Opening Address

Margaret Reynolds
Senator for Queensland

THE AUSTRALIAN INSTITUTE OF CRIMINOLOGY IS TO BE CONGRATULATED for initiating this conference to address the problems of women in dealing with legal system.

This conference is timely in its scope of issues on the agenda and it is to be hoped that some of the myths and stereotypes about women will be exploded.

In Berlin 1974, the World Council of Churches passed the following:

> Neither men nor women will become truly human until this disease of sexism is diagnosed and cured.
>
> It will be one world of women and men together or no world at all.

These were brave words of sixteen years ago at the height of optimism in the Women's Movement!

But how much has changed? It is true that governments have responded with anti-discrimination and reform legislation with programs to better identify the needs of women. New opportunities have opened up for women in the work force and more women are taking a lead in government and business. Yet this so-called progress is marred not only by sexism as described by the World Council of Churches but by its more insidious form: that of violence against women.

Just when we should be celebrating our many achievements in removing barriers to equality the statistics and media reports remind us of the stark reality of Australian women's lives. Whether at home or in our streets women are vulnerable to attack because the disease of sexism persists. It is almost impossible to find a safe area of quarantine which enables 49 per cent of the population to wield its power over 51 per cent.

The disease of sexism is particularly virulent in our legal system and leads many women to doubt that justice has a female image. Only recently the *Gold Coast Bulletin* ran a story (20 September 1991) that a man was merely fined $750 for strangling, head butting and sexually assaulting a woman. The report suggested that it really was an 'unfortunate' incident because the guy thought the woman had consented to sex. It seems that this judge, crown prosecutor and barrister appear to survive this disease of sexism very well. Like many of their colleagues throughout the country they enjoy an apparently healthy disregard for the view that women have a right to determine when they choose sexual intercourse. Sexism in the Australian legal system is not only confined to sexual assault and violence against women. The legal system has entrenched these attitudes in the institutions of the law, which has until recently

operated more like an exclusive gentleman's club than reflecting on the current mores of a multi-cultural egalitarian Australia.

This conference then will challenge many of the comfortable, old-fashioned prejudices which have barred women from full participation in the legal system in the past. The discussions will highlight the urgency of reform and fresh attitudes appropriate to the 1990s. I wish you well in your deliberations and I declare the Women and Law Conference open.

INTRODUCTION TO PART 1: WOMEN AND THE LAWS IN AUSTRALIA

Dr Patricia Easteal

HOW DO WOMEN STAND VIS-À-VIS SOME OF THE LAWS IN AUSTRALIA? HOW MUCH legislative change has taken place in recent years? And, how much more change is necessary? These are just a few of the questions which the authors in this section of the book are addressing. The overwhelming consensus by all appears to be that in reference to the areas which are of the greatest concern and relevance to many women —rape, battering, economic affirmative action, prostitution and abortion—there have been legislative modifications to meet the needs of women but that these changes have been inadequate: more law reform is necessary.

Scutt's paper describes the persistence of laws which reflect a perspective of women as the 'incredible' witnesses, defendants and victims. Focusing principally upon rape, Scutt discusses the rules which have developed over time through decisions of the court which both place rape laws distinct from other criminal laws and render a woman survivor of sexual assault as less than credible. The paper also examines how criminal assault in the home has been decriminalised which acts to lessen the credibility of wife battering and its victims throughout the system.

In a similar vein, Hatty looks at the concept of dependence as it is defined and articulated within the law. She explores the challenge which has been mounted by feminists toward laws which relate to domestic violence and the criticisms of this approach. The article provides an overview of the study of women, drugs and crime noting both its marginality as a research area and its presentation of female addicts primarily in a sex stereotyped fashion.

Easteal's paper exposes what she perceives as another example of women's marginality in the laws which relate indirectly to wife battering. The failure of Australian courts, until very recently, to allow Battered Woman Syndrome as grounds for self defence in cases where battered women kill their violent partners is presented. Easteal explores what Battered Woman Syndrome means and how it has been used in American courts to help judges and juries to redefine what is 'reasonable' self-defence behaviour. Imminence of danger, proportionality, and duty of retreat are reinterpreted through the perspective of a battered woman. Easteal contends that without expert witnesses to testify about the syndrome, the components of self-defence statutes in Australia persist in being defined through a white male perspective.

Brereton describes the work of the Victorian Law Reform Commission on its reform of rape law and procedure reference. Their data are presented as evidence of non-reporting, police lack of charging, and court dismissal of charges. Prosecution

outcomes and the related legal issues such as belief in consent and unsworn evidence are also discussed. Some of the recommendations of the Commission are described: the need for the *Crimes Act* to define 'lack of consent'; the need to educate judges and jurors about what should be considered illegitimate cross-examination; and the need for changes in societal attitudes.

Turning from legal difficulties which can be confronted by any woman in Australia, the next two papers deal with the specific obstructions encountered by two doubly marginalised female populations. First, Payne explores the relationship of Aboriginal women to the law. She focuses upon the high rate of imprisonment for Aboriginal women, the crimes that they commit and their recidivism. Noting the dearth of research on the subject, the author turns to anecdotal evidence and presents the stories of two females who died while in custody. Aboriginal women as the victims of violence, the police and the Aboriginal community and the role which traditional laws might play are also discussed. The paper concludes that the solutions must come from or be derived from the Aboriginal community.

Secondly, Scheelbeck examines some of the obstacles for migrant women in attaining equity in the workforce, their infringement and redress. Both causation and the legislation that was enacted to ameliorate the problems are perused. The paper concludes with some of the Australian Law Reform Commission's recommendations to increase affirmative action through the laws.

Scheelbeck's discussion of employment and training discrimination is broadened to the entire class of women by Mark. His paper looks at the effects of marital status, pregnancy, and indirect discrimination upon females in Australia in the 1990s. Some of the specific issues surveyed are the continuous gender based pay inequities and credit rating difficulties encountered by women. The author believes that complaints of indirect discrimination need to be made within the anti-discrimination and the human rights jurisdiction.

Some of the preceding articles included brief mention of the need for law reform within their particular topic. The next group of papers is focused around the issue of law reform; the first two look at prostitution laws.

Perkins examines the almost mercurial legal situation for street prostitutes in Australia: the historical pendulum of legal reform culminating with a legal policy in the early 1980s which the author describes as 'laissez-faire' to a more repressive approach which commenced in 1983. Perkins identifies the results of shifting laws and states that the results of the 1983 and 1988 laws have included an increase in property crime, movement of street workers to different locales while noting that no laws end up restricting the 'inevitable' prostitution. Egger's paper also provides an overview of the 'piecemeal' reforms of prostitution laws in New South Wales which largely decriminalised prostitution in that state. After describing how the industry is broken down, Egger looks at how prostitution is policed under the new laws and the problems which still remain.

Abortion and rape are two other areas that are of particular concern to women, and which, according to the next two papers, are in need of further legal reform. Abortion reform is the topic broached in Holmes' paper. She briefly reviews the historical position on abortion held by the church, the medical profession, and international human rights documents arguing that abortion law reform should fall within the domain of human rights issues. Corbett reports on the work of the Real Rape Law Coalition in Victoria, a group interested and committed to the reform of sexual assault laws in that State. The article looks at the objections to reform and

addresses those concerns. The limitations of the current laws and the need for 'free agreement' to replace the term consent and more legislative clarity about the rights of the victims in the system are also critiqued.

THE INCREDIBLE WOMAN: A RECURRING CHARACTER IN CRIMINAL LAW

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TO BE A WOMAN, WHETHER AS VICTIM OF CRIME OR ACCUSED, IS TO BE INCREDIBLE in the context of the law. This is nowhere more clearly illustrated than in the case of Lisa Jane Kelly. Lisa Jane Kelly is a young woman (now dead) whom we, as women, know without any modicum of doubt, was raped on 23 May 1990. We know that, as a direct consequence of that rape, she died on the Brunswick Road entrance to the Tullamarine Freeway. We know further that, if the law were to be applied appropriately, those who raped Lisa Jane Kelly ought also to be held guilty (in addition to rape) of murder or, at best, criminal manslaughter.

The rapist or rapists intentionally committed the act of grievous psychological harm constituting the rape (together with the physical damage associated with it), as a direct consequence of which Lisa Jane Kelly died on a Melbourne road. But what does the legal system, through its enforcement arm, the police, say of this rape and unlawful killing?

> . . . the results of tests on whether she had been sexually assaulted were inconclusive and could not be confirmed until the end of the week (*The Age*, 24 May 1990).

Thus are the dying words of a woman incredible in law. They are unable to be taken as the truth: that the woman was raped. If these dying words are unable to be believed, and medical confirmation is necessary—that is, the *credible* words of a (no doubt) male professional, a police surgeon or doctor, what price the words of live women in the criminal justice system?

Woman as Victim and Survivor of Crime

Sexual assault

Nowhere is the incredible woman more in evidence than in laws relating to rape. Chief Justice Hale's aphorism that rape is a crime 'easily charged and hard to be disproved 'tho [the accused be] never so innocent' (Hale 1678, *Pleas of the Crown*, p. 635) founds the basic body of rape law. It underlies special rules which developed over time, through judicial decisions, which set rape law apart from the general run of the criminal law. One such rule was that of the prompt complaint. If a woman did not promptly complain of rape, then there was an assumption, at law, that she was not raped at all. However, if she did complain promptly, this was no evidence that she had in fact been raped. It was evidence solely of the reality that she had complained soon after the alleged act. Thus, the woman who for whatever reason did not make a complaint to anyone as soon as the opportunity arose after the act of sexual intercourse, was incredible at law: she was not to be believed. Complaining as soon as possible did not, however, render a woman credible.

The corroboration rule is also illustrative of the incredible woman syndrome. Prior to amendments to laws around Australia in the early 1980s, judges were required to warn juries, in all sexual cases, of the danger of convicting an accused unless the evidence of the chief witness for the prosecution—the woman stating she had been raped—was corroborated. That is, for juries, the woman's word was indicated as being insufficient in itself: they had to look for 'independent' evidence—evidence from other witnesses, or at least medical or other material that would go to support the woman's story (*R v. Graham* 1910, note 1967). A jury was entitled to convict on the word of the woman alone; but if a judge failed to warn them against the purported dangers of doing so, the conviction could be quashed on appeal.

In the 1980s, jurisdictions around Australia modified the corroboration rule, so that a judge was no longer mandatorily required to give the corroboration warning. But it remained the law that a judge had a discretion to apply the warning: that is, it was up to the individual judge, in the individual case, to determine whether or not the corroboration warning should be given. This could hardly be said to be an advance. Indeed, it left the way open for there to be no effective change at all: if judges continued to subscribe to long held beliefs (and there is hardly any reason why they should change their views overnight), the lack of credibility of women giving evidence about their own rape would remain, with a consequent application of the corroboration rule, unchanged. As all judges have been trained in a legal system which solidly subscribes to the notion of woman-as-incredible in sexual offences, for a judge not to continue to apply the corroboration rule in the same way as he (or she) had prior to the change would be extraordinary. That this is a fair assessment is evident when looking at more recent judicial decision-making where the word of woman is placed before the courts for determination.

In 1989 in the Victorian County Court Sandra Jane Collis and Tracey Michelle Collis pleaded guilty to perjury and were sentenced to 27 months' gaol apiece, with a minimum term of one year and nine months before becoming eligible for parole. The perjury charged against them was that on 22 May 1986 each of them made signed statements to the police that she had been indecently assaulted by her father Robert John Collis, and subsequently stated that this was a knowing, wilful and corruptly false statement.

For the appeal, Tracey and Sandra Collis placed evidence on affidavit that they had been under intense pressure from their parents to retract accusations of sexual abuse by their father. Their original statements were true, and the retractions made under pressure. When served with the summons charging perjury, their father took them to a solicitor. That solicitor was a solicitor the father had earlier consulted in relation to the charges against him (of incest).

In *R v. Sandra Jane Collis and Tracey Michelle Collis* (Nos. 75/1989 and 76/1989, 14 September 1989) the Court of Criminal Appeal said there was 'no suggestion that the pleas of guilty were entered by mistake or that the applicants were forced against their will to plead guilty or that they did not know what they were doing when they pleaded guilty'. Yet at least the evidence as to the role of the father and his wife (the children's mother) in the matter could be taken as an indication of some pressure upon Tracey and Sandra Collis in pleading guilty to the perjury charge. However 'neutral' the solicitor considered his conduct to be, Tracey and Sandra Collis may have been influenced in what they did by the fact that he was effectively (or had been) their father's legal adviser in the very matter wherein they had made statements against their father. (They were represented by Counsel instructed by the same solicitor, at the trial.)

Further, the Crown conceded that if the allegations of sexual abuse against the father were true, then the convictions for perjury were not sustained by the factual situation. The Crown, indeed, took a position that was supportive (or at least not negative to) the appeal by Tracey and Sandra Collis: that is, they acknowledged the miscarriage of justice and problems with the original case for the Crown, although they acknowledged that the father and mother could not be tested on the evidence, because they had escaped the jurisdiction and were unable to be found.

The Court held that because the women had originally pleaded guilty to perjury, and therefore there was never any argument as to whether or not the father had committed the acts of incest against them, the truth of the incest was not a matter for it in the appeal. The Court seemed to say that, because the young women had told one false story (albeit, as we are able to discern, under what might be said by some to appear to be considerable pressure), they were rightly convicted of perjury, although the conviction for perjury related to statements that were in fact true.

The Tracey and Sandra Collis case shows too well that the legal system is impervious to the rights of women and children who are sexually abused in the family, or who complain of violation. Women who seek the assistance of the authorities are met with disbelief. Their claims are viewed as incredible. When they retract, as did Sandra and Tracey Collis, the ability of the system (ostensibly) to believe women's words suddenly, miraculously even, comes to the fore.

The pardon of Tracey and Sandra Collis at the behest of the Attorney-General (not the courts) was no less than should have been granted. But how much better if the legal system had never supported, as it continues to do, the possible sexual abuse of Tracey and Sandra Collis in the first place. The legal system had to right its own wrongs. It pardoned Tracey and Sandra Collis, but it has done little to right the wrongs done to them and to the thousands of other girls and young women victims and survivors of sexual abuse and exploitation. Their words remain disbelieved, they remain categorised as incredible women.

A similar lack of credibility is still imposed upon adult women who are raped. Thus in *R v. David Ram Singh* (No. 226 of 1990, 18 December 1990) the Victorian Court of Criminal Appeal set aside a jury's convictions of a man for indecent assault

and two counts of rape, and entered verdicts of acquittal. A reading of the decision reveals that where there was some conflict in the woman's story, the Court considered this to be of considerable importance, and that the determination by the jury to believe her story of rape was 'unsafe and unsatisfactory' (p. 5): the jury acting reasonably [sic] should have had a reasonable doubt as to the guilt of the accused. However, where the accused's story contained conflict (and indeed a prior inconsistent statement) this was not considered to be any evidence of dissimulation—or downright lies, but rather *evidence of the veracity* of the accused.

A number of difficulties arise in the Court of Criminal Appeal's decision. For example, although the notion that a woman has to evidence rape by torn clothing, bruising or other physical damage is said to no longer be required, the Court of Criminal Appeal infers this is necessary: 'When the prosecutrix was medically examined at about 10.30 am *no abnormalities or any sign of force having been used, apart [sic] from the love bites [sic] on the neck, were found*' (my emphasis, pp. 3-4). This seems to be saying that: (a) signs of force remain necessary, at least in Victoria; (b) if there are signs of force that are arguably consistent with consensual sex, then they must be evidence of consensual sex and are not evidence of rape. This seems to be a modern version of 'heads I win, tails you lose'—or simply a restatement of antediluvian law.

When it comes to inconsistencies in the accused's story, the reader could not be blamed for considering that a *reasonable* jury acting *reasonably* (the legal expression used to refer to the legal standard applicable) could perfectly properly hold that this was evidence of the accused's lack of honesty. Rather, the Court of Criminal Appeal saw it as clarifying his veracity: he in being inconsistent is credible (or even increases his credibility); she in being inconsistent is incredible.

The Court of Criminal Appeal was critical of the woman's evidence relating to the extent of her acquaintanceship with the accused. It also raised as a criticism of her evidence that she admitted that before she was pulled down on to the carpet in the kitchen the [accused] had asked her to have intercourse with him in her bedroom. She replied that there were children in both beds and added: 'We will have to do it on the kitchen floor'. The Court went on to say (putting paid to any notion that in Victoria signs of force, struggle, crying out and the like are no longer necessary to prove rape) that the evidence 'did not suggest that the intercourse was not consensual'—this ignores entirely the victim's word. A reference to 'no disarrangement of furniture in the flat' seems to imply that not only must one struggle and be injured or at minimum bruised, shout, and cry for help; one must fight back to such an extent that furniture is strewn about in disarray.

Further, it is revealing that the jury, with all the evidence—and the contradictions—before it, and with the general community mindset of which we are aware: namely, a tendency to disbelieve rape has occurred (particularly on single women of 30 years or so, and especially those who are divorced with young children) actually found the man guilty. The Court of Criminal Appeal shows that it is even further behind the community in coming to grips with the real nature of rape and the rights of women to operate as autonomous beings, whatever our lifestyle, our marital arrangements and the like, without being subjected to unwanted sexual acts.

In 1980 in New South Wales rape laws were reformed to make clear that there is no requirement that the prosecution show evidence of struggle, torn clothing and the like as necessary for a conviction for rape. The Victoria Court of Criminal Appeal decision in *R v. David Ram Singh* makes clear that this legislative reform is essential:

without it, judges continue to render incredible women who have been raped and who have their word alone (plus 'love bites') to show for it.

The 'quasi-criminal' and the incredible woman

The category of incredible woman as victim has taken a new turn with the reality that has been brought about by the decriminalisation of criminal assault at home through the passage of laws relating to non-molestation orders, injunctions, intervention orders and the like. The problem for women has been that because we lacked credibility as legitimate victims of crime, where our husbands, 'boyfriends', 'lovers' and sons beat us, rather than demanding that the criminal justice system take us seriously as legitimate citizens, the path was taken of passing 'new' laws. Under these laws, criminal assault at home is decriminalised. Instead of husbands being arrested for committing criminal acts of assault, unlawful wounding or grievous bodily harm on wives, 'non-molestation' or 'intervention' orders are (sometimes) taken out to 'prevent' a man assaulting or harassing the woman again (McCulloch 1985; Scutt 1983, 1986, 1990)). A woman *may* obtain a non-molestation order (this is by no means assured (Community Council on Violence 1991)). Yet the woman is more likely than not to have suffered more crimes than she has orders. Thousands of women around Australia have been thus diverted from the criminal justice system into the quasi-criminal system. Simultaneously, men who are in truth guilty of crimes of violence against women with whom they are living, or with whom they have lived, escape criminal intervention. They escape the clear recognition for themselves that what they have done contravenes the criminal law. They are led yet again into a position of being figuratively patted on the head and asked (politely, now) not to 'do it' again.

And within this system, women *still lack credibility*. To present a man who has inflicted criminal acts upon another human being with an order that he 'not do it again', which is comparatively rarely followed up, anyway, is hardly confirmation that women are equal citizens, with equal rights not to be bashed, brutalised and abused.

One particular case illustrates the way in which a woman whom we would consider 'the system' might be forced to take seriously—to regard as credible—loses that credibility in the legal system. The woman in this case is a professional person, with a university degree and other qualifications. Her husband was in a field peripherally allied with hers, but without formal qualifications. As she appeared as an assertive person who fitted into the court's mould of a professional woman who could 'look after herself', she was defined out of the category requiring legal intervention. Ironically, had she come into the category that the judge might have thought needed 'protection' she would hardly be likely to be in court in the first place: would the police have taken action on her behalf? Rarely do they, where intervention orders are concerned. Even more rarely do they put into effect the criminal law, despite their responsibility to do so. Would she have been able to take the action herself? Refuge workers and ethnic community workers do give considerable assistance to women in this area. Yet there is evidence that the system has a credibility gap it imposes on women in this category, as exemplified in a report of the Victorian Community Council Against Violence, *The Legal System and Family Violence* (1991).

In Western Australia it is reported that certain magistrates refuse ethnic workers the right to be in court together with their client when she makes application for an intervention order (personal communication, 1990). Thus the woman is robbed of

credibility as a citizen with entitlements to be accompanied by a court-friend. The ethnic workers (all of them women) are denied credibility in their professional status.

Numerous examples are available of difficulties women experience with the legal system in getting (the semblance of) protection from domestic violence through intervention orders (and their equivalents throughout Australia). At a conference in October 1990, held by the Victorian Community Council on Violence, reports included:

- Clerks of court disbelieving or judging a woman's situation and not allowing her to apply for an intervention order or even an interim order;
- Women applying for interim orders having to wait four days or more for the applications to be heard by a magistrate;
- Clerks telling women that they are unable to apply for Interim Orders unless the other partner is present to tell their side of the story;
- Clerks telling women that magistrates are tired of women applying for intervention orders so that they can be granted priority housing;

- Women being told by clerks and police that they are unable to apply for intervention orders unless they have already separated from their partner;
- Women being told by clerks of court that an intervention order will not be granted for emotional abuse;
- Police not taking out intervention orders on behalf of women (Community Council on Violence 1991).

The difficulties do not lie only with clerks of the courts. In 1991, a magistrate at the Prahran Magistrate's Court in Victoria, is reported to have swept into the courtroom where a woman waited, together with a support worker from the women's refuge to which she had fled, for her application for an intervention order to be considered. 'I've read these papers, and you don't need an order', said the magistrate (or words to that effect). 'You're at a refuge. They're supposed to be looking after you'. Reiterating that she did not 'need' any intervention order (because she was a refuge resident), the magistrate dismissed the application and swept back out of court (personal communication, 1991). Like non-English speaking background workers in Western Australia and Victoria, women's refuge workers (together with women applicants) lack credibility in Australian courts.

The incredible discount in sentencing

The incredible woman exists not only as victim and witness in trials prior to conviction or acquittal, and in the newly created category of 'quasi-victim'. She is evident also at the sentencing stage, and where victim compensation is in question.

On 14 August 1991 women demonstrated outside the County Court, then marched to *The Age* building in Spencer Street, Melbourne, to protest their anger at a decision by a judge that rape was likely to cause women working as prostitutes less psychological harm than other women. The week in between had seen numerous letters to the editor published on a daily basis, declaring opposition to the judgment.

The rationale for sentencing Hakopian, the man convicted of rape, to a lesser term than would have been the case, was as stated by the judge that the woman whom he attacked and victimised was working as a prostitute. The judge said that the courts do not apply one law for prostitutes and another for 'chaste women':

> Prostitutes are not second class citizens. Prostitutes are not, by reason of their vocation, any the less entitled to receive the protection of the law. However, one important consideration with respect to sexual offences is the effect on the victim. As pointed out by Starke, J. in the case of *Harris*, the experience of the courts is that the forcible act of sexual intercourse, very often has a serious psychological effect on the victim *I do not think that that applies to the same degree here*.

> *As a prostitute, Miss [X] would have been involved in sexual activities on many occasions with men she had not met before, in a wide range of situations. She had, for money, agreed to have oral and vaginal intercourse with you, and had very shortly before these offences occurred, had oral intercourse with you on a consensual basis.*
>
> On my assessment, the likely psychological effect on the victim of the forced oral intercourse and indecent assault, *is much less a factor in this case and lessens the gravity of the offences* (my emphasis, at pp. 7-8).

He then went on to acknowledge it would have been 'a frightening experience for Miss X, particularly as you had a knife. It went beyond what prostitutes such as Miss X might be prepared to accept [sic] as conduct that is part and parcel of their occupation' (at p. 8).

The case highlights a certain 'grading' of credibility of women as victims of crime, and a categorisation of women-harm-damage calculated with reference to *a woman's sexual experience*. The defence counsel for Hakopian argued (amongst other matters) that Hakopian should be sentenced taking into account that he had raped a prostitute. It was rather akin, the argument ran, to raping a woman wearing a mini skirt, make-up and 'wandering through a Housing Commission car park' (*The Age,* 9 August 1991). This astonishing proposition was not accepted by the Court. But the Court did accept, and confirm as a legal proposition, the notion that sex-for-money (or consensual) sexual experience is relevant to psychological damage in rape. On appeal to the Supreme Court Appeal Division, the Crown dropped as a ground of appeal the proposition that the sentence should not have been affected by the fact that the woman raped was a prostitute. The Crown 'conceded that the judge was justified in making the comment (that 'the likely psychological effect on the victim of the forced oral intercourse and indecent assault is much less a factor in this case and lessens the gravity of the offences', in the context being a 'reference to the fact that the victim of the assault was a prostitute') and that, generally speaking (the judge) was not in breach of any sentencing principle when he dealt with the matter as he did on the basis that the complainant was a prostitute' (*R v Heros Hakopian*, unreported 11 December 1991, pp. 10-11, citing *Attorney-General v. Leonard Richard Harris*, unreported 11 August 1981, Court of Criminal Appeal, Melbourne, Australia). Consequently the Crown dropped as a ground of appeal the proposition that the judge 'erred in placing too much weight on the fact that the complainant was a prostitute'.

If, as the County Court said (and the Court of Criminal Appeal repeated), prostitutes are not 'second class citizens' and the law treats them in the same way as other citizens—or at least other women—then the only conclusion can be that the relevance of Miss X's profession is not that she barters sex for money, but that she has had a variety of sexual experiences with a number of men. This means that all women who have had a variety of sexual experiences with a number of men, whether for money or not, are 'better' targets for men who rape. That is, so long as they direct their actions at women in this category, men will gain lesser penalties for rape, whatever the circumstances of the rape.

This form of reasoning has also found its way, at least initially, into the victim compensation field. On 22 November 1989 K.R. was awarded a sum of $2,295.00 for paid and suffering pursuant to section 21 of the *Criminal Injuries Compensation Act 1983 (Victoria)* for injuries suffered on 20 May 1988 as a result of offences by Joe Huljak. He had pleaded guilty to false imprisonment, intention to cause injury, and

indecent assault, and was convicted in the County Court. The sum of compensation requested in K.R.'s original application was cut down in accordance with section 20(1) of the Criminal Injuries Compensation Act.

The physical injuries were detailed in a report of Dr How of the Royal Woman's Hospital and included a swollen and tender jaw with difficulty opening her mouth properly, severe bruising of the forehead, eyes, face, mouth, neck, chin, shoulders, arms, elbows, wrists and legs, bilateral subconjunctival haemorrhages and right peri-orbital swelling and marks from the laces and cord. Her false upper denture was also broken.

The swelling lasted about two weeks. K.R. and social workers gave evidence that the marks on her face and discolouration and bruising lasted eight weeks or more and she experienced pins and needles of the hands. At the time of the Tribunal hearing she was continuing to suffer from headaches and disturbances of her sleep with nightmares of the experience a couple of times a month. The Tribunal observed marks on her arms and legs, where she was bound with the laces and cords as shown by the photographs. The birth of her child was normal.

The Tribunal acknowledged the severity of the assault but claimed there was no evidence of permanent physical injury apart from the possibility of scarring. Because there was no expert evidence, the Tribunal said there could be no finding of psychological injury. It was further said that K.R. had directly contributed to her injuries by returning to her flat, taking amphetamines, and continuing a relationship with the offender.

Again the message seems to be that women who come into a particular classification have even less credibility than those who do not. Yet on this sort of analysis, any woman can be 'classified in' to the relevant category. If a woman returns to her own home, following a criminal assault upon her by a person with whom she lives, she is in the class. Equally capable of argument under this application of principle is that the woman who walks down the street late at night and is raped ought not to qualify for compensation, or ought to have the compensation cut down, because she put herself in a situation where rape occurred. Indeed, in the current world the woman who walks out on the street in daylight runs the risk not only of being attacked, but also under this analysis having victim compensation reduced on the basis that she was there—right there where she was raped.

As the 'trigger' for crimes against women is the very fact of being a woman; under this analysis a woman cannot escape her responsibility, so long as she remains female—and thus falls inevitably into the category of the incredible woman.

Woman as Criminal Accused

Women are placed in a special category in the criminal law, particularly where they are accused of crimes relating to violence at home. Women are not credible in terms of provocation law and self-defence laws: these laws, although ostensibly 'sex neutral' are biased in favour of male action and male characteristics. Thus a woman is more likely to be prosecuted for murder, and where an argument as to provocation is made the experience in Australian courts is that such an argument is not well considered. Self-defence is not only not considered—it is rarely if ever even put forward! In a small number of cases, where women are not put on trial for murder they are given an opportunity to 'plea bargain', so that they plead guilty to manslaughter rather than murder. But in these cases, the more appropriate outcome would be a full acquittal on the basis of self-defence.

Examples which can be selected at random are numerous. They include the Beryl Birch case in Queensland (Rathus 1985); the case of Georgia Hill in New South Wales (Court of Criminal Appeal, New South Wales, 18 June 1981); that of *R v. R* in South Australia (1981, p. 321); that of 'Sylvia' in Western Australia. The latter two cases involved women who had been victims of long periods of violence at home, inflicted by the husband. In each case shortly prior to the killing, the woman had revealed to her by her daughters, with final admissions by the husband, that he had been sexually abusing the children. In one case the woman killed the husband and father with an axe. In the other the weapon was a gun. In each case the woman was prosecuted for murder and provocation was not allowed to be put to the jury. This is ironic in the light of the traditional provocation base being the case of the man who comes home to find his wife in bed with another man, then kills one or the other, or both. Provocation is the standard argument. Yet for each of these women, where the abuse and violence was against their *daughters*—and with the added horror and violence that that involves—the system was unable to give credence to the act within the bounds of provocation.

The 'sick' incredible defendant

Women are also rendered 'incredible' through a definition of an accused woman as 'ill' —the raging hormones theory. Thus infanticide laws, instead of having regard to the real economic, political and social position of woman-as-mother, provide for women to be classed as guilty of a crime equivalent to manslaughter on the basis that the killing of her child was carried out whilst she was lactating, or her body had not recovered, hormonally, from giving birth. Every aspect of the menstrual cycle has at one time or another been called upon to define women out from being competent participators in the world, to being 'ill', 'mentally 'off'' or their biological or hormonal equivalents. The argument generally runs that women are suffering from 'diminished responsibility' during these times, and thus have no or little or lesser control over their actions.

To recognise and deplore this defining of women into the category of 'sick' is not to refuse to acknowledge that some women suffer real pre-menstrual and menstrual pain. But it is important to ensure that 'research' which purports to attribute every antisocial or criminal act of women as arising out of our hormonal 'nature' or 'character' is recognised for what it is—unwise; or not to be recognised at all.

A Credible Future?

The criminal law shows some little evidence of a move toward a more credible future for women as participants in the justice system. On 30 September 1988 in the Brisbane Magistrate's Court two police constables were committed for trial on charges of failing to perform their duty over the alleged rape of a woman by a police officer. Anthony Mason Rawnsley and Ian Harry Friend were charged with between 11 February 1988 and 22 February 1988 failing to investigate the complaint (*Courier Mail,* 1 October 1988).

In Melbourne on 17 July 1990 the Victorian County Court was the forum wherein a man was found, by a jury, guilty of rape when he refused, despite her request, to wear a condom and went ahead to force unprotected sexual intercourse upon her. The 21-year-old woman was concerned about the AIDS virus. Garry John Norwood was found guilty of one count each of rape, attempted aggravated rape, detention for the purposes of sexual penetration, having caused injury intentionally, and theft. He was sentenced to five years and nine months gaol. The jury's decision and the judge's sentence illustrate what is hopefully a shift in the way women are regarded. Hopefully it shows the beginning of what might turn out to be a trend in granting credibility to women in criminal law.

As for victim compensation, the decision of the Victim Compensation Tribunal in Victoria, relating to K.R. (referred to earlier) did not remain as law. On 30 July 1990 the Administrative Appeals Tribunal upheld an appeal against the determination. Those aspects of the Tribunal decision which held that K.R. was in somewise responsible for her own injuries, or the level of them—such as taking amphetamines, returning to the flat after discharging herself from hospital and 'persisting with her association with the offender' were discounted. The Administrative Appeals Tribunal said that if the K.R.'s action in returning to the flat was to have any relevance to a 'contribution' it could only be if her return was unusual and unnecessary 'in the sense of there being a real alternative which should have occurred to K.R. at the time'.

As for women as accused persons, in Australia moves have generally been forced into the system, where women and women's groups have undertaken political action when a woman has been prosecuted for and convicted of murder in circumstances of self-defence or provocation. The legal system is being pushed into a position where it will have to begin to accommodate women as credible figures in criminal law, when in the position of accused persons. In the United States, in particular, women are beginning to move toward a position of credibility as accused persons, where charged with retaliatory offences resulting in death for a violence spouse or attacking rapist (Tong 1984). Self-defence is more often being used as a legitimate defence to crimes of violence committed against women who fight back. Yvonne Wanrow fought back against a prison guard who determined to rape her. Self-defence was eventually accepted on the basis that her resort to a weapon to defend herself was appropriate in a circumstance where the strength, size, weight and power differentials were pronounced: she was a woman, her attacker a man. Francine Hughes, who killed her husband by burning, after years of his torture, abuse and attack violently meted out against her—because she was his wife—is an example of the Women's Movement working assiduously to have women reinstated (or more accurately instated) as credible characters in the criminal justice system. The case illustrates that, for the woman who is under constant abuse and attack by her husband, too often the only

credible way to escape is by killing her gaoler and torturer—her husband (Jones 1981).

Women in other areas of the law—family law, paternity law, contract law, consumer law—have suffered from the failure of the legal system to take women seriously, to grant to women the same allowance that is extended to men: that of characters with full mental powers, with full human status, with the right to be regarded as credible as human beings operating in this world. At the same time, there are apparent moves toward extending credible status to women here, in ways that may in turn feed back into the criminal justice system, so that the incredible woman becomes a creature of a misogynist past. Sadly, in the interim, whilst we fight to advance the new millennium, too many women are being disregarded or distorted by a justice system which should take women, like men, seriously.

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INVISIBLE LIVES: WOMEN, DEPENDENCE AND THE LAW

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THIS PAPER WILL EXPLORE THE CONCEPT OF DEPENDENCE AS IT IS DEFINED and articulated within the law, and in crimes committed against women and by women. In examining the concept of dependence, legal categorisation of women's experiences, the policing of male violence, and women's involvement in drug-related crime will be discussed.

Law and the Gender Contract

Anne Worrall (1990, p. 33) points out that women's lives are organised around the 'socially ambiguous status of dependence'. On the one hand, women are expected to nurture, support, and care for others, particularly if they are family members. On the other hand, society defines ideal womanhood in terms of emotional fragility, intellectual bankruptcy, and moral strength. All of this means that women require 'protection', from themselves as much as from others. As MacKinnon (1987, p. 56) notes: 'There is nothing like femininity to dignify one's indignity as one's identity'.

Normalised womanhood consists of demonstrated competence in the domestic sphere, including adherence to the tenets regarding maternal behaviour. Within the family, women are expected to be financially and emotionally dependent on the male partner, who provides leadership, guidance and protection. The state may intervene in families if there is evidence of deviance from this normalised pattern; the woman, as mother, is often the site of intervention (Hatty 1991a). The discourse of domesticity legitimises the intrusion of various state authorities, and professional groups, in the family. These authorities and groups are empowered by the law to intervene. Hence, the law, as institution, is a significant determinant of women's experience of the gender contract: the deal whereby women relinquish certain forms of power (and risk) in exchange for protection (and safety).

Law may be described as a set of knowledges, principles and practices which give the impression of unity, of being a singular and coherent entity (Smart 1989). Weedon (1987) has argued that law constitutes a discursive field, generating meaning in relation to social processes and organisations. Discourses of femininity are antithetical to the very idea of law, which is structured around discourses of masculinity. The latter, like law, constitute men as rational beings capable of independent and decisive

action. Men, within the discourses of masculinity, and of law, are constituted as intellectual and creative agents possessed of subjectivity.

Law, according to Carol Smart (1989), exercises a claim to truth. This is the ideal of law. The status of law—as truth—privileges legal discourse over other forms of knowledge in society. In doing so, law 'sets itself outside the social order' (Smart 1989, p. 11), as though it can make sense of the world through the process of refraction. Further, through its power to disqualify other forms of knowledge, law retains the authority to pronounce 'truth'. Yet, the 'mantle of legal power' (Smart 1989, p. 13) extends to issues beyond the traditional legal domain. Determinations regarding many areas of social life may be made within the hallowed precincts of the court of law. As legal discourse is built upon the foundation of 'truth', other competing discourses are rendered inferior and irrelevant.

Legal rules, like legal method, are assumed to be 'homogeneous, unproblematic, external, inevitable, essential and eternal' (Worrall 1990, p. 16). Legal method, like other techniques of enquiry, is gendered (Mossman 1986). The rules governing the administration of justice confer authority and credibility upon certain legal actors, and define others as illegitimate or incredible participants. Legal representation is 'a strategy whereby the non-legitimated account of the defendant is confronted, controlled and rendered "normal" ' (Worrall 1990, p. 20).

Legal discourse encapsulates the illusion of power shared between legal representatives and their clients. Solicitors, for example, refer to 'taking instructions'. The suggestion is that solicitors listen carefully to the experiences of the client and convey the wishes of the client to the court. The reality is that solicitors, as members of a privileged group, re-order and re-construct the client's experiences and desires into discourses that will be acceptable to the court. This involves removing inconsistencies, contradictions and irrelevancies; in short, 'tidying up' the account so that the client is presented to the court as a coherent subject located within legal discourses about crime or social disorder. Hence, Worrall (1990, p. 29) alleges that:

> Magistrates, solicitors, psychiatrists, and probation officers together constitute a 'chain of signification' in the court-room, authorised to define and give meaning to the fragmented and contradictory reality which brings defendants into their purview.

For women, the consequences of exclusion from this 'chain of signification' are very serious. Carol Smart (1989) shows how women's experience of male sexuality, violence, and harm, are disqualified in the rape trial. Discourses about women's capricious sexual nature, about men's insatiable sexual appetite and the meaning of consent, inform the trial process. Yet, these discourses do not reflect women's experiences of their bodies, of pleasure, or of harm. Law's 'claim to truth' negates the authenticity of women's understanding of these issues.

Worrall (1990) remarks that women are 'out of place' in the courtroom, and generally remain 'unseen'. Female defendants, who are accused of non-stereotypical offences, are identified as existing outside the discourses of femininity, that is, are viewed as 'unfeminine'. Indeed, female defendants are socially constructed within the discourses of domesticity, sexuality and pathology. However, it is possible to argue that these discourses are also applied to the woman complaining of rape or other forms of assault.

Women, as victims and defendants, are subordinated and silenced within the court process. The definition of the courtroom as public space, with its adversarial

ethos and vocabulary of battle, may intimidate women. The apparently gender-neutral rules of legal method, and the power vested in particular legal actors to articulate 'truth', marginalises women and renders them mute. Women's accounts of victimisation or criminal offences are dismantled and repackaged in a form that normalises the woman's experiences. Further, these accounts are translated into a socially acceptable version of reality for the court. 'Incredible' women are thereby transformed into 'understandable' witnesses or defendants. To paraphrase Worrall (1990, p. 95): the 'reasonable man' may recognise the 'normal woman'.

Female victims and law-breakers, whilst rendered passive and silent within the legal process, may resist the dominant discourses of women and crime in various ways. As minimal as some of these gestures may seem, they may nevertheless represent an attempt at autonomy and a refusal to abide by the terms of the gender contract.

Male Violence and the Guarantee of Protection

The law is based on the doctrine of rights. The concept of formal equality—or equal treatment—is enshrined in the doctrine of rights which lies at the heart of the Western liberal legal tradition. The ideology of liberal legalism is fundamental to the notion of the rule of law in society. Margaret Thornton (1990, p. 14) refers to the 'paradox of liberalism' wherein both individualism and social equality are simultaneously promoted. As she correctly points out, the celebration of individualism involves the perpetuation of social inequality. By assuming equality before the law, the legal order reproduces hierarchical social relations and obscures the reality of the inequality of these relations. Hence, it is formal equality (equality of treatment) and not substantive equality (equality of result) which is at the core of liberal legalism.

Contemporary feminists, and their fore-sisters, appealed to the doctrine of rights in the quest to improve the social position of women. This challenged the law in the areas of matrimony, child custody, and, of course, male violence in the home. 'Domestic violence' re-emerged as an issue of public concern about twenty years ago. Feminist groups lobbied for state recognition of 'domestic violence' as a social problem requiring the allocation of financial and social resources. In line with the prominence of the doctrine of rights, feminist groups also campaigned vigorously for law reform and policy review. Integral to this recourse to law was the redefinition of 'domestic violence' as a crime which should be prosecuted in the same manner as other crimes against the person. Legislative change was deemed essential; however, enforcement of the law was also placed high on the agenda. This focused a great deal of attention on the police as the gatekeeping agency for the criminal justice system.

There is no doubt that police in many modern Western countries traditionally disregarded, and trivialised, male violence in the home. Research conducted in several locations indicated that the police utilised their discretion to avoid arresting violent husbands or partners, and relied on a number of extra-legal factors to justify this decision. In addition, discourses of femininity, sexuality and pathology underscored decision-making by police officers (Black 1980; Berk & Loseke 1981; Smith & Klein 1984; Bell 1985; Waaland & Keeley 1985; Hatty & Sutton 1986; Hatty 1989a; 1990). In some jurisdictions, women responded by mounting class action suits against police departments for failing to provide equal protection to victimised women (*see Thurman v. City of Torrington*, S9S F. Supp. 1521; *Thurman v. City of Torrington*, USDC No.

J-84-120, 25 June 1985; *see also* Graycar & Morgan 1990, for a useful discussion of these class action suits). Research on the processing of 'domestic violence' cases through the criminal justice system indicates that this category of case is often treated differently during every stage of the prosecution process (Albonetti 1987; Miethe 1987; Gottfredson & Gottfredson 1988).

However, many feminists have criticised this recourse to law, that is, the promotion of law reform as the principal solution to the problem of male violence. There is scepticism about the success of strategies which appeal to the doctrine of equality in the search for legal protection of women's rights (for example, Brophy & Smart 1985; Kingdom 1985; Smart 1986; 1989). These appeals fail to challenge the hegemony of liberal legalism (Hatty 1988).

Whilst it is recognised that the state provides its female citizens with an apparent guarantee to protect their physical safety (Hanmer & Stanko 1985), there is an awareness of the limitations placed on this guarantee. First, as Carole Pateman (1988) has demonstrated, women are not accorded the status of persons in civil society; indeed, to do so would undermine the validity of the sexual contract in which men are guaranteed access to women's bodies in society. Second, the doctrine of rights applies generally to the public domain and has little or no relevance to the private domain. Further, as society is organised around the construct of gender, which privileges the masculine over the feminine, it is arguably impossible for the state to recognise the extent of male violence against female partners. Prosecuting men for engaging in normative male behaviour would seriously challenge the male prerogative of dominion over women in the private sphere. It would also conflict with the concept of the 'chivalrous male' as constructed within discourses of masculinity.

Nevertheless, the state, in many instances, has responded to feminist calls for law reform. In Australia, government inquiries have resulted in legislative change throughout the country. In the United States, six states passed laws by 1986 requiring arrest of domestic violence offenders in cases of probable cause. By the same year, forty-seven large city police departments had adopted policies of mandatory or presumptive arrest (Ferraro 1989a). By 1988, legislation specifying mandatory arrest for 'domestic violence' had been enacted in more than twelve state legislatures (Victim Services Agency 1988). By the same year, over 80 per cent of state legislatures had amended police powers of arrest or set down other police responsibilities in responding to domestic violence cases (Buzawa & Buzawa 1990). This legislative activity was prompted by feminist demands for accountability by the criminal justice system, by law suits alleging municipal liability on the part of police departments, and by the results of the Minneapolis domestic violence experiment (Sherman & Berk 1984).

Research on the effects of mandatory—or presumptive—arrest law and policy has yielded equivocal support for this strategy. Ferraro's (1989a; 1989b) investigation of the presumptive arrest (or pro-arrest) policy adopted by the Police Department in Phoenix, Arizona, found that police failed to implement the policy. Of the sixty-nine family fight calls that Ferraro observed, the police made no arrests in 82 per cent of these cases. In 51 per cent of the cases, the police resorted to conciliation to resolve the situation. Ferraro (1989b) cited an incident in which a husband and wife were arrested when neither had inflicted injury, and another incident in which a woman was arrested for tearing her own dress. This occurred because 'officers had been instructed that destruction of community property was an offence [which] should result in arrest' (Ferraro 1989b, p. 169). Police officers' decisions regarding arrest were determined by

rationales relating to police role, social class, tolerance of violence, and the demeanour of the individual participants. This is consistent with police decision-making concerning 'domestic violence' in other jurisdictions (Hatty 1989a).

Irrespective of the serious methodological flaws in the Minneapolis domestic violence experiment (Lempert 1989), it influenced police policy in Britain, Canada, the United States and Australia (Hatty 1991b). Yet, the results of subsequent replications, funded by the National Institute of Justice, and undertaken in several large US cities, do not support the original research findings. One study found that deterrent effects for arrest were apparent only when an arrest warrant was obtained in the offender's absence (Dunford, Huizinga & Elliott 1990). Another study found that, in general, arrest failed to deter domestic violence offenders. In fact, amongst the unemployed, arrest had a criminogenic effect, substantially increasing the likelihood of subsequent violence (Sherman et al. 1990). Indeed, Ferraro (1989b) notes that the deterrence literature does not support the proposition that arresting violent men will decrease recidivism. However, the appeal of the Minneapolis domestic violence experiment lay in the meshing of its results with the ideological approach underlying the feminist campaign for criminal justice intervention. The fact that this approach can no longer be sustained by research may lead to a legitimation crisis for the feminist movement regarding the appropriate responses to male violence.

The promotion of the criminal justice system as the primary solution to male violence against known women has the potential to increase state control over families, particularly female members of those families. We have already seen how women can inadvertently be caught in the escalating process of criminalising male violence. A recent study of the processing of domestic violence offenders within the criminal courts of Connecticut found that a quarter of the defendants who came before the courts were women (Martin 1990). Approximately one-third of the arrests in domestic violence matters were dual arrests of heterosexual couples in which the woman was arrested as well as the man. This is consistent with the discourse of masculinity which suggests that men are entitled to exercise power over women in the public and private domain; in other words, it was impossible for these men to be arrested and held solely accountable for their actions. Ironically, it would seem that the doctrine of equal rights (that is equal treatment) can jeopardise women's access to justice; simply being at the scene of an alleged crime at the time of police intervention may result in induction into the criminal justice system.

Clearly, the apparent guarantee of protection extended by the state does not necessarily result in the delivery of this protection. Despite the enactment of legislation and policy dictating or promoting arrest, police officers will not always enforce or abide by these directions. Women, often dependent on violent men in a number of sex-appropriate ways, are also dependent on the agencies of the state for protection from various types of harm. The criminal justice system may fail to provide protection and justice to victimised women. For example, the Connecticut research revealed that there was no significant relationship between the severity of injury sustained by female victims and the decision to prosecute the offenders (Martin 1990). Confirming previous findings (Rauma 1984), the study found that severe injury was positively associated with dismissal of the case. Whilst the goals of mandatory arrest policies remain confused, it is obvious that the recourse to law will not necessarily promote women's interests but may, instead, extend the reach of social control mechanisms of the state, and further entrench women's dependence upon the state and its agencies.

Women, Drugs, and Defiance

Most research on illegal drug-use focuses on the socially powerful, and most visible participants, in the drug-using subcultures. Research on heroin or cocaine-use in urban locations in the United States, Britain and Australia tends to investigate men's experience within the drug distribution and consumption networks. The study of women, drugs and crime is relegated to the periphery. The voice of the male researcher and the male subject reverberate throughout the research; women are often confined to an inchoate silence. When research does centre upon women's drug-use, women are often viewed as 'out of control in need of control or both' (Ettore 1989, p. 595). Hence, women's drug-use is often interpreted within the discourses of domesticity, sexuality and pathology (Worrall 1990).

Consideration of women's involvement in drug-related violence has often occurred within the context of models applied to male behaviour. Goldstein (1989), for example, has developed a theoretical framework to account for the relationship between drugs and violence in society. This framework suggests that drugs and violence are inter-related in three ways: in terms of psychoparmacology; in terms of economically compulsive activity; and in terms of the intrinsic role of violence within an illicit economy. The psychopharmacological model presumes that individual drug-users may engage in violence as a result of ingesting particular substances. Stimulants, rather then opiates, are considered the most likely to induce violence. However, withdrawal from opiates has been identified as a possible contributor to violence. Earlier research by Goldstein (1979) linked assault and robbery to the withdrawal experience. Goldstein alleged that female prostitutes were more likely to attack their clients and steal their money when withdrawing from heroin than at other times. He noted that (1989 p. 25): 'In a more relaxed physical and mental state these women claimed they could behave like prostitutes rather than robbers.' This gender-laden description, which juxtaposes prostitution against property crime, implies that prostitution is essentially a passive, acquiescent activity. This negates women's interpretation of the prostitution experience. One woman told the researcher (Goldstein 1990, p. 329): 'Without the drugs, I didn't even want these men to touch me . . . If I hadn't been sick, I'd have gotten more. But I had to be in a hurry. I couldn't wait to con him.' Further, to account for women's behaviour in terms of psychopharmacology denies the legitimacy of the structural accounts of prostitution which refer, for example, to the amount of violence or abuse directed at prostitute women in the course of their work (Hatty 1989b; 1992).

The economically compulsive model of the relationship between drugs and violence presumes that a proportion of drug-users engage in violent crime for financial gain. The primary motivation for this crime is apparently to obtain money to purchase illegal, and, hence, expensive, drugs. Most studies of opiate or cocaine-users, and their recourse to crime, have examined the male subculture (Chaiken & Chaiken 1982; Johnson et al. 1985). Whilst several methodological deficiencies have been identified within the drugs/crime research (Nurco, Kinlock & Hanlon 1990), the failure to consider women's experiences and interpretations of drug-use is not amongst them.

Recent research indicates that illicit drug-use (particularly cocaine) features strongly in the backgrounds of female arrestees in the United States. The National Institute of Justice Drug-Use Forecasting Program has shown that a higher percentage of female than male arrestees tested positive for illegal drugs in thirteen out of the twenty cities surveyed in 1990 (National Institute of Justice 1991). Sometimes these

differences were highly significant; for example, in Detroit, 69 per cent of female arrestees tested positive for illegal drugs compared with 46 per cent of their male counterparts. In addition, it was found that women were much more likely to call for treatment programs to address illegal drug-use, particularly women who were identified as using opiates, cocaine or multiple drugs.

Studies of imprisoned female drug-users have produced findings which overturn the notion that women routinely participate in the illegal drug subculture in a sex-stereotyped manner. One study in New York found that amongst the 94 per cent of female prisoners who were drug-users, property crimes and drug sales were the most frequently reported offences, accounting for 75 per cent of the women's criminal activity. Prostitution accounted for less than a quarter of the illegal activity. Further, in contrast to the prediction of the economically compulsive model (Goldstein 1989), there was no linear relationship between heroin or cocaine-use and crime rates. Instead, the relationship between heroin or cocaine-use and criminal offending appeared to be curvilinear. The once-daily users of these drugs were more likely to engage in property crime, drug sales, fraud and prostitution than those who used the drugs two, three or four times daily (Sanchez & Johnson 1987).

The third model of the link between drugs and violence is the systemic violence model (Goldstein 1989). This model implies that violence is integral to the illegal drug subculture. Included in this violence might be assault or homicide committed within drug distribution networks, robbery of dealers and the ensuing retaliation, punishment for failure to pay drug debts, and so on. Whilst it is assumed that women will not engage in such violence, research has shown that women do enforce normative compliance, particularly in connection with outstanding drug debts (Goldstein 1989). However, recent research has uncovered significant amounts of violence perpetrated against female drug users within the illegal drug subcultures. Often this involves assault of a woman by her male partner. These assaults occur independent of the woman's involvement in the drug-use subculture (Goldstein et al. 1991). Women have sometimes attempted to exact revenge upon violent male partners. Goldstein (1986, p. 512), for example, reports an incident in which a female opiate-user decided to inflict serious harm upon her abusive boyfriend:

> She served him a tuna fish sandwich and a cup of coffee for lunch one day. She had sprayed the tuna fish sandwich with half a can of Raid. Then she had crushed 400 mg of Elavil and mixed it into the coffee. She stated that her boyfriend slept for two days, and then woke up hungry as a bear. She lamented 'the bastard just won't die'.

Clearly, much of the current research and theorising on women's drug-use and involvement with crime is inadequate. Women are often incorporated into existing male-biased models. This serves to confine knowledge about women's drug-use within the dominant discourses of gender and power in society, and fails to consider the broader questions about the concept of dependence and women's relationship to it.

It has been pointed out that 'dependence' connotes several meanings: amongst them 'addiction' and 'subordination' (Ettore 1989). The former is the socially unacceptable manifestation of dependency. 'Addiction' implies that women have lost control over their drug-use, their morality, their health and many other aspects of their lives. Ettore (1989, p. 599) alludes to the 'stereotypical images which characterise [female drug users] as diseased, neurotic, pathological, decadent or polluted.' 'Subordination', on the other hand, is the socially acceptable manifestation of

dependency. Lack of social power, and reliance on male authority, wisdom, and protection, is the traditional bedrock of the female experience. This is reflected in the predominance of the public sphere—with all its connotations of masculine pre-eminence in economics, politics and law (Pateman 1988)—over the private sphere. However, as Ettore suggests (1989, p. 598), we need to look closely at the meaning and significance of women's drug-use, acknowledging the gender-based power disparities in society. She suggests that we begin by asking 'what pleases women?' The answer to this question may hinge on the significance of empowerment. Hence, drug-use, for women, may instigate feelings of autonomy and independence. Goldstein (1990, p. 325) reports, for example, that both male and female drug-users describe the sensation elicited by some drugs as 'a tremendous feeling of omnipotence.' This feeling may be congruent with men's social position, and men's greater access to social power (although it is easy to see the allure of drugs for Black or Hispanic Americans). However, this feeling would certainly be discontinuous with the experience of most women in society.

Consequently, pleasure for most women may be a 'subverted or hidden reality' (Ettore 1989, p. 559), with the search for independence (constructed as a form of pleasure) assuming a non-conformist, or even illegal, expression. Thus, Ettore recommends that we redefine the 'alcohol [or other drug] dependence syndrome' as the 'patriarchal defiance syndrome'.

Conclusion

Women's dependence on men, the law and the state, is socially constructed in opposition to the 'natural proclivities' of women. Discourses about the female body portray women's reproductive capacities in terms of biological 'otherness'. This, in turn, overdetermines women's psychology and behaviour. Women's reproductive functions are viewed as inherently pathological: menstruation, pregnancy, childbirth and menopause render women irrational, irrepressible and irredeemable (Martin 1989). Women, in the grip of these hormonal surges, are seen as 'out of control'. Women's bodily functions transform the female body into an 'abnormal' entity; femaleness, as disease, is contrasted with maleness, as healthy norm. Further, women's reproductive cycle is thought to influence and shape women's psychological functioning and behaviour in a profound way. Women are trapped within the body; men are alienated from their physicality. This 'difference as pathology' perspective permeates public discourse in many areas, including welfare, law and medicine.

The biological imperative, in which femaleness is constructed as disease, and its social corollary, in which female psychology and behaviour are constructed as abnormality, underscore the drive to control women. The ideology of female biology as disease, and female psychology as abnormality, provides the rationale for the social structures or process which impose control. It is not surprising, then, to discover a consistency between the institution of law and theory or research about women's deviance from the established masculine norms. The reliance of the law on discourses of masculinity is matched by the reliance of much theory and research on women's law-breaking or victimisation on discourses of femininity. Hence, the latter reproduces the dominant ideas about women's unbridled sexuality (and corresponding recourse to prostitution) and irrationality (and corresponding inability to engage in predictable

behaviour). The former incorporates the discourse of male subjectivity, with its connotations of personhood, transcending the constraints of corporeality.

The law cannot encounter women outside the framework of these discourses; there is no space in which women can occupy the position of rational, credible subject. Women cannot act or respond (as offender or victim) on equivalent terms to men in the discourses of masculinity which construct the law. Women, confined within the diseased body and the abnormal mind, are excluded from the theorising or legal remedies applied to men's deviance. Men who commit crimes of various kinds, including acts of violence, are seen to possess the same attributes as the law itself. However, in the case of violence against women, discourses of pathology may be applied to some men. For example, wife-killers may be deemed 'mentally ill' (that is feminised) for the purposes of the court. This assists with the perpetuation of the discourses of masculinity which suggest that men are always 'in control' and that women are generally 'out of control' (provocative, irrational, or, perhaps, menstruating).

Men, on the other hand, are imbued with qualities which are antithetical to femininity or women's 'natural proclivities'. As Pateman (1989) points out, men are seen as possessing the capacities necessary for acceptance as 'workers' or 'citizens'. Interestingly, the major criteria for citizenship is 'independence'. However, according to Pateman (1989, p. 185):

> the meaning of 'dependence' is associated with all that is womanly—and women's citizenship in the welfare state is full of paradoxes and contradictions. To use Marshall's metaphor, women are identified as trespassers into the public edifice of civil society and the state.

There are three elements integral to the 'independence' accorded to men as citizens which bear directly upon the relationship between gender and crime. The first element is the capacity of men to bear arms. Women are denied this possibility in society; instead, men are charged with the responsibility of protecting women (Pateman 1989). We have already seen how this form of female dependence upon male protection disadvantages individual women who are victims of violence, and largely negates the promise of legal protection or justice.

The second element of 'independence' central to the citizenship extended to men is the capacity to own property. Men not only own material property, but 'property in the person'. Clearly, with regard to consent to sexual relations and industrial rights as 'workers', women's entitlement to citizenship is eroded. As women do not 'own' their person (and their bodies), women cannot negotiate the deployment of sexuality, pleasure, productivity or reproductivity in the manner that is available to men. Women may struggle to negotiate access to these sources of power in a range of alternative ways. This may include resisting the dominant discourses of women and crime.

The third element of 'independence' is self-government. Pateman (1989, p. 186) states:

> Men have been constituted as the beings who can govern (or protect) themselves, and if a man can govern himself, then he also has the requisite capacity to govern others. Only a few men govern others in public life—but all men govern in private as husbands and heads of households. As the governor of a family, a man is also a 'breadwinner'. He has the capacity to sell his labour-power as a worker, or to buy labour-power with his capital, and provide for his wife and family. His wife is thus 'protected'.

The concept of protection is premised on the practices of domination and subordination, of subjectivity and objectivity, of power and powerlessness. Men, as 'independent' citizens, govern and control women. Men, as citizens, are visible in the public sphere. Women, as sexualised, irrational and dangerous non-citizens, largely occupy the private sphere. Incursions into the public sphere (as professed victims of crime or alleged law-breakers) render women visible through the lens of masculine discourses. Hence, Allen (1987, p. 82) demonstrates how women accused of violent crimes are often portrayed as 'helpless and pitiful' within the trial process. Allen reports that 'meanings attributed to both offenders and offences are typically manipulated, modified and reconstructed' to dilute the danger associated with crimes committed by women. Visible women may thus be reframed as passive, dependent (and feminine) women.

However, this may not always be the case. The recent portrayal of Roseanne Catt, convicted in New South Wales of eight counts of attempting to kill her husband and have him committed to psychiatric institutions (amongst other charges), diverges radically from attempts to feminise female defendants. Catt, who alleged that her husband had sexually assaulted his children and had assaulted her, was described within the trial as 'the most manipulative and domineering woman in Australia'. Catt was convicted of administering noxious quantities of Lithium to her husband. This conjured images of Pollak's (1950) 'hidden' female criminal who uses poison to kill and who indulges in false accusations of rape. Referring to the Malleus Maleficarum (*The Hammer of Witches*; a theological guide to detecting and prosecuting witches published in the fifteenth century), Pollak (1950, p. 8) maintained that 'man's complaint about women's deceitfulness is old'. Indeed, Pollak observed that 'women offenders are more deceitful than men'. Consistent with these discourses of women and crime, the defence counsel for Roseanne Catt posed the question: 'Is she some sort of witch, the Witch of Taree?' This male lawyer went on to speculate: 'she could be a saint'. Hence, the image of the evil and dangerous (read: sexually active) woman was displaced by the image of the ascetic and asexual heroine. In fact, the lawyer continued to reconstruct the image of Roseanne Catt. He remarked: 'In fact, in some ways, Roseanne Catt reminds me of Joan of Arc. She was a saint and what did they do to her? They burnt her at the stake as a witch'. Hence, the lawyer, through the process of inversion, avoided confronting Catt 'the witch'. Instead, he could console himself with the idea that Catt was a sacrificial victim. The spectre of the dangerous woman was thus denied, and the lawyer could maintain a defence of his 'reconstructed' client.

When women, as defendants, are subject to the public gaze, their visibility may be conditional. Men's visibility in the public sphere is unconditional. Here, however, visibility should be interpreted as prominence, not exposure. Men, as citizens, retain the right to govern, control (and see) women. Women, as repositories of danger, must be confined to private (masculine) space, that is, rendered invisible, and kept under surveillance. This paradox of gazing upon the 'unseen' is reflected in the dichotomous images of women produced in society. Thus, women are dismembered for public

consumption: women are 'exposed' as a collection of physical or psychological attributes. However, in private, women are 'eclipsed'. Dismantled and reassembled like a Picasso painting, women struggle to recognise these public images. Through engagement with the law, women have attempted to make the reality of women's lives visible and to undermine the masculine prerogative of control through violence. Through engagement with crime, some women have attempted to disentangle themselves from the discourses of femininity, with their icons of dependence and invisibility. For some of these women, this has entailed finding new routes to sexual autonomy or the varieties of pleasure. The body is, after all, at the core of the discourses of femininity which entrap women. As one author commented in 1852, puberty 'gives man the knowledge of greater power' whilst it 'gives to woman the knowledge of her dependence' (cited in Ussher, 1989, p. 18).

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BATTERED WOMEN WHO KILL: A PLEA OF SELF-DEFENCE

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WHAT EXACTLY IS BATTERED WOMAN SYNDROME (BWS) AND HOW CAN IT be used as a plea of self-defence? This paper will answer those questions and raise what is, to the author, a more important question: why hasn't woman battering syndrome achieved a similar degree of legitimacy and acceptance in the Australian courts as we find exists in the United States?

The material presented in response to these queries was gleaned from an extensive review of the overseas and Australian literature. It must be noted that there is a vast amount of American research with a multitude of books and articles appearing during the 1980s. The lack of a commensurate amount of research in this country is itself perhaps reflective of the lack of apparent interest or effort that has been taken to ensure that women receive similar fair treatment in our courts. Reading page after page of what can only be described as horrific tales of cruelty and nightmarish existences that so often precede the final act of homicide in America, the reader may have some difficulty in maintaining a scholarly dispassionate perspective. Then when one turns to the Australian literature and finds so little either written or implemented, the horror can turn to something deeper and at the least provides the incentive to share some of the observations and concerns in the perpetual hope that bringing 'things out of the closet' can indeed initiate a process of change.

BWS as Self-defence in the United States

Since 1979, BWS has been raised in hundreds of cases in America. Self-defence, for so long narrowly defined in a male perspective suitable to describing violent interactions between two males, began to be interpreted in a broader framework. It acknowledged that in many cases, both due to physiological and socialisation differences, a female simply cannot defend herself in the same manner as a male and even more specifically, that living in a battering situation for an extended period of time impacts on the individual's ability to act according to the way that 'a reasonable man' would behave. Let us therefore first examine how lawyers in the US have broadened the interpretation without actually changing the wording of self-defence.

However, one qualifier must be stressed. Although some women in America are being acquitted, many in fact continue to be convicted of murder or manslaughter. For example, in Ewing's (1987, pp. 42-3) sample of 100 cases of this type which occurred between 1978-1986, nine pleaded guilty, three were acquitted on grounds of insanity, and three had the charges dropped. Of the remaining 85 who went to trial claiming self-defence, 22 were acquitted whilst 63 were found guilty of some type of homicide; twelve of the latter received life imprisonment sentences. Fifty-five of the 63 appealed; 22 convictions were affirmed, 22 got new trials, and four had their cases dismissed. BWS has been used in sufficient numbers to merit a recent US Senate approval of an amendment which requires the Attorney-General and Secretary of Health and Human Services to review its use and assessment by legal practitioners ('Study of "Battered Women's Syndrome" ' 1991).

Battered woman syndrome

BWS refers both to a certain pattern of violence and to the psychological consequences upon the recipient of the violence. For example, experts in the field of domestic violence have ascertained that being subjected to repeated physical, sexual and or emotional violence may result in certain behaviours and thoughts which contribute to an increasing inability to leave the batterer (Thyfault 1984). This is of course a critical issue which the defence attorney needs to address: why didn't she just leave instead of killing him? BWS is considered to be a sub-type of post traumatic stress syndrome which has been identified as a consequence of enduring years as a hostage or other high stress scenario such as concentration camp internment.

The syndrome is the culmination of three stages which recur in the domestic violent situation (Thyfault 1984; Walker 1989). The first phase of tension building leads to the second stage of severe bashing which is followed by the third phase which is exemplified by the batterer's contrition, promises, and temporary cessation of violence. This latter period acts to keep the woman in the relationship believing that the nightmare is over when in fact, most often it has just begun. The cycle continues with the stage two violence increasing in type over time.

These stages of course have subtle and direct implications in assessing the lack of immediacy of defensive action by the battered woman. For example, she may kill the batterer in stage one when there has not YET been a severe bashing in the current cycle but where she is focussed from past experience upon what will happen next. Her defensive response may not occur until phase three; the actual stage of his most acute violence does not permit the expression or even feeling of anger. All energy is directed upon surviving the violence.

Over time, a psychological process may occur with the victim acquiring a learned helplessness response to the situation. She becomes convinced that her options are negligible, that the batterer is all powerful and her repertoire of responses becomes very limited. '. . .[l]earned helplessness explains how people lose the ability to predict whether their natural responses will protect them after they experience inescapable pain in what appears to be random and variable situations' (Walker 1989, p. 36). The woman is living with a Jekyll and Hyde person with the minute by minute uncertainty of which persona is there. Contributing to and resulting from the dynamics of the violent relationship are both the victim's increasing loss of self-esteem and her isolation from others (Douglas 1987). Shamefilled, her suffering is silent, a secret from friends, neighbours and the authorities.

Concurrently, another by-product of BWS is the development of self-destructive coping mechanisms. These may include alcohol or drug abuse, and minimisation of the violence and/or the anger it engenders. For example, one battered woman whose vagina was torn from repeated blows from her husband's fists, claimed in his defence that 'he didn't realise what he was doing; he was pleasing himself' (Douglas 1987, p. 43).

Lastly, fear becomes a constant companion. The battered woman lives in a state of terror, constantly vigilant against the ever present but erratic threat of violence.

Studies have shown that in situations where the victim ultimately kills her partner, there are factors that differentiate the situation from other batterings where homicide is not the result. First, the cases which end in death more often contain alcohol abuse, death threats, threats with weapons, more severe battering and sexual violence toward the woman and or others in the family (Browne 1987; Ewing 1987; Walker 1989). The actual killing is usually preceded by an unusual incident; something done by the male that was not in his usual repertoire of violence. This often concerns the children in the family; he either threatens their lives, begins to sexually assault one or more of the children, or the wife first learns of the latter. This has been referred to as 'the turning point': 'He never did that before'; something occurred that simply went beyond the range of what the woman had learned to live within (Blackman 1989; Browne 1987).

What self-defence means in the US

Gillespie (1989) points out that there are three components of the self-defence law that may be problematic for battered women who kill: a requirement that the threat was imminent or immediate; the need for the force to be commensurate with the attack; and the obligation to retreat or try to escape from an attack. The perception of imminence and severity of the assault plus the individual's perception of how much force is requisite to counter it must all be reasonable (Thyfault, Browne & Walker 1987). Psychologists and lawyers have worked hard to redefine the terms in this definition to fit the actions of a victim of BWS and place the defendant's actions against the norms of a reasonable battered woman not a reasonable man.

(Reasonable belief in) **The Immediacy Issue**: Traditionally, in the context of male vs male, this has been narrowly defined to mean that the attacker is in the process of attack; the defender is thus in immediate danger and strikes back in self-defence. After all, a real man does not sneak but calls his antagonist out for a fair fight. However, one must remember that the definition states 'reasonably believes that one is in immediate danger'. Two landmark cases did not involve battered women but are relevant to the issue of differing concepts of reasonable. In *State v. Wanrow*, the Washington Supreme Court ruled that the accused who had been on crutches had committed the killing in self-defence when the deceased, a known child molester with a history of violence, entered her home. The court stated 'It is clear that the jury is entitled to consider all of the circumstances surrounding the incident in determining whether the defendant had reasonable grounds to believe grievous bodily harm was about to be inflicted' (Eber 1981, p. 921). In *State v. Garcia* (1977) the defendant had been physically and sexually assaulted by two men who threatened to return. Garcia went home, got a gun, found them and killed. In her second trial she was acquitted on the grounds of self-defence (Thyfault, Browne & Walker 1987).

It has since been argued successfully in many US courts that the victim of BWS who kills during a lull in her partner's violence—even whilst he is asleep—may be seen to believe that she is in immediate danger, IF one defines the reasonable perception as based on the reasonable perception of a battered woman and NOT the reasonable perception of John White Male Smith. BWS theory suggests that the woman is living in a constant state of terror convinced that one day her partner will kill her. In this situation, the immediacy of danger is a constant (Eber 1981). Thus, in a 1985 New York Supreme Court decision (*People v. Torres*) the judge wrote:

> . . . It is the defendant's state of mind and sense of fear which is critical to a justification defense. In this regard, proof of violent acts previously committed by the victim against the defendant as well as any evidence that the defendant was aware of specific prior violent acts by the victim upon third parties is admissible as bearing upon the reasonableness of the defendant's apprehension of danger at the time of the encounter' (Blackman 1989, pp. 188-9).

Since in a battering situation, violence is always a strong possibility, the threat is always there, even during the ostensible lulls. It must be remembered that the women in these cases are not alleging that because they are battered that they have the right to kill, but that because of the 'history of violence in the relationship', they become 'sensitive to cues from the batterer' that generate a feeling or belief of imminent danger (Thyfault, Bennett & Hirschhorn 1987, p. 59).

Reasonable amount of force: *The State v. Wanrow*, the case above, also dealt with the issue of whether a woman can use a weapon to defend herself if the male is not armed. This particular court recognised that to fight equally with a man, a woman may need to use a weapon. The idea of equal force being defined the same for a woman/man conflict and a male/male conflict is quite ludicrous given not only the physical differences but also the gender differentiation in socialisation that is commonplace. When considering BWS victims, one must also remember that most of these women have endured long-term punching, throwing, choking and kicking. Their partners' hands, fists and feet have in fact been dangerous and potentially lethal weapons. Yet, until recently in America and in Australia case law has not been interpreted to include the danger of these body weapons as grievous enough or as a serious enough threat to permit self-defence with a non-body weapon (Gillespie 1989). Juries, without understanding BWS and the dynamics of battering, see a gun or a knife as excessive force in relation to the batterer's violence. Looking at proportionality of response in BWS killings involves a comprehension of the terror and the history involved.

Use of such force necessary: or 'Why didn't she just leave?': BWS evidence, if allowed in the court, helps to explain to the jury why a reasonable battered woman does not leave. Not that she was a masochist, but that as a victim of the syndrome, for a multiplicity of reasons, she had become incapable of such action. Aside from the psychological constraints, she may have practical problems, for example, where to go, and a fear of retaliation which is justifiable since such women are often threatened with death if they dare to go.

The use of expert witnesses

Expert witness testimony is presented to combat the existing myths about battered women, not to address the ultimate issue of guilt or innocence (Brodsky 1987). Without the expert witness, it would be virtually impossible for the jury to consider the battered women's actions as self-defence since the knowledge of what is reasonable for a BWS victim has been described as beyond the ken or the understanding of the average juror. *Ibn-Tamas v. United States* (DC Court of Appeals 1979) was the first court to hold that expert testimony about BWS was worthy of consideration in a case where a woman had killed her husband (Buda & Butler 1984-85). Numerous other courts have made similar rulings that have permitted the BWS expert's evidence (for list of cases, *see* Walus-Wigle & Meloy 1988). Admissibility has followed the determination by the various courts of the scientific and legal acceptance of battered woman syndrome. The acceptance of such testimony by the judge is certainly critical. Its failure to be allowed has been the grounds for numerous appeal court cases—many of them successful (Thyfault, Bennett & Hirschhorn 1987).

Cases in the US

It should be noted that until self-defence was argued, women were either found guilty of murder, pleaded guilty to a lesser charge of voluntary manslaughter, or were acquitted on the grounds of insanity as in the movie *The Burning Bed*. Since 1979, by employing the arguments above, hundreds of women have pleaded self-defence with quite mixed results. The following three cases illustrate the variety of situations, pleas and consequences that have ensued.

Molly's case (Browne 1987, pp. 132-4;161): Beaten for years by husband Jim, Molly was finally allowed to work and began to save to escape with her small son. (She was given more freedom because Jim had a young girlfriend with whom he was spending most of his time and his beating.) The girlfriend ran away and Jim returned home to vent his anger on Molly hitting her head with his fists, pounding her head against cupboards, kicking her in the ribs and stomach. She tried to dial the police; Jim dislocated her fingers. He pulled her hair out by clumps, gouged her eyes, punched her in the stomach and on and on for hours. She lay in her blood on the floor as he slept. When he awakened, he threatened to kill her if she was not able to find out the whereabouts of the girlfriend. '. . . I'll shoot you, you son of a bitch. I'll kill you dead. Dead, dead, dead,' he said over and over again as he left.

The day passed in a blur for Molly. She became more and more frightened. Jim returned that night very intoxicated and started to choke and beat her while he laughed. She ran out to the car and got his gun; ran to the neighbours but no-one answered. Jim fired at her. Then he threatened the baby. He had never done that before and came outside carrying the baby and put his arms around the infant's neck. She raised the automatic and shot Jim, grabbed the baby and ran to the neighbours. This time, they let her in and called the police. She was arrested, taken to gaol and charged with murder. The baby was placed in foster care. Molly ultimately asked to plead guilty to a lesser charge so that she could be reunited with him.

State vs. Allery, 1984 (Johann & Osanka 1989, pp. 284-6): Sherry Allery was found guilty of second degree murder by a trial court that did not allow BWS expert testimony to explain her fear of imminent danger and gave instructions to the jury that

did not adequately explain self-defence law. The history of violence in the marriage was extensive and severe. Since 1975, she had been beaten with fists, pistol whipped and attacked with knives. The battering increased over time and culminated with Sherry starting divorce proceedings. The husband, Wayne was served with a restraining order.

One night Sherry returned home fairly late and found Wayne in the house. He threatened her, 'I guess I'm just going to have to kill you sonofabitch. Did you hear me that time?'. He went into the kitchen and Sherry believed that he was getting a knife. Unable to escape through the bedroom window, she loaded a shotgun and killed Wayne whilst he was lying on the couch.

Sherry received a new trial. Aside from the issues already mentioned, the Appeals Court held that the trial court had failed to indicate to the jury that Sherry had no duty to retreat from her home. It should be noted that this case dramatises another truism about woman battering and marital murder. For those who do not understand BWS and how difficult it becomes for the woman to leave the home, perhaps they can understand that even if the woman manages to leave, the violence does not often end. In fact, her departure has been found to often act as the precipitator of increased violence and murder (*see,* for example, Walker 1989).

The ***Diaz*** **Case** 1985 (Blackman 1989, pp. 184-6): This case is particularly interesting since it exemplifies the increasing use of a self-defence plea in situations where, in traditional terms, there is no immediate sense of danger since the batterer is asleep (or passed out) at the time of the killing. Madelyn's husband, a police officer, had committed numerous acts of violence, including sexual, upon her during their marriage. These included taking her out in the car in winter, making her undress and inviting a stranger to rape her in the backseat while he watched.

The day preceding the killing, he had threatened their six-month-old daughter, holding a revolver at the baby's head. He had never done this before. The next morning as he still slept, Madelyn left with the three children to go grocery shopping. Having forgotten money, she returned and opened the drawer where the money was kept. She picked up the gun that lay there and hearing a flashback of his voice as he had held the gun to the baby, she fired it twice at his sleeping body. Then she left, went shopping and bought items that he normally liked. Initially, she told investigators that the apartment had been broken into; three days later, she remembered what she had done and confessed. Madelyn was indicted for murder in the second degree, the highest murder charge in New York State.

Ultimately, she was acquitted. The jury 'extended the definition of self-defense to include the circumstances Madelyn described'. The jury, with the help of expert witnesses, was able to see that the threat of violence was psychologically imminent.

Women who have killed: Australian Courts

As stated earlier, there is comparatively little mention made in the Australian literature of battered women who kill their violent partners. It would appear that for numerous reasons, BWS has not been used as the grounds for self-defence by any of these

defendants[1]. Tarrant (1990) reports that in ten such cases in Western Australia from 1983 to 1988, a self-defence plea was only used directly in two and peripherally in two other; it was successful in one case. Among Bacon and Lansdowne's (1982) sample of thirteen, again it was raised for only two of the women, by the court for one and mentioned in two. Success was directly correlated with the conformity of the events preceding the killing with the traditional interpretation of immediacy.

Certainly its relative lack of use is not because self-defence is defined in a significantly different way in the Australian statutes: the same elements of reasonable perception of danger and reasonable amount of force are included. For instance, the Western Australia Criminal Code states that 'when a person is unlawfully assaulted in such a way as to cause reasonable apprehension of death or grievous bodily harm and the person assaulted believes on reasonable grounds that (s)he cannot otherwise be saved, there is justification for using deadly force against the assailant' (Tarrant 1990, p. 148).

The difference then is not in the wording but in the Australian courts' failure to interpret the law more broadly, thus recognising both differences derived from gender and the impact of BWS on reasonable perception. In lieu of self-defence, what has emerged in Australia is the sometimes successful use of a provocation defence which can reduce the charge from murder to manslaughter. (Provocation was used by seven of Tarrant's (1990) ten women and by five of the thirteen in Bacon and Lansdowne's (1982) sample). The use of provocation can act against the introduction of self-defence as the former becomes normative in this type of case. Tolmie (1991) believes that provocation is more palatable to many since it equates women as emotional and losing control instead of exonerating their action. It is interesting that even the use of what one can only view as this poor second to self-defence, has met with much controversy.

Provocation is problematic in the current legal environment when there is no immediate incident that can be construed as threatening. In other words, if the woman waits until her partner is asleep, which is understandable given what we know about BWS and the physical and socialisation differences between gender, it is doubtful that the court would accept provocation.

As Scutt states:

> The interpretation of the law is significant and must be seen in context. Judges interpret the laws. Lawyers fight the cases for judicial decisions. Judges and lawyers until the early twentieth century, have all been men, and even now proportionately few women practise as solicitors or barristers. Men dominate the profession, so laws are interpreted with men, not women, in mind. This is nowhere more clear than in cases of murder (1983, p.184).

An informal survey of newspaper reports of dispositions by gender and the reading of many backgrounds and subsequent dispositions in cases of battered women who kill the batterer confirm Scutt's perspective and lead one to speculate whether there has been any change during the almost 10 years since she wrote the above. Greene (1989) does believe that in many of the cases, IF the woman's actions have conformed to the traditional interpretation of provocation, she is allowed to plead guilty to manslaughter and we do not hear much about these cases. Undoubtedly cases

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1 Since the paper was presented, BWS evidence has been presented in two trials in April 1992 (*R v. Kontinnen* in South Australia and *R v. Hickey* in New South Wales. For more detail, *see* Easteal 1992.

like *R v. R* in South Australia (Greene 1989; Scutt 1983, 1990) continue to take place. Although the deceased had essentially tortured his family for almost three decades, since R. killed him whilst he slept, as the law is currently interpreted, self-defence was not an option. Further, since provocation also involves the idea of immediacy, the trial judge refused to allow provocation to go to the jury; fortunately due to public pressure, the appeal court held that such a decision should have been left to the jury. Ultimately, R. who had learned within 36 hours of killing her husband that he had raped and wounded one daughter and had sexually abused all the daughters frequently, was acquitted.

The acquittal was described in one *Bulletin* article as 'perverse' (Harding 1989) and by another commentator as 'compassionate' (Rathus 1989); obviously a controversial decision. The latter advocate of self-defence for battered women who kill, expresses her view about the essential gender inequity of self-defence and provocation legal interpretation:

> So why is it that a man who kills his wife because he finds her in bed with a lover can have a charge of murder reduced to manslaughter, with the expectation that the judge will impose a light sentence because he understands how the man must have felt. Meanwhile a woman who kills her husband after brooding about his having been raping her daughters for 20 years is convicted of murder because she thought about it too long (Rathus 1989, p. 41).

There is thus still an insistence upon one major provocative incident that occurred immediately prior to the killing. Because of this, Tarrant (1990) points out that attempts to use a history of domestic violence as opposed to the one incident can in fact backfire on the defendant as in the case of *R v. Bradshaw* in 1985. The prosecution used the background information conveyed by the defence as evidence of the woman's 'mere' anger. She was convicted of murder.

Specifically within the legal realm, aside from the preponderance of male players, in Australia there are factors which operate to keep BWS out of the court.

The laws of self-defence and provocation now involve an objective standard. Therefore, the jury should now measure the accused's actions in the framework of a reasonable battered woman and not a reasonable man. However, as Greene (1989) points out, it is doubtful that this will translate into such a practice since judges are prone to stress the concepts of cooling off time and 'proportionality of response'. Additionally, the courts in this country seem to be reluctant to allow the expert witnesses' testimony that would be a necessary component of showing exactly what is reasonable behaviour for a battered woman. The courts adhere to the common knowledge rule and the ultimate issue rule. (The common knowledge rule states that experts are not permitted to testify about subjects which are already understood by the average juror. The ultimate issue rule does not allow testimony which could be construed as giving an opinion on the guilt or innocence of the defendant. Both of these rules promote the inadmissibility of expert witnesses. Without experts, jurors are left with their own preconceived notions of reasonable behaviour for a battered woman. Thus, the objective standard is worthless if the jury is not equipped to understand what is indeed reasonable behaviour for a woman who has experienced long-term battering (Greene 1989).

It is certainly true that both in America where some women have been acquitted or granted clemency if in prison, as recently occurred in the states of Ohio and Maryland ('Celeste Gives Clemency to 25, Cites Battered Woman Syndrome' 1991; 'Clemency Drives Stepped Up for Battered Women Who Strike Back' 1991), and in Australia where it has been much less employed, the use of BWS has not been without its critics. The main arguments against the use of BWS as self-defence very ironically revolve around discussions of the judicial and societal purported ideal of gender equity. Thus, the deriders allege that BWS gives women special dispensation under the law to kill, exploits traditional stereotypes about women, and violates the due process rights of male homicide defendants and victims (Kuhl 1985; Rittenmeyer 1981). This seems like a rather poorly thought out argument. First, it presupposes that the existing or archaic self-defence interpretation is equitable to both genders. Secondly, BWS is a problem that affects females; woman battering occurs and woman battering syndrome results due to a plethora of overt and covert gender inequities that permeate the attitudinal, behavioural and organisational levels of our culture.

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RAPE PROSECUTIONS IN VICTORIA

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IN OCTOBER 1990 THE LAW REFORM COMMISSION OF VICTORIA WAS GIVEN a reference on reform of rape law and procedure by the Victorian Attorney-General (Law Reform Commission 1991). As part of its terms of reference, the Commission was directed to:

- review the Director of Public Prosecution's files on all recent rape prosecutions, being for a period of not less than six months, and in particular report on:
  - the outcome of cases committed for trial (acquittal, convictions, guilty pleas, convictions for other offences, etc.);
  - the frequency and manner in which the issue of consent arose.

This paper summarises the major findings of the Commissioner's research.

Part One: Background

About the data

Two related studies were undertaken specifically for the Commission's reference (*see* Law Reform Commission 1991, Appendixes 2 & 3). The first was an 'audit' of all rape prosecutions initiated in Victoria in 1988 and 1989, using administrative records maintained by the 'Rape Team' of the Office of the Victorian Director of Public Prosecutions (DPP). This study was designed to identify the main points at which rape prosecutions 'dropped out' of the criminal justice system, and to obtain statistically reliable estimates of conviction and guilty plea rates. Data were collected on 323 accused: 161 of whom were charged in 1988 and 162 who were charged in 1989.

The second, much more detailed study, focused specifically on prosecutions initiated in 1989. A major concern of this study was to identify factors which were related to different prosecution outcomes and, in particular, to determine the frequency with which various legal and evidentiary issues arose in rape trials. Data for this study were obtained from case files held by the DPP. There were 144 accused in

this study—89 per cent of all accused charged with rape offences in 1989. (In eighteen cases the relevant DPP file could not be located. These were mostly matters which had been disposed of in the Children's Court, or prior to a committal hearing being held.)

The paper also draws upon the findings of two related research projects conducted in Victoria in 1991:

- a study by the Victorian Community Council Against Violence (CCAV) of 1473 rapes reported to the Victoria Police in the three financial years 1987 to 1990 (Victorian Community Council Against Violence 1991);
- a phone-in survey conducted by the Real Rape Law Coalition in April 1991. This survey collected data about 267 sexual assaults (predominantly rape or attempted rape) from 255 callers (The Real Rape Law Coalition 1991).

Definitions

As used in this paper, the general term 'rape offence' embraces the specific offences of rape, rape with aggravating circumstances, attempted rape and assault with intent to rape. Of these various offences the most commonly charged are rape (charged in 42 per cent of cases in 1989) rape with aggravating circumstances (charged in 33 per cent of cases) and assault with intent to rape (21 per cent of cases).

In the following discussion an accused is classified as 'convicted of rape' if he was convicted of at least one count of any rape offence. 'Convicted non-rape' applies to any accused who was acquitted on all rape charges, but convicted of at least one count of another offence (for example indecent assault, or intentionally causing serious injury). 'Acquitted' means acquitted of all charges. Prosecutions are recorded as 'withdrawn', 'discharged at committal', or 'nolle prosequi entered' only if all charges were dropped.

The prosecution process

Except in rare cases, responsibility for formulating initial charges in criminal cases lies with the Victoria Police. This is an important, but relatively unstructured, area of discretion. The Victoria Police Manual states only that a brief should not be authorised if there 'is insufficient evidence, or a prosecution is not justified' (section 3.8(8)(c)). It does not indicate what evidentiary standard should apply. According to senior police officers, a 'prima facie' standard is normally used where rape or some other serious indictable offence is alleged. This test asks: 'is there evidence upon which a reasonable jury, properly instructed, could be satisfied that all the elements of the offence have been established beyond reasonable doubt?' However, it is unclear to what extent this test is applied in practice by individual police officers, or how it is interpreted in particular instances. There is also no formal mechanism for external or internal review of police decisions to discontinue an investigation, or to not charge a suspect. It is open to someone who feels aggrieved by apparent police inaction to make a written complaint to the Internal Investigations Department of the Victoria Police, the Deputy Ombudsman or the DPP. However, these avenues of redress are little known and rarely used.

The Victorian DPP is empowered under the *Director of Public Prosecutions Act 1982* (section 10) to issue charging guidelines to the police, but has not yet done so in relation to any offences. Overall, the DPP has little involvement in police charging decisions. DPP solicitors will give advice on charges when asked to by the police, but

they usually emphasise to the police that they are not required to follow the advice given.

For most indictable (triable by jury) offences, the DPP does not become actively involved in the prosecution process until after committal proceedings have been completed. However where rape offences are concerned, the DPP assumes responsibility for the prosecution once a person has been charged and a brief of evidence prepared.

Within the DPP, rape prosecutions are primarily handled by a special section known as the 'Rape Team'. Once a brief of evidence is received, this section is responsible for assessing the evidence, making any amendments to charges, and briefing a barrister to appear at a committal hearing. If a defendant is committed to the Melbourne County Court, the Rape Team is then responsible for the preparation of the case for trial or plea. If a defendant is committed to the County Court country sittings, the case is dealt with by the circuit section at the DPP. Any decision to discontinue a prosecution, or accept a plea to a lesser offence, is subject to an extensive internal review process, involving Crown Prosecutors, senior members of the DPP's Office and, in the case of 'nolle prosequi', the director him/herself.

Part Two: Pre-Charge Screening

It is clear that the major filters in the prosecution process are the victim herself and the police. By comparison, as discussed below, only a relatively small proportion of prosecutions 'drop-out' once a decision has been made to charge a suspect.

Victims act as filters in two ways:

by deciding whether to report the offence to the police in the first place;

having reported, by then deciding whether they want further action to be taken.

The police act as a filter both directly by making the decision whether charges should be laid and indirectly, by influencing the victim's decision whether to take further action.

The decision to report

Only a minority of rapes are ever reported to the police (Temkin 1987). The most reliable Australian data comes from the 1983 *Crime Victims' survey* conducted by the Australian Bureau of Statistics. This study found that of those women aged eighteen years or over who said that they had been sexually assaulted in the previous twelve months, only 26 per cent had reported this to the police. However, this survey did not distinguish rape from other forms of sexual assault. It seems likely that rape victims would be more likely to report than victims of relatively minor indecent assaults, but how much more likely cannot be determined. Another study of interest is the phone-in survey conducted by the Real Rape Coalition in Victoria in April 1991. Of the 139 women aged eighteen years or over who responded to this survey, 39 per cent had reported to the police. Most of these respondents were victims of rape offences. (It is *possible* that the phone-in methodology may have undercounted non-reporters although by how much is unknown.)

The reasons for non-reporting are complex. They include such factors as the victim's own interpretation of what happened and why, the social context in which the rape occurred, the victim's perceptions of what the law requires to prove rape, and so on. It is significant, however, that in both the ABS survey and the Coalition phone-in, the most common reason given by victims for not reporting was that they considered that the police would not, or could not, do anything about it. Clearly, these perceptions of the police need to be changed if reporting rates are to be increased.

Screening by the police

Even if a victim does decide to report a rape to the police, there is only a one in three chance that a prosecution will be initiated. The CCAV study (see above) found that in the three-year period, 1987 to 1990, only 35 per cent of rapes reported to the police resulted in charges being laid. Of course, the police were not always able to locate a suspect, but this does not appear to have been the most important factor, given that only 36 per cent of the reported rapes examined by the CCAV involved strangers.

The CCAV also analysed police crime reports to determine the reasons given by police for not proceeding past the initial report stage. According to this analysis, the most common reason cited by police was that the victim herself did not want to take the matter further. This factor was cited in 60 per cent of cases, whereas 'false reports' or 'insufficient evidence' were cited in 33 per cent of cases. However, it should be noted that this study picked up only cases which 'dropped out' at a very early stage of proceedings. In the majority of cases which did not proceed, the decision not to lay charges was only taken later. Moreover, the 'official' reasons provided by the police must be interpreted with great care. While it is true that some victims genuinely do not want charges to be laid, it is also clear that others are talked out of proceeding by the police. In the Real Rape Coalition phone-in, thirty-five respondents aged eighteen years or over said that they had reported to the police but that their case had not proceeded to court. Of these thirty-five respondents twenty-five (71 per cent) said that the decision not to proceed had been taken by the police, rather than themselves. 'Off the record' remarks of senior police officers confirm this police role. As one officer commented: 'whichever way you want the case to go, you can generally persuade the complainant to go along with you'.

The stated view of the police is that they will only decline to lay charges, or try to dissuade victims from going ahead with court action, if the evidence is weak, or if

they think the victim might not stand up to the strain of a prosecution. However, as noted earlier, the decision as to what is, or is not, 'insufficient evidence' is relatively unstructured and therefore highly discretionary. There is obviously also considerable scope for the beliefs and assumptions of individual officers to influence the advice which they give to victims in particular cases.

Policy issues

The Commission's Interim Report (1991) contained a number of recommendations aimed at improving the quality of police charging decisions in sexual assault cases. These included:

- the DPP should use his power under section 10 of the Director of Public Prosecutions Act 1982 to issue detailed guidelines to the police on the laying of charges in sexual assault cases;
- sexual assault victims should have a formally recognised right to have the DPP review any police decision not to lay charges;
- sexual assault victims should be provided, on request, with a written explanation of any decision to discontinue a prosecution or not to lay charges;
- all sexual assault victims should be informed of their right to request written reasons, or to have police charging decisions reviewed.

The *Interim Report* also addressed at some length the more general problem of improving the way in which sexual assault victims are treated by the police and by the criminal justice system generally. (Most of the proposals contained in this report have since been adopted by the Victoria Police and the DPP. As at February 1993, their implementation is being evaluated by the Victorian Bureau of Crime Statistics and Research.)

Part Three: The Prosecution Process

As indicated, the Commission's research was concerned primarily with collecting and analysing data on the outcome of rape prosecutions. The remainder of this paper summarises the main findings of this research.

Rape prosecutions in Victoria, an overview 1988-1989

In brief, the outcomes of the 323 rape prosecutions initiated in Victoria in the calendar years 1988 and 1989 were as follows:

- 137 accused (42 per cent) were convicted in the County Court or Children's Court of at least one rape offence;
- seventy-seven accused (24 per cent) were convicted of some other offence (sexual or non-sexual) in the County Court, Magistrate's Court or Children's Court;
- seventy-seven accused (24 per cent) were not convicted on any charge—this included accused who had been acquitted at a County Court trial or Children's Court hearing; and those who had had all charges withdrawn prior to committal, discharged at committal, or withdrawn following the committal;
- eighteen accused (6 per cent) had their cases returned to the police for re-charging on a non-rape offence';
- ten accused (3 per cent) had absconded; and
- four accused (1 per cent) were still awaiting the completion of proceedings in either the County Court or Children's Court.

Post-charge screening

Once a decision was made to charge a suspect with a rape offence, relatively few prosecutions were screened out prior to plea or trial. Thus in the two years examined, there were only twenty-five cases (8 per cent), in which the DPP dropped all charges. This was done either by withdrawing the charges prior to the completion of the committal (twenty accused), or entering a 'nolle prosequi' subsequent to the committal (five accused). In most cases where rape charges were dropped, there was a prosecution for some other offence. Eighteen were returned to the police for re-charging, eighteen accused pleaded guilty to a lesser offence in the Magistrate's Court, and another nineteen pleading guilty to a non-rape offence in the County Court.

The majority of cases which did not proceed as rape prosecutions were screened-out at a relatively early stage, prior to the completion of committal proceedings. Once an accused was committed to stand trial for rape, there was a strong likelihood that he would subsequently be presented for trial on rape charges.

It should be noted that committal hearings were not a significant filter of 'weak' cases. Over the two-year period, only ten accused had all charges against them discharged at the committal hearing, compared to twenty who had all charges withdrawn prior to committal, and five who were granted 'nolle prosequis' by the DPP.

Information on the circumstances under which rape charges were withdrawn, or 'nolle'd', was obtained from the detailed study of 1989 prosecutions. Overall this study showed that prosecutorial discretion was very carefully exercised and that rape prosecutions were generally only discontinued by the DPP if there were good reasons.

Guilty pleas to lesser offences

Our research established that 'pleading down' to lesser charges was accepted in only limited circumstances. In 1989, twenty-four accused pleaded guilty to a non-rape offence. The most common plea was to an indecent assault (eleven accused) followed by sexual penetration of a child aged between ten and sixteen (four accused). One accused pleaded guilty to incest and another to sexual penetration of a child under the age ten. The remaining accused pleaded guilty to one or more non-sexual offences, such as intentionally causing injury.

In virtually all cases where a plea to a non-rape offence was accepted, there was an indication in the DPP file that there had been some negotiation over charges between the prosecution and the defence. According to the DPP's guidelines, the complainant should also have been consulted before the plea was accepted (Office of the Director of Public Prosecutions 1988-89).

The willingness of the DPP's office to accept a plea appeared to depend largely on two factors:

Seriousness of offence The less serious the initial charge, the greater the willingness of the DPP to accept a plea to a non-rape offence. Only 5 per cent of accused initially charged with rape with aggravating circumstances pleaded guilty to a non-rape offence. By contrast, pleas to a non-rape offence were accepted from 26 per cent of accused initially charged with attempted rape or assault with intent to rape. Relatedly, the DPP was generally unwilling to accept a plea to a non-rape offence if the complainant had suffered physical injuries requiring medical treatment or hospitalisation. The only exception concerned a defendant who pleaded guilty to intentionally causing serious injury after initially being charged with assault with intent to rape with aggravating circumstances.

Strength of evidence Pleas to non-rape offences were less likely to be accepted if DPP officers considered that there was a strong case against the accused. For instance, 65 per cent of the accused who pleaded guilty to a non-rape offence, had made no admissions to the police, whereas only 17 per cent of the accused who pleaded guilty to a rape offence had made no admissions. In addition, in a substantial proportion of cases where a plea to a non-rape offence was accepted, there were file entries by DPP personnel indicating significant doubts about the likely quality of the complainant's trial testimony. The reluctance of DPP officers to 'plead down' where there were significant physical injuries may have reflected an assessment that they had a strong case against the accused.

Part Four: Rape Trials

The decision to go to trial

In 1988-89, seventy (33 per cent) of the 210 accused committed to the Victorian County Court on rape charges entered a plea of guilty to one or more of these charges. This was well below the overall County Court guilty plea rate of 79 per cent (Brereton & Willis 1990). The low guilty plea rate for rape is one of the most striking differences between this offence and other serious criminal offences.

The Commission's study of 1989 prosecutions found that by far the best predictor of plea was the initial record of interview. Of the thirty-seven accused in this study who pleaded guilty, 82 per cent had made full admissions to the police. By contrast, only 13 per cent of those who pleaded not guilty had made full admissions.

The fact that admissions were a good predictor of a guilty plea is hardly surprising. An accused who has made a confession to the police has, in most cases, made a subjective acknowledgment of guilt. The other consideration, of course, is that an admission, provided it is legally admissible, is very strong evidence against the accused. In such circumstances, pragmatic considerations dictate that it often makes more sense to enter a plea of guilty and hope for a sentencing 'discount' than to risk being convicted and sentenced at trial.

Explaining why accused choose to make admissions in the first place is less easy. To a large extent, this decision appears to be based on non-quantifiable factors such as the psychological make-up of the accused, his or her own perception of what took place, the skill of interrogating officers, and so on. However, it was apparent that accused were somewhat more likely to make admissions where the complainant was previously unknown to them and/or initial contact with the complainant had been non-voluntary. For instance, in 55 per cent of the cases where the accused made admissions the initial contact was non-voluntary (according to the complainant). This compared to only 23 per cent of the cases in which the accused made no admissions. Likewise, 35 per cent of the accused who made admissions were strangers to the complainant, compared with only 17 per cent of those who made no admissions. Somewhat surprisingly, the willingness of accused to make admissions was not related to the degree of violence involved in the alleged rape.

Clearly, the issue of the low guilty plea rate for rape requires serious attention. Obviously the role of admissions is important, but other issues, such as how accused persons perceive their chances of acquittal, and the extent to which pleas are encouraged or discouraged by the DPP, also require investigation.

Overview of trial outcomes

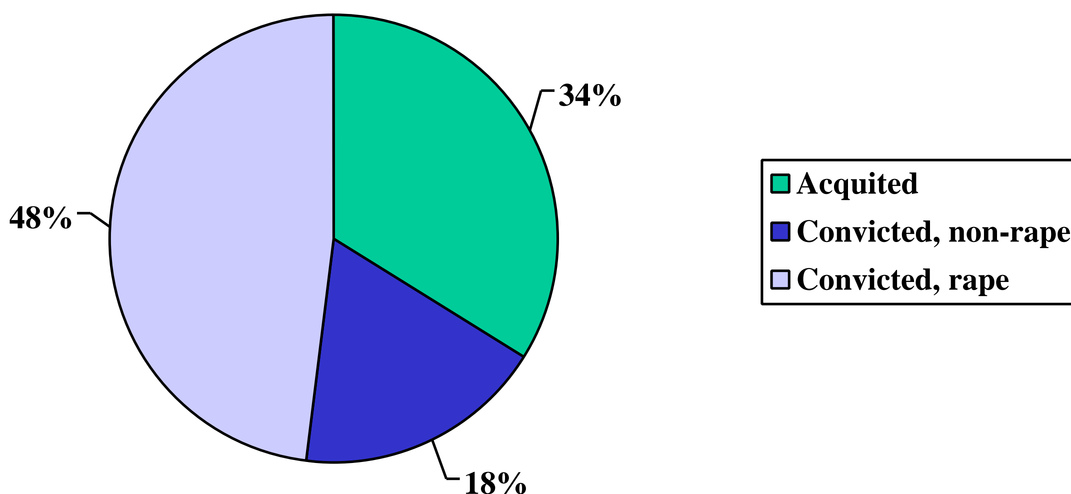
Summary of outcomes In the two years 1988-1989, 111 accused were tried by a jury on one or more charges of rape. Another three accused were presented for trial on non-rape charges only, after the DPP had decided to drop all rape charges.

The outcomes for the 111 accused who stood trial on charges of rape are shown in Figure 1.

Nearly half of the accused were convicted of at least one count of a rape offence. Overall, there were 38 acquittals in this two-year period. One of the acquittals was a directed acquittal and one was an acquittal on appeal. The remainder were jury acquittals. It should be noted that there were twenty-three acquittals in 1988, compared to only fifteen in 1989. More data are required to determine if the smaller number of acquittals in 1989 is indicative of a downward trend in acquittals, or simply a random year-to-year fluctuation. However, it is the view of some DPP personnel that there has been a 'real' fall in the acquittal rate in recent years. It should also be noted that twenty accused were acquitted of rape, but found guilty of some other offence.

Figure 1

Trial outcomes, accused charged with rape, Victoria, 1988-1989



Source: Law Reform Commission of Victoria 1991

Acquittal rates for other offences The acquittal rate in rape trials is substantially lower than for County Court criminal trials as a whole. In 1989, 45 per cent of all accused whose cases were tried by a County Court jury were acquitted on all charges (Victorian Attorney-General's Department, unpublished). This was well above the acquittal rate of 34 per cent for accused who were tried on rape charges. However, as

noted above, accused charged with rape tend to opt for jury trials much more frequently than those charged with other offences.

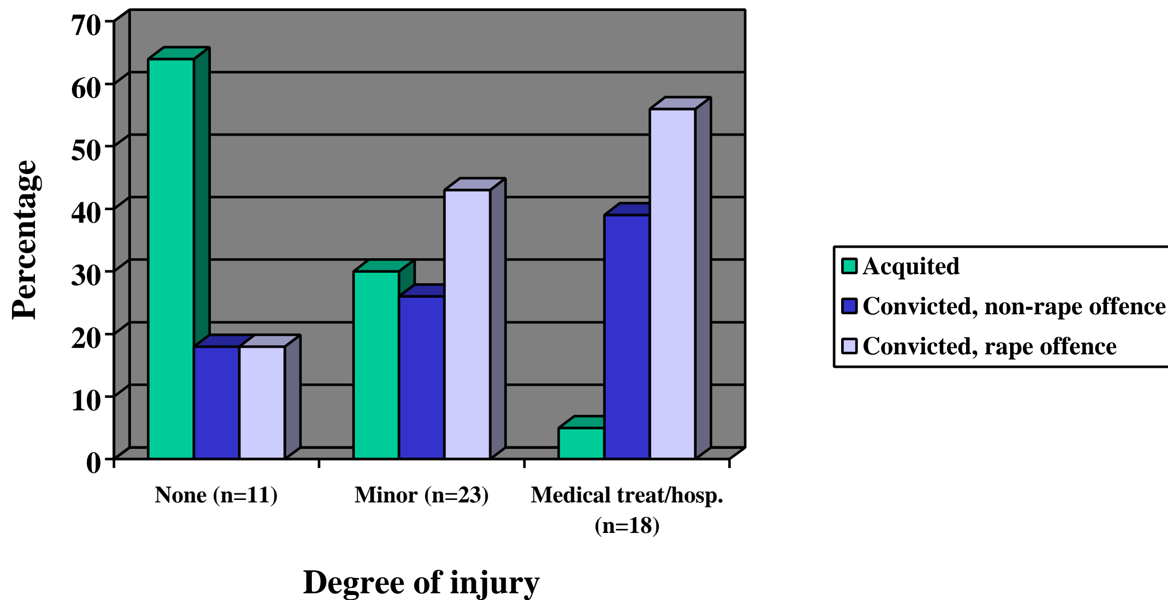
Factors affecting trial outcomes

Of the fifty-three accused in the 1989 study who stood trial for rape, fifteen (28 per cent) were acquitted of all charges—in fourteen cases by a jury and in one case on appeal. Convictions on at least one count of a rape offence were obtained against twenty-three accused (43 per cent). The remaining fifteen accused (28 per cent) were acquitted on the rape charges but convicted of some other offence, either of a sexual or non-sexual nature.

Given the small number of cases involved, the inherently variable nature of jury decision-making, high levels of multi-collinearity and the important role which may be played by non-quantifiable factors, it is a futile exercise to attempt to explain all of the variance in rape trial outcomes. However, the data does point towards two particularly important factors: evidence of physical injuries to the complainant and, to a lesser extent, evidence of admissions by the accused.

Figure 2

Evidence of injuries and rape trial outcomes, Victoria, 1989



Source: Law Reform Commission of Victoria 1991

Injuries There was only one case in which substantial physical injuries (that is requiring medical treatment or hospitalisation) were inflicted and the accused was

acquitted on all charges (*see* Figure 2). By contrast, in the eleven cases in which there was no evidence of injuries, there were seven full acquittals.

At the same time, evidence of injuries was not, by itself, always enough to ensure a conviction for rape. Thus, in seven cases where there was evidence of injuries requiring medical treatment or hospitalisation, the accused was acquitted of all rape charges and convicted of a non-rape offence only.

Admissions As noted above, most accused who made admissions to the police subsequently pleaded guilty to rape. However, there were eleven accused who decided to go to trial despite having made admissions. Presumably they did this in the hope that their confession would be excluded or, if it was admitted, could be explained away. For the most part, such hopes appear to have been misplaced. Of the eleven accused who made partial or full admissions, only one was acquitted on all counts. (The full acquittal arose out of a case in which belief in consent was the dominant issue. In his taped record of interview the accused had told the interviewing detectives: 'And then—um—I took off my shoes and had sexual intercourse with her, without her consent . . . she was in a deep sleep'. In unsworn evidence at the trial, the accused said that he had only answered this way because he was in shock and frightened.) By comparison, thirteen (32 per cent) of the forty-one accused who did not make any admissions were acquitted.

Discussion Overall, there were only three accused (6 per cent of those who went to trial) who were convicted of rape in the absence of an admission of evidence of injuries to the complainant. One of these cases involved the issue of identity—the defendant's main line of defence being to deny all knowledge of the complainant. (DNA tests conducted on semen from the complainant's medical examination and other evidence obtained from the defendant's car almost conclusively identified the defendant as the assailant.) In the second case, the complainant had been forced into the accused's car while walking to work. The accused argued that there was consent and that the victim was previously known to him, but there was little evidence available to support this claim. In the third case the accused conceded that the victim had struggled and screamed at some stage during the encounter and that he had not asked her if she wanted to have intercourse with him.

Other findings

The study of rape trials was equally important for what it did not show. Specifically, it established that very few prosecutions failed because the accused was successfully able to argue a mistaken 'belief in consent'. The study also showed that the right of accused persons to give unsworn evidence was not a barrier to obtaining convictions.

Belief in consent There are four main lines of defence which an accused person can raise to an allegation of rape:

- he can deny that he was in contact with the complainant when the rape was alleged to have occurred;
- he can admit to contact with the complainant but deny that any sexual encounter took place;
- he can admit that there was a sexual encounter with the complainant, but assert that this was with the consent of the complainant;
- he can argue that even if the complainant did not in fact consent, he honestly believed that there was consent.

Of the fifty-three accused in the study, only three relied on 'belief in consent' as their primary line of defence, with another nine (17 per cent) using a mix of 'consent' and 'belief in consent' defence.[1] By contrast, twenty-seven accused (51 per cent) based their defences primarily on the issue of the complainant's actual consent. Eleven per cent of accused denied any contact with the accused and another 11 per cent admitted that there was contact, but denied that there had been a sexual encounter. In two cases, the line of defence adopted by the accused was unclear.

There is no evidence that those few accused who ran a 'belief in consent' defence fared any better than other accused. Of the twelve accused who relied partly or primarily on this line of defence, six (50 per cent) were convicted of rape and only three (25 per cent) were acquitted of all charges. In four of the six cases where there was no conviction for rape, a 'mixed' defence was run: it is unclear how much weight the jury gave to the 'belief' as opposed to 'consent' issue in these cases.

It is not surprising that few rape trials turn on the issue of the accused's belief in consent. Few juries are likely to believe an accused who claims to have believed that the complainant was consenting, if there is uncontradicted evidence that force or threats had been used, or that the complainant had communicated her lack of consent to the accused. There was only one accused in the DPP study who claimed to have interpreted the complainant's verbal and physical resistance as evidence of consent. Not surprisingly, the jury did not believe this story and the accused was convicted on all counts. In the other two cases in which 'belief in consent' was the primary issue, it was accepted that penetration had been effected without any resistance on the complainant's part. In one case, the complainant was drunk and said that she had mistaken the accused for her husband. In the second case, the complainant said that she was asleep at the time she was first penetrated. In the first of these cases the jury found the accused guilty of indecent assault. In the second, it acquitted on all charges. (*See* Appendix 3 of the *Interim Report*, pp. 87-8.)

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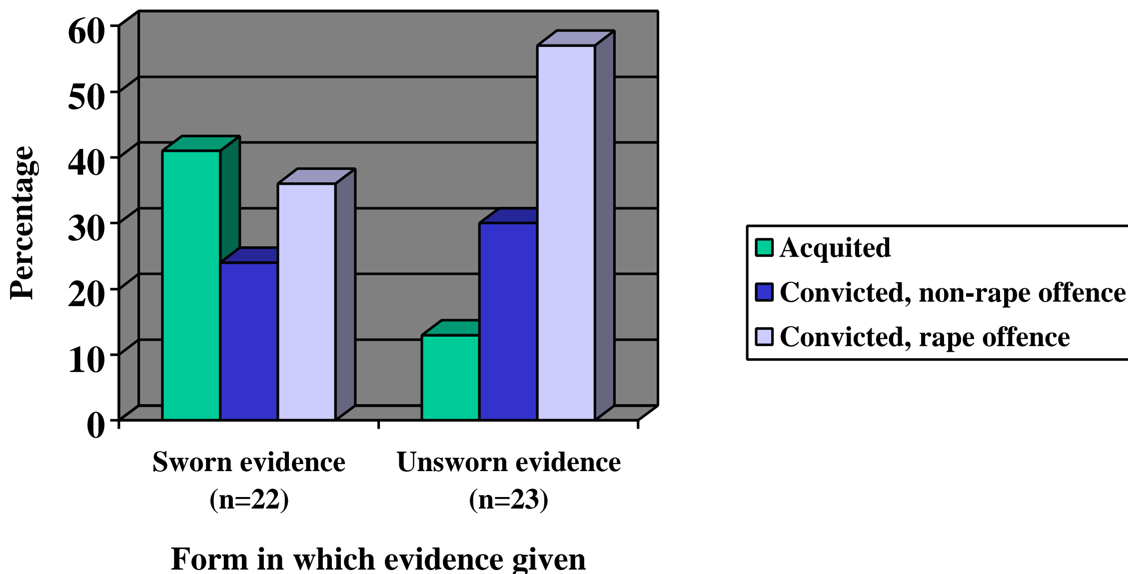
1 The criteria for distinguishing between 'belief', 'consent' and 'mixed belief and consent' defences are discussed in Appendix 3 of the Commission's *Interim Report* (pp. 82-4, 85-8). In brief, 'belief' cases were classified as those in which the defence conceded that there was a real possibility of a mistake on the part of the accused. In 'consent' cases, on the other hand, there was a clear disagreement between the accused and the complainant about what each of them had said or done. Logically, the accused in these cases were also asserting a belief in consent, but the claim was that the belief was well grounded, rather than the result of a possible mistake. 'Mixed' cases were those in which the line of defence shifted during the course of the trial, or evidence was presented which could be seen as relevant to either issue.

Unsworn evidence Forty-six per cent of the accused in the study gave unsworn evidence at their trials and 44 per cent gave sworn evidence. The remaining 10 per cent exercised their right to remain silent.

As Figure 3 shows, only three (13 per cent) of those accused who gave unsworn evidence were acquitted on all charges, compared to nine (41 per cent) of those who gave sworn evidence.

Figure 3

Unsworn evidence and rape trial outcomes, Victoria, 1989



Source: Law Reform Commission of Victoria 1991

The fact that accused who gave unsworn evidence were rarely acquitted may indicate one of two things. It may show that juries give substantially less weight to unsworn than to sworn evidence. Alternatively, it may indicate that the option of giving unsworn evidence is most likely to be exercised when the case against the accused is strong and the risks involved in undergoing cross-examination are particularly great. Either way, the oft-stated claim that the accused in a rape trial is unfairly advantaged by the right to give unsworn evidence is not supported by the evidence from this study.

Summary and Policy Implications

Obviously, no one expects that the conviction rate in rape trials, or any other trials for that matter, should be 100 per cent. Some accused who stand trial may well be genuinely innocent. Others may have committed the offence but the evidence does not establish this beyond reasonable doubt. Unless this evidentiary standard associated protections for the accused are abandoned, it is inevitable that some guilty people will walk free. This is the price paid for minimising the risk that people will be wrongfully convicted of serious criminal offences.

Having said this, however, there is understandable concern that juries appear to be very reluctant to convict without evidence of injuries or admissions. Although there were some cases in our study in which it had not been established beyond reasonable doubt that a rape had been committed, there were others where the decision to acquit was surprising, to say the least. No doubt, it is possible to find examples of 'surprising' acquittals throughout the criminal law, but this hardly justifies doing nothing about the problem as it arises in relation to rape.

Unfortunately, this is not a problem which lends itself to easy solutions. The research reported here indicates that doing away with the accused's right to give unsworn evidence, or replacing the mental element of the rape with an objective standard, would not have a significant impact on overall conviction rates—whatever the other arguments for or against these reforms. Other measures, such as getting rid of juries, reversing the onus of proof, or not allowing the complainant's evidence to be properly tested in court, are not acceptable. Such measures would be unfair to those accused charged with rape. Also, once adopted, it would be very hard to confine them to a single area of the criminal law.

There are, however, some worthwhile measures which can be taken. In its report, the Commission proposed that the Victorian Crimes Act define 'lack of consent'. The *Crimes (Rape) Act 1991*, which was largely drafted by the Commission, gave effect to this recommendation. The Act makes it absolutely clear that to prove lack of consent it is not necessary for there to be evidence that the complainant protested or physically resisted, or that she sustained physical injuries. Judges are now required to direct juries along these lines in appropriate cases.

Another area which needs to be considered is the complex issue of what is legitimate cross-examination. The aim, ideally, should be to ensure that material is only put before juries when it is properly relevant to the issues in the case. This is not so much a matter of legislation as of educating judges and barristers to think more critically about what is and is not pertinent to the issue of consent, or the complainant's credibility as a witness. It also requires a serious analysis of what are, and are not, legitimate cross-examination techniques.

In the long run, perhaps the factor which will have the greatest impact on conviction rates in rape trials will be changes in community attitudes. On this point there may be room for a note of guarded optimism. In Victoria there has recently been an outcry about the comments made by a County Court judge in sentencing a man for raping a prostitute, after the woman had indicated that she did not want to continue having sex with him. It is understandable that many people should have been upset at the judge's suggestion that the accused should get a lesser sentence because the victim was a prostitute. Nonetheless, it also must be kept in mind that the jury had found the accused guilty. Even a few years ago, it would have been unlikely for such a case to have found its way into court, let alone to have resulted in a conviction.

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ABORIGINAL WOMEN AND THE LAW

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IN ORDER TO FULLY UNDERSTAND THE IMPACT OF EUROPEAN LAWS AND lifestyle, violence and alcohol, and to gain some idea of how entrenched and misused these influences are in contemporary Aboriginal society, it is necessary to examine the factors leading up to it. It is a sad legacy of history that the Aboriginal people were colonised by a people who considered it their God-given duty to go forth and civilise the heathen, at a time when humanity was at best based on superiority, and at worst, at its lowest point. Aboriginal women have borne the brunt of much of this legacy.

Traditionally, women in Aboriginal culture have a status comparable with and equal to men. They have their own ceremonies and sacred knowledge, as well as being custodians of family laws and secrets. They supplied most of the reliable food and had substantial control over its distribution. They were the providers of child and health care and under the kinship system, the woman's or mother's line was essential in determining marriage partners and the moiety (or tribal division) of the children.

Consecutive policies and practices have served to undermine that status. While it would not serve any purpose, however, to itemise these in this paper, suffice to say that whatever the cause, by distorting and rejecting the Aboriginal experience, non-Aboriginal people absolve themselves of guilt. This has manifested itself in a double-edged sword—a society, which while rejecting Aboriginal people, still expects them to accept the values of the dominant society.

Recent anthropological studies have also contributed to a view of Aboriginal women, where if they appeared at all, were portrayed as the passive victims of white and Aboriginal men alike, and Aboriginal men as the freedom fighters. Male social and psychological researchers unquestioningly refer to the compromising of traditional male roles with the domestic or welfare economy, while describing women as conforming more easily to the welfare identity, implying that there is no difference between Aboriginal and Anglo cultures at least in relation to women (Hunter 1990). As Jocelynne Scutt writes, however, 'The invisibility of white women's culture and the

secondary role (white) women have . . . has a tendency to pollute any culture' (Scutt 1990). This, coupled with the experience of European settlement has had the effect of disempowering Aboriginal women, downgrading their role in society and silencing their cultural voice.

One of the most disempowering acts of all for women particularly was the 'assimilation' policy which saw Aboriginal babies taken from their mothers. The devastating effects of this institutionalisation and forced adoption of Aboriginal infants and children will continue to be a major factor in Aboriginal over-imprisonment for both sexes for a long time to come. A perusal of the backgrounds of the deaths investigated by the Royal Commission into Aboriginal Deaths in Custody reveals how common this was.

The Big Picture

There is little information available specifically on Aboriginal and Torres Strait women and the law. This in itself is symptomatic of the issues relating to Aboriginal women and the law, and for this reason, numerical data does not form a major part of this paper.

Statistics show, for instance, that in 1989, Aboriginal women represented some 16.3 per cent of the female prison population, compared to the figure for Aboriginal men of 14.1 per cent of the total male prison population, indicating that the situation for women is worse than for men. These figures depict one day of the year only, however, and caution should be used when looking at them. For instance, in the Northern Territory, Aboriginal women represented 100 per cent of the inmates at the time of the census, an appalling distribution you might think, until you see that this actually represents three women in total. The number for Aboriginal men was 240.

Indeed, the numbers are so small it is hard to gain an accurate or reasonable picture. According to the National Prison Census 30 June 1990, there were 105 Aboriginal and Torres Strait Islander women out of the total female prison population of 778, a decrease from the 1989 figure of 111. This represents 13.5 per cent and 16.3 per cent of the total female prison population respectively. (There were 2,041 Aboriginal and Torres Strait Islander men at the time of the National Prison Census).

The most frequently committed offences usually involved non-payment of fines, drunkenness (or the new improved, disguised lawful means of arresting for intoxification) and social security fraud—the result of extreme poverty.

In terms of recidivism, Aboriginal women (75 per cent) again rate lower than Aboriginal men (80 per cent). Compared to non-Aboriginal men (48 per cent) and women (29 per cent), the rate is substantially higher. Aboriginal women also returned to prison sooner than non-Aboriginal men and women (Broadhurst 1988).

Notwithstanding the available data, there is a deficiency of conclusive statistics to accurately portray the position of Aboriginal women in relation to the law. There is a need rather, to rely on anecdotal evidence and first hand accounts, such as those mentioned in the Discrimination in Government Policies and Practices Report where grave allegations were made relating to 'the sexual harassment and rape of Aboriginal women and girls by police while in custody' (Equal Opportunity Commission 1990) and the investigations carried out by the Royal Commission into Aboriginal Deaths in Custody.

Royal Commission into Aboriginal Deaths in Custody

The Royal Commission, by focussing on the underlying issues of Aboriginal disadvantage generally, and in each individual death, emphasised that underlying issues such as racism, alienation, poverty and powerlessness resulting in hopelessness and alcoholism all contributed more significantly to the imprisonment of Aboriginal people than any degree of criminality.

Generally speaking, the Royal Commission into Aboriginal Deaths in Custody did not include specific references to problems faced by women. Investigations by the Royal Commission into the individual deaths of the eleven women within their scope of inquiry reveal, however, the considerable disadvantage that these women faced within the wider society as well as within the criminal justice system.

One of the deaths involved the apparent suicide of a young girl aged fourteen years and three months, Karen Lee O'Rourke. Both of Karen's parents, an Irishman and an Aboriginal woman, drank heavily and had a history of conflict with the law. Karen was born with a disfigurement (webbing between the fingers and toes), and was raped before she was three years old. She was placed in an institution when she was six, after her mother left. She was raped again at the age of twelve and after ten years, when she was finally reunited with her mother, was unable to communicate emotionally with anyone.

Karen died after starting a fire at the Birralee Children's Home where she was being detained in yet another institution, before being sent back to Sydney. Before she died, the doctor who treated her asked 'Why did you want to kill yourself?' 'I didn't', she replied, 'I just wanted to get out of the place' (Wyvill 1990)—no suicide at all in fact.

In the case of Barbara Yarrie, Commissioner Wyvill states that 'Barbara's criminal history resulted largely from her . . . addiction to alcohol from an early age'. She had been taken to watch-houses some forty times for drunkenness, as well as on occasions for other 'crimes' associated with alcohol abuse. And while her criminal record reveals a history of drunkenness and poverty, she was never convicted of crimes against the person. Like her young sister Fay and all the other deaths investigated by the Commission, 'Barbara Yarrie witnessed very little justice in her life' (Wyvill 1990).

Commissioner Wyvill also sums up the circumstances surrounding Fay Yarrie's death. He says:

> Fay Yarrie died because the place to which she was removed was designed without consideration for her safety. She died because the people charged with the responsibility for her welfare were unable or unwilling to care. The horrible circumstances of her death—being set upon by another in a cell in which she was placed for 'protective custody'—underlies the obscenity of placing severely intoxicated people in police cells (Wyvill 1990).

All of the deaths have a common thread of destitution, drunkenness and hopelessness—'The Young Woman who Died at Ceduna', was a life-long chronic alcoholic and a victim of many assaults; Christine Jones's life was 'affected by family dislocation and cultural breakdown and habituation to alcohol' (O'Dea 1989). Joyce Thelma Egan died from an overdose of a potent cocktail of alcohol, Mogadon, Serepax and Doxepin; Muriel Binks suffered a life threatening illness, masked by intoxification and undetected, with the police involved blamable for 'inadequate screening procedures, infrequent, neglectful and insensitive supervision, poor training

and ingrained and misconceived attitudes concerning the behaviour and management of the severely intoxicated' (O'Dea 1990).

The Other Side of the Coin

Aboriginal women's contact with the justice system does not involve only their direct contact with the police, the judiciary or prisons. Their contact must also be counted in terms of being the wives, mothers and sisters of the prodigious number of Aboriginal prisoners and as the victims of homicide, assault and rape crimes at levels unheard of in the rest of Australia and against which the criminal justice system seems helpless.

Criminal activity can be delineated along male/female lines. As for non-Aboriginal groups, it is a fact of life that there is one law for men and another for women. Men are responsible for the vast majority of crime committed, yet it is women who suffer disproportionately.

Men rarely suffer sexual assaults, domestic/family or other physical violence at the hands of women. However, for many women being the victims of such crimes at the hands of men is an all too common occurrence.

Comprehensive studies of violence in Aboriginal communities in the last couple of years, particularly in the Northern Territory, the Kimberleys and in North Queensland, have revealed a degree of violent crimes against women which is affecting the future existence of whole communities. Data from those studies expose a level of death by homicide among Aboriginal women by their spouses, sons, grandsons, uncles, and the list goes on to include all male relatives, at a rate which rivals that of all Aboriginal deaths in custody over the same period.

There were no deaths in custody of Aboriginal women in the Northern Territory during the Royal Commission reporting period, yet according to Northern Territory police crime reports, thirty-nine Aboriginal women died due to homicide. Aboriginal women in the Northern Territory are twenty-eight times more likely to die from homicide than any other Australian person (Bolger 1989).

It is also appropriate to look at the issue of violence in mainstream Australian society and compare that with the experience of Aboriginal women. While physical aggression may be seen as a feature of Aboriginal communities, the use of force in the wider population is much more common than is generally recognised. The National Committee on Violence's Report, *Violence: Directions for Australia* (1989), observes that 'violence permeates all life in contemporary Australian society' and notes that the hidden nature of this crime is such that estimates may only be in the nature of informed guesses.

One of the major similarities of violence suffered by Aboriginal and white women is the use of 'provocation' as a legitimate and acceptable excuse for men who are abusive. The major differences between violence in Aboriginal society and that in the general society appears to lie in the nature of the violence and the tendency for implements/weapons to be used against Aboriginal women and the frequently fatal outcome.

While a considerable amount of violence against women is not associated with excessive alcohol consumption, women in all levels of society, both Aboriginal and white, related the level of violence to problems with alcohol. The commendable move by most states and territory governments to decriminalise drunkenness has added another burden for Aboriginal women. The way in which governments have not

complemented the legislation with resources indicates that little has been learned by the way in which 'full citizenship' was given to Aboriginal people, when the churches and missions withdrew virtually overnight leaving no administrative structure or training and support to enable those left behind to manage their own affairs.

By not providing alternatives to police cells, such as sobering-up centres or detoxification units for detaining those excessively affected by alcohol, one answer has been to take them home. It is often the wives, mothers and grandmothers who are left to deal with the consequent violence and mental and physical problems.

The Police and the Law

As the vast majority of initial contact with the criminal justice system starts with the decisions of police, it is appropriate to examine past and present policing practices and procedures, and the subsequent impact on decisions by the courts.

The relationship between the police force, which is often the only continuing official presence, and the Aboriginal communities reflects the social imbalance where Aboriginal people are excluded from the dominant culture and placed in an inferior relationship. For women, the police role as agents of the old Aborigines Protection Boards, carrying out the assimilation policy and the zealous application of those duties, have soured the association even further.

Negative opinions are also reinforced if the only time Aboriginal people meet police is in times of conflict. An unbalanced view of police activities (and of community life on the part of the police) is bound to emerge. Criticism too has been levelled at police for the way in which they disclose the custodial deaths of relatives by the Royal Commission which found that lack of effective communication was bound to foster suspicion about the role the police have played in the deaths.

A personalised police force which consults and liaises more with communities is one way of changing perceptions. The Community Justice Panels in Victoria provide an excellent example of a consultative, liaison exercise which successfully brings together police and the community and which has been effective in reducing the number of Aboriginal people arrested in centres which have the program.

Another method for improving relations is to address the cultural ignorance and consequent racism within the police force. The development of cross-cultural training and recruitment procedures which exclude racists from the police service, rather than specialist services or increased numbers of police, is the approach needed.

The proposals put forward to receive funding to implement recommendations from the Royal Commission's Interim Report highlight the differing approaches. In Queensland, for example, the proposal outlined improvements to police training and enhanced recruitment practices as well as the establishment of alcohol rehabilitation centres. In New South Wales, they went for more police and bigger and better cells in areas of high Aboriginal population. It does not take a genius to work out which will have the effect of increasing prisoner numbers and amongst which minority group that increase will occur.

One answer I would not advocate is the establishment of Aboriginal police aide schemes as they presently exist. The criticisms concerning the scheme contained in the Western Australian Equal Opportunity Commission's Report, such as discriminatory powers of arrest limited to Aboriginal people only, doing all the 'dirty work' of police in Aboriginal communities with none of the benefits received by

regular police officers and limited career structure, are often repeated to me in forums across Australia. Not the least of these criticisms is the arrest and detention of police aides in Central Australia accused of raping an Aboriginal woman in their custody. The police aides themselves speak of being 'caught between two worlds, neither full members of the police force, nor accepted by the local Aboriginal Community' (EOC 1990).

Aboriginal communities must also recognise that entrenched attitudes against police are inhibiting the fostering of closer relationships. While we have been force-fed non-Aboriginal culture, the wider Australian community knows little of the societal and cultural values of Aboriginal people. Much of the police mismanagement and misinterpretation is based on cross-cultural ignorance and education through closer ties will alleviate a great deal of the ignorance.

Traditional Law: Solution or Illusion?

Traditional law is not necessarily an appropriate method to address the question of over-imprisonment and assault of Aboriginal women. Whilst conceding that traditional law solutions have much to offer, the current cry to return wholesale to the old ways is asking for trouble.

Groups of Aboriginal women are saying that they are being subjected to three types of laws, as women in the Northern Territory have so appropriately described it: 'white man's law, traditional law and bullshit law', the latter being used to explain a distortion of traditional law used as a justification for assault and rape of women, or for spending all the family income on alcohol and sharing it with his cousins, justifying the action as an expression of cultural identity and as fulfilling familial obligations. It is suggested that this is merely using 'Aboriginal tradition to justify what is in essence selfish exploitation based on an individual desire for alcohol' (Gibson 1987). It is ironic that it is the imposition of the white man's law on traditional law which has resulted in the newest one.

Numerous too are the instances where defence lawyers have abused customary law. In rape cases, a dangerous precedent has been set where sexual assault is cited as traditional or acceptable by quasi-anthropologists and all manner of experts. In Canberra this year, the defence for a particularly hideous attack on an Aboriginal woman was based on the loss of lands and culture on the part of the young males involved. Apparently the young woman had no such defence although she too had lost her heritage.

The judge accepted these 'extenuating' circumstances and gave the two men involved five and eight months respectively. The sentence for the main offender was later extended after an appeal. While the present system provides little incentive for the rehabilitation of violent men, it would have been preferable that the judgment mention something of the real situation. It was the combination of being young, male and drunk which led to the assault!

On the positive side, a case in the Northern Territory which involved the rape of a fourteen-year-old girl who was taken into 'protective custody' and released to walk home alone at 1.30 am in Alice Springs came to a different conclusion. Kearney J. found in this case that the evidence to have sex with the child under customary law irrelevant, that 'Aboriginal women have a right as all other women do to be protected by the law . . . Rape . . . in circumstances as this case where there are no elements of tradition involved, are crimes of violence in their essence'.

The implications of the increasingly common findings based on so-called cultural norms are frightening. Apart from the fact that these types of defences set dangerous precedents, they also denigrate Aboriginal men and Aboriginal culture. My grandfather had no need to resort to rape. His fifty-year relationship with my grandmother was based on love and mutuality.

The author is not an advocate of imprisonment or punishment generally—a traditional response to rape of Aboriginal women might prove an appropriate and long-term deterrent.

Solutions: Do Any Exist?

Solutions will come from within the Aboriginal community. Strong communities are made up of strong individuals brought about by the development of culturally specific training, which balances the physical, emotional, social and spiritual aspects of their lives.

One of the other manifestations of unexpurgated guilt of non-Aboriginal Australia has been the construction of Aboriginality. In the past, Aboriginal Australia was a multicultural society with hundreds of languages and 'tribal' groupings. The contemporary sense of community largely results from the common rejection by the white society. From the fractured societies of the Aboriginal past there has arisen a powerful sense of cultural identity, a commonality of purpose.

One important measure to ensure the success of community work remedies is to encourage and facilitate the growth of Aboriginal organisations and infrastructure to provide services to Aboriginal people. The revitalisation of Aboriginal culture and identity has come through the emergence of Aboriginal community organisations such as the various legal, medical or health services, arts and craft co-operatives, housing companies or sporting bodies. It is through such organisations that the avenue for change will continue to emerge.

In the field of criminal justice where states and territories have direct responsibility, differing laws, legal remedies and alternative services, the delivery of coherent community based initiatives, appropriate to the needs of Aboriginal people, is extremely difficult. Nevertheless there are many ways for achieving, through close consultation and consensus on the common objectives, greater consistency in these criteria throughout rural and urban Australia.

Community development, rather than social justice options offer the best chance for Aboriginal self-management and self-determination. The big picture of social justice, part of a grand vision, does not take account of local nuances or that resources of communities may be adapted to fit in with solutions, whereas community development occurs when communities identify their own problems and solutions are adapted to address these, using the resources within the community to develop and implement their own solutions.

It is with that commonality of purpose, through the resurgence and strength of positive and powerful Aboriginal community organisations that change will emerge. While non-Aboriginal people have a role to play as facilitators and advisers, the solutions will only be effective if they are developed by Aboriginal people, with services staffed and controlled and delivered by Aboriginal people. Non-Aboriginal people who cry racism at such specialist endeavours, should ask themselves where are the Aboriginal women at mainstream refuges, at rape crisis centres. Why don't the courts, the police or the health facilities treat the assaults and rape of Aboriginal women as seriously as for non-Aboriginal women? For Aboriginal women, they should question the heavily male-oriented organisations and demand their right to be heard as is culturally proper. The infighting and criticism of Aboriginal people by Aboriginal people has got to stop. We cannot go back but we can go forward, taking all that is positive and good and blending it with all that is acceptable.

Conclusion

It may be said that the issues facing Aboriginal women and the criminal justice system are a double indemnity; a reflection of the wider issues of dispossession, alienation, poverty, and discrimination which feature customarily in the everyday life of Aboriginal people, as well as the socio-economic position of women generally within a male dominated 'western' society. These issues will never be fully resolved while Aboriginal women occupy, whether by ignorance or design, their current position in Australian society. And, as Jocelynne Scutt writes 'white women will be advantaged if the visibility of black women in Aboriginal culture is properly recognised by dominant Anglo-Australia' (Scutt 1990).

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MIGRANT WOMEN AND THE LAW: BARRIERS TO ACCESS AND EQUITY

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THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION ADMINIsters several pieces of federal anti-discrimination legislation, including the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*, which together provide important rights to migrant women, particularly in the areas of racial discrimination, sexual discrimination, and harassment.

A brief overview of some of the barriers to access and equity for migrant women, particularly those in the workforce, the difficulties that can arise in deciding if legal rights have been infringed, and difficulties experienced by migrant women in gaining access to legal protection and redress is presented below.

The Human Rights and Equal Opportunity Commission has been involved in consultations with the Australian Law Reform Commission on possible reforms to family, contract and criminal law. Some of the provisional proposals made by the Law Reform Commission which are of importance to migrant women will also be discussed.

Human Rights Framework

In addressing the general issue of migrant women and the law, it is relevant to consider what the international community has adopted as fundamental rights regarding access to and participation in the legal system. These rights and standards are set out in international covenants and declarations negotiated through and adopted by the United Nations.

The International Covenant on Civil and Political Rights (ICCPR), for example, provides that:

> All persons are equal before the law and are entitled without discrimination to the equal protection of the law (Article 26).

Other stipulations under the Covenant include the rights:

- to equality before the courts and tribunals, and to a fair hearing in any criminal case or law suit; and in determination of any criminal charge to guarantees including the right of every person;
- to be informed promptly, in detail and in a language the person understands of the nature and cause of the charge;
- to be tried without undue delay;
- to be tried in his or her presence, and defend him or herself in person or through counsel of his or her choosing;
- to have legal assistance assigned where required by the interests of justice, free of charge where the person has insufficient means to pay;
- to examine witnesses;
- to have the free assistance of an interpreter if he or she cannot speak the language in court (Article 14).

The International Convention On The Elimination Of All Forms Of Racial Discrimination (CERD) similarly provides the right of everyone to equality before the law, regardless of race, colour, or national or ethnic origin, including the right to equal treatment before tribunals and other organisations administering justice; and the right to security of person and protection by the State against violence or bodily harm (Article 5).

The Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW) provides that women have the right to equality with men before the law (Article 15), and that existing laws, regulations, customs and practices which discriminate against women should be modified or abolished (Article 2).

The general principle emerging from these international conventions is that the law should apply uniform standards, without discrimination on the basis of sex, race, colour, descent or national or ethnic origin. Australia is a signatory to these and other conventions and has sought to implement some of these rights in federal and state anti-discrimination and equal opportunity legislation, although not all rights can be effectively addressed in legislation alone.

Principles of these conventions have also been embraced in Access and Equity and Equal Opportunity policies and programs, and in the Federal Government's policy on Multiculturalism (National Agenda for A Multicultural Australia).

Philosophy not Implemented in Practice

While these standards set in place a strong philosophical basis for fundamental changes in the administration of our social and legal systems to accommodate the interests of immigrants, in practice changes have not been as effective as hoped. Translating access and equity into practice is still often based on a lack of understanding of the needs of people of non-English speaking background which can lead to stereotyping, labelling and marginalisation.

The process of dealing with these people's needs too often results in special, segregated programs subject to the vagaries of budgetary generosity or constraint, and to implementation by people lacking cross-cultural skills. In the end, the process of accommodating the needs of immigrants is one of making the people fit the system, rather than making the system fit the people.

Barriers to access and equity

The Human Rights and Equal Opportunity Commission's principal statutory obligation is to accept, investigate and seek to resolve complaints of discrimination and violations of human rights. In handling complaints valuable information about the difficulties people encounter is acquired. Barriers to access and equity identified by migrant women in their complaints and in discussions with the Commission include:

- discrimination in employment, in promotion and in access to training opportunities;
- lack of access to English language training;
- lack of access to adequate child care facilities;
- poor interpreting services;
- difficulties in obtaining recognition of overseas qualifications;
- difficulties in access to legal protection and redress.

These barriers are sometimes the result of racism and discrimination. At other times, they can arise out of misunderstanding or ignorance. Misunderstandings between workers and employers that arise from cultural differences can create major obstacles to equal participation for migrant women workers. Many employers do not appreciate or are simply unaware of the difficulties faced by people from non-English speaking backgrounds and tend to treat difficulties in the workplace as personal rather than institutional or systemic problems.

Conversely, many migrant women lack an understanding of industrial relations practices and of laws that offer protection for their rights. They are unable to negotiate the system to obtain redress. The Commission has found that many situations which begin as cultural or industrial misunderstanding or communication breakdown between a worker and management, escalate into major conflicts. These are not necessarily cases of racial discrimination. Nevertheless, they impede the migrant worker's ability to actively participate in the workforce and create unnecessary barriers to industrial democracy.

Whether caused by racism and discrimination or by misunderstanding or ignorance, the barriers that confront migrant women workers must be tackled. There

are already avenues for legal protection and redress but often migrant women workers face obstacles in obtaining access to these.

Access to Legal Protection and Redress

The Human Rights and Equal Opportunity Commission was established by the Federal Parliament under the Human Rights and Equal Opportunity Commission Act 1986.

The Commission promotes the acceptance and observance of human rights and equal opportunity by developing public awareness of these rights through public inquiries, community education and individual complaint handling. The Commission is a permanent independent statutory body and is responsible for the administration of four Commonwealth Acts: the *Racial Discrimination Act 1975*; the *Human Rights and Equal Opportunity Commission Act 1986*; the *Sex Discrimination Act 1984*; and the *Privacy Act 1988*[1].

The two pieces of legislation administered by the Commission which are most relevant for migrant women are the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*.

The Racial Discrimination Act 1975

This Act makes discrimination on the grounds of race, colour, descent or national or ethnic origin unlawful in the areas of access to public places and facilities, accommodation and the sale of land, provision of goods and services, advertising and employment. It is unlawful for an employer or a person acting or purporting to act on behalf of an employer: to refuse or fail to offer work which is available and for which a person is qualified; to refuse or fail to offer a person the same terms of employment, conditions of work and opportunities for training and promotion that are available for other people with the same qualifications; or to dismiss a person because of that person's race, colour, descent or national or ethnic origin.

Employers and principals can also be held responsible for the discriminatory acts of their employees and agents, unless they can show that they took all reasonable steps to prevent discriminatory acts occurring.

Until recently, complaints lodged under the *Racial Discrimination Act 1975* required 'race, colour, descent or national or ethnic origin' to be the dominant reason for an act of discrimination in order for a complaint to be established under the Act. This requirement, that race be the dominant reason, has been removed and it is now sufficient for the racial basis of the act to be one factor in the decision.

In addition, complaints under the Racial Discrimination Act can now be made on the basis of indirect discrimination. Indirect discrimination can be explained as treatment which on the face of things seems 'neutral' or 'fair' or to be common practice but which in fact operates unfairly on a particular person or group because of their racial or ethnic origin. For instance, prescribing a certain level of literacy for a job vacancy, where advanced language skills are not an essential prerequisite for the job, may have the effect of disadvantaging applicants from non-English speaking backgrounds.

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1 As at February 1993, the Commission also has the responsibility for the administration of the *Disability Discrimination Act 1992.*

The Sex Discrimination Act 1984

The Sex Discrimination Act makes it unlawful to discriminate on the basis of sex, marital status or pregnancy in the areas of employment, education, the provision of goods, services and facilities, accommodation, disposal of land, club membership and the administration of Commonwealth laws and programs.

It is also unlawful for trade unions or employment agencies to discriminate against a person on the ground of a person's sex, marital status or pregnancy.

The Act contains specific provisions in relation to sexual harassment in employment and education. As with the Racial Discrimination Act, the Sex Discrimination Act provides for indirect discrimination and vicarious liability on the part of employers.

Both the Racial Discrimination Act and the Sex Discrimination Act provide an effective structural mechanism for migrant women workers who have been discriminated against on the basis of their ethnicity or their gender. However, the Human Rights and Equal Opportunity Commission has found that few migrant women use the legislation to combat the discrimination they suffer.

Barriers to the Lodgement of Complaints

Although federal and state legislation now provide effective means for redress of many of the barriers to access and equity, it appears that few migrant women are aware of their rights, how they can assert them, or of the authorities (like the Human Rights and Equal Opportunity Commission) responsible for protecting them.

In a report commissioned by the Office of Multicultural Affairs lack of information was identified as one of the most fundamental barriers to access and equity for migrant women (Alcorso 1989). Very few of the women surveyed knew about the existence of anti-discrimination legislation or how to use it. Few women took action over cases of race and sex discrimination in the workplace. It would also appear that those women who do have some knowledge of the action they can take are generally reluctant to do so. Intrinsic barriers such as cultural factors often affect the willingness of women to lodge complaints. Many of the women surveyed did not report sexual harassment in the workplace because they were ashamed and felt it reflected badly on them. They also felt unable to complain against bosses and supervisors, because they were fearful of losing their jobs.

Another recent study for the Bureau of Immigration Research gives further insights into the particular difficulties faced by refugee and immigrant women, and the factors which impede their settlement in Australia (Pittaway 1991). According to this study, men from newly arrived migrant families are usually the first to seek work. If they are successful, this gives them the opportunity to learn a functional level of English and to adjust more rapidly to Australian culture. Children pick up English quickly at school and 'adapt easily to a new and often more liberal lifestyle'. Women devote their energies to establishing a new home, and must often seek employment if the husband is unsuccessful or to supplement the household income. However, they generally have to accept any work available, which is often 'lowly paid, dirty, boring and monotonous work'. Once back at home, they still take primary responsibility for housework and child raising, with the men relatively free to socialise or take courses to further improve their English skills.

The end result of this process is that the migrant or refugee women often fail to learn English, or to attend job-training courses due to lack of child care and exhaustion. Thus women experience major inequalities even in the process of settlement, particularly in regard to the gaining of English language skills. For newly arrived immigrant women, the barriers to learning about their rights often appear to be insurmountable.

The issue confronting the Commission, other anti-discrimination bodies and indeed, all other government bodies administering laws and services, is how to provide migrant women with the information and skills they need to make proper use of the mechanisms available.

The Human Rights and Equal Opportunity Commission has adopted a range of access and equity strategies for migrant women and people from non-English speaking backgrounds generally. For example, in 1988 the Commission undertook a pilot project to address the specific difficulties faced by immigrant women of non-English speaking background in becoming aware of the provisions of anti-discrimination law. Following consultations with relevant community groups, announcements were broadcast on ethnic radio stations in Turkish, Spanish and Khmer. These provided dramatised presentations of employment related situations such as sexual harassment and dismissal on the grounds of pregnancy, and access to services such as accommodation. Information kits were distributed to supportive community organisations and the Telephone Interpreter Service was used as a follow-up for inquiries. A similar project was also undertaken in Melbourne in 1989, targeting speakers of the same three languages.

The pilot project provided valuable feedback to the Commission from migrant women about what they perceived as the most important barriers to achieving access. It is worth briefly repeating some of these because they reinforce the findings of Alcorso's (1989) study of migrant women workers. They included: distrust of bureaucracy; an incomplete grasp of the mechanisms that would be set in train when laying a complaint; fear of reprisals or lack of witnesses; and lack of confidence in written and/or spoken English. As a result, most of the women preferred to approach a trusted bilingual community worker or friend in the first instance, before venturing into any government agencies.

Since the pilot study the Commission has attempted to redress some of the problems. For example, it will accept written complaints in any language, and makes no charge for the provision of interpreting and translation services. There have been more enquiries about the legislation, and a group complaint was recently lodged by a union on behalf of a group of women who have allegedly been discriminated against in employment. This integrated approach, involving organisations such as unions or community welfare groups which can advocate on behalf of women who need assistance in laying complaints, may be the most effective way to break down the barriers to access[2].

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2 As at February 1993, the Commission has initiated a number of projects seeking to improve migrant women's access to anti-discrimination mechanisms and bodies. For example, a series of six radio announcements about different aspects of discrimination dealt with by the Commission were broadcast for the Arabic-speaking communities through the Australia wide network of community radio stations broadcasting in languages other than English.

Through the Community Relations Strategy, launched under the National Agenda for a Multicultural Australia, the Commission has developed an information resource package called 'Unlocking the System'. This is aimed at community workers to help them to empower their clients

Employment Related Projects

Just as it is important to inform migrant women of their rights under our legislation, it is equally important to ensure that others observe those rights.

In the area of employment, the Commission's experience is that many employers are unable and/or unwilling to identify discriminatory acts, practices and policies in the workplace. This behaviour, whether it is deliberate or unconscious, may amount to unlawful discrimination. The Commission has been working with employers and trade unions to develop a more positive and structured approach to equality of opportunity in the workplace which satisfies their obligations under the legislation.

Two pilot projects have been undertaken in private sector companies, with the cooperation of management and on-site union representatives. In each case, while little evidence was found of serious discrimination or poor race relations, participants agreed that there was scope for improvement in such processes as recruitment, job evaluation and promotion through the establishment of a more equitable working environment with greater job satisfaction, improved efficiency and productivity. As a result of these pilot projects, the Commission has developed a training package to improve race relations in the workplace[3].

The Race Relations in the Workplace package will be run in fifteen workplaces throughout Australia to demonstrate how employers can improve their ability to effectively manage culturally diverse workplaces for the benefit of industrial relations and productivity.

Another project with particular relevance for migrant women workers is the Inquiry being held by the Sex Discrimination Commissioner into Sex Discrimination in Over-Award Payments. The Inquiry will be of particular significance to the majority of women in the paid labour force who work under minimum rates awards. The main areas involved are the retail and manufacturing sectors, industries where migrant women form a significant part of the labour force. However, our research associated with the Inquiry has also indicated that many migrant women work from home and are not represented by unions, and therefore do not have access to union organisations for advice and assistance in improving their wages and conditions.

It is well established that Australia's labour force is one of the most highly sex segregated labour forces within the OECD group of countries, with 'women's occupations' and industries attracting lower rates of remuneration than 'men's occupations.' Women continue to earn significantly less than men in all categories of earnings, all components of earnings, all major occupational groupings and nearly all categories of benefits and allowances. Research has shown that within this already sex segregated workforce migrant women tend to occupy the bottom of the occupational hierarchy in these 'women's industries.'

Submissions to the Review of Permanent Exemptions Under the Sex Discrimination Act have raised concerns about the lack of tax deductibility for child care expenses, and the consequent impact upon women's participation in the

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of non-English speaking background to solve their own problems and protect their rights through information and strategies to access the system. The package covers strategies in relation to problems with immigration, social security, education, employment, consumer affairs, neighbourhood issues, tenancy, police and domestic violence.

3 A video, *Managing Cultural Diversity,* has also recently been produced and was screened on SBS TV in March 1992.

workforce and on their income. As indicated earlier, lack of access to adequate child care facilities was identified as a significant issue for migrant women.

It is relevant to note here that another international human rights instrument, Convention No. 156 of the International Labour Organisation concerning Workers with Family Responsibilities, which was ratified by the Australian Government in March 1990, has enshrined the principle that men and women workers with responsibilities for dependent children or other family members in need of their care or support should not be prevented by those obligations from either preparing for, entering in, or advancing in economic activity (Article 1). In this context, access to child care can be a critical factor.

By way of implementing this Convention into domestic legislation, the *Sex Discrimination Act 1984* has been amended to include family responsibility as a ground of unlawful discrimination in certain areas. It is now unlawful to dismiss a person from employment on the ground of their family responsibilities. At present the Federal Government is conducting community consultations and assessing whether these amendments should be extended to include other areas covered in the Act.

National Inquiry into Racist Violence

The Human Rights and Equal Opportunity Commission is also vested with important powers to investigate more wide-ranging and systemic forms of human rights violations, through a public inquiry process. For example in 1989, the Human Rights and Equal Opportunity Commission commenced a National Inquiry Into Racist Violence in response to concerns in the community that racist violence was increasing. The report of the Inquiry was released in April 1991.

The Inquiry found that there have been serious incidents of violence, harassment and intimidation against people of non-English speaking background, their property and their places of worship. Whilst the Inquiry found that racist violence is nowhere near the level it is in many other countries, racial harassment and intimidation are common experiences for migrants, and these result in a threatening environment.

Several factors can influence the extent of racist violence against particular ethnic groups. Being visibly different, either in physical appearance (for example, being Asian) or dress (for example, wearing the hijab or Muslim women's headscarf) is often enough to provoke racist harassment, intimidation and, at times, violence. Some ethnic groups, such as Asians and Jews, have faced greater hostility than others, whilst hostility towards people of Arabic descent increased during the Gulf Crisis. Factors such as changes in patterns of immigration, levels of unemployment, crime reports, international conflicts and public statements by prominent Australians may trigger and inflame racist actions.

Australian Law Reform Commission¾Multicultural Reference

The Australian Law Reform Commission has also recently reviewed certain laws having regard to the multicultural nature of the Australian community. Specifically, the Federal Attorney-General asked the Law Reform Commission to consider whether Australian family law, contract law and criminal law are appropriate to a society made up of people from different cultural backgrounds and ethnically diverse communities. In particular, the Commission considered whether the principles underlying the relevant law, and the mechanisms available for resolving disputes arising under or concerning the law, take adequate account of the cultural diversity of Australian society. The Human Rights and Equal Opportunity Commission was involved in consultations with the Law Reform Commission regarding this review. Some of the relevant findings and recommendations of this Reference are discussed briefly below.

Contract law and the criminal trial

In our society, agreements to lend money are not only bound up by written contracts with numerous terms and conditions, but are also governed by various pieces of legislation such as the Trade Practices Act. Even average Anglo-Saxon Australians can have difficulties in comprehending their basic rights and obligations under credit agreements.

For some ethnic groups, the concept of 'consumerism' may be quite foreign, having lived in a place or kin relationship which accorded less significance to material needs, in a culture not characterised by possessive individualism and/or where goods were obtained by exchange or customary giving and receiving.

The Law Reform Commission's consultations suggest that many people, especially recently arrived migrants, have little understanding of how banks, building societies and credit providers operate. For many, the family is the main source of economic support. Some migrants may have come from countries where kin relationships play a key role in their economic survival. They may expect the same flexibility in loan repayments as would be allowed by their kin. The Commission also found that there is a widespread lack of understanding of the role of a guarantor under a credit agreement.

In some ethnic communities, more reliance may be placed on oral communications, and the parties may regard these communications as governing their rights and obligations, rather than a written agreement.

The Australian Law Reform Commission suggested that people from non-English backgrounds are particularly vulnerable to practices such as overselling of credit leading to over-commitment, faulty information about terms and conditions, and inappropriate reliance on guarantors (1991).

There is also a lack of knowledge about and understanding of consumer protection laws and dispute resolution mechanisms which, according to the Commission, is a significant reason why immigrants and people of non-English speaking background have not exercised their rights when a dispute occurs.

Consistent with our findings regarding migrant women's distrust of bureaucracies, the Law Reform Commission found that many migrant people have a fear of dealing with public institutions such as courts and consumer affairs departments, particularly where they have come from a country ruled by a repressive regime, and consequently have a fear and distrust of authority.

According to evidence given by the National Inquiry into Racist Violence, such a fear may also emerge as a barrier to reporting incidents of racist violence to police. Immigrants that had experienced violence and trauma at refugee camps, civil wars and at the hands of special police or the military were nervous about bringing themselves to the attention of any authorities. This fear, along with reluctance to disclose personal financial details, may also impede applications for legal aid by migrant people.

In making a range of proposals for reform in this area of consumer law, credit and insurance, the Law Reform Commission identified two underlying principles, which could be adapted to other areas of law:

Information People who make legally enforceable agreements should have as much information as possible about the nature of obligations they have assumed and the consequences of failing to comply with them so that, as far as possible, disputes will be avoided.

Dispute resolution Access to mechanisms by which people can exercise their legal rights if a dispute arises should be increased.

The Law Reform Commission also carried out extensive consultations in regard to migrant people's experience of our criminal justice system. In Australia, criminal trials are run on an adversary system, in which the prosecution and the defence prepare and present their cases before a neutral tribunal. As the Australian Law Reform Commission (1991) notes:

> The main purpose of the system is not so much to find out the truth but to ensure that a person is convicted and sentenced only where it is possible to say without reasonable doubt that the defendant did what he or she has been charged with.

In contrast, many immigrants will be more familiar with a European inquisitorial system, involving a wide ranging judicial inquiry, and have substantial misunderstandings about the adversary system.

If the parties to proceedings do not have an equal opportunity to present and challenge evidence, the adversary system can tend to break down. Some particular problems identified by the Commission are that the evidence of non-English speaking witnesses or witnesses with poor English skills may be distorted by misunderstanding the questions, and there may not be a cultural or linguistic equivalent of the terms used. The demeanour of a witness can be an indicator of his or her honesty or reliability in our court system. However, as the Law Reform Commission notes, there can be cultural variations in body language. For example, avoiding eye contact can be a mark of respect for authority in some cultures, but could be misinterpreted in a criminal trial in Australia as inattention, evasiveness or even dishonesty.

In addition, interpreters are only available to assist a witness of non-English speaking background to give evidence. They are not generally available at other times of a trial to a non-English speaking defendant, thereby denying him or her the ability to hear, understand and assess other evidence, legal argument and summing up by judges.

Inaccurate responses to questions can arise from culturally different practices in answering questions. For example, a person may say 'yes' to a question, on the basis that that is what he or she thinks the questioner wants to hear, rather than addressing the question.

These are just some of the findings of the Law Reform Commission's work, which provides many other valuable insights into problems encountered by people of non-English speaking background in participating in our criminal justice system, as well as important recommendations for reform.

Law Reform

Turning to the issue of law reform as it relates to women of non-English speaking background, the most significant recommendations of the National Inquiry into Racist Violence involve a package of legislative reforms to create a range of new criminal offences and civil remedies. The Inquiry recommended that the Federal Crimes Act be amended to create a new criminal offence of racist violence and intimidation. In addition, there should also be a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence.

The Inquiry also recommended that new civil remedies be created to address less serious forms of intimidation and harassment, by amending the Racial Discrimination Act to prohibit racist harassment and outlaw incitement to racial hostility.

A more holistic approach

The reforms to contract, criminal and family law being developed by the Law Reform Commission, and the recommendations of the Human Rights and Equal Opportunity Commission regarding the creation of criminal offences and civil remedies to combat racist violence and racial harassment, are important advances in protecting the rights of migrant people.

Looking at a more holistic approach to law reform, the barriers in utilising our legal system faced by many immigrants, and indeed other people of low economic means, reflect more systemic problems associated with the fact that our legal system was principally developed by and for a propertied class and accommodates the assertion of rights based upon ownership of property. It developed in the context of a political economy predicated on the political theory of possessive individualism. (For a full articulation of this theory, *see*, for example, Hobbes, Leviathon (1988) and Locke (1964-65).)

As revealed in the Law Reform Commission's consultations, many migrant people come from societies where family and kin relationships form the foundations of society, and not ownership of property. Relationships between people in our own society have also become more complex, and the influence of Mill (*see*, for example, *On Liberty*) and Bentham (*see,* for example, *Constitutional Code* in The Collected Works of J. Bentham) has permeated political theory in Common Law countries so that a much wider, more pervasive set of rights is now acknowledged than those upon which our legal system was founded. Consequently, the occasions of conflict requiring resolution within the system have vastly proliferated. On the international scene, violations of rights associated with national conflicts during the Second World War have led to the development of international human rights instruments, such as the International Covenant on Civil and Political Rights.

In Australia, the trend has been to more specialised tribunals, Royal Commissions, Inquiries etc., to provide forums in which to identify underlying social issues and guide people and governments to solutions.

Moreover, multiculturalism in Australia has recognised a different set of imperatives than the current judicial system serves; imperatives which require a range of systems to accommodate the diverse range of needs of our community.

Against this background, it is surprising that the impetus for the current Senate Inquiry into the Cost of Justice has been so slow. It is also surprising that public statements concerning the Inquiry appear to proceed on the premise that the legal system, particularly the processes of litigation, no longer serves the general community. History clearly demonstrates that it never did, and the present problem is that it no longer serves even the group for which it was founded.

Reform must, of course include the prescription of some conduct and the proscription of remedies. While behaviour may reflect attitudes, it is possible to alter behavioural patterns to eliminate particular forms of conduct. Usually, attitude change will follow. However, specific educational programs are also essential both to identify problems and to develop strategies for structural change in attitudes.

As part of the Community Relations Strategy referred to earlier, the HREOC has initiated several projects which seek to affect both behavioural and attitudinal change. These include the community information resource package for people of non-English speaking background described above, as well as a similar package for Aboriginal and Torres Strait Islander peoples. These packages have been developed in consultation with people from these communities with a problem solving-centred approach. The objective is to enable community workers to give advice on strategies for resolving human rights problems at a local level.

Also through the Community Relations Strategy Unit a training package was designed for people who work with victims of racist violence. The package is aimed at those likely to be the first contact point for such victims, like community workers, hospital staff, teachers and police, as well as for professional counsellors.

Reform must also address process issues. The conciliation process used by the Human Rights and Equal Opportunity Commission, falling mid-way between an adversarial and inquisitorial system, has repeatedly led to the resolution of formerly intractable problems. The Commission's approach to identifying problems and strategies under our other functions has been coloured by our experience in conciliation.

It is essential that reform reflects what people actually do: HREOC's and other research indicate that people seek first to resolve their problems at a community level. The HREOC projects mentioned have the advantage of allowing development of solutions to a wide range of recurrent social and legal problems at the community level. This strategy is preferable to one whereby the individual conflicts must be funnelled up to a more centralised and monolithic curial system where opportunities for equal participation and confronting the underlying causes are so often lost. Consequently, it is vital that administrative tribunals and solutions be retained.

Conclusion

Government agencies responsible for administering our laws must be pro-active in ensuring that all people, including people from non-English speaking backgrounds, are adequately informed of their legal rights, and the mechanisms for enforcing those rights.

The Human Rights and Equal Opportunity Commission has found that it is crucial to adopt a range of strategies to ensure that anti-discrimination policies provide practical outcomes for those groups they are designed to assist.

All people must have equitable access to our country's justice system, not just those who can pay. In addition to cultural and linguistic differences, many migrant women face similar problems to the poor and uneducated in our society who, because of these factors (poverty and limited formal education), are directly and indirectly disadvantaged in accessing and participating in our legal system. Social justice initiatives that address these problems of poverty and lack of education will also benefit many migrant women. A more holistic approach to law reform is also required to redress these current inequalities.

Migrant women are entitled to the full protection of law and to be treated fairly, equally, and without discrimination. All organisations, public and private, have an obligation to identify and address the obstacles to access and equal participation that confront them.

Services that are provided to ensure access and equity for migrant people, such as interpreters, translation and other advocacy services, must be fully integrated into our justice and administrative systems, and not remain as 'add-ons' and thereby the first to be cut in times of economic recession.

Australia has committed itself in international forums to the recognition, protection and fostering of certain rights. A rights based approach carries two necessary concomitants. These are firstly, a right exists independently of and must prevail over the dictates of economic rationalism; and secondly, a right which cannot be enforced is no right at all.

In its work in implementing these internationally recognised rights, the Human Rights and Equal Opportunity Commission is committed to these principles.

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WOMEN AND ECONOMIC STATUS

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ISSUES OF DISCRIMINATION AND EQUAL OPPORTUNITY ARE CENTRAL TO improvement in the status of women in paid employment, unpaid work in the community and in redressing their traditional lack of independent financial security.

This paper presents practical analyses of indirect discrimination and its application for women in the nineties, with particular reference to bridging the gap between work and home, and bringing the guns of anti-discrimination law more directly to bear on the pay differentials between male and female workers in Australia.

The term 'discrimination' has joined the list of 'buzz' words of the 1980s. In that decade, awareness of direct forms of discrimination became sufficiently widespread for many of the worst manifestations to be dealt with. Today, few employers, no matter how misogynous, admit with pride their belief that women should be excluded from the workforce.

Two types of discrimination that most dramatically affect women in the workplace in our particular jurisdiction are marital status discrimination and pregnancy discrimination. Marital status discrimination has not received the attention it deserves. It is quite prevalent. It also overlaps with family responsibilities and parental discrimination. Marital status discrimination arises when people are excluded from jobs, promotions or denied employment benefits simply because of the fact that they are married or because of their marriage partner. The law in this area, at least in New South Wales, is uncertain when the real cause of the discrimination is to whom the person is married and not the fact that they are married.

Marital Status

The classic case is the Gai Waterhouse matter. When Gai Waterhouse, wife to Robbie Waterhouse, who is warned off all racecourses because of his involvement in the Fine Cotton substitution matter, applied for a trainer's licence she was denied that licence because she somehow might be corrupted by her relationship with her husband. There are so many obvious holes in such an illogical conclusion that there is little need to go into them, but, we at the Board have to go into them time and time again with

employers who believe that employment decisions based on such relationships are quite reasonable and appropriate.

It seems that it is one of the most blatant ways for employers to demonstrate lack of knowledge of sound management practices; that they cannot come up with any better way to manage their office than trying to exclude large numbers of people simply because they might be a problem.

Pregnancy Discrimination

Pregnancy discrimination is another overt and insidious form of discrimination that we have to deal with very regularly. Pregnancy discrimination is not just discrimination against women who are pregnant, but it is also discrimination against women who may become pregnant. It is in that area, where it is so prevalent, that discrimination is often very difficult to prove.

When an employer becomes aware that an employee is pregnant (usually because of the woman bringing it to the attention of the employer) and the employer acts in a way that is either patronising or misguided in relation to health issues, or simply makes an economic decision cloaked in some other form and sacks the employee, what is really happening? The employer is making a statement about the culture that they have in their organisation and the sort of image they wish to portray—for example, that pregnant women make people uncomfortable and therefore should be invisible. We have heard from restaurateurs who believe they should not employ pregnant women as they might 'put people off their food'.

That sort of discrimination is often difficult to attack except where there are admissions by employers who say, 'Well I have got to get rid of her because she does not really fit in. We can't have a pregnant woman as a receptionist because its bad for our corporate image.' In such cases a number of more serious underlying questions immediately spring to mind.

The increasing number of complaints of pregnancy discrimination or discrimination against women of child-bearing age, resulted in our decision to hold an Inquiry. The Anti-Discrimination Board in conjunction with the Women's Coordination Unit in New South Wales and the Department of Industrial Relations and Further Education, Training and Employment are holding a public inquiry into pregnancy discrimination. We have called for submissions from individuals, organisations and any agency with an interest in this area of discrimination. The Board sought to hear from employers about their experience of pregnant employees, or of maternity leave and their impact.

The Department of Industrial Relations in New South Wales receives over 10,000 inquiries a year on the maternity leave provisions of the *Industrial Arbitration Act* which make it an offence not to grant maternity leave where it is owed. In the ten years of the operation of that Act there has not been one prosecution. This is not because there have been no problems about maternity leave. This is borne out by the number of complaints received by the Anti-Discrimination Board about pregnancy discrimination, including the refusal to give maternity leave. For instance, a woman in the retail area asked her employer about maternity leave and was told, 'If this means that you're pregnant, let me tell you right now that that means you will be sacked. We don't believe in maternity leave here'. For employers to be able to say that means they

are either acting out of bravado or ignorance. Often it may be a combination of the two.

One of the objectives we hope to achieve with our pregnancy inquiry is to educate people about the ambit of the New South Wales anti-discrimination legislation as well as the maternity leave provisions in the industrial legislation.

Indirect Discrimination

Indirect discrimination occurs where there is an apparently neutral condition or requirement, for example in employment. Selection criteria which is easier for one group to comply with than another group based on one of the grounds of discrimination covered by the Act may amount to indirect discrimination. One example is the old requirement that police needed to be 5 feet 9 inches tall. Fewer women than men are 5 feet 9 inches or above and so this indirectly discriminated against women. It also indirectly discriminated against people of various races who are less likely to reach this height than Anglo-Saxon Celtic men.

Indirect discrimination is the real issue that we have to tackle. It leads to systemic discrimination, not just in conditions or requirements of employment. It permeates our society and our thinking. It is part of the male culture. If you have a cultural perception about the way things should be and develop rules and requirements in line with that cultural perception, then obviously you are going to be excluding other perceptions. That exclusion may amount to indirect discrimination. The interesting thing about indirect discrimination, as distinct from direct discrimination is that it is only unlawful if the discriminatory practice can be shown to be unreasonable in the circumstances. That wonderful phrase used by lawyers, 'unreasonable or reasonable', is a major issue.

Pay equity, or perhaps, pay inequity, is a classic case of indirect sex discrimination. Unfortunately, however, far too many employers still readily accept the pay differentials women suffer in all areas of employment. They still believe that training women is a bad investment as they are likely to have babies at some stage and therefore be unavailable for overtime or other demands that might be placed on them. In the 1990s we are going to confront much more subtle forms of discrimination based upon systemic bias built into so-called objective selection or assessment procedures, or in the application of apparently neutral conditions or requirements with which fewer women can comply than men.

At the moment we are still not thinking in terms of indirect discrimination. Our perceptions are still directed at the 'ists', such as sexist, racist, misogynist, which all incorporate concepts of will or purpose, if not intent. Indirect discrimination requires no such will, purpose or intent. It is concerned about the impact of work practices. It is also difficult to recognise (at times) particularly by employers and lawyers.

Historically, women have had a problem in obtaining credit. Credit cards are issued to the 'Head of household'—always assumed male. The woman's salary is usually disregarded in determining credit level for the purpose of a family obtaining a mortgage. A woman is required to get her husband or male partner to guarantor any loan application, but conversely, a husband does not need a wife's guarantee.

In response to the outcry from women credit applicants and organisations like the Anti-Discrimination Board, some banks have attempted to redress this problem. They have introduced a so-called objective mechanism for determining suitability for loans

called the 'credit scoring' system. This system was supposed to objectify and simplify the credit application process by supplying a credit officer with a list of neutral questions to be asked of any applicant. These questions attract a specific score and should the applicant accumulate a certain number of points they would simply be granted their loan. No more bad decisions, no more subjectivity, no more discrimination.

Unfortunately, the entire philosophy upon which credit scoring is based is the belief that the stability of applicants is the paramount factor to be considered when determining loans. What amounts to stability in the banking industry? It is the length of time in employment and length of time in present accommodation.

Obviously women with broken work patterns or late entry into the workforce due to family responsibilities, are going to find it difficult to meet the required standard of stability if assessed by longevity in employment.

Complaints have been received from women who, on marital breakdown, have left the family home with the children and taken up residence in rented accommodation. One such woman was employed on a fairly decent wage, but required maintenance assistance from the husband to support the children. When the maintenance payments were not forthcoming, a situation not uncommon in Australia, she was forced to seek cheaper accommodation and eventually found herself in a housing commission house. When she attempted to obtain a loan of some $3,000 to purchase a second-hand motor vehicle, she was refused because she had moved twice in one year.

In terms of indirect discrimination it is my view that the banks should go back to the drawing board in re-thinking their 'objective' credit scoring process. On another note, it seems unbelievable that the banks would want to exclude 32 per cent of full-time workers and 80 per cent of all part-time workers as clients.

Another often quoted example of indirect discrimination in assessment procedures occurred when a group of six young management trainees was asked to agree to a list of what they considered to be the most significant inventions of recent times—a not unusual assessment task. All the men in the group compiled lists which when compared appeared to be very similar. They had thought of such things as the silicon chip and aerodynamics. The only woman in the group had a totally different list which included such items as antibiotics and the contraceptive pill. The men felt uncomfortable with her list which they considered to be irrelevant and at such great variance with their own, and were irritated with the time it took in reaching a consensus.

When the final list was made up it did not include a single item suggested by the woman. As a result she did not get a positive rating from the assessors since her performance did not demonstrate an ability to be persuasive in a discussion.

Unfortunately this kind of fuzzy thinking and adoption of apparently neutral conditions or requirements which adversely impact on one group more than another is not uncommon. In recent years in New South Wales we have seen the police force finally abolish its height requirement, which excluded women and non-Anglo Celtic applicants. This was perhaps done because of the growing awareness of benefits inherent in community policing rather than reliance on physical deterrent as an appropriate goal for policing. We have puzzled over similar height and weight requirements applied to postal workers and have marvelled at the requirement of a certain degree of chest expansion for performance of the duties of a fire fighter.

Reasonableness

Of course the first question when considering any of these examples that comes to mind is 'Why'? This, as far as the legal definition of indirect discrimination is concerned, brings us to the concept of 'reasonableness'. This is because the apparently neutral requirement or condition with which a substantially higher proportion of men can comply than women, is only unlawful when that requirement or condition is not reasonable having regard to the circumstances of the case.

While it is true that complaints lodged under the NSW *Anti-Discrimination Act 1977* require that discretion be exercised to determine whether or not they have substance, the question of the reasonableness of any condition or requirement that could amount to indirect discrimination would ultimately be a matter for the courts.

The element of reasonableness, or the lack of it, in the definition of indirect discrimination is obviously of great importance, but unfortunately also one of great difficulty when it comes to providing definitions with any predictive value (*Department of Foreign Affairs v. Styles* (1989) EOC 92-265). The words 'not reasonable having regard to all the circumstances of the case' are designed to allow a balance to be struck between the unfair impact of a requirement on the one hand and the unfair impact on an employer or other respondent of removing the requirement or altering it to one with a different, more equal impact.

In the United Kingdom, the test is one of 'justifiability' but the difference in words is probably one without any real distinction. On the one hand, refusal by a government department to allow a female employee to return to work part-time after the birth of her children has been held by the Employment Appeals Tribunal to be unjustifiable (*Holme v. Home Office (*1984) IRLR 299). The requirement in that case was said to be that employees work-full time or not at all. This requirement was found unnecessary for the maintenance of efficiency and indeed possibly counter-productive. The complainant relied upon departmental reports which recommended greater flexibility in relation to part-time workers, conducive to efficiency and retention of trained and experienced staff.

In another United Kingdom case (*Steel v. Union of Post Office Workers* and *General Post Office* (1977) IRLR 288), a staff selection procedure based upon seniority in permanent full-time positions was found by the Employment Appeals Tribunal to be unjustifiable and thus discriminatory against women who had until recently only been employed on a temporary basis. On the other hand, the United Kingdom Court of Appeal in 1982 gave a rather broad definition of justifiability in the following terms:

> If a person produces reasons for doing something which would be acceptable to right thinking people as sound and tolerable reasons for so doing then he has justified his conduct (*Ojutiku v. Manpower Services Commission* (1985) IRLR 661).

Moreover, in another case the commercial considerations of an economic rationalist approach have prevailed to justify a requirement that the employees work full time. Operations of one full time shift rather than two part time shifts was found to have 'marginal advantages' (*Kidd v. Dre (UK Ltd)* (1985) IRLR 190) in cost and efficiency. So the decisions in the industrial jurisdiction in this area are at best patchy.

One of the critical failures in the application of the indirect discrimination provisions is to certify the question of reasonableness and in particular, shift the onus

in establishing whether an employer's condition or requirement is reasonable from the complainant to the respondent. This could be achieved by amending the definition to require the respondent to establish that the condition or requirement is 'necessary' or 'reasonably necessary' for the operation of the enterprise, or that an alternative, less discriminatory approach could not be found.

The foremost and the most recent Australian Court decision on indirect discrimination is that of the High Court in *Australian Iron and Steel Pty Limited v. Banovic and others*, handed down on 5 December 1989. The High Court was dealing with an appeal from the NSW Court of Appeal which had, in turn, rejected an appeal by AI&S against the decision of the Equal Opportunity Tribunal (EOT). The EOT had awarded record damages (over one million dollars) to thirty-four women who had made complaints of both direct and indirect discrimination in employment. Specifically, the appeal was against the rulings that had led to damages being awarded both for initial failure to hire women job applicants and for application of the 'last on, first off' policy in retrenchment. The use of that policy had been found by the equal opportunity tribunal to be indirectly discriminatory because it selected for retrenchment a higher proportion of female employees than of males due to the history of direct discrimination in the hiring policies which had been applied by AI&S until 1980.

Of the five judges who heard the case, two, Brennan and McHugh JJ dissented. Dawson J. clearly identified the fact that use of the apparently neutral 'last on, first off' approach perpetuated past discrimination as the one critical factor which in his opinion rendered the requirement unreasonable in the circumstances. His Honour commented that in the context of different recruitment history, the 'last on, first off' policy could make a reasonable basis for selecting employees for retrenchment.

To succeed in their indirect discrimination claim the women needed to show that a substantially higher proportion of men (than women) could comply with the companies' requirement to avoid retrenchment.

Most argument in the AI&S case revolved around which men and which women were relevant in calculating these proportions. In other words, what was the scope or defining characteristic of the base group or pool from which the proportions of members who complied with the apparently neutral condition of 'last on, first off' were to be calculated.

None of the members of the High Court in the AI&S case accepted the argument that had been supported by at least one member of the NSW Court of Appeal that the relevant base groups were respectively 'All women in New South Wales' and 'All men in New South Wales'. This construction would render indirect discrimination impossible to determine. The High Court were, however, divided as to whether the appropriate base groups consisted of all men and all women respectively, in the AI&S workforce at the time of the retrenchments. The majority view was that it was necessary to define the base groups more narrowly than this because of the effects of the past discriminatory hiring practices. In their joint judgment, Deane and Gaudron JJ held that the purpose of the indirect discrimination provisions in the legislation required that the base groups be determined in such a way as to reveal whether the likelihood of compliance had been influenced by the employees' sex without allowing the answer to that question to be obscured by the relative numbers of men and women in the workforce.

The joint judgment of Deane and Gaudron JJ recommends 'The selection of relevant base groups which do not themselves incorporate the effect of allegedly

discriminatory practices and which can accordingly be used as reference points for ascertaining the effect of those practices'. Dawson J took the same approach to selection of the base group, pointing out that it should not be done in such a way 'as to mask the effect of the previous discriminatory recruitment practice'. He pointed out that 'failure to make some adjustment for past discrimination would be to avoid the very sort of wrong which the Anti-Discrimination Act was intended to redress'. This, it seems, underpins the social objectives of anti-discrimination legislation.

Another important fact to note about the Banovic case is that it has established a class for the purpose of pursuing a class action as a result of the discriminatory actions of AI&S towards the women of the Illawarra. Whereas the section of the Anti-Discrimination Act which allows for class actions is flawed, it has certainly been under-utilised.

At the Anti-Discrimination Board it has been found that indirect discrimination is a very potent tool in focussing attention on employment practices and procedures which have acted as a bar to women joining the workforce or receiving promotions or benefits available to men. However, indirect discrimination can take us much further —particularly in the context of our growing understanding of family responsibilities and pay equity for women in Australia.

Women and work

Although the concept of indirect discrimination has been little explored in Australia, the industrial jurisdiction has grappled with the concepts of equal pay for decades, and more recently with issues associated with comparable worth, or equal pay for equal value, or pay equity.

The industrial jurisdiction, with its historic male dominance and entrenched view about the value of men's work, has delivered a rather frustrating series of decisions in relation to women and work. The 1969 equal pay for equal work decision in the Conciliation and Arbitration Commission had little or no effect on occupations where women predominated.

The historic 1972 principle of equal pay for work of equal value still based the male minimum wage to take account of family considerations which were not extended to females. Further, there is the principle of work value cases being run to determine the value of women's work *in comparison to men's work*, not on the value to the employer. Further restricting the comparison generally to classification in the same award, the Commission failed to recognise the high degree of gender segmentation of the Australian workforce, thereby severely restricting the usefulness of the principle.

The removal of direct sex discrimination from all federal awards in 1974 established equal pay for minimum rates on the same job, but again did nothing to address the problem of gender segmentation across the Australian workforce.

The rejection of the comparable worth submission in the nurses' case in 1985 was another low point in the struggle for equality for women in the Australian workforce.

More recently, the establishment of the supplementary payments principle and award restructuring, have delivered wage increases to women in a large range of occupations and provided scope for addressing some of the problems relating to the segmentation of the Australian workforce.

However, we have relied on the industrial jurisdiction to resolve these problems, and ninety years later we still have a long way to go. It is time for a fresh approach.

Conclusion

This paper has touched on a number of issues. I have discussed the definition of indirect discrimination and attempted to draw a connection between that concept, family responsibility and the struggle for pay equity in Australia.

Firstly, it is clear that until real pay equity is achieved and the present level of gender segmentation in the workforce is broken down, women will continue to suffer discrimination.

Until family responsibilities are understood to play an essential role in the structure and functioning of the workplace, society will continue to lose experienced and valuable employees, mostly women, and bear the costs of inflexibility.

Indirect discrimination needs to be further explored by complainants under both the *Commonwealth Sex Discrimination Act 1984* and the state *Anti-Discrimination Act 1977*. This could play a pivotal role in addressing the problems associated with systemic bars in selection and assessment procedures, bias in the provision of benefits and training opportunities and discrimination in dismissals and retrenchments.

In addition, the use of the anti-discrimination jurisdiction, with particular reference to indirect discrimination, should be tested as an alternative or adjunct to the industrial jurisdiction. Specific areas of vital concern to women could be addressed in this way. These include:

- The availability of part-time work. The requirement of 'full-time work or no work at all' indirectly discriminates against women as the principal carers in our society.

- Aspects of gender segmentation and job clustering caused by pay differentials and the assumptions about what is appropriate 'women's work'.

- Child care—the unavailability of child care indirectly discriminates against women in Australia—is this 'reasonable'?

- Training. Women are often considered to be a bad training investment due to assumptions about child rearing, and are accordingly denied opportunities. Pre-conditions for training involving length of time in employment or the age of the applicant can indirectly discriminate against women.

Lawyers and human rights practitioners need to further explore the ramifications of the decision in *AI&S v. Banovic*:

- Use of a neutral industrial policy 'last on, first off' was discriminatory when applied in a workplace with gender imbalance caused by previous discriminatory hiring practices. How many workplaces in Australia suffer such an imbalance?

- Utilise the finding of the High Court that in determining the appropriate proportions in indirect discrimination, care must be taken to meet the social objectives of the legislation and entrenched discrimination through systemic bias must be avoided.

- The role of class actions.

We also need to understand more fully the scope of the Convention on the Elimination of All Forms of Discrimination against Women which forms the basis of the Sex Discrimination Act. The wording of the Convention and the Act suggest that potential may already exist to address the problem of pay equity, particularly through the use of indirect discrimination. However, if the present scope is not wide enough, specific legislation should be enacted through the use of the external affairs power, possibly along the lines of the legislation which presently exists in the European Community.

We must also explore the nexus between our present legislation and the recently ratified ILO 156 convention. The clear principles in the convention when viewed in terms of the indirect discrimination provisions of the Sex Discrimination Act could achieve much in both recognising the women's role as the prime carers in Australia and in creating a drive towards the more flexible working conditions and arrangements to attract and retain workers of the highest merit to achieve a necessary competitive edge.

The human rights and anti-discrimination jurisdiction is a rich area full of new tools and fresh approaches to address the problem of gender bias in the Australian workforce. We simply cannot afford not to use it.

STREET PROSTITUTION AND ITS MANIPULATION BY LAW IN NEW SOUTH WALES

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SIR WILLIAM ERLE, THE PROMINENT ENGLISH CHIEF JUSTICE, ONCE SAID:

> The Law is for the protection of the weak more than the strong (*Reg. v. Woolley* [1850] 4 Cox CC 196).

As an axiom of the law at no time does this statement drift further from truth than in the legislation and law-enforcement of street prostitution. In New South Wales laws against prostitutes' activities were first introduced to curb public soliciting, and today the only laws directly affecting commercial sex traders are those aimed at restricting street prostitution. Considering that only about a tenth of sex workers take their business onto the streets, or no more than 100 at any one time across Sydney, and since these comprise women from poverty-stricken backgrounds, the heaviest drug users, and women with the fewest economic, social and political skills, they are among the weakest members of society. On the other hand, those people granted legal protection from these 'denizens of immorality' are usually landowners, the job secure, and members of the affluent middle class, who are among the strongest groups in society. There is, therefore, much room for doubting that the weak have anywhere near the same access to the law as the strong.

This paper examines the situation of street prostitute women and the laws which have been used against them from both an historical as well as a current research perspective, and argues that these particular women have attracted more attention from the law and law-enforcers than other prostitutes because of a manipulation of the law by social forces whose chief concerns are morality, bourgeois tastes and political ambitions, rather than any real threat posed by street prostitutes.

Prostitution in Colonial Times

For the first hundred years of white colonisation in Australia there were no laws specifically aimed at prostitutes' activities. Street prostitutes, however, could be, and often were, arrested for vagrancy, riotous or offensive behaviour under the colonial statutes, along with numbers of other homeless or drunken men and women considered 'undesirable' by colonial society. In mid-century the various Contagious Diseases Acts gave police an opportunity to control prostitution through detention and health examination by medical authorities. Since prostitutes were singled out as an imagined threat to wholesome society, this form of discrimination gave them a focus that would eventually lead to specific legislation that prohibited the activities of sex workers in an effort to stamp out prostitution altogether.

Encouraged by English legislation on prostitution introduced in 1885 in response to evangelical moralism, the colonial governments of Australia passed laws on 'brothel keeping', 'procuring' and 'public soliciting' in the 1890s and early 20th century that brought an end to centuries of legal laissez-faire commercial sex. In Victoria in 1891 it became an offence to 'importune' in a public place (*Police Offences Act* sec. 7[2]), while in Western Australia the next year soliciting became illegal (*Police Act* sec. 59) and in 1899 the Queensland Criminal Code (sec. 217) referred to a 'common prostitute' as 'a woman who commonly offers her body to men for lewdness in return for payment'. However, South Australia maintained its control over street prostitution under an early statute, the *Police Act 1844*, by which Clause 18 enabled the arrest of prostitutes as 'public annoyances'. Tasmania introduced a law against 'soliciting for immoral purposes' in sec. 17, of the *Police Act 1905*.

Prostitution Prohibition in NSW

In New South Wales the *Vagrancy Act 1902* (sec. 4[1][c]) enabled the arrest of a 'common prostitute' wandering the streets if she behaved in a 'riotous or indecent manner'. This of course, was open to conjecture. Earlier comments like that expressed by the anonymous author of a booklet entitled *Vice and Victims in Sydney* in 1871 which stated, 'girls and young women . . . may be seen airing themselves in the Domain and gardens on Sunday afternoons and on Sunday nights in George Street, putting even rough modesty to the blush by their shameless speech and acts—sapping the foundations of the state and urging youth to ruin and infamy', and those of the English traveller R.E.N. Twopenny in 1883 who thought Sydney prostitutes more numerous and more brazen than the street women in his native London, led to the same kind of moral outrage as that in England prior to the introduction of anti-prostitution laws.

Police gained greater power over prostitutes in 1908 when the *Police Offences (Amendment) Act* amended the Vagrancy Act so that a streetwalker could be arrested if she 'solicits or importunes for immoral purposes' (sec. 4 [1][i]). At the same time this statute included a law against those who 'live wholly or in part on the earnings of prostitution' (sec. 4[2][o][i]), which was aimed specifically at the women's lovers and husbands who acted as their protectors.

In addition, the Vagrancy Act also allowed the arrest of prostitutes for 'indecent behaviour' (sec. 8A), which became a major legal vehicle for controlling street

soliciting and other public prostitution. Table 1 includes arrest figures for prostitution-related offences in NSW police *Annual Reports* 1908-19.

Table 1

Prostitution arrests, New South Wales, 1908-17

Years	Soliciting	Indecent behaviour
1908-11	347	1.596
1912-14	110	2,250
1915-17	32	4,273

Source: NSW Police *Annual Reports,* 1908-17

The decline in 'soliciting' arrests suggest that either street prostitution decreased after the introduction of the laws, or that it became more clandestine. In any case the increase in arrests for 'indecent' behaviour suggests that police used other tactics to entrap public prostitutes, reaching its peak in the war years, no doubt in an attempt to protect 'our boys' on leave or being mobilised at home from vice and corruption.

In the 1920s soliciting was subsumed under the title 'vagrancy' in the police records, while arrests for 'indecent behaviour' gradually increased throughout the decade, apparently in an effort to curb the sexual liberation of women occurring at the time.

Table 2

Prostitution arrests, New South Wales, 1919-28

Years	Vagrancy	Indecent behaviour
1919-22	421	4,429
1925-28	144	7,213

Source: NSW Police *Annual Reports*, 1919-28

The Depression years witnessed the increasing use of the Vagrancy Act, but the overall decline in prostitution arrests is very likely due to the police having their hands full with other poverty-driven crimes.

Table 3

Prostitution arrests, New South Wales, 1930-36

Years	Vagrancy	Indecent behaviour
1930	184	819
1932	40	384
1935	316	436
1936	232	491

Source: NSW Police *Annual Reports*, 1930-36

The next major legal attack on prostitution occurred in the post-war era of the 1940s and 1950s. The number of arrests gradually increased throughout the decade as a reaction to an increase in prostitution due to the influx of thousands of lonely migrant men arriving in Sydney. It might be assumed that police reacted to protect the morals of these migrants, but a comparison between the early years of the decade and the later years indicates that increases in arrests coincided with powerful lobbying against prostitution by the new Council of Churches.

Table 4

Prostitution arrests, New South Wales, 1949-59

Years	Soliciting	Offensive behaviour
1949-52	192	7,273
1956-59	650	16,633

Source: NSW Police *Annual Reports,* 1949-59

The 1960s witnessed an explosion of the brothel trade in East Sydney lanes. Prostitution arrests reached a peak in this period as lobbies to the state government by the churches and residents mounted in intensity. Street prostitution took a back seat for a while, although most of the women working in the brothels had moved there from the streets. Many women remember this period as one in which police corruption and abuse was particularly heavy. They might well agree with jurist Ramsey Clark's comment in 1969 : 'You have to respect the law. But you can't respect the law when the law is not respectable.'

Table 5

Prostitution arrests, New South Wales, 1960-68

Years	Soliciting	Offensive behaviour
1960-62	26	20,580
1963-65	51	40,515
1966-68	103	22,752

Source: NSW Police *Annual Reports,* 1960-68

In 1968 the East Sydney brothels were closed down, and to prevent an increase in street prostitution a new law was introduced into the Vagrancy Act, viz. an offence to 'loiter for the purpose of prostitution' (sec. 4 [1][k]). Two years later the street prostitution laws were incorporated into a new omnibus statute, the *Summary Offences Act 1970*, sec. 28 of which covered 'soliciting' and 'loitering' for prostitution. Once more sex working on the street grabbed the major police attention. The impetus for this was 'protecting' American soldiers on R & R leave from Vietnam and curbing the increasing drug dependency of streetwalkers. The 1970s witnessed the highest numbers of arrests specifically for street prostitution. In addition to having to endure repeated arrests, street prostitutes at this time complained that police extorted $150 a week from each woman to keep arrests to a minimum.

Table 6

Prostitution arrests, New South Wales, 1971-78

Years	Soliciting	Vagrancy
1971	3,617	
1972	4,288	3,712
1974	3,301	2,007
1975	2,592	1,221
1976	1,930	1,032
1977	2,075	918
1978	1,804	718

Source: NSW Police *Annual Reports*, 1971-78

In the latter years of the 1970s the Wran Labor Government grappled with law reform under pressure from new groups arguing for social liberalism, such as the feminists and civil libertarians.

Finally, in 1979 the old prostitution laws aimed at prostitutes were repealed and a return of legal laissez-faire for streetwalkers occurred under the new Prostitution Act.

Legal Laissez-Faire in the Early Eighties

Almost immediately after this law reform, residents of Darlinghurst organised into lobby groups and argued that prostitution would run riot. Many of these residents had recently moved into the inner city despite its reputation for street and other forms of prostitution. Yet so confident were they of favouritism under the law that they felt they could easily manipulate the government into reversing its decision, particularly with the parliamentary seat of Bligh dependent on individual performance rather than party preference.

The local papers were crammed with news of residents supposedly suffering from the presence of prostitutes. A restaurant owner claimed his business had declined because of one prostitute sitting in the doorway of her brothel opposite his place. Resident women claimed they were accosted by men because of the presence of prostitutes and some took to wearing aprons in public to distinguish them from the streetwalkers. Other residents claimed sex workers and their clients were having sex on their front lawns, to which one prostitute in a public meeting wryly replied that their lawns were too full of thorns for her to consider using them. The traffic, the noise and discarded refuse in the area were all blamed on the prostitutes. Few journalists were interested in reporting the sex workers' side of the story. They were prepared to accept the residents' stories without question. One newspaper photographer was sent into Darlinghurst on three consecutive nights in the fruitless search for couples fornicating on front lawns. On the few occasions that prostitutes were granted space to speak in the media, journalists were more interested in reporting on the reasons the women took up sex work and how much money they made than in their responses to the residents' complaints.

In the meantime the police bemoaned their powerlessness without laws to use against the street prostitutes, while at the same time arrested the women for 'obstructing traffic' or, more often, for 'offensive behaviour' or causing 'serious alarm and affront' under the *Offences In Public Places Act 1979*. These were stop-gap actions by police frustrated by resident harassment for presumably failing to do their duty. In most cases the prostitutes were charged with 'alarming and affronting' people by merely standing on a street corner. A number of the women complained of being arrested simply walking home, and some were forced from their homes for running a brothel without council consent. In the first year of the law reform, 1979, almost seven times as many women were arrested for these offences as had been the year before. From 1976 to 1978 1,663 arrests were made of women for 'offensive behaviour', while from 1979 to 1981 10,480 arrests were made of women for 'serious alarm and affront'. Quite obviously police were determined to use whatever laws were available to them against streetwalkers regardless of the government's sentiments on the matter.

It was apparent that most of the reactions by residents and police were based on moral outrage at public solicitation. The prostitutes were upset by the increasing traffic of voyeurs brought about by the mounting publicity, yet they were still held to blame for the noise and hooliganism. The residents did not isolate the problem as one of voyeurism and the police failed to single out the real culprits, the tourist buses and car-loads of drunken young bucks and families cruising the area as sightseers. It was all too easy to make the street workers accountable by feeding upon ancient myths on prostitution and the supposed socially disreputable women who involved themselves in it.

The Wran Labor Government was not interested in reality either. It was more concerned over the seat of Bligh falling into the hands of the Opposition in a forthcoming by-election. The street prostitutes were the most disposable human component in the complex Darlinghurst dispute involving outraged churchmen; doctors blaming sex workers for spreading hepatitis B; residents claiming the mafia were moving in; other residents expressing concern for the corruption of children in streets where no children were living; hooligans in cars who were also potential customers of Kings Cross entertainment businesses; property developers whose main concern was a 'clean' neighbourhood to attract bourgeois home buyers; and police who wanted their job made easier by flexing muscles with tougher laws. The result was a backward step by the Wran Government, which re-introduced a street soliciting law (*Prostitution Act* sec. 8A [1]) on, perhaps not too inappropriately, Anzac Day 1983. It differed from the previous soliciting laws though in making it an offence only if the soliciting occurred 'near' a church, school, hospital or dwelling unattached to commercial premises. The Government thought it a good compromise. It could satisfy their inner city constituents while at the same time salvage their reputation as a libertarian reformist government.

The Current Situation in NSW

There were two major outcomes of the introduction of the new law. The first was a sudden rise in more serious crimes by women. The second was the relocation of most street prostitutes in Darlinghurst to other areas.

Between 30 April and 30 June 1983 there was a fluctuation rate of 13 per cent in the numbers of women incarcerated in the state's gaols, and the June numbers of detainees was 9 per cent higher than the April total. From 1 May to 26 June the number of female prisoners rose from 143 to 169. The June record for females in detention was the highest in 2.25 years. For the year ended 30 June 1983 the most notable increases in female crimes were 'break and enter', which rose by 52 per cent, and various petty thefts, such as shoplifting, which rose by 44 per cent of the previous year's figures. These increases were so extraordinary that the Department of Corrective Services supposed that female criminality was on the rise, giving support to the on-going argument in favour of another female gaol. At the time little thought was given to the consequences of police actions on the streets. However, the inference is that with the enforcement of the new soliciting law as many as twenty or more of the most desperate street prostitutes, being suddenly deprived of an income, turned to property crimes for survival.

Whilst most of Darlinghurst's street prostitutes relocated along William Street, where they were not breaking the law, some of the more redoubtables risked arrest by continuing to work on residential streets. Their descendants are still there today causing concern to police and outrage to residents. A number, though, moved out west to Canterbury Road in the suburbs of Campsie, Lakemba and Belmore. Although in some areas along this major western artery the women were not breaking the law, in others they were working 'near' a residence, a school or church. The term 'near' caused some confusion with police, the courts and the prostitutes. The Parliamentary Select Committee Upon Prostitution, which at the time was investigating prostitution, attempted to overcome this ambiguity by recommending the law be changed to include the phrase 'directly in front of or in close proximity to or directly opposite'

instead of 'near to' and that churches and schools should be 'in use or being occupied' when the offence is committed.

However, following the antics of local residents whose suburbs include Canterbury Road, even though most did not live on that road, the Greiner Liberal Government in 1988 decided to resolve the matter with yet another change of law disfavourable to the prostitutes. Once again no serious investigation of the residents' claims were made, and these were accepted as fact. Apart from the familiar claims of fornication in front yards, corruption of children and dropping of needles, one highly unlikely claim was the discovery of a prostitute's diary which included a comment on having sex with a fifteen-year-old boy. It was highly suspect, more akin to popular mythology than to reality. Prostitutes refuted the diary as something prostitutes do not keep and even if they did they would not carry such an item onto the streets.

Members of the prostitute organisation PROS (Prostitutes Rights Organisation for Sex Workers) conducted their own investigation of the area. On three consecutive nights they found no more than fourteen women working the four and a half kilometre stretch of Canterbury Road each night, and never more than eight at one time.

In spite of these findings the Greiner Government showed its get tough policy by recalling the *Summary Offences Act* and including an amended soliciting law (sec. 19) which prohibited soliciting 'within view from' a dwelling, church, school or hospital, and a new law to convict clients as well, viz., 'an act of prostitution' in a public place (sec. 20), which meant that both a prostitute and her client having sex in a car in an isolated parkland could be arrested. The morality underwriting these laws is obvious. In 1989 the Minister for Police proudly announced having made thirteen times more arrests for soliciting than the previous year. The following table indicates the extent of this on prostitutes.

Table 7

Prostitution arrests, New South Wales, 1985-89

Years	Soliciting
1985-88	132
1988-89	808

Source: NSW Police *Annual Reports*, 1985-89

Most of these arrests were of women along Canterbury Road. In view of PROS findings this means that a small number of women were arrested over and over, some as often as fifty times. This meant that these women ended up on a never-ending treadmill of working illegally to pay fines. The Attorney-General sought to alleviate this problem by even more stringent legal action. Prostitutes failing to pay their fines would be singled out for special treatment by receiving prison terms instead of doing community service as other fine defaulters were made to. Fortunately, a majority of more reasonable legislators defeated the motion.

The response to this pressure upon the women on Canterbury Road was that some of them moved further west to work on the dark and dangerous Great Western Highway, where they were joined by a handful of western suburbs women feeling the effects of unemployment in the present economic recession. So the whole sorry story began all over again.

Conclusion

What the above discussion illuminates is that street prostitution in a city the size of Sydney is inevitable given the economic, social and sexual inequalities of the sexes, regardless of laissez-faire or prohibition. Governments, more concerned for votes than the real effects of the law on prostitute women's lives, continue to make the same mistakes by thinking tough laws will eradicate prostitution. They are too often influenced by the most vocal moralists in our community under the mistaken belief that these represent the majority.

One recent example illustrates the ridiculous extent to which moralism can be taken at others expense. One resident in East Sydney said that she would not complain to police if street prostitutes working a block away used the back entrance to a house where they took their clients for servicing instead of the front entrance opposite her place. While the front door faced a well-lit street, the back entrance opened onto a dingy back lane. One woman was stabbed, the wound opening her stomach from vagina to navel, and several other women have been savagely beaten. So, in pandering to this one resident's moral sensibilities, young women are being seriously damaged and it is only a matter of time before one of them is murdered.

This paper concludes with a comment by the jurist Rosalind Fergusson which succinctly sums up the sentiments of this paper:

'Much law but little justice.'

Prostitution in NSW: The Impact of Deregulation[1]

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SINCE 1979 THE LAWS RELATING TO PROSTITUTION IN NSW HAVE BEEN characterised by a predominantly liberal or laissez-faire approach; the most liberal in Australia. Brothel keeping per se is not an offence (except under the provisions of outdated legislation like the *Disorderly Houses Act 1943* or the common law) and soliciting for prostitution is legal outside residential areas. The decriminalisation or deregulation of the industry in NSW may be contrasted with the approach adopted in Victoria. The scheme recommended by the Neave Committee involved the legal recognition of brothels through a licensing scheme (Victorian Inquiry into Prostitution 1985). The aim of the scheme was to regulate the industry: the location and size of outlets, the conditions under which workers are employed, the health and industrial safety standards employed etc. Whilst the implementation of the Victorian scheme has been criticised and appears to have led to certain undesirable consequences there was at least an endorsement by the Government of the value of a regulatory approach (Neave 1988).

The Victorian approach and the NSW approach thus represent the two extremes of contemporary approaches to prostitution. Both entail a recognition that the enactment of punitive criminal offences has failed to eradicate the industry. At most, such laws have changed the organisation and marketing of prostitution services, often

[1] The Authors thank and acknowledge the support of the Queensland Criminal Justice Commission. The present review was prepared by the authors for the Criminal Justice Commission and a more detailed analysis of the research findings is presented in the Commission's report *Regulating Morality? An Inquiry into Prostitution*, September 1991. The views expressed herein are not necessarily those of the Criminal Justice Commission.

forcing the workers to be employed in large, prosperous and protected brothels operated by vice syndicates.

Both perspectives recognise that whilst prostitution is not inevitable, it is likely to continue as long as the demand exists. In the long term, demand reduction strategies which recognise the gender bias and socially constructed nature of client demands may reduce the size of the industry. The overwhelming majority of clients are male and the majority of prostitutes are female. In the short term, however, there are many undesirable aspects of the industry which can be addressed by legal and administrative reforms.

The two approaches differ markedly in the way they seek to reduce the harms associated with prostitution. The approach recommended and partially adopted in Victoria was to control through a licensing and inspection scheme many aspects of the industry. In contrast in New South Wales the key criminal sanctions were removed and the industry was allowed to operate with few controls. The self-regulation inherent in the NSW approach did not stem from any articulated free-market policies but more from a recognition that criminal sanctions were responsible for the creation of many problems: police corruption, the discriminatory policing of workers, the growth of organised crime, the removal of the autonomy of the workers and the difficulties inherent in implementing an effective health and welfare outreach scheme in an illegal industry. The aim of the present paper is to examine the impact of the NSW laissez-faire laws in several key areas: the organisation of the industry, health and welfare of the workers, policing, and public order.

Typology of Sex Workers in NSW

The vast majority of prostitutes are females but a significant (though unquantified) number of males, and approximately 100 transsexuals, are also engaged in prostitution. The NSW Parliamentary Select Committee upon Prostitution estimated that on one day (in 1985) there might be between 1500 and 2200 female sex workers in all types of prostitution in New South Wales. Five years later, Lovejoy et al. (1991) concluded that there were still approximately 1500 female prostitutes working at any one time.

Age of Workers

In spite of frequent publicity about child prostitution in New South Wales, few prostitutes are aged under sixteen years. Most are between twenty-one and thirty years with a median in the late twenties. A few women continue to work over the age of fifty (Philpot et al. 1988). A recent study showed that most female sex workers entered 'professional' prostitution between the ages of sixteen and twenty-five years. Five per cent entered under the age of sixteen and a similar proportion entered over the age of thirty-five years (Lovejoy et al. 1991).

Parlours

Almost 70 per cent of female prostitutes work in parlours (brothels) which vary considerably in style and size. They are located throughout the Sydney metropolitan area, in Wollongong, Newcastle and a number of rural towns.

In general parlour workers are the most accessible to health professionals and researchers, both in the work place and because many of them regularly attend public STD clinics. They are also the group which seems to have responded most significantly to AIDS education campaigns. Currently, they have a low risk of HIV infection and appear to have reduced their risk of contracting other STDs by the adoption of safer sex practices and in particular by a very significant increase in the use of condoms for vaginal sex with paying clients.

There are, however, a number of parlours, employing mainly Asian women under a repressive contract system, which have a poor health record. Their managers often are hostile towards the prostitute support groups and outreach workers who have been instrumental in improving the conditions in other parlours.

The male brothels in Sydney seem to be well run and have few major health problems. Outreach workers report that condom use is high and safer sex practices are generally adhered to (Sex Workers Outreach Project, pers. comm., 1991).

Escorts

Approximately 12 per cent of prostitutes in New South Wales work exclusively as escorts. Women working as escorts are less well documented than parlour workers as they often use private doctors for their checkups and are less accessible to outreach. However, there is no evidence that their health is any worse than that of parlour prostitutes and it is generally assumed that they benefit from having fewer clients per week than do most parlour workers.

Nevertheless the situation for escorts is potentially dangerous because they work alone on the client's own territory and therefore are vulnerable to coercion.

Private workers

A similar proportion of female prostitutes prefer to work independently, on their own premises and, as with escorts, little is known about their health or work conditions. They are often also alone (although some employ receptionists or one or two other workers) but they have the advantage of being 'at home' and of controlling the initial phone contact with the client.

However it is of concern that private workers have many 'regular' clients with whom they are less diligent in practising safer sex (Harcourt & Philpot 1990).

Street Workers

Up to 10 per cent of female prostitutes in New South Wales work by soliciting clients on the street. Services are provided in cars, alleyways or lanes, or in nearby safe houses where rooms are rented on a casual basis.

The greatest health problems appear to be associated with male, female and transsexual street workers. A high proportion of all street workers (90 per cent or more) are severely socially and economically disadvantaged, have a high level of substance abuse and injecting drug use (IDU) and are at great risk of physical abuse from their clients and passers-by. Many lead haphazard and disorganised lives and rarely present for check ups and regular health care. However, female street workers do report a high level of condom use by their clients (Parliament of NSW 1985).

Sexual Health of Prostitutes

HIV Infection

There is still no documented case of a female prostitute in Australia receiving or transmitting HIV infection during sexual intercourse with a client. In New South Wales, those women identified as sex workers who are known to be HIV infected, all have IDU as a possible mode of transmission (Donovan 1990).

It is estimated by outreach workers (from Sex Workers Outreach Project and Kirketon Road) that fewer than twenty currently active sex workers, including males, transsexuals and females, are infected with HIV. Nearly all of these work on the streets and the females and transsexuals who are infected are all known injecting drug users. There is a greater likelihood however that some of the young males have become infected through their sexual activity.

Sydney Sexual Health Centre has records of over 1450 female prostitutes who have been tested for HIV antibody since 1985 with none found to be positive. Lovejoy's (1991) recent statewide study of 280 female prostitutes similarly found no HIV positive individuals. Over 70 per cent of women in both groups worked in parlours.

Condom use

The low HIV infection rate among female prostitutes may be attributed in some part to the low level of infection in the heterosexual population as a whole (National Health and Medical Research Council 1991). There has also been a considerable increase in condom use by parlour prostitutes (male and female) since 1986.

A study in Sydney in 1988 attributed this change 'to AIDS publicity and the educational work of health professionals and the Australian Prostitutes Collective (APC)' (Harcourt & Philpot 1990, p. 143). The APC was funded by the state Government between 1986 and 1989, and built up a considerable rapport and influence with most sectors of the industry, including many managers.

In 1985 Staff who were working at the Sydney Sexual Health Centre (formerly Sydney STD Centre) estimated that less than 5 per cent of female prostitutes insisted on their clients using condoms for vaginal intercourse (Philpot et al. 1988). By 1987 this figure had climbed to 46 per cent. In 1988, 87.8 per cent of respondents to a questionnaire said they used condoms always with paying partners (Harcourt &

Philpot 1990). Even more recently 97.5 per cent reported using condoms at work in a study of 280 female sex workers (Lovejoy et al. 1991).

Although they may use condoms consistently with paying clients, female prostitutes are much less likely to use them in their private relationships or, as indicated above, with 'regulars' (Philpot et al. 1988, Lovejoy et al. 1991).

Consistent condom use and acute sexually transmitted diseases

The increase in condom use, greater awareness of health issues, and the impact of outreach work by peer groups and health professionals have led to an observable decrease in acute STDs in female prostitutes. The effect on chronic, viral STDs is less obvious because of the long latency period of these diseases.

A study of 231 women found there had been a significant reduction in gonorrhoea (from 58 per cent to 38 per cent), herpes (over the same period, from 51 per cent to 25 per cent) and trichomoniasis (from 52 per cent to 29 per cent), when compared with a similar study of 132 female prostitutes conducted in 1985 (Philpot et al. 1991).

Lovejoy et al. (1991) also described a reduction in self-reported acute STDs (gonorrhoea, trichomoniasis and PID) in 1990 compared with 1985-86.

Gonorrhoea

Gonorrhoea is the disease which has decreased most significantly in the last decade. It is now rarely reported in Australian prostitutes in New South Wales whereas in 1980/81 Donovan observed that 44 per cent of prostitutes in a Sydney brothel acquired gonorrhoea within one month (a rate of 10 per cent per week). This was mainly attributed to the extremely high number of clients (an average of eighty per week) serviced by the women (Donovan 1984).

Since that time, apart from the increased use of condoms, prices have risen in brothels, attitudes in the community have changed somewhat, and the sex industry has been depressed by fear of AIDS and an economic decline. Parlour prostitutes now see an average of approximately twenty to twenty-five clients per week with a great deal of fluctuation between 'good weeks' (thirty-eight clients on average) and 'bad weeks' (average thirteen clients) (Philpot et al. 1991).

Asian workers

There is, however, one part of the industry where gonorrhoea is still common and that is in the parlours which employ contracted Asian workers. These parlours, which are often only identifiable through advertisements in the ethnic press, may number over forty (R. Louie, pers. comm., 1991). They are usually managed by men of non-English-speaking background (NESB) and many of the employees are women who are in Australia on short stay visas and are therefore working illegally. The women appear to be subject to a good deal of coercion and they service a large number of clients who are culturally disinclined to use condoms.

Donovan et al. (1991) found that 88 per cent of cases of gonorrhoea in females, seen at Sydney Sexual Health Centre were in prostitutes born overseas (76 per cent from Thailand and 25 per cent from Malaysia). Similar, unpublished, data have been collected at Parramatta Sexual Health Centre (D. Packham, pers. comm., 1991). Staff at Kirketon Road Centre also deal with very many cases of gonorrhoea of similar origin (I. Van Beek, pers. comm., 1991).

The clients are very difficult to access as they come mainly from non-English-speaking backgrounds and do not present to public STD clinics. It is not clear whether health education and HIV prevention messages are reaching them, or if they relate the messages they do receive to their own situations.

Substance Abuse

Injecting drug use

There is a widespread perception that prostitution and substance abuse, especially injecting drug use (IDU), are inevitably linked. In the USA a large multicentre study revealed that 'Half the prostitutes interviewed gave histories of IV drug abuse' (Centers for Disease Control 1987). A recent study in NSW, however, found that 22 per cent had injected drugs at least once in their lives, and 11 per cent reported current IDU (Philpot et al. 1989). These percentages had not changed by 1989 when a study of 231 women was completed. Heroin was still the most favoured injected drug, but amphetamines, and more recently cocaine were injected by a few individuals (Philpot et al. 1991).

In Lovejoy's (et al. 1991) sample of 280, figures for IDU are very similar, 5 per cent (13/280) injected amphetamines, 2.5 per cent (7/280) injected cocaine and 9.3 per cent (26/280) injected heroin.

However, neither of these studies included a significant number of street workers.

A study of forty-eight female prostitutes, including ten (22 per cent) street workers, attending the Kirketon Road Centre in Kings Cross, revealed that 25 per cent were currently injecting drugs (Harcourt & Philpot 1990). This high percentage of IDUs is associated with a much higher level of clinical hepatitis B in this group. Thirty five per cent of seventeen street workers interviewed in 1988 had been ill with hepatitis B within the previous five years, compared with 4 per cent of parlour workers. One was infected with HIV (Harcourt et al. 1989). Philpot et al. (1989) and Lovejoy et al. (1991) both found that worker IDUs do not regard sharing needles and syringes with their partners and close friends as a high risk activity. In fact they treat needle sharing very much as they treat condom use. Precautions are taken only with strangers. This attitudinal problem is very hard to combat as it is integral to the way prostitutes compartmentalise their lives to keep work distinct from private pleasure.

Non-injected drugs

The non-injected drugs most often used by prostitutes are tobacco (63-89 per cent of subjects), alcohol (47-79 per cent), marijuana (39-48 per cent), sleeping pills (25 per cent) and amphetamines (15 per cent) (Philpot et al. 1989).

Other Welfare Issues

The primary motive for entering prostitution is economic. For seriously disadvantaged marginalised groups such as very young, homeless males and females, for transsexuals, and for those with a major drug addiction, it is at times the only source of income to which they have immediate access.

Older women enter prostitution for more complex economic reasons. Many appear to have made a considered, rational choice and to be unscathed by the work or

the lifestyle it entails. Many others, however, feel they have little choice and are forced into prostitution through economic necessity.

Even when the industry is relatively depressed the economic rewards offered to women by prostitution appear to be greater than any other accessible source of income. No particular qualifications are required. They receive cash in hand and the hours are flexible and can be fitted around child minding and other domestic duties.

In the working-class western suburbs of Sydney where unemployment is high, 50 per cent of female prostitutes were supporting school aged children. Many of these were single parents, but a significant number were in stable relationships with a long-term partner experiencing severe economic hardship (Harcourt & Philpot 1990).

The stress of the job is compounded, for those who are having difficulties, by the need for secrecy about the source of income. Since children have to be shielded and other relatives may well be hostile, the prostitute is cut off from many of the support networks that might otherwise be available. The nexus between prostitution, drug dependence, welfare issues and public health is a very complex one and cannot be unravelled simply by legislation.

The Law and the Policing of Prostitution

The law in NSW attaches liability to certain prostitution related conduct under specified circumstances. The present review is confined to the most important provisions: soliciting and brothel keeping. These provisions have always been the cornerstone of the policing of prostitution and have been applied most often in a discriminatory fashion. The overwhelming majority of prosecutions are against working women. Clients are almost never prosecuted.

Soliciting for prostitution

Soliciting for prostitution under certain circumstances is prohibited by the provisions of the *Summary Offences Act 1988*. The key offence is that soliciting is prohibited 'in a public street near or within view from a dwelling, school, church or hospital'. The maximum penalty is $600 fine or three months imprisonment (s. 19(1)).

Soliciting for public prostitution is a criminal offence in many jurisdictions. The NSW provisions are notable in that soliciting is only prohibited in certain locations, loosely characterised as residential. Soliciting outside these areas is a lawful activity.

Traditionally, the justification for the legal prohibitions against soliciting has been in terms of public order. Soliciting in a public place is viewed as an act against public order. The noise generated by prostitutes, clients and clients' cars and the paraphernalia associated with the trade is a further harm often cited as justifying prohibitions against soliciting.

The NSW law attempts to strike a balance between the claims of residents and other citizens to be protected from the offensive and annoying activities associated with soliciting for prostitution, and the claims of prostitutes and clients to use public places as a venue for negotiation. A brief recent history of the NSW soliciting provisions serves to illustrate the tension between the public order problems arising out of a liberal legal approach to soliciting, and the crime, corruption and other problems arising out of a restrictive legal approach.

In 1979 the laws relating to prostitution were reformed as part of a package of public order reforms. Offences prohibiting soliciting for public prostitution were criticised as discriminatory, criminogenic, and an overreach of the criminal law and in 1979 soliciting for prostitution in a public place were decriminalised by the repeal of the *Summary Offences Act 1970*. The new *Prostitution Act 1979* contained no equivalent provision.

This liberal period was relatively short-lived; four years. Much has been written regarding this period with most commentators agreeing that the 1979 decriminalisation had the following effects (Travis 1986, Parliament of NSW 1986, Perkins 1991): a dramatic increase in public order problems in the 'vice' areas of Sydney (East Sydney, Darlinghurst and Kings Cross), and a corresponding increase in complaints from citizens who now resided in the recently gentrified areas of Darlinghurst; a dramatic decrease in police corruption. Many street prostitutes welcomed their new found freedom which removed the threat of prosecution and thus the need to pay for police protection; and an increase in the number of independent women working in the prostitution industry.

In 1983, largely as a result of the successful campaigns by the NSW Police Association and the residents of Darlinghurst the *Prostitution Act 1979* was amended. Soliciting in a public street, near a dwelling, school, church or hospital became an offence (s. 8A). The purpose of the amendment was to contain soliciting to areas which would not cause annoyance to residents.

The new provisions, by partially outlawing soliciting for prostitution in a public place, appeared to strike a reasonably successful compromise. Street workers were still able to legally use public places for soliciting if outside residential areas and the public order complaints were reduced to a minimum. The residential areas of Darlinghurst were deserted by the street workers and 'beats' were established in lawful locations in William Street. From time to time new areas were colonised by streetworkers and tensions created. In recent years street prostitution has moved into

the suburban western parts of Sydney. Canterbury Road, Belmore and the Great Western Highway, Minchinbury and Mt Druitt are relatively recent soliciting beats and public order tensions are still a problem (Vice Squad, pers. comm., 1991). Residents and workers have yet to establish a compromise as to the acceptable and unacceptable areas for soliciting.

In 1988, the *Prostitution Act 1979* was repealed and replaced with the *Summary Offences Act 1988.* The new soliciting offence (s. 19(1)) is very similar to the s. 8A of the Prostitution Act: soliciting is prohibited near or within view from a dwelling, school, church or hospital. The geographical scope of the prohibited conduct is widened to 'within view'.

Arrests for soliciting increased dramatically in 1988 after the enactment of this offence. The bulk of arrests are believed to emanate from the Canterbury Road area (Perkins 1991). Table 1 describes the increase in court appearances. Such an increase cannot be explained by the slight change in the formal requirements of the law. The more vigilant policing of prostitution can only be explained by reference to the changes in the wider political and 'law and order' context. A new government with a strong law and order platform was elected in March 1988. Soliciting charges have remained higher than in the 1983-88 period. They have not, however, returned to the high rates of the 1970s (*see* Table 1).

Apart from the Canterbury Road tensions, the public order problems associated with street soliciting have retreated to manageable proportions. The causes of this relative calm are complex. The most important factors appear to be the success of the provisions which have largely removed soliciting from residential areas and a relatively tolerant community attitude, informed by an understanding of the need for health care workers to have free and open access to prostitutes in the struggle to contain the HIV epidemic.

Owning, occupying or being found on premises used for prostitution

There are no statutory provisions in NSW which prohibit the keeping of a brothel and until 1990 it was unclear whether the common law misdemeanour of keeping a brothel was still available or had been displaced by the comprehensive legislative reforms involved in the Prostitution Act 1979 (substantially re-enacted in the *Summary Offences Act 1988*). There had been no common law prosecutions 'in living memory' (*Sibuse Pty Ltd v. Shaw* 1988 13 NSWLR 98, per McHugh, J.A). In 1990 a successful common law prosecution was mounted by the police (*R v. Chapman* 1990 unreported). The Vice Squad reported to the present authors that a further three prosecutions have been undertaken for this offence.

Table 1

Court Appearances for Prostitution Related Offences

	Soliciting	Live on Earnings	Allow Premises to be Used	Advt Premises	Premises Held Out As Massage Parlour	Own Premises Held Out as Massage Parlour
1972	4288	46	51			
1973	No Figures					
1974	3301	17	19			
1975	2592	21	24			
1976	1930	20	16			
1977	2075	19	4			
1978	1804	13	17			
1979	653	16	5	0	43	10
1980	6	35		4	94	28
1981	0	53		0	84	21
1982	0	39		0	66	17
1983	210	40		8	26	21
1984	419	33		166	27	17
1985	258	31		22	12	2
1986	180	11		0	11	7
1987	238	20		0	2	7
1988	376	32		68	8	4
1989	774	8		4	6	3

Source: NSW Bureau of Crime Statistics & Research

The scheme created by the *Disorderly Houses Act 1943* does, however, lay open the way for brothel keeping charges to be prosecuted. Under s. 3(1)(e) premises that are habitually used for the purpose of prostitution or have been used for the purpose of prostitution and are likely to be so used again may be declared a disorderly house by the Supreme Court. Offences are created in relation to owning, occupying, or being found on premises so declared.

In the 1980s the police made a number of applications to the Supreme Court seeking declarations. According to Perkins (1991) there are at present fifty such applications waiting to be heard. The procedure involved in seeking a declaration is costly and slow and the courts have exercised considerable caution in making declarations. However, in *Sibuse Pty Ltd v. Shaw* 1988 13 NSWLR 98 the NSW Court of Appeal by a two to one decision upheld a Supreme Court ruling that a brothel was a disorderly house notwithstanding that there was no element of disorder over and above the breach of the law (the common law misdemeanour of keeping a brothel). This decision is likely to make declarations easier to obtain.

The recent police use of legislation rarely applied since the 1960s is in direct contradiction to the policy underlying the reforms of 1979 and 1988. On both occasions the legislature turned its attention to the issue of prostitution and enacted extensive provisions relating to prostitution. Brothel keeping per se was not made the subject of the criminal law. Despite this, the police have repeatedly used the Disorderly Houses Act in an attempt to prohibit the keeping of a brothel and have

recently revived the common law offence of brothel keeping. Law enforcement appears to be at odds with the policy underlying the last decade of legislative reforms.

Police Corruption

Prostitution, along with many other so-called victimless crimes has long been regarded as an activity which encourages police corruption. There are many facets of the industry which are believed to lead to corruption:

- the vast discretion exercised by police when policing vaguely drafted soliciting and other public order laws;
- the ambivalent community attitudes to prostitution;
- the existence of a thriving market prepared to pay for services despite any illegality;
- the large police discretion created by the gap between the formal prohibitions of the criminal law on the one hand and the community tolerance and market demands on the other;
- the regular opportunities created by the 'squad' style of policing.

Police corruption has been a feature of the prostitution industry in NSW since the early days of the colony. The key areas of corruption appear to be in the payment of police by street workers to reduce the risk of arrest (the 'weighing-in') and the payment by brothel owners/keepers to ensure that the business remains open. Other benefits alleged to flow from the latter payments often include protection from prosecution for living on the earnings and restrictive trade agreements whereby newcomers to an area are closed down by the police.

In recent history, the period from the early 1960s to 1979 is regarded as the high point for police corruption. Payments were made to the police by street workers, brothel owners and managers. It was regarded as the cost of doing business, not much more than a tax on earnings. The factors that led to such a growth appear to be:

- the criminal prohibitions in the period 1968-79 were the most restrictive in NSW history;
- there was a thriving market (e.g. the influx of the R and R servicemen);
- the resulting discrepancy between the formal prohibitions of the law, and market demands and community tolerance allowed the police great flexibility and discretion in policing prostitution;

- the centralised style of policing where much of the vice policing was undertaken by the specialised squads in the CIB and elsewhere.

The decriminalisation of soliciting and the repeal of the brothel keeping offence (s. 32, *Summary Offences Act 1970*: knowingly permit premises to be used) in 1979 appear to have been instrumental in the decline of police corruption. The greatest impact appears to have been in the area of soliciting. Empirical research conducted in the early 1980s demonstrated that street workers enjoyed their new found freedom and reported the collapse of the system of paying police (Travis 1986, Perkins 1991). However, the impact of decriminalisation on police corruption in relation to brothel prostitution appears to have been less, at least in the early 1980s. The NSW Parliamentary (1986) Select Committee heard many allegations of corruption.

In recent years there appears to have been a further reduction in police corruption, particularly in relation to brothel prostitution. Personal communication with prostitutes, outreach workers, health workers and others suggests that payments to police by brothel and massage parlour operators are no longer a prominent feature of the industry. Whilst such a conclusion must be treated with caution, the information provided does at least suggest a change in the system of paying police if not a real change in the incidence.

The apparent decline is likely to be related to a number of factors:

- more permissive prostitution laws which reduce the power of the police to threaten those in the industry with a criminal prosecution;
- the appointment of a Commissioner whose reign was marked by a strong anti-corruption stance. (Corrupt conduct was identified by Commissioner John Avery as the first priority of his administration);
- the establishment of effective mechanisms for the investigation and prosecution of complaints against police;
- the imposition of severe penalties when complaints against police were proved;
- the structural reorganisation of the NSW police force into four regions with localised control and greater accountability to the community;
- the devolution of the responsibility for policing to the local detective and general duties police;
- the reduction in strength of the vice squad by 36 per cent in the last three years;
- the disbanding of the CIB and many of the specialised squads dealing with the policing of vice.

It appears that this vigorous anti-corruption campaign has combined with relatively liberal prostitution laws to create a situation where corrupt police involvement in the prostitution industry appears to be less now than at any other time

this century, particularly in the area of street prostitution. The major burden for the payment of corrupt police no longer appears to fall on the working women.

Conclusion

This brief review of prostitution in NSW has revealed many significant changes in the industry in recent years. The identification of the precise causes of these changes is a difficult task but some tentative conclusions may be drawn.

Successive NSW Governments have ignored the comprehensive recommendations of the NSW Parliamentary Select Committee. Instead, a number of piecemeal reforms have been made to the criminal law. These piecemeal reforms have, however, had a strong liberal character and when combined with other policy initiatives, appear to have resulted in a number of positive changes. The NSW prostitution law is the most liberal in Australia. Brothel keeping per se is not an offence (except as previously indicated) and soliciting for prostitution is legal outside residential areas. These liberal laws, combined with structural and prosecutorial anti-corruption measures in the police force, widespread AIDS education, improved funding for STD services, the establishment of outreach Health Services and funding for prostitutes organisations appear to have resulted in certain positive changes: a reduction in the public order problems associated with the industry; a reduction in police corruption; a decentralisation of the industry; the proliferation of small groups of independent workers; an increase in the use of condoms and other safer sex practices; a reduction in the prevalence of STDs amongst prostitutes; and an awareness amongst prostitutes and the general community of the measures necessary to assist in HIV prevention.

Many problems, however, remain. Violence, drug abuse, exploitation, poor health, stress and a multitude of other health and social problems are experienced daily by prostitutes. HIV prevention measures are not adopted in a certain proportion of brothels and are less common in other forms of prostitution. The threat of prosecution still plays a significant role in the industry and many workers are subject to dangerous working conditions. The extent to which a liberal, laissez-faire approach to the industry can adequately deal with these problems in the long term is questionable.

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HUMAN RIGHTS¾ ANOTHER LOOK AT ABORTION

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ACCORDING TO THE WORLD HEALTH ORGANIZATION SOMEWHERE between a quarter and half a million women die every year from illegal abortion (Short 1991). This is an 'epidemic' of gigantic proportions. Usually great efforts are made to curb tragic and unnecessary deaths, such as those from smallpox, malaria and AIDS. It is surprising then that almost nothing has been done about this shocking worldwide tragedy of the deaths of so many women from backyard abortion. While the deaths from epidemics are accidentally caused, these deaths from abortion result from government policies.

This is in itself a statement about the current status of women around the world. If the reasons abortion laws came into being could be established, it might explain why governments currently act, or do not act, in the way they do.

Feminists proclaim that the history of patriarchal societies and anti-feminist cultures has been about power and control in the family, and that abortion is part of this story. Others point out that the need to control women's sexuality is because men do not take responsibility for theirs.

Research into the history of abortion therefore results in somewhat confused and different views in relation to community use, acceptance, morality and the legality of abortion practice.

The Church

Over the last two centuries, with the centralisation of power in the Catholic church, various ideas on abortion have been standardised into a single inflexible position, that is, that the church is convinced all abortion is wrong (Pius IX—Aclae Santae Sedis 5298, *Conscience* 1991.)

The limited historical records suggest that the legal position on abortion has been uncertain. There are some records indicating that abortion was considered (by those in authority) a punishable offence, yet the practice appears to have been commonplace. Keown (1988) cites cases (1327, 1348, 1505, 1602, 1732, 1755) and a number of treatises asserting that abortion was punishable well before the first statutory publication of the offence in 1803 (Keown 1988, pp. 4-10). 'The Act of 1623 reversed common law presumption of stillbirth and provided that, if a woman concealed the

death of her illegitimate issue so that it might not be known whether it had been born alive, she should suffer death for murder unless she could prove stillbirth' (Keown 1988, p. 6). This adds emphasis to the suggestion that it is the sinful sex that is the crime.

In 1803, Lord Ellenborough's Act (England) restricting abortion was introduced. Keown says: 'There has as yet been no wholly satisfactory explanation of the restriction of the abortion law by this Act, which is perhaps understandable in view of the apparent absence of any popular or religious outcry over abortion' before it was passed and that there are 'three possible reasons for its enactment, namely: clarification of the law; perception of abortion as a social problem; and criticism by regular medical practitioners of the significance attached to quickening' (the time when the woman first feels movement of the foetus). The penalty was very severe. 'Attempted abortion after quickening was, between 1803 and 1837, punishable by death. So too was any felonious attempt which resulted in the woman's death. . . . It is suggested that the gradual extension of the law and its persistent severity can be seen not only as a reflection of the harshness of the contemporary criminal code as a whole but also as a response to proposals for reform, advanced by the emerging medical profession' (Keown 1988, p. 12, 25, 27).

The Medical Profession

Many women, particularly late twentieth-century feminists, have been critical of the (mainly male) medical profession, especially in the manner in which they have taken over women's traditional role in managing reproductive and birthing practices. These next findings are therefore quite illuminating.

> There is substantial evidence that medical men were concerned not only for the welfare of the potential victims of abortion but also to further the process of establishing and consolidating their status as a profession. This process could only have been hindered by abortion, which provided an outlet for irregular practitioners such as herbalists and midwives. By turning away women seeking abortion, the regulars risked driving them to their less qualified yet more accommodating competitors, perhaps permanently. Increasingly restrictive legislation on abortion and on the obtaining and supplying of abortifacient means would serve not only to safeguard foetal and female life, but would also hinder irregulars from capitalising on the demand for a service which ethical precepts prevented the regulars from satisfying (Keown 1988, p. 40).

Hereafter Keown presents a description of the development of the use of craniotomy (destruction of the foetus during labour) in preference to (the life threatening) caesarean section, and later the use of abortion and induced premature labour (both prior to and after viability) as a way of avoiding the above procedures. One almost feels that these procedures were legally safer than early abortion and were commonly used to terminate unwanted pregnancy.

During the passing of the (English) Offences Against the Persons' Bill 1861, evidence is presented that the *Lancet* journal's uncompromising demand, (written in the most emotive and degrading language) for legislative action had a strong influence on public opinion. Yet obviously abortion continued to be available.

In the USA, after the middle of the nineteenth century, physicians became medical crusaders, attempting to influence public morality and behaviour. After 1840,

abortion came increasingly into view and abortion clinics were vigorously and openly advertised in newspapers and magazines. It appears that it was acceptable for 'poor and unfortunate' unmarried and desperate women to have abortions but 'white protestant middle and upper class native born women began to use these services as well' (Conrad & Schneider 1980).

The Australian Medical Association passed a resolution condemning abortion in 1859 and was instrumental in having laws passed (1866-1877) making it a criminal offence. The reasons given were threefold:

- undoubtedly they believed in the moral rightness of their cause;
- concern was growing about the dropping birthrate (by the 'better classes');
- migrants were arriving with big families and 'middle-upper class men (physicians and legislators) . . . were deeply afraid they were being betrayed by their own women' (Mohr 1847, cited in Conrad & Schneider 1980).

Penalties related to the 'sin of illicit sex' in the church and to some degree in the state, gives weight to the feminists' argument of the desire to control women. Retention of the current laws on abortion and prostitution confirm their argument.

The church's position on morality moves increasingly to protect the foetus. However we are more a pluralist society now than ever before and the influence of any church, Catholic or otherwise has been diminished.

The emerging medical profession was anxious to develop and protect its status and area of practice. There seems little evidence that this was out of a strong concern for women's health, otherwise they would have also banned Caesarean section, forty-five women out of forty-nine dying in one series (Keown 1988). If safety was the rationale, there is certainly no justification for keeping the current laws, given that abortion options are many times safer for women than birthing.

What attempts have been made by governments around the world to review the rationale for abortion laws and the laws themselves? Countries collectively, have been able to make decisions. At the international level recognition has been given of choice about child bearing being a basic human right. In 1948 in the aftermath of world war, the International Human Rights' document was adopted. The Universal Declaration of Human Rights Articles 1, 3, 12 and 23 are relevant to the individual's right to determine the course of their life including child bearing.

In 1968 the International Conference on Human Rights in Teheran recognised that 'parents have a basic right to decide freely and responsibly on the number and spacing of their children'. The World Population Plan of Action agreed to at the Bucharest Conference of 1974 reaffirmed that right and expanded on it, stating: 'All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so . . .'. The document also states that governments should 'respect and ensure, regardless of their over-all demographic goals, the right of persons to determine in a free informed and responsible manner, the number and spacing of their children' (*Reproductive Health* 1991, p. 11).

In July 1980, the world body adopted the Convention on the Elimination of all forms of Discrimination Against Women. This Convention, referred to as CEDAW was signed by Australia in 1980 and ratified in July 1983.

The Convention is legally binding on ratifying countries.
Although several articles imply a right to abortion, Article 12 is most relevant.

> Article 12
>
> 1. States Parties shall take all appropriate measures to eliminate all discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
>
> 2. Notwithstanding the provisions of paragraph 1 of this Article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Abortion Law Reform: A Human Rights Issue

No country has approached abortion law reform as a basic human rights issue for women. Even in the USA through the high court ruling (*Rowe v. Wade* 1973), abortion was ruled to be a privacy issue (not a human rights issue).

Do governments around the world offer more than a token commitment to women's equality as a basic human right? Indeed, are women so devalued that women's rights are not human rights? Bunch (1990) states 'Significant numbers of women are routinely subject to torture, starvation, terrorism, mutilation and even murder simply because they are female'. She goes on to state that if this was happening to any other group of people it would be considered a gross violation of human rights.

Abortion is first and foremost a human rights and social justice issue. Social justice is not what is administered when all else fails, it is about full citizenship. It is a state of being. Rights are only rights when they can be exercised in an unfettered way. It is therefore dictatorial, degrading and an insult to the intelligence of a woman to have the decision on whether she will become a mother imposed on her by law or by a panel, or a doctor, or a priest, then leave her to carry out the responsibility of that decision. Abortion is at least eleven times safer than childbirth. Now would any man accept that anyone could force him to take a course of action eleven times more dangerous to his life than the course he was prepared to take? There is no comparable field of human activity where such a decision is made on another's behalf.

By July 1991, after eighteen months of government, the Labor government in Queensland, has achieved or is in the process of reforming the laws in relation to homosexuals, animal welfare and Aboriginal land rights. However, despite the majority public support for abortion law repeal in Queensland and across Australia, there has not been any positive reaction from government.

We have been distracted by the fertility choice/abortion rights argument and have failed to see the real issue which is that women are not trusted. Women are not considered capable of making good and right decisions. The truth is that women are not accepted as full human beings. It is society's inability to trust the judgment of women that causes governments to continue to (try to) control women's behaviour with repressive laws that bear on their sexuality.

It is the way that the issues of abortion and prostitution are handled that really matters. These issues are the measuring sticks by which we can gauge a government's

attitude to women and the status of women in that community. If women were considered equal human beings, it would be unthinkable to have laws like our abortion and prostitution laws.

Who Decides What a Woman Does With Her Body and Life?

Historically, with the control exercised by church and state, men have been and are still in positions of power and control over families and the opportunities open to women. Do most men still consciously seek control over women and their sexuality or is this subconscious behaviour?

Petchesky's premise is that 'Abortion is the fulcrum of a much broader ideological struggle in which the very meanings of the family, the state, motherhood and young women's sexuality are contested' (Petchesky 1986). This can be brought down to simple language and actions that all can understand and act upon. Men must be challenged to review their behaviour and the society to recognise what it condones. Current attitudes derive from what the author calls the 'Adam and Eve' complex, the belief deep down that women are seductive and destructive, and they will damage and destroy our society. Thus, their (sexual) behaviour must be controlled (by law). Never mind that these same women will risk poverty, death and starvation to bear and/or rear a child they want (and incidentally would never be challenged about their decision to do this).

There are those who say 'but if women can freely choose abortion, they'll run off and have it at twenty-five to thirty weeks!' This attitude again shows total disrespect for women's judgment. Research shows that women do not do this, but that when abortion is freely available they present early. Even if they did present late, almost always they have very grave reasons and are certainly desperate and need support.

No amount of equal opportunity legislation will ever give women equality if we do not trust them to make fundamental decisions about their sexuality and their reproductive lives. If women are not considered good decision makers, (at this most fundamental and personal level), how can they confidently be regarded as good managers or good politicians, good judges or policy makers? 'Human rights are still considered different and more important then women's rights. This separation perpetuates the idea that women's rights are of a lesser order than rights of man' (Bunch 1990).

Yet the most basic of all political and human rights is the right to control fertility. If we use the Universal Declaration of Human Rights, to which Australia is a signatory, as the baseline of human rights, a woman who is unwillingly pregnant loses these rights in Article 1, 3, 12 and 23. These women are not allowed to exercise their reason and conscience; they do not have liberty and security of person; they suffer arbitrary interference to their privacy and family and they do not have the right to work or free choice of employment. Compulsory motherhood is to be her occupation irrespective of her choice. Even access to adequate food and shelter can be jeopardised if she is unable to work or already has more children than can be managed by the family.

World population growth, safer births (requiring fewer therapeutic abortions), thalidomide publicity, the appearance of the long awaited birth control pill in the early fifties, together with women's improved education and employment opportunities have caused a re-examination of sex roles and sexuality, particularly in developed

countries. Better health programs for women and the new abortion pill RU486 will add to this momentum.

However, it still seems very important for society to have control over women or to 'use' women for its own ulterior purposes. For instance, of the United States Petchesky says:

> Legal abortion plays a (more) symbolic function in the formation of a right wing constituency . . . Antiabortion presents an aura of religiosity more than actual theology, separating the Godly from the Ungodly, the innocent from the damned . . . providing a banner to the claim of absolute morality . . . The foetus becomes the most potent symbol of helplessness . . . 'Saving the foetus' and 'Saving America' go together and both require a strong male leader (Petchesky 1986).

One wonders what would happen if abortion was made illegal again. What would keep the conservative right together?

Women's great hope, CEDAW—the Bill of Rights for Women, adopted by the United Nations in 1979, has failed to address the issue of abortion in the reporting procedures of member countries.

Here in Australia only the South Australian Liberal Government in 1970 and the Whitlam Government in 1973 (with the establishment of the Royal Commission on Human Relationships), have attempted to positively address the abortion issue, and certainly not from a human rights commitment. That women can get an abortion in Australia anywhere (except marginally in South Australia) is no thanks to our law makers, governments or politicians. They have remained consistently and cowardly silent.

Whatever their rationale, the rights of women: freedom from violence and the right to work, are not treated as basic human rights.

Conclusion

Social justice requires that the starting point for women must change. They must have the same starting point as men. When women have equal human rights then the way we think about providing services in areas that affect women's lives will change. We will stop 'sticking on band-aids' and stop 'closing stable doors after horses have bolted', and begin to look at preventing trauma and providing life affirming services. We will analyse real cause and effect rather than apportion blame. For instance, the child-bearing role of women might be valued to a point where, as a society, we do all we can to provide an environment where women are able and willing to give birth to healthy and wanted babies.

Failure to repeal laws against abortion is a flagrant example of man's inhumanity to woman. It is men who still dominate the politics of abortion and frame the legal codes. This results in our collective failure to recognise the primary human rights of women and women as equal human beings.

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LUNAR LANDSCAPES: THE DARK SIDE OF SEXUAL ASSAULT AND THE LAW

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IN 1968 'MAN' [SIC] LANDED ON THE MOON, PROMISING, AMONGST OTHER things, a gateway to new horizons and endless possibilities. In Victoria, twenty-three years later, an event of no less significance has taken place—proposals for reform in the area of sexual assault.

Now the analogy may appear absurd, but the following paper will describe an incredible journey through the dark and difficult landscape of the Victorian criminal justice system's responses to sexual assault.

The Real Rape Law Coalition is clearly more earth-bound and our horizons more defined than our colonising friend, Buzz Aldrin, but our first steps were anything but tentative.

The Campaign's Beginnings

The Real Rape Law (RRL) Coalition came together in August 1990 when the Victorian Attorney-General, Jim Kennan, proposed the introduction of a sexual offences reform bill that did almost nothing to address the appalling situation of adult sexual assault victim/survivors in relation to the law.

The Coalition is a collective of workers from community legal centres and centres against sexual assault and other people interested in reforming Victoria's rape laws. At a public meeting organised in September 1990, the question asked again and again by women who have had contact with the legal system was 'Where's the justice?' Two main problems were articulated: the issue of 'consent' and its operation in rape cases; and the humiliating and often hostile treatment by police and courts of women who have been sexually assaulted and whom the system regards as mere witnesses for the

1 This paper was written in September 1991. As at February 1993, the Real Rape Law Coalition no longer meets.

prosecution. 'Just which part of 'No' don't you understand?' and 'Who's on trial here anyway?' are questions that Victorian women are still waiting to have answered.

The Coalition considers it outrageous that consent to sexual intercourse can currently be inferred from a woman's dress or physical appearance or her participation in everyday social activities such as accepting a car ride, a dinner invitation, or the act of having a drink and a friendly chat with a man. Counsel for the defence, Mr George Traczyk, in a recent Melbourne rape case discussed the example of a 'woman wandering through a Housing Commission car park wearing make-up, mascara and a seductive mini skirt' and said 'the community standard would be: "what did she expect?" '

Because women are so often considered to be 'asking for it', and because of the way that consent is interpreted by the law, the victim is often herself on trial and under suspicion from the minute that she first contacts the police. The whole process of reporting a sexual assault and going to court is, at present, an extraordinarily disempowering one for the victim/survivor; she is not seen to have any rights or interest in the proceedings and hence is not legally advised or represented. Professional support is rare or non-existent, and there is little, if any, recognition of the traumatic nature of her experience. As one speaker at the public meeting summed it up: 'There is no difference between being raped and giving evidence as a key witness at the trial of your alleged rapist, except that this time it happens in front of a crowd'.

The RRL Coalition ran the first ever Victorian sexual assault Phone-In in April 1991 and the findings contained in our report confirm these points. Women often felt disbelieved, devalued and re-assaulted by the criminal justice system as the following remarks indicate:

> I was blamed for walking alone in the park at night and then asked if I was a man-hater.
>
> I was blamed and told I'd be no good in court, I was too hostile.
>
> The court process made me feel raped all over again.
>
> It took me longer to get over the court experience than the actual rape. I was treated as the criminal.

After intense lobbying of the Attorney-General on these issues, and with demonstrable community support for extensive reform, Mr Kennan sent a reference to the Law Reform Commission (Vic.) in October 1990 asking them to review again the definitions of rape and indecent assault, particularly the issue of consent, and to investigate measures that would reduce the trauma of the legal process for adult victim/survivors of sexual assault.

Opposition to reform, however, particularly from members of the legal profession, has been passionate and well-articulated (which is, after all, not surprising as its spokespeople are very often QCs). The 'defences' of the system take various forms, but the two main ones this paper will challenge, are, in essence:

- 'If there's a problem (and we're not saying there is), it's not with the law'; and

- 'It's a very ancient offence and to tamper with the elements of the crime would mean undermining a man's fundamental right to defend himself by bringing forward any and all information that might assist his defence' (or words to that effect . . .)

'If There's a Problem, It's Not With the Law'

The first of these responses, 'if there's a problem, it's not with the law', was consistently raised in answer to the assertion (and it's not a new one) that the application of 'consent' as the determining issue in the majority of rape cases is based on socially prevalent myths about sexual assault and false stereotypes of female and male sexuality. These myths in effect classify some women as 'real' or 'deserving' rape victims and others as 'unrapeable'; some rapes as 'real rapes' and others as 'half won arguments' with no harm done.

The law reproduces a stereotyped and narrow notion of rape, sensationalised by the media and based on only a minority of actual cases, where a stranger abducts an 'innocent' woman or breaks into her home, wielding a knife or other weapon. The dominance of this stereotype disqualifies or casts suspicion on women who complain of rape. However in the vast majority of instances, the assailant is someone known to the victim/survivor; there is no forced initial contact between the parties; there is no weapon used or present; and the victim/survivor does not sustain extensive physical injury. The findings of the sexual assault Phone-In confirmed that women in Victoria are certainly aware of the difficulty of complaining of rape when it does not fit the 'stranger danger' mould: 60 per cent of cases where the assailant(s) were strangers to the victim were reported to the police while only 21 per cent of cases where the assailant(s) were known to the victim were reported (even though 72 per cent of all cases involved known assailants).

Women may also be disqualified from obtaining legal redress in sexual assault cases owing to their occupation, prior sexual history or lifestyle. The recent decision made by Judge Jones in the case of *R v. Hakopian* is a perfect example of how sexist attitudes inform the law. Judge Jones followed Supreme Court precedent, which stated:

> . . . the crime when committed against prostitutes is not as heinous as when committed, say, on a happily married woman living in a flat in the absence of her husband when the miscreant breaks in and commits rape on her.

Is it to be inferred that women must be married in order to establish themselves as properly rapeable, and then only by someone other than the woman's husband?

Defenders of the legal system argue that such problems are not attributable to the law per se. They insist that the law as it currently stands does do what we would want it to do, namely, protect all citizens' rights to sexual integrity and self-determination; that is, the right to say 'No'. They point to the fact that all that the law in Victoria requires to establish that a rape has been committed is proof of sexual penetration, without consent of one party and without an honest belief in consent by the other party. It is argued that consent in rape cases carries its ordinary, everyday meaning—something like agreement or permission—which every person, of course, has the right to withhold regarding sexual penetration.

However, there are fundamental contradictions in a legal system that leaves the crucial questions in a rape case, such as the decision as to whether or not the victim/survivor was consenting, to be determined on the basis of 'ordinary', 'everyday' meanings. In the absence of explicit legal principles that decision can only be made on the basis of dominant social attitudes, myth and custom; the very social attitudes, myths and customs, in fact, that tolerate rape and mean that it is, unfortunately, common practice in our society, a norm rather than an aberration. In other words, if consent is not legally defined and is open to be given its 'everyday' meaning, then its application in rape cases can be expected to be itself based on the sexist attitudes and beliefs that are responsible for rape and sexual assault in the first place: for example, 'what did she expect?', 'she was asking for it', 'if she really didn't want it she would have kept her legs shut', and 'they all say 'No' but they don't mean it, they really love it'.

The aggressive sexism of Mr Traczyk and Judge Jones, as illustrated above, would certainly seem to confirm this theory. A number of recent rape cases in Victoria also serve to highlight some of the major inadequacies of our existing law.

Without consent

One prevailing assumption about female sexuality that is particularly prevalent and obnoxious in the way in which it informs the application of rape laws is the notion that a woman is always consenting to sexual penetration until she proves otherwise. This arises from the fact that consent is seen to be the key thing that distinguishes rape from lawful sexual intercourse. It is maintained, in other words, that consent is present in lawful sexual intercourse and absent in rape cases. This initially appeals to commonsense; however, the presence of consent in lawful sexual intercourse is not considered to be a positive presence, observable in either words or actions, as the judge in the following case explains:

> . . . there is a difficulty that some people experience in understanding this concept of consent. Some people think that it means the expression of consent, a woman saying 'Yes'. Clearly, it cannot mean that, because as you all know from your own experiences of life, and of the world, in the ordinary course of events, when a man has intercourse with a woman [sic], it is not preceded by the man saying to the woman, 'May I have intercourse with you?' and the woman saying, 'Yes'. I mean this does not happen.

Acceptance of this supposedly commonsense assessment of common practice dictates in effect, then, that absence of conclusive words or actions one way or the other will be taken as evidence of consent being present. Thus, for a woman to prove that consent was *absent* on a particular occasion, she must at present, paradoxically, establish the unequivocal *presence* of words or actions attesting to that absence of consent.

The difficulty of positively establishing absence of consent is well illustrated by a decision, in 1990, of the Supreme Court of Victoria in *R v. Singh*.

A woman was raped several times in the course of a night after two 'friends' arrived at her flat, drunk, at about 2 am. She let them into her flat because she was worried that their knocking and calling would wake residents in the other flats and her own sleeping children. One of the men passed out on the couch and the other proceeded to rape her after she rejected his marriage proposal. He threatened to kill

her if she did not comply. On appeal, the Supreme Court overturned a jury conviction, saying that:

> . . . it is a remarkable feature of the case that in spite of her evidence that she was forced to have intercourse there were no signs of force having been used on her body and no evidence of any struggle or resistance or of disarrangement of the furniture in the flat.

The court also placed great emphasis in this case on the fact that the woman did not sustain significant physical injury. They commented that:

> When the prosecutrix was medically examined at about 10.30 am no abnormalities or any sign of force having been used, apart from the love bites [i.e. bruises] on the neck, were found.

The effect of this decision is to require conclusive physical evidence of force, or some other 'physical' corroboration of the victim's testimony, in order to sustain a rape conviction.

The unenviable choice for women then, is to sustain extensive physical injury in addition to the rape, or to risk disparagement and disbelief. As one victim/survivor, whose case against her assailant resulted in an acquittal after much emphasis was placed on her alleged lack of resistance, says:

> The fact you are not torn limb from limb, splattered against a wall, maimed for life, implies that you did not fight. The implication that you did not fight is submission. You submitted. And submission implies consent? That is absurd. The act of sex will not kill you if you lay there like a piece of meat. You fight and you could be killed, you could be maimed—but if you do not fight, do not expect the courts to believe you.

Overwhelmingly, the stereotype of criminal assault remains the experience of physical attack in a 'public' place by a (male) stranger. Notions of 'force' and 'resistance' are similarly defined according to male standards, as Singh's case demonstrates. Women's experiences of assault, 'domestic violence' as well as sexual assault, are often not recognised within that framework.

The above cases are not unusual in their emphasis on evidence of physical force and injury. As one commentator notes, 'The law focuses on types of violence which reflect man's physical superiority over females . . . and ignores other types of violence which reflect man's economic, organisational and social "superiority" '.

While the physical strength of the perpetrator will easily outweigh that of the victim/survivor in a rape case, other power weighted factors are often significant, especially where the perpetrator is known, as in most cases he is. Embarrassment, shame, shock, confusion, despair and disbelief can determine the victim/survivor's response to an assault. Previous harassment, whether physical, emotional or economic can also mean that a rape takes place under duress without there being any apparent physical evidence of 'force'.

In fact, the most common response of callers in the sexual assault Phone-In to a question about the method of attack employed by their assailant was simply that they felt an overwhelming sense of powerlessness; 74 per cent of victim/survivors felt that there was nothing they could do.

If a woman reports sexual assault to the police and if she has to give evidence in court, however, she will rarely be asked anything about shock, or surprise or embarrassment or fear or denial or whether she was worried about her children in the next room, or that sense of powerlessness.

Gendered harm

The law and legal process similarly does not recognise or comprehend the harm of sexual assault for women.

Even in cases where the guilt of the offender has been established, if a woman does not sustain physical injuries, if she is not in the 'deserving rape victim' mould and the case not otherwise considered to be a 'real rape', then the culpability of an offender is often seen to be minimal or not warranting sanction by the courts because it is considered that there has been no 'real' harm done.

The *Hakopian* case again provides a good illustration of this point. When sentencing *Hakopian* for aggravated rape, aggravated indecent assault and kidnapping, Judge Jones said that:

> As a prostitute, Miss X would have been involved in sexual activities on many occasions with men she had not met before, in a wide range of situations . . . On my assessment, the likely psychological effect on the victim of a forced oral intercourse and indecent assault, is much less a factor in this case and lessens the gravity of the offence.

Another stunning example of judicial sexism meant that justice was denied the five women who had been repeatedly sexually assaulted as children by Robert Michelle. In that case, Judge Barnett of the County Court found the offences, to which the accused had pleaded guilty, to be 'stale' and Michelle was not convicted on the basis that the Judge could see no social benefit in convicting this man.

These decisions can only be explained in terms of the complete ignorance on the part of these judges, and many others responsible for administering the law, of the impact of sexual assault on the lives of victim/survivors. As one of the women in the Michelle case said, 'It's not stale to us. It makes a mockery of us coming forward'. All five women said that they were still scarred by the assaults which happened some twenty to thirty years earlier. One said that her marriage broke up because she could not stand her husband touching her and another woman said that she trusts no one and even now, at thirty-four, will not sleep at friends' houses.

The sexual assault Phone-In established that the repercussions of sexual assault frequently do not fit within the standard notion of 'injuries' consequent upon a criminal assault. For example, callers described sexually transmitted diseases, recurrent urinary tract infections, pregnancy, panic attacks and amenorrhoea as direct consequences of a sexual assault committed against them.

Some 98 per cent of callers to the Phone-In described extensive and long-term emotional damage as a consequence of being sexually assaulted and more than one third of victims also suffered physical repercussions.

The most commonly reported long-term effect of a sexual assault was ongoing fear of men, loss of trust in men, and problems in relating to men. Sexual and family relationships were often affected and, in some instances, broke down irretrievably.

Enduring feelings of anxiety, depression, guilt, shame and worthlessness were also commonly described. In some instances these responses precipitated suicide

attempts and breakdowns, self-mutilation, drug addiction, anorexia and other harmful behaviours which victims attributed directly to the sexual assaults against them.

One woman who was raped by four men ten years ago when she was fifteen, described her situation:

> It destroyed my life. I've never trusted anyone since. When you're married you're supposed to trust people but I can't. My sex life is a complete shambles, I shower continually because I always feel dirty. I can't sleep; I still have nightmares. They ruined my life so much, why didn't they just kill me?

Locating Responsibility with the Law

Rape laws which do not specifically exclude the application of sexist, discriminatory, and ill-informed attitudes and beliefs in the determination of sexual assault cases tacitly condone rape, condemn women to suffer in silence, and perpetuate and compound the harm consequent on a sexual assault.

It is not enough, then, to just look at a rule of law in splendid isolation in order to assess whether it achieves its intended purpose. In fact, it is abundantly apparent from the application of the law in the cases cited above that the effects of the laws in Victoria, as applied, offer anything but protection of individual's rights to self-determination in sexual matters.

What is being offered by Victoria's rape laws as they currently operate is a legal limit on the type and level of force that can be used in 'negotiating' a sexual transaction, with the penalisation of some of those assailants who exceed that limit with respect to certain victims.

The recommendations formulated by the Real Rape Law Coalition to reform law and procedure recognise that it will take more than a few cosmetic improvements to begin to make legal redress relevant to victim/survivors of sexual assault. Many of the Coalition's recommendations are aimed at restricting police, judicial and jury discretion and thereby limiting the scope for sexist views and assumptions to influence outcomes in sexual assault matters.

In defining the offences of rape and sexual (indecent) assault, the Coalition has attempted to place greater emphasis on the actions of accused persons, rather than on their victims, in the prosecution process and to fundamentally challenge male attitudes and behaviour by setting a legislative standard for the conduct of their sexual relations.

Failure by the accused to have actively ascertained whether or not 'free and voluntary agreement' to participate in the sexual act in question was present should, in our view, be sufficient to establish culpability. 'Free agreement' should replace consent since the latter carries with it a heavy load of sexist baggage. Even at the symbolic level, a new legal language will help to challenge the mind set of all players in our conservative legal system.

Furthermore, the legislation will need to state clearly that free agreement can only be ascertained by words or overt actions (a positive indication) and not by the dress or demeanour of the woman, her agreement to engage in sexual activity on a previous occasion or her failure to physically resist, among other things. Submission or inaction therefore could no longer be read by men as passive agreement nor could agreement be said to be freely given in circumstances where physical, economic, emotional or social coercion exist.

Legislative clarity about the rights of sexual assault victim/survivors in the criminal justice system must also be established. The right to be kept informed of the progress of the investigation and prosecution of the case; the right to be informed of the reasons for (and be able to seek the review of) decisions made by police not to proceed with legal action against the assailant; and the right to support and advocacy throughout the legal process are just some of the measures proposed by the Coalition to ensure procedural justice for those who report sexual assault.

In isolation, reforms to the substantive law or to the legal process will be insufficient to turn around the widespread crisis of confidence in our legal system expressed by sexual assault victims/survivors. Combined, and placed together with an extensive program of community re-education on sexual assault, acquainting all persons with the intent and scope of reforms to the legislation, they may go some way toward balancing more justly the rights of the victim/survivor with the rights of the accused and, in turn, deter the incidence of sexual violence in our community.

'. . . to tamper with the elements would mean undermining a man's fundamental right to defend himself . . .'

Balancing the rights of the victim with the rights of the accused is the proposition which gave rise to the second main cannonade of opposition to changes in Victoria's rape laws—the civil libertarian response to reform.

It has been suggested that any feminist campaign on the problem of violence against women would be tactically naive to antagonise the civil libertarian lobby, apparently a potential ally. Yet antagonism has taken place. The potential has not been realised.

Recommendations for substantive law reforms have been viewed as representing an attack on the fundamental rights of accused persons in the criminal justice system, the presumption of innocence, the right to a fair hearing and so on.

There has, however, never been an intention on the part of the Coalition to reverse the onus of proof in sexual assault matters. Reforms to the elements of the offences of rape and indecent assault are aimed at placing greater emphasis and responsibility on the actions of the accused, articulating what it is that he has done that constitutes a criminal offence and redefining circumstances of coercion.

The raison d'être of the civil liberties lobby is, of course, to ensure that the delicate balance between the interests of society and the rights of its citizens to be free from harsh or unfair treatment by the state is maintained. That is, to intervene on behalf of persons accused of crimes in order to keep state powers at bay and ensure just process.

In the area of sexual offences though, the balance is hardly a delicate one when for most victims, justice is about as remote as the moon. Two-thirds of the sexual assaults recorded by the Phone-In have never been reported to the police. When callers were asked what had influenced their decision not to report, 53 per cent said that they thought that telling the police 'would not do any good'. Two-thirds of adult victims who did not report said that they did not think that the police would believe them if they had. Just over one-third of victims who did not report were not sure whether what had happened to them would be regarded by a court as a criminal offence. These concerns and perceptions are well founded.

A sexual assault report will most likely not result in legal action against the assailant. The Phone-In and the recent research of the Victorian Community Council Against Violence found that 60 per cent of sexual assault reports do not result in legal action against the assailant(s).

Sexual assault victims are likely not to be believed by police and other legal officers. Of the cases from the Phone-In that did not proceed, 21 per cent of victims were told explicitly by police that they did not believe them.

Where is the balance or the justice when the reality is that only one in three sexual assaults at best are likely to be reported to the police; when only a minority of those reported offences will be prosecuted; and when the law is applied, even in these cases, not with the aim of protecting individual's rights but rather with the aim of curtailing certain 'socially undesirable' acts when performed on certain 'deserving' citizens? It is an undeniable state of injustice that a mere 6 per cent of all assaults committed end in conviction in our courts.

The second point of departure with civil libertarians relates to the question of whether the problems with the law and legal system as they pertain to sexual assault have anything to do with gender. In ignoring the importance of gender and the gendered harm which results from sexual assault, civil libertarians grossly limit their understanding of sexual assault and the problems with the response of the legal system. Indeed, it is difficult to justify a gender neutral stance when 96 per cent of sexual assault victims are female and 99 per cent of assailants are male!

However, the relevance of gender is not limited to the fact that the overwhelming majority of victims are women and perpetrators male. A gender analysis is also important to our understanding of the state and its role in law making, law enforcement, criminal investigation and prosecution.

One could suspect, prima facie, that if the law is made by men, enforced by a male dominated police force, and male perpetrators are judged by men (in Victoria, no County or Supreme Court Judges are women), then the interests of men in this system may well predominate over those of women. Civil libertarians may want to believe that the law is the law . . . is the law, applied equally to all, but to suggest that gender is not important in this context is as naive as refusing to accept there is violence based on racism and racial vilification.

Theoretically, in its role as protector/guardian of the public interest, the state intervenes on behalf of victims to bring the offender to justice. Again, the assumption inherent in this view of the workings of our legal system is that the state acts in an impartial manner, without favour, in protecting the interests of all its citizens. Indeed, it assumes that all citizens have equal power and access to the shaping of state laws and policies. We do not have to look very far to find the fallacy in this assumption. Women's unequal access to public power can be seen vividly in the impact of past and present state policies in the health, housing, welfare, employment and education spheres on women's lives. These policies have, by and large, rendered women economically dependent and socially isolated as recipients of pay and conditions unequal to those of men.

When women are sexually and physically assaulted and they look to the legal system for justice, the response is undoubtedly one of great reluctance to intervene, as many victim/survivors have testified. Far from acting in the interests of women, the state frequently ignores their cries or indeed acts in some instances to place women at far, far greater risk of harm.

For example, on those occasions when the state has been forced to respond to the prevalence of crimes such as domestic violence and sexual assault against women in the community, it has done so with measures aimed neither at challenging or arresting male violence, nor questioning its own underlying resistance to controlling male violence but rather, by suggesting that women adapt their behaviour and lifestyles accordingly.

'You need to prepare yourself for attack' is the message to women from the Victorian Crime Prevention Bureau, with other handy hints like:

- Don't wear high heels because you won't be able to run fast enough from your assailant.
- Don't wear short tight skirts, you won't be able to take long enough strides.
- Don't go out alone, but if you do lock all car doors and windows.
- If you live alone and the door bell rings in the evening, yell, 'I'll get it'—to convey the message that you are not alone.

In other words the burden of responsibility for male violence is to be carried by women—stay off the streets, lock yourself away: extraordinary advice in light of the fact that most violence against women is effected by men known to them and usually in the so-called 'safety' of their own homes.

It is in this context then, that we must seriously challenge the premises upon which civil libertarian arguments are currently advanced. If the state is not concerned with the rights of sexual assault victims and the liberty of women to live free from fear of assault, who is?

Conclusion

In the year since this particular round of campaigning for rape law reform commenced, the debate has travelled quite a distance. The intransigence of at least some members of the judiciary, some members of the ever cautious legal profession, and the ever pragmatic bureaucracy has begun to subside. The Coalition's campaign has been directed at highlighting the real dimensions of the problem, the crisis of confidence that victim/survivors experience with our legal system.

We must consider one final question, and that is, what ultimately is the object of rape law reform? Is it to protect some women from sexual assault or is it to challenge and change the social conditions and attitudes which allow rape to exist? Is it merely to limit the excesses or is it to put a stop to male violence?

It is argued that the criminal law should be used as a means of granting women a positive right to physical integrity and self-determination in sexual matters rather than merely affording some women protection. In other words, if we are to assume that women are fully competent, autonomous beings, if women are to be fully fledged citizens with rights and liberties, then we must assume that if a woman wishes to engage in sexual activity, she is more than capable of conveying this wish in overt or otherwise unambiguous terms. Silence or submission does not convey consent; and 'No' always means 'No'.

Will the lunar landscape of the law be illuminated to reflect women's experience of sexual assault? Will it say without hesitation that the licence to rape is now well and truly revoked?

PART 2: WOMEN AND THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION TO PART 2: WOMEN AND THE CRIMINAL JUSTICE SYSTEM

Dr Patricia Easteal

THE ARTICLES IN PART 2 LEAVE THE REALM OF STATUTES AND LAWS AND turn the focus to women defendants, practitioners, vis-à-vis the police, and within the domain of prisons. Again, most of the papers highlight the discrimination and sexism encountered by females.

Polk's paper reviews homicide cases perpetrated by females in Victoria and compares the themes found in these killings to those he has found in homicides perpetrated by men. The paper concludes that, when women kill, the victim is usually a child or partner—the latter precipitated by his violence. Polk also notes that in his sample, the criminal justice response was more lenient to female defendants, particularly when the victim is a child.

Easteal's paper also focuses on women who have killed. She highlights the role of premenstrual syndrome and how it has been used in the defence or mitigation of sentencing for women overseas in homicide trials (and in other lesser crimes). The controversy which this has caused both overseas and in Australia where it has not been introduced into court is discussed. The author suggests that some of the disagreement could be addressed through establishing a strict burden of proof and limiting the use of premenstrual syndrome to mitigation.

McDonald looks at social security fraud offences in the various domains of the criminal justice system. A few authors, responding on their specific research programs, are either more hopeful or less concerned with identifying inequities. The first paper, by Polk, is an example of the latter. McDonald discusses legislative modification in definition of sole parent that has had a negative impact on many women and has resulted in their appearance before tribunals and courts where they must prove that they are not in a marriage-like relationship. The results of the change in the unemployment benefit and its consequences particularly for women are also explored.

Does gender affect sentencing in the Victorian Magistrate's Court? Naylor presents the preliminary results of her study. Previous research has found that although gender does not impact directly on the length of sentence, particular aspects about the female defendant do have an impact—for example, divorced women received heavier sentences; the more dependent economically, the less severe the disposition given to the woman. In other words, sentences are affected by the degree to which the offender conforms to the prevailing female stereotype. Naylor's findings

are only preliminary but little difference in sentences by gender is apparent; if there is an effect by gender, Naylor believes that it is not in one direction but involves a complex interaction of variables.

Turning from women as offenders to women practitioners, Roach Anleu begins the discussion by examining the situation for women in the legal profession. She first surveys feminist theory on the subject and empirical studies which have identified the numbers of female lawyers as increasing but remaining in lower levels of the hierarchy. Women generally earn less, are apt to work in 'female' areas, and are less likely to become partners in firms. Anleu concludes by demonstrating the importance of understanding the recruitment processes and work contexts as contributors to this female pattern of differential employment.

Next, Douglas and Laster present their findings on a survey of magistrates in Victoria about women magistrates. They find that women appointed to the bench differ from men both in background and in some of their attitudes. Both genders appear to approve of the appointment of female magistrates although some concerns were articulated. Findings on the perception of females as sentencers and the recent professionalism of the jurisdiction are also provided.

Women in policing in New South Wales is the topic addressed by Nixon. Her paper supplies a brief history of females in that occupation and provides their current numbers and placement in the hierarchy emphasising the relative lack of women in the middle or higher ranks. Nixon expresses concern that the number of female police officers in New South Wales is levelling out instead of continuing to increase.

How are women treated by the police? McCulloch looks at the increasing amount of resources being put into law enforcement and then examines police response to crimes against women. She concludes that police minimise domestic assault and are reluctant to make arrests. McCulloch further believes that female survivors of rape meet with little police support or assistance. Turning to women as offenders, the author reviews police behaviour to prostitutes and their treatment of women in custody.

The plight of women in prison is the subject of George's article. Prison for women is defined in this paper as existing both at the institutional level and in the broader society with its pervasive violence against women and economic dependency for many females. Within the Victorian women's penal institutional context, George discusses the medical situation, drugs, suicide, and sexual harassment.

Aside from the issues highlighted by George, prison can impact on women in other more indirect ways. Aungles' article looks at the roles which society (and many researchers) place upon the wives of male prisoners. The demands placed upon such women are enumerated as the author outlines the numerous intersections between the prison and the home.

Larman and Aungles are concerned with the children who are affected by the imprisonment of a parent. They review the literature which enumerates effects and emphasises how little is done to meet the special needs of this population. The article also points out that the differences involved in having one's mother imprisoned instead of a father are not recognised by the system; the special concerns for imprisoned mothers are surveyed. Like George's analysis, the reader of these two articles is left feeling that imprisonment is not just an issue for women criminals but for all women and particularly, according to the last two papers, the women whose male partners are incarcerated.

HOMICIDE: WOMEN AS OFFENDERS

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THE PURPOSE OF THIS PAPER IS TO EXAMINE WOMEN AS OFFENDERS IN THE act of homicide. One should start such a discussion with an acknowledgment of the relative rarity of such events. Overwhelmingly, homicide is a masculine phenomenon, in terms of numbers of persons as offenders or as victims, or perhaps more importantly in terms of the social and psychological constructions of homicide. In Wallace's (1986) study of homicide in New South Wales, for example, it was reported that 85 per cent of homicide offenders, and 64 per cent of homicide victims were male. Comparable figures are found in overseas research, such as that reported by Falk (1990) where in a region of up-state New York males accounted for 88 per cent of offenders and 71 per cent of victims. Turning these figures to a slightly different angle, what this means, as Wilbanks (1982) has observed, is that women are much more likely to be victims, than offenders, of homicide.

There was a time when it was possible to argue that the view of women as offenders was guided by the notion that 'women were more perfidious by nature' (Rasko 1976, p. 398). An extreme form of this can be found in the writings of Gerald Sparrow:

> Women being different from men in their mentality, thought-processes, intuition, emotional reactions and in their whole approach to life and death, when they murder, do the deed in a way that a man often would not contemplate. Their crime does not bear the mark of Cain, it is stamped with that characteristic subtlety and horror that has distinguished the rare evil women of all times (Sparrow 1970, p. 8).

Research over the past few years, in Australia and overseas, has begun to give us a more accurate portrait of situations where women commit homicide. Wallace (1986), for one example, has pointed out that in New South Wales, when women killed, the victim was likely in a great proportion of the cases (81 per cent) to be a family member.

More important are the reasons for such family violence. When women kill within the family circle, previous research indicates that in roughly half the cases the victim is likely to be the spouse of the offender (Wallace 1986). In their examination of incarcerated women who had killed their spouses or boyfriends, Bacon and Lansdowne (1982) reported that in fourteen of the sixteen cases the woman had been assaulted by the male she was subsequently accused of killing. Thus, the violence of such women can be viewed as both reactive and defensive. Consistent with this view is the finding of Wallace that:

> Women killed their husbands against a background of violence; they killed in response to and because of violence perpetrated by their husband on them and/or other members of their family (Wallace 1986, p. 108).

The second most common scene in which women have been found to kill is that involving children. Wallace (1986) reported that women were almost as likely to take the life of a child as of their spouse, since child killings accounted for 38 per cent of cases where women were the offenders. Blum and Fisher (1978) have summarised these two trends in the following words:

> While murder in general is a very personalised crime, in the vast majority of cases taking place between people who know each other, female murder appears to be an especially intimate act. That is, women are more likely than men to murder another family member . . . particularly a husband or child; outside of husbands and children, the only significant choice for women appears to be a lover (Blum & Fisher 1978, p. 192).

The aim of the present research is to utilise new data to examine with more precision the specific arenas within which women call upon lethal violence. Drawing upon what has been established generally in the available literature, the guiding hypothesis is that such violence in women, in contrast to men, is likely to be confined primarily to intimate relationships, especially those involving either a sexual partner or a child.

The Data

The data for the present investigation of gender and homicide are drawn from an ongoing analysis of homicide in Victoria (Polk & Ranson 1991) which has as its source of data the files of the Office of the Coroner of Victoria. The files contain a number of reports which are collected for the purpose of carrying out the coronial inquest, and include an initial police report of the incident, an autopsy report regarding the cause of death, a toxicology report if such is relevant, a police prosecutor's brief, and the report of the inquest itself. The most helpful of these documents is the prosecutor's brief, which typically contains lengthy witness statements as well as transcripts of interview with defendants where these have been taken.

There will be two parts to the present report. First, data for all homicides for the years 1985 and 1986 (N=121) will be examined, drawing upon observations reported in an earlier report (Polk & Ranson 1991). For each homicide in these years, a lengthy case history was prepared drawing upon the material in the coronial files. These case studies were then subjected to a qualitative analysis of the themes which characterised the relationship between the victim and the offender. Second, the replicative phase of

this research covers the years 1987-1990 (N=256). This research, which is still in process, can be drawn upon to establish if the patterns observed in the first phase of the research can be verified in the additional case studies.

The Homicide Cases

A major observation that can be drawn from this first phase of research concerns the gender differences in the social patterns of homicide. Analysis of the themes of homicide which emerged from the case studies indicated that there were four major patterns of homicide involving males (Polk & Ranson 1991):

> First, there was homicide in situations of sexual intimacy where the violence represented an ultimate attempt of the male to control the life of his female sexual partner. In this instance, a major variation involved male partners reacting to the woman's attempt to move away from his control, while a minor variation consisted of exceptionally depressed male partners who had decided to end their lives through suicide, with the homicide of the woman being a part of the suicide plan.

Second, homicide was a result of a confrontation between males which became a form of honour contest, leading to a fight which in turn resulted in the violence turning lethal. Such events often occurred in public places such as pubs, discos, streets, train stations, parks or reserves, or perhaps at parties or barbecues. Most often they were closely tied to working or underclass masculine scenes of leisure, with alcohol featuring in a great majority of the cases.

Third, homicide flowed out of other criminal behaviour. A common scenario here was one where a robbery turned dangerously violent, and the robbery victim became a victim of homicide as well. These scenes, also, were distinctively masculine, and appeared to involve a willingness on the part of very marginal males to take exceptional risks regarding the lives of others, and often, in fact, their own lives.

Fourth, homicide was a final act in a series of events which start with the intimate bond of friendship. These scenes again most often involved males who are highly marginal in an economic and social sense, and can be defined as a form of ultimate conflict resolution.

These themes accounted for a majority of the homicides observed in Victoria. For present purposes what is distinctive about these is that these scenarios rarely involved women. Women did not kill their sexual partners out of jealousy or their fear of losing control over their mate. In this first phase of the research (1985-86), there was not a single instance where a woman killed her male partner out of jealousy (there was one case where jealousy provoked a woman to take the life of her sexual rival, and another case where a woman killed her woman lover as a result of an argument provoked by her jealousy). Women were highly unlikely to become engaged in the kinds of status contests that lead many men into homicide. As with jealousy, in this first phase there was not one incident where a woman was provoked to kill in an honour contest which so commonly was the setting for masculine homicide. While women, too, experience exceptional marginality, when they as a consequence engaged in criminal behaviour the forms of criminality rarely involved violence and the risk of life.

The scenario of sexual intimacy, masculine violence and homicide

Virtually all homicide involving women in the 1985-86 phase of this research was restricted to two major scenarios, each of which account for about half of the women offenders. First, there is the situation where the woman takes the life of a male with whom she has been involved with sexually (seven cases, or roughly 6 per cent of the total group of homicide offenders). In the great bulk of these cases (six of the seven), the relationship has been characterised by exceptional prior violence on the part of the male.

Illustrative of these is the following case history:

> Bob C. (age 29, labourer) could hardly be called an ideal husband. In the six years that he had been married to G.C., there had been numerous occasions of drinking and violence. They, in fact, had separated a number of times, with the duration varying from weeks to months. Finally, G.C. decided she had enough. They were at the time living together, but she thought that it was time to try to convince Bob that there was no future for their marriage. On the evening that this discussion took place, the tone became increasingly heated. Finally, as she later said, Bob: '. . . said he was prepared to leave, and I informed him that I did not care one way or the other'.
>
> The content, and manner, of this conversation enraged Bob. G.C. became fearful for her life. Bob ordered her into the bedroom, forced her to disrobe, and then compelled her to engage in a number of sexual acts which she found degrading and offensive (all the while, Bob was threatening to kill her if she did not participate).
>
> Bob left the following morning, but returned that night, saying to G.C. that if she did not want him to stay with her, '. . . there was nothing in life for him,' and he would 'slit his wrists'. He was very drunk, and when the argument turned abusive, G.C. punched him in the mouth. Since Bob was very drunk, the argument wound down as he finally fell asleep.
>
> The next morning, G.C. left to run errands. When she returned, Bob was unconscious, with an empty bottle of rum at hand, and an empty packet of pills close by. G.C. called for help, and he was taken to a nearby hospital.
>
> When Bob came out of hospital, he and G.C. talked, and he agreed that it was best that he left, which he did, saying that he was '. . . going to Queensland'. This was as empty as any of another of Bob's resolves, for he returned to the household two days later, informing G.C. that he had decided to return to his home for good.
>
> Fed up, G.C. insisted that Bob leave. When he refused, she called the police for help. Since they were living in a small country town, the local sergeant knew them reasonably well (including knowing of their troubles). He attempted, unsuccessfully, to talk Bob into leaving. The sergeant then left, feeling that while the situation was uncomfortable, that G.C. could call on her parents or another policeman for help, as they lived virtually within shouting distance. Later that night, after the couple had put the children to bed, Bob filled up the bathtub and closed the doors to the bedrooms of the children. He then approached G., who was seated on the couch in the lounge room, and announced that he was going to kill her, but that she had to choose whether it was to be by being drowned, stabbed or strangled. Bob then went to the kitchen, returning with a knife. He then proceeded to poke and prod at G. with the knife, taunting her and repeating

> over and over that he was going to kill her. He kept this tormenting behaviour up for some time, dragging her from room to room.
>
> At one point, as Bob was attempting to try a shift to a new form of torment, he jabbed the knife point down into the floor. G. immediately grabbed it up, and they started to struggle over the knife. As she said later to the police: 'I realised that it was me or him'. G. gained control over the knife for a brief moment, and stabbed Bob once in the stomach. When Bob slumped back into a chair, G. was able to escape from the house and summon help.
>
> Bob was first conveyed to a local hospital, then transferred to Melbourne where he died one month later from complications resulting from his wounds. Before he died, Bob acknowledged that G.'s account of the events leading to his wounding was accurate, and the Coroner found that G. had caused her husband's death ' . . . in lawful defence of herself' (Case No. 3945-85).

This case fits the pattern Wolfgang (1958) termed 'victim precipitated homicide,' where the victim was the first to engage in violence in the interaction which leads to the killing. It should be noted as well that the violence of the male was provoked by the intention of the woman to separate, so that masculine possessiveness, and violence, arise even in homicides where men become the ultimate victims.

An important feature of this case is that the precipitating violence on the part of the male immediately preceded the lethal violence, and the action of the woman was clearly proportional to the violence she was threatened with. There were cases, however, where there was a significant lapse of time between the masculine violence and the killing of the male, as in the following account:

> Kevin O. (age 42, truck driver) had been married to Belinda O. (age 40) for over twenty years, and the two had produced six children. Over the years, Kevin apparently became increasingly violent toward his wife and children. One witness close to the family said later that: 'Over the years of knowing Belinda and Kevin I became aware of the fact that Kevin was violent towards Belinda and their children. Belinda would often confide in me of the bashings Kevin would give her and the children. I have seen Kevin actually violently hit Belinda and the two eldest boys'.
>
> That the relationship was violent is well documented. Belinda had gone to the police, and on one occasion a report was made which indicated that she had suffered a severe beating that left injuries over most of her body. The report indicates that she had gone to the police because he '. . . believed that one day he would go too far and hit her and probably kill her'. At the time of this report, she was several months pregnant.
>
> The mother and the two eldest sons reached the point where they felt they were desperate. The two sons quietly entered their father's bedroom one night, and shot him in the head with a .22 rifle. The mother, sons, and a friend then took the body and buried it in remote bushland. For several weeks afterwards, whenever they were asked about Kevin, the three would claim that there had been an argument, and Kevin had 'gone to Queensland' where he had a job driving a truck. A few months later, Belinda let slip a few hints to a family friend who had been close to Kevin. This friend then informed the police, and their investigation resulted in the Coroner's finding that Kevin had been murdered by Belinda and the two sons (Case No. 1633-85).

There are some complications in this case that need to be highlighted. While there is a single victim, in fact, that victim occupied the roles of both husband and father with respect to the offenders. The person who actually fired the gun was one of the sons. The key events of this homicide appeared to evolve around the violent relationship between the husband and his wife, however. It should be noted that while there was an exceptional amount of violence in the treatment of the wife, in the immediate scene of the murder itself the husband had not exhibited violence. Further, the wife not only participated in the crude attempt to cover up the crime, she as well apparently helped in the planning of the killing itself and spoke words of encouragement and support to the son immediately prior to the shooting. It is unlikely, in fact, whether the son would have killed his father without the collaboration of his mother.

There were, as noted above, six such cases where a woman took the life of her male sexual partner as a response to precipitating violence on the part of the male. There was one additional case where a woman killed her male sexual partner where the motive was quite different. In this instance, the woman wanted to discard her husband.

> After a few short years of marriage to George S. (age 23, truck driver), Sally S. tired of the relationship. She met and fell in love with someone else. For a period of time, the lovers were content with an illicit relationship, but ultimately decided that they wanted something more substantial.
>
> For apparently financial reasons, they decided that the best way to be free of George was to arrange to have him killed. Sally then approached D.W. and asked if he could find someone to 'knock someone off' for a fee of $10,000. D.W. decided to take the task on himself. Sally arranged for a shotgun and rental car to be delivered to D.W., and then made careful plans so that he could gain entrance to the house when George was sleeping. D.W. entered the house early one morning, and fired two shots from the shotgun into George, killing him instantly. There were suspicious aspects to the stories concocted by Sally and her boyfriend, and they had underestimated the psychological pressure they would be under as a result of the murder. Their stories quickly became unstuck, and the three conspirators were charged with George's murder (Case No. 1366-86).

In these homicides where the relationship between the victim and the offender was one of sexual intimacy (which made up just under one-third, 31 per cent, of all homicides), it is worth noting that men far outnumbered women as offenders (twenty-nine of the thirty-eight cases, or 76 per cent). Thus, masculine homicide in relationships of sexual intimacy was different both in its greater frequency and in its different motivational structure.

Lethal violence with children as victims

The second theme of homicide involving female offenders was that where mothers took the lives of their children, which accounted for a total of eight homicide victims (or 7 per cent of the total of 121 victims, and 47 per cent of the seventeen victims of women offenders). These child killings displayed considerable internal complexity. Some were infanticides, which in the current day most often involved young women who were unable to face the facts of their pregnancy, as illustrated in the following account.

> Except for a brief period at college, Joan M (age 29) had lived in one small country town all her life. She worked as a clerical assistant at two part-time jobs. With the coming of the new year in 1985, several of the townsfolk suspected that Joan was pregnant, but she denied such allegations (the townsfolk had held the same suspicion in 1980).
>
> One day in early February, Joan came home from work, and as usual started to watch T.V. She had felt 'fine' throughout the day. Feeling uncomfortable, she retired to her room, and then went into labour for an hour and a half. As soon as she gave birth, she covered the baby with a towel and put it in a plastic bag, and hid it in her clothes basket. Joan then changed and washed her bedding, had a shower, and then started reading a book. Later that night Joan's house-mate noticed that Joan had almost completely lost her voice.
>
> Five days later, friends found the body in Joan's room. She had unsuccessfully tried to conceal the smell with air-freshener. They notified the police. When the police officer carrying out the investigation approached Joan and stated: 'I've checked your bedroom and I've seen what's inside the basket,' Joan's response was: 'Yes, what's wrong?' The police describe her as 'extremely confused' and she indicated that the incident had occurred 'a long time ago'. When asked why she did not tell anyone about the pregnancy, she replied: 'I didn't think it was true,' saying at another point that she '. . . just hoped it would go away'.
>
> Joan volunteered that a similar death had taken place some five years previously. She stated that she had placed a pillow over the child's face, and then buried it in the back yard. As with the first death, Joan had little recollection of the event. She did not notice the sex of either baby. When asked by police if she wanted the babies to die, she stated: 'I don't know if I did nor didn't . . . I didn't know what else to do, I suppose. I was worried about what the people in town would have said . . .' (Case No. AG960668 and AG860669).

Some of the cases involved women who were unable to cope with marital breakup, and then they decided to take their own life. The homicide of the children then became part of the plan, with the woman believing that the children were thereby protected from further pain and suffering.

> Connie H. (age 24) had been married to George H. for six years. It was a marriage marred by tragedy. When their eldest child was only four months old, he had suffered severe head injuries in a traffic accident, injuries which resulted in extensive brain damage. The child was quite disabled, and not responding to treatment in Australia. The couple travelled to the United States on three occasions to seek further treatment. The two in fact did not have the finances to cover the costs of the medical treatments, although they did receive help from volunteers and public appeals. The financial pressures mounted, and they were compounded by the fact that the exceptional disability was not showing significant improvement, and required a high level of care. The birth of the second child created further demands on their time and resources.
>
> Both parents began to feel immense stress. Both underwent courses of psychiatric treatment, with George being admitted to mental hospital once, and Connie three times. Connie had attempted to commit suicide twice, and had herself admitted to hospital on the third occasion because she began to hit the children and feared that she might injure them. After two brief attempts at separation, George decided that it would be best for all if he left the household. Connie felt an exceptional sense of isolation. She refused to discuss her problems

with a psychiatrist, because she feared being committed again to psychiatric hospital. She felt that his parents were constantly interfering in family matters, while her parents (from Europe and firmly opposed to divorce or separation) did not care.

One night George came over to see the children. Connie asked him to spend the night, but he refused. A day or two later, he informed her that he intended to move into a flat with a fellow worker who was female. This was enough to tip Connie over the edge. She confided to the baby sitter that she intended to commit suicide, and that she '. . . loved the children too much to leave them behind'.

After the baby sitter left, Connie wrote out several long suicide notes. She left extensive instructions regarding their funerals, stating she wanted her son buried to her left, the daughter to her right. She had purchased new clothes for the children's funerals, and laid them neatly on the couch. In the note to her parents, Connie wrote: 'I don't feel I am murdering my children, but saving them from sorrow and pain without their father . . . it's the only way out . . . all I ever wanted in life was a happy marriage and happy, healthy children . . . I have tried very hard . . . I cannot leave my children behind . . . At least with God there will be peace and happiness and no pain, so I will take them where they will be happy, and I will be there to care for them' (Case No. 2886-85).

Other cases involved classic patterns of 'battered children.'

Maria was a 26-year-old recent migrant from Europe with almost no command of English. She had five children ranging in age from 9 years to 9 months, and received little help with the child-rearing from her husband who worked full-time. All of the children were described as 'difficult'. Although the norm in the old country from which they came was that the father has the responsibility of disciplining the children, the task was delegated to Maria. He states that he never witnessed her use physical punishment.

Maria felt extremely isolated. No one nearby other than her husband spoke her language. Further, the neighbours had often complained about the crying of the children, adding the pressures placed on Maria. She was also frightened of her husband. Added to all this was the fatigue she experienced because the incessant crying of the baby deprived her of sleep. One evening all these pressures boiled over. Molly kept vomiting as Maria tried to feed her, then once again began her ceaseless crying. The two-year-old was also crying, requiring feeding and changing. The other children acted up as well, resulting in their being sent to their rooms by their mother.

Although Maria tried '. . . all sorts of calming methods,' Molly would not stop crying (the others also joined in). It became too much to bear. The doctors believe that Molly was struck with a heavy, flat object. Maria immediately tried to revive the baby, and when she was unsuccessful she ran to a neighbour who summoned an ambulance. Molly died from a fractured skull, subdural haemorrhage and brain damage. The autopsy also revealed fractures and trauma that were estimated to have taken place months ago. Maria in her later testimony stated that: 'I have dreamed before that the child was going to die, so I understand it was God's will' (Case No. 2754-86).

Follow-up data

When an examination is made of the 1987-90 follow-up data, from the overall distribution it might appear that the results are comparable. In the 1985-86 phase, there were fourteen homicide victims (12 per cent of all homicides) who had been victims of women offenders. In the follow-up phase, there were twenty-eight such cases (these comprising 11 per cent of all homicides in the 1987-90 period).

Closer inspection revealed, however, that there were differences in the patterns in the replication phase from those observed in the initial period. While in the first phase there had been no examples of female offenders where the homicide arose out of another crime, there were six such cases in the follow-up period. All of these involved situations where there were multiple offenders. In four of the six, while the woman played an active part in the planning and execution of the events which led to the killing, the actual lethal violence was carried out by one (or more) male accomplices. Typical is the following account.

> Gail (age 25) was an employee of M.S. (age 45). M.S. arranged that the two of them would spend the night at a motel room in the country town where they lived. Gail arranged with a male friend, Robert (age 23), that she would leave the door of the room open, so that he could come in so that they together would steal his money. After spending some time together, M.S. went into the bathroom to take a shower. Robert came into the room, and then attacked M.S. as he came out of the shower. They tied him up, and securely bound up his mouth in the process. They then took the money and left the room. When found the next day by motel staff, M.S. had died from asphyxia (Case No. 1425-89).

In two of the cases, the homicide was carried out by two women working together to carry out the crime. Both instances involved prostitutes who were drug abusers.

A second major difference concerned the pattern of 'confrontation'. This form of homicide was definitively male in the first phase of the research, and involved situations where what was initially a fight had boiled over to the point where lethal violence resulted. In the first two-year period, these homicides constituted just over one in five (21 per cent) of all homicides. In the follow-up period, there were four such events which involved females as offenders. The first of these is almost a classic 'confrontation'.

> While walking to the local supermarket nearby her council flat, Carrie (age 31) ran into Dana (age 21) and Toni. An argument developed between them, apparently because Carrie was blamed for gossiping about them, and for local graffiti reading 'Toni is a lesi bitch'. During the argument, Dana punched Carrie and threw her to the ground. Since at the time Carrie had her six-month-old baby with her, she decided that she would leave the scene.
>
> After leaving her child at home, and talking the matter over with some friends, Carrie went over to the flat occupied by Dana and Toni, arming herself with a small baton. Carrie called out to them to come out and fight, now that she did not have the baby. Dana came out of the flat carrying a knife. Carrie was heard to say, 'Hey, you don't have to use the knife,' and tried to walk away. Dana shouted 'I'm going to fuckin' kill you,' running after her, and stabbed her in the chest. The knife severed the right pulmonary artery, and Carrie died at the scene shortly afterward (Case No. 4202-88).

Others involved elements which have a mix of the patterns which in the earlier study were called either 'confrontation' or 'conflict resolution on the margin' killings. This later group consisted of homicides involving friends who found themselves in a dispute, as was the case involving Kylie and Sally:

> Kylie (age 29) and Sally (age 26) had known each other for many years, first as youngsters growing up in Broadmeadows, and later when they served time together at Fairlea, the women's prison. While in prison, Kylie had started a letter writing friendship with Lyle, who was also serving time in prison. Kylie lost interest in the friendship, and over time the letters from her stopped. Lyle then began writing to Sally, a fact of which Kylie was unaware.
>
> After they had been out of gaol for some time, the two women were spending an evening together in Kylie's flat. Both women had taken a variety of drugs that evening, including heroin and multiple doses of various tranquillisers. Sally began to brag about the many letters she had received while in prison, and when challenged, brought out the letters to prove her point. When Kylie looked through these, and found letters from Lyle, an argument developed, which quickly became an abusive shouting match. A knife was produced, the two fought, and Kylie received two stab wounds which proved fatal (Case No. 2174-87).

In this account the two were both highly marginal and had been friends for a long period, and in this regard it resembles the pattern which in the first phase was referred to as 'conflict resolution on the margin'. At the same time, the killing itself involved a dynamic of conflict which runs parallel to the confrontational theme observed in the first phase. In terms of the violence, this began as a fight and then escalated rapidly to the point where the killing resulted (there is no evidence available which suggests that as the two entered into the argument, and then the fight, that there was any prior plan for one to kill the other).

In the initial 1985-86 data, however, both the confrontation and conflict resolution patterns were distinctly masculine in terms of the offenders. In this case, and two or three like it, we find upon replication both that the events can involve women as offenders, and that it may not be possible to draw a neat dividing line in some cases between confrontational and conflict resolution homicides.

At the same time, in the replication phase a majority (eighteen of the twenty-eight, or 64 per cent) of the killings where women are the offenders, involved, as before, situations of intimacy. Eight involved sexual intimacy, and there were ten situations where a mother took the life of her child. Slight differences were noted in both of these groupings when compared with the first phase of the research. In the killings involving sexual intimacy, only a minority (at most three of the seven cases) involved situations where the woman was, or appeared to be, protecting herself from the violence of her male partner. Further, at least three of the killings were provoked by threats on the part of the male to leave the relationship (a pattern which most often was virtually definitively masculine in appearance in the first phase of the research).

When all of the cases from both phases of the research are added together, however, the earlier pattern whereby most often women who kill their sexual partners are responding to precipitating masculine violence would still hold as the predominant one. This observation is only slightly diluted by the replication cases.

While most of the types of homicide initially found where mothers kill their children were also present in the replication phase, as is to be expected when

frequencies are very low, the relative distributions were somewhat different. This time there were five cases where the children died of some form of traumatic injury (there was only one such case in the first period), and there were four child victims where the mother's plan was murder followed by her suicide. In general, then, the conclusion remains when the data are combined: women offenders are most likely to pick as the victim of homicide a person with whom they have an intimate relationship. At the same time, the follow-up data make clear that, while it is much less common than among men, women in a few cases were led into homicide by the same confrontational or conflict dynamics that are much more common among men, especially marginal men. As well, in the replication phase, there emerged a few cases where women (most often in concert with men) became involved in the exceptional risk taking whereby a killing results in the course of other criminal activity.

The Court Response

What is the response of the criminal justice system to women who commit homicide? In seven cases of homicide involving situations of sexual intimacy with male victims in the 1985-86 phase, five cases proceeded to trial, with four of the five being found guilty, and three receiving prison sentences. By way of comparison, of twenty-six cases involving males in 1985-86, fifteen went to trial, with twelve of these being found guilty, all twelve receiving prison sentences. Roughly comparable gender proportions (three of seven, twelve of twenty-six), therefore, of the initial cases have the ultimate result of a prison sentence. In the replication phase, however, of seven cases involving women offenders, only two went to trial, resulting in two convictions, both of which resulted in non-custodial sentences. Overall, then, the probability of receiving a custodial sentence was somewhat less for the women offenders.

The results were rather different in cases of homicide where children were the victims of their mother's violence. Of the eight cases, four went to trial, resulting in four convictions with none being sentenced to prison (three received good behaviour bonds, one a community based order). Where the offender was the father or step-father, of the five cases observed, three proceeded to trial, resulting in three convictions, with all three receiving prison sentences. In this case the replication phase repeats the pattern of the initial phase, since only two of the offenders went to trial, neither receiving a prison sentence (although one, mentally ill enough to satisfy the McNaghton rule, was institutionalised 'at the Governor's Pleasure'). While men killers of children, if convicted, are likely to serve custodial sentences, in this 1985-90 period in Victoria no mothers who killed their children were sentenced to prison.

In sharp contrast was the legal response to the other forms of homicide. Of the four confrontational/conflict resolution homicides observed in the 1987-90 period, all went to trial, resulted in convictions, and each was sentenced to prison. Of the six homicides which took place in the course of another crime, four resulted in trials, in which the women offenders were convicted, and they, too, were sentenced to prison.

Concluding Observations

In general, these findings support the conclusion reported in research elsewhere that when women kill, they are most likely to take the life either of their sexual partner or of their child. Even in these two arenas important observations needed to be added.

For one, the motivation for killing by women in situations of sexual intimacy was different from men. Women rarely killed out of either jealousy or depression (the dominant themes for males), and instead most often were responding to precipitating violence from their partner. Further, women were much less likely than men to kill their sexual partner, an indication of some difference in this form of homicide from what is observed in the United States, where often virtually identical numbers of women as men kill their partners (Campbell 1989, Zimring et al. 1983). On the other hand, when it comes to parents taking the lives of children, this is the one domain in which women in the present case studies were as likely to be offenders as men.

The present data confirm earlier research suggesting that the criminal justice system response is less severe when the homicide offender is a woman. A large percentage of women convicted of homicide (most often in the form of manslaughter) were likely to receive some form of non-custodial sentence, a disposition rarely handed down to male defendants convicted of homicide. This was especially notable in cases where the victim of the homicide was a child.

For women who kill their sexual partners, a major fact of the homicide itself tended to be the prior violence of the male. What in turn tended to have a major impact on the court response to the homicide was the nature of the timing between the violence of the male, and the reactive violence of the woman. In the two cases where the women were confronted with what could be construed as an immediate threat of bodily harm, the homicide was not deemed to be 'unlawful,' and the case did not go to trial. The presumption in these cases was that the homicide was seen as a legitimate act of self-defence, and a charge of criminal homicide was not laid.

One of the sexual intimacy cases which went to trial resulted in an acquittal on the charge of homicide by the jury. Of the cases where a conviction was obtained, one (a case in which the woman had been struck by her de-facto husband just prior to her stabbing him in retaliation) resulted in a community based order.

Three cases involving sexual intimacy resulted in a prison sentence. One was the situation where the woman arranged a 'contract' to kill a husband she wanted to discard for a new lover. The remaining two constitute an important sub-group for the analysis of the legal response to feminine homicide. These were cases of women who had suffered from a long history of exceptional violence by the male partner who became the homicide victim. The major factor which seemed to be operating to produce the prison sentence was that there was a considerable time lapse between the most recent beating by the male, and, as well, in carrying out the killing the woman had called upon help from accomplices.

The situation which provoked a conviction and a prison sentence was one in which killing was: (1) not an immediate response to presenting violence; and (2) accomplices became part of the homicide. There is a wide literature on the question of 'battered women' and the law, and one feature of this tends to focus on the question of the nature of 'imminent danger' as a feature of legitimate self-defence (Mather 1988, Gillespie 1989). Persuasive arguments have been advanced for a less gender biased construction in the law which recognises the particular circumstances faced by women who are persistently victimised by masculine violence.

This research underscores the diversity of patterns found in homicide generally, and among women specifically. This diversity of forms, and the response to this variety, can help inform the growing debate on the justice system response to the criminality of women. Allen (1987), for example, has argued that there are

problematic features in the way the courts 'render harmless' women who have committed violent crimes:

> Successive Home Secretaries and numerous pronouncements by senior judges have emphasised the need for severe custodial sentences in cases of serious violence against the person, and in the case of male offenders this policy is routinely followed. In the case of women convicted of such crimes, however, the commonest practice is to impose non-custodial sentences . . . (Allen 1987, p. 82).

Allen examined the reports prepared for the courts by psychiatrists and probation officers, which she argues portray the violence of women in distinct and sexually specific patterns which tends toward the exoneration of the defendant. Her concern is that feminist discourse which emphasises the way in which criminal women are more victims than aggressors, or more sinned against than sinning results in a refusal to permit female offenders to appear as 'morally guilty or personally discreditable' (Allen 1987, p. 93).

The present investigation has not examined in detail the reports that provide the information for Allen's research. The direct observations of the nature of the court's response are suggestive, however, of ways that Allen's conclusions might be sharpened. In Victoria, at least, the leniency seems to fall in specific arenas. These courts were not likely to render harmless women who engaged in predatory crimes, or who became involved in the forms of confrontation/conflict resolution so characteristic of masculine homicide. Quite the contrary, in such circumstances the women were viewed as dangerous and culpable, and, like men engaged in similar crimes, they were when convicted, convicted to prison terms.

The most striking pattern of leniency was that shown to mothers who killed their children, none of whom received a custodial sentence. Similarly, women who killed in an immediate response to the violence of their male sexual partner were not likely to pay the price of a prison sentence for their violence.

In combination, what these findings suggest is that there is a specific arena within which the process works to render women killers 'harmless,' that domain being focused on violence that is connected with the woman's role within the family as either mother or wife. While the present investigation lacks the language of the professional reports which would be needed for ultimate confirmation, the fact of the lengthy sentences handed out for homicides which occur in the course of other crimes, for one example, suggests that the Victorian courts are likely to see these offenders as both dangerous and culpable.

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PREMENSTRUAL SYNDROME (PMS) IN THE COURTROOM[1]

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THERE HAS LONG BEEN AN INTEREST IN FEMALE CRIMINALITY WITH A plethora of theories proposed to explain why some women commit antisocial acts. These biological, sociological and psychological explanations were seen as particularly necessary since a view of women's persona emerged in the 19th century in which females were regarded as innately angelical and by the natural order, incapable of violence. A violent woman was thus unnatural. Since females were the childbearers, they were perceived as passive, weak and highly vulnerable to stress, particularly during pregnancy, the post-partum and menstruation. Women offenders were sick or mad, but not bad!

Nineteenth-century theoreticians, some ancient philosophers and cross-cultural menstrual taboos all supported a view of females as the victims of menstruation, and later, by the mid 1800s, more specifically their ovaries, and then in the 1920s, their hormones. It was not, however, until the early 1950s that the focus changed from menstruation to the menstrual cycle and the time period preceding the menses; the premenstrual era and its concomitant theories relating to deviant behaviour had arrived. Thus, PMS began to be used either as a defence or as a mitigating factor in a number of countries.

In Overseas Courts

Although the major headlines in the United Kingdom about PMS in court occurred in the early 1980s, this defence argument had already resulted in acquittals and/or successful pleading of diminished responsibility prior to the 1980s for offences ranging from shop-lifting to manslaughter. However, none of these cases caused the same media coverage and reverberations as the following murder trials, two of which were heard within a couple of days of each other.

R v. Craddock (1980) and *R. v. Smith* (1981). Craddock was a barmaid with a lengthy criminal record: thirty prior sentences for theft, arson and assault. Charged with murdering a co-worker, years of diaries and institutional records indicated a

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[1] This paper was abstracted from Easteal 1991.

cyclical pattern to her violent behaviour. She was found guilty of manslaughter based on a plea of diminished responsibility; that PMS 'turned her into a raging animal each month and forced her to act out of character' (Benedek 1985 p. 24). Sentencing was delayed for three months to see if she would respond to progesterone. Subsequently, the judge also considered PMS as a mitigating factor. As a result, Craddock was placed on probation and court ordered progesterone treatment.

Later that year, Craddock who never had clear recollections of her crimes, received no progesterone for four days. On the fourth day, having fasted, she threw a brick through a window and reported herself to the police. She was arrested, received progesterone and was released by the Magistrate's Court.

Then, in 1981, Craddock who had changed her surname to Smith, began to receive a lower dosage of progesterone. In April, she attempted suicide, wrote a threatening poison pen letter to a police sergeant and waited behind the police station with a knife. Charged with carrying an offensive weapon, Smith's defence was the claim of automatism. The judge directed the jury that there was no question of considering this plea because there was no evidence that she had acted unconsciously. Again, the sentence was reduced to probation due to Smith's PMS.

R. v. English: This defendant differed significantly from Craddock and Smith since she had no prior criminal record. After a fight with her lover, a married man, English drove her car at him ramming him into a lamp post. Charged with murder, English ultimately was put on probation with the restrictions of abstinence from alcohol and a year's driving ban, plus a directive to eat regular meals.

Preceding the death, English had not eaten for nine hours. Dr Dalton testified that this fact, coupled with the accused's severe PMS, resulted in a raised glucose tolerance leading to a blood sugar level drop and the over-production of adrenalin. Several other physicians also testified that English had extreme PMS. Further, since she began to menstruate a few hours after the crime, there was no question concerning the premenstrual stage of her cycle at the time of the 'murder'. The court held that she had acted under 'wholly exceptional circumstances' and reduced the charge to manslaughter on the grounds of diminished responsibility due to PMS (Johnson 1987, p. 340).

A great deal of controversy ensued during and after these trials; however, PMS has continued to be raised in both United Kingdom civil and criminal courts.

The use of PMS as a defence or in sentencing also appears to have increased over the past decade in Canada. Prior to the 1980s, menopause and postnatal psychosis had been instrumental in dismissal of criminal charges for minor offences. Then, in the early 1980s, shoplifting charges were dropped when it was shown through medical evidence that a woman had had PMS since her teenage years. Subsequently, it was also considered in two Toronto cases as grounds for mitigating sentences to probation and conditional discharge (D'Emilio 1985). A defence of insanity on the grounds of PMS was given in a fairly recent (December 1988) murder trial in the Nova Scotia Supreme Court. Although the jury rejected PMS as a disease of the mind, McArthur believes that the case was significant in a number of ways: the psychiatrist for the defence was willing to testify that the defendant was insane within the Canadian legal definition and secondly, the jury found the woman guilty of only manslaughter, so they apparently 'considered a diminished-responsibility-type defence with PMS negating the intent requisite for murder' (1989 p. 860).

The most recent overseas case widely publicised in the press was heard in the United States during 1991. It may be reflective of the perspective contained in the

1990 supplement to *Crimes of Violence: Homicide and Assault,* by the noted American lawyer, F. Lee Bailey. He devotes a chapter to PMS, noting that it 'is a fruitful area for the diligent attorney to pursue . . . Those who suffer symptoms severe enough to impair their emotional or mental functions are a small proportion of the women who suffer from PMS. Do not try to raise the defense unless you can back it up with solid medical evidence' (Bailey & Fishman 1990, p. 728). This guide to lawyers in the United States goes on to specifically advise about expert witnesses and their preparation, jury consideration, testimony by the defendant and PMS sentencing.

The Controversy of PMS

In the United States case above, the woman was acquitted of drunk driving charges when her lawyer argued that PMS had exacerbated the effects of the alcohol. This created a furore among many, particularly feminists. Indeed, those who are concerned with gender equality are faced with a dilemma. Although they do not want the small number of severe PMS sufferers to be dismissed as neurotic or charlatans, the primary concern is that people might generalise from the few and negatively stereotype all women or all those who experience premenstrual symptoms. Like all medical disorders, a whole class of people with similar maladies could be stigmatised. This has occurred for epileptics when epilepsy has been used for pleading diminished responsibility (Sommer 1984). Thus, Scutt (1982) reports that Australian feminists strongly objected to the use of PMS in the British cases of the early 1980s fearing that once again the view of women as slaves to their hormones and therefore unable to occupy responsible employment positions would be reinforced. Biological deterministic theories of male superiority were recalled with the concern that PMS as a defence would revive this perspective with its obvious implications. This may well be part of the answer why the defence has never been raised in this country. Informal interviews conducted with representatives of the Office of the Director of Public Prosecutions in two states, a Public Defender, and several barristers indicate that each has heard 'PMT' used in shop-lifting cases as a mitigation factor. Although several recalled instances of postnatal depression being raised as a defence, no-one recollected 'PMT' as a defence in their courtroom experiences.

Further, press reports such as one appearing recently in the *Sydney Morning Herald* (Harris 1990) certainly would not promote PMS as a defence. In that article on female murderers, the brief paragraph on premenstrual tension cites an Adelaide forensic psychiatrist, 'Research has a long way to go before PMT can be considered as a cause'. Another contributing factor may be the domination of the legal occupation by males with little knowledge about PMS and its potential use in court.

Are these viewpoints valid? Must the few genuine severe sufferers lose their defence out of fear of the risk to the entire gender? To counteract such a halo effect the bona fide nature of the ailment and the relationship of some of its symptoms to criminal behaviour needs to be established. A strict burden of proof also needs to be implemented and lastly, its use as a criminal defence needs to be seriously weighed, in most instances, the preferred course being not to use it as grounds for insanity or diminished responsibility but as a mitigating factor. Each of these considerations will be briefly examined in the following sections.

Medical Perspective

There is certainly no universally accepted medical consensus about the aetiology, symptomology or treatment of PMS. In fact, particularly in Australia, there seems to be a reluctance by physicians to accept PMS as a legitimate entity to the degree that most refer to it by the anachronistic term, PMT—premenstrual tension or trivialisation. Why is the medical profession indecisive about PMS? Pahl-Smith (1985) attributes it to a lack of research funding and states that since more research has been done on epilepsy or diabetic hypoglycaemia, they have become better defined and thus more acceptable as components of criminal defences.

There does at least appear to be a trend in accepting PMS as a legitimate medical ailment or even disease. In the United States for instance, the American Psychiatric Association Diagnosis and Statistical Manual of Mental Disorders (DSMIII) has now added 'Late Luteal (premenstrual) Dysphoric Mood Disorder'. It is unfortunate that this acceptance has not been accompanied by a universal consensus or even understanding about aetiology and treatment. Thus the latter remains an area of debate among medical researchers and practitioners. No single therapy has emerged as effective in alleviating all symptoms; this could be the by-product of the varying types of PMS. The lack of a scientifically accepted remedy could present legal problems if the syndrome is used as a defence and court-ordered treatment is recommended and agreed upon by the defendant.

There is agreement in the literature about diagnosing the severe form of PMS. The following criteria must be met:

- recurrent symptoms;
- onset of symptoms at ovulation or shortly thereafter;
- disappearance of symptoms within five days after bleeding begins;

- severe enough symptoms to necessitate medical treatment and/or result in a decrease in level of functioning; and
- the absence of any other disease state or recurrent stress to account for the symptoms (Keye & Trunnell 1986).

Monthly recurrence and complete relief of symptomology following menses are the key denominators cited by all.

Burden of Proof

The burden of proof needs to focus upon the particular symptoms that have been found to contribute to acts of deviance. Symptoms of course vary in intensity, not only from woman to woman, but also from month to month. It is theorised that stress plays a role in exacerbating the emotional symptoms. Only a small percentage of sufferers actually experience some of the more severe symptoms. Dalton (1986), the physician who has been active in the United Kingdom as a defence expert witness on PMS, describes the three most common PMS symptoms she has found in women who have committed illegal acts:

- Depression leading to feelings of hopelessness and uselessness with ideas of right and wrong becoming confused. This can lead some to shop-lifting, suicide, smashing windows or arson;
- Irritability leading to sudden mood swings with a complete loss of control 'as the irrepressible impulse takes over';
- Psychosis induced by PMS which usually lasts only for a day or two and can involve hallucinations, paranoia and total amnesia of behaviour (p. 147).

Dalton's views, particularly her belief in temporary psychosis, are certainly not shared by all medical practitioners. But most medical experts do appear to agree that in a small minority of women, some of the emotional and behavioural by-products of PMS can lead to criminal actions.

It is important to differentiate between <u>severe</u> PMS which involves such symptoms as Dalton describes and the potential for criminal behaviour and a more mild form of PMS, also referred to as PMC (premenstrual changes). **Thus the general consensus and main point to remember is that although the syndrome is common, the incidence of its most serious facets which may manifest in antisocial actions is extremely uncommon**.

The burden of proof in the courtroom should involve rigid evidence requirements. The medical evidence must indicate that the woman has a clinically demonstrable physical disorder with the preceding symptoms plus a causal connection must be shown between the premenstrual symptom(s) and the criminal act (Chait 1986). Proof is problematic for a number of reasons. There are known discrepancies between current and retrospective accounts of symptoms (D'Orban 1983). Additionally, according to Heggestad (1986 p. 161) any woman could fake the syndrome for months before, even going to doctors or support groups. She could then walk into court,

'clutching her symptom charts and claim that the Devil, her hormones made her commit the crime'.

Dalton (1986) states that through careful collecting of evidence, including employment, school, hospital, police and medical records, one can show a cyclical pattern of behavioural change. She believes that there are also other means of proving a premenstrual crime including:

- evaluating the accused with the nine risk factors for PMS (e.g. painless menses, varying tolerance to alcohol, weight swings);
- biochemical testing of the sex hormone binding globulin capacity;
- postponement of the trial for several months of close observation;
- looking for the traits of a PMS crime (e.g. spontaneous, irrational, no attempt to avoid detection).

She theorises that these steps should eliminate malingerers and restrict the defence 'to the few who suffer from severe clinically recognisable PMS' (p. 154).

Types of Use in Court

In the early 1970s, the *UCLA Law Review* (Wallach & Rubin 1972) devoted over 100 pages to describing case studies that linked criminal behaviour to the premenstruum and exploring the possible defences that the legal community could employ. Others have concurred and believe that for some women, PMS renders them incapable of possessing all of the criteria required to be criminally liable. Consequently, throughout the 1980s, a number of legal journal articles have looked at the various defences or bargaining uses of PMS: their limitations, strengths if any, and consequences. It should be noted that with insanity, automatism or diminished responsibility it is likely that the defence counsel would have to show, possibly in a pretrial or voir dire with expert witnesses, that there is general acceptance of PMS within the relevant medical communities which is of course problematic. In addition, what type of scientific or medical expert would be acceptable to the court since PMS 'experts' include endocrinologists, psychiatrists, general practitioners, gynaecologists, sociologists and more? Further, the general consensus of legal experts' opinion is that PMS would not be accepted as insanity. McArthur (1989 p. 852) states that although some premenstrual women have mood swings and may behave irrationally, 'they still comprehend the consequences of their actions'. Osborne (1989) elaborates, commenting that the only cognitive symptoms of PMS are decreased concentration, indecisiveness, paranoia and others that do not indicate impaired intellect. It is also doubtful that many would choose an insanity defence both due to the stigma and the likelihood of lengthy incarceration in a psychiatric facility. However, Potas (1982) points out, on the latter point, that such detention may in fact be shorter in duration depending upon the particular jurisdiction.

It has been argued, in a British trial, that in certain women with PMS who go hours without eating, an excess amount of adrenalin is produced that causes a hypoglycaemic state of impaired consciousness and a plea of automatism is appropriate. However, one might respond that the PMS sufferer should be aware of

this recurrent condition. Thus, Osborne (1989) believes, that in Canada, the prosecution in such a case would say that the defendant's failure to eat was voluntary. Diminished responsibility has been used by defendants with PMS in the United Kingdom to decrease murder charges to manslaughter. The jurisdictions in Australia where this plea is an option (only with a murder charge) are New South Wales, Queensland, Northern Territory and ACT. However, Scutt (1982) does not believe that a defendant has much to gain with this defence since she might end up with a longer sentence plus the stigma of mental illness.

Conclusion

To reiterate, the general consensus appears to be that PMS should not be used frivolously but ought to be restricted to cases involving the small minority of women whose premenstrual symptoms are so incapacitating that they lack the necessary criminal intent. Limiting its use to mitigation in pretrial decisions such as bail or in sentencing could be construed as a useful compromise possibly appeasing those who fear either abuse of it as a plea or sexist generalisation to an entire gender. It is also to be hoped that mitigation takes away from the tendency to think deterministically—in other words, cause is no longer an issue; instead the emphasis is upon influencing. Perhaps then the pitfalls, potentially involved in using pleas which imply causation, could be avoided.

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WOMEN, SOCIAL SECURITY AND CRIMINAL JUSTICE

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> Suddenly and unexpectedly in August 1972 the Commonwealth Government decided to conduct an enquiry into poverty in Australia. It was not exactly what the Churches, Welfare Organisations and the Opposition (then a Labor opposition) wanted . . . But it did represent a significant milestone in the poverty debate in Australia. At last the Federal Government had officially acknowledged that poverty was a problem! (Hollingworth 1972).
>
> Britain, End of the 1980s. Margaret Thatcher in her third term in office and current government policies on employment, taxation, tax allowance, social security and the social services resulting in women . . . getting poorer all of the time (Carlen 1988).

THE SECOND QUOTE ABOVE WAS WRITTEN ABOUT BRITAIN BUT COULD AS EASILY have been written about Australia. In 1972 there was optimism about Australia's capacity to deal with the issue of poverty. It was out in the open. There was a commitment to doing something about it.

In 1991, just under twenty years later poverty is once again the fault of the poor. The government, far from having a commitment to doing anything about poverty, has introduced legislation which will continue to actively increase poverty in Australia and which isolates and rigorously controls the victims of that poverty. These changes impact heavily on women either directly because they are subject to them, or indirectly because they are members of families on which the legislation has an impact.

The two particular pieces of legislation to be discussed in this paper are the changes to the sole parent's pension to redefine 'married person' and 'defacto spouse' and the changes to the unemployment benefit.

The Sole Parent's Pension: 'Married Person' and 'Defacto Spouse'

To qualify for sole parent's pension a person must not be a member of a couple or, if a member of a couple, must be living separately and apart from their partner. 'Member of a couple' is defined at sub-section 4(2) of the *Social Security Act 1991* and includes a person who is legally married to another person and is not living separately and apart

from that person or a person who is living in a marriage like relationship with another person.

What this means is that if you are living in a residence with a member of the opposite sex, whether or not you are legally married to that person and you are living in a *marriage like relationship*, you are deemed to be a member of a couple and are ineligible for the sole parent's pension.

This has been the case for some time and there has developed a considerable body of case law about what constituted a marriage like relationship. However, until January 1990 the Department of Social Security had to prove that a person was in a marriage like relationship. This changed from 1 January 1990 when section 3A of the Social Security Act 1947 was introduced. Sub section 4(3) of the 1991 Act is in substantially the same terms as section 3A.

Sub section 4(3) requires the Secretary (being the officer of the Department on the counter who deals with the application) to consider a number of things. Broadly, these are:

- the financial aspects of the relationship
- the nature of the household
- the social aspects of the relationship
- any sexual relationship between the people; and
- the nature of the people's commitment to each other.

(*see* Appendix 1)

If the Secretary is of the opinion that, having considered these things, you are in a marriage like relationship, you are deemed to be a married person. The Secretary's decision can be appealed, but whereas previously the Secretary had to prove you were in a marriage like relationship, now you have to prove that you are not. If you are found to be in a marriage like relationship you have been fraudulently obtaining sole parent's pension and you become liable to a criminal prosecution. This is the only criminal offence where you have to prove that you are not guilty.

By far the most significant impact of these changes is on women because women are by far the majority of recipients of the sole parent's pension. It is worth noting that a person who fraudulently obtains several benefits under different names does not have to prove themselves innocent whereas a woman, who may well have had no other source of income, despite living with a man, does.

To understand the full impact of these changes on women it is necessary to understand how the tribunals and courts have dealt with the question of a 'marriage like relationship'.

Tribunals and courts

Much of the case law in this area comes out of cases which were interpreting the old *Family Law Act*. There is a real question about how appropriate it is to use these cases in interpreting what is supposed to be beneficial legislation. This question has never been addressed by the courts or tribunals.

The cases have effectively determined that while the question of financial support is a factor to be considered, it is not determinative. They have laid down that the whole of the relationship will be examined. If, in looking at the whole of the relationship, an elusive 'tie that binds' (author's terminology) can be found, then no matter what the relationship has or does not have it is a marriage like relationship. Part of the morality behind these decisions is that a woman, who is not legally married to a man or is legally married to him but is 'separated under the same roof', should not be in a better position than one who is married to a man and continues to reside in a relationship of marriage with him. The effect is that anything that may conceivably be considered to be a marriage like relationship has been held to be one.

A significant number of these cases involve women who either do not consider themselves to be in marriage like relationships with the men involved, or who even if they do are not being supported by the men. They are obtaining an income in the only way they have available to them. They have no power at law to compel the men they are living with to support them and their children. These women then become subject to continuous harassment and subject to the risk of substantial debts and criminal prosecution by the Department.

As far as the author is aware no man has been prosecuted in Australia for being an accessory in these sorts of cases. Yet, according to the Department, the man has lived with the woman and had the benefit of the income she 'fraudulently' obtained. The fact that women now have to prove that they are not in a 'marriage like relationship' significantly increases the risk that they will be found to be in such a relationship.

Many women have to struggle for years on very low incomes bringing up their children in circumstances of real poverty. If they are investigated by the Department and a marriage like relationship is found, they may then have to struggle for years to pay off the debt which the government and the Department says they have incurred.

The men who have failed to support them do not incur any penalty and in the vast majority of cases, fail to support them yet again.

The Changes to the Unemployment Benefit

It is really a misnomer to talk about 'changes' to the unemployment benefit. The unemployment benefit has been abandoned. From 1 July 1991 an unemployed person initially obtains a Jobsearch Allowance when they become unemployed and after twelve months unemployment (or when the person turns eighteen and has been unemployed for twelve months) they obtain the Newstart Allowance.

Under both the Jobsearch Allowance and the Newstart Allowance compliance with the activity test is required. The activity test requires that the person is actively seeking and willing to undertake paid employment, and that they should undertake a course of vocational training, participate in a labour market program, or participate in another course. In making such a direction the Secretary only has to be of the opinion that the person's participation will improve their chances of obtaining work or assist

them in seeking work. An agreement, on which payment depends, is made as part of the Newstart Allowance.

The terms of the agreement can include a requirement that the person undertakes one or more of the following:

a) a job search;

b) a vocational training course;

c) paid work experience;

d) measures designed to eliminate or reduce any disadvantages the person has in the labour market;

e) participation in a labour market program conducted by the CES; or

f) an activity proposed by the person.

These provisions (particularly (d)) are so broad that the person can be required to do anything from having their hair cut to seeking psychiatric counselling.

The legislation is both highly directive and punitive. If the person does not comply with the requirements of the activity test or the agreement and a host of other mandatory provisions the benefit will be lost. For each time that the person does not comply he/she will be precluded from obtaining benefits for longer and longer periods.

The stated intention of this legislation is to create a more flexible labour market. The government is seeking to deregulate the labour market to create a system like that in the United States where employees bargain on an individual basis and market forces determine wages. The side effect is that there will be a dramatic increase in poverty. In order to deregulate the labour market the government needs a large pool of unemployed people all competing for jobs. If many of these people do not have access to any income because they cannot comply with the requirements of the activity test and the activity agreement then they will take any terms and conditions of employment they can get. They will have to, in order to survive.

The impact on women of these changes to the unemployment benefit is significant. Large numbers of young women are unemployed. Many older women are no longer eligible for the sole parent's pension if their youngest child has turned sixteen, or the widow's pension, and many do not live in a marriage like relationship with a man. Many of these women have to accept the single rate of Jobsearch Allowance and then the Newstart Allowance.

The wives of unemployed men are the ones who have to struggle with an inadequate income when they receive the dole and an even less adequate income when their husbands cannot get the dole because they cannot comply with the requirements of the activity test and the agreement.

It is usually women who try to hold families together as they are torn apart by the effects of poverty, who see their children becoming involved in drugs and crime and in most cases are helpless to stop it. There may be a man around to assist them but in many cases there is not. It is usually women who suffer the consequences of increased violence resulting from powerlessness and frustration.

People who are subject to the present social security legislation are deliberately being more and more highly regulated and more and more marginalised. Women form a significant part of that population. Because of their increasing marginalisation they are becoming increasingly more likely to come into contact with the criminal justice system.

Australians have to learn to look at our laws critically and to be able to assess whether the laws being implemented are just. We must look behind the law and seek to determine what its impact will be and we must make decisions about whether we want that effect or not.

Laws which seek to regulate unnecessarily or to bury issues beneath the weight of the law are bad laws and must be rejected. The 'defacto' legislation and the 'unemployment' legislation are examples of two such laws.

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APPENDIX 1

Extract from *Social Security Act 1991*¾Member of a Couple Criteria for Marriage Like Relationships

4(3) In forming an opinion about the relationship between 2 people for the purposes of (determining whether they are members of a couple), the Secretary is to have regard to all the circumstances of the relationship including, in particular, the following matters:

(a) the financial aspects of the relationship, including:

- (i) any joint ownership of real estate or other major assets and any joint liabilities; and
- (ii) any significant pooling of financial resources especially in relation to major financial commitments; and
- (iii) any legal obligations owed by one person in respect of the other person; and
- (iv) the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:

- (i) any joint responsibility for providing care or support of children; and
- (ii) the living arrangements of the people; and
- (iii) the basis on which responsibility for housework is distributed;

(c) the social aspects of the relationship, including:

- (i) whether the people hold themselves out as married to each other; and
- (ii) the assessment of friends and regular associates of the people about the nature of their relationship; and
- (iii) the basis on which the people make plans for, or engage in, joint social activities;

(d) any sexual relationship between the people;

(e) the nature of the people's commitment to each other, including:

- (i) the length of the relationship; and
- (ii) the nature of any companionship and emotional support that the people provide to each other; and
- (iii) whether the people consider that the relationship is likely to continue indefinitely; and
- (iv) whether the people see their relationship as a marriage like relationship.

SENTENCING FEMALE OFFENDERS IN THE MAGISTRATE'S COURT: PRELIMINARY REPORT ON A PILOT STUDY[1]

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IN AUSTRALIA, WHERE SENTENCING GUIDELINES ARE UNCOMMON, THE SEX of the offender is not officially a relevant factor in sentencing. However, as Fox and Freiberg (1985) note in their text on sentencing in Victoria, a bias in favour of women is 'well entrenched'. Numerous cases are cited in which the courts have stated that it was appropriate to apply a 'lower tariff for females' (p. 465). Appeals on the ground of disparity by a male co-accused against a sentence which is more severe than that imposed on his female co-offender are usually unsuccessful. The reasons given for leniency as a general practice have included 'reasons of compassion', public opinion favouring a more merciful sentence for a female, the lower recidivism rate of women, and the differences in prevalence of crime between the sexes, making deterrent sentences unnecessary in the case of women (p. 466).

Fox and Freiberg found that some courts treated child care responsibilities as a reason to reduce a sentence, whilst others took the view that such matters should not *automatically* give rise to lenience.

The Victorian Sentencing Committee (in the nine pages devoted specifically to sentencing women in its three-volume report) in 1988 also noted the tendency to regard being female, and having the care of children, as mitigating factors, although it considered that the courts were now more ambivalent about this. The Committee lamented the lack of research in Victoria on the sentencing of women, which it said made it difficult to evaluate how women were being sentenced, whether they should be given special consideration when being sentenced, and whether they were

[1] This research was funded by a grant from the Criminology Research Council.

disadvantaged in the use of sentencing options. In the absence of information on sentencing practices, the Committee recommended that:

> Gender, of itself, should not form the basis for differential treatment in sentencing (Report vol. 1, p. 375).

The Australian Law Reform Commission (ALRC) (1988) also examined these issues, noting that many women are financially unable to fulfil conditions of bail; that if they are a single parent they are likely to have sole care of the children and may thus be excluded from community based sentencing options; that in such cases imprisonment may be more harsh than for a male, resulting in severance of family bonds and possible loss of the child; that a high percentage of women are imprisoned for drug offences, for which prison may be inappropriate; and that women's prisons tend to provide fewer programs and facilities than prisons for men. The ALRC recommended that:

> The gender of the offender should not, in itself, be a matter relevant to sentencing; that is, an offender should not be treated differently simply because of his or her sex (p. l).

However it also recommended that motherhood of a young child should be a relevant consideration and that:

> Only in exceptional circumstances, which constitute a real concern for the safety of others, should such a parent be imprisoned.

It stated that child care responsibilities should not be permitted to limit the range of sentencing options available for offenders, and recommended that child care facilities be part of centres providing community-based dispositions (p. xxv).

Background to the Present Study

This study was undertaken to test the hypothesis that gender affects sentence in a range of ways, not necessarily explicitly. It was assumed that any such effect will sometimes be to the woman offender's apparent advantage and sometimes not. The study was also undertaken with the view (endorsed by the Victorian Committee and the ALRC, inter alia) that research is needed to ascertain just how gender is operating in sentencing decisions.

There has of course been widespread recognition by legal philosophers of the relevance of judicial values to decision-making, although not traditionally in relation to gender. As Norma Wikler (1987) observes:

> When social scientists and feminist legal researchers finally turned their attention to the judiciary they found overwhelming evidence that gender-based myths, biases and stereotypes are embedded in the attitudes and behaviours of some of those who serve as judges, as well as in the law itself (p. 13).

Starting with the above hypothesis—that sentencing is a gendered process—it was important to examine both substantive and methodological questions:

- in what ways is gender relevant to sentence? and

- how can the effect of gender be tested empirically?

An observation study was designed to examine sentencing as an active process, recording observations and analysing both quantitative and qualitative data. The study which will be discussed here was designed as a pilot study, to test both the methodology and the hypothesis.

It should be emphasised that the findings discussed in this paper are only tentative. Data entry is not yet complete, and only preliminary analysis has been carried out on the data which has been entered[2].

Other Studies

Studies based simply on a comparison of sentences of male and female offenders for similar offences show that female offenders tend to get lower sentences than men (for example, Farrington & Morris 1983).

This kind of comparison has been easily made (given relative ease of access in most jurisdictions to sentencing statistics with a raw gender breakdown). It also seems to be part of the 'folklore' or common understanding of practitioners. It is generally seen as bearing out the so-called 'chivalry thesis'.

More sophisticated analyses pointed out that female offenders were far more likely to be first-time offenders, and to have committed a less serious form of the relevant offence; they stole smaller or fewer items, used less violence, and so on. Prior history of offending, and seriousness of offence, are fundamental factors in determining severity of sentence, for any offender. Once these variables were entered into the equation, it was possible to conclude that female offenders are not being treated any differently from males in equivalent circumstances. However it has also been argued that gender still affects decision-making, but in more complex ways.

Farrington and Morris (1983), for instance, concluded from a study of Magistrate's actual decisions that the sex of the defendant did not have any direct influence on severity of sentence or probability of reconviction. Women tended to receive lower sentences insofar as they had generally committed less serious offences and were less likely to have prior convictions.

However, when the sentencing of men and of women was examined separately, different factors were found to be significant. Looking at the factors which were important for women (but not for men), it was observed that women convicted with other offenders were more likely to receive a severe sentence than those convicted alone. Further, women in the 'other' marital status category (generally divorced or separated) received heavier sentences, as did women from a deviant family background (usually broken home). It was suggested by Farrington and Morris that magistrates may have disapproved of these categories of women offenders.

An alternative interpretation can be drawn from the work of Kruttschnitt (1982) who investigated the link between economic independence, informal social control, and heavier sentences for women. In a study of convictions in a Californian population in the 1970s Kruttschnitt found that sentence may differ with the extent to which a woman is economically dependent upon someone else for her day-to-day existence: the more dependent she is, the less severe her disposition. She concluded

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2 The Report, 'Gender and Sentencing in the Victorian Magistrate's Courts: A Pilot Project, was provided to the Criminology Research Council in September 1992.

that the degree to which a female offender can be shown to be under informal social control may produce a lighter formal sentence.

Roger Douglas (1987) examined data on sentencing in Victorian Magistrate's Courts collected in 1978, 1979 and 1983. He looked at (a) reasons given by magistrates when sentencing; (b) the relationship between gender and sentence; and (c) this relationship after controlling for legally relevant variables (seriousness, priors) and participation (representation, plea in mitigation). He found that Magistrate's reasons for sentence were generally 'legally'-oriented, emphasising seriousness of the offence, and defendant's prior record, with few references to personal circumstances or to treatment. He found no evidence suggesting the latter factors were given more weight in relation to women offenders than for men.

The one area in which he found a gender difference was in the amount of fines, for traffic cases and for traditional crimes, female defendants being fined significantly less, even after controlling for the other variables. Douglas suggests that this may indicate a *generalised* assumption about women's lower capacity to pay a fine, rather than a reaction to the individual defendant's resources, which were rarely provided in court. In any event, Douglas also concluded that, looking at Magistrates' stated reasons for decision, sentences were largely unaffected by the input of social information (see above). The lower fines imposed on women might therefore reflect 'benign stereotyping, based on a realistic assessment of women defendants' poorer economic circumstances' (p. 355). He conceded however that his data did not preclude the possibility that:

> female defendants may have been sentenced according to different criteria to those used to sentence males . . . the possibility that those whose domestic arrangements approximated most closely to traditional roles would have been dealt with more leniently than those whose arrangements differed from traditional roles . . . Nor do they enable an investigation of whether different magistrates reacted in different ways to gender (p. 355).

Several Australian studies have noted the importance of individual differences between magistrates (eg. Grabosky & Rizzo 1983; Lawrence & Homel 1987; Polk & Tait 1988). This is a factor which was also addressed in the present study.

A number of studies have found clear gender-stereotypes in sentencing when they have looked *within* the category of 'woman offender'. Several writers have observed that women may be treated more leniently than men when they act in an approved feminine role, but that they seem to receive no advantage, and may in fact be treated more severely, if engaging in 'unfeminine' crimes (such as crimes of violence) or in untraditional roles.

For example, Visher (1983) in a study of police arrest decisions found that chivalry is demonstrated at arrest stage if the woman displays appropriate gender behaviour and characteristics, but that there is no advantage to a female offender if she deviates from stereotype. So older, white female suspects are less likely to be arrested than younger, black or hostile women. The fact that an offence is against property seemed to be weighted more heavily for female defendants for males. Different factors were also found to influence arrest decisions for male and for female suspects.

Class and race are likely to be linked with gender in prosecution decisions, as suggested by Visher's study. Kruttschnitt (1984) looked at the question whether sex per se, or social statuses associated with sex, affect sanctions. She found that significantly different variables affect sentence for males and for female offenders,

and that women were more likely to remain free, both before and after adjudication. However she also concluded that differences in the social locations of male and female offenders may confound assessments of gender effect, such as single-parenthood and poverty. The relevance of class was also noted by Wundersitz et al. (1988), who concluded that class factors may be interacting with gender factors to benefit the young women in their study.

Mary Eaton (1983) observed that magistrates in the court she studied were influenced by child care responsibilities and social problems, such as financial stresses, or the care of an invalid. This was so regardless of gender of the defendant—although in fact women tended to be more frequently in such circumstances.

Eaton went on in her research, however, to look at the images of society which are constructed in the plea in mitigation—pictures which communicate attitudes about the social order. She observed that both male and female defendants relied on arguments based on their familial place when pleading. But the type of family invoked was one which, while so familiar, reinforced the subordination of women. For instance, a husband could argue that he should be treated more leniently because he was now trying to make the marriage work; there was a tendency to privilege the maintenance of the marriage relationship, even in the face of evidence that the wife did not want him back (p. 394).

The Current Research

Having surveyed the literature, it was clear that what was needed as a starting point was to try to capture the decision-making process in total, by examining as much as possible of the information being presented to the sentencer, as it was presented. This should include legal, factual, social and personal information, presented verbally by the offender, or representative, or welfare worker, and behaviourally, particularly by the offender.

The primary focus of the research design was obviously on identifying the influence of gender. However class and race factors were not ignored, in recognition of the importance of looking at 'structured inequalities of all kinds and their importance for explanations both of criminality and of the workings of the legal, judicial and correctional systems' (Edwards Hiller 1982, p. 83).

It was also important to be able to identify and distinguish the 'legally appropriate factors', found by Douglas (1987) to be most commonly determinative; the other factors which the magistrate may explicitly refer to as relevant to decision; and factors which may in fact influence sentence differences, which the magistrate may not have stated, or perceived, as affecting the decision.

Methodology

Choice of Magistrate's Court

Magistrate's Courts hear the vast majority of all criminal matters, and represent the most public (and most accountable) face of the justice system for most people who will come into contact with that system. They handle the minor offences which perform a 'control' role in society, but magistrates are also seeing more of the 'serious' end of the criminal spectrum, as their jurisdictional limits are regularly increased. The

Magistracy itself has been professionalised over the past few years; it is also the only Victorian court at present with women members. In 1990 there were around ninety-four magistrates in Victoria, at least thirteen of whom were women, including the Chief Magistrate. It therefore provided a high-volume, wide-ranging and accessible body of cases for observation.

Data was to be collected which could be analysed both quantitatively and qualitatively. Quantitative analysis would require a substantial number of cases, out of which it was hoped there would be enough comparable cases to draw conclusions about the decision-making process (and particularly the effect of gender on sentencing). Qualitative analysis would require detailed recording of observations, including a narrative of the circumstances of the offence, and where possible verbatim notes of pleas and sentencing comments.

After discussions with the Chief Magistrate, it was decided to concentrate on three busy metropolitan courts, Melbourne (City) Court, Prahran and Broadmeadows. The research was carried out over a period of around five months, with observers sitting in the various courts, and courtrooms at those courts, recording all matters coming before that court for decision on that day. Collection of data ended in July 1991.

The single most consistent 'gender' aspect of crime is of course the low percentage of women involved. The ratio of male to female offenders obviously varies with the type of offence. Over the five-month period around 1200 cases were recorded. Data on 734 cases has been entered to date, of which around 17 per cent were female offenders (n=125), charged with the full range of offences prosecuted in those courts over the period of observation.

It is relevant to note that most cases recorded were uncontested—they were mentions, pleas or ex parte hearings. Only 7.6 per cent (n=56 out of 734) of cases were contested. This probably reflects the workload of the court; it means that most cases observed were relatively brief, with the facts only peripherally disputed.

Some Findings

The main findings to date are essentially descriptive. In fact, the findings set out in this paper represent only a selection of all the information collected, but give an interesting picture of prosecutions for summary offences. It has not been possible to test correlations as yet, as the data is still being entered; this will be carried out over the next couple of months.

Age of offenders

Age was specifically referred to in something over half the cases. For most of the remainder of cases where the defendant appeared at the hearing, age was estimated by the observer. As found in other studies of 'criminal populations' the majority of defendants were young. Of the sample analysed so far, 50.8 per cent were between seventeen and twenty-five. There was no significant difference in age breakdown between male and female offenders.

Employment

As far as could be ascertained, only 47.4 per cent of defendants were in the paid work force. According to the Australian Bureau of Statistics, in the general population 4.8 per cent of males over fifteen are unemployed. This was therefore generally a fairly *needy* population: 30.8 per cent were 'unemployed', 7.6 per cent were 'on pensions' and 10.2 per cent were students.

There were significant differences in the employment status of male and female defendants, some of which presumably reflect differences in the general community. Women were far more likely than men to be economically dependant, either on family or the state. Significantly fewer female defendants were in the paid work force (27.8 per cent compared with 51 per cent); slightly more were unemployed than were the men (36.1 per cent compared to 29.8 per cent) and many more were said to be engaged in home duties (12.4 per cent compared to 0.6 per cent). Considerably more women were also said to be receiving pensions (13.4 per cent compared to 6.5 per cent).

Legal representation

Most defendants had legal representation (62.8 per cent; n=461). Of the remainder, 24.1 per cent (n=177) appeared for themselves, while 12 per cent (n=88) made no appearance and had no representative at court. Female defendants were slightly more likely than males to have legal representation, and less likely to appear for themselves. Females also had a higher non-appearance rate.

Extent of involvement in hearing

As might be anticipated, given the predominance of uncontested hearings (and of legal representation), the majority of defendants had very little active involvement in the hearing. Over half simply stood to receive the sentence (n=397; 54.1 per cent); 18 per cent (n=132) had some interaction, answering questions from the magistrate, while 6.4 per cent (n=47) ran their own defence.

Female defendants appeared to participate significantly less in their case. They were more likely to take no active part (at most, standing to be sentenced); men also tended to be in this category, but more men actively gave evidence than women. Very few women contested cases in this sample (5 out of 56 cases). However, given the exigencies of a contest, they seemed equally as likely as a male defendant to be involved in the hearing of a contest, for instance by giving evidence.

Offences

At this stage of the analysis the first charge has been examined, assuming (for the sake of simplicity) that the first charge will usually be the most serious.

Traffic and property offences combined comprised over half (51.7 per cent) of the workload studied. Traffic offences alone constituted almost one-quarter of first charges. This is so despite the trend in recent years to have minor traffic matters dealt with administratively. Property offences were an even more substantial group, constituting 30 per cent of all first charges; theft and wilful damage were the major offences in this group. The theft prosecutions will be looked at in more detail later, being a group which included a number of female offenders. The other substantial category was alcohol-related offences. Sixteen per cent of first charges were in this class, most of these being 'drink-driving' offences.

A number of 'offences against public order' were charged (14 per cent); the largest single category was soliciting for prostitution, mostly involving female defendants. People charged with soliciting for prostitution rarely appeared, and usually received a standard fine.

Drug offences made up 9.9 per cent of charges, the most common being possession of cannabis, usually only enough for the defendant's own use. Offences against the person represented 6.5 per cent of first charges.

There were statistically significant differences in charges between male and female offenders. Only slightly fewer women were charged with traffic offences (with similar numbers of male and female licence holders), drug, property, regulatory and alcohol-related offences.

However, significantly fewer women than men were charged with offences against the person (7.6 per cent of males, n=46, compared with 0.8 per cent of females, n=1). Significantly more women were charged in relation to 'public order' offences (8.3 per cent males, n=50; 20 per cent of females, n=25). Half the female

offences (n=13) were for loitering for prostitution: males had a fair spread of public order offences, the main ones being indecent language and offensive behaviour.

Table 1

Offences Charged
(First charge)

	Male	Female	Total
Traffic	141 23.4%	21 16.8%	162 22.4%
Drugs	59 9.8%	13 10.4%	72 9.9%
Against person	46 7.6%	1 0.8%	47 6.5%
Property	176 29.2%	41 32.8%	217 30%
Public order	50 8.3%	25 20%	75 10.4%
Regulatory	23 3.8%	6 4.8%	29 4%
Alcohol	101 16.7%	15 12%	116 16%
Other	3 0.5%	3 2.4%	6 0.8%
Total	599	125	724

Sentencing: In line with the high volume of much magisterial work, little time overall was spent on sentencing. Where magisterial considerations were indicated they were usually addressed to circumstances of the offence, and the seriousness of the offence. This is consistent with the findings of Douglas, that magistrates in their stated reasons are primarily concerned with 'legally relevant' factors. Other considerations referred to in a reasonable number of cases included family circumstances of the offender; the fact of this being a first offence; and special and general deterrence (often along the lines of 'this should teach you a lesson', and 'make sure we don't see you back here again'). Details of both plea material and sentencing comments are yet to be analysed.

Aggregate sentences: looking at the total 'cost' to the defendant, custodial sentences were in this sample very rare (around 4 per cent); fines were by far the most common disposition, being imposed in almost two-thirds of cases. Around one-quarter of cases involved a bond.

Case Study: Prosecutions for Theft

Non-motor vehicle theft prosecutions are to be examined as a separate group. The data analysed to date showed 101 first charges, with ninety-five convictions. Sixty-seven convicted defendants were male and twenty-eight female. Some preliminary findings are given below.

Seriousness of charge

This was identified by reference to the value of the item stolen. Almost half of the offences (43.2 per cent) fell into the first category of seriousness (that is, less than $50 in value). Overall there was no statistically significant difference in seriousness of offence between male and female offenders.

Number of prior convictions

As with the general population sample, the largest category had no priors (60.7 per cent of females and 56.1 per cent of males); there was also no statistically significant difference between males and females, on the present analysis.

Age

The largest age groups were under 20 and 31-35. There were more females in the 26-30 age group (females 22.2 per cent; males 12.1 per cent), and more males in the 31-35 age group (males 37.9 per cent; females 29.6 per cent), but these differences were not statistically significant.

Employment

There were even fewer defendants in this group who were in the paid work force, suggesting an economic motivation for the crime. Only 11.1 per cent of females, and 32.3 per cent of males were in paid work, a statistically significant difference.

Sentencing

Table 2

Sentencing for Theft
(First charge)

Sentence	Male	Female
Fine	23 34.3%	7 25%
CBO	8 11.9%	3 10.7%
Bond	32 47.8%	14 50%
Susp. sent.	3 4.4%	3 10.7%
Cust. sent.	5 7.5%	2 7.1%
Court fund	13 19.4	6 21.4%
Total Males convicted of theft:	67	
Total Females convicted of theft:	28	

Note: More than one form of disposition may be imposed on an offender.

There appears to be little difference in sentencing on the basis of gender on the face of these data; small numbers preclude drawing any conclusions at this stage. A matter which may however be interesting to follow up is the use of the suspended sentence for female offenders, and the possibility that it is used in preference to a fine, in response to the lesser economic capacity of women charged with theft[3].

[3] Analysis of the full set of data obtained in this study found little difference between men and women in the imposition of custodial or suspended sentences. Male offenders were, however, significantly more likely to have a fine imposed; female offenders more frequently obtained a bond. But after controlling for offence seriousness and prior record, the only difference was in size of fines, with the men tending to receive lower fines. This is discussed further in the Report mentioned at footnote 1.

Conclusion

It is now well recognised that personal values affect decision making in the judicial process. It is therefore highly likely that perceptions regarding gender, and gender-appropriate behaviour and treatment, are influential in sentencing offenders. The literature reviewed suggests that where the offender is female, the degree of conformity to certain stereotypes does in fact correlate with the severity of sentence. This study is an attempt to examine the sentencing process in the lower criminal courts for indications of, and explanations for, such gender influences.

The research is still in progress, and any interpretations being drawn from the data collected to date must obviously be very tentative. The study shows important differences in the circumstances of the women and men coming before the courts; however further analysis is needed to ascertain whether these do affect the sentences imposed, at least at a statistically discernible level.

There is some suggestion in the data that gender and sentence are related, but sentencing is not clearly more lenient for female defendants, and the gender effect (if any) does not appear to be all in one direction. It will be important to examine the qualitative material to understand the context in which these cases arose and were disposed of.

The methodological question is also open—whether this form of analysis is the best way of discovering how gender perceptions affect the decision making process.

Finally, the issue which must be addressed will be, what are the implications for the participants in the criminal justice system—female and male offenders, decision-makers, lawyers—of the findings as to the effect of gender on decision making?

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WOMEN IN THE LEGAL PROFESSION: THEORY AND RESEARCH

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BARRIERS TO WOMEN'S ENTRY INTO THE LEGAL PROFESSION SEEM TO HAVE all but disappeared. Over the past two decades the number of women graduating from law school and practising law has grown enormously in most industrialised, Western societies. Legal barriers were repealed during the first two decades of the Australian Commonwealth (the first state being Victoria in 1903 and the last, Western Australia in 1923), nevertheless fewer than one in five of all law graduates were women until the 1970s (Mathews 1982, p. 636). In the decade 1978-1987 the proportion of women graduates grew to almost one half at some law schools (*see* Table 1). Similarly, but not as dramatically, the number of women lawyers has expanded. In 1947 only 2 per cent of all practising lawyers in Australia were women compared with 17 per cent in 1986, and an estimated 25 per cent in 1991 (*see* Table 2).

The same pattern has been documented in several other societies (Abel 1985). In the United States, for example, women received 2.5 per cent of all law degrees conferred in 1960 and 40 per cent in 1987. Women currently constitute one-fifth of the profession compared with less than 5 per cent in the 1960s and earlier (Epstein 1983, p.4; US Bureau of the Census 1990, pp.163, 389).

This demographic change has spawned considerable theorisation (particularly among women law school faculties) about the difference women's entry will make to the practice and organisation of legal work. In contrast, research on stratification within the legal profession indicates that barriers persist resulting in gender segmentation. Women are concentrated in lower paying, less prestigious employment settings with few opportunities for promotion relative to men (Abel 1985; Epstein 1983; Hagan 1990; Mossman 1990; Murray 1987; Podmore & Spencer 1982; Sokoloff 1988). Arguments suggesting that women will make a difference appear to be in-

Table 1

Women as Percentage of Graduates of Selected Law Schools 1978-87

	1978		1979		1980		1981		1982		1983		1984		1985		1986		1987	
	% of Women	Total N	% of Women	Total N	% of Women	Total N	% of Women	Total N	% of Women	Total N	% of Women	Total N	% of Women	Total N	% of Women	Total N	% of Women	Total N	% of Women	Total N
Adelaide Univ		(122)		(126)		(116)	38.1	(97)	38.1	(97)	43.3	(120)	36.4	(129)		(141)	40.5	(116)	48.1	(129)
ANU[1]	17.0	(88)	32.2	(90)	34.7	(95)	39.0	(77)	27.9	(86)	28.9	(67)	32.0	(78)	31.6	(98)	41.8	(98)	49.4	(79)
Macquarie Univ					32.8	(64)	23.0	(129)	15.6	(135)	33.1	(124)	29.1	(165)	35.4	(175)	42.0	(174)	42.1	(171
Monash Univ	20.8	(231)	25.7	(226)	23.2	(241)	27.6	(239)	29.8	(198)	31.5	(235)	37.6	(234)	34.8	(273)	43.9	(244)	47.6	(208)
Tasmania [2] Univ	24.0	(33)	22.7	(44)	26.3	(38)	22.9	(35)	15.9	(44)	30.6	(49)	32.6	(46)	37.5	(40)	21.8	(55)	26.9	(52)
Univ of NSW	21.5	(242)	22.9	(218)	29.8	(168)	33.3	(201)	36.3	(237)	31.0	(210)	40.0	(220)	38.1	(194)	43.9	(228)		
Univ of Tech Sydney[3]							16.7	(6)	24.0	(25)	19.0	(63)	22.1	(68)	26.7	(86)	23.3	(86)	35.2	(71)
Univ of WA	20.2	(79)	18.6	(86)	28.2	(85)	31.9	(94)	38.0	(71)	41.7	(84)	41.7	(84)	40.2	(82)	57.0	(86)	47.8	(90)

Data Source: Supplied by respective law schools.

[1] includes honours graduates
[2] includes honours and combined degree students
[3] 1981 - first year of graduates

Table 2

Law Professionals[1], Australia

Year	Men	Women	Total	Women as % of Total
1947	4,467	109	4,576	2.4
1961	6,478	258	6,736	3.9
1976	11,939	970	12,909	7.5
1981	15,523	1,993	17,516	11.4
1986				
full-time	17,995	3,628	21,623	16.8
part-time	1,433	768	2,201	34.9
1991[2]				
full-time	24,453	8,182	32,635	25.1
part-time	661	789	14,501	54.4
Rate of increase (based on 1986 full-time employed lawyers)	4.0	33.3	4.7	

1 Law Professionals: judges, magistrates, barristers, solicitors and legal officers.

2 Australian Bureau of Statistics. 1991. *Labour Force Survey* (unpublished data).

Source: Australian Bureau of Statistics 1947-1986 *Census of the Commonwealth of Australia,* ABS, Canberra.

compatible with research indicating that women tend to be concentrated in areas and positions where they would have very little scope for transforming the organisation of legal work and knowledge.

Discussions of the differences women lawyers might make to the practice and organisation of law must take into account the locations of women in the legal profession, relative to those of men. Recruitment processes, work contexts and the division of labour all affect the possibilities of adopting different approaches. Moreover, the meaning and relevance of gender will depend on specific social contexts. A central question then becomes: In which kinds of work settings are men and women lawyers situated and what are the consequences for legal practice? This paper first examines recent feminist jurisprudence and empirical research on women in the law. It then discusses women lawyers in one segment of the profession, namely in-house legal counsel, in order to demonstrate the importance of recruitment processes and work contexts for an understanding of women's position in the law relative to that of men. Finally, the paper suggests further research on women's position within the legal profession and the implications for legal practice.

A Woman's Voice in Law?

There have been two divergent responses to the question: 'Whether women will be changed by the legal profession or whether the legal profession will be changed by the increased presence of women?' (Menkel-Meadow 1986, p. 899). First, many argue that the entrance of women will make a difference as they will adopt a caring approach and value empathy and mediation over a competitive, adversarial and individualistic orientation. The law can incorporate women's experiences and approaches to practice. On the contrary, others argue, the law is so imbued with such masculine values as objectivity, reasonableness, individual rights and adversarial tactics, and has been so instrumental in perpetrating gender inequality that there is little scope for women to make any difference.

Proponents of the 'difference' approach maintain that women have particular transformative contributions to make to the practice of law, perhaps resulting in 'an alternative professional culture' (Menkel-Meadow 1989a, p. 313). This transformative potential derives from women's experiences of exclusion which creates an outsider's critical perception; oppression which engenders greater empathy for subordinated groups; and the learned attention to caring and relationships (1989a, pp. 312-13). Women's life experiences are unlike those of the framers of the law and their focus on recognising and accepting different points of view negates the impetus to create universalistic truths which are insensitive to a broad range of experiences. Theorists suggest that women will be more concerned with substantive justice for all than with procedural fairness. Women will be more likely than men to take into account contextual factors in understanding and communicating with clients rather than focussing narrowly on the specific legal issues (Menkel-Meadow 1989b, p. 233).

Menkel-Meadow starts with Carol Gilligan's (1982) notion of a different voice in moral development to infer a women's different voice in legal processes (1987, p. 44). In present legal structures, she argues, such male-dominated or male-created values as victory, predictability, objectivity, deductive reasoning, universalism, abstract rights and principles override so-called 'female values' of mediation, caring, empathy for both parties to a dispute, and preservation of relationships. The underlying theme is that such an approach would be more just, more sensitive and more appropriate, indeed superior to the adversarial court process.

Continuing in this vein, some theorists propose a set of feminist legal methods, including a distinctive approach to litigation, which emphasises the centrality of the clients' experiences and women's perspectives, often excluded or silenced by current legal practice and doctrine (Bartlett 1990, p. 831-2).

Consciousness-raising is seen as a central element in empowering the client and moving toward the substantive goal of ending the subjugation of women by demonstrating to the courts, among other things, how the law affects women's lives (Bartlett 1990, pp. 863-7; Burns 1990, p. 196; Cahn 1991, pp. 4-5). A recent article in the *Harvard Women's Law Journal* suggests: 'Feminist litigation . . . is governed by its contribution to the larger feminist enterprise of transforming established social, economic, political and legal power relations that work to the detriment of women' (Burns 1990, p. 193). In addition, feminist lawyers seek to empower their clients through litigation (Cahn 1991, p. 20).

This 'difference' viewpoint assigns women considerable agency and ability to change legal practice without examining how the organisation of work constrains the possibilities or even the desirability of different approaches. Such values as mediation

and negotiation may have more to do with the nature of the work context (in turn affected by market forces and government laws and regulations) than with the gender of the legal practitioners. Indeed, much of lawyers' work does not involve adversarial practice or dispute resolution but involves managing uncertainty both for their clients and themselves (Flood 1991; Macaulay 1979). Ironically, the entry of women into the profession has been accompanied by greater litigiousness which reflects, in part, the complexity and anonymity of contractual relations and increased government regulation rather than the changed gender composition of the profession. Little scope for the transformation of legal practice or the adoption of feminist legal methods would exist in large law firms with corporate clients.

Alternative dispute resolution procedures emerge in precisely those areas where human relations skills are needed and where women or children are likely to be victims or complainants, for example in family law and issues of child welfare or protection. It is in those areas of the law that women have made the most inroads and which look like an extension of women's traditional familial roles thereby reproducing gender segmentation within the profession. Moreover, women and women's groups have been particularly adamant about the use of criminal penalties in such areas as domestic violence and rape, and see little scope for mediation or negotiation because of inequalities in bargaining power between men and women. In the more informal, welfare approach emphasising participants' control, compromise and choice any agreement reached is generally not enforceable (Lerman 1984, p. 67). The procedural protection of a court system and the attempt to equalise power relationships through legal representation and formality may be essential to achieve justice for women (Bottomley 1985, p. 164).

For other legal theorists neither increasing women's entry nor placing more value on so-called female qualities will transform legal practice and knowledge. They describe law as 'maintaining male domination' (Polan 1982, p. 294), 'a powerful conduit for the reproduction and transmission of the dominant ideology' (Thornton 1986, p. 5), 'a paradigm of maleness' (Rifkin 1980, p. 84), and 'a particularly potent source and badge of legitimacy, and site and cloak of force' (MacKinnon 1989, p. 238).

Rejecting the notion of 'different voices' Catherine MacKinnon (1982; 1983; 1987; 1989) suggests that inequality comes first, the most central inequality being gender; differences follow. She argues that focussing on differences serves as ideology which neutralises and rationalises power inequalities. Gender is a question of power, of male supremacy and female subordination (1987, p. 40). To valorise empathy, care, mediation, concern for relationships and orientation to others inevitably reproduces gender inequality and reinforces male dominance. Such allegedly 'female' attributes are in no way 'natural' nor constitute a 'woman's voice' but are by-products of male dominance; their emphasis reproduces that inequality. MacKinnon writes:

> I do not think that the way women reason morally is morality 'in a different voice'. I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them . . . Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don't just speak differently. A lot you don't speak (1987, p. 39).

The qualities attributed to women result from the oppression of male dominance, which is hegemonic and impervious to change (MacKinnon 1987, p. 7). Male

dominance is perhaps the most pervasive and tenacious system of power in history, and is metaphysically nearly perfect (MacKinnon 1983, p. 638).

MacKinnon's concern is not just to identify male dominance and propose a feminist theory, but also to engage in practical action and the transformation of power relations through a feminist method, namely consciousness raising. She suggests that consciousness raising enables women to view the shared reality of their condition from within the perspective of their own experience. This grounding in experience permits a critique of the purported generality, disinterestedness, and universality of prior accounts (1982, pp. 536-7).

She seems to suggest that despite women's various experiences a coherent women's perspective transcending ideological distortion will emerge through consciousness raising. MacKinnon assumes that women's experiences and accounts will be complementary not conflicting; that the feminist critique of knowledge and male power is an amalgam of all women's partial views. However, taking experience as the level of analysis raises several interpretive questions: How can accounts or experiences be evaluated? On what basis does a theorist or observer (for example, MacKinnon) choose one view rather than another? (cf. Huber 1973, pp. 280-82). Some women have access to male power, is their experience less valid than those who do not have access to power? MacKinnon argues that to show that an observation or experience is not the same for all women proves only that it is not biological, not that it is not gendered (1987, p. 56). To say that all experiences are gendered is as true for men as for women. If all accounts are equally as valid, then the same can be said of men's accounts. Moreover, how does consciousness raising cast off the male point of view which has been imposed? Given these problems, claims that women will produce an accurate depiction of reality, either because they are women or because they are oppressed appear highly implausible (Hawkesworth 1989, p. 544).

While MacKinnon views consciousness raising as an important feminist methodology her critique of law is overly deterministic, making it difficult to imagine from where a distinctive women's experience could emerge. The notion of the maleness of law, that law reflects and perpetuates male dominance which is 'metaphysically nearly perfect' begs a further question of how MacKinnon (and other proponents of the law is patriarchal viewpoint) can explain her own knowledge base. On one level MacKinnon claims there is a distinctive women's perspective that is privileged yet when she confronts women's accounts which differ from her own she denies them thereby undermining her notion of a women's standpoint (Hunter & Law 1988; MacKinnon 1987, p. 205).

A major feminist project has been to dismantle views of the world which present women as one dimensional member of an homogeneous category; however, in many respects MacKinnon does the opposite. While seeking to capture the variety of women's experiences MacKinnon's view of women collapses into the very stereotype of women she seeks to critique; she portrays women as passive, submissive, dominated and victims of rape (1983) sexual harassment (1979) pornography (1986), or more generally sexuality as defined by male domination. While it is essential not to conceptualise gender inequality as arising solely from women's actions and choices it is also important to recognise women's resistance and historical achievements.

The 'difference' and 'domination' perspectives suffer from opposite limitations: the former assigns women practitioners too much agency; while the latter assigns too little. Both approaches offer a somewhat one-dimensional view of women as either demonstrating greater sensitivity to clients and adopting a nurturant approach to legal

dealings or as passive victims of male dominance. Additionally, the two approaches tend to treat the law, both as an occupation and a body of knowledge, as a given; as non-problematic and as unified. This leads to an historical, static and reified conception of law as an objective fact which women confront. Their conceptions of law are too broad and abstract. Neither considers the ways in which types of legal practice or employment settings construct gender relations. Certainly women may exhibit specific qualities held to be evidence of a feminist approach, but only under certain circumstances, for example where:

- the client is relatively powerless and has little knowledge of their rights or of the operation of the legal process;
- there is little time pressure, thus enabling extended conversations to discover the client's point of view and experiences;
- the work context has a political rather than a purely economic or administrative ideology;
- billable hours are not the principle criterion of employer satisfaction and promotion;

- the clients are women or children with personal (as distinct from corporate) legal problems.

The availability and applicability of different approaches to legal work will depend on the structure of the workplace and women's position within it. This requires analysis of both the structure and organisation of law, that is the processes of domination, and of the ways in which women and men negotiate or bargain for privileges and resources which might make a difference to the practice of law (Gerson & Peiss 1985, p. 322). Not all women are in the same position or have the same experience of law. While women lawyers have little control over the structure of the legal profession and their position within it, that position involves constraints as well as opportunities for action. There is scope for agency and change, albeit constrained (Alcoff 1988, pp. 433-4).

Often behaviour deemed to be evidence of gender difference in fact derives from men and women's differential locations within work settings (Kanter 1977). Thus, in order to investigate difference and domination within the legal profession it is essential to examine women's positions within it, then to explain how those positions might affect legal practice and knowledge.

Stratification and the Legal Profession

Far from being a 'community within a community' (Goode 1957) the legal profession has always been segmented and stratified (Heinz & Laumann 1982; Smigel 1964). Different kinds of work are differentially evaluated; the division of labour is also a division of status, clientele and visibility (Heinz & Laumann 1982, p. 36). The profession has undergone numerous changes, including growth, increased specialisation, bureaucratisation of employment settings, the growth of large firms, the decline of the solo practitioner, and a relaxation on advertising restrictions (Roach Anleu 1992). This re-structuring coincides with the movement of women into the profession. The profession has become more complex and new dimensions of inequality are emerging; gender cross-cuts other cleavages that stratify legal practice (Hagan 1990, pp. 848-9). Recent discussion suggests the existence of dual career structures and 'glass ceilings' which restrict women's opportunities for promotion. In the United States, for example, women who take advantage of flexible working hours, maternity and child care provisions offered by some law firms may be disadvantaged in promotion decisions and relegated to the 'mommy track'. Many others decide to leave because of incompatibility between motherhood and law (Hochschild & Machung 1989, pp. 110-25; Kingson 1988). Changes in the structure of the profession are benefiting men more than women. Aggregate statistics showing women's greater participation in the legal profession obscure gender segmentation within the occupation (Sokoloff 1988, p. 37). A simple comparison of men and women according to broad areas of practice and employment obscures differences in the types of work they perform in different organisations or within the same organisation, for that matter.

While large-scale empirical research has been sparse in Australia, two studies show that women lawyers have occupational profiles different from those of men (Dixon & Davies 1985; Hetherton 1981). Research on Victoria's lawyers in practice in the mid-1970s found that women received just over half the income of men. Nearly 15

per cent of the men were barristers compared to 1.4 per cent of the women and 40 per cent of the former and 18 per cent of the latter were law firm partners. Women were more likely to be employees in private practice whereas men and women were evenly distributed in corporate or public service employment. Sixteen per cent of the women worked part-time compared to 4 per cent of the men. Family law and probate/estate administration accounted for almost twice the proportion of work hours among women than among men. Property law also constituted proportionately more of women's work. In contrast, women spent less time than men in commercial and company law and criminal law. These gender differences in income, status and areas of work, the study concludes, seem to be independent of the relative youth of the women and the high proportion of part-time women (Hetherton 1981, pp. 125-44).

The tendency for women not to follow the traditional male career path of articles then partnership in a private law firm was observed also in a Western Australian study (Dixon & Davies 1985). Family responsibilities were far more likely to interrupt women's career and various options to conventional legal practice were more attractive to women. Government employers (public service and law schools) were more accommodating to motherhood, in part due to sex discrimination legislation. Women who did work in private practice were concentrated in smaller firms that paid less than large firms (Dixon & Davies 1985, pp. 19-25, 73-90).

Gender segmentation within law is not restricted to Australian society. A recent Canadian study of men and women lawyers found women to be under-represented in corporate and commercial work and civil litigation, and over-represented in family law, especially in small to medium firms and in solo practice. The greatest gains for women are in corporate settings, in part due to the expansion of these sectors and specialisations (Hagan 1990, p. 842). Men and women lawyers move along gender specific mobility ladders that produce a gender stratified income hierarchy; on average men earn about twice as much as women. The gender gap in income within the legal profession actually may be widening (Hagan 1990, pp. 838, 849).

In the United States of the 586 respondents to a questionnaire mailed to women who graduated in 1975 or 1976 from one of fourteen eastern-state law schools 21 per cent were law firm partners; 12 per cent were solo practitioners; 22 per cent worked for public agencies; 14 per cent were corporate counsel; and 14 per cent were associates in law firms (Caplow & Scheindlin 1990, p. 404). These lawyers practised across the range of specialties: 17 per cent specialised in corporate business; 12 per cent in litigation; 10 per cent worked in administrative law. Less than 5 per cent worked in family law, tax, or trusts and estates. However, about half of the respondents believed that their salary was somewhat or substantially lower than those of comparable male colleagues (Caplow & Scheindlin 1990, pp. 404-9).

The clear pattern is that women are not competing with men for the same positions or jobs within the legal profession; women earn less, are more likely to experience interrupted careers, specialise in so-called 'female' areas of the law, and are much less likely to make partner. However, little research deals with the processes whereby those outcomes emerge. Do they result from gendered assumptions on the part of law schools or employers? Do they result from women's career choices, albeit made within constraints specific to many women? What kinds of work is allocated in accordance with a set of gender norms? Under what conditions are feminist methods employed?

Women Lawyers in In-House Legal Departments

In a study of men and women lawyers in in-house legal departments that varied by size and industry in corporations located in the northeast United States, the author found differences among the firms with respect to the number, position, and salary of men and women lawyers. The aim was to identify their relative positions within the labour market, how the recruitment practices of firms affected the hiring of men and women, and the work of men and women lawyers within the departments. The research involved in-depth, semi-structured interviews with thirty-four men and thirty-four women in-house counsel and the General Counsel (head of the legal department) and/or the legal recruitment officer of each corporation to gather information on recruitment practices.

Nearly one-third of the lawyers (total number of lawyers: 184) in the six financial services companies were women, compared with less than one-fifth in the six manufacturing firms (total number of lawyers: 497). Proportionally more women lawyers worked in the medium-sized legal departments (11-25 lawyers), whereas the large departments (26 or more lawyers) employed the least women. Women lawyers were far more likely than men to work in medium-sized departments in financial services companies. Men lawyers were more likely to work for manufacturing companies, especially those in electronics, information processing and defence industries—in particular those with small (10 lawyers or fewer) or large in-house legal departments (Roach 1990, p. 210).

In order to explain these differences it is essential to examine the recruitment practices of the different legal departments.

> [It's] just the way the law schools are composed now . . . half of the students are women, and if you're going to be upset about hiring women, you are going to be in big trouble.

This comment exemplifies the response of all the recruiters (both general counsel and recruitment officers) to questions regarding the number of women lawyers on their staffs. Invariably, they explained these gender differences by indicating that recent hires of men and women were about equal, reflecting the increased number of women entering and graduating from law school. They indicated that the older members of the department are predominantly male, reflecting the composition of law schools at the time of their graduation, whereas the ratio of recent men and women hires is more balanced because of the similar numbers of men and women law school graduates. Even so, this does not account for why some in-house legal departments hired relatively more women than others.

Every general counsel and recruitment officer claimed they look for and hire the best lawyers, however they do not all define 'best' in the same terms. Rather, they hire, or try to hire, the 'best lawyers' from those segments of the labour pool in which they seek recruits. Women and men are not evenly distributed across the legal labour market. Corporations with large legal departments, opportunities for promotion and career development, and salaries comparable to large law firms can compete with those firms for the same graduates of prestigious law schools; consequently, they tend to hire fewer women because of the lower proportion of women at these schools.

Manufacturing companies requiring experienced lawyers in specific fields of law recruited from the pool of law firm associates experienced in business and corporate

law. Women are also underrepresented in this segment of the labour pool. Financial services companies seeking experienced lawyers recruited lawyers with skills in banking, insurance and finance laws, which to some extent are 'female areas' of legal practice. More significantly, though, tertiary sector industries are large employers of women in a variety of jobs and positions. Unlike the manufacturing companies studied the legal departments in the financial services companies are centralised in one location and tend to focus on lawyers with fewer alternative employment opportunities due to immobility, and these lawyers are more likely to be women than men.

The large departments in this study perform most of their companies' legal needs and thereby occupy important positions within those companies. They expect recruits to develop their careers within the host company. The large law departments recruit new law school graduates and compete for the top graduates of the best schools, at which women are underrepresented. On the other side, small legal departments tend to recruit associates from the outside law firms, frequently firms with whom they have worked previously. This reduces the perception of risk in hiring a completely 'unknown' lawyer and increases the probability of hiring men.

Even if men and women possessed the same law school training and firm experience the recruiters suggested that men were more likely to have contact with corporate clients and responsibility for business cases. This visibility enhanced men's chances of recruitment to an in-house legal department, especially to those in manufacturing companies, because many preferred to hire lawyers with whom they had dealt with previously. The general counsel of a small legal department in a manufacturing company observed that uncertainty in recruitment is minimised by:

> Hiring people that we have worked with when they were on the outside . . . The younger man in the corporate law department worked with us when he was in a large firm downtown, and . . . the litigation counsel was a man we had worked with quite a bit when he was outside. So we got to know them pretty well.

The segment of the labour pool from which this department sought recruits contained disproportionately few women, or in other words, the recruitment strategy was inadequate for locating suitably qualified women lawyers.

These employment patterns do not necessarily reflect different ideas on meritocratic hiring, nor do they reflect discriminatory intent, but are a consequence of an organisation's location, its perceived needs, and its ability to attract lawyers, all of which may have discriminatory effect. Unequal employment of men and women lawyers does not merely reflect conditions in the labour market, but corporate recruitment efforts are insufficient to locate certain applicants, in particular women.

Within the legal departments significant gender differences existed regarding current position and salary. Women were concentrated in the lower echelons of the legal departments and earned less because they were disproportionately located in financial services companies which pay lower salaries compared with the manufacturing companies. However, few differences between the men and women interviewed were found with respect to quality of law school attended, academic performance, previous legal employment, and legal speciality. Men were slightly more likely to be engaged in litigation work but most men and women concentrated on general corporate work. Women spent more time on contracts and men more on disputes, trial work and administration (Roach 1986, p. 215-16). One in-house lawyer

specialising in property law explained that in her previous law firm job she was given home mortgages and personal real estate cases, whereas at her current in-house legal department she works on joint ventures, business property acquisitions and commercial real estate involving millions of dollars. She stated:

> I would not have been given that kind of work in the private firm, but in a corporation there is none of the personal real estate work to be done.

Another woman lawyer previously employed in a private law firm observed a tendency for some firms to allocate women 'paralegal' tasks, for example, looking up records and examining business correspondence. She indicated that when she was given this kind of work:

> The partner said that even though it was not legal work the client wanted it done, and by assigning the job to a lawyer the firm could bill at a higher rate.

These comments suggest that profit considerations and gender assumptions are more important criteria of work allocation in private legal practice than in corporate legal departments.

The biggest difference between men and women in-house counsel is numerical which is probably the result of variations in the gender composition of legal labour markets combined with the specific recruitment practices of the legal departments. Men and women differ very little regarding career antecedents and the division of labour which suggests that gender segregation within the legal profession is incomplete. Women lawyers are not excluded from in-house legal departments, but men and women lawyers do not appear to compete for the same jobs, obtain the same positions, or earn identical salaries despite similarities in 'human capital' attributes.

Conclusion

In conclusion, women increasingly are entering the legal profession, yet they are not located in the same positions as men. Arguments that the mere entry of women must make a difference to the practice of law need to examine the work contexts where different methods might be adopted rather than focusing on the gender of the practitioner. The idea of feminist methods seems to be applicable only in certain areas of law thereby undermining the assertion that they are potentially transformative. On the other hand, women are not passive victims of the male-dominated legal system but are active participants in it as lawyers, although gender segmentation restricts the areas in which women participate.

Rather than viewing women's entry into the legal profession as signalling change for the better, or no change at all it is imperative to examine the women's locations within the occupation and the ways in which these locations make gender relevant and constrain the nature and content of legal work. There is much scope in Australia to examine those areas of law and legal practice most hospitable to women lawyers; the processes whereby legal work is allocated and by whom; the relationship between the work of lawyers and para-legals (a predominantly female occupation); and the impact of feminist arguments on the process of lawyering.

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FEMINISATION OF THE MAGISTRATE'S COURTS: THE INFLUENCE OF GENDER?[1]

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THE 1980S HAVE SEEN A SERIES OF MAJOR REFORMS TO THE VICTORIAN Magistrate's Courts, the courts responsible for processing the vast majority of the state's criminal and civil cases. The reforms have massively expanded the jurisdiction of the courts (while simultaneously shunting off minor cases for administrative disposition). There have been important administrative reforms. Associated with these reforms have been major changes in recruitment to the bench. The lay justices have been deprived of their judicial functions. Magistrates are no longer recruited from the ranks of the clerks of courts, and are no longer members of the state's civil service. Instead, new recruits to the bench are drawn from various branches of the legal profession. And in another development, there has been a concerted effort to recruit women to the bench. It was only in 1985 that the first woman was appointed to the magistracy. Since 1985, there have been numerous appointments of women to the bench and currently, almost 20 per cent of the Magistrates (including the Chief Magistrate) are women. This has been a substantial change for the jurisdiction. The nature and impact of this change are the subject of this paper.

The effect of the appointment of increasing numbers of female professionals to senior decision-making roles has been of interest both to researchers and the women's movement (Menkel-Meadow 1986; American Judicature Society 1990). The central

1. This research was funded by a grant from the Criminology Research Council.

question has been whether or not women decision-makers 'differ' from their male counterparts in their decision-making. Some theorists have argued that it is likely to change the way in which public policy is formulated. This is based on work suggesting that male/female differences in moral reasoning of the kind examined by Gilligan (1982) will be reflected in differences in decisions and decision-making. Similarly, it has been suggested that women, by virtue of their position in the social structure, could be expected to approach their tasks with a set of assumptions different from those brought by males to their tasks.

The research findings are somewhat inconclusive. There is some evidence to suggest that women judges vote somewhat differently to men in cases involving claims of sexual discrimination and other feminist issues (for example Gottschall 1983, Gryski, Main & Dixon 1986). However other studies have found that in cases involving women's issues, criminal rights and economic liberties, women were more likely to be to the extreme liberal or the extreme conservative end of the judicial spectrum (Allen & Wall 1987). While there is some evidence suggesting that female political activists are more liberal politically (*see* the research cited in Allen & Wall 1987: 234, but cf Gruhl et al. 1981: 309), there is also some evidence suggesting that male judges may be more likely to hand down decisions protecting personal rights (Walker & Barrow 1985). The evidence on sentencing discloses few obvious differences between male and female sentencers (Gruhl et al. 1981). Gruhl et al. (1981) suggest that male judges may be more likely to favour female defendants by handing down lighter sentences (but it should be noted that there are numerous all-male courts where there is no direct evidence of gender-based sentencing (*see*, for example, Douglas 1987).

The implications of the evidence may be interpreted in a variety of ways. One is that there are in fact few differences between male and female decision-makers. One reason for this might well be the criteria used by those who appoint decision-makers. Insofar as women (or men for that matter) lack what are regarded as the relevant attributes, they will be less likely to be appointed. Given this, gender-based differences within those recruited for particular positions are likely to be far smaller than those within the pool of those who might arguably meet the formal qualifications for the position.

A second reason may be that positions constrain the incumbent. Socialisation, role-constraints, and the nature of the job will tend to affect the way in which it is carried out regardless of the attributes of those appointed to the job. Judges, for example, are all faced with similar tasks: handing down decisions which will establish their credibility within the profession, and minimise the likelihood of being overturned on appeal; handling their case-loads; smoothing relations with other members of the courtroom workgroups, and so on. The most important determinant of judicial decisions is the law. It is not surprising therefore that the gender of the decision-maker is no more important than other personal attributes of the decision-maker, or, for that matter, the personal attributes of the defendant. One conclusion one might draw from this analysis is that new recruits come to accept the prevailing ethos within which they work. A more encouraging interpretation is, however, that new recruits might gradually affect that ethos.

A third possibility is that research has often failed to identify significant male/female differences because the impact of male/female differences may be relatively subtle. It is not so much to be found in unidimensional effects on quantum of sentence or likelihood of conviction, as in the style of decision-making.

In this paper differences in responses between male and female magistrates to recent reforms in the Magistrate's Court jurisdiction in Victoria are examined. While there is evidence of some gender-based differences in approach, these may reflect the different background and experience of the women magistrates rather than gender per se. The similarities in responses of men and women magistrates to the reforms to the jurisdiction are also more likely to be a reflection of the fact that the recent reforms to the jurisdiction represent a 'feminisation' of the traditional authoritarian approaches to the management and style of the lower courts. The acceptance of women into the jurisdiction has been a symbol of this ideological shift.

Method

Thirty-one Victorian magistrates were interviewed. The sample was selected as follows. Two-thirds of all male magistrates were randomly selected for interview while all eleven female magistrates then sitting were included as potential interviewees. Of those selected for interview, half the males agreed to be interviewed and seven of the eleven female magistrates participated.

A structured interview of some one to one and a half hours duration was conducted, with all but three interviews conducted by both authors. The aims of the interview were to provide a profile of the backgrounds of the magistrates; record responses to specific reforms to the substantive law and administrative practices of the jurisdiction; and gauge the reaction of magistrates to the appointment of women to the bench and the perceived influence of gender in decision-making.

The major purpose of the interviews was to assess the reaction of magistrates generally to the reforms of the past decade. However, the interviews also provided a context for assessing differences between male and female magistrates' reactions. The major methodological problem with making this assessment lay in the difficulty of interpreting any male/female differences that might emerge. As noted, already, female magistrates could be expected to differ from male magistrates in two crucial respects. Given that there were so few female clerks of courts, the female magistrates were all ex-lawyers, whereas many of the male interviewees were ex-clerks. One obvious problem is the degree to which male/female differences are in fact ex-clerk/ex-lawyer differences. Closely related to this distinction is a second consideration, namely the fact that women magistrates were appreciably younger than male magistrates, since the ex-clerks were often close to retiring age, while the ex-lawyers had less than ten years on the bench, and the women, less than six years on the bench. A third complication is that the women were all recruited by a Labor government whose Attorney-Generals took an active part in the recruitment procedures. Since the male magistrates included older magistrates, some of the men had been appointed under Liberal governments. Male/female differences might turn out to be reducible to 'appointing government effects'.

Multivariate analysis was out of the question due to small sample size. However, where appropriate, analysis has included comparison between not only men and women, but male ex-clerks, male ex-lawyers, and women. Where these comparisons are not explicit, it can be assumed that there were no obvious differences between any of the three classes of magistrate.

A second methodological problem and one which is present in all interviewing lies in the possibility that respondents will err in the direction of 'social desirability'

responses. One might expect, for example, that men would be wary of uttering sexist sentiments when being interviewed by a female academic. There are, however, grounds for doubting the degree to which this poses problems. A minimum condition for such responses is awareness of what would constitute a sexist answer. It should also be noted that there are ways in which the pressures of social desirability can be overcome. For example, attitudes which the respondent disavows can be attributed to anonymous colleagues or, questions may be posed in such a way as to minimise the cues to the 'politically correct' answers. Some of the most interesting data arose in the context of questions where the face-relevance of gender was non-existent. The question about responses to the appointment of women to the bench was located in an initial question about recruitment changes which bundled together all the changes to recruitment (including such non-controversial decisions as the decision to strip the JPs of their judicial powers, and the decision to make legal qualifications sufficient and subsequently necessary for appointment).

Results

Background

Women appointed to the bench have been significantly younger than their male counterparts. Obviously, the men who had proceeded onto the bench after careers as clerks of court were older. However, the women themselves noted that they were younger than even the men appointed under the new lateral entry recruitment procedures. This is a pattern long-noticed in the appointment of women to the American courts (Martin 1990).

The experience of the men and women prior to appointment tended to differ. As with their American sisters, women magistrates were less likely to have been partners in prestigious law firms and more likely to have had a variety of experience which included judicial experience on various boards and tribunals, some academic teaching experience or salaried public legal practice (*see* for example Carbon, Houlden & Berkson 1982).

The women too were more likely to have been approached to apply for positions or indeed urged by other women to seek appointment to the bench. Some of the female interviewees made it a positive practice to encourage applications from their network of female friends in the law.

Their careers once on the bench also differed from their male colleagues. They were far more likely to be attached to the City Region rather than the suburbs. (None had served in the country). There are two important consequences of this. Working in the one region, the women were likely to have greater contact with each other. Their greater concentration in one region also gave them greater visibility and the potential for greater impact on the work of the city courts.

Magistrates who had been clerks of courts were more likely to have had a long-standing ambition to become a magistrate—sometimes from their early teens. For the new group of appointees the major motivation seems to have far more to do with 'lifestyle'. For women, the magistracy offered an opportunity to combine an interesting and varied legal career with family commitments. It would be wrong however to see this concern confined to women. As one of the female magistrate interviewees noted, 'The men on the bench are quite extraordinary and talk at least as much about their families and their children as the women'. Less explicitly many of the more recently

appointed males gave 'family' and 'lifestyle' as their motive for seeking appointment to the bench. For some, these advantages outweighed the loss of income from a move to the bench from the bar. Universally, interviewees found the work of the bench far less stressful than mainstream legal practice.

There seemed little difference in the career planning between recently appointed men and women magistrates. Most of the newer appointees envisaged remaining in the job for the immediate future and found the diversity of work satisfying. Most of the interviewees had a sense that 'burn-out' in this type of work was a reality and that they might need to have a complete change of career after a time. Two interviewees however noted that burn-out was a state of mind and had far more to do with morale rather than the pressures of the job. For these participants 'retirement' at an arbitrary age was the sticking point. Most magistrates however contemplated a complete change of career, away from law if necessary, at some point in the future. Many were mindful of the problem of trying to re-enter the profession having once served in a judicial capacity.

While morale was generally high among all the interviewees, none of the female magistrates were concerned with industrial issues such as inequities in superannuation of magistrates compared to judges and the limited career prospects of magistrates which were raised by some of the male magistrates. This again may have more to do with the relatively young ages of female magistrates.

There were no discernible patterns in their preferred type of work. The great appeal of the summary jurisdiction for almost all our interviewees was the opportunity to work in a variety of areas. Interviewees were equally divided in their preference for the 'criminal' or 'civil' jurisdictions and there was no pattern in their attitude to specialised jurisdictions such as the coroner's court or children's court. At least as many of the men as women believed the Children's Court to be a 'difficult jurisdiction requiring particular skills and qualities'. Both male and female magistrates nominated Children's Court work as one of the most stressful parts of the job.

There were no appreciable differences in their approach to what some would regard as 'female' areas such as Family Court work and domestic violence. Both women and men magistrates were concerned about the level of spousal violence while also maintaining some reservations about the effectiveness of the law in dealing with it and the possibilities for injustice when making *ex parte* orders.

Women magistrates were far more likely to be favourably disposed towards training and continuing legal education for magistrates. For many of the men training was 'usually a waste of time', you 'had to be able to do the job' on appointment. Perhaps because the women were younger and therefore more recently graduated, they saw continuing legal education as 'vital' or 'highly desirable'. Another explanation for this difference might be the higher proportion of women who had a background in the public rather than private legal sector which has had a greater institutional commitment to training and to continuing legal education.

Reactions to the recruitment of women to the bench

Overall, interviewees regarded the broadening of eligibility of appointment to the bench as 'necessary' ('had to come') and desirable. Even those magistrates who had been clerks of court recognised that lateral entry broadened the pool of appointees and thereby enhanced the calibre of the bench.

Responses to the appointment of women fell into two groups. The first regarded it as somewhat sexist to think of their colleagues on the basis of gender and responded initially with comments such as 'Well it's hardly an issue really, is it?', and 'As far as I'm concerned they're just magistrates, they're not female'. The second group (which included a good proportion of the first group after their initial horror at the question) took the opportunity to make positive comments about their female colleagues and their contribution to the jurisdiction. In various ways, and perhaps a little less colourfully, most interviewees agreed that women magistrates were 'down to earth, can tackle anything and don't put up with a lot of bull-shit'. They were, in the words of another interviewee, 'rip-snorters'.

The acceptance of women initially, though, was less whole-hearted. The jurisdiction has been, according to a male magistrate:

> Traditionally male and . . . those males who had always had wives who fulfilled the home-maker role . . . found it difficult to come to grips with working with women who saw themselves in a career mode . . . even just the simple things of just sitting around in the common-room and telling bawdy jokes, they had to take a back seat and they found it uncomfortable and just found it difficult to talk to women generally. They are used to only talking to women about domestic issues at home.

These problems, however 'faded away' as many of these 'old-timers' retired. There had been some modifications to old habits—according to one interviewee, the men now spent 'less time in the public bar', although the swearing had not diminished because some of the women 'were the worst offenders'.

For some of the interviewees there was a special quality of decision-making which women brought to the jurisdiction. One interviewee, with experience of appearing before women in the jurisdiction, perceived that they were 'more sensitive, they're more compassionate and they are more understanding'. Of his own statement he immediately added, 'It's a very sexist comment, isn't it?' Another male magistrate welcomed women to the jurisdiction because they are equally capable and have qualities that men have but not to the same degree, such as 'understanding' and 'empathy'. For another male interviewee:

> Certainly I always think women sometimes have the ability to sense something perhaps quicker than a male. It's a point of view that perhaps males haven't looked at it from and they can provide it.

By contrast, another interviewee maintained that 'There are some females who do a magnificent job and there are some who are very, very ordinary . . . and I perceive that all of the females are judged by those who haven't got the capacity'. The overwhelming impression from the interviews, however, was that both the men and women thought that the female appointments had been exceptional and that, as a result, 'taken as a group', 'as a percentage . . . I suppose they'd be better than the males'.

There was some concern about the possibility that females have been appointed to the bench 'because they are women'. The concern about 'affirmative action' was not confined to the older magistrates appointed from the ranks of clerks of court. A number of the newer magistrates, including some of the women, were worried about the possibility of 'tokenism'. Indeed, the criticism of some of the female members of the bench, according to one respondent has been largely due to the fact that they were

appointed relatively young with a corresponding lack of legal experience. Several of the respondents concluded that while these problems were inevitable as a short-term measure to redress male predominance in the jurisdiction, they will, in time, right themselves.

Women in the jurisdiction were also seen to create minor logistic problems, for example maternity leave and, because they have young families, there was some concern that they seem to be given somewhat lighter loads so they can 'go home to the babies'.

These concerns, however, were far outweighed by the positive response of almost all interviewees about the beneficial effect of women on the work environment. Women are 'good fun' and tend 'to liven things up', because they are 'a bit more social' and 'more talkative and more socially adept and initiate discussion and topics of conversation'. For the younger magistrates who had gone to university and practised with women this was not remarkable. For the men long used to an all-male jurisdiction the changed work environment 'gave them a new lease of life'. For some of the women, close relationships have been formed with the older, more experienced magistrates who have shared their knowledge and been particularly supportive.

For a small number of the interviewees gender was noticeable in court. For one magistrate there was nothing worse than the prospect of 'a sea of male faces as barristers, defendant and witnesses' in a case scheduled to run for several days. Sometimes the reverse occurs and, for one female interviewee, it was amusing to look at and observe that the clerk, the defendant, the lawyer and the prosecutor were all women and the only man in the court was the security guard at the door. The visible presence of one or other gender is, according to one female magistrate, sometimes greeted differently by defendants:

> I can't help feeling that often you get the sense that a woman in the witness box is terribly glad there's a woman on the bench. Now that's just a fact of life I think, the gender identification . . . and the opposite would be true too that sometimes men in the witness box would be rather disappointed to find a woman on the bench.

These reactions however are subtle and, according to the interviewees, have little effect on the carriage of a case or its outcome. Two of the female interviewees maintained that the court ritual and traditional authority of the magistracy overcame any sense of gender.

> I have not found anybody treating any prosecutor or any defendant or any barrister appearing before the court who seems to be conscious that you're a man or a woman. They all call you 'Sir' generally because they are just in that mould. You're just 'the Magistrate'.

Female magistrates occasionally become aware that their gender, while not important in court, is a matter of some comment if parties are unhappy with a decision. Police for example might grumble about the decision of a male magistrate but are more likely to make some sexist or derogatory comment about a female magistrate who has made an unfavourable decision in a particular case. Other times sexism is noticeable in the embarrassment of police officers having to repeat indecent language in court in front of a female magistrate. Sometimes senior barristers, according to a female magistrate, try 'to lord it over a young looking female

magistrate', with, she added, little success. For these women such displays of sexism are trivial and are problems for the sexist individual rather than for them or the jurisdiction (cf US experience, Eich 1986, Schafran 1988).

Sentencing

A number of the older magistrates noted that if there was any objection to the appointment of women initially it was based on the fear that women might be 'a bit soft' or 'timid' as sentencers. They conceded that these fears were unjustified. One interviewee stated that the women 'had firm ideas and some of their decisions were perhaps firmer than what we 'men' had given. And that wasn't in areas where females were involved'. Or, in the words of one female interviewee, 'It is well-known that some of the women can be real animals'.

When asked how they rate as a sentencer all bar two (both male) of the respondents classified themselves as either 'moderate' or 'light' sentencers. For most interviewees gaol was considered to be a decision they were loathe to make ('I bend over backwards to avoid gaol'), particularly sentencing an individual to gaol for the first time. For almost all interviewees imprisoning defendants was ranked as one of the most stressful parts of the job.

Men and women magistrates also seemed equally likely to 'take a chance' with individual defendants whom they felt would benefit from a more lenient disposition. A number of the women magistrates talked explicitly about their 'intuition' or 'a hunch' which prompted them to act in this way; however this is probably a difference in use of language rather than any appreciable gender difference in sentencing practice.

There were individual differences in the use of 'suspended sentences'. Some magistrates welcomed their introduction as a creative alternative to imprisonment. This group favoured the extension of the current twelve month maximum period for suspended sentences. Most magistrates however were uneasy about the suspended sentence regarding it in some way as a 'Clayton's sentence' which probably has little deterrent affect. As one of the women magistrates put it, 'It's like threatening to punish your children. At some point you have to do it to maintain credibility'.

No noticeable gender differences were apparent in the way that concepts such as 'beyond reasonable doubt' were operationalised. Magistrates differed in the way in which they applied the test, for example for one, the maxim was 'If in doubt throw out' whereas for others it was a feeling in the pit of your stomach or, 'If you had to keep thinking about it—you had reasonable doubt'. There were similarly idiosyncratic measures for applying the civil test of 'balance of probabilities' but these did not fit any particular pattern nor were they gender-based.

The arbitration system

The *Magistrates (Summary Proceedings) Act 1989* (Vic.) provided a less formal mechanism for the determination of civil actions under $5,000 dollars. Magistrates are empowered to, with the agreement of parties, dispense with rules of evidence and formal court procedure. The legislature hoped that this scheme would minimise the cost of civil litigation and allow for speedier determination of cases.

Since folk wisdom suggests that women may be less adversarial in their management style, it was expected that any gender differences may well be highlighted in magistrates' attitudes towards the conduct of arbitration hearings. As a proportion women seem to favour and feel more comfortable with the more relaxed

procedure. One magistrate contrasted her own 'love of pre-hearings with the scepticism of one of her male colleagues'. He had complained:

> I don't know how you do those pre-hearings. I just had one and I said to the woman. 'You'll lose, there's no question you'll lose', and she wouldn't settle. I was really amused because I just have a totally different approach to them. Now in some his approach might be excellent but in a lot of cases everyone's going to lose face, feel alienated, and go away saying, 'I'll show the bastard and I'll fight it'.

The differences in approach have much more to do with personal style than with gender. Because the women on the bench happened to be more gregarious they were more comfortable with the informal hearings. However women were just as critical as their male colleagues of the half-baked nature of the scheme. Many magistrates suggested that they had been inadequately trained in this new style and, by default, simply ran arbitration hearings much the same way as formal proceedings.

Qualities of the ideal magistrate

Respondents were asked what they would look for if they were the Attorney-General making appointments to the bench. The most common response was 'commonsense'. Experience was also regarded as important, although respondents differed as to whether or not experience of the jurisdiction or general 'life experience' was the most important requirement. For some magistrates it was important to have someone who had 'knocked around a bit' and who knew a bit about life. There was a slight tendency for women magistrates to be more specific about this quality suggesting that the ideal magistrate needed to be perceptive about people and confident in their judgments about others. Both male and female magistrates identified qualities such as 'humanity', 'tolerance' and 'compassion' less frequently and in about the same numbers.

Language and style

While there were no noticeable differences in opinions expressed by male and female magistrates, there were subtle distinctions in the way in which they approached the interview and the language of their responses.

Women were less likely initially to agree to participate in the study. When they finally did agree to the interview they expressed some reservations about how useful their comments would be. They were more likely to qualify their comments on the grounds that they had not been working in the jurisdiction for long enough or had no recent experience in particular parts of the jurisdiction and to suggest that other individual magistrates were more likely to be knowledgeable about particular reforms. In fact, the responses of the women magistrates demonstrated a very sophisticated knowledge of the jurisdiction and their answers were frequently far more detailed than those of their male counterparts.

Their diffidence about participation in the study should not, however, be seen as indicative of a general lack of confidence. To the contrary, as American researchers have found, women judicial officers 'express assertiveness, confidence and determination in their dealings with men colleagues as well as pride in being women' (Martin 1990).

One explanation for their reluctance to participate in research, however, may be related to gender. A great number of the women balanced work and family

commitments and may have been reluctant to participate in an interview which further encroached on their time.

While not specifically asked about their private life, the women magistrates readily volunteered information about their families. Unlike the men they would often comment upon discussions which they might have had with their husbands. This is probably due to the fact that the women magistrates are more likely to have spouses also working in the law.

In interview, the female magistrates were also more likely to discuss their husbands and to use children as a metaphor to explain various approaches or attitudes. One woman magistrate seeking a way of complimenting the older magistrates who had come from the ranks of clerks of court said:

> You'd trust him with your life in court. I mean if one of your kids was going to come up in court, if it was before him you'd know not that the kid would get off, but the right thing would happen . . .

The male magistrates also considered issues of parenting. However their language was more oblique and they would illustrate their points by referring to specific cases rather than their own immediate life experience as a parent.

Discussion

The differences in attitudes to substantive reforms within the jurisdiction between men and women were often subtle and had more to do with style than content. Such differences as did exist were also probably related to the youth, background and personality of the women appointed and at most only indirectly related to gender. The absence of gender differences and the apparent ready acceptance of women in the jurisdiction however requires explanation.

The magistrate in all Australian jurisdictions is a lone decision-maker. Unlike the lay magistrates in the United Kingdom or the judicial panel in some of the US federal courts, our magistrates run their court without relying on the assistance of others. In a negative sense decision-making in Australian courts for magistrates is, as one of our interviewees put it, 'a lonely business'. The positive aspect of this however is that the judicial independence of the magistrates is never compromised. Constitutionally, once appointed, magistrates are free from political interference and, as a result of changes in recruitment procedure, from the bureaucratic control of the Attorney-General's Department and Public Service Board. A number of important implications flow from this position of autonomy.

Women in the Australian jurisdiction do not need to be 'consensus builders' nor, once in the courtroom are they the conspicuous 'minority' who need to gain legitimacy by seemingly agreeing with their male counterparts (cf Worrall 1987). In the Australian bench according to one female interviewee, there 'are no office politics . . . here you are an individual and there is no competition for managerial positions so you are free to be yourself and you don't have to conform.'

Among the bench there is a willing acceptance and respect for the autonomy of individual decision-makers. For some magistrates, this was one of the main attractions of the job,

> I'm fairly independent, I like doing my own thing. You are your own boss, you do what you want to do and you're responsible to yourself and no-one else.

Almost all interviewees professed not to know about how other magistrates run their courts ('the last person to ask about a magistrate's sentencing is another magistrate. I wouldn't know'.) There was also a great deal of empathy for the hard job of decision-making in the pressured environment of the courtroom. Many interviewees noted that they frequently only had very limited information on which to base their decisions. It was therefore unfair of sections of the media to be critical of particular decisions because it may well be that the magistrate was not apprised of all the circumstances.

The nature of the job has also bred a unique camaraderie and support network among the magistracy. Although they do not interfere in the conduct of each other's cases, they rely on the support of their peers. This is demonstrated in a number of ways. Almost all of the interviewees, for example, enjoyed working in a centralised court complex because it provided them with opportunities to mix with and discuss cases with their colleagues. There is a high level of socialising that takes place across age and gender boundaries within the magistracy. Many noted that they take particular effort to introduce themselves to new magistrates and there seems to be an unwritten rule that they will always make themselves available for advice and assistance even if this means temporarily adjourning their own court.

For newly appointed women magistrates the benefits of this organisational philosophy are self-evident. Unlike their sister decision-makers in other overseas jurisdictions they are not under the immediate scrutiny of their male colleagues. Once appointed there is an ethos which supports their individual style and management of the courtroom. They are accepted even by their more conservative male colleagues as 'peers' because in many respects, the label of 'magistrate' overrides their identity as 'women'.

More important, however, than the traditional camaraderie of the bench have been the changes to the jurisdiction itself. The jurisdiction has unashamedly been 'professionalised' both in its personnel and administration. 'Throughput', 'case-flow management' and more generally 'efficiency' have been the catch-cries of courts management over the last decade. These developments have brought computers, registrars, regionalisation of courts and better scheduling of cases. At the same time, the workload of the summary jurisdiction has profoundly increased. Taken as a whole, these developments have overshadowed what would, in the normal course of events, have been the novelty of the appointment of women to the bench. Magistrates are all collectively occupied with absorbing the changes to the jurisdiction and the increased workload. Women are now just part of a necessary and important professional team.

These changes have normally been viewed as extensions of 'new managerialism' or 'corporatism'. There is however an alternative view. Increased efficiency of the courts has meant that there is a growing awareness, explicit among our interviewees, of the court as a 'service delivery' agency, meeting the needs of 'customers'. As a consequence, new professionals are committed to a different ideology of justice. The law is now regarded as having an obligation to provide creative solutions for litigants and defendants. This is most clearly evident in sentencing where magistrates are committed to fashioning dispositions which suit individuals rather than applying formulistic 'punishments' demanded by inflexible law. In the civil jurisdiction many of the new reforms, albeit imperfectly, try to provide mechanisms for parties to negotiate

their own solutions with the court acting in the capacity of a mediator and conciliator rather than mere fact-finder.

In both civil and criminal jurisdictions there is the sense that the court must 'market' itself. It must be perceived by the community as accountable not just in legal theory but as a matter of practice. People (even criminals) should come away from court feeling that they have been fairly treated. In describing the image of fairness that they wish to project, magistrates went well beyond the formal legal requirements of 'fairness'. There was also a keen awareness of good court administration as an important factor in restoring the credibility of the jurisdiction. Long delays and inefficient listing procedures needed to be eradicated so that people were not inconvenienced. The costs of civil litigation too needed to be kept in check, according to many magistrates, so that the law remained accessible and not just a privilege for the wealthy.

The focus on the community by both men and women magistrates was most noticeable in their responses to a general question about their perceptions of the major challenges for the jurisdiction over the next decade. 'Keeping in touch with community values', 'providing better service to the community' and other similar formulations made this new ideology explicit. In other responses a commitment to a new ideology was implicit. The challenge for some interviewees was to 'keep up with the current pace of change' and not allow the increased workload to overpower the jurisdiction's capacity to function effectively.

The changed philosophy was palpable in other ways. There was a perception of a new 'work ethos' among magistrates. They readily conceded that in the 'old days' a magistrate might well be home for lunch, sometimes morning tea and a 'golf day' was an unwritten part of a magistrate's schedule. Now, the sentiment that 'we are here to work' was echoed by many of the respondents.

All these developments and perceptions are consistent with new corporatist philosophies over the public sector. What is sometimes overlooked however is the 'soft' applications of what, in other contexts, is merely the quest for higher profit margins. In the court system the hard philosophy has been interpreted as greater empathy with consumers, an acceptance of the need to foster individual and community development (nurturance?) and strategies designed to minimise conflict and build consensus. These objectives for the jurisdiction were endorsed by the Attorney-General's Advisory Committee's (1986 p. xii) *Report on the Future Role of Magistrate's Courts* which recommended inter alia, 'the procedures of the Magistrate's Courts should be substantially reformed to enable the Court to better administer justice and respond to community needs'. Some of these values are consistent with 'feminisation' in contrast with the traditional adversarial model which reinforces the authoritarian 'patriarchal' modes of conflict resolution through law.

There is no suggestion that this shift in emphasis has been conscious. For government, cost-cutting has probably been the major incentive for many of these reforms. What may have only been the 'rhetoric' of summary justice reform for government, however, has taken on a life of its own within the magistracy. Recruitment policy has brought together a large number of 'like-minded and highly motivated individuals' who have diligently worked to put the rhetoric into practice. The appointment of women to the bench, and to senior positions within the magistracy, has probably been a significant factor contributing to this 'soft' translation of corporatist ideology.

The 'feminisation' of the summary jurisdiction probably has less to do with the direct influence of women than the impact of more subtle changes to social philosophies in the last twenty years. As many of the women interviewees noted, their male colleagues were an exceptional group of men and,

> There isn't any such thing as a woman magistrate's way of doing things or a male magistrate's way of doing things, because while it's true generally that everyone has male and female characteristics . . . lots of male magistrates have female ways of doing things—it's a feminine-style reaction to things—gentleness, sensitivity . . .

The organisational climate of the summary jurisdiction of course does not support 'softness'. Rather, by a process of natural attrition, selective appointment and strong leadership, a new bench has been fashioned with a clear understanding of its collective 'mission'. Commitment to service delivery and customer satisfaction has taken place alongside of respect for the autonomy and individuality of decision-makers. This in turn has produced high morale and a positive acceptance and willingness to be part of change and reform of the summary jurisdiction.

However, these findings must be understood in their political context. The apparent feminisation which has been characteristic of the jurisdiction might be expected to change once the Labor government is succeeded by a government which is neither rhetorically nor substantively committed to 'feminine' values. Under such a government, the recruitment of women to the magistracy will no doubt continue. (It is hard to imagine even a conservative government depriving itself of the chance to make appointments from the large pool of talented female lawyers). However, one might expect that both female and male appointees would be less likely to exhibit 'feminine' values. It is predicted that the appointees will behave first as magistrates, second as magistrates operating within the culture of the Victorian Magistrate's Court, third as conservatives, and only in interstitial respects as women and men.

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THE HISTORY OF WOMEN IN THE POLICE SERVICE

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THE NATURE OF THE WORKFORCE IS CHANGING AS SOCIAL AND demographic changes take place in the Australian population. Increasing numbers of women want to work and, with fewer young entrants to the labour market, they will become a valuable sought after resource, recognised for their skills and ability. Hopefully police services around this country will recognise this available talent.

New South Wales

Historically, policing in Australia and other countries has been an occupation dominated by large-sized males. The occupational culture held that to carry out the tasks of policing you had to possess strength, bearing and self-confidence. These requirements and the culture fundamentally excluded anyone less than five feet nine inches tall and lacking the required features. Those women who were allowed entry suffered as they still do from gender stereotyping.

Women police are a twentieth-century phenomenon. Their employment in NSW and other states came about, in the main, after agitation by the Women's Emancipation Movement, who for some thirty-five years prior to the appointment of female police lobbied the New South Wales Government in the following areas: the employment of women in the police force; concern to be shown for women and children at risk; and the development of a morally pure society.

In 1915, two women, Lillian Armfield and Maude Rhodes were employed by the Chief Secretary. It was suggested that over four hundred women applied for the positions. The requirements for applicants to this hazardous job were: under age thirty, of good character, reasonably educated, and capable of enduring hardship and fatigue.

After their employment as Special Constables both women were assigned to deal specifically with matters involving women and children's welfare. Over the next forty-seven years the number of women increased by fifty-eight and they remained at the rank of Special Constable. In 1963 the Criminal Investigation Branch of the Police Association who represented thirty of these women pressed the Executive to 'request

the Commissioner of Police, Norman Allan, to recognise that women police should be part of the Police Force instead of being Special Constables'.

In 1964, the sixty women were sworn in as police officers and became entitled to superannuation, long service leave and all other benefits previously denied them. No suggestion was made to compensate the women for loss of earnings or rank. The women were in a seniority system separate from men and were promoted according to the number of authorised positions. This meant that a number of the women were not being promoted at the same rate as their male colleagues.

By 1975 there were 130 females with approximately 8,500 male police in New South Wales. The duties undertaken by these women had expanded from their 1915 tasks by the inclusion of public relations, school lecturing and some formal criminal investigation duty.

Reflecting community changes, from 1975 onward a slight change began to occur for women police. Women began to undertake training as detectives, though only on a limited basis with personal selection by the Officer in Charge of Women Police. Women police were also issued with handcuffs and twenty selected women issued with firearms. The climax of this change was the transfer on a trial basis of four women to general police duties, three to Darlinghurst Police Station and one to Mascot Airport.

From 1976 women recruits were placed on the same seniority list as men. After initial training they then spent six weeks in general duties prior to taking up their normal duties of lecturing in schools or working in the Women Police Office. During this time two women became prosecutors, twelve completed the detectives course and two women performed duties in crime prevention.

1980 saw more rapid improvements for women police mostly brought about through the New South Wales *Anti-Discrimination Act* which was introduced in 1977. Initially this legislation was ignored by the police administration. It was not until 1980 when action was taken against the Police Force under this Act that things began to change. Victoria Carr, a rejected police applicant took the Police Force to the Anti-Discrimination Board over a quota system which imposed strict limits on the number of women employed yearly by the Police Service. She was able to prove that the quota was discriminatory and the Service was directed to abolish the quota system. As part of this settlement the Service also undertook to encourage women to enter policing.

In 1981 Eileen Thompsett brought an action against the Police Service claiming discrimination on the grounds of marital status. As a married woman, she had been denied entry to the Police Service. The Anti-Discrimination Board found in her favour and the barrier was lifted.

From 1980, women were transferred directly to general duties after training and continued in this phase of duty unless they wished to apply for a transfer. Further, the Women Police Office was disbanded in 1981 and the last Officer in Charge of Women Police retired in 1982.

In 1982 women were integrated into the male seniority system. They were placed back in equal positions to the men with whom they had joined. What was not taken into account was that a small number of women had been denied promotion due to lack of vacancies in the women's seniority system.

Therefore with all of these changes, the future for women police in 1982 looked promising, with all the obvious overt barriers dismantled.

Table 1 indicates that the numbers of women joining the Service increased through 1982 until 1987 when entry of women began to slow and level out.

Table 1

Composition of NSW Police Service, sworn officers by gender, 1915-1991

	Women	*Men*	*Total*	*% Women of Total*
1915	2	-	-	-
1955	38	-	-	-
1972	130	8500	8630	1.5
1983	535	9356	9891	5.4
1986	883	9882	10765	8.2
1987	1086	10645	11731	9.2
1988	1217	10959	12176	9.9
1989	1288	10983	12271	10.4
1990	1409	11440	12849	10.9
1991	1437	11789	13226	10.8

If this levelling continues we will see a decrease in the percentage of women as sworn officers. Additionally, promotion on merit has not seemed to open the opportunities expected for women as shown in Table 2.

Table 2

NSW Police Department, by rank and gender as at 30 July 1991

Rank	*Men*	*Women*	*Total*	*% Women of Total*
COP	1	-	1	0.0
State Com	1	-	1	0.0
Ass Com	7	-	7	0.0
Ch/Supt	34	-	34	0.0
Supt	50	1	51	2.0
Ch Insp	110	2	111	1.8
Insp	295	4	299	1.3
Sen Sgt	536	3	539	0.5
Sergeant	2171	26	2197	1.2
Sen Con	2517	130	2647	4.9
Con 1/C	1577	389	1966	19.7
Const	3163	652	3815	17.0
Pro Con	1327	231	1558	14.8
Total	11789	1437	13226	10.8

Other Australian Police Services

Women police have faced great difficulties in NSW, but they are obviously not alone. Women police in most other states have suffered just as many difficulties. Table 3 illustrates the present position of women police in this country.

Table 3

Australian Police Forces, March 1991

	Men	*Women*	*Total*	*% Women of Total*
Australian Federal Police	2039	413	2452	16.8
Northern Territory	622	91	713	12.7
Queensland	5319	471	5790	7.1
Victoria	8581	1466	10047	14.6
Western Australia	3555	381	3936	9.7
Tasmania	895	100	995	10.0
New South Wales	11730	1449	13179	11.0

Anecdotal evidence from other states and the Australian Federal Police portrays a varied picture of the advancement of women in policing. Victoria has Assistant Commissioner Bernice Masterson as the most senior policewoman, Chief Superintendent Val Dougherty is the most senior woman in Western Australia, Superintendent Bev Lawson is NSW's most Senior Officer, South Australia has one Chief Inspector and Queensland has recently appointed five women Inspectors.

United States

Women entered the field of policing in the United States as Matron in 1891. In the US in 1985 there were 148,956 sworn police officers of these 10,129 were women. That is, 6.8 per cent of all sworn police officer were women.

Conclusion

Balkin's article entitled 'Why Policemen don't like Policewomen' explores the idea that the male ego which police officers invest in their careers conflicts with women being able to competently perform policing duties. He also suggests that women not only suffer the normal stresses of policing but suffer from the stress of coping with male police attitudes as well. He optimistically suggests that change for policewomen will only come when a new generation of policemen enter the scene minus their psychological baggage.

ALL'S FAIR IN LOVE AND WAR: POLICING WOMEN

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THIS PAPER WILL EXAMINE THE NOTION OF POLICING, PROTECTION AND control. It will argue that increasing law enforcement equals increasing control of minority or disadvantaged groups, including women, along with the protection of existing privilege.

Increasing Law Enforcement

In the past decade and a half there has been a massive increase in the number of police and resources devoted to law enforcement, accompanied by an increase in police powers.

In the twenty-year period between the mid-sixties and the mid-eighties state government spending on police increased 172 per cent as compared, for example, to only a 41 per cent increase for housing and community amenities (Mukherjee et al. 1990). While stringent economic conditions have led to large cutbacks in spending in areas such as education, police budgets have continued to be increased. The cost of maintaining police forces has increased sevenfold from $18 to $133 per Australian per year in the past sixteen years (Mukherjee & Dagger 1990). In the twelve years between 1973/74 and 1985/86 the number of police officers per thousand residents Australia wide increased from 1.8 to 2.3. In Victoria during the same period the number of police rose 37 per cent (Mukherjee et al. 1990).

Still there is no indication that the growth in the size of police forces is set to stop. Victoria's tabloid newspaper, *The Herald-Sun*, continues to editorialise about the lack of police resources and numbers (*The Herald-Sun* 8 August 1991 p. 12). Senior police rarely make public statements without referring to lack of resources and the Liberal opposition has promised one thousand more police if it is elected at the next election (*The Age* 2 August 1991 p. 1). The Victoria Police Force's most recent annual report states that a public concern to be addressed is the lack of police in the community.

In the recent past police in Victoria have gained greater power to fingerprint, take blood samples and detain people. The Police Complaints Authority, an independent body that reviewed police investigations of complaints against police and conducted

its own investigations into some complaints, was abolished. The Authority had, in the twenty-two months it existed, been critical of police internal investigations of complaints and police procedures (Freckelton 1991).

The war on crime

Law enforcement is now described as the war on crime. There is the 'crime fight' and the 'battle against crime'.

It has been said that the military in the United States of America and the Soviet Union has escaped the control of its governments and is now a force on its own, creating tension to promote military spending (Wilden 1987). Similar observations can be made about the police.

It is well recognised that police themselves have little influence on the number of crimes committed and that even if they did Australian police numbers are well past the threshold at which police could be said to have any positive influence on crime rates (Just 1991). Crime rates have increased as police numbers have increased (Mukherjee et al. 1990).

Police gains in numbers, resources and powers have been made in the context of the politicisation of police and policing.

Police Associations

Police Associations are mighty industrial forces. Not only is their strength used to gain favourable work conditions, such as superannuation packages and annual leave entitlements that are the envy of other unions, they are also used to influence the broader context in which police work. The Police Association played an active role in the 1988 Victorian state election promoting issues such as police numbers and powers. It is now recognised by political parties that to antagonise the police union is to risk electoral defeat (Bailey 1988, Freckelton 1991).

Law and order: whose law, whose order?

Conservative politicians have found it profitable to play on and inspire fear of crime in the community. The authoritarian attitudes of conservative parties fit in well with the rhetoric of 'law and order'. The breakdown of 'law and order', seen as represented by increasing crime statistics, is quickly equated with the breakdown of discipline and traditional values, a theme quickly taken up by some sections of the community. One contributor to the letters sections of a daily newspaper linked the lack of corporal punishment and strict discipline in schools with the murders of two police officers.

In 1988 a rally was organised by a group known as the Supporters of Law and Order with the aim of persuading the government to increase police powers. The group describes itself as having aims and objectives similar to that of the police. One speaker at the rally, Barbara McKay, widow of anti-drugs campaigner Donald McKay, spoke of moral decay and the need to return to family values. Bruce Ruxton, former President of the Returned Serviceman's League, was advertised as a speaker but was not present on the day. A reporter from radio 3CR, Melbourne's community radio station, interviewed some of the crowd to find out why they attended. Many of those interviewed expressed concern about homosexuals, child molesters, and sex education in schools. Several placards reflected this point of view with slogans such as 'fund families not faggots' and 'the government supports paedophiles' (McCulloch 1988).

Crime statistics

It is clear police have used crime statistics for political purposes (Freckelton 1987). When the police wanted a new law that gave them greater powers in relation to weapons, such as knives, they produced figures that showed that knife attacks had increased dramatically. Independent research, by the Victorian Law Reform Commission found that there had been no increase in knife attacks (Law Reform Commission 1989). States, such as Victoria, which have no Bureau of Crime Statistics are particularly vulnerable to the manipulation of crime statistics (Palmer 1991).[1]

Police charging patterns influence crime statistics. The incidents of assault police charges increased dramatically in New South Wales with changes to occupational health and safety laws that made it advantageous for police to record such charges. Reporting rates also influence the crime statistics. The increasing tendency of people to have household insurance and programs like Neighbourhood Watch make it more likely that people will report burglaries and similar offences. It is well known that women frequently do not report crimes of violence committed against them, particularly when they are committed by men they know. Even if they do, police frequently fail to perceive or record such incidents as crime.

It is unclear whether statistics that indicate increasing crime rates really represent increased offending or simply more reporting of crime, charging by police, or changes in the way statistics are compiled. Further, the close relationship between the police and the media and the dependence of the media on police as a major source of news information ensures that police stories about rising crime statistics receive prominence (Freckelton 1988).

Calls for Crime Prevention Strategies

The recognition that increasing police numbers and powers will not lead to a reduction in crime statistics has led to calls for social policies that address the causes of offending. It can be seen that youth offending, youth unemployment and lack of government support go together, so calls are made for more support for unemployed youth. Homelessness and offending are linked so there are calls for more affordable housing. Drug use and abuse are linked to offending so there are calls for drug rehabilitation programs. Poverty and offending are linked so there are calls for social justice programs. It is argued that the concentration on these types of programs provides greater protection to the community than increasing police numbers and powers. These sensible calls are usually ignored or taken up in a tokenistic way.

Yet these calls for government assistance to relieve the causes of offending reinforce the notion that it is the poor and powerless in society who we need to be protected from.

In a society which is divided by race, class and gender only those activities which are seen to harm the collective interests of white middle-class men are defined and treated as crimes. Some activities partly or wholly motivated by the desire to prevent harm to human beings are criminalised. Euthanasia is a crime, as was conscientious objection during the United State's war in Vietnam. From time to time and from place to place abortion is a crime. Activities which have no victim, such as prostitution, drug use and possession, and homosexuality, are from time to time and place to place

[1] The Victorian Bureau of Crime Statistics was established in 1992.

criminalised. Rape is a crime but not necessarily if the perpetrator is the husband of the victim. There are about two hundred workplace deaths, many resulting from unlawful work practices, compared to about seventy-two homicides in Victoria each year (Just 1991). The latter are treated as crimes the former are not.

Crimes Against Women

The war on crime is a battle for hearts and minds. Attacks on women and children, by the enemy, are given particular prominence. In the most recent annual report by Victorian police the number of serious assaults, particularly against women, is listed as an issue of concern to the public. Testimony from women who have been raped has been used to assist police in their campaigns for increases in police powers. One is either on the side of the woman and the police or the rapist.

The emphasis on crimes against women in public places obscures the reality that most crimes of violence against women are committed by men they know. Most women are raped by men they know. The family is the predominant setting for violence. The victims of family violence are women and children (Women's Policy Co-ordination Unit 1985). Highlighting rapes in public places feeds the myth that rapists are working-class. The image of the man in the car park is not one of a man in a suit, yet doctors and businessmen also rape. Rapes also occur in offices and doctors' surgeries.

Reports of attacks on women in public places are not designed to inform but to scare. The publicity underwrites the notion that the streets are unsafe for 'respectable women' and reinforces the notion that public space is male. Women who exercise their right to freedom of movement are seen as 'asking for it'. To inform women that there is no typical rapist would simply not be good for business. To have women too scared to travel the streets alone is one thing, to have women refusing to work for or with men, refusing to use male doctors, refusing to get married or enter relationships with men would be quite another.

Policing of Crimes of Violence Against Women

The policing of domestic violence and rape belies the notion that police are interested in protecting women from violence. Police response to crimes against women is underpinned by the misogynist notion that if women are hurt then they are probably guilty themselves of something. Why else would the police officer father of a young woman who was brutally attacked and murdered feel it necessary to say 'She was just a normal 18-year-old. She was employed and there was just no reason, she's never been in trouble with the police' (*The Age* 22 July 1991, p. 3). Unemployment or a police record would have apparently made her less innocent and her murder less senseless.

Criminal assault in the home

The man who habitually beats the woman he lives with is not described by police as a career criminal. He is more likely to be described as an 'errant husband' (*The Age* 3 September 1988). If called upon to assist a woman being assaulted by a man, police will respond according to the relationship of the perpetrator to the victim, rather than according to the seriousness of the violence. If the victim is in a relationship with the attacker the criminal law against assault is not deemed relevant. It is the male

aggressor who decides whether or not there is a relationship and the fact that there is violence is enough to convince many officers that there is a relationship because many see violence as a normal part of male/female relationships. If the police do make an arrest in a domestic violence situation, it is most likely because their own authority is challenged, not because of the violence perpetrated on the woman. Attacks by men upon women with whom they are in a relationship are excused by police officers on the basis that women ask for it, deserve their beating or like it. Women victims are frequently perceived as hysterical and mentally unstable. The violence against women in domestic violence situations is trivialised and officers frequently identify with the man. As one researcher put it, police cast women 'as failures or oppressors and men as heroic victims' (Hatty 1989).

Women attacked by men they do not know may also be asking for it or liking it but added into the police response is the notion that the woman may be some other man's property. If the woman belongs to another man, is another man's wife or daughter then the crime takes on a greater significance because the crime is seen as a violation of a male's property rights. The rape of a white woman by a black man is considered a more serious crime because white women belong to white men. Black women, according to a racist mind set, also belong to white men and so their rape is permitted (Stanko 1985).

When it comes to domestic violence police suddenly gain a perspective which is lacking in other areas of law enforcement. It is said that to arrest the aggressor will not solve the problem because the violence arises out of complex social factors. This is true in all areas of law enforcement yet the police enforce other laws. There is research into policing of domestic violence which indicates that arrest may reduce the likelihood of further violence. Criminal assault in the home is seen as essentially a private matter but police are not coy about enforcing other laws, such as laws against drug use, prostitution and homosexuality that also belong in the private realm. It is said that women do not want assistance in domestic violence situations beyond things being calmed down, yet women report deep disappointment and frustration at police performance. While it may be true that some women who call the police for assistance may not want the violent man arrested this is no reason to exclude all women from any protection the criminal law may offer (Federation of Community Legal Centres Domestic Violence Working Group 1988).

It is clear that the police failure to enforce the law against assault when men and women are living together or in relationships endangers women's lives. More than a third of all murders are committed by a relative of the victim and in about half of spouse killings there has been at least one prior incident of physical abuse, almost always involving the wife as victim (Law Reform Commission of Victoria 1988, p. 12). A family law solicitor told a Victorian Committee inquiring into community violence that if police responded actively to calls for assistance in situations of domestic violence by laying criminal charges . . . some homicides could be prevented.

Rape

Female victims/survivors of rape also cannot depend on police assistance or sympathy. It is well known that the police treat with suspicion women's reports of rape. The now disbanded Police Complaints Authority in Victoria undertook a study on police response to victims of sexual assault after receiving many complaints that police treated victims of rape as if they were guilty of something themselves. Their

discussion paper contains a number of case studies which illustrate this point. One woman who had been savagely assaulted by four men and hospitalised as a result was persuaded to leave her hospital bed and go to police headquarters by the police. The police, hearing her account, did not believe she had been raped but discovered that there were warrants for her arrest as a result of unpaid parking fines. She was taken directly to a police cell to serve her time. It took the intervention of lawyers and the Police Complaints Authority to get her removed from the cells and taken back to hospital (Freckelton 1991).

The Police Complaints Authority paper comments that the attitudes of some members of the police remain sexist, stereotyped, and judgemental, leading to the danger of unnecessarily distressing and alienating those female victims who come forward, and discouraging others from reporting crimes (Police Complaints Authority 1988).

Prostitution

While police baulk at protecting women, controlling women is relished. The illegality of prostitution gives police control over a large number of women. When the New South Labor Government passed legislation, in the late seventies, which decriminalised street prostitution, the Police Association took out full page advertisements in daily newspapers, deploring the changes and asserting that they had been robbed of their power to control criminality on the streets. The Police Association asserted that the changes prevented police from protecting law abiding citizens (Scutt 1990).

In most states the laws against prostitution criminalise only those who work as prostitutes and not their customers. The police have had no trouble with this double standard. In those places where there are laws that make it an offence to be a prostitute's client, generally the police have not been enthusiastic about enforcing the law against clients (Scutt 1990).

A current example of the double standard at work is the police charging of two people who worked as prostitutes and are HIV positive with endangering life because they continued to work. The workers were engaging in safe sex (*The Age* 15 July 1991). On the other hand, there is no indication that the police are considering charging men with conduct endangering life who travel to the Philippines on sex tours and then return to married life.

Women who work as prostitutes are seen as the legitimate targets of male violence. Frequently assaulted and raped, they are not provided with police protection (Prostitutes Collective of Victoria 1989-1991). As 'bad women' they do not deserve it. Street walkers—women of the night; male space and male time: the attitude endangers all women. The rape of a prostitute was recently compared to a woman wandering through a Housing Commission car park wearing make-up, mascara and a seductive mini skirt. Both the prostitute and the 'wandering woman' are said to be asking for it (*The Age* 9 August 1991).

Women in police custody

One in four people arrested by the police are female (Mukherjee et al. 1990). Apart from the general psychological and physical abuse which may take place in police custody, women are almost inevitably subject to abuse of a sexual nature. The very fact that the overwhelming majority of police officers are male puts women in a

vulnerable position when they enter police custody. A recent report on police mistreatment included a number of examples of police offences with regard to women. The following is a description of what one woman reported happening to her. 'A police car pulled up, asked me what I was doing, and told me to get in the car. I was taken to the police station, through a back door, and told to strip. I was questioned whilst I was naked, and police tried to insert an instrument. They then hit and kicked me'. In a separate incident the woman reported she was standing on the street when '. . . Police pulled up in a car and said they had a warrant for me. They took me to the police station, and to the cells, where they physically abused me, threw buckets of cold water over me and hit me in the face. They held a gun to my head and pulled the trigger, though unknown to me, the gun was not loaded'. Other women have reported being threatened with rape at police stations (Federation of Community Legal Centres 1991).

Aboriginal women are subject to racist and sexual abuse by police. The inquiry into racist violence heard that Aboriginal women were physically abused by police, raped and threatened with rape. The report of the inquiry states that an 'Aboriginal woman captured the combination of threats of violence towards Aboriginal women when she stated that while she was in police custody . . . police officers alternated between saying 'should we rape her' or 'should we hang her' (Human Rights and Equal Opportunity Commission 1991, pp. 88, 89, 121).

Women as source of police information

The number of women arrested is an underestimation of the magnitude of police intervention in women's everyday lives. Women are frequently seen as a source of information about offences committed by men. To this end police frequently question women they do not arrest or charge. During the course of questioning women are often threatened with harm if they do not cooperate. A recurring theme is the police threat to take women's children off them and put them in a home (Flemington Kensington Legal Service 1990-1991).

Women in police raids

Women suffer in police raids. Police frequently raid houses by smashing down the front door with sledge-hammers and entering with guns drawn. Many raids are carried out pre-dawn. Sleeping women open their eyes to the sight of armed men at the end of their beds. Increasingly it is reported that guns are being held to the heads of young children. Houses are ripped apart during raids. Women do the cleaning up (Flemington Kensington Legal Service 1990-1991, Ombudsman 1990).

Whole communities have been targeted for police raids. In early 1990, 135 police were involved in pre-dawn raids on eight houses in the Aboriginal settlement at Redfern, New South Wales. The raid was, according to police, motivated by a desire to protect that community from drugs. There were eight people arrested as a result of the raid. All charges related to minor offences or to warrants which were years old. The only arrest relating to drugs was the arrest of a juvenile charged with the possession of an implement for the use of drugs. The people raided described being terrified, humiliated and physically hurt. A report found that the excessive use of force, by the police, had the potential to cause serious death or injury to innocent persons, including children and the elderly (Cunneen 1990a).

After the killing of two police officers in October 1988 in Victoria dozens of pre-dawn raids were carried out in Flemington and nearby suburbs. Many residents

described being assaulted and having guns held to their heads. Few arrests were made during these raids. However, one Flemington resident said that living in the area in that time was like living in a 'war zone' (Flemington Kensington Legal Service 1990-1991, McCulloch 1991).

Policing of young people

Women increasingly head the poorest households. Women who live in poor areas, such as public housing estates, find their male children subject to police attention that they would never suffer if they lived in more affluent neighbourhoods. Police attention may involve harassment and assault of young people. Women often leave their male partners so they and their children can live free from violence only to find their children suffer physical abuse at the hands of the police (Federation of Community Legal Centres 1991).

Police violence against vulnerable members of the community

Most police violence is hidden violence perpetrated on the most vulnerable members of our community. The national inquiry into racist violence found that many of the attacks on Aborigines, young and old, were perpetrated by the police (Wilkie et al. 1989). In a report on homeless young people as victims of violence 47 per cent of females and 58 per cent of males reported having been physically hurt by police (Alder 1989, p. 38). A report on police treatment of Aboriginal young people found that 85 per cent of the young people interviewed reported being hit, punched, kicked or slapped by the police. Thirty-two per cent reported having guns drawn and/or fired by police during arrest or while in custody (Cunneen 1990b). A report by GLAD (Gay Men and Lesbians Against Discrimination) describes as 'the most disturbing aspect' of the survey they undertook, the extent to which gay men and lesbians reported harassment, discrimination and violence at the hands of the police (GLAD 1991).

Complaining about police abuse

Most people who become victims of crimes at the hands of the police do not officially complain. One thing that inhibits people from making complaints is fear of reprisals in the form of further harassment, violence or false charging. If a complaint is made the complainant will be treated with suspicion by the police to whom they complain. Various authors suggest that police refuse to assist in the investigation of other police (Goldsmith 1991; Queensland 1989; Freckelton 1991; Independent Commission Against Corruption 1990).

The police brotherhood

It is often said that the police force simply reflects the values and prejudices of the community. It is said that the police are the community and the community are the police. This is not so. The community is made up of men and women, people who are unemployed and employed; disabled and able bodied; black and white; from English and non-English speaking backgrounds and indigenous and non-indigenous people. The police force is made up largely of a group of employed, able bodied men from English speaking backgrounds.

While there is a wide range of views within the community there is a narrower range of views within the police force, for example attitudes to domestic violence. While surveys have found that an alarming proportion of people find domestic

violence acceptable, many police seem to have attitudes which condone or excuse such violence.

This is not to deny differences within the police ranks. There is a world of difference between the community policing squads and the paramilitary squads, the armed hold-up squads and so on. However, the paramilitary style squads, and those squads which act out the 'cops and robbers' notion of policing are seen as the elite of the organisation, the policeman's policeman, described as men of steel and Sons of God. The small percentage of women in the police force are concentrated in the community policing squads and those in other areas are said to undermine force morale (*The Age* 26, July 1989).

While police public relations emphasises community policing there is an increasing move to military style policing. Police are now armed at all times and firearms are frequently used against unarmed people. Our children now grow up observing armed police patrolling the streets.

When people join the police force they take on more than a uniform. To join the force is to become a member of the brotherhood. The police force, like the military, is an archetypically male organisation.

Conclusion

The war on crime is not being fought to protect the community. The war is being waged to teach the lesson of punishment to those who are guilty of surviving as women, as blacks and as poor in a misogynist, racist and classist society.

While the rhetoric of law and order is protection the reality is control. This is an old lesson. Although promised protection in their relationships with men and within the home, what women get is control. In the early nineteenth century in England, women looked to police to make the streets safer after publicity surrounding male violence in public. Women found 'The police not only limited the freedom of all women to freely walk the streets; they, like the non-uniformed men, found amusement in indecent assault and molested women themselves' (Clarke 1987, p. 102).

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THE BIG PRISON

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IN A DISCUSSION OF PRISONS, WOMEN ARE USUALLY ABSENT. WOMEN'S ABSENCE from the study of crime and prisons occurs because of the narrow view taken of what is crime and what are prisons and, because, as in all other aspects of society, women are marginal and unimportant.

The relatively small number of women in Australian institutional prisons—780 compared to 13,500 men—has always been used to justify a lack of resources being directed at them, and has resulted in a paucity of information on them (Walker & Hallinan 1990).

In Victoria, for example this failure to commit resources to the women's prison population has resulted in an inquiry by the Equal Opportunity Commissioner into Barwon maximum security prison. This prison holds 150 men and fifteen women. Women get access to the education centre five hours a week and men the rest of the time; women can only see their children on weekends or every second Friday if the children are wards, but men can have visits the whole week; women have access to an oval two hours on a Saturday morning and the men the rest of the time.

When women prisoners and offenders are studied they are judged on male standards of femininity. This determines women's deviance. In contrast male prisoners are never judged or described in respect of their masculinity. When women are judged as deviants it is always from the standpoint of the male-constructed view of women. If we deviate, it is from a norm that men have constructed. Yet who gave men the authority to construct notions of how women should think, behave and feel? For women, our prison starts from the point when we enter a society which defines us, but in which we have little say.

That the world is constructed by and for men is epitomised in the prison. Prisons are paramilitary institutions. Prisoners and prison officers wear uniforms; there are ranks; prisoners participate in 'regimes' and there is a rigid time-tabling of meal, shower, work and recreation times.

Not content to make women in prison submit to the military hierarchy of a prison, women inside prison are charged with prison offences twice as often as men (Victorian Office of Corrections—information obtained under the *Freedom of Information Act 1991*).

Interestingly, while in this highly regimented environment, male suicides are at least three times lower than in the outside community, whereas women's rate of suicide in prison increases more than three times (George & McCulloch 1988).

An example of the irrelevance of women to the concerns of the prison system is the fact that there are no statistics kept on the number of prisoners with children. The National

Correctional Statistics Committee when requested to do this said 'this information was potentially socially important but its immediate relevance to correctional management was dubious . . . and it was not information that would be valuable' (Minutes of National Correctional Statistics Meeting, 29 September 1988). Would the 74 per cent of women inside who are mothers agree with this?

The assumption of the committee is that the (female) partners of (male) prisoners will be looking after children. Unfortunately female prisoners usually do not have wives and female partners to look after their kids. Nor usually do their male partners: more than half of women's children are with friends and relatives and almost a quarter of their children are under state supervision (Broderick 1988). In reality children are 'relevant' to prison management; they are the most potent weapon of control against women prisoners.

Women's irrelevance is further illustrated by the fact that in Victoria, prison officers do not get any training on working with women prisoners. Given that the population in prison is referred to as the 'stocktake muster', perhaps even humanity needs to be taught.

It is clear that society in general is structured to ensure that particular dominant groups maintain their power and privilege. The most dominant group that benefits from this structuring of society is men. Within their own gender of course, men are stratified by race, class, culture, sexuality, disability, age and religion.

Thus, the women inside prison represent the condition of all women in society. The institutional prison contains women who have suffered the worst excesses of a highly stratified sexist, racist, and class based society. Nationally Aboriginal women are 1.5 per cent of women in the general population, yet they are 20 per cent of the women's prison population and 50 per cent of women in police cells (Smyth 1989; Biles 1989; McDonald 1990). Between 70 and 80 per cent of women inside are survivors of incest and sexual abuse (NSW Women in Prison Task Force 1985). Almost 70 per cent of women are unemployed.

Before venturing further it needs to be said that there is absolutely no evidence that increasing the rate of imprisnment has any impact on the crime rate or makes communities any safer (Mathieson 1990). Indeed, the contrary is probably true. While there is an increasing commitment to law, order and punishment, there is less money and political will to put resources into what is effective crime prevention; job creation, housing and income security.

What is Crime?

To look at social control generally we should look at who determines what behaviour is criminal and why. The law of theft is a good example. We know that one consequence of feudalism in England was that lands that had previously been common were enclosed and made private. Activities that were essential for survival such as collecting fuel, hunting and gathering food on this land became illegal. But the forced appropriation by individuals of what had been commonly held land in the first place, was not theft (Beatie 1975). Was the colonisation of Australia by the English theft? Is the forced removal of Aboriginal children from their families kidnapping?

Women have always been disciplined and criminalised for behaviour that does not conform to these expectations and for behaviour which if done by men would be acceptable. An early example of this is the bridal cage. The cage was the punishment for women who were judged to be 'shrews, nags and viragos', women not under the proper control of their husbands. The bridal cage was a metal cage placed over a woman's head. The cage had a metal spike or a pointed wheel which was placed in the woman's mouth (Dobash & Dobash 1986).

The silencing and punishment of women who do speak up has a recent contemporary example in Victoria. Two sisters who spoke out about incest were sentenced to over two years gaol for perjury after withdrawing a police complaint. Both women had been sexually abused by their father. A national campaign of feminist organisations got the women released from gaol and eventually pardoned.

In contrast, although it is common knowledge that police sometimes lie on oath, they are rarely charged with perjury (Independent Commission Against Corruption 1990).

The Politics of Language

The language of society determines how we think. What language does not name is as important as what it does. Sexually active young women are described in terms of abuse . . . whore, mole, slag, slut and so on. Sexually active young men in terms of studs and oat sowers. The language which describes young men's sexual behaviour reflects society's lack of concern about it.

The identification of young women as basically only sexual entities is reflected in the fact that police made specific mention of sexual and moral conduct in 5 per cent of referrals of young men and in 40 per cent of referrals of young women to courts (Chesney-Lind 1990).

The language around violence also illustrates its particular politics. The naming of violence as domestic violence categorises it as small, local and insignificant. Is violence in the street ever called pedestrian violence?

Prisoner's status is also defined by language. Male prisoners are men, women prisoners are referred to as girls. Girls are less threatening and more malleable than women. Women are infantilised to disguise the real fear that society has of women, particularly those who do not conform.

The Prison of Violence

Violence against women is another weapon in social control. Physical violence against women is widespread. Sexual violence and rape are another form of social control. Not only is it widespread but society tries to blame women for it.

The women in our gaols are long time survivors of sexual abuse. Over 70 per cent to 80 per cent of the women in our gaols have had their trust in close family and men decimated. In escaping this situation young women are often criminalised, institutionalised or left on the streets. In a report on youth homelessness last year, 50 per cent of young women cited sexual abuse as their reason for leaving home (Hirst 1990).

In Victoria, most young women have contact with the juvenile justice system not for criminal activity but for running away, being uncontrollable and being subjected to abuse. Whilst only 4 per cent of boys and young men came to court on protection applications, 38 per cent of girls and young women came to court on protection orders (Higgins 1990). Young men are seen to be law breakers, whilst young women's deviance is in breaking laws of sex roles.

The increased control exercised over young women is shown in the fact that adult women are 5.4 per cent of the adult prison population yet young women are 12.1 per cent of young people under correctional supervision (Victorian Office of Corrections 1990; Higgins 1990).

The Economic Walls and the Poverty Within Them

The economic position accorded to women is also a gender based punishment. Women who are in the full time work force receive 67 per cent of men's wages. In terms of the jobs that women do have, 55 per cent of women are located in two occupational groups—sales and clerical. Similarly, the employment that women are offered in gaols is overwhelmingly cooking, cleaning, laundry and clothing manufacture. This work itself can be a punishment.

The Federal Government's move away from the principle of a livable level of aged pension towards income support from private superannuation funds will have a devastating effect on women when they are older. For older women, often the aged pension and a separate cheque is their first experience of an independent income. The fact that women get less money than men when in full-time employment, and that women make up the majority in part-time employment and so accumulate less superannuation (as well as the predominance of women in casual employment where there is no superannuation) creates a huge gap in income potential for older women who have been in paid work. Women in unpaid work get no super whatsoever. We will have a whole generation of older women living in poverty or forced into dependence on men.

Women who are not in paid employment must promise fidelity to either the state or individual men. If a woman on a pension is deemed by the Department of Social Security (DSS) to be in a 'marriage-like relationship' with a man, DSS will require that the man financially support her and her dependants.

This is the type of prostitution authorised by the state. So there is a choice: take the state as your one and only or a man. Indeed, DSS is a jealous partner. If you have relationships with others it is the woman who is charged with fraud and whose sole source of income is stopped.

Whilst DSS's world view is that women should be in an economically dependent unit comprising man, woman and children, or the state, women and children, the Taxation Department views us differently. The taxation system treats women and men as individual units of assessment. Therefore, women contribute to the state as an independent economic unit but benefit from the state only as an appendage to a man or the state (Graycar & Morgan 1990).

That the rich get treated much better by the courts is graphically illustrated by the discrepancy in the sentencing of social security and taxation fraud. In Victoria, recently, a supporting parent was sentenced for a $46,000 social security fraud and a barrister for a $100,000 taxation fraud. Neither had prior convictions. The prosecutor recommended the gaoling of the sole parent. They did not recommend the gaoling of the barrister. The woman was given a two-year suspended sentence and three months in gaol. The barrister was given a six-month suspended sentence and a $5000 good behaviour bond. He did no time (*The Age*, 16 June 1991).

The Medical Prison

In the continuum of the social control of women, one of the most tangible agents of control is the medical system. Since firstly the church and then doctors appropriated what had historically been the domain of women, there has been systematic abuse and control of women by the medical system.

One poignant example of this is that women are prescribed 70 per cent of tranquillisers in this country (Byrski 1986). Do doctors think women have a genetic deficiency in these drugs?

If so marriage must exacerbate this deficiency as married women are given twice as many tranquillisers as single women.

In prisons the approach of doctors is to prescribe medication to women to cope with their experience of prison, rather than address their medical condition (Victorian Office of Corrections 1990). Whilst there is a sophistication of drugs to control women, there is still no safe method of birth control for women.

The refusal to allow women to control their bodies is no better articulated than by the abortion debate. Whilst abortion is seen by its opponents to be a moral issue the total removal of the uterus is not. In Australia 40 per cent of women are likely to have a hysterectomy in their lifetime (Ryan 1985).

A new injectable contraceptive called Norplant has just entered the criminal justice system. Norplant is a vial surgically implanted in a woman's arm. It acts for five years. Earlier this year in the US a woman convicted of child abuse of two of her four children was gaoled and was required to have the device implanted. Two years earlier another judge offered to reduce the sentence of a woman who had been convicted of child abuse if she agreed to be sterilised: she agreed (Tentler 1991).

Women's bodies have increasingly become the site of struggle in the control of women. Naomi Wolf has commented that since Eve took her first bite women's right to eat has been restricted. In the outside community some 20 per cent of women are anorexics or bulimics, in prison it is more than 50 per cent (Wolf 1990).

The increasing pressure that women be physically weaker and smaller is shown in the fact that a generation ago models weighed 8 per cent less than the average woman's weight, now it is 23 per cent less. To be anorexic or bulimic is in reality to be a political prisoner.

In Prison

Meanwhile women in Victoria's largest gaol do not even have a woman doctor. There are numerous allegations by women at Fairlea about the use of pelvic examinations for illnesses such as headache, earache and other such conditions. It is also alleged that if a woman is taken to an outside hospital to see a gynaecologist, she is in handcuffs the whole time. She is given an internal examination while she is in handcuffs. A male prison officer is also present. Not only does the examination take place in front of the male prison officer but he is present throughout the whole consultation. This is a breach of the woman's confidentiality with her doctor, let alone her dignity.

It is virtually impossible to get statistics on the use of tranquillisers in gaol, but many women get their first taste of major tranquillisers in gaol. Women who have never used them before are given large doses of largactil, melleril and stellazine. The overprescription of these drugs causes women's hands to shake so much they can't feed themselves. Women dribble when they speak to you. These women get released and often have no idea, or documentation of what doses and cocktails they had inside.

They are forced on release into either a detoxification unit or withdrawal at a most crucial and stressful time, or they are forced to do the roundabout of doctors who frequently will not believe the levels and types of medication women get inside. Failing this women go to the street drug trade.

Whilst drug and alcohol dependence have long been recognised as health problems, on entering gaols these women are doubly punished. In Victoria there is no detoxification facility for women. Supposedly, women are in police cells long enough to dry out or withdraw. The justification is also given that women are medically assessed at reception, and if they need to,

they can go to hospital at Pentridge men's prison. This attitude reflects a profound level of ignorance of withdrawal particularly from benzodiazapenes and alcohol. When women go into prison on methadone they are not able to control or maintain it. Prison punishment is supposed to be the deprivation of liberty, not of medical care.

A review on suicide in Victoria's prisons commissioned by the OOC supported the relationship between lack of structured detoxification and self-inflicted injury, yet still there is no detoxification unit for women in Victoria (Harding 1990).

Women who do self-inflict injury have only further punishment to expect. If a prisoner breaks a light bulb to slash themselves they are charged with damaging government property. According to the Director-General's rules, handcuffs, restraint belts and hobbles and chains are authorised for use on prisoners. Generally women are still put in isolation (solitary), deprived of sensory input and placed in a bare concrete cell with a canvas mattress and canvas blanket in a canvas nightie. Recently, (according to a confidential source) one woman who refused to go into a strait jacket was stripped naked by four male officers and had a restraint belt put around her stomach and was handcuffed to it. Suicide attempts and self-inflicted injury are but one indicator of the severe level of depression powerlessness and anxiety felt by women inside.

Another aspect of the sexual humiliation of women in prison is the use of strip searches. In a five-month period when the average number of prisoners at Fairlea was eighty there were 1200 strip searches of women prisoners (Victorian Office of Corrections, information obtained under *Freedom of Information Act 1991*). When women are strip searched they are naked; they bend over, spread their cheeks and if they are menstruating they must take out the tampon in front of the officer. The regulations do not require that officers must be female.

The level of sexual harassment in women's prisons is enormous. The fact that the women in gaols are young, are often vulnerable from hanging out and are absolutely powerless in the institutions creates the perfect conditions for sexual harassment. Ask any woman who has been inside. On a prison tour by international delegates at Fairlea prison this year a senior officer was seen pinching the bottom of a female prisoner and behaving in an offensive and lecherous fashion. The same officer when asked if there were any Aboriginal women inside replied that there were some women who said they were 'half castes' (Workshop on Women Prisoners 1991).

Inside the Institutional Prison

What else is going on inside women's prisons and who is benefiting from it? Alienating and isolating women in prison further from society, stigmatising them for the rest of their lives, removing their children, subjecting them to strip searches, denying them adequate health care and decision making power and putting them in a paramilitary environment is counterproductive.

Prison serves to strip women of all resources they have outside; whilst inside, prison insists that they be dependent and forces them to lead a life determined by petty and discretionary rules and rulers. If they are not totally submissive they are punished for such trivial things as appearing at morning muster in dressing gowns, not making beds properly, or spitting and swearing. For three incidents of not making her bed an inmate gets two extra days on her sentence. For being in possession of perfume, a woman got four days in isolation.

Women whose cultural and religious practices are not Anglo Christian are unable to prepare food and care for themselves in culturally significant ways. Women who do not read and speak English are in a disastrous position in gaol. No information is available in

languages other than English. There is rarely another woman to speak their language. Women have been sent to gaol literally not knowing why they are there or how long for. They are not able to understand the rules and running of the prison. Women who do not speak English and consequently have not understood the prison rules have been charged with prison offences. These women suffer even more isolation and punishment than other women inside.

It is what women have outside gaol that keeps them from offending. Prison destroys all this. In Victoria when women leave prison 60 per cent of them are homeless (Inner Urban SAAP Services Group 1991). A more appalling statistic is that over the last three years thirty-nine women have died since their release from Fairlea (information provided by FLAT OUT, Victoria—accommodation service for women leaving prison). Clearly prison did little to assist their lives.

Whilst inside prison, women are in a state of crisis. Over a two year period in Victoria though women were only 6 per cent of the prison population they were 50 per cent of incidents of self-inflicted injury (Harding 1990). Although we have no death penalty in this country, in the last ten years twenty-six women have entered custody only to leave it dead (Biles et al. 1989).

Once a woman is gaoled, her child's institutionalisation or fostering out invariably is justified and maintained because of their mother's incarceration. At Fairlea 22 per cent of women's children are under the control of CSV (Broderick 1988). A cycle of institutionalisation of women and their children can develop.

The women in our gaols are also very young. Almost a third of them are under twenty-four years. Half of the women have not been in an adult gaol before.

In looking at the offences for which women are imprisoned, the reality of lives destroyed by poverty, violence, racism and sexism is obvious; 11 per cent of women are in for homicide, 7 per cent for assault, 8 per cent for robbery, 43 per cent for offences against property, 13 per cent for drugs and 10 per cent for good order. Seventeen per cent of women in gaol have not been convicted (Walker & Hallinan 1990). There are an unknown number of women inside for prostitution. Though the legal status of prostitution is different in each state, what is not different is that across the country, women are imprisoned for working in the sex industry. In Victoria two years ago, 130 women were imprisoned for prostitution or for non-payment of fines (unpublished research, Victorian Federation of Community Legal Centres).

Conclusion

There is much to change. Rather than some new world orders we need a re-evaluation of the old ones. Society seems happy to participate in technological change but it is less happy about social change.

Inside prison changes are needed urgently:

- women prisoners must have the choice of a woman doctor;
- strip searches should be stopped;
- women must have information and resources in their own language;
- prostitution, drunkenness, possession of drugs and poverty offences must be decriminalised;
- structured detoxification must be provided;

- contact visits should be a right;
- prisoners who self-injure must not be punished.

To change what is the prison as well as what goes on in them we must also work on change outside:

- women must have independent economic status;
- women must have control of their bodies;
- men must learn to listen;
- Aboriginal sovereignty must be acknowledged, self-determination the rule;
- society must acknowledge, and pay for, its reliance on women as carers.

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PENAL POLICIES: THE HIDDEN CONTRACTS

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THE FEMINIST CHALLENGE TO MASCULINE ACCOUNTS OF SOCIAL LIFE HAS BEEN described as centring on three key concerns:

- the mutual dependence between the public and the domestic spheres;
- the false assumption of the self-sustaining nature of public life; and
- the arbitrary privileging of public aspects of social life and the marginalisation of the domestic (Yeatman 1986, p. 159).

These concerns have underpinned the feminist materialist analyses of the relationship between the family and the welfare state (Finch & Groves 1983). Such a perspective has uncovered the crucial role that the unpaid work of caring plays in sustaining social life, especially in the period of the 'retreat from welfare'. The state is able to draw on the 'hidden contract' of family obligation in its search for low-cost solutions to the need for care for a range of people made marginal to productive life.

This framework is used here to examine the way that penal discourses constitute an especially significant group of unpaid carers—people in the population 'families of prisoners'. Garton (1988, p. 322) has posed the question, 'what populations are constructed by the discourse of power and control as it occurs in the realm of penality?'. The feminist materialist perspective, however, indicates that a further set of questions needs to be asked:

- What populations are masked or marginalised in these discourses?
- How significant is the unpaid caring work of the people in the population 'families of prisoners'?

- What are the economic, social and personal costs for the people in those marginalised populations?

Conjugal Visiting and the Hidden Contract

The significance of these questions is most clearly illustrated in one particular set of penal policies dominant in the sphere of punishment and control in the 1970s. The explosion of prison violence especially when it was manifested in the collective actions against prison administrations in the international prison crises in the 1970s redirected penal discourses to the volatility of all male imprisonment. In the United States and in Northern Europe, throughout the 1970s, there was a series of academic papers, neo-liberal reformist arguments and some penal policy changes centring on the restitution of conjugal rights of male prisoners (Hopper 1969; Schneller 1975; Lockwood 1978, 1980, 1982). Most of the conjugal visiting policies incorporated the home into the prison through a regulated pattern of punishment, control or reward. However, the penal policies of Costa Rica had the most systematic version of this policy of 'progressivism'. The relationship between the prison and the home was plotted through a program associating punishment and reward with a minutely detailed balance between control in the institution or the home (Goetting 1984, p. 168).

- Maximum Security Closed inmates are allowed no conjugal visit;
- Maximum Security Open prisoners are allowed one two-hour conjugal visit every three weeks;
- Medium Security Closed inmates are allowed one two-hour conjugal visit every fifteen days;
- Medium Security Open inmates are allowed a three-hour visit every fifteen days;
- Minimum Security prisoners are allowed one conjugal visit from 5.30 pm to 7.00 am every fifteen days;
- Limited Confidence inmates live at home every week from Saturday at 1.00 pm until Sunday at 6.00 pm;
- Widened and Complete Confidence categories sleep at home every night of the week except Saturday (adapted from Goetting 1984, p. 160).

These specifically allocated rewards, of carefully plotted increases of time with the family, incorporate the domestic into the penal sphere with Benthamite precision and zeal. With this program blending the diffuse care of the family with the precise control of the stopwatch, Costa Rica has attracted the reputation of being 'known as one of the most penologically advanced countries in the Western Hemisphere' (Goetting 1984, p. 160).

This description obscures the interdependence between the penal and the domestic realms in terms of the masked expectations of the extraordinary malleability

of the women outside of prison and their willingness to use their resources of time and emotional skill in fitting in to the demands of these precise schedules of prison control. The prison extends into the lives of the families outside imposing major areas of lack of freedom over the woman's time and control over her own material resources. Yet, the 'naturalness' of the woman's family obligation to support the prisoner masks this domestic labour so effectively it becomes invisible in most of the articles that advocate conjugal visiting programs and that define the 'progressiveness' of the Costa Rican penal system. It is women's work as sexual labourers, securing the sexual rights of the prisoner as well as the civilisation of the prison, that is the masked exploitation in these liberal discourses of the late 1960s and 1970s. Moreover, what is even more marginalised in these approaches is the range of other practical domestic labours that are taken for granted in the policies of conjugal visiting. There is little acknowledgment in any of the texts of the infrastructure of housework that is necessary for conjugal visits: negotiating time away from paid work, organising contraception, rescheduling the household budget to be able to afford visiting over a two or three-day period, arranging for children to be cared for, or if the children are included in the visit, all the practical preparation that is the inevitable corollary of taking children away on a 'holiday'. There is also the emotional work of preparing them for the visit and working through the after-effects of a stay behind prison walls.

This scheme can be interpreted as a Weberian 'ideal type' of prison reform program. The masking of the extensive work involved in maintaining family contact with prisoners is the common feature of the majority of texts and articles in the social scientific reformist literature on imprisonment. Whether that literature focuses on conjugal relations programs or on any of the several other attempts to 'civilise' the prison, the social sciences have played a major part in drawing on, yet denying, the significance of the work of caring in the legal penal sphere.

The Variety of Forms of Intersection Between the Prison and the Home

The impact of social scientific professionalism on the constitution of the population 'families of prisoners' can be located in a specific stage in the relationship between the home and the prison. It is set in the third of the four main forms of the intersection between the prison and the home that have characterised the history of penality over the past 200 years. Very broadly these forms of prison-family relationship can be summarised as comprising:

- **The Home in the Prison**—in the prisons which are effectively family labour economy penal colonies (Goetting 1982a, Aungles 1990);

- **The Home outside of Prison**—when the prison and the home are clearly segregated, the neglect of the family outside becomes part of the punishment of the imprisoned offender in the classical era of imprisonment as segregation (Smith 1986a);

- **Permeable Boundaries between Home and Prison**—here the family is constituted as a 'bridge back' and as a 'prime treatment agency', yet also as a 'cause' of criminality in the 'psychological' discourses of penality. This third mode is a consequence of the transformation in penal ideology and practice in the late nineteenth century. With the shift from a philosophy of freedom

to a psychology of 'personality' and the idea of the reformability of the offender, the ground was laid for the family to be brought into the prison/penal programs as part of therapeutic-rehabilitative schemes;

- **The Prison in the Home**—in this fourth mode the family domain becomes the site of the containment for a variety of sanctions: probation, community service orders, after-care and parole. With this form of incorporation into the penal-welfare complex, the family becomes a 'naturally related community resource' (Cohen 1985, p. 281). It is in this mode that the most intensive and most manifest form of the relationship between home and prison has developed during the past fifteen years—home detention (Aungles 1991). It is important to emphasise that these strategies of control have not developed as alternatives to institutionalised imprisonment, whatever the initial intention of the penal administrators, but have worked in parallel with them (Cohen 1985).

In this paper the focus will be on that third form of relationship—the home outside but allowed into the prison. In particular, it will be a review of the way that the social sciences have constituted the population 'families of prisoners'.

Social Science Constructions of the Family in the Penal Discourses

The swings in penal administration are mediated through various academic legitimations or theories with the various specific social scientific discourses within positivism tending to 'fit' more or less closely with any one of a number of different political and bureaucratic discourses. Underpinning the various theories, or social science approaches, to criminality and 'the criminal personality' are assumptions, sometimes manifest, sometimes obscure, about the family of the offender. The way that the family becomes incorporated into the various programs of therapy, rehabilitation, terror or surveillance thus changes with the different degrees of importance that any one state places on the competing discourses within which punishment is being addressed.

There are broadly six major theories of criminality that are part of the various discourses that underlie the third and fourth modes of the incorporation of the family into the prison. The ways that families of prisoners are conceptualised and acted upon is filtered through the symbols of family and criminality within each of these theories. They are broadly the: bio-anthropological and the bio-psychological psycho-dynamic sub-cultural, structural, radical, and the neo-classical, social science literatures on criminality.

The unspoken image that hovers over most of these accounts of criminality is of a threatening amoral public space in which young, working class men congregate unfettered by chains of conformity forged in conventional, that is, middle-class family relationships. For example, when partners of prisoners are explicitly included in the psychiatric model of criminality they have been described as having 'the same psychopathology as the felons'. It is worth noting that this conclusion comes from a study with the title: 'A Psychiatric Study of Wives of Convicted Felons, An Example of Assortative Mating' (Guss et al. 1970), and that one of its conclusions was that the psychopathology of the family was likely to be an enduring characteristic. Similarly,

in the sub-cultural framework, the family is manifestly constituted as being at fault in producing criminality. In this perspective, it is specifically the households headed by women without economic support from their spouse in which the criminogenic values are fostered; the greater propensity to crime is a result of the lesser 'ego strength' of the criminal. The failure of the family to adequately socialise the child is therefore one of the key factors in producing crime in these accounts: inconsistent and inadequate family control that fails to pass on adequate moral lessons results in an absence of shame in the children of lower-class families. The inadequate family, in terms of its nonconformity to the classic, nuclear family model of bread-winning father and dependent and caring-controlling mother, is essentially the amoral family, the cause of criminality.

Nevertheless, the family has a contradictory role in these discourses. It becomes the site of both the blame for, but also the possible reformation of, the resocialised morally upright reformed prisoner. Although the family is to blame it also becomes the 'bridge back' and the 'prime treatment agency' in these master stories of deviance and control.

Family as 'bridge' and as 'treatment agency'

The family in this discourse is the natural site for the provision of both social and material resources. It is defined as the agent of the prisoner's resocialisation back into the citizen skills of 'scheduling time . . . paying bills . . . (and) meeting social obligations', and also of being the most frequently used material buffer, supplying home, money and job contacts in the crucial early post release period (Liker 1981).

The several analyses of caring work in other areas of social life have shown that caring is not only about emotional relationships, but also has important material dimensions (Finch & Groves 1983, Ungerson 1983. Watson & Mears 1988). Nevertheless the privileging of the emotional aspects of domesticity serves to mask the material importance of caring work in the dominant discourses of the public sphere. The feminist materialist thesis is that the specific aspects of the actual relationship between the material and the emotional components of domesticity have to be delineated for a full understanding of social life: 'caring is about both labouring and loving' (Finch & Groves 1983, Ungerson 1983).

Liker found that it was women, particularly mothers of male prisoners, who bore the high economic and emotional costs of the immediate post-release period. The majority of the freed men in his study of black prison releasees went home to their families: 60 per cent to mothers or mother surrogates, 20 per cent to wives or partners. These women were already bearing the financial burdens of their class and gender in having sole responsibility for children whilst having access only to low status, low income insecure jobs; 57 per cent of the mothers nevertheless received no contributions from the men towards housekeeping nor did 38 per cent of the wives. Even those men who did pay were likely to borrow more than they contributed.

Liker's work makes explicit the economic exploitation of women that is involved in this particular mode of the incorporation of the family into the penal sphere. In the mainstream families of prisoners literature, however, home is unproblematically constituted as that place 'where, when you have to go there, they have to take you in'. The positivistic literature on recividism and the family unreflexively reinforces this construction of the domestic realm as involving this long-term obligation of women.

However, in much of the mainstream families of prisoners literature surrounding these programs, women on their own are not defined as being sufficiently skilful to do the work of rehabilitation. In the several texts or journal articles on the experiences of families of prisoners the dominant theme has been one of techno-reformism. In this approach the family of the prisoner is defined as a 'family in crisis' or as a 'disorganised family' but it is 'the family's' response or adjustment rather than imprisonment as the source of the crisis that is defined as problematic. Moreover, 'the family' in these studies is conflated with 'the wife'.

The techno-reformist literature extends from the 1930s to date. In a 1981 report on the problems faced by prisoners' wives, Daniels (1981) continued to use the model of the family '. . . as a major untapped resource in a rehabilitative correctional system' (p. 310) and in 1983 Robert Marsh was basing his argument for greater resources for group counselling in prison on the claim that the family '. . . provides a stable environment for the released offender and ultimately reduces recidivism' (Marsh 1983, p. 162). However, it was in the period from the 1950s to the late 1970s that this approach dominated the literature on families of prisoners.

The first of the major texts in the field was the work by Norman Fenton in 1959. Fenton specifically directed attention to the family as 'the therapeutic agent'. In Fenton's work most of the key elements of the approach in the later texts are laid out: the family is designated as the social unit most likely to prevent recidivism. But the family on its own is unlikely to achieve the right balance in the post imprisonment relationship. It is necessary therefore to intervene scientifically in the relationship between the prisoner and his family and reconstruct it in terms of the appropriate balance in the relationship. He advocated a course on family counselling for custodial staff in the Californian Department of Corrections and a program of group psychotherapy for family members of prisoners due for parole. One important refinement added in the literature following on from Fenton's work, and one that eventually became the focus of this approach, was the importance of diagnosis. The writers very quickly took on the role of scientific researcher into the domestic relationship prior to and necessary for the counselling. The literature thus shifted towards a 'blaming' discourse, defining several forms of domestic relationships, indicating the appropriate and normal form and, by definition, categorising all others as 'family disorganisation'.

One program in Philadelphia in the United States brings the prisoner's partner into the prison once a week in the three months before his release to work with the prisoner in a psychodynamically oriented program of counselling (Kaslow 1978). The aims are to restore the family relationships through:

> a knowledge of the psychosexual development, personality structures, ego and superego functioning, impulse control, object relations, level of anger, and frustration areas of unmet needs, nature of support system and dreams and goals and in general by tapping into the patient's ego strengths, optimism and desire for a better life to make the therapy productive . . . (p. 125).

In a small-scale pilot program on parental counselling in Idaho, the wives of the prisoners in the program, after doing the extensive domestic labour of caring for the prisoners' children throughout the several earlier traumatic phases of arrest and punishment, had to allow an observer into their home to record their 'parenting skills', prior to an eight-week training program in the prison attended by both the prisoner and the mother and children. The period of 'at home' observation involved the prisoner's

wife in being intensively measured and scored according to a 'Behavioural Observation' form on which was recorded the number of times the children complied with the mothers' commands and the types of control behaviour she exhibited. The observer scored a wide range of behaviours including such positive responses as approval, attention and positive physical responses and such negative responses of children and parents as crying, disapproval, destructiveness, humiliation, yelling and hitting (Marsh 1983, pp. 160-1).

The women also were involved in

> . . . writing self-reports, completion of an 'Adjectives Check list' on each of the children, measurement of interpersonal communication skills of parents by means of a pre-test/post-test in the parent training class . . . (Marsh 1983, p. 157).

Reuben Hill's work on the 'family in crisis' became the basic paradigm within which the literature developed. One of the most marked features of the 'family crisis' literature is the increasingly positivisitic character of the literature. 'Families in crisis' are constituted in terms of highly schematic patterns of family relationships. Variables are constructed from these models and are calculated in increasingly statistically sophisticated terms.

Pauline Morris's (1965) work on 588 women who were married to prisoners in British prisons in the 1960s is one of the most influential texts in the literature. The detailed information on impoverishment, social isolation, problems of information and the amount of work involved in maintaining the family outside of prison gives vivid evidence of the hidden punishment and hidden labour involved for women who are partners of imprisoned men. Most of this evidence comes from the detailed informal responses she recorded in which the women speak for themselves about their experiences. However it is on the quantitative and analytic measurements of family disorganisation and family adjustment that Morris centred her findings. She used a variety of statistical techniques to estimate factors associated with the levels of family adjustment. She also developed a categorisation of prisoners' families according to the various patterns of dominance/submissive or nurturant/receptive relations between the two partners. From these patterns six possible kinds of family relations were described: 'dependant wife-dominant husband, mothering wife-dependent husband, dominant wife-passive husband, immature wife-immature husband, mature wife-dominant husband' (pp. 144-206).

Nine years after the publication of Morris's work, Perry used the same categories but called the family forms—'Daddies and Dolls, Mothers and Sons, Bitches and Nice Guys, Masters and Servants, both dominant-hawks or both nurturant-doves' (Perry 1974). This naming more explicitly placed the blame for 'inadequate' family relations on the women: dolls, mothers, bitches and servants having different connotations to the terms used for the men—daddies, sons, nice guys and masters. Moreover the family crisis paradigm here clearly incorporates the 'psy' assumptions that the responsibility for the adjustment to the crisis is a natural part of the domestic labour of the women. Perry's judgments of the women in his sample is that few of them measured up to the ideal of an assertive purposeful wife but were too passive and intimidated by their husbands to be able to perform the expected labour of influencing or modifying the husband's social behaviour (Perry 1974, pp. 88-93).

The three major texts, following Morris's work in this literature, used increasingly sophisticated, more intensive and more statistically based analytical techniques to

decipher the confessions. Foucault's thesis that knowledge insidiously objectifies those on whom it is applied and that surveillance, classification ordering and coding are not simply aids to control and discipline but are themselves woven into the very form of power itself, is exemplified in Stanley Brodsky's description of his methodological approach and his analysis: 'the study called for photocopying mail written and received, tape recording visits of the prisoner, and personal interviews' (Brodsky 1975, p. 119).

One thesis is that the normalising power of political technologies succeeds when they are only partially successful because when there is failure this is construed as further support for the necessity to reinforce and extend the power of experts (Foucault 1977, pp. 268-72). This success through failure theme is clearly manifested in the reformist families of prisoners literature. After testing thirteen factors concerning aspects of the women's lives for their relevance to 'adjustment' Foucault found that 'unfortunately none of these factors was related to the adjustment score with the exception of family size . . .;' and she concludes her analysis of what factors are associated with the prisoners wives' ability to adjust by suggesting that greater refinement in the technique was necessary.

Thus the reformist technicist studies became ends in themselves, seeking to catch the most private and delicate aspects of prisoner-family relationships in sophisticated networks of analysis. The family (that is the woman) properly controlled to behave normally by a network of well-resourced professional experts, is constructed as a basic resource for reform. Reform is predicated upon intensive surveillance, personal confessions and intricate analysis. In the majority of these studies there is no questioning of penality and none of familism.

Discussion

In summary, the people in the population 'families of prisoners' are incorporated into the legal penal sphere alternately as: providers of economic support during imprisonment, invisible, the cause of criminality, criminal associates, a 'bridge back', a 'mitigating counter-force' (through programs of conjugal visiting and through experiments with co-educational prisons), a 'prime treatment agency', the site of 'resource and resolve', co-controllers of the prisoner, and a 'reward' for the prisoners 'good' behaviour.

In these several and contradictory forms of incorporation, the partners and parents of prisoners are brought into the legal penal sphere through their hidden labour, their hidden economic subsidies to the state and/or through their hidden punishment. The punishment is sometimes a manifest but more often a masked feature of the policies and practices of penal control. The social sciences have played a major part in the constitution of the population 'families of prisoners' in the third era of penality, the era of 'reform'. Even when the 'reform' era grew sour these literatures maintained their power through the modified promise to relieve the worst effects of 'institutionalisation' and the brutalities of prison life.

In these therapeutic and social administrative literatures the labour of people with family obligations to prisoners would seem to be more manifestly drawn into penal discourses. Nevertheless, the material aspects of that labour are masked by the assumptions of the naturalness of family care and the focus on the emotional relationships of care rather than on the physical costs of caring work as 'caring for' is

elided with 'caring about'. Moreover, the punishment borne by the people in the population 'families of prisoners' is a contingent rather than a central feature of these discourses. The hidden punishment of the family is never made theoretically problematic in these discussions. As G. de Conick points out in his overview of the literature on families of prisoners up to 1982, although various ameliorations to the situation of families were suggested, what is most noticeable about the studies is the fact that hardly any of their recommendations were ever implemented. Similarly, of the several recommendations concerning families of prisoners in the NSW reports that include a discussion of their situation, the Nagle Report, the 1982 Children of Imprisoned Parents Report, the Department of Corrective Services Report on the effects of marital separation (Kemp 1981) and the Women in Prison Task Force Report, only eight have been implemented.

Since the late 1970s there have been a number of critical reports based on feminist and class analyses of the shared and marginalised punishments of the family outside (Crosthwaite 1975, Johns 1979, Liker 1981, de Coninck 1982, Hounslow et al. 1982, Jones 1983, Hatty 1984, Smith 1986b, Aungles 1990, 1991). Nevertheless, these stand as isolated studies. They have not been incorporated into any of the three potentially relevant critical literatures: the socialist feminist critiques of the relationship between the state, the family and the economy, the Marxist or radical critiques of penality nor the feminist critiques of penality and criminology. Nor has there been any collection of the various studies in an anthology that indicates the commonalities as well as the specific variations across several societies of the hidden labour, hidden costs and hidden punishment of families outside of prison.

This isolation means that the second stage of critical analysis, the stage of public systematisation is not reached. The only publics the studies reach are those with a specific interest in families of prisoners, or the spasmodic and thus apolitical attention of a wider public. The condensed invisibility of families of prisoners then is maintained in spite of these embryonic criticisms. The dominant form of the relationship between domesticity and penality is still that of classic liberalism—the individual prisoner inside prison manifestly punished by his restricted access to waged labour and the destitution of the family outside prison whose shadow punishment is marginalised and largely invisible to the public gaze. However, layered onto this dominant form are the attempts to civilise the prison through domesticity. It is in this complex and contradictory space that the political economics of family altruism is experienced in its most condensed form in the hidden labour, hidden costs and hidden punishments of the people in the population 'families of prisoners'.

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CHILDREN OF PRISONERS AND THEIR OUTSIDE CARERS: THE INVISIBLE POPULATION

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How many Children?

IT IS DIFFICULT TO ESTIMATE THE NUMBERS OF CHILDREN AFFECTED BY THE imprisonment of a parent. This difficulty is an integral aspect of the shadow punishment experienced by children of prisoners and their outside carers. It is closely associated with the neglect of public care for this especially vulnerable population. The official neglect of the impact of imprisonment on the child of the prisoner is the common focus of four recent commentaries on the prison systems of Belgium, the US, England and New South Wales (Hounslow et al. 1982, de Coninck 1982, Smith 1986a, 1986b, Bauhofer 1987). These reports identify two aspects of this issue of neglect:

- that there is almost no public information available about how many prisoners have children, where the children are, or how they are cared for;

- that this neglect is not accidental but is an inherent aspect of a judicial system centred on the principals of 'justice' and 'individual responsiblity'.

Smith (1986a) further argues that, in the case of the legal penal system in England, the shift to a more punitive 'law and order' climate increases both the shadow punishment of the family outside gaol, and the pressures to mask that punishment:

> It would be political suicide to build up one picture of crime and criminals to the voting public, instilling fear and prejudice and present a law and order platform and then contravene it by aiding prisoners' families (p. 9).

Although we cannot know the exact figure we can make some estimates based on reports of imprisoned parents. In Morris's (1965) study of families of prisoners in the UK, 80 per cent of the married male prisoners (including those in de facto marriages) were parents, with an average number of two children in each family. In a study of all newly committed male prisoners in Oregon, of the 744 men committed there were 988 children 'left behind' (Sack et al. 1976). McGowan and Blumenthal's (1978) survey of seventy-four women's gaols in the US found that two-thirds of the 9,379 women prisoners who responded to their survey were parents. In Australia, the 1982 Family and Children's Service Agency (FACSA) researchers tried but failed to get systematic information about the numbers of prisoner-parents in any NSW gaol apart from Mulawa, the women's gaol. Fifty-five of the one hundred women prisoners there had children (Hounslow et al. 1982).

As a very rough rule of thumb we estimate that there is at least one child for every woman prisoner in gaol and that there are two children for every three men imprisoned. Using this very approximate measure, on any one day in New South Wales there are at least 4,000 children of prisoners. The figure for the numbers of children who have a parent in prison during the course of one year would be much greater than this.

A fairly consistent finding in all of these studies is that most of the prisoner parents were living with their children prior to imprisonment, although the figure for this finding varies between two-thirds to three-quarters.

Effects of Imprisonment: Literature Review

The literature about children of prisoners falls into two major categories:

- those using a 'family in crisis' model which emphasises the various psychological problems of the family outside and their ability/inability to cope with the imprisonment of a family member. In these, the object of the analysis is the behaviour and attitudes of the individual child or the child's outside carer. The raison d'être for these studies is often that the prisoner's parenthood is their one positive self-image so that clinical intervention by the professional evaluator will enable the family to stay together and thus be instrumental in reducing the rate of recidivism; and

- reports using a more critical paradigm and a method of 'studying up' that constitute the penal system as the problem to be investigated. Some of these studies also incorporate a feminist critique and focus on the interrelationship between the penal and family spheres as an especially powerful site of social control.

Although there are major methodological and political differences between these two broad approaches there are some findings that are constant throughout the literature. In general terms these are:

- that the family outside shares the punishment of the prisoner: 'they are doing my time';
- that separation by imprisonment leads to the risk of experiencing the same problems, but in more extreme form, that any enforced and traumatic separation from a parent creates—anxiety states, neuroses, enuresis, personality disturbances, inhibited or aggressive behaviour and prolonged stress that has negative consequences for the child's emotional, cognitive and psychomotor development. The physical stress, risk of internalised guilt, emotional disturbances, aggressive behaviour at home and falling standards of schoolwork then impose extensive demands on the work of nurturing taken on by the outside carers of children of prisoners;
- that there are some children who are more resilient than others;
- that letting the child know about the imprisonment increases the child's sense of control over the separation;
- that allowing the children to maintain contact with their imprisoned parent is an important aspect of 'the conditions for growth' for children of prisoners. (There are some obvious exceptions to this where, for example, the imprisonment of the parent relieves the child of physical or emotional stress).

The more critical literature, however, indicates that there are major structural factors that exacerbate the hidden punishment for children of prisoners and their outside carers:

- that the most resilient children are those whose outside carer is experiencing the least stress (Jones 1983);
- that the shift to a more militaristic form of policing places children of prisoners at greater risk of experiencing trauma during the arrest of their parent. Small confined households are especially frightening places when guns are being wielded (COPSG 1990);
- that the tensions of the first visits to gaol are increased for children because prisons are not child-oriented. There is little provision in the maximum security gaols to enable the prisoner parent and their children to have a 'normal' family conversation;
- that children are regarded as nuisances and security risks rather than as people with rights of their own and in need of especial care in the potentially traumatic situation of a prison visit;

- that the variations, pettinesses and arbitrariness of rules about prison visiting create uncertainties that increase tensions between prisoners and their children and between prisoners and the outside carers of the children. The spiralling sense of a loss of control that this process creates increases with the increased demands on prison resources (Smith 1986a);

- that the imprisonment of the parent increases the economic insecurity of the family not only because of the loss of his/her wage but because the imprisoned parent has previously been the main child carer enabling the co-parent to earn a wage (Jones 1983). Imprisonment policies can also involve the family outside in major costs such as providing goods for the prisoner, travelling, moving home to stay near to the prisoner when (s)he is reclassified or moved for reasons of prison security or prison management of scarce resources. This loss of income and increased costs of maintaining family contact can lead to the loss of the family home and further stress for both the children and their outside carers;

- that there is little recognition of and provision for the differences between children of prisoners. These differences include the issue of whether it is the father or the mother who is the imprisoned parent. Women are less likely to have their children being cared for by a co-parent or other family member. The children are less likely to be in the continuous stable care of one household. Women are more likely to have their children separated and cared for by different carers, less likely to have the children brought on regular visits by another family member, and less likely to have letters and telephone calls from their children. Unsurprisingly, therefore, women are more likely to return on release to a splintered family than are men prisoners (Koban 1983; Hounslow et al. 1982);

- that the recent shifts in policing and prison policies have increased the tensions of imprisonment. In the pre-sentence period of imprisonment more prisoners are being held in police cells for longer periods and police cells are the most stressful sites for maintaining family contact (Aungles 1990, pp. 438-40). In the post sentencing period, the pressure on prison resources reduces the possibility of contact visits and of family 'picnic' days;

- that socioeconomic status and racial origin are factors that differentially expose children to the risk of having a parent imprisoned, or of having a parent imprisoned for longer periods in the most punitive and segregative institutions within the penal system.

Children of Prisoners Support Group (COPSG): Current Issues (as at 1992)

The experience of the workers in the COPSG accords with these findings from the review of the literature. It is against this background that we would like to express our concern about several issues that are currently affecting the lives of children and their imprisoned parents in NSW.

Imprisoned mothers in Mulawa had been able to have visits with their children once a fortnight. These contacts have been cut back to once a month. Children were

able to have their all-day visit on any day from Monday to Friday. Now Friday is the only day on which these visits can be made. Further, children whose mothers are on protection are now unable to have any all-day visits. This cutback has occurred because there are now insufficient prison resources to allow this form of family contact for these children.

Only five women prisoners can be placed on the Methadone program at Norma Parker. This effectively reduces the proportion of imprisoned women (including imprisoned parents) who can be transferred to this minimum security prison. This policy then means that there is a significant reduction in the level of family contact as minimum security prisoner parents have access to a range of privileges and programs not available to parents in a higher security gaol.

Imprisoned parents also report to COPSG workers that the children of women imprisoned for more than twelve months are most at risk of becoming state wards for specified periods. In the case of extremely young children this could be until they are eighteen. Although judges assure women that they can engage in the processes of regaining custody, women on release from gaol do not find it easy to regain their legal parenthood. In addition, imprisoned parents feel that they have little say about what they want in relation to decisions about the long-term care of their children and that they were not given enough time at the point of arrest to arrange care for their children.

Lastly, COPSG believes that the sentencing policy of imprisonment for drug offences and other non-violent crimes needs to be seriously reconsidered. The destructive impact of the twelve months or more sentences of imprisonment on the imprisoned mother, her children and her parents in the records of COPSG highlights the extensive social costs that accrue from unnecessary imprisonment.

Conclusion

In summary, the Children of Prisoners Support Group argues that there are a range of issues generated by the ways in which the parenthood of prisoners is currently being constituted. COPSG joins with other womens' policy advocacy groups (Lee 1988, Kane 1991) in arguing that there are four questions about information requirements that need to be raised if policy makers are to be able to address these 'hidden' issues of the intersection of penal and domestic life:

- what information is required to facilitate and improve policy development?
- what data are currently available and what is known about the effect of having a parent imprisoned?
- what are the information gaps?
- what should be done to improve the data base?

The Group is currently restructuring its own method of data collection to begin to chart the impact of parental imprisonment on the civil status of children of prisoners. However, the resources of the group are limited. For this work to be done effectively further funding is required. Moreover, this specific data set is only one part of a range of information that needs to be collected and systematised. The primary problem is

that research in the sphere of punishment is oriented around the principal of individualism. The actual infrastructure of domestic support and the actual punishments experienced by the children of prisoners and their outside carers are marginalised to the point of invisibility in the policies, practices and data collection procedures of the legal-penal sphere.

Data collection is a necessary but not a sufficient component of the process needed to remedy the hidden punishment of children of prisoners and to redress the loss of the rights of prisoner parents. The FACSA report of 1982 clearly outlined the ways in which the NSW Government could set about remedying some of the problems experienced by children of prisoners and their carers and parents (Hounslow et al. 1982). Although some of those recommendations were implemented, by the 1990s even those few reforms had been severely eroded by the extra strains imposed on the NSW prison system.

De Coninck (1982) in his overview of the literature on families of prisoners up to 1982 points out that although various ameliorations to the situation of families were suggested in this literature what is most noticeable about the studies is the fact that hardly any of the recommendations were ever implemented. In NSW there have been four reports that addressed the issue of the hidden punishment of families of prisoners. Of the many recommendations made by these reports only eight have been implemented. Moreover, as indicated above even these changes need to be constantly defended.

Over the past two years the NSW Government has introduced several changes in the legal penal system under the principle of truth in sentencing. Support for that principle needs to acknowledge fully, and thus to measure, the impact of imprisonment on the children of prisoners and their outside carers and on the parenthood of the people imprisoned. Although the principle reason for this claim is to ensure that the rights of children of prisoners and their parents are safeguarded, there are also arguments in the reformist literature that fit with the emphasis on economic rationalism and good management principles of the current government. These arguments have been based on the economically rational attempts to reduce the rate of recidivism (Irwin 1985). The Corrective Services research department has indicated that the lowest rates of recidivism are associated with the maintenance of family ties and the ability of the outside carers to maintain the material and the emotional bases of the prisoners 'home' (Dewdney et al. 1978). There is then no discontinuity between the arguments centred on childrens' rights and the arguments centred on economic rationality. It would be both more humane and more rational for any penal administration to acknowledge the significance of the issue of the rights of children of prisoners.

If the mark of a civilised society is the treatment of its prisoners, then we must ask ourselves what kind of a society are we condoning when the rights of children of prisoners are continually marginalised and rendered invisible.

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