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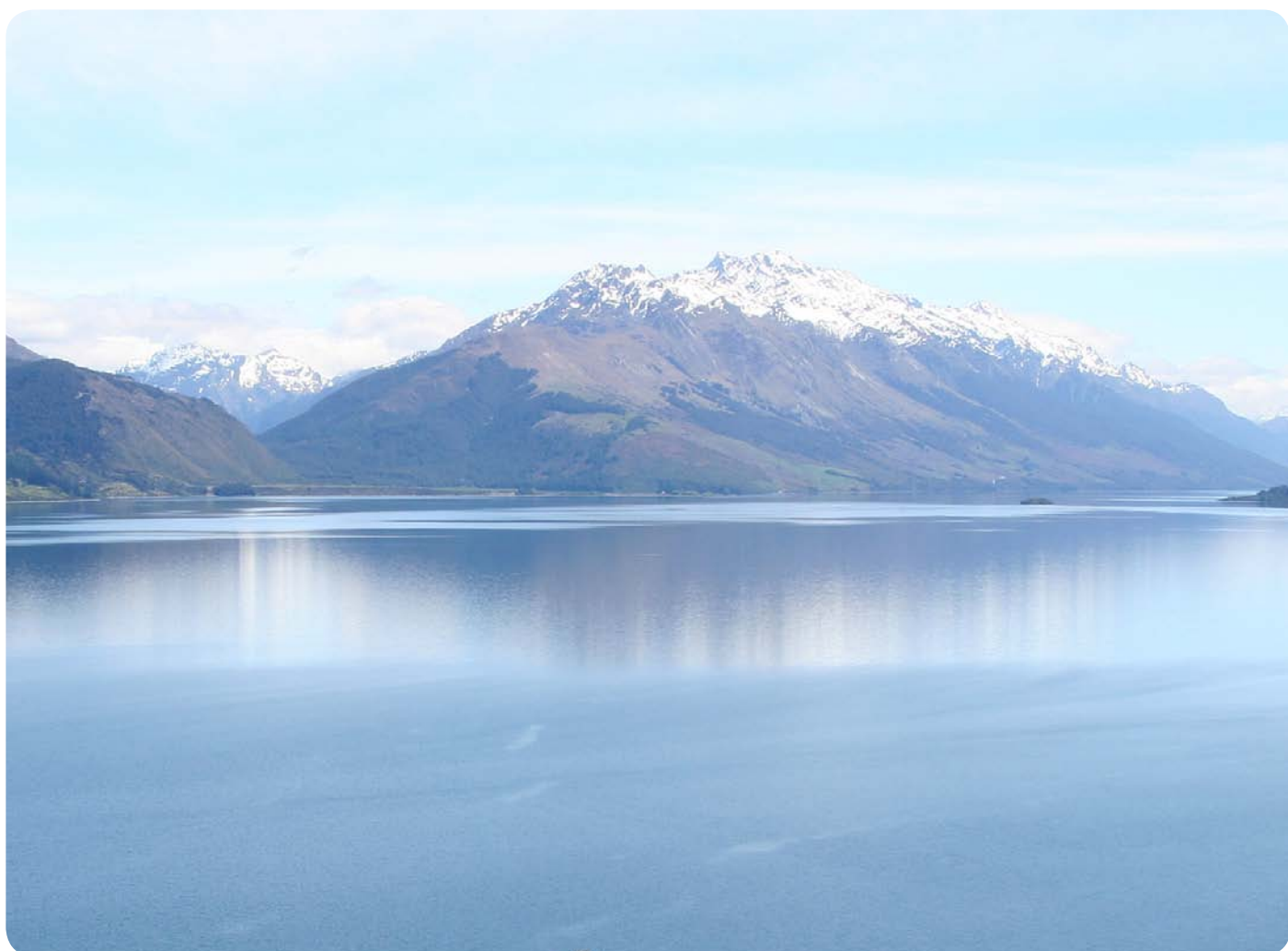
## About Yemaya

Marianna Leishman

Yemaya is the African-Yoruban, Afro-Brazilian 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 Brasil, crowds gather on the beach of Bahia to celebrate Candalaria: a Candomble ceremony on December 31. 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.



*Lake Tekapo, New Zealand Brooke Hughes*

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## **Editor's Welcome** **Anna Payten**

Welcome to Yemaya 2009.

First published by the Sydney University Law Society in 2006, Yemaya is now in its fourth year and continues to provide a vehicle to illustrate and access the opinions, thoughts and creative expressions of women. This year, the Law Society is proud to publish a collection of essays, short stories, poetry, personal reflections, opinion pieces, photography and art from a diverse range of women. Our contributors hail from various backgrounds both from within and beyond Sydney University, extending to women across the world.

Contributions to this year's journal not only provide an insight into the vast array of issues facing women today, but identify ways in which they can be overcome. Our contributors have explored a diverse range of topics including; the parenting rights of women, the rights women have over their own bodies, surrogacy and marriage rights of homosexual couples and the impact of the global financial crisis on the adult entertainment industry. In addition, the journal provides a snapshot of the role of women in the professions of veterinary science and international relations and explores the relevance of feminism in the field of criminology. We are also proud to feature the photography and artworks of several young women which beautifully capture the experiences of women around the world.

The experience of editing Yemaya has been a thoroughly enjoyable one and I am extremely grateful for the assistance of those involved. This publication would not have been possible without the generous sponsorship of Mallesons Stephen Jaques. I would especially like to thank Sam Garner and Emma Lloyd for their support throughout this project. We are honoured to have the journal launched this year by Justice Virginia Bell of the High Court of Australia.

Thank you to the Womens' subcommittee and all who have helped with the production of Yemaya – it has been wonderful to work with such an enthusiastic and dedicated group of people. Finally, thank you to our contributors for sharing your ideas and creativity with us.

I hope you enjoy this year's edition.



**Our Culture**



*Jaisalmer, India Brooke Hughes*



## Equal Time – In whose best interests?

### Lizzie Finn analyses the legal approach to post-separation parenting arrangements

The issue of 'equal time' or 'shared care' for post-separation parenting arrangements has long been hotly contested. However, with the introduction of the 'equal time' provisions in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), the issue has come under sharp scrutiny. This essay argues that undue emphasis on time in the new legislation is likely to lead to an assumption amongst judges, practitioners and parents that the more time a child spends with each parent, the better off that child will be. The 'equal time' provisions take the focus away from quality of parenting by suggesting that the meaningfulness of a relationship can be measured in hours and minutes. The idea that it is generally best for children to spend equal time with both parents is a misguided principle which focuses not on the wellbeing of the child, but on the wishes of parents. In reality, shared care is often inappropriate and unworkable due to the age of the child, the presence of conflict, issues related to violence or simply because such arrangements are logistically extremely difficult and financially taxing. Further, the cases that come before the court are likely to be those in which a shared care arrangement is most inadvisable.

#### What has changed?

Prior to the 2006 amendments, standard care arrangements for children post-divorce generally reflected the '80:20 rule'<sup>1</sup>, which refers to the time children spent respectively with their mother and father. For most children of divorce, their mother's home was their main home, while they saw their father every second weekend and for half the school holidays. Altobelli notes that this 'default visitation schedule' was not an intended effect, but rather, simply reflected what families, practitioners and judges expected and had become accustomed to.<sup>2</sup>

The Family Court's statistical data from 1993 to 2002 shows that the overwhelming majority of contact arrangements fell within this normal or default range: shared care was the outcome of proceedings in only 8% of sample consent applications, 4% of cases settled before trial, and 2% of those cases that were judicially determined.<sup>3</sup> The Court accounted for the low figure in judicially determined cases by noting that 'litigating parents are more likely to be hostile and un-cooperative with each other than are those who are able to negotiate a settlement involving their children. Shared residence

is most unlikely to be in the best interests of children in such circumstances.'<sup>4</sup>

The 2006 reforms promoted a major cultural change in relation to the way that children are parented after divorce. In line with the recommendations of the *Every Picture Tells a Story* report,<sup>5</sup> the new legislation introduced section 65DAA, which requires that where an order for shared parental responsibility has been made, the court 'must consider' making an order for the child to spend equal, or if not equal, then substantial and significant time with each parent if this would be in the best interests of the child and would be 'reasonably practicable'.

While this does not create a presumption in favour of shared care, it is designed to encourage a shift in the family law system away from the traditional 80:20 approach and towards a shared care model.<sup>6</sup> Recent Family Court statistics evidence this change: in clear contrast to outcomes of proceedings between 1993 to 2002, statistics for Family Court cases conducted between 2007-2008 showed that 19% of consent cases and 15% of judicially determined cases resulted in a 50:50 care arrangement, while a further 17% of consent cases and 12% of judicially determined cases resulted in a care arrangement somewhere between 30:70 and 45:55.<sup>7</sup> This very significant increase demonstrates that, consistent with the aims of the amended legislation, there has been a clear shift towards shared care.<sup>8</sup>

#### Requirement to advise about shared care

Under the new legislation, not only must the court consider making an order for shared care, but advisers must inform parents that they "could consider" the option of an equal time arrangement.<sup>9</sup> As Rathus points out, practitioners are very influential in decision-making. The message implicit in what lawyers, mediators or counsellors say to parents can be very powerful in influencing what a party will include in their application or affidavit, how they will participate in discussions about settlement, and also what they may agree to in an agreement or parenting plan.<sup>10</sup> In practice, this requirement will mean that throughout the separation process, the parties will continually have it suggested by their lawyer, family counsellor, dispute resolution practitioner and family consultant, that they enter an equal time arrangement. As a result,

parties are likely to get the impression that this is the model they should be aiming towards; the model that society and the law believes is 'right'.

Interestingly, there seems to be no prerequisite of ascertaining whether equal shared parental responsibility is appropriate in the particular case before advisers are bound to suggest shared care. Section 63DA(2) simply states that the adviser is bound to inform the parents of the option of shared care in situations where the adviser is providing advice 'in relation to the parental responsibility for a child following the breakdown of a relationship.'<sup>11</sup> Thus, it appears that the legislation requires advisers to give this advice even where shared care is clearly inappropriate, such as in cases where violence is an issue.

### In whose best interests?

Lamb argues that while legal decisions are often justified by reference to children's best interests, in reality, decision-making and policy development are often guided by political, ideology and cultural values rather than scientific research. He believes that in the case of divorce, what is fair for the parents often obscures, or takes precedence over what is in the children's best interests.<sup>12</sup> The idea of 'equal time' epitomises this concern: it is not about the best interests of the child, but rather, is a parent-focused concept which, Kuehl argues, is based on the idea that because it is usually difficult to choose between two good parents, the Court should simply use a procedural, mathematical formula to divide up the child. Kuehl argues that parenting arrangements should do what children request: 'to reflect, as much as possible, the way their lives were arranged before the divorce, whatever that was. Only in this way can we truly say we are operating in the best interest of the child.'<sup>13</sup>

Maloney concurs. 'Equal time', he argues, is a reductionist approach to parenting, which 'borders on treating children as commodities.'<sup>14</sup> The term 'equal time', which was inserted into the legislation almost at the last moment, distracts attention from the central issue, that is, that children have an ongoing *relationship* with both parents.<sup>15</sup> Research consistently shows that when determining whether a care arrangement is in the best interests of the child, it is the quality of parenting which matters, not the amount of time the child spends with each parent.<sup>16</sup> As Smart writes, the key element is 'not equal time, but equal caring.'<sup>17</sup>

Studies of parents with 50:50 care showed that especially for fathers, a key motivating factor behind the push for equal parenting was a sense of their own rights as parents.<sup>18</sup> For others the proposal was a chance to make the system fair, just, equitable and dignified.<sup>19</sup> What advocates of the presumption seemingly failed to take into account were the realities of the proposal for children.

### Children caught in a warzone

A multitude of studies suggest that where there are high levels of conflict between parents, shared care can have a detrimental effect on children's well-being.<sup>20</sup> In fact,

studies show that intensity of conflict is a better predictor of adjustment than separation and divorce per se.<sup>21</sup> Frequent transitions between warring parents can exacerbate this interparental conflict.<sup>22</sup> Gardner points out that where warring parties agree to 'joint custody', what may actually result is a no custody arrangement, in which neither parent has power or control, and the children are caught 'in a no-man's land exposed to their parents' crossfire and available to both parents as weapons.'<sup>23</sup>

McIntosh and Chisholm note that when children make frequent transitions between warring parents who cannot conceal their feelings in front of the child, these children become preoccupied and 'begin to use considerable energy to ensure their own comfort and emotional safety in each environment, actively and constantly monitoring the "emotional weather" they encounter in each parent's home.'<sup>24</sup> This can cause acute anxiety for the child, and may greatly diminish their capacity for learning, thinking, interacting and playing.<sup>25</sup> McIntosh writes of Rachel (10) as an example of the stress and anxiety caused by constantly moving between warring parents. Seven years after her parents' acrimonious divorce, Rachel arrived for therapy clutching a complicated visiting schedule that she was trying to work out for herself in an attempt to order her chaotic world:

"Everything is wrong", and the tears came and didn't stop, through moments of pent-up rage. "I'm not allowed to even take my insulin from Dad's house to Mum's house. I'm not allowed to play the CD Dad gave me at Mum's house. They fight all the time about who can have me – either they both want me or neither of them wants me."<sup>26</sup>

Further, constant transition between warring parties has been found to leave children confused about their loyalties,<sup>27</sup> and feeling torn between their parents.<sup>28</sup> These feelings are most pronounced and their effects most destructive, where the child is caught within their parents' conflict.<sup>29</sup> Because children in shared care arrangements are more regularly exposed to conflict, they

**"The idea of 'equal time' is not about the best interests of the child, but rather, is a parent-focused concept"**

are more likely than sole-residence children to report feeling caught between their parents. Buchanan et al. found that such feelings were related to higher levels of child depression, anxiety and deviant behaviour.<sup>30</sup>

Conflict is especially detrimental to young children. Enduring parental conflicts disrupts attachment processes in infancy. High intensity conflict is linked with the development of insecure and disorganised attachment styles. This in turn interrupts the development of emotional security. Children are more prone to negative emotional arousal and distress, are less able to regulate their feelings, less optimistic about their ability to cope, and less able to cope.<sup>31</sup> Further, because children under five are more likely to self-blame, inter-parental conflict



is likely to be especially detrimental for them.<sup>32</sup>

Persistent conflict between parents has been found to pervasively undermine the quality of their parenting, and their affective response to their children.<sup>33</sup> Parents can be so consumed with the conflict that the needs of the children become secondary; children may instead feel that they must protect their *parents'* feelings. According to Smart, the majority of children know how important apportionment of time is to their parents, and do not wish to upset an arrangement which is 'fair' to their parents.<sup>34</sup>

Neale, Flowerdew and Smart found that some children in shared care who found the arrangement burdensome were reluctant to raise the issue with their parents for fear of reigniting parental conflict or because they felt 'too guilty or too responsible for their parents feelings to broach the subject.'<sup>35</sup> Matt (15) for instance, told the interviewer that he would prefer to stay in one place, but did not want to tell his parents because, "They'd probably go mental about the amount of time I was spending at each

house...I'd just feel under pressure not to say anything...They'd fight over every day...they'd argue over like, whoever had one long day or something."<sup>36</sup>

**"It seems frequency of contact is often an explicit need of the parent, rather than of the child"**

If children in shared care arrangements wish to change their living arrangements, but cannot express this wish for fear of upsetting their parents, then an equal care arrangement is probably not in their best interests.<sup>37</sup>

In fact, where this is the case Smart, Neale and Wade argue that shared care 'can be just as debilitating...as those cases where one parent refuses to allow children to see the other parent or to spend meaningful time with them.'<sup>38</sup> As Batagol writes, for children in such pressured situations, a law which engrains the expectation of equal time 'creates an additional prevailing societal expectation of being a son or daughter by carefully measured equality.'<sup>39</sup>

Even when parents do recognise that the arrangement is not working, where conflict is high, most parents will be unwilling to upset the delicate balance of the agreement, 'to willingly throw the situation back into conflict.'<sup>40</sup> Thus, arrangements may remain which are not effective or not best for the child, simply because the alternative is a return to court.

### Shared care for young children

In deciding whether a shared care arrangement is appropriate, the age and developmental stage of the child are important considerations. Although there is general recognition that inappropriate living arrangements can

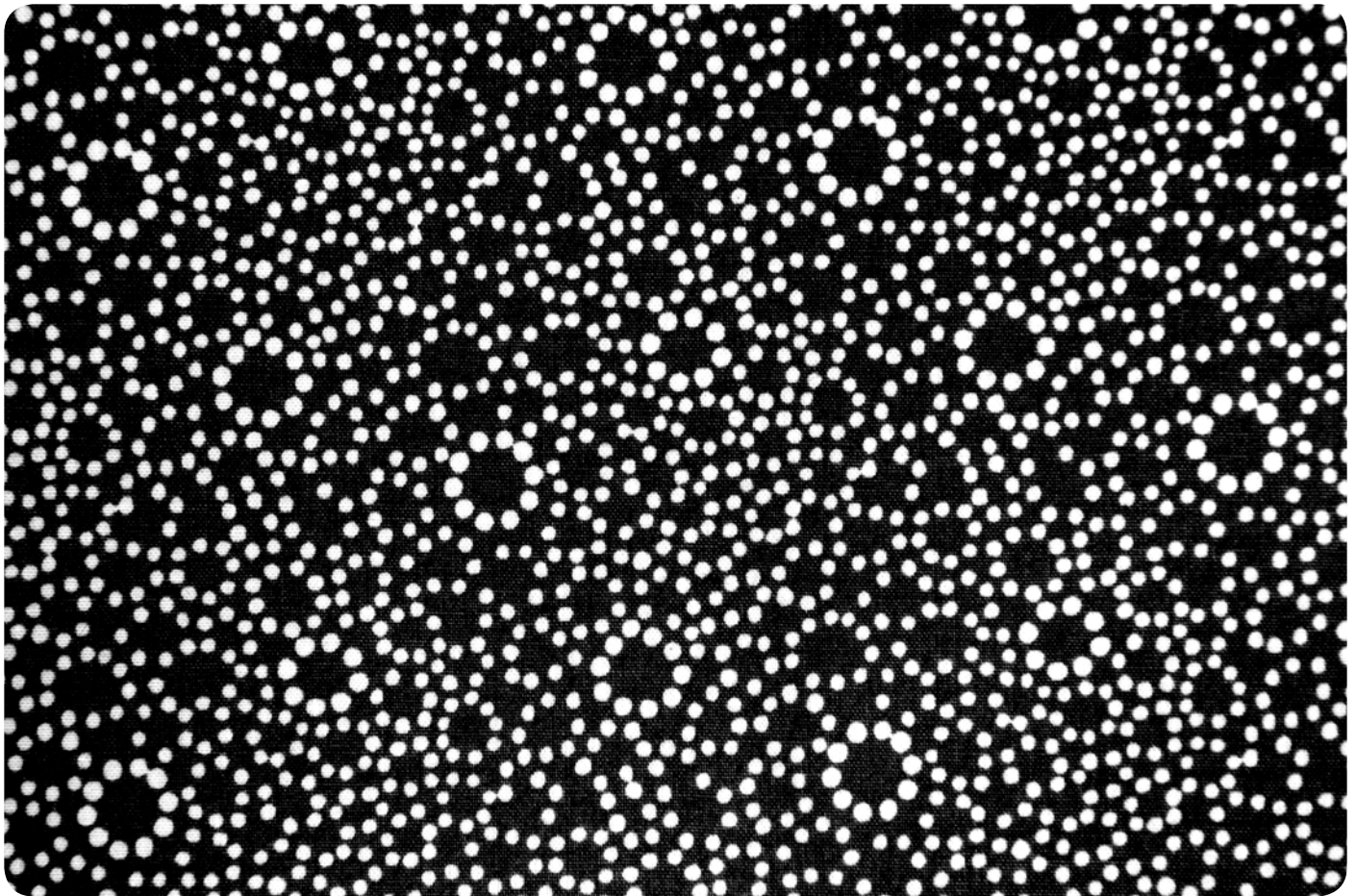
have a serious impact on young children's psychological development, there is disagreement about what care arrangements are most appropriate for young children.

McIntosh and Chisholm argue that there are important developmental reasons why a shared care arrangement may be unsuitable for young children. Children's healthy emotional development is dependent on the existence of a continuous care-giving relationship from an early age, through which they can form an organised attachment.<sup>41</sup> In order to form good attachments, a child must have a continuous experience of reliable care with one or other parent: attachment security does not transfer from parent to parent as a child moves between them. Rather, the child is likely to have a more secure attachment to one parent (usually the mother) than the other. Constant movement between parents, as happens in shared care arrangements, disrupts and is likely to have a negative impact on the primary attachment relationship, which in turn can have serious developmental consequences for the child.<sup>42</sup>

However, some child psychologists question the assertion that shared care is necessarily detrimental for young children. Advocates of shared care for young children argue that much child development literature fails to recognise the importance of fathers, and that attachment theory is often overstated and misinterpreted.<sup>43</sup> Kelly and Lamb for instance, reject the argument that a child forms only one primary attachment. While they note that young children do develop a preferential relationship with their primary caregiver, they argue that 'amounts of time that infants spend with their two parents do not affect the security of either relationship.'<sup>44</sup> They argue that by the age of 2, children can manage two consecutive overnights with each parent without stress, and suggest that care arrangements for infants and toddlers should involve frequent transitions between households to avoid long separations from either parent.<sup>45</sup>

However, Solomon and Biringen question the findings, methodology and recommendations made by Lamb and Kelly. While agreeing that theories of attachment have often been misunderstood and misused to exclude fathers from the lives of young children, they point out that overnight separations present a far greater challenge to the development of organised primary attachments than do daytime separations. In addition, they note, there is no evidence to suggest that frequent overnight transitions have a positive effect on the father-infant attachment. Thus it seems frequency of contact is often an explicit need of the parent, rather than of the child.<sup>46</sup>

Significantly, despite the divergent views of researchers concerning appropriate care arrangements for young children, all agree that shared care is inadvisable in cases where high levels of parental conflict are coupled with low levels of parental communication.<sup>47</sup> Even Lamb and Kelly note that young children require a stability and consistency, so that while the two residential environments need not be the same, feeding and sleeping routines must be similar.<sup>48</sup> This requires a high level of cooperation and communication between parents – unlikely



*Untitled Brooke Hughes*

where parents are highly conflicted.

### **Successful shared care requires specific conditions**

In reality, shared care arrangements are unlikely to be suitable in most cases which come before the Family Court. Studies suggest that successful shared care is generally associated with a distinct demographic profile. Moyer found that shared residence arrangements were more common among better educated, higher earning parents who cooperate and are child-oriented, and in families that include boys and only children.<sup>49</sup> Smyth et al. found that families who self-selected into shared care tended to display a number of common characteristics; they concluded that successful shared care requires the confluence of a number of conditions: geographical proximity; a business-like relationship; child-focused arrangements; commitment by all to make shared care work; family-friendly work practices, especially for fathers; a degree of financial independence, especially for mothers; and a degree of paternal competence.<sup>50</sup>

Shared care requires an extremely high level of cooperation. Take for example, what may be seen as the typical shared care situation: the week-about arrangement. Under such an arrangement, any extracurricular before or after school activity which a child wishes to take part in must be negotiated with the other party. A parent cannot enrol their child in Tuesday afternoon soccer practice or Thursday morning piano lessons without consulting, coordinating, and agreeing with the other parent.

As well as a high degree of cooperation, shared care ar-

rangements also require a number of favourable material conditions. Financial capacity is central, since shared care is resource intensive, often requiring duplication of central infrastructure like clothes, computers, sporting equipment, furniture and toys across the two homes.<sup>51</sup> Unfortunately, most families are unable to meet these conditions, which is probably why self-selected shared care is relatively rare amongst the general population. For many families, equal care will be unworkable and unachievable.<sup>52</sup>

### **Imposing shared care: an order to agree**

The above section outlines the conditions necessary for a shared care arrangement to be successful. Unfortunately, as McIntosh and Chisholm point out, separating parents who require litigation or formal mediation to determine their care arrangements tend not to exhibit these characteristics.<sup>53</sup> For this reason, the imposition of shared care arrangements by the court is often inappropriate.

Imposing shared care arrangements on parents is unlikely to enable them to achieve the conditions necessary to sustain a successful shared care arrangement.<sup>54</sup> In fact, numerous studies show that where shared care arrangements are court-imposed, they are generally unsuccessful.<sup>55</sup> An early study by Steinman et al. of families with court-imposed joint custody arrangements found that in all but one of the families, the court-imposed joint-custody arrangement had failed. They concluded that the more the court influences the joint custody arrangement, the more negative the



outcome.<sup>56</sup>

Johnston et al. found that the children in their study who were placed in shared care arrangements at the behest of a court or mediator were significantly more depressed, more withdrawn and uncommunicative, had more somatic symptoms, and tended to be more aggressive.<sup>57</sup> A recent study (the 'Child Responsive Program' study) looking at the outcomes for parents and children prior to and four months after litigated settlement of their care disputes, found that in 73% of cases in which shared care had been ordered, at least one parent reported "almost never" cooperating with the other parent four months later, and in 39% of these cases, at least one parent reported "never" being able to protect their children from the conflict.<sup>58</sup>

Shared care arrangements agreed to in formal mediation seem to be similarly unsuccessful. The findings of the 'Children Beyond Dispute' research program considered separated parents who were involved in mediation for entrenched parenting disputes. A year after the dispute was resolved, they found that 75% of parents who had completed mediation with a new agreement for shared care had reverted to a less than 35:65 division. In contrast, all the parents who had arrived at the mediation in already established shared care arrangements maintained that arrangement over the course of the year.<sup>59</sup>

That shared care arrangements arrived at through mediation or court orders are often unsuccessful is not surprising. As Kuehl notes, 'Simply ordering parents to cooperate in the raising of their children has never worked to guarantee or increase such cooperation.'<sup>60</sup> Many of the studies which reported positive outcomes for shared care involved self-selected arrangements or did not control for self-selection.<sup>61</sup> Parents who fit the criteria necessary for a successful shared care arrangement are likely to be able to agree themselves to a shared care arrangement without the need for mediation or litigation: the qualities which the research suggests will result in successful shared care arrangements are similar to those which permit parents to agree to their own post-separation children's arrangements in the first place.<sup>62</sup>

Where the conflict and disagreement between parties is such that a detailed parenting order is necessary, shared care is unlikely to be in the best interests of the children. As Hetherington et al. point out, 'those litigated cases in which a judge is forced to make a difficult custody decision may be exactly the ones for whom joint custody will not work.'<sup>63</sup>

It is therefore concerning that both the Child Responsive Program study which looked at litigated cases and the Children Beyond Dispute study which considered mediated cases, found higher rates of shared care among parents who had been involved in legal conflict, than in the general population of separating parents (46% litigation sample; 27% mediation sample; 9.5% general population).<sup>64</sup> While shared care should be available to parents who elect it, it should not be im-

posed on unwilling parents.

## Conclusion

It is submitted that while shared care arrangements can work for some families, for a majority of families, they are not appropriate or workable. While the new legislation maintains that the child's best interests are the paramount consideration, the emphasis on time may cloud this overriding principle and overshadow other important considerations, to the detriment of outcomes for children. The new emphasis on time can mislead parents and judges from a focus on the quality of parenting and the child's welfare, towards a focus on equal time for parents.

## Endnotes

1. R. Chisholm, 'Post Separation Parenting: The Changing Legal Environment', unpublished paper in Tom Altobelli, 'Rethinking Contact Arrangements Involving Young Children' (2005) 19 *Australian Journal of Family Law* 29 at 40.
2. Altobelli, *ibid* at 40.
3. The Family Court of Australia, *Submission of the Family Court to Standing Committee Inquiry into Joint Custody Arrangements in the Event of Family Separation* (2003) at 22.
4. *Id.*
5. House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: report on the inquiry into child custody arrangements in the event of family separation* (2003).
6. Catherine Caruana, "'Shared Parental Responsibility' and the Reshaping of Family Law' (2006) 74 *Family Matters* 56 at 56.
7. Family Court of Australia, *Shared Parental Responsibility: Statistical information about the Family Court of Australia* (2009) [http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Business/Statistics/FCOA\\_stats\\_SPR](http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Business/Statistics/FCOA_stats_SPR) accessed 15 May 2009.
8. *Family Law Act 1975* (Cth) s 63DA(2).
9. Zoe Rathus, 'Shifting the gaze: Will past violence be silenced by a further shift of the gaze to the future under the new family law system?' (2007) 21 *Australian Journal of Family Law* 87 at 95.
10. *Family Law Act 1975* (Cth) s 63DA(1).
11. M.E. Lamb, 'Placing Children's Interests First: Developmentally Appropriate Parenting Plans' (2002) 10 *Virginia Journal of Social Policy and the Law* 97 at 98.
12. *Ibid.*
13. Lawrie Moloney 'Dads, family breakdown and the 2006 family law reforms: It's about time – or is it?' (Keynote Address at the Men's Advisory Network 2nd National Conference, 3 August 2008) at 9.
14. *Id.*
15. Carol Smart, 'From Children's Shoes to Children's Voices' (2002) 40 *Family Court Review* 305 at 317;
16. *Ibid.*
17. B Smyth, C Caruna and A Ferro, 'Shared Parenting: The views of separated parents with 50:50 care arrangements' (2003) 65 *Family Matters* 48 at 52.
18. Geoffrey Green, 'Shared Parenting: In the shadow of the law' (2003) 65 *Family Matters* 56 at 64.
19. See for example J. Johnston, M. Kline and J.M. Tschann, 'Ongoing Post Divorce Conflict: Effects on Children of Joint Custody and Frequent Access' (1989) 59 *American Journal of Orthopsychiatry* 576; P.R. Amato and S.J. Rezac, 'Contact With Nonresident Parents, Interparental Conflict and Children's Behaviour (1994) 15(2) *Journal of Family Issues* 191; Whiteside and Becker (2000); Jennifer McIntosh and Richard Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation' (2008) 14 *Journal of Family Studies* 37.
20. E.M. Cummings and P. Davies, Children and Marital Conflict: the Impact of Family Dispute and Resolution (1994) in Jennifer McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development' (2003) 9(1) *Journal of Family Studies* 63 at 71.
21. Solomon and Birngren at 361 in Altobelli at 37
22. Gardner, 'Joint Custody is Not for Everyone' (1982) 7 *The Family Advocate* 8 at 9 in Kuehl, above n19 at 40.
23. McIntosh and Chisholm, above n26 at 43-44.

24. McIntosh, above n27 at 67.
25. *Id* at 67-68.
26. *Id* at 67
27. Stephen Gilmore, 'Contact / Shared Residence and Child Well-Being: Research Evidence and its Implications for Legal Decision-Making' (2006) 20 *International Journal of Law, Policy and the Family* 344 at 357.
28. McIntosh, above n27 at 72.
29. C.M. Buchanan, E.E. Maccoby and S.M. Dornbusch, *Adolescents After Divorce* (1996) at 157 in Gilmore, above n34 at 357.
30. McIntosh, above n27 at 66.
31. *Id* at 68
32. Fincham et al. (1994) and Krishnakumar and Beuhler (2000) in McIntosh, above n27 at 72
33. Smart, above n22 at 314.
34. B. Neale, J. Flowerdew and C. Smart, 'Drifting Towards Shared Residence?' 33 *Family Law* 904 at 908.
35. Carol Smart, Bren Neale and Amanda Wade, *The Changing Experience of Childhood: Families and Divorce* (2001) at 133.
36. Becky Batagol, Castan Centre for Human Rights Law, 'Why a Rebuttable Presumption of Equal Time Should Not Be Implemented: A Research Informed Argument', *Submission to the Standing Committee on Family and Community Affairs: Child Custody Arrangements Inquiry* (2003) at 10.
37. Smart et al., above n42 at 133.
38. Batagol, above n43 at 10.
39. Alison Taylor, 'Shared Parenting – Is It Working? Reflections by a Court Service Mediator' (1989) 27(2) *Family Court Review* 7 at 11.
40. McIntosh and Chisholm, above n26 at 43.
41. McIntosh and Chisholm, above n26 at 43-44
42. Z. Biringen et al., 'Commentary on Warshak's "Blanket Restrictions: Overnight Contact Between Parents and Young Children"' (2000) 40 *Family Court Review* 204 at 208.
43. M.E. Lamb and J.B. Kelly, 'Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon and Biringen' (2001) 39(4) *Family and Conciliation Courts Review* 365 at 366.
44. J.B. Kelly and M.E. Lamb, 'Using Child Development Research to Make Appropriate Custody and Access Decision for Young Children' (2000) 38(3) *Family and Conciliation Courts Review* 297 at 306.
45. J. Solomon and Z. Biringen, 'Another Look at the Developmental Research: Commentary on Kelly and Lamb (2001) 39(4) *Family & Conciliation Courts Review* 355 at 360.
46. Kelly and Lamb, above n51; R.A. Warshak, 'Blanket Restrictions: Overnight Contact Between Parents and Young Children' (2000) 38(4) *Family Conciliation and Courts Review* 422; Solomon and Biringen; J. Solomon and C. George, 'The Development of Attachment in Separated and Divorced Families: Effects of Overnight Visitation, Parent and Couple Variables' (1999) 1 *Attachment & Human Development* 2; McIntosh and Chisholm, above n26; Altobelli, above n1 at 41;
47. Kelly and Lamb, above n51 at 307.
48. Moyer, 'Background Paper Child Custody Arrangements: Their Characteristics and Outcomes' (2004) Department of Justice, Canada at 14; 17 in Gilmore, above n34 at 357.
49. B Smyth, C Caruna and A Ferro, 'Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting' (Paper presented at the Australian Social Policy Research Conference, University of New South Wales, 9-11 July 2003) at 21.
50. Rhodes and Boyd, above n16 at 133
51. Batagol, above n43 at 5.
52. McIntosh and Chisholm, above n26 at 38.
53. Batagol, above n43 at 7.
54. Smyth et al, above n56 at 10; McIntosh and Chisholm, above n26 at 40; Steinman, Zimmelman and Knoblauch, 'A Study of Parents who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court' (1985) 24 *Journal of the American Academy of Child Psychiatry* 554; Johnston, above n26.
55. Steinman et al., above n62 at 554.
56. Johnston et al., above n16.
57. McIntosh and Chisholm, above n26 at 42.
58. McIntosh and Chisholm, above n26 at 40.
59. Kuehl, above n19 at 37.





## The Road to Recovery

Rachael Hyde shares the story of her battle with anorexia and her gradual healing journey

My name is Rachael. I am in recovery from anorexia and major depression. It is still difficult for me to say that aloud. Four years ago, at fifteen, I had lost my health, my hair, my skin, my self-esteem, my energy, my height, my ambition, my friends, my ability to think, to reason, my trust in myself, other's trust in me, my pride; in short, my identity, to a disease I had rarely considered, even in the vaguest terms. Four years on, I have painstakingly struggled to grasp it all back. It is, and, I suspect, always will be, a work in progress. I am not the same person I was pre-anorexia, and nor will I ever be.

However, my present self is so far removed from the dangerously sick girl I was in high school that recalling and articulating my state of mind at that time is incredibly challenging. The brief flashes of recollection I do have in certain places, or at certain times of year, are still incredibly intense. I recently opened a bottle of perfume I have not used for a few years, and was quite literally bombarded by a stream of negative emotions and images, to the extent that I found myself shaking, on the verge of tears, and experiencing severe stomach pains within a few seconds. That said, I know that these experiences never come close to reaching the constant anxiety and terror of an anorexic mind. I also know that they are transient and I cannot stress enough how happy, how relieved that makes me.

At my lowest physical point, I weighed below 35 kilos. For a girl of average height, this was fatally underweight. I was hospitalised for seven weeks, and have no doubt that physically, this saved my life. My memory of this point and the months leading up to it is very fractured. My brain is literally physically incapable of giving any narrative, coherent framework to this period of constant crying, incessant biting cold, desolation, intense loneliness and isolation, bruising, shaking, insomnia, physical pain, terror, panic and confusion.

It is commonly cited that anorexia has the highest suicide rate of any psychological illness. I have been told by countless medical practitioners that the mortality rate of the disease is around 20% and that, of the select few that do fully recover, an average 'recovery period' is around 7 years. Those numbers are scary. I have cried myself breathless over them countless times. To suffer from anorexia is to have your own self mercilessly screaming at you every second of every day. For years. I remember literally not understanding how it would be possible to sit and feel the way I did for minutes, let alone hours, days or years without dying from the inside out, actually disintegrating with sadness. For what

seemed like an indescribably long period of time, every time I found myself crying I honestly believed I would never be able to stop.

I cannot emphasise enough the devastating nature of the disease not only physically but emotionally and mentally. To watch your body self-destruct is scary. To experience the same phenomenon in your mind is terrifying.

Hopefully, these feelings are beyond your personal identification. I can only imagine how hard it is to watch someone close to you become dangerously, seemingly irrevocably consumed by irrationality, obsession and depression. I do not know what I weighed before this. I could not tell you what clothing size I was. I wore what fitted. It was simply never an issue. To explain the blatant paradox behind this phenomenon, I emphasise that it simply was never about my weight.

Anorexia is a psychological enigma, and I do not profess to have any more of the hows and whys than the rest of the community. What I do have is a memory of the devastating, prolonged struggle back to life. I do not use these terms theatrically. Recovering from anorexia was invariably harder than slowly submitting to self-destruction.

Once I realised something was seriously wrong, I cannot emphasise enough how firmly convinced I was that I could not do 'it'. It was inconceivable to imagine a world where obsession with food, weight, and self-loathing did not permeate every thought I had. I remember being overwhelmed with panic when realising that I could not recall a time when this did not define my reality.

My stubbornness, my pride, my perfectionism, and my impossibly high expectations fuelled my anorexia. They are also what eventually got me out. Recovering from anorexia was like climbing out of a well. You will seem completely isolated. You will often have no idea how to proceed. The struggle will overwhelm you, so that you will not be able to contemplate or interact with anything else. It will be torturous, and to simply let go and fall will often seem inevitable, and always seem easier. Sometimes, you will simply have to stay where you are for a while. But as long as you don't let go, this is not failure. To get out will take what seems like an eternity, and you won't see the top until you get there.

Physical recovery was painstaking. But I write this not to theatricalise an ugly, confronting disease, rather in an attempt to bring some sense of understanding to onlookers, and perhaps sufferers, about how overwhelmingly incomprehensible the nature of the disease is to every-

one involved. I am still ashamed to say I laughed off a friend's real concerns about me dying on more than one occasion. Unfortunately, I quite literally could not comprehend what well-meaning friends at their wit's end were saying when they would shout, reason, threaten, cry and plead with me in a vain attempt to push me away from self-destruction. My lack of response at the time meant that they still, I think, are not aware of the large part they played in saving my life, not physically, but mentally.

As an individual, a parent, a sibling, a friend, or a community, we cannot provide alleviation for the mental agony that is recovery. As much as we would like to, we cannot pull our loved ones out, or crawl up for them. What we can do is be waiting at the top of the well. What we must do is to believe in them when they cannot believe in themselves. For however long it takes.

No-one is equipped to deal with this disease. We have come a long way in the recognition of mental illness, but from my experience, overcoming the stereotypes and the embarrassment that persist long after physical recovery was a large part of the struggle. Anorexia nervosa is not a self-serving disease of vanity. It is not a stereotyped perfectionist desire for control, nor a middle-class cry for attention. It is not a conscious decision. It has no good points. To truly, genuinely believe that eating to maintain yourself is somehow promiscuous on your part is a reaction to a great deal more than models in magazines.

I have only recently recognised that recovery also involves dealing with grief. This is not an inappropriate word to describe the long-term trauma inflicted by the disease. I still lament that I was, at best, only half-present at many points in my life. Further, as much as hospitalisation was physically helpful, the experience was emotionally destroying.

To be forcibly placed with a group of girls as physically and mentally ill as I was introduced me to an intense amount of competition, mind games and despair. Perpetual snide remarks, threats or open hostility from other patients and, most notably, nurses either inflicting blame for anorexics 'wanting to be sick' or trivialising our difficulties on top of my own crumbling state of mind resulted in daily anxiety attacks, chronic insomnia and constant, constant crying that continued far beyond my discharge.

For the next few years, when the memories and the continuing struggle with recovery still dominated and interfered with a large part of my daily life, every time someone even vaguely referenced eating disorders, or hospital, or food, or weight, whether generically or personally, be they naïve or informed, I would experience a hot surge of shame and fear. At first, it was overwhelming. But with each year I become more recovered, more distanced from the disease, more sure of my post-anorexic self, I become more capable of recognising, articulating, and dealing with the trauma and its implications.

I took a gap year last year before starting university, and, for the first time, told some of the people I met over-

seas about my history with anorexia and depression out of my own free will. I remember being incredibly surprised that this did not alter my relationship with them in any way, did not change their perception of me, or our ability to enjoy each other's company. It still somewhat surprises me that I was, and am, pleased, not regretful, that I told them. Love and support are the best tools you can offer to a sufferer. You do not need to know what to say, or how to 'fix' someone. You do need to recognise both their need for support and their independence. You do need to recognise anorexia as a disease, not a personality.

Now, I get hungry, rather than faint, a few times a day. Having lunch with a friend is enjoyable, rather than stressful. I don't obsessively plan or analyse the food I eat. I am free to think about other, far more engaging topics in my day, and in my dreams. Mirrors are predictable, and somewhat useful, rather than terrifying. All this is amazing. But more than that, I can trust again. I am not proud, but nor am I desperately ashamed, of my experience with anorexia. My perception of myself is not defined or limited by memory of the disease. I have many amazing people around me that I care about, and genuinely have a lot of fun with, but who also, I am still realising, accept and support my history and my con-

**“To suffer from anorexia is to have your own self mercilessly screaming at you every second of every day.”**

tinuing challenges and will be there for me if I ever need or ask them to be.

Until recently, I never believed

that anyone understood the psychological trauma I experienced. It is only through learning about anorexia and depression that I have realised that as much as it feels like your well is deeper and darker than anyone else's, other people have gone through the same thing, and have come out the other side.

It is a blessing that those that haven't cannot perhaps entirely identify with your struggle. That does not mean that they cannot be incredibly important in your recovery, or that having had anorexia must somehow damage your relationship with them. Ironically, whilst one of the defining features of anorexia was, for me, an overwhelming sense of isolation, 2-3% of Australian females fulfil diagnostic criteria for the disease.

My name is Rachael. I am in recovery from anorexia and major depression. I am also a highly motivated, ambitious law student with a love of ricotta cheesecake, walking in the rain, warm doonas, peppermint tea, musty old books and polka dots. I do not know exactly why anorexia or depression develop, or progress so devastatingly. I do not know exactly what we can do as individuals, or as a society, to prevent the illnesses, or hasten recovery. I do know that it is possible to come out the other side, to regain an identity for oneself, and to re-engage with the world. And it's wonderful.



## *Kore; or I Persephone*

Alice Zheng explores the mythology of the  
Goddess of the Underworld



### (I) Ripe

Helios' steeds'  
sweeping wings  
lathe your brow

and scoop over rye-tickled  
bellies, swelling  
with late summer air

and startling  
through the earth –  
sheathed blossoms, tips  
lancing the breathless sky.

Quick-fingered, you trawl the fields sown with your  
footprints  
ransacking cowslips to wreath in your hair

Wide acres,

stretching like lines on Zeus' palm  
traverse toward Dusk  
where, against  
the chalk white caves

springs a lone, proud narcissus  
black.

Between two heartbeats  
steals  
a  
sudden  
quiet;

dimming  
the fury of a red sun.

like an eel,  
sliding beneath your feet in shallow waters

silvery slimy shock.

But:  
you squelch through wet foreboding,  
defiant; to pluck –

– bright darts of petal glint – clean nails  
sharply pinch – jet

in your hand;  
sinking like the sun –

The ground grinds its jaw,  
vice-like lips stretch, mouthing the tumult  
of its giant face splitting  
a chariot springing from between rocky gums  
like a tongue  
chasing the plucked narcissus –  
fluid flanks and dark manes  
rope behind the grumbling of the earth.  
Boulders catapult and shatter  
and Hades emerges, shadowed by stony wrath  
in the volcanic pelter of hoofs, rears his arm  
and scoops...

seized by your dress.  
he clutches you to his side, his steeds stampeding at  
the dying light.

Swallowing –  
your face pressed to his armoured breast,

his eyes spear the horizon  
pinning the world beneath him –

you tear your mouth wide and

a shriek –  
like the sharp shafts of narcissi  
scratching at the sky –

*Mother!*

as tunnelling bones and dirt  
stir and converge – the topography of death –  
under the chariot wheels  
grinding over your hoarded blooms  
falling from your hands; a dowry  
wilted.



**(II) Rind**

*Stop crying  
or I'll slap you.*

Hecate's whittled fingers  
cork your tears.

Seizing the hem,  
she flings you out of  
your clothes

tossing your chiton to her dogs.

*Did the horses shit on you?*  
she sneers  
at your stink.

Mewling and helpless,  
your spine shrivels  
like a salted slug

an insoluble lump  
wedged in your throat

folds of clean linen  
erasing your limbs.

Pinching your scalp,  
Hecate rips dead flowers from your hair  
and discards them.

You are a gnat  
squashed under her sandal.

—

The halls of the dead  
are hollow  
his court of echoes and shades dispersed.

You think of your mother's fields  
the warm baked earth  
shot with cowslips and billowing reeds

With your ebony locks still  
dripping of the Styx,

dread crab-claws your intestines  
and pride wrings your tear-ducts dry  
as Hades approaches.

Paralysed.

*Kore, is it?*

Your lead weighted tongue  
clunks in your mouth.



He's grey tinted and carved  
from the marble of his columns,  
the silk of his tunic  
hemmed with onyx.

His granite eyes roll,  
with a fluttering of black spiny lashes.

*Speak.*  
*Are you frightened?*  
*I will be kind.*

*Speak.*

His voice bruises you.

You sink your heels,  
quiver like a shredded sail

*Let me go home to my mother.*

—

Bitten by the draughty air  
You are excavated  
empty as a grave  
waiting for a cadaver  
to rot within.

### (III) Flesh

Weeks slouch by  
thick-thighed and pregnant  
miscarried grief kicking  
damp, shivering  
petals.

*I'm scared*

*let me go*  
*I'll be good; quiet; gone.*

Limpid loneliness plugs up  
hysteria's abyss

and Hecate pinches you  
into your flesh.

*I won't cry.*

—

You hollow;  
your mother's memory sliding down newly starved planes  
clinking about your ankles.

—

a ringing bell  
igniting the air,  
flint fingered  
drying Hades' moist breath



a shadow, pressed and brittle,  
against your lids

—

Your father Zeus, enthroned in air,  
through his thunder and might he does  
not hear, though his ears they reach, your cries.

*Then cry no more your worthless tears.*

and Demeter,  
nail-broken hands scrabbling dirt graves to  
dig you out from Death,  
though Death grows aeons deep.

*And beg no more, and no more should you weep.*

and your own hands,  
milky-blossomed and vain, blistering at the  
touch of sand.

—

Hades' crown  
discord spun and hewn  
pulses a dim sun  
moulding the mineral depths  
as Zeus steers the heavens.

It hangs:  
the signet of his Queen;  
her ebony bones pillar the roof  
and she wades through the dead  
like reeds,  
armoured in his skin.

—

and you,  
in your bare skin,  
shivering.

—

Weeks slouch by  
halted by your decision  
to enter the House of Hades.

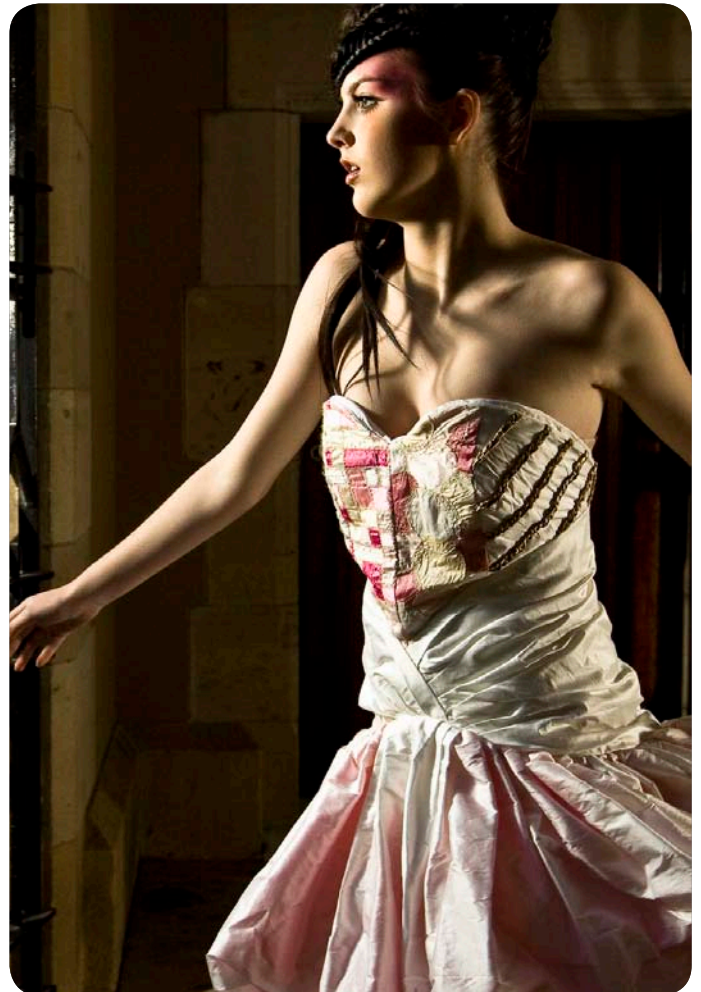
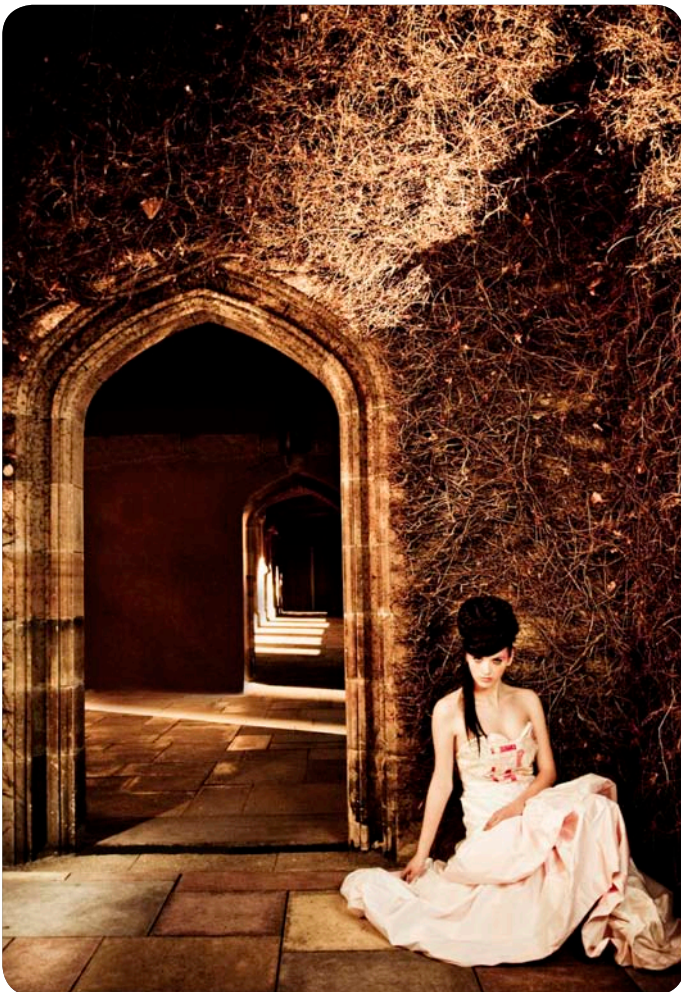
Rising from seclusion and  
draped heavy in shoaly grey

you spear fathoms;

waxing like the moon,  
cupping light in  
your clear-veined hands.









## The Last Hour

Amanda Lim



I am a girl who likes to illustrate my imagination through photography. I love to beautify, capture personalities, evoke emotion, bring meaning to life. I love conversations that provoke thought. I am also a bit of a drama queen at times, I think that influences the theatrical quality of my work.

## My Story, My Words

### Melanie Nasser shares her experience of overcoming adversity

Life is a wonderful journey and behind each countenance there is a story to tell. This is my story, and in my words.

I remember arriving with my family in Australia at the age of 7, and everything went well for a few short years. Then, tragedy struck. I was 9 years old when my mother was diagnosed with cancer. As the eldest daughter of the family, I could no longer attend school, but remained at home nursing my Mother. I recall the days when I helped her to perform the simplest tasks, such as walking to the bathroom, taking a shower, holding a spoon for a bowl of soup and even drinking out of a cup, all of which became a daily challenge for her. Eventually, after a 3 year battle with cancer, she passed away. My life would never be the same again.

My Dad re-married a number of times, none of which worked out. My once united family was now torn and divided in many ways, and I found myself questioning everything about life, death and religion. Looking back, I was an inquisitive child, persistent in finding answers to my questions. By the time I was 15, my Dad had had enough of my religious questions. Having proclaimed my newfound Christianity, I was disowned and cast out from the family. My Dad told me to leave the house, and said I was a disgrace to the family.

The memories of that horrid day are as vivid to me today as though they had just taken place. I remember walking away from my home, leaving behind my sister, and the memories of my Mother. With each step I took, I left a trail of tears. I walked for hours with nowhere and no-one to turn to. My school friends were no longer permitted to speak to me, and my school counsellor had advised against associating with me, as I would be a 'nobody.' Painful words indeed for a homeless teenager with no education, no school or high school certificate, no friends, and as it appeared, nothing left to live for.

But, within weeks I secured employment as a supermarket cashier and maintained contact with my sister. Each day my eyes were fixed upon the entrance of the supermarket door, hoping and longing for the day my Dad would come for me, and take me back home. That day was not to be, and my Dad never came for me.

It took some time, but I eventually realised that I do have great worth and am capable of accomplishing many things, just like anyone else. I learned a lot during that time and swiftly matured beyond my years. I understood the importance of not waiting for opportunity to knock at my door, but to go out and seek opportunity, and to make the most of all that came my way. Eventually I came to the conclusion that, since I wasn't given opportunities to advance in employment due to my lack of academic qualifications, I would work for myself as a

business owner. So, I secured a bank loan and started my own business. At the age of 23, I was the proud owner of a chocolate store, and it wasn't long until I branched out into three new stores, commenced franchise operations, employed a staff of 12, and purchased a brand new car.

Yet, amid all this, I often wondered what could have become of me had my family remained intact and had I completed school. I eventually sold my business and enrolled at TAFE for the Tertiary Preparation Certificate (TPC), the equivalent of Year 12. I successfully completed my studies, and it was during this time that my life took another dramatic change; I met a fellow student in the library, who would eventually become my husband.

Soon after our marriage, my husband and I opened a business in the health food sector, and did well for some time. Unfortunately, following an unfortunate series of events, we lost our business, our home and most of our belongings and my husband and I were forced to live in our car. Throughout this time it was extremely difficult to find employment.

To my amusement my husband suggested we return to studies to improve our chances of employment. This is exactly what we did, and while living in a car, I returned to TAFE, completing my Diploma in Business, Human Resources with Distinction, taking 1st place in the course.

It was during this time that I developed a deeper passion for education and with encouragement and support from my husband, decided to pursue my academic studies. I applied through UAC for admission into a Combined Law degree, and to my delight I received an offer from not one but two institutions. It is with great joy I am now a full-time law student at the University of Sydney.

My time at university to date has been, and still is, remarkable in many ways. My thoughts often return to my days at TAFE, where my teachers were not only supportive of my studies and unlike my school counsellor who said I would be a 'nobody,' treated me as though I was 'somebody' with a positive contribution to make in this world.

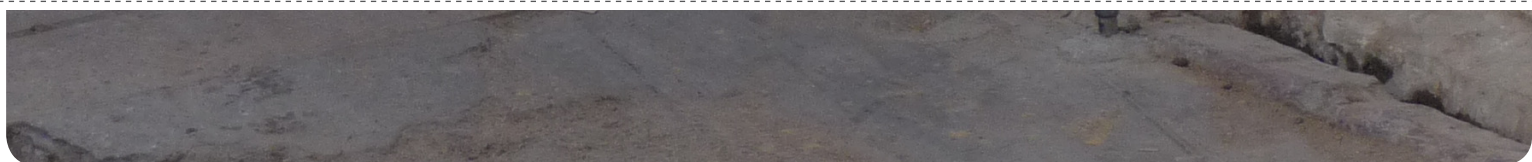
Throughout my life so far, I have learnt that there is great power in simply believing you can achieve all you set your sights upon, and throughout the fiercest trials which may fall upon you, faith, hope and courage are vital. My story so far ends here, but my journey and adventures continue, as I look forward with great anticipation to where my studies at university will eventually take me and the people I will meet along the way.

This is my story, and in my own words.





**Our World**











Pongal in Pondicherry, India Lucy Boyle

## Feminists and Light Bulb Jokes\*

**Has feminist criminology ‘made it’? If not, do we still need it? Antonia Clarke examines the relevance of a feminist approach to criminology**

*“[U]nless the question of gender remains at the forefront of criminological endeavours...criminology will fail to offer an agenda that is suitably informed by an understanding of social justice that strives to be attentive to humane constructions of...offenders, whether or not they be male or female.”<sup>1</sup>*

The public outcry in response to female offenders is evidence of the continuing role that needs to be played by feminists in criminology. The early study of the aetiology and character of female crime by feminists exposed axiomatically that the foundations of criminology were profoundly based on the masculine perspective. Much mainstream criminological thinking was ‘skewed’ because the essential maleness of criminological subjects was ignored.<sup>2</sup> Thus feminist criminologists have made some inroads into “penetrating”<sup>3</sup> the “enormous blind spot”<sup>4</sup> that is ungendered criminology. Yet the relevance of contemporary feminist criminology has been queried. Theorists such as Smart and Klein argue that in order to effect real change in societal and legal perceptions of the female offender, feminism must avoid criminology’s “allegiance to positivist paradigms”.<sup>5</sup> This essay argues

that despite calls to reject criminology as the source of effectual change, it is clear from contemporary media discourse of female criminals such as young offenders, that we still need feminist criminology; ‘we’ being society. The feminist criminology that this essay advocates is perhaps better described as the ‘feminist perspective on criminology’ because the term ‘feminist criminology’ implies a discourse still marred by positivist attitudes. The feminist perspective offers the opportunity to reveal and communicate women’s experiences and views in order to transform the content of the law and the prevailing societal concepts of justice.<sup>6</sup>

The media is an interesting barometer of the gap between “popular fictions” of criminal women and “unpopular [feminist] truths”<sup>7</sup> because by selecting and presenting ‘problematic events’ it influences societal consensus on criminal deviation and criminal discourse.<sup>8</sup> This essay will examine whether feminist epistemologies can address the failings of traditional criminological theories by engaging in research that recognises the critical significance of sex and gender differentiation on female criminal behaviour.

## A brief overview of the failings of traditional criminological theories

*"She was driven by her hormones or her heart, never by reason" – Sumner (1990)*

The feminist point of view was largely absent from criminological epistemology during the early periods of theoretical development. This latent development inhibited the understanding of the female criminal as an autonomous subject, and instead placed the female criminal as the 'other' in criminal studies of men.<sup>9</sup> The reason behind this historical lack of interest in female offending was that being male "is so frequently associated with criminal behaviour"<sup>10</sup> – female offenders were, and still are, statistically insignificant in terms of general crime rates. Moreover, the ignorance of women as criminals was reflective of the concern of traditional 'control-oriented' criminology with recidivist criminals;<sup>11</sup> female offenders were mostly engaged in petty offences and therefore did not pose a "pressing social problem."<sup>12</sup> Prior to the women's liberation movement, the study of females in criminology was underdeveloped.<sup>13</sup>

The stunted development of criminology in respect of women meant that traditional ideologies merely provided a "scientific gloss"<sup>14</sup> for culturally given understandings of women and their role in crime. The biological reductionist theories propounded by Lombroso and Pollak are the clearest examples of the 'scientific' theories constructed from the cultural notion of a woman's place in patriarchal society. These theorists explained female crime by referring to the concept of the 'proper' female role; women that deviated from the norm were "revengeful, jealous, inclined to vengeance of refined cruelty" resulting in the opinion that the criminal woman was a "monster".<sup>15</sup> Moreover, female offenders were viewed as "far more sinister and cruel than men"<sup>16</sup> because of their deviation from the socially constructed norm.

The socialisation theories that followed early reductionist views also characterised the behaviour of women criminals in terms of predetermined social constructs. These theories hypothesised that women who engaged in crime were a result of 'poor socialisation;' that is, these women were not socialised to be "passive and need affection."<sup>17</sup> Role theory went further and propounded that as crime is "symbolically masculine," women are unsuitable for crime and therefore the feminine woman will choose not to engage in the essentially male activity of law breaking.<sup>18</sup> Becker argued that such labeling of women as passive and domestic meant that they were more likely to be conformist and less likely to commit crime.<sup>19</sup>

As early feminist criminology informs us, these theories were based on little more than culturally accepted stereotypes about the nature of women and crime. The theories perpetuated sexist ideologies not only because they differentiated between the sexes, but because socially undesirable traits were explained with reference to the intrinsic nature of women.<sup>20</sup> Whilst the flaws in these theories have meant that they are largely repudi-

ated today,<sup>21</sup> their effects clearly resonate in contemporary media discourse on female offenders. The problem with these theories is that they can be oversimplified and utilised by society to explain female offender behaviour in a manner that accords with their preconceptions of women.<sup>22</sup>

The media essentially uses these explanations to create simple, "self-evident and unchallengeable"<sup>23</sup> storylines that perpetuate cultural notions about women and crime. Khalilzadeh views the 1950s New Zealand murder trial of the teenage girls Parker and Hulme as illustrative of the way in which early criminological theories conceptualised female criminals within patriarchal constructs. She argues that during this pre-feminist era the 'known' woman in "the patriarchal space [was] obedient, docile, mild-mannered and sexually submissive;"<sup>24</sup> both Parker and Hulme stepped outside this space and consequently were objectified and "mythologised" by the media.<sup>25</sup> Early feminist criminologists attempted to expose this myth.

**"Public outrage is heightened when young girls engage in criminal behaviour because crime has traditionally been viewed as a masculine activity."**

Whilst it is generally agreed that feminist perspectives in criminology have exposed the myth of early criminological explanations of the female offender, this essay argues that

the myth still haunts popular modes of thought. Rather than evincing the need to reject the feminist perspective in criminology, however, the perpetuation of this myth highlights the continuing need for a feminist perspective that can transcend cultural preconceptions. This essay looks at the role already played by feminism in criminology to identify how it has failed to impact popular modes of thought, and how it can rectify this failure to assume greater cultural relevance.

### The role of feminism in criminology

*"And all the time she was there behind me, staring. She just stares. She is, you know, a witch. I could feel her eyes burning holes in my back" – Joy Kuhl as quoted in Evil Angels (1985)*

Feminism as a political, sociological and philosophical theory has many facets and differing degrees of radicalism and liberalism.<sup>26</sup> There is no one relationship between feminist perspectives and criminology but it is generally agreed that feminist contributions aim to place women's criminal behaviour into a broader social, economic and political context in a way which illuminates the institutionalised sexism of the criminal justice system. As a whole, feminist criminologies acknowledge that women have for too long been peripheral to the study of men.<sup>27</sup> Thus criminology is fundamentally flawed because men are defined as the standard scientific case, resulting in empirically biased research.<sup>28</sup>

Early feminist criminologists identified that male criminal behaviour was explained by a plethora of factors, including socioeconomic background, upbringing and early response to deviant behaviour. Gender had no role to play in these explanations, even in the face of extraordinary evidence that shows crime is committed largely by males. In contrast, traditional criminological theories (and the law) sought to contain and control the female offender by classifying, defining and so domesticating her behaviour.<sup>29</sup> Any deviation from the expected gender role was inextricably linked to her sex, her biological being.<sup>30</sup> By confining the explanations of female criminal behaviour to the “mad/bad dichotomy”<sup>31</sup> at an individual level, society was blinded to the possibility of seeing the other causes of female criminal behaviour.<sup>32</sup> The early intrusion of feminism into criminology attempted to address this gender bias, not through evaluating the essential ‘maleness’ of crime, but through discussion of ‘women and crime’.<sup>33</sup>

Since those early beginnings, feminist perspectives on criminological theories have become more comprehensive.<sup>34</sup> This essay will limit its analysis to the fundamental tenets of feminist empiricism. It will examine how it has been used to understand and address the representations of the female criminal in contemporary media using the case studies of juvenile female offenders. The public outcry to these offenders demonstrates that so far, the feminist intrusion into criminology, and thereby society, has not been effective. Yet it also represents the continuing need for the development of a feminist perspective in criminology which plays a role in criminal justice reform

and consequently alters social consciousness through criticism and demystification of accepted values and beliefs.

### Feminist empiricism

Feminist empiricism arose from the acknowledgment that whilst men had been studied in an objectively scientific way and were the “centre of the [criminological] picture,”<sup>35</sup> women were largely absent from the sphere of scientific observation. Feminist scholars aimed to identify the inherent sexism in criminal institutions by documenting women as both offenders and victims. Yet the call for more studies on women was largely politically motivated and thus early studies of feminist empiricists were largely “at the service of’ feminist politics and campaigns;”<sup>36</sup> the research that emerged was *for* women, as opposed to *on* them.<sup>37</sup> Feminist empiricism tended to accept men as the norm and ask why women were not treated the same. In this way, women did not become the subject of criminology but were the “interlopers” to the “natural social actor,” men.<sup>38</sup> Fundamentally, this ‘add women and stir’ approach has been criticised as representing a mere social adjustment, rather than a conceptual paradigm shift.<sup>39</sup>

Despite the criticisms of feminist empiricism, the basic recognition that women should be studied empirically is utilised in most contemporary feminist criminologist literature.<sup>40</sup> Today it is particularly useful in respect of criminological analysis of young female offenders. Gelsthorpe and Carrington have used the intellectual context provided by feminist empiricism to assess the legal and societal responses to female juvenile offenders.





## Girls and violence: 'sisters in crime'

Public outrage is heightened when young girls engage in criminal behaviour because crime has traditionally been viewed as a masculine activity. Recently the media has become aware of some evidence which suggests that the number of girls engaged in criminal behaviour is increasing.<sup>41</sup> Whether this statistical and anecdotal evidence reflects a change in the perception of girls within the justice system or a real change in female criminal behaviour is unclear.<sup>42</sup> Yet what is evident is that the public perceive the increased violence of young females as "mainly due to Women's Liberation."<sup>43</sup> Feminist empiricists denote this explanation as the 'sisters in crime' thesis.<sup>44</sup>

The 'sisters in crime' thesis argues that the narrowing of the ratio of female to male juvenile offenders arose when girls begin to exercise the freedom of choice granted by the second wave of feminism.<sup>45</sup> This argument, also called the liberalisation thesis, has been criticised by feminist criminologists as methodologically unsound. Steffensmeier suggests that the increase in crime could be attributed to increases in the number of women living in poverty and an increasing dependency on drugs; similar factors which affect male crime rates.<sup>46</sup> Campbell also acknowledges that young women often exhibit traditional views about gender roles.<sup>47</sup>

Smart has challenged the statistical validity of the theory as it does not account for the contribution of unemployment, unskilled and low paid work and greater financial pressures in an increasingly material society.<sup>48</sup> Moreover, Carrington argues that the findings are a statistical artifact of the shift from girls being dealt with by the welfare system to the criminal justice system.<sup>49</sup> Thus whilst feminist criminologists cannot point to a singular causal basis for increased participation in youth subculture by girls, they have acknowledged that it is unlikely to arise from Women's liberation. Moreover, they have unequivocally demonstrated that violent girls are subject to increased adverse attention from the criminal justice system and the general public.

The shock value of violent girls is paradoxically juxtaposed with the claim that their behaviour is (apparently) the result of liberation;<sup>50</sup> if girls are equal to boys why is their behaviour treated differently? The media is partly to blame for fueling an increased level of public anxiety based on empirical findings of increased levels of violence amongst girls. Indeed Worrall argues that the 1990s saw the emergence of several moral panics in relation to young female offenders.<sup>51</sup>

In Australia, the reaction of the public and the media to the fatal 'bashing' of Sydney taxi driver, Youbert Hormozi, in 2006 illustrates this moral panic. The two fourteen year old girls involved in the unprovoked assault on Hormozi were subject to a media onslaught, which described them as remorseless, arrogant, "violent little animals".<sup>52</sup> Despite all contrary evidence by feminist criminologists, the media reported that this is what happens when adolescent girls are allowed to believe themselves equal to men.<sup>53</sup> Feminism has

handed girls a life as "equaling stressing" as men's and girls respond by becoming more deviant.<sup>54</sup>

If we assume, as the media does, that Women's liberation provides the basis for female delinquent behaviour, then the logical response to this behaviour is to punish girls in the same way as boys. But the fact is that girls are not punished equally because of preconceived societal notions of femininity. Studies by Terry (1970) and Chesney-Lind (1973) in the UK and US respectively demonstrate that the courts operate with a "double standard of morality" when it comes to female juvenile offenders.<sup>55</sup> The findings of these feminist empiricists illustrate that courts tend to sexualise the nature of female delinquency due to an "overwhelming concern for the sexual morality of young women."<sup>56</sup>

The media perpetuates this concern through its construction of public perception based on biased statistical information. The feminist empiricist contention that women's behaviour is not a by-product of Women's liberation has fallen on deaf ears. In effect, feminist perspectives have failed in the most part to deconstruct the patriarchal construct of the domesticated, demure female and explain female delinquent behaviour in the same objective terms as male delinquent behaviour. Yet as long as there is such moral outrage consistently voiced over young female criminals, a feminist perspective in criminology is necessary because it offers an alternative to the 'masculine hegemonic' discourse propagated by the media.

### Does criminology still need feminism?

*"Unsex me here;  
And fill me, from the crown to the toe, top full  
Of direst cruelty!"* (Macbeth, Act I, sc. v, 38-40)

The need for feminist criminology must necessarily be weighed against its potential for effective legal and social reform. As it stands, it cannot be disputed that feminist criminology has brought a gendered analysis into the sphere of criminological jurisprudence.<sup>57</sup> Criminology as a discipline has slowly become more sensitive to diversity of experience.<sup>58</sup> The increasing diversity can be seen tangibly in the reform of prostitution and rape laws and changes in policing of domestic violence that resulted from feminist criminological research during the 1980s and 1990s.<sup>59</sup> But fundamentally this essay has shown that outside of law reform, feminist perspectives on criminology appear to have failed to permeate society's preconceived notions of femininity with regard to explaining the behaviour of female offenders.

It is clear from the examination of the media's response to female deviants that the traditional theories of criminology still pervade cultural consciousness and provide society with instant explanations of female criminality.<sup>60</sup> Media representations are still dominated by popular patriarchal constructs of the female deviant because traditional, male-dominated theories



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continue to exist in “common conceptual currency.”<sup>61</sup> Indeed young girls engaged in crime are seen as a by-product of Women’s liberation, despite feminist criminologist’s empirically-based protestations to the contrary. The conventional views of society in turn legitimise the conceptualisations of policy makers and thus preserve the given moral and socio-political order.<sup>62</sup> Indeed in the UK it has been shown that gender specific reform of the criminal justice system is described as “limited and patchy”<sup>63</sup> with regard to the female offender.

If, as critics of feminist criminology claim, the jurisprudence of feminist criminology is only ‘grudgingly’ accepted by society then do we still need it as a discipline?<sup>64</sup> The epistemological failings of criminology have led Carol Smart to reject the notion of feminist criminology as an oxymoron.<sup>65</sup> Criminology as a discipline, she argues, suffers from “intellectual bankruptcy.”<sup>66</sup> Its commitment to positivist paradigms and its inherent conservatism cannot be reconciled with the radicalism and diversity of feminist scholarship; criminology’s search for a single unifying solution to the multi-faceted problem of crime inherently limits the efficacy of feminist teachings.<sup>67</sup> Indeed when feminism is incorporated into criminology it becomes one-dimensional and is “limited by the very paradigm it seeks to judge”.<sup>68</sup>

Feminist criminology, in an attempt to bring gender within the patriarchal confines of a traditionally ungendered discipline, simultaneously ignores the pleas of different classes, races and sexualities of women.<sup>69</sup> Thus Smart states that a new theoretical account should be devel-

oped that stands alone from the traditional positivist criminology claiming that “criminology needs feminism more than the converse.”<sup>70</sup>

Yet one cannot escape the observation that criminology is, at a basic level, an exercise in sociology. We do not live in an “androgynous utopia”<sup>71</sup> and as long as myths surrounding female crime exist, feminist criminology calls for an examination of the social, cultural and historical context in which those myths of female criminality arise.<sup>72</sup> Whilst it is clear that the ‘add women and stir’ approaches have not resulted in the sought-after paradigm shift in societal views of female offenders,<sup>73</sup> feminism still has a vital role to play. This essay argues that Smart’s aphorism be reassigned to state that criminology needs feminism because society still needs feminism. Feminist jurisprudence offers an approach to criminology which queries the traditional discourses of victim, offender and justice. It moves beyond the paradigm of individual pathology and engages in an analysis of damaging circumstances and power relations.<sup>74</sup>

Its advantage lies in its ability to bring a multi-faceted and inter-disciplinary approach to criminology.<sup>75</sup> In this way, feminist criminology evaluates society and questions the controls on female behaviour which attempt to fit female offenders within the normative criminological discourses of femininity.<sup>76</sup> By challenging the foundations of criminology, the values of feminist criminology can begin to form the basis of “common-sense attitudes” towards crime by entering folklore and by dissemination of feminist perspectives through the mass media.<sup>77</sup>



Some argue that feminist criminology can no longer challenge the status quo because it has become part of mainstream criminology.<sup>78</sup> This essay argues, however, that the failure of feminist perspectives to infiltrate the cultural mainstream means that they still stand outside the accepted discourse of criminology. If feminism is to continue to challenge the criminological and societal status quo, it needs to go beyond a simple gendered analysis of crime and the criminal justice system. In order to “turn positivism on its head,”<sup>79</sup> feminist criminology needs to be more inclusionary and humanistic;<sup>80</sup> it needs to explore issues of control, diversity and power by re-evaluating those ‘axiomatic’ truths that feminism seeks to assert.<sup>81</sup>

### **The future for feminist criminology: revitalising critiques**

*“How do our insights prevent us from being captured by traditional justice thinking?” – Laster (1996)*

If the supposition is that society needs feminist criminology the next issue must necessarily be how feminist criminology can engage with its diversity and dynamism. Carlen advocates more theorisation and empirical studies on women, men and crime.<sup>82</sup> Feminist criminological jurisprudence has responded to this call for revitalisation with the development of theories, including ‘critical race’ feminism and postmodern feminism. The critical race feminists use an empirical approach to account for statistical differences in crimes committed by women of different races and classes. To the critical race feminist, social relations are interactive, eliminating colour-blind or gender-neutral approaches to understanding crime.<sup>83</sup>

In contrast, postmodern feminism takes a more theoretical approach by deconstructing societal notions of Truth and the power it assumes. In doing so, it queries the “falsely universalising perspective of the master,”<sup>84</sup> whether that master be male or female.<sup>85</sup> Both theories overlap in their desire to expand the parameters of Woman as the criminological subject but approach this task in different ways. Thus it is clear from these theories then that feminist perspectives still have much to contribute to the wider discipline of criminology through movements which query the preconceived concepts of absolute truth and unity.<sup>86</sup>

### **Postmodern feminism**

Postmodern feminism (whether labeled ‘postmodern’, ‘poststructuralist’ or ‘deconstructionist’) does not offer itself as an alternative to the other feminist theories.<sup>87</sup> Instead, it rejects the notion that there can be a single explanation of criminality. It does this by opposing essentialism – the idea that the differences between women and men are innate – and claims that gender is a byproduct of social construction. It offers a valuable alternative to feminist empiricism, which viewed women as a denigrated ‘other’ to the male ‘self’, and celebrates the diversity and plurality that being the ‘other’ offers.

A postmodern feminist approach works from the Foucauldian notion that Truth is a social construct.<sup>88</sup> From this vantage point, postmodern feminism can look

beyond the subject of the Law (Woman) to “reimagine” the Law itself as the subject of its critique.<sup>89</sup> By reasserting what is objectivity it rejects the imposition of a fictive unitary reality on women.<sup>90</sup> A postmodern feminist approach therefore allows criminological theories to incorporate issues of race, gender and class.<sup>91</sup> Essentially, postmodern feminism offers a provocative critique of criminology by advocating that modernist feminist criminology ‘relinquish’ its own “gender myopia”.<sup>92</sup>

The contribution of postmodern feminism to societal and legal responses to female offenders can be seen in the case of ‘battered women killers’. Howe identifies the considerable efforts of feminist deconstructionists to reduce the difficulty women have in using self-defence laws constituted around men’s actions.<sup>93</sup> The work recognises the multiplicity of circumstances where women kill their male partners and invalidates the assumption that emotions can be universally categorised.<sup>94</sup> The results of this work can already be seen in the gradual recognition by society that women subject to continual domestic violence are not cold-blooded killers, nor inspired by irrationality, but are responding to often extraordinary violence.

For example, the recent case of Joyce Chant, who was convicted of the manslaughter of her abusive husband, demonstrates the understanding that the circumstances of violence are altered by individual experience; in the case of Chant, she suffered violent “bashings...nearly every day.”<sup>95</sup> In this sense, postmodern feminism is an advocate of “emancipatory practical reason” and by unmasking gender prejudices encourages a description of relations between subjects (here, Law and the battered woman) so that the reasons behind the actions of offenders are recognised.<sup>96</sup>

Yet postmodern feminist criminology is not without its criticisms. Carrington and Hogg highlight the problems with the purely theoretical nature of the study, stating that it merely provides “pessimistic polemics” without politicised change.<sup>97</sup> Smart also queries the efficacy of a discourse that is “theoretically pure.”<sup>98</sup> Indeed if the notion of Truth is deconstructed as a relative social construct, the search for what is just becomes “difficult to defend.”<sup>99</sup>

Essentially, once the ‘truth’ of oppression is lost, the wave of collective feminist action loses sight of its goals and its momentum.<sup>100</sup> In rebuttal, postmodern feminists such as Cornell argue that justice in fact adheres in the process of change and not necessarily in a universal preconception of the universality of justice.<sup>101</sup> Moreover, a postmodern feminist approach to criminology does not herald the dissolution of collective action, but rather the emergence of a new action structured around different axes of oppression including race, ethnicity, or sexuality.<sup>102</sup>

Regardless of the criticisms of these developments in feminist approaches to criminology, what is clear is that these approaches reflect the reflexive awareness of the contribution of gender scholarship to criminology. Whilst feminist criminology has come closest to documenting

the multi-dimensional nature of the woman's relationship with the social world it recognises that its success within the criminological enterprise is not "generalisable."<sup>103</sup>

The ability to self-criticise demonstrates the fullness of the field of feminist criminology. The new feminism must seek value to distance itself from the notion that female criminality is explained predominantly by gender role expectations and engage in analytical skepticism to see what more can be done to influence societal preconceptions of control, gender and justice.

## The Way Forward

Feminism as a sociological discipline is no longer a "fly-by-night" radical movement – it has been absorbed into the cultural mainstream.<sup>104</sup> On the other hand, whilst feminist criminology has raised the profile of gender in crime, it arguably remains somewhat marginalised.<sup>105</sup> As this essay contends, it is clear that gender scholarship is needed to protect and develop the insights made in relation to gender and crime.

The advantage of the feminist perspective is that it can incorporate a variety of theoretical and empirical issues within the conventional criminological concepts of law and justice. Most fundamentally, it highlights the limitations of a universal theory of criminology. In turn, it offers criminology the opportunity to identify and address its shortcomings. If "failure is the leitmotif of criminological enterprise"<sup>106</sup> then the successful contribution of feminist perspectives may be better measured by the fear it generates, rather than its acceptance by the mainstream.<sup>107</sup>

Yet as it stands feminist criminology has failed in its bid to influence mainstream perceptions and representations of the female offender as shown by the public reaction to young female offenders. Rather than evincing the need to reject feminist criminology, however, this failure evinces the continuing need for more developments in the study of feminist criminology; in particular, it now needs to come to terms with the associations of race, sexuality and class to transcend the traditional constraints of society.<sup>108</sup>

This essay explored the particular relevance of a postmodern feminist approach to criminology but what is clear is that current developments on the feminist perspective must continue to shake the foundations of criminology. Indeed the attraction of feminist criminology is that whilst providing criticism, it can also provide the basis for reform.<sup>109</sup>

In this way, feminism becomes a fundamental tenet of criminology – it aids in the creation of a 'new site' – a domain where issues of gender, class and control become relevant to societal notions of crime. The result is a criminology that understands the cultural and societal constructions of female criminals. The media can therefore contextualise female crime so that its occurrence is not seen as 'extraordinary' and society can deal with criminal behaviour unobstructed by the stereotype of Woman.<sup>110</sup>

## Endnotes

\* The reference to 'feminists and light bulbs' is taken from the introduction in Kathy Laster, 'Feminist Criminology: Coping with Success' (1996) 8(2) *Contemporary Comment* 192 at 193.

1. Sandra Walkate in Introductory statement to Karen Evans and Janet Jamieson (eds) *Gender and Crime: A Reader* (Berkshire: Open University Press, 2008), at xi.
2. Carol Smart, 'Feminist Jurisprudence' in Carol Smart, *Law, Crime and Sexuality* (London: Sage Publications, 1995), at 162.
3. Loraine Gelsthorpe 'Feminism and Criminology' (Synopsis, 2002).
4. Ngaire Naffine, *Feminism and Criminology* (Sydney: Allen and Unwin, 1997), at 9.
5. Evans et al. above n2, p.249 and Nicole Rafter and Frances Heidensohn (eds) *International Feminist Perspectives in Criminology: Engendering a Discipline* (Buckingham: Open University Press, 1995) at 10.
6. Smart, above n3 at 171.
7. Azadeh Khalilzadeh, 'The Crime of the 'Other': the problem of conceptualizing women within the public criminal arena' (2007) 13(2) *Polemic* 29 at 34.
8. Emmerson Dobash, Russell Dobash and Lesley Noaks (eds) *Gender and Crime* (Cardiff: University of Wales Press, 1995) at 79.
9. Simone de Beauvoir, *The Second Sex* (Harmondsworth: Penguin, 1972) as quoted in Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995), at 12.
10. Albert Cohen et al. (eds) *The Sutherland Papers* (Bloomington: Indiana University Press, 1956) in Judith Allen, 'Men, Crime and Criminology: Recasting the Questions' (1989) 17 *International Journal of the Sociology of Law* 19-39 at 24 in Ngaire Naffine Gender, *Crime and Feminism* (Cambridge: University Press, 1995), at 104.
11. Carol Smart, 'Criminological theory: its ideology and implications concerning women' in Evans et al. above n2 at 5.
12. Ibid.
13. David Ward, 'Crimes of Violence by Women': A Report to the National US Commission on Crimes of Violence (Washington, DC: US Government Printing Office, 1968).
14. Smart, above n3 at 6.
15. Cesare Lombroso and William Ferrero, *The Female Offender* (New York: D. Appleton, 1899).
16. Otto Pollak, *The Criminality of Women* (1950) as quoted by Smart, above n3 at 21.
17. Robert White and Fiona Haines, Ch 7 'Feminist Perspectives' in *Crime and Criminology: An Introduction* (Oxford University Press, 2004) at 126.
18. Carol Gwynn, 'Women and Crime: the Failure of Traditional Theories and the Rise of Feminist Criminology' (1993) 19 *Monash University Law Review* 92 at 97.
19. Id at 98.
20. Smart, above n3, at 18.
21. Shlomo Shoham, *Society and the Absurd* (Oxford: Basil Blackwell, 1974) in Smart, above n3 at 19.
22. Allison Morris and Loraine Gelsthorpe, *Feminist Perspectives in Criminology* (Buckingham: Open University Press, 1990), at 59.
23. Dobash et al. above n8 at 79.
24. Khalilzadeh, above n7 at 30.
25. Id at 31.
26. For more information see White et al. above n18.
27. Id at 117.
28. Naffine, above n5 at 8.
29. Id at 79.
30. White et al. above n18 at 126.
31. Naffine, above n5 at 6.
32. Sylvie Frigon, 'A genealogy of women's madness' in Dobash et al. above n8 at 35.
33. Sandra Walkate *Understanding Criminology: Current Theoretical Debates* (Sydney: Open University Press, 2007) at 72.
34. Gelsthorpe, above n4.
35. Naffine, above n5 at 7.
36. Denise Riley, 'A short history of some preoccupations' in J Butler and J Scott (eds) *Feminists Theorize the Political* (London: Routledge, 1992) in Smart, above n3 at 5.
37. Smart, above n3 at 5.
38. Naffine, above n11 at xv.
39. Dorie Klein (1995) 'Crime through gender's prism: feminist criminology in the United States' in Rafter, above n6 at 218.
40. Naffine, above n11 at xiii.
41. Kerry Carrington, 'Does Feminism Spoil Girls? Explanations for Official Rises in Female Delinquency' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 34 at 38.
42. Leslie Acoca (2004) 'Outside/inside: The violation of American girls at home, on the streets, and in the juvenile justice system' in Carrington, above n42 at 40.
43. Loraine Gelsthorpe, 'Towards a Sceptical Look at Sexism' (1986) 14 *International Journal of the Sociology of Law* 125 in Naffine, above n11 at 28.
44. Rita Simon, *Women and Crime* (Lexington, MA: DC Heath, 1975) in Carrington, above n42 at 40.
45. Carol Smart Women, *Crime and Criminology* (London: Routledge and Kegan Paul, 1976) in Carrington, above n42 at 40.
46. Darrell Steffensmeier and Emilie Allan 'Gender and crime: toward a gendered theory of female offending' (1996) 22 *Annual Review of Sociology* 459 in Carrington, above n42 at 41.
47. Anne Campbell, *Girl Delinquents* (Oxford: Basil Blackwell, 1981) in Carrington,



- above n42 at 41.
48. Carol Smart, 'The New Female Criminal: Reality or Myth?' (1979) 19(1) *British Journal of Criminology* 50 in Gwynn, above n19 at 101.
49. Carrington, above n42 at 41.
50. Fiona Harari, 'The secret life of girls' *The Australian*, July 14, 2007.
51. Anne Worrall (2004) 'Twisted sisters, ladettes, and the new penology: the social construction of 'violent girls'' in Evans et al. above n6 at 38.
52. "'Boasting' cabbie killers jailed' *Daily Telegraph*, May 4, 2007.
53. Worrall, above n52 at 39.
54. Harari, above n51.
55. Smart, above n3 at 29.
56. Ibid.
57. Paul Rock, 'Cesare Lombroso as a signal criminologist' (2007) 7(2) *Criminology and Criminal Justice* 117.
58. Evans, above n2 at 250.
59. Catherine Alder, 'Feminist criminology in Australia' in Rafter, above n6 at 22-23.
60. V L Allen, 'The common sense guide to industrial relations' (1974) 17 *University of Leeds Review* 1 in Smart, above n3 at 26.
61. Khalilizadeh, above n7 at 35.
62. Smart, above n3 at 30.
63. Evans et al. above n2 at 246.
64. Alisa Stevens, Confronting the 'Malestream': The Contribution of Feminist Criminologies, *Issues in Community and Criminal Justice Monograph no.7* (London: NAPO, 2006) in Evans et al. above n6 at 248.
65. Frances Heidensohn, 'Feminist perspectives and their impact on criminology and criminal justice in Britain' in Rafter, above n6 at 65.
66. Evans, above n2 at 248.
67. Ibid.
68. Smart, above n3 at 185.
69. Ibid.
70. Evans, above n2 at 248.
71. Khalilizadeh, above n7 at 35.
72. Ibid.
73. Klein, above n40 at 218.
74. Id at 229.
75. Gwynn, above n19 at 103.
76. Maureen Cain, 'Towards transgression: new directions in feminist criminology' (1990) 18 *International Journal of the Sociology of Law* 1 in Evans et al, above n2 at 249.
77. Allen, above n85at 26.
78. Comments by Associate Professor Gail Mason during Criminology lecture on 21 April, 2009 at the University of Sydney.
79. Rafter, above n6 at 11.
80. Loraine Gelsthorpe, 'Feminist perspectives on gender and crime: making women work' (2003) 53 *Criminal Justice Matters* 8 in Evans, above n2 at 251.
81. Smart, above n3 at 70.
82. Evans et al. above n2 at 249.
83. Kathleen Daly and Deborah Stephens, 'The dark figure of criminology: towards a black and multi-ethnic feminist agenda for theory and research' in Rafter, above n6 at 208.
84. Sandra Harding (ed) *Feminism and Methodology* (Milton Keynes: Open University Press, 1987) in Smart, above n3 at 45.
85. Smart, above n3 at 45.
86. Ben Golder, 'Rethinking the Subject of Postmodern Feminist Legal Theory: Towards a Feminist Foucaultian Jurisprudence' (2004) 8 *Southern Cross University Law Review* 73 at 85.
87. Smart, above n3 at 45.
88. Naffine, above n5 at 72.
89. Golder, above n109 at 74.
90. Smart, above n3 at 10, 45.
91. Laster, above n1 at 192.
92. Walkate, above n34 at 78.
93. Id at 223
94. Adrian Howe, 'Postmodern Criminology and its Feminist Discontents' (2000) 33(2) *Australian and New Zealand Journal of Criminology* 221 at 231.
95. Margaret Scheikowski, 'Woman admits killing violent husband' *Sydney Morning Herald*, April 14, 2009.
96. Pauline Johnson, 'Does Postmodern Feminism have a Future?' (1995) 22 *Australian Feminist Studies* 121 at 136.
97. Kerry Carrington and Russell Hogg (eds) Ch 5 'Feminism and critical criminology: confronting genealogies' in *Criminology: issues, debates, challenges* (Willan Publishing, 2002).
98. Smart, above n3 at 212-213.
99. Jennifer Orff, 'Demanding Justice without Truth: The Difficulty of Postmodern Feminist Legal Theory' (1995) 28(3) *Loyola of Los Angeles Law Review* 1197 at 1246 in Golder, above n109 at 83.
100. Id at 84.
101. Id at 86.
102. Ibid.
103. Laster, above n1 at 192.
104. Ibid.
105. Id at 193.
106. Id at 192.
107. Naffine, above n11 at xvii.
108. Laster, above n1 at 195.
109. Ibid.
110. Khalilizadeh, above n7 at 35.





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## **Raunchy Rationality and the Sexual Trade-Off**

**Cat Tayeh considers the effect of the economic crisis on the adult entertainment industry in the Netherlands**

The Global Financial Crisis may be a cooler doomsday forecast than Global Warming, but luckily it hasn't created any crisis in the bedroom. As recently as last December, the BBC identified sex as the most popular penny-wise past time of adult British citizens. The fact that more and more people are relying on sex as the meat substitute in their recession sandwich has only contributed to its overall intrigue. Though it may be more ephemeral than most consumer durables, the practice of sex and the gratification of sex have begun to permeate our purchasing patterns far more overtly since the credit crunch. Sex is now more than a mere perk of the private sphere, or even a symbol of free love liberation. It has become a consumable good, with some interesting ramifications for the social relations underlying our economic and legal systems.

The unwavering gusto of the adult entertainment industry at the quakes of consumer doubt is no where more evident than in the Netherlands. Renowned as one of the most liberal cities in the world, Amsterdam has con-

tinued to maintain a robust level of adult tourism despite the economic downturn. At first glance, the legalisation of prostitution in the Netherlands may seem to draw significant attention for its freak-show novelty value within the international arena. But we cannot just assume that this unique legal situation is a product of a more morally permissive Scandinavian culture.

**“More and more people are relying on sex as the meat substitute in their recession sandwich”**

Social researcher, Harry Oosterhuis, evinces that the Dutch are neither prudish nor hedonistic, hovering around the same area of the moral spectrum as the populations of most Western countries. Despite the inception of these progressive laws in 2000, the Netherlands' fascination with sex has hardly diminished, although it has undeniably legitimised the sale and purchase of sex.



In this way, legal prostitution has crucially rewritten the relationships between money, sex and power.

### Whose sex is it anyway?

The legalisation of limited forms of exploitation within the Dutch sex industry was justified as necessary to clean up the business of prostitution and reduce the level of associated crime. But regardless of whether the licensing regulations were successful in that respect, they essentially codified the business relationships associated with sex work. Though Dutch policy documents identify many different types of prostitution, window sex workers are the most pertinent to this discussion because their vending practices mirror the conventional way consumer goods are advertised.

Whilst most sex workers in Amsterdam see themselves as self-employed, in actual practice, the dictation of hours, house rules and payment rates by business owners have been interpreted by the Dutch courts as evidence of an employer-employee relationship. However window sex workers occupy a distinctly unique position within the industry because they independently rent their rooms and the windows that effectively serve as their advertising spaces. Furthermore, their hours of work and the prices of the services they offer are also self-determined, which means that they have more autonomy than most women who work in the industry. As in any other business, self-employment renders them free from exploitation by superiors and

gives them decisive ownership over the product they are selling.

But sex is an exceptional product. Though those in the industry may declare that the physical nature of the

act can be separated from its personal qualities, severing the identity of the vendor and the product itself is surely much harder to accomplish. In this way, the legally recognised right to sell sex out of windows blurs the distinction between supplying a service and transforming the individual into a consumer good.

As such, what appears as a homogenous product or service at face value becomes distinctly heterogeneous because each product is as individual as its provider. Additionally, the inescapable intimacy of all sexual acts means that the characterisation of the sexual transaction is dependent as much on the sexual desires and fantasies of the buyer as the provider. This makes for low levels of substitutability and varying levels of satisfaction between sex workers, reflected in the fact that many customers feel a sense of loyalty to a single sex worker, ironically

perhaps, in view of the adulterous potential of such consumption.

### Theorising the buyers' frenzy

The peculiarity of selling sex naturally lends itself to considerations of the eccentricities associated with its purchase. At first, walking through the streets of Amsterdam peering through the glass at women wearing nothing but lace and a few goose-bumps may feel like shopping for a new backpack. But an environment which encourages groups of men to hover around the glow of the red lit window panes provokes significant social questions.

Window-shopping for sex embodies an emotional conundrum, because the prospective buyer is simultaneously detached from the act of sex itself, whilst emotionally invested in wanting to consume it. Shopping is an activity which operates in the public space. By its very nature it necessitates the appraisal of goods, the consideration of opportunity costs and ultimately the exchange of money. This process reinforces the objectification of window models; as they exhibit themselves for judgement, consumers make choices between those that are available and must eventually overcome their capitalist fetishism of money to obtain greater utility through the purchase.

On the other hand, the metaphysical understanding of consumption proposes that we shop so that we might experience wants and desires. Accordingly, it is not far from exaggeration to declare that consuming everything from cookies to Kookai is an emotional investment, though to varying degrees. The personal and physical nature of sex and its ability to generate pleasure can only be persuasive evidence of its emotionally charged consumption. Thus, shopping for sex requires us to navigate with both objectivity and closeness, leaving the consumer with nothing but the hope that these philosophical complexities don't impede their performance.

A second issue emerges from the power struggle associated with the gratification of the customer's sexual wants. In heterosexual transactions this imbibes gender conflict and becomes drenched in a labour for control. As previously established, the unique characterisation of window prostitution in both law and economics allows these particular sex workers, more than any other kind, to claim ownership over their bodies and their boundaries. She determines what she will do and how much it will cost. Though these decisions are influenced by market demand and supply levels, and even the price of competitors, they also doubtlessly dictate her self-worth.

Therein lies the problem, as the purchaser also claims ownership over elements of the sexual transaction. He claims that he is entitled to dictate his sexual fantasy and he is correct to an extent, though the final transaction will be subject to her consent. But even after they settle on a range of activities and their prices, the purchaser inevitably conflates his ownership of the sexual experience with ownership of the sex worker herself. Even though she has explicit legal rights and has defined her business in terms

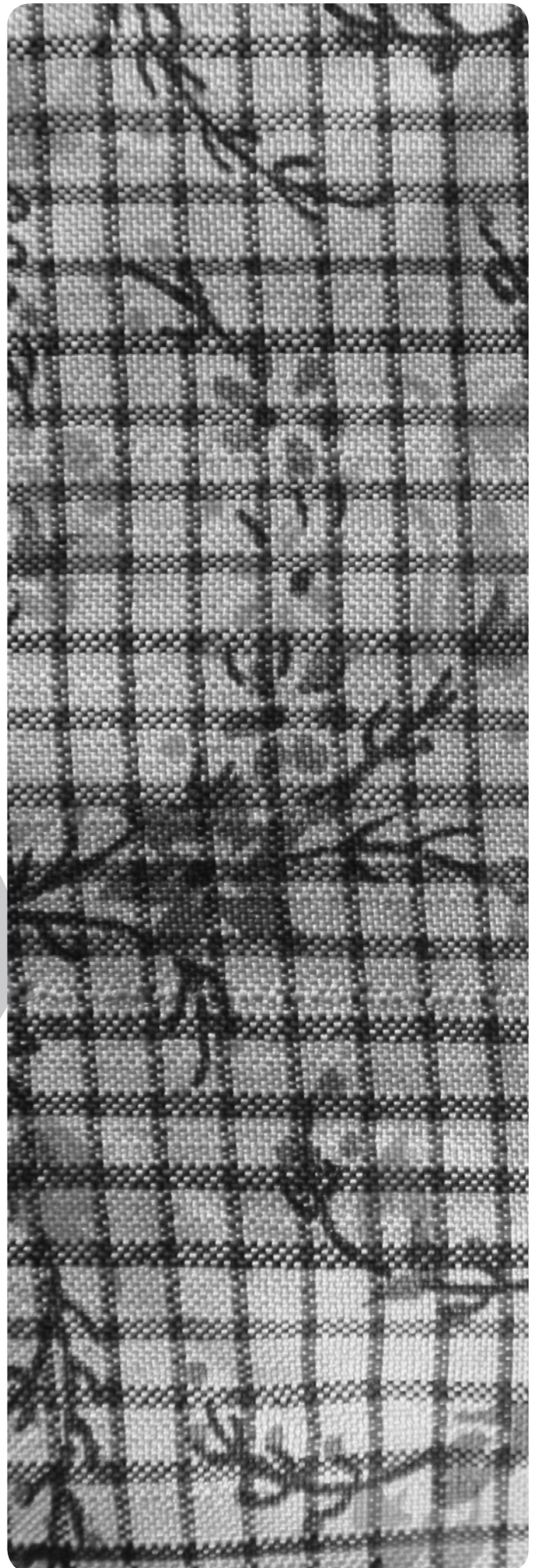
of standard commercial practices, he is still socially conditioned to possess her. Hence, in this act of shopping for sex, the element of gratification disguises patriarchal possession and female subjugation.

The last curious issue to arise from the consumption of sex concerns its paradoxically inconspicuous yet public nature. Consumption today is not only motivated by a desire to maximise utility, but out of a self-conscious craving to belong. So rather than shop as individuals, we remodel our wants so that they are similar, and can therefore be gratified by overtly following uniform purchasing practices. However, the sex that we consume never goes on display so there is consequently no onus to moderate our desires. Instead, it is one of the few acts that allows for complete self-fulfilment. It legitimises the ordinary perversions of ordinary people, reconditioning us to be at ease with our own desires.

### **But only Mr Moneybags needs to pay for sex!**

Wondering how the consequences of shopping for sex affects those of us who can get it for free? Though it may seem that there is no money involved when couples decide to forgo dinner and a movie for vegemite toast and sex, we can still judge the value of sex in terms of the opportunity costs of the goods foregone.

The economic crisis means that we are becoming increasingly likely to choose sex in view of other more costly alternatives. Though this sex may seem like it's for free, in actuality, it is dictated by the same economic rationality that attaches itself to shopping for sex. This is because it involves inescapable considerations of cost in the realisation of sexual desire, even though no money directly changes hands. The worried consumer has transformed sex; if only he had paid for a back massage instead.









## Faces of Tircuhuli

Lucy Boyle



Tircuhuli is a typical village in Southern India. There is sporadic electricity, no running water and three streets made from dirt that is either so dry it flies in your eyes or so muddy it engulfs your feet. The residents are predominantly farmers – dependant on the whims of the weather for their income. In 2008, I spent one month in the village, working for a field-based NGO that aims to empower women within the local community and surrounding villages. These are a selection of images of the women and girls I worked with whilst volunteering at the NGO.



# Love, Lesbianism and the Law

Nicole Mansergh examines the same-sex marriage debate

*Marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition...The gay marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason...the marriage restriction is rooted in prejudice.<sup>1</sup>*

Having long been construed as a thoroughly inequitable institution, marriage is increasingly a site of contestation, rather than consensus. As Hull observes, fierce battles are being waged over who is allowed to marry, what marriage signifies and whether marriage should be extended beyond its current parameters.<sup>2</sup> Most significantly, the right to marry is increasingly being sought by disgruntled lesbian couples who maintain that all citizens, irrespective of sexual orientation, should possess the opportunity to fully express their humanity and enact the rights and responsibilities of their citizenship. As Madame Justice L'Heureux-Dube explains,

*We must ensure equality for all...This means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less than capable for no good reason, or that otherwise offend fundamental human dignity.<sup>3</sup>*

Nevertheless, in 2004 the *Marriage Act 1961* (Cth) was amended to restrict legal marriage to heterosexual couples. In effect, legislators framed lesbian unions as undeserving of recognition and equal protection under the law.<sup>4</sup> This paper will examine the validity of arguments that oppose same-sex marriage and in doing so will illuminate the unjustness of Australian law. It will

“Marriage serves companionate, economic and interpersonal goals that are independent of procreation, rendering it entirely appropriate for lesbian couples.”

be shown that wherever the current legislative provisions prevail there can be no equality for lesbian women in Australia until the unequivocal introduction of same-sex marriage.

## Marital Objections

As West explains, social conservatives generally assert that lesbian couples should be precluded from marriage on the following grounds:<sup>5</sup>

- 1) Marriage consists of the conjoining of man and woman in marital reproductive sexual acts, its overriding purpose is to ensure the procreation and rearing of children.
- 2) The institution of marriage should protect children, the hetero-nuclear family being essential to the achievement of this end.
- 3) Lesbian relationships are both dysfunctional and deviant and, as such, deserve neither valorisation nor protection

## Marriage for reproduction?

Inherent in the first objection to lesbian marriage is the presumption that lesbians should be excluded from marriage by virtue of their inability to participate in reproductive sexual acts.<sup>6</sup> Such a proposition is not a logical ground on which to prohibit same-sex marriage. Eskridge observes that consummation of a marriage in acts of sexual intercourse of any sort is not necessary for a civil marriage.<sup>7</sup> Moreover, if there is a sexual relationship between married partners, there is no requirement that those relations be of a reproductive nature. Neither the use of birth control nor engagement in non-coital acts render a marriage null and void. Nor does the decision to refrain from having children altogether.

As noted by Justice Marshall, a marriage between two octogenarian partners on their deathbed is as valid as a marriage between a couple in the throes of sexual passion.<sup>8</sup> Put simply, marriage serves companionate, economic and interpersonal goals that are independent of procreation, rendering it entirely appropriate for lesbian couples.



Canterbury Plains, New Zealand Brooke Hughes

### The interests of the Child?

The second objection to same-sex marriage is equally illogical. That is, conservatives claim that the institution of marriage must serve to promote and protect the well-being of children.<sup>9</sup> Further, heterosexual unions alone, it is argued, are facilitative of that end. The hetero-nuclear family is posited as both natural and fundamental to the psychological well-being of children. It will be demonstrated below that this assumption is false, an affront to the multitude of children who are currently being reared in loving and stable lesbian families.

To elaborate, an increasing number of children are being reared by lesbian couples as a consequence of adoption or artificial insemination.<sup>10</sup> Most importantly, no causal connection has been established between a mother's sexual orientation and adverse consequences for her child. Indeed, children reared by lesbian mothers are no more likely to exhibit emotional or behavioural difficulties than children raised in traditional, heterosexual homes. Empirical research consistently demonstrates that such children are as educated, healthy, responsible and law-abiding as their peers.<sup>11</sup>

They are no more likely to exhibit personal distress, social impairment or restricted activity, nor do they possess a greater propensity toward cross-gender behaviour or sexual confusion.<sup>12</sup> Rather, as Saffron notes, an abundance of mothering can be

construed as advantageous, children in two mother families were found to be less aggressive and hostile; more aware of their feelings and more empathic toward minority group members.<sup>13</sup>

Far from placing children at risk, evidence suggests that such familial forms are particularly conducive to psychological well-being. As Stacey explains, that is, the average lesbian couple is apt to be far more prepared and devoted than their average heterosexual counterpart.<sup>14</sup>

There are no accidental same-sex parents. Nor do lesbians have children as a consequence of societal or parental expectation. In short, lesbian women have children simply because they want to, impelled by a nurturing instinct sufficiently strong that they are willing to fight formidable cultural barriers in order to do so. As Stacey notes:

*On average, they are better parents for a whole host of reasons that social scientists call selection factors. They tend to be older and better educated. They obviously desperately want to be parents. And they have overcome numerous obstructions in order to get to that point.*<sup>15</sup>

Restricting marriage to heterosexual couples does not protect the interests of children. Instead it victimizes them both emotionally and legally, denigrating the functional and loving environments within which they are reared. Therefore it holds that marriage prohibitions are both profoundly and tragically



ironic – they are anti-family and anti-children.<sup>16</sup>

### Dysfunctional Deviants?

Finally, many detractors oppose legislative amendment on the grounds that to do so would constitute the valorisation of relationships that are fundamentally inferior. In order to understand the existence of such attitudes it is useful to briefly examine the socio-political climate within which portraits of lesbianism are located. Indeed, as Millbank notes, we reside in a culture that accords structural, institutional and discursive privileges to heterosexuals, while systematically denigrating lesbian desire, identity and lifestyle. Popular culture largely depicts lesbians as overtly masculine and lacking in maternal sensibility, their choice of partner is construed to be the consequence of rape, an irrational hatred of men and childhood familial trauma.<sup>17</sup> Moreover, as Millbank explains, lesbian relationships are assumed to be thoroughly unsatisfying and discordant, predicated on dominant/submissive, sadistic/masochistic configurations.<sup>18</sup>

In this all-pervasive climate of devaluation and invisibility it is unsurprising that same-sex marriage is regarded as detrimental to society's interests. One cannot be expected to wholeheartedly support unions that they have been conditioned to construe as inherently lacking in value. Nevertheless, as I shall discuss below, empirical research sharply refutes the aforementioned presumptions, suggesting that prevailing stereotypes are not justifiable and that lesbians are equally capable of expressing and sharing love in its manifold forms. As Justice Ackermann observes:

*They are just as capable as heterosexual spouses of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support...of constituting a family. They are not a threat to societal stability.*<sup>19</sup>

This tendency toward emotional intimacy is noted by Green, Bettinger and Zacks who argue that lesbian relationships are characterised by a greater degree of emotional bonding, warmth, nurturance and intense physical and psychological intimacy between partners.<sup>20</sup> After researching all couple types (heterosexual, lesbian, gay male) they found that lesbian couples exhibited the highest rates of cohesion. Heterosexual married couples were the *least* emotionally entwined and the most desirous of physical and psychological separateness. Only 17% of lesbians exhibited the low levels of cohesion which typified over half of the

heterosexual sample.<sup>21</sup> As lesbian couple Pattie La Croix and Terrah Keener explain: *Our relationship is very much a partnership. We have a very strong level of communication and a low tolerance for being out of sync with each other...Being in this relationship is a very fundamental spiritual journey. I think that two women together converse more than other couples. You don't have the gender-gap in same-sex relationships, so you discuss your feelings a lot more. Advantageously, you know what the other person is thinking and feeling because you have experienced it...it's very fulfilling.*<sup>22</sup>

In addition, assumptions regarding the unhealthy preponderance of fixed masculine/feminine roles fail to find support in the research literature. Many heterosexuals believe that female couples both pathologically and 'unnaturally' ascribe to rigid dominant-submissive dynamics when interacting, one held to enact the role of 'husband' and the other of 'wife'. Unsurprisingly, empirical research provides no justification for such presumptions.

Put simply, most lesbian couples do not use traditional gender role divisions to structure their reciprocal behaviours in areas such as leadership and rules regarding the household division of labour. Rather, as Green, Bettinger and Zacks note, lesbians successfully establish patterns of egalitarian and highly-flexible decision making, their relationship script approximating that of a friendship in which power is equally held and distributed.<sup>23</sup>

It is clear that lesbian partnerships do not pose a threat to societal stability. Nor will their valorisation lead to a plethora of social problems. Instead, same-sex marriage would constitute a healthy addition to the marital landscape, providing a space in which many women could grow to their full intellectual and emotional potential. In this way, same-sex marriage would prevent societal decay, not contribute to it.

### Case Closed

In conclusion, as has been demonstrated, objections to same-sex marriage are untenable, based upon homophobic and heterosexist stereotypes that bear no resemblance to the realities of lesbian lives. Indeed, as Nicholson notes, legislative distinctions contain no acknowledgment that lesbian, gay, bisexual and transvestite individuals possess and express the most human of qualities – love and commitment through relationships.<sup>24</sup> Lesbian unions are wrongly framed as incapable of furnishing emotional and spiritual support, as fundamentally and uniformly different; and as damaging to minors. This is unacceptable, a pyrrhic achievement of which no government should be proud. In the words of Justice Alastair Nicholson:

*Marriage prohibitions achieve nothing but an insult to the dignity of recognition that every family treasures and has the right to expect in a country that supposedly supports tolerance for peaceful differences among its members. They are utterly inhumane.*<sup>25</sup>

## Endnotes

1. *Hillary Goodridge v Department of Public Health* 798 N.E2d 941 (Mass, 2003).
2. Hull, Kathleen, *Same-Sex Marriage. The Cultural Politics of love and Law*, Cambridge University Press, 2006.
3. *Egan v Canada* (1995) 12 RFL (4th) 201 at 228.
4. Cooper, D, 'For Richer for Poorer, in Sickness and in Health: Should Australia embrace Same-Sex Marriage?' (2005) 19 *Australian Journal of Family Law* 153.
5. West, R, *Marriage, Sexuality & Gender*, (2007).
6. Eskridge, W.N, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*, The Free Press, 1996.
7. Ibid.
8. *Goodridge*, above at n.1
9. West, R, above n.5.
10. Bernstein, R, *Families of Value: Personal Profiles of Pioneering Lesbian and Gay Parents* (2005).
11. Tasker, F and Golombok, S, *Growing Up in a Lesbian Family. Effects on Child Development*, (1997).
12. Green, R., Mandel, J.B., Hotvedt, M.E., Gray, J., and Smith, L, 'Lesbian Mothers & Their Children: A Comparison with Solo Parent Heterosexual Mothers and their Children' (1986) 15 *Archives of Sexual Behaviour*, 167-184.
13. Saffron, L, 'Raising Children in an Age of Diversity – Advantages of Having a Lesbian Mother,' in Gillian Dunne (ed), *Living Difference: Lesbian Perspectives on Work and Family Life* (1998).
14. Stacey, J, *In the Name of the Family: Rethinking Family Values in the Postmodern Age*, (1996).
15. Ibid.
16. Bernstein, above n.12, 17.
17. Millbank, J, 'Lesbians, Custody & the Long Lingered Gaze of the Law' in SB Boyd (de), *Challenging the Public/Private Divide* (1997).
18. Ibid.
19. *National Coalition for Gay & Lesbian Equality v Minister for Home Affairs*, 2000 (2) SA 1 at 32-3.
20. Green, R, Bettinger, M and Zacks, E, 'Are Lesbian Couples Fused & Gay Male Couples Disengaged? Questioning Gender Straightjackets' in L Garnet and D. Kimmel (ed) *Psychological Perspectives on Lesbian and Gay Male Experiences* (1993).
21. Ibid 196.
22. Lahey, K. A and Alderson, K, *Same-Sex Marriage: The Personal and the Political* (2004).
23. Green et al, above at n.25, 197.
24. Nicholson, Alastair, 'The Changing Concept of Family: The Significance of Recognition & Protection' in C. Kendall (ed) *Sexual Orientation and the Law: Proceedings of the Sexual Orientation and the Law Conference* (1997).
25. Ibid.





““

If you educate a man,  
you educate an individual,  
but if you educate a woman,  
you educate a whole family.

– Dr Kwegyir Aggrey

””



Vali, KGVB School for Girls - Narikudi Lucy Boyle





## Adding Feminism to the Law

### Mimi Zou interviews the Honourable Justice Claire L'Heureux-Dubé

A former Judge of the Supreme Court of Canada, the Honourable Justice Claire L'Heureux-Dubé is a distinguished jurist and considered to be one of the Canadian legal profession's greatest female pioneers. She was the first woman appointed to the Québec Superior and Appeal Courts, and the second woman to ever take a seat on the Supreme Court of Canada in 1987. She also served as the International President of the International Commission of Jurists from 1998 to 2002. Throughout her illustrious legal and judicial career, L'Heureux-Dubé has been a long-time crusader for women's rights and social justice.

L'Heureux-Dubé's career is remarkable, particularly at a time when women were often not welcome in legal circles. When L'Heureux-Dubé decided to attend law school in 1949, women in Québec had been allowed to practise law for only eight years. L'Heureux-Dubé gave an example of when she was denied a scholarship that was given to men of the same financial means: "As a female law student, I recall that women – we were so very few – were not entitled to the same academic opportunities as men."<sup>1</sup> However, as a gifted student, she excelled academically and graduated cum laude from Université Laval's law school in 1951 with special awards in Civil Law and Labour Law.

For the next two decades L'Heureux-Dubé worked in private practice in Québec City, specialising in family law. She was a partner of the firm Bard, L'Heureux & Philippon and later senior partner with L'Heureux, Philippon, Garneau, Tourigny, St-Arnaud & Associates. In 1973 she

was appointed to the Québec Superior Court, and named to the Québec Court of Appeal in 1979. Eight years later, she became the second woman to be appointed to the Supreme Court of Canada, after the Honourable Justice Bertha Wilson's appointment in 1982.

More often than not L'Heureux-Dubé pursued an independent course on the Supreme Court. She led the Court in the frequency of her dissents and her separate concurrences (written agreements with the majority decision). Her judicial approach was distinctive, as she drew on overseas authorities and academic sources (particularly social science research) much more readily than did most of her colleagues. L'Heureux-Dubé was prominent in promoting concepts of equality and social justice through formulating precedent-breaking judgements in diverse areas of the law, including family law, taxation, human rights law, immigration law, and criminal law. In 1992, she shook the long-held legal definition of judicial notice to include a broad range of social studies data in *Moge v Moge*;<sup>2</sup> while in *Canada (Attorney-General) v Mossop*<sup>3</sup> she took a lone stand in attempting to alter the definition of family by acknowledging evolving social norms including same-sex partnerships.

During her fifteen years on the Supreme Court from 1987 to 2002, L'Heureux-Dubé participated in over 600 Canadian Charter of Rights decisions, many of which were profoundly significant and often controversial. In these cases, L'Heureux-Dubé was a strong advocate of access to justice and the rights of marginalised groups such as women, Aboriginal people, gays and lesbians, people

with disabilities, migrants and prisoners among others. For example, in *Haig v Canada*,<sup>4</sup> her decision extended voting rights to prisoners under the charter. In *Moge v Moge*,<sup>5</sup> L'Heureux-Dubé reflected on the harsh economic and social realities of a divorce for women and ruled that mere economic self-sufficiency did not disqualify someone from spousal support in a non-consensual divorce. The decision was considered a landmark for women's rights as it addressed the deficiencies of spousal support law and developed new statutory interpretation guidelines for courts which effectively enhanced protection for women with little job experience from becoming destitute after their divorce. As a prominent Canadian family lawyer noted after the decision:

*[W]omen will take great satisfaction from this judgment. It arms them with real weapons in the battle for support. For a very long time obtaining adequate support has indeed been a battle for women, and Moge goes a long way to redress some of the injustices that have occurred.*<sup>6</sup>

Both on the bench and as a public figure, L'Heureux-Dubé advanced a feminist analysis of law that served to enhance the quality of life for women. She drew criticism as well as praise for her written opinions that attacked alleged sexism and stereotypical thinking in the decisions of lower courts. In "Adding Feminism to the Law: The Contributions of Justice Claire L'Heureux-Dubé",<sup>7</sup> the various contributors considered the unique ways in which L'Heureux-Dubé's decisions enhanced women's legal and social equality in Canada, and their influence on jurisdictions beyond Canadian borders. Each of the contributing essays demonstrated how her judicial approach was defined by human compassion and an ability to see and understand the lived reality of people's lives. The concept of equality for all was at the heart of this approach, as she affirmed:

*From time immemorial, human beings have thirsted for justice. Our pursuit of this ideal has necessarily translated into a long and difficult search for truth, impartiality, and, ultimately, equality. For, as Alexis de Tocqueville has said, equality is the foundation upon which all other rights are built. Equality's intimate link to human rights, justice, and impartiality makes it the premier instrument for the recognition of rights.*<sup>8</sup>

Since her retirement from the bench in July 2002, L'Heureux-Dubé has been serving as a judge in residence at Université Laval. We were very fortunate to have the opportunity to interview the Honourable Justice L'Heureux-Dubé who shared with us her thoughts on the notion of equality, judicial methods, the 'rights revolution', judicial activism and embarking on a human rights career.

**The notion of substantive equality often informed your judgments. Could you elaborate on what 'substantive equality' in the law means to you?**

My vision of the law is that its aim is to promote democracy and social justice, which is at the heart of true democracy. Social justice cannot be achieved without re-

spect for the dignity of a human being. Equality is about human dignity, respect and full participation in society by all members of society. Discrimination is the antithesis of equality.

A true understanding of equality emphasizes dignity and respect for all. It requires substantive change and accommodation rather than simply formalistic egalitarian treatment. It is not about 'being the same'; it is about taking account of differences. It is premised on the fact that individual dignity may flow as much from one's own value as a human being as from one's gender or one's membership in a racial, cultural, ethnic or cultural group. It is about promoting an equal sense of self-worth. It is about treating people with equal concern, equal respect and equal consideration. This is the rich contextual understanding of substantive equality.

**You were the first judge in Canada to take judicial notice of sociological data - how do you feel that has impacted your decision-making?**

Judicial notice of sociological data is essential in order to apply the law to the reality of people's lives. It is a tool to eliminate myths and stereotypes and to reach a result which is grounded in today's context and people's reality. Neither the law nor the facts can be interpreted in a vacuum: they must be contextualized in order to achieve a just result. In law, context is everything.

**What does the 'rights revolution' mean to you?**

The 'rights revolution', as it is often referred to, dates back to the end of World War II with its horrors and atrocities. Following Nuremberg, all nations of the world got together in the search for a lasting peace and the end of the indignities of wars. The Universal Declaration of Human Rights (1948) was such an answer. Signed by all nations, it has given the world a common denominator, which has served as the basis for a number of new constitutions. In that sense, the guarantee of fundamental rights for every human being by the sole fact of their birth has brought about a new era in the way the law has developed ever since. People have started to think in terms of fundamental rights and in response courts have developed a body of jurisprudence based on human rights and international law, which did not exist to that extent previously.

**You are often remembered as one of the great dissenters in the Canadian Supreme Court. Your questioning of social norms in your legal reasoning have been reflected in various landmark judgments such as *Moge v Moge* and *Canada (AG) v Mossop*. In what ways does this questioning of norms enhance the legal and social equality of marginalised groups, e.g. women, Aboriginal people, gays and lesbians, and people with disabilities in Canada?**

Questioning social norms is part of the search for equality and justice for all. Professor Graycar in her book 'The Hidden Gender of Law' has clearly showed how much laws were and are still imbued with discriminatory assumptions. Unconscious assumptions are often the



product of earlier and even current cultural biases. This is true for gender as it is for gays and lesbians, aboriginals, race, religion and people with disabilities.

The rights revolution has been a great factor in uprooting those unfounded assumptions. Being sensitive to discrimination in all its aspects does lead to questioning social norms and, in so doing, ensuring that laws reflect the goal of legal and social equality in a free and democratic society which is the essential function of the law.

### Is there a place for activism in the judiciary?

'Judicial activism' is a misnomer. It is almost invariably used by conservatives- generally when they disagree with the result of a decision and decry as 'activists' those they consider not sufficiently conservative. Judges, in a constitutional democracy, have a duty to decide whether a legislation does conform with the Constitution. In so doing, they may find that it does not and declare a particular legislation unconstitutional. For those who still insist on parliamentary sovereignty, such a declaration would constitute 'judicial activism'. If that term is to be used, it should also apply to strict constructionists whose interpretation of the Constitution serves their particular agenda. The Constitution is a 'living tree' in Lord Sankey's famous words, and interpreting the Constitution as promoting democracy recognizes fundamental constitutional values.

### What advice would you give to the students at Sydney University Law School interested in pursuing a career in the field of human rights and social justice?

The field of human rights and social justice is a vast one, particularly in this era of a global legal community. It is national and international. It is important for law students not to lose their ideal of justice and to remember that the law is a service to the public. There are today a number of NGOs, such as Lawyers without Frontiers, human rights organizations, legal aid, public legal information clinics, etc. which need volunteers here and abroad. The ideal for students is to combine their studies with time to do pro bono work. It is good for the soul and it enhances the profession's public interest mandate. At the end of the day, this is what counts most.

### Endnotes

The author would like to thank Luisa Mockler for her assistance with the interview  
1. 'Supreme Court justice L'Heureux-Dube retires', Canadian Broadcasting Centre News, June 28, 2002.

2. [1992] 3 S.C.R. 813

3. [1993] 1 S.C.R. 554

4. [1993] 2 S.C.R. 995

5. [1992] 3 S.C.R. 813

6. Philip M. Epstein, 'Practice Pointers from *Moge*', Paper delivered at *Family Law à la Moge*, Law Society of Upper Canada seminar, 30 March 1993.

7. Elizabeth Sheehy (ed) *Adding Feminism to the Law: The Contributions of Justice Claire L'Heureux-Dubé* (2005).

8. Claire L'Heureux-Dubé, 'Relationship Recognition: The Search for Equality', Seminar Papers: A Discussion Forum on Relationships and the Law, Sydney, 7 July 2000.



## The Right to Choose

Reena Rihan considers the effect of abortion jurisprudence on US politics

Being pro-life or pro-choice is an intensely personal decision. Trying to change somebody's mind about abortion is an argument that can never be won. There are those who are pro-life and illogically accuse those who are pro-choice of killing babies. Conversely, many pro-choice proponents do not understand how anybody can force their decisions, morals and values on another. I am pro-choice because I would like to make my own decisions for my own body. By the same token, I do not want to be responsible for the lives of other women by imposing my values upon them. In other words, I am pro-choice because I want to make decisions about my body just as much as I want you to make decisions about yours.

Everybody, irrespective of political affiliation, education, race, gender or sexuality seems to have an opinion on the legality of abortion. Though abortion may not impact everyone's life, we are all potentially affected by abortion law. In any debate about abortion law throughout the world, the iconic decision of *Roe v Wade* is invariably mentioned as a watershed moment in abortion jurisprudence.

Whether you believe that the decision was a wise interpretation of an implied right to privacy in the US Constitution or a remarkable overstep of judicial activism, *Roe* remains a controversial decision. It is not the endurance of the decision but rather the continued tumult surrounding abortion policy that keeps *Roe* in the headlines 36 years after it was decided.

President Obama's recent nomination of Justice Sonia Sotomayor for the position of Associate Justice on the US Supreme Court has meant that questions of the composition of the Court on a *Roe* issue have been revisited. Until a matter with issues similar to those of *Roe* appears before the court, discussion of the positions of the Justices is largely speculative. That is not to say that politicians and voters should not be concerned with how Justice Sotomayor's views may affect such a decision.

What is crucial to the consideration of judicial appointments is finding people who are not closed off to change, who are not averse to questioning their own assumptions

and who are not bound up by partisan propaganda. It is a balancing act between being guided by a thorough understanding of the law and being able to account for extenuating circumstances. Pre-determined opinions on issues, such as abortion, are not the fatal flaw. Rather, the patent disregard for the specificities in a certain case in favour of a long-held policy is the problem. Such problems manifest when politicians select justices based on their stance on *Roe* in the abstract.

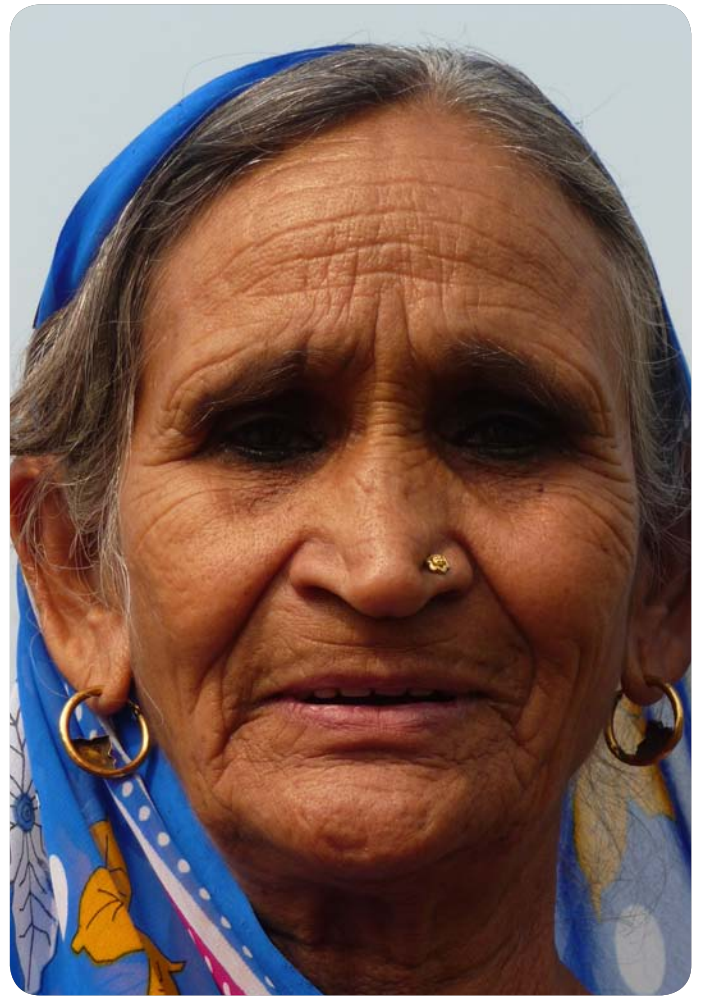
In the US, presidential nominees, candidates and judicial appointees are continually referred to as being pro- or anti-*Roe*. How can one case, decided three decades ago, still be a defining characteristic in contemporary American politics? Maybe, because *Roe* is seen by many as the pinnacle of judicial activism; a point in history where the Justices of the Supreme Court determined what was in their opinion, the best practical outcome and found a way to achieve it within the confines of the law.

Republicans and Democrats alike are often concerned with allowing justices to make up their own minds without being directed by the legislature. Ultimately, what is important to remember is that every single jurist earnestly believes that his or her interpretation of the law is the right interpretation at the time.

What seems illogical to me is not the reasoning behind legal opinions held by potential justices of the Supreme Court, but rather the basis for the longstanding fault lines between pro-life and pro-choice proponents. For a country steeped in the tradition of a separation between church and state, there seems to be a lot of discussion about the religious immorality of abortion. If religion guides morality that is an individual prerogative, but it is a choice to be guided by religion. The problem for me is when someone else's religion imposes on my decisions and in a country that celebrates autonomy, I would like to think I'd be able to keep mine.

At the end of the day I would like to be able to keep my right to choose what happens to my body. Although you may not necessarily agree with my choices, can you justifying denying me this right? Abortions are intensely personal decisions. But nobody has to live with my decisions but me. Abortion policy may be politically contentious but should Americans still be voting for politicians who appoint judges based on their own opinion of the morality of abortion?







## Women of Uttar Pradesh

Brooke Hughes

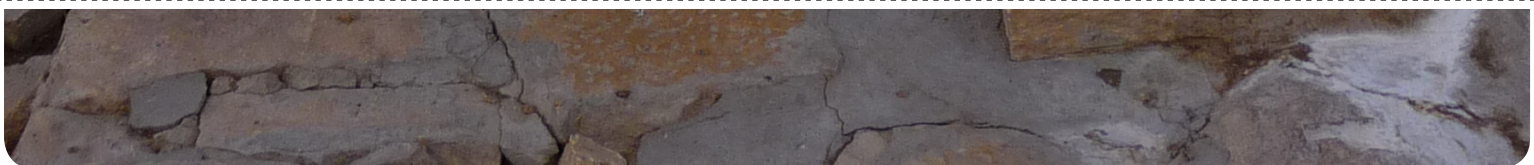


These portraits were taken in the Mughal gardens of the Taj Mahal, on a trip to India last November. The women were from a small village in the state of Uttar Pradesh and had travelled to visit India's most famous mausoleum. The women were very friendly and keen to chat despite the language barriers.





**Our Country**



*Jaisalmer, India Brooke Hughes*



## Where Are All the Women? International Relations and the Forgotten Sex

May Samali questions the lack of female representation in the field of International Relations

### The Invisible Gender

On the 19th May 2009, Sally Wilkinson posted a comment on The Interpreter, the blog of the Lowy Institute for International Policy, Australia's leading independent international policy think tank. 'Where are all the women?' she asked, in reference to the banner on The Interpreter site. The banner features four men, and no women. She continued:

"The photo depicts very influential 20th century figures. But it also emanates an unfortunate symbolism. Seeing the photo tapped into my ongoing frustration at the fact that the majority of our public policy and political discourse is dominated and shaped by men. So I proceeded to investigate the make-up of the Lowy Institute. Only four out of 26 bloggers are women; and one out of twelve board members. There is, unfortunately, nothing particularly unusual in that."

Wilkinson's comment points to the systematic lack of female representation in the field of international relations. The statistics speak for themselves. For example, the Department of Foreign Affairs and Trade (DFAT) appointed its first female Deputy Secretary as late as 1996, and by 2008 there was still only one female Deputy Secretary out of five.

On the whole, women international relations scholars also lag behind their male colleagues in rank and recognition. This gender imbalance especially applies to those areas of international relations at the end of 'hard' politics such as international trade, defence, national security and diplomacy. Therefore, in the academic and policy world, the credence and weight given to senior female views remains limited by the simple virtue of their lack

of numbers. It is puzzling that women in the developed world are not as visible in the international policy world as they are in other professions. While women have made some serious inroads in law and medicine and in the world of business, in the field of international relations, women are yet to be seen or heard. This is despite DFAT's publication of the book, *Women with a Mission: Personal Perspectives* (2007), which contains stories by nine women who headed diplomatic missions and posts from 1983 to 2006. These contributions provide valuable insights into the demands and rewards, professional and personal, of undertaking a career in Australia's diplomatic service. In one of the stories, Penny Wensley, former Ambassador to the United Nations reveals:

"As a diplomat, I would rather be asked about my experience representing Australia at the United Nations in Geneva, in New York, and as Ambassador for the Environment, leading Australian delegations to myriad major international meetings, negotiating crucial conventions and agreements...But heads of mission who also happen to be women are role models; and the judgments made about our effectiveness reflect not only on our countries but on women in general. There exists an extra dimension to our experience – at least until there are many more of us in places that count."

Therefore, for the few women who have successfully climbed the ranks, gender inequality is still a pressing issue.

### Why are Women Underrepresented in International Relations?

Scholars offer diverse explanations for the underrepresentation of women in international relations. One of



the most popular cited reasons in the literature is the differential effects of family responsibilities on men and women. Women are more likely than men to interrupt their careers to raise children, and they are more likely to become primary caregivers for children. However, this theory is somewhat limited in accounting for the absence of women in top academic and policy positions.

Some analysts argue that women international relations scholars lag behind men in terms of promotion and tenure because of differences in productivity. According to this argument, women are more likely to hold the ranks of assistant and associate professor because they produce fewer publications on average than their male counterparts. Men out-publish women in political science journals by a ratio of two to one.

Also, women are significantly more likely than their male colleagues to collaborate in their research and they are disproportionately likely to co-author with men, rather than other women. However, they are far less likely to be listed as the first author in these articles. Other analysts argue that the gender gap in publishing is the result, not of differences in productivity, but of differences in ambition, reputation, and merit. A few even argue that women care more about advising, administrative work and departmental committees than research.

Another explanation for this gender imbalance is isolation or discrimination. On this view, women are more likely to be excluded from social networks in departments dominated by men, to receive less institutional support, and to suffer from subtle or even overt discrimination. There are fewer professional networks for women or opportunities for mentoring relationships. One piece of evidence for this claim may be the lower percentages of women who publish in edited volumes, since professional contacts are a key part of participating in these volumes.

### **The Structural Bias in International Relations**

According to the results of the 2006 Teaching, Research, and International Politics (TRIP) Survey, conducted in the United States, women scholars' also focus their research around different regions and substantive issues. Comparatively higher percentages of women study international organization, international political economy, international law, the environment and human rights. On the other hand, higher percentages of men study US foreign policy, international security, international relations theory, and comparative foreign policy. Women are also more likely to study transnational actors, international organizations, and non-governmental organizations than their male colleagues. In direct contrast, male international relations

scholars have a tendency to focus on state actors. These findings are consistent with evidence from the broader field of political science. In addition to their different substantive foci, women also adopt different methodological and theoretical tools to study international phenomena. Women are more likely to employ qualitative methods rather than quantitative tools. There is also a greater propensity among women to employ non-traditional paradigms in their research, such as constructivism and post-positivist epistemologies – paradigms that have arisen in part as a reaction to the dominance of realism and liberalism. Ann Tickner contends that this tendency may be explained by the fact that women's status in society helps them to see women's marginality in scholarship.

Therefore, women's underrepresentation in the international relations field is in part attributed to the way in which international policy is conceptualised. Martine Letts of the Lowy Institute argues that international security voices are still overwhelmingly male because the analytical frameworks have changed little since the time of ancient political theory. Furthermore, the conceptual frameworks favoured by women tend to be more focused on conflict resolution, development and gender-based approaches.

In reality, there is a structural bias with respect to the way women think about security, which does not suit the way the world is organised and analysed. There is comparatively less "public space" for these kinds of approaches in the media, the think-tank and policy world and even in academia. This is because security studies still tend to focus on the state as the basic unit, with war and peace between states and "various muscular and less muscular versions of international relations theory all linked to the great game being played out between great, emerging and waning powers."

Security scholars focus on notions such as democracy, economic security, ideology, ethnicity and national identity as factors that impact on security within and between states. According to Letts, "by and large that also corresponds to the way the world is organised." Therefore, the traditional tools of analysis appear to be a more secure platform from which to begin than gender or rights-based approaches that many states will not understand and which may appear "woolly or soft."

### **Making the Invisible Visible**

Despite these institutionalised barriers, women are no less interested than men in pursuing careers in international relations, whether they be academic or policy-related. For example, 34 of the 63 interns at the Lowy Institute have been women. A number of them now work at the Department of Defence or DFAT, while some have gone on to further academic study in international relations.

Nevertheless, young women see very few models of successful women in the field. Role models play an important role. Young students, graduates and employees often look to more senior members of their fields to understand how they got 'from A to B.' In Australia, female scholars like Coral Bell are the exception that proves the rule, but it is not evident who her successors will be. Therefore, for

**“A diversity of opinions cannot be achieved by excluding an entire gender from the discourse on international relations.”**

even the most motivated young woman, it is disheartening to discover that international policy think tanks, universities and government departments are heavily staffed by men, while the majority of secretaries and support staff are female.

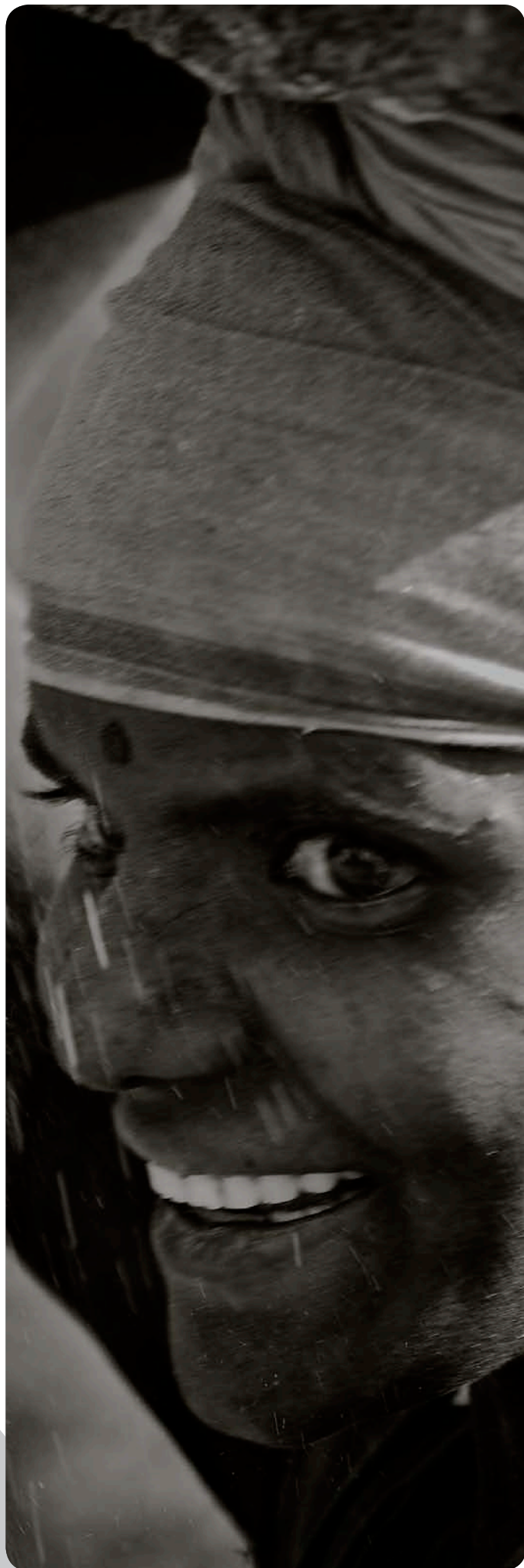
The women in international relations are hidden in the background. They are not featured on any banners, and their voices are rarely heard. This needs to change. More women, bloggers and scholars alike, must speak out against the invisibility of their gender in the world of international relations. Women have the power to redesign their own destinies. In her post, Wilkinson claims that greater female involvement in international policy will give rise to better decision-making and public debate.

Sam Roggeveen of the Lowy Institute has rejected this idea on the grounds that “being a woman is no more of a qualification for commenting on international affairs than is being a man.” However, if the aim of the Lowy Institute is to encourage a “diversity of opinion,” as stated by Roggeveen, then surely a diversity of opinions cannot be achieved by excluding an entire gender from the discourse on international relations. While the gender of a scholar should not be relevant, it ends up being so because that characteristic, rightly or wrongly, has great bearing on the person’s education, career, opportunities and experience.

In order to achieve gender equality, including both integration of gender perspectives and the recognition of women scholars in international relations, the international relations discipline needs to become more theoretically diverse and pluralistic, including more reflective of the global community of scholars. Women scholars, many of whom subscribe to non-dominant perspectives other than liberalism and realism, can thrive by immersing themselves in global networks. They can achieve this by linking their careers to the worldwide, multidisciplinary, international studies scholarly community, rather than by internalizing the narrower, paradigmatic boundaries of the domestic international relations field. For example, the establishment of the *International Journal of Feminist Politics* in 1999 by feminist scholars of international relations has built a broad constituency for feminist work across the terrain of international studies.

Both women and men scholars participate in the social construction of academic practice in the international relations profession. By continuing to engage in innovative international relations research and teaching inspired by feminist theoretical perspectives and methodologies, scholars can redress the discrimination against women in the field. Greater recognition of individual women and feminist scholars will only come with greater recognition of the importance of intellectual diversity, disagreement, and dialogue in the international relations field as a whole, and of the collective contribution of feminism, constructivism, post-colonialism and “Other” currently non-dominant perspectives. Ultimately, international relations should not be dominated by Y-chromosomes.

‘Where are all the women?’ Wilkinson asked. Let us tell her that the women are on their way. They are coming.







*Indian Silks I Brooke Hughes*





# Should Australia adopt a presumption against contact between violent parents and their children?

Emily Gair analyses the legal approach to parental contact where there is a history of family violence

## Introduction

Post-separation family violence<sup>1</sup> is pervasive in Australia.<sup>2</sup> Many women seek to protect themselves and their children from their violent partner by obtaining civil protection orders<sup>3</sup> to prohibit contact. These endeavours prove worthless when the prevalence of parenting orders provide legitimate loopholes for contact to continue, compromising the safety of women and children. This essay argues Australia must adopt a rebuttable presumption against contact where it is shown a person has used family violence against their partner, child or both.<sup>4</sup>

## “Mum...I heard you getting raped”<sup>5</sup> - the impact of witnessing family violence

Witnessing family violence is a form of child abuse,<sup>6</sup> which detrimentally effects a child’s emotional, cognitive and behavioural development.<sup>7</sup> ‘Witnessing’<sup>8</sup> family violence encompasses not only being physically present and observing, but hearing family violence, being held hostage, used as a weapon against their mother, being forced to watch family violence or being hit or threatened when caught in the crossfire.<sup>9</sup>

Children witnessing family violence frequently display paradoxical behaviour, often being aggressive, antisocial and rebellious whilst concurrently exhibiting fearful, withdrawn and inhibited behaviour, when compared to children from non-violent homes.<sup>10</sup> This demonstrates the damaging affect witnessing violence has on children’s behavioural and emotional functioning. Children can exhibit signs of ‘post-traumatic stress disorder’<sup>11</sup> and commonly revert back to age inappropriate behaviour such as bed wetting.<sup>12</sup> Increased anxiety,<sup>13</sup> depression,<sup>14</sup> eating disorders<sup>15</sup> and disruptive sleeping patterns<sup>16</sup> are behaviours commonly associated with exposure to family violence.

Witnessing family violence is often a precursor for a child’s own violent behaviour.<sup>17</sup> This accentuates the impact on the cognitive functioning and attitude, with exposure to family violence used to justify their own violent behaviour.<sup>18</sup> Research on incarcerated male juveniles from violent homes demonstrated violence is often associated with enhancing one’s self image.<sup>19</sup> This shows children normalising violence, perhaps as a coping strategy, in which they reframe and minimise family violence.<sup>20</sup>

Long term effects of depression, low self esteem and

acute anxiety<sup>21</sup> are common in adults exposed to family violence growing up. The normalisation of family violence often leads children who witness family violence to use, or for girls be the target of, violence in adult relationships.<sup>22</sup>

The destructive impact of witnessing family violence and the overwhelming evidence indicating the intergenerational cyclical pattern of family violence<sup>23</sup> provide a strong foundation on which to build a presumption against contact between a child and their violent father. Post-separation family violence habitually occurs around the time of child contact or ‘handovers’ exposing children to further family violence, making them susceptible to the adverse consequences.

The more lasting the violence, the more acute the dissonance, the worse the outcome for children who bear witness,<sup>24</sup> thus ‘no-contact’ is imperative to minimise children’s exposure to violence and the risk of the children themselves becoming targets. Between 30-60% of cases where partner or child abuse occurs, one will find the other form of violence also being perpetrated.<sup>25</sup> Exposure to violence “is not only an unintended consequence of violence between adults, but ..[sic]... is a potential indicator of the occurrence of child abuse.”<sup>26</sup> This fortifies the need for ‘no-contact’ as a means of protecting mothers and children from family violence.

## “Our policies are crazy”<sup>27</sup> - pro-contact versus child safety

At face value the Part VII of the *Family Law Act 1975* (Cth)<sup>28</sup> is child centred, emphasising children’s rights in relation to shared parenting post-separation and ensuring their protection from family violence.<sup>29</sup> The *Family Law Reform Act 1995* (Cth)<sup>30</sup> made the issue of violence prominent in the FLA, requiring the court to consider a history of family violence and whether there was an unacceptable risk of family violence occurring in the future, as relevant factors when making decisions about children.<sup>31</sup> The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)<sup>32</sup> elevated issues of family violence by making it a primary consideration to protect the child from physical and psychological harm from being subject to, or exposed to, abuse, neglect or family violence.<sup>33</sup>

The shared parenting philosophy fails to acknowledge male perpetrated family violence is a principal factor in





*Arawhata, New Zealand Brooke Hughes*

the breakdown of heterosexual relationships and that family violence does not necessarily end with the end of the relationship.<sup>34</sup> This results in ‘pro-contact’ trumping family violence considerations<sup>35</sup> with violent fathers being encouraged to maintain contact with their children, providing for potential danger to the child and their mother.

The informal<sup>36</sup> presumption of contact is rebutted where there are reasonable grounds to believe there has been family violence or child abuse<sup>37</sup> and unsupervised contact with the parent would “expose the child to an unacceptable risk of harm.”<sup>38</sup> In practice, courts rarely deny contact, despite severe allegations of family violence.<sup>39</sup> The court’s focus is on *how* to maintain contact until the final hearing rather than *whether* contact should be ordered at all.<sup>40</sup>

Rather than suspend parental contact the judicial compromise is to order supervised contact, demonstrating how the new ideologies of shared parenting expressed as children’s rights<sup>41</sup> are synonymous with father’s rights.<sup>42</sup> Supervised contact, neutral handovers and contact support centres are offered as protective mechanisms to ensure the child’s safety either at the interim or final hearing concerning family violence allegations, seemingly ignoring the link between family violence and child abuse.<sup>43</sup> This illustrates the primacy of the father’s perceived right to contact over the child’s right of protection.<sup>44</sup>

The rationale appears to be “it would be too horrible to contemplate”<sup>45</sup> denying a father contact if family

violence allegations were later proven untrue. Instead courts take the gamble of exposing a child to risks of physical and psychological harm by ordering supervised contact take place. The gamble rarely pays off. A significant proportion of cases where contact was ordered at interim stages, are later rescinded at the final hearing because allegations of family violence have been thoroughly evaluated.<sup>46</sup> The danger is, expensive litigation results in many interim contact orders remaining in place, severely jeopardising the safety of the mother and child. Issues of family violence are not thoroughly considered during the interim hearing, with orders often made amongst factual uncertainty. An interim ‘no-contact’ order where family violence is alleged will appropriately prioritise safety over the child-parent relationship.<sup>47</sup>

Only where allegations of family violence are *severe* and supported forensically, will it become tactically permissible for a target of family violence to make an application for ‘no-contact.’<sup>48</sup> Thus the pro-contact climate results in inappropriate contact orders between a child and their violent father, determined judicially, agreed by consent or privately negotiated by the parties. The inaccessibility of legal services can lead targets of family violence to agree to contact, rather than take on challenges of proving family violence unrepresented.<sup>49</sup>

Where responsibility for making parenting arrangements is left to the parties, one must question how freely consent is given.<sup>50</sup>

Targets of family violence may find it difficult to negotiate for their own interests because violence creates a

substantial power imbalance between the parties.<sup>51</sup> Therefore the target may feel under pressure to agree to contact arrangements which are unsafe for them and their children.<sup>52</sup> Targets of family violence may have low self-esteem due to continual denigration so they may not believe they are entitled to much<sup>53</sup> and “may be willing to sign anything to get rid of the bastard.”<sup>54</sup> Some women consent to contact arrangements because “it’s easier to give in...give him what he wants...so then he’ll stop [the violence].”<sup>55</sup> Consent should not be equated with satisfaction with the arrangement, nearly 50% of women<sup>56</sup> considered the outcomes reached would compromise their own safety or that of their children.<sup>57</sup>

Where contact arrangements are court adjudicated, issues of family violence are seemingly invisible with courts imposing the same ‘standard contact orders’ in these situations, as are implemented in cases where family violence is not present.<sup>58</sup> Despite FLA provisions<sup>59</sup> aimed at overcoming inconsistencies between ADVOs and parenting orders, institutional<sup>60</sup> ignorance of the provisions renders them ineffective.<sup>61</sup> Yet again family violence takes a back seat to parental contact.

**“The child still needs to have some knowledge about their father, even if they come to the conclusion he is not a particularly nice person”<sup>62</sup> - justifying contact between a child and their violent father**

The ‘pro-contact’ underpinnings of the Act highlight the dominant ideology of parenting in Australian society,<sup>63</sup> namely ‘two heterosexual parents are better than one.’ This rhetoric is spurred on by fathers’ rights groups who contend a father has a right to contact, “however unworthy he is, he is best and should be involved as much as possible...otherwise children will grow up unable to form stable relationships.”<sup>64</sup> Claims children who are involved with their fathers are less likely to be in trouble with the police, gain higher educational attainment, experience less distress and lead a happier life<sup>65</sup> aim to authenticate the ‘pro-contact’ culture. However it is essential to note these assertions are based on an assumption the father is *non-violent*.

The psychological theory of identity formation coupled with the central role parents play in a child’s recognition of their own identity<sup>66</sup> sees parental contact quash considerations of violence. The absence of a violent father is regarded as more problematic for a child’s long term development than his presence.<sup>67</sup>

Severance of contact may lead to ‘genealogical bewilderment,’<sup>68</sup> a child’s lack of knowledge of their origins which leads to confusion and insecurity about identity. This ideology is substantiated in a number of judicial decisions, which, despite the fact the children had been traumatised as a result of exposure to severe family violence, contact with their violent father was still ordered as he was believed to be “psychologically relevant.”<sup>69</sup>

Acknowledging the dire effects contact may have on the children it was held “it is ultimately better for these children to know [their father] for what he is

and what he has done than to have him completely absent from their lives.”<sup>70</sup> The judicial scales erroneously weigh heavily on anecdotes from disgruntled men<sup>71</sup> as to the impacts of their absence rather than heeding to research documenting the adverse effects of exposure to family violence.

**“It’s not public enough...”<sup>72</sup> – failing to make contact safe for targets of family violence**

### Contact Centres

Supervised child-violent father contact is sometimes facilitated by specialised contact centres, which aim to provide a safe environment for children, free from exposure to family violence.<sup>73</sup> Studies of contact centres<sup>74</sup> reported generally negative experiences of those who use them. Despite strict arrival and departure times, separate entrances and security, a number of women reported experiencing family violence whilst using the centres. This ranged from being punched, hit, slapped, and grabbed by the throat. Psychological violence was also prevalent during contact visits which included stalking, death threats, threats of sexual violence and vulgar disparagement.<sup>75</sup> The failure of contact centres to adequately provide protection for targets of family violence has led appeals for centres to be abolished on the grounds contact with a violent father unnecessarily compromises the safety of women and children.<sup>76</sup>

### ‘Neutral handovers’

The shortage and inaccessibility of many contact centres means ‘neutral handover’ locations are frequently offered as an alternative to centre facilitated contact.<sup>77</sup> The rationale is handovers conducted in a neutral, public place will minimise the risk of family violence. In practice, women and children are still at grave risk from the violent father. Police stations are often designated handover locations, as they are inherently ‘safe’ places. Regardless of the fact that police stations are not “particularly nice [places] for the kids,”<sup>78</sup> they fail to guarantee the safety of those who use them.<sup>79</sup>

The irony is by allocating police stations as handover locations decision-makers are conceding the probability of violence being perpetrated, but “it’s ok [because] if anything goes wrong...you’re in the right place [to report it].”<sup>80</sup> Where family violence has occurred, women are often told to “go outside with your domestic”<sup>81</sup> highlighting institutional non-feminist understandings of family violence.<sup>82</sup> Lucy highlights the added irony of court ordered handovers at a police station where her former partner has prior convictions for assaulting a police officer.<sup>83</sup>

Child friendly public places such as McDonald’s car parks, shopping centres and parks are popular handover points, theoretically reducing the probability of family violence being committed.<sup>84</sup>

Yet in practice, 40% of mothers who used McDonald’s or an equivalent experienced verbal, physical violence, or both<sup>85</sup> at the hands of violent partners.



### Third party assistance

Handovers assisted or undertaken by friends or family members are largely unsuccessful at eliminating the risk of family violence. Third parties report being physically and verbally attacked by the violent father,<sup>86</sup> making them reluctant to help. Assistance by friends or family members may aggravate the violent man and serve as a catalyst for increased family violence directed towards the target because “[he]...is pissed off he didn’t get to see me on my own.”<sup>87</sup>

Tactics of social isolation<sup>88</sup> employed by violent men may mean their targets do not have a familial support network to provide a third party willing to assist them. These women will be left to implement contact alone, making them susceptible to further violence.

Contact supervised by a member of the violent man’s family is problematic with concerns about the quality of supervision given by family members who may deny or minimise the history of family violence. The inability of a family member to prevent family violence during supervised contact is illuminated by the observation “how is a woman [the violent man’s mother] in her late sixties meant to pull him off me?”<sup>89</sup>

These vivid accounts illustrate the ineffectiveness of protectionist mechanisms utilised to alleviate tensions between the competing s60B objects. The safety of women and children is effectively disregarded as the ‘pro-contact’ principle legitimises continued family violence.

### “Daddy said I can punch you...he has shown me how to do it”<sup>90</sup> – violent men using contact to perpetrate indirect violence

Contact arrangements designed to avoid physical contact between the target and the violent man aim to eliminate family violence, ensuring the safety of the target and removing the probability of children being exposed to such violence. This justification demonstrates a judicial propensity to adopt a non-feminist understanding of family violence which equates ‘violence’ with ‘physical assault.’<sup>91</sup> In practice, *any* form of child-violent father provides opportunities for family violence to continue.

Where a violent man is denied access to his target, he frequently implicates his children to act as his proxy in the continued abuse of their mother.<sup>92</sup> Children are recruited to convey “messages to Mummy”<sup>93</sup> of a threatening nature, for example, “Daddy has got a gun and is going to kill you.”<sup>94</sup> Other tactics used to continue family violence include attempts to indoctrinate the children against their mother,<sup>95</sup> interrogation to gain information

about their mothers,<sup>96</sup> denigration and encouraging the use of physical violence against their mothers.<sup>97</sup>

These experiences demonstrate while the risk of *direct*-physical family violence perpetrated by the father against the mother decreases, contact continues to provide an effectual avenue for psychological abuse. Many targets of family violence deem mental and emotional violence as the worst aspect of family violence. Physical injuries heal but the fear inflicted by the threat of severe physical and sexual violence lives on.<sup>98</sup>

Children of violent men are at risk from abuse themselves during contact visits.<sup>99</sup> These risks include kidnap or abduction overseas, hostage taking, physical, sexual and psychological violence.<sup>100</sup> Contact is sometimes used by violent men to maintain ties with their target, rather than a desire to spend time with their children.<sup>101</sup> Lucy explains how her former violent partner often “sees red”<sup>102</sup> when she does not accompany the children on contact visits and on one occasion has “taken his frustration out on the kids”<sup>103</sup> by means of physical violence and disparagement.

Contact visits can adversely affect children. Children may return from contact confused and distressed,<sup>104</sup> exhibiting highly aggressive behaviour or ‘acting up.’<sup>105</sup> Children frequently display problems commonly associated with witnessing family violence such as anxiety and refusing to eat.<sup>106</sup> This behaviour may be symptomatic of the tension children feel between wanting to spend time with their violent fathers whilst concomitantly being extremely frightened of him.<sup>107</sup>

Contact provides a catalyst for family violence, meaning the target and children are not given any time to recover from the effects of such violence.<sup>108</sup> Women may find initial contact problematic because they are often still in a state of crisis and are in need of time away from their violent partner.<sup>109</sup> For children, immediate contact with their violent father, without time to allow for healing, fails to ameliorate the harm caused and for many may exacerbate it.<sup>110</sup>

For violent fathers, child contact becomes a legitimate means of perpetuating patterns of denigration and violence against their targets,<sup>111</sup> with children often used as tools in their continued campaign of control.<sup>112</sup> Empirical evidence supports the notion that contact visits with violent men jeopardises the safety of targeted women and their children<sup>113</sup> and impair chances of recovery.<sup>114</sup> Contact arrangements are made which fail to recognise the link between family violence and the welfare of the child.

Not only do children suffer emotionally and psychologically from having grown up in violent homes but also during the process of maintaining contact with their violent father which is often fraught with danger.<sup>115</sup> A failure of the current contact provisions to address these risks has led to an acute compromise of safety. The only contact arrangement whereby the protection of women and their children is paramount is one of ‘no-contact.’

**“I’ll drag you into court every day of the week until I get what I want”<sup>116</sup> – using litigation surrounding contact as a form abuse**

The FLA reforms provide a new tool for violent men to preserve control over their targets<sup>117</sup> by effectively giving greater scope for harassment by persistently challenging and undermining the mother’s parental autonomy through “an endless cycle of court orders.”<sup>118</sup> The judicial response is to make highly detailed specific issue orders, aimed at reducing grounds for dispute. However such orders are a double-edged sword as they potentially allow the violent father to continue family violence<sup>119</sup> by imposing unattainable standards of parenting on the mother.<sup>120</sup>

Women regard incessant litigation to be driven by a desire to maintain control rather than a desire to see their children.<sup>121</sup> Thus it is imperative to ascertain whether violent fathers are pursuing contact to fulfil a parental responsibility or whether they are manipulating the shared parenting ideology as a way of reviving family violence.<sup>122</sup>

Applications alleging contraventions of contact orders are additional weapons in a violent man’s legislative arsenal. Most applications are brought by the non-resident parent alleging a failure of the resident parent to facilitate parental contact.<sup>123</sup> Most however are without merit,<sup>124</sup> which illustrates applications are often pursued as a means of harassment rather than being borne out of a genuine complaint.<sup>125</sup> Of the legitimate complaints, 17% were deemed trivial, for example the resident parent being 15 minutes late for a contact visit.<sup>126</sup>

A majority of women report significant and recurring contraventions of contact orders with violent father being perpetually late or failing to turn up at all.<sup>127</sup> Few women initiated formal proceedings, citing the expense of litigation and fear of reprisal from the perpetrator as the breaches are used to “remind [the target] who’s in charge.”<sup>128</sup> There is a clear double standard in the FLA which sees the mother’s contraventions attract penalty while a violent father’s failure to maintain contact as escape punitive sanctions<sup>129</sup> as “you can’t force him to be their dad.”<sup>130</sup>

The informal shared parenting presumption provides violent men with a legitimate avenue to continue family violence under the guise of contact orders.<sup>131</sup> A presumption against contact where there is a history of violence will deny violent men the legislative tools to continue to exert power and control over their targets. Litigation surrounding contact arrangements will transpire once the violent man has satisfied a court he is rehabilitated to the extent he no longer poses a danger to his child or their mother.

**“Where family violence constitutes a coercive pattern of behaviour over a period of time, obtaining substantiated evidence is enormously challenging.”**

**“If I say I don’t want him seeing the kids ‘cos I’m worried [about their safety] then I’m made out to be a bitch or like I’m turning the kids against him”<sup>132</sup> – the unfriendly parent**

The anti-feminist rhetoric of ‘selfish mothers’,<sup>133</sup> driven by fathers’ rights groups, proclaim false allegations of family violence are used tactically by women to avenge their former partners. S 117AB and s 60CC (3) (c) FLA appear to give credence to this narrative, effectively silencing family violence. The popular “shibboleth”<sup>134</sup> is raising allegations of violence “will result in a mother being branded unfriendly.”<sup>135</sup>

Yet in reality the majority of women wish their children to maintain contact with their violent fathers, often sacrificing their own safety.<sup>136</sup> Women do not challenge the ‘pro-contact’ lightly. Concerns their children are being subjected to physical, sexual and psychological abuse are cited as reasons for opposing contact.<sup>137</sup> Thus, the ‘selfish mother’ is in fact the ‘devoted mother’ who endeavours to guard her children from their violent father.

The FLA is suspicious of women opposing contact rather than giving appropriate weight to their concerns. This shows the distinct gendered bias which sees a target’s concern for safety as sacrilege against the ‘father’s right to contact.’<sup>138</sup> The responsibility for family violence is shifted from the perpetrator to the target who is characterised as implacably hostile.

Narratives of the ‘no contact’ mother describes bitter ex-wives sabotaging contact are equated with parental incompetence. Clearly demonstrative of gendered bias, the irony is such connection between spousal roles and parental roles are not made when considering whether contact with a violent father would be in the child’s best interests.

**“I am just trying to teach him how to be man”<sup>139</sup> – parenting styles of violent fathers**

**Parenting styles of violent fathers**

The number of contact arrangements made between violent men and their children indicates the parenting capacity of violent men is wildly overestimated.<sup>140</sup> Their potential to be a good father is largely assumed with little or no reference to their responsibility of family violence.<sup>141</sup>

Initially the courts were reluctant to make the connection between an “abusive husband” and an “unfit father,”<sup>142</sup> however judicial acknowledgment of this connection is apparent in an encouraging number of later cases.<sup>143</sup> These acknowledgments fail to be reflected in the contact orders made. This is symptomatic of a desire for increased parental involvement exerting a “magnetic pull in these cases which impels the courts to avoid considerations of domestic violence.”<sup>144</sup> The inevitable result is “any involvement by fathers with their children is good enough fathering.”<sup>145</sup>

Legislative and judicial assumptions of violent fathers as desirable active participants in their child’s upbringing must be challenged<sup>146</sup> in order for the best interests of the





*Laughing Nuns, Kanyakamari Lucy Boyle*

child to be met. Typically, violent fathers engage in a punitive style of parenting, characterised by aggression and strict disciplinary rules.<sup>147</sup> Violent men frequently feel a sense of entitlement in interaction with their children, often commanding respect and unconditional love, despite inflicting terror on the family home.<sup>148</sup>

A feminist critique understands family violence as the exercise of power and control over their target,<sup>149</sup> so it is unsurprising strict control is considered an important aspect of the father-child relationship for violent men.<sup>150</sup> When obedience and respect is not forthcoming, violent men often feel rejected, disrespected and out of control.<sup>151</sup> Noncompliance may be regarded by violent men as “justified retribution”<sup>152</sup> and may be met by verbal or physical violence, or both.<sup>153</sup>

Exposing children to family violence is tantamount to child abuse, thus violent men must be deemed inherently violent fathers.

### **Holding violent men accountable for family violence**

Some violent men have a “yearning for a closer, deeper connection with their children,”<sup>154</sup> however lack alternatives to violent behaviour which underpins their parenting skills.<sup>155</sup> Violent men who are sincere in their desire for a relationship with their children must participate in mandatory counselling and parenting classes specifically designed for violent fathers. Otherwise violent fathers are let “off the parenting hook”<sup>156</sup> by making them invisible rather than accountable for their violence.<sup>157</sup>

Effective intervention with violent fathers, aimed at challenging deeply entrenched beliefs and fostering a new child-focused perspective,<sup>158</sup> may rebuild the child-father relationship. In some cases previously violent men may contribute to a healthier emotional development of their children.<sup>159</sup> Violent men who have been rehabilitated should be encouraged to foster violence free, supportive and nurturing relationships with their children.<sup>160</sup>

Until the effectiveness of rehabilitation and parenting intervention with violent men is demonstrated to the degree of satisfying a court that he no longer poses an ‘unacceptable risk’ to the child, the safety of women and children can only be guaranteed by a prohibition of contact.<sup>161</sup>

### **Criticism of the ‘no-contact’ presumption**

#### **“How do I prove I saw his shadow?”<sup>162</sup> - problems with collating evidence of family violence**

Whilst a rebuttable presumption of ‘no-contact’ prioritises the safety of women and children, such presumption is only triggered where the evidentiary burden is met. Proving family violence is notoriously hard due to its inherently private nature. It is often committed in secret, away from prying eyes of potential witnesses. Thus being able to provide corroborative evidence is uncommon.<sup>163</sup> Judicial weight is given to *recent* accounts of *physical* violence or threats when considering appropriate contact orders.<sup>164</sup> Decision-makers are inclined to de-contextualise family violence, requesting evidence of ‘incidents’ rather than

understanding family violence as a pattern of power and control executed by the perpetrator.<sup>165</sup> Recalling specific dates and times of these ‘incidents’ proves difficult as targeted women often employ strategies for coping with family violence, for example dissociating themselves from the violence and minimising its seriousness.<sup>166</sup>

Physical evidence, for example photographs and hospital records needed to prove family violence, is rarely obtained.<sup>167</sup> Where family violence constitutes a coercive pattern of behaviour over a period of time, obtaining substantiated evidence is enormously challenging because “potential sources of proof may be lost, witnesses (if there were any) may no longer be available, injuries may have faded and the non-physical symptoms of trauma may not be obvious.”<sup>168</sup>

The difficulties associated with providing evidence which can withstand judicial scrutiny means many targets are deterred from raising family violence, often by their lawyers.<sup>169</sup> Where evidence *is* provided, it is often of little probative value, highlighting the inadequacy with which legal practitioners present such evidence.<sup>170</sup> These problems are systemic in family law, with legal practitioners failing to pick up on issues of family violence or engage in sensitive questioning to explore the possibility.<sup>171</sup> A mandatory component of family violence to the curriculum of family law is essential so considerations of family violence are ingrained on legal practitioners.<sup>172</sup>

With the majority of allegations of family violence unsupported by substantive evidence, litigation comes down to “his word against mine.”<sup>173</sup> The fact allegations of family violence are largely met by denial<sup>174</sup> and concern targets of family violence are unreliable witnesses<sup>175</sup> due to the psychological harm suffered, adds to the seemingly impossible task of proving family violence took place.

The only way to overcome evidentiary hurdles which marginalise and silence family violence is to get rid of them. If family violence is to influence post-separation contact arrangements a presumption of ‘no-contact’ triggered by *allegations* of family violence is essential. Terminating contact where claims have not been forensically supported seems radical.

Yet, given the small percentage of fraudulent claims and the high number of interim contact orders which are later reversed at final hearing, this step seems the only way to guarantee protection to targets of family violence. Critics may see that this turns the ‘innocent until proven guilty’ philosophy on its head. But it is not the job of the Family Court to determine criminal liability; its jurisdiction is to make orders which are in the best interests of the child. Surely eliminating the potential for family violence by termination of contact should be given greater weight than preserving the reputation of a father where allegations of family violence prove false?

### **“My ex-wife once chucked a frozen chook at me”<sup>176</sup> - casting the net too wide?**

For Parkinson, a legislative presumption against contact where there is a history of violence risks casting the net

too wide.<sup>177</sup> Concern stems from research suggesting in some relationships violence is reciprocal which would lead to both parents being regarded unfit under such presumption.<sup>178</sup> Research shows in over 50% of partnerships in which violence occurred, both partners struck each other with the same frequency.<sup>179</sup>

Such research does have its limitations. Research often measures isolated acts of violence<sup>180</sup> rather than patterns of coercive behaviour which are characteristic of family violence.<sup>181</sup> Family violence is often confined to a non-feminist understanding which equates it with physical acts, seemingly ignoring the pervasiveness of emotional abuse, social isolation, economic abuse and threats and intimidation which are almost always perpetrated by men.<sup>182</sup> Evidence from police reports, hospital and court records demonstrate a clear gender disparity in who perpetrates family violence.<sup>183</sup> It must also be noted that men and women may have different conceptions of what constitutes ‘violence’ as vividly illustrated by the comment “my ex-wife once chucked a frozen chook at me.”<sup>184</sup>

Research proclaiming men and women to be equally violent must be understood in relation to the severity of injuries sustained. Johnston’s study observes women sustain more frequent injuries than men, and such injuries are more likely to be serious.<sup>185</sup> Statistics do not measure the *motivation* for the reported acts of violence<sup>186</sup> and overlook when women use physical violence it “is often in the context in which they have been repeatedly assaulted by their partner and are trying to defend themselves and/or trying to stop his violence.”<sup>187</sup> Such actions are not family violence<sup>188</sup> and should provide an automatic rebuttal of the presumption of ‘no-contact.’<sup>189</sup> This would avoid the net being cast too wide.<sup>190</sup>

Where family violence is genuinely mutual ideally the child ought not to have contact with either violent parent until rehabilitation provides them with the skills to be better parents. Although this may seem unrealistic, one cannot ignore the research documenting the severe effects exposure to family violence has on children. Perhaps a more realistic approach should follow Louisiana, USA, where legislative provisions provide where family violence is reciprocal, the ‘no-contact’ presumption fails and the court awards residence to the parent who is less likely to perpetrate family violence.<sup>191</sup>

## **Conclusion**

Despite the prevalence of post-separation family violence we have seen the emergence of a ‘pro-contact’ socio-legal climate which unmistakably regards the absence of fathers as a *greater* social problem than family violence.<sup>192</sup> The FLA not only legitimises but preserves family violence by enshrining a violent father’s right to contact<sup>193</sup> whilst sacrificing the safety of women and children.

A presumption of ‘no-contact’ may seem a drastic way of achieving protection for targets of family violence. However, in light of high rates of recidivism and post-separation violence, ‘no-contact’ is the *only* certain way to protect women and children from chronically violent men.<sup>194</sup>



## Endnotes

1. The term 'family violence' in this essay is to be understood in terms of the definition of domestic violence put forward by the intergovernmental taskforce in domestic violence: *Partnerships Against Domestic Violence, 'What is Domestic Violence?' (2003)*

*Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women in a relationship or after separation. It occurs when one partner attempts to physically or psychologically to dominate and control the other. Domestic violence takes a number of forms. The most commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation.*

2. Lawrie Moloney, Bruce Smythe, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Proceedings: A Pre-Reform Explanatory Study (2007) Research Report No.15 AIFS*

3. *Apprehended Domestic Violence Orders Crimes Act 1900 (NSW) s 562A.*

4. For the purposes of this essay I will explore family violence in the context of male perpetrated family violence against his partner. This essay will not look at issues of child abuse per se but will examine the affects of witnessing family violence on children.

5. As cited in Zoe Rathus, Kathryn Rendell and Angela Lynch, *An Unacceptable Risk: A Report On Child Contact Arrangements When There Is Violence In The Family (July 2001) (Women's Legal Service Brisbane)* at 3.

6. Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context (2008)* at 190.

7. Jennifer McIntosh, 'Thought in the Face of Violence: A Child's Need' (2002) 26 *Child Abuse and Neglect* 229, 230.

8. This essay notes the feminist critique of the term 'witness' as implying merely observing violence rather than reflecting the realities of living in a violent home (Jude Irwin and Marie Wilkinson, 'Women, Children and Domestic Violence' (1997) 3 *Women Against Violence* 15 at 17.) Use of the term 'witness' in this essay should be understood broadly to mean more than passively observing family violence.

9. Jude Irwin and Marie Wilkinson, 'Women, Children and Domestic Violence' (1997) 3 *Women Against Violence* 15, 17.

10. Jeffrey L. Edleson, 'Children's Witnessing of Adult Domestic Violence' (1999) 14 (8) *Journal of Interpersonal Violence* 839, 846.

11. PTSD. In researching the impact witnessing family violence has on children I interviewed Laura a child behavioural therapist who routinely sees children who have grown up in violent homes. Laura, personal interview 08/05/09.

12. Laura, personal interview 08/05/09.

13. Edleson, above n 10, 846.

14. Ibid.

15. McIntosh, above n 7, 232.

16. As part of my research for this essay I was fortunate enough to interview Lucy – a mother of two children aged 8 and 10, who had recently separated from her violent partner. "Jake [her son, aged 10] would be scared of going to sleep in case his dad beat me in the night and he [Jake] needed to call the cops" Lucy, personal interview 08/05/09.

17. Edleson, above n 10, 846.

18. Peter Jaffe, Susan Wilson and David Wolfe, 'Promoting Changes In Attitudes and Understanding of Conflict Resolution Among Child Witnesses of Family Violence' (1986) 18 (4) *Canadian Journal of Behavioural Science* 356, 360.

19. S Spaccarelli, J.D. Coatsworth and B.S. Bowden, 'Exposure To Serious Family Violence Among Incarcerated Boys: Its Association With Violent Offending and Potential Mediating Variables' (1995) 10 *Violence and Victims* 163, 173.

20. Edleson, above n 10, 864.

21. Id, 860-861.

22. Id, 861.; Jaffe, Wilson and Wolfe, above n 18.

23. See Edleson, above n 10; Jaffe et al, above n 18; Scott and Crooks, above n 24.

24. McIntosh, above n 7, 230.

25. Einat Peled, 'Parenting by Men Who Abuse Women: Issues and Dilemmas'

(2000) 30 *British Journal of Social Work* 25, 28; Jeffery Edleson, 'The Overlap Between Child Maltreatment and Woman Battering' (1999) 5 (2) *Violence Against Women* 134, 136; Moloney et al, above n 2, 110.

26. Adam Tomison, 'Exploring Family Violence: Links be child maltreatment and domestic violence' (2000) 13 (Winter) *Issues in Child Abuse Prevention: AIFS* at 8.

27. Dr Lesley Laing as cited in 'For the sake of the children' *The Sydney Morning Herald* 4th May 2009 <[www.smh.com.au/national/for-the-sake-of-the-children-20090501-aq6j.html](http://www.smh.com.au/national/for-the-sake-of-the-children-20090501-aq6j.html)> at 4th May 2009

28. *Family Law Act 1975 (Commonwealth)* referred to as the FLA.

29. *Family Law Act 1975 (Commonwealth)* s 60B.

30. Referred to as the 'FLRA.'

31. Patrick Parkinson, *Australian Family Law in Context: Commentary and Materials* (4th ed, 2009).

32. Referred to as the '2006 Amendments'

33. *Family Law Act 1975 (Commonwealth)* s 60CC.

34. Lynne Harne and Jill Radford, 'Reinstating Patriarchy: The Politics of the Family and the New Legislation' 68-85 in Audrey Mullender and Rebecca Morely (eds.) *Children Living with Domestic Violence: Putting Men's Abuse of Women on the Child Care Agenda* (1994), 68.

35. 'For The Sake of The Children' *The Sydney Morning Herald* 4th May 2009 <[www.smh.com.au/national/for-the-sake-of-the-children-20090501-aq6j.html](http://www.smh.com.au/national/for-the-sake-of-the-children-20090501-aq6j.html)> at 4th May 2009

36. In *B and B* the court held that the reforms had not created a presumption in favour of contact – *B and B* (1997) 21 *Fam LR* 676, 730.

37. *Family Law Act 1975 (Cth)* s61 DA(2).

38. This test was first devised by the High Court in *M v M* (1988) 166 *CLR* 69 which involved allegations of child abuse. It was subsequently held to apply to allegations of family violence in *In the Marriage of A* (1998) 22 *Fam LR* 756.

39. Moloney et al, above n 2.

40. John Dewar and Stephen Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 96, 116.

41. *Family Law Act 1975 (Cth)* s60B (2) (a) and (b) and (e).

42. Harne and Radford, above n 36, 68.

43. Helen Rhoades, 'The No Contact Mother: Reconstructions of Motherhood in the Era of the New Father' (2002) 16 *International Journal of Law, Policy and the Family* 71, 82.

44. Harne and Radford, above n 36, 75.

45. *Re W (Sex Abuse: Standard of Proof)* (2004) 32 *Fam LR* 249, 259.

46. Dewar and Parker, above n 42, 109.

47. Moloney et al, above n 2, 122.

48. Rae Kaspiw, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112 ; Moloney et al, above n 2, 109.

49. Hester, Marianne Humphries, Julie Pearson, Chris Qasier, Khalida Radford, Lorraine and Woodfield, Kandy-Sue 'Domestic Violence and Child Contact' 87-101 in Audrey Mullender and Rebecca Morley (eds.) *Children Living With Domestic Violence: Putting Men's Abuse of Women on the Child Care Agenda* (1994), 110.

50. Miranda Kaye, Julie Stubbs and Julia Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law*, 10.

51. Hilary Astor, 'Violence and Family Mediation Policy' (1994) *Australian Journal of Family Law* 3.

52. Juliet Behrens, 'The Form and substance of Australian Legislation On Parenting Orders: A Case for the Principles of Care and Diversity and Presumptions Based on Them' (2002) 24 (2) *Journal of Social Welfare and Family Law* 401, 415.

53. Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002), 351-352.

54. Family Court Counsellor as cited in Kaye et al, above n 52, 10.

55. Lucy, personal interview 08/05/09.

56. In the research sample - Kaye et al, above n 52, 10.

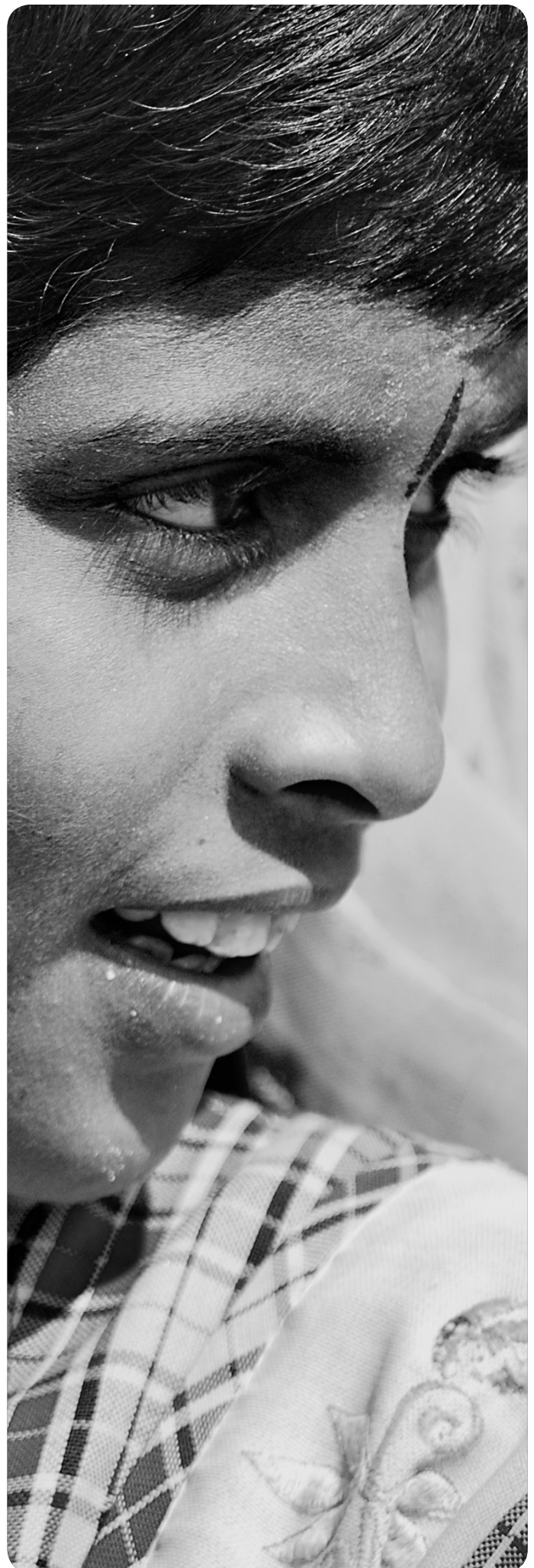
57. Ibid.

58. Kaye et al, above, n.52; Moloney et al, above n 2, 119.

59. *Family Law Act 1975 (Commonwealth)* s 68T.
60. Judiciary, police, legal practitioners.
61. Kaye et al, above n 52, 8.
62. Hester et al, above n 51,113.
63. Behrens, above n 54, 409.
64. Families Need Fathers as cited in 'Invisible Men' *The Guardian* (20th September 1993), 30.
65. Families Need Fathers <[www.fnf.org.uk/downloads/FNF\\_Research\\_summary\\_on\\_the\\_Importance\\_of\\_Shared\\_Parenting\\_2007.pdf](http://www.fnf.org.uk/downloads/FNF_Research_summary_on_the_Importance_of_Shared_Parenting_2007.pdf)> at 11th May 2009.
66. Kaspiew, above n 50,125.
67. Ibid; Rhoades, above n 45, 81.
68. H J Sants, 'Genealogical Bewilderment in children with substitute parents' (1964) *British Journal of Medical Psychology* 37, 133-141.
69. Kaspiew, above n 50, 126.
70. Ibid.
71. Rhoades, above n 45, 73.
72. As cited in Christine Harrison, 'Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence' (2008) 14 (4) *Violence Against Women* 381, 396.
73. Grania Sheenan, Rachel Carson, Belinda Fehlberg, Rosemary Hunter, Adam Tomison, Regin IP and John Dewar, 'Divergent Expectations and Experience: An Empirical Study of the Use of Children's Contact Services in Australia' (2007) 21 *International Journal of Law, Policy and the Family* 275, 276.
74. This research sampled children between the ages of 6-15 years old included observations of very young children and infants in the first eight weeks of using the centres, Strategic Partners Pty Ltd, Contact Services in Australia: Research and Evaluation Report – Final Report (December 1998) Commonwealth Attorney General's Department. For research which noted positive experiences of the contact centres please see Sheenan et al, above n 75at 285. Note the sample of children interviewed were between 6 and 15 years old and had routinely used the centres for at least eight weeks - a limitation conceded by the authors.
75. This includes comments such as "bitch", "slut" and "whore" - Kaye et al, above n 52, 25.
76. Harne and Radford, above n 36, 83.
77. Helen Rhoades, Reg Graycar and Margaret Harrison, 'The Family Law Reform Act 1995: The First Three Years' (2000) *Australian Family Lawyer* 1, 5.
78. Lucy, personal interview 08/05/09.
79. Kaye et al, above n 52, 26.
80. Lucy, personal interview 08/05/09.
81. Kaye et al, above n 52, 26.
82. Discussion of institutional non-feminist understandings of family violence and the attitude of the police is beyond the scope of this essay.
83. Lucy, personal interview 08/05/09.
84. Kaye et al, above n 52, 26.
85. Ibid.
86. Hester et al, above n 51, 113.
87. Lucy, personal interview 08/05/09.
88. Rosemary Hunter, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 733, 740.
89. Lucy, personal interview 08/05/09.
90. Rae Kaspiew, 'Violence In Contested Children's Cases: An empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112, 121.
91. Hunter, above n 91, 751.
92. Hester et al, above n 51,107.
93. Lucy comments her children often return from a contact visit with their violent father saying "mummy daddy has got a message for you" which will then be a threat of sexual violence for example "daddy is going to tie you up so you can't say no." -Lucy, personal interview 08/05/09.
94. Rathus et al, above n 5, 4.
95. Hester et al, above n 51, 108.
96. Ibid.
97. Kaspiew, above n 50, 121.
98. Hunter, above n 93, 741.
99. Hester et al, above n 51, 106.
100. Ibid.
101. Ibid.
102. Lucy, personal interview 08/05/09.
103. Lucy, personal interview 08/05/09.
104. Hester et al, above n 51, 108.
105. Ibid.
106. Kaye et al, above n 52, 30.
107. Einat Peled, 'Parenting by Men Who Abuse Women: Issues and Dilemmas' (2000) 30 *British Journal of Social Work* 25, 38.
108. Harrison, above n 74, 400.
109. Hester et al, above n 51, 109.
110. Harrison, n 74, 400.
111. Kaspiew, above n 50.
112. Ibid.
113. Hester et al, above n 51, 103; Kaspiew, above n 50; Kaye et al, above n 52.
114. Harrison, above n 74, 400.
115. Hester et al, above n 51, 103.
116. Kaye et al, above n 52.
117. Rhoades et al, above n 79, 3; see also Kaspiew, n 50; Behrens, above n 54, 414.
118. Rhoades et al, above n 79, 3.
119. Dewar and Parker, above n 42, 105.
120. Rhoades et al, above n 79, 3.
121. Kaspiew, above n 50, 124.
122. Hester et al, above n 51, 104.
123. Rhoades et al, above n 79, 7.
124. Id, 6.
125. Ibid.
126. Ibid.
127. Kaye et al, above n 52; Hester et al, above n 51, 114.
128. Lucy, personal interview 08/05/09.
129. Rhoades, above n 45, 78.
130. Lucy, personal interview 08/05/09.
131. Maria Eriksson and Marianne Hester, 'Violent Men as Good Enough Fathers? A Look at England and Sweden' (2001) 7 (7) *Violence Against Women* 779, 792.
132. Lucy, private interview 08/05/09.
133. Rhoades, above n 45, 73.
134. Chief Justice of the Family Court of Australia Diana Bryant as cited in 'For the sake of the children' *The Sydney Morning Herald* 4th May 2009 <[www.smh.com.au/national/for-the-sake-of-the-children-20090501-aq6j.htm](http://www.smh.com.au/national/for-the-sake-of-the-children-20090501-aq6j.htm)> at 4th May 2009
135. Ibid.
136. Hester et al, above n 51, 109; Rhoades, above n 45, 76.
137. Kaye et al, above n 52, 37.
138. Rhoades, above n 45, 73.
139. As cited in Scott and Crooks, above n 24, 102.
140. Harrison, above n 74, 397.
141. Ibid.
142. "There is no suggestion that Mr Heidt has ever treated his children with the violence with which he has treated his wife....[sic]..in assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband." Murray J in *Heidt* [1976] FLC 90-77, 75,362.
143. *Jaeger and Jaeger* [1994] FLC 92-492; *JG and BG* [1994] FLC 92-515; *In Grant* [1994] FLC 92-506; *Patsalou* [1995] FLC 92-580.
144. J Meier, 'Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions' (2003) *American University Journal of Gender, Social Policy and the Law* 657 at 659.
145. Eriksson and Hester, above n 133, 791.
146. Harne and Radford, above n 36, 68.
147. Guy Perel and Einat Peled, 'The Fathering of Violent Men: Constriction and Yearning' (2008) 14 (4) *Violence Against Women* 457, 459.
148. Scott and Crooks, above n 24, 99.



149. Hunter, n 90, 751.
150. Scott and Crooks, above n 24, 99.
151. Ibid.
152. Scott and Crooks, above n 24, 99.
153. Ibid
154. Perel and Peled, above n 149, 457.
155. Id 470.
156. Einat Peled, 'Parenting by Men Who Abuse Women: Issues and Dilemmas' (2000) 30 *British Journal of Social Work* 25, 33.
157. Ibid.
158. Scott and Crooks, above n 24, 108.
159. Peled, above n 159, 30.
160. Ibid.
161. Id, 33.
162. Greta Bird, 'How Do I Prove I saw His Shadow? A Review Essay Presenting Katzen and Kelly's Research' (2002) 11 *Women Against Violence* 48.
163. Kaspiew, above n 50, 129; Moloney et al, above n 2, 117.
164. Hunter, n 93, 756.
165. Ibid.
166. Id, 742.
167. "He is not going to drive me to the hospital after he has broken my ribs... and I'm not going to go on my own and leave the kids alone [with him]" Lucy, personal interview 08/05/09
168. Moloney et al, above n 2, 118.
169. Amy Haddix, 'Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights' (1996) 84 *California Law Review* 757, 803.
170. Moloney et al, n 2, 97.
171. This point is only touched on as further research on how legal practitioners deal with family violence is beyond the scope of this essay.
172. Professor Hilary Astor, 'Family Law Lecture: 10' (Lecture Delivered The University of Sydney 1st of April 2009)
173. Lucy, personal interview 08/05/09.
174. Moloney et al, above n 2, 97.
175. Fehlberg and Behrens, above n 6,217.
176. Miriam Cosic, 'Uncivil War,' *The Australia Magazine* (Sydney) 21-2 August 1999, 15,20 as cited in Reg Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' (2000) 24 *Melbourne University Law Review* 737, 745.
177. Patrick Parkinson, 'Custody, access and domestic violence' (1995) 9 (1) *Australian Journal of Family Law* 41, 53.
178. Id, 54.
179. Bruce Headley, Dorothy Scott and David de Vaus, 'Domestic Violence in Australia: Are Men and Women Equally Violent?' (*Australian Monitor*, 1999) <<http://www.fact.on.ca/Info/dom/heady99.pdf>> at 11th May 2009
180. Miranda Kaye, 'Domestic Violence, Residence and Contact' (1996) 8 (4) *Child and Family Law Quarterly* 285, 290.
181. Hunter, n 93, 740.
182. Janet Johnston, 'Domestic Violence and Parent-Child Relationships in Families Disputing Custody' (1995) 14 *Australian Journal of Family Law* 12, 16; Moloney et al, above n 2, 115.
183. Kaye, above n 182, 290.
184. Cosic, above n 178, 745
185. Johnston, above n 184, 17.
186. Rebecca Dobash and Russell Dobash, *Women, Violence and Social Change* (1992), 280.
187. Id, 271-272.
188. Hunter, n 93, 740
189. As is the law in Louisiana, USA – Haddix, above n 171, 808.
190. Kaye, above n 182, 291.
191. Haddix, above n 171, 808.
192. Rhoades, above n 45, 83.
193. Rhoades et al, above n 79, 2.
194. Haddix, above n 171, 815.







*The road out of Tiruchuli Lucy Boyle*



*Annapurna Base Camp, Nepal Lucy Boyle*



# The Gender Shift in Veterinary Science

Steph Hing looks at the rise of women in the veterinary science profession

When you take your beloved dog or cat for their next check up, it seems increasingly likely that they will be cared for by a female veterinarian. Many clients and patients seem to appreciate a woman's touch. Despite this, the veterinary community has not always been dominated by women and many aspects of the career do not fit the stereotypes of a 'female profession'.

Women comprise approximately 75% of the University of Sydney Bachelor of Veterinary Science class of 2009. This figure reflects the situation nationwide. Recent data shows that over 60% of students enrolling in veterinary science in Australia are women, and 75% of graduates from Australian vet schools are female. Yet not so long ago, the veterinary profession was firmly dominated by men. It was only as recently as 1935 that the first female veterinarian graduated from the University of Sydney, and in the 1970s there were still only 100 female vets in the whole country.

The past few decades have witnessed a dramatic shift in the make-up of the profession, and female veterinarians in Australia have grown to outnumber their male colleagues. Similarly in the United States, over 70% of the students in the graduating classes 2005 to 2008 were women, and in some American veterinary schools, such as the Cornell College of Veterinary Medicine, over 80% of the graduates are female.

At first glance, the increasing number of women in the veterinary profession may seem appropriate given its association with 'feminine' gestures of compassion and baby animals. However, the daily reality of work as a vet highlights the shortcomings of generalisations about the profession and the concept of 'women appropriate' careers.

It is difficult to feel glamorous while being drenched in excrement, and there is only limited comfort to be had in

a freshly manicured hand when it is lost several centimetres up a cow's anus. It may surprise many to learn that aggravated patients are not the only source of occupational hazards for vets.

Women in veterinary science face increased risk of spontaneous abortion as a result of prolonged exposure to radiation, volatile chemicals, hazardous biological materials and anaesthetic gases. Lifestyle is also compromised by long work hours limiting time with friends and loved ones. The problem of high debt incurred while at university is compounded by the average to below average salaries following graduation. A 2005 survey of graduates from Australian vet schools show that vets were working a median of 43 hours a week and majority of those were being paid less than \$40,000 per year.

The difficulties posed by the physical challenges are met by similarly strenuous emotional demands. Far from caring for ponies, puppies and poodles all day long, vets play a crucial role in determining whether or not an animal should live or die and how to inform the owners of this decision. This is not a profession for the faint hearted.

So why then has there been such a significant rise in female participation in the veterinary profession?

There are several theories as to why this gender shift has occurred. One hypothesis is that the rise of female vets has coincided with a growth in small animal practices, which may be a particular area of interest for women.

However, the evidence suggests otherwise, with many females in the class of 2009 demonstrating a preference for working with cattle and horses in large animal, mixed or equine practice. It has also been suggested that more young women are meeting the high entry requirements than before. Furthermore, where their male counter-

parts gain the requisite marks, they are more likely to choose professions such as law or business given the higher levels of remuneration. Although the numbers of women in these professions have also been steadily increasing, they do not comprise 75% of the graduating class as in the veterinary profession.

The gender shift also has social implications. The Veterinary Student Society has been known to invite students from the Engineering faculty to parties to make up the testosterone deficiency and a rap from a Vet revue, titled 'Where are the Men in Vet?' to the tune of Men in Black has become legendary. Many students work in private practices throughout Sydney, the majority of which are run by male vets. The number of men currently occupying leadership positions in the veterinary profession highlights the extent to which the profession was once male-dominated. However, there are an increasing number of clinics which are run by female vets and if the aspirations of the class of 2009 are anything to go by, there will be many more to come. There are now a number of veterinary workplaces which are female only, occasionally joined by a single male figure.

In a 1934 edition of the Australian Veterinary Journal, editor Prof. Clunies Ross wrote

"So far there are very few women graduates in veterinary science from Australian universities...There is, however, every probability that from this year onwards there will be a number of women graduates added to the profession in Australia...There are few today who would deny the possibility for women finding useful employment in our profession, while there are many who would affirm that in the field of research or clinical practice there is no conceivable reason why they may not achieve a distinction equal in all respects to that of their brother members."

Fortunately, we've certainly found more than just 'useful employment' in the profession, and it looks like one day we might well be the profession.

#### References

- Clunies Ross, W.I Editorial – Women in Veterinary Science. AVJ 1934 10:4 1-2
- Cockrill, P. Women pioneers of the Australian veterinary profession. National Pioneer Women's Hall of Fame. <http://www.pioneerwomen.com.au/beautybeasts.htm>
- Fraser, D., Hughes, K., Caple, I. And Yovich, J. Veterinary Science Education. Submission to the review of higher education financing and policy. The Committee of Australian Veterinary Deans. Apr 1997. <http://www.dest.gov.au/archive/highered/hereview/submissions/submissions/C/CommAustVet-Deans.htm>
- Heath, T.J. Initial work experiences of veterinarians who graduated from Australian universities in 2005. AVJ Sept 2008 86:9 357-364
- Maines, R. Why are women crowding into schools of veterinary medicine but are not lining up to become engineers? Cornell Perspectives. June 12, 2007. <http://www.news.cornell.edu/stories/June07/women.vets.vs.eng.sl.html>
- Wright, D. Animal Attraction: Women in Contemporary Veterinary Medicine [http://www.brynmawr.edu/sandt/2006\\_january/index.html](http://www.brynmawr.edu/sandt/2006_january/index.html)







*Flying*







**Other Worlds**  
**Alexandra Moon-Age**

Moon-age embodies a Surrealist sensibility, drawing on the tools of psychoanalysis and meditation. With heightened tension between reality and illusion, her artworks show a deep understanding of the abstract reality of the subconscious. Alex's artworks appear simultaneously nostalgic and contemporary, beautiful and morbid. Her collages contain pages of books, newspapers, sewing patterns and patterned paper which have been reinvigorated and reconstructed within the frame of her work.



# A Worthy Challenge - Surrogacy Rights for Homosexual Couples

Felicity Quigley examines surrogacy laws for homosexual couples in Australia

Surrogate motherhood poses challenges to the conceptions of motherhood, love and parenting, and raises questions about the use of the female body for such means. The pursuit of parenthood through this avenue by male homosexual couples in particular, further circumvents traditional ideas of parenthood and the idea of the nuclear family. Recent legislative amendments combined with the capacity of females to bear children has allowed female homosexual couples to pursue avenues of parentage more easily.

Male homosexual couples however, have not attained similar opportunities and their overt difference in anatomy and minimal gains have rendered limited avenues available to pursue parenthood. Consequently the importance of surrogacy as a mechanism for male homosexual couples to have children has heightened. To this end, this paper will first examine male homosexual access to surrogacy and assisted reproductive technology in NSW. Second, it will aim to provide insight into the legal rights of a child born out of a surrogacy arrangement and the means by which parties can pursue legal recognition of parentage of the child.

## **SURROGACY AND ASSISTED REPRODUCTIVE TECHNOLOGIES (ART)**

The Commonwealth government is restricted in its ability “to implement a universal legislative scheme for the provision of assisted reproductive technologies.”<sup>1</sup> Consequently, regulation of this field in Australia is administered at a state level through a combination of statu-

tory law, ethical guidelines and professional standards.<sup>2</sup> Nonetheless, states are bound by Commonwealth legislation governing human cloning and embryo research.<sup>3</sup> Such legislation entails compulsory accreditation by the Fertility Society of Australia (FSA) for clinics and renders the use of human embryos in any way without such accreditation an offence.<sup>4</sup>

### **1. Surrogacy**

The National Health and Medical Research Council’s (NHMRC) Ethical Guidelines define surrogacy as “the arrangement by which one woman (the surrogate mother) carries and bears a child for another woman or couple (the commissioning mother, or commissioning parents) to whom she will transfer custody at or shortly after birth.”<sup>5</sup> A surrogacy agreement however, can take several forms. Thus it is imperative to clarify the type of surrogacy arrangement that clients propose to undertake, and the ramifications of such specific characteristics.

### **2. Commercial versus Altruistic Surrogacy**

The proposition of a monetary payment to a prospective surrogate mother would have significant implications. This monetary feature would render such an arrangement a commercial surrogacy, which refers to the circumstance whereby a payment is made to the surrogate mother.<sup>6</sup> This is opposed to a non-commercial or altruistic arrangement, in which “no money is paid to the surrogate mother.”<sup>7</sup> Although such agreements are usually conducted between friends and family, a stranger can be sought to be a surrogate mother in this context.<sup>8</sup>

#### **2.1 Assisted Reproductive Technology Act 2007 (NSW)**

As the law stands in NSW, a surrogate arrangement whether commercial or altruistic, is neither prohibited nor encouraged.<sup>9</sup> This is because the *Assisted Reproductive Technology (ART) Act 2007* (NSW) has passed both Houses in Parliament but is yet to be proclaimed.<sup>10</sup> Once this legislation comes into force, commercial surrogacy is

deemed illegal.<sup>11</sup>

## 2.2 NHMRC and Reproductive Technology Accreditation Council

Due to the inoperative legislation in NSW at present, the use of ART for surrogacy is regulated by the NHMRC's Ethical Guidelines<sup>12</sup> and the *Code of Practice for Assisted Reproductive Technology Units 2008* developed by the Reproductive Technology Accreditation Council (RTAC).<sup>13</sup> The NHMRC's guidelines permit the provision of ART services for non-commercial surrogacy arrangements, but prohibit commercial surrogacy on the grounds that it is "ethically unacceptable."<sup>14</sup> Non-commercial surrogacy agreements, however, will only be facilitated once certain criteria has been met<sup>15</sup> such as counselling.<sup>16</sup> Such guidelines are only applicable to the extent that they are not affected by legislation, or in the absence of legislation<sup>17</sup> and their effect on accredited clinics.

## 2.3 Accredited Individual Clinics

As Commonwealth legislation governing the use of human embryos stipulates compulsory accreditation by the Fertility Society of Australia (FSA), adherence to the NHMRC and RTA guidelines would render clinics unable to undertake or facilitate a commercial surrogacy agreement. Sydney IVF is one such clinic, which specifically states that 'surrogacy must involve no payment or commercial element between the commissioning couple and the surrogate.'<sup>18</sup> Furthermore, once the *ART Act 2007* (NSW) comes into force, the actions of third parties such as Sydney IVF to facilitate commercial surrogacy agreements will be deemed illegal.<sup>19</sup>

## 2.4 Recommendation - Commercial ambiguity

While there is an array of barriers prohibiting commercial surrogacy arrangements, the ambiguity regarding classification of such arrangements<sup>20</sup> may be utilised. Despite an altruistic surrogacy being labelled 'unpaid', this arrangement may entail payments throughout the surrogate's pregnancy, such as medical and counselling costs.<sup>21</sup> This lack of clarity encourages clients to consider pursuing an altruistic surrogacy agreement. While this could not affect the surrogate chosen, it would entail replacing a proposed one-off fee with payments throughout the surrogate's pregnancy. There are limitations to this option, however, which will need to be considered.<sup>22</sup>

## 3. Advertising for a Surrogate

In NSW there are no laws that prohibit advertising for a surrogate mother.<sup>23</sup> Although a couple may advertise for a surrogate, it would be advisable not to specify a monetary payment on this advertisement. Although the advertisement itself is not illegal at present, the likelihood that a clinic will engage in a commercial surrogacy arrangement is almost nil. As mentioned, this is because any clinic that engages in the use of embryos must be accredited and thus will comply with the NHMRC's Ethical Guidelines prohibiting the facilitation of a commercial surrogacy agreement. Once the *ART Act 2007* (NSW) comes into force however, advertising

with the intent to carry out a commercial surrogacy will be illegal.<sup>24</sup>

## 4. Artificial Insemination - Full versus Partial Surrogacy

If the surrogate mother was to undergo artificial insemination from the sperm of one of the couples in a male homosexual relationship, this feature would render this arrangement a partial surrogacy, also referred to as a traditional surrogacy.<sup>25</sup> A partial surrogacy entails the provision of the surrogate mother's oocytes for in vitro fertilisation for insemination by the sperm of a donor, typically the commissioning parent.<sup>26</sup> This is a partial surrogacy since the child is usually related to one of

"Commercial surrogacy is particularly controversial, with issues ranging from commodification of the child to exploitation of poor families for the benefit of rich ones"

the commissioning parents.<sup>27</sup> The other form of surrogacy, full or gestational surrogacy, entails in vitro fertilisation of a woman's ovum, in which the embryo is transplanted into the uterus of the surrogate mother<sup>28</sup> and

thus, the commissioning parents may have provided all the genetic material for the child.<sup>29</sup>

### 4.1 Potential Refusal of Clinics to Assist with Partial Surrogacy Arrangements

The choice of whether to pursue a partial or full surrogacy is with the commissioning parents and is influenced by their respective circumstances. It is important to consider the rules of specific clinics and whether they will facilitate full and/or partial surrogacy arrangements. For example, Sydney IVF "will not assist traditional (partial) surrogacy arrangements."<sup>30</sup> Given such rules, it may be in the clients' best interests to pursue a full surrogacy arrangement. Although it is evident that all homosexual couples will not be able to provide the entire genetic material for a child, a gay couple may use a donor's oocytes - one method in which this obstacle may be overcome. Therefore, the choice of undertaking a traditional surrogacy can be hampered by specific clinic policies, and this may increase the propensity for a surrogate mother to change her mind and keep the baby<sup>31</sup> - a situation that presumably all clients are keen to avoid.

## 5. Eligibility Requirements to Access ART

While the legislation in other Australian state jurisdictions is primarily concerned with permitting access to ART only in circumstances where it is necessary to prevent the transmission of a genetic disease or to alleviate clinical infertility, the *ART Act 2007* (NSW) is starkly different.<sup>32</sup> In NSW treatments were once limited to married or heterosexual de facto couples, however this requirement was prohibited on the basis that it was inconsistent with Commonwealth legislation under s 109 of the Constitution.<sup>33</sup>





*Okuru, New Zealand Brooke Hughes*

The underlying philosophy of the *ART Act 2007 (NSW)* is to prevent the commercialisation of human reproduction and to protect the interests of those involved in the provision of ART treatments.<sup>34</sup> Whether such aims have actually been fulfilled by this legislation is beyond the scope of this paper.

### **5.1 Potential for Discrimination**

As a consequence of the aims mentioned above, the *ART Act 2007 (NSW)* does not stipulate eligibility criteria for participants to meet in order to gain access to ART services. The question of eligibility is also not contained within the NHMRC's guidelines.<sup>35</sup> Although this may have been intended to prevent discrimination regarding access to treatment in NSW, eligibility is left at the discretion of individual clinics. Such clinics may adopt a narrow approach, potentially limiting treatments to those with a medical need and leaving candidates exposed to the discretion of Ethics Committees. As Smith notes, such stipulations "may actually be justified as "reasonable" on the basis that infertility treatments are (essentially) aimed at overcoming *clinical* fertility problems and therefore are not discriminatory."<sup>36</sup> NSW may be compelled to legislate further however, whether to restrict access to assisted reproductive services, or to insert an exemption into their anti-discrimination legislation.<sup>37</sup> The latter course of action will permit variations in eligibility to be determined by individual hospitals and clinics. In their absence, the *Sex Discrimination Act 1984 (Cth)* will continue to apply.<sup>38</sup>

## **LEGAL RIGHTS TO CHILD**

### **1. The Role of Contracts and Public Policy**

The ability to ensure a surrogacy arrangement is fulfilled, namely that a surrogate mother gives the child up at or shortly after birth, is reliant on the clarity of the contract between parties. Although a contract requires many elements to be valid, such as intention and consideration,<sup>39</sup> it is important to highlight why the unique circumstances relevant to a surrogacy arrangement render a contract void or illegal.

#### **1.1 Statutory Law**

Under statute, a contract may be deemed illegal as formed, if the contract is concerned with something expressly forbidden by statute.<sup>40</sup> This principle will apply when the *ART Act 2007 (NSW)* comes into force, which deems commercial surrogacy illegal and all surrogacy arrangements (including altruistic) not legally enforceable.<sup>41</sup> Furthermore, once commenced s 45 of *ART Act 2007 (NSW)* will render all surrogacy agreements void "whether made before, on or after the commencement of this section," thus it has retrospective application.<sup>42</sup>

#### **1.2 Common Law**

Contracts can also be void at the common law if they are against public policy.<sup>43</sup> This is currently the case regarding surrogacy. As Stuhmcke notes:

"Surrogacy throws at law the clash of norms, the as-

sumption that a child has two parents, that a child should be biologically related, that heterosexuals should create families, that nature should predetermine family formation and that motherhood and fatherhood should not be splintered.”<sup>44</sup>

Commercial surrogacy is particularly controversial, with issues ranging from commodification of the child and the surrogate mother, to exploitation of poor families for the benefit of rich ones.<sup>45</sup> For these reasons contracts cannot be employed to ensure surrogacy arrangements are fulfilled.<sup>46</sup> Thus it is crucial that any surrogacy agreement is transparent, with all parties having a clear understanding of what the agreement entails from the outset, including their rights and responsibilities. Such action will enhance the likelihood of the agreement to be fulfilled without dispute, a lesson emphasised in *Re Patrick*.<sup>47</sup>

## 2. Recognition of Legal Parentage

### 2.1 Status of Children Act 1986 (NSW)

The *Status of Children Act* 1996 (NSW) s14(1)<sup>48</sup> renders the parental responsibility for a child on the birth parents of that child - the woman who gives birth to that child and with consent, her husband or *de facto* husband.<sup>49</sup> Additionally, ss 14(2), 14(3) clarifies the issue of genetics in regards to the presumptions of parentage. Section 14(2) highlights that in the case of sperm donor aiding the pregnancy of a female, this donor is “presumed not to be the father of any child born as a result of the pregnancy.”

In the case of pregnancy by utilisation of an ovum obtained from another woman, s 14(3) states that the “other woman is presumed not to be the mother of any child born as a result of pregnancy.” Hence ss 14(2), 14(3) emphasise that genetics are not the ultimate grounds upon which parentage can be sought, rather it is the birth mother and (potentially) her partner. This issue is further enforced by s 60H of the *Family Law Act* 1975 (Cth). Thus, the surrogate mother is always considered the legal parent from birth and is *prima facie* responsible for the care and protection of the child.<sup>50</sup>

## 3. Means to pursue parental rights

The “irrebuttable presumption that the commissioning parents are not the parents of the child”<sup>51</sup> evidenced above stresses the fact that a male homosexual couple will not be considered the legal parents, regardless of the genetic contribution to the child.<sup>52</sup> All this being said, if issues of parental rights arise under surrogacy arrangements, they can be resolved through parenting orders or adoption following family law proceedings.<sup>53</sup>

### 3.1 Parenting Orders

Following amendments to the parentage presumptions in the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* 2008 (Cth), the *Family Law Act* 1975 (Cth) recognises State and Territory parenting

orders, made under prescribed State and Territory Law, transferring parentage of children born under surrogacy agreements.<sup>54</sup> This new section of the *Family Law Act* 1975 (Cth), s 60HB dictates that where a child is born under a surrogacy agreement, same-sex couples can be recognised as the parents of the child if there is a State or Territory Court Order in which parentage is transferred to them.<sup>55</sup>

Although such amendments have had a considerable effect on parenting rights for lesbians, male homosexual couples have not had a comparative increase in rights. Recent amendments to the *Births, Deaths and Marriages Registration Regulation* 2006 (NSW), the *Status of Children Act* 1996 (NSW) and the *Births, Deaths and Marriages Registration Act* 1995 (NSW)<sup>56</sup> have had a two-fold effect for lesbian couples.

Firstly, it has enabled parenting presumptions to be made in favour of the birth mother and a consenting co-mother in a female homosexual relationship, where the child was conceived through a fertilisation procedure to be born into their relationship.<sup>57</sup>

Secondly, amendments have enabled the status of lesbian couples to be recorded as the child’s parents on the child’s birth certificate.<sup>58</sup> Thus it is evident that the extension of s 60H of the *Family Law Act* 1975 (Cth) to same-sex couples whose child is born out of a surrogacy arrangement does not secure parental status for gay fathers in the same mechanism that it does for lesbian mothers.

Parentage orders from the Family Court may regularise the commissioning parents relationship with the child, but will not provide them with full parental rights and responsibilities<sup>59</sup> and will cease when the child turns eighteen years of age.<sup>60</sup> Any person concerned with the “care, welfare and development of a child”<sup>61</sup> can apply to the Family Court for residence, contact or parental responsibility.<sup>62</sup> Although in theory any resident of NSW can attempt to apply for parental orders through the consent of the Family Court, however there is no guarantee they will be granted<sup>63</sup> as was the case in *Re: Evelyn*.<sup>64</sup>

Furthermore, as already noted, Australian courts will not enforce a surrogacy agreement as a contract. Hence, Family Law tests,<sup>65</sup> rather than contractual principles, will apply to any disagreement following the birth of a child through surrogacy.<sup>66</sup> As NSW law does not permit two fathers to be recognised on a child’s birth certificate,<sup>67</sup> parenting orders are the best means in which to pursue parentage at present.

### 3.2 Adoption

Adoption is another means through which parenting rights can be pursued once the child has been born out of a surrogacy arrangement. Unlike parenting orders, adoption gives parents full legal rights to a child.<sup>68</sup> It is important to note that adoption can usually only be instigated with the surrogate mother’s consent and in the circumstance that the surrogate mother is related to the commissioning parents, there are much more



concrete mechanisms and rules in which to facilitate adoption claims.<sup>69</sup> The state courts retain jurisdiction over adoption proceedings and before making an adoption order, require a background report from either the Department of Family and Community Services or an approved private adoption agency.<sup>70</sup>

Adoption by same sex couples is not permitted in NSW or internationally.<sup>71</sup> Thus adoption is not an option that can be pursued by the clients at present.<sup>72</sup> Section 26 of the *Adoption Act 2000* (NSW) specifies who can make an application for an adoption order, limiting applications to an individual or a couple. A couple, however, is defined by this Act as a “man and a woman who a) are married, or b) have a de facto relationship,” thus excluding those in a homosexual relationship. Nonetheless, a gay couple may apply to adopt as individuals. However, this is virtually impossible and fairly token in nature given their inherent status as a ‘single carer’, the lengthy waiting lists in Australia and specifications such as explicit permission to be given by the birth parents before a child can be adopted by a single applicant.<sup>73</sup>

### 3.2 Alternate Means - Overseas Commercial Surrogacy Agreement

Commercial surrogacy is legal in some places overseas, including the state of California and Canada. However it is a very expensive process.<sup>74</sup> Nonetheless, *Re Mark* concerned a commercial surrogacy arrangement in the United States in 2002 in which a donor egg was used and the sperm of Mr X. Mr X and his partner Mr Y, lived in Victoria and applied to the Australian Family Court for parental responsibility. The Court declared that parental responsibility for Mark vests in Mr. X and Mr. Y. Thus, “they alone have the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”<sup>75</sup>

In regards to entry into Australia following surrogate birth overseas, “there is no option under migration provisions for surrogacy, they are currently considered under expatriate provisions which require (amongst other things) that the adoptive parent(s) were residing overseas for 12 months prior to the adoption for reasons other than to adopt a child.”<sup>76</sup> If this option is a likely path, then further legal advice should be sought.

### 4. Recommendation

Overall, there are certain factors that need to be taken into consideration by a male homosexual couple wishing to have children via a surrogacy arrangement. As acknowledged, a one-off payment is a feature of a

“Should we not insist that at the very least gay couples should be given the same rights as lesbian couples despite their biological differences?”

commercial surrogacy arrangement which faces many barriers including prohibition. Clients may wish to pursue an altruistic surrogacy by providing a range of payments relevant to the surrogacy agreement. The clients may also wish to find an oocyte donor that is not the surrogate mother, to enable greater access to clinics that prohibit partial surrogacy agreements. An advertisement for a surrogacy, should be just that, no mention of payment nor the intent for a commercial agreement once the surrogate is found.

If individual clinics do discriminate on the grounds that the clients are a homosexual couple, they may be in breach of the *Discrimination Act*. As surrogacy agreements are not contained within the realm of contracts, there is no way to ensure that the child is given up at or shortly after birth. Furthermore, clients will not be considered the legal parents of the child, nor can they pursue this, as adoption is not an option at present. Thus, the clients should pursue parenting orders from the family court, but acknowledge that this does not give them full legal rights. A potential option briefly mentioned for further investigation, is the pursuit of a commercial surrogacy agreement overseas.

This paper has analysed the issue of surrogacy and assisted reproductive technology in NSW, in the context of male homosexual couples pursuing this option. The legal rights to a child born out of a surrogacy arrangement have also been examined, combined with the means in which to pursue legal recognition of parentage of the child.

Most importantly however, this paper has highlighted the controversy, and ultimately the complexity of a topic which raises several issues and questions. These include: whether the ability of females to bear children equates with the right to utilise their bodies for a surrogacy arrangement; and whether the contravention of the ideas of parenting, motherhood, fatherhood, love, the nuclear family and the like are so perverse as to severely inhibit male homosexual couples from being parents. Consequently, such challenges question whether the human rights of homosexual couples are being ignored to retain the status quo.

While it is evident that homosexual rights are not on par with the rights of heterosexual couples, should we not insist that at the very least gay couples should be given the same rights as lesbian couples despite their biological differences? As the debate rages over surrogacy and homosexual parentage, in the absence of substantial change, it is important that laws surrounding other avenues such as adoption are confronted and hopefully changed. Although the pursuit of increasing the rights of homosexual couples to pursue parentage may be a challenge, it is irrefutably a worthy one.

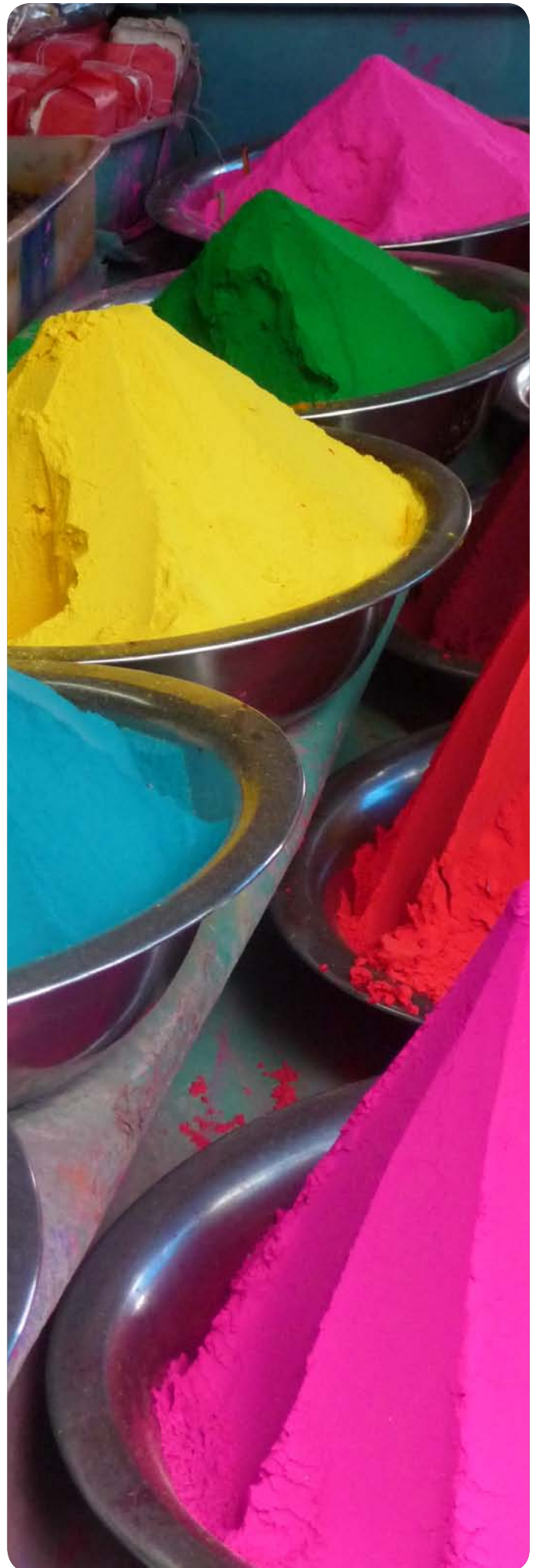


## Endnotes

1. *Parliament of Australia, Bills Digest No 24 2000-01, Sex Discrimination Amendment Bill (No. 1) 2000* (2000) Department of Parliamentary Library <<http://www.aph.gov.au/library/Pubs/BD/2000-01/01BD024.htm>> at 31 March 2009.
2. Malcolm Smith, 'Reviewing regulation of assisted reproductive technology in New South Wales: The Assisted Reproductive Technology Act 2007 (NSW)' (2008) 16 *Journal of Law and Medicine* 120, 121.
3. *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006* (Cth).
4. Smith, above n 2.
5. National Health and Medical Research Council, 'Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research' (2007) NHMRC, <[http://www.nhmrc.gov.au/publications/synopses/\\_files/e56.pdf](http://www.nhmrc.gov.au/publications/synopses/_files/e56.pdf)> at 26 March 2009, 61.
6. Anita Stuhmcke, 'For Love or Money: The Regulation of Surrogate Motherhood' (1996) 3 *Murdoch University Electronic Journal of Law* 1, 1-2.
7. *Ibid.*
8. Jenni Millbank 'Recognition of Lesbian and Gay Families in Australian Law - Part Two: Children' (2006) 34 *Federal Law Review* 205.
9. Law Reform Commission, Parliament of NSW, *Report 60 (1988) - Artificial Conception: Surrogate Motherhood*, (1988) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R60CHP2>> at 27 March 2009.
10. Anita Stuhmcke, *Reproductive Minefields: Can we make laws to deal with the social and ethical complexities of surrogate pregnancies?* (2008) UTS Speaks <<http://www.uts.edu.au/new/speaks/2008/October/resources/2910-talk.pdf>> at 27 March 2009, 6.
11. State of NSW *A proposal for a National Model to Harmonise Regulation of Surrogacy* (2009) Attorney General's Department <[http://www.lawlink.nsw.gov.au/lawlink/legislation\\_policy/ll\\_lpd.nsf/vwFiles/Surrogacy\\_consultation\\_paper\\_FINAL.doc/\\$file/Surrogacy\\_consultation\\_paper\\_FINAL.doc](http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/vwFiles/Surrogacy_consultation_paper_FINAL.doc/$file/Surrogacy_consultation_paper_FINAL.doc)> at 26 March 2009, 2; Assisted Reproductive Technology Act 2007 (NSW), s 43.
12. National Health and Medical Research Council above n 5.
13. Stuhmcke, *Reproductive Minefields* above n 10, 6; See: Reproductive Technology Accreditation Committee, Fertility Society of Australia, Code of Practice for Assisted Reproductive Technology Units (revised May 2008) <<http://www.fertilitysociety.com.au/wp-content/uploads/20080924-rtac-cop-final.pdf>>.
14. Stuhmcke, *Reproductive Minefields* above n 10, 6.
15. The NHMRC will not permit non-commercial surrogacy arrangements: unless every effort has been made to ensure that participations have a clear understanding of the ethical, social and legal implications of the arrangement and have undertaken counselling to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.  
See: National Health and Medical Research Council above n 5.
16. State of NSW above n 11, 1
17. *Ibid.*
18. Sydney IVF Assisted Conception: Surrogacy Sydney IVF <<http://www.sydneyivf.com/Assistedconception/Surrogacy/tabid/122/Default.aspx>> at 26 March 2009.
19. Assisted Reproductive Technology Act 2007 (NSW) s 44.
20. This ambiguity in regards to this payment feature has been addressed by Anita Stuhmcke in particular (See: Stuhmcke For Love or Money above n 6, and Stuhmcke *Reproductive Minefields* above n 10) and in the recent Parliamentary Inquiry into Legislation on Altruistic Surrogacy in NSW (See: Standing Committee on Law and Justice, 'Inquiry into Legislation on Altruistic Surrogacy in New South Wales,' 19 March 2009.) Unlike the Assisted Reproductive Technology Act 2007 (NSW) which is yet to be in force, the UK has attempted to clarify such ambiguity by proposing a payment limit of ten thousand pounds for those pursuing altruistic surrogacy arrangements.
21. Sydney IVF provides a list of examples of such payments including: medical and social expenses associated with presenting for medical treatment; initial reports and counselling costs; life-insurance for the surrogate during pregnancy and legal costs; medical and other expenses associated with the pregnancy; and legal costs associated with the transfer of the baby from the birth mother to the genetic parents. See: Sydney IVF above n 18.
22. In pursuing this avenue, one must be aware of all the potential payment areas, including an awareness of the need for flexibility in the circumstance that payments may exceed expectations or in the instance that further payments are required. It is also important to realise that this procedure may be very expensive and as it is likely to be non compensable through Medicare, it must be fully self-funded as noted by Sydney IVF above n 18.
23. State of NSW above n 11, 2.
24. Assisted Reproductive Technology Act 2007 (NSW) s 44.
25. Sydney IVF above n 18.
26. Stuhmcke For Love or Money above n 6, 1-2.
27. *Ibid.*
28. Sydney IVF above n 18.
29. Stuhmcke For Love or Money above n 6, 1-2.
30. Sydney IVF above n 18.
31. *Ibid.*
32. Smith above n 2, 123.
33. See *McBain v Victoria* (2000) 99 FCR 116; *Sex Discrimination Act 1984* (Cth).
34. Assisted Reproductive Technology Act 2007 (NSW), s 3; New South Wales Parliament, Assisted Reproductive Technology Bill 2007: Second Reading, 27 November 2007.
35. Smith above n 2, 127-128.
36. *Ibid.* 128.
37. Parliament of Australia above n 1.
38. *Ibid.*
39. Andy Gibson and Douglas Fraser *Business Law* (3rd ed, 2007) Pearson Education Australia.
40. *Ibid.*
41. *Assisted Reproductive Technology Act 2007* (NSW) ss 43, 45.
42. Law Reform Commission, above n 9, 1.
43. Gibson and Fraser above n 39.
44. Stuhmcke, *Reproductive Minefields* above n 10, 11.
45. State of NSW above n 11, 4.
46. Hence, one may appreciate and understand the purposive use of the term 'arrangement' rather than contract.
47. *Re Patrick* [2002] FamCA 193.
48. *Status of Children Act 1996* (NSW) s 14(1) stipulates that: "when a 'married' woman has undergone a 'fertilisation procedure' as a result of which she became pregnant: a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.
49. State of NSW above n 11, 28-29.
50. *Ibid.*
51. *Ibid.*
52. If artificial insemination was not employed, but rather Maximus has sexual intercourse with the surrogate mother, then he would be legally considered the birth father.
53. State of NSW above n 11, 28-29.
54. *Ibid.* 2, 20. These amendments commenced on 21 November 2008, when the De Facto Act received royal assent.
55. *Ibid.* 20-21 .
56. *Ibid.* 11.
57. *Ibid.* 11.
58. *Ibid.* 11.
59. *Ibid.* 28-29.
60. Jenni Millbank, *Hot Topics 53: Same-sex Families*, (2005) Legal Information Access Centre.



61. *Family Law Act 1975 (Cth) s 60CA.*
62. **NSW Government** *Understanding your legal rights: A Guide for Lesbians and Gay Men in NSW (2009)* Attorney General's Department <[http://www.safetypartnership.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/vwFiles/UYLRs.pdf/\\$file/UYLRs.pdf](http://www.safetypartnership.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/UYLRs.pdf/$file/UYLRs.pdf)> at 26 March 2009.
63. Stuhmcke, *Reproductive Minefields* above n 10, 4.
64. This was evident in *Re Evelyn* in which Evelyn's biological and surrogate mother Mrs S found it difficult to cope with the relinquishment of the child to Mr and Mrs Q. Custody was contested and the final decision was made by the Fully Court of the Family Court of Australia in which Mrs S was awarded custody of the child.
65. *Family Law Act 1975 (Cth) s 60CC.*
66. Stuhmcke, *Reproductive Minefields* above n 10, 4.
67. **NSW Government** above n 60.
68. Stuhmcke, *Reproductive Minefields* above n 10.
69. **State of NSW** above n 11, 28-29.
70. **Law Reform Commission** above n 9, 1-2.
71. **Millbank**, *Hot Topics* above n 58.
72. Although there are overt barriers preventing a homosexual couple from adopting a child born from a surrogacy arrangement, an Inquiry into Adoption by Same-sex Couples was conducted by the NSW Legislative Council Law and Justice Committee at the end of February this year. Even though it is unlikely that legislation will be radically altered in the near future, in its absence more reform efforts may enable parenting orders to be more easily pursued. Furthermore, given the array of barriers and hence unlikelihood that a gay couple will become parents through a surrogacy arrangement, the importance of adoption as a critical mechanism for gap couples will intensify. (Stuhmcke, *Reproductive Minefields* above n 10, 9-10).
73. **Millbank** *Hot Topics* above n 58, 21.
74. **NSW Government** above n 60.
75. Stuhmcke, *Reproductive Minefields*, above n 10, 9-10.
76. Stuhmcke, *Reproductive Minefields* above n 10, 7.



## Broken

### Sophia Chen explores the psychological complexity of sexual assault

He wished he knew that some things are better left undone. That the thin line which divides reason and the dark territory of animal instinct is better left uncrossed. Traversing the terrain of black oily desires comes at a price too great to pay. And she was part of it.

She is broken.

She is fragile as she feeds on the airy substance of hope. Whenever she's not careful or strong, as it is so often the case, she gets lost in the labyrinth of memory that haunts her unrelentingly.

Where is not the question. Instead, she would stare at Time straight in the face, watching the minutes pour themselves into a spiral of hours—when and when and when she asks.

The seconds pulse.

And then she knows time cannot give her the answer which lies elsewhere. Before she finds where that is, she would be lost again in the memory that never ends.

Never will she be free from that horridly small confinement of space in a room where blackness was as thick as wool and sticky as lust.

Just one touch, please.

She fretted over the sexual undertone of such a jest in a situation like this, hoping that a jest was all that it was, despite the discomfort brought by the sudden thickening of blackness surrounding a man and a woman in a closed small room.

She was foolish enough to ignore the hoarse and unfamiliar personality entwined within that voice. Oddly enough, those dark tales one is exposed to in adolescence didn't unfold in exactly the same way they were told. When the girl reconstructed those tales in her wildest fantasies, adding spices of drama seen in fragments

from fictions, she indulged in the pleasure of recreating shock and thrill that were larger than life.

The fear of falling victim to the frightening blackness had evoked a mysterious, bewitching sensation. But in real life, such glorification was non-existent.

Fear was never as inflated as it was in the dark girlish imagination.

It simply came when humour, the only antidote to the intensity aroused by animal instinct, stretched and broke against the thick black air.

Snap. You knew then that you had no control over what was going to happen next. And what was worse? The moment of realization of what had occurred.

The second when the chilling squeeze left by the rough hand seeped through the skin of her right breast and froze the heart behind.

The second when those white lips of hers parted to let the frozen heart exhale the command *get out*.

That second he paused, realized what he had done and tried awkwardly to embrace her with apology but found he couldn't move.

That second was the moment they both knew that the action could not be undone.

The gulf of distrust widened and grew as she fled from the dark and grotesque room and walked into the night, shivering and cursing his weakness. She doubts the scar of this memory is ugly enough to sway justice onto her side. Nor is she strong enough to bear the publicity which will tear open this wound again and again.

But would she ever be able to forgive a man who loved her unconditionally and in a split second abused such love?





““

We know what we are, but  
not what we may be.

– *Hamlet* Act IV. Sc V.

””



## Our Contributors



**Lucy Boyle** is in her fifth year of Commerce/Law. In 2008 she completed Honours in Economics. Last summer she spent 3 months in India and Nepal where she worked for a field based NGO that aimed to empower women through the operation of micro-credit and educational programs.



**Sophia Chen** is currently in her second year of Arts/Law at Sydney University. She was born in Shanghai and lived there for 13 years. She has participated in volunteer programs in Central and Latin America and has been an advocate for gender issues in model UN conferences.



**Antonia Clarke** is in her final year of Science/Law at Sydney University and is completing her final semester on exchange in Belgium. In 2007, she completed honours in Science. She is looking forward to travelling in South America and jackarooing in Australia next year.



**Lizzie Finn** (left) is in her final year of Arts/Law and is completing her degree on exchange at the University of Oslo, Norway. She has a strong interest in Family Law and has worked at the Legal Aid Commission in Family Litgation. She hopes to pursue a career in this area when she graduates.



**Emily Gair** is in her final year of Graduate Law at The University of Sydney, having moved from London in 2006 where she completed a Political Science Degree with Honours. She enjoys boxing and running and is currently training for the half marathon.



**Stephanie Hing** is currently living a semi-nomadic lifestyle as part of her final year of Veterinary Science. After graduation, she hopes to work with wildlife and become one of the many women contributing to this fantastic profession!



**Brooke Hughes** is a final year student doing a Bachelor of Education (Primary) at Sydney University. She is looking forward to working and travelling next year and continuing to combine her love of travel and photography.



**Rachael Hyde** (left) is in her first year of Arts/Law at Sydney University. She hopes to one day move into political journalism or family law, and fantasises about backpacking in South America at the end of her degree.



**Amanda Lim** is one of Sydney's emerging fashion and beauty photographers. Her work revolves around the concept of self and her style is marked by an intimate relationship between herself and her subject. She has achieved photography awards and strives to illustrate the world.



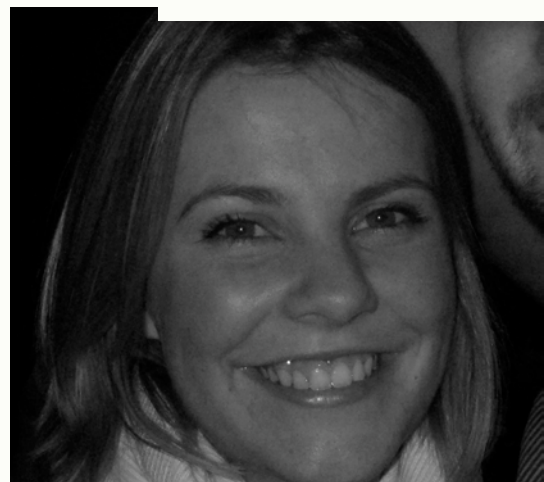
**Nicole Mansergh** is a final year Law Student at Sydney University. Her interests include Family Law, GLBT Rights, Criminology and feminist legal theory. In her spare time, she enjoys writing, painting and piano.



**Alexandra Moon-Age** studied at the College of Fine Arts in Sydney and has now moved to London to continue her art practice there. She is a 'jack of all arts' experimenting with performance art, fashion, animation and drawing.



**Melanie Nasser** is in her first year of Arts/Law. She is involved in the University of Sydney Union and was a guest speaker for International Women's Day 2009 at Granville TAFE. She enjoys dining out, theatre, movies, exercise, Martial Arts, travelling, shopping and meeting people.



**Felicity Quigley** completed a Bachelor of Commerce (Liberal Studies) in 2008, finishing her last semester on exchange at the University of Edinburgh, UK. She is now studying a Bachelor of Laws at UTS.





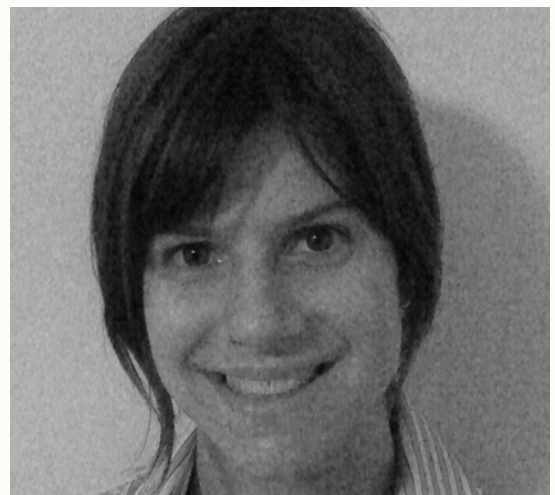
**Reena Rihan** moved to Sydney five years ago to attend university, before which she spent 18 years travelling, living and studying over the Asia-Pacific. She has no set plans for when she graduates this year, but would like to continue living as an expatriate and working, rather than studying.



**May Samali** is in her fifth year of a Combined Law degree at the University of Sydney. She is currently the President Editor of the Sydney University Law Society, and Associate Editor of The Sydney Globalist. May enjoys blogging, lomography, and watching celebrity court trials on television.



**Catherine-Josephine Tayeh** is in her third year of studying economics and law. She will continue to be a feminist until the government accuses her of damaging the ozone layer with her steaming rage. Even then, she will probably stick with the feminism and just buy offsets.



**Linda Thompson** is in her fifth year of law at Sydney University, having completed honours in Art History and Theory and Australian History. She currently works as a paralegal, but dreams of one day working in the Maldives as a photographer. She enjoys playing netball and travelling.



**Alice Zheng** is in her fourth year of Combined Law at Sydney University. She is currently the Competitions Director for the Sydney University Law Society. She enjoys sudoku, Russian Literature and list-making.



**Mimi Zou** recently completed her combined LLB/B Ec Soc Sci (Hons I) degree. She spent her final semester on exchange in The Netherlands, where she worked for an international law NGO in The Hague. She is strongly interested in gender equality in the workplace and the law.



## Resources for Women

### Assistance and legal resources

NSW Women's Refuge Resource Centre	<a href="http://www.wrrc.org.au">http://www.wrrc.org.au</a>
Wirringa Baiya	<a href="http://www.wirringabaiya.org.au">http://www.wirringabaiya.org.au</a>
Legal Aid NSW	<a href="http://www.legalaid.nsw.gov.au">http://www.legalaid.nsw.gov.au</a>
Women's Legal Resource Centre	<a href="http://www.womenslegalnsw.asn.au">http://www.womenslegalnsw.asn.au</a>
Working Women's Centre	<a href="http://www.wwc.org.au/">http://www.wwc.org.au/</a>
Redfern Legal Centre	<a href="http://www.rlc.org.au">http://www.rlc.org.au</a>
Domestic Violence Advocacy Centre	<a href="http://www.dvas.org.au">http://www.dvas.org.au</a>
Many Rivers Violence Prevention Unit	<a href="http://www.manyrivers.com.au">http://www.manyrivers.com.au</a>
Marrickville Legal Centre	<a href="http://www.mlc.asn.au">http://www.mlc.asn.au</a>

### Official bodies, networks and coalitions

Sydney University Law Society	<a href="http://www.suls.org.au">http://www.suls.org.au</a>
Australian Women Lawyers	<a href="http://www.womenlawyers.org.au">http://www.womenlawyers.org.au</a>
Women Lawyers Association of NSW	<a href="http://www.womenlawyersnsw.org.au">http://www.womenlawyersnsw.org.au</a>
NSW EEO Practitioners' Association	<a href="http://www.neeopa.org/">http://www.neeopa.org/</a>
Women Barristers Forum	<a href="http://www.nswbar.asn.au">http://www.nswbar.asn.au</a>
Equal Employment Opportunity network	<a href="http://www.eeon.com.au">http://www.eeon.com.au</a>
Australian Virtual Centre for Women and the Law	<a href="https://www.nwjc.org.au/avcwl/">https://www.nwjc.org.au/avcwl/</a>
National Women's Justice Coalition	<a href="http://www.nwjc.org.au/">http://www.nwjc.org.au/</a>
National Network of Indigenous Women's Legal Services	<a href="http://www.nniwls.org.au">http://www.nniwls.org.au</a>
Taskforce on Care Costs	<a href="http://www.tocc.org.au">http://www.tocc.org.au</a>
Australian Law Reform Commission	<a href="http://www.alrc.gov.au">http://www.alrc.gov.au</a>

### Aid organisations

UNIFEM Australia	<a href="http://www.unifem.org.au">http://www.unifem.org.au</a>
UTS Anti-Slavery Project	<a href="http://www.antislavery.org.au/">http://www.antislavery.org.au/</a>
Amnesty International (NSW chapter)	<a href="http://nsw.amnesty.org.au">http://nsw.amnesty.org.au</a>



