East Timor's struggle for national independence. Both inside the country and in the diaspora, they courageously challenged the Indonesian invasion and occupation, as well as the international support that made these possible. East Timorese women have survived Indonesian military campaigns of violence, including forced sterilization, rape and sexual slavery. They have shown themselves as leaders, though they are often pushed aside in political discussions. And women have continued to struggle for equality throughout the United Nation's administration of East Timor. Unfortunately, women's liberation is not a natural outcome of national liberation.*<sup>5</sup>

The main problems identified by the Timorese women analysed in the editorial include the following:<sup>6</sup>

- Impact of poor economic and social conditions, including bars to property ownership;
- Failure of domestic and international law to adequately address gender based persecution from the Indonesian occupation in 1975 to the present;
- Failure of policy or law to provide acknowledgment or compensation for survivors of gender-based persecution or the children born of rape;

<sup>5</sup> "Editorial: Women and the Reconstruction of East Timor." *The La'o Hamutuk Bulletin*, Vol. 2, No. 5: August 2001.

<sup>6</sup> Note the following key documents produced by Timorese women as summarised by Torben Retboll, "The Women of East Timor" 21 May 2002:

- Fokupers, "Gender-based Human Rights Abuses during the Pre and Post-Ballot Violence in East Timor," January-October 1999, issued June 2000.
- "Statement from the First Congress of Women of Timor Loro Sae," Dili, 17 June 2000.
- REDE: Feto Timor Loro Sae, Timorese Women's Network, Statement to the Donors Conference for East Timor, Brussels, 5-6 December 2000. Internet: [www.pcug.org.au](http://www.pcug.org.au).
- REDE: Feto Timor Lorosae, Timorese Women's Network, Briefing Paper to Donors Meeting, Canberra, June 2001. Internet: [www.geocities.com/etngoforum](http://www.geocities.com/etngoforum).
- "Women's Charter of Rights in East Timor," *La'o Hamutuk Bulletin*, vol. 2, no. 5, August 2001. Internet: [www.etan.org/lh](http://www.etan.org/lh).
- Statement from REDE, Feto Timor Lorosae, On the occasion of the UN SC special session on the role of women in maintaining international peace and security, Dili, 24 October 2000.
- "East Timorese woman addresses UN Security Council," 30 October 2001. Internet: [www.etan.org](http://www.etan.org)

- Failure of domestic law to protect women from the escalation of domestic violence post independence;
- Obstacles to participation in pre and post independence decision making, including representation in formal elections; and
- Obstacles to participation in key decisions about transitional justice mechanisms, such as the draft amnesty law.

The first half of this paper reviews the real progress that has been made in the separate disciplines of international law and transitional justice, but notes that this has not yet translated into concrete gains for Timorese women despite the intention of Security Council Resolution 1325.<sup>7</sup>

Crucial precedents have been set regarding the definition and prosecution of gender based violence under international criminal law, but there have been no such breakthroughs in the area of State obligations to punish such violations, at least in the case of East Timor. As described by M Cherif Bassiouni, transitional justice models may have moved on slightly from the crude Realpolitik position of openly bartering justice for peace (generally in the form of a political settlement) but the substantive outcomes of justice mechanisms are still extremely selective.<sup>8</sup> Ultimately, despite outward appearances, Hamish McDonald has argued that justice for East Timor could be bargained away by the international community in return for the cooperation of the large, liberal Muslim State of Indonesia in the 'war against terror'.<sup>9</sup>

The danger for East Timorese women is what I term the 'changing the curtains' phenomena – fundamental changes in the sovereignty of the State in the form of independence may not result in many changes to the basic conditions of women's lives, or their potential to claim their rights, as described by Sister Lourdes above.

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<sup>7</sup> Christine Chinkin notes that "Addressing post-conflict reconstruction in the context of a peace agreement without 'asking the woman question' means that those involved in the peace process failed to take seriously the call by the Security Council in its Resolution 1325 to 'all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective'. To do this they must give attention to two separate concerns: gender balance in the peace process, and gender mainstreaming in the negotiation of the substance of the agreement." "Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women" Prepared by Christine Chinkin, Consultant to the Division for the Advancement of Women EGM/PEACE/2003/BP.1 31 October 2003 United Nations Division for the Advancement of Women (DAW) Expert Group Meeting on "Peace agreements as a means for promoting gender equality and ensuring participation of women – A framework of model provisions" 10-13 November 2003 Ottawa, Canada. p.9.

<sup>8</sup> "Accountability for Violations of International Humanitarian Law." *Post-Conflict Justice*. Ed M. Cherif Bassiouni. Transnational Publishers: New York. 2002. p.7.

<sup>9</sup> Hamish McDonald "Introduction", *Masters of Terror*, Australian National University, Canberra, p.5. Note the recent editorial in *The Wall Street Journal*, February 11, 2004 "Review & Outlook: The Wiranto Leak". Note also Pace, J & S. Harris Rimmer. 2003. "Hamstrung Justice" *Alternative Law Journal* 28:3, 143.



As to why this state of affairs exists, I note recent scholarship into the gendered nature of international law, which provides some insights and areas for reform. Feminist critics of international law have argued that for the most part, international law has proven strongly resistant to a transformation that would meet the experience of women. Within the context of international criminal law, Charlesworth and Chinkin examined recent developments in the area and concluded that although precedents in prosecuting gender based crime might mean that 'the silence about the suffering of women in all forms of conflict has been broken', there were still serious shortcomings.<sup>10</sup>

These insights are particularly important in trying to explain why, even if there is a lack of formal justice for all Timorese, women in that society may receive no overall benefit from independence compared to men, despite their contribution to achieving that independence.

In the second half of the paper I advance a radical feminist model for transitional justice. If we can marry the understanding of women's experience of conflict with peace agreements and transitional justice, there may be potential for transformation of the society as a whole, instead of just making small gains for women within the existing structure. There is an opportunity, and I would argue a duty, for the role of international law in this transitional setting to be transformative in nature, both in terms of promoting a normative model of democracy and human rights, and promoting women's integral part in that democracy. To promote new thinking and debate, I have identified ten key elements of such a 'transformative' model, illustrated by examples from the experience of East Timorese women.

The ten key elements are:

1. Proper documentation and recognition of women's roles in the conflict
2. Due consideration of gender persecution in any humanitarian intervention by the international community
3. A gender sensitive peace agreement
4. Women's input into transitional justice decisions
5. Prosecutions of gender based persecution according to international law within the transitional justice model adopted, including traditional law systems
6. Political participation of women
7. Improvements of women's basic living conditions in annual Human Development Indicators

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<sup>10</sup> Charlesworth, H. and Chinkin C. 2000. *The Boundaries of International law: A feminist analysis*. Mellan Schill Studies in International Law, Manchester UP; p.330.

8. Targeted programs to address women survivors of violence, and children born of rape
9. Women's participation in non legal transitional justice mechanisms – culture, faith, arts, museums.
10. Strong levels of women's participation in civil society, and strong engagement of civil society in public decision making

The UN has now defined a possible end point to a transitional context, even beyond the attainment of democratic representation, which would equate to a good society. The elements agreed upon for a culture of peace were a society characterised by human rights, tolerance, democracy, free flow of information, non violence, sustainable development, peace education, and equality of men and women. The above eight elements contribute to that goal.<sup>11</sup>

Why have I selected East Timor as a case study? Primarily because in chronological terms, the crisis in 1999 came after ground breaking precedents had been set in the area of international criminal law in the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) but before the jurisdiction of the new International Criminal Court (ICC) could be engaged. It is cited everywhere as a 'UN success story', a rare humanitarian intervention by the Security Council in a timely manner, a successful peace keeping mission led by Australia, a UN Transitional Authority with a clear mandate that got results, an election where the majority voted without violence. While the assessments are superficial, East Timor did have positive elements to its transition to independence, which should have assisted the new State to have more choices at its disposal.

However, I also chose East Timor because of its stark contrast with Bosnia in terms of awareness in the international community over the issue of gender persecution. Systematic rape, including rape hotels and camps, forced pregnancies and torture comparable in every way to Bosnia were common features of human rights violations in Timor for 25 years. Assertions of massive violations of women's rights are not disputed and yet hardly any hard data is available, and the anecdotal evidence has made almost no impact on the international community. The common picture in the Western mind of East Timor focuses on the post ballot deportations, violence and scorched earth policy in 1999. Part of the purpose of this paper is, in this respect, consciousness raising.

### **Challenges to Transitional Justice Theory**

Transitional justice is an emerging area of research that gathered momentum in the 1990s, mainly produced by US political scientists. It has not attracted much interdisciplinary analysis from the field of

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<sup>11</sup> Press Conference on Hague Appeal for Peace 1999 (United Nations, April 6, 1999).

international law, nor explicitly feminist critiques, despite the obvious linkages with international criminal law.<sup>12</sup>

Transitional justice has two separate but interrelated meanings. The first refers to accountability mechanisms at a point of transition for those accused of committing human rights violations during the prior regime, including:

- (a) international prosecutions;
- (b) intentional and national investigatory commissions;
- (c) truth commissions;
- (d) national prosecutions;
- (e) national lustration mechanisms;
- (f) civil remedies; and
- (g) mechanisms for the reparation of victims.<sup>13</sup>

There have been several key precedents set in the past twenty years relating to international prosecutions and particularly reparation for victims, with the apogee being the International Criminal Court (ICC), which combines elements of both restorative and retributive justice. The second is the efforts to restore a justice sector to a society where the rule of law has broken down or weakened as a result of conflict. The goal of justice sector reconstruction has not received much attention or analysis until very recently. As the 'Responsibility to Protect' report summarises:

*...Increasingly, and particularly from the time of the UN Transitional Authority in Cambodia (UNTAC) in the early 1990s, there has been a realization in UN circles and elsewhere about the importance of making transitional arrangements for justice during an operation, and restoring judicial systems as soon as possible thereafter. The point is simply that if an intervening force has a mandate to guard against further human rights violations, but there is no functioning system to bring violators to justice, then not only is the force's mandate to that extent unachievable, but its whole operation is likely to have diminished credibility both locally and internationally.<sup>14</sup>*

The report notes that NGOs have developed adaptable 'justice packages,' including a standard model penal code, which can be applied immediately to ensure protection of minorities and allow intervening

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<sup>12</sup> The exception to this is the important collection *Post-Conflict Justice*. Edited by M. Cherif Bassiouni. Transnational Publishers: New York. 2002.

<sup>13</sup> "Accountability for Violations of International Humanitarian Law." *Post-Conflict Justice*. Ed M. Cherif Bassiouni. Transnational Publishers: New York. 2002. p.27.

<sup>14</sup> *The Responsibility To Protect*. Report of the International Commission on Intervention and State Sovereignty December 2001 p.42. Online; <http://www.dfait-maeci.gc.ca/iciiss-ciise/pdf/Commission-Report.pdf>.

forces to detain persons committing crimes. This may prevent a 'justice gap' for future conflicts.

### **Developments in State Practice**

Since 1945 there have been some 250 conflicts all over the globe, which have caused between 70 and 170 million casualties.<sup>15</sup> Yet only a handful of people have been prosecuted. In 1992, the Security Council established the Commission of Experts to investigate crimes arising out of the conflict in the Former Yugoslavia, headed by expert M. Cherif Bassiouni. This was the first truly international effort to investigate with the intent to prosecute international crimes. Since then, the International Tribunals for the Former Yugoslavia and Rwanda were established, and then the International Criminal Court in 2002, along with a plethora of tribunals and truth commissions around the globe.

Bassiouni himself identifies that the impetus for change was the end of the Cold War and the lessening in impact of Realpolitik proponents who saw justice as an impediment to peace, of use only as a bargaining chip to be bartered away for a better settlement.<sup>16</sup> Other commentators have noted the changing nature of news media, the rise of the human rights NGO sector, precedents in international criminal law, and the changing nature of conflict to mainly civil wars with high civilian casualties.<sup>17</sup>

Bassiouni believes that the political realist opposition to impunity measures now comes in the form of arguing that every conflict is different and should be treated differently, which means that there are no agreed guidelines as to minimum measures to be taken to avoid impunity. Certain conflicts – predominantly those with very low political value to the international community – are therefore left completely unaddressed. This was the case in Ethiopia, despite over one million casualties under the Mengistu regime.<sup>18</sup>

The major criticism levelled at the post 1992 mechanisms is that the international tribunals such as the ICTR and ICTY are incredibly expensive, slow, badly managed by the UN and do not contribute, or can even undermine, efforts to restore the rule of law in the affected country. On the other hand, non international efforts are likely to be stymied by the violating parties still within the country until international interest dies away.<sup>19</sup>

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<sup>15</sup> "Introduction." *Post-Conflict Justice*. Ed. M. Cherif Bassiouni. Transnational Publishers: New York. 2002. p.xv.

<sup>16</sup> *ibid* , xv.

<sup>17</sup> Neil J Kritz. "Progress and Humility: The Ongoing Search for Post-Conflict Justice" *Post-Conflict Justice*. Ed. M. Cherif Bassiouni. Transnational Publishers: New York. 2002. p.56

<sup>18</sup> M. Cherif Bassiouni "Introduction." *Post-Conflict Justice*. Ed. M. Cherif Bassiouni. Transnational Publishers: New York. 2002, xvi-xvii.

<sup>19</sup> Simon Chesterman, *Justice under international administration: Kosovo, East Timor and Afghanistan*, (2002) International Peace Academy

<[http://www.ipacademy.org/PDF/Reports/JUSTICE\\_UNDER\\_INTL.pdf](http://www.ipacademy.org/PDF/Reports/JUSTICE_UNDER_INTL.pdf)> at 16 April 2003.

An important insight into the recent developments has been the idea of primary and secondary audiences of transitional justice processes, advanced by Neil J Kritz. He posits that international efforts can be often more reflective of Western guilt over tragic failures to intervene, such as the Rwanda tribunal located in Arusha administered by The Hague than efforts that will reconstruct the rule of law in that State as well as avoid impunity.<sup>20</sup> (Notably, there may be a wide variety of circumstances, including timing, the strategic and economic impact of the conflict, as well as the capacity of citizens in a country to engage the international community which may lead to the engagement of the international community.)

Kritz notes that the primary audience should be the people of the society who lived through and suffered in the conflict, victims, bystanders and perpetrators. The international community should be only a secondary audience, who might hope for jurisprudence, deterrence value and a better understanding of the conflict, which will aid early warning systems.<sup>21</sup> In East Timor we see a stark contrast in the audience evaluation of the mechanisms, between an initially rosy view by international commentators, and a disenchanted view by Timorese civil society who still demand an international tribunal.

Generally the political debates around transitional justice still reflect differing Realpolitik versus anti impunity views regarding the 'trade ability' of justice outcomes, the selective gaze and resources of the international community for justice outcomes, and who is the key audience for those outcomes. The underlying debate is over what is the proper role of law, ie, is political change a pre condition to development of the rule of law or vice versa?

### **Developments in International Law**

While the transitional justice debates are characterised by trade-off paradigms, the conception of the role of transitional criminal justice is generally that of punishment only, in classic Nuremberg style. This conception is mainly due to the characterisation of international crimes as *jus cogens* norms of international law; peremptory and non derogable norms which are fundamental to the interests of the international community.<sup>22</sup> All States have a joint legal interest in the protection of *jus cogens* norms, because they are crimes that threaten

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<sup>20</sup> M. Cherif Bassiouni. "Introduction." *Post-Conflict Justice*. Ed. M. Cherif Bassiouni. Transnational Publishers: New York. 2002. p.xv., xviii.

<sup>21</sup> "Progress and Humility: The Ongoing Search for Post-Conflict Justice" *Post-Conflict Justice*. Ed. M. Cherif Bassiouni. Transnational Publishers: New York. 2002. p.59.

<sup>22</sup> See Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63, 67.



the peace and security of humankind and shock the conscience of humanity.<sup>23</sup>

However, while the legal norms are, in my view, sufficiently established, there has not been the political will to implement them. Jus cogens norms have been traded by States in transition with the general acceptance of the international community, as with the amnesties offered by the South African Truth and Reconciliation Commission in exchange for full disclosure.<sup>24</sup> It remains to be seen what the outcome would be if the ICC wanted to prosecute a perpetrator who was the subject of an amnesty through a truth commission process.<sup>25</sup>

A key development in international law is that restorative justice has been codified under international law in the Rome Statute but not in time to benefit East Timor. It incorporates the Joinet<sup>26</sup> and Van Boven Bassiouni<sup>27</sup> principles, a synthesis of international law and practice on the right to reparations for victims of gross violations of human rights and humanitarian law. Restorative justice measures provided for in the Rome Statute include reparations to victims,<sup>28</sup> establishment of a trust fund for the benefit of victims of crimes within the jurisdiction of the Court,<sup>29</sup> and establishment of victims and witnesses unit within the Court Registry.<sup>30</sup>

### **Developments in Transitional Justice Theory**

The main theoretical development in transitional justice debates has been the breaking of the simplistic dichotomy between 'peace' and 'justice'. Ruth Teitel has advanced the theory that transitional criminal justice 'does not simply advance the conventional purposes of punishment in a rule of law state' but that the law in a transitional period holds an 'independent potential for effecting transformative

<sup>23</sup> *Barcelona Traction, Light and Power Co. Ltd (Spain v Belgium) (Second Phase)* [1970] ICJ Rep 3, paras 33-4. Note M. Cherif Bassiouni. "Accountability for Violations of International Law." *Post-Conflict Justice*. Ed. M. Cherif Bassiouni. Transnational Publishers: New York. 2002, p20, fn 85.

<sup>24</sup> Priscilla Hayner *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2002) 99. See further Anita Roberts, *The Two-Track Model of Transitional Justice in Timor Leste: Is it working?* *The Australian Journal of Asian Law*. Vol 5, No.3 December 2003; pp. 260-289..

<sup>25</sup> See further Anita Roberts, *Transitional Justice in East Timor*. Honours Thesis, Faculty of Law, ANU 2003. p.14

<sup>26</sup> UN Commission on Human Rights, Special Rapporteur on Amnesties, Louis Joinet, *The Administration of Justice and the Human Rights of Detainees*, ESCOR, 48th Sess., Annex II, U.N. Doc. E/CN.4/Sub.2/1996/18.

<sup>27</sup> UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur, Theo Van Boven, *Study Concerning The Right To Restitution, Compensation And Rehabilitation For Victims Of Gross Violations Of Human Rights And Fundamental Freedoms*, U.N. Doc. E/CN.4/Sub.2/1992/8 (interim report); E/CN.4/Sub.2/1993/8 (final report); E/CN.4/sub.2/1996/17 (amended principles). See also UN Commission on Human Rights, Independent Expert, Cherif Bassiouni, *Report on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, UN Doc E/CN.4/2000/62.

<sup>28</sup> *Rome Statute* art 75.

<sup>29</sup> *Rome Statute* art 79.

<sup>30</sup> *Rome Statute* art 43.6.

politics' and 'liberalising' change. She suggests that there is no universal norm but rather, that transitional justice measures may be 'partial, contextual and multiple'.<sup>31</sup> Teitel's solution is a spectrum of transitional justice options ranging from mechanisms critical of the prior regime, to those that maintain the pre existing legal order; each tailored to the legacy of the injustice, the legal culture, the dynamics of the transition and the expectations of the affected people.<sup>32</sup> The solution may not sound particularly radical but in fact what Teitel is suggesting is that the outcomes of transitional justice should be judged by how much they contribute, not to peace or justice however defined, but to democracy. I see the benefit of this theory as focusing on the participation and capacity of citizens to contribute to decisions about transitional justice, and opens consideration of whether there is a right to democracy under international law.

The weakness in Teitel's thesis is that the international community's commitment to democracy in a transitional justice context has often been shallow, usually only stretching to the hasty holding of elections. Her theory therefore begs the question of who makes the decisions about what constitutes democracy, and whether an action contributes to it. It also does not take into account Bassiouni's bottom line approach to transitional justice – that there must be minimum standards of accountability for all global human rights violations to combat impunity for international crimes.

### **Feminist Challenges to International Law and Theory**

The prosecution of gender based persecution in international humanitarian law is also an emerging field, but has not yet been married with transitional justice debates. This is the intent of this paper, as I argue this approach could bring the benefit to the debate of more informed and therefore better quality policy decisions.

As stated, expert commentators such as Hilary Charlesworth and Christine Chinkin note that international law itself is gendered and has been resistant to attempts to transform it into a legal system that can properly deal with women's experience. The limitations of international law include the fact that war crimes and crimes against humanity are required to be wide spread and systematic, and as the authors point out 'although the rapes and sexual violence in the former Yugoslavia have been perceived in such terms, this may not always be the case. There is a tendency to regard the sexual abuse in the former Yugoslavia as exceptional and not as a regularly occurring part of armed conflict.'<sup>33</sup> The UN found that sexual violence was widespread and systematic in

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<sup>31</sup> Bronwyn Leebaw, 'Book Review: Transitional Justice by Ruti Teitel' (2001) 49 *American Journal of Comparative Law* 363, 364.

<sup>32</sup> Cherif Bassiouni, 'Searching for Peace and Achieving Justice: the Need for Accountability', (1996) 59(4) *Law and Contemporary Problems* 9, 23.

<sup>33</sup> *ibid*, 333.

East Timor,<sup>34</sup> but this finding did not elicit the same response from the international community as the same type of offences in Bosnia.

Charlesworth and Chinkin also point to an inadequacy of international legal remedies that provide long term, financial and practical assistance, and that international law only emphasises women's sexual and reproductive identities and harms inflicted by opposing forces.<sup>35</sup> This proposition is again borne out by the testimony of women in April 2003 to the 'Women and Conflict National Public Hearing' by the Commission on Reception, Truth and Reconciliation in Timor Leste (CAVR):

*Don't just drive around in your big new cars, or fly around the world. In villages in all thirteen districts there are so many widows and orphans. I ask you to do something to help them in their daily lives.*<sup>36</sup>

Notably the definition of international crimes in Timor's domestic jurisdiction of the Serious Crimes Court is taken almost verbatim from the subject matter jurisdiction of the Rome Statute of the International Criminal Court (ICC), but the compensation provisions were not included.<sup>37</sup>

Another important insight has been the continuum of violence in women's lives from the private to the public sphere (aka 'changing the curtains'). This phenomenon has been noted by the Independent Experts' Assessment on the Impact Conflict on Women and Women's Role in Peace building commissioned by UNIFEM for the Secretary-General. They note that the violence women face during conflict 'does

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<sup>34</sup> Economic and Social Council Distr. GENERAL E/CN.4/2001/73 23 January 2001 Original: ENGLISH COMMISSION ON HUMAN RIGHTS Fifty-seventh session Item 12 (a) of the provisional agenda INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE VIOLENCE AGAINST WOMEN Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45 Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000)

<sup>35</sup> *ibid*, 334.

<sup>36</sup> Commission on Reception, Truth and Reconciliation in Timor Leste (CAVR). 2003, 28-29 April. *Women and Conflict National Public Hearing*. Online: [www.jsmp.minihub.org/News/6\\_05\\_03.htm](http://www.jsmp.minihub.org/News/6_05_03.htm)

<sup>37</sup> A spokesperson for the Commission has justified the need to pay special attention to women in their own hearings using the language of cultural feminism, as follows: "Because women are socially constructed as primary caretakers and nurturers of children, guardians of the hearth, healers of those in pain, their social identity is derived from their biological roles as those who give birth and nurse. When they are sexually violated, it is not only their bodies that suffer; their very identity as women is attacked. This, then, is a part of women's suffering. Many women continue to suffer physical trauma -- they cannot give birth or only do so painfully, their sexual organs are scarred or damaged. But also damaged is their sense of self. How can they come to accept themselves as whole women if they or others feel their sexual abuse has soiled their reputation and moral character for life? How can they heal?" (Campbell-Nelson, 2003).

not arise solely out of the conditions of war, it is directly related to the violence that exists in women's lives during peacetime.<sup>38</sup>

Cynthia Cockburn, however, notes that the violence in war against women is differentiated to violence against men; 'it is perhaps in brutality to the body in wars that the most marked sex difference occurs. Men and women often die different deaths and are tortured and abused in different ways, both because of physical differences between the sexes and because of the different meanings culturally ascribed to the male and female body.'<sup>39</sup>

Feminist commentators have suggested three explanations for the common rape of women in war. First is the booty principle, women as spoils of war when victory is declared. Second, while rape serves to humiliate enemy women, the target is also the masculinity of the enemy men, which is particularly marked in ethnic conflicts such as Bosnia.<sup>40</sup> Notably Cockburn theorises that when men too are raped, sexually humiliated, or their genitalia mutilated, the act is no less gendered as it is their masculinity that enemy men are deriding. The third explanation is male bonding theory, that rape (particularly gang rape and systematic rape) is given as a privilege to soldiers by officers, and engaged in by the rapists themselves, because it promotes soldierly solidarity.<sup>41</sup>

These explanations all posit the male as the object of the perpetrator's gaze, even while the woman is the victim. The fourth explanation must be that women are often agents in conflict themselves, and are targets because of their own political or strategic importance, but their punishment is often gendered to punish them in the most effective and demeaning way the enemy can imagine. As Cockburn notes, 'the instruments with which the body is abused in order to break the spirit, tend to be gender differentiated, and in the case of women, to be sexualized. Political violence and armed conflict are not distinct – one spills into the other. Nor is it necessarily helpful to identify discrete moments like 'before', 'during' and 'after' conflict. Violence flows through all of them, and peace processes may be present at all moments too.'<sup>42</sup>

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<sup>38</sup> Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building - Elisabeth Rehn & Ellen Johnson Sirleaf

<sup>39</sup> Cynthia Cockburn. "Gender, Armed Conflict and Political Violence: Background Paper". The World Bank, Washington DC, June 10<sup>th</sup> & 11<sup>th</sup> 1999.

Online: <http://www.worldbank.org/gender/events/Cockburn2.doc>

<sup>40</sup> Meznaric 1994, quoted by Cynthia Cockburn. "Gender, Armed Conflict and Political Violence: Background Paper". The World Bank, Washington DC, June 10<sup>th</sup> & 11<sup>th</sup> 1999.

Online: <http://www.worldbank.org/gender/events/Cockburn2.doc>

<sup>41</sup> Ruth Seifert 1995:59, quoted by Cynthia Cockburn. "Gender, Armed Conflict and Political Violence: Background Paper". The World Bank, Washington DC, June 10<sup>th</sup> & 11<sup>th</sup> 1999. Online: <http://www.worldbank.org/gender/events/Cockburn2.doc>

<sup>42</sup> Cynthia Cockburn. "Gender, Armed Conflict and Political Violence: Background Paper". The World Bank, Washington DC, June 10<sup>th</sup> & 11<sup>th</sup> 1999.

Online: <http://www.worldbank.org/gender/events/Cockburn2.doc>

The gender sensitive definitions of persecution for offences in the Rome Statue are a considerable achievement given that the first precedent for rape as an international crime was set less than five years ago in the ICTY. It flowed from the view of a strong civil society movement that what was mostly needed was not new offences under international criminal law, but a more gender sensitive interpretation of those offences. For example, the same *actus reus* of rape could be charged as a crime against humanity, genocide, torture, or a war crime depending on the *mens rea* of the perpetrator. The goal was to rebut the notion that rape was a 'by product', a domestic crime, not an objective or weapon of armed conflict.<sup>43</sup> Given the limited scope of this paper, I will elaborate only on the imperative need in a transitional justice setting for proper prosecution of gender based persecution as *jus cogens* crimes, especially torture.

The UN human rights mechanisms were slow to deal with the issue of gender based persecution as torture. Professor Kooijmans, introducing his 1992 report to the Commission on Human Rights, noted that '[s]ince it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.'<sup>44</sup>

In 1994 the Commission on Human Rights 'invite[d] the Special Rapporteur to examine questions concerning torture directed disproportionately or primarily against women and conditions conducive to such torture, and to make appropriate recommendations concerning prevention of gender specific forms of torture'.<sup>45</sup> In his report to the fifty first session of the Commission on Human Rights in 1995, the Special Rapporteur addressed gender specific forms of torture.

Sir Nigel Rodley found that methods of torture involving sexual abuse may be characterized as essentially gender based. He noted that although the human rights instruments concerning torture do not refer specifically to gender based violence, several instruments in the humanitarian law context contain provisions related to proscription of torture against women.<sup>46</sup>

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<sup>43</sup> See generally Kelly Askin. 1997. *War Crimes Against Women: prosecution in International War Crimes Tribunals*. Kluwer Law International: The Hague. Appendix A.

<sup>44</sup> E/CN.4/1992/SR.21, para. 35.

<sup>45</sup> See paragraph 5 of CHR resolution 1994/37.

<sup>46</sup> For example, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict (General Assembly resolution 3318 (XXIX)) provides that "[a]ll forms of repression and cruel and inhuman treatment of women and children, including ... torture ... committed by belligerents in the course of military operations or in occupied territories shall be considered criminal." Article 27 of the Fourth Geneva Convention provides that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault" and applies to women who are "protected persons" within the meaning of article 4 of the Convention. Article 76 (1) of Protocol I and article 4 (2) (e) of Protocol II also prohibit rape, enforced prostitution and indecent assault. Article 4 (2) (e) adds the prohibition of



He also noted that the practise of rape and other forms of sexual assault were reported in many countries to be common means of torture:

*Although allegations of sexual abuse were occasionally received wherein men were the target, the vast majority of such allegations concerned women. When sexual abuse occurred in the context of custodial detention, interrogators were said to have used rape as a means of extracting confessions or information, to punish, or to humiliate detainees. In some instances, the gender of an individual constituted at least part of the very motive for the torture itself, such as in those where women were raped allegedly for their participation in political and social activism... Finally, women are sometimes tortured as surrogates for the real target, who may be the victim's spouse or family member or friend.<sup>47</sup>*

Due to the trauma of the victim, the social stigma attached to rape and fear of ostracism from her family and inadequate concern of authorities, women were reported to be less likely to seek redress by reporting rape to the authorities, increasing the likelihood of impunity for a torturer. The Special Rapporteur endorsed the CEDAW recommendation No. 19 for gender sensitive training of judicial and law enforcement officers and other public officers, and in addition, he recommended that female security personnel be present during the interrogation of women detainees.

Remarkable and valuable as this UN recognition was, prosecutions for gender related crimes in international criminal law have been even more revolutionary. Both the ICTY and ICTR have successfully indicted, prosecuted and convicted defendants for gender based crimes for the first time in history, including rape as a crime against humanity and an element of genocide in the Akayesu case before the ICTR,<sup>48</sup> and the Celebici, Furundzija and Kunerac cases relating to rape as torture, sexual slavery and sexual acts as inhumane treatment before the ICTY.<sup>49</sup> Article 5(g) of the new International Criminal Court Statute explicitly enumerates rape as a crime against humanity. A unanimous Security Council Resolution 1325 (2000) was passed on the topic of 'Women, Peace and Security' urging the Secretary General to carry out a study on the impact of armed conflict on women and girls, and the

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"outrages upon personal dignity, in particular humiliating and degrading treatment ...". The Committee on the Elimination of Discrimination against Women (CEDAW), in general recommendation No. 19 contained in its report to the General Assembly of 24 June 1992 (A/47/38), enumerated the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment as among those rights impaired by or nullified by gender-based violence under international law and constituting discrimination within the meaning of the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>47</sup> E/CN.4/1995/34, paras. 15-24).

<sup>48</sup> *Prosecutor v. Jean-Paul Akayesu*, 2 September 1999, ICTR-96-4-T.

<sup>49</sup> *Prosecutor v Dragoljub Kunerac, Radomir Kovac and Zoran Vukovic*, Judgement, Case No. IT-96-23/1-T, 22 February 2001, *Prosecutor v. Anto Furundzija*, 10 December 1998, ICTY-95-17/1-T.

role of women in peace building. There have been significant decisions by regional human rights courts, such as *Mejia Egocheaga v. Peru* in the Inter American Commission of Human Rights.<sup>50</sup> It is these developments to which Charlesworth and Chinkin refer when they state 'the silence about the suffering of women in all forms of conflict has been broken'.<sup>51</sup>

I submit that the model of transitional justice employed in East Timor, implemented since these developments, have not been as influenced by them as Timorese civil society would have hoped. My argument follows from the following propositions. Firstly, as stated, the mounting evidence is that women in armed conflict, (and certainly women in East Timor) experience violence as a continuum, from peace to war and back again. Although the acts of persecution may move from the public to private realms of the State, and from the mandate of national to international law, the experience of violence remains a constant. Evidence suggests that reports of domestic violence increase after the end of conflict,<sup>52</sup> which is again the documented case of East Timor. Women's experience of domestic violence should be seen as relevant to the proper evaluation of their needs in a post conflict situation. This was a key recommendation of the Independent Expert Assessment Report, *Women, War, Peace*.<sup>53</sup>

Secondly, regardless of how the offence is legally classified, many serious acts of gender based violence, including domestic violence can have the psychological effect of torture. Torture, as a crime, has a lasting effect on its victims, that of silencing and alienating them from communal support. Psychological impunity created by torture can have disproportionately negative effects on women, already disadvantaged in power structures.<sup>54</sup>

If both of these propositions are accepted, it means the State and the international community should focus its efforts on successful prosecutions of perpetrators so that societal norms can be rebuilt, and on providing support, opportunities for truth telling and compensation for victims in the transitional period so that they can rebuild their lives and contribute to society. Currently, because the nature and consequences of gender based violence are often not fully understood or selectively acknowledged by the international community, women face the real prospect of not benefiting in any material sense from the regime

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<sup>50</sup> (1996) 1 Butterworths Human Rights Cases 229. See Charlesworth & Chinkin, 2000 p.330-2

<sup>51</sup> 2000: 330.

<sup>52</sup> Ruth Siefert, "War and Rape: A Preliminary Analysis" in A. Stiglmeier (ed), *Mass Rape: The War Against Women in Bosnia-Herzegovina*. Lincoln, University of Nebraska Press, 1994. p.66.

<sup>53</sup> *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* - Elisabeth Rehn & Ellen Johnson Sirleaf. p. 18.

<sup>54</sup> Note Susan Opatow, "Psychology of Impunity and Injustice: Implications for Societal Reconciliation." *Post-Conflict Justice*. Ed. M. Cherif Bassiouni. Transnational Publishers: New York. 2002, p206.

change or from the transitional justice mechanisms unless their needs are consciously and carefully addressed.

My argument is that a feminist methodology is a very useful way to examine transitional justice if what we are hoping to achieve is laws and policies which are transformative in nature and lead to democratic participation. 'Asking the woman question' and examining gender relationships forces the eye towards patterns of violations, and hopefully towards solutions and insights that will benefit the entire society.

It is easy to empathise with President Xanana Gusmão in his dilemmas over pursuing the best future for his country. Put crudely, East Timor is poor, with a giant, hostile neighbour and vulnerable borders. He made a statement in 2002 that 'We must do our best to eradicate all sentiments of hatred, of revenge. If you still feel like this, then you are living with the ghosts of the past.' Bishop Belo countered: 'I hear the voices of widows, the complaints of raped women, of orphans. They don't like to live together and meet in the street their perpetrators.'<sup>55</sup> The 'ghosts of the past' for many women are living threats. These contrasting attitudes, State versus Church, male versus female, capture neatly one of the key dilemmas of transitional justice – who is to bear the cost of the compromises made for peace?

The question cannot be answered by a democratic society, or a society that hopes to become democratic without properly considering the perspective of women. The society and the international community must in the first instance know what those costs have been for the women of Timor. There are three clear points that arise from this analysis. First, gender-persecution in Timor has not been given the attention under international law that it deserves. Second, there are two contrasting narratives around gender persecution where it is recognised – one of victims, and one of survivors and fighters in the independence struggle. Third, the amnesty debate has not thus far properly addressed the concerns of Timorese women.

The other reason to focus on women during this period is because there is a window of opportunity to gain rights for women in Timor. As Sheila Meintjes has expressed it:

*Women do gain from the shifts in gender relations during the war, they may lose their wartime gains in the cusp, in the period between war and peace. Thus the transition from war to peace emerges as a critical moment in the shifting terrain of gender power.<sup>56</sup>*

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<sup>55</sup> Associated Press. 2002, May 18-19 "Revenge is low on the list of priorities", *The Weekend Australian*, p. 15.

<sup>56</sup> Sheila Meintjes, 'War and Post- War Shifts in Gender Relations' in *The Aftermath: Women in Post-Conflict Transition*, 64.

When Natércia Godinho Adams addressed the UN Security Council, she pointed out that the Indonesian occupation had not wholly been a disaster for the women of East Timor, it had also created a number of new opportunities for them:

*...While crisis creates serious problems for women it also creates opportunities. Men's and women's roles changed substantially during the years of conflict and social disruption since 1974. A significant number of women assumed active roles in the clandestine liberation front and the armed resistance. They were soldiers, they smuggled medication, food, armament, and information to the resistance movement hiding in the mountains.*

*In the absence of the male household head, women assumed new responsibilities in traditional male income generation. East Timorese women want to build a society that will respect their newly acquired post conflict roles, and will not force them to return to traditional powerless roles.<sup>57</sup>*

Taking a broad perspective of the three current transitional justice mechanisms in East Timor, it is clear that the Indonesian government line that the conflict was a 'civil war between equally matched Timorese factions, with Indonesian security forces as bystanders' could be written into history.<sup>58</sup> In other words, the failure of the current mechanisms will mean that not only individuals who committed crimes against humanity will be granted impunity, but that the historical record will be false, or at best skewed.

A core priority for the UN in East Timor must be a functional court and legal system, preferably an international tribunal. Only then can the UN human rights system truly be said to have succeeded and Mary Robinson's prophecy of betrayal avoided. This would be a tragedy for justice. But it must be acknowledged that even if a Tribunal was announced tomorrow, if Timorese women do not benefit from independence, if their physical and mental well-being are not addressed as priorities in the new State, if they are excluded from decision making, that would also be a tragedy for justice.



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<sup>57</sup> "East Timorese woman addresses UN Security Council," 30 October 2001. Internet: [www.etan.org](http://www.etan.org).

<sup>58</sup> Rowan Callick. 2002, May 8. "Timor trials set to downplay role of Indonesian military" *Australian Financial Review*. p. 18.

## Stolen Wages: Six Perspectives from Six Women



**Christine Howes** is a freelance journalist who has been actively involved in the Stolen Wages Campaign. The following article combines speech excerpts from **Joanne Willmot; Lanora Jackson; Ros McLennan; Associate Professor Anna Haebich & Dr Ros Kidd** on stolen wages with an introduction by Christine Howes.

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The issue of missing, unpaid and underpaid wages belonging to Aboriginal workers over the past century is destined to be an issue until governments both state and federal face up to their moral and legal responsibilities.

Known for the past 20 years or so in Queensland as the “Stolen Wages”, money matters covering wages, savings, inheritances, trust funds, child endowment and other government benefits are now making themselves felt in New South Wales and other states and territories since the Beattie Government was the first state government to make former Aboriginal and Islander workers an offer in 2002.

It seems, in almost every State and Territory, governments have had some hand in controlling the economic security of those who were forced into labour. In Queensland it may or may not have been legal to do so at the time, but historian Dr Ros Kidd’s extensive research over a ten year period has revealed successive governments in that state also knew the trust and savings book system for holding money belonging to Aboriginal people and communities was not working. Embezzlement and misuse was believed to be widespread despite a number of legislative efforts between 1897 and 1984 to address the situation. What was known as the last remaining ‘intact’ account, the Aborigines Welfare Fund, was not frozen and prevented from being siphoned back into general revenue until 1993.

Touted as being made ‘in the spirit of reconciliation’ the Queensland offer was capped to \$55.6 million (Dr Kidd has suggested the amount actually missing may be closer to \$500 million) with acceptance conditional on the signing of a legal indemnity barring any further action on recovering any monies owed, including that of any deceased family members who died before the day the offer was made on 9 May 2002. The offer, available to applicants until early 2006, has been distributed in amounts of either \$2000 or \$4000 per individual worker according to age.

Former stockman Fred Edwards, featured on a postcard campaign aimed at raising awareness about the issue, said he was not asking for much for his 25 years of forced labour but if it had to be a token offer



the least they could have done was allowed him to claim for his deceased father and brother's earnings.

Women have borne the brunt of these practices, raising their families with nothing, dealing with hurt, pain and frustration of their own, as well as their fathers, brothers, husbands and sons. Generational and endemic poverty in the Aboriginal community can be traced back to the double standards of governments who have allowed Aboriginal people to be blamed for their economic insecurity and presumed inability to manage their own affairs.

After a two and a half year awareness-raising campaign which has drawn in community groups and unions on a regional, state, national and international level, the Queensland State Labor party conference recently passed a resolution, now part of the party platform, calling on the government to re consult with the Aboriginal community as to what would provide closure for those concerned. The resolution allows for consideration of the legal rights of those who accept the current offer as well as what might be done for the families of those who have passed on. Campaigners are currently holding a series of meetings to discuss this new development.

Women have taken a high profile in the campaign with the charge in Brisbane led in part by former Cherbourg 'dormitory girl' Aunty Ruth Hegarty and the Grassroots Murri Action Group, formerly led by artist Gloria Beckett and her sisters and family. Not long before she succumbed to cancer in 2003, Aunty Gloria announced she would accept the government's offer rather than continue her fight, so her children would not have to pay for her funeral expenses. Other women, the daughters of claimants, unionists and researchers, have also played a vital role in raising the campaign's profile and awareness about the issue.

What follows are edited extracts from five women whose speeches and contribution to the campaign over the past two years has been inestimable.

**JOANNE WILLMOT, daughter of Aunty Vera Hill, both formerly of Cherbourg.**

The following exert is taken from a speech made to a public meeting in Adelaide in November 2003:

I've known about this all my life. It started in the late 1800s when the Queensland government was able to garnishee the wages of Aboriginal people under the Aboriginal Protection Acts. Those Acts meant Aboriginal people automatically became wards of the state which meant the government could make them do whatever they wanted. The many Aboriginal people who were taken away from their families and country and put into the reserves and missions became, in fact, a labour force for the broader

community. I grew up in Queensland in the 1960s and 1970s trying to understand the changes to legislation and law in 1967 which meant Aboriginal people had 'opportunities' to be engaged in the broader community. But I was also raised with the taunts and attitudes that we were lazy, dirty and had nothing to contribute, that we were very fortunate non-Aboriginal people came to this country and developed it for us, and that we were pagans or heathens. Growing up with that kind of attitude certainly changes your mindset about humanity and it takes a long time for people to let go of that anger.

It's not just about the stolen wages[ ] it's about what the implications are for people taking away a very fundamental economic base. Take away the land which nurtured the people, take the people from the land, put them into someone else's country, split their families up these are real stories, they're not fabrications, they're not made up.

In the 1960s the government found they had a whole lot of Aboriginal savings fund money in 'trust' so they lent that money out to developers and other people who were wanting to build Queensland.

Dr Ros Kidd's book 'The Way We Civilise' has lots of photographs of Aboriginal people in the missions and reserves and the conditions they lived under whilst their wages were being garnisheed by the governments. They lived in appalling conditions with health and other problems, so the money certainly wasn't going into developing the communities and making sure there was the right infrastructure to support people working or that their children were looked after properly. That money was confiscated by the government to earn interest which was not paid back into those accounts[ ] the government just put it into their own general revenue.

So what has happened over time is the money left in people's accounts dwindled to a small amount but in the 'spirit of reconciliation' last year the Queensland government said they would pay reparations of \$2000 and \$4000 to each worker still alive after 9 May 2002. When we talked to them about how they arrived at that figure I think there were a few red faces because people couldn't actually say and we still don't know the answer to that question today. Or how can they justify paying so little to so few. They think they are justified in the spirit of reconciliation and that we should be there with open arms embracing that whole concept of still being devalued.

It's no different to the 1960s.

This is what happens to Aboriginal people.

There was so much happening after the 1967 referendum when Aboriginal people were acknowledged as people in this country and had the freedom to go in and out of the missions and reserves and live wherever they chose. But because so much of their money had disappeared there was no opportunity for Aboriginal people to have an economic base so a lot of Aboriginal people stayed on the missions and reserves.

The others took out their families but trying to get jobs, find a home and a place to send their kids to school, while at the same time living with all the racism perpetuated by the government and its attitude towards Aboriginal people at the time, was very difficult.

But Aboriginal people are very strong people.

For my ancestors, I recognise the tenacity of their will to not only live but to maintain the struggle. I've listened to my grandparents and parents talk about this over a long time and feel they have been unjustly dealt with.

So the issue for us is do we accept what the government is offering and say it's just, or do we set up a campaign where we talk to Aboriginal people to become more motivated along with unions and other people who are aware of this as a very important social justice issue?

If we need to change what people are doing in this country, if we want a better country, and if we want to talk about true spirit of reconciliation then we're going to have to redress a lot of those issues of the past.

We know about the land rights struggle, we know about the stolen generations, now we're talking about the stolen wages what more can be taken from us as indigenous people?

Where do we fit, what is our validation in this nation, what do we need to do to further show people that all we've ever wanted are the same rights as everyone else?

That is not too much to ask for.

This issue of the stolen wages is a workers' issue and a social justice issue in the truest sense of the phrase. For all of my uncles and aunts, the opportunity to have some sense of self worth and value was denied them by this offer the fact that the government took away the money they rightly earned and now be told this is all they are worth. Not to mention putting up with a community that wanted to debase and demean Aboriginal people for their contribution.

What we want is other people, who have a voice, have a political and social conscience to support Aboriginal people, offering

whatever resources to make this a more open issue that's more openly discussed.

**LANORA JACKSON's father, Henry Jackson, has thus far refused the government's offer and asked his daughter to take up the fight for him.**

The following exert is taken from a speech delivered to the International Women's Day Rally in Melbourne 2004 to the theme of Women Against War, Racism and Sexism:

I'm about to tell you a story about the effects of a racist system which for more than 70 years waged an economic war on generations of Aboriginal women and their families. This is about wages, savings and social security benefits stolen from Indigenous workers which were never paid back in full.

For nearly 100 years Aboriginal workers were forced to work as domestics, labourers and stockmen for little or no wages. In Queensland most of what their employers paid for this labour was transferred directly to governments. Archival records show from 1897 until the early 1980s Queensland governments held this money 'in trust' but most of this money has never been returned. Preliminary research is indicating this may have happened to some degree in every state and territory particularly concerning child endowment and soldier benefits.

Governments have since allowed Aboriginal people to be blamed for their poverty even though the financial security of generations of Aboriginal families was never under their own control during this period.

In Queensland as much as \$500 million could be owed but in May 2002 the Beattie Government made a \$55.6 million 'take it or leave it' offer which amounts to \$2,000 or \$4,000 for each worker still alive after 9 May 2002.

I have been affected by this. Members of my own family were forced to work for no wages. They were forced by circumstance to manage their lives as best they could without ever benefiting from the fruits of their labours.

My own parents started their married life together with what they could find at the local rubbish dump. They lived in a tent with no floor and were forced to share their meagre existence with snakes and any other animal who wanted to make their home there. My father was forced to work in a swamp to clear and plant grass for a sheep farm in north Queensland. He lived in a corrugated iron shack; he would wake up with leeches on him. He had to physically remove trees and weeds from the land with a hand held saw. [H]e would come back to the shack after starting from

daylight and finishing at dusk seven days a week, take off his boots and find them full of blood from leeches.

With the offer from the Beattie government I feel my father should be paid \$4,000 for one week of that work. If a worker today was underpaid as little as \$10 it could be dealt with directly with an entire legal and industrial system to bring about justice for that worker.

Similar stories belong to almost every Aboriginal family in Queensland at least, if not in other States.

Today is a day we can especially acknowledge the strength of the women who raised these families under the most difficult of circumstances without wages, without money, without child endowment, without any economic or social security at all. We need to make sure their stolen wages are returned. We need to support wage justice for everyone and to fight the racism that caused this to happen and then, in its turn, contributed to racist attitudes today.

It is time Aboriginal people were acknowledged and respected for the work they did and no longer ripped off by a system which has always been outside of their control.

**ROS MCLENNAN is Secretary of the Townsville QCU (Queensland Council of Unions) and initially became aware of the stolen wages issue through her union networks. After being approached by local elders in February this year, Ros took the issue to her members who have since lent their full support to the campaign.**

The following exert is taken from her speech on Labor Day, 2004:

Labor Day is the focal point for the fight against injustices we see around us in our own community today. One such challenge is the fight for wage justice for indigenous workers whose wages were paid by their employers directly to government but withheld over 100 years the Stolen Wages. Records show that from 1897 until the early 1980s this money was held in trust by governments, but the vast majority of this money has never been returned to the people who earned it.

This situation is particularly disgraceful in the context of the poverty experienced by many indigenous Australians today, and I urge everyone here to support the Stolen Wages campaign to right this past wrong.

In supporting the Stolen Wages campaign, we call on the State Government to demonstrate practical support for true reconciliation in our Queensland community by:



1. Revising the terms of their current offer for Indigenous Workers' Reparations and Savings to that of a down payment with the rest of monies owed to be paid;
2. Extending the current offer to families of deceased workers (in accordance with the NSW proposal); and
3. Negotiating closure for the stolen wages issue with Aboriginal communities, rather than presenting an arbitrary 'take it or leave it' offer.

This is very central to who we are as unionists. I find it hard to believe that any amongst us would accept less than full payment of any wages bill to any union member and would organise to strongly resist any 'take it or leave it' offer made by a boss in workplace bargaining negotiations.

On this basis, our full support is given for the Stolen Wages campaign.

**ASSOCIATE PROFESSOR ANNA HAEBICH, West Australian- based historian.**

The following exert is taken from the Melbourne University History Department's Kathleen Fitzpatrick Lecture delivered in May 2004:

At last, the 'Stolen wages' issue is heating up after many frustrating decades of lobbying by Aboriginal people. Over the last 12 months it has begun a seismic shift from local Queensland concern about unpaid Aboriginal wages to an industrial wage justice issue of national significance encompassing swag of discriminatory practices. Litigation and a national public awareness campaign are in process and a national report documenting the history and legacy is now in the pipeline.

I first heard stories in the 1980s from Aboriginal workers claiming to have been robbed of their wages by the West Australian government. I knew that prior to the introduction of equal wages in 1968 Aborigines in the pastoral industry had worked in appalling conditions for no pay. But the people I listened to had been sent out to paid work under government supervision. They told me that their wages were put directly into government Trust Accounts and that they had received nothing back after years of back breaking labour. I went on to write about the systematic withholding of wages in Western Australia in my book 'For Their Own Good'.

Meanwhile historian Dr Ros Kidd was beginning her forensic analysis of enforced wage 'saving' in Queensland. Aboriginal writers like Steve Kinnane and Glenys Ward were publishing personal accounts of forced and unpaid servitude.

During the 1990s the RCIADIC and BTH Inquiry and my own book, 'Broken Circles', along with hundreds of hours of Aboriginal testimony, provided further evidence of past nationwide discriminatory treatment of Aboriginal workers of all ages.

I have argued that this is 'consequential poverty' a direct consequence of the 'special conditions' imposed on Aboriginal families by successive governments, with devastating consequences for Aboriginal households.

As Ros Kidd stated in a recent public lecture on the Stolen Wages issue: governments institutionalised poverty, hunger, destitution, sickness and death to a degree unheard of in our 'free' country. It is government, which charted their failures and hid those records from the public; it is governments which must now be made accountable for the deeds of their office deeds whose cost haunts and shames our nation today.

I have also argued that a tragic illogic has plagued government planning and implementation into the present as stated intentions to liberate Aboriginal people from poverty and dependency are translated into projects that limit and distort and that reinvigorate self fulfilling prophecies of failure and hopelessness.

But it is not just government.

We are all responsible.

The interests, imaginings and fears that we hold within us as a nation help to shape these ingrained patterns and to bestow an appearance of normality on the illogic in our governments' dealings with Aboriginal people. These stem from our colonial past and the continuing colonial nature of our relationships with Aboriginal people. Let's not be kept in an hypnotic and comfortable 'twilight of knowing' about this issue, I urge you to read, find out more, do your own research and support the initiative of Aboriginal leaders and claimants.

In his 2002 'The Price of Reconciliation' speech, Justice Einfeld concluded: The things in the past should not have happened. Together they are human wrongs, not for blame in the crude sense. But for the deepest regret and for a commitment to put them right as a matter of the utmost urgency. If they represent what some have called a black arm band of history, I for one wear it as a mark of sorrow, and as a commitment to reconciliation. Rather a black arm band that a white blindfold to shut out the truth. Let us not devastate another opportunity to demonstrate our pledge to make amends.

Surely the Stolen Wages issue is the ideal vehicle to finally snap Australians out of that hypnotic twilight zone and to create a

common understanding of what Aboriginal people have had to endure in the past and the will to work together to create a better future.

**DR ROS KIDD has written volumes on the administration of Aboriginal Affairs in Queensland. Many of her speeches and papers on the subject are accessible on her webpage at:**

**<http://www.linksdisk.com/roskidd>.**

The following exert is taken from a speech delivered to a workshop at the Northern Territory's recent 'Garma Festival' in August 2004:

My name is Ros Kidd. I am a mother and grandmother from Brisbane, Queensland. I am affiliated with Griffith University Brisbane which has sponsored my visit to the Garma Festival to speak with you today.

Ten years ago I completed my PhD thesis which investigated how Queensland governments controlled the lives and finances of Aboriginal people. I read thousands of church and government files and correspondence and was horrified by what I learned. I have been fighting for justice on this issue ever since.

#### Stolen Wages Queensland

From 1890s 1970 men, women and children were contracted out to work. They had no control over wage rates and no direct access wages and savings which went directly to government agents usually police protectors. From 1919 the government said pastoral workers would get 66% the white wage, but records show that in 1949 workers got only 31%. In fact, in every year between 1941 [and] 1956 the government sold Aboriginal labour for less than the 66% rate. That is a massive loss of wages over 15 years due to government negligence.

From the early 1900s the government was constantly warned workers were likely to be cheated of their pocket money, the only cash they got while they worked, yet it never fixed the system. Auditors in the mid 1960s said there was no way of knowing whether it was ever properly paid during all those years.

Fraud on Aboriginal savings by police protectors was so common thumb prints were introduced in 1904 and again in 1921. In 1933 bulk savings were centralised in Brisbane specifically to reduce police fraud. Yet in 1941 a Report found there were still no effective checks of police dealings on Aboriginal money. Even in the mid 1960s auditors said there was no way of knowing whether witnessed receipts were in fact authentic.

So there is documented long term failure of government to protect the wage rates, pocket money and savings of the Aboriginal

workers it controlled, despite countless warnings that people were being cheated.

#### Other States

I haven't accessed primary records from other States, so this summary is gleaned from others who've done so, including my colleague Dr Anna Haebich with regard to Western Australia.

It seems that in States with smaller Aboriginal populations (NSW, Victoria, South Australia and Tasmania), Stolen Wages comprise the wages of children apprenticed to work from missions and Homes, and entitlements such as child endowment. Hundreds of children were processed through institutions and sent to work as cheap labour until the age of 18 or 21, and many say they did not receive their pocket money during the work period, or that final balances were underpaid or unpaid when they were released from State controls. As adults they could claim standard rates of pay and conditions in the general community; in reality they had to take what they could get.

There is now evidence that some of the child endowment of mothers on mission stations was kept by the government. It was only after 1960, in Victoria and NSW, that pensioners were directly paid. The NSW government recently admitted, although not publicly, that it withheld money from wages, pensions, endowment and workers' compensation. In 1930 alone, this government took over \$1.3 million (today) from mothers' endowment; till now government policy was to deny it held any Trust monies.

In WA from 1874 any Aboriginal child could be institutionalised and apprenticed to work from age 12 to 21, although after 1886 they were sent out even younger. Between 1915 [and] 1920 over 500 people, that is one quarter of the population in southern WA, were deported to missions and stations from where children could be sent out to work. The Welfare Board continued deportations until 1954, and kept guardianship of children until 1963. Supervision of child endowment payments ceased in southern WA by 1950, but ten years later there were still no controls over distribution of child endowment by pastoralists in the north. In the 1970s, the northern missions in WA were still receiving massive bulk child endowment payments. How much of this money actually went to the mothers?

Development of the Northern Territory was similarly dependent on unpaid Aboriginal labour. Although the 1910 Act allowed for payment of wages into a trust account via the police or the protector, there was no compulsion for cash payment. When the Commonwealth took control in 1910 a new Ordinance stated all wages must be paid in cash, but calls for a minimum wage were

dismissed out of hand; in fact many pastoralists paid no cash wages for another 30 years. A Report in 1928 said rations were frequently withheld as punishment and there was much starvation and sickness. In this context it is horrifying to note that pastoralists were still authorised as ration distributors for the Commonwealth until 1966.

In the NT, as in Queensland, department bureaucrats planned how to divert child endowment monies to capital works which were patently state responsibilities; in the NT endowment went into construction of schools, dormitories and hospital clinics. In 1964, according to investigations by Dr Haebich, social security benefits still provided 40% of mission incomes in the NT and far exceeded state support to pastoralists acting as ration stations.

### **The Fight For Justice**

Because we hold so much detailed and incriminating evidence, Queensland leads the way in the fight for justice over Stolen Wages. In 1996 seven workers from Palm Island settlement won a Human Rights and Equal Opportunity Commission case against the government for the deliberate underpayment of wages between 1975 [and] 1986 (underpayment on the basis of race was illegal after enactment of the federal Racial Discrimination Act 1975; after 1986 community councils controlled wage rates). The plaintiffs won compensation of \$7000 each. The Beattie Labor government fought and lost several more cases, before offering all community employees from this period \$7000, expecting the total to reach \$25 million. This offer closed end of last year and cost the government almost \$40 million. Many workers have rejected the payment because it is conditional on relinquishing all rights to pursue justice through the courts.

During 2002 a Stolen Wages Working Group consolidated to mount a public campaign for justice. Unions nationally have taken up the cause, holding workplace meetings, donating to a fighting fund, and running our information in newsletters and websites. 4AAA Indigenous radio which broadcasts nationally, and the National Indigenous Times newspaper out of NSW, are major supporters of our campaign.

The Stolen Wages Working Group is working with a range of Brisbane lawyers who have offered to act pro bono for individuals wanting to take legal action for full compensation. Some Under Award Wage cases have been settled out of court at many times the \$7000 offered by the government. Given the wealth of incriminating evidence, there is little doubt many Stolen Wage cases could be similarly successful. Class actions are planned. Nervous of Queensland's position, a couple of months ago the NSW government offered to repay all monies it still holds which



belong to Aboriginal workers and mothers. Unlike Queensland, the NSW government does not revoke people's right to pursue justice through the courts. But both governments resolutely refuse to allow a public independent inquiry into their shameful financial dealings.

But this is much more than an issue of money.

This is also about truth in our history.

The vast majority of non indigenous Australians have no idea of the enormous debt they owe to the Aboriginal men, women and children whose labour built this country. They have no idea that many workers would have had money and freedom to prosper if governments had not stifled their choices, ignored unpaid and underpaid labour, and misused their earnings and entitlements.

It is time all Australians knew the truth of their history. It is time all governments faced the magnitude of their debts.



## Australian Sex Industry Law: Who has a say?



**Janelle Fawkes** is the president of Scarlet Alliance, the national peak organisation representing the State and Territory sex worker organisations and projects, and the issues of Australian sex workers at a national level. This paper has been adapted from the paper 'Decriminalisation, a best practice model: the Australian experience' delivered by Janelle at 'Out in the Sun Legal Constraints and Possibilities in Protecting the Rights of Sex Workers', an international conference on the sex industry and workers' rights at the City University of Hong Kong on May 2, 2004.

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*Decriminalisation: 'all laws criminalising the sex industry be removed and the industry be regulated through standard business, planning and industrial codes/laws.'*<sup>1</sup>

Australian sex industry laws are developed at a state and territory level. This, along with the vast size of Australia and the division of Australia into six states and two territories, provides an ideal case study of a range of models of sex industry law reform and their outcomes. The various models range from decriminalisation (except street work) through to complete criminalisation, with legalisation somewhere in between. Furthermore, each sector of the industry (brothel, massage parlour, private, escort and street based sex work) is dealt with differently and varies from the way that same sector is regulated in bordering states and territories.

In this paper I use the Australian experience to outline factors currently contributing to the development of sex industry law. I focus on recent law reform proposals by Australian state and territory governments and the involvement of sex workers and their organisations. I then share with you ten arguments, which are not supported by fact or evidence, that recur each time another state or territory considers developing sex industry laws. Finally I look at new trends impacting on sex industry law.

Many sex workers, sex worker organisations, projects, unfunded sex worker networks, lobby/activist groups and Scarlet Alliance, as the national peak body, have lobbied for sex work laws which 'recognise sex work as legitimate employment'<sup>2</sup> and

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<sup>1</sup> Metzenrath S & Banach L. 'Principles for Model Sex Industry Legislation'. Sydney. Scarlet Alliance and AFAO 2000

<sup>2</sup> Metzenrath S & Banach L. 'Principles for Model Sex Industry Legislation'. Sydney. Scarlet Alliance and AFAO 2000; SWAG 2002; Arnot, A 'Legalisation of the sex industry in the State of Victoria, Australia: The impact of prostitution law reform on the working and private lives of

recognise decriminalisation as the sex industry law reform model which would best support this outcome. However, decriminalisation, while recognised by Australian sex workers and recommended by government inquiries<sup>3</sup> and supported by national peak health organisations<sup>4</sup> and the International Committee for Prostitutes' Rights<sup>5</sup> has not been the model proposed for sex industry law reform by any Australian state or territory government since 1995.

*Decriminalisation in NSW has been consciously and inadvertently undermined, driving small scale business underground.*<sup>6</sup>

Less than ten per cent of the sex industry in New South Wales complies with local council policies meaning the majority are unauthorized.

Whilst most of the sex industry in New South Wales has been decriminalised, local councils have effectively prohibited the industry or over regulated it to such an extent that only larger well funded brothels can afford the costs of applications and court processes required for approval. Thus, the smaller operators unable to relocate are deemed unauthorized and closed down. This forces workers to then choose between the larger brothel or finding other ways to work, often in the illegal sector. (For example, the experience in Gosford, NSW).

The experience of Scarlet Alliance, formed in 1989, is that four main elements are common to, and have the greatest impact on, the development of sex industry laws in Australia.

### 1. The ideology behind the push to reform laws.

These ideologies stem from:

- Misinformation rather than fact; moral beliefs.
- Pressure on government to be seen to address the incongruous situation where large numbers of workers in the sex industry not recognised by law for the purposes of such areas as workers compensation or industrial law but

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women in the legal Victorian sex industry.' MA Thesis, University of Melbourne (<http://www.scarletalliance.org.au>). 2002;

Hudson-Rodd, N PhD '*Human Rights of Sex Workers in Western Australia*' Unpublished. 2002.

<sup>3</sup> Intergovernmental Committee on AIDS Legal Working Party.. '*Recommendations of the Legal Working Party of the Intergovernmental Committee on AIDS*'. Canberra: Department of Health, Housing and Community Services: 13-15.1991.

<sup>4</sup> AFAO (Australian Federation of Aids Organisations). '*Submission on the Tasmanian Sex Industry Regulation Bill 2004*'. Sydney. 2004.

<sup>5</sup> International Committee for Prostitutes' Rights (ICPR), 1985, '*World Charter For Prostitutes Rights*' Published in Pheterson, G (ed.), *A Vindication of the Rights of Whores*. Seattle: Seal Press, 1989. (p.40).

<sup>6</sup> *Private Workers Alliance of NSW*, 2003 .

whose income is recognised by the department who enforces the payment of taxes.<sup>7</sup>

- A concern for the protection of public health and the perceived need for the protection of the community (from sex industry 'harm').
- The perceived need for the 'control' of the sex industry and for it to be regulated by law.
- A need to prevent police corruption. For example, the NSW Royal Commission indicated police corruption and lack of action when it was known sex workers were being abused.<sup>8</sup>

*The Parliament considers it inappropriate for the control of persons involved in prostitution to be subject to the normal principles of administrative law.*<sup>9</sup>

**2.** The area of Government which handles the development and drafting of the legislation (eg. police, Attorney General, Health).

- Police Even though police corruption is a proven element of sectors of the sex industry which are regulated by police<sup>10</sup>, and even though Royal Commissions into Police Corruption recognise the need to remove police from this role<sup>11</sup>, recent draft sex industry laws have included:
  - Increased involvement by police in the industry including policing sexual activities<sup>12</sup>.
  - High level surveillance methods including: licensing, fingerprinting, forcing individual sex workers to carry identification cards<sup>13</sup>.
  - Increased police powers that allow arrest without proof that an offence is committed and infringe human rights and civil liberties. The powers also provide Police with greater powers over the individuals in the industry to a point where police are no longer required to prove a person

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<sup>7</sup> Cooke, T 'Let's not confuse sin with crime', West Australian Newspaper, Perth, May 7 2003, 20.

<sup>8</sup> Final Report 'Royal Commission into the New South Wales Police Service' V1: Corruption May 1997.

<sup>9</sup> Prostitution Control Bill 2002 (WA)

<sup>10</sup> Dowd, E) 'Sex Workers' Rights, Human Rights: The Impact of Western Australian Legislation On Street Based Sex Workers' Outskirts, online journal, 2002

<sup>11</sup> Neave, M 'The failure of prostitution law reform', Australian and New Zealand Journal of Criminology 1995.

Arnot, A 'Legalisation of the sex industry in the State of Victoria, Australia: The impact of prostitution law reform on the working and private lives of women in the legal Victorian sex industry.' MA Thesis, University of Melbourne 2002

<sup>12</sup> QLD Police Powers and Responsibilities and other legislation amendment Bill, 2003 (QLD)

<sup>13</sup> Prostitution Control Bill 2002 (WA)

is guilty. Rather the prosecuted must prove they are innocent<sup>14</sup>.

- Recommendation to the courts for restraining orders (originally developed to protect women from violence) to be used by police in preventing street based sex workers entering an area of the city for up to twelve months<sup>15</sup>.

**3.** The level of sex worker involvement at each phase of law reform. (eg. Needs analysis or research on the current industry and consultation prior to and throughout development of the model, the drafting of the Bill and during redrafting and introduction to parliament).

In practice, recent experience has shown:

- Development of sex industry draft legislation without consultation with sex workers (for example the *Western Australian Prostitution Control Bill 2002*<sup>16</sup>).
- Dismantling of the Queensland Prostitution Advisory Committee (PAC)<sup>17</sup> which was pushed through parliament without consulting sex workers. The PAC was the only decision making structure which included sex worker and sex industry representation as part of the legal sex industry framework in Queensland. Its removal effectively removed the voice of sex workers from decision making structures.
- Powers to regulate the sex industry have devolved to local government level in NSW. Sex industry representatives are rarely consulted yet the majority of local governments in NSW have developed policies that effectively ban the industry.
- Sex workers are not consulted during the drafting of legislation and are then asked to have input after an unworkable model has been developed.

**4.** The ability of sex workers to participate in processes of law reform.

- Legislation is written in a legalistic style that many do not understand. This restricts the possibility of comprehension and feedback. (For example the *Western Australian Prostitution Control Bill 2002*<sup>18</sup>).

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<sup>14</sup> *Prostitution Act 2000* (WA).

<sup>15</sup> *Prostitution Act 2000* (WA).

<sup>16</sup> D'Anger, J 'Sex Laws Flawed', Voice News, Perth, September 14 2002, 7.

<sup>17</sup> *Police Powers and Responsibilities and other legislation Amendment Bill*, 2003.

<sup>18</sup> Scarlet Alliance 'Response to: *Western Australian Government's Prostitution Control Bill 2002*' Public submission provided to Minister for Police 2003.



- Sex workers who are criminalised, because their sector of sex work is illegal, are unlikely to be able to participate in formal processes of sex industry law reform.
- Under funding of sex worker projects as a result of their comments against proposed laws results in a loss of intellectual property, reduction in the capacity for sex worker input into policy development, and creates fear amongst other NGOs, preventing them from speaking out. (For example 'Phoenix', a Western Australia sex worker project, 2003<sup>19</sup>).
- Community consultation occurring at the busiest time of the year for the sex industry shows ignorance/disrespect for sex industry workers. (For example over the Christmas period, the busiest period for the Australian sex industry.)
- Inclusion of specific clauses in core funding for sex worker organisations/projects, which prohibit their involvement in systemic advocacy, law reform or media representation on issues affecting sex workers.
- Government reneging on strategies to increase sex worker participation in law reform. For example, in Western Australia, as part of the sex worker project, 'Phoenix', sex workers reached an agreement with staff of the Minister for Police allowing individual sex workers to use their alias on submissions regarding proposed legislation. However, later, the Ministers' office advised SWAG (Sex Worker Action Group) that some submissions were disallowed because they did not include contact details and a full name.

To summarise, the Australian experience of law reform is that sex workers are often provided with little more than tokenistic opportunities to participate or involved too late. They are provided with little incentive to participate because their experience of contributing to time consuming working parties often results in recommendations not being taken up by government. (For example, the AGSPAG (Attorney General's Street Prostitution Advisory Group experience<sup>20</sup>). Also, sex workers are targeted as 'difficult' when reaching agreement is hard or deemed politically risky. (For example, the changes to *Disorderly Houses Amendment Act* experience). They are also

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<sup>19</sup> Martin, R. 'Kucera blocks funds for sex group', The Australian, Melbourne, June 13 2003, 4

<sup>20</sup> Victoria, 2002

described as 'too vocal' when raising sex worker issues as women's issues such as during the Women's Convention, Western Australia, 2002.

Our experience indicates that the persistence of sex workers is branded as problematic when in fact sex workers are only trying to hold hard won ground. Thus, sex workers are not provided with the opportunity to have the issues which directly impact on their work, health and safety addressed by Government. Sex workers, their organisations/projects and Scarlet Alliance, have found themselves outside of the process of law reform. They are often forced to organise or form alliances in order to prevent the introduction of proposed laws which their knowledge and experience indicates will negatively impact on the health and safety of sex workers, rather than being treated as the key stakeholders, working with Government on how to improve the sex industry through the recognition of sex work as a legitimate form of employment.

In effect sex workers are forced to react. Instead of debating the complexities of decriminalisation, they are still fighting for the right to be heard both in the community and within social/legal institutions. Resources, time and energy is wasted debating issues which are not those of most relevance to sex workers but those of relevance to other stakeholders who have a greater influence on law reform.

Twenty years into the sex worker rights movement in Australia, there is little opportunity to be proactive on sex worker issues or to effectively work towards a model which is equitable and based on any real understanding of the sex industry. Instead we are re-forming, re connecting and bracing ourselves to fight familiar and ongoing battles which are bred from poorly structured responses by Government when dealing with sex industry law reform along with new battles on the horizon.

At this point I would like to return to the 'snags in the stockings' of Australian sex workers: the ten issues which recur, often without logic, each time sex industry law reform debate occurs. At the beginning of the night 'a snag' might not be visible but quickly it develops into a ladder and the sex worker has little choice but to work without them. So is the case with badly formed sex industry laws which negatively impact on the working practices of sex workers to such a degree that sex workers have little choice but to work outside of the law in order to continue to make an income.

These issues are symptomatic of more importance being placed on fears, misinformation and myth rather than factors affecting sex worker health and safety.

They are:

**Mandatory testing-** Even though self regulation is a success, with low rates of STIs (sexually transmissible infections) and HIV, governments still insist on laws which create a barrier to good health practice often also including mandatory condom use and presumption of knowledge of Sexually Transmissible Infection (STI) laws.

**Licensing of brothels & owner/operators** – This often includes an external licensing body. It is very difficult to get a license or probity checks and this creates a two tiered industry with a small legal industry and a larger illegal industry.

**Licensing individual sex workers** – This is often regulated by police. There is low compliance and resources are wasted attempting to enforce compliance. There are also privacy issues for sex workers and the related potential for corruption.

**Lack of support for private workers** – Being forced to work alone is less safe. Workers unable to get council permission to do so are trapped working in an illegal sector.

**Prohibition of street sex work-** Street sex work is the most criminalised, marginalised and voiceless sector of the sex industry. It is heavily policed and the most likely area in which sex workers are imprisoned. It is most susceptible to corruption. Other issues include workers having children taken away, being victims of violence and being unable to report crime. This makes up 2% of the Australian sex industry.

**Entrapment** Police may pose as sex workers and/or clients to gain arrests. This increases the potential for police corruption. Police are seen as *prosecutor* NOT *protector*, affecting the likelihood of sex workers to report crimes or harassment.

**Reversal of onus of proof** – This reversal of proof makes it almost impossible to prove innocence. It is used to decrease the evidence necessary and the workload needed to get an arrest by police.

**Reduction of human rights-** This is an issue for sex workers while law makers and enforcers continue to prioritise the ‘moral wellbeing’ of the community, a community which mysteriously excludes sex workers.

**Employer/employee or sub contractor** – There is a lack of acknowledgement of sex workers as employees even though precedent in the Australian Industrial Relations Commission has indicated this relationship exists. Employers benefit from classing workers as sub contractors to avoid workers compensation, sick pay and superannuation.

**Local councils** – Councils are able to make moral rather than planning decisions about where sex industry businesses and individual sex workers can be located. They conceal moral objections by using council powers to overregulate the sex industry. For example, one proposed condition on consent in Parramatta, New South Wales, was that no part of the brothel except the entrance be visible from a public place or within 50 metres of taxi ranks, bus stops, train stations, hotels or any club. Thus local councils do not treat sex industry businesses like any other business.

### **How have local councils responded to decriminalisation?**

In our experience, many local councils developed brothel policies, either formal or informal, which aim at discouraging the sex industry. This is despite the fact that the intention of reforms was to ensure well run brothels could operate legally and local councils could effectively regulate the industry<sup>21</sup>.

Law reform of any industry which is undertaken for reasons which exclude, or conflict with, improving the occupational health, safety and rights of the workers in that industry and fail to provide incentive for the industry to participate in a new legal framework, will result in ineffective and costly outcomes with those worst affected being the individuals workers in the industry. The sex industry exemplifies this.

Our diverse laws in Australia show us the elements of models of sex industry legislation which are effective and those that are not. Decriminalisation in Australia is a success, however, it has been undermined ever since its introduction. Unless there are major changes, it will be heralded as a failure by anti sex work lobbyists because it was never given the opportunity to succeed. Hopefully, New Zealand may provide us with a working example of decriminalization on which to base future debates.

A paper discussing issues impacting on sex industry law reform would not be complete without reference to the global trend threatening to affect the rights of sex workers and to inform sex industry legislation. The anti trafficking lobby is understood by many to have been railroaded by abolitionists, whose agenda in this debate is more intent on stopping the sex industry globally than assisting women who are trafficked against their will. There is not the opportunity in this paper to explore the extensive examples of laws and policy which seek to address trafficking but which negatively impact on sex workers, however the *Leadership Against HIV/AIDS, Tuberculosis and Malaria Act* (the

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<sup>21</sup> SWOP NSW, 2003.

Act) passed in the United States in 2003 provides some indication of the direction these debates may take.

The Act outlines the areas and support that the US administration is prepared to endorse in the fight against these diseases. The Act includes the limitation that:

*No funds made available to carry out this Act...may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.*

The outcome of this move by the US may not be immediately obvious as many of the South East Asian based organisations which provide HIV/AIDS prevention education to sex workers have only recently been forced to make their choice to either continue to receive this core funding and change their philosophy, agreeing to an anti sex work agenda (risking the loss of connection with the community they seek to educate), or seek alternative funding. What this means in practice is not yet clear.

Of course, it is not only South East Asia that is affected. In Australia we are also beginning to see the effects of the abolitionist agenda. In May 2004, ABC television program, *Lateline*, reported Kathleen Maltzen from Project Respect calling for the 're criminalisation' of the sex industry as the answer to ending trafficking. This call, along with a push by abolitionists in Australia for the introduction of the Swedish sex industry laws, which target and criminalise the clients of sex workers in an attempt to end the sex industry by stopping demand, are yet to have an impact on state based sex industry law in Australia. However, we can assume that both of these factors are set to shift sex industry law reform debate further away from improving the occupational health and safety of sex workers and closer to an abolitionist driven agenda to end the sex industry and discussions of whether female sex workers are exploited in their work<sup>22</sup>.

Whilst there is strong research on the negative impacts resulting from the Swedish model of sex industry law reform, the voices and experiences of sex workers go unheard. Some feminists continue to uncritically accept the notion that criminalization of clients will stop demand in the face of research which clearly indicates the negative impacts on sex workers as working practices and work sites change to avoid prosecutions.

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<sup>22</sup> Paine, M 'Plea to end push for Legal Brothels' Tasmanian Mercury, Hobart. September 11, 2004.



What is clear, is when the sex industry is criminalised, sex workers are much more vulnerable to exploitation and have less ability to report crime or harassment.

Until the objective of Australian sex industry law reform is to endorse sex work as a legitimate form of work and to provide the workers of this industry with the same entitlements as workers in other industries, including equitable access to safe working environments, we will continue to endure laws which do little more than endorse discrimination against sex workers by the implication that sex workers are different and as such can be treated differently<sup>23</sup>.



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<sup>23</sup> Arnot, A 'Legalisation of the sex industry in the State of Victoria, Australia: The impact of prostitution law reform on the working and private lives of women in the legal Victorian sex industry.' MA Thesis, University of Melbourne 2002 .

AFAO (Australian Federation of Aids Organisations.) 'Submission on the Tasmanian Sex Industry Regulation Bill 2004'. Sydney 2004.

## Balancing Security and Liberty: Terrorism Offences in the Criminal Codes of Australia and Germany



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The need to balance security with human rights has been debated in Germany for over thirty years.<sup>2</sup> Since the first terrorist attacks were carried out by the Baader-Meinhof group in the 1960s, and which culminated in the 'German Autumn' of 1977, Germany has introduced legislation in an attempt to prevent and punish terrorist activities. These laws have been subject to intense debate in parliament, the courts and the media.<sup>3</sup> Australia's legislative history in relation to terrorism offences is more recent: with the exception of the Northern Territory<sup>4</sup>, the first provisions to deal with terrorism in Australian law were enacted in response to the attacks on the World Trade Centre and the Pentagon.<sup>5</sup>

This paper examines terrorism provisions in the criminal codes of Germany and Australia. The first part of this paper considers the terrorism offences created in Part 5.3 of the Commonwealth Criminal Code 1995 (Cth), introduced after September 11. This paper then considers the terrorism offences which already existed in Germany prior to September 11, and the two counter terrorism 'packages' enacted after September 11. Some comparison is made between the criminal code provisions in each country, and some comment is made in relation to the impact of anti terrorism legislation on individual rights in each country. German courts, which have been called upon on a number of occasions to balance security and liberty, have indicated in two recent decisions (of the Federal Constitutional Court and the Federal Court of Justice) that procedural rights must be guaranteed in terrorism trials, and that security legislation is not to have a disproportionate impact on

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<sup>1</sup> This article reflects only the authors personal opinions.

<sup>2</sup> Oliver Lepsius, 'Liberty, Security, and Terrorism: The Legal Position in Germany' (2004) 5 *German Law Journal* 435 at 435.

<sup>3</sup> Oliver Lepsius, 'The Relationship between Security and Civil Liberties in the Federal Republic of Germany After September 11' (2002), American Institute for Contemporary German Studies, [www.aicgs.org/publications/PDF/lepsiusenglish.pdf](http://www.aicgs.org/publications/PDF/lepsiusenglish.pdf) at n2.

<sup>4</sup> See *Criminal Code Act 1983* (NT) ss50-55.

<sup>5</sup> Christopher Michaelsen, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275 at 281. Jenny Hocking observes the lack of debate in the Australian media concerning these laws in 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355 at 356.

individual rights. While this paper does not propose any solutions to the complex task of balancing security and liberty, it attempts to highlight the need to protect individual rights in trials and legislation relating to terrorism.

### **Terrorism Offences in Part 5.3 Of the Commonwealth Criminal Code**

On 12 March 2002, the (then) Attorney General, Daryl Williams, introduced the Security Legislation Amendment Bill 2002 (Cth)<sup>6</sup> to Australian Parliament to insert new terrorism provisions (Part 5.3) into the Criminal Code Act 1995 (Cth) ('Commonwealth Criminal Code').<sup>7</sup> The purpose of the legislation was to ensure that Australia complied with its international legal obligations and to prevent terrorist activities from occurring.<sup>8</sup> The legislation has been amended a number of times.<sup>9</sup>

Part 5.3 of the Commonwealth Criminal Code defines 'terrorism' and prohibits various terrorist 'acts' and acts in relation to 'terrorist organisations'. Part 5.3 applies to conduct anywhere, irrespective of whether the alleged conduct occurred in Australia and irrespective of whether the result of the alleged conduct occurred in Australia,<sup>10</sup> if the conduct constitutes a:

- (1) terrorist act or threat of terrorist action as defined in section 101.1 [considered below] ; or
- (2) a preliminary act that relate to terrorist acts.<sup>11</sup>

As will be seen below, the jurisdiction to prosecute in Australian law is broader than that provided for under German law.

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<sup>6</sup> The bill was part of a 'package' of five bills relating to 'counter-terrorism' that were introduced to Parliament on 12 March 2002. See also *Suppression of the Financing of Terrorism bill 2002 (Cth)*; *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth)*; *Border Security Legislation Amendment Bill 2002 (Cth)*; *Telecommunications Interception Legislation Amendment Bill 2002 (Cth)*.

<sup>7</sup> While there is no legislative head of power in the Constitution for the Federal Government to pass laws in relation to criminal law, the Australian States have referred their power to the Commonwealth under s51(xxvii) of the Constitution.

<sup>8</sup> Karl Alderson, Principal Legal Officer, Attorney-General's Department, Senate Standing Committee for the Scrutiny of Bills, *Reference: Provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 and Related Bills*, Hansard, 1 May 2002 at 1-2, <http://www.aph.gov.au/hansard/senate/commtee/s5501.pdf>.

Security Council Resolution 1373 of 28 September 2001 obliges all Member States to 'take the necessary steps to prevent the commission of terrorist acts' (Paragraph 2(b)). Paragraph 2(e) of the Resolution requires Member States to ensure that 'terrorist acts are serious criminal offences in domestic laws'.

<sup>9</sup> At the time of writing (18 September 2004), the following bills had been introduced to modify provisions of Part 5.3 of the *Criminal Code Act 1995 (Cth)*: *Criminal Code Amendment (Terrorism) Bill 2002*, *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Bill 2002*, *Criminal Code (Terrorist Offences) Bill 2002*, *Criminal Code Amendment (Hezbollah External Terrorist Organisation) Bill 2002*, *Criminal Code Amendment (Hizballah) Bill 2002*, *Anti-Terrorism Bill 2004*, *Anti-Terrorism Bill (No.2) 2004*, *Anti-Terrorism Bill (No.3) 2004*.

<sup>10</sup> See s15.4 ('Extended geographical jurisdiction – Category D') *Commonwealth Criminal Code*

<sup>11</sup> See s100.4 *Commonwealth Criminal Code*

### 'Terrorist Acts'

Under Part 5.3 of the Commonwealth Criminal Code, individuals are prohibited from engaging in a 'terrorist act' (s101.1). A 'terrorist act' is defined as an 'action or threat of action' which is made with the 'intention of advancing a political, religious or ideological cause' and is done with the intention of 'coercing, influencing by intimidation, the government [or part] of the Commonwealth or a State, Territory or foreign country' or 'intimidating the public or a section of the public' (s100.1(1)). An act is a 'terrorist act' if it causes, serious physical harm to a person, serious damage to property, a person's death, or endangers a person's life (other than the life of the person taking the action), or creates a serious risk to the health or safety of the public or a section of the public, or seriously interferes with, seriously disrupts, or destroys, an electronic system (s100.1(2)). An act is not a 'terrorist act' if it is advocacy, protest, dissent or industrial action<sup>12</sup> and is not intended:

- to cause serious harm that is physical harm to a person; or
- to cause a person's death; or
- to endanger the life of a person, other than the person taking the action; or
- to create a serious risk to the health or safety of the public or a section of the public (s100.1(3)).

In addition to 'terrorist acts' (s101.1) the following related activities are prohibited:

- providing or receiving training connected with preparation for, engagement of a person in, or assistance in a terrorist act (s101.2);<sup>13</sup>
- possessing a 'thing' connected with a terrorist act is prohibited (s101.4);
- collecting or make a document that is connected with a terrorist act (s101.5); and
- doing any act in preparation for or planning of a terrorist attack (s101.6).

These activities are prohibited, irrespective of whether the terrorist act occurs. A considerable number of terms used to create these ancillary offences are not defined in the dictionary (s101.1), such as: 'training', 'providing', 'receiving', 'things', 'collecting', 'documents', 'making documents', 'preparation', 'planning' and 'other acts'.

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<sup>12</sup> This provision is to be contrasted with the provision in the initial bill, which provided an exemption for 'lawful' advocacy, protest, dissent or industrial action.

<sup>13</sup> This provision initially imposed strict and absolute liability on the defendant, however this burden has been removed and burden of proof rests on the prosecution.

### 'Terrorist Organisations'

Various activities in relation to 'terrorist organizations' are also prohibited under Part 5.3 of the Commonwealth Criminal Code. 'Terrorist organizations' are defined in s102.1 as organisations<sup>14</sup> that are:

- directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
- specified through the proscriptive powers under the Act (considered further below) or is an organization that has already been proscribed in the Act.<sup>15</sup>

### Proscriptive Powers

The Security Legislation Amendment (Terrorism) Bill 2002 (Cth), introduced to Parliament on 12 March 2002, proposed that the Attorney General have the power to make a declaration in writing that an organisation was a proscribed organisation if 'the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country'. The proscriptive powers contained in this initial bill were subject to considerable criticism because they vested a 'broad and effectively unreviewable discretion in a member of the Executive'.<sup>16</sup> The bill was amended to provide that an organisation could only be proscribed if it were referred to in a decision of the Security Council of the United Nations.<sup>17</sup> However, the Criminal Code Amendment (Terrorist Organisations) Bill 2003 (Cth), which was introduced to Australian Parliament on 29 May 2003 and passed by the Senate on 4 March 2004, contained provisions similar to the initial Security Legislation Amendment (Terrorism) Bill 2002 (Cth). Under the current legislation, the organization need not be mentioned in a decision of the Security Council, and the Federal Attorney General may

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<sup>14</sup> An 'organisation' is defined in s100.1 as a body corporate or an unincorporated body, whether or not the body (a) is based outside Australia; or (b) consists of persons who are not Australian citizens; or (c) is part of a larger organisation.

<sup>15</sup> Under 102.1 the Hamas organization, the Hizballah organization and the Lashkar-e-Tayyiba organization are explicitly listed as 'terrorist organisations'.

<sup>16</sup> See recommendation number 4 in the *Senate Legal and Constitutional Legislation Committee, Consideration of Legislation Referred to the Committee, Security Legislation Amendment (Terrorism) Bill 2002*, May 2002, at 59, [www.aph.gov.au/senate/committee/legcon\\_ctte/customs/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/customs/report/report.pdf)

<sup>17</sup> When this amended bill was enacted, s102.1(2) of the Commonwealth Criminal Code provided that an organisation could be proscribed where the Attorney-General was satisfied on reasonable grounds that:

- a) The Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and
- b) The organisation is defined in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates; and
- c) The organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).

At the date of writing, 17 organisations have been listed as 'terrorist organisations', [http://www.nationalsecurity.gov.au/agd/www/nationalsecurityhome.nsf/Page/Listing\\_of\\_Terrorist\\_Organisations](http://www.nationalsecurity.gov.au/agd/www/nationalsecurityhome.nsf/Page/Listing_of_Terrorist_Organisations)



proscribe an organization, as long as the Attorney General remains satisfied that the organization is:

*...directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of terrorist act (whether or not the terrorist act has occurred or will occur' (s102.1(2)).<sup>18</sup>*

While the 2002 Explanatory Memorandum to the Act states that the Attorney General's decision can be reviewed under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ('ADJR Act'), the 2002 Bill (as well as the 2003 Explanatory Memorandum and the 2003 Bill) are silent on this issue. Even if judicial review under the ADJR Act is available, it may not provide an adequate review mechanism, because judicial review under the ADJR Act is limited<sup>19</sup> and decisions relating to national security may not be subject to review.<sup>20</sup>

### Prohibited Activities in Relation to Terrorist Organisations

Various activities in relation to 'terrorist organisations' are prohibited, such as:

- directing the activities of an organization that is a terrorist organization if the person knows or is reckless that the organization is a terrorist organisation (s102.2);
- being a member (including an 'informal member' and someone who has 'taken steps' to become a member) of an organisation that has been proscribed as a terrorist organisation if the person knows the organisation is a terrorist organization (s102.3);<sup>21</sup>
- recruiting a person to join or participate in the activities of a terrorist organization if the recruiter knows or is reckless that the organization is a terrorist organization (s102.4);
- providing training to or receive training from a terrorist organization if the person knows or is reckless that the organization is a terrorist organization (s102.5);

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<sup>18</sup> Where the 'Minister ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing planning assisting in or fostering the doing of a terrorist act [...] the Minister must, by written notice publish in the Gazette, make a declaration to the effect that the Minister has ceased to be so satisfied' (s102.1(4)). Contrast this with Part IIA of the *Crimes Act 1914* (Cth) which provides for the proscription of 'unlawful associations' which aim to overthrow the Constitution or the government. These provisions require the Attorney-General to apply to a Federal Court to have such associations banned.

<sup>19</sup> George Williams and Iain Gentle argue that a proportionality assessment would not be available to review a decision under the ADJR Act (Submission to the Senate Legal and Constitutional Legislation Committee, Gilbert and Tobin Centre for Public Law, <http://www.gtcentre.unsw.edu.au/Terrorism%20Senate%20Submission.doc>). As to whether proportionality constitutes a ground of review in administrative law, see further Aronson and Dyer, (2000) *Judicial Review of Administrative Action*, Law Book Company, Sydney at 289ff.

<sup>20</sup> *The Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, *ibid* n20.

<sup>21</sup> It is a defence for the person to prove that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organization. The burden of proof is on the defendant.

- receiving funds<sup>22</sup> from or making funds available to a terrorist organization if the person knows or is reckless that the organization is a terrorist organization (s102.6);<sup>23</sup>
- providing support or resources to a terrorist organisation that would help the organisation engage directly or indirectly in preparing, planning, assisting in or fostering the doing of a terrorist act if the person knows or is reckless as to whether the organisation is a terrorist organization (s102.7); and
- associating with a person who is a member or who promotes or directs the activities of a listed terrorist organization where that association provides support that would help the terrorist organization to continue to exist or to expand (s102.8(1)) (considered further below). <sup>24</sup>

### 'Associating with a Terrorist Organisation'

The offence of associating with a terrorist organization under s102.8(1) is the most recent amendment to Part 5.3 of the Commonwealth Criminal Code. The offence was introduced in the Anti Terrorism Bill 2004 (No 2) (Cth), which was passed on 13 August 2004. This offence applies to individuals who associate on two or more occasions with organizations that are listed as a terrorist organization under the Criminal Code Regulations 2002 and the person knew that the organization was a listed organization, and intended that his/her association support that organization. There are various exceptions to the new offence in s102.8(4) namely, where the association is in relation to:

- close family members (which is narrowly defined in s102.1);
- religious worship;
- the provision of humanitarian aid;
- the provision of legal advice or representation in criminal proceedings; or
- proceedings in relation to whether the organisation is a terrorist organization.

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<sup>22</sup> 'Funds' are defined in section 101.1. Under Division 103, individuals are prohibited from financing terrorism, which encompasses the provision or collection of funds.

<sup>23</sup> This section does not apply if the funds are received solely for the purpose of providing legal representation for a person in proceedings relating to this Division or for the purpose of providing assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory. The burden of proof is on the defendant.

<sup>24</sup> In relation to all of these offences relating to terrorist organizations, under s102.10, if the trier of fact is not satisfied that the defendant is guilty of the offence for which he/she has been charged, the trier of fact may substitute the charge with another charge under the same section as the original charge. The defendant may be found guilty of this other charge, 'so long as the defendant has been accorded procedural fairness in relation to that finding of guilt' (s102.10(2)).

This provision is concerning for a number of reasons. It is of concern that 'close family members' is so narrowly defined. It is also of concern that 'religious worship' is not defined, considering that religious worship can take many forms. Similarly, 'humanitarian aid' is not defined. Further, the conduct which would give rise to a contravention of s102.8(6) is arguably the same as the conduct that would give rise to a contravention of s102.7 (providing support for a terrorist organisation), given that any 'support' would most likely require a 'communication' or 'meeting'. The provision is also problematic in that the term 'member' is a vague concept (indeed, it is not defined in the legislation) and so the offence of 'associating' with a 'member' is a concept that is even more ambiguous. While s102.8(6) states that the section is not to interfere with the implied freedom of political participation, association and communication, the section arguably may contravene these implied guarantees.<sup>25</sup> The lack of precision with which the offence is defined may be a disproportionate incursion into the right to freedom of expression and association guaranteed in Article 19 and 22 of the International Convention on Civil and Political Rights.<sup>26</sup>

### Strict and Absolute Liability in the Criminal Code

Strict liability<sup>27</sup> applies under s102.5 (training with a terrorist organization) and s102.8 (training with a terrorist organization). Therefore the prosecution would not have to prove the person was aware the organization was specified in the regulations. The defence of mistake of fact (s9.2) is available to the defendant however the defendant bears the onus of proof.

Absolute liability<sup>28</sup> applies under s101.4 (possessing things connected with terrorist acts) and s101.5 (collecting or making documents likely to facilitate terrorist acts). The prosecution is not required to prove that the defendant knew or intended that the thing or document be connected with a terrorist organization. The defendant is required to prove that he/she did not intend that the thing, document or recruiting be connected with a terrorist organization.

Typically offences of strict and absolute liability have been confined to: (a) offences which do not include imprisonment; or (b) minor or

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<sup>25</sup> *Nationwide News* (1992) 177 CLR 1; *Australian Capital Television* (1992) 177 CLR 106.

<sup>26</sup> A number of submissions to the Senate inquiry make this point, see for example, the submission by HREOC and the Castan Centre for Human Rights, available at: [http://www.apf.gov.au/Senate/committee/legcon\\_ctte/anti\\_terror\\_2/submissions/sublist.htm](http://www.apf.gov.au/Senate/committee/legcon_ctte/anti_terror_2/submissions/sublist.htm)

<sup>27</sup> Strict liability describes a type of criminal responsibility which is defined by the absence of any requirement of fault yet the defence of 'reasonable mistake of fact' (Part 9.2 of the Commonwealth Criminal Code) is available (s6.1 of the Commonwealth Criminal Code).

<sup>28</sup> Absolute liability describes a form of criminal responsibility that does not require the prosecution to prove intention, knowledge, recklessness, negligence or any other type of fault. Unlike strict liability (described above) the defence of reasonable mistake of fact is not available (s6.2 of the Commonwealth Criminal Code).

regulatory offences which attract monetary fines.<sup>29</sup> The imposition of strict and absolute liability in the above instances is concerning for two reasons. First, these offences carry maximum penalties of lengthy periods of imprisonment.<sup>30</sup> Second, the imposition of a burden on the defendant reverses the onus of proof and may contravene the presumption of innocence contained in Article 11(1) of the Universal Declaration of Human Rights and Article 14 (2) of the International Covenant on Civil and Political Rights.

### **Anti-Terrorism Provisions In German Law**

In the 1960s and 1970s, Germany experienced a number of 'waves' of terrorist attacks. The 1960s student movement in Germany was fueled by opposition to the Vietnam War, as well as a perception that the government was moving towards greater authoritarianism. An 'extra parliamentary opposition' movement emerged (Ausserparlamentarische Opposition or 'APO'), comprising various groups and individuals from society, that instigated protest rallies in response to legislative proposals of the CDU/CSU (Christian Democrat Union and the Christian Socialist Union) coalition. While the momentum behind the student movement decreased in the late 1960s, three radical groups emerged from the movement that carried out various terrorist attacks in the late 1960s and 1970s: the Red Army Faction (Rote Armee Faction, 'RAF'), the Revolutionary Cells (Revolutionaere Zellen, 'RZ') and the 2nd of June Movement (2. June Bewegung). Terrorist activities of these groups culminated in the 'German Autumn' of 1977, when Arab terrorists hijacked a Lufthansa aircraft, demanding that various RAF members be released from prison. The aircraft was stormed at the Mogadishu Airport by German special services and all of the hostages were released. However, as a result three RAF members committed suicide in a prison in Stuttgart, and Hans Martin Schleyer, the President of the Federal Association of German Industry, who had been abducted by RAF members, was murdered. Terrorist activities declined in the 1980s, and were focused mainly on peace marches and anti-nuclear protests.<sup>31</sup>

In response to the terrorist attacks in the 1970s, the German government introduced a number of pieces of legislation to prevent and punish terrorist activities. After September 11, the German government enacted two counter terrorism 'packages'. The first of these expanded Germany's jurisdiction to punish terrorist offences and revoked an exemption granted to religious organizations. The second package

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<sup>29</sup> See 'Application of Absolute and Strict Liability in Offences in Commonwealth Legislation' (2002) Senate Standing Committee for the Scrutiny of Bills, at 284 (in relation to strict liability) and 259 (in relation to absolute liability) [www.aph.gov.au/senate/committee/scrutiny/bills02/b06.pdf](http://www.aph.gov.au/senate/committee/scrutiny/bills02/b06.pdf).

<sup>30</sup> Section 102.5 provides for a maximum of 25 years' imprisonment; s102.8 provides for a maximum of 3 years of imprisonment, s101.4 and s101.5 both provide for a maximum of 15 years' imprisonment.

<sup>31</sup> A summary of the terrorist activities during this period is available in Shawn Boyne, "Law, Terrorism and Social Movements: The Tension of Between Politics and Security in Germany's Anti-Terrorism Legislation" (2004) 12 *Cardozo Journal of International and Comparative Law* 41 at 51.

modified the laws relating to asylum and increased the powers of security agencies.

### Counter Terrorism Legislation Prior to 11 September, 2001

In 1971, the first piece of legislation was introduced in response to terrorist activities (however it did not specifically refer to 'terrorism'). The law prohibited the hijacking of aircraft and other attacks on aircrafts (Article 316c of the German Criminal Code) and prohibited the manslaughter, kidnapping and the taking of hostages (Articles 239a and 239b of the German Criminal Code).

In 1976, the first law specifically related to terrorism prohibited the formation of terrorist organizations (Article 129a of the German Criminal Code).<sup>32</sup> This amendment to the Code<sup>33</sup> (which is still in force) prohibits an individual from founding an organization, or being a member of an organisation, that has a purpose that is directed at:

- committing murder, manslaughter, genocide, crimes against humanity, war crimes; or
- offences against personal freedom (Art129a(1)).

A person is also prohibited from founding an organization that has a purpose or activities directed at:

1. causing another person serve physical or mental injury;
2. committing various offences against companies, public works and the use of explosives and other devices;
3. committing offences against the environment;
4. breaching the laws relating to the control of weapons of war; or
5. committing offences against the Weapons Act.

A person is prohibited from being a member of one of these organisations, if the organisation seeks to commit any of the above acts (1-5) and those acts are directed at intimidating the community to a significant extent or threatening an authority or an international organization with violence, or destroying or seriously affecting the political, constitutional, economic or social framework of a State or

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<sup>32</sup> The 1976 Fourteenth Amendment to the German Criminal Code also prohibited various other activities related to terrorism, such as:

- the public support of serious violent crimes through distribution of written material or oral communications at an assembly of people (Article 111 of the Criminal Code)
- the non-reporting of a planned terrorist crime (Article 138(II) of the Criminal Code).
- the public exhibition or glorification of violence (Article 131 of the Criminal Code)
- inducement to criminal acts (Article 130a of the Criminal Code),
- approbation and rewarding of criminal acts (Article 140 of the Criminal Code),
- threatening criminal acts (Article 126 of the Criminal Code)
- feigning a criminal act (Article 154d of the Criminal Code)
- threats (Article 241 of the Criminal Code).

<sup>33</sup> Article 129a of the German Criminal Code is available at: <http://dejure.org/gesetze/StGB/129a.html>



international organization, and through its activities can seriously affect [the interests] of a State or international organization (Article 129a(2)).

Threatening to commit such offences is also punishable.<sup>34</sup> Specific penalties apply for ringleaders of organizations<sup>35</sup>, members of organizations,<sup>36</sup> supporters of organizations<sup>37</sup> and individuals who apply for membership in such organizations.<sup>38</sup> Under Art 129a (7) the Court may impose a lighter sentence if the accused sought to prevent the continued existence of the organization, or disclosed to the competent authorities that he/she was aware that an offence was planned (and that offence could be prevented). If the accused was successful in preventing the continued existence of the organization, or if the organization dissolved without his/her efforts, the person is not to be punished.<sup>39</sup>

Even before the September 11 attacks, and the subsequent reinvigoration of the discussion regarding anti terrorism laws, the impact of Article 129a of the German Criminal Code had been subject to debate by the political factions Buendis '90/ Die Gruenen (the Greens) and the Democratic Socialist Party (Partei des Demokratischen Sozialismus or 'PDS').<sup>40</sup> The provision was criticized on the ground that Article 129a provided for strict liability (a similar complaint that has arisen with respect to the Australian legislation). An individual may support an organization he/she thinks is engaged in humanitarian activities however, that organisation may also be involved in criminal activities.<sup>41</sup> This debate has subsided, and the provision still remains in force.

### Definition of 'Terrorism' in German Law

Although the provisions in Article 129a relate to 'terrorist organisations', notably there is still no definition for terrorism in German law.<sup>42</sup> Markus Rau points however to a definition offered by the Federal Ministry of the Interior (Bundesinnenministerium), which describes terrorism as the:

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<sup>34</sup> Art 129a (3)

<sup>35</sup> Art 129a (3)

<sup>36</sup> Art 129a (4)

<sup>37</sup> Art 129a (4)

<sup>38</sup> Art 129a (5)

<sup>39</sup> Art 129a (7) read with Art 129 (6)

<sup>40</sup> BT-Drs 13/9460 v 11.12.1997 and BT-Drs. 14/5832 v. 5.4.2001 cited in Oliver Lepsius, 'The Relationship between Security and Civil Liberties in the Federal Republic of Germany after September 11' (2002), American Institute for Contemporary German Studies, [www.aicgs.org/publications/PDF/lepsiusenglish.pdf](http://www.aicgs.org/publications/PDF/lepsiusenglish.pdf)

<sup>41</sup> See Boyne, Shawn, 'The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States' (2003) 11 *Tulsa Journal of Comparative and International Law* 111.

<sup>42</sup> See Markus Rau, 'Country Report Germany' in Walter, Voeneky, Roeben, Schorkopf, (eds) *Terrorism as a Challenge for National and International Law: Security versus Liberty* (2003), Springer Verlag, Berlin <http://edoc.mpil.de/conference-on-terrorism/country.cfm> at 12.

‘persistent struggle for political goals, which are to be attained with the help of attacks against physical integrity, life and property of other persons, in particular through serious criminal offences as defined in Article 129a Paragraph 1 of the Criminal Code, or through other offences, which serve as a preparation for such crimes’.<sup>43</sup>

While terrorism is not defined in German law, the European Union Council Framework Decision of 13 June 2002 on combating terrorism defines terrorism in Article 1 as various acts<sup>44</sup> which have the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organization to perform or abstain from performing any act, or
- seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country of an international organization.

The elements of the EU definition are similar to the elements creating the offence of being a member of a terrorist organisation in German law (Article 129a(2), above), however the term ‘terrorism’ is not defined for other provisions in Article 129a. An organisation is automatically a terrorist organisation if it commits any of the acts specified in Article 129a(1) or (2). The specific intention required to intimidate the public etc is only applicable where an individual is a member of an organisation which sets out to commit any of the offences specified in Article 129a(1) or (2). Marcus Rau observes that the offence of creating a terrorist organisation is inadequate, because the specific intent required for a terrorist activity is not part of the offence.<sup>45</sup>

#### Limitation on Defence Counsel’s Access to the Accused

In 1977, the Kontaktsperregesetz (‘prohibition of contact law’) was passed. This law restricted the access of defence counsel to detained suspected terrorists, and the contact defendants could have with other defendants while in custody. The law was enacted in response to the allegation that some defence counsel were assisting RAF members in custody to communicate with RAF members. This legislation is still in

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<sup>43</sup> Ibid at n48.

<sup>44</sup> Council Framework Decision 2002/931/CFSP of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, available at:

[europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_164/l\\_16420020622en00030007.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf)

(see Article 1 (a)-(i)). See also Kim Lane Scheppele, ‘Other People’s PATRIOT Acts, Europe’s response to September 11’ (2004) 50 *Loyola Law Review* 89; Wouters, Jan, ‘The European Union and ‘September 11’’ (2003) 13 *Indiana International and Comparative Law Review* 719 at 735ff; Durnitriu, Eugenia, ‘The EU’s Definition of Terrorism: The Council Framework Decision on Combating Terrorism’ (2004) *German Law Journal* 585.

<sup>45</sup> Markus Rau, ‘Conference Report, Germany’ in Walter, Christian, Voenekey, Silja, Roeben, Volker, Schorkopf, Frank (eds) *Terrorism as a Challenge for National and International Law: Security versus Liberty*, (2003), Springer Verlag, Berlin, <http://edoc.mpil.de/conference-on-terrorism/country.cfm> at 12.

force (see Articles 31–38 of the Introductory Law to the Judiciary Act<sup>46</sup> and Article 148 of the Code of Criminal Procedure<sup>47</sup>).

The legislation allows for the possible incommunicado detentions of suspected terrorists. This was a very contentious piece of legislation, however it was found to be compatible with the Basic Law (Grundgesetz) in a 1978 decision of the German Federal Court (Bundesverfassungsgericht, or BVerfG).<sup>48</sup> The European Commission on Human Rights also found that there was no violation of Art 6 of the European Convention on Human Rights (regarding the right to a fair trial) in the 1978 decision, *G.Ensslin, A.Baader and J.Raspe v Federal Republic of Germany*.<sup>49</sup>

As Stefanie Schmal points out, the Human Rights Committee has not yet ruled upon the legality of brief incommunicado detention of suspected terrorists,<sup>50</sup> however the Committee has indicated that various risks are associated with incommunicado detention, such as torture.<sup>51</sup> The ICCPR General Comment No 20 (10 March 1992) states that incommunicado detention for an extended period of time may breach Article 10(1) of the ICCPR or, in serious instances, Article 7 of the ICCPR.<sup>52</sup>

#### Anti Terrorism Provisions in German law after 11 September, 2001

After September 11, the German Parliament passed two legislative packages to prevent terrorism and comply with its obligations under international law. The first anti terrorism package (Anti Terror Paket) came into effect in December 2001 and made two significant changes to the law.<sup>53</sup> First, it extended the geographic jurisdiction of the prohibition on terrorist organizations already existing in the Criminal Code. Second, this package prohibited religious organizations that may be ‘fronts’ for individuals involved in criminal activities. The second

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<sup>46</sup> *Einführungsgesetz zum Gerichtsverfassungsgesetz*, or *EGVG* available at: <http://dejure.org/gesetze/EGVG/31.html>

<sup>47</sup> *Straffprozessordnung* (StPO) available at: <http://dejure.org/gesetze/StPO/148.html>

<sup>48</sup> *Schleyer-Entscheidung* BVerfGE 16 October 1977. The court found that the access by lawyers to the defendants would jeopardize the negotiations for the release of Hans Martin Schleyer (who had been abducted) and that there was no contravention of the rights to a fair trial, the freedom of expression or to family or of the principle of equality, see 49 BVerfGE 29 at 53.

<sup>49</sup> *G.Ensslin, A.Baader and J.Raspe v FRG* (1978) 14 DR 64 at 112-113.

<sup>50</sup> Stefanie Schmal, ‘Specific Methods of Prosecuting Terrorists in National Law’ (2003) in *Terrorism as a Challenge for National and International Law*, Springer Verlag, Berlin, at 33.

<sup>51</sup> CCPR/C/79/Add.61 paragraphs [12] and [18] (1996), <http://www.unhchr.ch/tbs/doc.nsf>. See also: ‘Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism’ (2003), UNHCHR, [www.un.org/Docs/sc/committees/1373/human\\_rights.html](http://www.un.org/Docs/sc/committees/1373/human_rights.html) at 51.

<sup>52</sup> CCPR General Comment 20 (Forty-fourth session, 1992), paragraph [11], [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

<sup>53</sup> The first security package was not introduced in reaction to the September 11 attacks but was already before both houses of Parliament before 11 September 2001. See Lepsius, Oliver, ‘Liberty, Security and Terrorism: The Legal Position in Germany’ (2004) 5 *German Law Journal* 435 at 440.

anti terrorism package extended the powers of security agencies and amended some provisions in asylum law.

### *The First Anti-Terrorism Package*

#### (a) Extension of Jurisdiction over Terrorist Offences

The first anti terrorism package extended the jurisdiction of Article 129a of the Criminal Code (creating various terrorism offences, considered above). Previously under Articles 129 and 129a of the German Criminal Code, the formation of criminal and terrorist organizations was prohibited if the organization existed to some extent in Germany. Article 129b of the Criminal Code extended the geographic jurisdiction of s129 and s129a of the Code to activities outside Germany. This provision was introduced partly in response to a European Union (EU) Joint Action issued on 21 December 1998, stating that any EU member state may prosecute an individual who has been involved in a criminal organization based in any EU country.<sup>54</sup> Section 129b also allows German authorities to prosecute activities that take place outside the EU however Germany can only prosecute non European terrorist organizations and their members in the following instances:

- if a provision of the German criminal law applies to the activity;<sup>55</sup>
- if a German is one of the perpetrators of an attack;
- if a German is one of the victims of an attack; or
- if the member of the organization is apprehended in Germany <sup>56</sup>

#### (b) Exemption for Religious Organisations Revoked

Under the old provisions in the Act Governing Private Associations (Vereinsgesetz, or VereinsG), religious organizations which pursued illegal activities or activities that could undermine the constitutional order were not subject to the Act Governing Private Associations (i.e. they could not be prohibited). This 'religious privilege' (Religionsprivilege) was abolished in the first anti terrorism package. Now, if any organization, including a religious organization, contravenes Article 3 of the Act Governing Private Associations (prohibiting organizations which seek to undermine the constitutional order or pursue illegal activities) the organization can be prohibited. This piece of legislation was contentious because it potentially violated Article 4 of the Basic Law (concerning the freedom of religion).<sup>57</sup> Arguably, however

<sup>54</sup> Official Journal of the European Communities (98/733/JHA) [http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l\\_351/l\\_35119981229en00010002.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_351/l_35119981229en00010002.pdf)

<sup>55</sup> Articles 3-5 of the *German Criminal Code*

<sup>56</sup> Article 129b(1) of the German Criminal Code. See further Markus Rau, 'Country Report: Germany' in Christian Watlerk, Silja Voienky, Volker Roeben, Frank Schofkopf (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2003) Springer Verlag, Berlin at 42.

<sup>57</sup> After this piece of legislation came into force, the German Minister of the Interior, Otto Schily, banned the Caliphate State and a Dutch organization 'Sister of Islam' (with 19 connected organizations). In



this provision does not discriminate against religious associations, because it merely brings those associations under the general provisions of the law.<sup>58</sup>

### *The Second Anti Terrorism Package*

The second Anti Terrorism Package was enacted on 1 January 2002. This legislation made amendments to the law relating to asylum. Article 1F and 33(2) of the Refugee Convention were explicitly included in the legislation under which a person's application for asylum is assessed (consequently a debate has arisen as to what evidential threshold must be reached to expel an alien that is suspected of planning a terrorist act).<sup>59</sup>

Security agencies have also been provided with extended powers of surveillance. Computer profiling searches (*Rasterfahndung*) allow authorities conduct searches on suspected terrorists (for example, after September 11, young males of the Islamic faith studying at technical universities in Germany were subject to such computer searches). The Federal Intelligence Office (*Bundesnachrichtendienst*) has been given the power to obtain information regarding telecommunication records and banking records where there is reason to believe that there exists a serious threat to the foreign policy and security of Germany. Police can subject individuals travelling through train stations and airports to identity checks, and in some circumstances, conduct such checks within 30 kilometres of a border. Biometric data is to be included in passports (previously such data was only collected if the individual was suspected of committing a criminal offence).

Oliver Lepsius, Professor of Public Law and Jurisprudence at the University of Heidelberg, observes that the terrorist threat has changed since the 1970s in Germany. Previous threats to the security of the Federal Republic in the 1970s were carried out by specific people and were confined to a region. The threat posed by the September 11 attacks, however constitutes a global threat and one that is not limited to one region. The nature of the Government's response has also changed: surveillance was previously only warranted if an individual's conduct raised suspicion. Now, individuals can be subject to surveillance, merely because they are members of the public, and not because of their behaviour.<sup>60</sup> A further problem with this type of surveillance is that because it is carried out in secret, an individual will

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January 2003 the German government prohibited the group, the Party of Liberation, which was accused of spreading violent anti-Semitic and anti-American propaganda.

<sup>58</sup> Verena Zoeller, "Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights" [2004] 5 *German Law Journal* 469 at 489.

<sup>59</sup> See for example, Verena Zoeller, "Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights" [2004] 5 *German Law Journal* 469 at 491.

<sup>60</sup> Oliver Lepsius, 'The Relationship Between Security and Civil Liberties in the Federal Republic of Germany after September 11' (2002), *American Institute for Contemporary German Studies*, at 17; see also Erhard Denninger, 'Freiheit durch Sicherheit? Anmerkungen zum Terrorismusbekämpfungsgesetz' (2002) 10-11 *Aus Politik und Zeitgeschichte* 22.



most likely not know if his/her privacy has been invaded and therefore will not be able to apply to a court for remedies.<sup>61</sup>

## **Jurisprudence Of The German Federal Constitutional Court**

### Trends in Constitutional Balancing of Security and Liberty

Two recent decisions of German courts stress the need to ensure procedural fairness in terrorism trials and that counter-terrorism legislation is proportionate and adapted to the goals it aims to achieve.

#### *Security versus the Right to Privacy*

The decision of the German Federal Constitutional Court on 3 March 2004<sup>62</sup> found that a 1998 amendment to the Basic Law to allow for the surveillance of communications within private homes and the monitoring of mail and telecommunications (the so called 'Grosser Lauschangriff'), was unconstitutional because it intruded too much upon the right to privacy. The Federal Constitutional Court held that where an individual was not suspected of having committed a criminal offence, surveillance of private communications within a home would have a disproportionate impact on the dignity of the individual.

#### *Security versus Criminal Procedural Guarantees*

A 2004 decision of the Federal Court of Justice highlights the need to ensure procedural guarantees in trials of alleged terrorists. Shortly after September 11, it was revealed that some of the pilots involved in the attacks in the United States had studied in Germany. One of the first suspects to be arrested was Mounir El Motassadeq, a student studying at a technical college in Hamburg, and who was alleged to have met the pilots involved in the terrorist attacks, and associated with another person who was involved in the attack, Ramzi Binalshib. El Motassadeq was charged with being an accessory to the murder of more than 3,000 people, and being a member of an unlawful organization. The evidence against El Motassadeq included the alleged transfer of 5,000 DM to Binalshib's bank account. El Motassadeq stated that he did not have anything to do with the attacks. Binalshib, who was being held in custody in the United States, was subpoenaed; however the US Government did not allow him to testify. The US Government also prohibited an FBI agent who was present at El Motassadeq's trial from testifying. In addition, the German government instructed the German intelligence organization, the Bundesnachrichtendienst (BND), not to provide the court with information in relation to Binalshib, despite the statutory duty imposed on government bodies in German law not to withhold from a court evidence which may exculpate the accused. The

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<sup>61</sup> Tomuschat, Christian, "The Individual Threatened by the Fight Against Terrorism?", Lecture held on 13 September 2002, Warsaw University,

[http://www.rewi.hu-berlin.de/jura/inst/int/texte/warschau\\_tomuschat.pdf](http://www.rewi.hu-berlin.de/jura/inst/int/texte/warschau_tomuschat.pdf) at 9

<sup>62</sup> BVerfG, 1 BvR 2378/98, 3.3.2004,

[http://www.bverfg.de/entscheidungen/rs20040303\\_1bvr237898.html](http://www.bverfg.de/entscheidungen/rs20040303_1bvr237898.html)

German courts found that a conviction could not be entered if evidence existed that may assist the defendant and was not produced, contrary to German law.<sup>63</sup>

## Conclusion

At a time when the United States Government is creating special courts/tribunals for the trials of alleged terrorists, which operate outside the usual standards of justice available in the US court system,<sup>64</sup> it is reassuring to observe that German courts, which have some experience in dealing with the complex task of striking a balance between security and liberty, have stressed the need for procedural fairness in terrorism trials and that counter terrorism legislation is to be proportionate and adapted to the goals it seeks to achieve.

It is clear, according to the Secretary of Defense Donald Rumsfeld, that the 'war on terror' will not have an expiry date.<sup>65</sup> In such an open ended 'war on terrorism', it is a concern that exceptional measures may become the norm, and indeed perceived as essential in the fight against terrorism. However security is to be achieved not only through minimizing the threat of terrorism, but also through upholding and guarding human rights. After all, the fight against terrorism is ultimately about protecting human rights.



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<sup>63</sup> Safferling, Christoph, 'Terror and Law – Is the German Legal System able to deal with Terrorism? - The *Bundesgerichtshof* (Federal Court of Justice) decision in the case against *El Motassadeq*' (2004) 5 *German Law Journal* 517 – 518; Blaauw-Wolf, Loamni, 'The Hamburg Terror Trials – American Political Poker and German Legal Procedure: Un Likely Combination to Fight International Terrorism' [2004] 5 *German Law Journal* 791; Kim Lane Scheppele, 'Other People's PATRIOT Acts: Europe's Response to September 11' (2004) 50 *Loyola Law Review* 89

<sup>64</sup> See for example the comments made by Lex Lasry QC, the independent observer at the directions hearing of David Hicks on trial procedure at Guantanamo Bay available at <http://www.lawcouncil.asn.au/HicksTrial.html>

<sup>65</sup> Donald Rumsfeld, 'A War Like No Other Our Nations has Faced', *The Guardian*, 29 September 2001.

# Of Illegitimate Conceptions: Australian Laws Regulating Women's Access to In Vitro Fertilisation and their Influence on Gender, Norms and the Heterosexual Nuclear Family



**Ben Bertoldi**, UQ law student, is the 2004 winner of the annual WATL Student Paper Competition.

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*From Archaeology*  
*One moral, at least, may be drawn,*  
*to wit, that all*  
*our school text books lie.*  
*What they call History*  
*is nothing to vaunt of,*  
*being made, as it is,*  
*by the criminal in us:*  
*goodness is timeless<sup>1</sup>.*

The emergence of new reproductive technologies has resulted in considerable disruption to the idealised norm of the heterosexual nuclear family<sup>2</sup> and challenged both the validity and function of legislative restrictions that act to prohibit these services on the basis of 'reasonable discrimination'<sup>3</sup>. Restrictions that seek to prohibit access to these reproductive services, specifically access to In Vitro Fertilisation (IVF) work to sanction the proper heterosexual family formation and to 'eliminate pollution to the paternal masculine social order through eliminating contamination by other modes of being'<sup>4</sup>. In support of this contention this essay will begin by respectively examining the current legal position of heterosexual defacto couples, single women and lesbians with regard to accessing IVF technologies. The social and political impact of the proposed *Sex Discrimination Act 1984* (Cth) (SDA) amendments will then be explored, with consideration given to the federal government's underlying intention to reinforce the nuclear family stereotype. The 'appropriate family' concept will subsequently be

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<sup>1</sup> W. H. Auden. 'Archaeology'. (1973/1979) *Selected Poems*. Great Britain: Faber and Faber Ltd.

<sup>2</sup> Belinda Bennet. 'Reproductive Technology, Public Policy and Single Motherhood'. (2001) 22 *Sydney Law Review* 625-635.

<sup>3</sup> Jenni Millbank. 'Every Sperm is Sacred?' (1997) 22(3) *Alternative Law Journal* 126-129.

<sup>4</sup> Linnell Secomb. 'IVF: Reproducing the Proper Family of Man'. (1994) 4 *Australian Feminist Law Journal* 37.

assessed, along with its social construction and inherent flaws. Through the application of s 7B(2) grounds for reasonable discrimination in the SDA, these flaws will be used to demonstrate why the federal government has no justification for the use of legally enforceable restrictions. It will then be furthered that the drive to cultivate the nuclear family derives from a socially constructing humanistic order<sup>5</sup> structured around the fiction of the heterosexual norm. Ultimately, in understanding that ‘only nineteen percent of Australian families fit into the heterosexual nuclear model’<sup>6</sup> the legal regulation of reproductive technologies which prohibits access to those who fail to conform to the heterosexual narrative of the family, offers a powerful insight into the current social definitions of reproduction, sexuality and the family.

Legislative restrictions regarding access to IVF by heterosexual defacto couples have to an extent been tempered by a small body of case law, comparatively allowing it to take residence on the lower echelon of determinative categories for prohibition. A pivotal case to emerge from this body is *MW, DD, TA & AB v Royal Women’s Hospital, Freemasons Hospital & State of Victoria* (MW)<sup>7</sup>. Prior to the case of MW the *Infertility (Medical Procedures) Act 1995* (Vic) (the Victorian Act) provided in s 8(1) that ‘a woman who undergoes a treatment procedure must be married’<sup>8</sup>. In MW, the Human Rights and Equal Opportunity Commission (HREOC) determined that three women in long term heterosexual relationships who had been denied IVF by virtue of s 8(1), had been ‘subjected to discrimination on the basis of marital status, which is prohibited by s 22 of the SDA’<sup>9</sup>. The Victorian Act (although not capable of being held inconsistent with the SDA) was subsequently amended to allow heterosexual couples in defacto relationships access to Assisted Reproductive Technology (ART). This decision symbolised an immediate victory for the notion of “legitimate defacto relationships”<sup>10</sup>, although the public outrage of ‘pro family liberal and coalition governments’<sup>11</sup> generated by the win, offered a reflection of the ‘state and federal government’s concern to perpetuate the heterosexual nuclear family by whatever means at their disposal’<sup>12</sup>. Additionally, Bronwyn Statham forwards that the decision was detrimental as it recognised that the ‘spectral figure of the male partner is insistently and ominously present’<sup>13</sup> in ART services.

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<sup>5</sup> Above 24.

<sup>6</sup> Tami Dower. ‘Redefining Family: Should Lesbians Have Access to Assisted Reproduction’. (2001) 25 Melbourne University Law Review 470.

<sup>7</sup> [1997] HREOCA 6 (5 March 1997).

<sup>8</sup> Kristen Walker. ‘1950’s Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria’. (2000) 11 *Public Law Review* 293.

<sup>9</sup> Above.

<sup>10</sup> Sylvia Winters. ‘Gay and Lesbian Relationships and the Law of NSW’. 1997 (1) *Australian Gay and Lesbian Journal* 54-80.

<sup>11</sup> Jenni Millbank. ‘Every Sperm is Sacred?’ (1997) 22(3) *Alternative Law Journal* 128.

<sup>12</sup> Above.

<sup>13</sup> Bronwyn Statham. ‘Reproducing Lesbian Infertility’. (2000) 9(1) *Griffith Law Review* 118.

Single women undeniably encounter legislative demur in the face of access to IVF. In Victoria and Western Australia ART services are limited to those married or living together in a heterosexual defacto relationship for a minimum of five years<sup>14</sup>. All other states, excluding South Australia, have no direct legal regulation, however, the National Health and Medical Research Council (NHMRC) licences service providers and issues federal guidelines, which when breached 'could result in the withdrawal of funding and medical registration'<sup>15</sup>. The NHMRC guidelines stipulate that insemination should only be given when 'doctors have taken serious regard to the long term welfare of... any children who may be born'<sup>16</sup>. These provisions have allowed the interpretation that 'a child should not be born to a single mother as it is not in that child's best interests'<sup>17</sup>, to be enforceable through the backing of NHMRC policy. In South Australia, s 13(3) and (4) of the Reproductive Technology Act 1988 (SA) (which excluded single women from utilising IVF services) (q), were held by the Supreme Court in the case of *Pearce v South Australian Health Commission*, to be inconsistent by virtue of s 109 of the Constitution with the provision of the SDA and were therefore held to be invalid<sup>18</sup>. IVF is therefore available to single women in South Australia, which to a certain degree may represent 'the legal sanctioning of 'alternative' family forms, signifying a shift in Australian law away from the perceived norm of the heterosexual nuclear family as the only environment where children may be raised'<sup>19</sup>. Nevertheless, the political furor following the decisions in both *JM v QFG & GK*<sup>20</sup> (JM) and *McBain v Victoria*<sup>21</sup> (McBain), threatens to render the progress made by Pearce as ineffectual.

The decisions of the Queensland Anti Discrimination Board (QADT) in JM and the High Court in McBain embodied a temporary breakthrough for lesbian women in the arena of legal and social reform. In 1997 QADT held that the denial of donor insemination services to a lesbian woman was discriminatory on the basis of lawful sexual activity under the *Anti Discrimination Act 1994* (Qld) and ordered compensation to be paid for JM's humiliation of 'being treated as less than the equal of a heterosexual woman'<sup>22</sup>. The tribunal found that the doctor's basis of refusal of treatment, being that KM could not be classed as clinically infertile under s 2.1(a) of the Australian Health Ethics Committee Guidelines, which states that 'one of the partners must be unable to

<sup>14</sup> Jenni Millbank. 'Every Sperm is Sacred?' (1997) 22(3) *Alternative Law Journal* 126.

<sup>15</sup> Above.

<sup>16</sup> Above 127.

<sup>17</sup> Bronwyn Statham. 'Reproducing Lesbian Infertility'. (2000) 9(1) *Griffith Law Review* 115.

<sup>18</sup> Anita Stuhmcke. 'Lesbian Access to In Vitro Fertilisation'. (1997) *Australian Gay and Lesbian Law Journal* 30.

<sup>19</sup> Above 29.

<sup>20</sup> [1998] QCA 228 (18 August 1998)

<sup>21</sup> [2000] 99 FCR 116.

<sup>22</sup> Above 31.



conceive through normal intercourse<sup>23</sup> was erroneous. QADT and the Supreme Court on appeal, together found that the doctor had adopted ‘an unnecessarily narrow and discriminatory definition of infertility which was not medically justified’<sup>24</sup>, as infertility is ‘a socially constructed phenomenon existing within a complex matrix of historical and socio cultural specifications’<sup>25</sup>. Ambrose, J (of the Supreme Court) furthered that the doctor’s definition of infertility had less to do with JM’s lesbian activity, but was rather ‘due to her heterosexual inactivity’<sup>26</sup>. This statement sought to elucidate the way in which the discourses of law and medicine operate in parallel ways to inappropriately reaffirm the normative value of heterosexual partnerships as the only acceptable social form for the raising of children<sup>27</sup>.

Similarly in Victoria, Dr. McBain sought before the Federal Court that s 8(1) of the Victorian Act was inconsistent with s 22 of the SDA, which makes it ‘unlawful to discriminate against a person on the basis of that person’s sex or marital status... by refusing to provide goods or services’<sup>28</sup> and was therefore, by virtue of s 109 of the Constitution, invalid. The Catholic Church was heard as *amici curiae*, along with the Victorian Health Minister)<sup>29</sup>. Sundberg, J held that inconsistencies did exist and any decision otherwise would ‘give primacy to implication from other international treaties (specifically the *Covenant on the Elimination of All Forms of Discrimination Against Women* (CEDAW) over the words of the very treat to which the SDA gives effect’<sup>30</sup>. An appeal by the Attorney General and the Catholic Church by way of certiorari to the High Court was rejected as their honours found that ‘there were no grounds for the use of certiorari’<sup>31</sup>, with Gummow and Gaudron JJ asserting that the Attorney General had ‘no roving authority to initiate litigation to disrupt settled outcomes... so as to ride the law reports of what are considered unsatisfactory decisions’<sup>32</sup>. Both McBain and JM may accordingly be ‘seen as recognition that other family forms are in fact deserving of legal endorsement and that access to IVF for lesbian and single women will add richness and diversity to the fabric of society and the institution of the family’<sup>33</sup>. The *Sex Discrimination Amendment Bill*, introduced by the federal government in 2000 and passed by the

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<sup>23</sup> Bronwyn Statham. ‘Reproducing Lesbian Infertility’. (2000) 9(1) *Griffith Law Review* 115.

<sup>24</sup> Above 140.

<sup>25</sup> Above 137.

<sup>26</sup> Above 137.

<sup>27</sup> Above 124.

<sup>28</sup> Michelle Rabsch. ‘The Fallout from McBain’. (2002) *Law Society Journal* 54.

<sup>29</sup> Above 56.

<sup>30</sup> Above 55.

<sup>31</sup> Above 55.

<sup>32</sup> Above 56.

<sup>33</sup> Tami Dower. ‘Redefining Family: Should Lesbians Have Access to Assisted Reproduction’. (2001) 25 *Melbourne University Law Review* 471.

House of Representatives in 2002, reveals, however, an apparent intention to ensure that such an understanding will never prevail.

The SDA amendments, advised by the Attorney General, would allow the federal government to insert provisions into the SDA which would authorise discrimination against single and lesbian women with regard to accessing ART services, effectively amounting to a eugenic promotion of the heterosexual nuclear family<sup>34</sup>. Despite the Senate Committee's findings that these amendments would be 'ineffective in trying to protect the interests of the child and are contrary to both the spirit and the letter of the SDA'<sup>35</sup> the Bill, although amended and still with the Senate, has been pushed ahead, attempting to legally sanction discriminatory exclusion and to 'encourage the narrative of heterosexuality as the social norm for the raising of the child'<sup>36</sup>. Rabsch maintains that more worrying is the fact that it is 'not good legislative practice to introduce discrimination into anti discrimination legislation'<sup>37</sup>, as the exclusion of family forms other than that of the heterosexual family would erode the SDA through 'undermining confidence in Australia's system of human rights protection'<sup>38</sup> and allow the law to become inconsistent with the recognition of alternative families in other areas of law<sup>39</sup>. The SDA amendments would thus constitute an over attempt to halt the current transition of the legal and social concept of 'accepted family relationships'<sup>40</sup> and impose norms which define 'single women and lesbian reproduction as illegitimate and outside the bounds of proper pregnancy and family life'<sup>41</sup>.

The government's actions are motivated by a flawed political campaign to entrench the concept of the 'proper family' into law, through administering 'family ideals and disciplining those who stray from these confines'<sup>42</sup>. What the federal government seemingly fails to understand, however, is that the 'proper family both produces and is produced by humanistic constructions of rational and free will, regulated through legal structures and moral codes of approved behaviours and interactions'<sup>43</sup>. Indeed, heterosexuality may be 'naturalised in a culture

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<sup>34</sup> Jenni Millbank. 'Every Sperm is Sacred?' (1997) 22(3) *Alternative Law Journal* 128.

<sup>35</sup> Michelle Rabsch. 'The Fallout from McBain'. (2002) *Law Society Journal* 57.

<sup>36</sup> Anita Stuhmcke. 'Lesbian Access to In Vitro Fertilisation'. (1997) *Australian Gay and Lesbian Law Journal* 39.

<sup>37</sup> Michelle Rabsch. 'The Fallout from McBain'. (2002) *Law Society Journal* 57.

<sup>38</sup> Above 55.

<sup>39</sup> Stella Tarrant. 'Western Australia's Persistent Enforcement of an Invalid Law: Section 23(c) of the Human Reproductive Technology Act'. (2000) 8 *Journal of Law and Medicine* 103.

<sup>40</sup> Belinda Bennet. 'Reproductive Technology, Public Policy and Single Motherhood'. (2001) 22 *Sydney Law Review* 623.

<sup>41</sup> Linnell Secomb. 'IVF: Reproducing the Proper Family of Man'. (1994) 4 *Australian Feminist Law Journal* 34.

<sup>42</sup> Barry Adam. 'Structural Foundations of the Gay World'. In Steven Seidman, *Queer Theory/Sociology*. London: Blackwell Publishers (1996) 118.

<sup>43</sup> Linnell Secomb. 'IVF: Reproducing the Proper Family of Man'. (1994) 4 *Australian Feminist Law Journal* 32.

that commonly understands homosexuality to be a derivative or less evolved form of heterosexuality'<sup>44</sup>, nevertheless the law still recognises that 'the word family is not intended as a reference only to the group constituted by a husband and wife and the children of their union'<sup>45</sup>. The Family Law Act 1975 at s 43(b) recognises the family as the 'natural and fundamental group... responsible for the care and education of children)<sup>46</sup>, which does not require that it is in the best interests of a child's long term welfare to be born into a family formed by a heterosexual male and female parent'<sup>47</sup>. Importantly, the rise of alternative family forms has 'exposed the heterosexual nuclear family as cultural construct' which is why the rhetoric of the welfare of the child 'has long been used to mask the marginalisation of alternative family forms, as it is largely based on assumptions and prejudices rather than hard evidence'<sup>48</sup>. This rhetoric is explicitly apparent in the welfare test of the NHMRC that 'promotes highly subjective views of what the family should be'<sup>49</sup>. Nevertheless, in spite of the government's desire to further the normative view of the family, a rapidly intensifying quantity of statistical evidence indicates that 'the importance of the family derives from its function rather than its structure'<sup>50</sup>, making the SDA amendments appear both medically and psychologically unsubstantiated.

Through an examination of s 7B(2) of the SDA's grounds for reasonable discrimination, it becomes apparent that the government's views are not supported by medical or psychological fact, but rather are 'reflective of gender stereotyped bias'<sup>51</sup> which seriously 'compromises fairness in the administration of justice'<sup>52</sup>. S 7B(2) reveals that the purported discrimination will only be deemed reasonable given the nature and extent of the disadvantages imposed by the requirement and whether the disadvantage is proportionate to the result sought by the requirement<sup>53</sup>. With regard to the nature of the disadvantage, the right to procreate 'is a fundamental entitlement protected in international law. Article 16 of CEDAW demands that it is a woman's right to decide on whether to have children and to have access to the means to enable them to exercise this right'<sup>54</sup>. The federal government argues, however,

<sup>44</sup> Annamarie Jagose. *Queer Theory*. Melbourne: Melbourne University Press (1996) 16.

<sup>45</sup> Anthony Dickney. 'The Notion of Family in Law'. (1997) (4) *University of Western Australia Law Review* 433.

<sup>46</sup> Above 433.

<sup>47</sup> Michael Warner. 'Normal and Normaller. Beyond Gay Marriage'. (1999) 5(2) *GLQ: Journal of Lesbian and Gay Studies* 54.

<sup>48</sup> Tami Dower. 'Redefining Family: Should Lesbians Have Access to Assisted Reproduction'. (2001) 25 *Melbourne University Law Review* 468.

<sup>49</sup> Above 474.

<sup>50</sup> Above 480.

<sup>51</sup> Patricia Hoyle, Patricia. 1996. 'What's in a Word'. (1996) 8 *Proctor* 12.

<sup>52</sup> Helen McKelvie. 'Gender Bias: It's Time to Educate'. (1993) 18(3) *Alternative Law Journal* 137.

<sup>53</sup> Stella Tarrant. 'Western Australia's Persistent Enforcement of an Invalid Law: Section 23(c) of the Human Reproductive Technology Act'. (2000) 8 *Journal of Law and Medicine* 104.

<sup>54</sup> Above 105.

that the denial of such a right is proportionally necessary to ensure that any child born as a result of IVF is provided with a loving and stable environment<sup>55</sup>. Studies show that this argument lacks credibility as there is no conclusive sociological research to say that family structure per se has a detrimental or beneficial effect on the child<sup>56</sup>. 'Empirical studies have firmly established that children growing up with a lesbian or gay couple as parents are not at a disadvantage compared with children living with heterosexual parents'<sup>57</sup>. Higher levels of psychological problems connected to children of single parents<sup>58</sup> have been acknowledged to be a result of poverty<sup>59</sup> and psychological trauma from the breakdown of heterosexual marriage, not from the single parenting itself<sup>60</sup>. Furthermore, no studies have shown that heterosexuality and dual parenting is a factor in providing stability in a family<sup>61</sup>, especially considering that the 'presence of the father does not guarantee that the father will have a positive impact on his children's development'<sup>62</sup>. It is the 'quality of parenting, not the parent's sexuality, which forms the most crucial factor for a child's health, growth and development'<sup>63</sup>. Legislative frameworks that shift the focus away from the suitable family form are not functioning to provide for the best interests of the child, but rather to cultivate biased stereotypes of the legitimate family structure<sup>64</sup>.

As the 'legal world is structured around the tools of heterosexuality: marriage, reproduction and discrete biological family units'<sup>65</sup>, it comes as no surprise that certain government officials seek to reinforce the stereotype of the heterosexual family in the absence of any sound justification. Essentially, heterosexuality has assumed a 'normality and normativity, which in turn has framed the understanding of all social relations'<sup>66</sup>. The perpetuation of this normativity is reliant upon the law

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<sup>55</sup> Above 106.

<sup>56</sup> Above 105.

<sup>57</sup> Anita Stuhmcke. 'Lesbian Access to In Vitro Fertilisation'. (1997) *Australian Gay and Lesbian Law Journal* 37.

<sup>58</sup> Kristen Walker. '1950's Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria'. (2000) 11 *Public Law Review* 295.

<sup>59</sup> Stella Tarrant. 'Western Australia's Persistent Enforcement of an Invalid Law: Section 23(c) of the Human Reproductive Technology Act'. (2000) 8 *Journal of Law and Medicine* 103.

<sup>60</sup> Kristen Walker. '1950's Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria'. (2000) 11 *Public Law Review* 295.

<sup>61</sup> Anita Stuhmcke. 'Lesbian Access to In Vitro Fertilisation'. (1997) *Australian Gay and Lesbian Law Journal* 38.

<sup>62</sup> Kristen Walker. '1950's Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria'. (2000) 11 *Public Law Review* 303.

<sup>63</sup> Anita Stuhmcke. 'Lesbian Access to In Vitro Fertilisation'. (1997) *Australian Gay and Lesbian Law Journal* 38.

<sup>64</sup> Danny Sandor. 'Children Born from Sperm Donation: Financial Support and Other Responsibilities in the Context of Discrimination'. (1997) 4(1) *Australian Journal of Human Rights* 176.

<sup>65</sup> Sarah Zeitlin. 'Lesbian Bodies Before the Law: Chicks in White Satin'. (1995) (5) *Australian Feminist Law Journal* 51.

<sup>66</sup> Above 54.



acting 'more and more as a norm, where the legislative/judicial institutions are increasingly incorporated into a continuum of apparatuses whose functions are for the most part regulatory'<sup>67</sup>. Consequently, in contemplating Foucault's assertion that 'the juridical systems of power produce the subjects they subsequently come to represent'<sup>68</sup>, the government's reluctance to accept alternative family forms is understandable, as IVF effectively threatens 'the humanistic construction of a man centred, dichotomously organised universal order'<sup>69</sup>. The gendered stereotype of the heterosexual family is constructed to 'anchor sexuality and provide it with permanent support along its two primary dimensions: the husband wife axis and the heterosexual parent child axis'<sup>70</sup>, which allows the legitimate and procreative couple to lay down the law<sup>71</sup>. ART services are accordingly restricted to ensure that this stereotype is reinforced by denying single, defacto partners or lesbian women 'any role in child rearing, so as to make it unlikely that children can grow up with anything other than a distorted view of what is natural'<sup>72</sup>. This process incontestably implicates an unofficial political/legislative agenda (as seen also in Marriage Legislation Amendment Bill 2004) to make certain that the heterosexual nuclear family remains the 'central organising principle of society'<sup>73</sup>.

The development of ART services has irrefutably propelled the notion of 'the family' into a crucial period of social, moral and legal re evaluation. The recognition of defacto partner's rights to IVF in MW, for single women in Pearce and for lesbians in JM and McBain, are all representative of a judicial step away from a reliance on traditional, inaccurate stereotypes of the family which 'limit the system's ability to dispense equal justice'<sup>74</sup>. It is in the face of these progressions that the federal government's proposed SDA amendments revealed an unfortunate, yet undeniable attempt to reinforce the heterosexual nuclear family at the expense of the eighty one percent of the Australian population<sup>75</sup> who do not conform to this norm. Despite the knowledge that 'social structures and models of the family which have been posited as 'natural', may, in time, come to be seen as an artificial and invidious constraint on human potential and freedom'<sup>76</sup>, the federal government

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<sup>67</sup> Above 51.

<sup>68</sup> Michael Foucault. *The History of Sexuality: Volume One*. Britain: Chaucer Press (1981) 110.

<sup>69</sup> Linnell Secomb. 'IVF: Reproducing the Proper Family of Man'. (1994) 4 *Australian Feminist Law Journal* 26

<sup>70</sup> Michael Foucault. *The History of Sexuality: Volume One*. Britain: Chaucer Press (1981) 107.

<sup>71</sup> Above 94.

<sup>72</sup> Dennis Altman. *Homosexual: Oppression and Liberation*. New York: New York University Press (1993) 111.

<sup>73</sup> Above 96.

<sup>74</sup> Helen McKelvie. 'Gender Bias: It's Time to Educate'. (1993) 18(3) *Alternative Law Journal* 137.

<sup>75</sup> Tami Dower. 'Redefining Family: Should Lesbians Have Access to Assisted Reproduction'. (2001) 25 *Melbourne University Law Review* 479.

<sup>76</sup> Tami Dower. 'Redefining Family: Should Lesbians Have Access to Assisted Reproduction'. (2001) 25 *Melbourne University Law Review* 479.



persists in implementing restrictions which seek to minimise disruption to the norm of the heterosexual nuclear family. Nevertheless, the resilience of those who have challenged and continue to challenge these laws before the courts is testament to the fact that:

*We have a good law if it will be obeyed, if it is enforceable and if it so prudently drafted that it avoids most of the harmful effects that could flow from it. If a law does none of these things it is a bad law, no matter what the logic or moral intensity behind it*<sup>77</sup>.

Until it is wholly accepted that ‘what is natural is not static, but rather a product of social construction that must evolve with changing societal attitudes’<sup>78</sup>, it is unlikely that the government’s discriminatory presumptions of what constitutes a good family may ever be considered as ‘good law’.



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<sup>77</sup> Richard Hughes. *Culture of Complaint- The Fraying of America*. London: Oxford University Press (1993) 164.

<sup>78</sup> Tami Dower. ‘Redefining Family: Should Lesbians Have Access to Assisted Reproduction’. (2001) 25 Melbourne University Law Review 478.

