



YEMMAYA

SYDNEY UNIVERSITY LAW SOCIETY 2010

ABOUT YEMAYA



Marianna Leishman

Yemaya is the African-Yoruban, Afro-Brasilian and Afro-Caribbean Goddess of the Ocean, whose waters broke and created a flood that created the oceans. While she can be destructive and violent, Yemaya is primarily known for her compassion, protection and water magic.

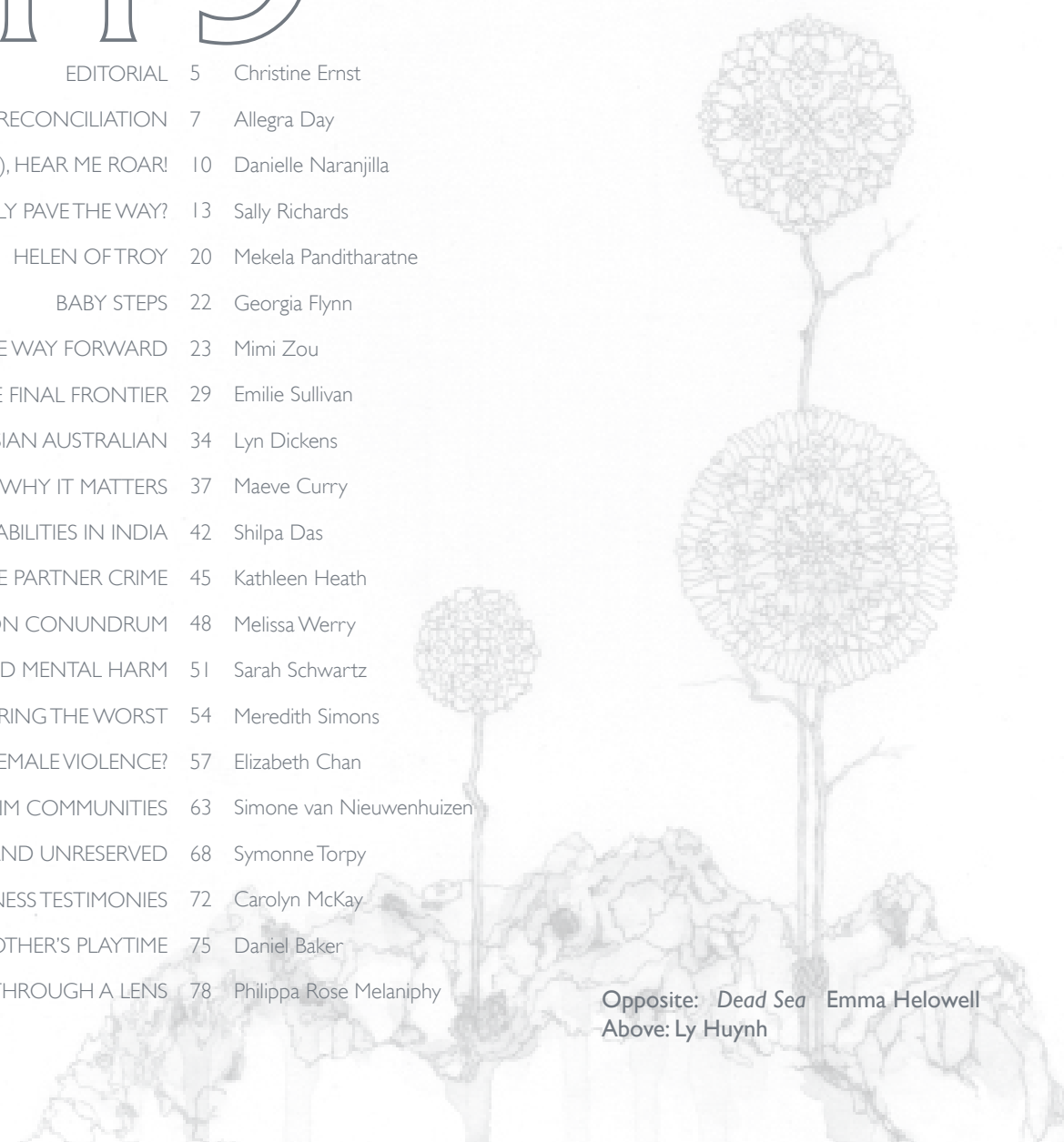
Often depicted in the form of a mermaid, and worshipped as a moon goddess in the Haitian Vodou, Yemaya is also known as Queen of Witches, the Constantly Coming Woman, the Womb of Creation and Stella Maris (Star of the Sea). Associated with female mysteries, fertility, childbirth and shipwreck survivors, it is said that new springs of water appear whenever she turns over in sleep.

In Cuba, she is referred to as Yemaya Olokun, who can only be seen in dreams, and her name is a contraction of Yey Omo Eja: "Mother Whose Children are the Fish". Canonised as the Virgin Mary, and appearing as river goddess Emanjah in Trinidad, Yemaya rules the sea, the moon, dreams, secrets, wisdom, fresh water and the collective unconscious. In Brazil, crowds gather on the beach of Bahia to celebrate Candalaria: a Candomble ceremony on 31 December. Candles are lit on the beach while votive boats made from flowers and letters are thrown into the sea for Yemaya to wash away their sorrows.

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Opposite: *Dead Sea* Emma Helowell
Above: Ly Huynh



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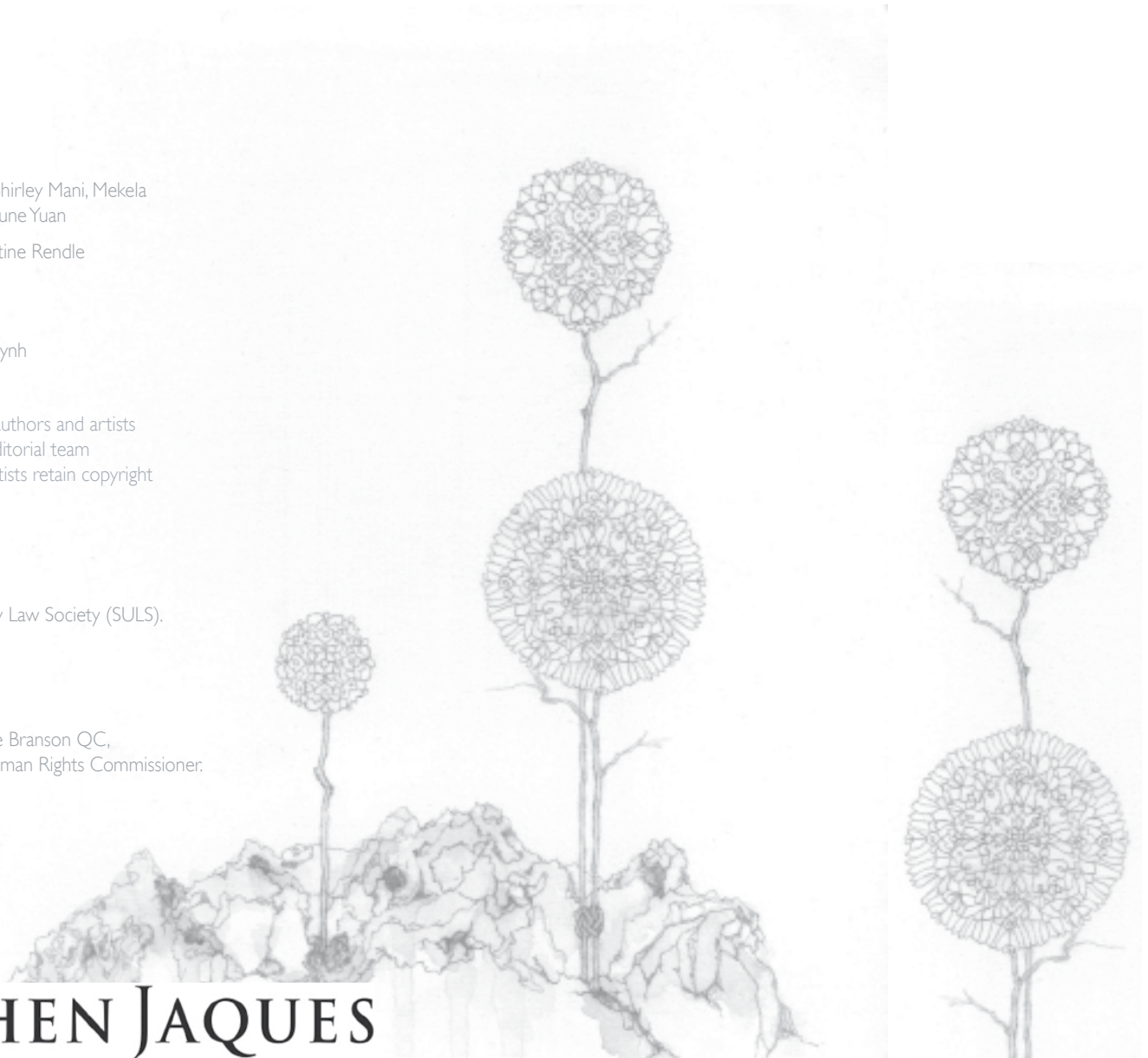


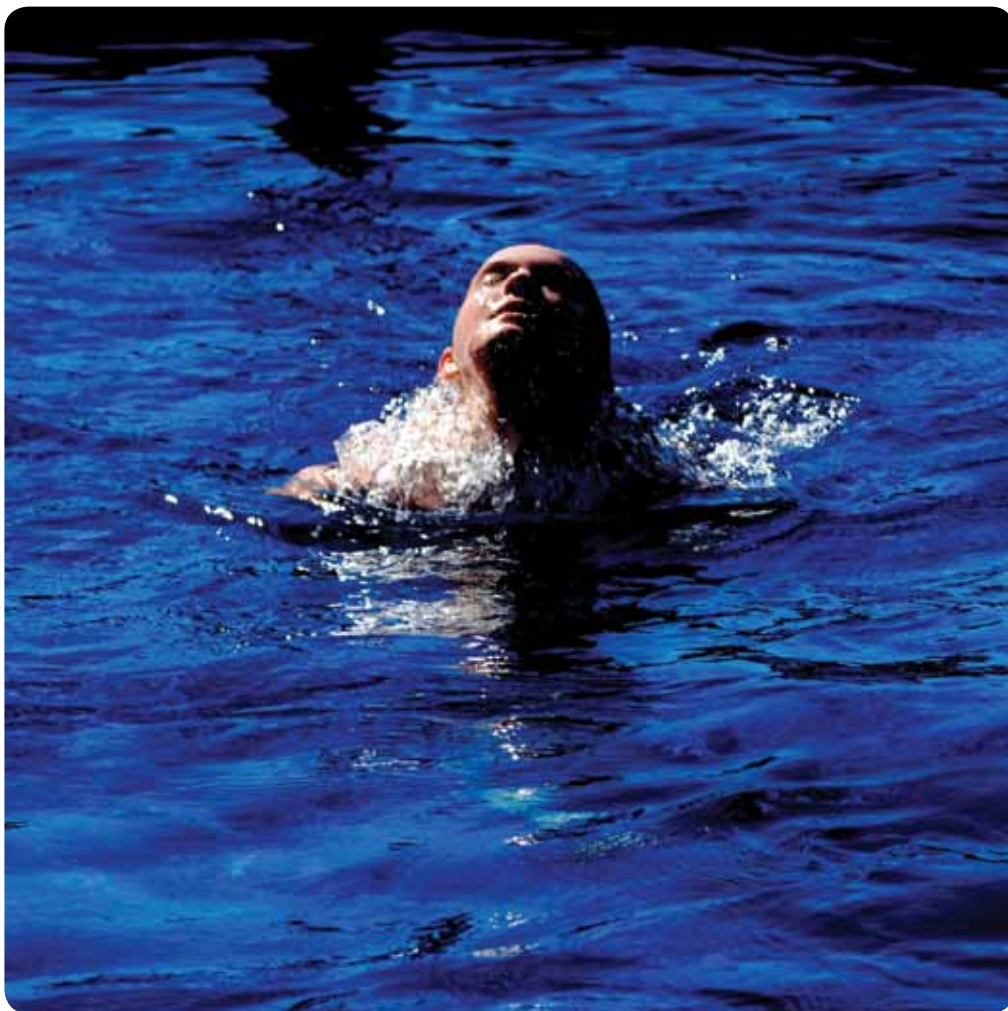
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MALLESONS STEPHEN JAQUES





Jessica Amy Inman-Hislop

EDITORIAL

2010 has been a momentous year for women. At an international level, the world witnessed the establishment of UN Women, an agency four years in the making that consolidates existing United Nations women's agencies, increases the budget allocated to gender issues and will serve to challenge governments to better protect and promote women's rights. In Australia, a long-awaited paid parental leave scheme passed through Parliament with bipartisan support, providing for 18 weeks of parental leave at the minimum wage from 1 January 2011. Days later, Australia's first female Prime Minister, Julia Gillard, was sworn into office by Australia's first female Governor-General, Quentin Bryce.

Milestones such as these have significance for women locally and around the world. In selecting the theme for this issue – 'Identity, Community, Memory' – we sought to encapsulate the diversity of experiences of women worldwide. This issue traverses the globe, documenting topics such as war crime trials in Cambodia and the tragedy of child sexual abuse in Peru. It also deals with pressing domestic issues including the adverse consequences of mandatory detention on the mental health of asylum seekers.

In bringing Yemaya 2010 to fruition, I have had the privilege of working with an outstanding editorial team. I am indebted to the editors for their enthusiasm, professionalism and good humour. We hope that you derive as much enjoyment from reading Yemaya as we have from producing it.

Yours sincerely,

Christine Ernst
Editor-in-Chief 2010



IDENTITY

CAMBODIA'S ROAD TO RECONCILIATION

ALLEGRA DAY interviews Annelise Young, an intern with the United Nations Assistance to the Khmer Rouge Trials

You are currently working for the UN Assistance to the Khmer Rouge trials being held in Cambodia. Now that the trials are underway, what role does the UN play? How does the 'hybrid tribunal' model work?

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is a hybrid tribunal, like the Special Court for Sierra Leone. So, the whole venture is a combined project between the Cambodian government and the UN. Theoretically, for every national staff member, there is an international staff member, employed by the UN. The UN, therefore, provides legal staff, funding, security - the same things that Cambodia provides.

It is the first hybrid tribunal to be based on the French civil law system. As a hybrid tribunal it is vested with jurisdiction both over national crimes and international crimes. As well as comprising Defence teams, the Prosecution, and the Trial Chamber, the Court also has a Pre-Trial Chamber, which is an Office of Investigating Judges tasked with obtaining both exculpatory and inculpatory evidence, and Civil Parties, consisting of victims who wish to participate in the proceedings and have been approved as qualifying to receive compensation for their claims.

What stage are the trials currently at?

Trial 001 of DUCH, the head of the S-21 prison, finished late last year. The Trial Chamber has announced that they will deliver a verdict on 26 July 2010. In the meantime, we are working on case 002, in which there are four Charged Persons who are the last surviving senior members of the Khmer Rouge: Nuon Chea (who was 'Brother Number 2' under Pol Pot); Ieng Sary (who was the Minister for Foreign Affairs); Ieng Thirith (who was Minister for Social Affairs, Ieng Sary's wife, and Pol Pot's sister-in-law); and Khieu Samphan who was the former head of Democratic Kampuchea (although this was more of a figurative role and Pol Pot was the actual leader).

While the trial in case 002 has yet to be started, there are still written appeals to the Pre-Trial chamber and small hearings dealing with pre-trial issues of detention of the Charged Persons, disputes over evidence being placed on the case file and disagreements between the Office of the Co-Investigating Judges (OCIJ), Defence and Office of the Co-Prosecutors (OCP) over procedural issues concerning the internal rules of the Court.

You mentioned that the purpose of the ECCC is reconciliation. How is this being achieved?

Cambodians aren't taught about the Khmer Rouge at school, despite most people having been affected by the regime. Nor has there ever been a comprehensive effort to ascertain the truth of what happened during the Khmer Rouge regime. In conjunction with the Document Centre of Cambodia, the ECCC seeks to ascertain that truth. In addition, the trial is important as a deterrent to prevent future atrocities, and to make it clear that perpetrators will be held accountable. Finally, the trial seeks to achieve justice and dignity for the victims. This is particularly heightened at the ECCC, as the ability to become a civil party gives an additional voice to the victims.

What crimes are being prosecuted?

We don't know exactly what crimes will be prosecuted as the four charged persons have not yet been indicted. Because the ECCC functions as a civil law court, the Prosecution is not allowed to carry out investigations or issue an indictment for the Charged Persons, as that is the role of the Investigating Judges. Based on their investigation, we undertake internal preparation for trial, refine our legal arguments and collate all the evidence that supports the indictment that we seek. The OCIJ will then take our submissions into account when writing the Closing Order, in which they set out the indictment.

Obviously our work is confidential, but I can say that the law of the ECCC gives this court the jurisdiction over the crimes of Genocide, Crimes Against Humanity (such as Extermination, Torture, Rape, Persecution, Other Inhumane Acts), War Crimes (Grave breaches of the Geneva Conventions) and Domestic crimes (such as Murder) committed by senior members of the Khmer Rouge during the period of Democratic Kampuchea (1975-1979).

What has been the response of the Cambodian public who are free to go and watch the trials? What is the connection between the trials and outreach programs in rural communities?

The outreach program provides buses to transport Cambodians who are interested in watching the trial to the Court. They are also given a stipend for the day so that they are not prohibited from attending because they will miss a day of work. The outreach programs focus on the need to spread awareness of the trials to the majority of Cambodians who live in rural areas. The Public Affairs Unit and Victims Unit run out-reach programs where they travel to smaller towns to conduct question and answer sessions, and distribute booklets informing people about the ECCC. In addition to ECCC-initiated projects, a local Cambodian film company has made a series out of the first case, 001, called Duch on Trial, where the highlights from the trial are broadcast throughout the nation.

Despite this, there is a strong sense that many Cambodians are indifferent to the Court because they believe that the Charged Persons were instrumental in perpetrating the crimes of Democratic Kampuchea. Therefore, some believe that a trial is a redundant exercise when the money could be better spent on humanitarian projects within Cambodia. True as this may be, the ECCC costs only a fraction of the amount of aid donated to Cambodia in general. In addition, during outreach sessions, there is often much confusion about the nature of potential reparations to be awarded to the Civil Parties. Many Cambodians expect monetary compensation, and it seems absurd

Image opposite: Ly Huynh



that the best the ECCC can hope to provide is moral reparations.

What difficulties, if any, have you noticed with the prosecutions in the ECCC?

There are many practical difficulties associated with the prosecution. First, unlike the ad hoc tribunals where French and English are the official languages, the Khmer Rouge Tribunal has three official languages: English, French and Khmer: This means that every document that is produced must be translated into all three languages for it to become an official document, which considerably slows down the prosecution process. Second, the tribunal is vastly under-funded compared to the ad hoc tribunals. This means that there are limitations in the number of national and international staff, with the result that the tribunal relies heavily on unpaid interns. While it is great experience for us, there is a climate of uncertainty about the future of the tribunal and the international support for it. Just last week, Japan, one of the largest sponsors of the Court, announced a 75% cut in their funding. Third, the age of the Charged Persons, who are in their late seventies or early eighties— and are in bad health, creates an impetus to begin the trial 002 as soon as possible. However, the vast scale of the crimes alleged means that the process is inevitably going to take a long time. There are four Charged Persons and crimes occurring over nearly four years, encompassing the whole of Cambodia and the deaths of a quarter of the population. In addition, from a common law perspective, the civil law system 'adds in' several steps such as the process of writing the final submission and the OCJ closing order as a means of simply indicting the Charges Persons. This arguably works much better in a smaller domestic court, but can seem repetitive and slow in a trial of this scale. Finally, the delay of more than thirty years since the reign of the Khmer Rouge means that there is very little forensic evidence on which to rely, unlike in the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).

What advice can you offer to law graduates seeking to undertake a career in international criminal law?

Do an internship. It shows that you are interested in this work and that you are prepared to make a significant financial and time commitment towards that goal. All the younger staff members at the ECCC began as interns either here or elsewhere. It is slightly different for the more experienced staff, who have been 'in the system' for a bit longer, but the industry is becoming more and more competitive and doing an internship is looked upon very favourably. In order to do this, don't rule out applying to a defence team, as it is often easier to find internships in defence because it is less popular and the management of the teams is fairly informal. Also, the work in defence is really varied and interesting, and you get a lot of responsibility. There are many tribunals you can apply to - think about the ECCC, ICTR, ICTY, SCSL, ICC, Special Tribunal for Lebanon, or the Court of Bosnia and Herzegovina.

Having said that, don't be a perpetual intern. Gain some experience in domestic criminal law, either as a defence lawyer or for the DPP. The importance of this has been emphasised to me by several of my senior colleagues. The lawyers that progress the furthest in international criminal law are those that have a foundation in domestic criminal law and solid advocacy experience.



Images left and above: Olivia Teh Yuan-Ning

I AM WOMAN(IST), HEAR ME ROAR!

Danielle Naranjilla considers why some members of the Sisterhood do not identify as ‘feminist’

If a feminist of colour is ranting in her own little corner of the internet, but no one is reading, does she make a sound?

My upper lip tends to involuntarily curl when people insist we live in a post-feminist world, more so when women won't identify as feminist because of the social stigma; even as a former Gender and Cultural Studies aficionado I can't help but question what the pillars of feminism actually are, and I am constantly renegotiating the boundaries of my definition. I find the modern movement problematic.

Anecdotal experience suggests that the movement is fractured, tainted by the disparate and opposing views of what a “good” and “bad” woman is. Depending on which wave your beliefs subscribe to, women are questioning what feminism stands for and whether it reflects the same things they stand for. Problematically, the criticism levelled against the modern movement isn't from those outside that seek to silence it, but from within the community itself. This sentiment has been relatively easy to follow, because, like most modern movements, much of contemporary feminism exists online.

Reading the comments on feminist blogs such as *Jezebel* makes me wonder: do any of the women engaging in the site's discussions, who are fluent in jargon, and seem to enjoy imposing commentary on whom they believe to be good and bad feminists from atop their feminist ivory towers, realise how much they're drowning in their own privilege?

In a post about Jessica Simpson's new show, *Price of Beauty*, one commenter thought the show “skew[ed] a little too much of *Heart Of Darkness* As Brought To You By *Cosmo*.” The following comments responded with the virtual equivalent of clinking each other's wine glasses as they twittered with self-indulgent amusement. But for every

patronising “anthropological show on something vaguely feminist: you're doing it wrong!” comment was an equally patronising “let's pat Jessica on the head, she's trying to better herself and she hasn't even taken a Women's Studies class!” one.

While feminists around the world had near hernias when Sarah Palin polled so well with “everyday” women, they didn't seem to realise how alienating the modern, feminist narrative could be. Women don't want to be looked down on, least of all by other women. Jessica Valenti, an editor of *Feministing* wrote about getting married and performing a ceremony that reflected how her and her husband wanted the institution of marriage to ideally be like; but even she was told by readers that she was being “un-feminist” for getting married in the first place.

I'm far from being the torchbearer of anti-intellectualism. There is definitely value in evaluating the cultural noise that creates and regenerates social norms; but there are class markers that are barnacles on the movement, which I believe can make it inaccessible. A woman who works two jobs to support her family, for example, probably wouldn't be interested in the parlour room discussions on the feminist relevance of Ayn Rand. So when did the primary feminist discourse shift from the grassroots to the privileged classrooms of academia?

When did feminism become absolutist?

I reject that this is how the movement ought to exist but can't find any better definition for how I want it to be. I used to oscillate between “feminist” and “humanist” when I classified myself. But I found neither were quite right; one term contains me and the other is a bit of a cop-out. So, if I'm going to be completely self-reflexive, I have to question: What exactly is my mother's cause?





As a Filipina, my mother's feminist experience vastly differed from the feminist narrative I have learned growing up and educated in a typically Western culture. To use the term literally, my mother's cause was deposing a corrupt President. She did this by becoming active in the movement that led to the People Power EDSA Revolution in 1986, after which she voted for Asia's first democratically-elected female head of state. It was also the year she became a mother.

My mother actually doesn't define herself as feminist – not because she hisses like a vampire exposed to sunlight whenever the term is used but simply because she has found no need to. Yet the role of women in EDSA, and in other fledgling democracies in Asia, is one that is rarely touched upon in the prevailing feminist discourse unless the continent is being used as a counterpoint to the “progress” women have made in the West.

Even though I am Australian-raised, I find affinity with the Filipino story, perhaps because it is what catalysed my social awareness. I've realised that reconciling my cultural heritage and my ethnicity with the movement has proven difficult. For a long time, I didn't know why “feminism” always felt like a shirt I loved and yet seemed to fit me awkwardly.

This isn't just a class issue. In early April, *The Guardian* online published an article by Chloe Angyal, a white Feministing writer and Ivy League alumna, entitled ‘You're not a feminist, but... what?’ She believed that young women used this tired platitude as a white flag to appear non-threatening to society proper. Apart from being written in the same brand of feminist piety that can estrange women from the Sisterhood, Angyal attributed the feminist exodus to the overused scapegoat of bad public relations and to the lack of prominent, young voices, rather than to mainstream feminism's narrow focus.

Renee Martin, a black freelancer from Canada, published a counter article on *The Guardian* online, discussing why she is a “feminist by nature, but not by label”. Martin pointed out how Angyal's article implicitly assumes that all feminist experiences were similar: Martin identifies as a “womanist” because

“The knee-jerk reaction of white women revealed the anxiety of recognising that they enjoyed privilege in other spheres of their lives.”

the academe tends to concentrate on a canon of white feminist literature, and in her life experience the sisterhood "lasts only as long as you [didn't] insist on interrogating oppression from multiple sites." And this extends to the feminist blogosphere.

Martin disputes that the internet is a great equaliser. This is because feminist blogs replicate "the hierarchy academia has been perpetuating for a long time", which is often ethnocentric, classist, transphobic and ableist. Blogs owned by traditionally marginalised women rarely have the same kind of readership of mega-blogs such as *Jezebel*, *Bitch PhD*, *Feministe*, *Feministing* and *Pandagon*, which are largely run by white women. So when the discourse is moved from the online to the offline, "it is routinely the same white feminist voices representing the broad perspectives that are visible on the internet." Effectively, these blogs have the power to direct and disseminate a certain kind of feminist message; one Martin felt was exclusionary.

While controversial, it wasn't until Megan Carpentier posted an ostensibly impartial response on *Jezebel* that conflict erupted in the feminist blogosphere. Opening with how she thought Martin's piece was "excellent", she dismissed the accusation of the feminist blogosphere being largely white-centric by pointing to the token black editors and writers of the blogs cited. The post ended with a passive-aggressive allusion to Martin's apparent hypocrisy.

The comments both on *The Guardian* and *Jezebel* that responded to Martin's article were less obtuse. Women like Martin apparently had persecution complexes and were breaking up the movement. One commenter went so far as to suggest black women "owed" white women for enjoying the rights that they did. Others questioned why she and other women of colour continued to engage with these websites when no one was stopping them from starting their own blog and ranting in their own little

corner of the internet.

Some people couldn't seem to grasp what an important platform these feminist blogs have due to their readership. Smaller feminist blogs were angry at Carpentier's response and the discussion that followed. By diminishing the concerns of feminists of colour and pushing them to the periphery, these sites were effectively silencing them. Meaningful conversation on these sites degenerated into what one commenter on *Jezebel* called the "Oppression Olympics".

"The sentiment that began to emerge, though probably unintentionally, was that women of colour should either accept the whiteness of feminism or exist as separatist."

The knee-jerk reaction of white women revealed the anxiety of recognising that they enjoyed privilege in other spheres of their lives. Those who responded negatively to the article weren't willing to accept the validity of Martin's argument because it threatened their understanding of their own,

personal, feminist narratives, which was a source of pride and identity. White, wet-liberal women were affronted someone could suggest that they were (gasp!) latently racist. After all, they were educated - they were enlightened. They too were oppressed. The sentiment that began to emerge, though probably unintentionally, was that women of colour should either accept the whiteness of feminism or exist as separatist.

But why identify with a movement that doesn't adequately represent your concerns?

Feminism is not immune from the same hierarchical structures that undermine our struggle for wider egalitarianism, nor are its members socialised in a vacuum. Feminists rarely acknowledge the points of difference that exist within the community. Modern feminism assumes a certain level of equality among women that doesn't exist, and the sexism white women face today is not necessarily the same sexism women of colour experience. The effect of this is that white middle class,

disgendered feminism buoys issues that are more likely to affect them rather than issues such as: the lack of positive media representation of disabled women; migrant women who are exploited in suburban, garage sweatshops; demeaning sexual stereotypes of Asian women that perpetuate violence against them by non-Asian men; the politics of the hijab that doesn't solely focus on a Western perception of religious subjugation; trans women who fear being denied medical treatment because of prejudice; black women being under-diagnosed in cases of anorexia and bulimia because eating disorders are positioned as a psychodrama that affects only white women; or the woeful maternal mortality rate of Indigenous Australians.

Space is ultimately a function of privilege, and when it is dominated by a single type of voice - whether it be male, white, able-bodied, cisgendered, heterosexual - it pushes those who are marginalised into a corner, or another space altogether. We need these voices to stay and be part of the discussion. Sometimes those in privilege should recognise that they benefit from it rather than suppress their first instinct to deny that they do, because doing so ignores what it means for those who don't have it. Gender equality cannot truly exist when equality within the gender doesn't.

My points are not new, but they are persisting. Branches of the movement have gained currency because of this. Postcolonial feminists criticise the movement as universalising women's issues, and Chandra Mohanty points to power models as not being rooted purely in a gender binary. Proponents of womanism, like bell hooks, expound on this and suggest that intersectionality plays a big role in a woman's experience. There will always be issues that extend beyond and intersect with being a woman. But when the status quo is challenged by women like Martin, the proceeding responses only reinforce the long-standing criticisms of the mainstream movement.

I have found womanism an alternative space in which to exist, and I use it as another lens through which I can critically examine women's rights beyond just

the issues of white collar wage parity, sexual and reproductive health and maternity leave. However, I can't help but question, as I engage with various womanist blogs and see the same groupthink as present in mainstream feminist ones, whether it's just another sphere for academic postulation. Even by simply writing about this in a publication of my alma mater, with the luxury to self-reflect and re-evaluate my own feminist narrative, I have revealed my own privilege.

Perhaps the most confronting question I have to ask myself is: is feminism still relevant, not just for women like me, but for me, personally?

My feminist narrative will never be like my mother's, who stood in solidarity alongside military tanks and men like my father, to ensure democracy in her country; nor will it ever be the white woman's narrative who will never be told to "go home". It will not be the Indigenous woman's narrative, who faces racial profiling and prejudice; nor will my narrative be like a woman who feels excluded by the movement because she isn't an ideologue armed with a cache of Gender Studies jargon. My narrative is ultimately my own, and one that I am still experiencing and creating and learning.

I doubt the modern movement will have anything quite as unifying as universal suffrage, or a grand feminist narrative like the second wave. But despite this, I'd like to believe that, beyond the somewhat arbitrary labels I've thrown around, and when I return to the core values that compelled Filipina insurgent leader Gabriela Silang to take arms against Spanish colonialists more than 300 years ago, and whose memory lives through a Filipino women's political party and women's rights organisation, my answer is simple. My answer is: Yes. Always.



SEXUALITY AND REFUGEE STATUS DETERMINATION: Does Australia really pave the way?

SALLY RICHARDS examines Australia's approach to sexuality-based refugee determination

Introduction: Does Australia Really Pave the Way?

Over the past several years there have been extensive reforms to Australia's legal framework for determining sexuality based refugee claims. These reforms include the initial recognition of sexuality as a basis for refugee status; the common law rejection of "discretion reasoning"; amendments to the Migration Regulations to allow same-sex couples to be deemed "spouses" for the purposes of status determination; and the implementation of "sexuality training" for Refugee Review Tribunal (RRT) members to ensure sexuality-based decisions are administered in a manner that is free from heterosexism and homophobia. Australia is now seen as a positive example to other states in this area. International authorities such as the United Nations High Commissioner for Refugees have pointed to Australia as providing an effective model of how domestic legal structures that regulate status determination can be improved to meet obligations to Lesbian, Gay, Bisexual and Transgender individuals imposed under the Refugee Convention and other areas of international human rights law.

This paper rekindles the scholarly debate in the area that diminished after the final reforms in 2008.

Whilst improvements in the area have undoubtedly been made, the extent to which Australia has been praised is unjustified. On the outside, Australia's laws may meet its international legal obligations, but much is left to be desired in terms of their implementation.

This paper seeks to address this disjunction between the image of Australia's legal mechanisms to protect LGBT refugee applicants and its actual effectiveness. It argues that Australia is still a long way from meeting its protection obligations to LGBT individuals under the Refugee Convention and the Yogyakarta principles, which articulate the rights afforded to LGBT individuals under international law. It focuses on this disjunction in the RRT context, and argues that outcomes are still far too often dictated by the ideology of the tribunal member rather than the guiding legal principles recently established at common law. What we now have is a problematic over-praising of Australia's technical legal "openness" to sexuality-based refugee claimants and an absence of appreciation for the practical ways in which these structures fail. If Australia really does pave the way for refugee status determination on the basis of sexuality, then it paves a tangled path for other states to follow.

The Genealogy of Australian Jurisprudence: Context for Current Appraisal

Sexuality as an Accepted Category of a Particular "Social Group"

In 1994, a line of Australian RRT decisions found that LGBT individuals were owed protection obligations under the Refugee Convention, which has been incorporated into Australian law through the Migration Act. The Tribunal construed these applicants as falling within the "social group" ground of the Refugee Convention, such that an applicant would be granted protection if they could demonstrate "a well-founded fear of persecution" on the basis of their sexuality, as a member of the LGBT social group.

However, a number of critics at this time pointed out that whilst LGBT claimants were entitled to protection under Australia's domestic law, decision makers failed to implement these changes in a way that truly met Australia's international legal obligations to LGBT applicants. In particular, there was a tendency to require LGBT applicants to demonstrate that they had done everything within their capacity to hide their sexuality in their home country. It was commonly held that if the



Beirut Emma Helowell

applicant failed to be “discreet” about their sexual orientation then their “fear of persecution” was not “well-founded” and they therefore could not qualify for refugee status.

S395: The Rejection of the “Discretion” Distinction

Further reforms to Australia’s infrastructure for sexuality-based status determination occurred in 2004, in s395. Here, the High Court officially rejected the “discretion reasoning” that had been applied in previous decisions. The Court found that the applicant’s discretion is not a relevant factor for the Tribunal. Instead, the Tribunal should question whether the applicant faces a real chance of persecution, regardless of the extent to which the applicant is either public or discreet about their sexuality.

Following s395, the Gay and Lesbian Rights Lobby (GLRL) questioned whether the removal of the “discretion” requirement effectively translated into the removal of each tribunal member’s own discretionary homophobia. In a comprehensive report released in May 2008 the GLRL argued that there was a further need to develop the RRT’s ability to understand what it means to be LGBT in an applicant’s country of origin. The RRT have followed a number of the GLRL’s recommendations, including the primary recommendation that it conduct compulsory sexuality training for its members. The next part of this paper is the first of its kind to attempt to ascertain the extent to which this sexuality training has been fruitful, and whether or not there is now a unity between legal image and reality following these 2008 changes.

Post Reform: The Ongoing Disjunction Between Legal Image and Reality

The Quantitative Appearance

Prima facie, the quantitative analysis of RRT decisions since the final reforms may suggest that processes and outcomes for LGBT claimants have improved. For one, there have been substantial increases in the number of RRT decisions that are publically available. Whilst the 2008 GLRL study found only 55 publically available RRT decisions between 2004 and May 2007,

I have found 81 publically available RRT decisions in 2009 and 2010 alone. On one level, the dramatic increase in publically available RRT sexuality-based decisions may attest to improved processes for LGBT applicants, as the Tribunal may be willing to release a greater number of decisions if they believe that they reflect due process for these claimants.

Further, there has been a dramatic increase in the number of released decisions that find favourably for the applicant. Whilst Catherine Dauvergne and Jenni Millibank found that 34.5 per cent of sexuality-based RRT decisions in 2004 found favourably for the applicant; my study finds that the percentage has increased to 62 per cent in 2009/2010. On one construction, this changed quantitative appearance may attest to improved legal reasoning and analysis, which may be resulting in greater success rates for LGBT applicants.

The Qualitative Qualification

(i) The Ongoing “Discretion Test” and the Need for Homosexual Openness in the Country of Origin

Further analysis reveals that there is an ongoing disjunction between the legal image and the operative reality of refugee claimant applications. Although it is no longer lawful for Australian decision makers to require LGBT refugee claimants to display an element of openness (referred to in the literature as “publicness”) in order to prove their homosexuality, this requirement continues to pervade the decision making of various tribunal members. In the case of a gay applicant from Lebanon, for example, the Tribunal found that the applicant was not homosexual based on the implicit requirement that he must provide the Tribunal with evidence of his public homosexuality rather than his homosexuality in general.

In his reasons for rejecting the applicant’s claim, the member stated:

“The Tribunal acknowledges that a person identifying as homosexual may not have very much evidence to support that claim, by virtue of the very fact that they come from a country where to live openly as a homosexual is to risk persecution. At least the Tribunal would expect an applicant from Lebanon,

sexually active to the extent the applicant claims to have been, to be able to specifically name some of the known gay venues in Beirut... The applicant did not do so in this case."

From this it can be adduced that a formal acknowledgment of the applicable legal principle is not necessarily akin to its implementation. Whilst the member formally acknowledges that: "a person identifying as homosexual may not have very much evidence to support that claim", his subsequent reasoning reflects a complete rejection of this belief. Instead, the member disbelieves the applicant's claims at homosexuality on the basis that he cannot provide evidence of being publically involved in Lebanon's "gay life".

It would be one thing if the member challenged the applicant's claims on the basis that he had said he had been to a gay club but could not provide any descriptions of what the club was like – this, indeed, would be a valid area for questioning as it may go to the applicant's credibility. But it is another thing entirely to require the applicant to be able to name Lebanon's gay venues in order to demonstrate bona fide homosexuality. This reasoning relies on the misguided assumption that an individual must publically display their homosexuality for it to be considered legitimate. It problematically perpetuates the notion that sexual discretion could attest to heterosexuality, which was deemed unlawful in s395. Whilst, on the surface, it may seem like applicant 0903318 is in a better position post-s395, the operative truthfulness of this depends on the vacillating discretion of whichever tribunal member he meets on the day.

(ii) The Ongoing "Discretion Test" and Pressures of Openness in the Hearing Context

Another problem associated with recent decisions is that some members continue to require unrealistic levels of sexual openness in the hearing itself. Members have interpreted applicants' silence on certain facts as evidence of their overall lack of credibility. One striking example of this was a case involving a Bangladeshi applicant who was found not to be credible for failure to answer a question put to him by the tribunal member. One conversation between the member and applicant went as follows:

[TRIBUNAL]: Do you have sex in the morning?

INTERPRETER: This is a personal question.

[TRIBUNAL]: You don't want to answer?

INTERPRETER: No...

[TRIBUNAL]: Do you have sex with him though?

INTERPRETER: Yes...

[TRIBUNAL]: Now you may not want to answer this question but when you do have sex do you use a lubricant?

[APPLICANT]: I don't want to.

[THE TRIBUNAL]: Don't want to answer...

In his reasons, the member found that the applicant's failure to answer the question equated to a general lack of credibility. He claimed that a credible witness would not have been hesitant to answer this question and imputed that the applicant's silence testified to his underlying heterosexuality. Fortunately, this problematic reasoning was refuted on appeal in NAOX where it was held that the member's reasoning constituted *Wednesbury* unreasonableness; it was so unreasonable that no reasonable decision maker would have made it.

Although the RRT construction was rightfully found to be so problematic that it infringed the principle of *Wednesbury* unreasonableness on appeal, this provides little consolation for LGBT claimants generally. This is because, unfortunately, it is not as likely that the same outcome would be reached by the Court had the Court not found that the decision was so unreasonable that no reasonable decision-maker

could have made. In fact, applicants who are faced with members who apply such clear bias and illogicality as this may actually benefit in comparison to applicants who face disguised and minimal homophobic and illogical reasons, as the former are at least likely to be able to access judicial review to retry the decision.

Regardless of whether or not *Wednesbury* unreasonableness can be found, this tendency to dismiss an LGBT applicant's credibility due to their failure to answer a sensitive question is highly problematic. It shows a misunderstanding of the culturally sensitive nature of sexuality and the difficulty that many LGBT applicants face in articulating their [homo]sexuality. It also perpetuates the problematic notion that applicants must be unashamedly forward about their sexuality in order to have a credible case. Whilst this is different from the "discretion test" that was rejected in s395 in that it requires sexual openness in the hearing context (rather than demonstrations of sexual openness in the home-state), it still stems from the same heterosexist reasoning that informed that rejected principle. Further, it still fails to draw a distinction between an applicant's sexual discretion and their overall level of credibility. Therefore, whilst post-s395 decisions such as these tend to formally recognise the difference between a lack of evidence and a lack of credibility, we should not be silenced into thinking that a formal statement such as this amounts to a corresponding application of the principle. For applicants such as the Bangladeshi applicant in NAOX this formal statement amounts to nothing more than legal lip service.

(iii) The Ongoing Discretion Test and the Significance of Discretion

from State Authorities

Finally, and again problematically, a number of recent decisions have informally perpetuated the discretion test with reference to the issue of state authorities. The GLRL notes that some members have failed to recognise the significance of LGBT applicants discreetly hiding from their state authorities to avoid state-enforced punishment and persecution. Their report finds that, since 2004 - even post-s395 - some members have failed to recognise that penal codes and laws that outlaw sexuality can lead the LGBT applicant to hide from the authorities out of fear of state persecution. Instead, these members have construed this hiding as evidence of the actual safety of the applicant. As Ros Germov and Francesco Motta point out, this act of going into hiding from the authorities may ironically suggest the *prima facie* existence of a well-founded fear of persecution rather than a complete lack of fear, which is what members have sometimes implied.

“a failure to respond in any way to penal codes has been construed as evidence of a lack of well-founded fear and a lack of homosexuality.”

But has this phenomenon changed since the compulsory "sexuality training" conducted by the RRT in May 2008? Ironically, case analysis

of recent decisions shows that members have sometimes gone the opposite way in construing the significance of states penal codes. Rather than rule out the existence of a well-founded fear when an applicant is discreet from their state authorities – as was often done in the past – there have been recent instances of going so far the other way that tribunal members have now construed a lack of knowledge of a state's penal code which outlaw homosexuality as evidence of their lack of credibility. In the past, for an applicant to go into hiding from authorities sometimes reduced their chances of being considered homosexual; whereas, now, it may be said that a failure to respond in any way to penal codes has been construed as evidence of a lack of well-founded fear and a lack of homosexuality. This is evidenced in the following RRT transcript, for example, where it was recorded in the member's reasons that:

"75. The Tribunal accepts that the applicant is not a lawyer and should not be expected to be conversant in the law. The Tribunal also has no reason to doubt that he was raised in a traditional Islamic household where issues of homosexuality would not be discussed. The Tribunal nevertheless considers that the applicant's ignorance of the legal prohibition is an anomaly... One would expect, if the applicant's evidence about his experiences was true, that he would have become aware of the legal prohibition which is the tool of State repression and persecution of homosexuals in Lebanon..."

There are numerous problems with this construction. Whilst the

member formally acknowledges that there are valid reasons why the applicant may not be aware of the penal codes that outlaw homosexuality in Lebanon, his subsequent reasoning completely dismisses this acknowledgment. In contradiction, he takes the applicant's failure to appreciate the illegality of homosexuality in Lebanon as evidence of heterosexuality. This would not necessarily be a problem if the member had found inconsistencies in the applicant's story – if, for example, the applicant had claimed that the practice of homosexuality was illegal in one instance and then made opposite claims in another. To the contrary, however, the applicant was adamant in stating that he was not aware of any law in Lebanon that made homosexuality a crime. It is difficult to see how this could then be rightfully interpreted as evidence that the applicant's homosexuality was not a basis for persecution by state officials. For many citizens of politically unstable states, government persecution and corruption exist outside common knowledge of the law, such that being persecuted by a state official is not necessarily the (perceived or actual) product of the (il)legality of the acts that the individual is being persecuted for.

Therefore, the Tribunal reasoning, whilst again layered with formal acknowledgments of the difficulty that LGBT applicants may face in providing evidence, proceeds to subsequently disregard these considerations entirely. On the one hand, it moves away from the flawed reasoning of former RRT decisions that saw an applicant's contrived retreat from state authorities as evidence of a lack of "well founded fear." On the other, it creates a new problematic polemic that a lack of knowledge about homosexual illegality amounts to a corresponding lack of fear.

Conclusion: The Legal Image and Operative Reality

Whilst the past several years have brought extensive reforms to Australia's domestic infrastructure for assessing sexuality-based refugee claims, these reforms are not deserving of the praise they have been given. Although a quantitative glance at sexuality-based RRT decisions may suggest positive improvements for LGBT applicants, the qualitative analysis reveals that there is still much to be achieved. Whilst the concept of "applicant discretion" has been formally rejected by the High Court, the same heterosexist and homophobic reasoning that underlies this principle has been applied in numerous decisions since. Even following the 2008 sexuality training of RRT members, decision makers continue to apply "discretion reasoning" to LGBT cases – especially with regards to requirements of displaying "public homosexuality" in the applicant's home country; displaying homosexual flamboyance in the public hearing context, and with respect to the perceived significance of the applicant's discretion from state authorities.

As such, the extent to which Australia meets its obligations to LGBT applicants under the Yogorta Principles is highly contextual and problematically contingent on the Tribunal; it depends on which tribunal member they meet and whether they meet them on a good day. Until the RRT is reformed into a multi-member panel, or at least regulated with the sufficient mechanisms to produce fairness and consistency for all LGBT applicants, an ongoing disjunction between legal image and operative reality will remain. The High Court's outlawing of "discretion reasoning" is not a call for scholars in the area to be silenced; it is a call to re-examine the structures that perpetuate these problematic discourses. Only then will the vast disjuncture between the legal image and operative reality be effectively adjoined.



Caroline Garcia

Endnotes

1. See, RRT N93/00846 (8th March 1994) and RRTN93/02240 (21st Feb 2004); the first two RRT decisions to construe homosexual applicants as falling under the definition of refugee under the United Nations Convention Relating to the Status of Refugees (hereafter the Refugee Convention or the Convention). The Refugee Convention was done at Geneva on 28 July 1951 and the Protocol in New York in 1967. The Refugee Convention entered into force on 22 April 1954 and the Protocol on 4 October 1967. The Convention covers events occurring before January 1951 and the Protocol extends the definition to events after that date
2. Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71.
3. 1994, Amendments to Reg 1 (effective as of 1st July 2009)
4. This training followed the recommendation in the Gay and Lesbian Rights Lobby (NSW) (hereafter GLRL), *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (2008). The training was conducted in February 2008.
5. Hereafter UNHCR. See, for example, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (2008) pp. 5, 8 and 9
6. Hereafter LGBT. This is the politically correct term advocated by the GLRL, above n 4.
7. The rights of LGBT individuals under international human rights law can be summarised under the Yogyakarta Principles developed by human rights experts in 2007. For a full statement of these principles see: "The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity" available online at: http://www.yogyakartaprinciples.org/principles_en.pdf. The principles that are especially relevant to LGBT refugee applicants include: Principle 3, The Right to Recognition Before the Law; Principle 5, The Right to Security of the Person; Principle 6, The Right to Privacy; Principle 10, The Right to Freedom from Torture and Cruel, Inhumane or Degrading Treatment or Punishment; Principle 23, The Right to Seek Asylum; and Principle 28, The Right to Effective Remedies and Redress.
8. As an exception to this see: Jenni Millibank and Laurie Berg, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 *Journal of Refugee Studies* 1
9. Summarised above n 7.
10. Ibid.
11. S395, above n 2.
12. See RRT 93/00846 and RRT 93/02240. The question of the basis of the "social group" categorisation has been considered in detail by these two cases and subsequent cases have followed these decisions.
13. 1958 (Cth), s 36.
14. Above n 12.
15. See Kristen Walker, 'The Importance of Being Out: Sexuality and Refugee Status' (1996) 18 *Sydney Law Review* 568 and 'Sexuality and Refugee Status in Australia' (2000) 12 *Int'l J Refugee L* 175; Jenni Millibank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) *MULR* 7.
16. Ibid.
17. Ibid.
18. Above n 2.
19. Ibid.
20. Above n 4.
21. Id at 89.
22. This was first conducted in February 2008.
23. For the only published paper in the area since 2008, see: Jenni Millibank and Laurie Berg, above n 8. Note, however, that that paper does not examine the possibility of recent improvements in the area since the compulsory sexuality training of RRT members in 2008.
24. Above n 4 at 12. The GLRL came to these findings through assessing relevant hits that came up when entering the terms "homosexual* AND refugee" in the Austlii database
25. My search terms mimicked those used in the GLRL study, above n 24
26. Catherine Dauvergne and Jenni Millibank 'Applicants s396/2002 and s395/2002, a Gay Refugee Couple from Bangladesh' (2003) 25(1) *Sydney Law Review* 97, 2.
27. See appendix.
28. However, even with regards to this quantitative appearance, it must be noted that this study is exceptionally limited in what information it gives us about the tribunal reasoning and approach in LGBT claims. For one, the scope of this study is itself limited as I have not analysed the data in relation to important variant factors such as the specific sexuality of the applicant, or the tribunal member who made the decision. Further research could build on these areas. Also, one cannot necessarily assume that 100 per cent of the applicants are genuine refugees and
29. s395, above n 2.
30. RRT Ref: 0903318 [2009] RRTA 916 (23 October 2009).
31. Id at para [92].
32. Ibid.
33. Refuted on appeal in *NAOX v Minister for Immigration and Citizenship (MIAC)* [2009] FCA 1056 (hereafter *NAOX*).
34. Id at para [78].
35. Id at para [50].
36. Above n 33.
37. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
38. On this point see: Jenni Millibank and Laurie Berg, above n 8 at 21.
39. Id at 55.
40. Id at 56.
41. Ros Germov and Francesco Mott (2003) *Refugee Law in Australia* (Melbourne: Oxford University Press), 327.
42. See, for example, RRT Reference N05/50711 [2005] RRTA 208 (Unreported, 14th June).
43. Above n 4, at 56.
44. RRT Ref: 0905281 [2009] RRTA 1196 (30 December 2009) at para [75].
45. On this point, see GLRL, above n 4 at 56 and Jenni Millibank (2004) 'The Role of Rights in Asylum Claims Based on Sexual Orientation' 4(2) *Human Rights Law Review* 194, 197.





The Dilemma of Modernisation (2007)
Parts I, II, III
Olivia Teh Yuan-Ning

HELEN OF TROY

MEKELA PANDITHARATNE
transports us to the ruins of
Turkey

**“Do you not feel
the air thin around
us? It is the
collective breath
of a thousand
women and
children as they
watch their men
go to war.”**

As the Turkish sun waned over a flushed horizon, Helen relaxed from the taut crouch that had gripped her body for several hours. In the still Hisarlik air it was easy to be so motionless, although she had found it impossible back in Cincinnati. Now the familiar tawny weeds felt coarse as they brushed against her skin, slowly lulling her into the present. Stretching her warm body out, Helen drained the cool remnants of water from her bottle and carefully packed away her well-worn tools. This was the part of the day she loved the most. In the evenings the distinction between the earth and sky was subtle; science met poetry and incongruity dissipated into the pink and pale gold.

Strange that the poet had been her first suitor, archaeology only a lesser habit. The adolescent Helen had been fascinated by the grandeur of the Trojan battles, the greatness of Achilles and Hector; the grace of Briseis captured in those immortal lines. Now, almost sixteen years later, she found herself just as affected— though now it was more the thrill of bearing witness to myth and culture woven so precisely together. It was this interest that had carried her here, to the excavation site in Turkish Anatolia, which for her had long simmered like a volcano of elusive discovery. A place of many mores, the team based at Hisarlik liked to emphasise, not just Homeric Troy. Civilization built atop civilization. Yet despite official rhetoric the attraction of the site was, and would always be, densely rooted in the words of an old Greek poet.

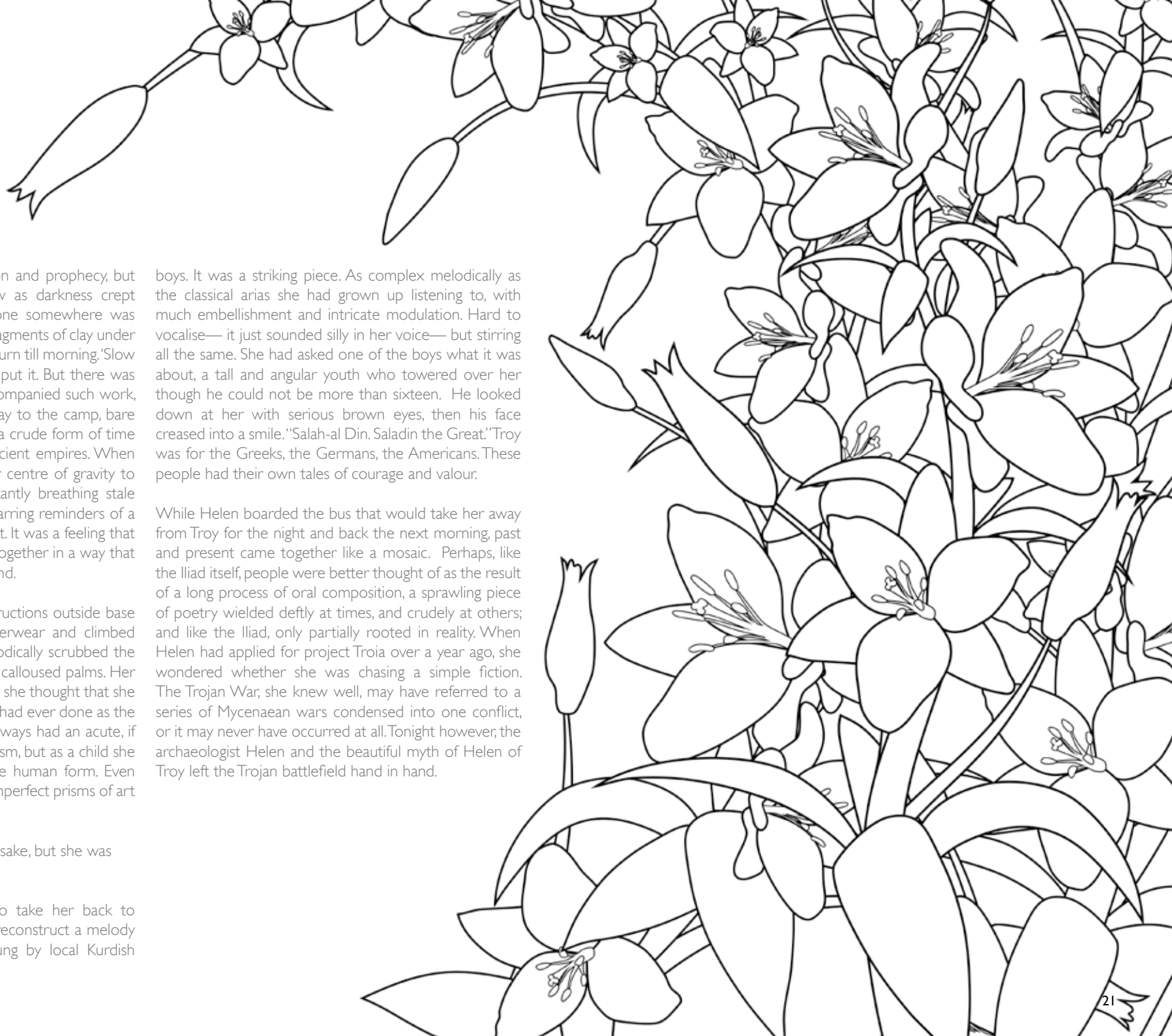
When she took students around this site, Helen liked to identify the places with mythic as well as scientific significance. A little like showing someone the architectural blueprint of your house, then sharing the personal objects that made it a home. She would point out the location of the fortifications of the city, and the perimeter ditch that had been

discovered by the '92 magnetometer readings. She showed them the 'potsherd garden', where hundreds of ceramic fragments, bones, brooches and spearheads, spindles, and coins were assembled for sorting and cleaning. But she was quite aware that there was nothing she could tell these students that they had not already divined from a textbook, nor anything she could show them that they could not see from lucid photographs. Except this sight, here, in this moment, when the land seemed to almost come alive in the gentle glow.

The most powerful lessons, Helen knew, were sometimes found outside empirical truth. Look around— can you not see the Myrmidons marching fiercely through the shimmering heat? They are advancing upon us, shouting sharp battle cries that penetrate the winds guided by Apollo. There is Achilles, at the head, infused with the divine anger for he comes to avenge the death of his beloved friend slain at the hands of Hector; Prince of Troy. Do you not feel the air thin around us? It is the collective breath of a thousand women and children as they watch their men go to war. For there is seldom glory in the battle itself; it is too often veiled by the noxious vapour of death. Andromache, wife of Hector, cannot cry as she watches the broken body of her husband dragged through the dust behind Achilles' chariot, the dust rising up in scarlet spirals at his feet.

Hector, the reluctant warrior.

Archaeologists were no Homeric heroes. They had passion, certainly, but precision and patience too. They were not reckless, would not make decisions on a whim.



They did not believe in superstition and prophecy, but logic and perseverance. Even now as darkness crept quietly over the landscape, someone somewhere was precisely brushing sediment from fragments of clay under a jaundiced neon glow that would burn till morning. 'Slow but seductive', a lecturer had once put it. But there was also a sense of dislocation that accompanied such work, Helen thought as she made her way to the camp, bare skin prickling in the chilly air. It was a crude form of time travel, delving into the earth of ancient empires. When you came here, you realigned your centre of gravity to a theoretical past. You were constantly breathing stale air. Emails, newspapers, films were jarring reminders of a world that somehow felt too distant. It was a feeling that connected her and her colleagues together in a way that other people could rarely understand.

Stopping at the rudimentary constructions outside base camp, Helen stripped to her underwear and climbed into a makeshift shower. She methodically scrubbed the clay from her arms and calves with calloused palms. Her body was rough and sunburned, but she thought that she appreciated it much more than she had ever done as the pale, fragile Cincinnatian. She had always had an acute, if slightly detached, sense of aestheticism, but as a child she had struggled to find beauty in the human form. Even now, she found more allure in the imperfect prisms of art and poetry than in physical lustre.

Helen. Helen. An unfortunate namesake, but she was learning to live with it.

As she waited for the minibus to take her back to town for the night, Helen tried to reconstruct a melody that she had sometimes heard sung by local Kurdish

boys. It was a striking piece. As complex melodically as the classical arias she had grown up listening to, with much embellishment and intricate modulation. Hard to vocalise— it just sounded silly in her voice— but stirring all the same. She had asked one of the boys what it was about, a tall and angular youth who towered over her though he could not be more than sixteen. He looked down at her with serious brown eyes, then his face creased into a smile. "Salah-al Din. Saladin the Great." Troy was for the Greeks, the Germans, the Americans. These people had their own tales of courage and valour.

While Helen boarded the bus that would take her away from Troy for the night and back the next morning, past and present came together like a mosaic. Perhaps, like the Iliad itself, people were better thought of as the result of a long process of oral composition, a sprawling piece of poetry wielded deftly at times, and crudely at others; and like the Iliad, only partially rooted in reality. When Helen had applied for project Troia over a year ago, she wondered whether she was chasing a simple fiction. The Trojan War, she knew well, may have referred to a series of Mycenaean wars condensed into one conflict, or it may never have occurred at all. Tonight however, the archaeologist Helen and the beautiful myth of Helen of Troy left the Trojan battlefield hand in hand.

BABY STEPS

GEORGIA FLYNN explores one woman's conflicted feelings about motherhood

She knew this feeling would fade. It would get blurred around the edges, until she couldn't quite capture the staggering strangeness of her thoughts that day. Finally, even a clear recollection of her beating heart would slip away, in the same manner a dream seals itself off from the dreamer with the morning's first pot of coffee and quick scan of the headlines. But for now, it brimmed in her head, threatening at any moment to escape from grasp. So, she held it tight and experienced once more the revolutionary thought that had occurred to her in the course of an escalator ride.

The conclusion, while not particularly revolutionary in its own right, had been entirely the product of her own thought processes. There was a certain satisfaction in that. Even then, she was aware that the bubbling excitement that passed through her was too dramatic for real life. There grew in her a near irresistible compulsion to express the words aloud. Her husband, had he chosen to join her on this particular shopping expedition, would have called her childish, would have walked several strides in front of her and left her to unload the bags into the boot of the car. She could picture it vividly, the way they would sit in silence in the front seat, until he adjusted the air conditioning to the bone-chilling temperature she hated.

"Who's being childish now?" she would mutter, with an icy glance in his direction.

Perhaps there was something petulant about the way she felt - for a child experiences wonder at every mundane thought independently grown. A child is forgiven and with the passage of time, each one realises the irrefutable truth that almost every profound thought that occurs to an average person has been written in a book, or transformed into film. Tomorrow the time for rummaging around in another person's words would come, but today was different. This whole strange pattern of thought was childish, then. There was a fitting irony in that, and she folded it up to consider later, when the force of her escalator ride had

receded and her resolution wavered.

It had come upon her swiftly, while she stood absolutely still, not even attempting to walk up the motorised stairs. Her arms were heavy at her side, filled with shopping - enough for two, health-conscious adults. Apart from a light sprinkling of foreign fare that they had taken to in the course of their most recent journey to Mexico. But for all the exotic imports of salsa verde and Serrano chillies, there was no denying the fact that they were - overall - a thoroughly conventional couple in their tastes. There were oranges, tubs of yoghurt that at any moment threatened to spill out into the plastic bag, a long stick of celery and milk. For some reason, her mind stumbled over that mental inventory when she reached the milk. With no warning, she came to a decision. Somewhere between the ghoulish linoleum of the supermarket and the raw meat of the butcher, she decided.

Well, maybe I just won't have children.

That single phrase struck her with the force of the most unutterable obscenity. Even as the sound of it echoed in her mind, it seemed like a resigned conclusion to a long dispute, as if her mind had been arguing over the issue for many hours, only to slump exhausted on the couch with a brokered peace. Certainly, over the past weeks and months, the topic of children had turned from houseguest to squatter. It started with observations he offered about women around them in their street, who would negotiate yoga mats and prams. He would comment on the sexiness of a slim-hipped woman turning sideways to expose the very beginnings of a baby bump. Sometimes she would find herself cooing to a baby that passed by in a pram, glowing under the warm approving gaze of her husband.

Yet if she was honest with herself, she had always been fearful of a perceived coolness at the centre of her character. There had been some comfort in the thought that even if she was unable to feel an affinity for the concept of children, there was always the possibility of loving one in particular. But, for the first time, somewhere

between the first step on the escalator and the smooth conveyer that propelled her back into the crowd below, the unspoken possibility of choosing never to join that elevated station of motherhood seemed subversive and thrilling. No infirmity, no lack of a willing partner; no more than the decision never to belong to another person.

But, with the first step into the crowd milling around the butcher, the first doubts crept into her mind. With the predictability of a mathematical equation, an anxiety filled her, posing an unavoidable question.

Then what? If not a baby, then where would the meaning lie?

In this panicked haze, a strange zealotry overtook her and she found her entire countenance steeling itself against those thoughts that had seemed so liberating only seconds earlier. The light shifted and she saw herself clearly as selfish, as unfeminine, and as thoroughly undeserving of the largely peaceful marriage she enjoyed each day. A baby, then, she decided, before picking up her day where it had left off in a brief moment of vertigo. With each step she took, she blended into the crowd of shoppers until her form was undistinguishable and any questions about then or what disappeared entirely.



EQUAL OPPORTUNITY FOR WOMEN IN THE WORKPLACE: THE WAY FORWARD

Mimi Zou examines the status of affirmative action in Australia

Introduction

'Diversity management'. 'Be an Employer of Choice'. 'Good Practice, Good Business'. Such rhetoric is commonly used by policy makers in selling the 'business case' of equal employment opportunity ('EEO') to employers. This has been the dominant approach taken by the Equal Opportunity for Women in the Workplace Agency ('EOWA') to encourage compliance with the Equal Opportunity for Women in the Workplace Act 1999 (Cth) ('EOWW Act') which EOWA administers. Among the regulatory measures in Australia aimed at addressing gender inequality in employment, the EOWW Act is unique in that it imposes a positive duty on employers to assess their organisations, establish a workplace program to eliminate discrimination and promote gender equality, and report annually to EOWA.

Despite its potential to prompt, support and make accountable self-regulatory responses of corporations in addressing systemic discrimination embedded in organisational policies and practices,¹ the EOWW Act (along with the business case used to sell it) has been criticised for being 'toothless'. It applies only to large organisations (with 100 or more employees), imposes minimal procedural obligations on employers, gives EOWA little monitoring or enforcement powers and provides limited sanctions for non-compliance. Legislative compliance is further contingent on

meeting organisational needs. As Thornton argues, the Act is a 'creature of deregulation', and embodies a liberal approach of achieving equality of treatment (formal equality) instead of equality of outcomes or opportunity (substantive equality) for women.²

Drawing on recent scholarship on reflexive regulation, this paper explores the limitations of the EOWW Act and how it could be developed into a more 'proactive model, aiming at institutional change'.³ Reflexive regulation involves establishing a 'superstructure that will support self-regulatory mechanisms'⁴ to realise 'proactive measures for embedding the equality principle in organisational practice'.⁵ This paper first outlines the background to the EOWW Act and the ascendancy of the business case discourse. It then explains what reflexive regulation is and analyses the EOWW Act through the 'reflexive lens'. It concludes by considering the United Kingdom's Gender Equality Duty (GED) as an example of reflexive regulatory innovation, which may provide some guidance for reforming Australia's EEO framework.

Background of the EOWW Act and the 'business case' approach

It is worth noting that there are other regulatory mechanisms available to advance gender equality in employment, such

as the equal remuneration decisions of industrial tribunals, realigning pay structures and improving entitlements through collective bargaining, and statutory-based employment rights and protections. These mechanisms have some demonstrated potential in addressing the historic inequality between women's participation and rewards in employment.⁶ However, their significance has been limited, in the background of decentralisation and de-regulation⁷ of employment relations favouring individual workplace bargaining.

In the realm of anti-discrimination legislation, the Sex Discrimination Act 1984 (Cth) ('SDA') makes it unlawful to discriminate, directly or indirectly, on the grounds of sex, marital status or pregnancy and prohibits sexual harassment. The SDA implements an individual rights-based, complaints-led model. Employers are under a general proscriptive duty not to discriminate and, in the event of transgression, are liable only if the victim enforces her/his rights and receives compensatory redress through legal action.⁸ Employers are not required to be proactive in eliminating discrimination or promoting substantive equality, with only a limited 'special measures' or 'positive discrimination' exemption.⁹ Other than providing a baseline in guarding against overt discrimination, the SDA makes only 'desultory gestures'¹⁰ in addressing systemic or structural discrimination.

An alternative approach to the individual rights-based model was the Affirmative Action (Equal Opportunity for Women) Act 1986 (Cth), predecessor of the EOWW Act. It attempted to introduce a limited positive duty on employers to eliminate discrimination and promote gender equality in organisational practices. Employers were required to audit their organisations, institute an affirmative action ('AA') program that identified structural barriers to gender equality, and produce an annual report to the AA Agency on program implementation. Proponents argued that an effective AA/EEO program had the potential to change power structures and challenge institutional arrangements, which perpetuated gendered norms of women's places and capacities at work.¹¹ The legislation did not impose quotas of any kind, and neither its reporting requirements nor sanctions for breach was particularly onerous. However, the concept of AA was controversial as it was depicted as a threat to 'merit' and lost support in the ascendancy of neo-liberalism.¹² In 1998 a review of the legislation led to its repeal. The language of AA was completely removed in the succeeding EOWW Act.

The EOWW Act also weakened the minimal reporting requirements of its predecessor, such as deleting the step of specifying goals and targets, removing the evaluation of programs against a common standard and waiving the annual reporting requirement for employers who have

been compliant for more than three years. With the compliance focus on report submission, the quality and effectiveness of workplace programs were irrelevant. A recent sampling of reports by Strachan and French¹³ revealed that many organisations met the minimum legislative requirements and nothing more. Many programs either did not show a real understanding of EEO or addressed equity issues in a minimal fashion.

With a weak legislative underpinning, EOWA has pursued the business case to promote voluntary self-regulation. Employers are encouraged to adopt an effective program because EEO 'boosts a company's profitability and makes incredibly savvy business sense'.¹⁴ The business case assumes that employers' business interests are always compatible with equity goals, and any tension is rarely acknowledged.¹⁵ Moreover the focus on an employer's 'capacity to comply' allows for greater management discretion in only adopting policies and practices that meet short-term cost-effectiveness and business needs. Charlesworth et al.'s research further suggests that the business case appeared to be largely rhetorical for many organisations, with little actual cost/benefit analysis or measurement of business outcomes undertaken.¹⁶

In effect, the EOWW Act is part of a policy context which emphasises individual organisation choice and enterprise

responsibility as opposed to legislative and economy-wide standards in order to achieve equality goals. Unfortunately, it does little to ensure that 'equality even makes it onto the employer's agenda or that responses are genuine and effective'. This is where an understanding of developments in regulatory thinking can assist us in re-assessing our current equality laws.

What is 'reflexive regulation'?

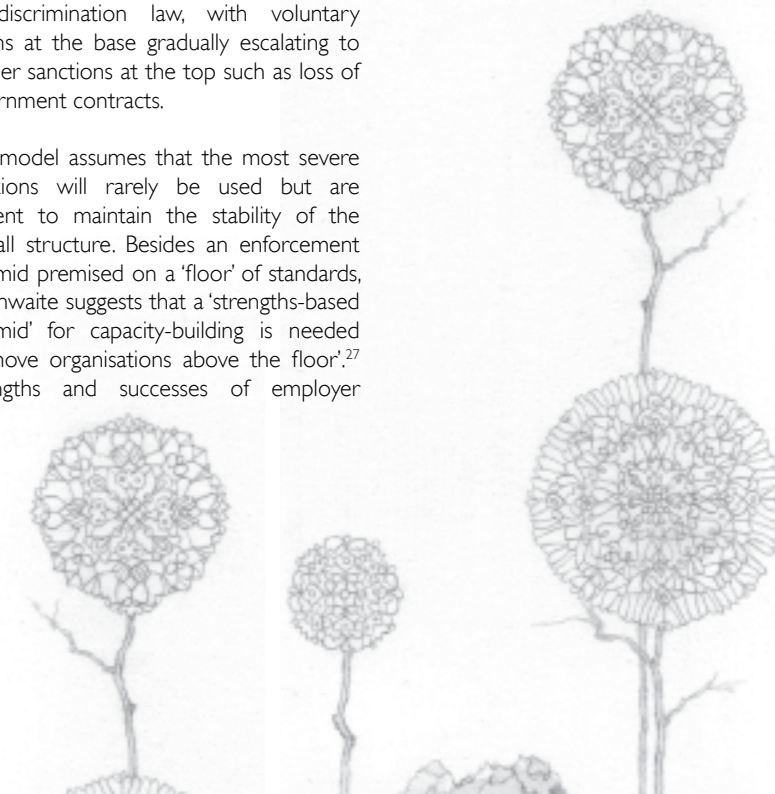
Growing academic and policy interest in reflexive regulation has been driven by the desire to address regulatory weaknesses of, on the one hand, command-and-control approaches which are based on prescriptive, detailed controls supported by heavy sanctions for non-compliance; and on the other, deregulation of the kind which removes statutory controls in favour of individual freedom of contract or market-based governance.¹⁸ The rationality behind reflexive regulation is recognising that organisations, such as corporations, operate as their own sub-systems within society, with their 'inner logic' of norms, processes and communications that are particular to that sub-system itself.¹⁹

The legal system is constrained in directly bringing about change in other social sub-systems because of their 'limited openness to external normative interventions'.²⁰ Reflexive regulation seeks to increase the law's effectiveness in steering sub-systems towards self-regulation that

would internalise public policy objectives. It does so by creating a set of 'procedural stimuli that lead to the targeted subsystem adapting itself'.²¹ The law's function shifts from direct control to 'proceduralisation' by which the relevant norm can be modified within another sub-system.²² For policy makers, the challenge is how to make legal interventions that 'provoke... a reconfiguration of self-regulation'²³ by those being regulated 'without falling into trap of old-fashioned command-and-control regulation, or the trap of de-regulation'.²⁴

Effective reflexive regulation also combines different types of sanctions to enable the regulator to prompt the desired behaviour of regulated actors. Ayres and Braithwaite's 'pyramid of enforcement' model presupposes that hard sanctions (even penal ones) at the apex of the pyramid must be exercised if all else fails.²⁵ Hepple et al.²⁶ have extended this pyramid to discrimination law, with voluntary means at the base gradually escalating to sterner sanctions at the top such as loss of government contracts.

The model assumes that the most severe sanctions will rarely be used but are present to maintain the stability of the overall structure. Besides an enforcement pyramid premised on a 'floor' of standards, Braithwaite suggests that a 'strengths-based pyramid' for capacity-building is needed to 'move organisations above the floor'.²⁷ Strengths and successes of employer



actions need to be identified, along with mechanisms developed to reward and expand upon best practices.²⁸ Both pyramids recognise the complex motivations of corporations. Profit maximisation is likely to be a major consideration, but not to the exclusion of other motivations such as good corporate citizenship.²⁹

Another critical focus of reflexive regulation is on deliberative, participatory mechanisms to achieve social policy goals. Reflexive regulation supposedly encourages each organisation to engage in its own assessment of the problem, to deliberate with different stakeholders and to create the best solution which stimulates consensus.³⁰ Reflexive regulation considers different potential solutions, while using benchmarking procedures and other deliberative strategies to test their relative success or failure.³¹ Furthermore, it recognises the role of various potential participants in the regulatory process, particularly those directly affected such as interest groups that act as watchdogs, educators and advocates for individuals in enforcing their rights.³²

Like any regulatory model, reflexive regulation has potential limitations. First, the model may insufficiently identify and recognise the role of conflicting interests and power relations between actors, thus appearing to de-politicise the area of regulation concerned.³³ Second, the model's enthusiasm for open-ended stakeholder deliberation to define the problem may undermine the core set of ethical values in the equality context that are 'thought to be central to our conception of appropriate behaviour, and not open to fundamental challenge'.³⁴

Further, as McCrudden argues, effective reflexive

regulation needs to identify the three essential conditions under which a deliberative process may succeed: first, organisations are required to assess themselves based on objective and comparable evidence in their sectors; second, organisations are required to seriously consider alternative approaches that will shift entrenched patterns of inequality, capable of being monitored by an external authoritative body; and third, organisations are required to regularly engage with other stakeholders which will challenge organisations' own sets of assumptions.³⁵ These conditions 'must be affirmatively created, rather than taken for granted'.³⁶ The following section will examine whether the EOWW Act sets out or creates these pre-conditions for effective reflexive regulation.

The EOWW Act through reflexive lens

Drawing on McCrudden's pre-conditions for effective reflexive regulation, there are several limitations in respect of the EOWW Act. First, there is a lack of public disclosure obligations placed on employers, which undermines the law's capacity to support effective deliberations and reflections which require the production and dissemination of reliable data. While the reports submitted to EOWA are 'public' documents, organisations are not required to produce objective or comparable data, nor the findings of its audit or evaluation of its programs. Reports do not contain the past EEO issues or actions in a workplace, but 'merely a snapshot taken during the reporting year'.³⁷ Organisations that have been waived from reporting or named as non-compliant will not even have a report that is publicly available. EOWA has no authority to evaluate and grade workplace programs and publicly disclose these

results. Since organisations do not need to report in a standardised form, EOWA's capacity to compare performance between and within organisations over time is further weakened. Furthermore, the lack of disclosure denies other stakeholders access to the information necessary to assess and compare organisations,³⁸ to identify leaders and laggards and to set a normative benchmark for good practice. EOWA has sought to use various educational tools to disseminate information about innovative programs and a certification exercise to encourage organisations to go beyond the reporting requirements. However, there is no means of auditing or verifying organisations' proclaimed actions, and no evidence of collation and diffusion of best practice standards emerging from these processes.³⁹

Second, while the Act requires an organisation to assess itself and establish a plan, it is not compelled to execute or review the plan. The focus is on submitting the reports instead of auditing the outcomes. As such, there is no effective obligation on employers to change existing practices or consider alternative approaches. Furthermore, EOWA has virtually no monitoring or enforcement powers to ensure organisations actually implement and review their plans. Unlike a 'pyramid of enforcement', sanctions for non-compliance are limited to being named in parliament or excluded from government contracting. The minimal reporting requirements further undermine the responsiveness of these sanctions to promoting desired behaviour. Without such powers, EOWA has little opportunity to 'enter into regulatory dialogue with non-compliant organisations'⁴⁰ to evaluate their practices and improve their performance.

Finally, the Act does not impose any specific duty on employers to consult with the range of potential stakeholders. It does not set up any mechanism for regular and meaningful engagement with stakeholders that is capable of challenging the assumptions and practices that the organisations presently adopt.⁴¹ While one of the Act's objectives is to foster workplace consultation between employers and employees, the business case adopted by EOWA puts an almost exclusive focus on management.

Overall, the EOWW Act has a long way to go in fulfilling the pre-conditions for effective reflexive regulation. Its current model (premised primarily on the business case) is incapable of using 'procedural requirements as stimuli to get organisations to buy into equality' at the level at which equality becomes an 'endogenous' value within the organisation.⁴² To secure behavioural and cultural change within and across diverse organisations, the EOWW Act needs to have these pre-conditions in place to 'receive and translate reflexive legal norms in a way which makes their implementation effective'.⁴³ The next section considers a possible way forward in developing the Act into a more responsive regulatory instrument by considering the UK's GED.

Moving Forward – a Gender Equality Duty (GED)?

While Australia needs to develop its own responses to specific problems in our equality laws, the UK's GED may offer some guidance for a new approach to addressing gender inequality – particularly in view of its reference in several submissions to the recent Senate inquiry reviewing the SDA.⁴⁴ The GED was introduced in 2007 after a review of the UK's anti-

discrimination laws,⁴⁵ and heralded as a 'new approach to equality – one which places more responsibility on service providers to think strategically about gender equality, rather than leaving it to individuals to challenge poor practice'.⁴⁶

The GED imposes a general positive duty on public authorities⁴⁷ to have 'due regard' to the need to eliminate discrimination and to promote gender equality in employment, service provision and policy-making. This general duty is supported by a list of specific duties requiring authorities to: publish a 'gender equality scheme'; consider the need to include objectives to address any gender pay gap; gather and use information on how its policies and practices affect gender equality; consult stakeholders to determine objectives; assess the impact of current and proposed practices; implement the scheme within three years; report on the scheme annually; and review it every three years.⁴⁸ These specific duties are a means of meeting the general duty and are enforceable by the Equality and Human Rights Commission (EHRC).

Furthermore, the GED scheme includes a statutory Code of Practice, which sets out detailed instructions on preparing a gender equality scheme, including selecting and prioritising objectives, consultation, implementation, evaluation and monitoring. Whilst the Code serves as a practical guide, an authority that fails to follow its provisions may be called upon to show how it has otherwise complied with the general and specific duties.⁴⁹ In effect, the Code presents an informal set of common standards to assess the extent of compliance. The EHRC can issue enforceable compliance notices to authorities failing to meet their duties. Persons, interest groups or the HER can also seek judicial review of non-compliance by a public authority.

While it is too early to assess the GED's effectiveness, aspects of its regulatory design suggest that the pre-conditions for reflexive regulation are in place to some extent. However, McCrudden highlights several significant limitations: the absence of an obligation on authorities to monitor their workplaces' composition and produce objective, comparable data; the danger of slipping into de-regulation without some compulsion on organisations to seriously consider alternatives; and the lack of active and informed civil society engagement.⁵⁰

These issues may prompt us to consider the challenges of (re)designing Australia's own regulatory framework.

In moving towards effective reflexive regulation, the EOWW Act could be reformed in several ways. First, for a deliberative and reflective process to succeed, objective, comparable information on workplace programs within and across organisations needs to be produced, compiled and disseminated publicly. The Act could revert back to a standardised reporting form and extend disclosure requirements that are procedural and substantive in nature. This enables EOWA and other stakeholders to utilise reliable information for effective monitoring and lobbying, fostering and diffusing leading innovations across sectors, and to help organisations build self-regulation capacity. Second, the Act could specifically require organisations to continually evaluate and review their practices against measurable goals, for example, by conducting regular equal pay audits. Getting organisations to consider seriously alternative approaches will also require an external accountability mechanism.⁵¹ EOWA should have available to it broader monitoring powers and a responsive enforcement pyramid as suggested by Hepple et al.⁵² Finally, the Act could require organisations to consult a range of internal and external stakeholders (such as unions and civil society) and meaningfully involve them in developing, implementing and reviewing EEO programs.

Conclusion

Understanding reflexive regulation in theory and practice can help us to reconsider how the EOWW Act can be more responsive to the diverse motivations and behaviours of corporations to proactively identify and alter existing practices and structures that perpetuate gender discrimination and inequality.⁵³ Whilst recognising the need for a 'positive duty' model (a shift from the traditional individual complaints-based model), the EOWW Act is severely circumscribed in its ability to prompt those employers who have the capacity to bring about real change. Examining innovations in regulatory scholarship, such as the pre-conditions for effective reflexive regulation as identified by McCrudden and developments in regulatory efforts such as the UK's GED, may stimulate further discourse on how policy-makers can develop a new approach to achieving equality for women in the workplace.

Endnotes

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Christina Calgaro

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Port Macquarie Shirley Mani

FASHIONISTA:

Emilie Sullivan examines the relationship between feminism and fashion in the twentieth century

The final frontier



The semiotics of fashion has always been of great interest to me, specifically the power we bestow upon clothing as a means of projecting ourselves to and protecting ourselves from the outside world. However, somewhat problematically, recognition of fashion's communicative power is often restricted to the relationship between the garment and the individual. As a result, a great breadth of interesting territory is overlooked; particularly the way 'culture' utilises garments to communicate with the individual. Fashion, much like music, language and art is an essential aspect of popular culture and its very production is branded with the values of its place of origin. Shaped by ideas relating to gender, politics, history and class, fashion engages the body as a proverbial billboard. This then provides fertile ground for exploring cultural responses to feminism, by using a view of women that has become visible through women and the aesthetic choices they have made.

For the sake of a succinct argument, let's focus on the woman from the modern period onwards. Beginning at the turn of the century within the western world, women were awarded the vote gradually during the first two decades of this period. This political timeline paralleled the cultural state of fashion at the time. Hence, we see an interesting trend beginning to emerge. During the 1920's there was an explosion of waif-ish decadence, elongated silhouettes and androgynous haircuts. The culmination of these influences was the creation of the iconic image of the roaring 20's emaciated beauty. Historically this development

is connected to the development of a middle class with a disposable income, economically prosperous times and their unraveling of the proverbial corset that is; Victorian conservatism. However it cannot be ignored that ironically, at the precise moment when women became symbolically prominent, seen for the first time in history as politically autonomous citizens, it was demanded that women undergo a physical transformation that maintained the idea of a diminutive status.

“Shaped by ideas relating to gender, politics, history and class, fashion engages the body as a proverbial billboard.”

On to post-WWII, as women came out of years of manual labor in their husband's absence, Christian Dior patronizingly offered them the now-infamous collection of dignified ensembles referred to affectionately as 'The New Look'. Ironically (or perhaps deliberately), there was nothing NEW about the waist cinching structure that referenced popular fashion pre-industrial revolution. Whilst the garments communicated poise they notably ignored empowerment. What was being unequivocally suggested was 'return to your traditionally female posts' and reinstate a gendered status quo. The men had returned, and with them the understanding of women as gentle constructions of femininity rather than legitimate contributors to society. The 'New Look' was restrictive and predominately focused on shaping the body to the feminine extreme of the hourglass shape. Gone were the practical cotton work wears of the early 1940's, the short utilitarian hair styles and muddy palette (less easily stained). Instead the look was cream on cream and silk, exaggerated and through its elegance, deceptively oppressive.

The full skirt aesthetic created by the New Look of 1947



“...while all of those who care for the discourse of feminism weren’t looking, patriarchy was miraculously overthrown and with it the well worn phrase “you will not leave this house looking like that.””

Farshan Emilie Sullivan

endured well into the 1950's, gradually losing favor towards the end of the decade when fashion and the idealised body changed yet again. 1962 was a pivotal moment for feminism, being the year the contraceptive pill was bestowed upon women. Imagine this context of excitement and freedom and then picture the face of the generation. Doesn't seem to match up? Quite right. Strong assertive beauty? Hardly. It is clear whom I'm referring to: a doe eyed elfin girl named Twiggy. Twiggy who was inducted as the doyenne of western fashion, was child-like in every sense, the complete aesthetic antithesis of a sexually independent woman. Cropped baby doll dresses created an A-frame structure that sought to mask the woman's body. In contrast to the New Look, which heavily referenced the female form, with The Pill came the sanction that sexuality could include acts of pleasure as well as productivity. As a result garments could literally be read as semiotic inferences of moral panic. Hips melted to waistlines, fifties scooped necklines crept to boat neck heights, bosoms

shrunk considerably, even the provocative cone shaped bust line was now seen as garishly promiscuous as opposed to charmingly maternal.

Through the 90's as Generation X defied their mothers and flung themselves at the glass ceilings, the 80's supermodel disappeared and left Kate Moss covering in her wake. In retaliation for invading the work force en masse, the vision of the luxury high fashion pretty woman morphed into an exhausted, pale-faced neo-gothic. De-sexualized and dripping in grunge, femininity was snatched away, banished to a time when women didn't appear to 'resent' it. Calvin Klein utilised his substantial fashion clout to plaster billboards with the unsmiling face of a disheveled Kate Moss. Gaunt and insignificant, her figure was dwarfed by garments that parodied the masculine suit and obscured the female form.

In this time period Klein infamously cast Brooke Shields as the baby-face of his line of denim, glamorising her recent celluloid turn as a child prostitute. The 90's face of fashion was drugged; track marked and sullen, the Heroin Chic chick clearly functioning in the same space as the flappers and mini-mods before her. The garments of these eras literally speak for themselves, acute evidence of the fact that whenever women truly began to revolutionise the cultural status quo, a symbolic silencer was used to distort their ascent.

In the past decade we have seen popular culture defined by the term 'Raunch Culture'. In the guise of the Donatella clone, Raunch Culture is a confusingly tongue in cheek style reminiscent of Julia Roberts' Pretty Woman pre-Pygmalion moment. Poker straight synthetically extended hair, strange hues of solarium tans and the combination of a multitude of erogenous zones (which previously would only ever have been worn out one at a time).

It is now commonplace to witness an adolescent army of 'bums, tits and legs' wondering aimlessly along Saturday night promenades, armed with nothing but frostbitten bravado.

In terms of fashion and feminism what I can deduce from this sexually gratuitous present is the opinion that feminism must be over. As I understand it, the sentiment goes a little something like this: while all of those who care for the discourse of feminism weren't looking, patriarchy was miraculously overthrown and with it the well worn phrase "you will not leave this house looking like that." In celebration women everywhere are leaving the house dressed not in the image of social and artistic autonomy but rather more like the middle school students of a Degrassi school dance. The sweatshirts of modest deception have been thrown off to reveal toned abs flashed from under mid drift t-shirts replete with sequined shoulder pads.

What is amazing to me is that even the dignified Couture houses have capitulated to the consensus of the 'raunch' consumer. Brands such as Balmain churn out \$20,000 micro/mammary skimming mini dresses that despite their six month waiting list are indistinguishable from those you might find on the streetwalkers of downtown L.A. In 2002, Stella McCartney famously mis-stepped in her debut catwalk collection for the Stella McCartney Line. Fresh from head designer at Chloe, she ventured out on her own, with a showing that consisted of nipple baring 't-shirts', garish lace body stockings and cringe-worthy slogan tees that read 'Slippery when wet'. However,

being panned by the global fashion media had little to no impact on the success of her sales in that first year. Stock flew off the shelf and chain stores emulated her aesthetic, flooding the High Street with a wave of 'porno-chic'.

Sexual 'profanity' is no stranger to fashion, (quite often it has been harnessed to create some memorable moments in fashion history, particularly in Vivienne Westwood's early subversions of sex-shop-chic). The difference here is the uniformity, the fact that sexuality is no longer characterized by eccentricity, and thus stripped of all the fun. Raunch culture has created a situation where Hilton-esque identities are being held up as feminist icons, praise given to their apparently 'clever' manipulation of sexual objectification. A fallacy therefore exists that when a woman chooses to embody the patriarchal understandings of sexuality, she is then in some way 'empowered'. But just as the individual suffering from Stockholm Syndrome remains captive, the self-objectified woman's performance (regardless of ironic intent) maintains the same position within the structure of the sexual economy that it has done in the past.

What is most worrying is the extent to which young women are involved in a role-play that they don't adequately understand. We need to be wary of this confusion because feminism is at risk when the history of the movement is obscured. Soon enough, the knowing wink of ID magazine covers will be phased out and we may find ourselves right back where we started.

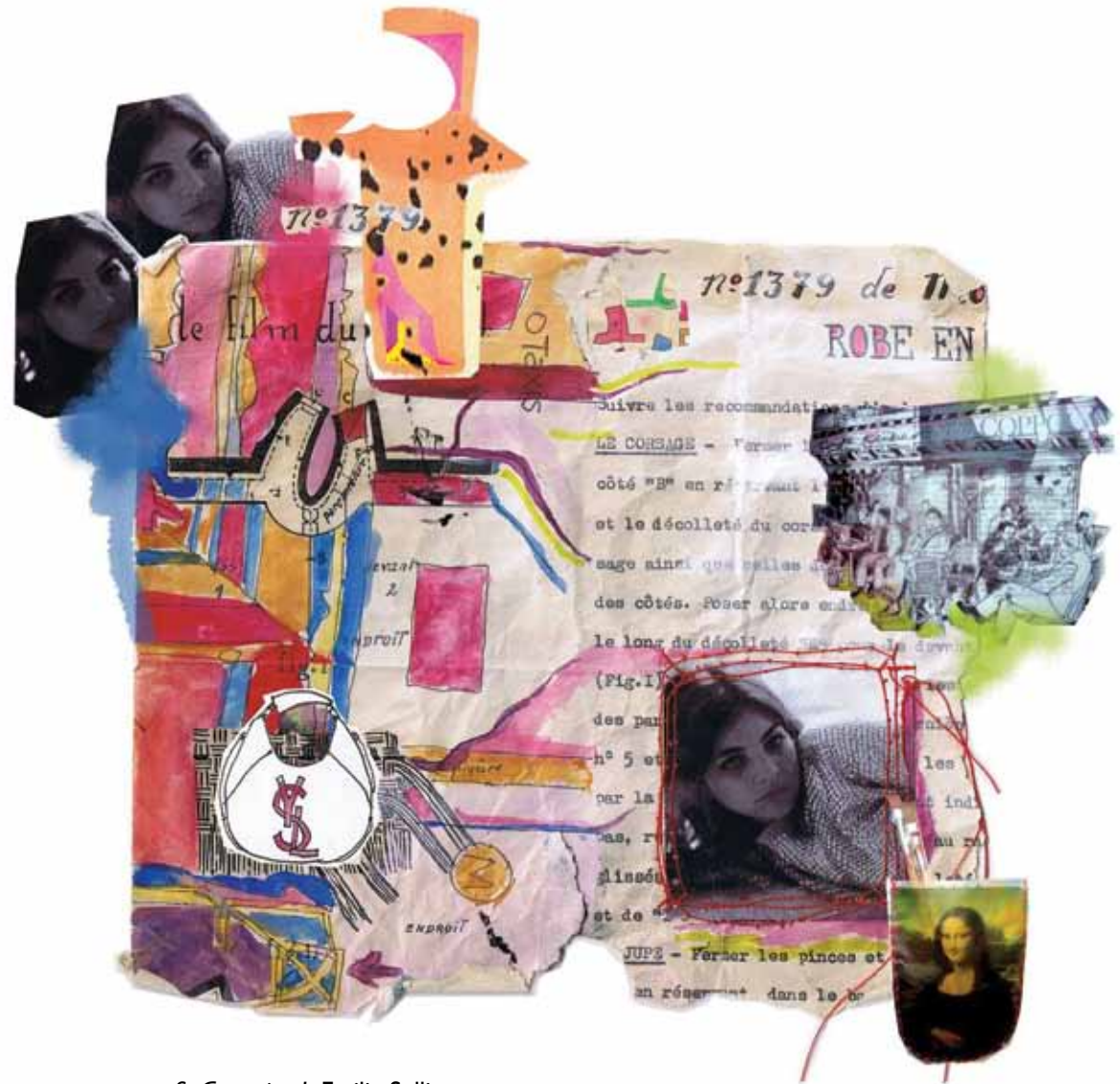
How could it be that after coming so far, momentum has been stifled to such an extent? From the perspective of a real life 'Gen Y-er' a quick survey of my peers uncovers the perception, quite simply, feminism is 'annoying'. As the unconscious heirs to equal education, professional opportunity and reproductive rights, feminism is no longer a concept that represents hope and privilege so much as it seems to be a term cute boys wrinkle their nose at. Fashion of the noughties exemplifies this response; manifested as a proverbial 'screw you' to the didactic dialogue of the second wave.

Now I am very aware that I have presented a fairly dismal view of fashion over the past 100 years. After all there is a spectrum of designers that have forged spectacularly subversive careers, recreating the canon of femininity and physical fashion in one foul swoop. Such designers include my all time favorites, Elsa Schiaparelli, Coco Chanel, Diane Von Furstenberg, Viviane Westwood, Rae Kawakubo, Donna Karen and Alber Elbaz. The clothes created by such 'frock industry' stars are unique manifestations that have forged breathtaking dialogues with disciplines including art (surrealism for Schiaparelli), feminism (Von Furstenberg), history (Westwood), technical skill (Kawakubo) and aesthetics (Elbaz). The problem with the works created by these visionaries is the marginal influence they hold over the mainstream industry. Unfortunately it is the Mary Quant and Donatella Versaces of fashion history that have enjoyed such a sway over the trickle down effect. Fashion behaves as a representation of the status quo; a proverbial pulse expressing the opinions of the garment-wearing multitude.



I believe an investigation of this kind is hugely important to the future of fashion design. For too long, an understanding of fashion has been patronising, considered as being solely a woman's domain. However, only when we acknowledge the power embedded in this art form can we be at an advantage. To understand the extent of fashion's voice is to be able to utilise its influence. As the domain of 'women', fashion should be reclaimed as an ally rather than a tool for maintaining the status quo. Two revolutionaries I mentioned before - Westwood and Kawakubo - have already made great progress in this direction. Their respective bodies of work reveal the potential to emancipate fashion from the controlling discourse of patriarchy. Whilst each of the two engage thematically with 'femininity' it is not the femininity that is defined by binary opposition but rather a discussion of women's biological physicality, creating a new understanding of women, sex, fashion and the dialogue that these ideas can create.

I feel very strongly that fashion can and will be so much more than a way to exclude. It is an industry where anthropology, history, politics, industry, science, aesthetics and theatre combine to create ever-changing testaments to the cultural climate. It is vital to look behind and see the correlation to women's rights and women's image and take a proactive approach to preventing such obvious attempts to usurp the process from happening again. Perhaps Louis Vuitton's recent show 'And God Created Women' is a hint of what's to come...women that are valued because of their strong engaged presence rather than despite it.



St Germain / Emilie Sullivan



St Germain II Emilie Sullivan



St Germain III Emilie Sullivan

BEING A EURASIAN AUSTRALIAN

Lyn Dickens relates her experiences of being a young Eurasian woman in Australia

Being a Eurasian Australian is a strange thing. Don't get me wrong, my mixed-race heritage has never been a source of inner-conflict, nor have I ever had an 'identity crisis' about having Anglo-Celtic and Peranakan parentage. Unfortunately, I can't say that everyone else is always so comfortable with my ethnicity.

When I was fifteen, I was at my local shopping centre when a strange man loomed into my path and demanded, "What are you?" Stunned, I avoided his bemused gaze and kept walking. What did he mean? was my initial reaction. Then I thought, with slow-mounting anger, what kind of question is that? I was not a thing – a "what" could not encompass who I was. But even in my racially naïve teenage brain, I realised that his question was about my not-quite-white appearance. It was not the first time that I had been confronted by a stranger about my racial heritage. The question "Where are you from?" was a disturbingly common occurrence during my teenage years. Funnily enough, while my Asian friends were sometimes quizzed about their

origins by acquaintances, they didn't seem to attract strangers on the street the way my sister and I did.

Were we freaks? Back then, the thought occasionally crossed my mind. It wasn't until I reached university and actually met a few other Eurasian women that I realised they had all had similar experiences, and that these experiences would keep coming. Even today, meeting someone new all but guarantees a discussion of my race and, inevitably, everyone sees something different. At a conference recently, a woman assumed I was Chinese and when I informed her of my heritage she responded in an offended tone, "but you don't look Eurasian". On another occasion I was at a dinner party and the majority of the guests assumed I was half white and half 'something'. The exact type of 'something' which made up this half became a topic of conversation. Was I half-Japanese, half-Singaporean, half-Burmese?

Compared to many other young, Eurasian Australian women,

my experiences could have been worse. My friend Serena – twenty-nine, fun, friendly and Eurasian – went to a trendy Sydney nightclub recently. While she was dancing with a group of friends, a Caucasian man grabbed her and bit her on the shoulder. Shocked, she could only stare in amazement when he said, "You wanted that, didn't you? Girls like you always do."

"Girls like what?" I exclaimed, slightly scandalised, when she told me. She gave me a wry smile and shrugged.

"Girls like us", she replied. "Eurasians".

No way, I thought at first. And then I remembered my friend Radha's story.

Radha was Eurasian and thirteen. She had just performed in a school play and her Anglo-Australian father was driving her home. It was late, and she was still wearing her stage make-



Jumping Motion Olivia Teh Yuan-Ning

up. For no apparent reason, a police car pulled them over. The policeman shone his torch into her face and inspected her; then asked her father to step out of the car and identify himself. He questioned him about the nature of his relationship with Radha, and the policeman looked sceptical when he said he was her father. The officer went back to the car and spoke to Radha. "Is this man really your father?" he asked her. "Are you in this car willingly?"

Her experience is not something an adolescent girl should have to go through, and it demonstrates the difficulty many people have in realising that blood ties can exist between people who not only look different but, according to the way we categorise the world, appear to belong to two different races. Academics and scientists no longer believe that 'race' exists in a biological or genetic sense. According to the American Anthropological Association, "[e]vidence from the analysis of genetics (e.g. DNA) indicates that most physical variation... lies within so-called racial groups... This means that there is greater variation within

'racial' groups than between them.'" Among academia today, race is almost always referred to as a 'social construct'. Such a perception, however, has done little to alter ideas of racial and cultural authenticity, or racial discrimination and stereotyping. The reality of such stereotyping is played out in the daily experiences of many mixed-race people, who often encounter individuals who seek to deny or disbelieve their bi-racial parentage.

The idea of authenticity also causes difficulties for Eurasians in a variety of national and cultural contexts. In many Southeast Asian countries, Eurasians account for a large number of local celebrities and are praised for their beauty, their glamour, and their enviable fair skin. They are not, however, generally regarded as authentically Asian, or as legitimate representative of their countries. Until recently, in countries like Thailand and Vietnam, which were populated by large numbers of American troops in the seventies, Eurasians were thought of as the children of foreign soldiers and local prostitutes. Countries like Malaysia, furthermore, perceive the popularity of Eurasian models and

actors as a threat to their national and racial identities. In 2007 the Malaysian Information Minister, Datuk Seri Zainuddin Maidin, actually implemented a prohibition on government-owned media corporations using mixed-race models. He also advocated a nationwide ban of their use by private media organisations. The reason for this ban? Because they are "foreign-looking" and therefore not representative of Malaysian culture, regardless of whether they were born and raised in the country. In short, they are not considered authentic Malaysians.

And in Australia? Australia has always had a tricky relationship with race and, in spite of its claims to multiculturalism, this relationship remains uneasy at the dawn of the twenty-first century. Not only does Australia still covertly conceptualise itself as a 'white nation', it also possesses a singularly simplistic view of race and race relations. White is white and black is black. High schools do their best to promote diversity by having multicultural days, when students dress up in their 'national costumes' and wear sashes variously labelled 'Greece', 'Nigeria' and 'Vietnam'.

No provision is made for a child who may have ancestry from all three countries. We throw around phrases like 'fusion cuisine' and 'hybrid fashion' and yet we cannot bear to truly think about the implications of fusion, hybrid people.

Eurasians, of course, have had more publicity than other multiracial combinations in Australia. When I mention the word Eurasian, the stock reaction is often that "all Eurasians are so beautiful!" That is, of course, when someone knows what the word means. Many people I meet don't even know what a Eurasian is. And who can blame them? Apart from references to sexy young Eurasian models, or John Safran's latest sensationalist antics (also about women), Eurasians are not a strong presence in Australian popular culture. And they are certainly not a three-dimensional presence, filled with a human quota of varieties, flaws and dreams. When they do appear in the media, they are beautiful, fetishised young women who ooze a slightly deviant sexuality. No wonder a man tried to bite my friend Serena in a nightclub.

These slightly bizarre ideas of Eurasian beauty and sexuality have ugly racial undertones. An oft-cited psychological investigation conducted in 2005 concluded that Eurasians are more attractive to Asians and Caucasians than either non-mixed race, and this particular study continues to fuel speculation that racial mixing equals sexiness. Reflecting on this study and the attractiveness of Eurasian women, the *Sydney Morning Herald* observes that "A diverse genetic background reduces the risk of genetic mutation. Consequently, we perceive mutts as healthier than thoroughbreds and so find them more attractive." Unfortunately for the *Sydney Morning Herald*, and its attempts at cosmopolitanism, the analogy drawn between mixed-race women and mongrel dogs does not promote a healthy attitude

"You wanted that, didn't you? Girls like you always do."

ideas are internalised by mixed-race individuals themselves. Teenage girls seem particularly vulnerable. A brief survey of questions on the website Yahoo! Answers reveals that Eurasian Australian girls are preoccupied with questions like: "Is being half Asian half white attractive in Australia?", "Guys – do you like half-Asians?", and "I'm half white, half Asian. Do you think I look more Asian, white, or a perfect even 50/50 mix?" While all young women possess some degree of insecurity regarding their looks, the racialised component of these questions is disturbing. Girls should be able to value their beauty for their personal uniqueness, yes, but they should not have to rely on self-exoticisation and ethnic tokenism to do so.

Unfortunately, so long as ideas of racial categories continue to fragment our ability to imagine humanity, many minorities have few choices but to cash in on their 'exotic' appeal. For Eurasian women, this means accepting all the baggage of deviancy, prostitution and foreignness that is implicit in it. It also means a lifetime of answering the "what are you?" question and being told that they are not their parents' children.

Being Eurasian is so much more than the sum of its parts - half this and half that. It is something whole and complete, something new. Being Eurasian is also so much more than being a "mutt". As far-fetched as it might seem, underneath all of the race theory and media hype, to be Eurasian is to be human.

to multiracial individuals.

What is even sadder than this dehumanising image is when these



Siblings Danielle Chiverini

DEFINING 'PARENT' UNDER THE FAMILY LAW ACT - AND WHY IT MATTERS

Maeve Curry examines the broadening definition of 'parent' under Australian law and the impact it has upon same-sex couples

Introduction

Although the Family Law Act 1975 (Cth) (FLA) remains principally concerned with the best interests of the child, it has undergone significant reform to reflect the growing number of non-traditional families and the increasing use of technology in the conception of children in the twenty-first century. The de facto relationship has exponentially increased as a social living arrangement since 1975 and the legal duties under such a relationship have evolved with the enactment of the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth).¹ On the face of the Amending Act, children, regardless of the circumstances of their conception or birth, should have the same rights, protections and privileges to receive proper parenting from either a biological parent, or that biological parent's partner (including a same-sex co-parent), as biological children born to men and women who have been legally married, living in a de facto relationship or who have never lived together.²

Married, opposite-sex de facto and same-sex couples can all access the federal Family Court to resolve matters of parental responsibility and child support after a relationship breaks down. However, some same-sex couples are still disadvantaged, in spite of the recent amendments to the FLA. This essay will consider

the significance of the amendments to the FLA, in particular the expansion of the definition of 'parent' under the Act. Is it merely a matter of semantics, or does the expansive definition of a 'parent' have substantive implications for the reality facing modern families?

Defining a 'Parent' – Why it Matters

Under Australian law, each of the parents of a child under 18 has parental responsibility for the child unless a court order is made to the contrary.³ This responsibility is not affected by any changes in the nature of the relationship between the child's parents. The consequences of not being recognised as a parent under the law affect both the children and the co-parents on many levels. In conceptualising parenthood, it is helpful to distinguish three facets of the status or role: the legal, the social, and the biological.⁴

Prior to the 2008 amendments to the FLA, the co-parent or parent not genetically related to the children of a lesbian couple employing assisted reproductive technology (ART) using donor gametes was excluded from legal parentage. In such families, the children had only one legal parent, namely the birth mother.⁵ Determination of parental responsibility and liability for child support under the Child Support (Assessment) Act 1989 (Cth)

falls exclusively on parents and this legislation applies to parents as they are defined in the FLA. Consequently, in the absence of legal parentage, the birth mother would be unable to pursue child support from the co-mother if the relationship ended. This is certainly problematic when you consider that the rate of separation of lesbian couples appears to be on par with the divorce rate in the general population.⁶ Similarly, parents who had children through surrogacy arrangements did not come under the definition of 'parent' in the FLA. In these families, the gestational mother and her male partner, not the commissioning parents, were the legal parents.⁷

From an emotional or social perspective, without legal authority, non-biological mothers experience difficulties in getting children admitted to hospital or to see a doctor because they cannot prove their maternal identity or their legal right to make medical decisions for the child.⁸ This legal barrier has emotional repercussions for the non-biological mothers whom feel excluded from their children's lives when in the public realm.⁹

There is no denying that same-sex families are prevalent and increasing in number; and as a result, legislation needs to reflect the variety of ways in which individuals and couples become parents to represent the best interests of the child. It is estimated that between 15-20 per cent of homosexual women have children, and that figure

is likely to increase in the near future. There is much less information available regarding homosexual men, but according to US figures, around 10 per cent of gay men are parents.¹⁰

In a major report of the research on lesbian and gay families conducted in 2002 by Jenni Millbank, UTS Law Professor, it was found that the sexuality of a child's parents has absolutely no bearing on their development or well being.¹¹ This report demonstrates that a considerable body of credible social science research on lesbian and gay parents and their children shows convincingly that lesbian and gay parents are 'like' heterosexual parents in that their children do not display any significant differences in development, happiness, peer relations or adjustment.¹²

Legislative Amendments – The Story so Far

In 1983 the FLA was amended to assign parental status to the husband of a birth mother only if state and territory provisions already did so. State and territory laws deemed a husband to be the father of any child born as a result of his wife being artificially inseminated with donor sperm with his consent.¹³ In 1987 the FLA provision was repealed and replaced with a new section (s 60H) which ascribed parental status to the husband or male de facto partner of a birth mother either on the basis of his consent or due to prescribed state and territory laws for children born through ART.¹⁴ However, unlike the state and territory laws that both sever the link to donors and accord parental status to the birth mother and her partner, the FLA only accorded the status to the genetically unrelated parent and did not include provisions severing the relationship with the genetic parent.¹⁵ Consequently, there were varied and inconsistent judicial

interpretations of s 60H.

According to Jenni Millbank, federal law has until now proceeded without any form of coherent or comprehensive definition of 'parent' or 'child'.¹⁶ In October 2008 major reforms concerning family relationships passed Federal Parliament. Significantly, s 60H of the FLA was amended to extend the definition of 'parent' and 'child' to include lesbian parents who have a child through assisted reproductive means and, in more limited circumstances, to include parents who have children born through surrogacy arrangements.

Interpreting the FLA Today

The 2008 amendments to the FLA were intended to ensure that children, regardless of the circumstances of their conception or birth, should have the same rights, protections and privileges under the Act to receive proper parenting as biological children born to men and women who have been legally married, living in a de facto relationship or who have never lived together.¹⁷ However, as detailed below, some commentators and judges have expressed the view that they are unsure that the legislation has had that effect.

The new 60H(1) is gender neutral and provides that if a child is born to a woman through ART then, whether or not the child is biologically a child of the woman and her spouse or de facto partner, the child is theirs and not the child of another

person who provided genetic material. The woman and her partner, as well as any other person who provided genetic material in the procedure must have consented to the carrying out of the procedure. It is clear from this provision that the FLA now recognises both female parents as legal parents in a lesbian family formed through ART.

“Further legislative amendment is essential to clarify a single birth-mother’s status as a parent and to address the legal parentage of children born through surrogacy arrangements overseas.”

The severing provision, s 60H(1)(d) brings the federal law in line with comparable state legislation. However, Millbank points out that this provision appears only in the first subsection of s 60H, relating to women who are in a marriage or de facto relationship.¹⁸ The

provision does not appear in the second and third subsections, which refer to a birth mother who is not a genetic parent and to a man who is not a genetic parent. Thus, Millbank stipulates that it is possible that a single mother who conceived with the assistance of a known donor would still have to contend with the argument that the donor is a parent under the FLA.¹⁹

The new s 60HB deals with children born under surrogacy arrangements, providing that if a court has made an order under a prescribed state or territory law as to the parentage of a child, then for the purposes of the FLA the child is a child of the person or persons. Millbank has pointed out a significant limitation of this provision, as s 60HB only refers to state and territory laws and consequently parentage transfers in surrogacy arrangements granted by courts overseas are not recognised. This leaves the parentage of children born through surrogacy arrangements overseas in a continuing vacuum.²⁰ Further legislative amendments are therefore necessary to clarify a

single birth-mother's status as a parent and to address the legal parentage of children born through surrogacy arrangements overseas.

Case Analysis: Aldridge v Keaton

Aldridge v Keaton²¹ was the first case under the new s 60H. The case concerned a claim by Ms Keaton in relation to a child born to her former partner, Ms Aldridge. Ms Keaton argued she was a parent under the new s 60H. Ms Aldridge claimed that the relationship had ended and that they were merely close friends at the time of both conception and birth. The women were living together at the time of birth but not conception. The case turned upon whether the women were in a de facto relationship within the meaning of the FLA. If they were, then under s 60H Ms Keaton was a parent. The court determined that the relationship in which the consent is given must exist at the time of the conception procedure and thus found the women were not in a de facto relationship at the relevant time.²²

Jenni Millbank has criticised this judgment on a number of counts. Firstly, she points out that the court does not seem to understand that it is only natural and indeed perfectly acceptable for intending lesbian parents to change how they view their parental roles over time. She states:

There is apparently no appreciation here that a lesbian couple (and in particular a lesbian couple within the context of a long-standing absence of any form of legal recognition of the non-birth mother) could jointly conceive and parent a child based on an evolving understanding of each other's roles that

developed over time, or alternately that they could do so based upon a fixed understanding that the birth mother would have a greater say in parenting while the other partner would still be a parent.²³

Secondly, there was little attention given to the 'care and support of children' factor that can be used to determine if the couple are in a de facto relationship. The Federal Magistrate reasoned that the shared early care of the child did not demonstrate co-parenting or a de facto relationship because Ms Keaton's role was unclear and went on to apparently distinguish between 'support' given to the birth mother and 'co-parenting'.²⁴ Millbank finds it very problematic that the Federal Magistrate appears to understand co-parenting as equal parenting, arguing that "there are a great many fathers past and present who do a lot less 'co' parenting than the evidence reveals Ms Keaton did for those first 10 months of the child's life."²⁵ Millbank suggests that in future cases the court needs to be aware of the fact that the social and legal context in which lesbian family planning and parenting takes place differs from the experience of heterosexual families.²⁶

This case has also been criticised by Daniel McGuinness who argues that expense and time was wasted in litigation on the basic question as to whether a de facto relationship even existed was at the detriment of the best interests of the child.²⁷ He suggests that the Commonwealth should have followed the lead of England and New Zealand in conferring a centralised system of voluntary registration for same-sex relationships, which upon registration have equal rights as heterosexual marriage.²⁸ This removes the need to retrospectively determine whether a de facto relationship existed.

Conclusion

In conclusion, under the FLA, 'parent' refers to biological parents who may be married or in a heterosexual de-facto relationship, as well as lesbian couples in a de-facto relationship employing ART, homosexual couples with surrogacy arrangements and couples or co-parents who adopt. The amendments seek to protect the best interests of the child in light of the new reality facing legislators –the increasing number of non-traditional families and the developments in technology facilitating the conception of children provide the necessary impetus for reform. However, the discrepancies in the rights awarded under the legislation remain. Further legislative amendment is essential to clarify a single birth-mother's status as a parent and to address the legal parentage of children born through surrogacy arrangements overseas. Additionally, the introduction of a voluntary system of registration for same-sex relationships would greatly improve the efficiency of the court in deciding these cases. The definition of a parent is thus more than a matter of semantics, but rather goes to the heart of the reconciliation between the traditional and modern perceptions of 'family' and by extension, the rights of parents and children alike.



Shirley Mani

Endnotes:

- 1 Daniel McGuiness, 'Treating Different Cases the Same' (2010) 3 Queensland Law Student Review 73.
- 2 Aldridge v Keaton (2009) 42 FLR 369 at 377.
- 3 FLA s 61C.
- 4 Charlotte Patterson, 'Family Lives of Children Born to Lesbian Mothers' in Charlotte Patterson and Anthony R. D'Augelli, Lesbian, Gay and Bisexual Identities in Families (1998).
- 5 Jenni Millbank, 'De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms', Australian Journal of Family Law (2009) 23 AJFL 160.
- 6 Jenni Millbank, Meet the Parents: A Review of the Research on Lesbian and Gay Families (2002).
- 7 Ibid.
- 8 Fiona Nelson, Lesbian Motherhood: An Exploration of Canadian Lesbian Families (1996).
- 9 Ibid.
- 10 Millbank, above n7.
- 11 Ibid.
- 12 Ibid.
- 13 B v J (1996) 21 Fam LR 186 at 192.
- 14 Millbank, above n6.
- 15 Ibid.
- 16 Jenni Millbank, 'Areas of Federal Law that Exclude Same-Sex Couples and their Children: Research Paper' (2006) National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits I.
- 17 Aldridge v Keaton (2009) 42 FLR 369 at 377.
- 18 Millbank, above n6.
- 19 Ibid.
- 20 Millbank, above n6.
- 21 (2009) 42 FLR 369.
- 22 Ibid.
- 23 Millbank, above n6 at 34.
- 24 Id at 35.
- 25 Ibid.
- 26 Millbank, above n6 at 37.
- 27 McGuiness, above n1.
- 28 Ibid.




COMMUNITY

VISIBLE INVISIBLES:

WOMEN WITH DISABILITIES IN INDIA

Shilpa Das discusses the personal and cultural challenges faced by women with disabilities in India



Last year, I met an official from the Indian Ministry of Women and Child Welfare at a meeting. While talking to her, I asked what kind of programs the Ministry provided for women with disabilities. She said unfazed, “let the Ministry work for normal women first. When a certain threshold is reached, we’ll also consider disabled women.” The significance of this response for women with disabilities in India cannot be underestimated. First, it indicates that women with disabilities are not ‘normal’ women but rather that they are a subordinate group. Second, it says that the concerns of ‘normal’ women should be prioritised. Only after their needs are met can women with disabilities or other ‘not-normal’ women receive attention. Third, it suggests disabled women run the risk of appearing naïve or petulant if they raise questions concerning their welfare. Lastly, and significantly, it reeks of ableism—in its rhetoric, its barely concealed impatience, its assumptions of the ordained hierarchy in the scheme of things and in its patronising tone. This is not to say that the official in question was insensitive, but rather that she was completely unaware of her own ableist approach and way of thinking. The incident serves to highlight the lacunae in policymaking in this country.

Even the discourse and practice of feminism in India overlooks the concerns of women with disabilities. Indian feminists, in theorising about gendered embodiment, reflect upon differences

among women in terms of caste, class and rural or urban domicile but overlook impairment entirely. Similarly, disability theory in India leaves out and subsumes the particular concerns and experiences of oppression faced by women with disabilities in this country. As in other parts of the world, the disabled people’s movement is by and large a male bastion and concerns itself primarily with structural issues that affect men; those of the built environment, and pertaining to education, employment and housing.

“A girl who is born with or acquires a disability is considered a disaster at worst and a liability at best.”

According to the National Census Data of 2001, persons with disabilities in India constitute 2.2 per cent of the population, or approximately 22 million persons. However, the UN’s five per cent worldwide prevalence rate suggests that there are approximately 60 million persons with disabilities in India, and that disability directly impacts the lives of about 600 million Indians. India has more persons with disabilities than the total populations of the UK, Canada and Australia. According to the UN there are 300 million women and girls worldwide with disabilities, most of whom live in developing

or resource-poor countries. About 50 per cent of persons with disabilities in India are women, or roughly 35 million. Only 38 per cent of India’s women go to school. Only 0.5 per cent of women with disabilities receive tertiary education. In India, women constitute only 28.45 per cent of the decision-making bodies, with women with disabilities comprising a mere 3.71 per cent. In addition, 47 per cent of persons with disabilities remain unmarried in India, of which 60 per cent of women with disabilities do not get married compared with 40 per cent of men with disabilities. There are no NGOs in India dedicated exclusively to women with disabilities.

In India, caste, class and domicile combine to render more complex the damaging experience of disability for Indian women. For many of these women their most punishing disability is society’s attitude towards them. Even today, the birth of a daughter often rings in disappointment, or anxiety, and she is deemed a curse or a burden. On top of this, a girl who is born with or acquires a disability is considered a disaster at worst and a liability at best. In our rural areas women with disabilities are kept out of sight because of social taboos and stigma. Such girls are often neglected, abandoned, subjected to name-calling and stereotyping, become victims of taboos and superstitions, are left out of family and community activities (especially religious rites and rituals) and are socially excluded. One girl who lost her vision in her mid 20s says that

she and her family went to great lengths to keep her condition hidden from their neighbours for almost a decade for fear of social harassment. We often find that parents of young girls with disabilities may be overly overprotective, assuming that their daughters by dint of being both female and disabled are doubly vulnerable. All this leads to a tremendous loss of self-esteem in these women.

Studies have established that women with disabilities are also easy prey for sexual abuse and incest within the family. A small survey conducted by US Aid in 2004 in Orissa found that virtually all of the women and girls with disabilities were beaten at home, 25 per cent of women with intellectual disabilities had been raped and 6 per cent of women with disabilities had been forcibly sterilised. Violence against disabled women is a silent act because a majority, such as women with cerebral palsy, do not even realise that they are victims of sexual abuse. The large demand of parents for compulsory sterilisation of mentally retarded daughters speaks volumes about their plight.

Our able bodied culture, which looks upon women with disabilities as flawed, rejects girls with disabilities in the marriage market. They are considered unfit to fulfill the traditional roles of Indian women— of wife, homemaker, and mother—and as not conforming to the stereotypes of beauty and femininity in terms of appearance. The system of arranged marriages and dowry is oppressive for women with disabilities because it means that parents have to give extra dowry if the girl is to marry a non-disabled boy. One woman says, “When my husband told my mother-in-law that the girl he wanted to marry was blind, she started wailing as though he had died.” In that case, the prospective groom was visually impaired too. As it happens, men with disabilities would rather marry a woman without a disability than with a disability, which further de-values these women. Therefore, oppression stems from both non-disabled boys and men and men with disabilities. Even when parents do manage to enable their daughters to get married

after giving a considerable dowry, the stigma of disability looms large and many women report being ignored or ill-treated at home.

Some national studies say that girls with disabilities are not sent to school. Where schools for children with visual, hearing and intellectual impairments are commonly segregated institutions, girls with extensive physical disabilities have even less opportunity for schooling. A few special schools concentrated in large cities have residential facilities, but lack basic amenities such as special toilets, leading many of them to stay away from school. Many girls with mobility impairments say that they do not go to the toilet all day while at school or college. One can only imagine the scenario in our villages. Some girls have mentioned negative and hostile experiences with their teachers including being publicly insulted or threatened with low marks in their exams. Others talk about being refused admission into a school with ‘normal’ students and being kept from joining other children on the playground because they ‘lacked’ something.

Many Muslim girls in particular say that given their community and economic standing, girls with disabilities even when educated are especially discouraged from going out to work. By and large, disabled women earn the lowest wages compared to disabled men or non-disabled women. The inaccessibility of the built environment deters them from moving out of their homes. Some women report being harassed at the workplace, sexually by male colleagues and otherwise by female colleagues; their disability seems to make them a vulnerable or easy target. Despite this, most women shield their families from the discrimination they face, partly because they fear their freedom to leave the house will be curtailed. As a result, these women either quietly put up with such harassment on a daily basis or put up resistance on their own.

The ramifications of disability on the psycho-social wellbeing of these women are damaging and far

ranging. Our society subjects women to both institutional and individual discrimination, something that men rarely experience.

It is imperative that women with disabilities are empowered to bring to light issues rooted in our socio-cultural context that affect them, giving a voice to their experiences, and enabling them to lay down their own definitions of their identities.

One woman expresses the wish to narrate her own account:

“It is not as if we cannot tell people our stories... Earlier, people felt that society is first and disabled people must necessarily follow and society kept them aside. But at some point, every disabled person begins to feel that we must live life on our own terms. We leave behind shame and fear. We don't worry, 'What will society do to us?' Because we know that we have to create a space wherein society will follow us.”



Shirley Mani

COMPENSATORY JUSTICE FOR INTIMATE PARTNER CRIME

Kathleen Heath analyses the compensation scheme that awards state-funded compensation to victims of intimate partner violence

Introduction

The unique and sensitive challenges of intimate partner crime require special recognition within our legal system. In many cases, traditional criminal justice mechanisms alone are inadequate to provide a just legal response to domestic violence and sexual assault.

Statutory compensation schemes operate alongside the criminal law and play an important role in a holistic strategy to address intimate partner crime. This article will focus on the NSW statutory compensation scheme established by the Victims Support and Rehabilitation Act 1996 (NSW) (hereafter the Victims Support Act). This scheme gives practical recognition to victims' rights by creating an entitlement to a government-funded remedy. It is also a more sympathetic and accessible system for many abused women.

The substance of this article is based on interviews conducted with Rachael Martin and Thea Deakin-Greenwood. These women are full-time solicitors at Warringa Baiya, a small community legal centre serving the

needs of Aboriginal women and children who are victims of domestic violence or sexual assault. Their run-down office, nestled in an abandoned hospital in Marrickville and surrounded by a hostile barbed wire fence, does little to reflect the value of the services they provide.

Legislative Outline

The Victims Support Act entitles victims of violent crimes to receive government-funded compensation. Victims Services NSW, a body of the Department of Justice and Attorney General, will compensate a primary or secondary victim for an injury caused by an act of violence occurring during the commission of an offence. For most crimes, the legislation requires proof of a specific compensable injury. Qualified compensation assessors review submissions and determine claims.

An important exception to the requirement of proof of injury exists in the case of domestic violence or sexual assault. The statute recognises those crimes as injuries in and of themselves, and once the acts of violence have been proved on the balance of

probabilities, even minimal proof of harm will give rise to compensation.

Criminal Justice versus Statutory Compensation

The contrast between a criminal and compensatory response to violent crime arises from their distinct theoretical origins. Criminal law is an incident of the relationship between the offender and the state. A government department instigates and controls the prosecution to indicate that the state itself has been injured by the actions of the offender. The process is offender-oriented and the victim is largely incidental to the process.

In comparison, the NSW statutory compensation scheme is entirely centered on the rights and needs of victims. The legislation seeks to acknowledge the suffering of victims, assist their rehabilitation and recovery, and validate their right to compensation.

The criminal justice system is often ill-equipped to deal with the needs of victims of intimate partner violence. "Dealing with intimate partner crime is very different to dealing with

crimes where the offender is a complete stranger,” notes Ms Martin. However, the criminal justice system is not calibrated finely enough to reflect these distinctions. Both Ms Martin and Ms Deakin-Greenwood expressed their opinion about the advantages to abused women in seeking compensation as opposed to conviction through a system more sensitive to their needs.

A failure to report to the police does not bar a legal remedy

Wiringa Baiya frequently handles cases where few or no incidents of domestic violence or sexual assault are reported to police. Sometimes, the only event reported is the very final incident, when a woman approaches authorities at the most desperate stage of her relationship with a violent partner. In other cases, there is no police evidence of violence at all. Unless a third party reports the violence independently, women who are afraid or unwilling to go to the police will have no recourse through the criminal justice system.

One of the reasons for the underreporting of domestic violence arises is a negative perception of the criminal justice system itself. The solicitors at Wiringa Baiya provided anecdotes suggesting that police mishandling of domestic violence deters women from seeking police assistance. Further, there is a lingering mistrust of state authorities in Aboriginal communities. “You frequently speak to women who have had negative experiences with the police,” Ms Martin explained. “Police who were indifferent to their complaints, who didn’t try hard enough to locate the abuser, who didn’t respond adequately to the fears of the women. When news of this spreads, many women start to ask ‘what’s the point?’”

A distinct benefit of the NSW Victims Support Act is that it does not require police reporting or any contact with the criminal justice system. “It gives women a legal remedy even where the criminal law system denies them one,” notes Ms Deakin-Greenwood.

Under section 30 of the Victims Support Act, whether the act of violence was or was not reported to a police officer is a discretionary consideration only. This provides scope for the compensation assessor to recognise the barriers that abused women face in accessing the criminal justice system. In cases

of domestic violence or sexual assault, this discretion must be exercised with regard to the nature of the relationship between the victim and the person alleged to have committed the act of violence (s30(2A) Victims Support Act). The compensation assessor may also consider factors such as whether the victim held any fear of retaliation if they reported, which may be another barrier reporting in cases of domestic violence (s 30(2) (d) Victims Support Act). These provisions create a remedy for women despite the lack of police evidence.

Women are relieved of the guilt of approaching the police

Women often experience guilt and trauma when reporting their partners to the police for domestic abuse. This can be exacerbated by community pressure which is particularly strong in Aboriginal communities. Ms Martin describes the enormous guilt felt by Aboriginal women who are accused of “causing another black death in custody” and “locking up the father of Aboriginal children” if they approach police.

By “siding with the police”, these women are viewed as traitors to their communities. While these concerns are particular to the Aboriginal community in Australia, similar feelings of guilt can be shared by women from all backgrounds, informed by their own context and experiences.

In contrast to the stigma associated with the criminal justice system, claims brought under the Victims Support Act do not carry penal consequences for offenders, thus alleviating victims’ feelings of guilt.

The lower burden of proof makes a compensatory award more likely than a conviction

Domestic violence and sexual assault cases are notoriously difficult to prosecute because of the need to prove the crime beyond reasonable doubt. “These are secret crimes, done behind closed doors,” says Ms Martin, “so there are typically no witnesses”, and the perpetrators are careful to keep it that way. For example, Ms Martin described a case where the abuser would not let his wife out of the house until her bruising went down. Both solicitors frequently come across cases where an

abuser’s psychological manipulation, forced isolation, or threats of retaliation has prevented the accumulation of evidence.

In a claim for compensation, the evidence of violence is assessed on the balance of probabilities. Thus, it is possible for both an accused to be acquitted and for compensation to be awarded, which is a common situation in the cases dealt with by Wiringa Baiya.

As opposed to the criminal justice system, the tribunal is able to look more holistically at all evidence to infer violence. Ms Deakin-Greenwood notes that “the criminal definition of violence is narrow and legalistic, focusing on particular dates and events - that doesn’t fit with what domestic violence is in society. The tribunal is more able to consider a pattern of abuse that existed over a longer period of time, and compensate accordingly.”

Ms Martin recounted a notable example of this greater degree of leniency where a client was sexually assaulted by her father as a child, and now as an adult was seeking legal recourse. The evidence was limited to the client’s own statutory declaration and a statement by her sister who had merely noticed a ‘strange relationship’ between the father and the victim. This scant evidence is characteristic of many of the cases of historic child sexual assault. Nonetheless, the tribunal was willing to accept this evidence and grant the victim compensation.

Both solicitors noted the important symbolic value of a compensatory award, particularly for women who have suffered the disappointment of their abuser receiving an acquittal. “Many of our clients just want someone to believe them,” says Ms Deakin-Greenwood. “I like to hope that an award can help them be better able to deal with the trauma. It is someone in a position of authority saying ‘yes, we acknowledge your experience and the harm you have suffered.’”

A ‘paper trial’ avoids re-traumatisation of the victim

A criminal trial can be an intimidating and daunting experience for women who are required to appear as a complainant. These women risk having both their credibility and character

questioned during cross-examination. They may feel extreme embarrassment, discomfort, or shame when prompted to describe sexual acts. "For most of my clients, they couldn't have gone through the stress of a trial; it was simply never an option," says Ms Martin.

Submissions to the Victims Tribunal are only accepted in written format, making the process for victims less stressful and traumatic. The evidence of the victim is recorded in a statutory declaration that has been drafted privately between the victim and her lawyer. While this method may nonetheless be difficult for the victim, it can be tailored to the needs of each individual to help them feel more comfortable and maintain greater control over the process. "When I say to a client 'you don't have to go to court, you don't have to be interviewed by the police, it's a private process where you only have to speak to me', they are usually very relieved," notes Ms Deakin-Greenwood.

Moving forward: Strengthening access to Victims Compensation

Regrettably, many victim's legal right to compensation may be nullified by a lack of access to and knowledge of the statutory compensation scheme. Currently, two principle problems exist that prevent women from taking advantage of this program.

First, there is a lack of awareness by women of their legal right to compensation. "Police, the Department of Public Prosecutions and court workers are getting better at advising women about victims compensation," says Ms Martin, "but they only have access to women who are already in contact with legal processes." The goal of raising awareness of this legal remedy encouraged Ms Martin to participate in this personal interview.

Second, Victims Services NSW lacks the resources to cope with the current level of applications. Women who apply for compensation generally face a delay of at least one year. According to the most recent Victim's Compensation Tribunal Chairperson's Report in 2007-08, 7031 applications for statutory compensation were received during the review period, but only 4013 of those claims

were assessed. At the time of the report, there were over 10,000 claims pending determination.

The combination of ignorance and long delays in determination of awards may undermine the scheme's potential benefits. A more efficient scheme has the potential to financially empower women trapped in abusive relationships, alleviate their dependency on an abusive partner, and help them make the decision to leave.

Conclusion

The value of the NSW compensation scheme is in many ways what keeps the solicitors at Wurringa Baiya so committed to and passionate about their work. This is a valuable component of the state reaction to victims of domestic violence and sexual assault. However, victims' rights are meaningless without the capacity to access them. Strengthening the network of information access points and increasing the capacity of the tribunal would assist in providing a more just legal response to intimate partner crime.



Tam Caroline Garcia

THE COMMUNICATION CONUNDRUM

Melissa Werry contemplates the role of face-to-face communication in the Digital Age

It may have been dubbed the “information age”, but as Facebook surpasses Google as the most visited site on the net this era could be just as aptly be named the “communication age.” You know what I’m talking about. You’ve felt the rush that accompanies those two little beeps signaling that a message awaits. You’ve battled that embarrassing urge to pay a quick visit to Facebook on your iPhone while out with friends. You gave a moment’s consideration to entering the International Speed Texting Championships before common sense kicked in to tell you that it would be social suicide. But while most of us are texting, friend-requesting and tweeting like neurotic teenagers fearing for their social welfare whilst carted-off on a family holiday, our marginalized groups are pushed even further to society’s edges by the cultural infiltration of social media.

The compulsive need to be constantly connected to our friends in the cyber world coincides with a decline in face-to-face interaction with people in the real world. This constitutes one of the great paradoxes of our communication obsessed society. While walking home through the city recently, a few homeless guys chatting on the street asked me how my day had been. To be honest with you, usually I would have made some elaborate gestures at my watch and kept walking, but perhaps the sun was shining particularly brightly that day and I stopped for a chat with the old fellas. This seemed to shock them; apparently most of us are veterans of the watch dance, for they told me that I was the first of ten passers-by who had actually ventured a response to their friendly inquiry.

The decline of face-to-face communication is particularly disturbing in light of new research by the Social Policy Research Centre which reconceptualises conventional understandings of what it means to be “living in poverty”. The report, *Towards New Indicators of Disadvantage: Deprivation and Social Exclusion in Australia*, reveals the inextricability of severe economic disadvantage and social isolation, encouraging us to expand our definition of poverty beyond mere material deficiency, to also encompass relational deficiency. Similarly, the United Nations Educational, Scientific and Cultural

Organization notes in its report on Social Capital and Poverty Reduction that ‘the first step of the ladder [to social equality] is at the micro-level, beginning with belonging to a family, a group, and a community of people who help and support each other. Humans are both the means and the ends of development.’

We do not need Twitter to tell us that humans are relational beings. Report evidence supporting the benefits of re-engaging socially isolated individuals is in line with our understanding of human nature. For so much of our happiness, identity, and sense of self-worth are derived from our relationships. While our personal interaction increasingly takes place in social media forums, the chances of rehabilitating the disadvantaged through social inclusion grow dim. Those who experience marginalisation are unlikely to encounter opportunities that will enable them to develop the interpersonal skills needed for proper social integration, let alone the skills needed to impress an employer in an interview. It is even more unlikely that Bob who sleeps under the bridge and whose property boundaries extend to the edges of a shopping trolley is going to possess the necessary technological know-how to participate in online social forums, hence magnifying the exclusion of those already living below the poverty line.

Ironically, while the robust social justice program at our own university testifies to the passion of young people in their efforts to combat social disadvantage, the young are also the primary promulgators of the communication trend. In fact, much of the interaction of our youth with non-government organisations and social equity programs occurs in an online capacity (I cannot deny that I have experienced a moment of guilty frustration at receiving yet another Facebook invitation to sign the Act to End Poverty). While online forums are an invaluable means of raising awareness and rallying support against injustice, they may actually contribute to the problem of social inequity by distracting our focus from the real human faces on the other side of the action. Let us not allow the importance of real life interaction to be lost in the competition

of how many members a Facebook group can attract.

Australian Indigenous Mentoring Experience (AIME) is one organisation that has tapped into the power of human relationships to rehabilitate the disadvantaged. The AIME program involves partnering Australian Aboriginal high school students with university students of all backgrounds. The goal is to encourage the Indigenous students to persevere in their studies and to draw out the latent talents of these youth. The statistics speak for themselves: in 2009, the national university participation of Indigenous Australians was 1.25%, compared to the 38% university admission rate of those Indigenous youths who had been involved in AIME. The program is proof that targeting social disadvantage from a real life, relational basis might provide a longer term solution than providing material and financial help alone. Social rehabilitation of the underprivileged works to equip them with vital interpersonal skills, or in some cases, simply a healthy dose of self-confidence, to successfully enable individuals to function within their society and secure material needs for themselves. Last week I decided it was time to practice a little of what I preach. A couple of friends and I took to the streets with a McDonalds family dinner box in hand and invited Ron, a homeless guy we met on the steps of Town Hall, to dine with us. What our dinner party lacked in elegance, it made up for in entertainment value, as Ron turned out to be quite the comedian. I hardly got a word in the whole night, but was beguiled by a stream of riotous stories from our new friend. I did not even realise that I had left my mobile phone at home until after we had bid him farewell. We’ve all got a story, some of us just need an ear to listen.





IMMIGRATION DETENTION AND MENTAL HARM

Sarah Schwartz considers the psychological trauma that can result from mandatory detention of asylum seekers

In 2001 detention centre health staff and Westmead Hospital specialists wrote 13 letters to the Minister of Immigration describing the severity of a young boy's psychological state as a result of his experiences in Woomera and Villawood detention centres. The letters urged the Department of Immigration to remove the boy from the traumatising detention environment. Upon receiving the ministerial minute prepared by his staff, the Minister of Immigration Phillip Ruddock returned the paper with the handwritten word 'Bucklies' (sic). In other words, the young boy Shayan had no chance in the world of receiving any sympathy from the Department of Immigration. This was nine years ago, what has changed?

The detainment and systemic exclusion of illicit migrants, asylum seekers or refugees who arrive on Australia's shores in search of a better life has become an established practice since the formalisation of a mandatory detention policy in 1992 under the Keating Government. However, there is an increasing amount of evidence emerging which demonstrates that the detention environment imposed on 'unlawful non-citizens' under s189(1) of the Migration Act 1958 (Cth) is a direct contributor to psychological stress which has led to increased rates of suicide, self-harm, and psychological conditions for detainees.

The Case of Shayan Badraie

After fleeing religious persecution in Iran, Shayan Badraie and his parents arrived in Australia by boat in March 2000. Upon arrival, they were taken to Woomera Detention Centre where they were held for one year before being transferred to Villawood. Shayan spent a total of 17 months in immigration

detention, during which he developed severe psychological injuries. During his time in Woomera, Shayan witnessed a number of traumatic events including three days of rioting involving hunger strikes, fires and the use of tear gas and water cannons; acts of intimidation by other detainees towards his family; and an adult detainee slash his own chest with a shard of glass and attempt to jump from a tree. Shayan soon began to exhibit symptoms consistent with post-traumatic stress disorder (PTSD) including "bed wetting; sleep disturbance; repeatedly drawing fences with himself and his family portrayed within them; social withdrawal; nail biting; and aggression at school." After relocation to Villawood in 2001, Shayan witnessed what came to be regarded as the precipitating event for his further deteriorating condition. Whilst playing with a friend, Shayan discovered a male detainee in the aftermath of a suicide attempt. Following this incident, Shayan became increasingly withdrawn and mute. Upon admittance to Westmead Children's Hospital, a child psychiatrist drew an undoubted correlation between Shayan's experience in detention and his deteriorating mental health.

Soon after the release of Shayan's family from the detention environment, they were put in touch with lawyer Rebecca Gilsenan of Maurice Blackburn in order to launch what would soon become a landmark legal action against the Federal Government in the Supreme Court of NSW. Gilsenan stated:

Mine and the firm's motivation was a little bit broader than Shayan. Refugee camps in Australia had been overcrowded since the late 1990s, and various people interested in refugee rights had tried to make attacks on the system. We knew that

mental illness was widespread, particularly in the child population. We were interested in Shayan's well-being as an individual, but the broader issue was whether this was another way in which we could make an attack on the ways people were being kept in detention. If we won our case and the Commonwealth had to pay compensation, it would mean that they might have to think carefully about the circumstances in which they kept children in immigration detention.

The Legal Rights of Asylum Seekers

The Commonwealth government owes a non-delegable duty of care to provide adequate mental health services and psychiatric care to immigration detainees. If the government fails to comply with this duty, they may be liable for negligence under tort law.

On the 29 August 2002 the Human Rights and Equal Opportunities Commission (HEREOC) investigated Shayan's treatment in Woomera and Villawood. HEREOC found that Shayan's detention had breached a number of articles of the Convention on the Rights of the Child. However, due to the unenforceability of international law in Australia, the Federal government was able to deny HEREOC's findings and decline to follow its recommendations. As Gilsenan said, "The government couldn't care less that it was breaching human rights; in fact, it was probably a 'badge of honour' for them showing that they were being tough on refugees". Ultimately, a claim in tort law against the federal government led to a gruelling thirteen weeks of trial and an out of court settlement of \$400,000 awarded to Shayan Badraie for psychological harm.

The case was not an attack on the policy of mandatory detention but about the way in which mandatory detention was carried out. It was “about the way that the system failed to protect Shayan, failed to place him in a proper environment and then continued to disregard his welfare even after being told by independent and expert medical practitioners of the harm that was being done to him.”

Shayan was not the only person to witness the traumatic events in Woomera and Villawood. Undoubtedly, countless others have witnessed traumatic events in detention centres and their mental health has suffered because of it. “I think it would be fair to say that very few people came through detention centres during that period of time and were unscathed,” claims Rebecca Gilsenan. The majority of these people will never have the opportunity to bring legal actions against the federal government for their mistreatment. Not only does the Civil Liability Act limit the scope of claims for psychiatric illness but many detainees are completely unaware of their legal rights. Gilsenan recalls that, “their English was already limited, they couldn’t understand the system. It was such a stress, the system really lacked transparency and the people were already vulnerable, I think it was very dehumanising and frustrating for them.”

The Culture of Detention

One of the paramount objectives of Australia’s detention system is to deter illicit migration. Accordingly, those who violate Australian law by unlawfully entering the country are seen as receiving their ‘just deserts’. Gilsenan recalls that “Shayan and his family were victims of a very hardline attitude. There was a culture of trying to ‘keep them out’ and being tough on refugee claims. They were seen as ‘fakers’ and ‘queue jumpers’ and people looking for a better life and somehow if they got their better life in Australia, it would detract from the very high standard of living that we have.”

The Change

The success of the Badraie case and the actions of other activists at the time saw a significant change in attitudes towards illegal immigrants. In June 2005, in response to pressure surrounding the detention of children, the Government amend-

ed the Migration Act to ensure that children would only be detained as a ‘last resort.’ Furthermore, in 2008, Immigration and Citizenship Minister Chris Evans announced the end of the Australian government’s practice of indefinitely detaining all unauthorised non-citizens.

While these changes represented a significant shift in the tone of governmental policy towards illegal migrants, mandatory detention has remained as a key component of strong border control for:

- all unauthorised arrivals, for management of health, identity and security risks to the community
- unlawful non-citizens who present unacceptable risks to the community and
- unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

While this considerable shift in policy has, to a great extent, aligned on-shore processing centres with the federal government’s human rights obligations there is an increasing concern about the transparency of off-shore processing centres such as Christmas Island which has been in operation since 2006. Christmas Island is modelled on a high security prison and has been described as a “Guantanamo Bay-type institution, where electric fences and microwave probes detect movement; there are camera systems posted under eaves, on roofs and in every room; and the whole camp is linked by CCTV to a remote control room in Canberra.” Asylum seekers who arrive on Christmas Island are barred from the refugee status determination system that applies to mainland detention centres. They have no access to the Refugee Review Tribunal, which provides other refugees with an avenue of administrative appeal, and very limited access to the Australian courts. Ultimately, they are even more invisible than Shayan and his family.

It is clear from the statistics of self-harm, suicide and abuse amongst the detainee population that the indeterminate nature of immigration detention and the prison-like conditions are both disabling and disempowering. In the words of a detention centre detainee:

Since the moment we arrived in the detention centre, we have forgotten what happiness and laughter means, and scenes of

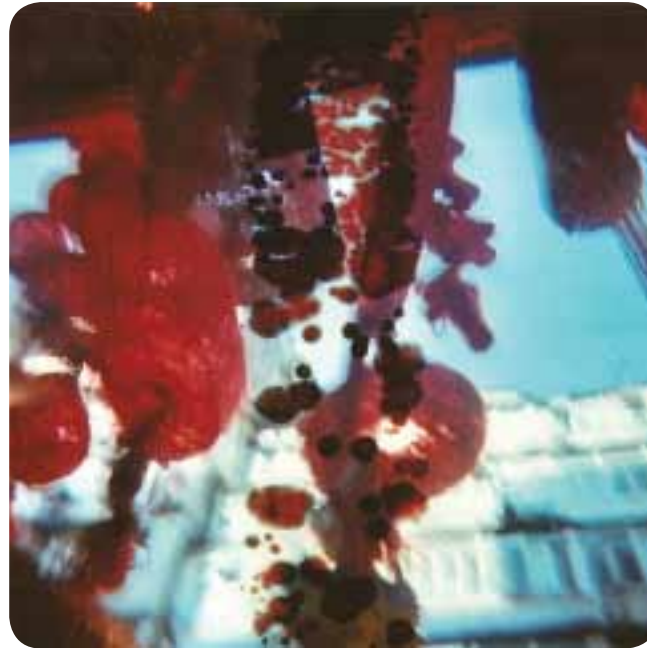


suicides; death and terror make us more depressed. I think the world has forgotten me...I am talking about a true prison, where thoughts are killed and death is always knocking at the door.

In his submission to an Australian Senate inquiry, psychiatrist Dr Jureidini (2005) wrote:

I know of no other cohort where such universal mental ill-health has been demonstrated. Parents have been crippled by their experiences to a point that they could not protect their children, and all children have been damaged by having witnessed frightening violence and adult self-harm. Most single men who have been in detention for longer periods of time are grossly damaged. Their characteristic coping methods (eg, working, camaraderie, exercise) co lapse after 1 or more years. Gradually protest and self-harm emerge, only to be replaced by withdrawal, with men isolated to their rooms, ruminating unproductively about their misfortune or the future and with grossly disrupted sleep and other bodily functions.

Dr Howard Gorton, a former Baxter psychologist claimed in an



Images by Juliet Lui

ABC Four Corners interview:

The people I saw and treated at Baxter were the most damaged people I've seen in my whole psychiatric career. Up until that time, I'd never met an adult-onset bed wetter. I'd never met someone with psychological blindness.

A study conducted in 2004 found that refugees who have spent time in detention have twice the risk of depression and three times the risk of PTSD when compared with refugees who have not spent any time in detention. Furthermore, the risk of depression increased by 17% for each additional month spent in detention.

Where to from here

There is no doubt that Australia needs to employ strong methods of border protection to ensure the health, safety and security of its citizens. However, there must be a balance between state security and the human rights of refugees and asylum seekers who come to Australia's shores. While the new immigration detention policy announced by Immigration and Citizenship Minister Chris Evans in 2008 represents a positive step towards protecting the rights of illegal immigrants, there is still more to be done. Of particular concern is offshore processing centres that are less open to scrutiny and which organisations such as HEREOC are unable to analyse.

The serious consequences of immigration detention on the psychological wellbeing of detainees need to be recognised by the Australian Government. "The focus should be on ensuring that if people do arrive and seek asylum in Australia, we treat those people fairly and humanely."

FEMALE GENITAL MUTILATION: FEARING THE WORST

Meredith Simons considers the unique vulnerabilities of girls who claim refugee status on the basis that they are at risk of forced female genital mutilation

Female genital mutilation (FGM) is the collective name given to all procedures involving the partial or total removal of the external female genitalia, or other female genital organs, carried out for non-medical reasons. It is estimated that between 100 and 140 million women worldwide have undergone FGM, with approximately three million girls at risk every year. As FGM is mostly, albeit not exclusively, carried out on girls under the age of 15, it is a useful case study for analysing the way in which the fact of childhood is relevant to refugee processing. Many countries now accept that a girl seeking asylum because she has been compelled to undergo, or is likely to be subjected to, FGM can qualify for refugee status under the 1951 Convention relating to the Status of Refugees ('the Refugee Convention') and its 1967 Protocol. While the importance of gender has been increasingly recognised, inadequate consideration has been given to how the fact of childhood impacts on the substantive and procedural rights of the young girls who claim protection.

This paper will analyse the importance of childhood in four different aspects of an FGM-based refugee claim. This will be done by comparing the recently published UNHCR Guidance Note on Refugee Claims Relating to Female Genital Mutilation ('2009 Guidance Note') with jurisprudence from Australia, the United Kingdom, the United States and Canada. First, it will consider the Article 1A(2) requirement of 'persecution' and demonstrate that the fact of childhood has had little relevance in these areas in cases to date. Secondly, it will consider the Article 1A(2) requirement of 'well-founded fear' and show that the fact of childhood is of critical importance in relation to this element. Finally, it will analyse procedural issues raised by an applicant's status as a child. Interwoven into the analysis will be a consideration of the intersection between the Refugee

Convention and the Convention on the Rights of the Child ('CRC'). As will be shown, it is only by adopting a child-centred approach to all aspects of the refugee determination process and giving express consideration to the rights articulated in the CRC, that girls at risk of FGM can be comprehensively protected.

Acceptance of refugee claims based on fear of FGM

Claims for refugee status by girls who fear being forced to undergo, or have already been compelled to undergo, FGM have been accepted by courts around the world. Such decisions have been made in Australia, the United Kingdom, the United States, and Canada. This jurisprudence is clearly consistent with the opinion of the UNHCR, most recently expressed in its 2009 Guidance Note. The trend in jurisprudence is a welcome sign that the Refugee Convention is being treated as a living instrument and that girls are being protected without express reference in the Article 1A(2) definition to gender or age. However, many cases fail to adequately address the relevance of childhood in FGM-based claims. The lack of extensive consideration raises concerns that decision makers and courts are applying an adult-centred approach to FGM-based claims and perhaps marginalising the unique experiences of young girls. This in turn invites analysis of the importance of the fact of childhood in the substantive and procedural elements of refugee processing.

Substantive Issues

Persecution

In many refugee cases concerning children, it is important to consider that actions or threats that might not qualify as

persecution in the case of an adult may do so in the case of a child. While this is undoubtedly true, the 2009 Guidance Note makes it clear that the potential and actual harm caused by FGM is so serious that it must be considered to qualify as persecution, regardless of the age of the claimant. In the short-term, all victims of FGM experience excessive bleeding, severe pain, shock and psychological trauma. As the procedure is often undertaken using rudimentary tools and in unhygienic circumstances, FGM also commonly leads to infections, urine retention, damage to the urethra and anus, and even death. It is clear that FGM inflicts severe harm. In the UK case of *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412, as in most contemporary cases, both parties conceded that the threat of being forced to undergo FGM amounted to persecution. Further, the statutory requirement in Australia that the harm must involve systematic and discriminatory conduct is also satisfied. As established by the Australian Refugee Review Tribunal in *RRT N97/19046* (1997), which involved the FGM-based claims of a Nigerian woman and her 18 month old daughter, FGM is done to women rather than men to repress unbridled female sexuality and in turn maintain the position of men as the rulers of society.

While a consideration of childhood is thus not necessary for a claim to be successful, a child-centred approach to refugee processing ought to explicitly recognise that FGM violates a range of human rights enumerated in the CRC. For example, in the case of *Khadra Hassan Farah* the Canadian Immigration and Refugee Board found that FGM as practiced in Somalia violated the right to protection from physical and mental violence and to the highest attainable standard of health contained in the CRC. In the most extreme cases, FGM may also violate a child's right to life. Of particular importance is Article 24(3) of the

CRC, which specifically requires States Parties to work to abolish traditional practices prejudicial to the health of children and this undoubtedly includes FGM. Further, the overarching principle of the CRC is that of the best interests of the child, as articulated in Article 3. This principle demands that harm be assessed from the child's perspective, taking into account their unique vulnerability. As FGM is predominantly carried out against children and may thus be characterised as a form of child-specific persecution, the CRC should be used to compliment the Refugee Convention to ensure a holistic approach to the protection of girls at risk of FGM.

Well-founded fear

An approach to refugee processing which does not explicitly recognise the fact of childhood is perhaps most problematic when considering the requirement of 'well-founded fear'. This requirement is comprised of both an objective and subjective component. In FGM-based cases, the objective component will almost always be satisfied. However, the subjective element may be inappropriate. As Crock emphasises, 'young children may be exquisitely vulnerable, yet incapable of expressing any fear'. This inability of a child to express subjective fear should not be a barrier to recognition of refugee status. In its 2009 Guidance Note, the UNHCR expressly dealt with this issue, acknowledging that 'it can happen that a girl is

unwilling or unable to express fear, contrary to expectations'. This may occur for two main reasons, each of which will require a different response.

First, because of a child's underdeveloped cognitive state, a young girl could be unaware of or not fully understand the harm that FGM entails. The 2009 Guidance Note concludes that in such circumstances, it is up to a decision maker to make an objective assessment of the risk facing the child, regardless of the absence of an expression of fear. Further, when this fear is expressed on behalf of the child by the parent or caregiver, it may be assumed that the fear of persecution exists. Many countries have accepted this modification of the refugee definition for children. In Australia, the RRT's Guidelines on Children Giving Evidence explicitly acknowledged that 'child applicants in a refugee matter may not be able to express a subjective fear of persecution in the same manner as an adult applicant.' Although this provision has not been carried forward into the RRT's Guidance on Vulnerable Persons which replaces the former guidelines, child applicants are recognised as being vulnerable and as such in need of special procedural and evidentiary safeguards. Further, Australian cases in other contexts have supported the UNHCR approach of looking to the parents' fears on behalf of the child. In *Chen Shi Hai v MIMA* (2000) 201 CLR 293, a case involving a three year old boy who was a 'black child' under the one child policy of the People's Republic of China, no point was taken that



by reason of his age and circumstances the child lacked the fear necessary to bring him within the Article 1A(2) definition of refugee. Rather, it was accepted that his parents' fears on his behalf were sufficient. By analogy, an absence of fear should be no bar to a finding of refugee status in cases of girls threatened with FGM.

Secondly, because FGM is a deeply embedded social rite in many societies, which is seen as ensuring the purity of girls and marking their entry into womanhood, girls could accept and welcome going through the procedure. Article 12 of the CRC provides that States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child. This is undoubtedly an important consideration in refugee cases given the tendency for children to be 'invisible' in the determination process. However, even in FGM cases where there is an apparent agreement or desire by girls to undergo the procedure, the influence of social pressure and community expectations must be addressed. Where a girl's compliance stems from her aspiration to be accepted as a full member of her community, her decision to undergo FGM may not be informed or free of coercion. Much will depend on the age and maturity of the child. While a strong view expressed by a 17 year old should be given substantial weight by a decision maker, a strong view expressed by a younger child may need to be overridden by an objective assessment of the risk facing the child. This approach is consistent with the fact that the best interests of the child principle informs the application of all other provisions of the CRC.

Procedural Issues

Identifying the independent claims of children

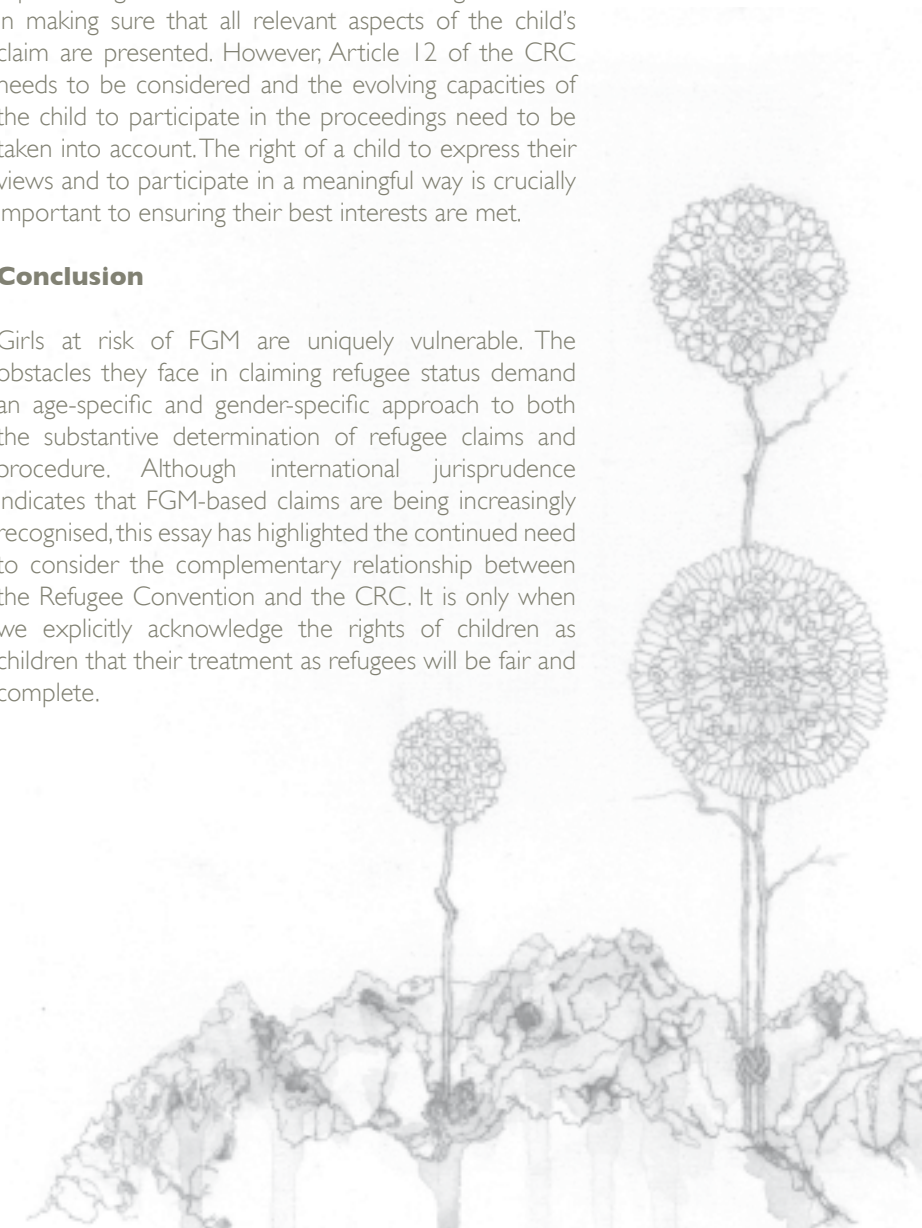
Perhaps one of the primary reasons that a child-centred approach has not been taken in many FGM-based claims, is because the young girls in need of protection are often not given an independent voice. While unaccompanied and separated children are obviously at risk, Carr argues accompanied children are also vulnerable to being rendered invisible in refugee proceedings. A number of scenarios Carr outlines can be usefully applied to FGM cases to demonstrate the need for every girl to be independently assessed. The first is when an accompanied girl has the same status and interests as her mother. For example in RRT N97/19046 (1997), a woman and her 18 month old daughter both claimed refugee status on the basis that if they were returned to their tribe in Nigeria they would both be subject to FGM. In that case, the RRT treated the mother as the primary applicant and the child's claim was subsumed within that of her mother and the child's status as a refugee was derivative. In such scenarios, the child is often an invisible participant in proceedings but fortunately has a high likelihood of being protected. However, it should not be assumed that all cases are so straightforward.

The second scenario raised by Carr is where the girl and parent have aligned interests but conflicting statuses. For example, imagine that the mother in RRT N97/19046 (1997) claimed refugee status on the basis of her political opinion rather than fear of FGM and failed to raise the independent claim of her daughter. The parent may be opposed to FGM but if the daughter's claim is subsumed within that of the parent and the parent is then denied refugee status, the daughter will also be denied refugee status without her true claim being assessed. This scenario reveals the importance of ensuring that each girl at risk of FGM has an independent claim to

refugee status. Even a young girl accompanied by her parents can be the principal applicant, and this may be the best way to ensure protection of the child. If the child is very young, the parent, caregiver or other person representing the child will have to assume a greater role in making sure that all relevant aspects of the child's claim are presented. However, Article 12 of the CRC needs to be considered and the evolving capacities of the child to participate in the proceedings need to be taken into account. The right of a child to express their views and to participate in a meaningful way is crucially important to ensuring their best interests are met.

Conclusion

Girls at risk of FGM are uniquely vulnerable. The obstacles they face in claiming refugee status demand an age-specific and gender-specific approach to both the substantive determination of refugee claims and procedure. Although international jurisprudence indicates that FGM-based claims are being increasingly recognised, this essay has highlighted the continued need to consider the complementary relationship between the Refugee Convention and the CRC. It is only when we explicitly acknowledge the rights of children as children that their treatment as refugees will be fair and complete.



‘Can and should the state BE HELD RESPONSIBLE FOR male-on-female violence?’

ELIZABETH CHAN explores whether international law can be applied to the field of domestic violence against women

Violence against women in the home is often treated as a private matter, beyond state interference. Despite the prevalence and severity of domestic violence, states have not reacted with urgency. In many countries, there is a lack of legislative protection, political commitment and resources to tackle this problem. Yet states are rarely held accountable for this crisis in their criminal justice systems. How can international law assist victims of domestic violence? I explore the possibility of ‘public’ international accountability for ‘private’ violence against women in three parts. First, I critique the deficiencies of many national legal systems in responding effectively to male-on-female violence. Second, I consider how international law may provide a solution through innovative human rights jurisprudence. Finally, I advocate the value of this international accountability in delivering justice to victims of domestic violence.

State Responsibility for Private Violence in Domestic Law

States are often reluctant to take responsibility for private violence. The orthodox position is that domestic violence is a harm that only private actors (the individual perpetrators) are legally responsible for. This belief stems from the western liberal philosophy that the individual should enjoy autonomy in the private sphere with minimal state intrusion. Thus, the law treats the family, the home and the couple as a singular entity, a “black box” into which it will not purport to peer.

This privileging of individual autonomy effectively excuses the state from taking responsibility for private violence against women and translates into a hands-off approach concerning domestic violence. The lack of regulation of the private sphere is manifested in the absence of laws that specifically condemn domestic violence in most countries. As of 2006, the majority of the world’s states did not have legislative provisions combating domestic violence. But even in countries where there are laws specifically addressing domestic

violence, institutional apathy on the part of the police and the courts to enforce these laws renders them effectively redundant. There is often a lack of political will, resources and capacity to implement these laws.

The implications of not protecting women from domestic violence are serious. The preservation of the home as a private sanctuary masks the gender imbalances that often exist within families and excuses the state from taking action to rectify them. Far from being a place of refuge and safety, the family can sometimes be a “cradle of violence”. Women are disproportionately victims of physical, sexual and emotional abuse perpetrated by male family members. Yet these instances of “intimate violence” are often trivialised and condoned by the community as mere “chastisement” or “discipline”. Rhonda Copelon argues that stripped of “privatisation, sexism and sentimentality”, domestic violence is just as serious as other forms of degrading and inhuman treatment. State passivity in protecting women from domestic violence both entrenches and perpetuates the cultural acceptance of violence. It permits perpetrators of domestic violence to act without impunity and encourages victims to tolerate such violence as being natural or commonplace.

This public/private dichotomy has also fostered ambivalence of the courts towards holding states accountable for failure to protect victims of private violence. In *Town of Castle Rock v Gonzales*, the United States Supreme Court held that the state did not have a general duty to protect individuals from private acts of violence. A majority of the Court held that the police were not liable for failing to enforce a restraining order against the plaintiff’s husband even though this gave him the opportunity to murder their three daughters. Granting discretion to the police over whether to enforce a restraining order contrary to the specific statutory mandate compelling police to arrest violators of restraining orders weakened incentives for the police to properly investigate victim claims and set a precedent that limited the state’s accountability for harm caused

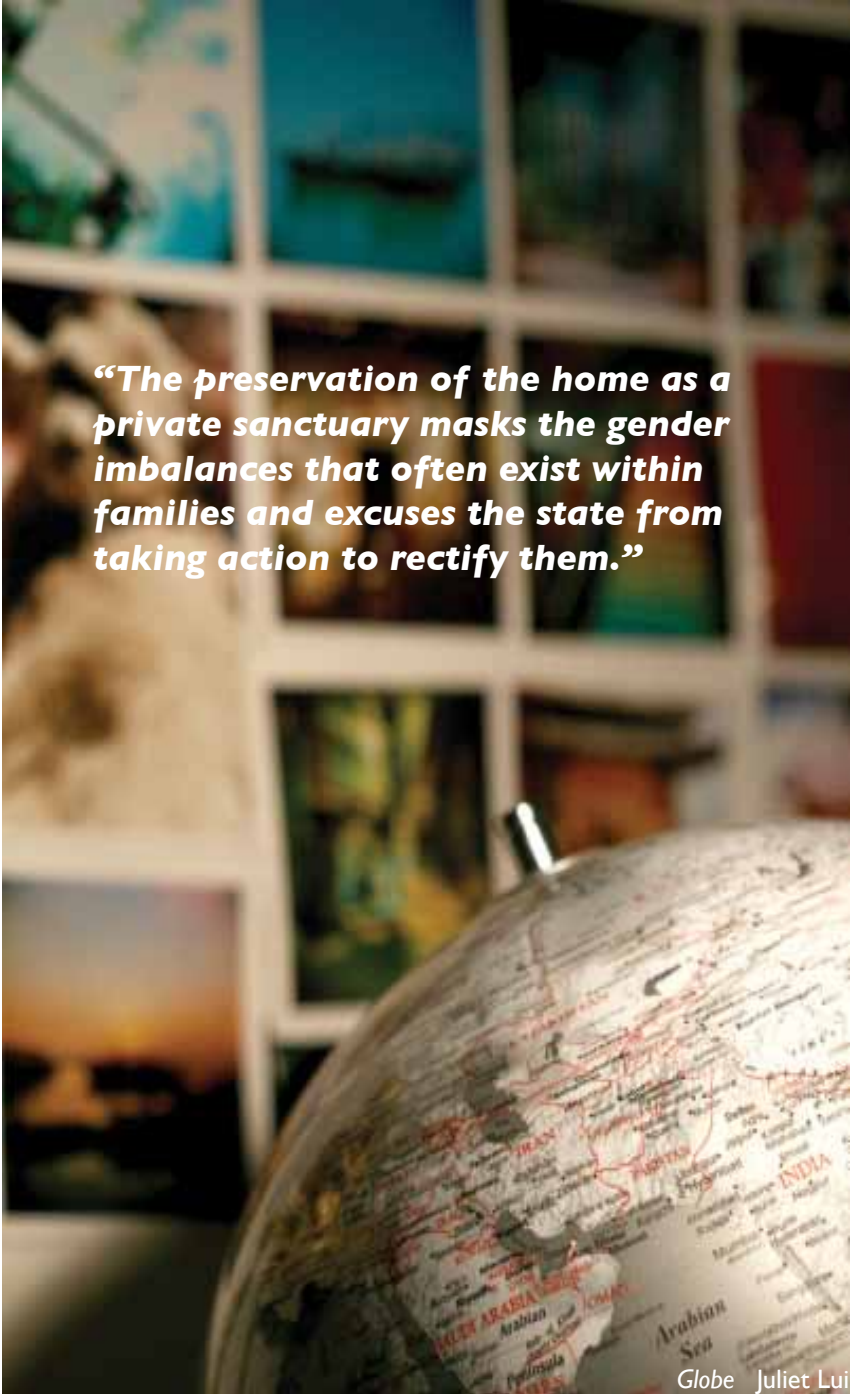
by domestic violence.

The irony is that the state is both part of the problem of domestic violence as well as the main institutional body with the resources to expose and attack it. Reliance on the state to regulate itself is problematic. In particular, reluctance by national courts to hold the state accountable for inadequate responses to male-on-female violence suggests that some external intervention may be necessary.

State Responsibility for Domestic Violence in International Law

The development of a gender-sensitive international human rights approach has ruptured the public/private dichotomy by expanding state accountability for the violent acts of ‘private’ individuals. International monitoring bodies are increasingly willing to formulate in concrete terms the nature and extent of states’ obligations to enforce women’s human rights. In particular, international law has focused on the duty of states to appropriately punish and deter domestic violence. I examine three legal developments which have contributed towards an expansive notion of state responsibility for private violence against women: the ‘positive duty’ doctrine, the limitation of state discretion and the ‘due diligence’ threshold.

Regional human rights courts have been prepared to impose a duty on states to actively protect women from abuse. Such a positive duty would require states to intervene in the private sphere to prevent, investigate and punish perpetrators of violence against women. In *Opuz v Turkey*, the European Court of Human Rights (ECtHR) imposed a duty on the police to protect a woman’s right to life. Given the police’s knowledge of the defendant’s history of violence, the Court held that the subsequent fatal attack on the victim was foreseeable and that the police should have intervened. The Turkish authorities argued that they did not want to interfere



“The preservation of the home as a private sanctuary masks the gender imbalances that often exist within families and excuses the state from taking action to rectify them.”

with a “private” family affair and that in any case, the plaintiffs had withdrawn their complaints against the defendant. The Court held that this response was unacceptable. The police knew that the victims had dropped their complaints for fear of the defendant’s death threats; rather than seeing this as a compelling reason to prosecute the defendant, the police treated it as an excuse to do nothing. The Court held that the legislative framework should have enabled the police to prosecute the defendant, regardless of whether the complaints had been dropped. In this way, the Court was requiring the state to intervene in citizens’ private lives in order to safeguard victims from domestic violence.

International legal bodies have not only imposed a general duty on states to respond effectively to private violence claims, but have also articulated standards for appropriate responses to male-on-female violence. At the ECtHR, the “margin of appreciation” operates to give states broad discretion as to how they fulfil their human rights obligations. However, the ECtHR has not recognised the state’s discretion in the context of certain liberties, such as the freedom from inhuman treatment. In *MC v Bulgaria*, the ECtHR held that freedom from inhuman treatment required the penalisation and effective prosecution of rape, without the need for the victim to adduce evidence of physical resistance. The ECtHR condemned Bulgarian legislation’s “undue emphasis” on the requirement of “direct” proof of rape (such as physical resistance) rather than on the more important issue of consent.

By prescribing the minimum content of a criminal law provision, the limiting of state discretion provides a second way of strengthening protection against domestic violence. The ECtHR’s refusal to apply a proportionality analysis in situations of violence against women by private actors is significant because it means that states cannot use their discretion to enact legislation that imposes burdensome evidentiary thresholds on victims or otherwise disadvantages women. Although the ECtHR’s decision may be regarded as a serious challenge to state sovereignty, this would seem justified in order to place a heavier responsibility on the state to safeguard women’s human rights.

The Committee on the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) has also applied a ‘due diligence’ test to assess states’ obligations concerning domestic violence. This requires states not only to pass legislation protecting women from private violence, but also to implement these policies to a reasonable standard. Additionally, the fulfilment of due diligence requires states to address the root causes of domestic violence through public education campaigns, the provision of services such as counselling, shelter and crisis support for victims and effective prosecutions of perpetrators in the courts. Arguably, this doctrine imposes a much broader duty on states to combat domestic violence, with a view to changing discriminatory societal attitudes, not just the law. In *Yildirim v Austria*, the Committee held that such broad based solutions to domestic violence were necessary to allow victims of domestic violence to enjoy the actual realisation of their right to gender equality.

Globe Juliet Lui

The Values of International Accountability

The availability of international law as a recourse for victims of domestic violence to obtain justice is significant, especially where national judicial systems fail to provide accountability. It has important implications for individuals, states and the international community.

International accountability for private violence against women can provide a meaningful avenue of legal redress for victims. Achieving a positive institutional response through the courts can empower domestic victims and give them an identity as "rights-defined" subjects who have the power to enforce their legal rights. The right to appeal to regional human rights courts provides victims with an opportunity to vindicate their rights against the state. After the US Supreme Court's ruling in *Town of Castle Rock v Gonzales*, the plaintiff, Jessica Gonzales, appealed to the Inter-American Commission of Human Rights (IACHR). The IACHR agreed to hear her claim. For Gonzales, this was a significant milestone. She said, "I was not heard in my own country so I had to go to an outer body to be heard, to help the United States understand how it failed me and my children". She argued that appealing to the IACHR was the only viable option for holding her government accountable and ensuring that her personal tragedy was not repeated. However, it is worth remembering that individual appeals to regional human rights courts are not practically and financially accessible for most victims of domestic violence, for whom the national criminal justice process will be their first and final avenue to seek justice.

International accountability also provokes states to reflect seriously on their human rights obligations towards women. It requires the state to answer for an alleged failure to protect victims of domestic violence at an international forum, where its response is publicly documented. If the state's defence is not accepted, international legal bodies will reprimand the state and make appropriate recommendations. These recommendations are specific to each country's circumstances and so may serve as a model for national legislation and policies geared towards combating domestic violence. Different bodies have varying enforcement mechanisms to ensure or at least monitor compliance with their decisions. For example, the ECtHR's decisions are legally binding on state parties while the CEDAW Committee has reporting mechanisms that put moral pressure on states to conform. Additionally, public pressure generated from international condemnation of a state's failure to address domestic violence effectively may encourage states to ratify any international human rights and women's rights treaties that they have historically refused to accept.



Lisa Caroline Garcia

International accountability has also contributed towards a transnational dialogue on domestic violence as a human rights violation. Women's rights are increasingly the subject of international conferences, United Nations discussions and reports and the jurisdictions of regional human rights courts. The international human rights discourse may offer new perspectives on "old" issues, which in turn provides the opportunity to revitalise those issues domestically. This also contributes towards a "cross-pollination" process whereby judges in domestic courts are not only considering human rights cases from other jurisdictions, but are also applying, modifying and building on them in their specific contexts. Michael Dorf uses the term "Strasbourg effect" to describe how the ECtHR's human rights-sensitive decisions have had great influence internationally.

International accountability can raise awareness about the seriousness of domestic violence and the failure of too many states to respond to this crisis. More broadly, it exposes the public/private dichotomy for sustaining gendered power imbalances in society. States that do not protect women from domestic violence should be regarded as being complicit in the degrading treating of women. International law can and should impose liability on states for private violence against women and their failure to prevent it. If states will not take leadership in protecting women from violence, the international community must pressure them to fulfil their responsibilities. International accountability can contribute towards a safer world for victims of domestic violence.



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Caitlin Caroline Garcia



WOMEN'S MOSQUES IN CHINA: AN EXAMPLE OF FEMALE LEADERSHIP IN MUSLIM COMMUNITIES

Simone van Nieuwenhuizen examines the history of women's mosques in the Chinese Muslim tradition

Over recent years, images of Muslim women donning the hijab, niqab or burka have become popular symbols of women's religious and social oppression in Muslim communities. The distinction between social practices of discrimination against women in Muslim communities and Islamic teachings has become increasingly blurred, leading to sometimes pernicious generalisations of women's inequality being a symptom of religion. This can be partly attributed to the fact that the study of Islam is often restricted to the Middle East and Central Asia. This means that the rich history of Islam in China, and the unique role that women play within this context, is frequently overlooked. The establishment of independent women's mosques (女寺, nüsi) in Central China exemplifies ways in which religion can play a role in liberating women and, more importantly, the significant roles Muslim women themselves play in their religious communities. Although there is much to discuss about nüsi, this article will focus on Hui (回族) Chinese Muslim women's roles as imams (Chinese: 女阿訇, nü ahong, literally 'female imams'), the teachers of women and girls in regions where opportunities to receive education are otherwise limited. It will also discuss women's roles in realising and asserting the Muslim identity of their community.

A Brief History of Nüsi

Although the history of Muslim women's education in China can be traced back to the Ming Dynasty (1368 – 1644 A.D.), when education was largely received in the household, the establishment of nüsi is a relatively recent phenomenon. In the Qing Dynasty (1644 – 1911 A.D.), women's religious schools (女学, nüxue) were established in Hui communities by men who recognised the importance of women's education to their society. These later developed into nüsi, separate places of educa-

tion and worship for female Muslims. The practice of Muslim women's education has also led to the establishment of Arabic-Chinese bilingual secondary schools for girls (中阿女学), which provide a more comprehensive education than religiously-focused nüxue.

After the outbreak of the Anti-Japanese War in the 1930s, the migration of Muslims from the zhongyuan region led to the spread of the nüsi tradition to other parts of China.

Nü Ahong (translation), Their Role in Preserving Hui Muslim Identity and Their Leadership Within Their Communities

The Chinese Muslim identity is a complex one. Chinese Muslims have had to conform to Confucian and Communist ideals and assist in the 'modernisation' of the motherland on the one hand, whilst striving to preserve their cultural heritage and religious principles on the other. During the Ming Dynasty, Hui Muslims began to experience a crisis of identity as they were gradually marginalised by the Han majority and became increasingly removed from their religious practices and teachings. This led to a decline in mosque attendance, meaning that other methods of transmitting religious and cultural knowledge were required. Thus, the perception that women should be completely confined to domestic duties changed as men began to recognise women's significance in passing on traditions through the family. Women became vital to the preservation of the Hui identity as they were able to teach their husbands and children, and convey their knowledge to other members of the community. This was important to restoring an awareness of Hui religious culture.

Today, Nü ahong's roles vary depending on what kind of nüsi they work in. The majority of existing nüsi are situated within

nansi (男寺, male mosques), and therefore largely controlled by men. In this type of nüsi, nü ahong's religious roles are limited, resulting in their salary being lot lower than that of their male counterparts. However, a number of nüsi are positioned outside nansi and are financially independent, and thus officially registered by the Chinese Government as legal religious sites. As a result, they are given equal status in the eyes of the Government as well as their communities. In such nüsi, women play a vital role in leading prayers, teaching the importance of religious traditions and rituals, mediating disputes, and imparting advice.

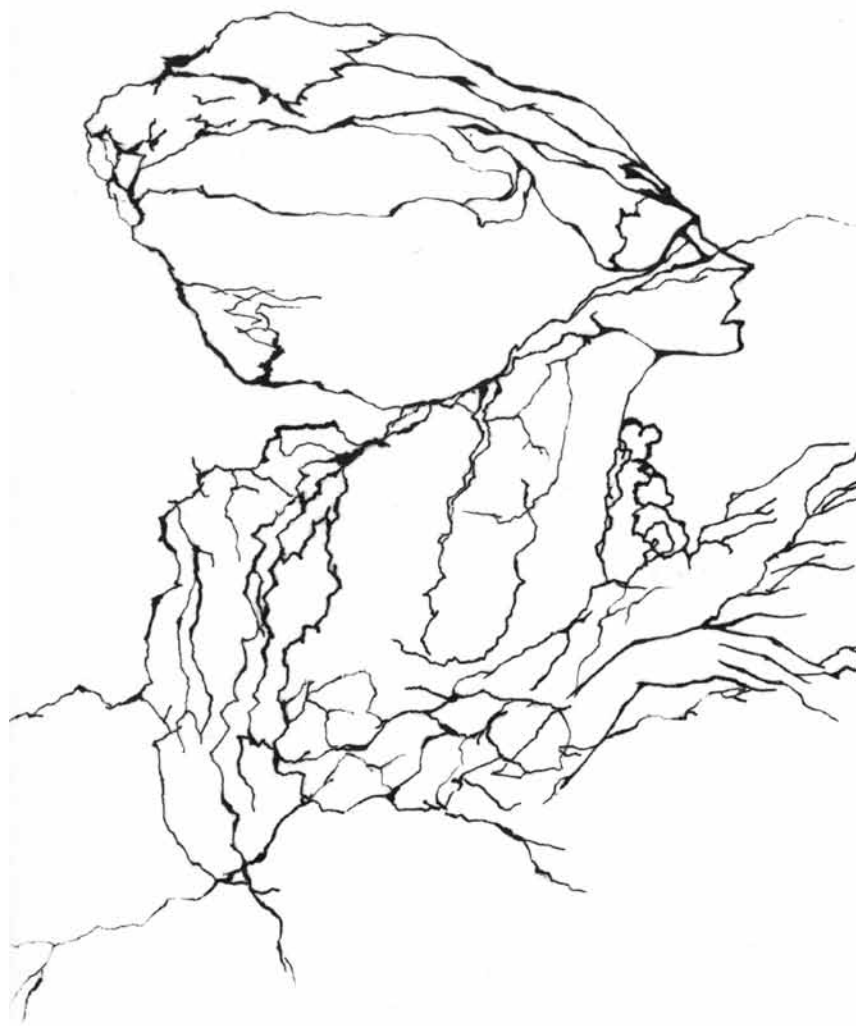
In recent years, independent nüsi and nü ahong have played a part in improving the economic conditions of their communities. For instance, in order to expand sources of income, one such nüsi constructed a clothing factory which provided work for seven Muslim women.

Nüsi and the Provision of Education in Theory and Practice

Education is an important principle in the Islamic faith. As Fatima Mernissi states, "Islam is the Religion of Knowledge." Women are no exception to this; their education is considered vital to the survival of the Hui Muslim community and its traditions.

Interestingly, while Qing Islamic-Confucian scholars such as Ma Zhu and Liu Zhi wrote of the Confucian principle of women's obedience to father, husband and son, they nevertheless encouraged women's education and participation in religious life;

"... Yin (阴) and Yang (阳) are composed of the free elements ... with more yang [obtainable through education] a woman can be superior to a man ..."¹³



Therefore, it was believed that educated women would be better Muslims as well as being in a position to better serve the community.

Furthermore, as Jaschok and Shui's fieldwork reveals, many male religious leaders in Hui communities also support women's education through social and religious principles.

"if confined to the house, [women] could not see the truth and would get lost in spiritual darkness... ignorance of their rights enshrined in the Koran and traditions made some Muslim women resign themselves to low education and low... public status..."¹⁴

Thus, an educated Muslim woman is able to challenge patriarchal interpretations of Koranic scriptures and apply her own knowledge of religious teachings to public life in order to realise her potential public role. As one nū ahong said, the disapproval of female religious leadership is a result of their misreading of the Koran.

It is interesting to note that Chinese Muslim women have taken advantage of the espousal of Communist discourse decrying the 'feudal' nature of gender inequality in Chinese history so as to garner support for the construction

of independent nūsi and play a greater role in the religious community.

Conclusion

The existence of independent spaces for women to worship and learn does not equate to complete gender equality within Hui Muslim communities, as patriarchal structures of both Confucian and Islamic heritage still exist. However, with access to education comes the ability to interpret and question patriarchal readings of Islamic scriptures. In contrast to the Western perception of Muslim women's subordinated status, Central China's nūsi represents the greater participation of women in religious life. This has led not only to an increased involvement in social life, but has also allowed women to exert a greater influence upon their societies.

This article is largely reliant upon information presented in Jaschok and Shui's book, *The History of Women's Mosques in China: a Mosque of Their Own*. This is the only truly comprehensive study of nūsi available and I am deeply indebted to the depth of knowledge that it offers.





Jessica Amy Inman-Hislop

MEMORY



ON LOAN AND UNRESERVED

**Symonne Torpy weaves
a tale inspired by Joseph
and the Amazing Technicolour
Dreamcoat**

*I left my heart at Wal-Mart.
It was warm in there.
The strobe lights hummed
In a comforting harmony;
Took away my loneliness,
Siphoned off the ice crystals
That had formed upon my fingers,
Making me distant
Unable to touch, feel, sense.*

*I left my heart at Wal-Mart
And somebody opened the fridge,
Let the spidery cool invade me,
Form sheets of ice
Detaching me from the pet food aisle
Which I had grown to love,
Removed the cling wrap from my heart,
In some hope
That the cool would keep it safe.
It did not.*

*I left my heart at Wal-Mart.
I liked the sound of the cash registers,
The consistent chiming.
It was always there,
And the voices over the intercom:
“Clean up in aisle twelve”.*

*I left my heart at Wal-Mart.
It seemed they cared.
Cared that the mess in aisle twelve
Was really my raw heart,
Rotting, weeping under the feet
Of unseeing customers.*

*I left my heart at Wal-Mart.
They came with mops and disinfectant,
Cold, vacant expressions
On young faces.
They only cared
That my heart was turning others away.*

*I left my heart at Wal-Mart.
I should have shopped at Costco.*

Within what sterile linguistic bounds shall I be forced to define my life? Is there any language, either singular or combined, with which I can express my true thoughts? For how long must you live in a nation before calling it your home? And with what retrospect can you remember the place you once called your home, with such bitter resentment that you refuse to name it thus again? India, when I visit you now – only in my dreams – I wander past temples falling to dust with years of aging wisdom. Coloured streets of people, each richly spiced in pungent fields of memory. There still stand the morning markets; glimmering silk saris stacked upon tables like giant hibiscuses curling in the heat of the stalls, row after glittering row of glass bangles, bejewelled wooden elephants standing silent and solemn, for prosperity, and for peace. There is a little girl playing with her wooden peg dolls as she listens to her father playing the sitar and her mother grinding pepper in the afternoon sun. I see the wisdom trapped in her eyes and lost in the chaos of the city streets. I feel the weight of a woman's blind obedience to centuries of rules, and the sadness of a father in watching his daughters answer to obligation.

For eighteen years my universe was an insignificant village in Hyderabad. I was the daughter of a poor man, the servant of a wealthier one. As the eldest of eight sisters, it was my obligation to be married first, yet I longed for love – a dream that my family would never afford. My sisters grew bitter and resentful; they wished to cast off the shackles of poverty and follow the hand that promised a better life in exchange for marriage. I realised, perhaps much too early in life, that a stomach could go empty, a heart could not. It was this that almost destroyed me, the day that my father's body was brought back to the slum, torn and broken, indistinguishable from the man that had once commanded our household. His body had been caught on the side of a bus as it whipped through the city. He had died slowly, and he had died terrified; there was no dignity in the contorted rigor mortis that met us that cruel morning.

Poverty is thicker than blood. It is impossible to understand now how I did not foresee the day when my sisters inevitably found Him – the man who would sell them their freedom. The slum was a scrap-metal tower of young, vulnerable women, wishing every day for a chance to be set free. The men came on black, petrol-guzzling steeds, to deliver families from anguish, to promise lives of wealth and luxury, a passage to a new world far from the streets we had known. It is perhaps a testament to human instinct that the girls would still scream as they were being taken away, they would cling to their fathers and beg for mercy.

I did not beg, nor did I cry; one, two, three and the shutters snapped on my life. I was trapped in an image, looking in on myself, waiting desperately for sound and smell and taste and touch to return. My limbs had been rendered useless as I was ushered to the car. I could not look back. I could not look at my mother, the woman who had sold me. I knew at that moment that my

pain could not have rivalled her own.

Exhaustion governed my brain and body as I was led from plane to terminal, to car, to house, blurring my perception of time. I could smell something new in the air – the sweat, the oppressive heat, the breath of home, was gone. I had arrived in 'the land of opportunity' but had never felt so fettered to my situation.

His house was a modern harem. The modern appliances mocked the ancient rules we followed. The women were their own culture. Hostility pulsed beneath the surface of every encounter. They had a strength and solidarity between them that shut me out, and let me know that I was not one of them. The gold that adorned my body did not give me a feeling of pride, but one of debt and ownership.

During my second week in America, I met Wal-Mart. There were clothes, there was food, there were friendly clerks waiting to say, "Hi, can I help you?" and direct you to the laundry detergent. Wal-Mart whispered in my ear, "This is where you will come and shop. You will buy your vegetables and your bread." I nodded wide-eyed. This new world of consumerism took me in its arms and told me that everything was going to be okay.

I returned to Wal-Mart once a week with one of the other women. Acceptance is seeded by time and knowledge. They were fierce because they had to be strong. I imagined myself becoming a mother, growing old and seeing before me the next young woman; the woman

time had not yet touched. I was a walking remembrance of their past, they were mirrors of my future.

Certainty saps fear of its momentum. One month after I had arrived in America, the inevitable happened. My eyes were not wide with terror; there was little naivety and there were no romantic expectations. I think there were silent tears. It was mechanical. My mind forced my body to submit, and His face swam in and out of my consciousness. Life is too contrived, death predictable. Sleep is the metaphor we traverse, a respite from the inevitability of committing to one or the other. It is the world to which we escape, indulging in visions of our fantasy and confronting our innermost fears without lasting consequence. I tried to sleep, but saw only the images of the night, smelled only the heavy droplets of His breath on my body. Escape was not an option; His home was my world. I knew nothing of New York, had no money of my own; my fear was not only crippling, but also rational. In early July, we received the news that Shazaan was expecting a child. She was the eldest of the women, and at forty-eight, complications were likely.

Visits to Wal-Mart became my link to New York. My English grew stronger, and I would take the trip alone. The Beatles were always there to welcome me home: "Let me take you to strawberry fields; nothing is real; and nothing to get hung about. Strawberry fields forever." I watched the shoppers; some clutching their handbags as they raced through the aisles,

some clutching their children's hands, some with vacant expressions and slow moving feet – they, like me, had nowhere else to be.

Seasons passed in the changing of the leaves – the colours bright and brilliant brought back memories of India, but I shut them from my mind with my resolve to block out the past. The sun was replaced by rain and the air became icy; the sidewalks turned white. I had never before seen snow.

It was easy to imagine that the Wal-Mart regulars were my friends. I would watch them select their cans and packets; for weeks I watched a woman with blonde, untamed curls, so unlike my own, wander in and out with her standard basket of frozen meals. I smile at the recollection. Shirley. It was a winter afternoon when she first said hello. I returned with "Hello. I am Maya", four simple words, and she smiled. I laughed – friendship in the Wal-Mart aisles.

Shirley and I both knew something about each other through distant observation, but it was Shirley who knew more about my life that I ever would have guessed, "I have seen so many of you, moving in and out of the store. Every year there is a new one. Sometimes they bring children with them; girls as young as seventeen, already mothers. Not that I can talk – ha! I had a kid at your age. Bastard left me, parents kicked me out. I'm alright though. I've got Reuban and we survive. I spend my days working at Costco. Can't stand mixing work and pleasure – ha! So I shop here."

Christmas came and went with tinsel trimming in the store and plum puddings on the shelves. Shiny red nail polish and a Tonka truck for Reuben replaced the frozen meals on Shirley's shopping list. We swapped gifts the day before Christmas Eve. I bought her a box of Hershey's and a Snickers bar for Reuben; she gave me the bottle of red nail polish. "Live a little", she said with a twinkle in her eye. I think I fell in love with Christmas in New York. I went home, locked myself in the bathroom and carefully painted every fingernail.

Over the next nine months, my friendship with Shirley grew. Shazaan's baby was born, a still-born child. The sound of her weeping will never leave me. I had Shirley and Wal-Mart now – we cried, we laughed, we found hope in each other.

'Position available. No experience necessary. Enquire within', said a sign posted near the sliding doors at Wal-Mart. Shirley held my hand and told me to apply. She said that I could live with her until I found my way. She opened up my mind once more to the possibility of freedom.

My bag was packed and I left His house for the last time. I took the red nail polish and the jewellery I wore. It was worth enough to survive on for several weeks if I lost my job. My heart raced as I carefully measured my pace to Wal-Mart. I was to meet Shirley, and she was to drive me to her apartment, "one day you'll look and see I've gone. For tomorrow may rain, so, I'll follow the sun."



The apartment building was cracked and yellowing, but its windows caught the light and winked at me as if to welcome me to freedom. Shirley's apartment was small, with clothes and toys on the floor and a television in the corner. "This is brilliant", I said wistfully. She drank and I danced; we sang "I am the egg man. You are the egg man. I am the Walrus. Goo goo g'joob", until Richard from the flat below knocked on the door with bloodshot eyes and asked if he might join us.

The sun was a red balloon low in the sky, as I glanced out of the car window. I had my first paycheck in my pocket and Shirley was belting out a song, "The best things in life are free, but you can give them to the birds and bees. I want money. That's what I want". Trepidation had given way to euphoria, and a raincoat in the window of the Salvation Army store made me signal Shirley to stop the car. It was beautiful. The pinks and blues merged with greens and yellows. Bright orange buttons ran down the front and when I put it on, it fell to my ankles, enveloping me in colour. I counted out fifteen dollars and handed it to the man at the register. He looked at me quizzically, "Costume for a theatre production?"

"Something like that" I said, and strode from the store.

The night shift became a routine. Wal-Mart became my home. Wal-Mart became my religion. On the first day, God created man. On the second day, man created consumerism. On the third day, consumerism filled man with everything he would ever need.

Shirley worked during the day from Sunday to Thursday. I worked during the night from Thursday to Tuesday. Seven months passed and there were moments when I stopped looking over my shoulder. I began taking Reuben to school in the morning and writing during the day. I wrote letters to my mother that I did not post. I wrote poetry to myself and messages to Shirley and Reuben that I knew would make them smile. In March the apartment upstairs fell vacant in an uncharacteristic twist of fate. I was happy with Shirley, but we both knew I needed independence.

I grew comfortable with my freedom. I grew comfortable

with my surroundings. I began to cook some of the dishes my mother had taught me. I began to dream again. Hope was returning to my life, but with it came the conflicting realisation that I was still empty. I continued working at Wal-Mart, but its lustre had been a strobe-light illusion. There was no honesty in the aisles, no warmth in its air-conditioned embrace. The people who walked in and out of the store did so without seeing. There was something bitter about the music on the radio "If you get too cold I'll tax the heat; if you take a walk I'll tax your feet." It was our reality, a vacant exchange of cash for goods, of soul for New York lifestyle. On the fourth day, man tasted greed, and so it was that consumerism set about to destroy man... and achieved it whilst remaining open twenty-four hours, even on the Sabbath.

And so I ran away. I sought to become yet another feature in the frenetic New York landscape. A nine-to-five job in a small business in the inner city became my new calling. I pressed my brand new jacket and slacks and gazed wistfully at the technicolour raincoat in my closet. The click-clack of my heels on the sidewalk was foreign to me.

They shut me in a small room with no windows and a scrubbed particleboard desk. There was a computer and a chair and I revelled in my own disappointment. There wouldn't be a sunny day when I would give up wanting more. This constant want, this ability to choose to want, to choose apathy or happiness, disillusionment, or altruism – this was the American dream.

So that is my story. I have been sitting on this park bench for several weekends now, thinking myself a paperback writer. I do not think I will ever give up my dingy New York apartment. It is a symbol of loss and gain, and I know it is smiling at me every day I return. I wave at my neighbours and they no longer keep their eyes averted or furtively steal glances from behind their pocketbooks. I am part of a family; they have accepted the spicy smells from my apartment and the fact that I sometimes wear my technicolour raincoat on sunny days. We are close enough not to have to speak in the halls, and to know that we no longer harbour that initial New York hostility that we wear; no matter what stores we shop at.

I think about my sisters back in India; theirs is a world pulsing with life and promise which invariably leaves so many of its citizens to die in the brutal fight out of poverty. These women, blackbirds singing at twilight, are unable to ever will their clipped wings to fly. I think about the new world they have gifted me – a world of freedom, of doors and windows, each like a brand new book, holding a story to be unlocked.

I walk past Wal-Mart. The automatic door buzzes into action, welcoming me home. Penny Lane is on the radio, in my ears and in my mind. I step inside and exchange a dollar for a Snickers bar. They're \$1.50 at Costco. The girl at the counter smiles her training-stipulated smile. It is a Faustian bargain we make with boxed store goods. I wouldn't have it any other way.



Shirley Mani

WORD OF MOUTH: EYEWITNESS TESTIMONY

Carolyn McKay explores murder trials from a visual arts perspective

The weight of the spoken word, utterances, stillness, and gesture – such was the focus of my recent research into the nature of viva voce testimony in murder trials. The research provided me with the opportunity to observe and interpret murder trials from a visual arts perspective, inspiring a body of work *Word of Mouth*. Given my prior legal studies, I was also interested in re-interpreting and deconstructing court procedures, rituals and the aesthetics of a murder trial.

Not only do murder trials attract intense media scrutiny and engender public fascination, they are a source of rich language and surprising narratives that exceed the imagination. In my search for resonant testimony I attended several high profile murder trials including *R v DL* [2008], *R v Wood* [2008], *R v Stewart* [2008], *R v Beltrame* [2009] and the 2008 Inquest into the Death of Jacob Kovco. My methodology involved harvesting speech fragments from witnesses' courtroom responses, and re-presenting them in my video and photo-media artworks, orphaned from context. I sought to highlight the ambiguities in murder trials: the intersections of truth and fiction, the slippages of memory, the non-linear presentation of diverse narratives, and the divulging of secret, private information into the public arena. In so doing, I wished to tap the tenor of the live trial experience, and create mere fragments of testimonial evidence

for the viewer to ponder and engage with in an activity of speculation and interpretation.

Despite advances in forensic sciences and surveillance technologies, viva voce testimony continues to play a key role in criminal trials. While the ultimate goal of the trial is the production of an alleged objective truth, the entire process elevates the subjective human experience and oral expression. Through the mouth, the unique, first-hand experience of witnessing a murder is publicly expressed with the singular, embodied voice of the witness. It is with the accumulation of many living testimonies, flesh-and-blood accounts, and contradictory multiple viewpoints, that the murder's narrative is plaited, the past crime scene is reconstructed and a semblance of objective truth becomes apparent.

Testimony provides factual evidence, thereby forming a portrayal of the crime that has taken place in another temporal and spatial dimension. Murder trials seek to make sense of the vast complexity and confusion of a moment in time, and the labyrinth of evidence is best

organised and made tangible through a process of storytelling. Such testimonial storytelling in the courtroom enables the modelling and understanding of intricate scenarios, particularly when the storyline flows over an extended period, implicating various sites and a cast of characters.

Like a clichéd TV crime show, the crucial dramatic action of the trial - the murder - has already taken place. The unfolding in court is retrospective and becomes complete with multiple perspectives, subplots and flashbacks. The Crown Prosecutor presents a basic plot outline and the various witnesses provide new pieces of evidence connecting the WHO, HOW, WHERE, WHEN, WITH WHAT and WHY so that the complete gestalt of the crime may be re-constructed. Viva voce evidence effectively reconstitutes the murder, bringing the past crime scene into the present trial setting.

Using the medium of digital video I explored the role of the human voice in articulating memories, and the inner human experience of witnessing a violent act. My starting point was the mouth – that orifice from which the raw, sensorial experience of the witness is divulged - and that became the

“Not only do murder trials attract intense media scrutiny and engender public fascination, they are a source of rich language and surprising narratives that exceed the imagination.”

central motif in my artwork. Through the mouth, the subjective, human experience of witnessing a murder is expressed with the singular, embodied voice. My digital video work *I'm talking about truth and lies* is a representation of testimony given in a trial of a woman accused of murdering her father. Through digital masking techniques, the mouth is highlighted and isolated to create an image that, when projected oversized onto a wall, is simple yet unnerving. The mouth, so enlarged, alienated and abstracted from the face, stresses the primacy of the live voice and becomes emblematic of the secret internal stories it disgorges.

My digital video work explored how the voice, both as sound and as spoken word, is instrumental in resuscitating and giving life to the past in these high human dramas. Not only do the voices of witnesses recreate the crime scene, it is through these voices that the murder victim, that impossible witness, may be heard. Of course, a distinguishing feature of the murder trial, as distinct from other proceedings, is that the ultimate witness - the deceased - remains absent, mute and unavailable to unravel the truth for the public. The spoken word is instrumental in providing murder victims with an ephemeral resurrection as their voices may now be heard, filtered through the words of witnesses. In *I'm talking about truth and lies* the words of the deceased father are recalled and re-presented by living witnesses. However, his abstract restoration through spoken word is transient, and the authenticity of words attributed to him is impossible to judge.

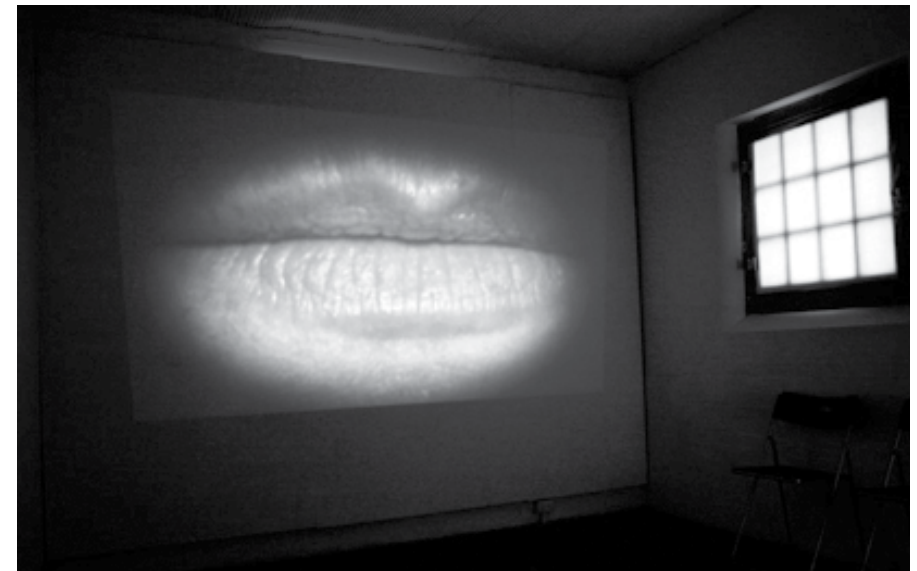
From another murder trial, in a collaborative work, I took testimonial fragments to create an interactive digital poem *Photograph 43 Exhibit N* where witness phrases, videoed as projections onto a body, are presented as disconnected pieces of evidence. This work explores the notion of fragmented versus linear narrative. The viewer must navigate the text, sounds, and visuals to

interpret the mystery of the murder scene.

Murder trials, embedded with defective characters, unnatural deeds, ambiguous intersections of truth with fiction, fatal flaws and transgressions, reveal predicaments that are inescapably human and tragic. Nevertheless, I encountered the rich language and thought-clusters of witnesses as poetic evocations, where word and sound conjoin with sensorial experience. The words spoken and the stories told were stranger than any fiction I could have imagined - some unnatural poetry emerging from a violent realm. Yet, wordless moments were also eloquent nonverbal expression, facial micro-behaviours and gestures, gaps and silences; these encircle our language to reveal the soft subtleties of human communication and unconscious truths. Fragmented phrases, articulations and utterances from witnesses inspired my body of work *Word of Mouth*, and found a second life as photo-media on cotton rag and video art installations. Through this process, I found the ugly and the unspeakable could be re-constituted to function aesthetically in another medium.



Oath Carolyn McKay (2009)
Digital video on DVD 02:04 min looped



I'm talking about truth and lies Carolyn McKay (2009)
Digital video on DVD 20:45 minutes looped



Alexander Latti

ANOTHER'S PLAYTIME

Daniel Baker gives a harrowing account of a Peruvian boy's battle against sexual abuse

While malevolence is intrinsically woven through the fabric of society, there are certain things, factors if you like, that bring it to the fore and let it brood and breed.

The isolation of the poor, rural village swallows his cries. Its remoteness keeps the police away; ensures his tears always flow. Through the thick, brown, mud-brick walls the neighbours hear nothing. In the cold, dark night they cannot see outside. The sick, unconscionable evil is thick in the air; yet no one can smell anything apart from the fresh manure in paddocks of their small farms. No-one can feel anything but the cold, intrusive wind blowing through their windows. Isolation—it's dry wood to malevolence's fire; lets it flourish and burn, sear to ashes one's soul.

Little Hernando lives high up in the rugged Peruvian mountains. He starts off his day by crawling timorously off his thin straw mattress. Thank God there's no mirror in his bare brown room for him to look in. The dry, chilling cold of the mountains together with irregular washing has shriveled his cheeks. Lack of food has kept him so thin that his dark brown skin clings to his bones. His black hair is long and messy and unevenly trimmed, courtesy of his mama's unsteady hand. He puts his navy World Vision tracksuit pants over his unwashed underwear and his matching World Vision sweater over his bare chest. Poverty chokes his life, but that's not why his sad, sore eyes are always damp and moist. Poverty is not what stirs his fears, heightens and exacerbates them, elicits his piercing nightmares, causes him to cringe and fret in his sleep and wake up screaming in terror. No. That's caused by something far more harrowing than poverty.

Little Hernando tucks his feet into his old, dirty sandals that are falling apart and heads outside with a small candle before dawn. He feeds the pigs in the sty and collects the eggs from the chicken coup before rinsing his tiny hands in the water that runs in a gully beside the dusty road. After eating a warm vegetable soup prepared by his beaten mama, Little Hernando sees his papa. His papa is bigger, stronger, fitter and faster than Little Hernando with big black eyes, crooked yellow teeth and a thick black beard. Although the smell of last night's whisky still hangs heavily in the air, Little Hernando is glad his papa isn't drunk right now. His Papa looks at Little Hernando, and takes pleasure in watching him fidget, quiver, sweat. Then he puts his hands over Little Hernando's small, undeveloped privates. His papa's lips curl into a wicked smile before Little Hernando runs terrified out the door.

'Hernando!' his papa bellows.

Little Hernando stops and turns around. He's standing in the paddock among a small herd of cattle. He's shivering, nervous and afraid. He wishes he had longer legs so he could run away, or at least another set of hands so he could cover his bottom too.

'You forgot your lunch, little boy,' his papa says. He hands Little Hernando a paper bag which holds two small carrots grown in their vegetable patch. Little Hernando takes it uneasily.

'Don't be afraid, little boy,' his papa says.

Papa moves closer. Little Hernando wants to run, but he is

frozen by his papa's stare. Papa's dark eyes control Little Hernando's legs, melt them into the ground. His tiny hands press harder and harder against his privates. I don't want to play! I don't want to play! he yells in his head. But fear glues his lips tightly shut.

His papa is standing in front of him now. He squats down to Little Hernando's level.

'Why are your hands down there?' he asks calmly.

Tears bleed from Little Hernando's eyes. It's still dark. Oh great sun, save me! Save me! I don't want to play! But he wouldn't dare say that to his papa.

'Move your hands,' his papa orders.

Little Hernando's hands shake and become slippery with sweat. They tremble away from his privates and cross over his chest.

His papa reaches out his hand. It replaces Little Hernando's tiny ones, and is no longer still.

'See—it's not so bad, is it?'

Little Hernando's eyes bolt shut. His teeth grit. He sweats and pants profusely.

His papa continues for a few more seconds before the friendly sun awakes, threatening to expose his sick compulsions. He retreats inside. Little Hernando opens his eyes and relaxes his jaw. He feels relieved that his papa didn't finish playing. After wiping the tears from his eyes, he walks up the hill, past the other mud-brick houses. Like Little Hernando's home, they all sit on small farms that are fenced off from the road and house a few cattle, pigs and chickens.

A little while later, Little Hernando arrives at school for his very first day. The school is enclosed by a brown wooden fence with three mud-brick classrooms in a line on one side of the land. On the other side is a large field where children are kicking around a soccer ball, jumping skip rope and happily chasing each other around the field. Instead of joining the other children, Little Hernando sits on the fence and watches them silently.

'Do you want to play with us?' the children ask him.

Little Hernando covers his privates and shakes his head.

The bell rings and all the children run into the classrooms—grades one and two in one; three and four in another; and five and six in the third. Little Hernando sits in the corner by himself. He finds it hard to concentrate on what the teacher is saying, and doesn't feel like joining in with the other children sounding out the letters of the alphabet. He doesn't feel like one of them. He doesn't feel happy and young and free. Why am I different? he asks himself – but he does not know. He's confused about so many things.

At lunch time, Little Hernando returns to his seat on the fence. He slowly chews on one of his carrots and watches the other children enjoy themselves. He thinks, why can't I smile like them? Why can't I laugh like them? How come they're so happy and I am not?

He finishes both of his carrots and continues watching.
'Do you want to play with us?' the children ask him again.

Little Hernando covers his privates and shakes his head.

After a while, the teacher comes over to him. He looks just like his Papa.

'Why don't you want to play with the other children?' the teacher asks.

Little Hernando doesn't say anything.

'Come on—let's play,' the teacher encourages.

Little Hernando covers his privates and shakes his head.

'Come on,' the teacher insists.

Little Hernando had never played with anyone but his papa before. He'd never even spoken to anyone apart from his parents. He grows scared, and starts shivering and sweating. He doesn't want to play, but he's only a little boy and the teacher is an old man like his papa. He can't say no.

Little Hernando nervously reaches out his tiny, trembling hand and starts to repeat his papa's morning ritual.

The teacher recoils. He hits Little Hernando across the face, causing him to fall off the fence and onto his back.

'What's wrong with you! What the hell is wrong with you!' he roars.

The other children stop running around. They watch the teacher stand over the boy like a murderer over his bloody victim and wonder what Little Hernando must have done.

'You said you wanted to play . . .' Little Hernando murmurs.

The teacher hits him again.

'Get out of here!' he bellows. 'Go home! And don't ever come back!'

Little Hernando staggers up off the ground, turns around and runs away. When he's out of sight of the school, his running slows to a jog and then to a walk as his tiny hand rubs his throbbing cheek while he tries to straighten the curved and crooked lines of his world. What

did I do wrong? Confusion is all little Hernando has ever known, and no matter how much he thinks, nothing makes sense.

Little Hernando arrives home. His papa is in the field, planting corn in the small vegetable patch with one hand and drinking from a bottle of whisky with the other. He stumbles a little. Little Hernando can see he has been drinking for a while even though it is still daylight and the sun burns warmly.

'Go to your room,' his papa orders. 'Wait there for me.'

Little Hernando does as he's told. He sits on his bed in the corner of the room and waits in terror; hoping that the cattle and the pigs and the chickens all collude to kill his papa so Little Hernando can be spared his imminent suffering. But it's hopeless. The sun scurries, whimpers away. Little Hernando can almost hear it whispering I'm sorry . . . I'm sorry.

Darkness sets in. Little Hernando hears his papa's footsteps stagger closer and closer to him and he backs up into the corner of the room; brings his knees up below his chin; hugs his shins; buries his head in his knees; tries to reduce himself to nothing.

His papa is inside his room now. He closes the door behind him and lights a small candle next to Little Hernando's bed.

The stench of whisky fills the room. Little Hernando knows it's time. He knows the cattle and the pigs and the chickens and the sun have all betrayed him.

'Don't be scared,' his papa croaks. 'Don't be scared.'

Little Hernando quivers anxiously as his papa takes his tiny hands and makes him perform his evening chore. Little Hernando knows his papa controls him like a puppet. He knows his papa owns his little body.

'Don't be scared,' his papa repeats. 'Don't be scared.'

Where are the police? Where are the police? Little Hernando begs in his head. Please come!

But he knows they won't.

Little Hernando's clothes disappear. Come back! Protect me! He's left exposed. This is the part he hates the most. Little Hernando breathes heavily, pants, gasps, whimpers, cries; but

it's all he can do. Papa owns his little body. His mama hears.

'What are you doing in there?' she asks timidly.

'We're playing,' his papa responds. And that response is more like an order: leave us alone or I'll beat the shit out of you, it means.

That's the last Little Hernando hears from her. Like the police and the teacher at school, she won't help him. And in an isolated village that will always be so. Outside, the wind blows harshly and nothing can be seen. The mountains are passive and the darkness is silent. Little Hernando's stomach becomes hot and sticky and then his papa leaves his bedroom. Little Hernando wipes it away with his tiny hands before retreating to the room's corner once again. Once again, he hugs his shins; closes into himself; tries to shut the cruel, uncaring world out. He cries into his knees.

Not all children like playing.

DOMESTIC VIOLENCE IN PERU

- Violence and sexual abuse against children is a serious problem in Peru. It is something that happens hourly
- In 2009 there were 1,650 cases of violence or sexual abuse of children five years of age and under and 3,687 cases of abuse of children ages six to 11
- Many abuse cases are unreported because society mostly views abuse as a family problem to be resolved privately
- The most biggest concern is that nobody discusses child sexual abuse and children are not told that they have any rights
- Parents and teachers need to be taught how to protect children and how to respond to a child who has been abused

Further reading:

<http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136123.htm>

<http://www.dreamcenterperu.com/sexual-abuse-prevention-campaign.htm>

Courtesy of Allegra Day

Image by Olivia Teh Yuan-Ning

WILDLIFE THROUGH A LENS

PHILLIPPA ROSE MELANIPHY interviews Jan Latta,
a wildlife photographer and children's book author

An experience with mountain gorillas changed Jan Latta's life inspiring her to pursue a career as a wildlife photographer and children's author:

Her story begins in the shadow of one of the world's most brutal civil wars: Rwanda, East-Central Africa. Jan Latta, an Australian advertising designer and her male travel companion made the perilous journey in 1994, to the Virunga Mountains in the Parc National des Volcans, the homeland of the Rwandan mountain gorilla. Their journey was fraught with danger; reckless drivers; unsealed roads with sheer drops; and the distant shudder of gunfire. "That was 16 years ago," she said. "That was the beginning."

I met Latta at Sydney's Customs House Library in April where she presented photographs taken throughout her career to an audience of wildlife enthusiasts and keen photographers. "I wanted to photograph the gorillas in their natural environment," she told us.

Dressed in black, a red scarf draped across Latta's shoulder nestled beneath her silver hair - longer and blonde in her youth she told me. Her date of birth eludes me. "Sorry but I never discuss age" she says. The closest confirmation is an article in the Sydney Morning Herald, July 1, 2006 that said she was "in her sixties."

"It was a tough climb for over four hours," said Latta, recounting her journey into the Rwandan mountains. "The guide told us the rules; never

look a gorilla in the eye - it's threatening. If they come close to you - take submissive pose." Latta broke the rules and shared a forbidden moment of eye contact with a silverback, "I felt so privileged" she said. A few feet away from the silverback was a female gorilla with her fluffy baby. "I crouched down knowing it can be dangerous when young are involved," Latta explained. Fortunately, there was nothing to fear as the mischievous baby gorilla was playful. "I could feel my shoe-laces being untied. The baby had started to play with my shoe-laces!"

Latta made the decision to write and publish books on rare African and Asian species after her guide told her there were around 600 mountain gorillas left in the wild. "I thought that was very sad. I decided then to start producing books for young children so they could learn about endangered animals." She illustrates each of her books with photographs taken on location.

Latta did not have formal photographic training, "I learned in the wild" she said.

Her images are often close-ups, "I'm interested in the detail of the animal for my stories" She says. She also avoids retouching, "I want to keep everything authentic", that is, except for a certain "silhouette," belonging to male elephants. "And meerkats. The same thing happens with the little lads," she laughed.

Latta's photographic trips have taken her around the world to destinations including Uganda,

Zambia, Kenya, China, India and Borneo. Frequently she travelled alone, "I would live in a tent. It could be a bit scary at night at times."

Latta's life has been characterised by travel and punctuated with drama. "I'll write on my gravestone: she was brave!" she joked with me. She married twice, moving with her second husband to Japan and then Hong Kong in 1971. She sacrificed her well-paid job to relocate. Then the unimaginable happened. "My husband ran off with another man." Unsurprisingly, the situation was irreconcilable. "A few times in our life we have major turning points," she mused. "I had no visa, no money, nowhere to live and no job."

Latta was resilient. She remained in Hong Kong. "I took the risk to stay" she said. I asked her why and she gave no hint of self-pity. "It was a very adventurous place to be." I was intrigued by her answer. Does she relish living on the edge? She laughed at my suggestion. "No, I think you have to do what you have to do."

Latta opened a boutique publishing company with two partners. An experienced creative director with a background in design, she had previously worked in advertising in both London and Sydney. The fledgling company was very successful but in the wake of China's takeover of Hong Kong, two of their biggest clients pulled-out. Others followed. "It started to come down like a pack of cards," she said. "And then the whole thing came down."



All images courtesy of Jan Latta

The business failure forced her return to Australia in 1997. "Coming back was difficult." But the crisis was a catalyst. "If you can focus on something that gives, that's important. It was then that I decided to focus on endangered animals." She reformatted some of her earliest books, and then set to work on new additions. It became her full-time occupation.

Latta had published twelve books on endangered species by 2007, including *Diary of a Wildlife Photographer* which was commissioned by the ABC. "I was extremely flattered they asked me," she said. The book contains over 300 photographs taken throughout her career and details stories from her safari diaries. A keen artist, some of Latta's pencil sketches are also featured in her books.

Susanne Gervay, author and co-regional advisor of the Society of Children's Book Writers and Illustrators, Australian and New Zealand, has known Latta since her return to Australia in 1997. "Jan is extremely entrepreneurial. She has that magic combination of creativity, professionalism and a good deal of common sense. Aside from that, she's a very kind and generous woman" says Gervay. Gervay admires Latta's choice to publish under her own label True to Life Books. "She controls every step of the creative process. It's a very brave decision actually."

Each project is a heavy investment for Latta. A photographic trip costs around \$18,000 and each book presents new challenges. Latta had to recall 400 copies of *Ping-Pang the Panda*, first edition. The word 'slit-eyes,' had been misprinted. "I imagine everyone was wondering what slit-eyes are," she laughed. "The whole book was made under very difficult circumstances; when I was photographing the pandas, it was either misty or raining."

Timba the Tiger was Latta's "most challenging," book to date. "I did nine months of research about where to find a tiger. I searched everywhere. I was about to go home." Similar problems occurred with the unpublished "Leopard book," Latta is currently working on. "It took about 14 years before I got one photograph of a leopard." Luckily the animals are not always camera-shy. Latta recalls her experience with Bornean orangutans for example. "I needed to anchor my glasses to my head, empty my pockets and hide my tiniest camera. Still they managed to steal everything off me!"

I ask Latta if she ever doubts her career decision. "Every book is an enormous challenge," she acknowledged. "But I never doubt spending money to try to achieve something." Her motivation is educating young people. "One little boy will say to me, 'I want to save an animal.' And that's very rewarding." Chris Bray, a Sydney-based wildlife photographer and adventurer, agrees. "Jan is inspiring the next generation of conservationists. They will soon grow up to make the decisions that will shape our natural world."

Books are not the only way Latta reaches her audience. She is a frequent guest speaker at schools, libraries, and festivals. She will open the international exhibition of the BBC Wildlife Photographer of the Year Award, at Newcastle City Library in July. Latta received "fan-mail," from children who met her in 2008 at the All Saints College Festival of Young Adult and Children's Literature, said Kris Williams,

Festival Coordinator, "Kids are very selective about which authors they write to. Jan personally answered each letter. She enclosed bookmarks when she wrote back." Alexandra Pearson, Founder of Bookworm Beijing International Literary Festival adds that, "the children really enjoyed



enjoyed the interactive nature of Jan's talk [in 2009]."

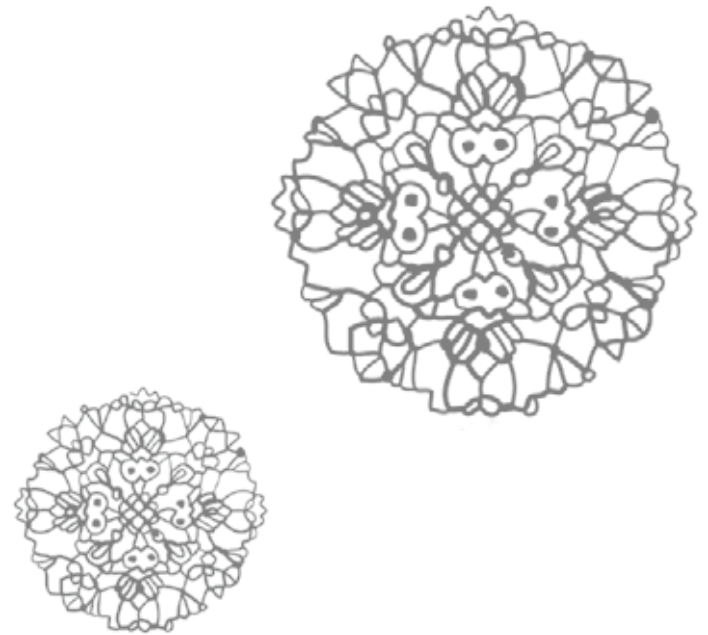
At the talk I attended, Latta presented a short wild-life video for the first time in a public context. She shot the footage, wrote the script and provided the voice-over. Filming occurred in February when Latta accompanied Jonathan Scott, presenter of BBC's Big Cat Diary, to the Rekaro camp, Masai Mara, South Western Kenya. While watching the clip, I am impressed by Latta's voice; it is as compelling and melodic as the imagery it accompanies. I suggest that a television series based on her books could be a natural progression. "I would love to do that", she says and considers showing the video to the ABC.

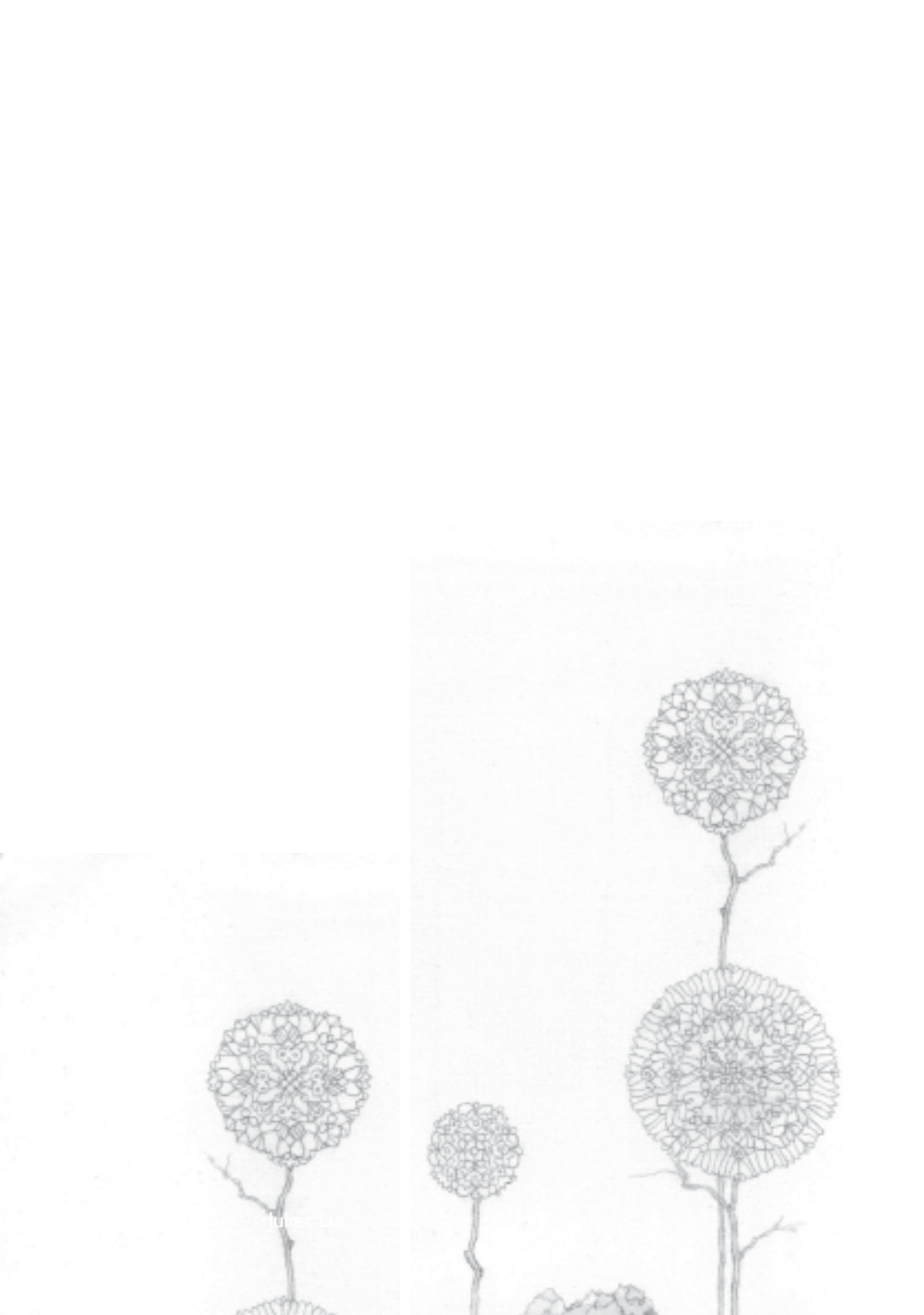
Watching the film, I sensed Latta behind the camera on the plains of the Masai Mara, her favourite place in Africa, "It's mesmerising" she says. Silently she sits in the jeep as her guide points into the distance taken by a momentary distraction. Nearby, the animal struts. "I recognise her markings. Like a black necklace around her throat." The allure is in the detail. The curves, lines, limbs, facial features. The "endless skies," the "open space," - a perfect picture frame. She clutches her Nikon camera. And then? She smiles. "Sometimes magic happens."

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NOTES





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