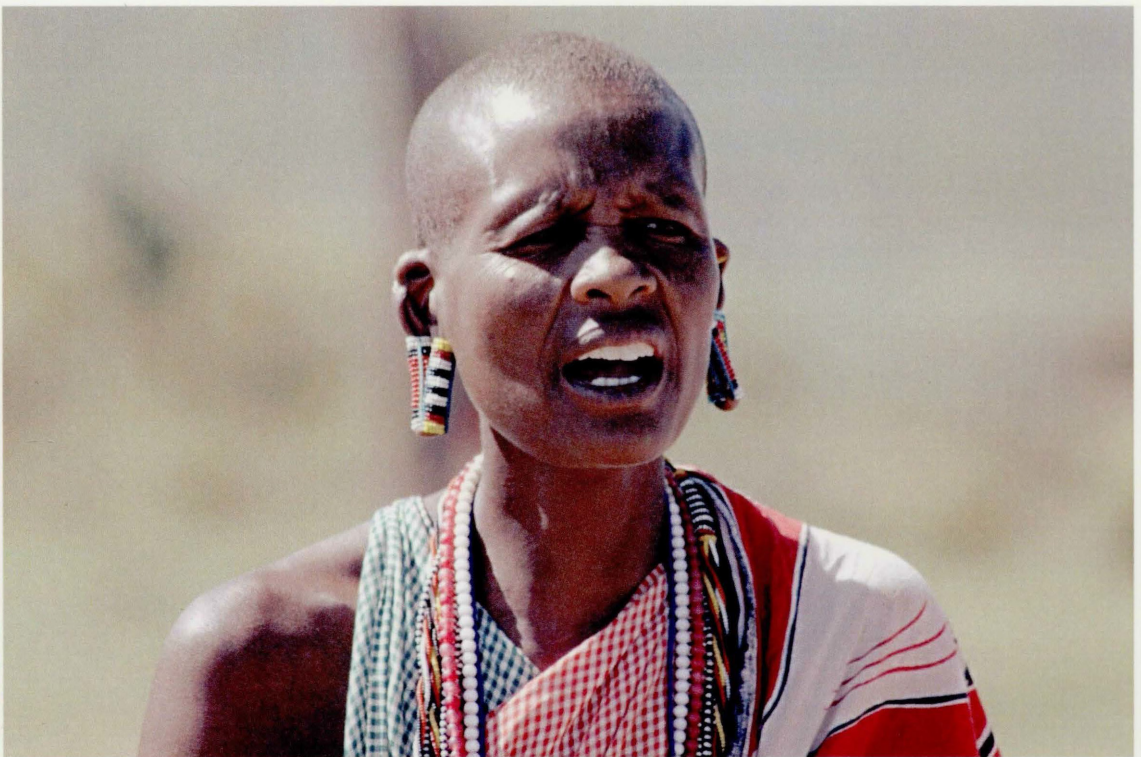


Pandora's Box 2005

Women of the world



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Editors

Jessica Cameron Holly Kluver Penny Allman-Payne

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Editors' Note

Welcome to Pandora's Box 2005.

This edition of Pandora's Box highlights and gives praise to "*Women of the World*". From women's rights in Indonesia to girls as child soldiers, the 2005 edition of Pandora's Box highlights important contemporary issues on an international level as well as within Australia.

We have also published essays from the WATL Magistrates program. These articles cover thought-provoking issues from judicial discretion to the effectiveness of the Murri Court and Drug Court in Brisbane.

It is natural to read some of these articles and feel helpless in a world full of suffering and injustice. However, the aim of Pandora's Box is to empower change through education and understanding. We hope that by becoming aware of contemporary legal issues that face the world today, we can be better equipped to challenge suffering and injustice.

We hope that you enjoy reading the articles we have chosen to publish as much as we have enjoyed compiling the 2005 edition of Pandora's Box.

In closing, we leave you with the following quote:

*There are two ways of spreading light --
To be the candle, or the mirror that reflects it.*
Edith Wharton

Jessica Cameron, Holly Kluver and Penny Allman-Payne
Pandora's Box Editors 2005

Whilst the editors have checked references for authenticity, any mistakes belong to the authors.

FOREWORD

Hilary Charlesworth*

This edition of Pandora's Box is a testament to the many different voices of women in law. It presents both academic and personal accounts of problems that women encounter across the globe.

Some lawyers find a focus on women, sex or gender disconcerting, arguing that the law is blind to differences between women and men. The articles that follow demonstrate that the law can often inculcate discrimination. It took me a long time to see this. As a law student many years ago, I imbibed the mythology of the law as impartial and it was not until I began in legal practice that I began to realise how limited the impartiality of the law was. The particular – the masculine – has become the general in legal terms. As I grow older and more impatient, I look forward to the day when issues of sex and gender will become less relevant and concerns of humanity will become more significant. This will mean women will not be required to speak *as women* because men are always speaking *as men*.¹

Some of the articles included here show the influence of feminist thought. What are the central concerns of feminist jurisprudence? It is clear that the term 'feminism' is an over-extended umbrella and that we can readily find bitter theoretical disputes between scholars who identify as feminists. Examples of these disputes include the debate over pornography, or over the issue of trafficking in women.

An early search for points of commonality between women has fractured and now it is common to find references to 'feminisms' rather than 'feminism'. The Canadian academic, Denise Réaume, has challenged the idea of feminist jurisprudence as a distinctive school of thought and has attempted to recognize the diversity within feminist scholarship.² She has proposed an account of

*Keynote speaker for the WATL Annual Professional Breakfast in 2005.

¹ See ANNE PHILLIPS, *ENGENDERING DEMOCRACY* (1991) at 7.

² Denise Réaume, *What's Feminist about a Feminist Analysis of Law?* *LEGAL THEORY* (1996).

feminist jurisprudence as 'an analysis of the exclusion of (some) women's needs, interests, aspirations, or attributes from the design or application of the law.'³ This account does not require a thick substantive conception of the aims of feminism.⁴ In other words, it assumes a broad commitment to the equality of women, without defining what equality actually is. Réaume's notion of feminist jurisprudence also builds on the sense that the injustice women face is structural and systemic and it is sceptical about the justice of traditional power structures.

I find this explanation of feminist jurisprudence as concerned above all with the exclusion of women attractive as an alternative to the radical feminism associated most strongly with the writings of Catharine MacKinnon because it does not depend on a notion of the universal victimisation of women and the universal empowerment of men.⁵ It moves us away from the rather dispiriting and often paralysing idea of women as the eternal downtrodden at the hands of an international brotherhood of men.

The diversity of the contributions you will read here is evidence that women's lives remain excluded from the law in many different ways. Some cases are easier to tackle than others, but we have a lot to learn from work going on around the world. I congratulate the editors and the contributors on their hard work in bringing these important stories to a broader public.

³ *Ibid.* at 271.

⁴ *Ibid.*

⁵ See Vanessa E. Munro, *On Power and Domination: Feminism and the Final Foucault* 2 EUROPEAN JOURNAL OF POLITICAL THEORY (2002) 79, 80.

Killing Childhood – Girl Child Soldiers

Dr Mark Zirnsak has been actively involved in activities relating to the promotion of peace, arms control and disarmament since 1997. He was employed as the Synod Social Justice Development Officer in June 1999 for the Victorian Uniting Church and is currently the Director of the Justice and International Mission Unit of the Victoria and Tasmanian Uniting Church. Mark continues to advise the Uniting Church nationally on issues relating to International Humanitarian Law, peace and disarmament. He is the Uniting Church representative on the Minister for Foreign Affairs National Consultative Committee on International Security Issues.

In his time with the Uniting Church, Mark also represented the Uniting Church on the Australian Coalition to Stop the Use of Child Soldiers, acting as co-ordinator for the Coalition in 2001.

From December 1997 to the end of 1999, Mark had been National Religious Network Contact and Victorian Religious Network Coordinator for Amnesty International Australia.

In 2003, Mark was awarded the National Meritous Service Award by Amnesty International Australia.

It is estimated that at least 300,000 children under the age of 18 are currently taking part in armed conflict around the world.¹ Hundreds of thousands more may be enrolled in government armed forces or armed opposition groups and made to fight. In over thirty countries around the world, these young combatants are both the tools and the casualties of adult hatreds. The problem is most critical in Africa and Asia. Over two million children have been killed in armed conflicts in the past decade, with six million more seriously injured or permanently disabled. Child soldiers are often indoctrinated with ethnic, nationalistic or religious hatred, and then forced to fight in adult wars.

¹ Dyan Mazurana and Susan McKay, "Child Soldiers: What about the girls?", Bulletin of Atomic Scientists, Vol. 57, No. 5, September/October 2001, pp. 30-35.

Between 2001 and 2004, armed hostilities involving children less than 18 years old occurred in Afghanistan, Angola, Burundi, Colombia, the Democratic Republic of Congo, Cote d'Ivoire, Guinea, India, Iraq, Israel and the Occupied Territories, Indonesia, Liberia, Myanmar/Burma, Nepal, Philippines, Russian Federation, Rwanda, Sri Lanka, Somalia, Sudan and Uganda. Governments that used child soldiers in armed conflict were Burundi, the Democratic Republic of Congo, Cote d'Ivoire, Guinea, Liberia, Myanmar/Burma, Rwanda, Sudan, Uganda and the USA.²

Children in combat are at greater risk of harm. This is due to their relative immaturity and also due to the drugs and alcohol they are often forced to take. The availability of modern lightweight weapons enables children to be more easily used as soldiers. They are also used as spies, messengers, sentries, porters, servants and even sexual slaves. Child soldiers are more vulnerable to disease while campaigning. They can also end up with deformed backs and shoulders from carrying loads too heavy for them.

Child soldiers consist mainly of:

- Refugee and internally displaced children;
- Children separated from their families or with disrupted family backgrounds;
- Economically and socially deprived children;
- Other marginalised groups; and
- Children in conflict zones.

While some children are recruited forcibly, others are driven into armed forces by poverty, alienation and discrimination. Many children join armed groups because of their own experience of abuse at the hands of armed forces or groups.

² International Coalition to Stop the Use of Child Soldiers, "Child Soldiers Global Report 2004", 2004.

Girl Soldiers

Girls are recruited, as well as boys, but in smaller numbers and usually by armed opposition groups. Some even join voluntarily. In the spring of 1999, 16-year-old Elinda Muriqi from a US high school was recruited by the Kosovo Liberation Army (KLA), being caught up in the KLA's aggressive recruitment campaign. As Elinda and other Albanian-American volunteers waited in a hotel car park to depart for the war in Kosovo, speakers praised them for their bravery and dedication while relatives wished them well. Elinda's first stop would be Albania, where she would join hundreds of other volunteers from around the world for 15 days training before being sent to take on the seasoned forces of the Federal Republic of Yugoslavia. "I'll die happy if the first bullet kills me I will die for the freedom of Kosovo," said Elinda.³

In 2001 girls were active participants in armed conflicts in 32 countries around the world.⁴

Girls who volunteered were usually influenced to join by a significant person in their life or because they believed the movement's propaganda that promised them a better life. Poverty is a significant factor in girls volunteering to be child soldiers. They see themselves as having food, a uniform that would give them status and a group to which they could belong.⁵

Over the past 15 years, girls have been kidnapped and forced into wartime service in at least 20 countries Angola, Burundi, Liberia, Mozambique, Rwanda, Sierra Leone, Uganda, Colombia, El Salvador, Guatemala, Peru, Cambodia, East Timor, Myanmar/Burma, Philippines, Sri Lanka, Federal Republic of Yugoslavia, Turkey and Palestine.⁶

³ Dyan Mazurana and Susan McKay, "Child Soldiers: What about the girls?", *Bulletin of Atomic Scientists*, Vol. 57, No. 5, September/October 2001, pp. 30-35.

⁴ Dyan Mazurana and Susan McKay, "Child Soldiers: What about the girls?", *Bulletin of Atomic Scientists*, Vol. 57, No. 5, September/October 2001, pp. 30-35.

⁵ Yvonne E. Keairns, "The Voices of Girl Child Soldiers", Quakers United Nations Office, October 2002.

⁶ Dyan Mazurana and Susan McKay, "Child Soldiers: What about the girls?", *Bulletin of Atomic Scientists*, Vol. 57, No. 5, September/October 2001, pp. 30-35.

Schools, discos and markets are typical places for the recruitment of forcing of girls into armed forces or armed opposition groups. In Sri Lanka, Tamil girls orphaned by the war were recruited and coerced into joining the ranks of the Liberation Tigers of Tamil Eelam (LTTE). The LTTE also ran its own orphanages and took children from these orphanages to make up its numbers.⁷

Girls are sometimes given by their parents into armed service. This can be as a form of “tax payment”, as in Colombia and Cambodia. In a different example, after the rape of his 13-year-old daughter, a Kosovo-Albanian refugee father gave his daughter to the KLA. “She can do to the Serbs what they have done to us,” he said. “She will probably be killed, but that would be for the best. She would have no future anyway after what they did to her.”⁸

Girls who are victims of sexual or physical violence in their homes are at greater risk of becoming child soldiers.

Rape of Girl Soldiers

Girls who are used as soldiers are at risk of rape, sexual harassment and abuse. In African conflicts, girls have often been treated as sexual property, allocated to soldiers as “wives”, distributed as rewards for good soldiering, or given to local chiefs. For example, according to a 22 year-old male ex-commander in the Lord’s Resistance Army in Uganda, “I was abducted at the age of 9. I was a ‘good’ soldier and by the age of 14, I was ‘given’ my first wife (she was 17 years old at the time). When I turned 18, I was rewarded with a second wife (then 14 years old).”⁹ Girls have been reported to have been systematically forced to provide sexual services for armed forces and/or armed opposition groups in Angola, Bosnia, Burundi, Cambodia, Colombia, the Democratic Republic of Congo, East Timor, Honduras, Indonesia, Kosovo,

⁷ Dyan Mazurana and Susan McKay, “Child Soldiers: What about the girls?”, *Bulletin of Atomic Scientists*, Vol. 57, No. 5, September/October 2001, pp. 30-35.

⁸ Carol Williams, “In Kosovo, Rape Seen as Awful as Death”, *Los Angeles Times*, 27 May 1999, A1.

⁹ Aki Stavros, Robert Stewart and Amanda Stavrou, “The Reintegration of Child Soldiers and Abductees: A Case Study of Palaro and Pabbo, Gulu District, Northern Uganda”, Background papers for the International Conference on War-Affected Children, September 2000, (Ottawa: Canadian International Development Agency and UNICEF, 2000).

Liberia, Myanmar, Mozambique, Peru, Rwanda, Sierra Leone, Sudan and Uganda.¹⁰

In Zimbabwe, former girl trainees reported rapes at the National Youth Service training centres, including by officials.¹¹ For example a 19-year-old woman described her experience as:

“There was no one in charge of the dormitories and on a nightly basis we were raped. The men and youths would come into our dormitory in the dark, and they would just rape us – you would just have a man on top of you, and you could not even see who it was. If we cried afterwards, we were beaten with hosepipes. We were so scared that we did not report the rapes. The youngest girl in our group was aged 11 and she was raped repeatedly in the base.”¹²

In Cambodia and El Salvador, pregnant girls in armed opposition groups were given the choice of aborting their babies or giving their babies to peasants, who would raise them until they reached fighting age and they would then be pressured into service.¹³

The rape of girl soldiers also carries with it risks of sexually transmitted disease, infection, uterine deformation, vaginal sores, menstrual complications and sterility. In Sierra Leone, health workers estimate that 70 – 90% of rape victims tested positive for sexually transmitted diseases, and girls abducted to serve in armed groups were especially at risk because of repeated incidents of sexual violence.¹⁴

In the aftermath of repeated sexual assault, girls often experience shock, loss of dignity, shame, low self-esteem, poor concentration and memory, persistent nightmares, depression and other post-traumatic stress effects. The many

¹⁰ Dyan Mazurana and Susan McKay, “Child Soldiers: What about the girls?”, Bulletin of Atomic Scientists, Vol. 57, No. 5, September/October 2001, pp. 30-35.

¹¹ International Coalition to Stop the Use of Child Soldiers, “Child Soldiers Global Report 2004”, 2004.

¹² International Coalition to Stop the Use of Child Soldiers, “Child Soldiers Global Report 2004”, 2004.

¹³ Dyan Mazurana and Susan McKay, “Child Soldiers: What about the girls?”, Bulletin of Atomic Scientists, Vol. 57, No. 5, September/October 2001, pp. 30-35.

¹⁴ Dyan Mazurana and Susan McKay, “Child Soldiers: What about the girls?”, Bulletin of Atomic Scientists, Vol. 57, No. 5, September/October 2001, pp. 30-35.

problems rape victims must cope with are compounded in some countries by the stigma of lost virginity. Girls may be alienated or rejected because they have been raped or had pre-marital sex, as in Sierra Leone, Mozambique and throughout the Balkans. The children born as a result of rape may be rejected, with the girl's problems magnified if their family rejects their daughter or her baby.¹⁵

Former girl soldiers with children find their prospects for marriage reduced. In many countries, in order to be desirable for marriage, girls must have skills and be able to contribute to the family, but former girl soldiers with children often lack the opportunity to gain skills. There are often limited options for child care. Such former girl soldiers may be forced to turn to prostitution in order to survive.¹⁶

Unfortunately, when demobilisation of armed forces occurs after conflicts, girls in armed forces are too often ignored in programs of reintegration into society.¹⁷ In Sierra Leone, demobilisation programs initially failed to address the needs of thousands of girls associated with armed groups.¹⁸ Girls sometimes self-demobilise to avoid stigmatisation in their own communities associated with being part of an armed group.

Not all armed groups tolerate sexual violence against girl recruits. In the Philippines and Sri Lanka, sexually intimate relationships between men and women in armed opposition groups were forbidden without the consent of the woman and the approval of a commander.¹⁹

Other Uses of Girl Soldiers

¹⁵ Dyan Mazurana and Susan McKay, "Child Soldiers: What about the girls?", *Bulletin of Atomic Scientists*, Vol. 57, No. 5, September/October 2001, pp. 30-35.

¹⁶ Susan McKay, Mary Burman, Maria Gonsalves and Miranda Worthen, "Known but Invisible: Girl Mothers returning from Fighting Forces", *Child Soldiers Newsletter*, International Coalition to Stop the Use of Child Soldiers, Issue 11, May 2004, pp. 10-11.

¹⁷ Dyan Mazurana and Susan McKay, "Child Soldiers: What about the girls?", *Bulletin of Atomic Scientists*, Vol. 57, No. 5, September/October 2001, pp. 30-35.

¹⁸ International Coalition to Stop the Use of Child Soldiers, "Child Soldiers Global Report 2004", 2004.

¹⁹ International Coalition to Stop the Use of Child Soldiers, "Child Soldiers Global Report 2004", 2004.

Girl soldiers have conducted suicide missions, helped recruit and abduct other children, and carried out punishments of others, such as other children that have attempted to escape.

Improving International Human Rights Standards

Article 38 of the United Nations Convention on the Rights of the Child sets 15 years of age as the minimum age for recruitment of children into armed forces and their participation in hostilities.²⁰

International Humanitarian Law (the Geneva Conventions and the Additional Protocols) requires states to take “all feasible measures” to prevent children under 15 years of age taking a “direct part in hostilities”, in particular by not recruiting them into armed forces.

Conscripting or enlisting children under the age of 15 into armed forces or using children in combat is a war crime under the statute of the new International Criminal Court. In 2003, the Prosecutor of the Special Court for Sierra Leone (an international court established by the UN and the government in 2002) issued the first indictments against those bearing the greatest responsibility for crimes against humanity and war crimes. The indictments included charges of conscripting, enlisting and using boys and girls under the age of 15 to participate in active hostilities.²¹

An Optional Protocol to the UN Convention on the Rights of the Child came into force on 12 February 2002. The Optional Protocol:

1. prohibits armed groups from using children under the age of 18 in conflict;
2. bans all compulsory recruitment of people under the age of 18;
3. bans voluntary recruitment of people under the age of 18 by armed groups;

²⁰ “United Nations Convention on the Rights of the Child”, Office of the UN High Commissioner for Human Rights, <<http://www.ohchr.org/english/law/crc.htm>>.

²¹ International Coalition to Stop the Use of Child Soldiers, “Child Soldiers Global Report 2004”, 2004.

4. raises the minimum age to 15 for voluntary recruitment by Governments and provides some safeguards.²²

As of June 2005, 97 countries had ratified the Optional Protocol and a further 37 countries had signed.

The introduction of the Optional Protocol has been a contributing factor in the decline of the use of children in armed conflict since 2001. However, the Democratic Republic of Congo, Burundi, Uganda, USA, Tajikistan and Liberia ratified the Optional Protocol and then violated its obligations. The USA violated the Optional Protocol by sending 62 soldiers aged 17 to the conflicts in Afghanistan and Iraq in 2003 and 2004.²³

Australia signed the Optional Protocol in October 2002, and is now moving to pass the Optional Protocol into Australian law. There is an Australian Defence Force Directive that requires that the Australian military not use people under 18 years of age in armed combat. However, under the Optional Protocol, Australia will continue to allow 16-year-olds to be recruited into the armed forces.

Around 60 countries of the 191 states which are party to the Convention on the Rights of the Child have laws permitting the recruitment of people under 18 years of age. The only argument that has been advanced for setting recruitment below the minimum age for participation in hostilities has been the need to provide training. The argued need for training would seem to assume the intention to send recruits into combat at the minimum acceptable age, rather than seeing this as indeed a minimum below which such action is completely unacceptable.

Both the United Nations Children's Fund (UNICEF) and the UN High Commission for Refugees advocate 18 years as the minimum age for recruitment and participation in armed conflicts. In 1997 the Labour and Social

²² Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts", Office of the UN High Commissioner for Human Rights, <<http://www.ohchr.org/english/law/crc-conflict.htm>>.

²³ International Coalition to Stop the Use of Child Soldiers, "Child Soldiers Global Report 2004", 2004.

Affairs Commission of the Organisation of African Unity adopted the Arusha Recommendations which, *inter alia*, “[c]ondemn recruitment and conscription of children under the age of 18 years in the armed forces or armed groups”.²⁴

The UN requires 18 year olds as peace-keepers and prefers those aged 21 and over.

International Labour Organisation (ILO) Convention 182 on the elimination of the worst forms of child labour has been ratified by 150 governments as at August 2004.²⁵ It defines the forced or compulsory recruitment of children under 18 for use in armed conflict as one of the worst forms of child labour and therefore prohibited. Australia has signed the Convention, but is yet to ratify it.

Since 1999, demobilisation programs for child soldiers have been officially established in 12 countries, with UN agencies working in partnership with governments and international non-governmental organisations. Some governments have created their own programs.²⁶

The Uniting Church in Victoria and Tasmania has continued to campaign for the Australian Government to put pressure on countries and armed opposition groups to end the use and recruitment of child soldiers. However, Australia is yet to ratify the Optional Protocol and must do so before it can be taken seriously in the international arena on this issue. Anyone interested in a copy of a letter-writing action to the Australian Government on the issue can contact the Uniting Church in Victoria and Tasmania on (03) 9251 5271 or jesse.cain@vic.uca.org.au.

²⁴ Report of the Secretary-General on the Twentieth Session of the Labour and Social Affairs Commission, CM/2014 (LXVI), para 84.

²⁵ International Labour Organisation, <<http://www.ilo.org>>.

²⁶ International Coalition to Stop the Use of Child Soldiers, “Child Soldiers Global Report 2004”, 2004.

The Common Sense of Jurors Versus The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials

This article was first published in UNSW Law Journal Vol 28(1), Forum 11(1).

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Assuming [the pleaders]...successfully avoided errors in form, and did not stammer (for stammering would have been immediately fatal to the stammerer's case), the issue was then before the court for judgment.¹

In medieval times, precision and completeness of oath determined the court's verdict. How much do the demands of appellate cases present the trial judge's duty to give directions and warnings in the sexual assault trial with challenges akin to the medieval pleader? The role of precise incantations in court has a more recent embodiment also in the 19th (and 20th) century formulaic corroboration direction. Corroboration law became so hidebound with technicalities remote from functionalism that by the late 20th century courts and legislators relegated it to the historical dustbin. The purpose of this article is to explore whether we are seeing a third generation of legal formulaic demands in the form of the judicial directions and warnings in sexual assault trials. In recent years consideration has been given to prosecutorial decisions in regard to sexual assault cases², to conviction rates for sexual assault offences³ and to reform of evidence law affecting sexual assault trials⁴. However less attention has been given to how the growth of judicial directions and warnings to juries impacts on sexual assault trials. Using a snapshot of statistics from the caseload before the NSW Court of Criminal Appeal in 2004 this article highlights

* The author wishes to acknowledge and thank Jill Hunter, Jill Anderson and Felix Tse for their useful comments on this article. All errors however are the author's.

¹ Kathryn Cronin and Jill Hunter, *Evidence Advocacy and Ethical Practice: A Criminal Trial Commentary* (1995) 9.

² See, eg, Denise Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases', Trends and Issues in Crime and Criminal Justice No 291, Australian Institute of Criminology (2005).

³ See, eg, Legislative Review Committee, Parliament of South Australia, *Inquiry into Sexual Assault Conviction Rates* (2004).

⁴ See, eg, NSW, *Report on Child Sexual Assault Prosecutions: Standing Committee on Law and Justice*, Parl Paper No 208 (2002) Ch 4.

the prominence of appeal submissions based on alleged defects in a trial judge's warnings and directions in sexual assault trials. The significant number of appeals that concern sexual assault trials and the prominence of these grounds of appeal give tangible weight to the concerns expressed by Sully J in *R v BWT*⁵ that the law has created a Herculean task for trial judges to ensure they recite all manner of directions with precision. The trend towards greater numbers of and increased complexity in directions and warnings raises a query as to their effectiveness in sexual assault trials. The article concludes by asserting the need for jury research to determine the utility of those directions and warnings as effective 'forensic reasoning rules'⁶.

I Background

There are 475 cases on the New South Wales Court of Criminal Appeal website for 2004.⁷ In view of the number of defendants who plead guilty, it is not surprising that sentence appeals comprise the greatest part of the cases in the 2004 sample (at 62.5% of cited cases). Conviction appeals as a percentage of cases in the sample totalled 26.7%.⁸ The table below divides the 2004 conviction appeals into categories concerning sexual assault offences, other violence against the person offences, property offences, drug offences and other offences.

⁵ (2002) 54 NSWLR 241.

⁶ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2004) 499.

⁷ LawlinkNSW, <<http://www.agd.nsw.gov.au/scjudgments/2004nswcca.nsf/WebView1?OPenView&Start=1&End=31>> at 1 May 2005. Some cases include more than one appeal however those multiple appeals were not counted separately.

⁸ Other appeals, for example, appeals pursuant to s 5F of the *Criminal Appeal Act 1912* (NSW) were 10.8% of the cited cases.

Table 1. 2004 NSW Court of Criminal Appeal: Conviction Appeals

As % of all conviction appeals	
Sexual assault offences	28.3%
Other violence against the person offences (for example, murder and assault offences)	29.9%
Property offences (for example larceny offences and armed robbery offences where no physical injury was charged)	18.1%
Drug offences	19.7%
Other offences (for example, insider trading and escape lawful custody offences)	3.9%

It is notable that the percentage of appeals concerning sexual assault convictions is almost equal to appeals concerning all other violence against the person convictions. There is no wish to make these percentages overstate any position, but what can be safely suggested is that conviction appeals concerning sexual assault convictions are numerically significant. The more interesting statistic is that 55.5% of those sexual assault conviction appeals concern grounds of appeal based upon submissions that argued that the trial judge had given an inadequate or incorrect judicial direction and or warning.

II Judicial directions and warning in sexual assault trials

The case of *R v BWT*⁹ is now well known, in particular, for paragraph 32 where Wood CJ listed a 'multitude of directions'¹⁰ that are necessary to be considered by a trial judge when summing up in a sexual assault trial.

Put shortly the following warnings and directions need to be considered. This list is not exhaustive and the cases before the New South Wales Court of

⁹ (2002) 54 NSWLR 241.

¹⁰ *R v BWT* (2002) 54 NSWLR 241, 250.

Criminal Appeal in 2004 indicate that directions which were the subject of appeal in sexual assault cases extended beyond this list.

1. The *Murray*¹¹ direction – where only one witness asserts the commission of a crime the evidence of that witness *must be scrutinized with great care* before concluding that the accused is guilty.
2. The *Longman*¹² warning (reinforced by the High Court in *Crampton v The Queen*¹³ ('Crampton') and *Doggett v The Queen*¹⁴ ('Doggett')) must be cast as a warning rather than a comment or a caution – where there is any delay in making a complaint that is not triflingly short and there is a risk of relevant forensic disadvantage that is not 'far-fetched or fanciful'. Even if there is evidence that corroborates the complainant's account the jury should be told that it would be *unsafe or dangerous* to convict unless the jury scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.
3. The direction under *Criminal Procedure Act 1986* (NSW) s 294 – a delay in complaint does not necessarily indicate that the allegation is false and there may be good reason why the complainant hesitated in complaining.
4. The *Crofts*¹⁵ direction (said to counterbalance the direction under s 294) – delay in complaining or absence of a complaint may be taken into account in evaluating the evidence of the complainant and in determining whether to believe him or her. The direction should not be made in terms that suggest that complainants of sexual assault are unreliable or that delay is a sign of falsity of the complaint.
5. The *KRM*¹⁶ or *Markuleski*¹⁷ direction – where the jury entertain a reasonable doubt concerning the truthfulness of the complainant's evidence in relation to one or more counts, that must be taken into

¹¹ *Murray v The Queen* (1987) 11 NSWLR 12.

¹² *Longman v The Queen* (1989) 168 CLR 79.

¹³ (2000) 206 CLR 161.

¹⁴ (2001) 208 CLR 343.

¹⁵ *Crofts v The Queen* (1996) 186 CLR 427.

¹⁶ *KRM v The Queen* (2001) 206 CLR 221.

¹⁷ *R v Markuleski* (2001) 52 NSWLR 82.

account in assessing the truthfulness or reliability of the complainant's evidence generally.

6. A direction which indicates the forensic use of complaint evidence in regard to its admissibility as relevant to facts in issue (via hearsay) and or the credibility of the complainant.
7. The *Gipp*¹⁸ direction – a direction that tells the jury how evidence of uncharged sexual conduct can and cannot be used – whether only to show the nature of the relationship and not to use it for satisfaction of the occurrence of such conduct for proof of the act charged.
8. A direction pursuant to *Evidence Act 1995* (Cth) s 95¹⁹ or the *BRS*²⁰ direction – where evidence revealing a tendency (usually of an accused) is inadmissible for a tendency purpose but admissible for another purpose, the jury should be told that the evidence should only be used for that admissible purpose and to use the evidence to prove a tendency is improper.
9. A direction in relation to the use of evidence admissible to rebut an explanation of coincidence where an accused is charged in the one indictment with sexual assault against two or more complainants, the jury are told that they should be satisfied beyond reasonable doubt first, of the offences alleged in respect of one complainant and then, of the existence of such a substantial and relevant similarity between the two sets of acts as to exclude any acceptable explanation other than that the accused committed the offences against both complainants.
10. Any identification warning pursuant to *Evidence Act 1995* (Cth) s 116,²¹ a *Domican*²² warning, or an unreliable evidence warning pursuant to *Evidence Act 1995* (Cth) s 165,²³ upon request and unless there is good reason not to give the warning.

¹⁸ *Gipp v The Queen* (1998) 194 CLR 106.

¹⁹ See also *Evidence Act 1995* (NSW) s 95.

²⁰ *BRS v The Queen* (1997) 191 CLR 275.

²¹ See also *Evidence Act 1995* (NSW) s 116.

²² *R v Domican* (1992) 173 CLR 555.

²³ See also *Evidence Act 1995* (NSW) s 165.

III The move away from corroboration

Corroboration warnings, now increasingly restricted by statute, required judges to direct juries in all cases involving sexual assault offences that it was unsafe to convict on the uncorroborated testimony of the complainant. By the mid-20th century trial judges were required to give a corroboration warning for testimony of three classes of 'suspect witness': accomplices; complainants in sexual assault cases; and children. Corroboration warnings were archaic because they made categorical assumptions about the credibility of whole classes of witness irrespective of the circumstances of the case. The corroboration warning requirement in sexual assault cases reflected two assumptions: first, that sexual assault complainants frequently make false allegations due to perhaps neurotic fantasy, shame or spite; second, that it was especially difficult in the context of one person's word against another's, with little other evidence to determine the conflict, for juries to detect false allegations. Strong prejudice and resentment toward the accused was a distinct possibility and the presumption of innocence could fall by the wayside particularly where the allegation concerned child sexual assault.

As the problem of non-reporting of sexual crimes became recognised, the idea that sexual assault allegations are easy to bring and sustain to conviction became progressively more implausible. The practical and psychological barriers to taking matters to court were recognised and the necessity of confronting artificial evidentiary hurdles began to be questioned. In addition, the moral climate was changing. The social consequences of extra-marital sex were diminishing and there was no longer any reason to support the assertion that false allegations were widespread and that they necessitated an automatic corroboration warning in all sexual assault prosecutions.

The utility of the corroboration warning was also questionable. As a contribution to rational adjudication the warning was either superfluous where the complainant's unreliability was obvious and useless where the complainant was a skilled, convincing liar. It also gave the harmful impression that the criminal justice system unfairly discriminated against sexual assault complainants. The

complainant corroboration warning was also supposed to be protective of the accused, when in practice it could operate to his detriment with the trial judge being required to list damaging evidence capable of providing corroboration and focusing the jurors' minds on the most damaging aspects of the prosecution's case just before the jury deliberated.

Corroboration law also rapidly became superseded in no large part because the technicality and rigidity of the requirements provided a ready avenue for appeal. Ritualistic incantations and formal legal mantras would often be meaningless if not mystifying for the jury. The *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), as well as the *Evidence Act 2001* (Tas), abolished corroboration requirements²⁴ along with the requirement for a corroboration warning in s 164, but have preserved judicial discretion for a corroboration warning to be given. The directions that evolved in Australia outside corroboration law are in the history of Anglo-based evidence law, 'second generation' directions. Their flexibility and functionality made them appear far more effective in guiding the jury and so bringing about just results. They evolved in response to the legalism and technicality of corroboration directions.

These more 'flexible and functional' directions heralded by *Bromley v The Queen*²⁵ and *Longman v The Queen*²⁶ ('Longman') were designed to address newly recognised circumstances involving potentially unreliable evidence and potential unfairness to the accused. The clear objective was to facilitate jurors' evaluation of particularly problematic testimony. A qualitative rather than a quantitative approach was being encouraged. Juries received directions and warnings from the trial judge that pointed out the reason(s) why the particular evidence was of concern. Corroboration, on the other hand, did not give this information to the jury but instead identified other evidence that was capable of connecting the accused with the crime charged. Corroboration in this regard harked back to ancient canon or civil law which required a 'sufficient agglomeration of items of evidence to add up to 'full proof'.²⁷

²⁴ Except for perjury or a similar or related offence (s 164(2)).

²⁵ (1986) 161 CLR 315.

²⁶ (1989) 168 CLR 79.

²⁷ Cronin and Hunter, above n 1, 16.

What is clear is that for sexual assault trials the number of second generation 'flexible and functional' directions has become a 'multitude'. Ritual incantation is beginning to emerge. For example, in the 2004 Court of Criminal Appeal case of *R v LTP*²⁸ Dunford J (Simpson and Howie JJ agreeing) pointed out that in sexual assault trials judges would be well advised to use the list provided by Wood CJ in *R v BWT*²⁹ as a check list and said 'it is preferable to give the directions, even if the judge considers one or more of them unnecessary in the particular case, rather than have convictions upset on appeal because of the failure to give them'.³⁰

Is this a sign of the evolutionary wheel turning 360 degrees – demanding punctilious observance of form over substance? How does this 'checklist' operate to ensure jurors are aided in their use or weighing of evidence? Arguably the new imperative to direct the jury according to a checklist may function to appeal-proof a conviction, but does it aid jurors? Obviously judicial directions must meet standards of content set by appeal courts according to categories of obligation, not according to ease of juror understanding. However directions combatable with the juror's own understanding are as important as expositions of the legal requirements to which jurors must conform. A more collaborative approach to appellate review and criminal adjudication requires sensitivity to the subtle ways legal determinations bear on forensic fact finding undertaken by the jury. Justice McHugh's observation below drives home the importance of examining what goals are achieved by a multitude of directions and whether such directions are the best means of achieving those goals

IV Are judicial directions effective?

[T]he more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings.³¹

²⁸ [2004] NSWCCA 109 (Unreported, Dunford, Simpson and Howie JJ, 1 July 2004).

²⁹ (2002) 54 NSWLR 241.

³⁰ *R v LTP* [2004] NSWCCA 109 (Unreported, Dunford, Simpson and Howie JJ, 1 July 2004) (Dunford J) [47]

³¹ *KRM v The Queen* (2001) 206 CLR 221, 234 (McHugh J).

Judicial directions on the use of an item of evidence are given for two broad reasons – to reduce or remove a potentially unfair form of reasoning (such as propensity or tendency reasoning based on insufficiently probative evidence) or to ensure jurors appreciate potential defects in certain evidence (such as identification, prison informant, oath-against-oath evidence).

The effectiveness of judicial directions has probably been hampered by an unrealistic perception of jury reasoning which seems implicit in many evidentiary doctrines. An axiom of common law trials is that the jury has no business sitting in judgment, except to determine the facts. This has encouraged judges to believe that juries will faithfully follow judicial directions. Some directions and warnings contain an explanation, for example the *Longman*³² and *Domican*³³ warnings require the jury to be told of the forensic consequences for the accused caused by delay in complaining and the reasons why evidence of identification may be unreliable. Some directions and warnings have an obvious purpose for example the *Murray*³⁴ direction. This direction requires a self-evident assertion – where only one witness asserts the commission of a crime the evidence of that witness must be scrutinized with great care before concluding the accused is guilty. It must be questioned whether modern jurors are in need of a judicial assertion of the patently obvious, particularly in view of the avalanche of directions now often required in a sexual assault trial.

Judicial directions and warnings are very often used to save items of evidence from discretionary exclusion. An appropriate direction is considered effective to reduce the danger of unfairly prejudicial evidence distracting jurors in their evaluation of evidence. If jurors do not understand or obey the direction or warning, or if they think that it defies common sense and ignore it, the warning is not having the intended effect. If judicial directions are ineffective, the danger of unfair prejudice has not been reduced. The impact of unfairly prejudicial evidence on the jury is consequently underestimated.

³² (1989) 168 CLR 79.

³³ (1992) 173 CLR 555.

³⁴ (1987) 11 NSWLR 12.

A direction instructing juries that a particular use of evidence is forbidden is likely to fail to the extent that it conflicts with the jury's common sense reasoning. Bentham made the point 200 years ago that directions attempting to mandate how evidence should be used in arriving at a conclusion are likely to be counter-productive³⁵. Juries should receive judicial assistance to reason correctly, but judicial directions will not be adequate to the task if they fail to connect with the jury's understanding. Some judicial directions may fail to provide the jury with an explanation they can understand. With limiting use directions, such as in *Gipp v The Queen*³⁶ where the accused's uncharged sexual conduct is before the jury to show the nature of the relationship and should not be used to say that such conduct occurred so the accused is more likely to have committed the act charged, the jury have a doubly demanding task – to comprehend the limited use, and then to resist the temptation to employ an impermissibly prejudicial use.³⁷ Another example of a limited use direction concerns those relating to the use of complaint evidence for a credibility purpose only³⁸.

One of the benefits of our system of jury trials is that jurors bring their 'individual experience and wisdom'³⁹ to reaching a verdict that accords with good judgment and common sense. Does the checklist of directions facilitate common sense or does it create layers of unnecessary complexity which could give rise to jury confusion? Take, for example, the directions concerning a delay

³⁵ Jeremy Bentham, *Rationale of Judicial Evidence* (1827) vol 3, 219 cited in Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2004) 81.

³⁶ (1998) 194 CLR 106.

³⁷ See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (2003) [2-430]:

You have heard evidence that [the accused] has a prior conviction for ... Now there is a danger about which I must warn you, and that is the danger that such evidence will set off in your minds the following prohibited line of reasoning – 'The evidence shows [the accused] to be a person of bad character; crimes are more often committed by the bad than the good. Therefore [the accused] is likely to be guilty of the crime with which [he/she] is charged.' A jury is never permitted to use such evidence for the purpose of concluding that the accused person is guilty of the crime with which [he/she] is charged simply because [he/she] is the sort of person who would be likely to commit that crime. As I say, that is a prohibited line of reasoning and my firm direction to you is that you must not allow it to enter into your deliberations. [Where appropriate, add] You are, however, free to take that evidence into account, giving it such weight as you think it deserves as evidence showing that [he/she] is not a truthful person, when you are assessing the credibility of the evidence [he/she] has given in this trial. [When the "bad character evidence" is probative of a fact in issue under the similar fact rule, add] You may, however, bearing in mind my direction about the prohibited line of reasoning, take that evidence into account in the following way in relation to the issue of ... [state the issue].]

³⁸ See *Graham v The Queen* (1998) 195 CLR 606.

³⁹ *Black v The Queen* (1993) 179 CLR 44, 49 (Mason CJ, Brennan, Dawson, McHugh JJ, Deane J agreeing).

in complaint. On the one hand, juries are told that there may be good reason for the delay and delay does not necessarily mean that the allegation is false. On the other hand, juries are also told that they can take the delay into account when determining whether to believe the complainant. The two directions together can be nonsensical. If there is a good reason for a complainant to delay in complaining, such as trauma or threat, how does her or his delay relate to the complainant's credibility? With the greatest respect, when members of the Court of Criminal Appeal, because of a concern about possible appeal, encourage trial judges to give warnings and directions 'even if the judge considers one or more of them unnecessary in the particular case'⁴⁰, the tail is wagging the dog. Taking this conservative approach is understandable but it may sacrifice the function of judicial directions and warnings, that is, enhancing a jury's insight into the evidence.

The jury can understand when a delay in complaining has importance. In an adversarial trial defence counsel can be relied upon to make the jury so aware. 'Delay' may have always been relevant in the ancient context of the feudal village when the hue and cry was the primary means of finding the wrongdoer. However, nowadays it is a matter of common sense that the more damaging (emotionally and or physically) the sexual assault the longer the 'delay' in complaining. If there is a good reason for not complaining immediately, the fundamental rule of admissibility – relevance – should be used to make these two directions unnecessary.

The *Longman*⁴¹ warning now looms very large in trial courts particularly given its recent and repeated confirmation by the High Court in *Crampton*⁴² and *Doggett*.⁴³ The High Court has indicated that such a warning is integral to the fundamental fairness of a criminal trial. Consequently, a failure to give the warning in the appropriate way can cause an appeal to be upheld even if there was no indication from trial counsel that it was appropriate (rule 4 of the

⁴⁰ *R v LTP* [2004] NSWCCA 109 (Unreported,, Dunford, Simpson and Howie JJ, 1 July 2004) per Dunford J [47].

⁴¹ (1989) 168 CLR 79.

⁴² (2000) 206 CLR 161.

⁴³ (2001) 208 CLR 343.

Criminal Appeal Rules (NSW) requires leave to be given to argue an appeal point under these circumstances). In the 2004 Court of Criminal Appeal case of *R v MM*,⁴⁴ Levine J was concerned about the possibilities in regard to appeal in view of the importance of a *Longman*⁴⁵ warning:

It would be regrettable to the administration of criminal justice if there was evolving some 'forensic culture' in sexual assault trials in which the *Longman* directions are concerned, for there to evolve a practice of silence on the part of counsel at the conclusion of the summing-up on the basis that Rule 4 would never be applied because any post-trial asserted deficiency in *Longman* directions would go to the heart of the matter, and if made out would amount to a miscarriage of justice.⁴⁶

The extent of litigation on the *Longman*⁴⁷ warning and the High Court's treatment of it led Sully J in *R v BWT*⁴⁸ to conclude that a prudent judge should give the warning unless the time lapse between offence and complaint was 'trifling' and the risk of forensic disadvantage to the accused is 'far-fetched or fanciful'.

Justice Sully continued:

[A] common sense understanding of the real world suggests that a jury which is given *Longman* direction in the form now apparently required, is likely to reason that the trial judge, although he has stressed repeatedly that it is not for him to tell the jury how the facts should be found, is in fact sending a none-too-subtly coded indication to the jury that the dangers of convicting are such that the jury ought to return a verdict of not guilty.⁴⁹

Justice Sully's concern may be based on the potential for jurors to be influenced by their awe of the trial judge's superior experience. An alternative view is that if the warning is given in circumstances where there has been no significant delay between the offence and the complaint to the authorities, the jury may either

⁴⁴ (2004) 145 A Crim R 148.

⁴⁵ (1989) 168 CLR 79.

⁴⁶ (2004) 145 A Crim R 148, 157.[36]

⁴⁷ (1989) 168 CLR 79.

⁴⁸ (2002) 54 NSWLR 241.

⁴⁹ *Ibid*, 280.

ignore the warning or take the view that it is giving an accused an unfair advantage. Either view is equally detrimental to the purpose of the direction and the administration of justice.

The 2004 NSW Court of Criminal Appeal figures relating to appeals based on judicial directions and warnings in sexual assault trials indicate that 'appeal proofing' as a stratagem is unsuccessful to date. *R v LTP*⁵⁰ indicates that McHugh J's concern about 'the more directions and warnings juries are given' remains unheeded.

Even if the directions *are* effective and functional one must question whether they are sufficiently effective to warrant their present complexity and number. The problem is that we do not know how juries use the directions and warnings given in sexual assault trials. There is no Australian empirical research that has examined this and so no evidence to support an answer to either of these issues. There is substantial empirical research examining the effects of judicial directions on juries, but none have focused on the *combination* of directions presently relevant to sexual assault trials. Research indicates that jurors may struggle to understand trial judges' technical directions.⁵¹ The studies in the main do not examine how the evidence was actually used by real juries.⁵² Many US studies deal with the impact of technical legal language, foreign logic and stilted structure on jury comprehension. This author is not aware of a jury study undertaken with a view to analysing whether the assumptions that underpin the effectiveness of different directions in sexual assault trials are substantiated by the way in which they are comprehended and or utilised by jurors.

V Conclusion

The lack of research on the effect of directions and warnings on juries in sexual assault trials (individually as well as their cumulative effect) makes it impossible to determine whether they are having the desired effect. The snapshot of New

⁵⁰ [2004] NSWCCA 109 (Unreported, Dunford, Simpson and Howie JJ, 1 July 2004).

⁵¹ See, eg, Jamie Arndt and Joel Lieberman, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology Public Policy & Law* 677.

⁵² Rather than mock juries.

South Wales criminal appeal cases for 2004 show that judicial directions and warnings in sexual assault trials provide a fertile ground for appeal. The need for and content of the directions and warnings have received significant attention from appellate courts, including the High Court. The exhortations that an 'if-in-doubt-warn' policy is a safe course of action for a trial judge suggests that the 21st century judicial warning is in danger of looking like its 19th century predecessor, and not immensely dissimilar to medieval pleadings. It would appear that warnings and directions initially intended to be flexible and functional have become numerous, complex and formulaic. The effect of the judicial warnings and directions may be productive of more obscurity than light.

An 18 month review of the operation of the uniform *Evidence Acts*⁵³ is presently being undertaken by the Australian and New South Wales Law Reform Commissions. The Australian Law Reform Commission has raised questions regarding whether common law warnings should be placed within the categories of the unreliable evidence section (s 165).⁵⁴ Perhaps a more fundamental review of directions and warnings is required, one that includes an examination of the impact on jurors of these judicial directions and warnings in sexual assault trials.

⁵³ *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW).

⁵⁴ Australian Law Reform Commission, *Review of the Evidence Act 1995*, Issues Paper No 28 (2004) Questions [14.9], [14.11].

When Discriminatory Employment Practices Persist: Female Media Workers in Indonesia

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Introduction

Laws that institute basic equal rights (...) often are not enough to eliminate persistent gender inequalities embedded in a country's institutional foundation (World Bank 2001:108).

In 1984 Indonesia ratified the United Nations' Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Indonesia has also ratified the United Nations Human Rights Convention and a number of other agreements relevant to protecting the rights of women. In 1988 the Ministry of Manpower Circular No. 4 - 1988 (04/MEN/88) on the Implementation of the Convention on the Elimination of Discrimination against Women Workers was sent to all Heads of Provincial Offices of Manpower throughout Indonesia. It required company regulations and collective agreements to include equal pension age limits and equal medical benefit costs for male and female workers, and requested them to ensure that employment arrangements did not include any forms of discrimination against women workers, in accordance with *UURI 7 – 1984*, the law which outlaws discrimination against women. However, despite all this, in the new century women looking for work, and women at work in Indonesia continue to experience overt discrimination and prejudice.

The *de facto* situation is that women remain unequal to men in terms of rights and opportunities because of a combination of traditional and cultural

practices and certain laws that are contrary to the spirit, if not the letter, of the principle of equality. The view that the man is the head of the family and the woman the manager of the household reflects this (CEDAW 1998: 3).

Discrimination on the basis of sex remains one of the biggest problems in Indonesia according to the International Labour Organisation (ILO). Discrimination starts at recruitment when male workers are preferred over women, then moves on to lower pay, less involvement in decision making, and different ages for retirement. Women are paid, on average, only about 68 per cent of men's wages (Gardner 2003: 7). The curious nature of the Indonesian Marriage Law (*UURI 1 1974*) means that female workers are defined as single, even if they are married – 'the underlying assumption being that married women do not work and that the husband is the primary income earner' (Gardner 2003: 7). This means that the tax rates of female workers are higher and women are not paid family allowances where employers offer them. Furthermore, although Indonesia has specific legislation to protect the interests of women in the workplace, for example in *UURI 7 – 1984*, *UURI 39 – 1999* and *UURI 13 - 2003*, the laws and guidelines are little acknowledged, respected or implemented by employers and regulatory bodies. This has two effects. Firstly, employers continue to believe they have the right to discriminate against women in the workplace in all kinds of ways. Secondly, female employees tend to believe they have few rights. Even where the laws have changed, there may be little knowledge of these changes in the workplace, especially among older workers and employers.

Female Media Workers in Indonesia

In this paper we illustrate how some forms of discrimination against women workers operate in Indonesian media and communication workplaces – globally an arena of labour dominated by men. The fields of media and communication are those which can have quite a profound global effect on social relations, for example,

The free flow of independent and pluralistic information is best ensured if all talented journalists have an equal chance of becoming editors and media executives, purely on the basis of their professional ability and without regard to gender, ethnic origin, religion or any other unconnected factor (Matsuura 2000: 2).

It is acknowledged that the greater involvement of women in these fields of textual production can have a beneficial effect on the promulgation of negative gender stereotypes in media discourses. Yet women who train and enter the media/communications professions in Indonesia find a range of obstacles and impediments to their employment prospects and career advancement (Mariani 1990), and few protections in the legal system, or professional guidelines. Using interview data, this paper examines some attitudes towards, and experiences of, women in the media and communications professional training programs – the majority, and in the workforce – where they remain a minority. It is concluded that discriminatory practices can be identified in both the professional media training programs, and in media/communications workplaces. Employers seem to do more or less as they like when it comes to dealing with female workers in the structure of their organisations, yet behind their actions lies a history of contradictory laws and regulations. While some data indicates women successfully handling gender marginalisation and discrimination in an assertive and effective way, it is argued that the traditional view of the role of women in Indonesian society, combined with a set of conflicting legal discourses, influences the perspective of all stakeholders towards maintenance of the gendered status quo in the field of media and communications.

A study by the authors completed in 2004 found that there was a mismatch between the high numbers of young women graduating from media and communications degree programs at university, and the relatively low number of women workers in media and communication industries in Indonesia – an area of employment widely acknowledged as male-dominated (Lock 1991; Romano 1999). The study identified a number of factors that contributed to this phenomenon, including unrealistic initial expectations on the part of female

students and their families, later family discouragement against daughters taking certain kinds of media jobs, and social pressure on women to choose occupations that suit conventional understandings of the proper role of women (Utari and Nilan 2004). However, relevant to the discussion here, the study also identified some discriminatory practices against female students, female graduates seeking jobs, and against female workers in media and communication workplaces.

Discrimination in Training

While it is never easy for women to enter workplaces and fields of employment traditionally dominated by men (Blackburn 2001), in the case of the media/communications industry, there have always been some women workers undertaking specific support roles, glamorous presentation roles, and involved in the production of media texts aimed exclusively at women. Accordingly, there are female communications lecturers in universities, and as indicated earlier, lots of female students, some aiming at the traditional jobs of female media/communications workers, and others aiming for the non-traditional sector. Fifteen university academics lecturing in media and communications (mostly male) were interviewed in 2001. They revealed they had difficulty dealing with gender related teaching and learning issues. Most claimed women were not discriminated against in the degree program, yet at the same time they could not demonstrate how their media/communications training prepared female students for a male dominated work milieu, where masculinist values and priorities prevail (Gallagher 1995: 8). It was found that course materials and assignments themselves to some extent stereotyped communication studies students into traditional gender roles, but these were not challenged.

While most gave lip service to gender equity in the professional training program, many held the view that women could not master technology (Cockburn and Ormrod 1993: 1), for example,

In the theoretical components female students more quickly understand the materials than male students (...). However in practical activities that use

technology, for example in radio production, male students show far more mastery than females in operating equipment and creating the product (Mr Sabagyo, communications lecturer).

In practical activities most male students do better quality work than female students. I think it is in men's nature. They are braver than women about operating some media equipment. As a woman, I can understand that generally women do feel not comfortable or are worried to try something that they regard as not familiar, including those technologies (Mrs Inari, communications lecturer).

Yet these same lecturers agreed that the more media technology skills graduates had, the more likely they were to get jobs in the industry. The issue of media technology skills in the program was of particular concern for female graduates because, as later interviews with employers implied, women media workers are generally regarded as not as qualified as men – so lacking this important work skill was significant in their job chances. It seems a simple leap of circular logic then, for lecturers to assume that since women rarely work in media/communications areas that use a lot of technology, this means they have 'limited capacity' to master it, and therefore will avoid jobs in those same areas,

Do their problems really relate to gender issues? Do they have difficulties finding a job because they are not given the same opportunities as men? Or are women themselves the cause due to their limited capacity to use technologies, so they are not interested? (Mr Ahmad, communications lecturer).

While Mrs Inari does imply something about confidence 'they [men] are braver than women about operating some media equipment', she precedes this with the comment 'I think it is in men's nature' – indicating an essential sex difference gives rise to the apparent 'bravery' of men in using technology, rather than learned behaviour. In short, old-fashioned beliefs about 'inherent' differences in the capabilities of men and women tend to inform the pedagogic practices of lecturers in the media/communications professional training programs, undoubtedly reinforcing the lack of technology confidence shown by

young women. There is also the general message in gender specific curriculum and pedagogy, that it is men who will have the serious jobs and careers in media industries, for example,

I think not only fellow male students underestimate us, but some of the lecturers also. They sometimes give us segregated tasks. In journalism, for example, we can only choose topics that are related to women's areas. I hate this! Why must it be different? (Yunni, second year student).

It seems that female students must struggle against society-wide discursive odds to construct themselves as future media workers on an equal par with men, while having to cope with discriminatory attitudes on the part of lecturers, for instance - 'to be a cameraman? Those technologies are basically suited to men' (Mr Bahrudin, communications lecturer).

Discrimination by Employers

Throughout the world in media/communications employment women still tend to be a minority presence, absent from technical jobs and senior management, and segregated into certain limited areas (Gallagher 1987: 13; Matsuura 2000), for example,

I remember how I felt frustrated when much of the news I collected did not get printed by my editor on the grounds that such news had low status. If they did print it, they just put it in as second-class news placed in the later pages (Yudi, newspaper reporter).

The effect of gender as a determinant of work responsibilities was evident in the view of newspaper employers that 'soft news' is female news. For many *wartawati baru* (junior female reporters) who prefer to find exciting news, they find they are engaged in much less rewarding work due to the sex typing of media work and rewards (Romano 1999). Media work deemed 'appropriate' for women often betrays stereotypical gendered qualities. Gallagher (1995) notes these as invisible obstacles, including systematic barriers in organisational

policies, attitudes of management and, in the end, the attitudes of women themselves (Lafky 1993).

UNESCO studies in 1985 and 1987 indicated in absolute terms that on average women are at a disadvantage compared to the average man right from the date of recruitment in media industries. The study by Siregar, Pasaribu and Prihastuti of Indonesia showed that in the print media women comprise only 11 per cent of the total workforce (1999: 19), while Suherman noted that of 561 top managers of print media, including boards of directors, managing directors and editors-in-chief, only 75 were women (1998: 154). To gain a better sense of why these gender disparities persist, twenty-three employers were interviewed in 2001: Five newspaper employers, three radio employers, five television employers, four advertising employers, three public relations employers, and three on-line media employers. Most advanced the idea that media jobs were too 'hard' and 'risky' to be carried out by women. One newspaper editor, for example, explained that 'in practice these jobs are full of challenges'- 'too difficult, they have to take risks and the jobs cannot be adapted to suit women'. His argument was similar to other employers in all kinds of media. They were convinced that only men were suited to most kinds of media work, for example,

It is a job that demands we are outside the home with unlimited working hours and high-risk practices. It is difficult for women to do this given their limitations (Mr Adi M, radio coordinator).

If the deadline is near, our volume of work increases up to one hundred and eighty per cent. It means we have to stay up and work all night until it's finished. This work is a daily reality for certain media workers. Physically, it is difficult for this to be done by women (Mr Mulharadi, newspaper editor).

Both these comments refer to the gendered moral discourse that respectable Indonesian women (especially married women) do not work beyond daytime hours, particularly not in situations where they must be out at night, or working all night in teams of men. There is some legal weight of history behind this. The Ordinance on Measures Limiting Child Labour and Nightwork for Women

created in 1925 specified that women were prohibited from performing nightwork from 22.00 p.m. through to 6.00 a.m. It was only amended in 2003. *UU RI 13 – 2003*, Article 76 (1) on women's employment now states that women less than the age of 18 are prohibited from performing night work from 23.00 p.m through to 7.00 am, unless otherwise specified by a licence issued by the Department of Manpower. So it is only very recently that a married woman over 18 no longer required permission from her husband to work at night. This 1925 law was set up to protect women, but it actually gave employers in media/communications professions up to 2003 grounds for discriminating against women in appointment and employment. This discourse is fortified by the cultural Islamisation of Indonesia, where Shari'a courts may regard a wife undertaking night work as contributing to grounds for divorce by the husband.

Not all interview comments were negative. There were employers who preferred young, unmarried women for some kinds of frontline media work,

Female reporters show tougher spirit than male reporters. They don't despair or give up so easily. Even if sources of information either do not want to give information or neglect them, female reporters still have ways of begging, bargaining and giving alternatives to make sources give their information. They are *ulet dan gigih* (persevering) (Mr Wayan, on-line media editor).

Yet in general female media/communications graduates did not seem to be applying for jobs as often as men did,

It is rare to find women working in this company, since in the recruitment process so few apply, which means we only appoint a few (Ms Darina D, advertising agency accounts director).

Female graduates who had eventually found jobs offered some insight into why this might be so,

When I made my application, I really did not have confidence. As you can imagine there were many applicants there that I thought were coming from

more legitimate backgrounds and with better skills than I had, especially men (Nini, a tabloid reporter).

In practice many media employers still discriminate against women in job appointments. For instance, although apparently sympathetic, one media employer hinted at his preference,

We choose workers more for their work capabilities than for their sex. Nevertheless, from experience I have seen that men survive better than women in their careers. Women quit easily from positions. I think it is natural because women face more barriers in their career than men (Mr Budhi, radio station director).

However, although many comments implied that women could not develop successful media careers because they were likely to quit, often these conditions come about not from women employees themselves but from the pressure placed on them by media employers. Further on in the interview with Mr Budhi, he explained that there was an 'unwritten policy' in his radio station management practice that women who were newly married were shifted from their positions as radio DJ or programming to positions described by Beasley and Theus (1988: 127) as 'support roles'. A female DJ at Mr Budhi's radio station gave her version of what happened at her initial job interview,

When I was interviewed for my current job as a DJ in this radio station, Mr Budhi asked me when I wanted to get married. I had to tell him beforehand because he would prepare someone to take over my duties. It seemed like a tradition in this company if a female DJ married, another girl would take over the job. However, this warning was not given to men who applied for the same position (Dina, radio DJ).

After marriage the female workers here carried out clerical tasks and were pulled back from involvement in management decision-making. Obstructed in their career development once married, this might well be a reason to resign.

Mr Budhi's 'unwritten policy' narrowly avoids the statement in UURI 7 -1984, Article 11, paragraph 2(a) which 'prohibit[s], subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discriminations in dismissal on the basis of marital status', in that he does not dismiss married female workers, but seriously marginalises them, encouraging resignation. It seems there are plenty more unmarried female graduates waiting to take their place, as he says - 'if our women employees resign or shift we replace them'. His 'policy' does seem to contravene Human Rights Legislation UURI 39 – 1999, Article 2(b) which states that 'the worker is to be directed to the position that best suits the worker's capabilities including skills, talent, and motivation. Placement should be based on dignity, human rights and law', since he is redirecting them to other duties on the basis of marital status. Yet in a sense he is acting within the spirit of the Marriage Law – 'an area where blatantly unequal rights still prevail' (World Bank 2001: 117). In reference to the effects of this discriminatory practice, one female journalist postponed her marriage,

In the first part of my career, I had promised my fiancé that we would marry. However, (...) I didn't want my marriage to affect my first job (Niki, newspaper reporter).

There seemed to be an implicit understanding on the part of these media/communications employers that the terms 'career woman' and 'married woman' do not belong together, even if young female workers like Niki above do not see it that way. Paragraph one of the Marriage Act (*UURI 1 - 1974*) states that the rights and status of the wife are equal to those of the husband both in their married life and in society. However, paragraph three states that the husband is the head of the household and the wife is a housewife, reflecting conventional patriarchal family structure (Ariani and Nilan 1998: 63; Mariyah 1995). This impacts upon the perceived legitimacy of married women's careers. The CEDAW report expressed concern about this – 'the predominant view appears to be that married women might provide supplemental income for a family, but that there is very little emphasis on the right of women to develop a career of their own' (1998). Some female media/communications graduates

who had been able to build up a viable career while single or first married found a change in attitude at home once their family responsibilities increased,

I felt sometimes my husband was cranky if I came home late or I had to meet my clients in the night and outside. He suggested I should finish my job in work time and avoided taking it home. It is very hard for me to do, because sometimes I work overtime due to meetings or client appointments. In the first years of my marriage, my husband accepted my working lifestyle. However, now because we have a child, he blames me if I come home late as not being responsible for our child (Agung, advertising account manager).

In insisting on her career, Agung is implicitly challenging the underlying principles of the Indonesian Marriage Law. While other laws may protect her right to work, the marriage law discursively constructs her as woman whose rightful place is in the home, caring for her children.

Conclusion

In summary, while Indonesia does have laws that in theory should prevent the kinds of discrimination discussed above, in practice they do not. The 1925 prohibition on women working at night was only amended in 2003 - *UURI 13 2003*, and must have impacted adversely on the careers of older women in the media and communications professions. Certainly its legacy seems set to linger when it comes to female journalists working 'all night'. Moreover, the peculiarities of the 1974 Indonesian Marriage Law mean that married women (well over half of whom undertake some form of paid work) are inadequately recognised in law as the legitimate workers they actually are. Conflicting legal discourses about women as workers and women's work allow the overtly discriminatory actions of Mr Budhi the radio station manager, and other media/communications employers like him to flourish, in both recruitment and allocation of duties in the workplace.

It is no wonder then, that female lobby groups such as hotel workers in the Federation of Independent Workers' Unions (FSPM), in the process of negotiating collective bargaining agreements (CBAs) have prioritised such rights as 'safe transport home after night shifts', 'automatic family health benefits for women workers', and 'explicit anti-discrimination policies' (Gardner 2003: 8). Media and communications industries in Indonesia are currently not strongly unionised workplaces, as many of the new kinds of work do not fit within existing job/union definitions – such as journalism. Furthermore, as university-trained professionals, female media/communications workers are less likely than blue-collar female workers to join unions. Yet they vitally need to recognise their rights to a satisfying job and a viable career in the field (including after marriage) before they can challenge the discriminatory attitudes of employers. Without some extensive and overdue legal reform, particularly of the 1974 marriage act, and some more persuasive kind of public education campaign, discrimination against women workers in the media/communications industry seems likely to continue unchecked.

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The Law and Me

Jennifer (Zheng) Zeng was born in Sichuan Province, China in 1966. She grew up in an intellectual family and left her hometown for Beijing in 1984 when she was admitted to Peking University. Jennifer graduated in 1991 with a Masters of Science in geochemistry. She was married in 1988 and gave birth to her daughter in 1992. Jennifer began to practice Falun Gong in 1997 and was first arrested in July 1999 when the crackdown of Falun Gong began in China. She was arrested for the second time in December 1999, a third arrest in February 2000 and the fourth and final arrest in April 2000. In June 2000, Jennifer was sentenced to one year “re-education through labour” and was sent to Beijing Xi’an Female Labour Camp. During her time at the Labour Camp, Jennifer experienced and witnessed unimaginable cruelty and was subjected to brainwashing. Jennifer was released in April 2001 and started writing her autobiography one month later. She escaped to Australia in September 2001 and lodged a refugee application 20 days later. Jennifer was granted refugee status in 2003.

In January 2004, Jennifer’s book “Still Water Runs Deep - Witnessing History by a Falun Gong Practitioner” was published in Taiwan. In March 2005, the English version of her book “Witnessing History-One Woman’s Fight for Freedom and Falun Gong” was published in Australia. Jennifer is active in raising awareness of the persecution in China through constant national and international TV coverage, radio, newspaper and magazines.

My first memory of the ‘law’

I was fourteen before I realised my father had anything to do with the law. By that time, the Great Cultural Revolution in China was over, and the public security departments, procuratorial organs and courts that had been dismantled during the Cultural Revolution were to be resurrected. As a graduate of the University of Politics and Law, my father was recalled and given work in the new metropolitan Judicial Bureau of Mianyang City. My father worked in the bureau before he was relocated to a remote small town for more than ten years after

being labelled a 'reactionary capitalist-roader lackey' during the Great Cultural Revolution.

I grew up in this small town, moving to Mianyang City with my father and middle sister. However, my mother and youngest sister did not join us as my mother could not find a job. My mother was a middle school teacher at that time and she waited over three years to join my family in Mianyang. Eventually my father's work unit secured my mother a position in the court and she began working as the lowest level clerk in the court. My mother had to abandon her thirty year career as a teacher¹. By the time my mother was reunited with my father, I had left that city permanently for university in Beijing which was over 1600 km away.

At the age of fourteen, moving to a bigger city with my father was not very appealing. I felt like I had lost not only my mother, but also a 'home'. At that time, everyone who worked for the government or state-owned factories was 'looked after' by the government, or the (Communist) Party more exactly, in all aspects of life, including being assigned a place to live. There was no such thing as buying or renting an apartment of one's own.

The newly established Judicial Bureau did not have an office building or any apartments for its staff. The Bureau rented several rooms in a motel. My father was given a bed in the male dormitory, while my sister and I had to share one bed in the female staff dormitory. As my school was too far to travel, I had to live at school on my own, only returning to the dormitory to join my father and sister on weekends and holidays.

During all of my high school days, I lived a solitary existence. But little by little I learnt about the development of the Judicial Bureau of Mianyang. The Bureau was given office premises and a lawyers' house was established under it so that defendants could receive legal assistance. My father was transferred to the

¹ My mother later studied law in a self-educating adult's college. These colleges were for people who were not given the opportunity to go to high school. My mother was unable to attend high school as her father was considered "anti-revolutionary". Before my mother retired, she had become one of the best judges of the Mianying Intermediate Court.

lawyers' house, and eventually became known as one of the top ten lawyers in Sichuan Province, to which Mianyang belongs. I had heard that my father had once gained an extraordinary reputation for defeating all three lawyers representing the other side, thereby winning an almost impossible case. During the court debate, the room was filled with crowds who were especially impressed by his brilliant presentations.

I was a little bit surprised to learn of his achievements. To me, my father was a man of few words. Actually, I never heard him talk much at home at all. And I was even more surprised when he forbade me to become a 'liberal arts' student in the last year of my high school. In China, one year before the entrance examination for universities, every high school student has to choose whether to study 'liberal arts' or 'science'. After the student decides, the two groups are put into different classes.

My father explained very little of why he thought it was better for me to study science. The only reason he gave was: 'No matter who the president of the nation is, $1+1$ is always 2. You have less chance to make mistakes.'

I barely understood what he meant, but obeyed silently. I remember, back in the small town, my father sometimes wrote beautiful novels, short stories and poems. But my mother would always burn his manuscripts whenever she found them, sometimes before I, the only reader of my father's work, had the chance to enjoy them. My father seldom said anything when my mother did this, only biting his lips in a particular way which made me feel very anxious. My father was biting his lips again when he made this comment so I obeyed without argument, despite insistence from many people that 'female minds were not designed to study science'.

The battle begins

One year later I became a geochemistry student at Peking University, one of the top tertiary institutions in China. I did exceptionally well in all my science courses (even with my female mind), but was constantly attracted to the non-

science study as well. I read all the literature and philosophies I could find in the library, and was constantly asking myself the questions asked by others for hundreds of years: 'Who am I? Where did I come from? Where am I going?'. I did not find my answers until many years later, and not before my health was totally ruined due to a medical accident I encountered during the birth of my daughter in 1992. I had two massive haemorrhages and almost died. The blood transfusions that saved my life left me with hepatitis C which severely debilitated me for more than four years.

In 1997 my parents and middle sister back in Sichuan started practicing a type of traditional qigong called Falun Gong or Falun Dafa. Its purpose is to refine the body and mind through exercise, meditation and cultivation of the heart, guided by the principles of 'Truth, Compassion and Tolerance'. After trying it for one month, my family found it wonderful and sent me some books on Falun Gong. I read these books twice and I was amazed to find the answers to my questions I asked so many years ago.

Right away I made the decision to follow this practice. And sure enough, within one month of practicing Falun Gong, my hepatitis was gone without a trace. I was able to return to work with renewed vitality and a feeling that I was living a new existence.

That was a golden period in my life. I held the position of manager in an investment consultant company (despite my Masters degree in science); and I regained a harmonious family life with my husband, beautiful daughter and my husband's parents².

The number of people peacefully practicing Falun Gong in both Beijing and my home city, Mianyang, was enormous. By the early morning of 20 July 1999, while people slept, a plot that had been brewing for a long time finally came to fruition. The then-head of the Chinese Communist Party (CCP), Jiang Zemin, declared that 'Falun Gong is competing with the Party for the masses', realising

² In China, it is accepted that the older generation will live with their child and grandchildren.

that there were more Falun Gong practitioners (roughly 100 million) than Party members (about 60 million) in China. Thus, a thorough and ruthless crackdown was launched.

The first storm began with a 24-hour anti-Falun Gong propaganda onslaught. Day and night, all media channels were broadcasting how evil Falun Gong was, how many people had committed suicide because it had made them mad, how the Falun Dafa Research Association was banned and how nobody was allowed to appeal through any channels. I was dumbfounded, not just by how the Communist Party had fabricated these lies, but even more so by the ferocity with which the bans were announced. It was all too clear that the Party intended to eradicate Falun Gong right from the roots.

The weather was so hot, with a record high of 42.5°C. I felt suffocated, not by the heat itself, but by an extremely heavy, yet formless and invisible depravity, squeezing forcefully at me from all directions. My home instantly became a jail. Apart from being detained in a sports centre with several thousand other practitioners for a whole day on the first day of the crackdown and taken to the local police station to be interrogated, I was continually watched by my mother-in-law. She wanted to ensure that I would not practice any more, even silently behind the closed door of my small bedroom. From the 'atmosphere' created by the atrocious media blitz, every Chinese person with memories of the Cultural Revolution could sense that the Party was ready to kill again. The only way out was to give it up.

For me to give up the practice meant returning to the old days of lying in hospital endlessly and not even able to watch my daughter growing up. It would mean going back to the hopeless and helpless days of not knowing what to do with my useless self, feeling like a prisoner impounded by my ruined health, awaiting execution.

No, I couldn't; and I wouldn't.

My encounter with the Chinese Communist Party ‘justice’

The whole summer and autumn of 1999 saw me struggling everyday with my mother-in-law for my rights to practice ‘secretly’ in my little bedroom as hot as a steaming basket, while being frequently visited by the local police officer. He needed to make sure that I wouldn’t go out to make any ‘trouble’ for him.

It pained my heart so much to watch the continuous vicious attacks, and to see how frightened my in-laws were. But little by little, with the wearing-down of the initial shock, indignation grew within me. Who gives the government the right to say that white is black and black is white? Who on earth allows the government to violate the constitution by banning a meditation practice with such peaceful and advantageous beliefs? If Falun Gong can benefit me so greatly, it can help a lot of others, and the government should encourage that benefit. And as someone who has gained from the practice and who cares about others, I should at least somehow voice my opinion.

I thought my chance came when learning that after being detained for more than five months, the four members of the Falun Dafa Research Association were to be put on trial at Beijing No. 1 Intermediate Court for ‘instigating others to appeal for Falun Gong’. According to law, the longest period a person could be held in custody is one month. But because there were no legal precedents regarding how to deal with this phenomenon, and no relevant laws to go by, these members had just been locked up, awaiting the Party’s ‘policy’.

I decided to go to the court to attend the trial; firstly to make up for my regrets at never attending any court trials and witnessing how wonderful my father’s debates were, and secondly to defend the members if possible by telling the court that I was not ‘instigated’ by anyone into practicing or appealing for Falun Gong. I went to the court only to be arrested in the street even before I reached the front gate, together with more than one thousand other Falun Gong practitioners. I was immediately put in a detention centre. And my actions sent me to the detention centre on another two occasions. At the end of the third

term of a one-month detention, I was given a one-year 'Re-education Through Forced Labour' sentence.

My father had told me that all the lawyers in Mianyang City had been cautioned about defending Falun Gong practitioners. In a word, no lawyer was to take up these cases under any circumstances.

I could almost see my father biting his lip again on the other end of the telephone when he told me this. And I fully understood why, as a top lawyer in the province, he never bothered to try to help me in any legal sense. There was no law for Falun Gong practitioners at all. Followers of Falun Gong were considered to be the 'state enemy'. And the police at the detention centre even went so far as to openly declare that I was arrested because of my 'thoughts'.

Out of academic habit, I read the labour camp sentence carefully and noticed one item saying that I could apply for a review within 60 days if I thought I had been wronged. The police ignored my request for pen and paper to write my review application. Three days later, I was sent to the 'Re-education Through Forced Labour Despatch Division' in Daxing County, some 20 kilometres away from the centre of Beijing.

China's system of re-education through forced labour was established in the 1950s to deal with the 'remnants of the idle pre-liberation exploiting class'. Its purpose was to remould these remnants through forced labour into 'socialist new people'. Gradually the re-education system was extended to petty and non-criminal offences like pilfering, brawling, prostitution and drug-taking. After the crackdown, it had become a major tool for persecuting Falun Gong practitioners, as no legal procedures were necessary, making it extremely convenient and all the major provincial cities already had their own labour camps anyway.

A Gestapo-type organisation, the '610 office' (named after its set-up date, June 10 1999), which encompassed all administrative, legal and Party organisational

functions was created specifically for this persecution. All labour-camp sentences were issued by the 610 office.

A year in hell

On the first day of my arrival in the Despatch Division, I was forced to squat under the scorching sun for more than 15 hours. It sounds like nothing on paper, but there were so many moments that I felt I could not last one second longer without fainting. But somehow I knew I couldn't. Both the intense and excruciating pain I felt and the crackle of electric batons applied on whoever did faint and fall, kept me vividly aware. Using all the language available in the world, let alone in English, my second and far less fluent language, I am not able to describe the intense suffering.

But the second day was even worse. We had to stand in a small cell for sixteen hours, motionless, with our hands clasped in front of our belly and our heads lowered, looking at our feet. At the same time, we had to recite out loud the degrading labour camp regulations, espousing 'supporting the Communist Party and socialism'; 'not mixing with pimps and bad types'; 'not indulging in ribald or barbarous behaviour', and so on, and so on. I felt I would be driven mad by the humiliation, each one more vile than the last, by the constant violation of my thoughts and the havoc this wrought on my willpower; my dispirited body being mercilessly ripped apart like a defenceless lamb.

Day three was simply a repeat of the previous day. By midday, I felt my head was going to burst and my nerves were shot to pieces. In a desperate attempt to break away from all this, I asked the police to give me a piece of paper to write my appeal—this was my legal right anyway.

The result was that I was dragged into the courtyard with electric shocks raining down on my body everywhere, each jolt making me tremble uncontrollably as it pierced me with a violent burning sensation. At one stage the batons stayed on me and I felt they would never be taken away.

The crackle grew in intensity—I could feel the current rippling through my body. I squeezed my eyes shut, mustering all my will against the black despair sweeping over me, and against this monstrous evil threatening to engulf me. Suddenly something snapped in my brain and I felt the whole world descend into darkness with a great roar. I collapsed, unconscious on the ground.

I don't know how long this lasted, but as I slowly came round I found myself squatting on the ground with a criminal nicknamed Wolf. She was one of the 'little sentries' given police power to 'discipline' Falun Gong practitioners, and was trying to put my hands behind my head in the correct 'head lowered, hands clasped' posture required in the camp. I felt so weak that my hands slid off each time she put them up. So she just gave me a kick whenever I moved a muscle.

I squatted there, watching my sweat splashing down onto the burning concrete. Each drop shrank to nothing and evaporated without a trace within about two seconds. Soon the drops stopped, not because the sun was less fierce, but because my body had no more sweat to give.

Amidst the unbearable thirst and dizziness, I remembered father's tightly bitten lip, and I cried weakly and soundlessly in my heart, 'Oh father, who told you that whoever is the president of the nation, 1+1 is always 2? With Jiang Zemin in power, 1+1 could be anything!'

And that was only the third day of my labour camp career. The police told us that the only purpose for us being sent to the camp was to 'reform' us into believing that Falun Gong was evil. Further 'reforming' methods included sleep deprivation for up to 15 days and nights, brainwashing sessions accompanied by police equipped with electric batons; slave labour usually lasting for up to 20 hours a day, and the endless assurance that nobody could ever walk out of the camp unreformed and alive.

Beatings, electric shocks, verbal abuse, knitting sweaters for exportation until our hands bled, being bound to a bed for a continuous 50 days—all this made up our daily life in the camp. Many a time I was on the verge of total collapse;

and there were many collapsing around me, from an elderly woman of 68 to a girl of 18, and from a blind woman to a paraplegic. No one who practices Falun Gong is spared.

Enough is enough—the road to ‘reform’

After several months of struggling, one day a voice cried out to me: ‘It’s too dark! You must get out and expose all of this to the world. You must try to stop all these inhumane crimes!’ But, how could I, unless I ‘reformed’?

After a thousand struggles which were surely more agonising than the electric shocks, I decided to do just that. The story of what was happening to thousands upon thousands of Falun Gong practitioners in China would be told!

But to ‘reform’ is not an easy process. There were five steps: the writing of a guarantee; a renunciation of Falun Gong; the exposing and repudiating of Falun Gong; then going public, reading your repudiation before the whole camp, and finally helping the police torture fellow practitioners to get them ‘reformed’.

Writing my 18-page ‘exposing and repudiating’ criticism nearly killed me! Gritting my teeth tightly, I suddenly understood why my mother had burnt all of my father’s writings back in that small town. Under the Communist regime, the most dangerous and unforgivable crime is somebody’s thoughts.

I was released in April 2001; but not before the hardest battle with the police. I had to convince them that I was really reformed by writing ‘thoughts reports’ to them again and again. These were the cruellest tussles between my most intense desire to leave and the deepest guilt at having betrayed my most cherished principles and having helped the police to ‘reform’ others. I felt that my integrity had fallen apart. Deep within I was terrified that one day my spirit would shatter completely.

But the tragedy did not end there. I had to go into hiding only five days after I was released, no matter how I longed to be with my husband and my little daughter after more than one year’s separation. If I hadn’t, local police would

have taken me to brainwashing classes, set up because labour camps alone could not hold all practitioners. My role, of course, would have been to continue to help the police to reform those held there.

Fulfilling my vows

As luck would have it, I was able to escape to Australia to seek asylum five months later. To fulfil my vows in the forced labour camp, I had finished my book, *Witnessing History: one woman's fight for freedom and Falun Gong*. This was published two years later by Allen & Unwin in March 2005.

In October 2002, together with six other Falun Gong practitioners from six countries, I submitted Communications to the United Nations Committee Against Torture and the United Nations Human Rights Committee against Jiang Zemin for the persecution. This led the way for the largest human rights legal battle since World War II. Over 50 separate legal cases have been filed in more than 20 countries against the persecutors. This has not been an easy battle either. Four days after the announcement of my legal action, my husband was arrested back in China.

The legal future of human rights

Nearly three years have passed; and we have still heard nothing back from the United Nations. Here in Australia, the Supreme Court of NSW case of Australian citizen and international artist, Ms Zhang Cuiying against Jiang Zemin and the 610 Office, was allegedly interfered with by an officer in the Foreign Affairs Department of Australia, who offered to provide legal advice to Jiang Zemin. The right to hold a banner saying 'Stop the persecution' outside the Chinese Embassy in Canberra is yet to be contested by Falun Gong practitioners all around Australia against Australian Foreign Affairs Minister Alexander Downer, who has been signing certificates every fortnight to ban Falun Gong banners and music since the day before the Chinese Foreign Affairs Minister's visit to Australia more than three years ago.

After World War II, the judicial precedents created by the Nuremburg Court and the Tokyo Court were used only to punish the dictators who committed crimes against humanity in the name of the law. However, such punishment did not prevent dictators such as Pol Pot, Milosevic, Saddam Hussein and Kim Jong Il from using autocratic state power to commit atrocious crimes against humanity (as recorded in the 'Nine Commentaries on the Communist Party', published by *The Epoch Times* newspaper, November 2004). .

In China, a country that holds over one fifth of the world's population, autocratic state authorities continue to commit crimes against humanity in various forms, but all of the judicial systems in all human society are powerless to bring justice for these victims. The most serious crimes against humanity are carried out with the authority of state power which like domestic violence, occurs behind closed doors.

In order to address this, a group of professionals, dissidents and ordinary citizens have set up a "Special International Committee to Bring the CCP to Justice", under the authorisation of people around the world. It's belief is that human rights are above sovereignty. State sovereignty occurs only through the will of the people of that state as a whole, whilst the CCP has usurped state power through violence. There are never free elections in China. So the aim of the special committee and its associated courts is to create a set of legal principles to bring dictators to trial while they are still in a position to monopolise state power by violence.

I will again be bringing my charges against Jiang Zemin and the 610 office in the corresponding court in Sydney, under the Special Committee for Genocide and Torture. I am fully aware this court does not have state power to back its rulings. But as Oscar Wilde once said: '*The one duty we owe to history is to rewrite it*³.' The fate of humankind enters new realms through the process of continually going beyond fate and beyond the accomplished regulations.

³ Oscar Wilde, *The Critic as Artist* (1891) p12. Online. Available at <<http://www.ucc.ie/celt/published/E800003-007/>> (Accessed 26 August 2005).

Although I haven't had the chance to study law because of my father's '1+1 equals 2' theory, who can say that my legal actions may not be written into human history, and perhaps even future text books for law students?



Above: Jennifer’s original photo ID from the labour camp she was sent to in 2000.

Special Seal
for Receiving Visitors

Notice of Visiting Person(s)
Subject to Re-education Through Labour

It is hereby to notify
Relatives or Guardian of Zeng Zhong

Please come to the labour camp with this notice and your ID at 8:30 am. 4th December 2000 to visit the person under re-education through labour Zeng Zhong. Please note the following points for attention when visiting the camp:

1)

Visitors are restricted only to the spouse, directly related blood relations and collateral blood relatives within three generations or step parents and adopted children, and the number should not exceed three.

2)

Things allowed to bring to the person under re-education through labour include: sweater, underwear, woollen sweater and pants, bedding, shoes and socks (leather shoes and boots are not included) as well as books of politics, economics, culture, science and technology, and necessary stationaries.

3)

Family members who want to deposit money should hand it to the policeman who is in charge of the Finance Section and a receipt is provided. It's forbidden to hand the cash directly to the person under re-education

4)

Obey the regulations of meeting.

Visitor's Name	Sex	Relationship to the Person under re-education	Detail Address	Post Code	Contact Number
1					
2					
3					

Beijing Xin'an Camp of Re-education Through Labour
21 November 2000

Address: Tiantang He, Daxing Caounty, Beijing

*Translated by Fan Huiqiang
37 Camerbury Rd. Blackburn 3130 VIC
Tel: (03) 98781400*

NATIONAL
CONCENTRATION
AUTHORITY FOR TRANSLATION
AND INTERPRETERS

NAATI No. 19115
HUOQIANG FAN
TRANSLATOR
MANDARIN <-> ENGLISH

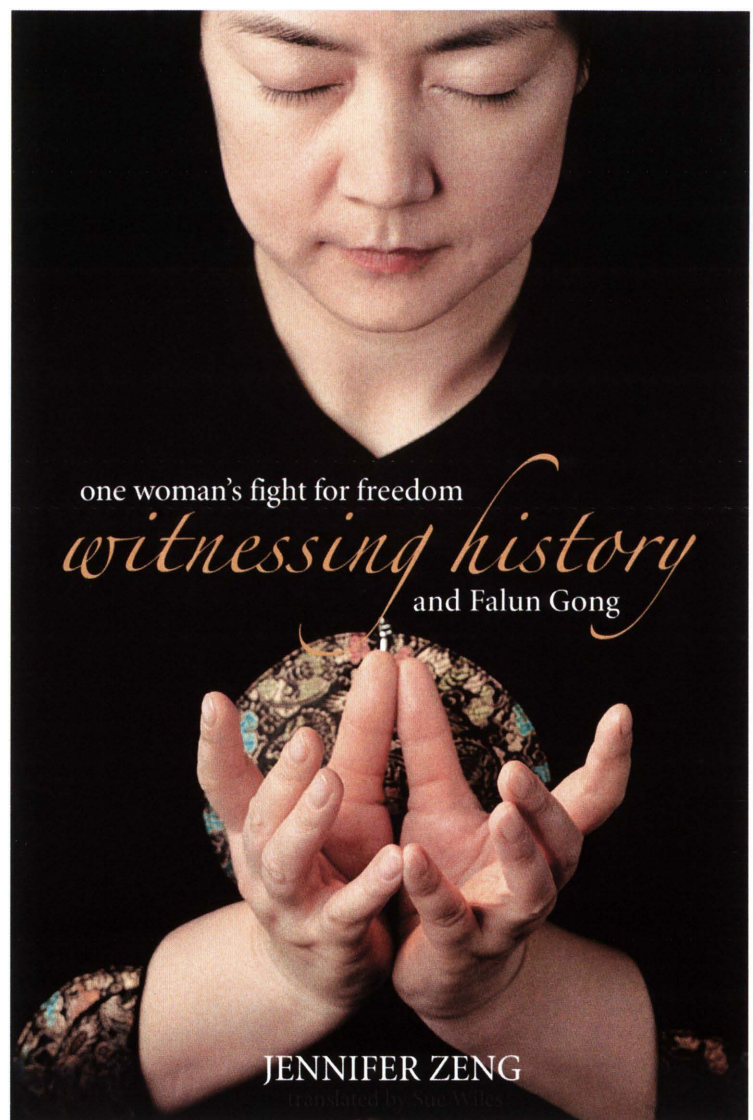
Fan Huiqiang
13/9/01

Right: Notice for persons visiting the labour camp.

Right: Jennifer’s book “Still Water Runs Deep” was published in Taiwan in 2004.



Readers who are interested in finding out more about Jennifer's incredible story, may wish to read "Witnessing History - One Woman's Fight for Freedom and Falun Gong".



The Battle for Justice

First published in *The Hindu*, on 6 January, 2002

Professor Madhu Dandavate is a former Finance Minister and former Deputy Chairman of the Ninth Planning Commission.

Gender injustice is a problem that is seen all over the world. But unless there are certain attitudinal changes, women will continue to get a raw deal. Professor Madhu Dandavate analysed the roots of this problem at the Besant Lecture delivered at the Theosophical Society, Chennai, on December 27. Excerpts from the speech appear below.

As we study the social evolution of human society, the glaring fact that emerges is that in the old feudal system, woman was always given an inferior status. Paradoxically, she was also considered the symbol of the sanctity and purity of the family. But this very aspect of her personality made woman the target as well as the victim in conflict-torn society. In a feudal society there are serious land disputes and conflicts about property rights. These are not always sought to be settled through due processes of law. No weapon of intimidation, torture or humiliation is considered unethical. The most revengeful way to humiliate a family against whom disputes are pending is to subject the womenfolk in that family to crimes that rob them of their honour and dignity and bring them disrepute.

Compounding gender injustice

In our tradition-bound society, structured on old social values, when a woman is subjected to a crime like rape, it becomes a multiple crime. She is raped at home, then in public life, followed by an agonising cross-examination in court, and the climax is reached when sensational reports about the crime appear in the media. The victim of the crime finds the public exposure more agonising than the crime inflicted on her. The most humiliating aspect of crime against a woman is that her status in the hierarchical structure of society also comes in

the way of securing justice for her. Thus her social status compounds her gender injustice.

In a well-known rape case, the most obnoxious situation was that the court concerned observed that the alleged rapists were middle-aged and as such were respectable and were not amenable to a crime against a woman. Not satisfied with this, the court made the astounding observation that "since the alleged rapists were higher-caste men, the rape could not have taken place because the alleged victim was from a lower caste". Such observations only give credence to the widely prevalent prejudiced view that men from the higher social echelons of society are paragons of virtue and not likely to commit atrocities on socially deprived women. What a tragedy that woman has to face the compounding of gender as well as social injustice.

The right to be born

In India, with a highly utilitarian approach, poor parents do not aspire for a female child for two selfish reasons. Firstly, because of the fabulous dowry to be paid on the daughter's marriage, parents consider a daughter as a "financial liability". And, secondly, because the daughter has to leave the parents' house after marriage, she is no longer considered useful as an earning member of the family.

The instinctive urge, particularly of poor parents, is to prevent the birth of a female child. The most astounding statistics reveal that in a prominent hospital in Mumbai, the pre-sex determination tests revealed that during 1978-1982, nearly 8,000 pregnant women were expected to give birth to a female child. But to prevent this, 7,999 of them underwent abortions.

Article 21 of India's Constitution on "Protection of life and personal liberty" states: "No person shall be deprived of his life or personal liberty except according to procedure established by law." In the case of female children in the womb of expectant mothers, they are not only denied the right to live, but are robbed of their right even to be born, as revealed by the statistics mentioned earlier. This is the travesty of gender justice! ...

Women in Champaran

Gandhiji had sensitivity for the problems of women, the weakest among the weak. He sent a team of workers to study and report on the problems of Champaran district. But the report they gave him did not refer to any problems of the women there. "How can any report be complete without an account of the women's problems?" he asked. The workers told him that the women of Champaran were very shy and would not meet them. Gandhiji then deputed Kasturba Gandhi and Avantikabai Gokhale to visit Champaran to report on the women's agony. At first, the women of Champaran would not meet them or even open their doors.

At sunset, Kasturba Gandhi knocked on one door and told the women inside: "We have been moving round your town from sunrise to sunset. We are now thirsty. Will you not offer us a glass of water?" A door was then slightly opened. A woman's hand appeared with a glass of water on her palm. Kasturba drank the water and then said: "Sister, we have seen your hand. But we want to see the woman behind this hand."

The woman inside broke down. She said, "Three women of our household share only one untorn sari and one woman has gone out with that sari; how could the others open the door for you and expose our half-naked bodies with torn clothes?" Kasturba told the weeping woman: "Close the door. The doors of your heart are opened."

Kasturba and Avantikabai, touched by the reply, returned to Gandhiji with this heart-rending report. The report steeled Gandhiji's determination not to rest till the honour of the women in Champaran was restored.

Global inequality

In these days of globalisation, the global picture of women is most ignoble and inequitable. Women constitute 50 per cent of the world's population, and account for 66 per cent of the work done, but they have only a share of 10 per cent in the world's income and own one per cent of the world's property ...

The psychology of industries in India weighs heavily against women. One of the reasons is that women in industry are to be given preferential welfare and social facilities and benefits. To avoid this, in the post-independence era, industries have preferred to reduce the number of women employees ...

The role of social reformers

The battle for gender justice has been a long-drawn struggle. The sustained efforts of several social reformers, even in the face of resistance from social orthodoxy, have given impetus to the cause of gender justice. Constitutional provisions, various laws, and judgments of courts have made their own contribution to the cause of gender justice. However, more fundamental is the work and role of social reformers who sought to change the mind-set of orthodox tradition-bound society and usher in women's reforms in the social, economic and educational fields ...

Despite resistance from orthodoxy, women's education gradually acquired greater acceptance. In the old orthodox society the Sati system of widows mounting the funeral pyre of their husbands was an atrocious practice. If this practice was gradually discarded, it was not only because of the Sati Prohibition Act in Bengal in 1829 at the behest of Bentinck, Governor-General, but mainly due to the social reform movement against the Sati system carried on by the eminent social reformer Raja Rammohan Roy. Though the Sati system is banned under law, in isolated cases it is still implemented in a clandestine way due both to remnants of orthodox beliefs, and to machinations by the relatives of the widow to garner her wealth and property by forcing her to mount the funeral pyre of her dead husband. Still, there are efforts to continue to build a halo of sanctity around the Sati system. This only amounts to a glorification of gender injustice and has to be resisted through an awakened public opinion ...

Male chauvinism

In different parts of the world, male chauvinism in different degrees has led to gender injustice. In some developed countries too, women were accorded the right to vote very late. They had to launch a determined struggle to secure the

right of adult franchise. Even when women secured the right to vote, initially they did not receive in the legislatures the recognition they deserved on the basis of their merit and ability ...

If the social-reform program is to be pursued vigorously, certain attitudinal changes are urgently called for. These comprise change of context, change of relations and change of values. Without such a comprehensive change in the existing value judgments of the present consumerist culture, the battle for gender justice cannot be won.

State Responsibility in the 'Private' Sphere: *Refugee Status Granted Due to a Lack of State Protection from Domestic Violence – a Feminist Analysis*

Megan Breen is entering the final year of her law degree at The University of Queensland, after completing a BA in politics and journalism in 2003. This essay was written while studying a course in feminist jurisprudence, entitled 'Women and the Law', which Megan undertook during a study exchange to the University of Auckland.

Violence against women within their homes may 'feel' like a human rights violation to women, but giving it basis as an international law claim required at least some theorising about the distinctions international law draws between State and non-state action.¹

I. Introduction

Appeal decisions from Australia and New Zealand reflect a shift towards a recognition that the 'public/private' distinction within international law fails to protect women. This essay involves a comparative analysis of two cases in which women were acknowledged as refugees on the basis of a lack of state protection from domestic violence. While the two cases examined; *Refugee Appeal Decision No. 71427/99*² and *Khawar*,³ represent positive developments in the law for women, in that women have been recognised as constituting a 'particular social group' for Convention purposes, some of the reasoning relied on in making these decisions is problematic from a feminist perspective. Although it has been affirmed that the responsibility of state protection includes protection from violence by private actors, and therefore state responsibility has entered the private sphere, there has still not been a full recognition of the extent domestic violence is a form of persecution that is inherently political.⁴ In addition, amendments to the Australian *Migration Act 1958* (Cth) made since

¹ Bell, Christine "Women's Rights as Human Rights: Old Agendas in New Guises" in Angela Hegarty and Siobhan Leonard (eds) *Human Rights: An Agenda for the 21st Century* (Cavendish Publishing, London, 1999) 139-153, 148.

² [16 August 2000] Refugee Status Appeals Authority.

³ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR .

⁴ Kneebone, Susan "Women within the Refugee Construct: 'Exclusionary Inclusion' in Policy and Practice - the Australian Experience" (2005) 17 *International Journal of Refugee Law* 7-42, 8.

the *Khawar* decision, have the potential to limit the effective application of jurisprudential developments which recognise women seeking asylum from domestic violence as a 'particular social group' fleeing persecution.⁵

The first part of this essay provides an overview of some relevant developments within the international human rights system. In addition to a case comparison, the second part of this essay involves a discussion of feminist theories that have contributed to the development and criticism of current jurisprudence on domestic violence as a basis for asylum claims. With the breaking down of the 'public/private' distinction, in regards to state responsibility, comes an opportunity for an expansion of the scope of human rights abuses to include the recognition of domestic violence as persecution and a form of social and political subordination of women.⁶

Feminist theory has played a role in the development of international jurisprudence that extends the responsibility of states' beyond the 'old' private/public distinction, in order to address discrimination and persecution that particularly affects women. Still, the nature of domestic violence as a human rights abuse has not yet been fully recognised. While the international law against gender discrimination offers some avenues of redress for women, gendered violence is still not adequately addressed in the protection of refugee women.

II. Overview of Relevant Refugee and Human Rights Law

A. State Responsibility and the Public/Private Distinction

State responsibility for breaches of human rights within state borders is a central principle of international law, which has generally meant that proving human rights abuses relies on proving that the state or its agent has actively

⁵ Haines, Rodger "The importance of mainstreaming refugee claims by women" in *Gender-related Persecution and Refugees* UNHCR discussion paper No. 1/2005, January 2005, 8-10, 10.

⁶ Copelon, Rhonda "Intimate Terror: Understanding Domestic Violence as Torture" in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) 116-151, 130.

breached human rights. This is problematic for women, as Charlesworth and Chinkin have noted:

The law of state responsibility distinguishes 'public' actions for which the state is accountable from those 'private' ones for which it does not have to answer internationally. ... the most widespread violence sustained by women around the world occurs in the 'private' sphere, particularly the home.⁷

The concept of a public/private distinction in law is often discussed in feminist discourses which challenge the ability of the law to represent, or to protect, women. This critique argues that law focuses on the public domain but the private realm is the one in which the major issues for women exist, for example in relation to issues such as: sexuality and reproduction; family and the division of labour; and violence in the home.⁸

Domestic violence is a form of gender persecution that has traditionally been understood as belonging to the 'private' sphere, and therefore being outside the realm of state responsibility.⁹ The implications of the public/private distinction for women asylum seekers fleeing domestic violence are great, as their claims for asylum rely on being able to prove *state* persecution.

Although state persecution must be proven it does not necessarily have to involve a positive act, a state's refusal or inability to provide protection from human rights abuses can also constitute a violation of human rights obligations and persecution by that state.¹⁰

Internationally, courts have recognised that a state's failure to act to protect a 'particular social group' from serious harm as a result of persecution by non-

⁷ Charlesworth, Hilary and Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) 148.

⁸ Graycar, Regina and Jenny Morgan *The Hidden Gender of Law* (The Federation Press, Leichhardt, 2002) 10-29.

⁹ Roberts, Anthea "Gender and refugee law" (2002) 22 *Australian Yearbook of International Law* 159-199, 164.

¹⁰ See: UNHCR Handbook par 65; and *Horvath v Secretary of State* [2001] 1 AC 489; both cited in Kneebone, Susan "Moving Beyond the State: Refugees, Accountability and Protection" in Susan Kneebone (ed) *The Refugees Convention 50 years on: Globalisation and International law* (Ashgate, Burlington USA, 2003) 279-311, 289.

state actors can be interpreted as state persecution.¹¹ Rebecca Cook has explained the situation as follows:

If a state facilitates, conditions, accommodates, tolerates, justifies, or excuses private denials of women's rights ... the state will bear responsibility. The state will be responsible not directly for the private acts, but for its own lack of diligence to prevent, control, correct or discipline" such private acts through its own executive, legislative, or judicial organs.¹²

This means that state responsibility effectively extends into the private sphere, a development that offers potential protection for victims of domestic violence and other forms of gender related violence.

B. Women within human rights and refugee law

According to the 1951 Refugee Convention, a refugee is someone who: is outside of her/his country of origin; has an well-founded fear of persecution because of her/his race, religion, nationality, membership of a particular social group, or political opinion; and is unable or unwilling to avail her/himself of the protection of that country.¹³ The Refugee Convention is "silent on gender";¹⁴ gender is not identified as an enumerated ground on which to establish refugee status. Despite this, there is provision within other branches of the international system to address the relevance of gender in effective protection of refugees. These developments, outlined below, are largely due to the lobbying of non-government organisations (NGOs) and feminist theorists campaigning for women's rights.¹⁵

¹¹ *Islam v Secretary of State for the Home Department, R v Immigration Appeal Tribunal, Ex Parte Shah* [1999] 2 AC 629, at 653.

¹² Cook, Rebecca J. "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women" in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) 228-257, 299.

¹³ Convention Relating to the Status of Refugees, opened for signature 28 July 1951, (entered into force 22 April 1954) ("Refugees Convention").

¹⁴ Wallace, Rebecca M.M. *International Human Rights: Text and Materials* (Sweet & Maxwell, London, 2001) 268.

¹⁵ Riles, A "The virtual sociality of rights: the case of 'women's rights are human rights'" in Michael Likosky (ed) *Transnational Legal Processes* (Butterworths Lexis Nexis, London, 2002) 420-439, 421.

In 1967, the General Assembly adopted the Declaration on Elimination of Discrimination against Women¹⁶. The Declaration recognised that non-discrimination imposed more than just an obligation on states to refrain from discrimination against women, it also requires States to take positive action against discrimination by individuals¹⁷. The declaration was made law by the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW).

Article 2 of CEDAW, especially the extract below, is particularly relevant for the purposes of this essay. Article 2(e) and (f) of CEDAW state:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(e) To take all appropriate measures to eliminate discrimination against women *by any person*, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women.¹⁸

The reference here to state responsibility for the elimination of discrimination *by any person* and to the need to take appropriate measures against discriminatory *customs and practice* are particularly relevant to the protection of women threatened by gender-based violence, including domestic violence, at the hands of non-state actors. These provisions represent a step in breaking down the public/private distinction with respect to state responsibility for the protection of women.

As a response to: further lobbying from women's rights NGOs; research conducted by feminist theorists;¹⁹ and as a result of general political pressure,

¹⁶ See Article 2 of General Assembly Resolution 2263 (XXII), adopted unanimously on 7 November 1967.

¹⁷ Bell, above n 1, at 141.

¹⁸ Convention on the Elimination of all Forms of Discrimination Against Women (1979), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ("CEDAW"). Note emphasis added.

¹⁹ Bell, above n 1, discusses the role of feminists in the introduction of gender sensitive human rights instruments and institutions.

in 1993 the General Assembly adopted the Declaration on the Elimination of Violence against Women (DEVAW). Article 1 of the Declaration states:

For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, *whether occurring in public or in private life*.²⁰

This recognition of violence “whether occurring in public or in private life” is significant in that it represents the expansion of the scope of state responsibility for preventing violence against women.

There have also been developments in the international system to address refugee women’s experiences of violence. The Office of the United Nations High Commissioner for Refugees (UNHCR) appointed a special rapporteur, Radhika Coomaraswamy, in 1994, to collect information on acts of gender-based violence and to present national, regional and international strategies for its elimination.²¹ In addition, in 1991 and 1995, the UNHCR issued specific ‘Guidelines on the Protection of Refugee Women’ which provided the impetus for many nations (including Australia in 1996)²² to issue their own national guidelines.²³

The development of the instruments referred to above is largely due to the work of feminists, many of whom, though sceptical about the ability of *current* human rights frameworks to offer substantive protection to women,²⁴ are willing to adopt human rights institutions and discourses as a strategy in a broader

²⁰ See General Assembly resolution 48/104, adopted without vote on 20 December 1993. Note emphasis added.

²¹ The report was presented in November 1994 - *Special rapporteur on violence against women, Preliminary Report, Commission on Human Rights, E/CN.4/1995/42*, issued 22 Nov 1994. Also E/CN.4/1996/53 issued 5 February 1996 - report to the Human Rights Commission on violence in the family. Cited in: Bell, above n1, at 143.

²² Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applications: Guidelines on Gender-Issues for Decision-makers* (1996).

²³ Spijkerboer, Thomas *Gender and refugee status* (Ashgate Dartmouth, Aldershot, 2000) 2.

²⁴ See: Romany, Celina “State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law” in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) 85-115.

feminist campaign.²⁵ Charlotte Bunch, a lawyer, professor of women's studies and director of the Center for Global Women's Leadership at the University of Rutgers, "has suggested that her interest in violence predated her interest in human rights by several years - that the turn to human rights was a strategic means of foregrounding the issue of violence among the many possible feminist causes rather than a means of promoting the concept of women's rights as human rights".²⁶ Feminist scepticism about the efficacy of current human rights frameworks is often explained in terms of the public/private distinction in law, that is that law excludes the experiences and interests of women and is a male construct based on male norms. For example, Romany states:

[A]t a formal level, women do not even have an entrance pass to mainstream human rights law. The public/private distinction continues to be manifestation of legal privilege that dispenses licenses along gender lines".²⁷

This type of argument has been applied, by a number of feminist theorists,²⁸ to an analysis of the grounds for proving persecution under the Refugee Convention, an issue explored below.

C. Proving persecution for Convention purposes

The basic formula for proving persecution for Convention purposes is cited in both *Refugee Appeal Decision No. 71427/99*²⁹ and *Khawar*³⁰ as being "persecution = serious harm + lack of state protection".³¹ It has also been defined as "sustained or systematic violation of basic human rights demonstrative of a failure of state protection".³²

²⁵ Knop, Karen "Why Rethinking the Sovereign State is Important for Women's International Human Rights Law" in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) 153-164, 157.

²⁶ Riles, above n 15, at 427.

²⁷ Romany, above n 24 at 90.

²⁸ See: Romany, above n 24; and Charlesworth and Chinkin above n 7.

²⁹ [16 August 2000] Refugee Status Appeals Authority, par [67].

³⁰ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR, per Kirby J par [126].

³¹ *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex Parte Shah* [1999] 2 AC 629, at 653.

³² *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, cited in: Roberts, above n9, at 165; and in the decision of Haines QC in *Refugee Appeal Decision No. 71427/99* at [47].

Roth makes the point that not all failures by the state to provide adequate protection from violence should be classified as breaches of human rights, as “an intractable approach to private violence would trivialize the special stigma behind the label ‘human rights violator’”.³³ In order for persecution to be shown there must be an element of *state complicity* in the violence, as Romany has noted:

Complicity depends upon the veritable existence of a parallel state with its own system of justice; a state that is designed, promoted, and maintained by official state acts; a state sanctioned by the official state.³⁴

This means that within the current human rights framework, domestic violence can only be recognised as a breach of human rights and persecution amounting to grounds for refugee status if the asylum seeker can establish that the state has been complicit in the abuse, by failing to provide adequate protection through reliable law enforcement (assuming domestic violence is considered a criminal offence, which is not currently universally the case) and provision of anti-violence policies and services, such as refuges.

III. Survivors of Domestic Violence as Asylum Seekers – Australia and New Zealand

It is important to note some important differences between the two decisions discussed below. The decision from New Zealand is from a quasi-judicial administrative tribunal with inquisitorial responsibilities, while the decision from Australia is a High Court case, representing the applicant’s last right of appeal and reflecting the determination of the Australian authorities to limit the grounds for asylum claims of this nature.³⁵ While these are significant distinctions, the comparison is made in order to analyse the different approaches taken in reasoning when determining very similar issues.

³³ Roth, Kenneth “Domestic Violence as an International Human Rights Issue” in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia, 1994) 326-339, 331.

³⁴ Romany, above n 24, at 100.

³⁵ Cauchi, Stephanie “Fleeting Refuge: Women, domestic violence and refugee status in the *Minister for Immigration and Multicultural Affairs v Khawar*”(2002) 14(1) *Current Issues In Criminal Justice* 102-105, 103.

A. The New Zealand Case - Refugee Appeal No. 71427/99

1. Asylum Seekers in New Zealand – some general points

The New Zealand Government acceded to the 1951 Convention Relating to the Status of Refugees on the 30th of June 1960 and acceded to the 1967 Protocol on the 6th of August 1973.³⁶ Until relatively recently, the refugee status determination procedure in New Zealand was non-statutory, a situation that changed when amendments to the *Immigration Act 1987* were made in 1999.³⁷ The New Zealand Immigration Service generally takes approximately two months to process asylum claims. Although detention of asylum seekers was rare within the New Zealand system before the September 11 bombings, current practice is to 'hold' new arrivals until their claims are processed.³⁸

Applicants are eligible for government-funded legal aid and accommodation for up to three months. Asylum seekers arriving in New Zealand are also entitled to one work permit per family while the claim is processed, and children may attend school. While New Zealand's system for processing asylum seekers is preferable to the Australian regime, it is not without flaws, as the recent controversy over the treatment of asylum seeker Ahmed Zaoui has revealed.³⁹

2. Refugee Appeal No. 71427/99

This appeal against the decision of the Refugee Status Branch of the New Zealand Immigration Service was heard in July 1999, and the decision of Chairperson Haines⁴⁰ was delivered in August 2000. The explanation for the

³⁶ Haines, Rodger *The legal condition of refugees in New Zealand* (Legal Research Foundation, Auckland, 1999) 1.

³⁷ Haines, Rodger *Immigration and Refugee Law: Recent Developments* (University of Auckland Faculty of Law, Auckland, 1999) 26.

³⁸ Nasim, Katya "Road to freedom? A survey of the track records of different countries: some good practice - and some bad." *New Internationalist* 350 (Wallingford, England, October 2002)18-19. Nasim also comments: "Refugee advocates in Australia and Aotearoa often compare the two countries' policies. Australia detains virtually all asylum seekers while Aotearoa often lets them live and work in the community, providing comprehensive access to welfare services. When last year Aotearoa admitted 131 Afghan asylum seekers who had been among the 400 Afghans Australian had refused and taken to the remote island nation of Nauru instead, the contrast appeared even sharper."

³⁹ For example the recent controversy over the handling of the asylum claim of Ahmed Zaoui; see Amnesty International New Zealand Homepage <<http://www.amnesty.org.nz/zaoui>> (at 6 April 2005).

⁴⁰ For the Refugee Status Appeals Authority (hereinafter 'the Authority').

delay between the hearing and the delivery of the decision was that there was a need for extensive research to be conducted⁴¹. Indeed the decision incorporates a large amount of information about the appellant's country of origin, Iran, information that clearly establishes "institutionalised and state-sanctioned discrimination against women in the Iranian family context".⁴²

(a) Summary of facts and procedural history

The relevant facts⁴³ of the appellant's case can be briefly summarised as follows:

- In November 1987, at age 19, the appellant entered into a traditional arranged marriage. Her husband came from a conservative Muslim family and was a member of the Sepah Pasdaran ('Revolutionary Guard'). From the time that the appellant first started living with her husband she was subjected to psychological abuse and physical violence.
- The appellant was beaten and denied access to healthcare during pregnancy. After the birth of her son, she was told the baby had contracted hepatitis B and had to be kept in hospital. The appellant was discharged without seeing him and her mother-in-law later told her that the baby had died. In fact the husband 'sold' his son to a couple (referred to in the decision as "Mr and Mrs X").
- A month later the appellant was sent back to live with her parents.
- Using his influence as a member of the Sepah Pasdaran, the husband delayed divorce proceedings in the hope that the appellant would relinquish her rights to support under the marriage settlement.
- A divorce hearing finally did occur in June 1989, at which the appellant first became aware that her child was still alive, as it was at this hearing that the husband was given custody of the child.
- The husband embarked on a campaign of harassment against the appellant. She was repeatedly arrested by the Pasdaran on false pretences, like violating the dress code or the code requiring the segregation of men and women. On one occasion she was flogged.
- The appellant learnt that her son was not living with her ex-husband and

⁴¹ *Refugee Appeal No. 71427/99* [16 August 2000] Refugee Status Appeals Authority, at [2].

⁴² *Ibid*, at [3].

⁴³ The facts of the appellant's claim for refugee status are set out in the decision at [12]-[35].

sought the intervention of the court. Although the ex-husband retained custody, the appellant was given access one day a week. The appellant was unable to exercise these rights.

- In 1993 the 'adoptive parents' ("Mr and Mrs X") and the appellant sought intervention from the court on the grounds that the ex-husband had failed to comply with the earlier ruling. In July 1994 the court granted the appellant the responsibility of full-time care for the child⁴⁴ on the conditions that the appellant did not remarry or move from the area. If the appellant breached these conditions she would lose her son and be sent to prison.
- In April 1997 the appellant entered into a 5-year temporary marriage with another man and moved to Tehran. A few months later her ex-husband and several armed Pasdaran went to the appellant's parents' home in Karaj and demanded to be given the appellant's address in Tehran. The appellant's mother was beaten and she eventually gave the men the address. When the appellant and her husband learnt that her ex-husband had their address, they immediately left Tehran for a nearby town, with the intention of leaving Iran. The appellant did not return to her apartment. Her husband bribed an official to add the child to the appellant's passport and the appellant and her son left Iran for Turkey. The appellant's husband was to join her in Turkey after selling their assets, but after being unable to contact her husband or her parents from Turkey the appellant sought the help of an agent to travel to New Zealand. She arrived at Auckland Airport with her son on March 1998 and sought refugee status on arrival.
- The appellant has since learnt that her second husband has been harassed and beaten by the Pasdaran. He was prosecuted for having the son's details added to the passport, but avoided a prison sentence by paying a bribe. The appellant has also become aware that her ex-husband has arranged for a warrant for her arrest, charges unknown.

(b) Feminist analysis of the reasoning in this case

The decision of Haines QC for the Refugee Status Appeals Authority has been described as being "exceptional"⁴⁵ in that it refers to the "state-sanctioned inequality of women within the context of the Islamic theocratic regime in Iran",⁴⁶

⁴⁴ Although the ex-husband retained formal custody with visiting rights.

⁴⁵ Kneebone, n 4, 21-22.

⁴⁶ *Refugee Appeal No. 71427/99* [16 August 2000] Refugee Status Appeals Authority, at [7].

and thus to the “overlap between the grounds of political opinion and religion”.⁴⁷ Kneebone makes the point that this characterisation of the persecution suffered through domestic violence is removed from the private sphere of the family and into a public, or state, context.

International recognition of domestic violence as a form of subordination and political persecution of women would be a major development in both human rights and women’s rights, in that it would increase the scope of protection available to refugee women and would be a significant step towards true equality for women.

In general, this decision is sensitive to the gender dimensions of the appellant’s asylum claim. Haines acknowledges that women can form a ‘particular social group’ within particular societies on the basis of patriarchal social structures and systemic discrimination. However the decision still raises some issues for feminist critique. The perplexing part of the decision is that while it acknowledged that the appellant was at risk of serious harm at the hands of her husband *and* there was a lack of state protection, the Authority found no nexus between the persecution by the appellant’s ex-husband and a Convention ground.⁴⁸ In other terms the Authority did not accept that the persecution suffered by the appellant’s was inflicted ‘*for reason of*’ her membership of a particular social group (woman in Iran) or another Convention ground. The statement of Chairperson Haines that: “[I]t is artificial to say that the serious harm likely to be inflicted on the appellant by the first husband is *for the reason of* the fact that she is a woman”⁴⁹ is rather surprising, particularly when he later states: “the reason why the appellant is exposed to serious state harm and to a lack of state protection both from the husband and from the state itself is because she is a woman”.⁵⁰ In my opinion there seems to be an artificial distinction being made by the Authority here in order to limit the full potential for recognition of domestic violence as a form of persecution of women. I would argue that the persecution of this appellant (at both levels of persecution - by

⁴⁷ Kneebone above n 4, 21-22.

⁴⁸ *Refugee Appeal No. 71427/99*, at [116].

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, at [119].

the husband and by the state) was definitely '*for reason of* her membership of a particular social group - women. The domestic violence in this case was symptomatic of systematic political subordination of women in Iran.

Despite this criticism, overall Haines is sensitive to the gender issues that are inherent to this case, as is reflected in the following statements from the decision:

... the policy of gender discrimination and the enforcement of gender-based norms against women as a group in Iran is of a nature which permits a finding of persecution in the sense of a sustained or systematic violation of basic human rights. ...The harm sourced from the husband is compounded by the harm sourced from the state.⁵¹

The decision also refers to the restrictive approach to the definition of 'persecution' and the treatment of 'particular social group' taken by Australian courts,⁵² which is the subject of the next section of this essay.

B. The Australian Case - Khawar

1. Asylum Seekers in Australia – some general points

The Australian government acceded to the Refugees Convention on the 22nd of January 1954 and acceded to the 1967 Protocol on the 13th of December 1973. Australia's system of determining asylum seeker's applications is set out in the *Migration Act 1958* (Cth). Australia's immigration and refugees policies, especially in relation to the detention of asylum seekers,⁵³ have come under considerable attack (from human rights NGOs, the media and groups of concerned citizens) in recent years. There are many issues within the

⁵¹ Ibid, at [78]-[79].

⁵² Ibid, at [23].

⁵³ See: Nasim, above n 38, at 18-19: "All non-citizens who unlawfully enter Australia are detained, most until their cases are considered. This can take months or years. Detention facilities are remote and far from legal help. Some asylum seekers may be granted temporary protection visas valid for three years. They may be able to work but are excluded from many benefits. ... The asylum system changed in 2001, prompted by the arrival of 1,200 unauthorized 'boat people'. The Government initiated the 'Pacific Solution' whereby Papua New Guinea and the tiny island of Nauru have become 'offshore' refugee-screening sites for Australia-bound asylum seekers".

Australian immigration system that are highly problematic, but for the purposes of this essay I focus only on women refugees fleeing domestic violence.

2. Refugee women in Australia as a 'particular social group'

When persecution can be shown to be occurring due to the applicants' membership of a 'particular social group', asylum should be granted, according to the Refugee Convention. However, 'membership of a particular social group' can be interpreted narrowly or widely. In Australia there has been a tendency towards narrow construction of the term, with some notable exceptions. In *Applicant A v Minister for Immigration and Ethnic Affairs*,⁵⁴ Brennan (in minority) allowed the appeal, adopting the approach taken in *Canada (Attorney-General) v Ward*⁵⁵ that a 'particular social group' can be defined by "an innate or unchangeable characteristic", this would include individuals who might fear persecution on the basis of gender. Brennan J broadly defined a 'particular social group' as:

a group constituted by those who share a common distinguishing characteristic which is the 'reason' for persecution that is feared.⁵⁶

This broad notion of 'particular social group' has not been widely applied in Australian jurisprudence, nor has the nexus requirement between persecution and particular social group been interpreted broadly, despite the fact that the UNHCR Handbook states:

Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.⁵⁷

⁵⁴ *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225.

⁵⁵ *Canada (Attorney-General) v Ward* [1993] 2 SCR 689.

⁵⁶ *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, at 236.

⁵⁷ See UNHCR *Handbook on Procedures and Criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* No. 79 (UNHCR, Geneva, 1992) 10; cited in Errera, Roger "Who is a refugee?" in Geoffrey Care and Hugo Storey (eds) *Asylum Law: First International Judicial Conference* (The Steering Committee of The Judicial Conference on Asylum Law, London, 1995) 9-16, 16 fn 1.

In fact, since the *Khawar* decision, legislative changes⁵⁸ were introduced to restrict opportunities for flexible judicial interpretation on this issue. The changes are explained in a paper from the Department of Immigration, Multicultural and Indigenous Affairs as follows:

To provide clearer parameters for decision makers and the courts and tribunals, the Australian Parliament has recently passed legislation to amend the *Migration Act 1958* to clarify that a Convention reason *must be the essential and significant reason* for the persecution, and that the persecution must involve systematic and discriminatory conduct.⁵⁹

This severely limits the potential for successful domestic violence asylum cases as Australian judges have been reluctant to interpret the reason for domestic violence as occurring *for reason of* membership of a particular social group. The issue of the judicial interpretation of 'membership of a particular social group' in the *Khawar* case is explored later in this essay.

3. *The Khawar case - Summary of facts and procedural history*

- In September 1997 the appellant and her three daughters arrived in Australia from Pakistan and lodged applications for protection visas, seeking asylum on the grounds that there was a failure by authorities in Pakistan to protect the appellant from repeated acts of domestic violence. The violence detailed included: numerous beatings (occasionally leading to hospitalisation); verbal threats of murder; and one incident in which she had petrol poured on her and was threatened with being set alight.

⁵⁸ Amendments were made to the *Migration Act 1958* (Cth), including the insertion of section 91R:

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to <persecution> for one or more of the reasons mentioned in that Article unless:

(a) that reason is *the essential and significant reason*, or those reasons are the essential and significant reasons, for the persecution; and
(b) the persecution involves serious harm to the person; and
(c) the persecution involves systematic and discriminatory conduct.

⁵⁹ Department of Immigration & Multicultural & Indigenous Affairs (DIMIA), Refugee and Humanitarian Division *Gender-Related Persecution (Art. 1A(2)): An Australian Perspective – a Paper Prepared as a Contribution to the UNHCR's Expert Roundtable Series* (Canberra, 2002)
<http://www.immi.gov.au/refugee/publications/convention2002/08_gender.pdf> (at 19 April 2005), 96. Own emphasis is added.

- The application was based on the argument that there was a failure in state protection as the applicant had repeatedly made complaints to police and had never been offered protection. On different occasions the Pakistani police had: refused to take complaints; failed to take the complaints seriously or to record the details of the attacks accurately; been rude and dismissive; and had *never* taken any type of action against her husband.
- In her application for protection the appellant argued that the domestic violence (perpetrated by her husband and his family), and the failure of state protection from such violence, constituted systematic discrimination and persecution. The Department of Immigration and Multicultural Affairs refused the application.
- The Refugee Review Tribunal affirmed the Department's decision.
- The appellant appealed to the Federal Court – Branson J overturned the Tribunal's decision, holding that there had been two errors of law:
 - 1) in its interpretation of the Convention definition of 'refugee' incorporated into the *Migration Act 1958* (Cth);
 - 2) in failing to make findings on certain matters of fact, including whether the alleged abuse had occurred, and the reality for women in Pakistan based on a number of international reports.
- The Minister appealed to the Full Court of the Federal Court – the appeal was dismissed by the majority.
- The Minister appealed to the High Court.

As may be obvious from the procedural history described above, "the Minister for Immigration ... fought hard to have this particular case denied".⁶⁰ The High Court appeal is briefly analysed below.

*(a) Feminist analysis of this case*⁶¹

The issues for determination by the High Court in this appeal can be summarised as follows:

⁶⁰ Cauchi, above n 35, at 103.

⁶¹ This case has been widely commented by feminists so I have limited my commentary to some brief major criticisms. See also: Bacon, Rachel and Kate Booth "Persecution by Omission: Violence by Non-State Actors and the Role of the State Under the Refugees Convention *in Minister for Immigration v Khawar*" (2002) 24(4) Sydney Law Review 584-602; Cauchi, above n 35; and Kneebone, above n 4.

1. "Whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances in which the motivation of the perpetrators of violence is private, can result in persecution of the kind referred to in Article 1A(2) of the Refugee Convention".⁶²

2. "Whether women (or for present purposes women in Pakistan) may constitute a particular social group within the meaning of the Convention".⁶³

Both questions were answered in the affirmative by the majority, and therefore at a basic level at least, the case represents a significant development in refugee law in Australia as it acknowledges the expansion of state responsibility for persecution into the 'private sphere'.

However there are problematic elements in the judicial reasoning. Callinan J, like Haines in the New Zealand decision, finds that there was: "no nexus between the harm ... suffered at the hands of her husband and the convention ground of membership of a particular social group".⁶⁴ The reasoning of Gleeson CJ has also been criticised on the basis that it relies on a "legal presumption that the abuse perpetrated upon Mrs Khawar is 'domestic' and privately motivated".⁶⁵

The same writer has pointed out that: "[W]hile the Chief Justice's judgment provides a 'victory' for Mrs Khawar, it remains problematic. It renders the future prospect of surrogate protection for non-citizen women in a foreign state uncertain".⁶⁶

However there are still positive findings in this case, for example that women can form a 'particular social group', irrespective of the size of the group.⁶⁷ It has also been argued that the decision brings Australian law "into line with case law

⁶² *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR, Gleeson CJ at [5].

⁶³ *Ibid.*, at [6].

⁶⁴ *Ibid.*, Callinan at [140].

⁶⁵ Wood, Angela "Legal Theories of the State and Membership 2002: Case Analysis: *Minister for Immigration and Multicultural Affairs v Khawar*" (2002) 11(2) Griffith Law Review 497-507, 502.

⁶⁶ *Ibid.*

⁶⁷ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR, at [127].

in the United Kingdom and New Zealand” and that: “it signals that Australian decision-makers and courts should be prepared to apply the terms of the Convention in a way that emphasizes its broad humanitarian purpose”.⁶⁸

IV. Feminist Analysis Applied to Both Cases - Conclusions

A. Comparison of the cases

Although the two cases discussed above do offer some positive development within the existing interpretations of state obligations to asylum seekers under the Refugee Convention, in that state responsibility has entered the ‘private’ sphere, both decisions continue to rely on the public/private distinction in international law. As Susan Kneebone has noted, the approach taken in both decisions:

...involves converting ‘private’ or ‘cultural’ harm into a ‘public’ wrong. This paradigm demonstrates a tendency to ‘cultural relativity’ because it is not recognised that the power relationship reflects the political and legal position of women. This paradigm marginalizes the rights of women refugees to equal and universal human rights protection under the Refugees Convention.⁶⁹

While the decision in *Refugee Appeal Decision No. 71427/99* involved a more gender-sensitive and flexible approach to the meaning of ‘particular social group’, than that of the Australian High Court in *Khawar*, neither decision addresses domestic violence as a form of political persecution.⁷⁰

Although the Australian departmental guidelines on protection of refugee women follow the UNHCR Handbook in suggesting that persecution of women can be for reasons of political opinion, Australian courts have not yet recognised “imputed or perceived”⁷¹ political opinion as a possible basis for granting asylum to women who are fleeing domestic violence. The notion of

⁶⁸ Bacon and Booth, above n 61, at 597.

⁶⁹ Kneebone, above n 4, 8

⁷⁰ Ibid, at 22.

⁷¹ DIMIA, above n 60, at 101.

‘imputed or perceived’ political women could apply to women who challenge their persecutors, including violent partners or police or other state authorities that are complicit in domestic violence through a failure to provide adequate protection. Many refugee women are fleeing situations in which gender is the basis for inherently political forms of persecution.

The main difference between the two jurisdictions involves the understanding of the meaning of ‘particular social group’. Within the Australian context an additional element, beyond proving the simple formula: risk of serious harm + lack of state protection = persecution; is required. Changes to the *Migration Act 1958* (Cth), made since the *Khawar* decision, require a strict interpretation of ‘persecution’ under the Convention so that persecution is limited to a threat to life or liberty or a serious violation of human rights for a Convention reason,⁷² that is, persecution *because of*: race, religion, nationality, membership of a particular social group, or political opinion. This leaves a wide discretion to allow interpretations of the grounds for refugee status contained in the Refugee Convention.

In contrast, there has been some development within the New Zealand jurisdiction since *Refugee Appeal Decision No. 71427/99*, to indicate that where membership of a social group is a “contributing cause”⁷³ to the persecution, or the abuse suffered constitutes persecution when considered in relation to international human rights norms⁷⁴, then the requirement to establish persecution is *for reason of* an enumerated Convention ground will not be strictly applied. This means that the potential for women to claim asylum on the basis of domestic violence (as a form of persecution of women as a particular social group) is greater in New Zealand, where “the [legislative] impediments to a dynamic and purposive interpretation of the Convention do not apply”.⁷⁵ Still,

⁷² *Refugee Appeal Decision No. 71427/99* [16 August 2000] Refugee Status Appeals Authority, [111].

⁷³ *Refugee Appeal Decision No. 74628/04* [11 February 2004] Refugee Status Appeals Authority. Note that “the Authority reiterated that the Convention ground need not be the sole or even dominant cause of the risk of being persecuted. It need only be a contributing factor. Further, the nexus between the Convention ground and the persecution can be provided by either the risk of serious harm or the failure of state protection”. See abstract of decision at: <<http://www.nzrefugeeappeals.govt.nz/srchres.aspx>>.

⁷⁴ *Refugee Appeal Decision No. 74665/03* [7 July 2003] Refugee Status Appeals Authority, cited in: Haines, above n 5, at 10.

⁷⁵ Haines, above n 5, at 10.

approaching domestic violence as a form of political persecution would provide the broadest protection for women seeking asylum from domestic violence.

B. The role for feminist theory in further development

Feminist theories that argue gender-based violence is different to other acts of private violence could be applied to expand current interpretations of political persecution under the Refugee Convention. These theories argue that acts of gender-based violence should be classified as international human rights violations because it is a type of violence that effects the rights of women to integrity, security, and dignity, and because it constitutes discrimination against women as a group in that “its purpose is to maintain both the individual woman and women as a class in an inferior, subordinated position”.⁷⁶ There needs to be recognition at international law that, in many societies, the very fact of being a woman is inherently political.⁷⁷

Feminist theory has already played a role in the development of international instruments and jurisprudence that extends the responsibility of states’ beyond the ‘old’ private/public distinction, in order to address forms of discrimination and persecution that particularly affect women. While the Refugee Convention is silent on gender, jurisprudence has developed that offers women fleeing domestic violence across national borders the possibility of protection, if they can prove they belong to ‘a particular social group’ and that they have faced state persecution, or a lack of protection from persecution, as a consequence of membership to that social group. However, while some women may be able to satisfy this test and will be granted protection, the law is still inadequate in its failure to treat domestic violence as a fundamental abuse of human rights. Until domestic violence is seen as a form of persecution designed to subordinate women, and therefore is understood as a form of political persecution, the protection offered by international human rights law will continue to be inadequate.

⁷⁶ Copelon, above n 6, at 130.

⁷⁷ Kneebone, above n 4, at 8.

Magistrates Work Experience Program

Each year, WATL provides the opportunity for a select number of law students to participate in the Magistrates Work Experience Program. Successful applicants spend one day a week for 10 weeks with a Magistrate engaged in a variety of tasks, ranging from research and administrative work to sitting in on court sessions.

In 2005, the following students were selected to participate in the Magistrates Work Experience Program:

- Miss Bridget Daly
- Miss Jessica Howley
- Miss Tamlyn Mills
- Miss Kathryn Purcell
- Miss Grace Quan-Wing Tang
- Mr Sidney Tang

WATL wishes to thank the following Magistrates who generously supported this initiative for 2005:

- Ms L.M. Bradford-Morgan
- Mr A.G. Dean
- Mr B.P. Hine
- Judge M.P. Irwin
- Mr W. J. McKay
- Ms A.C. Thacker

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The Question of Discretion

Jessica Howley is the winner of the WATL Magistrates Program Essay Competition for 2005. Jessica was assigned to work with Ms L.M. Bradford-Morgan.

Under the *Transport Operations (Road Use Management) Act 1995*, Magistrates in Queensland have very little discretion in the sentencing of people caught driving over the legal alcohol limit. It is mandatory for the Magistrate to suspend the offender's licence and impose a fine, with amounts depending on age, previous offences and amount of alcohol in the driver's system. While mandatory sentencing in relation to drink driving is touted as a practical and fair approach, it begs the bigger question of discretion in general. Should the judiciary be granted the discretion to impose sentences on a case-by-case basis, or is justice best served by having a strict formula for sentencing offenders?

Judicial discretion in sentencing is attacked on a number of grounds. It is said to be the law of tyrants, inherently unknowable and dependent on constitution and temper. It opens the door for a lack of uniformity in sentencing offenders found guilty of the same crime. It means that justice is left in the hands of subjective opinion.

However, even champions of positive law admit that justice requires at least some degree of discretion on the part of the judiciary. H.L.A. Hart, despite maintaining that judges ought to apply the law without reference to morality or justice, conceded that in relation to sentencing, there must be some instance of discretion on the part of the judge and the weighing up of moral principles.¹

Dworkin, a strong critic of Hart, insists that a judge must use his discretion based on principles. When rules seem to lead to an unjust result, judges may

¹ H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harv LR* 593.

appeal to principles as justification for setting the rules aside. In this way, they come down on the side of fairness, justice and morality.²

The issue of justice and mandatory sentencing is a hotly contested one within Australia. In perhaps the most publicised Australian situation, the Northern Territory government, under amendments to the *Sentencing Act 1995 (NT)*, provided mandatory sentences for a wide range of property offences.³ Whilst this Act has since been repealed, at the time, this meant that even first-time offenders were required to serve a term of imprisonment, except in 'exceptional circumstances.'⁴ Mandatory sentencing also still exists in Queensland for the crimes of murder and piracy,⁵ in New South Wales for murder and trafficking of certain drugs⁶ and in Western Australia for offenders found guilty of their third home burglary.⁷

The argument against such legislation is that individual citizens expect a criminal system in which the strict application of the law is tempered with a consideration of the circumstances of a particular case.⁸ Indeed, only in such a way can sentencing reflect its aim of rehabilitation and deterrence of a particular individual.⁹

Ultimately, the issues are fairness and integrity. President McMurdo of the Queensland Court of Appeal cites a case in the Northern Territory of an 18-year-old Aboriginal man who siphoned nine dollars worth of petrol into his car in order to drive his pregnant girlfriend the 200 kilometres to Alice Springs hospital to give birth. Under mandatory sentencing laws, he was sentenced to 14 days imprisonment, with the Magistrate expressing his frustration at having to hand

² Ronald Dworkin *Taking Rights Seriously* (2nd ed, 1978) 24.

³ Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility and Judicial Process' (2000) 22 *Sydney Law Review* 585, 586.

⁴ *Sentencing Act 1995 (NT)* ss78A(1), 78A(6B) and (6C), repealed by the *Juvenile Justice Amendment Act* (No. 2) 2001 (NT); *Sentencing Amendment Act* (No. 3) 2001 (NT).

⁵ *Criminal Code Act 1899* (Qld) ss 305, 82.

⁶ *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) s431A(2).

⁷ *Criminal Code Amendment Act (No 2) 1996* (WA) s 401(4).

⁸ *Postiglione v The Queen* (1997) 189 CLR 295, 336 (Kirby J).

⁹ Manderson and Sharp, above n 3, 609.

down such an evidently unfair judgment.¹⁰ Surely justice demands some notion of flexibility in such a situation.

President McMurdo also notes the practical costs of mandatory sentencing.¹¹ She notes that mandatory sentencing results in fewer guilty pleas, increased resource pressures on the courts and a flow-on cost to the community in the range of millions of dollars.¹² Furthermore, it will have its worst effects on those already over-represented in Australian prisons: the uneducated, the unemployed and the mentally ill.¹³

The issue of mandatory sentencing also raises an important constitutional question. A judge, unable to weigh circumstances and decide, is arguably not *judging* at all, but merely imposing the will of the executive. Does the existence of mandatory sentencing thereby undermine the separation of powers in Australia?

The High Court has intimated at certain times that sentencing is a mere formality and not a necessary incident of judicial power:

‘The whole matter of the guilt of the accused is determined by a court. The nature and quality of the penalty which may be inflicted depends upon a statute. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law’.¹⁴

However, in recent times, there has been an indication by the High Court in cases such as *Nicholas v the Queen* that ‘sentencing is a clear “example of the exercise of judicial power”, and as such it must be “exercised in accordance with the judicial process.”’¹⁵ Likewise, it was noted in *Leeth v Commonwealth* that ‘[t]he sentencing of offenders, including in modern times the fixing of a

¹⁰ Margaret McMurdo, ‘Why the Sentencing Discretion Must Be Maintained’ (Speech delivered at the Australian Lawyers Conference, Aspen Colorado, January 13 2000).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Fraser Henleins v Cody* (1945) 70 CLR 100, 119–120 (Latham CJ).

¹⁵ (1998) 193 CLR 173, 209 (Gaudron J) (*Nicholas*).

minimum term of imprisonment, is as clear an example of the exercise of judicial power as is possible'.¹⁶

In light of such views, it may well be argued that mandatory sentencing constitutes an interference with the judicial power of the courts:

'Speaking generally, an infringement occurs when the legislature has interfered with the exercise of judicial power by the courts and usurpation occurs when the legislature has exercised judicial power on its own behalf. Legislation that removes from the courts their exclusive function "of the judgment and punishment of criminal guilt under a law of the Commonwealth" will be invalidated as a usurpation of judicial power'.¹⁷

On such a basis, many argue that 'crucially, the act of judgment must involve some degree of independent judicial discretion in determining sentence'.¹⁸ Independence in the sentencing process 'is required to ensure the continued integrity of the judicial process and continued public confidence in the judiciary'.¹⁹ On the strength of recent precedent such as *Nicholas* and *Leeth*, a constitutional challenge may well be raised against mandatory sentencing laws. In such a case, one would expect the judiciary to fervently uphold the independence and integrity of the judicial system, as it has always done, through an insistence on the discretion to determine punishment based on the circumstances of a particular situation.

While arguably not as serious as laws such as the Northern Territory's *Sentencing Act*, the provision of mandatory punishment in Queensland's *Transport Operations Act* does, at least in some respect, abrogate the role of the judiciary in carrying out its judicial function. If sentencing is seen as a pivotal part of the judicial process, then mandatory sentencing is interfering with the independence and integrity of the justice system in Queensland. This is not a situation of sentencing guidelines, but where, in each and every situation, a

¹⁶ (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ) ('*Leeth*').

¹⁷ (1998) 193 CLR 173, 220 (McHugh J).

¹⁸ Manderson and Sharp, above n 3, 590.

¹⁹ Ibid 591.

sentence is imposed which is essentially outside of the control of the Magistrate. Indeed, the situation was, for me, encompassed in the times where Magistrates indicated their pity for particular situations, but that their hands were tied and the sentence essentially outside their control.

The entire notion of justice begs for flexibility and discretion in the sentencing process. Mandatory sentencing abrogates the ability of the judiciary to independently review the circumstances of a particular case, leading to unfairness, constitutional implications and economic costs to society as a whole. The bigger question is one that needs to be addressed around Australia. But for the time being, remember not to drink drive in Queensland if you want to keep your licence. If you do, don't lay your trust in appealing to a Magistrate's sense of fairness: the executive has spoken.

One Last Chance

Bridget Daly was assigned to Ms A.C. Thacker. She worked at the Beenleigh and Southport Courthouses.

When I started this program I honestly thought that there is no way out of the continuous downhill spiral. You have given me a chance to start again and look forward to an exciting future ...

With the continuous push, all their phases and their requirements and the different options the Drug Court have to offer have obviously made me more determined than I have ever been with recovery and achievements.¹

The statements from the South East Queensland Drug Court graduates illustrate the positive impact this court can have on an individual's life. The Drug Court's success is largely due to the holistic approach used to assist in rehabilitation. This holistic approach is implemented through the individually focused court process; the court's emphasis on participants changing their thoughts and actions, and the numerous rehabilitative programs the court offers.

The Drug Court began in Queensland in 2000 and aims to give criminal offenders "one last chance" to break their drug and crime lifestyle and to get their lives back on track. The Drug Court addresses the problems of drugs and crime by focusing on rehabilitation; not simply punishment.

The jail sentences imposed on the Drug Court participants are suspended while they undertake an Intensive Drug Rehabilitation Order (IDRO). The program involves three phases each taking approximately three to six months. The first phase aims to get the participants drug-free, the second phase is stabilisation and the third phase is re-integration into the community. However, once the

¹ Magistrate John Costanzo, *Final Report on the South-east Queensland Drug Court pilot*, (2003) Queensland Courts 136.

order is completed or they fail their IDRO the sentence is re-evaluated and re-imposed, taking into account their level of participation and success with their IDRO. Successful graduates of the program often have a lesser sentence re-imposed that does not involve prison.²

The five drug courts around Queensland are situated in Beenleigh, Southport, Ipswich, Townsville and Cairns. The average client of a Drug Court is identified as male; late twenties; married or in a de facto relationship; Australian born³ but predominantly of a non-indigenous background with a prior period of imprisonment.⁴ Statistics show that 82% of Drug Court participants have been incarcerated with 45% spending longer than 6 months in jail.⁵ They also reveal that the average age for a participant's initiation into drug use is 15.⁶ These statistics illustrate the need for a holistic program which focuses on lifestyle and psychological and social changes that need to take place to assist the participants in overcoming their criminal lifestyles and ingrained drug addictions.

The three Drug Courts within the South East Queensland region have their own 'Drug Court Team' consisting of a representative from Legal Aid, Community Corrections, Queensland Health and the Queensland Police Service. The same Magistrate works in all three Drug Courts, spending two days each at Beenleigh and Southport and one day at Ipswich. In the morning of a sitting day, the team and the Magistrate hold a review meeting at which they discuss the circumstances and progress of each participant who will attend court that day.

These morning review meetings undertaken by the Drug Court team assist in creating the individually focussed court process. The purpose of the morning meeting is to discuss each participant's progress through the phases of rehabilitation; rewards and sanctions that may need to be implemented and any concerns or encouragement the Drug Court team feel the Magistrate should communicate to a participant.

² Queensland Courts, *Taking Part in the Drug Court (south-east Queensland) Fact Sheet No.4* (2003).

³ T Makkai and K Veraar, 'Final Report on the South East Queensland Drug Court' (2003) *Australian Institute of Criminology Technical and Background Paper Series No 6* 16.

⁴ Ibid 19.

⁵ Ibid 18.

⁶ Ibid 21.

The meeting may also address information that is not critical to the day's court session, but is discussed in the hope of pre-empting any possible breaches or relapses on the part of a participant. For example, information brought forward by caseworkers about friends or associates of a participant who are involved with drugs or crime, is discussed and monitored by the Drug Court team. This type of information would seemingly be deemed important, as statistics reveal that associating with drug users/offenders, leads to a higher probability of relapse into a drug/crime lifestyle.⁷

Objectivity, within the morning review and decisions, is also monitored by the *Drug Rehabilitation (Court Diversion) Act 2000*. Thus, even though the morning review is conducted in personal tones and opinions, any decision to impose sanctions and rewards or to terminate or grant an IDRO, must meet the criteria outlined within the Act. Further, even though some decisions are, on the whole, determined within the morning review, deliberation must be repeated within the open court session. In this way, while the morning reviews are conducted in a manner focussing on each participant's individual circumstances, objectivity within decisions is still upheld and identified as critical in maintaining the credibility of this individually focussed atmosphere that may be deemed as subjective to some.

Within the parameters of the Act, the proceedings of the court also aim for this individually focussed atmosphere. This court atmosphere is evidenced when participants approach the Magistrate's bench and have the opportunity to ask the Magistrate how her day is and how she is feeling. When a participant graduates to the next phase, or from the program altogether, the Magistrate comes down from the bench and presents the certificate and shakes the participant's hand. This action enhances the individual focus of the court, as it fosters the belief within the participants that their personal achievements are being recognised by the whole court.

⁷ T Makkai and J Payne, *Drug Courts: Current Issues and Future Prospects* (Paper presented at the Drug Court Conference, Brisbane, 9 July 2004).

One requirement of the IDRO is that participants produce diary entries every time they attend court for a review proceeding, which can be weekly/fortnightly/monthly, depending on their progress. The diary entries consist of any feelings and thoughts about the previous week/fortnight/month, any reflections they have about their progress within their counselling sessions, any insight they have gained about their drug addiction or crimes and any general information they want to communicate to the court.

These entries assist in enhancing the individual court focus, as an exercise of practicing insight and reflection along with allowing the court to have a means of ensuring the participants are taking their IDRO seriously. It ensures participants are fully committed by requiring the entries to be to a requisite standard. Often the Magistrate demands that an entry is repeated if it is not to this standard, and indicates to the participant that the diary entries demonstrate to the court their commitment. The diary entries help foster the individual court focus by ensuring a means by which the participants can communicate confidential information to the Magistrate or Drug Court team that they prefer not to be mentioned within open court. (Further, the entries illustrate the relaxed court atmosphere within the Drug Court by not requiring all information to be recorded within court proceedings.)

Several benefits have observably stemmed from the promotion of the individual court focus. The obvious benefit is that this focus encourages a court atmosphere of open and honest communication between the participants and the court. This allows the Drug Court team to become better acquainted with the needs and circumstances of the participants undertaking an IDRO, and in turn better assists them in becoming drug abstinent and crime free. Another benefit is that counsellors, case workers and service providers (e.g. Salvation Army), involved with the rehabilitation process, often attend graduation proceedings, general reviews and eligibility hearings. This attendance illustrates to the participants the services and people in the community who are willing to support them throughout the program and, more importantly, after their hopeful graduation when they are on their own in the community. Thus, this court process that is individually focused leads to observable benefits; whilst, overall

assisting the holistic approach taken by the Drug Court in assisting the participant's rehabilitation.

Honesty is a foundation requirement for participation in the Drug Court program. The court heavily sanctions dishonesty as this type of behaviour or thought process is consistent with a drug and drug-related crime mentality.⁸ A participant's breach of their IDRO that is also compounded by dishonesty is considered more serious by The Drug Court team and the Magistrate and may incur a heavier sanction, than a participant who is immediately honest about the breach.

A participant's appearance and demeanour are considered to be actions reflecting whether they are taking the program seriously and trying to enter into a new lifestyle. The Magistrate comments if a participant wears 'dressy' clothing, or in the opposite, if they wear singlets and informal clothing, stating that it is a reflection of their commitment to their IDRO and to their progression into a new life.

The presence of the participant's family within general review proceedings or on special proceedings regarding the granting or termination of an IDRO, is often observed, commented on and taken into consideration. The strong emphasis the Drug Court team and Magistrate place on the presence of family reflects statistics revealing that a lack of family stability does predict a higher probability of drug use and criminal activity⁹ as well as statistics illustrating that the prediction of a successful graduation is related to family stability or cohabitation with a partner.¹⁰

Similarly, employment is emphasised as another important factor to consider within a participant's lifestyle, as statistics show that entering the program while

⁸ McLean Hospital, *Alcohol and Illicit Drug Abuse: Do You Know the Warning Signs?* <<http://community.healthgate.com/getcontent.asp?siteid=mclean&docid=/hic/drugaddiction/Warning>> at 19 July 2005; Not My Kid, *Warning Signs of Substance Abuse* <<http://www.notmykid.org/parentArticles/substanceAbuse/>> at 19 July 2005; Medline Plus, *Drug Signs and Teenagers* <<http://www.nlm.nih.gov/medlineplus/ency/article/001975.htm>> at 19 July 2005.

⁹ Makkai and Payne, above n 7.

¹⁰ Ibid.

employed more readily predicts a successful graduation.¹¹ However, employment must not act as a detriment, in the earlier phases, to a complete commitment to the Drug Court program, which is considered the participant's number one priority. Therefore, employment is not really possible within phases one and two but is actively encouraged when participants enter into phase three.

It must be noted that the demand and insistence on these thoughts and actions is progressively expected. Therefore, a participant in the first phase, who lies or fails to take initiative, probably will be reminded and given a warning about the importance of these actions and considerations. However, a participant at the end of the third phase is expected to have 'learnt better', therefore, lying or failing to taking initiative is judged more seriously. The statistics show that the Drug Court is successful in emphasising the importance of these lifestyle factors. It was found that the number of participants who fail to attend without explanation reduces significantly through the phases.¹²

The holistic approach adopted by the Drug Court is further supported by the diverse rehabilitative and 'life skills' programs that the Drug Court offers their participants, who may never had the knowledge of, or the opportunity to, access at any other time. The majority of participants access programs, whether within a residential or non-residential setting, involving Relapse Prevention, Cognitive Skills Development and Life Skills.¹³ However, due to the Drug Court, and most of the residential programs, adopting a program that allows them to become familiar with the participant and their circumstances, they are able to identify and offer additional programs that focus on the participant's individual needs in assisting their rehabilitation.

These additional programs may be directly related to overcoming the actual drug addiction, such as Narcotics Anonymous or Alcoholics Anonymous and Detoxification (health program). They could also relate to the participant's

¹¹ Ibid.

¹² Makkai and Veraar, above n 3, 24. It was found that at phase one 343 participants failed to attend without explanation, phase two 35, phase three 10.

¹³ Ibid 28.

psychological development in overcoming triggers or factors that contribute to their drug abuse and criminal history, such as, Anger Management and Abuse counselling.¹⁴ The programs do not need to be directly related to overcoming the drug addiction or criminal lifestyle but can focus on developing a positive lifestyle after the Drug Court program.

Indigenous Drug Court participants, who are interested in re-discovering their cultural heritage, may be offered the opportunity to participate in programs teaching them about their cultural heritage, through art classes or work in different projects.¹⁵ In one case a Drug Court participant went on to produce an art show of his work.

Similarly, the Drug Court has encouraged and facilitated a young woman, who gained weight after detoxification, to access health programs and sport programs. This assistance aimed to limit any possible self-esteem and/or health issues for this young woman that could follow on from the gained weight.

Whilst on the IDRO, participants are also assisted to undertake programs and courses to enhance their employment prospects. It has been revealed that education and other factors that assist employment prospects are often pushed aside once drug use commences.¹⁶ Drug Court participants have undertaken varied programs at some time. For example, TAFE and university classes, hospitality courses, physical instruction, obtaining a drivers licence, defensive driving and heavy machinery tickets.¹⁷ Not only does undertaking courses assist with future job prospects, it was found that the Drug Court participants with reading and writing difficulties gained a sense of achievement and in turn a substantial boost in self-esteem through learning basic literacy and numeracy.¹⁸

Notwithstanding, it must be noted that several of the programs that are only accessed on a necessity basis could be beneficial to more participants than are

¹⁴ Ibid.

¹⁵ Costanzo, above n 1, 77.

¹⁶ Makkai and Payne, above n 7.

¹⁷ Costanzo, above n 1, 117.

¹⁸ Ibid 118.

presently gaining access to them. Funding limitations and even limited services are reducing the possibility of accessing programs that could benefit the participants' rehabilitation. One example of this is access to Abuse counselling for childhood sexual abuse victims. A recent review has found that one in five participants have self-disclosed having suffered sexual abuse as children.¹⁹ However, funding does not allow ready access to counselling, further, there is a severe limitation of counselling services for men who have been sexually abused as children.²⁰ Therefore, even though the Drug Court tries to address all possible factors to allow for a participant to undertake a comprehensive attempt to overcome their drug addiction and their criminal backgrounds, the continual problem of funding and ready access to programs and counselling could hinder such an outlook.

Statistics show that once a Drug Court graduate completes their IDRO only 9% go on to commit an offence, compared to 32% of individuals who self-terminate their IDRO. Of the individuals who refuse to participate in an IDRO, 61% are likely to commit an offence and of individuals who have undertaken a prison sentence without having entered or tried to enter the Drug Court program 47% are likely to commit an offence once they leave prison.²¹ Further, graduates of the Drug Court are found to take longer to re-offend and re-offend less frequently.²²

These statistics highlight the success of the Drug Court for the graduates. It could be said that this success is largely due to the holistic approach adopted by the Drug Court towards rehabilitation of their participants. This comprehensive approach is more likely to tackle the deeply ingrained and accustomed lifestyle of drugs and crime. The Drug Court implements this holistic approach through a individually focussed court atmosphere, an emphasis on thoughts and actions consistent with a lifestyle that is drug and crime free and offering access to programs and services that may not have been readily known or available to participants previously.

¹⁹ Ibid 84.

²⁰ Ibid 83.

²¹ Makkai and Veraar, above n 3, 40.

²² Makkai and Payne, above n 7.

However, it is not only the obvious statistics that demonstrate the success of the Drug Court. It is through the observations of people working within the Drug Court of changes within the participants and the stories and statements of the graduates themselves that illustrate its true success. As the participant quoted above states, “You have given me a chance to start again and look forward to an exciting future”.²³

²³ Costanzo, above n 1, 136.

The Murri Court – Justice for All?

Tamlyn Mills undertook her work experience with Mr B.P. Hine.

The notion that justice should be administered impartially is deeply engrained in the Australian legal system. All are equal before the law and the law protects all equally, regardless of race, religion or economic status. This was certainly the ideal I held when commencing the WATL work experience program at the Brisbane Magistrates Court in semester 1 2005. However, during the time I spent working with Deputy Chief Magistrate Mr B P Hine I was exposed to aspects of the court system which challenged the universal appropriateness of impartial justice. The opportunity to observe a session of the Murri Court emphasised the need for cultural specificity if the Australian legal system is to achieve true equity.

Modeled on the South Australian Aboriginal Court, the Brisbane Murri Court was recently established to address the overrepresentation of indigenous offenders in Queensland and related problems such as failure to appear and a high rate of re-offence. Indigenous Australians constitute approximately 2.5% of the Queensland population yet make up more than 25% of the State prison population.¹ Such statistics are alarming and indicative of the problems associated with applying an essentially foreign system of law to indigenous Australians.

The Murri Court attempts to administer the law with regard to cultural norms and by reference to culturally specific information. Under the *Penalties and Sentences Act 1992* (Qld) s 9(2) the submissions of elders or respected members of the indigenous community must be taken into account when sentencing Aboriginal or Torres Strait Islander people. This provision operates in the Murri Court in relation to adult indigenous offenders who plead guilty to an offence falling within the jurisdiction of the Magistrates Court, as elders are present in court and provide advice to the Magistrate about culturally

¹ Queensland Courts, *Murri Court Fact Sheet* (2005) 1
<http://www.justice.qld.gov.au/courts/factsht/qc_fact7.htm#1> at 10 July 2005.

appropriate sentencing. The elders can also explain proceedings to the offenders and liaise with community groups.

When I attended the Murri Court I noticed several unique features which distinguished it from other court sessions. The Magistrate presiding did not robe and sat with the elder, community representatives, offender and offender's family in a round table type arrangement. A Legal Aid lawyer was present but the sentencing procedure was more informal with the Magistrate questioning the offender personally. The Magistrate also spoke to the offender's mother who was given an opportunity to express her concerns and explain the effect of the offender's behaviour on her. The elder addressed the offender, encouraging reform and rehabilitation. Before sentencing, the Magistrate explained the options available to the offender as well as the consequences of breaching orders made by the court.

While there are insufficient statistics to fully measure the effectiveness of the Murri Court it represents a positive development in recognising the need for a modified approach to the law when dealing with indigenous offenders. While the authority of the Magistrate is maintained, the practice of not wearing a robe and sitting on the same level as the other parties lessens the perception that foreign law is being administered by an abstract authority figure with little understanding of the offender. Involving community leaders and family members gives the legal system legitimacy in the eyes of indigenous people and a sense of participation, if not ownership, in a process that otherwise seems largely to exclude indigenous custom and culture. When I discussed these issues with Mr Hine he commented that involving the community makes the offender accountable not only to the law but to their own people, preventing offenders blaming the legal system or the magistrate and further entrenching an attitude of "us against them". Elders and family are informed of the facts of a case and are able to condemn harmful behaviour.

While the Murri Court is playing an important role, its presence raises broader questions about indigenous legal issues and the potential for further incorporating culturally specific forums into the Australian legal system. The

overrepresentation of indigenous Australians in prisons is not a new phenomenon. Indeed indigenous criminal justice issues were highlighted in the Royal Commission into Aboriginal Deaths in Custody in 1991.² Nor is it something that seems likely to go away with recent statistics indicating that the imprisonment rate for indigenous offenders has increased by a greater amount than the general rate.³

Steps are being taken to develop legal structures that utilise traditional authority and knowledge and approach the law in a culturally sensitive way. Even in the absence of a court such as the Murri Court, consultation with community justice groups under s 9(2)⁴ is continuing to encourage greater involvement of indigenous communities in justice issues.⁵ Useful as this participation may be, however, many argue it is not enough. Allowing cultural values to be taken into account in sentencing may help ease problems such as low court attendance but merely touches the surface when it comes to recognising an indigenous legal system. Dr Irene Watson, an academic and aboriginal activist, writes of the critical need to recognise aboriginal perspectives when teaching law, emphasising the fact that the Australian common law represents merely one way in which to conceptualise and understand law both as an institution and in practice.⁶ The continuing existence of an indigenous legal system is not often acknowledged and is certainly not given any meaningful expression within or alongside the current system.⁷ In the Murri Court the same law is applied to indigenous offenders as to others; the only difference being a level of community consultation unique to that forum. The challenge is to move beyond increased community participation to a more fundamental incorporation of aboriginal laws into the Australian legal system.

While at a theoretical level appreciation and recognition of a unique indigenous legal tradition is possible, the difficulty lies in translating it into a workable and

² Stephanie Hack, 'Community-Based Sanctioning of Offenders: a new solution for Indigenous justice?' (2005) 30(1) *Alternative Law Journal* 24, 24.

³ Ibid.

⁴ *Penalties and Sentences Act 1992* (Qld).

⁵ Hack, above n 2, 24.

⁶ Dr Irene Watson, 'Some Reflections on Teaching Law: whose law, yours or mine?' (2004/2005) 6(8) *Indigenous Law Bulletin* 23, 23.

⁷ Ibid.

cohesive state system. Aboriginal knowledge is informal and resistant to communication via the methods common to western knowledge such as written documentation, rules and technological infrastructure.⁸ This raises the question of whether the two systems are simply incompatible and incapable of operating concurrently. Ken Brown has urged for the establishment of indigenous courts in the Northern Territory. In doing so he strongly criticises the claim that the Australian legal system is impartial and capable of governing all Australians fairly.⁹ He feels that any recognition given to customary law is problematic unless it is also allowed to be administered and applied by indigenous institutions.¹⁰ Whether or not one is in agreement with Brown about the formation of indigenous courts, his arguments raise an important point; namely the fact that the Australian common law is as culturally specific as any other. It is founded on a particular historic and intellectual tradition which is not common to all peoples and indeed its principles may be very foreign to the indigenous people of Australia. The ideal of impartiality mentioned at the beginning of this paper may, to some extent, operate to consolidate the dominance and superiority of one system over another.

Yet even Brown is aware of the substantial practical obstacles presented by his proposals. The jurisdictional ambit of indigenous courts, were they to exist, is one such "thorny question".¹¹ Dilemmas associated with increasing recognition of customary law are demonstrated by cases such as those of Jackie Pascoe.¹² In 2002 Jackie Pascoe, an aboriginal man, was sentenced to 13 months imprisonment for unlawful intercourse with a minor. The girl in question was Pascoe's 15 year old promised wife. The practice of promised marriages and their consummation was accepted within his aboriginal community as a cultural ideal and sanctioned by a complex system of customary law and practice. Lawyers on behalf of Pascoe argued for a reduction in sentence due to, *inter alia*, an insufficient recognition of customary law. The appeal was successful and the sentence was reduced, although the Director of Public Prosecutions

⁸ Ibid 24.

⁹ Ken Brown, 'Indigenous forums: laughed out of court?' (2000) 25(5) *Alternative Law Journal* 216, 216.

¹⁰ Ibid.

¹¹ Ibid 218.

¹² Facts cited in Gerard Bryant, 'Promised Marriages: The Jackie Pascoe Case' (2003) 5(23) *Indigenous Law Bulletin* 20.

made a further appeal. Regardless of the outcome, the case raises important questions about the ability of the Australian system to incorporate customary law within its existing structures. The decision was criticised for failing to afford the aboriginal girl the same protection afforded to other women and for effectively allowing some citizens to operate under one set of laws while the rest must adhere to another. Yet Pascoe argued that he was acting in accordance with his culture and laws and they deserved recognition.

The potential for recognising customary law and giving indigenous legal systems formal expression through courts or other such forums is fraught with difficulty and raises many controversial questions that challenge common assumptions about the nature of the law in this country. Yet it is a debate that carries with it pressing urgency and is one that Australian society must engage in. My experience with the Murri Court demonstrated to me the positive steps being taken to alleviate problems associated with indigenous offenders and the way in which community consultation and participation in legal processes can increase their effectiveness and legitimacy. It also forced me to look beyond my culturally defined understanding of the law and its operation, to the existence of other ways of conceptualising law and justice and the need to give recognition and further expression to indigenous legal systems.

A Commentary on Non-Prison Sentencing Alternatives

Kathryn Purcell worked under Chief Justice Marshall P Irwin of the Brisbane Magistrate's Court. Kathryn also sat with other magistrates, including Brian Hine (Deputy Chief Justice), on days when Chief Justice Irwin was absent.

The population housed in Queensland prisons is experiencing massive growth. The Department of Corrective Services projects that prisoner numbers will almost double by 2015.¹ Unsurprisingly, the Queensland government is considering ways to support and encourage alternative sentences, especially options that will simultaneously decrease imprisonment and increase non-custodial sentences.² The following paper will broadly outline the aims of sentencing, community sentencing options, future requirements of the corrective services infrastructure if prisoner number growth is not slowed, and prisoner population and community sentencing trends. It will examine some specific concerns that result from imprisonment and non-custodial alternatives and outline the available community-based sentencing options. Finally, it will suggest conclusions and evaluate the benefits of imprisonment and non-custodial sentences and how appropriately the government is addressing the problem of prisoner growth.

I Principles of Sentencing

Sentencing relies on the principles of:³

- Punishment;
- Rehabilitation;
- Deterrence;
- Showing public disapproval;
- Public protection; or
- A combination of the above.

¹ Department of Corrective Services, 'Strengthening Community Safety Through Managing Growth in Prisoner Numbers' (Paper presented at the Queensland Magistrates Conference, Brisbane, 25 May 2005).

² Ibid.

³ *Penalties and Sentences Act 1992* (Qld), s 9.

Imprisonment is the least preferred sentencing option at common law⁴ and legislation⁵. Community-based options and fines⁶ must be considered before a custodial sentence,⁷ and imprisonment imposed only when there is no available alternative.⁸ A sentence may be a probation or community service order, costs or compensation order, or an order that the offender is not liable to punishment.⁹ The priority of community-based alternatives over imprisonment is not applicable to offences involving violence¹⁰ and sexual offences involving children under 16 years.¹¹

II Community-Based Options

Community based orders include community service, fine option, intensive correction and probation orders.¹² Other non-custodial sentencing alternatives are suspended sentences of imprisonment and home detention orders. The least intrusive of these are community service and fine option orders. A community service order directs that the offender fulfil between 40 and 240 hours of community service without pay. An offender must fulfil reporting requirements and not commit any offences while under the order.¹³ A fine option order converts a monetary penalty into a requirement to perform community service.¹⁴

Probation orders are a longstanding non-custodial sentencing option. A probation order directs that the offender be released into the supervision of a corrective services officer.¹⁵ It may take effect immediately or following imprisonment of up to one year.¹⁶ Probation was originally used with young

⁴ *Vasin v R* (1985) 61 ALR 701, 704.

⁵ *Penalties and Sentences Act 1992* (Qld) ss 9(2)(a), 10.

⁶ *Ibid*, s 45.

⁷ *Penalties and Sentences Act 1992* (Qld), s9.

⁸ *Halsbury's Laws of Australia*, Harry Gibbs (ed in chief), vol 9 (at 209), 130-17050.

⁹ MJ Shanahan, MP Irwin, PE Smith, DJ Richards and S Ryan, *Carter's Criminal Law of Queensland*, vol 1 (79) [s669.30].

¹⁰ *Penalties and Sentences Act 1992* (Qld), s 9(3).

¹¹ *Ibid*, s 9(5).

¹² *Corrective Services Act 2000* (Qld), Schedule 3.

¹³ *Penalties and Sentences Act 1992* (Qld) ss 102, 103.

¹⁴ *Ibid*, s 66.

¹⁵ *Ibid*, s 92.

¹⁶ *Ibid*.

offenders in Australia¹⁷ and in the United States.¹⁸ In England, reluctance to place young persons in jails led to the development of a register of offenders and supervision by probation officers.¹⁹ By the early 20th century, probation was an established non-custodial order for adult offenders.

A sentence of imprisonment can be explicitly altered to allow the offender to avoid prison. An intensive correction order converts a prison sentence into a requirement to serve the sentence in the community.²⁰ The order includes reporting, counselling and community service requirements²¹ and sometimes restitution or compensation.²² The court may decide to partially or wholly suspend a sentence of imprisonment if it imposes a term of not more than five years.²³ Home detention is a community-based alternative that enables low-risk convicted offenders to avoid jail on the condition that they remain in their homes.²⁴ The chief executive may require that the prisoner wear an electronic monitoring device to ensure that the offender remains in their home at all times.²⁵

III Prisoner Population Growth

The Queensland prison population is expected to rise 90% in the next decade.²⁶ Current correctional facilities cannot hold this increased population, and expansion of infrastructure over the next ten years will cost \$1.8 billion if prisoner growth continues unchecked.²⁷ There is a clear financial incentive for the government to minimise prisoner growth and therefore the need for funding. Nevertheless, use of community-based orders is decreasing in Queensland and

¹⁷ Koichi Hamai and Renaud Ville, 'Origins and purpose of probation' in Koichi Hamai, Renaud Ville, Robert Harris, Mike Hough, and Ugljesa Zvekic (eds) *Probation round the world: A comparative study* (1995).

¹⁸ Maurice Vanstone, *Supervising Offenders in the Community: A history of probation theory and practice* (2004).

¹⁹ Ibid.

²⁰ *Penalties and Sentences Act 1992* (Qld) s 113.

²¹ Ibid, s 114.

²² Ibid, s 115.

²³ Ibid, s 144.

²⁴ ABC Radio, 'Home Detention versus Prison', *PM*, 30 June, 1999
<<http://www.abc.net.au/pm/stories/s32457.htm>> at 20 July 2005.

²⁵ *Corrective Services Act 2000* (Qld), s 191; Charlie Lynn, *Home Detention Bill*, New South Wales Legislative Council Hansard Article No 8, 15 October 1996.

²⁶ Department of Corrective Services, above n 1.

²⁷ Ibid.

worldwide.²⁸ The cause is unclear, but contributing factors include a failure of community corrections to keep pace with court and community expectations and inaccessibility due to an inability to relocate offices to follow population trends and population growth.²⁹ The Department of Community Corrections projects that parole, community service and probation orders will continue to decrease in popularity, but that intensive corrective orders will be made in increasing numbers.³⁰

Current and future infrastructure development

Increased prisoner numbers have necessitated \$52.2 million in state government funding to improve Queensland correctional centres during the 2005-2006 financial year.³¹ By 2008, Queensland's prisons will provide another 511 beds.³² A new women's prison will be constructed in Townsville and Sir David Longland and Arthur Gorrie Correctional Centres will be extensively renovated. Planning of future extensions to Townsville Men's and Lotus Glen Correctional Centres will be commenced.³³ Conversely, \$3.4 million funding has been allocated to extend sex offender rehabilitation programs and \$1.5 million to improve programs and train program facilitators.³⁴

This pattern of funding reflects a wider community preference for incarceration over community rehabilitation programs. In the coming financial year, correctional centres will receive over ten times more funding than rehabilitation programs to improve their services. Clearly, this does not assist in refocusing sentencing on community-based alternatives, but supports offender incarceration. It is counter-intuitive because the clearly stated preference of the Department of Community Corrections is for improved community services to encourage non-custodial sentences.³⁵ Courts are more likely to feel

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Queensland Government, *Police and Corrective Services State Budget 2005-06 Budget Highlights*, 2005 <<http://www.budget.qld.gov.au>> at 20 July 2005.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Department of Corrective Services, above n 1.

comfortable in sentencing offenders to community-based orders if community support systems are adequately funded. Increasing the holding capacity of prisons in no way contributes to or encourages community sentencing.

IV Decline in the use of non-custodial orders

Despite the clear statutory preference for prison alternatives,³⁶ there is a global trend towards more frequent imprisonment and a decline in the number of community based orders. This trend is manifested in Queensland, where prisoner numbers increased 19% between January 2001 and June 2004.³⁷ It can be attributed to increases in the number of persons being placed in custody, and in the average time spent in custody, because reported crime rates lowered over this time frame.³⁸ In most of Australia, the number of persons on community-based orders is between two and a half and three times the prison population, but that gap is narrowing.³⁹

V Increased use of Imprisonment

There are several reasons for the increased use of imprisonment in Queensland. The number of persons being held in custody on remand, awaiting trial or sentence,⁴⁰ increased from 12.6% of the prison population in 1999, to 20.2% of the prison population in 2004.⁴¹ The police are becoming more skilful in finding offenders.⁴² Penalties have generally increased, and prisoners now serve a greater proportion of their sentence before release.⁴³ Prison sentences are given more frequently and are seen as a preferable and secure option for people with intellectual disabilities and other psychopathologies.⁴⁴

³⁶ *Penalties and Sentences Act 1992* (Qld), s9(2).

³⁷ Department of Corrective Services, above n 1.

³⁸ Ibid.

³⁹ Denbigh Richards, 'Maximising Diversion within the Corrections Continuum', in Sandra McKillop (ed), *Keeping people out of prisons: proceedings of a conference held 27-29 March 1990* (1991) 17, 18.

⁴⁰ Dennis Trewin, *Prisoners in Australia* (2001).

⁴¹ Department of Corrective Services, above n 1.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

VI Specific Sentencing Concerns

Psychopathology and Prison

Over the past two decades, the Australian community has seen a fundamental philosophical shift in the treatment and care of people with mental illnesses. Australia has effected a tangible move towards de-institutionalisation and community care of mental health patients.⁴⁵ Mental institutions in Queensland and New South Wales have been closed, with patients now living in the community.

The intention was that low-risk inmates would live in halfway houses in the community, and be treated in society.⁴⁶ However, community support after release is lacking, so the implementation of this plan has been less than perfect.⁴⁷ Significantly, lack of adequate community-based infrastructure can foster an environment where people forget or choose not to take their medication, and increase the likelihood that they will commit offences.⁴⁸ Therefore, the number of prison inmates with psychiatric problems increased as a result of de-institutionalisation.⁴⁹ It is widely recognised that people with mental health problems should not be contained in mental hospitals, and therefore prison is an inappropriate environment for these people.⁵⁰ Community support systems for offenders given non-custodial sentences should give greater recognition to this fact and increase support for offenders with psychopathologies.

There are other significant concerns about incarcerating people with mental illness. Prison is not the most appropriate treatment facility and the prison system possesses inadequate mental health treatment resources.⁵¹ People found not guilty of offences on the basis of insanity (mental illness) sometimes

⁴⁵ ABC Radio, 'The Imprisonment of the Mentally Ill', *Late Night Live*, 31 October 1990, Terry Sweetman; 'Time for mental health shake-up', *The Sunday Mail* (Queensland), 31 July 2005.

⁴⁶ ABC Radio, above n 45; Terry Sweetman, above n 45.

⁴⁷ ABC Radio, above n 45; Terry Sweetman, above n 45.

⁴⁸ Terry Sweetman, above n 45.

⁴⁹ ABC Radio, above n 45.

⁵⁰ Terry Sweetman, above n 45.

⁵¹ ABC Radio, above n 45.

serve longer sentences than people found guilty of the same offence, and serve those sentences in prison.⁵² Psychiatric recommendations that a prisoner be released from custody may not be acted on for years.⁵³

Community supervision of prisoners with psychiatric issues is significantly cheaper than imprisonment and is significantly more beneficial to the offender. It allows them to gain employment facilitates access to better psychiatric care and removes them from a stressful environment that may exacerbate psychopathology.⁵⁴

Psychopathology and Women's Prisons

Women with mental illnesses in prison deal with even more inadequate infrastructure than male prisoners. Female prisoners encounter more problems with psychiatric treatment because there are fewer women's prisons and fewer treatment options.⁵⁵ It can take eight weeks to transfer a severely disturbed female prisoner to a more appropriate facility. A similar male prisoner could be transferred in two or three days.⁵⁶

Indigenous Australians and Prison

The imprisonment rate of indigenous Australians is much higher than the imprisonment rate of non-indigenous Australians. In 2000, the figure was almost 15 times larger.⁵⁷ Indigenous Australians are poorly served by the criminal justice system. It has been suggested that there is a perception that non-custodial sentences are unsuitable for indigenous peoples, but there is no empirical support for the existence of this presumption or its validity.⁵⁸

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Dennis Trewin, above n 40.

⁵⁸ Royal Commission into Aboriginal Deaths In Custody 1980, in Koichi Hamai and Renaud Ville, above n 17.

There is nothing to suggest that indigenous peoples commit offences at a higher rate than non-indigenous people. Nevertheless, national police custody surveys in 1988 and 1992 showed that Aboriginal Australians were 26 times more likely to be held in police custody than non-Aborigines.⁵⁹ A possible cause is that indigenous cultures hold communal gatherings in public spaces more frequently than other groups, and so are highly visible to police.⁶⁰ Indigenous persons may be more likely to be imprisoned than placed on community-based orders because they commonly travel great distances to fulfil cultural and family obligations, which affects the suitability of probation, community service and home detention orders.⁶¹

Problems of Home Detention

In New South Wales, home detention was originally intended for offenders with mental disabilities, parents with dependant children and aged persons.⁶² It aimed to save money and to benefit minor offenders. Benefits of home detention include relieving the strain on overcrowded prisons, reducing violence in prison, lower relapse rates, improved family contact and cost saving⁶³ (\$50 per prisoner per day in New South Wales).⁶⁴ However, it is not universally popular.

Disadvantages of home detention include problems of informed consent from the partners, increased risk of domestic violence, the possibility that home detention is only a temporary solution to problems with the current prison system, and a lack of alternative community sentence options.⁶⁵ The Australian Prisoners' Action Group claims that some offenders see home detention as harsher than incarceration,⁶⁶ but when used in conjunction with rehabilitation and employment training and opportunities, it can be of substantial benefit to

⁵⁹ Koichi Hamai and Renaud Ville, above n 17.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Charlie Lynn, above n 25.

⁶³ Mary Crooks, 'Women MPs must show they can make a difference', *The Age* (Victoria), 9 May 2003.

⁶⁴ ABC Radio, above n 24.

⁶⁵ Mary Crooks, above n 63.

⁶⁶ ABC Radio, above n 24.

offenders.⁶⁷ Some members of the community reject this 'soft' option, believing that offenders should go to prison before being accepted back into the community.⁶⁸ Home detention is certainly not as strict as the prison environment and may therefore be less of a deterrent than prison. Home detention does not significantly decrease prison inmate numbers or recidivism.⁶⁹

Gender and domestic violence are particularly significant issues in home detention.⁷⁰ The majority of convicted offenders are male, so the majority of offenders on home detention would be expected to be male. The offenders' partners will be mostly female. The partner bears a significant burden when an offender is placed on home detention. In Victoria, the partner must attempt to prevent re-offending, inform the authorities of inappropriate behaviour, and deal with the extra stress on the family unit.⁷¹ In Queensland, there is no specific legislative requirement for partner consent, but the courts may place conditions on home detention orders.⁷² Home detention causes a major shift in the nature of the home. The offender's partner suffers the ramifications and stress of visits by corrections officers and social censure, without having committed an offence.⁷³ Although these factors would equally affect the male partner of a female offender or a male partner of a male offender, the majority of partners affected by home detention are women, so it is a predominantly female issue.

VII Conclusions

The Department of Community Corrections aims to encourage use of community based sentencing options and thereby take the strain off Queensland correctional centres, largely because of the massive financial cost to the government if the current trend in prisoner growth continues.⁷⁴ Admirable as it is to decrease imprisonment rates, the government must ensure that it considers the wellbeing of offenders and the wider community, rather than

⁶⁷ Ibid.

⁶⁸ Charlie Lynn, above n 25.

⁶⁹ Mary Crooks, above n 63.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² *Corrective Services Act 2000* (Qld), s 143.

⁷³ Mary Crooks, above n 63.

⁷⁴ Department of Corrective Services, above n 1.

focusing solely on financial concerns. It is important that adequate community programs be developed and implemented before releasing large numbers of custodial prisoners into society. If the Queensland government is serious about slowing prisoner population growth, it must channel energy and financial resources into community-based programs, so that the community is equipped to deal with offenders in its midst. Specifically, the over-representation of indigenous Australians and mentally ill persons in our prisons, and the disproportionate indirect burden on female partners of community-based offenders need to be addressed. The Department of Corrective Services' does not appear to have adequately addressed these issues.

Women of Kenya: A Photo Essay by Evita Ymer



Massai Mara Game Reserve
in Kenya - The Traditional
Massai Woman.





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