



Griffith Journal  
of Law & Human Dignity

**GENDER, CULTURE  
& NARRATIVE**

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# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

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*Gender, Culture, and Narrative*  
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# **GENDER, CULTURE, AND NARRATIVE:**

## **EDITORIAL**

### I INTRODUCTION

Stories and narratives have long been used to influence, transform, and drive social change. When framed in a certain light, stories can break the dignity of people — render them helpless, stigmatised, and without a voice. By the same token, stories can create strong human connections with others, and they can repair the broken dignity of people. The words of poets like Audre Lorde and writers like Chimamanda Ngozi Adichie have spearheaded movements, torn down constructed narratives, and replaced them with stories of agency, resistance, and memory of events almost lost and erased. They make individual stories and experiences *visible* to others, when before they were *invisible*.

Our *Journal* seeks to give voice to the silenced, disenfranchised, and marginalised, and our narrative policy aims to empower voices excluded by traditional legal scholarship. While we have published narratives before, I sought to emphasise the value of life story-oriented narratives for this Special Issue. Almost two years ago, I remember sitting in an empty classroom in Beijing, China, long after the class had ended, trying to collect my thoughts and ideas for a draft Mission Statement that was well overdue. How should I put all my feelings into words?

From a very young age I have been exposed to different manifestations of the power and strength of women, from family members, friends, teachers, mentors. These women were powerful in their own right with a place in society, but what this power and place meant differed from culture to culture. I have spent a difficult part of my life negotiating between a culture that values brashness, outspokenness, and assertiveness, and another that encourages you to direct thoughts inward, listen, consider, and act pragmatically. How can I make people listen? Raise your voice; raise your hand; write words on a page? In our very different approaches, I see a common thread: that we can still fight to make others listen, to create change, and attempt to shape institutions rather than have them passively shape us. When I listen to the stories of people who have overcome adversity, or are survivors of tragic events, I am always reminded of this.

With this in mind, in that empty classroom, I drafted an earlier version of the following mission statement:

We define a culture by the values, customs, and norms shared among social groups. Gender roles are a pervasive feature across various cultures. When laws reinforce these norms, they shape the types of violence, struggles, or triumphs that characterise our narratives. In this Special Issue, we intend to create a space for personal narratives alongside academic scholarship. By including both types of discourse, we seek to broaden critical scholarship with the candid voice and lived experience. We know that issues of gender and culture are not widely understood, and we know they attract certain stereotypes and assumptions. We want to show how culture can silence but how culture can also liberate.

In creating this space for novel forms of legal narratives, and in highlighting notions of agency and resistance, we wanted to encourage conversations that address taboo topics, question traditional perspectives on gender and culture, and explore law's role in constructing and reproducing gender and cultural norms. In adopting this theme, the Special Issue takes inspiration from intersectional and postcolonial feminist approaches.<sup>1</sup> Through these lenses, I often view stories and articles as either empowering or diminishing the agency of the person or groups involved — placing value on how people are *represented* in discourse, and how these people respond to and resist compounding forms of oppressions. We are informed by a “feminist curiosity” that asks: Where are the women? Where are the people of colour? What perspectives can certain groups share?<sup>2</sup> Despite popular opinion, when we talk about *gender* we are not focusing solely on the experiences of women. The perspectives of women are important because the groups who face compounding forms of oppression and disadvantage are often women, so they are naturally the perspectives that we should seek out. But almost all feminists, myself included, define gender as a set of socially and culturally constructed variables that consist of “positive” masculine stereotypes — such as power, rationality, and strength — and “negative” feminine stereotypes — such as weak,

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<sup>1</sup> My inspirations for the Special Issue include the works of Professor Kimberlé Crenshaw, Professor Chandra Talpade Mohanty, and other intersectional feminists like Aph Ko.

<sup>2</sup> Enloe's “feminist curiosity”: Cynthia Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire* (2004, California, University of California Press).

powerless, emotional, and private.<sup>3</sup> Throughout the Special Issue, you will see how these stereotypes interact with and influence cultural norms; how they are performed, but also resisted and overcome.

## II STORIES & ESSAYS

The Special Issue opens with Dr Katherine Fallah's powerful, emotive, and intimate narrative '*Re Georgio*'. Fallah offers a window into Georgio's life, touching on the complex realities that affect the transgender community, such as internalised transphobia, pressures to "act" and "perform" gender stereotypes, and facing daily micro-aggressions when engaging with our cisnormative institutions. As she notes, Fallah does not attempt to speak *for* Georgio, but has worked closely with him to deliver his story, and does so with a poetic turn of phrase that breathes life and imagery into his narrative.

This is followed with an article written by Pidgeon Pagonis, an intersex person and activist. Pagonis' narrative highlights the trauma and violence the author has experienced at the hands of doctors, grappling with the medical profession's restricted understanding of sex and gender. With a powerful call to action, Pidgeon underlines that being intersex is *not* a medical condition. Being intersex is not what is wrong here — what is wrong has been the response of society.

An article written by Dr Carmen Lawrence, Australia's first female Premier, follows. In a unique approach, Dr Lawrence's article merges a personal account with her understanding of psychology to show the different, and often innocuously framed, ways that sexism permeates our societies — whether that be in "othering" women as "exceptional", or how our institutions and social structures continue to enable gender-based discrimination through male-centric definitions of "merit" and "good leadership".

Drawing on her own experience as an Asian American, Rachel Kuo discusses how micro-aggressions (or "everyday" sexism and racism) serve to normalise particular racial, gendered, and cultural tropes that are grounded in an historical context. By focusing on US immigration and naturalisation history, Kuo illustrates how the construction of Asian

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<sup>3</sup> See, eg, J Ann Tickner, 'You Just Don't Understand: Troubled Engagements between Feminists and IR Theorists' (1997) 41(4) *International Studies Quarterly* 611, 614.

peoples as “yellow peril” has anchored certain definitions of morality, sexuality, and xenophobia that continue to frame “Asian-ness” in Western societies.

Tuanh Nguyen and Reynah Tang’s article, which combines Nguyen’s narrative experience with an academic discussion of cultural diversity, is a timely reminder to be hyper-aware of how micro-aggressions and cultural stereotypes can fuel unconscious bias towards Asian Australians and other racial/ethnic groups. In Nguyen’s story, she reflects on experiences that have demoralised and discouraged many talented and capable women from progressing through the legal profession’s senior ranks, and Tang answers how we can work towards better solutions.

Dr Lauren Rosewarne then follows with a witty and pithy article that questions why the age-old maxim of “write what you know” has the heaviest burden on women when it comes to art. Drawing on Beyonce’s *Lemonade*, Rosewarne critiques and explores the assumption that the album is a diary, of confession, and how the craft, talent, and creativity of artists like Beyonce are downplayed when gossip and triviality threaten to overpower the art.

Elise Stephenson, Kaye Broadbent, and Glenda Strachan’s article delves into research comparing Equal Employment Opportunity (‘EEO’) policies among 10 female university leaders in Australia and Hong Kong. In using excerpts of interviews with female leaders, the case study highlights how narrow EEO policies that fail to address organisational culture in an environment where gendered and cultural norms intersect are not effectively addressing the ‘invisible barriers’ of unconscious bias, and more-developed EEO policies that target covert forms of discrimination (in addition to overt) promote better outcomes.

In a personal narrative, Juntao Lyu recalls his childhood and adolescence as one of China’s “left-behind” children. Through the author’s lenses, we can see how China has not only left the author “behind” but in other respects too, such as infrastructure, quality of education, and the *value* of education in relation to rural women and girls. In highlighting that these children deserve better solutions, Lyu prompts us to consider who are the “left-behind” in our own societies.

Judith Herrmann’s article then follows, analysing her experience navigating particular ethical and safety issues conducting research with Rwandan survivors of sexual violence.

In outlining the challenges she faced, she provides a personal account of context-specific experiences and lessons learned to help researchers prepare for their work with vulnerable groups.

Finally, Hazal Gacka's manuscript adopts a feminist perspective and discusses the experiences of female athletes in sport, including unequal salaries across genders, sexist comments, the sexualisation of female athletes, and more. She refutes the idea that sport becomes a place where "talent" and "hard work" prevails — instead highlighting the nuanced, multiple barriers standing between women and gender parity in sport.

### III LOOKING FORWARD

There are many lessons I have learned from putting together this Special Issue, and I am really proud of the breadth and scope we have achieved. One particular lesson is joined by a common thread throughout the articles: that instead of moulding ourselves to the image that fits, we need to continue fighting until our art-forms, workplaces, institutions, hospitals, and schools are foregoing traditional merit-based structures, campaigning against cisnormative violence, becoming conscious of those micro-aggressions that leave you off balance.

By the same token, we should recognise that these experiences are not universal, and are not produced in a vacuum. We acknowledge that to be "candid" and "authentic" are in themselves constructions, and we should always contextualise struggles and critiques in historical, geographical, and cultural locations — rather than positing them as universal insights. These authors speak from positions that are worlds apart, and may even contradict one another, but coherency is not our goal. These stories are powerful; they catch and hold you; and they draw on human emotion and connection.

By engaging with these stories, we can refine our own thinking, and learn, grow, and change. Maybe you will become more inclusive in your everyday interactions and language, and perhaps see the world from an alternate perspective. At the end of the day, these stories speak for themselves — I hope that you will listen.

Michelle Gunawan  
**Editor-in-Chief**



# **RE GEORGIO: AN INTIMATE ACCOUNT OF TRANSGENDER INTERACTIONS WITH LAW AND SOCIETY**

KATHERINE FALLAH\*

*In its everyday operation, the law presumes to narrate trans stories and shape trans lives. This article shines a light on law's claims to authority over transgender identities and transgender bodies, and offers an alternate, intimate account of one transgender person's interactions with law and society. The stories recounted here offer glimpses into the life of Georgio. Written from the perspective of someone who has had the privilege of bearing witness to his journey, this article assembles incomplete fragments of the joys and frustrations of Georgio's gender transition and invites deeper reflection on legal assumptions about the lives of transgender people. It represents an attempt to breathe humanity into law's cold scripts of gender identity.*

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\*\* This article was written in close collaboration with Georgio, at his urging. I am grateful to him for sharing his experiences with me and for encouraging me to share this small part of his story with you. In writing this piece, I have been conscious of the limitations of my experiences of the world as a cisgender woman and I have no desire (nor do I presume to be able) to speak for Georgio. Instead, this is our story, discussed at length with Georgio and ultimately written from my perspective. Thanks to Alecia Simmonds, Jane Wangmann, Terry Carney, Delphine Dogot, and Ivana Isailovic for their comments on this article.

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I BORDER CROSSINGS<sup>1</sup>

Airports are sites of anxiety for you at the best of times, what with their full-body scanners and 'pat-downs' and constant ID checks.<sup>2</sup> We antipodean travellers tend to be fairly resilient when it comes to the long-haul flights that send others into a spin, but you had already been ground down by the exhaustion and sweat and frustration of 24 hours of air travel, and I knew you simply didn't have the reserves of patience that you required for this particular exchange.

We were in transit through Singapore, rushing for our connecting flight, and we didn't have much time to clear customs and re-check our bags. I passed through immigration with easy efficiency, but when I turned back I saw you were stuck at the border, your face dark and your body tense. So I waited, unable to go to your assistance and watching a scene in mute, as you exchanged terse words with a man in uniform, the clock ticking closer and closer towards a missed connection.

Later, once you had made your way out of that administrative no-man's land, you would tell me what went down. The immigration official had looked at the landing card, then up at you, then over to me. Back and forth shot his eyes. 'I got

<sup>1</sup> Aren Z Aizura, 'Of Borders and Homes: The Imaginary Community of (Trans)sexual Citizenship' (2006) 7(2) *Inter-Asia Cultural Studies* 289.

<sup>2</sup> Dawn Ennis, 'Goodbye, "Anomaly" — TSA's New Word for Trans Bodies is "Alarm"', *The Advocate*, 23 December 2015 <<http://www.advocate.com/transgender/2015/12/23/goodbye-anomaly-tsas-new-word-trans-bodies-alarm>>.

smart to him,' you'd recount. But to me, your response had been measured (timid, even), and he would have had little idea of how deeply his brusque questioning had burrowed under your skin.

—*Is this your friend's landing card?*

—*It's mine.*

—*Boy or girl?*

—*Excuse me?*

—*Female or male?*

—*What does the passport say?*

—*Female.*

—*Does the passport show the same name as my landing card? Does it have my photo on it?*

—*Yes.*

—*Well there's your answer, then.*

This encounter with bureaucracy, routine and mundane for the immigration official who held your travel documents in his hand, was a jarring reminder to you that your gender does not go unnoticed: it leaves you open to questioning; it is cause for incredulity and exclusion. It was one of those daily micro-aggressions that leave you on edge and deflated, aware of your Otherness and your vulnerability and your precarious position at the margins.<sup>3</sup> It was a reminder that no matter how well you manage to 'pass',<sup>4</sup> you must constantly navigate your way through a society that is all too eager to deny you the 'normal life' that you crave.<sup>5</sup>

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<sup>3</sup> On the effects of gender-related 'micro-aggressions', see, eg, Kevin L Nadal, Avy Skolnik and Yinglee Wong, 'Interpersonal and Systemic Microaggressions Toward Transgender People: Implications for Counseling' (2012) 6(1) *Journal of LGBT Issues in Counselling* 55.

<sup>4</sup> See Kenji Yoshino, 'Covering' (2002) 111 *Yale Law Journal* 769; cf Mattilda (Matt Bernstein Sycamore) (ed), *Nobody Passes: Rejecting the Rules of Gender and Conformity* (Seal Press, 2006), which seeks to eliminate the pressure on gender nonconforming people to 'pass' or be seen as cisgender; that is, as a man or woman whose gender identity aligns to the (binary) sex that they were assigned at birth.

<sup>5</sup> Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press, revised and expanded edition, 2015).

Your passport was wrong, of course. Because you do not identify with the female gender that you were assigned at birth; you are a man.<sup>6</sup> Your official document was being scrutinised at the intersection of several jurisdictions: you were a permanent resident of Australia, undergoing a gender transition according to the laws of New South Wales, bearing a New Zealand passport, on your way from the United Kingdom to Malaysia, seeking admission to Singaporean territory. No official document was going to explain that you shopped for all your clothes in the menswear section, that you presented as a man but were sometimes mistaken for a butch lesbian, that you winced when waitstaff addressed the two of us as ‘ladies’, that you had just endured the agony of a long flight with your chest squashed into a compression binder that constricted you all the way down to your guts, that you longed for the day when you could finally inject vials of liquid testosterone into your ass cheeks, or that you were fixated on your body, constantly bugging me with questions like whether your six-pack looked like ‘girl abs’ or ‘boy abs’. But this guy was a stranger, your gender identity wasn’t really any of his business, and you had a plane to catch. So you deferred to the document.

## II ‘THAT GIRL’S GOT A MEAN STEP ON HER, AYE?’

Put a football in your hand and you’re in your element. When you were a little kid you would revel in thrashing the boys on the field, and you were picked for mixed representative teams every time the selectors came knocking. It wasn’t until the age of thirteen — around the time of that painful onset of (female) puberty — that your experience of sport became gendered, and you were siphoned off to women’s and girls’ teams.<sup>7</sup> Outside the school yard, you were by far the youngest person ever to play with adults in a highly-competitive first

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<sup>6</sup> Many people reject such a binary view of gender. For a collection of diverse understandings of gender, see Kate Bornstein and S Bear Bergman (eds), *Gender Outlaws: The Next Generation* (Seal Press, 2010). For counterarguments to a non-binary view, see Sita Balani, *Is it Time to Say Goodbye to the Non-binary in Gender?* (14 November 2016) Transformation <<https://www.opendemocracy.net/transformation/sita-balani/is-it-time-to-say-goodbye-to-non-binary-in-gender>>.

<sup>7</sup> The gendering of sport in society invites critique. Messner, for instance, challenges the ‘socially constructed meanings surrounding physiological differences between the sexes, the present “male” structure of organized sports, and the media framing of the female athlete’: Michael A Messner, ‘Sport and Male Domination: The Female Athlete as Contested Ideological Terrain’ (1988) 5 *Sociology of Sport Journal* 197, 197.

grade women's league; at school, you had a popular following as the star player; and you were in a development squad being groomed for a spot on the Black Ferns, the women's equivalent of the world famous All Blacks rugby union team.

You reached the pinnacle when, at sixteen, you were selected for New Zealand's national women's side. But you couldn't cope with the hyper-visibility that came with being on such a high-profile team. Playing at that level meant you were in the spotlight, but your masculine identity was invisible to everyone but you. If you had been a man you would have been on track to play for the All Blacks, with all the glory and pay that that entailed. But as a woman, you were stuck dressing like a girl in the team 'Number 1s', trying to avoid having to shower naked in front of your teammates, on the path to a poorly paid spot on the Black Ferns, where rugby was consigned to being a side gig. You threw in the towel and buried yourself in the bottle instead.

By the time I met you, you were playing social footy on mixed gender teams. It was always a thrill to watch you run the ball. I used to sit on the sidelines and listen to strangers gush over you. Your opponents would speak of you with trepidation and admiration, but even the compliments would come with the sharp edge of misgendering. 'Shit, guys, look out for that chick with the hat. She's fucken dangerous.' 'Oi Josh! Stay on that girl! Don't let her up the middle!' 'Faark. That girl's got a mean step on her, aye?' Mixed footy was becoming more of a hassle than it was worth, and you weren't ready to step into the cultural and legal minefield of moving to men's teams.<sup>8</sup> You looked on in horror as world champion runner, Caster Semenya, had her genitals measured and her hormone levels recorded, as opinion pieces were written about her sex, as she was berated and subjected to the most invasive scrutiny.<sup>9</sup> As you moved further into your transition, and as you began to inject that testosterone, you started skipping

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<sup>8</sup> On Australian efforts to deal with the effects of gender discrimination on participation in sport, see Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation and Gender Identity and Intersex Rights* (National Consultation Report, 2015) 21–22.

<sup>9</sup> Cheryl Cooky and Sharil Dworkin, 'Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy' (2013) 50(2) *Journal of Sex Research* 103; Johnm Sloop, "'This is Not Natural": Caster Semenya's Gender Threats' (2012) 29(2) *Critical Studies in Media Communication* 81; Jeré Longman, 'Understanding the Controversy over Caster Semenya', *New York Times* (New York), 18 August 2016 <<http://www.nytimes.com/2016/08/20/sports/caster-semenya-800-meters.html>>.

games, until you stopped playing altogether. I still mourn the loss of Georgio the Footballer. But when I ask you about it, you're affectless.

When you dropped out of the New Zealand squad, you weren't to know that women's rugby would enjoy an elevated status in the years to come, that you could have played professionally (though for far less pay and recognition than the men).<sup>10</sup> As we watched your old teammates claiming their gold and silver medals for women's rugby 7s at the Rio Olympics, I kept expecting you to show some signs of regret, envy, or loss. 'Doesn't a small part of you wish you were up there with them? I mean, it's an Olympic gold medal!' You just laughed. 'Hell no,' you said. 'I would never want to be up on that podium as a girl.'<sup>11</sup>

### III 'COOK THE MAN SOME F\*CKEN EGGS'<sup>12</sup>

In the week after we first met, I placed an order for two books: *Once Were Warriors*, and Butler's *Gender Trouble*.<sup>13</sup> My bibliographical instincts turned out to be unsettlingly prescient. Not that you were some sort of wife-beater, but lying dormant beneath your charming façade was a terrifying rage, and when it was unleashed, you were barely recognisable. Sometimes when you were asked to describe your upbringing in New Zealand, you would respond jokingly, 'You've seen *Once Were Warriors*?' and the fact is that you were exposed to some horrific

<sup>10</sup> The gender pay gap for footballers persists in Australia too, with the Australian women's soccer team drawing attention to the issue through industrial action against Football Federation Australia: 'Matildas Go On Strike as Pay Dispute Between FFA and PFA Escalates', *The Guardian (Australia)*, 8 September 2015 <<https://www.theguardian.com/football/2015/sep/08/matildas-go-on-strike-as-pay-dispute-between-ffa-and-pfa-escalates>>. See, further, Nick Evershed, 'How Much are Australia's Male and Female Sports Teams Paid?' *The Guardian (Australia)*, 15 September 2015 <<https://www.theguardian.com/news/datablog/2015/sep/15/how-much-are-australias-male-and-female-sports-teams-paid>>.

<sup>11</sup> It reminded me of something devastating that I read about Chelsea Manning's experience of being arrested and put on trial for the release of classified information to Wikileaks. She is quoted as saying, '[I] wouldn't mind going to prison for the rest of my life, or being executed so much, if it wasn't for the possibility of having pictures of me ... plastered all over the world press ... as [a] boy': Evan Hansen, 'Manning-Lamo Chat Logs Revealed', *Wired*, 13 July 2011, cited in Madeline Porta, 'Not Guilty By Reason of Gender Transgression: The Ethics of Gender Identity Disorder as Criminal Defense and the Case of Pfc. Chelsea Manning' (2013) 16 *City University of New York Law Review* 319, 320.

<sup>12</sup> This quote is an iconic line from the feature film adaptation of Alan Duff, *Once Were Warriors* (Vintage, 1995). The original text, at 28, is as follows: 'I ain't cookin' fried eggs with no boiled feed. Damned if I am. What I serve up is what you get. You're not satisfied then take a walk, Jim. This ain't a fuckin restaurant and I ain't no one's slave. Not even his.'

<sup>13</sup> Duff, *ibid*; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, first published 1990, 2011 ed).

role-modeling of masculinity. But what I didn't realise at the time (what *you* didn't realise) was how your inner Jake the Muss was so inextricably linked to your gender trouble.

You used to laugh about an old hook-up who had taken it badly when you'd broken things off with her: she'd lost her cool, thrown a bag of your stuff at you and yelled, 'You need to learn to respect women!' She'd thought she was hitting you hard but actually she was playing right into your hands. A guy friend who was fixing his car nearby heard her and sniggered with you. Here was another chance for you to perform masculinity by being one of the boys,<sup>14</sup> ridiculing those women who were braying for your respect. Bitches be cray, right?

You were convinced that asserting your masculinity depended on adhering to normative gender roles and casting yourself as separate from women — and what better way to do it than to demean them, to expect that they conform to outmoded gender stereotypes, to objectify and then dispose of them when you were done? You loved women, as you liked to tell me all the time, so I was surprised that you looked at me with unabashed incredulity when I first mentioned that I was a feminist. ('You're a *feminist*? Oh Jesus, not another one. You seemed like such a cool chick.') You were hostile to feminism in part because it excluded you,<sup>15</sup> and in part because patriarchy suited you.<sup>16</sup> You loved women insofar as they were objects for your enjoyment, and you were used to relying on

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<sup>14</sup> See also Kristen Schilt, 'Just One of the Guys? How Transmen Make Gender Visible at Work' (2006) 20(4) *Gender and Society* 465.

<sup>15</sup> For examples of outright hostility towards transgender identity within radical feminist lesbian circles, see in particular the work of Sheila Jeffreys: *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge, 2014); 'The Transgendering [sic] of Children: Gender Eugenics' (2012) 35 *Women's Studies International Forum* 384; 'Judicial Child Abuse: The Family Court of Australia, Gender Identity Disorder, and the "Alex" Case' (2006) 29 *Women's Studies International Forum* 1. More generally, see: Michelle Goldberg, 'What is a Woman? The Dispute between Radical Feminism and Transgenderism', *The New Yorker*, 4 August 2014 <<http://www.newyorker.com/magazine/2014/08/04/woman-2>>; Lori Chambers, 'Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon' (2007) 19(2) *Canadian Journal of Women and the Law* 305. For some of the tensions between feminism and the trans community, see Cressida J Heyes, 'Feminist Solidarity after Queer Theory: The Case of Transgender' (2003) 28(4) *Signs: Journal of Women in Culture and Society* 1093, 1113: 'either feminists elide, with Feinberg, the ethical questions that are raised by self-fashioning in the context of gender relations, or, with Hausman and Raymond, we condemn any trans move as merely another iteration of oppressive norms.'

<sup>16</sup> 'Trans Men Open Up About their Experiences with Male Privilege', *Huffington Post* (online), 20 August 2016 <[http://www.huffingtonpost.com.au/entry/trans-men-male-privilege\\_us\\_57b75597e4b00d9c3a179528](http://www.huffingtonpost.com.au/entry/trans-men-male-privilege_us_57b75597e4b00d9c3a179528)>.

them for unpaid domestic and emotional labour without having them ask you for much in return. I wasn't buying it. 'Cook your own damn eggs,' I'd bark at you when you tried it on with me.

It was a vicious cycle. Your insecurity in your masculinity became a source of your rage, and your performance of a particularly aggressive brand of masculinity gave you licence to express your rage in terribly destructive ways. It took some time for you to unlearn the lessons you had been taught about what it meant to be a man: you started to broaden your social circles, started to expose yourself to different models of male belonging, started to turn your mind to more inclusive streams of feminism, until one day you were secure enough in your own masculinity to become a feminist, too.<sup>17</sup> The clouds finally parted when you confronted your gender identity head-on: you were a man, and it was up to you to decide what sort of a man you wanted to be.

#### IV DYSPHORIA (SAD-FACE EMOJI)

Later, you would say that you supposed you'd always felt like a boy, but that you had never realised that being accepted as a man was actually a possibility for you. But the internet is an incredible resource, and once you started to hear trans stories, once you started to follow trans men on YouTube and Instagram, once you saw their normatively-masculine bodies and marveled at their deep voices and facial hair, once you saw that it was possible to transform your body and to 'pass' as male, you were overcome with a deep sense of urgency and single-minded focus. You needed to transition. We went online and ordered binders in an effort to spare your torso the pain of those constrictive double-layers of too-small sports bras that you were wearing every day. ('I'm gonna cut these off one day, haha!' was what you used to say about your breasts if anyone ever mentioned them. It didn't take long for me to realise you weren't actually joking, and before long you couldn't laugh at them or even tolerate anyone calling them boobs. 'The invaders,' you'd snarl.) First came the realisation that medical and

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<sup>17</sup> See Miriam J Abelson, 'Trans Men Engaging, Reforming, and Resisting Feminisms' (2006) 3(1) *Transgender Studies Quarterly* 15; Emi Koyama, 'The Transfeminist Manifesto' in Rory Dicker and Alison Piepmeier (eds), *Catching A Wave: Reclaiming Feminism for the Twenty-First Century* (Northeastern University Press, 2003) 244, 245.



social transition was a possibility; then came the realisation that, for you, it was a necessity.

All of these realisations coincided with your newfound sobriety. For the first time in your adult life, you were off the booze and confronting the decades' worth of emotions that came hurtling towards you as, day after day, you curled up in foetal position at the foot of the bed and sobbed like a broken child. Without old mate alcohol to field your pain and then black out your inconvenient memories for you, you were left reeling and unable to sustain the monumental effort that it had taken for you to hide from yourself and from the world. You raged, and then you went through periods of disconcerting quiet. You retreated from the world and became intensely dependent on me, the one person in whom you had confided. We talked a lot about courage and cowardice, and you were terrified about what lay before you, but you knew that you couldn't go on as you were. And so you booked your appointments and bled money as you placed yourself in the hands of the experts who would assess and categorise and treat you.

For now you had entered the realm of pathologisation. You were told you have 'gender dysphoria', satisfying the criteria set out in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* ('DSM-5').<sup>18</sup> I suppose we can be thankful that you weren't diagnosed under the older DSM-IV-TR, which would have seen you labelled as someone suffering from 'gender identity disorder'.<sup>19</sup> In 2013, the American Psychiatric Association made the concession that your gender nonconformity is 'not in itself a mental disorder'; instead, it's a 'condition' marked by 'clinically significant distress'.<sup>20</sup> And so it was that a core

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<sup>18</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (American Psychiatric Publishing, 2013), [302.85] (F64.1).

<sup>19</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (American Psychiatric Publishing, 2000), 582ff.

<sup>20</sup> 'The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition': American Psychiatric Association, *Gender Dysphoria Fact Sheet* (American Psychiatric Publishing, 2013), 1 <<http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>>. Note that the pathologisation of gender nonconformity has parallels with the pathologisation (and, later, de-pathologisation) of homosexuality: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-II* (American Psychiatric Publishing, 1952); Victoria Clarke et al, *Lesbian, Gay, Bisexual, Trans and Queer Psychology: An Introduction* (Cambridge University Press,

aspect of your identity was labelled a 'condition', and the prospect of 'treatment' or 'rectification' or 'cure' lay before you. What an insult. But also, what a relief.

A relief because you know that label, that diagnosis, is the legally and medically constructed key that unlocks a set of interlinked doors.<sup>21</sup> You need it for your testosterone injections, you need it if you want the state to recognise you as a man, and you need it for the 'top surgery' that will rid you of your 'invaders'.<sup>22</sup> And sometimes you have relished the availability of a medical vocabulary for explaining yourself to others.<sup>23</sup> I have observed your thrill at hearing about possible biological bases for your gender identity.<sup>24</sup> And wasn't it this pathologisation that provided a bridge across which at least one loved one could travel to meet you halfway? ('I've been reading about your condition,' she said. 'The good news is that there is a cure.')

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2010) 12–13; Michael Kirby, 'The 1973 Deletion of Homosexuality as a Psychiatric Disorder: 30 Years On' (2003) 37 *Australian and New Zealand Journal of Psychiatry* 674.

<sup>21</sup> See, eg, Dean Spade, 'Resisting Medicine, Re/modeling Gender' (2003) 18 *Berkeley Women's Law Journal* 15, 15–17.

<sup>22</sup> This ought not to be the case. The World Professional Association for Transgender Health ('WPATH') advocated for the DSM shift from 'gender identity disorder' to 'gender dysphoria' as a step towards depathologisation of gender identity, and has argued that since 'not everyone who experiences discontinuity between his/her sex and gender will experience distress about identity,' there ought to be a 'new medical (non-mental-illness) diagnosis and categorization ... created for those gender-variant people who require sex affirmation treatment, which is a separate matter from managing identity confusion': Jamison Green et al, 'Recommendations from the WPATH Consensus Process for Revision of the DSM Diagnosis of Gender Identity Disorders: Implications for Human Rights' (2011) 13 *International Journal of Transgenderism* 1, 4 (references omitted). WPATH has called for the 'worldwide de-pathologisation of gender variance,' noting that 'the expression of gender characteristics, including identities, that are not stereotypically associated with one's assigned sex at birth is a common and culturally-diverse human phenomenon [that] should not be judged as inherently pathological or negative': WPATH, *De-Psychopathologisation Statement*, Press Release, 26 May 2010 <[https://amo\\_hub\\_content.s3.amazonaws.com/Association140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf](https://amo_hub_content.s3.amazonaws.com/Association140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf)>. WPATH's position is echoed by the Australian and New Zealand Professional Association for Transgender Health ('ANZPATH'): *Statement on Legal Recognition of Gender Identity*, available at <<http://www.anzpath.org/about/statements>>. See also WPATH *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7<sup>th</sup> Version, 2011) 4, which encourages healthcare providers to use the language of 'gender nonconformity' rather than the more pathologising language of 'gender dysphoria'.

<sup>23</sup> Spade expresses concern about deference to 'medical evaluation of gender identity in legal work towards trans[\*] equality': Spade, above n 21. For Spade, this is a personal as well as professional concern: 'As a transgender person, and a lawyer working for trans equality, I must continually negotiate how to use medical evidence responsibly. ... I must proceed with extreme caution when approaching the interwoven governance mechanisms of legal and medical realms that continue to determine the fates of gender transgressive people': *ibid*, 18.

<sup>24</sup> Joan Roughgarden, *Evolution's Rainbow: Diversity, Gender, and Sexuality in Nature and People* (University of California Press, 2013).

But your diagnosis doesn't capture who you are and dysphoria isn't even your dominant emotion. You weren't 'dysphoric' on that sunny winter's day when you slid into your binder for the first time and strutted the streets with your new flat chest; your smile was about to crack your face clean off.<sup>25</sup> You have had your moments of devastation and frustration but your gender identity also brings you joy and excitement; your transition has been a time of awakening and possibility. Your 'distress' has derived less from your body than from the prejudices and assumptions of those people who have sought to reduce you to your gender nonconformity.<sup>26</sup> (As you consulted with your clinicians and dutifully filed your medical reports, I was working my way through the Family Court of Australia's decisions on adolescent access to gender-affirming healthcare,<sup>27</sup> and I would flinch every time a judgment opened with a diagnosis, as though that told us a trans person's story in a nutshell.<sup>28</sup>)

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<sup>25</sup> For other stories of celebration of transgender bodies, see SJ Langer, 'Our Body Project: From Mourning to Creating the Transgender Body' (2014) 15(2) *International Journal of Transgenderism* 66.

<sup>26</sup> In the case of one child seeking access to hormone treatment, his consulting psychiatrist identified a set of 'social risks' which, according to the psychiatrist, were 'associated with the treatment', but which were quite patently matters that had little to do with the medical fact of the child's hormone levels or pathology, and everything to do with social prejudices around gender nonconformity: *Re Marco* [2016] FamCA 187 (30 March 2016) [42] (Watts J citing, the evidence of 'Dr S'). Those risks were 'rejection by members of the extended family, friends and casual acquaintances; discrimination at school, in public and in the workplace; harassment and abuse, including physical attack and rape, as he may be perceived as a target and an object of hatred by some transphobic people': *Re Marco* [2016] FamCA 187 (30 March 2016) [42] (Watts J, citing the evidence of 'Dr S').

<sup>27</sup> See generally Felicity Bell, 'Children with Gender Dysphoria and the Jurisdiction of the Family Court' (2015) 38(2) *University of New South Wales Law Journal* 426. There is increasing resistance to the court's role as gatekeeper to child and adolescent access to gender-affirming healthcare, with medical practitioners, members of the judiciary, and children's rights advocates arguing that the process is unnecessary and traumatic for children and their carers: Mary Huft, 'Statistically Speaking: The High Rate of Suicidality among Transgender Youth and Access Barriers to Medical Treatment in a Society of Gender Dichotomy' (2008) 28(1) *Children's Legal Rights Journal* 53; Amanda Kennedy, 'Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transitions' (2008) 19 *Hastings Women's Law Journal* 281; Josie Taylor, 'Chief Justice Vows Change to "Traumatic" Court Process for Transgender Children', *ABC News Online (Australia)*, 5 July 2016 <<http://www.abc.net.au/news/2016-07-05/court-process-for-transgender-children-set-to-be-overhauled/7546884>>.

<sup>28</sup> Usually, the opening paragraphs are blunt ('Logan has been diagnosed as having Gender Dysphoria.'): *Re Logan* [2016] FamCA 87 (19 February 2016) [1] (Watts J). Sometimes, they are longer but tell us even less about a person ('Rosie is an almost 17-year-old girl who has been diagnosed with Gender Identity Disorder'; never mind that 'Rosie' goes by a masculine name and is a boy): *Re Rosie (Special Medical Procedure)* [2011] FamCA 63 (28 January 2011) [1] (Dessau J). In the latter case, despite Her Honour's misgendering of the child in question, Dessau J granted the application to allow the child to access medical treatment to conform with his identity as male, and offered no justification for referring to the child by a female name and female pronouns throughout the decision. Instead, Her Honour simply remarked, 'While Rosie currently identifies

And although the law demanded that you consult with a range of medical specialists before you could access gender-confirming treatment, we found the list of professionals willing or able to work with you as a trans patient was short, and the waitlists were infuriatingly long.<sup>29</sup> We were fortunate to find some wonderful practitioners whose support has been like a salve to calm our anxieties and allay our fears, but we have also discovered that prejudices in medical circles abound;<sup>30</sup> my relationship with one of my own doctors never recovered after she laid her cards on the table for me. ‘You can never tell Cass this,’ she said, ‘but it’s mutilation, pure and simple.’

#### V ‘HAS SHE HAD THE SURGERY YET?’

Another day, another frustrating administrative exchange with a government official. I called the Registry of Births, Deaths and Marriages to check on what was required for official recognition of your male name and your male gender.<sup>31</sup> I was answered with a question: ‘Has she had the surgery yet?’ It was plain that the bureaucrat on the telephone had no idea of what she meant by ‘the surgery’.<sup>32</sup> It was also clear that she, like many other officials, held expectations of a fixed, linear progression of gender transition,<sup>33</sup> and didn’t account for the

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as male, for the purpose of these Reasons for Judgment I shall refer to her by her female name and use the female pronoun’: *Re Rosie (Special Medical Procedure)* [2011] FamCA 63 (28 January 2011), [2] (Dessau J).

<sup>29</sup> ANZPATH maintains a list of service providers who work with trans and gender-nonconforming people in Australia and New Zealand: <<http://www.anzpath.org/about/service-providers>>.

<sup>30</sup> This experience is confirmed by one study which found that ‘healthcare providers who work with [the transgender and gender nonconforming] population are more likely to experience prejudice or administrative aggression from within the mental health system’: Randi Ettner, Tonya White and George R Brown, ‘Family and Systems Aggression Toward Therapists’ (2010) 12(3) *International Journal of Transgenderism* 139, 139.

<sup>31</sup> *Births, Deaths and Marriages Registration Act 1995* (NSW) pts 5, 5A.

<sup>32</sup> There are, of course, many ways in which a trans man can undergo medical transition (such as hormone therapy, a double mastectomy, and nipple reconstruction, and, far more rarely, ‘lower surgery’ such as hysterectomy and phalloplasty). But many trans men and gender nonconforming people are perfectly happy to keep their bodies as they are, and those who do seek to undergo medical transition make their own choices about the extent to which they wish to alter their bodies with surgery or hormones. For some, retention of a uterus is unthinkable; for others, sterilisation is an entirely unnecessary and invasive procedure, or a violation of basic reproductive rights.

<sup>33</sup> Jamison Green, ‘“If I Follow the Rules, Will You Make Me a Man?”: Patterns in Transsexual Validation’ (2012) 31(1) *University of La Verne Law Review* 23. Dean Spade recounts, ‘To [one] counsellor, my failure to conform to the transsexuality he was expecting required my immediate expulsion from that world of meaning at any cost’: Spade, above n 21, 22.

multitude of ways in which different trans men and women and gender nonconforming people express their gender.<sup>34</sup> She certainly didn't allow for the possibility that you wouldn't undergo surgical transition.<sup>35</sup> But you were still waiting for your expensive double mastectomy, and so you could only apply for a change of name; official change of sex would have to wait.

This was one of the many ways in which the state has intervened to construct your gender, mapping your transition and moulding your body. Your gender has been culturally and legally imagined, and even your physical form is subjected to law's interventions.<sup>36</sup> We tried our best to jump through all the administrative hoops without getting distracted by the important questions (why, for instance, does the state need to document your gender at all?<sup>37</sup>). You fought your way

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<sup>34</sup> For Burgin, for instance, 'top surgery' (mastectomy) was the focus. He writes, 'Before surgery, I was walking around with a sharp stone in my shoe, and there was no way I could ignore it. Now? I walk unencumbered': Ezekiel Reis Burgin, 'The Stone in My Shoe' in Zander Keig and Mitch Kellaway (eds), *Manning Up: Transsexual Men on Finding Brotherhood, Family and Themselves* (2014, Transgress Press) 35, 38. For Duane, on the other hand, 'Genital transformation was the last step for me into the world of men': A Scott Duane, 'Men Like Me' in Zander Keig and Mitch Kellaway (eds), *Manning Up: Transsexual Men on Finding Brotherhood, Family and Themselves* (2014, Transgress Press) 127, 131.

<sup>35</sup> Indeed, the legislative framework for change of sex in New South Wales does not allow it. In New South Wales, if a person seeks to alter the Register of Births, Deaths and Marriages in order to record a change of sex, they need to have 'undergone a sex affirmation procedure': *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32B(1)(b) (in the case of adults) and s 32B(2)(b) (in the case of children). The NSW Act defines a 'sex affirmation procedure' in narrow, invasive terms: the only recognised procedures are surgical procedures 'involving the alteration of a person's reproductive organs': *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32A. The Act does not define 'reproductive organs', which means that it is not clear whether or not NSW law requires 'lower surgery' or sterilisation in the case of trans men. The state of Western Australia has taken a far more restrictive approach, requiring applicants to undergo a 'reassignment procedure' before applying to a Gender Reassignment Board for a recognition certificate: *Gender Reassignment Act 2000* (WA) s 14(1). The Western Australian Gender Reassignment Board's requirement that trans men submit to surgery involving complete removal of the reproductive organs was subject to a successful challenge before the High Court of Australia: *AB v State of Western Australia and Another* (2011) 244 CLR 390. For a consideration of the bioethics and medical ethics involved in such requirements, see Anne E Silver, 'An Offer You Can't Refuse: Coercing Consent to Surgery through the Medicalization of Gender Identity' (2014) 26(2) *Columbia Journal of Gender and Law* 488.

<sup>36</sup> For Wittig, the legal system 'reinterprets physical features (in themselves as neutral as any others but marked by the social system) through the network of relationships in which they are perceived': Monique Wittig, 'One is Not Born a Woman' in *The Straight Mind and Other Essays* (Beacon Press, 1992) 9, 12.

<sup>37</sup> For an excellent critique of the state's insistence upon documenting gender and an exploration of some of the ways in which official gender classification impacts upon the lives of trans and gender nonconforming people, see Dean Spade, 'Documenting Gender' (2008) 59 *Hastings Law Journal* 731.

through a labyrinth of forms, across all those competing jurisdictions, desperate to be done with the lot of it.<sup>38</sup>

Even the change of name took forever, and when the paperwork arrived you were recovering from your top surgery. Fuzzy on painkillers, you opened the letterbox to discover you needed to collect some registered mail. Finally, this was it. No longer would you have to observe a bouncer's rising snigger when he looked at the girly name on your ID. The next morning, we raced down to the post office. You opened the envelope slowly, ready to savour the moment. Out came the certificate, and our hearts sank as we stared at it in silence.

*Given name(s): Georgio*

*Sex: Female*

And so it has been with every administrative encounter: each hard-earned victory matched by some careless act of erasure. Finally, you are 'Georgio', but anyone who reads your Change of Name certificate will be reminded that the state doesn't yet recognise you as a man. You hate that document.

The next day you experienced rare post-surgical complications and nearly died. As I rushed you outside to the ambulance, carrying you out of the building and supporting your dead weight as you collapsed in the street, I had the presence of mind to slip the certificate into my bag. But we hadn't negotiated the administrative labyrinth quickly enough: your name hadn't been updated on the Medicare system, and the Change of Name certificate was a worthless scrap of paper inside the hospital walls. As you drifted in and out of consciousness in hospital, you heard the staff referring to you as 'her', calling you by your old

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<sup>38</sup> The *Australian Government Guidelines on the Recognition of Sex and Gender* (November 2015) were issued in response to the recommendations of the Australian Human Rights Commission in its report, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (Concluding Paper of the Sex and Gender Diversity Project, 2009). The guidelines are part of an effort to simplify the process of documenting gender and are intended for roll-out in all Australian Government departments and agencies. For some Federal agencies, such as Medicare, the process is notably straightforward. However, the guidelines do not assist foreign citizens resident in Australia who must navigate the requirements of competing jurisdictions, and they have not yet been implemented across all Federal and State government agencies, leaving trans applicants to negotiate their way through a messy patchwork of forms and bureaucratic processes.

name, and in your panic, you worried about dying as a girl.<sup>39</sup> Before they wheeled you into emergency surgery, and when you were in recovery, every time they came to take your vitals, every time they came to administer your painkillers, it was the same thing: 'First, just state your full name and date of birth.' And you would glare at me as you forced out the words through gritted teeth: 'Cassandra Luisa Grace Palamo.'

## VI COMING OUT, GUNS A-BLAZING

A buzz of your phone ushered in a WhatsApp message from someone very important to you. As shots were ringing out in Orlando, as gay and trans people were being slaughtered at Pulse Nightclub,<sup>40</sup> as you stood there, living, breathing, emotion charging through your body, she had written to inform you that you had died, too: 'I'm mourning the death of my daughter.'

Later, you would tell me that back when you used to believe in the Jehovah's Witness teachings of your childhood, any time something terrible happened, your mind would pounce on the thought that it signaled the End of Days. And, wracked with guilt, you would wonder, 'did I make that thing happen?' And so it was that on the night of your Coming Out, that night of the mass killings in an LGBT nightclub on the other side of the world, a deep and pervasive guilt lurked behind you like a menacing, pouting Trump on the set of a presidential debate. The opportunity to confuse correlation and coincidence was just a little too tempting on this of all days. Was this some sort of Divine punishment?<sup>41</sup> But it

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<sup>39</sup> For other stories of misgendering by medical professionals and recommendations for improvement within the profession, see D Brienne Hagen and M Paz Galupo, 'Trans\* Individuals' Experiences of Gendered Language with Health Care Providers' (2014) 15(1) *International Journal of Transgenderism* 16.

<sup>40</sup> Delia Melody, 'What This Trans Woman Wants You To Remember In The Wake Of The Orlando Shooting,' *The Huffington Post* (online), 12 June 2016 <[http://www.huffingtonpost.com/entry/what-one-trans-woman-wants-you-to-remember-in-the-wake\\_us\\_575e10dae4b052f656efdf5c](http://www.huffingtonpost.com/entry/what-one-trans-woman-wants-you-to-remember-in-the-wake_us_575e10dae4b052f656efdf5c)>.

<sup>41</sup> Plenty of religious conservatives had no compunction in construing the attacks as divinely exacted revenge. On the night of the shooting, Texas Governor Dan Patrick, a forceful opponent of transgender rights in Texan schools, tweeted that 'a man reaps what he sows', a biblical quote from Galatians, 6:7: Mia De Graaf, "'Man Reaps What He Sows": Texas Lieutenant Governor Sparks Outrage with Anti-LGBT Tweet Just Hours after Orlando Gay Club Massacre', *The Daily Mail* (online), 13 June 2016 <<http://www.dailymail.co.uk/news/article-3637672/A-man-reaps-sows-Texas-governor-sparks-outrage-anti-LGBT-tweet-just-hours-Orlando-gay-club-massacre.html>>.

was more than just guilt that kept you from enjoying the outpouring of support that you received that night. Because it was on that night that the fear really began to set in.

Your elation at coming out (that opportunity for authenticity and acceptance) was tempered by the sharp realisation that with visibility comes exposure.<sup>42</sup> Orlando was a blood-soaked reminder that people who don't know you would hate you enough to kill you,<sup>43</sup> that you would be invoked in political campaigns, that you would be told that you were waging war on society (on marriage, on bathrooms),<sup>44</sup> that you were engaged in 'ideological colonisation'.<sup>45</sup> As you were buoyed by the support that poured in through channels both public and private, it was the words of the haters that clawed away at your self-confidence.

Chelsea Manning went missing for a couple of days: there were reports that she had attempted suicide in custody, she had failed to make it to a phone for her scheduled meeting with her lawyers, and the military prison authorities would not confirm her whereabouts or even whether she was safe. Manning's mistreatment in military prison had been well-documented: refused permission to grow her hair, denied access to gender-confirming healthcare, held in a male facility at great risk to her personal safety, she had become the very visible face of institutionalised oppression of the gender-nonconforming. In six years of solitary confinement in five separate locations, she had repeatedly sought help but her calls had been 'ignored, delayed, mocked, given trinkets and lip service

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<sup>42</sup> Jamison Green, 'Look! No, Don't! The Visibility Dilemma for Transsexual Men' in Kate More and Stephen Whittle (eds), *Reclaiming Genders: Transsexual Grammars at the Fin de Siècle* (Bloomsbury, 1999) 117.

<sup>43</sup> Jodi Jacobson, 'Inciting Hatred and Violence: Unfortunately, This Is Who We Are As a Nation', *Rewire News*, 12 June 2016 <<https://rewire.news/article/2016/06/12/inciting-hatred-violence-unfortunately-nation/>>.

<sup>44</sup> See, eg: Richard E Epstein, 'Transgender Wars', *Defining Ideas* (Hoover Institution), 16 May 2016 <<http://www.hoover.org/research/transgender-wars>>; Kristen Schilt and Laurel Westbrook, 'Bathroom Battlegrounds and Penis Panics' (2015) 14(3) *Contexts* 26. Scholars have pondered upon why it is that 'the presence of a transsexual in a public restroom causes such alarm for society in general, and for courts in particular': Terry S Kogan, 'Transsexuals in Public Restrooms: Law, Cultural Geography and *Etsitty v Utah Transit Authority*' (2008) 18 *Temple Political and Civil Rights Law Review* 673, 674.

<sup>45</sup> John Newsome, 'Pope Warns of "Ideological Colonization" in Transgender Teachings', *CNN.Com* (online), 4 October 2016 <<http://edition.cnn.com/2016/10/02/world/pope-transgender-comments/>>. (The irony of this accusation appears to have escaped His Holiness.)



by the prison, the military, and [the Obama] administration.<sup>46</sup> If this was what could happen to such a high profile trans detainee — an activist, an author, a public figure — what could happen to an unknown? We were overwhelmed with relief and sadness when we discovered her lawyers had received confirmation that she was alive, but that she had indeed been driven to self-harm; in a final show of strength, she announced that she was going on a hunger strike until she received the gender-confirming healthcare that she needed and the respect that she deserved.<sup>47</sup>

Both of us became susceptible to bouts of crippling anxiety. The more I read and listened to trans stories — so many of them stories of strength and resilience — the more acutely aware I became of the violence and degradation that is heaped upon people who are targeted due to their gender nonconformity. Stories of trans people at the mercy of hostile authorities hit me the hardest.<sup>48</sup> I remember waking one night in a cold sweat, rousing you from your sleep and making you promise that you would never be arrested and detained for anything.<sup>49</sup> The absurdity of it! As though a person can promise to never be wrongfully accused of something; as though a person can promise not to be victimised by police.<sup>50</sup>

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<sup>46</sup> Statement of Chelsea Manning in announcing hunger strike: 'Chelsea Manning Begins Hunger Strike Protest', *Free Chelsea Manning* website (9 September 2016) <<https://www.chelseamanning.org/featured/chelsea-manning-begins-hunger-strike-protest>>.

<sup>47</sup> Ed Pilkington, 'Chelsea Manning Starts Hunger Strike, Saying She is Bullied in Prison', *The Guardian* (online), 10 September 2016 <<https://www.theguardian.com/us-news/2016/sep/09/chelsea-manning-hunger-strike-bullying-wikileaks>>. Manning's hunger strike was a success; five days after her announcement, the army agreed to allow her to undergo gender-confirming surgery: 'Chelsea Manning Ends Hunger Strike after Winning Gender Surgery Battle', *The Guardian* (online), 14 September 2016 <<https://www.theguardian.com/us-news/2016/sep/14/chelsea-manning-ends-hunger-strike-after-winning-battle-for-gender-transition-surgery>>. She has since been granted clemency and is awaiting release from prison.

<sup>48</sup> For a collection of personal accounts, staggering in their volume, see Eric A Stanley and Nat Smith (eds), *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (AK Press, 2<sup>nd</sup> ed, 2015).

<sup>49</sup> See NSW Department of Justice, '7.23 Management of Transgender and Intersex Inmates', *Corrective Services NSW Operations Procedures Manual* (V2.0 December 2015); cf Jeremy Story Carter and Damien Carrick, "'Absolutely Terrifying": Transgender People and the Prison System', *The Law Report, ABC Radio National*, 4 April 2016 <<http://www.abc.net.au/radionational/programs/lawreport/transgender-people-and-the-prison-system/7284154>>; Jake Blight, 'Transgender Inmates', *Issues and Trends in Criminal Justice* (Australian Institute of Criminology, September 2000).

<sup>50</sup> See *NSW Police Force Strategy on Sexuality, Gender Diversity and Intersex 2016-2020* (June 2016)

<[http://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0007/421495/Sexuality,\\_Gender\\_Diversity\\_and\\_Intersex\\_Policy\\_2016-2020\\_July\\_Intranet.pdf](http://www.police.nsw.gov.au/_data/assets/pdf_file/0007/421495/Sexuality,_Gender_Diversity_and_Intersex_Policy_2016-2020_July_Intranet.pdf)>; but cf Toby Miles-Johnson, "'They Don't

But the thought of you being humiliated and abused was too much to bear, and, generous soul that you are, you offered me that impossible promise, and with it the gift of sleep.

#### VII BELOW THE BELT

People's reactions to your transition surprised us in a lot of ways. For the most part, the surprises were pleasant — people we might have assumed would be uncomfortable with the idea were instead incredibly supportive. Of the very vanilla friends who treated your transition with the greatest tact and generosity, several spoke with genuine enthusiasm about sensitivity training in the workplace, and many related stories of friends, acquaintances, and colleagues having transitioned. Others professed an eagerness to learn about different experiences of gender nonconformity, having recently been exposed to beautiful literature like *The Argonauts*,<sup>51</sup> or television drama such as *Transparent*. You were beginning to appreciate the socially transformative power of 'trans visibility'.<sup>52</sup>

But sometimes there is a fine line between support and 'fascination'.<sup>53</sup> You lost some of your enthusiasm for your transition when you realised that to many people you had become an object of curiosity. In hospital, when you were convalescing from your second, emergency surgery, a doctor entered your room with a team of around fifteen people in scrubs and abruptly asked you to take off your shirt. His unidentified posse gasped in approval as you reluctantly revealed your chest. 'There's a lot of you watching,' you quipped. 'Got any music?' (Only one of them got the joke.)<sup>54</sup> The worst of it was fielding question after question

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Identify With Us': Perceptions of Police by Australian Transgender People' (2015) 16(3) *International Journal of Transgenderism* 169.

<sup>51</sup> Maggie Nelson, *The Argonauts* (Graywolf, 2016).

<sup>52</sup> Viviane K Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (University of Chicago Press, 2000).

<sup>53</sup> Spade remarks upon the pressure to review 'zillions of articles and student papers from around the country ... in order to do damage control as increasing numbers of students and professors get "fascinated" by the topic of trans people and our legal problems': Dean Spade, 'Be Professional!' (2010) 33 *Harvard Journal of Law and Gender* 71, 77.

<sup>54</sup> Christoph Hanssmann, Darius Morrison and Ellery Russian, 'Talking, Gawking, or Getting It Done: Provider Trainings to Increase Cultural and Clinical Competence for Transgender and Gender-Nonconforming Patients and Clients' (2008) 5(1) *Sexuality Research and Social Policy* 5.

about your genitals, from friends and strangers alike. We would vent over dinner. ‘Why do they think they can ask you questions like that?’ ‘Haven’t people heard of the damn internet?’ At first, you would try to give them an answer (‘I haven’t even had a chance to think about it,’ you’d say), but then you learned to shut it down like Whoopi Goldberg.<sup>55</sup>

Those invasive questions were fairly benign compared to some of the phallogocentric vitriol that was leveled at you by people in your close circles. Men who were supposed to be your friends, men who had purported to be among the biggest supporters of your transition, invoked your gender while, as you slept, they carried out acts of sexual violence against your girlfriend. ‘We’ve been talking about it,’ they announced, ‘and we reckon you just miss cock.’ But what surprised us further was how easily men would reach for the transphobic sledge when they were losing an argument. One guy even used your gender as cover when he was losing a trivial rugby argument about David Pocock. As he skulked out of the room, knowing he’d been defeated, he threw down his nonsequitous trump card: ‘It’s good to have a cock. Any cock.’ You’ve come to realise that the low blow will always be available to those who are prepared to stoop down to take a swing.

Of course, it doesn’t help that some of the lowest blows are swinging from people in high places. And I’m not just talking about the Slavoj Žižeks and the Germaine Greers.<sup>56</sup> I am talking about the legislators who seek to make a trip to a public bathroom even more stressful than it already is for people like you;<sup>57</sup> I’m talking about the politicians and journalists who rail against the Safe Schools program;<sup>58</sup>

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<sup>55</sup> See Dawn Ennis, ‘Whoopi Goldberg: “Don’t Ask Trans People About Their Junk”’, *LGBTQ Nation* (9 September 2016) <<http://www.lgbtqnation.com/2016/09/whoopi-goldberg-dont-ask-trans-people-junk/>>.

<sup>56</sup> See, eg: Che Gossett, ‘Žižek’s Trans/gender Trouble’, *Los Angeles Review of Books*, 13 September 2016 <<https://lareviewofbooks.org/article/zizeks-transgender-trouble>>; Nick Duffy, ‘Germaine Greer on Trans Women: I Could Call Myself a Cocker Spaniel’ *PinkNews* (online), 19 December 2015 <<http://www.pinknews.co.uk/2015/12/19/germaine-greer-on-trans-women-i-could-call-myself-a-cocker-spaniel/>>.

<sup>57</sup> See, eg: *An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations*, General Assembly of North Carolina, House Bill 2, Session Law 2016–3 (2016) (US) (‘HB 2’); *Carcaño et al v McCrory*, Brief of Plaintiffs-Appellants, No.1: 16-cv-00236-TDS-JEP (4<sup>th</sup> Cir, 2016).

<sup>58</sup> See, eg: Natasha Bitá, ‘Safe Schools Coalition: Sexual Politics in the Classroom’, *The Australian* (13 February 2016); Shalailah Medhora, ‘Turnbull Orders Review of Safe Schools LGBTI Program

I'm talking about the powerful people who think your body and your identity are battlegrounds upon which to wage their own nasty wars.

#### VIII 'TRANNY CLUB'

If there's one thing you wanted, it was to assure yourself that you weren't one of them. You didn't want to get there in time for awkward small talk, you didn't want to be seen; you wanted to stand at the back and survey the room. You wanted to know what they looked like in person, these trans guys.<sup>59</sup> You wanted to know what they sounded like, whether they had girlfriends and jobs, and, most importantly, you wanted to know if they could pass as 'normal' guys.<sup>60</sup> 'You wouldn't even know he was trans,' was a sentence that would pour out of you like an exhalation — a lifetime's worth of relief and hope contained in seven little words.

This was 'Tranny Club'. Well, actually, it was the 'FtM Support Group'<sup>61</sup> at the Gender Centre in Sydney's progressive inner-west. But you weren't ready to call yourself trans, you weren't ready to claim that you needed support, and you certainly weren't ready to acknowledge that you were part of a 'group'.<sup>62</sup> You weren't a 'tranny' like these guys,<sup>63</sup> you weren't interested in being some sort of

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after Pressure from Cory Bernardi', *The Guardian (Australia)*, 23 February 2016 <<https://www.theguardian.com/australia-news/2016/feb/23/turnbull-orders-review-safe-schools-lgbti-program-after-pressure-from-cory-bernardi>>.

<sup>59</sup> Cf Adam F Yerke and Valory Mitchell, 'Am I Man Enough Yet? A Comparison of the Body Transition, Self-Labeling, and Sexual Orientation of Two Cohorts of Female-to-Male Transsexuals' (2011) 13(2) *International Journal of Transgenderism* 64.

<sup>60</sup> Meredith G F Worthen, 'Hetero-cis-normativity and the Gendering of Transphobia' (2016) 17(1) *International Journal of Transgenderism* 31.

<sup>61</sup> FtM is a common abbreviation for 'Female to Male' gender transition.

<sup>62</sup> This experience is by no means universal. Others, like Burgin, write of a close connectedness and deep sense of belonging with the trans community in the early days of their transition. He writes, 'After I came out, but before surgery or hormones, my sense of community was tied quite firmly to this transgender identity of mine. I restarted trans\* organizations on campus, educated peers and professors in class, excitedly went to see other trans\* academics and worked with local trans\* activists. My friend groups, too, were overwhelmingly trans-masculine. ... But these days I've started to realize that I have been welcomed more readily into cisgender society since I had surgery and started hormones. I no longer need to seek out other trans\* and genderqueer men in order to be considered "normal" — at least if I don't mention my trans status': Burgin, above n 34, 42.

<sup>63</sup> Lance Bass, 'Why We Shouldn't Use the Word "Tranny"', *Huffington Post blog*, 24 December 2011 <[http://www.huffingtonpost.com.au/entry/why-we-shouldnt-use-the-word-tranny\\_b\\_1168078](http://www.huffingtonpost.com.au/entry/why-we-shouldnt-use-the-word-tranny_b_1168078)>. We have both been affected by casual violence of radio hosts, television presenters, and public figures expressing transphobic sentiments. See, for instance, the

rah-rah trans activist, you weren't interested in being 'proud' of your gender fluidity. Unlike these groupies, you were an individual. Your gender identity was 'genuine,' it was 'authentic,'<sup>64</sup> and not faddish and performative.<sup>65</sup> These were the assumptions you carried with you and these were the ways in which you built a psychological wall between yourself and the other people in the room. So you gave the group a pejorative name, and you made a joke of it, which was your way of dangling your foot in the water, unsure of what lies beneath, leaving yourself ready to flee the instant something launches at you with open jaws and bloodthirsty eyes.

That's what internalised transphobia looks like.

You've never considered yourself to be a political person. 'I don't know anything about politics,' you would tell me. 'I just want to live my life in peace.'<sup>66</sup> Once, well before you commenced your transition, you had entered a public women's bathroom with a butch friend, and a woman in a panic had challenged your mate. 'What the fuck are you doing in here?' the stranger had howled. 'You're a man!' So your friend had lifted their shirt and flashed a set of tits at the girl. The two of you had a bit of an argument afterwards: your friend had wanted to know why you didn't say anything. You'd protested that you didn't want to make a scene.

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comments of syndicated radio hosts on the 'Lex and Terry Show' in the US. One of the presenters saw fit to report the news like this: 'There's a teen that shot a tranny after finding out that it was a man after they had a little sexual encounter.' His co-host responded, 'I don't blame him. I would have shot his ass too': Aaron McQuade, 'Radio Hosts Lex and Terry Apologize for Trans Murder Comment,' *GLAAD blog*, 7 June 2013 <<http://www.glaad.org/blog/radio-hosts-lex-and-terry-apologize-trans-murder-comment>>.

<sup>64</sup> Skepticism about the authenticity or veracity of claims to trans identity is reflected in law across several jurisdictions. Switzerland, for instance, has problematically called on trans individuals to establish their credentials as "authentic" or "true transsexuals" by satisfying a two-year waiting period as a precondition to accessing gender-confirming surgery. This legal requirement was successfully challenged before the European Court of Human Rights: *Schlumpf v Switzerland* (European Court of Human Rights, Application No 29002/06, 8 January 2009) (in French); English translation of the term by Joseph Dute, 'ECHR 2009/9, Case of Schlumpf v Switzerland, 8 January 2009, no. 29002/06 (First Section)' (2009) 16 *European Journal of Health Law* 281, 281.

<sup>65</sup> Cf Stephanie Beryl Gazzola and Melanie Ann Morrison, 'Cultural and Personally Endorsed Stereotypes of Transgender Men and Transgender Women: Notable Correspondence or Disjunction?' (2014) 15(2) *International Journal of Transgenderism* 76.

<sup>66</sup> Cf: Carol Hanisch, 'The Personal Is Political' (1969) in Barbara A Crow (ed), *Radical Feminism: A Documentary Reader* (New York University Press, 2000) 113; Andrew J Young, 'Personal is Political: Are You Doing Your Work? White Transmen Holding Ourselves Accountable to Audre Lorde's Legacy', *The Feminist Wire*, 20 February 2014 <<http://www.thefeministwire.com/2014/02/are-you-doing-your-work-white-transmen-holding-ourselves-accountable-to-audre-lordes-legacy/>>.

(Now that you present as masculine you go to great lengths to avoid intimidating women who may be concerned about their security in isolated public spaces.<sup>67</sup> Instead, you expose *yourself* to danger by venturing into men's bathrooms,<sup>68</sup> even if it means wading through an inch of urine and warding off the stares. 'That was horrific,' you once told me when you emerged from a bathroom full of plastered, aggressive men at the Sydney Football Stadium. 'It was a goddamned theatre of piss.') If you had your time again, you would stick up for your tit-flashing friend.

And so here you are, this person who doesn't care about politics, this person who doesn't like to make a scene. Here you are, flocking to your advocates and your allies, surrounding yourself with the people who lift you up. Here you are, spilling tears as you listen to Loretta Lynch speak about the Obama Administration's preparedness to litigate for trans rights.<sup>69</sup> Here you are, forging a community with other trans men, appreciating your similarities and your differences, answering each other's questions and slapping each other's shoulders, proper bro-styles. Here you are, confident enough in your masculinity to advocate for the rights of women and for the rights of the genderqueer, too. Here you are, head buried in your phone, chatting away to your FtM support

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<sup>67</sup> Damian Ray, "'I Never Stand Too Close': A Trans Man's Feminism', *Ravishly.Com*, 23 December 2014 <<http://www.ravishly.com/2015/03/16/i-never-stand-too-close-trans-mans-feminism>>. Some trans men have noted that, having experienced gender insecurity as people who present as women but who now present as men, they are uniquely placed to appreciate the safety concerns of women: see, eg, Australian Broadcasting Corporation, 'Transgender', *You Can't Ask That* (3 August 2016).

<sup>68</sup> Jeff Brady, 'When a Transgender Person Uses a Public Bathroom, Who is at Risk?', *NPR Weekend Edition*, 15 May 2016 <<http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk>>. See also Jody L Herman, 'Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives' (2013) 19(1) *Journal of Public Management and Social Policy* 65.

<sup>69</sup> United States Department of Justice, *Attorney General Loretta E Lynch Delivers Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination against Transgender Individuals* (Washington DC, 9 May 2016) <<https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint>>:

Let me also speak directly to the transgender community itself. Some of you have lived freely for decades. Others of you are still wondering how you can possibly live the lives you were born to lead. But no matter how isolated or scared you may feel today, the Department of Justice and the entire Obama Administration wants you to know that we see you; we stand with you; and we will do everything we can to protect you going forward. Please know that history is on your side. This country was founded on a promise of equal rights for all, and we have always managed to move closer to that promise, little by little, one day at a time. It may not be easy — but we'll get there together.

group, asking me, 'Oi, how do we change the rules so Medicare covers top surgery?' ('Well you can lobby the government, but you know it's too late for you, right?' 'Yeah, I know! But how do we change it for everyone else?'). Here you are, standing by the swimming pool, scars out, chest proud, breeze on your skin. Here you are, imploring people to listen to your story.

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# FIRST DO HARM: HOW INTERSEX KIDS ARE HURT BY THOSE WHO HAVE TAKEN THE HIPPOCRATIC OATH

PIDGEON PAGONIS\*

*Pidgeon Pagonis is intersex, meaning that similar to one in 2000 people, they were born with sex characteristics not easily categorised as either male or female. This article critiques the Concealed Non-Consensual Surgery model ('CNCS') that dominates intersex treatment via illuminating discrepancies between the model, which Pagonis and others have endured, and the Hippocratic Oath. Instead of the current CNCS model, which has caused harm to so many, Pagonis offers alternatives that centre on psychologists and support groups, instead of unnecessary surgeries.*

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## I INTRODUCTION

Hippocrates, the so-called father of Western medicine presumably wrote the Hippocratic Oath at some point between the third and fifth century BCE. The phrase "first, do no harm", synonymous with the oath, actually doesn't appear in the original, or in today's modern version. Yet, similar principles are strewn throughout the modern version that doctors, entrusted with my care as a young intersex child, neglected to honour.

Unfortunately, as I discovered the hard way, the oath doesn't seem to apply to roughly 2 per cent of the population born with sex characteristics that fall outside typical male or female parameters — also referred to as intersex.<sup>1</sup>

Instead, doctors dealing with intersex kids discard tenets of the oath and abide by an outdated protocol grounded in secrecy, shame, and surgery. I call this model the concealed non-consensual surgery ('CNCS') model. This model is what I grew up with, and will be the basis for the rest of this essay which compares parts of today's version of the Hippocratic Oath with relevant parts regarding my experience growing up intersex in the United States.

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<sup>1</sup> M Blackless et al, 'How sexually dimorphic are we? Review and synthesis' (2000) 12(2) *American Journal of Human Biology* 151.

II I WILL APPLY, FOR THE BENEFIT OF THE SICK, ALL MEASURES WHICH ARE REQUIRED, AVOIDING THOSE  
TWIN TRAPS OF OVER-TREATMENT AND THERAPEUTIC NIHILISM

If gender was a football field, I was born at the 50-yard-line between male and female goal posts. At birth, my body was told by its coach — my 46 XY chromosome pair with its inactive SRY gene — to run the “Trojan horse” play.<sup>2</sup> And so, my body was born ripe with intersex intricacies that weren’t immediately apparent at my birth.

Believing the Trojan horse to be a mare, clinicians typed F on my birth certificate and sent my parents home with their first child, a baby girl.

Six months later, the defence read my coach’s play and my paediatrician spotted something peculiar between my legs. Soon after, I was stripped naked before paediatric specialists at the local children’s hospital in Chicago, and my hidden intersex soldiers’ offensive play was foiled.

Confronted by diagnostic test after test, the defence discovered my karyotype results were indeed XY, not XX, as everyone assumed.

III I WILL REMEMBER THAT THERE IS ART TO MEDICINE AS WELL AS SCIENCE, AND THAT WARMTH,  
SYMPATHY, AND UNDERSTANDING MAY OUTWEIGH THE SURGEON’S KNIFE OR THE CHEMIST’S DRUG

As a child, I had a disturbing recurring dream. In it, I’d wake up flat on a gurney whizzing down a hospital hallway. One after another, rectangular fluorescent lights became a single long beam. Bending my chin towards my chest, I’d always be shocked awake by what I saw.

Packed amidst my thighs, between my vagina and kneecaps, were what I could only describe as rolls of blood soaked toilet paper.

I never told anyone about the nightmare, and just thought of it as one of my many weird recurring dreams. Eventually, I stopped having it, grew up, and moved away to college.

At school, I had other things to worry about, like starting over with new people in a new place. In junior high and high school, I struggled to keep up with the constant maintenance work of trying to appear normal.

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<sup>2</sup> AsapSCIENCE, *We were all female* (10 January 2013) YouTube <<https://www.youtube.com/watch?v=z1Kdoja3h1k>>.

During bi-annual check-ups, my doctors stressed — as they palpated my breasts and peered between my legs — that I not only *was*, but more importantly, *looked* normal. In spite of this, I never felt quite normal.

Maybe it was because I knew other kids didn't have these types of check-ups. Or, maybe it was because my family told me at a young age that I wouldn't get a period or be able to give birth to children because I was born with cancer in my ovaries.

This scripted version of the truth, an offensive play the doctors told my family to run on me, made me believe that my doctors saved my life. When I appeared sad, my family always reminded me that I could always adopt.

But all of that reassurance didn't matter once the other girls in school began to go through puberty and get their periods. Everyone insisting I was normal didn't change the reality that every time I looked past my flat chest, towards my pristine underwear, my lack of a menses reminded me I was indeed different.

As the doctors lied to my parents, and my parents lied to me, I began to lie to my peers.

By the time I finished junior high, I couldn't keep track of all the different scenarios in which I had gotten my first period. By the time I graduated high school, I couldn't count how many times I pretended to have my period — even going as far as painfully inserting tampons — in order to quell any suspicion my boyfriend may or may not have had.

Always pretending to be something I wasn't was draining. I constantly worried that those around me had begun to figure out what I was hiding inside of my Trojan horse. I hoped college would be a reset; a new, freer me.

Yet, once I moved to college, I doubled down and worked even harder to keep up the appearance of the normal happy girl. I diligently kept tampons on hand for others, and diligently hid my hormone replacement therapy medication.

The facade came crashing down the day I retrieved my medical records from my children's hospital, whose front doors were just down the street from my college dorm-room.

Reading the pages of my medical records, which began in 1986, turned me into a red-hot sobbing puddle in the middle of a tiny cinderblock dorm study room.

What I read in those records transformed the way I saw my doctors who before were trustworthy lifesavers. Afterwards, they seemed like criminals who got away with violating my human rights.<sup>3</sup>

IV I WILL NOT BE ASHAMED TO SAY “I KNOW NOT”, NOR WILL I FAIL TO CALL IN MY COLLEAGUES WHEN  
THE SKILLS OF ANOTHER ARE NEEDED FOR A PATIENT'S RECOVERY

My medical records illuminate not only how my physicians fell for the trap of over-treatment, but also that they weren't ever humble enough to admit they didn't have all the answers. They failed to call in colleagues, such as therapists, who were actually necessary and could have been helpful as I grew and developed a sense of my intersex identity, and figured out its place in this binary world.

In the introduction to *Herculine Barbin: Being the Recently Discovered Memoirs of a Nineteenth-Century French Hermaphrodite*, Foucault argues that the objective of social institutions is to restrict 'the free choice of indeterminate individuals'.<sup>4</sup> My doctors exemplified Foucault's claim when they decided, with no input from myself, to surgically assign my sex-uncertain body to appear phenotypically female.

It must have seemed like a no-brainer for my parents when my doctors presented them with surgical fixes for their kid. The clinicians told them that I was born with underdeveloped ovaries — which they referred to as gonads but in actuality were undescended testes — that would most likely become cancerous if left intact.

While there is a valid cancer concern in cases of intersex, it's not as dire as some providers make it seem. A 2013 Australian Senate Inquiry Report on *Involuntary or Coerced Sterilisation of Intersex People in Australia* cites the risk of gonadal malignancy

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<sup>3</sup> Office of the United Nations High Commissioner for Human Rights, *A step forward for intersex visibility and human rights* (25 September 2015)

<<http://www.ohchr.org/EN/NewsEvents/Pages/Astepforwardforintersexvisibility.aspx>>.

<sup>4</sup> Herculine Barbin, Michel Foucault (ed) and Richard McDougall (trans), *Herculine Barbin: being the recently discovered memoirs of a nineteenth century French hermaphrodite* (Harvester Press, 1980) viii.

for CAIS and PAIS to be .8 per cent and 15 per cent respectively,<sup>5</sup> and concluded a ‘serious shortage of quality information’ when it came to truly understanding this risk.<sup>6</sup>

Regardless, I agree with Organisation Intersex International Australia, who points out that since the likelihood of cancer occurring in undescended testes before puberty is extremely low, maintaining one’s testes should be an intersex person’s choice.<sup>7</sup>

Surgeons don’t routinely remove people’s prostates after birth because they have a likelihood of developing cancer later in life. Instead, people are allowed to have bodily autonomy, and clinicians may monitor for cancer down the line. This shouldn’t be any different for intersex people who are born with undescended testes.

Removing our healthy testes, and other reproductive organs, before we are of an age to give fully informed consent, is an affront to our human rights.

My medical records contain lengthy descriptions of consultations, evaluations, diagnostics, blood work, biopsies, and surgeries; a one-sided synopsis bereft of the one person’s voice whose humanity was actually affected by these decisions. Above all, they provide an account of a miscommunication between my healthy intersex body and the binary world it threatened, and the covert operation undertaken to de-escalate it.

V MOST ESPECIALLY, MUST I TREAD WITH CARE IN MATTERS OF LIFE AND DEATH. ABOVE ALL, I MUST  
NOT PLAY AT GOD.

Learning about the orchiectomy, the procedure in which my testes were removed before I was 1-year-old, paled in comparison to what I read next.

On 27 October 1990, when I was four-years-old, I was admitted to the children’s hospital again. Five days later, I was discharged without my clitoris due to “a clitoral resection and recession”. In other words, I was given a clitorectomy because the doctors felt my clitoris — a mere centimetre and a half “when stretched” — wasn’t something a girl should have.

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<sup>5</sup> Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) 86.

<sup>6</sup> *Ibid* 111.

<sup>7</sup> Morgan, *The Family Court case Re: Carla (Medical procedure)* [2016] FamCA 7 (8 December 2016) <<https://oii.org.au/31036/re-carla-family-court/>>.



This state sponsored violence is still happening today as evidenced by the recent Australian family court case involving a young child named Carla who was sterilised and given a clitorrectomy.<sup>8</sup>

It was that unnecessary, and purely cosmetic, genital mutilating surgery in 1990 that prompted the reoccurring dream I had as a child of blood soaked toilet paper between my legs. It wasn't just a bad a dream, but a chilling memory of being over-treated by clinicians who were too stubborn to say 'I don't know'.

I also found out that when I was 11, and admitted for what I was told was a bladder surgery, I actually underwent a non-consensual vaginoplasty. My "excellent results", the records boast, would allow for "normal adult relationships". Normal sex was, of course, defined by my surgeons.

As stated earlier, intersex isn't that rare and intersex variations show up somewhere between .05 per cent and 1.7 per cent of the human population.<sup>9</sup> The higher end of the range is similar to the amount of natural born redheads. Since we're not rare — just invisible — it means what happened to me is unfortunately not rare either.

The majority of intersex people are not born with any related life-threatening health issues. Yet, doctors consistently pressure parents to act, not to save our lives, but to save our outdated and fragile binary understanding of sex and gender. Instead of stating 'I don't know', and waiting to ask intersex children what they want for themselves when they grow up, our doctors choose to play God.

Doctors who deal with intersex kids are quick to tell you today that things are changing for the better. Yet, there is no mandate for hospitals to report the types, or amounts, of surgeries they are performing on intersex kids.

If you do hear them make this claim, make them be more specific like my colleague Anne Tamar-Mattis does, by asking them which intersex kids who would have been candidates for surgery 20 years ago, they wouldn't consider as candidates today.<sup>10</sup>

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<sup>8</sup> Ibid.

<sup>9</sup> Office of the United Nations High Commissioner for Human Rights, *Fact sheet: Intersex* (2015) 1 <[https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf)>.

<sup>10</sup> See generally Anne Tamar-Mattis, *Anne Tamar-Mattis – Publications* (2017) ResearchGate <[https://www.researchgate.net/profile/Anne\\_Tamar-Mattis/publications](https://www.researchgate.net/profile/Anne_Tamar-Mattis/publications)>.

If they boast that they now refer intersex patients to psychologists, ask them who those psychologists are, and what percentage of referrals actually follow through long-term.

If they tell you that most of their intersex patients are happy with their treatment, ask them how many they have followed into adulthood, and how they know they are happy with what their doctors did.

If you feel particularly brave and want to address the elephant in the room, ask why they are even doing any medically unnecessary surgery on intersex children at all.

It's been over 10 years since I first retrieved my medical records. Since then, I've been able to lead a training session, in which a youth member of InterACT and I gave an anti-surgery intersex presentation to team members of a clinic who work with intersex children at a children's hospital.<sup>11</sup>

In a subsequent meeting, the clinic's lead paediatric urology surgeon expressed that they wanted to be the person in their field to do better by intersex patients. At that point, my colleague Anne Tamar-Mattis who was also present for that meeting asked, 'If so, are you willing to be accountable for the harm your profession has caused intersex people?'

They replied, 'No, I'm not.'

This is the familiar wall intersex people and activists consistently find ourselves up against. We have yet to reach a pivotal point where doctors are willing to stop playing God, and instead, let intersex people decide how we would like to live our destinies.

If we are to move forward, we need the medical profession — which has caused so much harm to our community — to hold themselves accountable to the Hippocratic Oath.

While I don't have the power to control what happened to me in the past, I can make every effort to change the future for intersex children.

It is my hope, in this future, that we move away from the CNCS model that's been the hallmark of intersex treatment since the 1950s, and completely ban these medically

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<sup>11</sup> Interact is an organisation that advocates for intersex youth: InterACT, *Our Advocacy* (2016) <<http://interactadvocates.org/our-advocacy/intersex-youth/>>.

unnecessary damaging surgeries. Accountability from the medical community is imperative if we are to close this dark chapter and move forward.

In this new phase, when an intersex child is born we only need doctors to inform parents that they have a happy, healthy intersex child who is 'perfect just the way they are,' as the new UN campaign launched on Intersex Awareness Day advises.<sup>12</sup>

The campaign also points out that in most countries, there's no legal reason to rush to assign and register a sex. Regardless of when, parents should only do so with the idea that it's not permanent, and that an intersex child should be allowed to grow up and declare their sex and gender when they are old enough to do so.

Most importantly, genital mutilating surgeries need to be a thing of the past in this new chapter. As the UN reminds us:

There is no evidence that cosmetic surgery and treatment help your intersex child. Parents pressured into agreeing to such practices have often reported having regrets because it did not benefit their child, harmed them, and created difficulties in the parent-child relationship. The risks of these procedures are serious: permanent infertility, pain, incontinence, loss of sexual sensation, and lifelong mental suffering.<sup>13</sup>

Instead, every effort should be made to connect parents with well-regarded therapists and intersex support groups such as the Androgen Insensitivity Syndrome Support Group in Australia<sup>14</sup> and the AIS-DSD Support Group in the US.<sup>15</sup>

As we flip the pages into this next chapter, we should focus on changing society, not healthy intersex bodies just because they don't fit our limited views of sex and gender.

In addition, medical institutions that have robbed intersex people of our bodily autonomy need to formally apologise, and work with intersex activists to declare new intersex-affirming standards of care. Lastly, these same institutions need to contribute to a reparations fund that guarantees all current and future intersex people free medication, services, and therapy.

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<sup>12</sup> UN Free & Equal, *Intersex Awareness* (2016) <<https://www.unfe.org/intersex-awareness/>>.

<sup>13</sup> *Ibid.*

<sup>14</sup> AIS Support Group Australia, *Peer Support, Information and Advocacy for Intersex People and their Families* (10 March 2017) <<http://www.aissga.org.au/>>.

<sup>15</sup> AIS-DSD Support Group, *Home* (2017) <<http://aisdsd.org/>>.

This new chapter is already being written, and you just have to type intersex into a search engine to see it. Every day, there are brand new activist projects and resources popping up all over the world. Intersex people across the globe are doing the necessary work to build this brighter future for our children, and yours, by lifting up our stories.

In speaking our truths, we are collectively ridding the world of the stigma that is at the root of the outdated CNCS model. This devastating clinical model has unjustly dominated medicine's response to our bodies since the 1950s, and it's long past time that it disappears.

Instead of critiquing bodies, a critique of the antiquated binary sex and gender categories is what's needed. Intersex people, like unnecessarily stigmatised people, don't need to be fixed — instead society needs fixing. Luckily, this chapter can begin right now with parents of newborn intersex children doing what they're already instinctively programmed to do: love and protect their intersex child.

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## WOMEN, SEXISM, AND POLITICS: DOES PSYCHOLOGY HELP?

CARMEN LAWRENCE\*

*When Julia Gillard replaced Kevin Rudd as Prime Minister, there was, in some quarters at least, celebration that a woman had been accepted as qualified for the job; that we had no problems with a woman in the highest office in the country. Did we? We could say, could we not, that sexism was safely relegated to the past? Similar conclusions were reached when I became Premier in Western Australia — it was marked, not just as a first, but as a harbinger of further change. While Gillard's ascension and the growing numbers of women ministers, state and territory leaders, and members of parliament might encourage the perception that men and women are equally accepted in politics in Australia, other data raise questions about whether this is true.*

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## I INTRODUCTION

I approached the opportunity to reflect on my experiences in dealing with sexism throughout my political career with some trepidation. In the first place, I resigned my position as member for Fremantle nearly a decade ago, after a political career spanning 21 years and, as is my want, I have not spent much time since then ruminating about my experiences, a practice that I have seen embitter too many people, as they wear tracks in their heads. Nor did I keep a diary or make other contemporary records of sexist and discriminatory treatment which affected me, whether I was deliberately targeted or not. There are some records of interview and commentary by others which have explored sexism toward women politicians, including me.<sup>1</sup> These are a help, but the trail is a little cold — and my capacity to ignore personal vilification has become so well-developed that I stopped responding to sexist behaviour and taunts a long time ago.

I should also start by saying that one of the lessons ingrained in me by my study of psychology is the danger of trying to reach any meaningful conclusions about human behaviour from a sample of  $n=1$ . My experiences — and the conclusions I have drawn from them — may not be at all representative of women in politics or particularly instructive for neophytes in navigating the perilous shoals of political life in Australia. It is also true that a lot of these experiences are common in other walks of life and many

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<sup>1</sup> See, eg, Julia Baird, *Media Tarts* (Scribe, 2004); Susan Mitchell, *The Scent of Power* (Angus & Roberson, 1996); Karen Ross, 'Women's place in 'male' space: Gender and effect in parliamentary contexts' (2002) 55(1) *Parliamentary Affairs* 189.



are “gender neutral”. Politics is a tough trade and there is always plenty of criticism (and hostility) to go around.

It is also very difficult to read the political play: how do we decide when expectations of and responses to politicians are sexist and when they are generic? We cannot say that simply because a woman is disliked or censured she is being singled out because of her gender; that the evaluation of her is sexist. Reaching such a decision requires an analysis of both the content and the intensity of any responses. Are higher — or gendered — standards being set? Are they more fiercely enforced? I will try to explore these questions using any relevant, systematically derived evidence I can find, while referring to my own and other women’s experiences as illustrative.

## II GROWING UP IN POST-WAR AUSTRALIA

I grew up in a largely female household (Mum and Dad and seven kids, six of us girls), spent most of my schooling in an all-girls’ school run by Catholic nuns, was cloistered in a women-only college at university, and emerged into adult life as the second wave Feminist movement was gaining voice and momentum. As a young woman, I never entertained the idea that women were less capable than men (except at heaving weights); I was fortunate that both my parents and the teachers who supported and encouraged me did not appear to think my sex should constrain me in any way. Nor did I think of myself as a second-class citizen — at least not until I raised my head from my books and discovered, to my horror, that discrimination against women was deeply entrenched in most of our organisations and in the practices and attitudes of those (males) who held the keys to full participation in Australian life.

I was fortunate that my horizons were expanding as the old verities were being “questioned”, when the tenor of public discussion about a woman’s “place” was changing radically, and analyses of the ideologies underpinning women’s social status were hitting the quality presses (and even the mass media). Like many women in Australia, I was inspired by the international revolution challenging the god-given nature of women's roles — and inevitably, those of men too. More and more of us began to question our preordained paths and to actively repudiate them; we wanted nothing short of full participation in society, including in our politics.

I was part of a society permeated by inequality and discrimination against women — what we came to call sexism. Our mothers were fenced in by hearth and home, raising children and caring for their husbands, while burying their own desires and talents in quiet anonymity. Women were diminished by attitudes and expectations which belittled their intellectual capacity and restricted their choices; they were expected to move seamlessly from the role of daughter to wife, from one family to another, barely experiencing real independence between these life stages; in need of protection and without real agency. Often they were trapped by the canon that every marriage should survive and by the fear of social disgrace that divorce represented.

As I later became aware, women were still unable to fully control their own reproduction. Although the pill had made better fertility control possible, it was still extremely difficult and risky to have a pregnancy terminated, no matter what a woman's circumstances. Sexual assault and violence toward women were taboo subjects and under-reported, and women were often portrayed as contributing to their own abuse. There was little in the way of appropriate support or refuge. Some things have not changed much.

Academic underachievement was common among girls and they often left school prematurely; women's employment was seen as problematic, especially if women were married and had children. In fact, for women, paid work was often portrayed as simply incompatible with marriage and motherhood. Images of the "career woman" incorporated the idea that she was in some respects de-sexed, unattractive to men and lacking in "feminine" qualities. Many faced blatant discrimination when they entered — or tried to enter — the workforce. Very few women reached senior positions in any field of work, since they were denied permanence and opportunities for promotion. In neither the public nor the private sector did women receive equal pay and there were no provisions for affordable child-care for those mothers who did work. There were almost no women in politics, in any but back-room roles, or at any level. This struck me as a particularly egregious flaw in our society, since such representation was likely to be crucial to any campaign to improve the status of women.

## III WOMEN AND DEMOCRACY

I know now that sexism in politics has deep roots. From the beginning, democracies everywhere, including in Australia, excluded women. Debates on how our democracies should be structured often proceeded as if women did not exist as separate beings; women were routinely excluded from voting and denied the right to stand for political office. They were belatedly included only after hard fought campaigns by the suffragists, often in the face of bitter opposition which questioned women's abilities and suitability for public life.

While the right to vote and stand for parliaments was achieved relatively early in Australia, it was decades before women were elected in significant numbers. The progress toward anything resembling equal representation in our parliaments has been glacially slow. The political parties were particularly resistant to more women being selected to serve as representatives. If women were considered as candidates at all, it was most often in unwinnable seats. I was not challenged for pre-selection in my first attempt at a lower house seat, probably because the seat had not been won by my party for the previous 27 years.

As a result, the forms and procedures of our democracy, like others around the world, evolved without significant contributions from women. Our Constitution, our parliaments, and our political parties were designed by men to suit their preoccupations and convenience. Even something as apparently simple as parliamentary sitting times reflect this history. One of the first things I did as Premier in Western Australia was cut the late night (and sometimes drunken) marathon sittings, starting and finishing earlier so members could spend more time with their families. Although it was generally well-received, the initiative was promptly dumped by my (male) successor. In this and many other ways, our democratic institutions have never really been remodelled to accommodate the female half of the population.

At least as important for contemporary politics is that the very idea of who and what a politician should be has been shaped by this relative absence of women from public life and the stereotyped ideas that gave rise to it. The "politician as male" became normative and women's achievements and interests have typically been measured against this norm, rather than on their own terms. However else women politicians are described, it

is always her gender which is the primary descriptor. She is often defined by what she is not. As Norris puts it, 'she is not simply a politician (male as norm) but a special kind of deviant professional.'<sup>2</sup> Despite increasing numbers of women in politics, the rulers we run over women's achievements still bear male fingerprints. Many men cannot or will not see that their definitions of merit and expectations about what a competent politician should be may be nothing more than rules they have made up to protect their own positions.

#### IV GENDER INEQUALITY TODAY

When Julia Gillard replaced Kevin Rudd as Prime Minister, there was, in some quarters at least, celebration that a woman had been accepted as qualified for the job; that we had no problems with a woman in the highest office in the country. Did we? We could say, could we not, that sexism was safely relegated to the past? Similar conclusions were reached when I became Premier in Western Australia — it was marked, not just as a first, but as a harbinger of further change. While Gillard's ascension and the growing numbers of women ministers, state and territory leaders, and members of parliament might encourage the perception that men and women are equally accepted in politics in Australia, other data raise questions about whether this is entirely accurate.

We know that, despite the views of some conservative commentators, society-wide gender inequality is still with us; and it takes many forms — from what women earn and how they are employed, to the violence and harassment they still experience, to how they are publicly represented and judged. While there are more women in boardrooms and parliaments, the disparity in status and power between men and women is tangible. In politics, perhaps more important than the numbers — 30 per cent of lower house MPs are now women — is that fact that politics is still a largely "male space" in which women continue to be seen an aberration. It seemed to me that my own status as the first woman Premier of an Australian state often excited more attention — to both my vices and virtues — than was the case for my male colleagues. I stood out like a "sore thumb", as my mother would put it, an irritating departure from normality. Such "exceptional" status means that when women are in a minority, they are often assessed

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<sup>2</sup> Pippa Norris, 'Women leaders worldwide: A splash of color in the photo op' in Pippa Norris (ed), *Women, Media and Politics* (Oxford University Press, 1997) 6.

as “other”, the classic position from which prejudice arises. Even when, or perhaps particularly when, women achieve positions of power, they are not exempt from the effects of common or garden sexism. Such sexism provides the scaffolding for continuing inequality, driving discrimination and exclusion. Sexism, particularly in its most toxic form, misogyny — the hatred of women — often blights the lives of women who dare put their heads above the parapet in whatever their chosen field.

What is often overlooked is that sexism refers to more than just unpleasant attitudes about male superiority, but encompasses the social structures and institutions which enable gender-based discrimination. The much studied concept of sexism, first given voice in the 60s, covers all the conditions which perpetuate stereotypes about gender roles; in its extreme form, women are depicted as best suited to domestic caring roles and to be congenitally less capable than men, especially in the qualities deemed necessary to make good leaders in business, politics, and academia. Our homes, our workplaces, and our parliaments are designed accordingly.

Although it may be less common than in the past, and less likely to be publicly approved, most of us have little trouble identifying “hostile sexism” — the antagonism shown toward women who challenge the prescribed roles for men and women. There is plenty of evidence that in corporations and in government, women competing against men for high-ranking positions often face such sexism, not least because they are seen as threats to the status quo of male authority. We may have more difficulty recognising “benevolent sexism” when women are stereotyped as nurturing, delicate, and sensitive, needing to be protected and provided for by men, a position that can be just as restrictive as hostile sexism.<sup>3</sup> One consequence is that when a woman does not appear to be stereotypically “feminine” her very identity as a woman may be called into question. Coarse reflections on Gillard’s decision not to have children were clearly designed to make her seem somehow less of a woman. A local Sunday newspaper speculated I might be lonely as a divorced woman, and suggested that I was looking for a partner — this at a time when I was flat out carrying out my duties as Premier. One of my Federal cabinet colleagues occasionally called me “luv”; I decided not to have an argument every time it happened, and to ignore the implication that I was somehow not up to the job.

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<sup>3</sup> Peter Glick and Susan Fiske, ‘An ambivalent alliance: Hostile and benevolent sexism as complementary justifications for gender inequality’ (2001) 56(2) *American Psychologist* 109.

In studying the media representation of international women leaders, Norris found few examples of blatant sex stereotyping, but many instances of “conventional wisdom” which highlighted women’s lack of the usual qualifications and prior political experience, with the broader experiences they brought to the office commonly undervalued.<sup>4</sup> The commentary diminished women’s capabilities and experiences and evaluated appropriate qualifications in terms of the (masculine) characteristics of past officeholders. Although, at the time I was in office I had a PhD in Psychology, had lectured in the Medical Faculty for some years, and had undertaken research in a variety of fields, more attention was paid by the media to my family circumstances than my professional qualifications, with one headline dubbing me “Lawrence of Suburbia”.

It is clear from many years of systematic study that the media often frame women through such stereotyped and traditional values. For example, they stress the compassionate and nurturing qualities of women while men’s competence is underlined. In the past, the media’s starting point was that women belonged at home and they were expected to marry and raise a family. Politics was definitely reserved for men. I will never forget an *Australian* newspaper caption on a photograph of women State and Federal Ministers for Education which described them as “mothers and grandmothers” — and nothing else.

Biographical accounts suggest that the representations of women politicians in the media are more inclined to focus on gender-based evaluations of dress and demeanour than on the substance of decisions and actions. A series of interviews with British MPs found that most of the women believed that their outward appearance was the subject of considerably more attention than it was for their male colleagues.<sup>5</sup> The emphasis is often on their sexual appeal — or lack of it. The daily tabloids habitually referred to women MPs as “Blair’s Babes” and “Cameron’s Cuties” depending on their parties.

Similar observations have been made by Australian women MPs who report that the media almost always report the age and marital status of a woman, what they look like, their domestic and family circumstances, fashion sense, and so on. I recall when I became Premier in WA the Sunday newspaper invited local fashion consultants to do a

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<sup>4</sup> Pippa Norris, ‘Women leaders worldwide: A splash of color in the photo op’ in Pippa Norris (ed), *Women, Media and Politics* (Oxford University Press, 1997).

<sup>5</sup> Annabelle Sreberny-Mohammadi and Keren Ross, ‘Women MPs and the media: Representing the body politic’ in Joni Lovenduski and Pippa Norris (eds), *Women in Politics* (Oxford University Press, 1996).

“make-over” of my hair style, glasses, clothing. When I did get a haircut, it became the subject of further comment. Coverage of Prime Minister Theresa May seems as likely to focus on her shoes as on her policies. No wonder Hillary Clinton took to wearing sensible shoes and pant-suits.

Nonetheless, from where I stand, there have been big improvements over recent decades in our attitudes toward equality for women, including in leadership positions. Surveys confirm this, although they also point to worrying signs of that momentum having slowed or even reversed.<sup>6</sup> During my time as Premier — although not later when I was the target of a full-blown attack culminating in a Royal Commission — I was spared the worst of destructively sexist commentary and behaviour. People were supportive and generous and seemed genuinely pleased that a woman had taken on the role of Premier. However, I know my staff kept a bottom drawer of the filing cabinet for the angry, misogynist rants that some men seemed to find necessary to disgorge. These same people, when faced with the request to give their names and addresses to the letters-to-the-editors or the talk-back producers, appeared to lose their courage. Since then, online anonymity has amplified some very unpleasant sentiments toward women and licenced and publicised the crude comments that once disappeared with the hangovers. There may be nothing new about the nastiness, but it is given much wider circulation than once was the case; in some eyes it has come to be normal.

At the same time, research in the discipline to which I have returned, psychology, reminds me that eradicating sexism will not be easy. Even people who explicitly repudiate gender bias and applaud women’s full participation may harbour unconscious and automatic preferences for male leaders; ones they are probably not even aware of. Using tests that show how quickly a person can pair two concepts (for example, woman and leadership, or man and leadership), researchers have been able to go beyond what people say they believe to tap their implicit beliefs.<sup>7</sup> In one US study, when asked to sort images rapidly, participants found it easier to pair words like ‘president’, ‘governor’, and ‘executive’ with male names and words like ‘secretary’, ‘assistant’, and ‘aide’ with female names; many people appeared to have difficulty associating women with leadership at

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<sup>6</sup> Marcel van Egmond et al, ‘A stalled revolution? Gender role attitudes in Australia, 1986-2005’ (2010) 27(3) *Journal of Population Research* 147, 148.

<sup>7</sup> See, eg, Mahzarin R. Banaji and Anthony G. Greenwald, ‘Implicit stereotyping and prejudice’ in Mark P. Zanna and James M. Olson (eds), *The psychology of prejudice: The Ontario symposium* (Lawrence Erlbaum Associates Inc Publishers, 7<sup>th</sup> ed, 1995).

all.<sup>8</sup> Similar results have emerged in other domains and places, and they matter, since the more difficulty a person has in classifying a woman as a leader, the less likely they are to intend to vote for a woman; some 12 per cent less likely. This suggests that women may need to campaign harder to get the same results as a male colleague.

We are also largely unaware of the biased judgements we make about women's achievement and capacity. In research on hiring practices, one study asked science faculty academics to rate the applications of a student — who was randomly assigned either a male or female name — for a laboratory manager position. Both male and female faculty members judged the 'male' applicant as significantly more competent and hireable than the (identical) 'female applicant' and suggested a higher starting salary and more career mentoring.<sup>9</sup> This result has been replicated in a variety of workplaces. Differences emerge too in how success and failure are perceived: studies show that among managers, when women produce superior outcomes at work, this is attributed to luck or significant extra effort, whereas men's success is attributed to their personal capability alone. Conversely, failure among women is attributed to lack of ability, but for men, to bad luck.

Not only are such biased judgements likely to influence the judgements we make about women, they also influence the women on the receiving end. More than a decade of research has demonstrated that women's performance, like that of other disadvantaged groups, is diminished compared to their capacity when they are reminded that they are stereotyped to do poorly — for example at mathematics or science or leadership; where there is a threat in the air, the so-called 'stereotype threat'.<sup>10</sup> We all carry such stereotypes in our heads — about what women and men are really like — even if we reject them, and they can still be a potent influence on our behaviour, especially when they are constantly repeated.

#### V JUDGING WOMEN POLITICIANS

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<sup>8</sup> Cecilia Hyunjung Mo, 'What? Me Sexist?' [2011] *UpRising: Innovative Ideas for Gender Equality* 10, 12 <<http://gender.stanford.edu/sites/default/files/upRising%20Vol.1.pdf>>.

<sup>9</sup> Corinne A Moss-Racusin et al, 'Science faculty's subtle gender biases favor male students' (2012) 109 *Proceedings of the National Academy of Sciences* 16474.

<sup>10</sup> Steven Spencer, Claude Steele and Diane Quinn, 'Stereotype threat and women's math performance' (1999) 35(1) *Journal of Experimental Social Psychology* 4.



The question of whether sexism continues to blight the lives of women politicians was re-kindled by the treatment of Australia's first female Prime Minister, Julia Gillard, and by the candidacy of Hillary Clinton in the US Presidential elections. As Anne Summers has documented so comprehensively, there was a torrent of deeply offensive sexist commentary — indeed misogyny — directed at Gillard during her time in office by both some sections of the media and the blogosphere.<sup>11</sup> Similar patterns have been observed in commentary on Clinton's candidacy. Whatever one might think of Gillard's or Clinton's political records — and criticism is warranted — the angry, gendered nature of many of the attacks is obvious, and very unpleasant. I am only glad that my time in politics largely preceded the explosion of social media and the turbo-charged nature of online media coverage.

However, such malicious sexism, while easy to spot, does not account for all the challenges women politicians face. For example, some of what looks like legitimate political commentary is, on closer inspection, clearly sexist. Take the excoriating left wing criticism of Clinton's foreign policy record, which is prosecuted with a level of vitriol that somehow does not attach to either President Obama or Secretary of State, John Kerry who were also parties to the decisions for which she is held responsible. It seems that she is judged more harshly because such actions are seen as incompatible with what is expected of women.

Does this suggest we hold women politicians to a different (higher) standard of performance than we do their male colleagues? Both anecdotal and research evidence point to the fact that women politicians' mistakes or poor decisions are read differently from those of men. US and Australian research suggests that we are tougher on female than male politicians (and leaders generally) when they are perceived to make mistakes.

According to Australian researchers who had listeners judge political speeches by both men and women, when women politicians faltered they were judged less likeable and influential than equally tentative men.<sup>12</sup> Similar findings emerged from studies by Brescoll and her US colleagues on how people evaluate women who make mistakes in

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<sup>11</sup> Anne Summers, 'The misogyny factor' (NewSouth, 2013).

<sup>12</sup> See, eg, Renata Bongiorno, Paul Bain and Barbara David, 'If you're going to be a leader, at least act like it! Prejudice towards women who are tentative in leader roles' (2014) 53(2) *British Journal of Social Psychology* 217.

traditionally male occupations.<sup>13</sup> She and her colleagues gave participants a fictional news story about a police chief in a major city preparing for a big protest rally. After some time, the protest got out of hand and the chief dispatched squad cars. In one version of the story, the chief did not send enough officers, and 25 people were seriously injured. When it was a male police chief, his rating as an effective chief dropped by roughly 10 per cent, but when female, her ratings dropped by almost 30 per cent. Participants reading the stories wanted to demote her, but not him. Both leaders made a risky decision that backfired, but it cost her more. In another version of the story, the protest was successfully controlled when the chief sent in the squad cars; there were no injuries and the protest did not escalate. In that version, both leaders were given high marks, suggesting that the female leader was not automatically seen as a poor fit — just when she was seen to blunder.

Brescoll and her team also found one occupation — Women’s College President — which was both high status and usually held by women; men in those roles were also judged more harshly than women when they showed poor judgement. Brescoll’s team concluded that we are more accepting of a poor decision when a leader makes it in a gender-appropriate role. This, they point out, would not be such a problem if men and women had equal territory, but they do not. Men’s “territory” encompasses almost every area of the professions and public life: finance, law, sports, politics, the military, and the stock market. Until we associate women with leadership roles more broadly, mistakes will remain much more costly for women.

These results point to the fragility of the gains made by people — mainly women — in so-called “stereotype incongruent occupations”, and that is still most for women. Numerous studies have documented the ways in which people who take up these roles are discriminated against.<sup>14</sup> Indeed, the tension between what it means to be a “nice girl” and what is believed to be required of a successful politician seems an almost universal feature of much of the media coverage of women politicians.

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<sup>13</sup> Victoria Brescoll, Erica Dawson and Eric Uhlmann, ‘Hard Won and Easily Lost: The Fragile Status of Leaders in Gender-Stereotype-Incongruent Occupations’ (2010) 21(11) *Psychological Science* 1640.

<sup>14</sup> See, eg, Alice Eagly and Steven Karau, ‘Role congruity theory of prejudice toward female leaders’ (2002) 109(3) *Psychological Review* 573; Peter Glick and Susan Fiske, ‘The ambivalent sexism inventory: Differentiating hostile and benevolent sexism’ (1996) 70(3) *Journal of Personality and Social Psychology* 491.

As well as running the risk of hitting the “glass ceiling” in attempting to rise to the top of leadership roles, women often find themselves poised on a “glass cliff” — being promoted to more risky positions which make it more likely that they will fail and fall. Ryan & Haslam found that during a period of overall stock-market decline those companies who appointed women to their boards were the ones that had experienced consistently bad performance in the preceding five months; those who had not, appointed men.<sup>15</sup> It has been remarked on more than a few occasions that Joan Kirner and I were chosen in order to clean up the messes created by our predecessors and, in the eyes of some, would not have been chosen otherwise.

In her study of women leaders, Norris also found that the media often portray women leaders as agents of change who will clean up corruption in politics.<sup>16</sup> In examining the media treatment of women politicians in Australia during the latter half of the last century, Baird reports the many occasions on which women MPs were seen as the housewives of the Parliament — as scrubbing Parliament House clean, ‘bleaching politics of grime.’ Women are represented as being ‘in, but not of, politics...’ as floating above it, ‘gazing with pity and scorn at the muck beneath.’ There are dangers associated with these exaggerated saintly images: such inflated expectations are almost certain to be disappointed. Women politicians are often caricatured — hyped as heroines, then cast as villains or fools. In her book, ‘Media Tarts’, Julia Baird colourfully portrays the way in which so many women in Australian politics have been pursued with unprecedented enthusiasm, then dumped and discredited with equal intensity.<sup>17</sup>

In my transition to Federal politics, cartoonists depicted me as “Saint Carmen”, replete with halo and wings. The risks in this apparently benevolent portrayal are obvious and, not surprisingly, such a depiction infuriates some people. Former Prime Minister John Howard castigated me as a “grandstander” for claiming a moral superiority I did not have (although I made no such claims — I simply thought politics could be less adversarial). I have no doubt that his desire to take me down — as well as his own political ambitions — drove him to collude with Richard Court in setting up a Royal

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<sup>15</sup> Michelle Ryan and Alexander Haslam, ‘The glass cliff: Implicit theories of leadership and gender and the precariousness of women’s leadership positions’ in Birgit Schyns and James Meindl (eds), *Implicit leadership theories: Essays and explorations* (CT Information Age, 2005).

<sup>16</sup> Pippa Norris, ‘Women leaders worldwide: A splash of color in the photo op’ in Pippa Norris (ed), *Women, Media and Politics* (Oxford University Press, 1997).

<sup>17</sup> Baird, above n 1.

Commission to inquire into whether I had misled the WA parliament about my knowledge of a petition surrounding a dispute over an acrimonious divorce settlement. I was blamed for the young woman's later suicide. In her review of how the Australian press frames women politicians, Julia Baird concluded that part of my appeal was that I was a woman, different from men, 'who then expended considerable amounts of energy and millions of dollars to prove that she was not.'<sup>18</sup>

All this matters because these prejudices reinforce the perception that no matter what positions they reach, women are still outsiders in politics, residing at the margins; that women politicians are exceptions, "diversions from the serious male game of politics". While there has been a lot of change, maleness is still the norm. The set of attitudes, ideas, and interests that come with being male are taken as given. But it is critical, if we are to have an open and representative democracy, that men's privileged occupancy of positions of power and influence is no longer viewed as normal. It often appears that community attitudes are shaped by conclusions like Baird's: that women and power are like water and oil — they simply do not mix. Adamantly, repeatedly, and loudly insisting that women must be equal participants in society, and calling out sexism — whenever and wherever it surfaces — is the only way to render such conclusions obsolete.

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<sup>18</sup> Baird, above n 1, 220.

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## SCRIPTING RACED AND GENDERED MYTHS OF (UN)BELONGING

RACHEL KUO\*

*Oppression shows up in 'ambiguous and nebulous' forms that are more difficult to pinpoint and acknowledge.<sup>1</sup> Derald Wing Sue defines racial microaggressions as 'brief and commonplace daily verbal, behavioural, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group'.<sup>2</sup> These interactions take shape in everyday interactions concealed by benevolent intentions. Often also called "everyday racism" and "everyday sexism", the prevalence of microaggressions extend and maintain ongoing social injustices as they are tied to larger systemic disparities and violations of human rights. In the United States, despite multicultural metaphors of melting pots and salad bowls, the culture of middle class whiteness still dominates what is perceived as "normal". Such normalisation is quietly sustained through banal instantiations that police the boundaries of whiteness. These daily exclusions are part of our cultural narratives of gender and race. Below, I reflect on two commonly heard phrases from my own life, 'Where are you really from?' and 'You're so exotic', and how they reinforce racial, gender, and cultural assumptions that are also linked to history and policy.*

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<sup>1</sup> Derald Wing Sue et al, 'Racial Microaggressions in Everyday Life: Implications for Clinical Practice' (2007) 62(4) *American Psychologist* 271, 273.

<sup>2</sup> Ibid.

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## I INTRODUCTION

Oh, but where are you really from?

Glen Mills.

No, you must be mistaken. I mean originally.<sup>3</sup>

My identity, as tied to Asian and American, is often questioned. I do a lot of work negotiating between the two. As an Asian American,<sup>4</sup> ‘Where are you really from?’ is a question that comes up often. The other question I’m often asked is ‘What are you?’ or more specifically, ‘What kind of Asian are you?’ Sometimes, people try to guess where I am from. ‘Are you from China? Let me guess. You’re Korean? Japanese?’ Usually when people ask these questions, what they really want to know is that my parents immigrated to the United States from Taiwan. They need to know my ethnicity and my immigration history, thus isolating what is different about me, in order to begin interacting with me. As an Asian American woman, I experience specific forms of racialised sexism, where my experiences of racism are

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<sup>3</sup> Jennifer Sa-Rlang Kim, ‘Where Are You From?’ in Vickie Nam (ed), *Yell-Oh Girls! Emerging Voices Explore Culture, Identity, and Growing Up Asian American* (Harper Collins Press, 2001) 13.

<sup>4</sup> In this article, I am focusing primarily on my own experiences as an East Asian American women. However, it is important to note the unfortunate ways Asian women become homogenised by others as East Asian. There is an overlap here with experiences of South Asian, Southeast Asian, Middle Eastern, and Muslim women, but these communities have unique experiences which may go beyond the scope of this piece.



simultaneously tied to my experiences of gender and sexuality.<sup>5</sup> For example, disguised as a compliment, I am also often told, ‘You look exotic’.

On the surface, these questions and so-called compliments don’t seem particularly harmful. Rather, they seem more like innocuous expressions of someone’s well-intentioned curiosities. Yet, oppression shows up in ‘ambiguous and nebulous’ forms that are more difficult to pinpoint and acknowledge.<sup>6</sup> Racial microaggressions are ‘brief and commonplace daily verbal, behavioural, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group’.<sup>7</sup>

These interactions take shape in everyday interactions concealed by benevolent intentions. They insidiously make white supremacy a part of “everyday common sense” — a type of “folk theory” for people to interpret the world.<sup>8</sup> Microaggressions circulate within the routinised discourse of banal racism,<sup>9</sup> an inconspicuous kind of racism that reproduces and reifies racial difference.<sup>10</sup> Often also referred to as “everyday racism” and “everyday sexism”, microaggressions extend and maintain ongoing social injustices as they are tied to larger systemic disparities.

In the United States of America (‘US’), despite multicultural metaphors of melting pots and salad bowls, the culture of middle class whiteness still dominates what is perceived as “normal”. Such normalisation is quietly sustained through commonplace instantiations that police the boundaries of whiteness.<sup>11</sup> These daily exclusions are part of our cultural narratives of gender and race. Below, I briefly summarise how two commonly heard phrases from my own life, ‘Where are you really from?’ and ‘You’re so exotic’, link to historical and

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<sup>5</sup> Sexualised racism is another common term used in US law review literature to refer to this phenomenon.

<sup>6</sup> Derald Wing Sue et al, ‘Racial Microaggressions in Everyday Life: Implications for Clinical Practice’ (2007) 62(4) *American Psychologist* 271, 273.

<sup>7</sup> Ibid.

<sup>8</sup> Jane H Hill, *The Everyday Language of White Racism* (Wiley-Blackwell, 2008).

<sup>9</sup> Ibid; Hill examines discourse as the material presence of language-in-use through talk and text where ideas and knowledge circulate.

<sup>10</sup> Zhu Hua and Li Wei, “‘Where are you really from?’: Nationality and Ethnicity Talk (NET) in Everyday Interactions’ (2016) 7(4) *Applied Linguistics Review* 449, 450.

<sup>11</sup> See Nancy Leong, ‘Racial Capitalism’ (2013) 126 *Harvard Law Review* 2152.

legal frameworks around race and gender that continue to uphold the norm of whiteness and white supremacy.

## II SCRIPTING MYTHS

Mythic tropes like the perpetual foreigner, the model minority,<sup>12</sup> and the submissive “China Doll” and “Lotus Blossom” function via types of speech. As Roland Barthes writes:

It is the language which myth gets hold of in order to build its own system ... Myth is a pure ideographic system, where the forms are still motivated by the concept which they represent while not yet, by a long way, covering the sum of its possibilities for representation.<sup>13</sup>

Repetitive scripts index the process of racialisation and also function as glossing to explain the formation of racial metalanguages that conceptualise representations of “Asian-ness” in the US. Glossing, or speech events that define language or make one stretch of language equivalent to another, is a referential speech event that takes language as the referent or object of description.<sup>14</sup> For example, many Asian Americans, in their lived experiences of being racialised as perpetual foreigners, learn a particular script to defend their claims of “belonging” to the US and asserting their “American-ness”. The script is something similar to this:

‘Where are you from?’

‘Chicago.’

‘Where are you really from?’

‘Chicago?’

‘I mean, where are your parents from?’

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<sup>12</sup> See Ellen Wu, *The Color of Success: Asian Americans and the Origins of the Model Minority* (Princeton University Press, 2015).

<sup>13</sup> Roland Barthes, *Mythologies* (Annette Lavers trans, The Noonday Press, 1972) 114, 126 [trans of: *Mythologies* (first published in 1957)].

<sup>14</sup> Michael Silverstein, ‘Shifters, Linguistic Categories, and Cultural Description’ in Henry Selby and Keith Basso (eds), *Meaning in Anthropology* (University of New Mexico Press, 1976) 11–55.

This familiar script functions as a way to describe and reinforce the alienation of Asians in America as well as *feelings* of alienation.<sup>15</sup> Each time I enter this script, I understand precisely what the other person desires — as a prerequisite for interaction, they must place my ethnicity and my immigration history. As if knowing that particular detail about me satisfies their need to reconcile the very fact that my body is in a place that they don't expect it to be.

The demand that Asians must justify their belonging to one particular place affirms the alienation of Asians in the US and demonstrates the inability for someone to comprehend the presence of an Asian body in the US. Despite varying degrees of connection someone might feel towards so-called places of national origin, Asians are perceived to be 'bounded and bonded to a specific geographic location or particular context'.<sup>16</sup> There is a construction that Asian identities are tied to distant, faraway places. Given the pervasiveness of this script as a common shared experience among Asian Americans,<sup>17</sup> the "perpetual foreigner" trope is not only glossed but also indexed by generating individual feelings of alienation while also normalising xenophobic racism as acceptable. These scripts rely on indexical order to create micro and macro social frames.<sup>18</sup>

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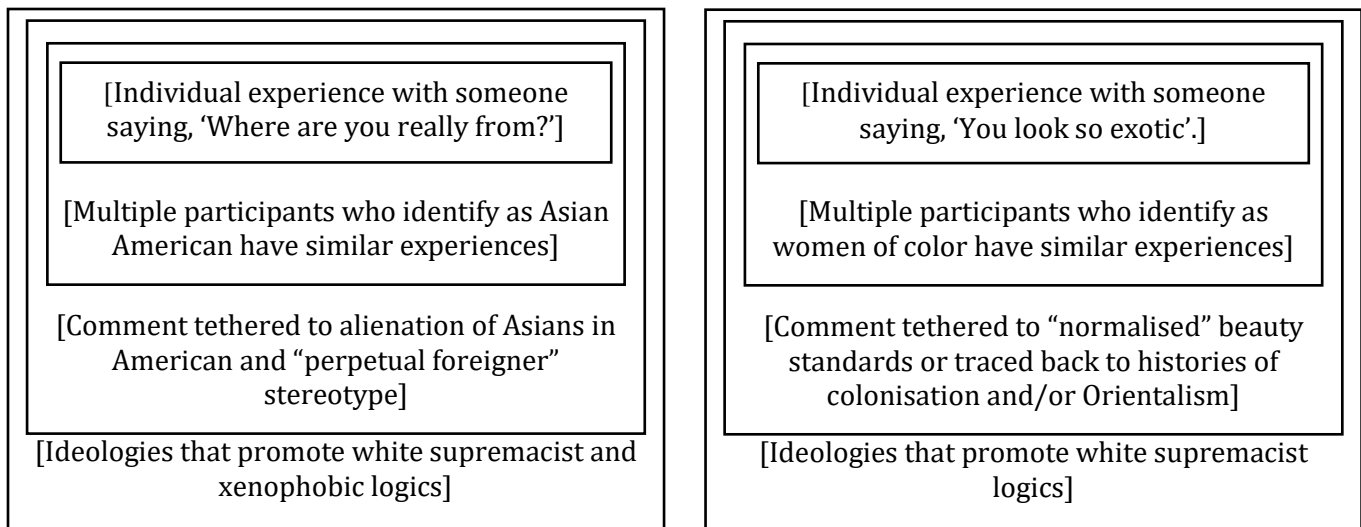
<sup>15</sup> See Kesaya E Noda, 'Growing Up Asian in America' in Asian Women United of California (ed) *Making Waves: An Anthology of Writings By and About Asian American Women* (Beacon Press, 1989) 24–251.

<sup>16</sup> Jennifer Ann Ho, *Racial Ambiguity in Asian American Culture* (Rutgers University Press, 2015) 1–21.

<sup>17</sup> Ibid; Ho describes an opening scene from Ruth Ozeki's 1998 novel, *My Year of Meats*, to demonstrate the 'spaced, placed, and raced' construction of Asian-ness in the US cultural imagination. The protagonist Jane Takagi-Little encounters an unnamed white character where he asks her a series of questions including, 'Where are you from anyway?'; 'No, I mean where were you *born*?'; and 'No, no, *what* are you?'

<sup>18</sup> Michael Silverstein, 'Indexical Order and the Dialectics of Sociolinguistic Life' (2003) 23(3) *Language & Communication* 193.

Through chains of analogies, individual experiences are connected to institutional and ideological frameworks. For example:



**Figures 1 and 2:** Indexical orders of micro to macro social frame for 'Where are you really from?' and 'You look so exotic'.

In addition to invalidating the everyday lived experiences of Asian Americans unrepresented by mainstream culture while also failing to represent the many different histories that make up Asian American identity, the question 'Where are you really from?' and the comment 'You look so exotic' conceal and reinforce historical legacies of xenophobic racism and sexual imperialism. Despite the Americas being a geographically and nationally diverse region, being "American" has become code for being white and being a US citizen. Due to my appearance as "non-white" — rather "definitely" Asian — I must always qualify my "American" identity as Asian American. My ethnicity is imposed upon me. These questions are reminders that my identities and my experiences are mismatched with what is expected and "normal".

### III 'WHERE ARE YOU REALLY FROM?': ON YELLOW PERIL AND XENOPHOBIC RACISM

So our food seems smelly and weird, we are rumoured to eat dogs, we all look "the same", our names are too hard to pronounce, and/or we are here to steal jobs. These tropes seem silly until we remember Vincent Chin, beaten to death with a baseball bat in 1982 by two

white men;<sup>19</sup> Japanese international student Yoshihiro Hattori, shot to death in 1993 for going to the wrong house on his way to a party;<sup>20</sup> Kuanchung Kao, shot to death in 1997 because a police officer was scared of his ‘martial arts moves’;<sup>21</sup> and Cau Bich Tran, who suffered from mental illness and was shot by police while he was holding a vegetable peeler in 2003.<sup>22</sup>

Xenophobia, or fear of perceived foreigners, specifically tied to anti-Asian sentiments, is not a new phenomenon. The persistence of the question ‘Where are you really from?’ shows the perpetuity of how “Asian-ness” indexes “foreign-ness”.<sup>23</sup> For many Asians in the US, their lived experiences of being racialised as perpetual foreigners are affected by similar questions that reinforce the idea, ‘You don’t look like you’re from around here’. More extremely, Asians may be told to ‘go home’. There are many stereotypes, generalisations, and suspicions about Asian Americans that paint Asians as forever “alien”, which is also the US government’s official term within immigration policy for non-citizens in the United States. As our bodies are linked with geographic and spatial distance, racial interpellations of Asian American identity are often temporally tied to US investments in international relations and foreign policies. These frame us as simultaneously excluded yet in need of “containment”. Ideologies about the “right” kind of citizen become marked legally, economically, and also morally.<sup>24</sup>

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<sup>19</sup> See *United States v Ebens*, 800 F 2d 1422 (6<sup>th</sup> Cir, 1985); in this often-cited case, Chin was a Chinese American murdered by Ronald Ebens and Michael Nitz. Both Ebens and Nitz worked in the auto industry and were recently laid off. The Detroit auto industry had steadily been losing market shares to the Japanese auto industry. Chin neither worked in the auto industry, nor was he Japanese.

<sup>20</sup> ‘Defense Depicts Japanese Boy as Scary’, *New York Times* (online), 21 May 1993 <<http://www.nytimes.com/1993/05/21/us/defense-depicts-japanese-boy-as-scary.html>>.

<sup>21</sup> Scott Winokur, ‘Kuanchung Kao’s Political Legacy’, *San Francisco Gate*, 9 September 1997 <<http://www.sfgate.com/news/article/Kuanchung-Kao-s-political-legacy-3101781.php>>.

<sup>22</sup> See Andrea Ritchie, ‘Law Enforcement Violence against Women of Color’ in Incite! (ed) *Color of Violence: The Incite! Anthology* (South End Press, 2006) 138–156.

<sup>23</sup> See, eg, E San Juan, Jr, ‘The Predicament of Filipinos in the United States: ‘Where are You From? When are You Going Back?’ in Karin Aguilar-San Juan (ed) *The State of Asian America: Activism and Resistance in the 1990s* (South End Press, 1994) 205–219; see also Frank Wu, ‘Where are You Really From? Asian Americans and the Perpetual Foreigner Syndrome’ (2002) *Civil Rights Journal* 16, 16–22; see also Mai Anh Huynh, ‘Double-A’ in Han Arar and Hsu John (eds) *Asian American X: An Intersection of Twenty-First Century Asian American Voices* (University of Michigan Press, 2004) 70–75.

<sup>24</sup> See Paula Chakravartty and Denise Ferreira de Silva, ‘Accumulation, Dispossession, and Debt: The Racial Logic of Global Capitalism — An Introduction’ (2012) 64(3) *American Quarterly* 361, 361–385: ‘Raciality and historicity attribute to persons and places to determine their legitimacy as juridical, economic, and ethical entities — both natural history and science of life take geographic and bodily traits as signifiers or mental (moral and intellectual) characteristics’.

For Asian Americans, moral dichotomies of good versus bad — good/bad immigrant, model minority/perpetual foreigner — can be mapped along our particular usefulness to the federal administration at a given historical moment. The dual racialisation of some Asians as exceptional “model minorities” and as backwards “perpetual foreigners” historically complements one another and provides the basis for Asian exclusion or assimilation in the United States.<sup>25</sup>

Here, I focus primarily on a short history of Yellow Peril to offer one context around racialisation, morality, and citizenship in order to unpack the question, ‘Where are you really from?’<sup>26</sup> Yellow Peril specifically generated terror and fear towards East Asians as economically predatory and also created the threatening perception of Asians as sexually immoral and devious, leading to policies like the *Page Act of 1875* and *Chinese Exclusion Act of 1882* that specifically aimed to keep Chinese immigrants out of the US.<sup>27</sup>

During the 1800s, most Chinese people in the US were immigrant men working as low-cost labourers. Brought to the Americas to supplement and replace slave labour, the contract worker occupied an ambiguous, intermediary position that obscured the labour performed by enslaved people while also being distinguished from enslavement.<sup>28</sup> In a liberal narrative of overcoming slavery through freedom and emancipation, the contract worker, or “coolie”, functioned as a tool — his material labour made the possibility of liberty attainable.

In examining the role of Chinese women, historically their presence as imports could establish the capacity for Chinese workers to create a reproductive family community. In this way, Chinese people could become useful and valuable as a ‘middle’ class through women

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<sup>25</sup> See Colleen Lye, *America's Asia: Racial Form and American Literature, 1893-1945* (Princeton University Press, 2004); Iyko Day, *Alien Capital: Asian Racialization and the Logic of Settler Colonial Capitalism* (Duke University Press, 2016).

<sup>26</sup> Arguably, histories of Yellow Peril have been excessively narrated, especially as compared to discussions of how xenophobic racism impacts South and Southeast Asian Americans. While recent events circulating around the intersection of Islamophobia and xenophobia are particularly urgent to cover, I picked this particular history as it more directly links to perceptions of how my identity and body as an East Asian woman are read.

<sup>27</sup> *Page Act of 1875*, 141, 18 Stat 477 (1873); *Chinese Exclusion Act of 1882*, 126, 22 Stat 58 (1882).

<sup>28</sup> See Lisa Lowe, *Intimacies of Four Continents* (Duke University Press, 2015).

and children, thus also securing a 'racial barrier' between white colonists and black slaves.<sup>29</sup> Chinese women's sexuality therefore became a tool for Western ideals of civility and family. Yet many Chinese women who immigrated to the US around that time were also deceived and kidnapped, or trafficked into serving this group of Chinese men. Eventually, they also established white clientele, and racial stereotypes began to emerge that Chinese women were luring white men towards sin, which expanded the trope of people in the sex industry being irresponsible and dangerous.<sup>30</sup>

Perceptions of racial difference became entangled with questions of national identity and hence eligibility for citizenship. The discourse of Yellow Peril started to circulate after Chinese labourers migrated to white settler colonies.<sup>31</sup> Chinese contract workers were criticised for allegedly being unfair job competition and also threatening American ideas of independence and freedom. As Asian bodies were intended to create exclusive and disposable labour as a way to shore up value for white settlers, the continued presence of Asians in the US became threatening. In 1882, the *Chinese Exclusion Act* was passed,<sup>32</sup> restricting the entry of Chinese workers into the United States and introducing the process of "naturalisation" into citizenship status. In the 1890s, the Government also mandated a Chinese registry.

Citizenship worked as a technology of racialisation and gendering.<sup>33</sup> Other historical acts, like the *Gentlemen's Agreement of 1907*, discontinued passports for Japanese labourers to the US and Hawaii. However, it allowed women and children to join husbands, resulting in over 10 000 women emigrating to the US as arranged "picture brides".<sup>34</sup> This practice was looked

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<sup>29</sup> Ibid.

<sup>30</sup> See Aki Uchida, 'The Orientalization of Asian Women in America' (1998) 21(2) *Women's Studies International Forum* 161.

<sup>31</sup> On a history of Chinese invasive fiction in American print and visual culture in the 1880s, as tied to foreign immigration, industrial capitalism, and empire, see Edlie L Wong, 'In a Future Tense: Immigration Law, Counterfactual Histories, and Chinese Invasion Fiction' (2014) 26(3) *American Literary History* 1.

<sup>32</sup> *Chinese Exclusion Act of 1882*, 126, 22 Stat 58 (1882).

<sup>33</sup> See Lisa Lowe, *Immigrant Acts: On Asian American Cultural Politics* (Duke University Press, 1996) 11; see also Chandra Talpade Mohanty, 'Cartographies of Struggle' in Ann Russo Mohanty and Lourdes Torres (eds) *Third World Women and the Politics of Feminism* (Indiana University Press, 1991).

<sup>34</sup> See Kei Tanaka, 'Marriage as Citizen's Privilege: Japanese Picture Marriage and American Social Justice' (2009) 31 *Nanzan Review of American Studies* 131; At 133, Kei notes that picture brides comprised only about

down upon as decidedly immoral by white Americans, adding to anti-Japanese sentiment at that time. Yet, after World War II and the domestic internment of over 110 000 Japanese Americans,<sup>35</sup> the US Congress passed the *War Brides Act*,<sup>36</sup> where US soldiers serving abroad were allowed to bring Japanese wives home. Many imagined Japanese wives to be virtuous homemakers.<sup>37</sup> Today, the fantasy of having an overseas Asian wife continues through the “mail order bride” industry, which continues to both commercialise foreign women and put them in vulnerable positions.<sup>38</sup> In this industry, women can literally be returned and exchanged.<sup>39</sup> We will explore the legacies and lived impacts of Orientalist fantasies and colonial sexual mythologies around Asian women in the next section.

#### IV ‘YOU LOOK SO EXOTIC’: HISTORICAL AND CULTURAL LEGACIES OF SEXUAL IMPERIALISM

Your eyes are like almonds. I want your hair! Asian women are all so beautiful. I just want to try  
having sex with an Asian woman.<sup>40</sup>

While not all women of colour experience racialised sexism in exactly the same way, as women of colour, our bodies are still constantly under scrutiny. Exotification comes with fetishisation and fixation on looks and their currency, such as skin colour, hair, body size, eye shape, or other body parts. This appears in ways that people may obsess over Asian women’s almond eyes, silky black hair, and petite, delicate figure.<sup>41</sup> This also appears in ways that our

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one quarter of the population of immigrant women, but their arrival in large groups was so public that they came to represent all Japanese immigrant women.

<sup>35</sup> See, eg, Lye, above n 25; Wu, above n 12; see also Lawson Fusao Inada (ed), *Only What We Could Carry: The Japanese American Internment Experience* (Heyday Books, 2000).

<sup>36</sup> *War Brides Act of 1945*, 59 Stat 659 (1945).

<sup>37</sup> See Evelyn Nakano Glenn, *Issei, Nisei, War bride: Three Generations of Japanese American Women in Domestic Service* (Temple University Press, 1986).

<sup>38</sup> See Tomoka Nakamatsu, ‘Faces of “Asian Brides”: Gender, Race, and Class in the Representations of Immigrant Women in Japan’ (2005) 28 *Women’s Studies International Forum* 405.

<sup>39</sup> For further discussions on contemporary changes in immigration patterns and the feminisation of Asian immigration and how these trajectories produce different lived experiences and stratifications, see Linda Trinh Võ and Marian Sciachitano (eds), ‘Introduction: Moving beyond “Exotics, Whores, and Nimble Fingers”: Asian American Women in a New Era of Globalization and Resistance’ (2000) 21(1/2) *Frontiers: A Journal of Women Studies* 1.

<sup>40</sup> These are quotes from my own personal experience.

<sup>41</sup> See, eg, Uchida, above n 30; Tony Rivers, ‘Oriental Girls’ (1990) *Gentleman’s Quarterly* (British ed) 158 cited in Sunny Woan, ‘White Sexual Imperialism: A Theory of Asian Feminist Jurisprudence’ (2008) 14(2) *Washington and Lee Journal of Civil Rights and Social Justice* 279.



bodies are oftentimes simultaneously seen as unwanted, such as Asian eyes being thought of as slanted, small, and sinister. Historically, Asian American women have been limited to 'racialized and sexualized representations as evil dragon ladies, exotic, erotic lotus blossoms, whores with hearts of gold, submissive mail-order brides, and compliant model minorities'.<sup>42</sup> Western masculine fantasy imagines Asian women as hyperfeminine and hypersexual and adopts racial stereotypes of Asian-ness, like the model minority myth, in an attempt to fix Asian women as sexually compliant and passive.<sup>43</sup> Below, I unpack several cultural and historical legacies of sexual imperialism as tied to the statement, 'You look so exotic!'<sup>44</sup>

The "Lotus Blossom" and "China doll" stereotypes objectify East Asian women as compliant, subservient, and delicate. Similarly, the current appropriations and historically inaccurate reductions of "geisha" into a sexualised identity also project fantasies of Asian women as commodities of sex. Imagined as decorative objects or toys, these tropes commodify Asian women into passive objects — made to be seen, played with, or touched. The emphasis of these stereotypes on submission and docility paints them as lacking agency and capacity to give consent. These assumptions can't possibly imagine Asian women to make their own decisions or have power over their bodies.

White supremacy exploits race, gender, and sexuality as commodity culture. Bell Hooks analyses desire, sexuality, and the "Other" through the British phrase, 'getting a bit of the other'; she discusses a scene in which a group of young, white men talk about their plans to try having sex with as many different women across non-white racial or ethnic groups as possible.<sup>45</sup> These young men perceive having sex with the "Other" as a way to engage in new,

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<sup>42</sup> Võ and Sciachitano, above n 39, 7.

<sup>43</sup> See Sumi K Cho, 'Converging Stereotypes in Racialized Sexual Harassment: The Model Minority Meets Suzie Wong' in Adrienne Katherine Wing (ed) *Critical Race Feminism: A Reader, Second Edition* (New York University Press, 2003) 349–366.

<sup>44</sup> "Exotic" has also been an analytic in critical mixed race studies and Black feminist thought. See eg, Bell Hooks, *Black Looks: Race and Representation* (South End Press, 1992); Chandra D L Waring, 'They See Me as Exotic... That Intrigues Them: Gender, Sexuality and the Racially Ambiguous Body' (2013) 20(3/4) *Race, Gender & Class* 299; Rebecca Chiyoko King-O'Riain, 'Multiracial' in Cathy J Schlund-Vials, Linda Trinh Võ, and Scott Wong (eds) *Keywords for Asian American Studies* (New York University Press, 2015) 174, 174–177.

<sup>45</sup> Bell Hooks, 'Eating the Other: Desire and Resistance' in *Black Looks: Race and Representation* (South End Press, 1992) 21–39.

different experiences — the exotic turns ethnicity into ‘spice, seasoning that can liven up the dull dish that is mainstream white culture’.<sup>46</sup> Edward Said’s theory of Orientalism offers a useful starting framework for examining the specific exotification of Asian women. As “Oriental” was used as an adjective by the West to describe the East, Said describes Orientalism as both a system of knowledge as well as imperial project and practice. As an invention, Orientalism is ‘willed human work’ where the intelligibility and identity of the so-called “Orient” was a ‘series of knowledgeable manipulations in which the Orient was identified with the West’.<sup>47</sup> The ‘orientalising’ of Asian women is a historical process where race, gender, class, immigration status, and empire all play a role.<sup>48</sup> The ‘eroticising of geography’ gendered projects of imperialism.<sup>49</sup> Since trade routes opened up in the 1200s, notably the Silk Road, white adventurers sought to find exotic goods in the Far East — not only spices and fabrics, but women as well. As seemingly faraway cultures and places begin being defined by objects and artefacts, these so-called exotic aesthetics end up getting imposed onto people and their physical appearance. As Ella Shohat writes: ‘From the early days of the voyages of discovery, through the adventures on the imperial frontier... globalization has long been embedded in gender issues and sexual discourses.’<sup>50</sup>

The ‘East meets West’ narrative is centuries overdone, and both literature and film play a role in the historical and ongoing construction of Asian women as subservient.<sup>51</sup> In 1887, Pierre Loti wrote the novel, *Madame Chrysanthème*, about a French officer going to Japan to find a ‘dainty’ and ‘delicate’ woman ‘not much bigger than a doll’.<sup>52</sup> This becomes the main

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<sup>46</sup> Ibid, 21.

<sup>47</sup> Edward Said, *Orientalism* (1st Vintage Books, 1978) 48; see also Sylvia Shin Huey Chong, ‘Orientalism’ in Cathy J Schlund-Vials, Linda Trinh Võ, and Scott Wong (eds) *Keywords for Asian American Studies* (2015) 182–185.

<sup>48</sup> See Uchida, above n 30.

<sup>49</sup> Ella Shohat, ‘Introduction’ in *Talking Visions: Multicultural Feminism in a Transnational Age* (MIT Press, 2001) 1–63.

<sup>50</sup> Ibid, 49.

<sup>51</sup> See, eg, Gina Marchetti, *Romance and the “Yellow Peril” Race, Sex, and Discursive Strategies in Hollywood Fiction* (University of California Press, 1994); see also Patricia Park, ‘From Chrysanthème to Bootiefly’, *Bitch Magazine* (online), 2014 <<https://bitchmedia.org/madame-butterfly-effect-timeline>>.

<sup>52</sup> Patricia Park, ‘The Madame Butterfly Effect: Tracing the History of a Fetish’, *Bitch Magazine* (online), 30 July 2014 <<https://bitchmedia.org/article/the-madame-butterfly-effect-asian-fetish-history-pop-culture>>.

basis for Puccini's 1904 opera, *Madame Butterfly*.<sup>53</sup> The gist is that an American soldier travels to Japan and takes on a Japanese wife. He leaves her to return to legitimately marry a white American woman, and she ends up killing herself. This storyline repeats itself in various films with settings across locations throughout Asia.<sup>54</sup> Later, the 1989 musical, *Miss Saigon*, resets the narrative in Vietnam.<sup>55</sup> The problem with the *Miss Saigon* and *Madame Butterfly* storylines is that in these novels, plays, and films, Asian women from different places end up homogenised and literally depicted as ornamental objects created for the sole purpose of white men's pleasure. Later works like *Sayonara* and *The World of Suzie Wong* embellished the "Western soldier seeks Asian bride" narrative by adding a saviour element — Asian women needed to be rescued and protected by white men.<sup>56</sup> As it turns out, these fictional tales and stories are also a big part of history.

Sunny Woan traces this exotification of Asian women to histories of white sexual imperialism in the context of wars in East Asia, including the Philippine-American War, World War II, and the Vietnam War. Throughout history, sexual violence against women is used as a wartime weapon and women are seen as part of the "spoils of war". During World War II, Japan enslaved over 200 000 women across Asia, including Korea, China, Taiwan, Indonesia, and the Philippines to provide sex for its troops in areas called 'comfort stations'.<sup>57</sup> After Japan surrendered to the United States, US occupation authorities approved of continuing the system for US troops, setting up a network of brothels under a "Recreation and Amusement Association". Military presence impacts local economies — for women who are poor, the sex

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<sup>53</sup> Maria Degabriele, 'From Madame Butterfly to Miss Saigon: One hundred years of popular orientalism' (1996) 10(2) *Critical Arts* 105, 106.

<sup>54</sup> Such films include *Toll of the Sea* (1922) starring Anna May Wong, who plays the character, 'Lotus Flower'.

<sup>55</sup> See Celine Parreñas Shimizu, 'The Bind of Representation: Performing and Consuming Hypersexuality in *Miss Saigon*' (2005) 57(2) *Theatre Journal* 247.

<sup>56</sup> Park, above n 51; see also Peter Kwan, 'Invention, Inversion and Intervention: The Oriental Woman in *The World of Suzie Wong*, *M. Butterfly* and *The Adventures of Priscilla, Queen of the Desert*' (1998) 5 *Asian American Law Journal* 99; Jing Yang, 'The Reinvention of Hollywood's Classic White Saviour Tale in Contemporary Chinese Cinema: *Pavilion of Women* and *The Flowers of War*' (2014) 28(2) *Critical Arts* 247.

<sup>57</sup> UN Commission on Human Rights: Subcommittee on the Promotion and Protection of Human Rights, *Update to the Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, 52<sup>nd</sup> sess, Prov Agenda Item 6, UN Doc E/CN.4/Sub.2/2000/21 (6 June 2000) 17, cited in Mary De Ming Fan, 'The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery' (2002) 27(2) *Yale Journal of International Law* 396.

industry then offers an opportunity to make a living. US military presence in Asia led to the creation of local sex industries as well as sex trafficking rings.<sup>58</sup>

United States participation in wars against and within Japan, Korea, the Philippines, and Vietnam have created national imagery that is represented in US pop culture and is subsequently internalised by any Americans who may not really know any Asians or Asian Americans. Asian nations and the people therefrom are then perceived as both dangerous as well as desired objects of conquest. Some of the first encounters soldiers ever had with Asian women were centred on the belief that these women were there to serve them sexually. Many women suffered horrible working conditions including assault and violence; however, institutions became more interested in ensuring women as commodities to serve military clientele than in the women's wellbeing. This historical violence carries on its legacy today in different, large-scale ways, such as in international human trafficking or the pornography industry. For example, in a content analysis study of 31 pornography sites depicting the assault and torture of women, more than half showed Asian women as the victim and one-third showed white men as the perpetrator.<sup>59</sup>

Women of colour are depicted as always wanting sex or being available for sex, but not in a way that actually reflects our desire, our wants, or our needs. Hypersexualisation is often imposed as hyper-heterosexuality — erasing the many ways women of colour express and identify their sexuality.<sup>60</sup> The myths that equate “exotic” with promiscuous are embedded within a system of rape culture — cultural practices that excuse or tolerate sexual violence by ignoring, trivialising, or normalising it. The ideology behind “exotic” is rooted and entrenched in the legitimisation of violence. While on the surface it seems complimentary, and at worst a casual faux pas, the historical and current impact of exotifying Asian women has targeted us for sexual violence. Further, these expressions of violence and abuse go

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<sup>58</sup> Woan, above n 41.

<sup>59</sup> Jennifer Lynn Gossett and Sarah Byrne, ‘Click Here: A Content Analysis of Internet Rape Sites’ (2002) 16(5) *Gender and Society* 689, cited in Sunny Woan, ‘White Sexual Imperialism: A Theory of Asian Feminist Jurisprudence’ (2008) 14(2) *Washington and Lee Journal of Civil Rights and Social Justice* 279, 292.

<sup>60</sup> See Shimizu, above n 55, 248: ‘I define hypersexuality as the inscription of a pathologically intense and excessive propensity for sexuality as if it were a natural characteristic, one directly linked to a particular raced and gendered ontology.’

unchecked with stereotypes that lead to real, lived harms. As rape myths are reinforced and enabled through racial history and stereotyping, the conditions that make Asian American women more vulnerable to sexual violence are enabled because of the way our culture evaluates race, gender, and sexuality.<sup>61</sup>

#### V TALKING BACK: ON COMPLICITY AND RESISTANCE

While the irking question of ‘Where are you *really* from?’ and comments of exoticness are often used to remind Asian Americans we’re not really from “here”, wherever here is, this question also warrants my own reflection on my history of migration and my relationships with land and space. Racially categorised as a “perpetual foreigner”, my belonging on this land, to this nation, and in this space, is constantly in question. I still struggle to make sense of what being Taiwanese American really means as my relationship to nationhood and space has been about trying to seek belonging and acceptance. I am not seen as fully American, yet when I visit Taiwan, it is clear that I am not Taiwanese. I seem to always be from somewhere else. My reply to ‘Where are you *really* from?’ has often been to assert and prioritise my belonging to the United States and reinforce my claims of belonging through my citizenship.

In the Americas, with the exception of Indigenous peoples, nobody is really from “here”. We’re all *really* from somewhere else. For some of us, our families immigrated here by choice at some point in history. Some people migrated here to seek refuge because their homes were no longer safe. Others came here because they were forcibly enslaved. Across these various histories, the reasons for ending up in the US can be painful and traumatic, liberating, both, or many other reasons in between. White supremacy has never completely accepted the presence of Asians in the United States, and history demonstrates this through institutionalised exclusion, internment, objectification, and hate crimes.<sup>62</sup> Yet, despite knowing that I am unwanted, I still find myself thinking — hoping — that if I can change the “non-American” parts of myself, I can finally experience the benefits of belonging. And so, I attempt to remove my “Asian-ness”.

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<sup>61</sup> Incite!, *Dangerous Intersections* <<http://www.incite-national.org/page/dangerous-intersections>>.

<sup>62</sup> Soya Jung, ‘On Asian American Privilege’ *Race Files* (online), 23 January 2014 <<http://www.racefiles.com/2014/01/23/on-asian-american-privilege>>.

When I am asked the question, “Where are you really from?” I purposefully erase my roots and reply that I am from the United States. The way I construct my identity and prioritise my “American-ness” is dependent on, and complicit in, historical and ongoing projects of US imperialism and colonialism,<sup>63</sup> which also structure my experiences of identity. Colonisation involves the extension of domination of one group over another, targeting Native groups from US states and territories impacted by global capitalism and groups indigenous to lands they were stolen or displaced from.<sup>64</sup> In the US, colonialism involves the global extension and expansion of US power in overseas sites like Asia and the Pacific Islands, as well as control over Indigenous peoples and nations.

For Asian Americans, we have both hoped for and lamented the US as both a site of liberation and of oppression. Simultaneously, we also constantly negotiate our many different experiences of power and privilege. Despite a complicated relationship with this country, for those of us who hold the privilege of US citizenship and call the United States home, we must find new ways to locate belonging and continue fighting towards justice and equity in ways that divest from “American-ness”. While protecting whiteness is not new, with the current US administration it becomes particularly urgent for Asian Americans to rethink what our “American-ness” means as both a possibility and an obstacle to dismantle white supremacy in ways that link together anti-black racism, settler colonialism, and xenophobia. We must ask difficult questions about how our own political and economic opportunities are haunted, limited, yet also enabled by histories of settler colonisation, Black enslavement, and US imperialism.

It can be really difficult to think through and admit that this space is contested space — that we are tangibly contributing to the racialised oppression of another group of racially marginalised people. While all communities of colour are oppressed by white supremacy, the histories of oppression are not the same and cannot be compared. This is not to erase, ignore, or deny ways that settler colonialism has also disenfranchised, harmed, and killed

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<sup>63</sup> Bonita Lawrence and Enakshi Dua, ‘Decolonizing Antiracism’ (2005) 32(4) *Social Justice* 120, 120–136.

<sup>64</sup> Linda Tuhiwai-Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2<sup>nd</sup> ed, 2012).

people of colour throughout history. For example, transatlantic slavery is a product of both white supremacy and settler colonialism. It is an imperialist project that took Indigenous people from their land and sent them to places that were stolen from other groups of Indigenous people. Slavery is stolen people forced onto stolen land.<sup>65</sup>

Our attempts to transform and improve our own oppressive conditions can make us complicit in the oppression of others. As our experiences are bound up in white supremacy and imperialism, we need to pay attention to how they support themselves and each other. In the US, white supremacy is supported by anti-black racism, racism that treats different communities of colour as perpetual foreigners, and the elimination of Native peoples.<sup>66</sup> As an Asian American, I could have the illusion of freedom and equality by participating in both anti-Black racism and the displacement of Indigenous sovereignty.<sup>67</sup> In addressing my own responses to experiences of “everyday racism”, I also need to be attentive in how I participate in other cultural narratives premised around histories and policies of exclusionary practice. While state and institutional power is necessary in providing for everyday, material conditions, if we start letting go of the idea that recognition of our “American-ness” is the only possibility towards freedom, perhaps then we can imagine new pathways to freedom that connect us to the movements for black lives, Native sovereignty, and immigrant rights.

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<sup>65</sup> Tuhiwai-Smith, above n 64, 27.

<sup>66</sup> See Andrea Smith, ‘Heteropatriarchy and the Three Pillars of White Supremacy: Rethinking Women of Color Organizing’ in Incite! (ed) *Color of Violence* (Duke University Press 2006) 66-73; Patrick Wolfe, ‘Settler Colonialism and the Elimination of the Native’ (2006) 8(4) *Journal of Genocide Research* 387.

<sup>67</sup> Soya Jung, ‘The Racial Justice Movement Needs a Model Minority Mutiny’, *Race Files* (online), 13 October 2014 <<http://www.racefiles.com/2014/10/13/model-minority-mutiny/>>.

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# GENDER, CULTURE, AND THE LEGAL PROFESSION: A TRAFFIC JAM AT THE INTERSECTION

TUANH NGUYEN AND REYNAH TANG\*

*The legal profession is an old and conservative one, which has had difficulty addressing diversity and inclusion, particularly in relation to gender. In this article, the issue of gender, culture, and the legal profession is tackled from two complementary perspectives: Tuanh Nguyen shares her journey as both an Asian Australian and a female in the law, while Reynah Tang reflects on the state of cultural diversity in the Australian legal profession and the reasons for the lack of such diversity. It is argued that the legal profession cannot wait for gender diversity to be solved, but rather that it is vital that cultural diversity be considered in parallel, and that concrete action be taken to address the barriers that exist. It should be acknowledged that this article examines cultural diversity from an Asian Australian perspective, but such issues are not restricted to people from Asian cultural backgrounds, as evidenced by the lack of diverse representation across racial/ethnic groups, and the formation of associations focused on promoting cultural diversity for Hellenic, Italian, Muslim, and French lawyers.*

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\* Tuanh Nguyen is President, and Reynah Tang is Immediate Past President, of the Asian Australian Lawyers Association ('AALA'). The AALA was established in 2013 to promote cultural diversity in the legal profession, with a focus on Asia.

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## I AN OLD AND CONSERVATIVE PROFESSION

The legal profession is among the oldest of the professions, and also probably the most conservative. It has a real problem with diversity and inclusion.

It was in 1905 — only a few years after Federation — that Flos Greig became the first woman to be admitted as a barrister in Australia at the Victorian Bar.<sup>1</sup> That was about a year or so after the admission of the first barrister of Chinese descent to practise in Australia, William Ah Ket.<sup>2</sup> However, over a century later, while women now represent about half the legal profession and more than 60 per cent of incoming law graduates, they still represent a minority of partners in

<sup>1</sup> Ruth Campbell and J Barton Hack, Greig, *Grata Flos Matilda (1880-1958)* (2006) Australian Dictionary of Biography Online <<http://adb.anu.edu.au/biography/greig-grata-flos-matilda-7049>>.

<sup>2</sup> John Lack, *Ah Ket, William (19876-1936)* (2006) Australian Dictionary of Biography Online <<http://adb.anu.edu.au/biography/ah-ket-william-4979>>.

law firms, barristers, and members of the judiciary.<sup>3</sup> The number of Asian Australians in the senior echelons of the legal profession is even lower.

While barely a day goes by without some analysis of the gender disparities in the legal profession, there has barely been any discussion in Australia about cultural diversity nor the extent to which the two aspects can intersect, which for Asian Australian women can be visualised as an opaque — and perhaps impenetrable — glass coated bamboo ceiling.<sup>4</sup>

There is something of a traffic jam for diversity in the law, with cultural and other aspects of diversity being held up, until gender equality has been cleared. This is most evident in the National Model Gender Equitable Briefing Policy issued by the Law Council of Australia ('LCA') in 2016 that sets hard targets for the briefing of female barristers. While recognising 'the desire to develop equitable briefing policies that represent broader aspects of diversity, including with regards to race and other attributes', the policy merely goes on to provide that 'the targets will be reviewed in July 2018 and the Law Council will continue ongoing discussions with its constituent bodies to monitor the impact of the policy and consider whether [sic] its broader application beyond gender' is required.<sup>5</sup> This is disappointing. As made clear in a 2016 report by the Australian Human Rights Commission ('AHRC'):

To wait until gender equality is achieved within the workplace would place the issue of cultural diversity on indefinite hold. In any case, the different dimensions of diversity frequently intersect. Efforts to improve the

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<sup>3</sup> Law Society of New South Wales, *2014 Profile of the Solicitors of New South Wales* (March 2015) The Law Society of New South Wales <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/942948.pdf>>; College of Law, *Encouraging gender diversity in the legal profession* (13 March 2014) College of Law <<https://www.collaw.edu.au/insights/encouraging-gender-diversity-legal-profession/>>.

<sup>4</sup> Lara Bullock, *A long way to go on the road to diversity* (16 September 2016) Lawyers Weekly <<http://www.lawyersweekly.com.au/podcasts/19575-podcast-a-long-way-to-go-on-the-road-of-diversity>>; Samantha Woodhill, 'Firm announces ambassador ahead of equal pay day', *The Australasian Lawyer* (online), 7 September 2016 <[http://www.australasianlawyer.com.au/news/firm-announces-ambassador-ahead-of-equal-pay-day-222948.aspx?keyword=gender diversity](http://www.australasianlawyer.com.au/news/firm-announces-ambassador-ahead-of-equal-pay-day-222948.aspx?keyword=gender%20diversity)>.

<sup>5</sup> Law Council of Australia, *National Model Gender Equitable Briefing Policy* (June 2016) Law Council of Australia <[http://www.lawcouncil.asn.au/lawcouncil/images/National\\_Model\\_Gender\\_Equitable\\_Briefing\\_Policy\\_-\\_June\\_2016.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/National_Model_Gender_Equitable_Briefing_Policy_-_June_2016.pdf)>.



advancement of culturally diverse talent may also contribute to improve gender representation in leadership (given that we can assume at least half of such talent will be female).<sup>6</sup>

In this paper, the issue of gender, culture, and the legal profession is tackled from both a qualitative (personal) and quantitative (data) perspective.

The central thesis of this paper is that it is vital for cultural diversity in the legal profession (including, but not limited to, Asian Australians) to be addressed, in parallel with steps being taken on gender and others aspects of diversity. As eminent jurist, the Hon Michael Kirby AC, CMG, said when launching the New South Wales branch of the Asian Australian Lawyers Association ('AALA'):

Law is not an ordinary profession ... Law is about the values that inform what we do, how we do it and outcomes ... therefore it's more important in law to reflect the diversity of values than it is in just about anywhere else because law is about power ... And if values affect the exercise of power, it is very, very important that the diversity of values and the experience of backgrounds should be reflected.<sup>7</sup>

## II FROM LEAKY BOAT TO LAW FIRM: A PERSONAL NARRATIVE BY TUANH NGUYEN

### *A A Family's Journey*

As my name suggests, my family's heritage originates from Vietnam. Both of my parents grew up in South Vietnam and whilst they grew up in loving and large families, they both experienced the Vietnam War for most of their lives in Vietnam. Both of my grandfathers and a number of my uncles were officers of the South Vietnamese Army and Navy. My grandmother also worked for the United States Army. My family was very much one which was allied with the South Vietnamese Government, its allies, and the military.

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<sup>6</sup> Australian Human Rights Commission, *Leading for Change – A blueprint for cultural diversity and inclusive leadership* (July 2016) Australian Human Rights Commission <[https://www.humanrights.gov.au/sites/default/files/document/publication/2016\\_AHRC%20Leading%20for%20change.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/2016_AHRC%20Leading%20for%20change.pdf)>.

<sup>7</sup> Asian Australian Lawyers Association, *The Asian Australian Lawyers Association launches in New South Wales* (10 November 2015) Asian Australian Lawyers Association <<http://aala.org.au/3625658>>.

In 1975, my family found themselves on the losing side of this long and bitter war. The immediate years after the end of the Vietnam War were difficult — my grandfathers were sent to “re-education camps”, my grandmother mysteriously died after an accident with some communist soldiers, and my aunts were forced to leave school to push street carts selling black-market trinkets to make a living. Their freedom was restricted, their possessions taken, food was rationed, and money was short (any money they did have before the war was of no value following the conversion to a new currency after the war).

After a few years of living hell, my parents decided they had had enough and made plans to leave the country. As many who did before, and many who did after, my parents and their brothers and sisters formulated plans to escape the country by boat.

In late 1982, my parents, along with several aunts and uncles, implemented this escape plan. Dressed as farmers, they discreetly travelled to Ba Ria, a seaside village in the south of Vietnam, where a boat was waiting for them. They walked for miles through forests and paddocks during the dark of night to get to the port of departure whilst avoiding waiting police and farmers (some of whom happened to be undercover police). Whilst my parents were lucky, a number of my aunts were not — they were caught by the police and sent to jail for their attempted escape.

Still under the cover of darkness, my parents made it to the port of departure and onto a tiny, overcrowded, rickety wooden boat. On this 12 metre long boat, my parents sailed for a week with over 100 cramped, sick, and scared people towards Indonesia, desperately risking their lives to seek freedom.

For their entire escape from Vietnam to reach Indonesia, where they were sent to a refugee camp on the island of Galang, my parents kept a secret from everyone, including their own families. My mum was four months pregnant with me. I was born in the refugee camp’s hospital. Given my parents were refugees and stateless — they were not Indonesians, not Vietnamese and at that stage, no other country had accepted to take them — that meant I was born without a

nationality. My birth certificate is an International Red Cross issued birth certificate with no nationality stated.

Approximately one month after my birth, my parents were accepted by Australia to resettle. However, as they were not permitted to leave the Galang refugee camp until I was old enough to travel by plane, for the first six months of my life, my parents and I lived in the cramped barracks of the refugee camp with hundreds of other refugees, awaiting processing and resettlement.

### *B Growing Up in Australia*

Along with my parents and two uncles, I arrived in Melbourne, Australia in January 1984 at the age of six months. Our first place of residence in Australia was a hostel for newly arrived Vietnamese immigrants in Maribyrnong, in the western suburbs of Melbourne.

As Vietnamese migrant families started to settle into their new country, the families moved into their own homes. As with my own family, most families moved to areas within reasonably close vicinity to other Vietnamese immigrants — Footscray, Richmond, and Springvale. Perhaps part of that was because housing in those areas was cheap relative to other areas of Melbourne. However, more of it had to do with comfort and security. For my parents, there was a level of comfort in being around people who looked like them, who spoke the same language as they did, and had experienced (and are still experiencing) a similar journey to their own.

My family ultimately settled in the western suburbs of Melbourne and this is where I grew up. Growing up in the western suburbs was comfortable. Not because we were financially comfortable, but socially comfortable. The western suburbs of Melbourne were a melting pot of cultures. Almost everyone I grew up with, went to school with, or otherwise interacted with was from a working class migrant family. We all came from different places — Vietnam, Malta, Italy, Ireland, Poland, Serbia, Greece, the Philippines, and Lebanon (just to name a few).

But we all shared one common bond — we were all different. We distinguished ourselves by our cultural backgrounds, but we were all minorities (even the small handful of people who did not come from a recently migrated family). We lived in a vast sea of colourful and contrasting cultures, and there was no “majority” race or culture that could have been described as the status quo. In other words, we were different but our difference was what made us the same.

However, outside this bubble that was life in the western suburbs, I did not feel this same sense of comfort and security about my race and cultural background. As I moved into my formative years, the Asian immigration debate was ramping up. At that time, there was a lot of reporting and coverage on the issue of Asian immigration and the problems that it was causing to Australia, which was particularly encouraged by certain outspoken politicians and their sympathisers. I was old enough at that time to understand the bigotry and hatred that certain people within the Australian community had for people of my race and cultural background. This understanding was supported by real life stories from family, friends, and acquaintances who had been subjected to outright racism by members of the Australian public.

Whilst I was old enough to understand that the Australian public did not like me, or people who looked like me because of my race and cultural background, I could not comprehend why. And perhaps because of that lack of understanding on “why”, I developed a sense of intimidation, shame, and fear. I distinctly remember being embarrassed by the fact that I was Asian. During my teenage years, I actively chose not to go anywhere or be seen anywhere outside my Melbourne western suburbs bubble. Outside my Melbourne western suburbs bubble, I felt that I did not belong, nor was entitled to belong. I feared that should I step outside my bubble, I too would be the subject of the racist attacks that my family members, friends, and acquaintances had experienced.

It has taken years, if not decades, for me to overcome this fear. The biggest life event that provided me with the platform to overcome my embarrassment at being Asian, and my fear of discrimination, was going to university.

Over the course of my five years at university, I made many friends who came from all sorts of places, and had very diverse backgrounds. Most people I came across did not seem to be fussed by the fact that I was Asian. My experience at university allowed me to see that there were many people who did not hold the same bigoted and discriminatory views that I had seen through the media during my teenage years. This experience really helped to overcome my personal fears.

### *C Life as an Asian Australian Lawyer*

I commenced my legal career undertaking Articles at an international law firm in 2006 and quickly settled into the corporate team. During my junior years, I worked hard and the fact that I was Asian or female did not inhibit my career progression. I was lucky enough to work with an amazing supervising partner and a wonderful team of senior lawyers, who supported me as I progressed.

However, as I moved into the more senior ranks, I began to see the unconscious biases seeping through. It did not necessarily come from the immediate team that I worked with, but rather from other partners and lawyers (within my own firm as well as other law firms), clients, and other people I professionally had contact with. The unconscious biases were not the overt sexism or the type of racism that I had feared in my younger years. Rather, the unconscious biases came through in subtle actions and words. I came across people who displayed this unconscious bias in the comments they made, such as statements like 'Wow, you have a really good Australian accent' or 'You look too young to be a senior associate.' Recently, I walked into a room for a completion with a junior associate. I was the short, female, Asian lawyer, while he was the very tall, blonde, Caucasian lawyer. The initial reaction we received from others on the transaction was that he was the senior lawyer and I was his "lackey" and it took some express clarification to the respective clients and other lawyers that, in fact, it was the other way around.

Until I moved into the more senior ranks of my profession, my biggest distinguishing factor was my race and cultural background. The notion that my career could be limited by the fact that I was female was completely novel to me. Growing up, the fact that I was female was never a real issue. Even though within

the Vietnamese family hierarchy, the males are given priority over the women, from an early age my family instilled in my mind that I could do anything in my career and that, professionally, men and women are and should be treated as equals.

However, the inequalities that women are subject to, and the lack of representation by women at senior levels, have become clearer as I continue to progress in my career. For example, in 2016, I advised a company on its initial public offering ('IPO') and listing on the Australian Securities Exchange. It was one of the largest IPOs in Australia by deal size that year. After we had completed the IPO, I was having lunch with the CEO and he observed that, of the approximately 25 client-facing professional advisers that he was involved with through the IPO process, I was one of two females.

After reflecting on this comment and why there is a lack of women (and particularly Asian women) in client-facing roles on major corporate transactions, I recalled numerous examples of conduct that have held them back. I have seen partners make decisions based on certain assumptions and unconscious preconceptions. For example:

- I have seen partners not select women for major transactions, expressly stating that the reason they were not selected was because those women worked part-time and therefore cannot fully commit to the job (without even giving those women the opportunity to confirm that assumption).
- I have had partners expressly tell me that I have to choose between being a corporate transactional lawyer or having a family, and it is not possible to have both at any one given time.
- I have heard partners expressly say that certain Asian women cannot have a "client-facing" role because they are too softly-spoken and lack presence, and therefore, would not be able to command a client's respect or attention.

These comments and observations made by senior lawyers in the legal profession are not isolated incidents. Unfortunately, these comments (in one shape or another) have been made to me and many other Asian women on a regular and repetitive basis. These types of statements have demoralised women and discouraged (and will continue to discourage) many talented and capable women, including those of an Asian heritage, from progressing through what is already a competitive and demanding profession. As a result, the vicious cycle continues, and women (and particularly culturally diverse women, including Asian women) continue to be under-represented in the top echelons of the legal profession.

### III LOCATING THE INTERSECTION AND INSTALLING A TRAFFIC LIGHT

#### *A Action by Association*

The AALA was established in 2013, at a time when Reynah Tang was President of the Law Institute of Victoria ('LIV'), being the first President from an Asian cultural background in what was then its 154-year history.

The LIV was and continues to be a leader in promoting diversity. For example, it was the among the first law societies in Australia to adopt an equal opportunity barrister briefing policy and a reconciliation action plan. However, it was apparent at the time that the LIV was not doing much in the cultural diversity space.

Anecdotal concerns about the lack of cultural diversity in the legal profession were starting to be raised. Why are there so few Asian partners in our large law firms? Where are all the Asian barristers? See if you can spot the Asian judge!

Remarkably, there were two other law society Presidents of Asian background in 2013 — Noor Blumer of the Australian Capital Territory Law Society and Peggy Cheong of the Northern Territory Law Society. However, when the three of them sought to raise the lack of cultural diversity in the legal profession with other law societies, they were met with a variety of reactions ranging from:

- Denial — 'I don't see race'; to

- Patronising — ‘you just need to be patient’; to
- Fairly hostile — ‘but why do you need information on the cultural background of lawyers, and what are you going to do with it?’

It was against that backdrop that the AALA was established to improve the level of cultural diversity in the legal profession, particularly at the senior echelons.

### *B Gathering the Data*

Unlike countries such as the United Kingdom and New Zealand, very little information is collected regarding the cultural origins of those that make up our legal profession. Interestingly, one statistic we do have is that some 10.75 per cent of solicitors in New South Wales were born in Asia.<sup>8</sup> One would expect that the percentage of solicitors with Asian cultural origins would be even higher.

It was in order to address this gap in data that the AALA formed a group of committee members and volunteers to review the publicly available information regarding law firm partners, barristers, and judicial officers to gather data on the level of Asian Australian participation. It was limited to those groups for which a reasonable level of public information is available.

The research showed that while Asian Australians account for some 9.6 per cent of the Australian population, Asian Australians represent only:

- 3.1 per cent of partners in law firms with more than 10 partners;
- 1.6 per cent of barristers; and
- 0.8 per cent of the judiciary.<sup>9</sup>

It is apparent from this summary that the level of Asian Australian representation in the senior echelons of the legal profession is low, and

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<sup>8</sup> Law Society of New South Wales, above n 3; This records that 28 per cent of NSW solicitors were born overseas, of which 38.4 per cent were born in Asia.

<sup>9</sup> Asian Australian Lawyers Association, *The Australian Legal Profession: A snapshot of Asian Australian diversity in 2015* (April 2015) Asian Australian Lawyers Association <<http://aala.org.au/Resources/Documents/aala-cultural-diversity-analysis-2015-infographic-final.pdf>>.



diminishes as one moves up the ranks. Moreover, the representation of Asian Australians at both the Bar and within the judiciary compares unfavourably with the corporate sector, with research undertaken by the Diversity Council of Australia ('DCA') on the corporate sector showing that 1.9 per cent of ASX 200 senior executives have Asian cultural origins.<sup>10</sup>

As the then President of the Victorian Bar quite rightly pointed out at the time the research was launched, at least in Victoria, access to the Bar is open to anyone who passes the bar exam so it is, of course, quite possible that the low representation arises because Asian Australian lawyers tend to prefer life as a solicitor, to the cut and thrust of the Bar. But, it seems equally possible that it may be the product of the lack of support for those Asian Australians that seek to be advocates or appropriate role models to inspire them. At the very least, it raises a question of whether more could be done to encourage Asian Australians to sign the Bar roll, and then to support them once they arrive. For example, if senior barristers took positive steps to put forward young Asian Australian barristers when asked for recommendations as to a junior barrister, this would help to develop the profile of Asian Australian barristers and overcome some of the possible biases of instructing solicitors.

### *C Establishing the Business Case*

Diversity is an increasing business imperative, including in the law. In a report published in 2015 by McKinsey & Company, the authors say 'diversity matters because we increasingly live in a global world that has become deeply interconnected. It should come as no surprise that more diverse companies and institutions are achieving better performance.'<sup>11</sup>

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<sup>10</sup> Diversity Council of Australia, *Cracking the Cultural Ceiling: Future Proofing your Business in the Asian Century* (2014) Diversity Council of Australia <<https://www.dca.org.au/cracking-cultural-ceiling/index.html>>.

<sup>11</sup> Vivian Hunt, Dennis Layton and Sara Prince, *Why diversity matters* (2 February 2015) McKinsey & Company <<http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>>.

The McKinsey analysis, which looked at hundreds of organisations and thousands of executives in the United Kingdom, Canada, Latin America, and the United States, found that:

- Companies in the top quartile of gender diversity were 15 percent more likely to have financial returns that were above their national industry median; and
- More astoundingly, companies in the top quartile of racial/ethnic diversity were 35 per cent more likely to have financial returns above their national industry median.<sup>12</sup>

Of course, as the McKinsey authors note, ‘the relationship between diversity and performance highlighted in the research is a correlation, not a causal link.’<sup>13</sup> However, they point to other studies that suggest that the likely reason that diverse companies have better performance is that they ‘are better able to win top talent and improve their customer orientation, employee satisfaction, and decision making, leading to a virtuous cycle of increasing returns.’<sup>14</sup>

The report also contained an important observation. The authors said

[t]he approach of many companies has been to adopt a single diversity programme to cover all action groups: racial/ethnic, gender, and sexual orientation. Yet the data suggests that such an approach is insufficient, resulting in a focus on a particular category rather than the issue as a whole.<sup>15</sup>

And, of course, in this Asian Century, many law firms are looking excitedly to Asia for growth. However, if they are to succeed in tapping into Asian markets, there is a real need for firms to focus on Asian cultural diversity so that they better reflect — and empathise with — the clients that they serve.

The McKinsey report touches on this issue in commenting on:

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<sup>12</sup> Ibid

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid 8.

a senior executive at a global company in Asia [who] stated an obvious if difficult truth when he said, 'in our top 100 executive meetings we spend more than half of our time speaking about Asia. But if I look around the room I hardly see anybody with an Asian background.'<sup>16</sup>

Turning to the judiciary, judges are, of course, duty bound to judge without fear or favour. However, the absence of diversity can lead to conscious and unconscious biases that play out in the wider justice system.

In a 2014 blog on cultural diversity in the Australian judiciary, Mr Ray Steinwall — General Counsel of Novartis Pharmaceuticals in Australia — referred to comments of former High Court Justice Michael McHugh who has said that 'when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution.'<sup>17</sup> Mr Steinwall went on to add that 'a diverse judiciary allows legal argument to be received by those who bring differing perspectives and experience to bear on an issue.'<sup>18</sup>

Ultimately, Mr Steinwall concludes: '[i]f Australia is to play a leadership role in the Asia/Pacific that is the fastest growing in the world, there is an urgent need to improve diversity on the bench to reflect the contemporary society that it serves.'<sup>19</sup>

#### *D Barriers to Cultural Diversity*

One of the most significant barriers to improving cultural diversity is the shaping of unconscious bias. In a 2013 article for *The Age*, Waleed Aly referred to an Australian National University study that demonstrated this bias. According to Aly, it:

found you're significantly less likely to get a job interview if you have a non-European name. The researchers sent fake CVs in response to job

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<sup>16</sup> *Ibid* 11.

<sup>17</sup> Ray Steinwall, *Addressing cultural diversity in the Australian judiciary* (30 April 2014) Diversity Council of Australia <<https://www.dca.org.au/blogs/view/14/Addressing+cultural+diversity+in+the+Australian+judiciary>>.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*.

advertisements, changing only the name of the applicant. It turns out that if your surname is Chinese, you have to apply for 68 per cent more jobs to get the same number of interviews as a [sic] Anglo-Australian. If you're Middle Eastern, it's 64 per cent. If you're Indigenous, 35 per cent.<sup>20</sup>

None of us are immune to the risk of unconscious bias because it is a result of the way our brains must operate in order to make sense of a complex world. The good news is that unconscious bias is a well-known phenomenon and there is training available to help people identify and overcome their natural biases.

Looking at the barriers to cultural diversity for Asian Australians more particularly, research conducted by the DCA in the business sector suggest potential barriers to Asian Australian progression include:

- Cultural bias and stereotyping, which often sees Asians viewed as being good workers, but not necessarily leaders;
- Westernised leadership models, which overvalue self-promotion and assertive, direct communication, and undervalue reserve and deference and respect for seniority;
- The lack of relationship capital, which results in Asian Australians failing to access those mentors and sponsors best placed to assist their careers; and
- The case for culture not being understood, with management failing to value their culturally diverse workforce or appreciate the strategic role that they could play in helping organisations to prosper in the Asian century.<sup>21</sup>

While the survey conducted by the DCA was across the business sector, similar issues can be anticipated in the legal profession, which may well be exacerbated given the conservative nature of the profession and its tendency to lag behind

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<sup>20</sup> Waleed Aly, 'The curse of Australia's silent pervasive racism', *The Age* (online), 5 April 2013 <<http://www.theage.com.au/comment/curse-of-australias-silent-pervasive-racism-20130404-2h9i1.html#ixzz3hegg9lvv>>.

<sup>21</sup> Diversity Council of Australia, above n 10.

developments in other sectors, as evidenced by the continuing issues faced by women in the profession.

It is also important to observe that such issues are not restricted to people from Asian cultural backgrounds. The existence of similar organisations for other ethnic groups — such as the Hellenic Australian Lawyers Association, Australian Italian Lawyers Association, the Muslim Legal Network and the French Australian Lawyers Society — suggest a shared need and concern.

#### *E And Don't Forget About Intersectional Diversity*

The above discussion focuses largely on cultural diversity because that is the focus of the AALA. However, at an organisational level, it is clear that addressing diversity and inclusion in a one-dimensional manner will be ineffective. As noted by the Deloitte University Leadership Centre for Inclusion, 'corporations have stalled in creating more diverse and inclusive work environments because of their inherently one-dimensional [diversity and inclusion] efforts.'<sup>22</sup>

As Tuanh's personal narrative shows, being both Asian Australian and female presents its own unique challenges.

Deloitte suggests:

the next [diversity and inclusion] breakthroughs will organically occur and shatter lingering barriers to fully inclusive organizations only when corporations revise [diversity and inclusion] frameworks to engage employees across difference and in the multiple ways they define themselves in a manner that promotes common ground.<sup>23</sup>

This is the reason that the AALA has been working closely with other associations, such as the Women Lawyers Association of New South Wales and Victorian Women Lawyers.

#### *F How We Can Promote Greater Diversity*

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<sup>22</sup> W Sean Kelly and Christie Smith, 'What if the road to inclusion were really an intersection?', *Deloitte University Press* (online), 11 December 2014  
<<http://dupress.com/articles/multidimensional-diversity/>>.

<sup>23</sup> *Ibid.*

The 2016 AHRC report suggests a way forward in terms of generating change on cultural diversity, involving leadership, systems, and culture.<sup>24</sup>

The importance of leadership in driving organisational change is self-evident. If those in leadership positions set an example, others will follow.

Systems involve both the collection of data and the tracking of progress.<sup>25</sup> As previously observed, the lack of data on cultural diversity in the legal profession has been an issue for the AALA. Accountability and targets are the next stage. It is incumbent on organisations like the LCA, LIV, and our major law firms to lead the profession on this.

Lastly, in terms of culture, there is a need to deal with bias and discrimination, and to actively cultivate diverse leaders.<sup>26</sup> The study referred to by Waleed Aly deals with bias at the recruitment stage. While that may be relatively easy to address, eg through the use of blind CVs, the issue becomes harder to monitor and address at more senior levels where selection criteria becomes more subjective and so 'prejudice can trump diversity'.<sup>27</sup> This is where the cultivation of diverse leaders can be critical.

#### IV OPENING UP THE INTERSECTION

Since Jane Hyun coined the term 'bamboo ceiling', there has been growing recognition that issues around cultural diversity in business need to be addressed in our society.<sup>28</sup> The support for the recent AHRC report from "Corporate Australia" acknowledges both the inherent importance of having discrimination free workplaces at all levels, as well as the role of diversity and inclusion in ensuring that Australia is best placed to meet the challenges and benefit from the opportunities of a globalised economy in the 21<sup>st</sup> century.

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<sup>24</sup> Asian Australian Lawyers Association, above n 7, 11.

<sup>25</sup> Ibid 15–20.

<sup>26</sup> Ibid 21–27.

<sup>27</sup> Ibid 21.

<sup>28</sup> Jane Hyun, *Breaking the Bamboo Ceiling: Career Strategies for Asians* (HarperCollins Publishers, 2005).

While the legal profession has been characteristically conservative when it comes to matters of diversity and inclusion and remains structurally challenged in addressing gender diversity, there are emerging signs that the intersection is opening up.<sup>29</sup> There is growing recognition of unconscious bias, with many firms embracing programs to address such biases and provide opportunities for talented lawyers to progress, whether they are female, Asian, or have diverse sexuality. Like the corner of Elizabeth and Flinders Street in downtown Melbourne, when the green pedestrian lights up, it should be possible for people to move forward in multiple directions at the same time.

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<sup>29</sup> For example, in March 2017, a number of large law firms committed to a cultural diversity initiative; see Katie Walsh, 'Law firms unite to shake up appearance: cultural diversity pledge', *Australian Financial Review* (online), 22 March 2017 <<http://www.afr.com/news/law-firms-unite-to-shake-up-appearance-cultural-diversity-pledge-20170320-gv2ha2>>.

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# FROM MEMOIR TO MAKE BELIEVE: BEYONCÉ'S *LEMONADE* AND THE FABRICATION POSSIBILITY

LAUREN ROSEWARNE\*

*Beyoncé's Lemonade has been one of the most critically acclaimed but also critically autopsied albums in recent years. Over and over again those 13 tracks have been mined to expose an apparent treasure trove of secrets into the artist's marriage. So ready were listeners to assume that Lemonade was a confession of treachery and anguish, that completely lost was the possibility that perhaps the album was just 45 minutes of folly. In this essay I speculate about why audiences were so willing to interpret Lemonade as memoir rather than make-believe. I propose reasons ranging from the power of I, the influence of social media, and the severe constraints imposed by gender. Lemonade is a fascinating illustration of how a range of social phenomena and distinctly gendered stereotypes have strongly manipulated how women's art is perceived.*

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## I INTRODUCTION

In all of the forensic analysis that the album has been subjected to, largely overlooked has been the possibility of *Lemonade* being fiction. That rather than the album being an insight into Beyoncé’s marriage, a confession of her anguish, a disclosure of Jay Z’s treachery, instead, perhaps it’s just 45 minutes of make-believe. This essay questions why. Why was *Lemonade* instantly assumed as a memoir rather than 13 songs of folly? Here, I propose reasons ranging from the power of I, the influence of social media, and the severe limitations imposed by gender. The conjecture around the album serves as fascinating testimony to a range of social phenomena and stereotypes that have strongly manipulated how women’s art is perceived.

## II I, STRANGLEHOLD

Politicians are experts at ducking and weaving around it. Instead of using that one tiny word, phrases like “it has been suggested” and “some people believe” get deployed. It’s a way of detaching, of putting a long arm’s length between oneself and an idea. Avoiding “I” is a weaselling way to both be heard putting voice to an issue, but also later being able to deny that it was personal opinion.

In the oily world of politics, “I” is a dangerous letter. In popular culture though, it means something a tad different. There’s still danger, sure, but there’s also an element of default, of design.

First-person narration in songs, in books, is typical. The objectivity offered by third-person narration might be lost, but first-person makes a tale personal, intimate. And it's Beyoncé's liberal use of "I" that cajoles audiences into making the perhaps logical assumption of confession: that on *Lemonade*, Bey is singing her story.

While such a leap makes sense, audiences aren't always so easily deceived.

Johnny Cash's "Folsom Prison Blues"; Axl Rose's "Used to Love Her"; Nick Cave's "O'Malley's Bar" — each song is a first-person narrative about murder. And yet it's completely impossible to imagine any listener pondering whether these gents really put their dastardly deeds to song. So what's the difference? Why do Cash and Rose and Cave escape speculation of spilled sin, but Beyoncé is assumed to have laid her life out bare?

To sing of committing a murder seems madcap. Surely had Nick Cave really shot a handful of folks in a bar, we'd know about it already. Such songs, therefore, get enjoyed as theatre, as performance, and credit is given to the writer for crafting such an arresting vignette. Such an interpretation, such an accolade however, wasn't extended to Bey.

In too many writing classes the aspiring scribe will hear the maxim write what you know. And while it's a millstone for novice writers, I suspect it places its heaviest burden on women. Women have long been associated with the home, with the domestic. Not only is there an assumption that they are connected most closely to domestic interiors, but to inners in the broadest sense: to inner worlds, inner lives, inner thoughts. When the write what you know dictum is applied to their writing, the assumption is that love and relationships and melodrama is women's realm. That it's what women know. The domestic, the soap operatic, apparently is lady terrain. Rather than having the opportunity for *Lemonade* to be considered as a collection of imagined stories and fictionalised feelings, instead, the assumption is that it's a diary. And it's just a diary because the lyrics are coming out of a woman's mouth and because a woman's name is all over the credits. And even if it's exaggerated, dramatised, or highly-stylised, it's assumed to emerge from Beyoncé's area of expertise: what she has lived; what she has felt. In such a reading, craft and creativity each get downplayed and, instead, the focus is on scuttlebutt, on gossip, on the triviality of the feminine.

Gender however, is only one part of this. Social media provides another element to the memoir presumption.

### III SOCIAL MEDIA AND THE VANQUISHED PRIVATE LIFE

Facebook, Snapchat, Twitter, and Instagram have revolutionised how we communicate. Today, the way we socialise, remain connected and move in and out of each other's lives looks substantially different to a generation ago. And just as it's altered the relationships we have with friends and family and colleagues — sometimes supplementing real-life relations, at other times completely substituting for them — such technology has also altered the celebrity-fan connection.

If you're a public figure — in actuality or just in your imaginings — a presence on social media is expected. Doing so creates an often mutually beneficial relationship whereby fans have access to you and you have a point of contact to keep them informed and interested. Resultantly, many celebrities work very hard at presenting themselves as open.

Beyoncé's updates are sporadic on Facebook and Twitter. Instagram is where she's most active. Providing photographic glimpses into her life — often completely captionless — Bey offers a highly curated, minimalist intimacy that allows the Beyhive to believe they're not only getting contact, but getting direct contact from her. While Beyoncé isn't a celebrity of the Kardashian ilk using social media to document her every up, down or pedicure, nonetheless, Beyoncé is a product of this same culture. And her audience have long been primed to think of media — particularly social media — as the site of modern confession.

For a good decade, social media is where we go to vent, to share, to gloat, promote. So when Beyoncé releases an album online — using the modern delivery system of a streaming service — it's unavoidable that her product will be consumed in the same way as other celebrity content delivered similarly. The audience is readied in such a space to construe — to consume — online output as personal, as intimate. Receiving *Lemonade* this way is a fundamentally different experience to purchasing it on CD in JB Hi-Fi. Online is where we read those personal Facebook and Twitter updates, it's where we see

all of those Instagram photos, and it's where we now wait for the next celebrity reach-out.

Even if Beyoncé is less active on social media than other celebrities, she is nonetheless producing music in an landscape where confession is construed as normal — where in song Justin Bieber will criticise ex-girlfriend Selena Gomez, for example, and where the spat will get a new life on Twitter — and where gossip and speculation is rife. No Beyoncé fan would be unfamiliar with the 2014 elevator footage showing her sister, Solange, “attacking” Jay Z. No fan would be unaware of the speculation that Jay Z is a pants man. Those in the Beyhive already know the names Rihanna, Rita Ora, and Rachel Roy. So when *Lemonade* comes out, it's released to an audience already familiar with the cast. And fans thrive on the opportunity to decode the presentations; to concoct their own theories about who “Becky with the good hair” is. To feel rewarded about knowing enough of the background to piece it all together.

Privacy in the social media age is less about secrets, is less about happenings occurring behind closed doors, and centres squarely on the orchestrated release. The assumption in the Internet age is that the sufficiently salacious stuff will eventually get out so framing is crucial. And sure, *Lemonade* might look slick and stylised, and it might not be as fly-on-the-wall as some fans might have hoped, but then again it looks an awful lot like the kind of contrived reality delivered to us by television and by Insta-celebs, and it appears “real-enough” for residents of a world where the definition of reality is ever-evolving.

#### IV WOMEN AS ARTISTS: BOTH FINE AND BULLSHIT

A side effect of a culture of both orchestrated reality but also high-level media literacy is that authenticity is considered as premium. Within this is a quest to expose people who are fake and to beatify those who show us their “real”. Beyoncé thus, gets praised — in some circles even deified — for an album that seemingly dares to speak about the less than shiny aspects of her life; that dares to present herself as less rarefied and more so just like us. And Bey doesn't correct her audience. Doesn't provide annotation or footnotes to her lyrics. Rather, the possibility of fans, of critics construing this all as an affidavit can only work to her advantage in this age of prurience, of cynicism. Lost however, in the accolades for her authenticity — lost in praise for anyone's show of real

— is recognition that it too can be highly stage-managed. Just as Amy Schumer and Jennifer Lawrence’s “real girls” shtick has started to wear very thin with their slips, stumbles, and goofy gaffes beginning to look a whole lot orchestrated, a celebrity now needs to do more than Tweet a makeup-free selfie to prove veracity. An entire album therefore, much which offers pain and triumph-over-adversity, can achieve this.

Culturally we have a conflicted relationship with reinvention, with transformation. An artist like David Bowie was celebrated for presenting new versions of himself across decades. Bowie was celebrated as an artist, as an innovator: of self, of medium. For an artist like Lana del Rey however, from the moment she shook off the shackles of her Lizzy Grant indie origins and rebranded herself as — to borrow her phrase — a “gangster Nancy Sinatra”, she was shredded. Few critics considered the possibility that the once barefoot-and-stool folk singer could also be a pouty-lipped seductress. The more common interpretation was that she was a puppet in some label’s Zeitgeist exploitation. For the entirety of her career del Rey has been dogged by the question of authenticity. That while performance of music will, naturally, always be part of how an entertainer is judged, equally so will be the performance of identity. It’s perhaps why we care so much that if Lena Dunham, for example, espouses feminist or anti-racism sentiments in her writings, that she’s consistent it in all sectors of her life. If not — if a rogue quip is made, or an off-the-cuff joke told — then she gets named, gets shamed. To be respected as an artist, the public — the critics — apparently need to feel they know you. A real you. Such a concept implies of course, that you in your entirety can ever really be known.

The burden of authenticity falls most heavily on women. With the tools of artifice — make-up and hair dye and push-up bras — at our disposal, women have long been subjected to the speculation of fakery. While men can, and do, dabble in such tools themselves, there’s a different judgment placed on women in a world where we’re urged to be ourselves while simultaneously hearing you’re not good enough as you are. The idea of fakery isn’t an accusation hurled at men with much frequency; rare however, would be the famous woman who hasn’t had her authenticity autopsied.

Beyoncé isn’t new to identity-play. Akin to Eminem becoming Slim Shady to give his darker side an airing, in 2008 Bey presented herself as Sasha Fierce, giving voice to a stronger, sassier, and sexier persona. It’s not unprecedented therefore, that audiences



recognise the capacity for the star to play with her identity. She's done it before. And yet, apparently when a new self-presentation appears to be self-referential, to converge with rumours and innuendo, and to not appear fierce enough or dark enough or sufficiently different to the public imaginings, audiences are quick to assume they're now hearing the real Bey.

#### V THE MULTIPLE IDENTITIES POSSIBILITY

In 2010, when Beyoncé laid Sasha Fierce to rest, she said her alter ego was “done. I killed her.”<sup>1</sup> She claimed that the Fierce persona was created to overcome her shyness which two years on, apparently was no longer necessary: “I don't need Sasha Fierce anymore, because I've grown and now I'm able to merge the two.”<sup>2</sup> Lost in our frequent use of alter ego is the acknowledgment of multiples: that the “alter” ego is still part of a greater whole, albeit one performed publicly with less often. To express an alter ego a person can only use the ingredients, the traits, they already possess. Ultimately however, it's the same person standing there.

The Fierce identity had a little fake-it-'til-you-make-it element about it, sure, but it also served as an acknowledgment of selves within the superstar. That none of us are the same persona all of the time and in reality we're each a bundle of contradictions with often multiples egos, often bristling against each other. In our preoccupation with authenticity, we seem to operate under a severely flawed assumption that there is only one single self at the heart of it. When Australians demanded to see the real Julia when Gillard was PM, or when Americans begged to see the real Hillary, lost was the appreciation of us each being a composite of selves. When Sasha Fierce was on stage, it wasn't a hologram, it wasn't an impersonator, it was Beyoncé, playing up a version of herself. A new moniker and some slightly more salacious styling liberated her enough to give an alternate side an airing.

*Lemonade* might be autobiographical, and then again, it might be completely fabricated. A possibility lies in the middle in that it might also be a bit of both: of real selves, invented selves and identity-play all at once.

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<sup>1</sup> Hillary Crosley, 'Beyonce Says She "Killed" Sasha Fierce', *MTV News* (online), 26 February 2010 <<http://www.mtv.com/news/1632774/beyonce-says-she-killed-sasha-fierce/>>.

<sup>2</sup> *Ibid.*

Hillary Clinton is also relevant to this story for a second reason. As a public figure, she had no option but to face marital humiliation in front of an audience of millions. In turn, she was judged, savagely, by an audience who condemned her decision to stay by Bill's side. In her decades long career, Hillary was never just her betrayal and yet, for years, this is what she gets remembered for. If Beyoncé was actually betrayed, she has a vested interest in this status not becoming the sum total of her identity. She quite possibly, therefore, chose to present betrayal as just one bit of a greater whole. That it might have been something that happened to her, but that it's not her. That she is Beyoncé above all else, and in turn, her betrayal gets downgraded to just one of a slew of song-worthy experiences.

An extension of this is the opportunity to not only control the story, but monetise it. That rather than issuing press release after press release, or another swag of happy-couple photos, instead, why not stoke the flames, keep the public guessing. And make a little cash in the process.

#### VI ONE'S SELF, ONE'S STORY AS COMMODITY

Beyoncé and Jay Z are both industry leaders. None of this is an accident; the duo knew precisely what they were doing. It's not mere chance therefore, that *Lemonade* was released on Jay Z's streaming service. It's no accident that the duo didn't do a sit down with Oprah or Barbara Walters to dissect their marriage. It's no coincidence that Jay Z later released his own post-*Lemonade* rap cryptically addressing some of the speculation. Beyoncé and Jay know that the game today is more than just the music — that a backstory, that ongoing newsworthiness, is vital.

Neither are unaware of the interest in their personal lives. Neither is oblivious to the gossip that has hounded them both for years. Even in the aftermath of the elevator scuffle, their ambiguous statement of it just being a "family" issue only worked to further fuel interest. In keeping fans on a drip feed of information, the release of *Lemonade* had them salivating; had commentators and critics poring over every line. Akin to Angelina and Brad releasing the troubled marriage film *By The Sea*, or Tom and Nicole doing the same with *Eyes Wide Shut*, these stars know that there is a ready, if voyeuristic, interest in their lives and thus, via their creative output they can play — if not also manipulate — perceptions whilst never really answering anything and thus perpetuating intrigue.

In 2016, *Lemonade* can never just be an album. It's the creative output of a woman, a wife, a mother, an African American who has reached the absolute pinnacle of success in an America, in a world, still — perhaps even increasingly — divided along gender and racial lines. The merit of the music is for others to judge. For me, the true story lies in all the chatter existing quite separate to the songs. In questioning why the idea of a memoir sits better with us than the compliment of art.

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# CLIMBING THE 'STAIRCASE': DO EEO POLICIES CONTRIBUTE TO WOMEN ACHIEVING SENIOR LEADERSHIP POSITIONS IN UNIVERSITIES IN AUSTRALIA AND HONG KONG?

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*Often at the vanguard of equal employment opportunity ('EEO') interventions and movements for equality, it is surprising that universities remain inherently gendered in leadership, with few women making it to senior leadership positions worldwide. While EEO policies have been expressly designed to achieve equality and redress gender imbalances inherent in university structures, it is unclear whether EEO policies practically contribute to this, with an enduring leadership imbalance evidenced globally. To determine the contributions of EEO policies across the international labour market in which universities operate, this case study compares the EEO policies and experiences of ten women university leaders in Australia and Hong Kong. This study finds that more-developed EEO policies correlate with more women in leadership and better experiences of leadership for women within the universities. However, it is clear from a sustained gender imbalance in leadership that EEO policies do not redress gender inequality alone. Limitations of EEO interventions include the narrow focus on aspects of discrimination and inequality and over-reliance on traditional concepts of "merit" and leadership. Grounded within the Asia Pacific region, this case study demonstrates that the contributions of EEO policies to women's leadership in universities are nuanced.*

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## I INTRODUCTION

The Asia Pacific region has the fastest-growing higher education sector in the world, yet compared to international standards for gender equality, its universities are falling behind on women's leadership.<sup>1</sup> Equal employment opportunity ('EEO') policies have increasingly been implemented over the past decades, with the express aim of achieving

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<sup>1</sup> Simon Marginson, Sarjit Kaur and Erlenawati Sawir (eds), *Higher Education in the Asia-Pacific: Strategic Responses to Globalisation* (Springer, 2011).

equality and reducing barriers to leadership for women. Research suggests that merely implementing these provisions for equal opportunity does not increase the number of women in leadership.<sup>2</sup> However, the university context remains relatively untested, as does research that compares EEO policies across the international labour markets in which universities operate.<sup>3</sup> This research therefore compares the situations in two universities across cultures in the Asia Pacific, one in Australia and one in Hong Kong, to begin to understand the contributions of EEO policies on women's leadership.<sup>4</sup> The case studies confirm that, despite the introduction of EEO policies, women in general still occupy few positions of leadership and are clustered at lower levels of leadership.<sup>5</sup> Yet, there are also clear correlations between the level of development of the policies and the numbers of women and their experiences in leadership, suggesting that EEO policies may have an effect in contributing to the women's leadership across the universities.

Prior studies on factors influencing women's leadership in universities have found that it is essential to understand the impact of organisational policy, practices, and processes.<sup>6</sup>

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<sup>2</sup> Glenda Strachan and Erica French, 'EEO: Is it Living Up to its Promise of Gender Equity?' (2008) in Pauline Stanton and Suzanne Young (eds), *Workers, Corporations and Community: Facing Choices for a Sustainable Future: Volume 1: Refereed Papers* (Paper presented at the Proceedings 22<sup>nd</sup> Conference of the Association of Industrial relations Academics of Australia and New Zealand – Workers, Corporations and Community: Facing Choices for a Sustainable Future, Melbourne, Australia, 6-8 February 2008).

<sup>3</sup> Alex Bryson and Carola Frege, 'The Importance of Comparative Workplace Employment Relations Studies' (2010) 48(2) *British Journal of Industrial Relations* 231; Geraldine Healy and Gill Kirton, 'The Early Mobilization of Women Union Leaders – A Comparative Perspective' (2013) 51(4) *British Journal of Industrial Relations* 709.

<sup>4</sup> Australia and Hong Kong were chosen as research locations due to their: demographic similarities; geographical position in the Asia Pacific; education and research ties; the Australian Government's policy priority on engagement with Hong Kong and the "Indo Pacific" (Hong Kong being chosen as one of four pilot locations for the recently launched New Colombo Plan); Australian Government policy priority on education exchange with Hong Kong; English as an official language; similar European-American university system; colonial histories; and contrasts regarding culture, political regime, and levels of gender equality.

<sup>5</sup> Louise Morley, 'Lost Leaders: Women in the Global Academy' (2014) 33(1) *Higher Education Research and Development* 114.

<sup>6</sup> See Jennifer de Vries, 'A Realistic Agenda? Women Only Programs as Strategic Interventions for Building Gender Equitable Workplaces' (PhD Thesis University of Western Australia, 2010); Carmen Luke, 'One Step Up, Two Down: Women in Higher Education Management in Southeast Asia' (2000) 1 *Academic Work and Life* 285; Louise Morley, 'The Rules of the Game: Women and the Leaderist Turn in Higher Education' (2012) 25(1) *Gender and Education* 116; Niki Murray, Marianne Tremaine and Susan Fountaine, 'Breaking Through the Glass Ceiling in the Ivory Tower: Using a Case Study to Gain New Understandings of Old Gender Issues' (2012) 14(2) *Advances in Developing Human Resources* 221; David Peets, Glenda Strachan and Carolyn Troup, 'Discipline, Change and Gender in the Academic Workforce' (Paper presented at the 28<sup>th</sup> AIRAANZ Conference Association of Industrial Relations Academics of Australia and New Zealand, 7-9 February 2014); Karin Sanders, Teneke M Willemsen, Carla C J M Millar, 'Views From Above the Glass Ceiling: Does the Academic Environment Influence Women Professors' Careers and Experiences?' (2009) 60 *Sex Roles* 301; Wendy Saunderson, 'Women, Academia and Identity: Constructions of Equal Opportunities in the 'New Managerialism' – A Case of Lipstick on the Gorilla?' (2002) 56(4) *Higher*

One pre-eminent theorist, Acker, provides a framework which will be used in this research to identify how policies and practices affect gender inequality and representation.<sup>7</sup> Acker's argument rests on the notion that all organisations have inequality regimes, defined as 'interrelated practices, processes, actions and meanings that result in and maintain class, gender, and racial inequalities'.<sup>8</sup> Even organisations with EEO policies and interventions can, over time, develop structures which negatively impact on women's experiences and constrain women's leadership. This key point makes Acker very relevant for studying how EEO policies contribute to women's leadership across the two case universities.

Research will first set the context by outlining a brief historical, cultural, and political overview of each country and university, of particular interest to this Special Issue on *Gender, Culture & Narrative*. The literature will be canvassed briefly and the methodology explained. Discussion will centre on the universities' context and the experiences of the women leaders. Through comparing the universities' EEO policies and the women leader's experiences, it is clear that EEO policies do correlate with more women leaders and better experiences of leadership within the universities.

## II WOMEN'S LEADERSHIP IN UNIVERSITIES

Universities are key players capable of driving women's participation in leadership. The Asia Pacific region is a global growth hub, with universities increasingly taking the foreground and the numbers of female graduates globally skyrocketing.<sup>9</sup> For the first time in history, women in both Australia and Hong Kong are enrolling in universities in greater numbers than men, representing 58 per cent and 53.7 per cent of enrolments

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*Education Quarterly* 376; Kate White, 'Women and Leadership in Higher Education in Australia' (2003) 9(1) *Tertiary Education and Management* 45.

<sup>7</sup> Joan Acker, 'Inequality Regimes: Gender Class, and Race in Organisations' (2006) 20(4) *Gender and Society* 441; Joan Acker, 'From Glass Ceiling to Inequality Regimes' (2009) 51(2) *Sociologie Du Travail* 199.

<sup>8</sup> Joan Acker, 'Inequality Regimes: Gender Class, and Race in Organisations' (2006) 20(4) *Gender and Society* 441, 443.

<sup>9</sup> Simon Marginson, Sarjit Kaur and Erlenawati Sawir (eds), *Higher Education in the Asia-Pacific: Strategic Responses to Globalisation* (Springer, 2011).



respectively.<sup>10</sup> Women currently represent half the population and approximately half of the university workforce.<sup>11</sup>

Yet, there are striking gaps when it comes to the leadership sphere. Despite representing half the population, women in Australia hold just under one-quarter of vice chancellor roles, approximately 30 per cent of deputy vice chancellor and pro vice chancellor roles, and comprise on average under 20 per cent of the professoriate.<sup>12</sup> Hong Kong has never had any women vice chancellors. Women comprise only 7.3 per cent of positions of dean and above, and women hold only 18.7 per cent of associate and assistant deans and heads of departments.<sup>13</sup> Gender should be equally represented across society, however, within the world of work, women across Australia and Hong Kong continue to participate in labour markets on an unequal basis, are paid less than men globally, bear a disproportionate responsibility for unpaid care work, and are more often found in insecure work.<sup>14</sup>

Statistics on Australia and Hong Kong are not immediately comparable because of the different statistical methods and rubrics used, however **Table 1** and **Table 2** provide a breakdown of employment by gender in the university sector in each context.<sup>15</sup> Despite

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<sup>10</sup> Australia has had more women enrolled in universities since 1987, almost three decades, which debunks the 'pipeline' myth that it will only be a matter of time before women reach leadership; See Australian Bureau of Statistics, *Hitting the Books: Characteristics of Higher Education Students* (2013) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20July+2013>>; Census and Statistics Department, Hong Kong Special Administrative Region, *Women and Men in Hong Kong: Key Statistics* (2014)

<[http://www.censtatd.gov.hk/FileManager/EN/Content\\_1149/Terms%20and%20Definitions.pdf](http://www.censtatd.gov.hk/FileManager/EN/Content_1149/Terms%20and%20Definitions.pdf)>.

<sup>11</sup> University Grants Committee, *Table 12 Academic and Research Staff (Headcount) in Academic Departments of UGC-funded Institutions with Salaries Wholly Funded from General Funds by Staff Grade, Sex and Institution, 2008/09 and 2009/10* (2010)

<<http://www.ugc.edu.hk/big5/ugc/publication/report/figure2009/pdf/table12.pdf>>.

<sup>12</sup> Jill Blackmore and Naarah Sawers, 'Executive Power and Scaled-Up Gender Subtexts in Australian Entrepreneurial Universities' (2015) 27 *Gender and Education* 320; Carmel Diezmann and Susan Grieshaber, 'Gender Equity in the Professoriate: A Cohort Study of New Women Professors in Australia' in M Devlin, J Nagy and A Lichtenberg (eds), *Research and Development in Higher Education: Reshaping Higher Education* (Paper presented at the 33<sup>rd</sup> HERDSA Annual International Conference, 6–9 July 2010).

<sup>13</sup> Sarah Aiston, *A Woman's Place at the Top Table is Not Assured* (27 March 2015) University World News <<http://www.universityworldnews.com/article.php?story=20150325170011964>>.

<sup>14</sup> UN Women, *Facts and Figures: Leadership and Political Participation* (2016)

<<http://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures#notes>>.

<sup>15</sup> Where actual numbers could not be sourced, percentages are used. Data is sourced from the most-recent statistics publicly available.

women leaders being labelled as “indispensable” both in policy and in general, they continue to be insufficiently represented.<sup>16</sup>

<b>TABLE 1: UNIVERSITIES IN AUSTRALIA</b>		
	<b>Women</b>	<b>Men</b>
Vice-Chancellors	10 (25%)	29 (75%)
Deputy Vice-Chancellors	34%	66%
Senior Administrative Staff	40%	60%
Above Senior Lecturer	3902 (31.7%)	8404 (68.3%)
Senior Lecturer (level C)	4494 (43.9%)	5753 (56.1%)
Lecturer (level B)	7252 (52%)	6698 (48%)
Tutor/Associate Lecturer (level A)	3783 (51.1%)	3616 (48.9%)
<b>TABLE 2: UNIVERSITIES IN HONG KONG</b>		
	<b>Women</b>	<b>Men</b>
Vice Chancellors	0 (0%)	8 (100%)
Dean and Above	8 (7.3%)	110 (92.7%)
Associate and Assistant Deans and Heads of Departments	18.7%	81.3%
Senior Academic Staff	245 (14%)	1508 (86%)
Junior Academic Staff	1037 (33.4%)	2069 (65.6%)
Academic Supporting Staff	1156 (52%)	1065 (48%)
Research Staff	885 (44.7%)	1097 (55.3%)

### III SETTING THE CONTEXT

The background to each university and country provides context for the development of EEO policies and women’s leadership within the universities. Universities in Australia and Hong Kong operate within an international labour market, based on similar global

<sup>16</sup> Y Wang, Q Yue and K Yu, ‘Women Leaders of Higher Education: Female Executives in Leading Universities in China’ (2013) 9(6) *Cross-Cultural Communication* 40.

European-American university models, with similar colonial histories, and similar demographic profiles within universities. Yet the universities are also based within two very different cultural contexts, with different political regimes, and marked differences between the numbers of women reaching leadership positions and the levels of leadership they are reaching. This section will briefly outline the cultural and ideological contexts of Australia and Hong Kong.

Australia is a democratic capitalist economy with a comprehensive workplace anti-discrimination legislative framework which, in theory, should make it easy, or at least achievable, to attain an equality in university leadership. A British colony, Australia has high international citizenry and is a well-developed federal constitutional monarchy guided by a parliamentary democracy, the rule of law, guaranteed freedoms, and adherence to international human rights laws and conventions. Australia is noted for its wide cultural diversity across society, and predominantly Western, individualistic values. Australia in general subscribes to a meritocratic understanding of career advancement and leadership — that promotion and position is awarded on merit, regardless of factors such as gender. Liberal ideologies around equality are reinforced and legal protections are ensured by anti-discrimination legislation and various governmental and non-governmental bodies.<sup>17</sup> However, Australia still has some underlying notions of “women’s” work versus “men’s” work. Covert forms of discrimination and bias are common, and there is a prevailing and significant gender pay gap across almost all fields of work.<sup>18</sup>

On the other hand, Hong Kong Special Administrative Region (‘SAR’) is a part of the People’s Republic of China (‘PRC’). It is characterised by a “one country, two systems” regime of political leadership, whereby political rule is autonomous, in theory, from the rule of the Chinese Communist Party on the mainland. Much like Australia, Hong Kong represents a melting pot of politics, societies, and heritage. However, Hong Kong is informed by its Confucian heritage and, arguably, “Asian values” which place an emphasis on the collective above the individual, a reverence for hierarchy, and heavily-gendered

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<sup>17</sup> See, eg, *Sex Discrimination Act 1984* (Cth); See also, Workplace Gender Equality Agency, *About Workplace Gender Equality* (2016) <<https://www.wgea.gov.au/learn/about-workplace-gender-equality>>.

<sup>18</sup> Workplace Gender Equality Agency, *Gender Pay Gap Statistics* (2016) <[https://www.wgea.gov.au/sites/default/files/Gender\\_Pay\\_Gap\\_Factsheet.pdf](https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf)>

concepts of public and private life.<sup>19</sup> While modern ideas of family and state are changing, Hong Kong's historical backing is significant for understanding the ideologies around gender and the framing of societal expectations.<sup>20</sup> Hong Kong was subject to many British patriarchal leadership structures, cultural, and legal influences due to British colonisation.<sup>21</sup> Being under British control until 1997 also meant that Hong Kong was not a part of the dismantlement of many patriarchal and feudal elements of Chinese Confucianism in the mainland, with the coming of modern egalitarian principles being espoused by the Communist Party in the PRC. As such, Hong Kong has a historical backing inclusive of both British and Chinese Confucian patriarchy, with Western feminism and Chinese egalitarianism yet to be fully grasped.<sup>22</sup>

Women leaders in Hong Kong currently experience a unique cultural context influenced by both British values and Chinese Confucian traditions. This has resulted in an environment which favours paternalistic leadership, traditionally rigidly defined gender roles and behaviours, and a historical hierarchy which 'placed Chinese women in secondary or subordinate roles to men.'<sup>23</sup> In this context, women have made substantial gains in professional and private sector occupations, however, this is not matched in universities. Further, while legal frameworks in Hong Kong have been an important step in addressing gender-based discrimination and equal opportunities over the past decades, their effectiveness is debated and the practical mechanisms to appeal against gender discrimination are not as well-developed as in Australia.<sup>24</sup>

While abundant literature is available on the Australian context, few studies exist regarding Hong Kong's circumstance. Literature suggests that overt discrimination, as predominantly tackled by anti-discrimination legislation and EEO policies, has given way to deeply entrenched inequalities, embedded in organisations through promotions

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<sup>19</sup> Fred Dallmayr, 'Confucianism and the Public Sphere: Five Relationship Plus One?' (2003) 2(2) *Dao: A Journal of Comparative Philosophy* 193; Ambrose King, 'Kuan-his and Network Building: A Sociological Interpretation' (1991) 120(2) *Daedalus* 120.

<sup>20</sup> Carmen Luke, "'I Got to Where I Am By My Own Strength": Women in Hong Kong Higher Education Management' (1998) 26(1) *Chinese University Education Journal* 31.

<sup>21</sup> Adelyn Lim, *Transnational Feminism and Women's Movements in Post-1997 Hong Kong: Solidarity Beyond the State*, (Hong Kong University Press, 2015).

<sup>22</sup> *Ibid.*

<sup>23</sup> Irene Chow, 'Gender Differences in Perceived Leadership Effectiveness in Hong Kong' (2005) 20(4) *Women in Management Review* 216, 218.

<sup>24</sup> See, eg, *Sex Discrimination Ordinance 1995* (Hong Kong); See also, Woon-Kwong Lam, *Gender Equality Policy/Practice in Hong Kong: Equal Opportunities Commission* (2011) <<http://www.cuhk.edu.hk/hkiaps/grc/pdf/EU-panel1-Mr.WKLam.pdf>>.

processes, informal norms, incomplete mentoring and professional development, and everyday interactions within universities.<sup>25</sup> As scholarship indicates that Asian culture has rigid expectations around women's experiences and participation in the workforce — valuing quiet, subdued and withdrawn characteristics which are antithetical to common perceptions of leadership — then academic women in Hong Kong face specific cultural challenges not matched in the Australian context.<sup>26</sup>

The introduction of EEO policies and mechanisms for appeals are relatively new, mostly having been spurred by the second wave of feminism from the 1960s and unified national systems for higher education in the 1980s.<sup>27</sup> Such affirmative action policies are called on by liberal feminism to remedy past and ongoing sex discrimination and improve women's representation in non-traditional occupations and leadership positions.<sup>28</sup> EEO policies have been used as an attempt to redress gender imbalances that have often been inherent in university structures. Many EEO policies aim to address overt problems, yet the development of EEO policies is often specific to the organisation and they are often applied inconsistently, even across public sector institutions such as universities. Recurring themes in literature surrounding the effect of EEO policies on women's leadership include the minimal recognition being given to covert discrimination and disadvantage; the lack of practical application of EEO policies; low penalties for failing to report on gender equality to overhead bodies; and the over-reliance on EEO policies to redress gender imbalances.<sup>29</sup> In parts of Asia, EEO policies often only represent 'an empty

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<sup>25</sup> Sarah Aiston, *A Woman's Place at the Top Table is Not Assured* (2015)

<<http://www.universityworldnews.com/article.php?story=20150325170011964>>; Yvonne Benschop and Margo Brouns, 'Crumbling Ivory Towers: Academic Organising and its Gender Effects' (2003) 10(2) *Gender, Work and Organisation* 194; Irene Chow, 'Gender Differences in Perceived Leadership Effectiveness in Hong Kong' (2005) 20(4) *Women in Management Review* 216; Louise Kloot, 'Women and Leadership in Universities: A Case Study of Women Academic Managers' (2004) 17(6) *International Journal of Public Sector Management* 470; Hilary Winchester, Colleen Chesterman, Shard Lorenzo and Lynette Browning, 'Academic Women's Promotions in Australian Universities' (2006) 28(6) *Employee Relations* 505.

<sup>26</sup> Sarah Aiston, 'Leading the Academy or Being Led? Hong Kong Women Academics' (2014) 33(1) *Higher Education Research and Development* 59.

<sup>27</sup> Joan Eveline, *Ivory Basement Leadership: Power and Invisibility in the Changing University* (University of Western Australia Press, 2004).

<sup>28</sup> Barbara Bagillhole, *Women in Non-traditional Occupations. Challenging Men* (Palgrave Macmillan, 2002); Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, 2000).

<sup>29</sup> Glenda Strachan and Erica French, 'EEO: Is it Living Up to its Promise of Gender Equity?' (2008) in P Stanton and S Young (eds), *Workers, Corporations and Community: Facing Choices for a Sustainable Future: Volume 1: Refereed Papers* (Paper presented at the Proceedings 22<sup>nd</sup> Conference of the Association of Industrial relations Academics of Australia and New Zealand – Workers, Corporations and Community: Facing Choices for a Sustainable Future, Melbourne, Australia, 6 – 8 February 2008).

shell or toothless tiger construction of EEO.’<sup>30</sup> Further, while the policies have been reasonably successful in providing equality in participation, they have had limited success in providing access or movement into senior leadership or management roles.<sup>31</sup> Inconsistencies in policies particularly affect women who are ultimately more reliant than men on support to overcome organisational challenges, like unconscious bias, to transform traditionally-male spaces into gender equal and supportive work environments.<sup>32</sup>

Literature suggests that universities need more transparent promotion procedures and a deeper awareness of gender inequality to overcome institutionalised inequality. Literature also notes that an over-reliance on concepts of merit, as often enshrined in EEO policies, can reproduce longstanding gender imbalances because of implicit notions of university leadership as “masculine” and “inherently gendered”.<sup>33</sup> Rather than being proactive in providing pathways for women in leadership, EEO policies are often reactive in preventing discrimination or providing grievances mechanisms only after the fact.<sup>34</sup> This suggests that EEO policies, as a sole intervention, may have a limited effect in contributing to increased women in leadership positions in universities, particularly if they are applied in isolation.<sup>35</sup>

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<sup>30</sup> Faiza Ali, 'A Comparative Study of EEO in Pakistan, India and Bangladesh' in Mustafa F Ozbilgin and Jawad Syed, *Managing Gender Diversity in Asia: A Research Companion* (Edward Elgar Publishing, 2010).

<sup>31</sup> Ibid.

<sup>32</sup> Joan Acker, 'From Glass Ceiling to Inequality Regimes' (2009) 51(2) *Sociologie Du Travail* 199; Clare Burton, *Monograph No. 2: Redefining Merit* (Australian Government Publishing Service, 1988); Clare Burton, *Monograph No. 3: Gender Bias in Job Evaluation* (Australian Government Publishing Service, 1988).

<sup>33</sup> Yvonne Benschop and Margo Brouns, 'Crumbling Ivory Towers: Academic Organising and its Gender Effects' (2003) 10(2) *Gender, Work and Organisation* 194; Louise Kloot, 'Women and Leadership in Universities: A Case Study of Women Academic Managers' (2004) 17(6) *The International Journal of Public Sector Management* 470; Hilary Winchester, Colleen Chesterman, Shard Lorenzo and Lynette Browning, 'Academic Women's Promotions in Australian Universities' (2006) 28(6) *Employee Relations* 505.

<sup>34</sup> Glenda Strachan and Erica French, 'EEO: Is it Living Up to its Promise of Gender Equity?' (2008) in Pauline Stanton and Suzanne Young (eds), *Workers, Corporations and Community: Facing Choices for a Sustainable Future: Volume 1: Refereed Papers* (Paper presented at the Proceedings 22<sup>nd</sup> Conference of the Association of Industrial relations Academics of Australia and New Zealand – Workers, Corporations and Community: Facing Choices for a Sustainable Future, Melbourne, Australia, 6 – 8 February 2008).

<sup>35</sup> Joan Acker, 'Inequality Regimes: Gender Class, and Race in Organisations' (2006) 20(4) *Gender and Society* 441.

## IV METHODOLOGY

Literature on workplace employment that compares and contrasts findings across countries remains relatively rare.<sup>36</sup> This research seeks to address this gap within the field of gender and universities using two case studies. A comparative case study approach was chosen with the aim of exploring the on-ground experiences and situations of women in two disparate polities. Since both Australia and Hong Kong have few women in university leadership and decades of EEO policies in place, the comparative approach provided a way to understand the problem from different contexts across the international labour market in which universities operate.

The research primarily involved semi-structured interviews to explore the experiences of women senior leaders. Interviews were conducted face-to-face with 10 senior women leaders in Australia and Hong Kong over eight months from April 2015 to October 2015. Women in senior leadership were defined as those in Vice Chancellor/President, Deputy Vice Chancellor, Pro Vice Chancellor, Dean, and Director positions. The problem of selection bias was mitigated by focussing on experiences of individual women selected from university employment databases to reflect different levels of senior leadership, roles, and portfolios. While there were several executive-level women leaders to interview at Australian University, Sino University had no executive-level women. The lack of women leaders at Sino University and the prevalence for most senior leaders to be at lower levels of leadership made it more difficult to gather interview participants.

Participants were initially contacted via email and the interviews generally took place in the women's offices for around one hour. This was followed by some follow-up meetings and emails to clarify points. Interviews were conducted in English and were then transcribed for analysis and sorted in themes guided by the research questions and Acker's theory of inequality regimes.<sup>37</sup> For the purposes of the interview, an interview guide was compiled using main questions or topics, yet the process was flexible and

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<sup>36</sup> Alex Bryson and Carola Frege, 'The Importance of Comparative Workplace Employment Relations Studies' (2010) 48(2) *British Journal of Industrial Relations* 231; Geraldine Healy and Gill Kirton, 'The Early Mobilisation of Women Union Leaders – A Comparative Perspective' (2013) 51(4) *British Journal of Industrial* 709.

<sup>37</sup> Joan Acker, 'From Glass Ceiling to Inequality Regimes' (2009) 51(2) *Sociologie Du Travail* 199.

adapted according to participant responses. Since the research involved multiple case studies, some structure was retained in order to ensure cross-case comparability.

Analysis centred on each university's EEO policy and practice, the women's career and life paths to leadership, and organisational impediments to change. Data was organised and analysed manually and quotes were chosen as representative of common themes or issues raised by interviewees, unless stated as an abnormality. Overall, research and analysis was undertaken from a critical social science methodological understanding, to '[go] beyond surface illusions to uncover the real structures in the material world in order to help people change conditions and build a better world for themselves.'<sup>38</sup>

#### V CASE DETAILS

Two case study universities were selected for this study. Both are publicly funded, have student populations in excess of 20 000 students, have multiple campuses, are based in major city centres, and are reasonably representative of other universities in each locality. Pseudonyms for both the participants and their institutions have been used in this research to protect confidentiality. The Australian case institution is referred to as Australian University ('AU'). With a track record of being an Equal Opportunity for Women in the Workplace Agency ('EOWA') women's employer of choice, AU is viewed as one of the more progressive universities with regards to women's leadership.

The second case study university is in Hong Kong and is referred to as Sino University ('SU'). Like many universities in Hong Kong, SU has gender-specific studies centres and rhetorical support for gender equity. SU is viewed as one of the more progressive universities in Hong Kong in regards to gender equity. The Chief Executive of Hong Kong is automatically granted the position of Chancellor for every university in Hong Kong, resulting in a degree of politicisation in senior university appointments.

Although women comprise of approximately half of employees in both AU and SU, there is a considerable disparity when it comes to the gender balance in positions of senior leadership. While statistics on gender and employment are readily available in Australia, SU keeps no statistics on university employment and gender. In fact, in Hong Kong

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<sup>38</sup> Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson Education Limited, 2013) 110.



statistics on gender are limited. This is a key example of how little attention is paid to the issue of gender at SU and other Hong Kong universities. Overall, AU has significantly more women in leadership than SU. University staff gender compositions have been collated in **Table 3.**

**TABLE 3: INDIVIDUAL UNIVERSITY STATISTICS<sup>39</sup>**

	Australian University		Sino University	
	Female	Male	Female	Male
Chancellor	-	Yes	-	Yes
Vice Chancellor or President	-	Yes	-	Yes
Deputy Vice Chancellors, Pro Vice Chancellors, Provosts (executive positions)	36%	64%	0%	100%
Deans	33.3%	66.6%	18.1%	81.9%
Levels Equivalent to Directors, Associate/ Assistant Deans and Heads of Department	39.2%	61.8%	27.5%	72.5%

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<sup>39</sup> Data was collated from the individual Australian University and Sino University websites, details of which remain with the researcher and supervisors due to confidentiality. Where position titles did not match exactly due to title differences, the equivalent positions were sought. For example, the position of Head of Department in Australia correlated with the position of associate Dean or Director of a school/centre in Hong Kong. Percentages were used instead of real numbers in order to help preserve anonymity.

**TABLE 4: PARTICIPANT DETAILS<sup>40</sup>**

<b>Pseudonym</b>	<b>Location</b>	<b>Title</b>
Natasha	Australia	Pro Vice Chancellor
Georgia	Australia	Dean
Catherine	Australia	Pro Vice Chancellor
Sandra	Australia	Pro Vice Chancellor
Ruth	Australia	Dean
Anna	Hong Kong	Associate Dean
Penny	Hong Kong	Associate Dean
Lilian	Hong Kong	Associate Dean
Beth	Hong Kong	Director
Anika	Hong Kong	Director

## VI WHAT IT MEANS TO WORK IN THE UNIVERSITIES

Gender inequality within universities is often addressed through EEO policies and processes. Both of the universities provide these EEO policies (country and institution-wide) and the “right” rhetoric around achieving gender equality. Across analysis, AU had more developed EEO policies, more women in leadership, and overall better experiences of leadership as expressed by the women leaders interviewed.

AU was founded on a commitment to equity and social justice, a rhetoric of which is foregrounded throughout the university and policy documents. Beyond just prohibiting discrimination, AU’s EEO policy also includes deliberate references to unconscious bias, ensuring representation across students and staff, and the continued education of

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<sup>40</sup> Table 4 provides basic information on the women senior leaders interviewed. Identifying factors such as race and ethnicity have not been included but generally AU participants were overwhelmingly white, Anglo-Saxon women, whereas SU participants reflected a higher diversity of ethnicities from European to South and East Asian backgrounds. This was particularly interesting to note considering that Australia has a much more diverse multicultural population. Although participant age was not part of the demographics sought, most participants were in their late 30s-60s. Participants were either in the middle or late stages of their careers, generally (although not in all cases) older and with no children or older children when they reached senior leadership.

university community members is centred around equality and diversity. Further, it references the impact of discriminatory language versus inclusive language, has promotion panel training on overcoming bias, and has specific programs for women leaders. By surface appearance, the overall policy is found to be comprehensive and strong, inclusive of overt and covert forms of discrimination, and complementing strong equal opportunity laws nationwide.

In contrast, SU has one specific EEO policy based around discrimination and harassment. The policy prohibits discrimination on the grounds of sex, disability, sexuality, marital status, pregnancy, family status or race, as well as prohibiting any forms of harassment. While addressing sex discrimination, the University does not have an overarching policy commitment to gender equality. In comparison to AU, SU's policy is still developing and is yet to integrate gender equality aims into the overall university strategic plan or direction.

The universities' EEO policies are analysed around three main provisions that contribute to women achieving leadership: (a) targets and measurable goals; (b) transparency in the promotions process; and (c) appeals and grievances mechanisms. Similarities and differences are contrasted in order to gain a more detailed picture of how the EEO policies contribute, or fail to contribute, to women gaining leadership positions. This allows for a reflection on how EEO policies are experienced in practice, and where future potential developments may be needed.

#### *A The provision of targets and measurable goals*

The provision of targets, quotas, and measurable goals is a common mechanism used to address workplace gender imbalance. The use of targets and quotas is contested, however, they do provide a measurement which ensures that at least a minimum is undertaken — as the management maxim goes, what gets measured, gets done.<sup>41</sup> AU had targets for gender equality, yet SU had no publicly available targets and there were no explicit measurable goals against which comparisons could be made. One participant states, 'I am the kind of person that thinks the university should be doing more, have frameworks, but I wonder if all my colleagues feel the same way'.<sup>42</sup> This approach "may

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<sup>41</sup> Petra Meier and Emanuela Lombardo, 'Gender Quotas, Gender Mainstreaming and Gender Relations in Politics' (2013) 65(1) *Political Science* 46.

<sup>42</sup> Interview with Lilian, Associate Dean, SU (Hong Kong, 5 October 2015).

be more acceptable to management” because there is no responsibility to produce measurable change, but progress at SU in particular appeared hampered by the absence of set targets or goals.<sup>43</sup> Participants indicated how goals for inclusion reaffirmed not only that they were welcome in the leadership spaces they occupied, but that there was acknowledgement that the lack of women in leadership was a problem to be rectified. Yet at SU, women leaders were sensitive that targets may not be welcomed among their colleagues.

Through processes such as funding, promotions, or appointments of new leaders, targets and measurable goals ensure that an awareness of gender equality goals is reached. Programs like the Athena SWAN Charter ('UK') and SAGE in Australia are gaining traction, whereby university funding is determined by how gender equitable a university or department is — the more equitable, the more funding a university receives.<sup>44</sup> When similar awards or benchmarks were explored at SU, a different story was found in the dialogue between interviewer and participant.

Participant: I work with a team of people in the United States and when they apply for research grants through the federal government there's a statement that you have to provide that you've done this and that for gender equity and you can actually get your application rejected if you don't take equity into account, they actually score you on it.

Interviewer: Do you know of anything similar in Hong Kong?

Participant: Are you joking? (laughs).<sup>45</sup>

Gender targets and benchmarks were yet to be made a priority at SU, despite it being common practice in many Western universities worldwide. This appears to have had a major effect on SU's ability to acknowledge and then retain a minimum percentage of women in leadership. Consequently, having targets and measurable goals does appear to correlate with more women achieving senior leadership, with greater gender representation being witnessed in AU as a result and more welcoming experiences of the leadership environment being reported. This may be because, unlike many of the

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<sup>43</sup> Joan Acker, 'Inequality Regimes: Gender Class, and Race in Organisations' (2006) 20(4) *Gender and Society* 441.

<sup>44</sup> Equality Challenge Unit, *Athena SWAN Charter* (2016) <<http://www.ecu.ac.uk/equality-charters/athena-swan/>>; Australian Academy of Science, *Gender Equity* (2016) <<https://www.science.org.au/supporting-science/gender-equity>>.

<sup>45</sup> Interview with Penny, Associate Dean, SU (Hong Kong, 16 September 2015).

provisions of EEO policies, the setting of targets is a proactive, empowering measure that goes beyond “prohibiting discrimination” to “promoting women leaders”. This is a major difference between the EEO policies of AU and SU — with AU's policy more proactive in promoting women leaders and SU's policy more reactive in preventing discrimination and harassment.

### B *Transparency in the promotions process*

Transparency in promotions is key to the advancement of women.<sup>46</sup> This is largely due to the impact of longstanding structural sex discrimination, the prevalence for leadership to be associated with masculine attributes, and the persistence of old boys' networks and theories of homosociability, which has traditionally disadvantaged women from gaining promotions to senior leadership.<sup>47</sup> AU outlines the importance of transparency, and as a publicly-funded institution, is subject to many laws and policies that require transparency. However “back door” methods of advancement in Hong Kong added to a lack of transparency around promotions and provisions for transparency in SU's EEO policy.

Hong Kong still employs the use of *guanxi*, loosely translated as a network of relationships, which places ‘emphasis upon getting things done through whom you know’.<sup>48</sup> It is part of a strategy that employs good relationships or use of the “back door” to accomplish objectives, such as filling or applying for new positions of leadership. Although it is officially railed against in China and Hong Kong, the practice seems to still be commonplace enough to affect participants working in this globalised university in 21<sup>st</sup> century Hong Kong. This can disadvantage women seeking leadership and promotions by not providing a clear and transparent pathway to leadership, also disadvantaging those who may have weaker social networks (often, women). One SU leader comments, ‘the Chinese masculine culture, as it's expressed at this university, if they are in positions of leadership ... they typically like to lead by the “back door”. So the decisions have all been

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<sup>46</sup> Hilary Winchester, Colleen Chesterman, Shard Lorenzo and Lynette Browning, ‘Academic Women's Promotions in Australian Universities’ (2006) 28(6) *Employee Relations* 505.

<sup>47</sup> Ibid; Joan Acker, ‘Inequality Regimes: Gender Class, and Race in Organisations’ (2006) 20(4) *Gender and Society* 441; Louise Kloot, ‘Women and Leadership in Universities: A Case Study of Women Academic Managers’ (2004) 17(6) *International Journal of Public Sector Management* 470.

<sup>48</sup> James Wall, ‘Managers in the People's Republic of China’ (1990) 4(2) *Academy of Management Executive* 27.

made in advance, and the meeting is really a perfunctory ceremony to endorse and put the final seal on it'.<sup>49</sup> SU women leaders interviewed indicated a level of uncertainty and a lack of transparency when they applied for positions of advancement which was not evidenced among the AU women leaders.

Further to a lack of transparency, a lack of clear criteria and definition of leadership was felt to obscure the appointment of new leaders across both SU and AU. One participant lamented that 'I wish there was a policy paper or there was a manual that would tell you what they want ... nobody knows what [leadership] is and how to quantify it. It is not in the promotion policy papers'.<sup>50</sup> Many SU participants detailed how this allowed outright discrimination to occur. Without a clear understanding of leadership from both the person wanting to be promoted and those assessing promotion applications, unconscious bias can play into how decisions are made. Hence, the recent emphasis on promotion-panels training and the importance of transparency in process, which was more evidenced at AU.<sup>51</sup>

AU appeared to have a better organisational environment around transparency, yet issues were still found. One AU participant talked about continued practices and processes which subvert efforts to increase women's equity, equal participation, and recognition. She spoke firstly about the traditional conception of a leader as male when it came to the appointment of a new head and the lack of transparency around definitions and criteria for the role.

I am the second-in-charge but I have already been given the signals first of all — too soon, not what the Vice Chancellor is looking for, not the right image — none of which has got anything to do with my ability or what I've achieved. So I think that the messages around what leadership is are very mixed here and certainly not what I'd be looking for in someone taking on a leadership role in [this school] in this day and age.<sup>52</sup>

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<sup>49</sup> Interview with Penny, Associate Dean, SU (Hong Kong, 16 September 2015).

<sup>50</sup> Interview with Anna, Associate Dean, SU (Hong Kong, 11 September 2015).

<sup>51</sup> Louise Kloot, 'Women and Leadership in Universities: A Case Study of Women Academic Managers' (2004) 17(6) *International Journal of Public Sector Management* 470; Hilary Winchester, Colleen Chesterman, Shard Lorenzo and Lynette Browning, 'Academic Women's Promotions in Australian Universities' (2006) 28(6) *Employee Relations* 505.

<sup>52</sup> Interview with Georgia, Dean, AU (Australia, 29 April 2015).

This had an impact on the participant not applying for the senior position on the executive, with her commenting that she felt that she had reached as far as she would in her career. Her experience was not linked to specific and transparent criteria or definitions around the position, but instead focussed on intangible and unmeasurable comments on her image. This demonstrates that even when there are specific criteria, as there are at AU, it seems that there is “something else” — the image and the values around that perceived image — that is needed. Georgia stated that:

I am perceived as a strong woman, and [the leadership] doesn't like strong women. That was actually said. On more than one occasion ... [they] will refer to me as 'she is no shrinking violet' or 'you could call her bossy,' and I mean you wouldn't use that language with men.<sup>53</sup>

Language perpetuates inequality as it can marginalise and trivialise women and their contributions to the workforce, as well as shape how their achievements, leadership styles, and personalities are perceived in the workplace.<sup>54</sup> Van Krieken et al note that language plays a crucial role in the maintenance of particular understandings of masculinity and femininity, and can work to constrain women seeking leadership in the workplace.<sup>55</sup> Despite AU's EEO policies around inclusive and non-discriminatory language, inequality continues to be perpetuated in this way, suggesting that transparency in promotions processes begins well before the actual application for promotion. It is clear that while having provisions for transparency in EEO policies is important for helping provide women leaders with more information and clarity around leadership positions, at neither university did it ensure that opportunities for promotion are always equitably received or assessed.

Where SU evidenced a less transparent promotions process and no provision for promotion panel training, the women spoke more often of difficulties in signalling for, applying for, and getting promotion. AU had stronger policies around transparency which seemed to create a more transparent overall environment which helped the women leaders, however there were still some clear divergences between policy and practice.

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<sup>53</sup> Interview with Georgia, Dean, AU (Australia, 29 April 2015).

<sup>54</sup> Yvonne Benschop and Margo Brouns, 'Crumbling Ivory Towers: Academic Organising and its Gender Effects' (2003) 10(2) *Gender, Work and Organisation* 194.

<sup>55</sup> Robert Van Krieken, Daphne Habibis, Philip Smith, Brett Hutchins, Greg Martin, and Karl Maton, *Sociology* (Pearson Education, 4<sup>th</sup> ed, 2010).

*C The provision of appeals and grievances mechanisms*

In the case of such divergences, appeals and grievances mechanisms are key structures for women in university employment. Some provisions of grievances mechanisms include committees that can investigate and decide on matters of discrimination or harassment. They were available in both universities, yet as will become clear, there are nuances in policy and application.

In SU, formal procedures for investigation against discrimination are available for all full-time and part-time staff and students, however, no mention is made of casual staff who are mostly women. There is a commission to deal with discrimination complaints within the university, yet the focus of the documents is on overt forms of discrimination. There is no mention of the fact that much of contemporary gender inequity is a result of “invisible” inequalities, unconscious bias, and general exclusionary practices, and interactions (old boys’ clubs, et cetera) in the university environment.<sup>56</sup> In this way, the EEO policy of SU addresses the important issue of preventing discrimination, but this does not necessarily create an equal workforce.

The importance of appeals and grievances mechanisms was demonstrated through one SU participant when she applied for a job within the university. She states that:

There was a position that became available in the university which I applied for but did not get ... I thought, oh, maybe my portfolio wasn't what they wanted or maybe it wasn't good enough, but it turns out, someone told me afterwards, 'oh you should know actually at the time you were not chosen because you were a woman'. This is through the university. And the main reason was that they said the department at that time thought that women would have children and would be out of action for a long time.<sup>57</sup>

This is a clear example of discrimination on the basis of gender and an example of where appeals can be important for women's career progression. While discrimination on this basis is illegal in Hong Kong, an appeal or grievances process was not followed by the participant. For women seeking leadership within the universities, appeals and grievances mechanisms are important, however, the women for whom they apply can

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<sup>56</sup> Joan Acker, 'Inequality Regimes: Gender Class, and Race in Organisations' (2006) 20(4) *Gender and Society* 441.

<sup>57</sup> Interview with Lilian, Associate Dean, SU (Hong Kong, 5 October 2015).



often be reluctant to use them, or feel that there is no point in going through the process. Since there is a focus on the “reactive” remedying of discrimination where it occurs, rather than “proactive” measures of encouraging leadership, it is unclear whether this contributes to more women in leadership in the universities. However, appeals and grievances mechanisms do contribute to the overall university environment whereby women have options and supports. This may contribute more to the retaining of women leaders, even if it does not actively increase their numbers. AU had a stronger appeals process which appeared more integrated and easier to access in the university design, which may have contributed to its more accessible and inclusive working environment for the women.

The three provisions (a), (b), and (c) begin to demonstrate correlations between the level of development of each universities' EEO policies and the levels and experiences of the women university leaders. AU had a more developed EEO policy which correlates with its higher numbers of women in leadership and more positive overall experiences of leadership. Yet an underlying similarity was found. Although both universities had developed EEO policies over a number of decades, neither university had achieved equal gender representation in leadership, indicating only a “moderate success” in terms of the effect of the EEO policies.

#### VII DEFICITS IN THE EEO POLICIES

Two key factors were found to limit the effect of the EEO provisions. They include: (i) the narrow focus on aspects of discrimination and inequality; and (ii) the inadequate addressing of subjectivity and bias in forming EEO and enacting policies. Acker's theory of inequality regimes is used to understand why EEO policies have had only moderate success. Outlining the effect of these policies is important because they often ‘fail to address other underlying processes of inequality’.<sup>58</sup>

##### *A The narrow focus on aspects of discrimination and inequality*

By failing to encompass some of the nuances and covert ways in which inequality is produced through everyday university life, EEO policies can obscure elements of inequality regimes. At SU there is only one reference to gender (sex) in the entire EEO

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<sup>58</sup> Ibid 457.

policy document and no definition or description is provided for what “sex discrimination” actually means. As Reilly et al state, by not making specific reference to women and their unique challenges within the university, there is an implication that the genders are equally disadvantaged and that no targeted response for women is needed.<sup>59</sup> Further, the focus on “narrow areas of inequality” and limited recognition of intersectionality (the intersection of multiple areas of inequality) can result in EEO policies failing to address underlying organisational inequality.<sup>60</sup>

One SU participant demonstrates the limitations of EEO policies that fail to build a gender equitable university environment. She talks about the all-permeating nature of a masculinist and rigid cultural environment, an intersection of inequalities which can act to constrain women’s leadership. In her position:

what I became very aware of was that it wasn’t just that women weren’t in senior positions, because [gender] should not be the sole reason why a person is in a senior position, but that there was this kind of invisible barrier, I don’t know how else to describe it, there’s no staircase for women to even access [leadership]. And that’s because it’s quite a masculine culture, but enmeshed with Chinese culture. It’s the two kind of mutually working together which prevented, at least from my observations, women having a real voice.<sup>61</sup>

Narrow EEO policies that fail to address organisational culture and environment can silence the voice of women in the workplace, making it hard to both enact leadership and observe that leadership being enacted.<sup>62</sup> The intersection of culture and gender was felt to limit women's leadership at SU. With limited provisions to address this intersectionality, and procedures around promotion panel training or combating unconscious bias or problematic language not evidenced, SU’s overall policy for addressing gender inequality was still developing. Many of these issues have been addressed at AU.

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<sup>59</sup> Amanda Reilly, Deborah Jones, Carla Rey Vasquez and Jayne Krisjanous, ‘Confronting Gender Inequality in a Business School’ (2016) 35(5) *Higher Education Research and Development* 1025.

<sup>60</sup> Joan Acker, ‘From Glass Ceiling to Inequality Regimes’ (2009) 51(2) *Sociologie Du Travail* 199, 213.

<sup>61</sup> Interview with Penny, Associate Dean, SU (Hong Kong, 16 September 2015).

<sup>62</sup> Amanda Reilly, Deborah Jones, Carla Rey Vasquez and Jayne Krisjanous, ‘Confronting Gender Inequality in a Business School’ (2016) 35(5) *Higher Education Research and Development* 1025.

*B Inadequately addressing subjectivity and bias in forming and enacting policies*

The second limitation of EEO policies concern definitions of leadership and merit. Much EEO legislation in the public sector in Australia (and internationally) bases initiatives around the concept of merit, commonly understood to be based on a person's ability or capacity to perform in a position.<sup>63</sup> Merit is, however, subjectively assessed, and evidence continues to suggest 'that men are perceived to be more able, to have more natural ability in a range of areas, than women'.<sup>64</sup> EEO policies can therefore have limited effect if they fail to take into account the subjective biases not only of those forming the EEO policies, but of those applying the policies, and whether the policies encourage the rethinking of traditional structures.<sup>65</sup>

This limitation is exemplified by the theme that most participants felt that they had not experienced "too much" overt discrimination or bias; like Reilly et al's study, many rejected gender as an explanatory framework for challenges encountered.<sup>66</sup> However, gender stereotyping and assumptions at the universities were regularly brought to the fore as issues not dealt with well by the universities' policies, and therefore also staff within their work environments. An AU participant states:

I have very rarely ever experienced overt discrimination at all, but what I experience on a daily basis ... is that I turn up to the breakfast this morning and all of the guests, pro vice chancellors, were male, and there are expectations of who am I and what am I doing here. It's always a little bit critical ... it's never disrespectful, it's just the expectation and probably, if you were to go to an engineering breakfast and you saw a woman there, you mightn't automatically think that she's somebody senior ... it's those kind of things that you're a little bit of novelty, you know, 'oh what are you doing here' and 'how did you get here'.<sup>67</sup>

The impact of these kinds of perceptions is put clearly by one SU participant when she acknowledges the importance of the perceptions of her colleagues (which are in some

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<sup>63</sup> Clare Burton, *Monograph No. 2: Redefining Merit* (Australian Government Publishing Service, 1988).

<sup>64</sup> *Ibid*, 2.

<sup>65</sup> *Ibid*.

<sup>66</sup> Amanda Reilly, Deborah Jones, Carla Rey Vasquez and Jayne Krisjanous, 'Confronting Gender Inequality in a Business School' (2016) 35(5) *Higher Education Research and Development* 1025.

<sup>67</sup> Interview with Sandra, Pro Vice Chancellor, AU (Australia, 12 May 2015).

cases, also the same people sitting on promotion panels) on her advancement to leadership. She asks:

If I were the dean, could I get a bunch of associate deans to believe in me? I would question that because I'm not sure, and this is something to do with the kind of feeling you get from the ground level. It's like, well, if you walk in and people still think you're the secretary, it says something about whether you're able enough. So would they be backing me if I had a tough thing I had to do?<sup>68</sup>

Without EEO policies which take into account non-traditional definitions of merit and leadership, policies may be inherently subjective and be inadequately dealing with the unconscious bias and gender stereotyping that they aim to address. Having non-traditional conceptions of leadership and merit may also open up a more inclusive collegial environment, which was desired at both AU and SU by the women leaders.

#### VIII CONCLUSION

This case study has demonstrated that EEO policies do contribute to women achieving senior positions of leadership. The benefit of a cross-cultural comparative study has shown clear differences in the level of development of university EEO policies and the level of women in leadership. More-developed EEO policies are positively correlated with more women in university leadership and better experiences of leadership. Addressing both overt and covert discrimination was important to achieving better representation in leadership. This was done at AU and could indicate why there were higher numbers of women in leadership. On the other hand, the EEO policies and mechanisms for women within SU focussed exclusively on overt discrimination, leaving covert discrimination unaddressed. The differences in policies appear to be a major factor contributing to the differences in the numbers of women leaders between the universities. This is a key insight as a result of analysing differences in the EEO policies.

Further, Acker's theory of inequality regimes offers key insights into why EEO interventions within universities often fail to produce the change they aim to instil: true equality. Primarily, this is because EEO policies and mechanisms for appeals within universities are only part of the solution. These policies and interventions are important

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<sup>68</sup> Interview with Lilian, Associate Dean, SU (Hong Kong, 5 October 2015).

for providing a framework for working towards equality, but they do not produce equality simply by virtue of existing. This reinforces much of the literature around EEO policies beyond universities, findings of which include that 'merely having organisations produce equity plans does not increase women's participation in senior positions'.<sup>69</sup> In fact, Acker finds that successful efforts to attain gender equality have a number of common characteristics: targeting a limited set of EEO objectives; combining social movement and legislative support outside the organisation with support from inside the organisation; and, coercion or threat of loss as a result of not acting to achieve equality.<sup>70</sup>

Due to the complexity of the issue, this study focussed on comparing the EEO policies and the experiences of the women leaders. The small sample size allowed for a deep analysis of each individual women's career paths and experiences within each context, however this has limited the ability to make generalisations, and the study could benefit from more participants in future. Further research directions could include a deeper analysis on how the different cultural environments influence the development of EEO policies and women's leadership. Acknowledging that EEO policies are only one of a multitude of factors impacting women's progression, issues surrounding culture persist and are worth investigating further. Hong Kong universities appear to require even more robust and comprehensive EEO policies than Australia to counter other known barriers and challenges for women, whether they be cultural, political, or legal within the Asian context.

Overall, it is clear that the EEO policies and guidelines at SU are still requiring development compared with AU, but even with stronger EEO policies, AU has not achieved its targets (see **Table 3**). One AU participant sums up the contemporary leadership experience:

It has almost gone full circle of women working really hard to get this level of work and have children, but at the end of the day it's still the women who have to do the

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<sup>69</sup> Glenda Strachan and Erica French, 'EEO: Is it Living Up to its Promise of Gender Equity?' (2008) in Pauline Stanton and Suzanne Young (eds), *Workers, Corporations and Community: Facing Choices for a Sustainable Future: Volume 1: Refereed Papers* (Paper presented at the Proceedings 22<sup>nd</sup> Conference of the Association of Industrial relations Academics of Australia and New Zealand – Workers, Corporations and Community: Facing Choices for a Sustainable Future, Melbourne, Australia, 6-8 February 2008) 10.

<sup>70</sup> Joan Acker, 'Inequality Regimes: Gender Class, and Race in Organisations' (2006) 20(4) *Gender and Society* 441.

majority of the work in the space ... you have to be 'all in', and women just choose or can't be all in.<sup>71</sup>

Luke's summary of gender equity progress in the workplace still seems to hold true:

Women have worked hard to gain entry into the public sphere, the professions, and to break through old stereotypes and seniority barriers – in short, they have worked hard to earn the right to work the double-day.<sup>72</sup>

EEO policies are important, but greater awareness of covert discrimination and the everyday practices and processes of inequality, as well as the reviewing of policies, may be needed. The implications of incomplete EEO policies and mechanisms, or reliance only on EEO policies and mechanisms to produce change leaves women leaders exposed to organisational challenges. It appears that AU should have a better organisational environment for women leaders, however neither institution has leadership equality. In spite of many years of gender reforms and awareness, universities globally are still sites of gender inequality.

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<sup>71</sup> Interview with Georgia, Dean, AU (Australia, 29 April 2015).

<sup>72</sup> Carmen Luke, "I Got to Where I Am By My Own Strength": Women in Hong Kong Higher Education Management' (1998) 26(1) *Education Journal* 31, 54.

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## THE STORY OF A 'LEFT-BEHIND' CHILD OF CHINA

JUNTAO LYU\*

*In China today, there are an estimated 61 million children that have been separated from their parents — the so-called “left-behind” children of China. As one of the “left-behind” generation, I have experienced the poverty, separation, and struggles that characterise these hard times. On reflection, the strong influence of rural Chinese gendered and cultural norms are paramount to understanding my experience and those who grew up alongside me. My story is by no means universal — the challenges faced by Chinese “left-behind” children are wide-ranging, and as diverse and complex as China itself. After all, my story is just one story of millions, and it is one of privilege when considering the experiences of others. While China’s rural-urban move has brought significant financial improvements and opportunities for many, this comes at a price for those left behind.*

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I INTRODUCTION

My parents are part of the *liudong renkou* — the “floating” migrant population of China. The migrant workers of China “float” because they leave their rural homes to find higher-paying temporary work in urban cities. For migrant workers, the move is an opportunity to change their fate and that of their families. The move can be uncertain and the working conditions harsh, but the alternative is farming for subsistence. If you visit any Chinese city today, almost every worker you see in restaurants, shopfronts, factories, and on the sidewalk are rural migrant workers.

My mother went to Shanghai when I was 11 years old, and my father followed six months later, leaving behind my older brother and I in our village home. Family separation among Chinese migrant workers is common due to China’s household registration system (the *hukou* system) that registers families as either rural or urban. The Chinese Government first implemented the *hukou* system to restrict population movement in the late 1950s. City residents were issued rations, given jobs, education, a residence and social welfare, while the rural residents were given land to farm and build their homes on. In the 1990s, the *hukou* controls were relaxed and people began to gravitate to where the jobs were. Today, your *hukou* provides you with social rights in the area where you are registered, including a living space, health insurance, and schooling.<sup>1</sup> When rural residents migrate for work in cities, as my parents did, they concede their *hukou* privileges. It is simply not feasible to bring children along due to the high living costs of urban cities, including rent, schooling, food, and hospital fees. There have been attempts to build private primary schools in cities for migrant workers’

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<sup>1</sup> For an overview of the *hukou* system and its reforms, see Lu Yilong, ‘Does hukou still matter? The household registration system and its impact on social stratification and mobility in China’ (2008) 29(2) *Social Sciences in China* 56, 57–58.

children, but these schools often close due to limited financial support and the strict regulations of local governments.<sup>2</sup> For these reasons, many children throughout China have been separated from their parents — the number is estimated at over 61 million.<sup>3</sup> We are called the “left-behind”.

Other countries also experience forms of the same problem, especially informed by both internal and international migration.<sup>4</sup> My story is not a universal depiction of the challenges faced by Chinese left-behind children, but my story is one that will hopefully illuminate some of the social impacts of China’s rural-urban migration on my generation and future generations of rural children. While the move has brought significant financial improvements and opportunities for many, this comes at a price for those left behind. Studies have shown that left-behind children are more susceptible to depression, antisocial behaviours, and delinquent and destructive behaviours.<sup>5</sup> Their experiences are also gendered, with left-behind girls being particularly vulnerable to sexual abuse and trafficking.<sup>6</sup> In my own home province, Henan province, a study revealed that 34 percent of the rapes that occurred in that province involved left-behind girls.<sup>7</sup> In many ways, I was one of the luckier ones.

## II MY STORY

My hometown is a small village in southern Henan Province, located beside the Huai River. Until I turned 11, I lived with my family in a rural cottage. At that time, the only

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<sup>2</sup> Charlotte Goodburn, ‘Learning from migrant education: a case study of the schooling of rural migrant children in Beijing’ (2009) 29 *International Journal of Educational Development* 496, 495–504.

<sup>3</sup> ‘They are also parents: A Study on Migrant Workers with Left-behind Children in China’ (Report, Center for Child Rights and Corporate Social Responsibility, August 2013) 3  
<[http://resourcecentre.savethechildren.se/sites/default/files/documents/they\\_are\\_also\\_parents\\_-\\_a\\_study\\_on\\_migrant\\_workers\\_in\\_china\\_ccr\\_csr\\_english.pdf](http://resourcecentre.savethechildren.se/sites/default/files/documents/they_are_also_parents_-_a_study_on_migrant_workers_in_china_ccr_csr_english.pdf)>.

<sup>4</sup> Stephen Castles, Hein De Haas and Mark Miller, *The age of migration: International population movements in the modern world* (Palgrave Macmillan, 2013).

<sup>5</sup> See, eg, Zhang Wenjuan, ‘Focus on Children’s Rights in Rapid Economic Development: The Proposition China Endeavours to Solve’ (Report, UNICEF China, November 2014) 4  
<[https://www.unicef.org/crc/files/Zhang\\_Wenjuan\\_EN.pdf](https://www.unicef.org/crc/files/Zhang_Wenjuan_EN.pdf)>; Jiayou Luo et al, ‘The Status of Care and Nutrition of 774 Left-behind Children in Rural Areas In China’ (2008) 123 *Public Health Reports* 382, 382.

<sup>6</sup> See 女童保护研究报告 [Girls’ Protection Research Report] [报告 [Report], 中国儿童少年基金会 北京师范大学社会发展与公共政策学院社会公益研究中心 [China Foundation for Children and Adolescent’s Social Welfare, School of Social Development and Public Policy, Beijing Normal University] (2013) 18 [author’s trans].

<sup>7</sup> Su Guojun and Wang Yuxin, ‘The alarming absence of guardians to protect left-behind girls in rural areas from sex predators’, *China’s Women News*, 18 December 2006, cited in Aris Chan, ‘Paying the Price for Economic Development: The Children of Migrant Workers in China’ (Special Report, China Labour Bulletin, November 2009) 12.

income of my family came from farming. We had six Chinese Mu (1 Mu = 666.7 m<sup>2</sup>) of fields to farm. When my father was younger, he also used to sell other agricultural products at the market, like peanuts that he collected from other farmers, and my mother used to tailor clothes for other villagers. But the profits from these kinds of small businesses could not meet the expenses of my family — my older brother, my parents, and myself. We had some unhappy spring festivals because my family's annual income was only around 100 *yuan*. My mother would cry when she saw the money she had left.

When I was younger, the main staple food my family ate were sweet potatoes. My mother would mix the sweet potatoes with flour and boil them. I remember I could eat five bowls of this meal at one time; it was my favourite food during my childhood. We also had our own small vegetable garden that was important for daily food supply. We separated our grain into two groups: one for our own family supply and another one for tax.<sup>8</sup> When I was young, I often went to visit my maternal grandparents, because every time I left their home, my grandmother would give me a big goose egg to take home to eat.

The primary education I received was in a small village school. Although it was small, the building — a two-floor concrete building with eight rooms — was still the best building in our village. I was seven years old when I was a first-year student. One time I was on classroom duty for the day, and I ordered a girl to do the cleaning, which was the job I had to finish. She was our village doctor's daughter, shorter than me, weaker than me. I ordered her to sweep the floor, relying on the authority of the duty team leader. She cried afterwards and went to tell her parents about this. A few days later, I became sick, and I went to see the doctor with my parents. Her mother spoke with my mother in front of me and she apologised to her. This taught me that people should not bully others who were weaker than them. I felt so ashamed at that time. Shortly after, I had a similar experience. Some taller boys in my class often bullied me at school. It was a cold winter day, and we were cleaning up garbage on the school grounds. The boys took away my hat and threw it to each other. Every time I took it back and put it on my head, they grabbed it again, so I clutched my hat tightly in my grip in case they stole it again. My neighbour's daughter saw this, and she came over and told me to put the hat on my head

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<sup>8</sup> Before 2005, Chinese farmers paid their tax by grain.

because the weather was too cold. She also told the boys not to steal my hat again. This memory stays with me as I always appreciate how brave and caring she was to stand up to the bullies.

In 2001, one of my uncles from my mother’s side, who had found a job in Shanghai, decided to take my mother there to try her luck. It was a hard time for my family when my mother decided to leave — we couldn’t sustain ourselves anymore in our hometown. My father stayed at home to look after me, but he often gambled, leaving me at home alone. I often cooked for myself, but since ingredients were limited and I didn’t have any money, my only options were flour and vegetables, so I mixed them and made them into a vegetable pancake. I remember there were many times that I tasted a kind of petrol flavour in my pancake, but I did not understand that it could be dangerous, and I had to eat them because I was so hungry. One day, I found that the flour was polluted due to a fallen diesel oil can. My father knew about the accident, but he didn’t tell me about it. The polluted flour didn’t poison me — probably because I didn’t eat much.

Six months later, my older brother dropped out of middle school and followed our mother to find employment in Shanghai. As he was too young, there were no factories that accepted him. So he came back home and took over my father’s job of looking after me. I remember that this was a difficult time. Although my older brother cooked for me more often, he thought that my father had always preferred me and had beaten him heavier than me every time. So when we were both at home, he beat me a lot and said nobody would protect me anymore. I was so helpless and the only option for me was to be beaten. We had to wait another six months until my brother turned 16 and was old enough to get a job. He began working at a supermarket in Ningbo — another city next to Shanghai. A little while after he left I received a long letter from him, apologising to me and telling me he wouldn’t beat me at home anymore and he now had the same hopeless feelings himself in a faraway city. I forgave him after I received that letter. However, I do not believe his sincerity anymore as he often beats his own son.

In 2002, I entered middle school. It was a boarding school, and I only needed to go home on the weekends. During middle school, I did not know how to look after myself. When I was 13 years old, I weighed only 36 kg. I was short, thin, and often got sick. My parents and my older brother were in Shanghai, and my puppy dog and I were left at my paternal grandparents’ home. I got my puppy when I was eight years old. I liked him



very much, and he always stayed with me rather than other families. I remember every time I came back home and saw him; he was so happy to put his head in my arms. Every time I went to school, he would follow me for a long way until I told him to go back. He was my closest friend during my childhood. Unfortunately, he died in 2013. My grandmother told me he ran away and died alone, so nobody could find him.

In China, we have nine years of compulsory education, which includes six years of primary school and three years of middle school. However, many children could not finish their education, especially girls. Dropouts were very common at my school. Everyone believes that if a child's performance is not good enough, then they should drop out from school. This was especially the case for girls, as they would get married soon after they graduated. So, if a girl could not get high marks at school, her parents would let her drop out from school to earn more money for the family.

At that time, many children did not perform well. My classmates easily got bored with learning. I had two good friends, who were also left-behind children at my middle school. We often rode bikes and played together, but in the second year of middle school they told me that they didn't like learning all day and preferred to find employment in a big city. This really impacted me because I was unable to make friends like them again. Fortunately, I soon found an alternative friend: books.

One time after school, I saw a book stall next to the school entrance. I was attracted by a British novel called *Robinson Crusoe* and a Russian novel called *Childhood*.<sup>9</sup> I spent seven *yuan* to buy these two books, which was three lunch meals worth of money. I took the books back and read them on my bed instead of having food. From these two books, I learned that people could survive alone even in difficult circumstances. It encouraged me to face my life and created an escape from my lonely reality. From that time, I gradually began reading more. I preferred long novels, such as the *Tale of Two Cities*, *Gulliver's Travels*, and *World of Plainness*. I visited this particular bookstore very frequently, and the shopkeeper became my good friend. The shopkeeper was a kind woman. She said she used to like reading, especially novels, but life forced her to give up her education and make money for her family.

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<sup>9</sup> These books were translated into Chinese.

I remember the year that my mother left I fell to the bottom of my class and I was never able to achieve high marks in school again. I failed my first College Entrance Examination — the compulsory *gaokao*. Fortunately, my parents did not force me to leave school, and I had a chance to retake the *gaokao* the following year, and passed. I then began studying at a public university in Henan Province. This university was not as prestigious as other universities around China, but for me, it was good enough since I was just the second student from my village to ever attend university.

After entering university, my parents' income had improved a little. I also earned money to reduce the burden for my parents. I worked in restaurants, the local supermarket, taught primary school students as a private tutor, and taught rural civil servants computer skills. During the first year of college, I found it very difficult to make friends, so in my second year, I set up a new club for students who cared about rural development. I posted a lot of recruitment advertisements around my campus, and soon after I had recruited around 30 members. We organised a reading club, public lecture events, and printed publications; we also climbed mountains and hiked together. Sometimes we joined the rural surveys with other universities and taught primary students as volunteers in some remote rural areas. The rural development club became a place where like-minded students with shared values could come together. My university's Communist Party Youth League also offered volunteer opportunities in rural areas, but this was mostly just for taking pictures.

After starting the Rural Development Club, I became less lonely, and I was able to see that education has a transformative power for rural children, particularly left-behind children. The remittances sent back home by migrant workers has barely contributed to much development in Chinese rural areas, so many young Chinese see their futures in the cities — whether as a low-paid migrant worker or by studying at an urban university.<sup>10</sup> When I was in my third year, I decided to apply to a postgraduate school for a Masters degree. For seven months, I prepared for the Graduate Admission Examination and passed it in my fourth year. In 2013, I entered the graduate school of a famous university in Beijing as a postgraduate student. I saw that the only way in China

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<sup>10</sup> For a discussion of the effects of migrant worker remittances, see, eg, Yilin Chiang, Emily C Hannum and Grace Kao, 'It's Not Just About the Money: Motivations for Youth Migration in Rural China' (Working Paper, Asia-Pacific Education, Language Minorities and Migration Network Working Paper Series, 18 February 2014).

to change your fate and improve the lives of others was through education. However, when I looked back on my whole educational career, I have to say, despite my rural upbringing, I am still one of the privileged — a boy.

### III GENDER INEQUALITY IN RURAL CHINA

It is obvious that many rural families suffer from poverty in China. The left-behind children are seen as a serious social issue today, but women and girls especially are suffering. Gender-specific issues have never been brought to public attention. I would like to introduce some true stories from my life to show these gender-based inequalities and their impacts on people in rural China.

When I was in my middle school, I lived in a rental house, which was next to my middle school. The hostess of that house was my cousin's aunt, who was also from my village. My cousin Nan also lived in that house, and we often went to school together. Nan's parents treated her very strictly. I remember one time Nan and I went to a faraway place with some girls and boys, just riding bikes and looking at new places. Her mother got angry with her and criticised her severely in front of me. She said that girls should not hang out and play with boys — she even asked me if I agreed with her, but I did not answer her. The owner of the house — aunt's husband — often drank alcohol. Every time he got drunk, he would casually lie on someone's bed, particularly girls' beds as they were at school during the daytime. Nan was angry with that and complained a lot to her aunt, but nothing changed.

I used to have a friend in the second year of middle school. One time I had a dispute with him about opening the window. I insisted on opening the window because the air was dirty in the classroom, but he insisted on closing the window because outside was too cold. I opened the window three times. It made him angry with me, so he hit me hard. A fat boy encouraged him to hit me again, and he did. It obviously destroyed our friendship. I kept him as my friend, but apparently, he did not think the same way.

The following events made me realise that people treat girls and boys differently. The boy who hit me did not get any warning or punishment from our class tutor, despite this happening in our classroom. However, the outcome was totally different if the same thing happened but girls were involved instead. I also had another friend — a pretty girl

who liked dressing up nicely. She could not achieve good academic marks, and our female class tutor didn't like her very much. One time, a boy who was getting high marks swore at her. She was very angry, and afterwards she called some friends to hit this boy after school. The boy complained to our class tutor. The class tutor became angry and she took this opportunity to expel her from the middle school. I still remember how the class tutor swore before expelling my friend. She said she was just a gangster's daughter! I understand why she said that about my friend. At that time, middle school girls were not expected to be dressing prettily as it might be a distraction to other students. People considered violence to be something only boys would engage in, otherwise people would call you a gangster girl or the girl from a gangster's family.

The closer I came to finishing high school, the more frequent dropouts became, especially girls. Even girls with very high grades dropped out before graduation when they became old enough to enter the factories. I remember a girl who liked a writer (Yu Qiuyu) very much, and we often discussed Yu's articles together. But she dropped out in the second year. There was also another girl, who was often rewarded a book of short stories due to her high marks, who dropped out in her third year of high school. At that time, I used to be very jealous of her because I liked short stories very much. She told me that her parents persuaded her to give up her education and to find a job in a big city. She said she agreed with her parents because she could not see how education could give her any opportunities in the future.

These experiences showed me how the fates of girls and boys in rural areas were not merely chance, but were pre-determined by tradition and circumstance. In the area I lived, I observed how married men often drank, played cards, gambled with others, and hung out with friends on the streets. Women were left with all the housework and also the care of children. The wives had to work hard day and night, and never had an opportunity to rest. When the families treated guests to meals, it was the wife's duty to prepare the meal, however, they would not be allowed to sit with the men to share the food — they had to eat their food in the kitchen with their children. This is just accepted as the way things are.

## IV OUR FUTURE

Throughout the three years of my Masters degree, the quality of education and training I received from my professors was excellent. I also came to realise that my childhood and rural background had made me more “radical” than my classmates in terms of my thinking. I often contemplated how to reduce the social and gendered inequalities between rural and urban areas, between men and women — social systems created and reinforced by the *hukou* system, which is responsible for creating the phenomena of left-behind children. I realised that for most migrant workers and rural Chinese families, their only chance to improve their lives was to break the rules that reinforced most of the privileges the upper classes have. For example, the *gaokao* (College Entrance Examination) in big cities is not available for migrant children from other provinces, which is to protect the local students’ higher educational opportunities and has directly aggravated the family situations of migrant workers. Many migrant workers have to send their children back to their hometown to join the *gaokao*, even though they have kept their children by their side before. Clearly, these rules not only created inequalities, but also maintained the order and hierarchies that governed our lives. Supposedly “kind” intentions with the public interest in mind have been justified, but they are just as dangerous when acted upon in heedless ways. I used to think that the elite students in famous universities were more intelligent, more rational, and especially more responsible. But the reality is, most of them are very smart in a kind of ego-driven way. Many elite students know how to maximise their personal interests without any moral burdens in doing so. When they face their leaders, they use a very soft and kind face, smiling, but when they face those “beneath” them, the kindness is not always there. I realised they are actually bullying the powerless, just like I bullied my female classmate, like the taller boys did to me, and just like males in rural areas do to females. My experiences have given me a clear view, enabling me to identify people who have grown up with an authoritarian predisposition and the same impulses that flicker upon myself. I constantly look at myself and the people around me to find real friends.

However, wherever you go, you are able to find different people. I have met students and teachers who focus on improving the lives of Chinese migrant workers and have petitioned the Government and public for their rights and equal treatment. I also focused my academic research on migrant workers. My Masters thesis related to medical

practices among migrant workers and the emergence of underground migrant doctors in Shanghai. I graduated with a Masters degree in 2016, and, afterwards, I came to England to study for my PhD and continue this research.

I think the lives of left-behind children can be very lonely and they lose hope early in their lives. They are left-behind twice — once by their parents, and then by China as a whole. We should draw lessons from the past and take them into the future. The *hukou* registration system still perpetuates and strengthens China’s urban-rural divide. Rural migrants still “float” — they can never really belong in another place, but they drive the development of our cities. The demand for low-cost workers in urban cities has not been matched by social services to support migrant workers in their temporary homes. We also need to address how different education policies must target the reasons why left-behind children feel education is not designed for them, and understand how these reasons are gendered among China’s rural villages.

In 2015, I heard that four children were found dead in a rural village home in Guizhou province. They died of pesticide poisoning and had left a suicide note — three girls and one boy, all siblings under the age of 14 whose parents had left to find work.<sup>11</sup> If anything comes from this tragedy, I hope people take notice. We need to work towards better solutions. They were too young to have lost all hope.

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<sup>11</sup> Tom Phillips, ‘Chinese police ‘find suicide note’ in case of ‘left behind’ children deaths’, *The Guardian* (online), 14 June 2015 <<https://www.theguardian.com/world/2015/jun/14/chinese-police-investigating-deaths-of-left-behind-children-find-suicide-note>>.

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## EXPERIENCES, CHALLENGES, AND LESSONS LEARNED — INTERVIEWING RWANDAN SURVIVORS OF SEXUAL VIOLENCE

JUDITH HERRMANN\*

*Research involving survivors of sexual violence requires particular ethical and safety considerations. In this article I outline challenges that I encountered when preparing and conducting interviews with female survivors of sexual violence in Rwanda. My research design was informed by phenomenological and feminist approaches, which assisted in sensitising me to and addressing matters specific to my fieldwork. Besides methodological issues deriving from the role of a qualitative researcher, the challenges included identifying and inviting participants, managing logistics relating to the interviews, researching in another language, building rapport with interview participants, referral to support services, and self-care. In this article, I discuss what I did to overcome these issues, making reference to existing literature and training that helped me in preparing for my fieldwork. Summarising my experiences, I provide a list of key experiences and lessons learned at the end of the article, aiming to help researchers prepare for their work with vulnerable groups. I also highlight a number of ethical issues that I perceived as particularly challenging and suggest that they require further discussion in the future.*

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## I INTRODUCTION

Research involving survivors of sexual violence poses particular ethical and safety issues, especially in settings where there is a high risk of stigma for survivors. As part of my PhD research,<sup>1</sup> I conducted interviews with female survivors of sexual violence in Rwanda. During the preparation of my fieldwork, a number of resources assisted me in understanding challenges associated with researching sexual violence and provided practical guidance on how to address these issues. I also attended various workshops on research with sexual violence survivors, trauma, and self-care, which assisted in preparing for my fieldwork.<sup>2</sup>

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<sup>1</sup> One article published as part of my PhD is: Judith Herrmann, 'A critical analysis of the transitional justice measures incorporated by Rwandan gacaca and their effectiveness' (2012) 19 *James Cook University Law Review* 90. Publications relating to the analysis of my primary data are planned but have not yet been published, since the analysis of my primary data is still in progress at the time of writing of this article.

<sup>2</sup> The training included the workshop "Designing and analyzing research for sexual and intimate partner violence" by Dr Henrica A F M Jansen at the Sexual Violence Research Initiative ('SVRI') Forum in Bangkok, 2013, the workshop "Researcher Self-care" at the University of Wollongong, 2015, facilitated by the

Besides ethical and safety concerns, I also had to consider methodological issues deriving from my research approach. Since it was important to me to give affected women a voice, I had chosen a qualitative research design involving semi-structured interviews with Rwandan survivors. My methodology was informed by phenomenological and feminist approaches to research, which assisted in understanding and responding to challenges deriving from qualitative research. My research design included a built-in reflexivity, which I used to both examine factors that could influence the research process and to address these factors.<sup>3</sup>

In this article, I firstly provide an overview of my research and introduce the above mentioned built-in reflexivity. I then outline some of the main methodological, ethical, and practical issues that I encountered during my fieldwork and discuss how I addressed them. Where appropriate, I will refer to relevant guidelines and studies by other scholars as well as training that assisted me in preparing for and conducting my fieldwork. The aim is to add to the body of work concerning research with survivors of sexual violence, and to provide guidance for future researchers to plan and conduct their studies with vulnerable groups.

## II BACKGROUND

My thesis analyses the needs of female survivors of conflict-related sexual violence and explores the survivors' experiences with transitional justice processes. My research focuses on Rwanda, assessing the needs and experiences of Rwandan women who participated in *Gacaca* in relation to sexual violence committed against them during the genocide against the Tutsi in 1994. *Gacaca* refers to the approximately 11 000 local community courts that were established in 2001 by the Rwandan government to deal with genocide-related crimes.<sup>4</sup>

I conducted semi-structured interviews with 23 Rwandan women, who were selected based on the following criteria:

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Australian Red Cross and Phoenix Australia, and the workshop "Trauma Awareness and Field Research: How to prepare and deal with traumatic research content", facilitated by Dr Wendy Lambourne at the University of Sydney.

<sup>3</sup> See, eg, Claire M Renzetti, 'Confessions of a reformed positivist' in Martin D Schwarz (ed), *Researching Sexual Violence Against Women: Methodological and Personal Perspectives* (Sage Publications, 1997) 131, 133.

<sup>4</sup> Phil Clark, 'The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda' (Cambridge University Press, 2010) 3.

- 1) The participant had experienced sexual violence during the genocide;
- 2) The participant had raised her case at a *Gacaca* court;
- 3) The participant consented to being interviewed.<sup>5</sup>

My interviews focused on the women's experiences with *Gacaca*. Interview questions aimed at eliciting the women's motivations and needs when raising their case at *Gacaca* and the impact of participating in the process from the survivors' point of view. During my interviews, I was assisted by a Kinyarwanda-English interpreter because I did not speak Kinyarwanda. All interviews were recorded on an audio recording device and were later transcribed and translated by a Kinyarwanda-English translator.

### III THE RESEARCHER'S REFLEXIVITY

My research design drew from phenomenology and feminist research. Both approaches informed my research questions and the methods of data collection and analysis. Phenomenological methods are meant to capture 'lived experiences of individuals about a phenomenon as described by the participants'.<sup>6</sup> The most common method of phenomenological research are interviews,<sup>7</sup> since interviews can assist in generating 'rich descriptions of lived experiences' of the participants.<sup>8</sup> The focus on experiences of research participants is supported by feminist research, which is concerned with individual experiences of women, particularly those of marginalised groups.<sup>9</sup>

Miller cautions that the personal backgrounds of qualitative researchers as well as their 'political and theoretical understandings of the social world' can influence how the experiences of research participants are interpreted.<sup>10</sup> To address this challenge, I wrote a list with all preconceptions that I had in relation to my research prior to starting my fieldwork.<sup>11</sup> This activity was based on phenomenological ideas, which propose that researchers commence a study by articulating their personal background and any

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<sup>5</sup> See Clark E Moustakas, *Phenomenological research methods* (Sage Publications, 1994) 107.

<sup>6</sup> John W Creswell, 'Research design: qualitative, quantitative, and mixed method approaches' (Sage Publications, 2014) 14.

<sup>7</sup> Ibid; Moustakas, above n 5, 114; Kim Usher and Debra Jackson, 'Phenomenology' in Jane Mills and Melanie Birks (eds), *Qualitative Methodology: a practical guide* (Sage Publications, 2014) 188.

<sup>8</sup> Zina O'Leary, 'The essential guide to doing your research project' (Sage Publications, 2010) 116, 139.

<sup>9</sup> Ibid 146; See also Renzetti, above n 3, 133.

<sup>10</sup> Jody Miller, 'Researching violence against street prostitutes' in Martin D Schwarz (ed), *Researching Sexual Violence Against Women: Methodological and Personal Perspectives* (Sage Publications, 1997) 144, 150.

<sup>11</sup> See footnote 14 for some examples.

preconceptions they have relating to the topic.<sup>12</sup> The activity was also supported by feminist researchers who suggest to openly acknowledge one's own assumptions, beliefs, and values that could impact research as part of a built-in reflexivity approach.<sup>13</sup> When revisiting my preconceptions after I had collected my data and making a first evaluation of my interviews, I noted that some of my preconceptions were confirmed while others were contradicted.<sup>14</sup> The fact that my data proved some of my assumptions wrong suggests that I did not conduct my interviews in a way to get the responses that I thought I would get, but that my questions allowed new data to emerge.

I also kept a field journal to record external factors that might influence the interviews, as was suggested by other researchers who had conducted similar studies.<sup>15</sup> In this field diary I captured my observations, reflections, and feelings, which can constitute 'data in their own right'.<sup>16</sup> Recording emotions during research can be helpful for the later analysis process since 'emotions can be used as a clue in understanding situations'.<sup>17</sup>

Another challenge associated with qualitative research derives from the intimate relationship between researcher and participant, and the impact this relationship has on the data collection process.<sup>18</sup> Both phenomenological and feminist researchers assume a close, collaborative relationship and reciprocity between the researcher and the 'researched',<sup>19</sup> embracing these factors as important characteristics or their methodologies. Challenges deriving from this close relationship were identified as part of my built-in reflexivity and are considered in various sections below.

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<sup>12</sup> Moustakas, above n 5, 105–6, 122.

<sup>13</sup> Renzetti, above n 3, 133–4.

<sup>14</sup> For example, based on the literature review regarding women's experiences during *Gacaca*, I believed that no woman would have wanted to discuss sexual violence in public. However, one of my interview participants explained to me that she would have preferred to have her case tried in public, seeing that she had also been raped in public in front of her community. Furthermore, based on my literature review, I believed that most women's experiences with *Gacaca* would be negative. I wrote as a preconception 'I believe that the majority of women would be dissatisfied with *Gacaca*, since it added to their traumatisation, community ostracism and stigma, and since *Gacaca* did not provide reparations.' Even though interview participants described their *Gacaca* experience as challenging and traumatic at times, many interview participants commented on positive aspects of *Gacaca*.

<sup>15</sup> Christine Mattley, 'Field research with phone sex workers' in Martin D Schwarz (ed), *Researching Sexual Violence Against Women: Methodological and Personal Perspectives* (Sage Publications, 1997) 101.

<sup>16</sup> See Uwe Flick, 'An Introduction to Qualitative Research' (Sage Publications, 4<sup>th</sup> ed, 2009) 16; Creswell, above n 6, 195.

<sup>17</sup> See Mattley, above n 15, 113.

<sup>18</sup> Miller, above n 10, 145, 147.

<sup>19</sup> Renzetti, above n 3, 133, 135; O'Leary, above n 8, 146. This is also a key feature of all postmodern methodologies.

## IV METHODOLOGICAL, ETHICAL, AND PRACTICAL CHALLENGES

Researchers conducting studies with human beings need to anticipate ethical and safety issues that may arise during the collection, analysis, and dissemination of their data.<sup>20</sup> Research on violence against human beings poses ‘a number of inherent risks to both respondents and interviewers’.<sup>21</sup> Van der Merwe, Baxter, and Chapman caution that research with victims of human rights abuses requires ‘very sensitive methodologies that do not harm (or further traumatise) those participating in research’.<sup>22</sup> Sensitive methodologies are particularly important when research involves violence against women,<sup>23</sup> and even more so when the women have experienced violence of a sexual nature.<sup>24</sup> The World Health Organisation (‘WHO’) explains that ‘the highly sensitive nature of sexual violence poses a unique set of challenges for any data gathering activity’,<sup>25</sup> and developed special ‘ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies’.<sup>26</sup> I used these ethical and safety recommendations as a guideline to organise and conduct my fieldwork.

Below I discuss methodological, ethical, and practical issues specific to my research with sexual violence survivors in Rwanda. I consider how ethical issues impacted on and reinforced methodological and practical challenges that I encountered when planning and conducting interviews in a country and culture that I was unfamiliar with. While I was preparing for my fieldwork, I was living and working in Australia. I had no existing relationships with any person in Rwanda and had never been to the country myself.

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<sup>20</sup> Creswell, above n 6, 92.

<sup>21</sup> Mary Carroll Ellsberg and Lori Heise, ‘Bearing Witness: Ethics in Domestic Violence Research’ (Lancet, 2002) cited in Mary Carroll Ellsberg and Lori Heise, ‘Researching Violence Against Women – a practical guide for researchers and activists’ (Guide, World Health Organization, 2005).

<sup>22</sup> Hugo Van der Merwe, Vicki Baxter and Audrey R Chapman, ‘Introduction’ in Hugo Van der Merwe, Vicki Baxter and Audrey R Chapman (eds), *Assessing the impact of transitional justice: challenges for empirical research* (United States Institute of Peace Press, 2009) 1, 5.

<sup>23</sup> Charlotte Watts et al, ‘Putting Women First: Ethical and Safety Recommendations for Research on Domestic Violence Against Women’ (Report, World Health Organization, 2001) 6–7.

<sup>24</sup> Chen Reis, ‘Ethical, safety and methodological issues related to the collection and use of data on sexual violence in conflict’ in Martha Albertson Fineman and Estelle Zinsstag (eds), *Feminist perspectives on transitional justice: From international and criminal to alternative forms of justice* (Intersentia, 2013) 189, 189.

<sup>25</sup> World Health Organization, ‘WHO Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies’ (Report, World Health Organization, 2007) 1.

<sup>26</sup> *Ibid*; These guidelines mainly apply to research conducted in ‘emergencies’. However, the WHO also cautions that ‘any inquiry into sexual violence must be designed and carried out with an understanding of ... the specific context in which the inquiry will take place’: *ibid* 7; I found that the ‘WHO Ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies’ contained valuable insights into safety issues associated with my research in Rwanda.

Since the methodological, ethical, and practical challenges of my research are interwoven, I discuss them concurrently.

#### V FINDING AND INVITING PARTICIPANTS

Conducting research with vulnerable groups and sensitive topics restricts researchers in their approach to finding participants. Scholars who had previously conducted research with genocide survivors in Rwanda had identified their participants by collaborating with local organisations working on the ground with survivors.<sup>27</sup> Such collaborations can also be helpful to obtain the compulsory research clearance by the Rwandan Ministry of Education, which requires any researcher who plans to conduct research in Rwanda to have an affiliation with a Rwandan organisation. Establishing a collaboration with a local organisation in Rwanda from outside of the country proved difficult for me. For example, emails were not the appropriate means to make first contact with organisations that did not know me. I found that meaningful relationships were best established by meeting face-to-face. Hence, I travelled to Rwanda to prepare my fieldwork and to introduce myself personally to organisations that were working with genocide survivors. This trip was invaluable to my research, since I was also able to find an institution that agreed to support my research as the “Affiliating Institution” required as part of the research clearance process. I also made important contacts who later referred me to Rwandan professionals who could assist in identifying and inviting participants for my study. Finally, during this first trip, I also met with and established a personal relationship with two Rwandan women who later assisted me as my interpreter and translator.

Originally, I had planned to source participants in five different regions of the country to increase the variety of participants. However, once on the ground in Rwanda I realised that identifying and inviting sexual violence survivors for an interview in a safe manner required extensive preparation. Furthermore, interviews needed to be conducted in a safe location and participants had to be provided with the contact details of an affordable and accessible counselling service. Building personal relationships with

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<sup>27</sup> Anne-Marie de Brouwer and Etienne Ruvebana, 'The legacy of the *Gacaca* courts in Rwanda: Survivors' views' (2013) 13(5) *International Criminal Law Review* 937, 943–4; Karen Brounéus, 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan *Gacaca* Courts' (2008) 39(1) *Security Dialogue* 55, 63–4.

professionals and planning my interviews in an ethical and safe manner in five different parts of Rwanda proved impossible with the budget and time available for my research, and I narrowed my research to two provinces.

Two main methods were used to invite women to participate in my research:

- 1) My invitation to participate was verbally passed on to potential participants by the professionals who worked with these women and knew them personally.
- 2) Passive snowball recruitment was used. Women who had been personally invited by the professionals were encouraged to pass on the information about my study to other women who they knew met the selection criteria.

One of the professionals who assisted me in finding participants was a counsellor who ran support groups — both in urban and rural areas of Rwanda — for women who had experienced sexual violence during the genocide. The counsellor passed on my invitation to all those women of her groups who had participated in *Gacaca*. Some of the women invited other women from their community to also participate in my research. This way, I recruited 21 participants. I was personally introduced to each of these 21 women by the counsellor prior to the interviews. Two other professionals who also worked with survivors of sexual violence assisted in inviting the other two women who participated in my study (I interviewed altogether 23 women). The majority of the women who I interviewed lived in rural areas and a few lived in urban areas. All women who were invited to participate in my research agreed to participate.

## VI INTERVIEW LOCATION

Researching topics that are linked to violence against women can pose risks for participants, their families, and also the fieldworkers involved in a research project.<sup>28</sup> Researchers need to provide for physical and psychological safety for both the participants and the research team.<sup>29</sup> Safety needs to be considered when finding an

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<sup>28</sup> Henrica A F M Jansen, 'Swimming against the Tide: Lessons from field research on violence against women in the Solomon Islands and Kiribati (Report, United Nations Population Fund, 2010) 5, 27.

<sup>29</sup> See *ibid*, 29; World Health Organization, *above n* 25, 16.



interview location.<sup>30</sup> Jansen claims that interviews of a sensitive nature require a private setting.<sup>31</sup> The WHO recommends conducting interviews with sexual violence survivors in 'a safe place ... that does not draw unnecessary attention and does not raise suspicion, and where participants cannot be overheard.'<sup>32</sup>

The professionals who supported my research by inviting participants also assisted with the provision of interview spaces. For example, the counsellor who helped to recruit 21 women made her office space available for the majority of my interviews. This was the same location where meetings of the support groups for the women were usually held, which meant that most women were familiar with the interview location and people living around the location were used to seeing women go in and out of this office.<sup>33</sup> Using this office as an interview location was consistent with good practice recommendations made by the WHO, which states:

some data collectors have found that obtaining information about women's experience of sexual violence can be done discreetly by arranging to conduct interviews in the context of other activities that draw less attention, for example, in women's centres ... that routinely offer a variety of services and activities for females.<sup>34</sup>

Another interview location was the house of one interview participant situated in a rural area where no office spaces were available.<sup>35</sup> The participant was a member of one of the support groups run by the counsellor mentioned above, and group meetings were frequently held at her house. Therefore, people living in the village were familiar with seeing women go in and out of the house regularly, and our meetings did not draw attention within the village.

One issue relevant to such fieldwork, particularly in rural communities, relates to the apparent tensions between two ethical concerns: avoiding any appearance of

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<sup>30</sup> See 'National Statement on Ethical Conduct in Human Research' (National Statement, Australian National Health and Medical Research Council, Revised Ed, 2007) 25 <<https://www.nhmrc.gov.au/guidelines-publications/e72>>.

<sup>31</sup> Jansen, above n 28, 29.

<sup>32</sup> World Health Organization, above n 25, 16.

<sup>33</sup> Similarly, Brounéus conducted her interviews with Rwandan women who had survived the genocide at the office of the widows' association, Association des Veuves du Genocide d'Avril ('AVEGA'): Brounéus, above n 27. De Brouwer and Ruvebana conducted their interviews with genocide survivors at the office of the organization Solace Ministries: Brouwer and Ruvebana, above n 27.

<sup>34</sup> World Health Organization, above n 25.

<sup>35</sup> The counsellor contacted the woman in advance to get consent to conduct interviews at the woman's house, which the woman readily agreed to.

inducement to participate and making sure that participants are not economically disadvantaged by their participation. I conducted a number of interviews in remote locations where opportunities to purchase food were limited. In addition, many of the women were extremely poor and did not have the financial means to buy food when travelling around. Women lived up to eight hours, by foot, away from the interview location. To minimise stress for participants and to ensure their physical well-being during my research, I offered each woman a soft drink and a small snack during the interview. I had not made indications about the catering before the interview to ensure that there were no perceived material benefits for participating in my research.

What I had promised during the information session was that I would reimburse each woman for costs associated with transport to and from the interview location. I wanted to ensure that a woman did not have to walk for hours and miss out on a whole day of work by participating in my research. Providing for transportation was also a way to address issues of physical safety for participants, ensuring that women could safely make their way to the interview location and back home. The professionals who had assisted in inviting women helped me to determine appropriate reimbursement for transport, since they knew where the women lived and the usual costs for transport in the area.

## VII INFORMED CONSENT

Studies with human beings usually require the researcher to obtain informed consent from participants.<sup>36</sup> Informed consent in human research of this kind is usually gained through the provision of a consent form that is read and signed by the participants.<sup>37</sup> However, the WHO ethical and safety recommendations caution that 'asking for a signature to confirm that informed consent has been given may not always be appropriate, [because] a signature will identify someone and possibly place that individual at risk'.<sup>38</sup> This concern was confirmed by the professionals who assisted with finding participants, flagging that it was not appropriate to ask any woman to write her full name in a readable manner on a consent form. I had addressed this issue when

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<sup>36</sup> Australian National Health and Medical Research Council, above n 30, 12, 16-8; See also World Health Organization, above n 25, 22.

<sup>37</sup> World Health Organization, above n 25, 16.

<sup>38</sup> *Ibid* 23 [6.5].

planning my consent gathering process, and interview participants could consent to being interviewed and audio taped by putting an “x” into the signature field, or, if they personally chose to, by adding their signature.<sup>39</sup> My interpreter then acted as an “impartial witness”, signing the consent form after the participants had put down an “x” or added their signature.<sup>40</sup> Afterwards, I signed the document as a means of additional confirmation that the interview participant had given consent.<sup>41</sup> All women who were invited to participate gave consent to be interviewed and to be audio-recorded.

## VIII CONDUCTING THE INTERVIEWS

Each interview was recorded on an audio recording device and took on average one hour. My interview schedule was designed as ‘an informal, interactive process ... [with] open-ended comments and questions’,<sup>42</sup> allowing the participants to talk in depth about what it was like to participate in *Gacaca*. Based on advice by Moustakas, I had developed ‘a series of questions aimed at evoking a comprehensive account’ of the women’s experiences with *Gacaca*.<sup>43</sup> In some interviews I used all the questions that I had developed; in other interviews only a few questions were needed, since the participant shared ‘the full story of ... her experience’ without the need of additional prompts.<sup>44</sup> I frequently encouraged participants to elaborate on certain aspects of their narrative and to provide further insight into the words they chose to describe their experience.<sup>45</sup> I also used questions of ‘what something felt like’ rather

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<sup>39</sup> This process had been approved by the Ethics Committee of James Cook University and the Rwandan Ministry of Education. 22 women chose to place their signatures (none of them were placed in a readable manner), one woman put an “x” in the signature box.

<sup>40</sup> Even though the interpreter is a party to the interviewing process, she does not have a personal interest in the data per se, but solely acts as an intermediary between the researcher and the participant. That is why she was considered to be a suitable person to witness the participants’ consent. This process of using an impartial witness was based on recommendations by the public research institute University of California, Irvine (‘UCI’): University of California Irvine, Consenting Subjects Who Do Not Read, Speak or Understand English (UCI Office of Research) <<http://www.research.uci.edu/compliance/human-research-protections/researchers/consenting-subjects-who-do-not-read-speak-or-understand-english.html>>.

<sup>41</sup> This was consistent with the WHO recommendation on how to gain consent of survivors of sexual violence: see World Health Organization, above n 25, 23 [6.5]. My consent gaining process was approved by the Ethics Committee of James Cook University (‘JCU’) and the Rwandan Ministry of Education.

<sup>42</sup> Moustakas, above n 5, 114.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

than asking 'why' and 'how' questions, which had been advised by O'Leary to elicit meaningful responses.<sup>46</sup>

Even though I had informed each participant that I would not ask questions about the genocide,<sup>47</sup> most women voluntarily talked about their experience with sexual violence during the genocide. Many would do so at the very beginning of the interview, often as a response to questions regarding their marital status and children. I was aware that women might want to include personal experiences from the genocide, based on Byamukama's experiences when interviewing Rwandan genocide survivors.<sup>48</sup> Even though Byamukama's research, like mine, focused on the participants' experiences with *Gacaca*, she explains that it was 'nearly impossible to interview a survivor of genocide, especially women who had been sexually assaulted, about the *Gacaca* process without dedicating at least 30 minutes to the genocide itself and their personal experiences.'<sup>49</sup> In Byamukama's view, listening to the women's genocide experiences was a necessary step and assisted in building rapport with the participants as well as creating a relationship of trust.<sup>50</sup> Further ways to create a safe environment and establish rapport are explained in the following section.

#### IX ESTABLISHING RAPPORT

Researchers who had conducted similar research flagged the importance of establishing rapport between researcher, interpreter, and participants. Rapport was needed to gain women's trust to participate in the interviews and to meaningfully share information about their experiences. Ample consideration of rapport building seemed particularly important due to my outsider status (being of different nationality and skin colour).<sup>51</sup> One way of establishing rapport is through association with a person who the participants know and trust. Sharratt explains that during her interviews with female

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<sup>46</sup> O'Leary, above n 8, 139.

<sup>47</sup> My PhD research does not focus on the experiences relating to the actual sexual violence, but on the experiences with the justice process dealing with cases of sexual violence.

<sup>48</sup> Shivon Byamukama, *Justice in the Aftermath of the 1994 Rwanda Genocide: A Study of Gacaca Courts* (Doctor of Philosophy Thesis, Glasgow Caledonian University, 2008).

<sup>49</sup> *Ibid* 39–40.

<sup>50</sup> *Ibid* 40.

<sup>51</sup> While I was in Rwanda, I was frequently called a "*Mzungu*", a Swahili expression meaning "white person".

survivors of sexual violence,<sup>52</sup> 'many women ... would not agree to participate unless someone they knew and trusted was part of the project.'<sup>53</sup> Brounéus, who was assisted during interviews with female genocide survivors in Rwanda by counsellors working for a local widows' association,<sup>54</sup> explains how invaluable the professional help was because the interview participants trusted the counsellors.<sup>55</sup>

The counsellor who was running support groups with survivors of sexual violence and who had assisted in recruiting 21 participants, organised and facilitated initial meetings between myself and the women to whom she had passed on my invitation. These meetings not only assisted in sharing important information about the study, but also provided an opportunity to build rapport between the women, myself, and my interpreter. Some of these initial meetings involved several women, while others involved individuals. Where a number of women attended at the same time, I initially had concerns about confidentiality, seeing that the participants would be implicitly identified as survivors of sexual violence. However, neither the counsellor who had organised these meetings nor the women who participated appeared to be concerned. Most of the women who attended these joint meetings knew each other from the support groups, during which they had already addressed issues of confidentiality. To account for those participants who were not part of one of these support groups, the counsellor reminded all women during the meetings how important it was to keep confidential everyone's experience, to which all participants agreed. Overall, I had the impression that the survivors of sexual violence I met had formed a remarkably close community and were committed to protecting each other's confidentiality.

In the initial meetings, the counsellor introduced me to the women as a person whom she knew and trusted. I was then given time to talk about myself and my research. Based on the experiences of other researchers, I was aware that the women might like to know about me personally.<sup>56</sup> Byamukama explains that offering participants to ask the researcher some personal questions made them feel comfortable.<sup>57</sup> 'Being direct and

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<sup>52</sup> Sharratt interviewed female survivors of sexual violence testifying before the International Criminal Tribunal for the Former Yugoslavia (ICTY): see Sara Sharratt, *Gender, Shame and Sexual Violence* (Ashgate, 2011).

<sup>53</sup> Ibid 48.

<sup>54</sup> Brounéus, above n 27, 63–4; Brounéus worked with AVEGA.

<sup>55</sup> Ibid 64.

<sup>56</sup> See, eg, Renzetti, above n 3, 140.

<sup>57</sup> Byamukama, above n 48, 38.

blunt' is, according to Byamukama, not appreciated in the Rwandan culture.<sup>58</sup> Her interview participants were mainly interested in knowing who she was rather than finding out details about her research. These experiences assisted me in being prepared for personal questions. One of the first questions that women asked me was whether I was "still a girl" (single) or "a woman" (married). In contrast to Byamukama, I found that women would also ask detailed questions about why I had chosen Rwanda for my research and what I was intending to do with my data later.

Besides gaining trust, the interviewer also needs to have adequate skills to encourage participants to share their experience.<sup>59</sup> Jansen reports great willingness of women to tell their stories about violence against them — even in settings in which these topics were usually considered a taboo — provided that interviewers had appropriate skills,<sup>60</sup> including 'creating a safe space and empathetic atmosphere'.<sup>61</sup> Through my work and training as a mediator and conflict coach, as well as through various workshops preparing me for this type of research, I had gained skills to conduct my interviews in an encouraging and empathetic manner. These skills include demonstrating attention to interview participants and deep listening, involving minimal responses as well as non-verbal behaviour such as supportive facial expressions and body language.

In all interviews, I was assisted by the same interpreter. A relationship of trust between the interpreter and the participants is an important requirement when conducting interviews.<sup>62</sup> Brounéus cautions that 'interview material will lose its value' when there is a lack of trust between the interpreter and the participants, for example because the participant may not speak freely.<sup>63</sup> During her research with genocide survivors, Brounéus was supported by Association des Veuves du Genocide d'Avril ('AVEGA') counsellors as interpreters and describes how important this assistance was, because the participants trusted the counsellors.<sup>64</sup> My interpreter had both the personal characteristics and professional skills to support the creation of a safe and empathetic environment. She was a Rwandan woman from the same area as the participants (albeit

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<sup>58</sup> Ibid 39.

<sup>59</sup> Jansen, above n 28, 23.

<sup>60</sup> Jansen refers to interviews that her team conducted in the Solomon Islands and Kiribati, see *ibid*.

<sup>61</sup> *Ibid*.

<sup>62</sup> See, eg, Renzetti, above n 3, 127; Brounéus, above n 27, 63; Sharratt, above n 52, 60.

<sup>63</sup> Brounéus, above n 27, 64.

<sup>64</sup> *Ibid*.

being unknown to the women) and shared a common history with them, which I believe assisted in establishing rapport between the participants and my interpreter.

Interpreters need not only be trusted by the participants but also need to be adequately trained and skilled to conduct interpretation in an ethical and professional manner. Data translated by an interpreter could lose its meaning if the interpreter chose to hide facts or distort information according to their own opinion.<sup>65</sup> My interpreter had useful qualifications, including a degree in clinical psychology and public health, and was enrolled in a PhD in public health. She had previously conducted research herself with vulnerable groups in Rwanda and was familiar with methodological issues.

I felt that one of the most important qualifications of my interpreter was her education and experience as a psychologist, since many of the participants felt distressed at some stage during the interviews. In a number of cases my interpreter had to take on the role as a counsellor to provide emotional support. On one occasion, I thought we should stop an interview because the participant got quite distressed, but my interpreter encouraged the woman to continue. My interpreter later pointed out to me that it had been very important for the woman to continue and that she would have felt much worse if she had stopped in the middle of the interview. Indeed, the participant expressed positive feelings about having continued at the end of her interview and stated that she was feeling a great sense of relief after having spoken to us.

Feeling relief after participating in the interview appeared to be a common reaction in nearly every interview. Each woman thanked me at the end for having taken the time to speak to her and explained how important it was for her to have participated in the study. Only one of the 23 women who participated in my research arrived late to her interview, and this was due to personal reasons. The majority of women, including those who lived several hours away, arrived early to their interview appointments, sometimes several hours early. One participant explained to me that she was several hours early because she 'could not have missed the opportunity to talk to me'. Another woman revealed during her interview that she was HIV positive, explaining that she had never shared this information with anybody outside her family before. These experiences gave me the impression that my "outsider" status had not prevented women from talking

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<sup>65</sup> Ibid.

frankly during my interviews. On the contrary, I sensed that women felt encouraged to share even extremely sensitive information, since they did not have to fear that sharing this information would have negative consequences for life in their community.

#### X RESEARCHING IN ANOTHER LANGUAGE

Making sense of the stories of research participants may require the researcher to understand the meaning behind words used by the participants to describe their experiences.<sup>66</sup> Since my research involved interviews with participants whose language I did not speak, I had to identify special ways to ensure that I could understand the above mentioned “meaning behind words”. During my interviews I relied on my interpreter’s ability to correctly translate meanings from the Kinyarwanda language into English. My interpreter and I acknowledged that exact interpretation would frequently be impossible, and recognised the need to identify potential different meanings and interpretations of words. I had a close working relationship with my interpreter and we held a debriefing session after each interview day to clarify in detail the meaning of ambiguous words as well as particular expressions used by the participants.

All interviews were transcribed in Kinyarwanda and then translated into English by a Rwandan translator. Initially, I had planned to only transcribe the English interpretation, provided by my interpreter during the interviews, myself. As a way of quality control, I had planned to have the interpretations at the time of the interview cross-checked by an independent translator. However, out of interest, I had one interview transcribed and translated in full. In direct comparison with the interpretation on the day of the interviews, the translated transcript was far richer than what my interpreter had been able to convey during the interview. I therefore had all interviews fully transcribed in Kinyarwanda and then translated into English. For each transcript I worked closely with the translator to clarify any questions and to obtain additional explanations of the possible meanings of various expressions and their implications. Working closely with both my interpreter and translator assisted me in clarifying misunderstandings and preventing me from missing important data if words had particular connotations in the Kinyarwanda language.

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<sup>66</sup> O’Leary, above n 8, 139.



## XI REFERRAL TO SERVICES

Researchers are required to provide for the psychological wellbeing of participants, including minimising stress for participants and preparing adequate psychological support.<sup>67</sup> The WHO recommends for researchers to ensure that 'basic care and support to victims/survivors ... [is] available locally before commencing any activity that may involve individuals disclosing information about their experiences of sexual violence.'<sup>68</sup> Jansen suggests that interviewers need to have available information on support services that can be provided to participants after the interview.<sup>69</sup> I had to consider that the availability of support systems in rural areas may be limited, and even if they are available, they may not be suitable to assist the individual.<sup>70</sup> Jansen suggests that the researcher, together with the local people who assist with research, should identify 'the most appropriate and accessible resources for each area, eg, church-based resources or health services' before conducting an interview.<sup>71</sup>

I was fortunate to work closely with the counsellor who assisted me with my research. She volunteered to counsel any woman who participated in my interviews if needed. On one occasion, a woman got so distressed during the interview that my interpreter and I decided to stop the interview. We encouraged the woman to get in contact with the counsellor, which she did on the same day. During this conversation the woman asked the counsellor to arrange for another meeting with me, since she really wanted to participate in the research. We met a second time, during which the woman was able to respond to all questions and complete the interview.

One ethical concern during research with human beings relates to avoiding any appearance of inducement to participate. When conducting fieldwork in rural communities, this concern may be in tension with the ethical requirement to ensure accessibility of referral services. Many women who took part in my research lived several hours, by foot, away from the counsellor's office. Even though most women possessed a mobile phone, many of them did not have the financial means to buy phone credit to get in contact with the counsellor. To ensure that the identified counselling

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<sup>67</sup> Jansen, above n 28, 29; World Health Organization, above n 25, 16.

<sup>68</sup> World Health Organization, above n 25, 15.

<sup>69</sup> Jansen, above n 28, 31.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

service was accessible, I provided a small financial contribution so that the participants could afford phone credit to contact the counsellor after the interview if needed. I did not mention this contribution until the end of the interview to not give the appearance of any financial benefit in taking part in my research.

## XII SELF-CARE

Not only the participants, but also the researcher and interpreter working with sensitive topics can feel distress during fieldwork. The WHO requires 'all members of a data gathering team ... to receive ... ongoing support.'<sup>72</sup> Jansen suggests providing some debriefing opportunities so that interviewers get a chance to talk about their most important experiences and let off stress.<sup>73</sup> Hearing accounts of rape and sexual torture from survivors was distressing for me at times. My interpreter and I spent at least an hour together after each interview day and talked about the most stressful moments of the interviews.

In workshops on researcher self-care, I had learned how important it was to look after my own well-being when conducting research that could be distressing for me. I exercised regularly while in Rwanda, and maintained my mental well-being by staying in regular contact with my family and supervisors. Furthermore, I ensured that I got time away from my research to switch off and regain energy by enjoying non-research related experiences in Rwanda, such as trips to various national parks.

During my fieldwork there were times when I found it distressing that I was limited to the role of a researcher, and that I could not help the women other than by listening to them and by later ensuring that my research would not be confined in a document on a bookshelf. However, it seemed like being listened to did have a positive impact on the participants. I got the impression that it gave the women hope that someone had come to hear their stories and advocate for their needs by publishing about them. I believe this helped me to come to terms with my limited role. Since I have returned from my fieldwork, seeking opportunities to tell the women's stories has given me a sense that I can do something for the women, even though it is only a small contribution.

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<sup>72</sup> World Health Organization, above n 25, 24.

<sup>73</sup> Jansen, above n 28, 33.

## XIII CONCLUSION

In this article, I have outlined methodological, ethical, and practical challenges that I encountered when planning and conducting research with survivors of sexual violence in Rwanda. Reflecting back on my experience, I believe I was as well prepared as I could be from outside of Rwanda, assisted by valuable resources relating to this type of research.<sup>74</sup> My initial visit to Rwanda was crucial for me to understand which context-specific challenges I had to address, and I made a number of changes to my participant recruitment and interview process after this visit. I learned that various practical aspects of my fieldwork could not be organised in advance from outside of the country, such as scheduling meetings with interview participants. It was vital for me to first establish a relationship of trust with a middle person (eg, the counsellor), which I believe can only be done face-to-face in the Rwandan culture. Assisted by the middle person, I was then able to get to know interview participants face-to-face in an initial meeting, allowing me to establish important rapport with the women. Only then was it possible to meaningfully organise dates and times for interviews that were suitable for the participants, as well as for me and for my interpreter, seeing that we had to travel several hours to get to each interview location.<sup>75</sup> Summarising my experiences discussed in this article, and supported by relevant literature, I have developed a brief “checklist” (see text box below) aiming to assist future researchers when organising research with survivors of sexual violence or other vulnerable groups.

Further reflecting on ethical issues, I found particularly challenging the tension between seemingly competing ethical concerns, such as avoiding any appearance of inducement to participate on the one hand, and ensuring that participants are not economically disadvantaged by their participation on the other hand. Another tension that I found challenging related to what an Australian ethics committee would deem to be ethical and what appeared to be both safe and practicable on the ground in Rwanda. I felt at times that it was advised to rely on what the middle person and the interview participants considered as practical and safe,<sup>76</sup> rather than sticking to rigid

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<sup>74</sup> Including guidelines, publications from other researchers, and relevant workshops.

<sup>75</sup> Some of the meetings were scheduled three weeks ahead and I was worried that women would forget and either not show up or be late. However, as mentioned above on page 15, only one woman was late for her interview, which was due to personal reasons.

<sup>76</sup> This point is supported by the WHO ethical and safety recommendations, suggesting to consider locally established procedures when researching sexual violence: see World Health Organization, above n 25, 3.

procedures.<sup>77</sup> A discussion on differing standards and views on what is most ethical whilst considering safety and practicability when conducting sensitive research in various contexts deserves more attention in relevant literature in the future.

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<sup>77</sup> For example, it was a requirement that I included my Australian office number on the information sheet for interview participants. I could not include my Rwandan mobile number. On the ground in Rwanda, it was unrealistic that a Rwandan woman who only spoke Kinyarwanda would ring an international number to get in contact with me. During the initial information session we organized for the middle person (eg, the counsellor) to facilitate phone communication between the women and myself if needed.

**KEY EXPERIENCES AND LESSONS LEARNED DURING MY RESEARCH**

- ✓ I accounted for particularities deriving from the role of a qualitative researcher by taking a built-in reflexivity approach to my research;
- ✓ Since I was not familiar with Rwanda, an initial visit was invaluable to prepare my fieldwork. During this visit I could commence establishing relationships with local organisations and individual professionals to support my research;
- ✓ All logistics relating to my interviews had to be carefully planned, which included finding a safe and confidential interview location and considering travel time, transport, and food for the participants, my interpreter, and myself;
- ✓ The sensitivity of my research required me to address particularities relating to the process of receiving informed consent from my interview participants;
- ✓ Prior to conducting my interviews, I developed knowledge and skills on how to establish trust with interview participants as well as how to create a safe space and empathetic atmosphere;
- ✓ On several occasions, the psychology background of my interpreter was invaluable, since she could attend to interview participants when they felt distressed;
- ✓ Since my interpreter was not a professional interpreter and did not speak English fluently, I had my interviews transcribed and translated by a translator. These translations provided richer and more accurate accounts than the interpretations at the time of the interviews;
- ✓ When identifying a local counselling service for the referral of interview participants, it was important to ensure the accessibility of the service for the participants;
- ✓ Researching a sensitive topic with vulnerable participants required me to handle intricate ethical issues. I based my decisions on what appeared to be both safe and practicable in the views of the interview participants and the local professionals who assisted with the research;
- ✓ I supported my mental and physical well-being during my fieldwork by debriefing with my interpreter, staying in contact with my family and by exercising regularly.

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# LEVELLING THE PLAYING FIELD: DISCRIMINATION AGAINST WOMEN IN SPORT IN AUSTRALIA

HAZAL GACKA\*

*Historically, female athletes have received minimal recognition and inequitable remuneration in the male-dominated world of sports. Recent developments are promising but a deeper examination of the changes within sports such as the Australian Football League ('AFL') and netball demonstrate that these historical issues remain. This article will first outline the relevant legislative and policy background, and the basis of discrimination against women in sport from feminist perspectives. A detailed analysis of two specific and interrelated issues will then be discussed: lower salaries, sponsorship and prize money, and inadequate media coverage. The inaugural AFL Women's ('AFLW') competition marks a significant step forward for women's sport and will be examined with regards to these particular issues. Finally, recent developments and further recommendations for eliminating discrimination will be outlined, including legislative amendments, targeted policies, and the need for a change in the gendered assumptions that women are somehow inferior to men in sport and in society in general.*

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\* Hazal Gacka recently graduated from Griffith University Law School, and prior to that completed a Bachelor of Education (Primary) at Griffith University. Hazal is concerned about the legal and social issues affecting women in general and will endeavour to raise awareness and engage with solutions to these problems throughout her legal career. Hazal is an avid sports fan and a former swimmer and water polo goalkeeper. This article is based on an essay originally prepared as part of the course Sports Law at Griffith University. It has been extensively revised to take into account recent developments in law, policy, and the sporting world.

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## I INTRODUCTION

'A revolution is underway.'<sup>1</sup> That is the current discourse regarding women's sports in Australia and recent developments do appear to support such a bold statement. The 2017 inaugural AFLW competition was successful beyond expectation; Netball Australia recently announced increased wages and a prime-time broadcasting deal; the women's Rugby Sevens team won gold at the Rio Olympics in 2016; and in 2015 Michelle Payne became the first female winner of the prestigious Melbourne Cup. Indeed, these developments are a promising step towards equality for female athletes; however, progress has been slow and there is still significant discrimination to overcome as evidenced by lower salaries for professional female athletes and poor media coverage of women's sports. These issues potentially equate to breaches of anti-discrimination legislation and equal pay laws. Feminist perspectives suggest this discrimination is founded on society's general belief that women are inferior to men, and are therefore incapable of succeeding in sport in the same way. Eliminating the discrimination suffered by women in sport requires legislative amendments, the continued action of governments and sport associations, and most importantly, a change in the gendered assumptions that are inherent in sport and society.

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<sup>1</sup> Linda Pierce, 'Women in sport: finally, your time starts now', *The Sydney Morning Herald* (online), 17 September 2016 <<http://www.smh.com.au/sport/women-in-sport-finally-your-time-starts-now-20160916-grhq10.html>>.

## II LEGAL AND POLICY BACKGROUND

Commonwealth and state legislation prohibit direct and indirect discrimination on the grounds of sex or gender, for example the *Sex Discrimination Act 1984* (Cth) ('SDA') s 5 and the *Anti-Discrimination Act 1991* (Qld) ('ADA') ss 7 and 9. Discrimination is also prohibited in relation to family responsibilities, pregnancy and breastfeeding, for example *SDA* ss 7, 7AA and 7A, and *ADA* s 7, which are discriminatory behaviours that are predominantly faced by women. Sport is a specific area of unlawful discrimination under *SDA* s 42, *ADA* s 111, and other state legislation; however, all provide an exception whereby a sex can be excluded from competitive sports where 'strength, stamina or physique' is relevant.<sup>2</sup> However, the *SDA* is based on the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'),<sup>3</sup> which provides key principles of true equality of men and women and action to end discrimination against women, and specifically includes a provision for equal participation rights for women in sport: article 10(g).<sup>4</sup>

The *SDA* outlines its objects under s 3, which include:

(a) to give effect to certain provisions of the *CEDAW*; (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; ... and (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

<sup>2</sup> See, eg, *Equal Opportunity Act 2010* (Vic), s 71, *Sex Discrimination Act 1984* (Cth) s 42(1), *Anti-Discrimination Act 1991* (Qld) s 111(1)(a), (3).

<sup>3</sup> Australia ratified CEDAW in 1983. Australian Human Rights Commission, '*The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Sex Discrimination – International Activities*' (2017) <<https://www.humanrights.gov.au/convention-elimination-all-forms-discrimination-against-women-cedaw-sex-discrimination-international>>.

<sup>4</sup> 'Each State Party shall take all appropriate measures to eliminate discrimination against women and to ensure to women equal rights with men ... [and] the same opportunities to participate actively in sports and physical education': United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), art 10(g).

However, there is a view that the *SDA* does not fully address these objects because it does not challenge systematic gender bias — its protection only extends to a person when they make a complaint, and most pertinently, it contains exemptions.<sup>5</sup>

The exemptions from the prohibition of sex discrimination in competitive sports may in fact be discriminatory themselves. Essentially, they allow exclusion of women participating in sports and are based on socially constructed gender norms, including ‘what women should do’,<sup>6</sup> and that men are stronger/faster/better than women. The legislation enforces these stereotypes by only focusing on ‘strength, stamina and physique’ rather than other factors such as skill, dexterity, speed, and dedication.<sup>7</sup> Thus, it appears that the law may be hindering the progress of women in sport in some cases.

One case example is *Ferneley*,<sup>8</sup> which challenged the legislated exclusion of female boxers in NSW. The rationale behind the exclusion was that ‘the spectacle of women attacking each other is simply not acceptable to a majority of people in our community’,<sup>9</sup> demonstrating how gendered assumptions of “appropriate” behaviours lead to discrimination against women in sport.<sup>10</sup> In *Taylor*,<sup>11</sup> it was found lawful to exclude 15 year old girls from playing mixed AFL games because their average lean body mass becomes one standard deviation less than that of a boy, therefore, the relative difference between the strength, stamina, or physique

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<sup>5</sup> J Kendal Smith, ‘Female boxers: ‘Sideshow Freaks’?’ in Thomas V Hickie, Anthony T Hughes, Deborah Healey and Jocelynne A Scutt (eds), *Essays in sport and the law* (ASSH Studies, 2008) 181, 183.

<sup>6</sup> Jocelynne A Scutt, ‘Dancing backwards over sand: women, sport and that old equality question’ in Thomas V Hickie, Anthony T Hughes, Deborah Healey and Jocelynne A Scutt (eds), *Essays in sport and the law* (ASSH Studies, 2008) 119.

<sup>7</sup> Charlotte Churchill, ‘Women, gender stereotyping and contemporary regulation of Australian sport’ in Thomas V Hickie, Anthony T Hughes, Deborah Healey and Jocelynne A Scutt (eds), *Essays in sport and the law* (ASSH Studies, 2008) 138.

<sup>8</sup> *Ferneley v Boxing Authority of New South Wales and Another* [2001] FCA 1740 (*Ferneley*). The case was held against *Ferneley* based on a technicality in the interpretation of the *SDA* (the Boxing Authority was not a ‘service’ for the purposes of s 22 and Wilcox J considered that s 42 only applied to mixed-sex sports, of which the present case was not).

<sup>9</sup> Ibid [6]: The statement is by the responsible Minister Mr Cleary from his Second Reading Speech on the Bill for the *Boxing and Wrestling Control Act 1986* (NSW).

<sup>10</sup> Matthew Bradford, ‘Sport, gender and law’ (2005) 1–2 *The International Sports Law Journal* 1, 8.

<sup>11</sup> *Taylor v Moorabbin Saints Football League & Football Victoria* [2004] VCAT 158 (*Taylor*).

of boys and girls was enough to validate the provision.<sup>12</sup> The decision has drawn criticism as it only reinforces the belief that the smaller average size of women to men makes them somehow inferior. It does not take into account the fact that boys who are one standard deviation below the average would still be allowed to play.<sup>13</sup>

This 'strength, stamina and physique' exemption is generally applied and justified in relation to men and women competing together, and allows single sex sport competitions, which is the norm for most sports especially at the elite level. However, the fact that this exemption exists allows sporting organisations to justify the exclusion of women and create single sex competitions from the early stages of girls' and boys' sporting development. It certainly allows the reinforcement of 'the supposed limitations on the capabilities of sportswomen.'<sup>14</sup>

In addition to the anti-discrimination laws, there are equal pay laws that are relevant to sports people playing professionally or semi-professionally. The *Fair Work Act 2009* (Cth) ('FWA') provides for equal remuneration for men and women workers for work of equal or comparable value under s 302(2). The modern awards objective and minimum wages objective must take into account the principle of equal remuneration for work of equal value but provisions for enterprise agreements are silent on this requirement.<sup>15</sup> Part 2-7 allows the Fair Work Commission ('FWC') to make equal remuneration orders. However, under s 302(3), unless the employee or employee organisation makes an application, or unless employees make a complaint to the Sex Discrimination Commissioner, this law will not necessarily be enforced. Sex discrimination in employment, including terms and conditions such as remuneration, and opportunities for

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<sup>12</sup> Ibid [65], [82].

<sup>13</sup> Churchill, above n 7, 138.

<sup>14</sup> Steven Taylor, 'Game, sex and match: sexism, heterosexism and homophobia in women's tennis' in Thomas V Hickie, Anthony T Hughes, Deborah Healey and Jocelyne A Scutt (eds), *Essays in sport and the law* (ASSH Studies, 2008) 155.

<sup>15</sup> The modern awards objective can be found in the *Fair Work Act 2009* (Cth) s 134, and the minimum wages objective at s 284.

promotion, transfer or training, or in superannuation is also prohibited under the *SDA*.<sup>16</sup>

Also, the *Industrial Relations Act 2016* (Qld) (*IR Act*), assented to on 9 December 2016, aims to 'provide a framework for cooperative industrial relations that is fair and balanced' and that 'supports the delivery of high quality services, economic prosperity and social justice for Queenslanders.'<sup>17</sup> This purpose is to be achieved by, among other things: '(j) ensuring equal remuneration for work of equal or comparable value; and (k) promoting diversity and inclusion in the workforce, including by providing a right for employees to request flexible working arrangements to help balance their work and family responsibilities'.<sup>18</sup> The *IR Act* provides that the modern awards objective must take into account the principle of equal remuneration for work of equal value.<sup>19</sup> Unlike the *FWA*, there is provision for collective bargaining agreements, and multi-employer agreements or project agreements, to provide equal remuneration for work of equal or comparable value in relation to all employees under s 201.<sup>20</sup> The Queensland Industrial Relations Commission ('QIRC') has the power under chapter 5 of the *IR Act* to ensure modern awards, bargaining instruments, and other instruments affecting wages provide equal remuneration. The QIRC, in making such an assessment on the value of the work, 'must be free of assumptions based on gender' and may use comparisons within and between occupations and industries.<sup>21</sup> Importantly, discrimination on the basis of gender is not necessary to establish that the work has been undervalued.<sup>22</sup>

Finally, the *Workplace Gender Equality Act 2012* (Cth) (*WGE Act*) aims to promote and improve gender equality (including equal remuneration between women and men) in employment and 'support employers to remove barriers to the full and equal participation of women in the workforce, in recognition of the

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<sup>16</sup> *SDA* s 14.

<sup>17</sup> *Industrial Relations Act 2016* (Qld) s 3.

<sup>18</sup> *Ibid* s 4.

<sup>19</sup> *Ibid* s 143.

<sup>20</sup> *Ibid* s 201.

<sup>21</sup> Explanatory Notes, *Industrial Relations Bill 2016* (Qld) 50.

<sup>22</sup> *Ibid*.

disadvantaged position of women in relation to employment matters', among other things.<sup>23</sup> The *WGE Act* requires certain non-public sector employers to lodge reports each year with information relating to various 'gender equality indicators',<sup>24</sup> which includes gender composition of the workforce and equal remuneration between women and men.<sup>25</sup> The overarching goal is to close the gender pay gap, which currently sits at 23.1 per cent.<sup>26</sup> The Workplace Gender Equality Agency ('WGEA') does play an important role in enforcing gender equality legislation and policies, although it is very workplace and industry focused, and does not appear to offer the same support for sportspeople as it does for management and staff of sporting organisations.

As well as legislation, the policies of sporting organisations are pertinent in prohibiting (or allowing) discrimination against women. The Australian Olympic Committee ('AOC') prohibits gender-based discrimination and harassment in its Constitution,<sup>27</sup> and the Australian Sports Commission ('ASC') provides a Member Protection Policy template for national sporting organisations to create their own anti-discrimination policies.<sup>28</sup> For example, Tennis Australia's Policy prohibits gender-based discrimination, but does provide for the exemptions under the legislation.<sup>29</sup> Also, the ASC, along with the Australian Human Rights Commission ('AHRC') and other anti-discrimination and human rights agencies, have created '*Play by the Rules*', which promotes anti-discrimination and inclusion programs in sport.<sup>30</sup>

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<sup>23</sup> *WGE Act* s 2A.

<sup>24</sup> *Ibid* s 2B.

<sup>25</sup> *Ibid* s 3.

<sup>26</sup> Workplace Gender Equality Agency, 'Data explorer' (2017) <<http://data.wgea.gov.au/>>.

<sup>27</sup> Article 4.5 AOC, '*Constitution of the Australian Olympic Committee Incorporated*' (2013) <[http://corporate.olympics.com.au/files/dmfile/AOCConstitution\\_Effectivefrom4May2013\\_Mar kedupV4\\_FINAL\\_APPROVED.pdf](http://corporate.olympics.com.au/files/dmfile/AOCConstitution_Effectivefrom4May2013_Mar kedupV4_FINAL_APPROVED.pdf)>.

<sup>28</sup> ASC, *Member protection policy* (2013)

<[http://www.ausport.gov.au/supporting/integrity\\_in\\_sport/resources/national\\_member\\_protection\\_policy\\_template](http://www.ausport.gov.au/supporting/integrity_in_sport/resources/national_member_protection_policy_template)>.

<sup>29</sup> Tennis Australia, '*Member Protection Policy*' (2014) Articles 8.12 and 8.14

<[http://www.tennis.com.au/wpcontent/uploads/2014/06/TA\\_Member\\_Protection\\_Policy-LR.pdf](http://www.tennis.com.au/wpcontent/uploads/2014/06/TA_Member_Protection_Policy-LR.pdf)>.

<sup>30</sup> *Play by the Rules*, '*About Play by the Rules*' (2015) <<http://www.playbytherules.net.au/about-us>>.

Thus, direct sex discrimination in remuneration and unreasonable practices that disadvantage women in sport constitute unlawful discrimination,<sup>31</sup> and would contravene most sporting associations' policies. Nevertheless, not all female employees within government and sporting organisations are being remunerated in accordance with these legislative requirements. Inequality and discrimination against women in sport remains a consequence of the historical subordination of women generally in society.

### III FEMINIST PERSPECTIVES

'Sport is historically a male-dominated sphere of popular culture',<sup>32</sup> which makes it difficult for women to be involved or taken seriously within its exclusive realm. This is particularly problematic in Australia as sport comprises an integral part of our national culture yet excludes many women — including those who have been playing sport for as long as men have — by denying them the same level of recognition, career opportunities, and remuneration as their male counterparts. Sport has, in many ways, come to define masculinity itself in terms of the physical skills, strength, and even aggression that is expected of athletes.<sup>33</sup> Women have historically had problems achieving equality because of the misconception of women as inferior.<sup>34</sup> This is most evident in the sporting context, where it is believed that women do not have the requisite strength, speed, and stamina to succeed at the same level as men. This in turn reinforces women's exclusion from full participation in society.<sup>35</sup>

Liberal legal feminists find that gender inequality exists because women are not always afforded the same basic rights as men. The liberal ideal of formal equality

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<sup>31</sup> Human Rights and Equal Opportunity Commission, *Equal pay handbook* (2008) <[https://www.humanrights.gov.au/sites/default/files/content/pdf/sex\\_discrim/equal\\_pay.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/sex_discrim/equal_pay.pdf)>, 4.

<sup>32</sup> David Rowe, *'Sports, Sexism and the Law: Some Contextual History'* (Panel presentation Western Sydney University Law School Public Seminar, Collector Hotel, Parramatta, 28 April 2016) <[http://www.uws.edu.au/ics/news\\_and\\_media/blog/sports,\\_sexism\\_and\\_the\\_law\\_some\\_contextual\\_history](http://www.uws.edu.au/ics/news_and_media/blog/sports,_sexism_and_the_law_some_contextual_history)>.

<sup>33</sup> *Ibid.*

<sup>34</sup> Marett Leiboff and Mark Thomas, *Legal Theories: Contexts and Practices* (Thomson Reuters, 2<sup>nd</sup> ed, 2014) 441.

<sup>35</sup> Iris M Young, 'The exclusion of women from sport – conceptual and existential dimensions' in Paul Davis and Charlene Weaving (eds), *Philosophical perspectives on gender in sport and physical activity* (Routledge, 2010) 15.



requires women and men to have equal rights to compete and achieve within the sporting arena.<sup>36</sup> This would involve the same access to facilities, coaching, pay and career progression opportunities as men. Radical legal feminists believe that the fundamental source of inequality is the oppression of women purely on the basis of sex.<sup>37</sup> In other words, society and its institutions are largely created and dominated by males for their benefit and serve to oppress women. This includes sport. Furthermore, Mackinnon argues that women are not only oppressed by the patriarchal society but are actually violated and exploited as sexual objects.<sup>38</sup> This powerlessness and sexualisation of women manifests in all facets of society, including sport, and is considered normal. Thus, sport maintains the patriarchal structures, beliefs, and behaviours that subordinate women. A radical view would find that once the inherent oppression of women in society is eliminated, the subordination suffered by women in sport would follow suit.

Although there have been some advances in gender equality, including specific policies, increased participation by women and major accomplishments by female athletes, there is still disparity between women to men regarding remuneration and sponsorship.<sup>39</sup> Less value is given to women's sports, resulting in unequal prizes and minimal media coverage.<sup>40</sup> This treatment of women's sport and female athletes is oppressive and discriminatory. Sport is in a unique position of both producing and reinforcing wider society's gender constructs and biases, which is why gender equality and prohibiting of sex-based discrimination in sport is crucial. Both sexes should be given equal opportunities to enjoy the various benefits of sport, including well-being, fame, money, and career opportunities.<sup>41</sup>

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<sup>36</sup> Bradford, above n 10, 2.

<sup>37</sup> Leiboff and Thomas, above n 34, 446.

<sup>38</sup> *Ibid* 448.

<sup>39</sup> Bradford, above n 10, 4.

<sup>40</sup> United Nations Division for the Advancement Women Department of Economic and Social Affairs, *Women 200 and beyond: women, gender equality and sport*, (2007) 3 ('UNDAWDESA').

<sup>41</sup> Gertrud Pfister, 'Gender equality and (elite) sport' (2011) 25 *Enlarged Partial Agreement on Sport (EPAS)* 1.

## IV UNEQUAL SALARY, PRIZE MONEY, AND SPONSORSHIP

Kate Jenkins, Australia's Sex Discrimination Commissioner, recently recognised that 'there are still many challenges to overcome for women in sport',<sup>42</sup> including equal pay and sponsorship opportunities. Many female athletes, even at the elite level, are unable to participate full-time in their sport due to insufficient earnings.<sup>43</sup> Discrimination against women in salaries is particularly alarming. For example, Netball Australia, only recently doubled the minimum wage to \$27 375, with a top wage of \$67 500 for some players and netball is only expected to become 'fully professional within five years'.<sup>44</sup> This is despite the success of the national netball team, the Diamonds, including 11 world championships and the fact that they have been playing the sport internationally since 1938. To put these figures in comparison, the minimum wage for players in the NRL is \$82 500, in the AFL \$55 440, and in the Football Federation of Australia ('FFA') A-League \$55 000, while the average wages are \$244 000, \$302 104, and \$146 666 respectively.<sup>45</sup>

Also, it was only in 2014 that the Jillaroos, the National Rugby League's ('NRL') women's team, first received a match fee of \$500 for playing a Test (the men receive \$12 500 per match).<sup>46</sup> The NRL has no plan to introduce a national women's competition until 2020, despite the 482 000 women involved in the game nationally.<sup>47</sup> Consequently, these women have little opportunity to make a living out of their sport while male players on minimum wage in the NRL can. Australian basketball and hockey are the only team sports that pay the same

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<sup>42</sup> Kate Jenkins, 'Women in sport: The gender gap is slowly closing', 24 January 2017, <<http://www.heraldsun.com.au/rendezview/women-in-sport-the-gender-gap-is-slowly-closing/news-story/8880c7e901302bfd526af4ee8a0b075b>>.

<sup>43</sup> State Government of Victoria, *Safe and Strong – Victorian Gender Equality Strategy* (2016) 31.

<sup>44</sup> Pierce, above n 1.

<sup>45</sup> Dan Colasimone, 'Women's AFL competition could spark turf war with netball, cricket, W-League and rugby', ABC, 16 September 2016 <<http://www.abc.net.au/news/2016-09-15/turf-war-in-womens-sport-would-be-great-for-female-athletes/7844516>>.

<sup>46</sup> Phil Rothfield, 'What's the buzz: Jillaroos become first women to be paid for playing a Test match', 8 November 2014 <<http://www.dailytelegraph.com.au/sport/nrl/whats-the-buzz-jillaroos-become-the-first-women-to-be-paid-for-playing-in-a-test-match/news-story/1f89f22560ade73617cfd93a0dc5d7c2>>.

<sup>47</sup> Jennifer Browning, 'NRL won't rush women's rugby league competition despite AFLW success, Todd Greenberg says', 5 February 2017 <<http://www.abc.net.au/news/2017-02-05/nrl-wont-jump-the-gun-on-womens-league-just-yet/8240140>>.

daily rate irrespective of gender.<sup>48</sup> As for prize money, tennis is one of the few examples of parity, with equal prize money introduced in the Australian Open over 30 years ago, with Tennis Australia offering equal prize money for all elite tennis players in tournaments.<sup>49</sup> In most other sports, female athletes must supplement their income with another job.

In soccer, for instance, Matildas' player Katrina Gorry explains that due to inadequate remuneration, most players work while playing at the highest level, while men earn much more from the sport.<sup>50</sup> Until recently, the Matildas earned only \$500 in match fees for standard games, compared to \$7500 for the Socceroos.<sup>51</sup> Yet the Matildas perform consistently well in all tournaments and are ranked 8<sup>th</sup> in the world (out of 177), while the Socceroos are ranked 55<sup>th</sup> (out of 209). The Matildas went on strike in 2015 in order to resolve the pay dispute with the FFA, which finally agreed to a minimum base-salary of at least \$30 000 and up to \$41 000 a year, as well as increased match payments and allowances during camps and matches after collective bargaining agreement negotiations with the players' union, Professional Footballers Australia ('PFA').<sup>52</sup> This at least brings the salary up to a liveable figure for the Matildas.

Until recently, The W-League — unlike the A-League and both national teams — did not have a formal pay deal, and women were earning as little as \$100 per week, or even playing for free.<sup>53</sup> The PFA reported that in 2016, 85 per cent of players earned less than \$5000 for the season, 25 per cent earn under \$500, and it cost on average around \$2200 for the women to play.<sup>54</sup> The FFA and PFA are

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<sup>48</sup> Michele Hutchison, 'The glaring pay imbalance in sport: Why it pays to be a man', 25 September 2015 <<http://www.news.com.au/finance/work/at-work/the-glaring-pay-imbalance-in-sport-why-it-pays-to-be-a-man/news-story/a7e1a0544da3982cdc9fc6080b3b52c3>>.

<sup>49</sup> Tennis Australia, 'Tennis Australia addresses United Nations Forum on Gender Equality', 16 March 2017 <<http://www.tennis.com.au/news/2017/03/16/tennis-australia-addresses-united-nations-forum-on-gender-equality>>.

<sup>50</sup> 'Matildas player Katrina Gorry: The truth about being a female athlete', News.com.au (online), 25 January 2015 <<http://www.news.com.au/lifestyle/fitness/matildas-player-katrina-gorry-the-truth-about-being-a-female-athlete/story-fnlsv2b8-1227196086921>>.

<sup>51</sup> Women on Boards, 'Gender balance in global sport report' (September 2016) 13.

<sup>52</sup> Ibid.

<sup>53</sup> Tara Cassidy, 'W-League pay on the agenda', 21 October 2016 <<http://thefootballsack.com.au/2016/10/w-league-pay-on-the-agenda.html>>.

<sup>54</sup> Professional Footballers Australia, 'W-League Workplace Conditions Report 2016' (2016) 7.

working towards a collective bargaining agreement for the players, and it is reported that the women did receive a base salary of \$5000 for the 2016/17 season.<sup>55</sup> The PFA is aiming to achieve a \$11 500 a season salary for professional W-League players, \$60 000 for those who also play in the Matildas (or have either overseas or employment contracts), and \$2500 for the amateur players, while also hoping for an extended 18-game season and development programs to enable the players to focus on football all year round.<sup>56</sup> However, further details about pay and other conditions might need to be addressed in order to achieve the purpose of allowing these women to become full-time professional players on \$11 500 a year, although it is more promising for those players who are also selected as Matildas.

With great news for female cricketers at least, Cricket Australia ('CA') has tabled a five-year offer which includes professional women's cricketers in the new Memorandum of Understanding between CA and the Australian Cricketers' Association ('ACA') for the first time.<sup>57</sup> The average salary of players in the number 1 ranked Southern Stars is set to jump from \$79 000 to \$179 000 and to \$210 000 by 2021, and for female domestic players, from \$22 000 to \$52 000.<sup>58</sup> CA will also introduce prize money for the winners of the Women's National Cricket League ('WNCL') (\$258 000) and the Women's Big Bash League ('WBBL') (\$309 000), and match fees for domestic one-day games will be the same amount for male and female players. Male players will likely have their international annual retainer increase to \$816 000 by 2021, and domestic players will have an average salary of \$235 000. Interestingly, during previous negotiations between CA and ACA in which ACA sought a further \$1.45 million to CA's \$4.23 million commitment, the men's team offered the difference from their own contracts in return for ACA having further involvement in the women's contract conditions,

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<sup>55</sup> Cassidy, above n 53.

<sup>56</sup> Anna Harrington, 'How the hype and success of the AFL Women's competition gave football the kick it needed', 22 February 2017 <<http://www.foxsports.com.au/football/w-league/how-the-hype-and-success-of-the-afl-womens-competition-gave-football-the-kick-it-needed/news-story/fffe69c880b7b511d5536de00395a025>>.

<sup>57</sup> Cricket Australia, 'CA table landmark proposal to players' 21 March 2017 <<http://www.cricket.com.au/news/cricket-australia-womens-pay-rise-double-salary-domestic-international-mou-aca-ca-sutherland/2017-03-21>>.

<sup>58</sup> Ibid.

but this offer was rejected. This indicates that despite the salary increases and improved conditions, it is still clear, even to their male counterparts, that female cricketers are being undervalued.<sup>59</sup>

In addition to their salaries, there are other relevant financial entitlements for women. In 2016, male and female athletes in basketball, soccer, and cricket were travelling in different classes and staying in different standard accommodation when attending sporting events, prompting Federal Sports Minister Sussan Ley and the ASC to demand gender equality in the travel policies of sports organisations.<sup>60</sup> It has recently come to light that a “loophole” in the *Parental Leave Act 2010* (Cth) effectively disqualifies female jockeys from receiving paid parental leave. Due to required safety rules, female jockeys cannot ride beyond the first trimester,<sup>61</sup> yet payment eligibility requires recipients to have worked for at least 10 of the 13 months prior to giving birth. Compliance with safety requirements renders them ineligible to receive leave payments.<sup>62</sup> Until the issue is rectified, Racing NSW at least has committed to its own parental leave scheme for its female jockeys to receive eight weeks’ pay based on their average weekly earnings for the previous year.<sup>63</sup> This issue demonstrates the importance of enforcing discrimination laws in relation to parental responsibilities and pregnancy, as many women in many sports may be affected by the operation of parental leave schemes and other family responsibility entitlements.

Finally, commercial sponsorships are of particular importance for athletes if their salary is not high, as is the case for many female athletes. However, females also receive less commercial support, with some exceptions including the Commonwealth Bank Southern Stars and surfer Stephanie Gilmore. Most

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<sup>59</sup> Women on Boards, above n 51, 17.

<sup>60</sup> Associated Press Australia, ‘Federal sports minister Sussan Ley demands gender equality in sport travel’, *The Guardian* (online) 3 February 2016 <https://www.theguardian.com/sport/2016/feb/03/federal-sports-minister-sussan-ley-demands-gender-equality-in-sport-travel>.

<sup>61</sup> Ray Hickson, ‘Racing NSW brings in parental leave scheme for female jockeys’, 29 November 2016

<http://www.news.com.au/sport/superracing/racing-nsw-brings-in-parental-leave-scheme-for-female-jockeys/news-story/24b8eff2b39483730699014f806de0dc>.

<sup>62</sup> *Paid Parental Leave Act 2010* (Cth) ss 32–36.

<sup>63</sup> *Ibid.*

endorsements seen in the media are of male athletes, spruiking everything from cereal to underwear. Olympic Gold medallist Sally Pearson has had difficulty attracting sponsors,<sup>64</sup> as have the world champion Diamonds, due to low media attention on the sport.<sup>65</sup> Sponsors and advertisers heavily invest in professional sports, such as football, cricket, and car racing — however, since men dominate these sports, the revenue raised is effectively for the benefit of male athletes.<sup>66</sup> This issue is so significant that in August 2015, the ASC Chair wrote to ASX 100 companies urging increased sponsorship of Australian women's sport, as corporate support lags substantially behind at just 8 per cent, meaning women 'earn just a fraction of their male counterparts.'<sup>67</sup>

Inequity and discrimination are quite apparent in the income that male and female athletes receive. The stereotypical beliefs about the value of women's sport create this inequality. The disparity in pay emphasises the fact that female athletes are assumed to lack the required skills and attributes to be as successful as men.<sup>68</sup> In other words, women have biological differences, which make them 'inferior' to men (who are stronger and faster, etc) and consequently, women's sports are 'not as competitive' and not as popular with fans, broadcasters, and sponsors, therefore female athletes should be paid less.<sup>69</sup> However, less opportunity begets less attention and revenues. If women are underpaid to the extent that they must supplement this income in order to support themselves and their family, then their availability for training and competition will be affected. With less time to devote to their sport, they cannot achieve the same levels of success.

The AFL, FFA, Netball Australia, and Cricket Australia have recognised that to attract the best talent and competition they must offer the best pay and

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<sup>64</sup> Justin Quill, 'Give the female athletes a level playing field on sports funding', *Sunday Herald Sun*, 22 September 2013 <<http://www.heraldsun.com.au/news/opinion/give-the-female-athletes-a-level-playing-field-on-sports-funding/story-fni0ffsx-1226724417784>>.

<sup>65</sup> Ashley Rose, 'Australian netballers: the last of the great amateurs?' in Thomas V Hickie et al, *Essays in sport and the law* (ASSH Studies, 2008) 165.

<sup>66</sup> Pfister, above n 41, 21.

<sup>67</sup> Australian Sports Commission, 'Support women's sport' (2017) <<http://www.ausport.gov.au/>>.

<sup>68</sup> Taylor, above n 14, 150.

<sup>69</sup> Women on Boards, above n 51, 15.

conditions to female players,<sup>70</sup> and recent improvements in pay and conditions are a step towards that goal. However, Matildas player and player-relations Executive Kathryn Gill notes that Australian sportswomen have been treated like ‘second-class citizens for far too long’,<sup>71</sup> and that the Matildas had to fight through collective bargaining negotiations to receive their improved workplace conditions, something their male counterparts have not had to face.

#### V LACK OF MEDIA COVERAGE OF WOMEN’S SPORTS

The role of the media in shaping mentalities and representations is important, and the media almost exclusively shapes people’s knowledge and opinions about women’s sports.<sup>72</sup> The unequal and discriminatory representation of women’s sport in the media is a significant issue. In fact, women’s sport and female athletes are underrepresented across all platforms of the media.<sup>73</sup> ASC research published in 2014 found that media time devoted to women’s sport was 7 per cent for dedicated TV sport coverage (compared to 81 per cent for men), with 5 per cent of TV news coverage, 7 per cent of print news, 3 per cent of online news and 4 per cent of social media coverage.<sup>74</sup> Tennis accounted for nearly half (47 per cent) of the TV coverage, and when broken down by sport, women’s cricket received 2 per cent of total coverage; football 7 per cent; basketball 15 per cent; golf 12 per cent; athletics 8 per cent; and surfing 4 per cent — although coverage of women’s sport increased to around 25 per cent in 2012 during the Olympics.<sup>75</sup> Therefore, despite the fact that there are concurrent women’s competitions in almost every sport, the media are unable or unwilling to give women’s sport the same coverage as their male counterparts.<sup>76</sup>

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<sup>70</sup> Pierce, above n 1.

<sup>71</sup> Associated Press Australia, above n 61.

<sup>72</sup> Committee on Equal Opportunities for Women and Men, *‘Discrimination against women and girls in sport’*, 29 March 2005, [44]

<<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileId=10812&Language=en>>.

<sup>73</sup> Emma Sherry, Angela Osborne and Matthew Nicholson, *‘Images of Sports Women: A review’* (2015) *Sex Roles* 1.

<sup>74</sup> James Paterson and Ryan Matzelle, ASC, *‘Women in sport broadcasting analysis – final report’* (April 2014), 7.

<sup>75</sup> *Ibid*, 36.

<sup>76</sup> Tracey Holmes, *‘When will the media meet the challenge of giving proper coverage to women’s sport?’* 28 December 2016 <<http://www.abc.net.au/news/2016-12-28/media-still-failing-challenge-of-womens-sport-coverage/8150724>>.

Australian women's cricket, football, and basketball teams are more successful than their male counterparts, yet very few of the public would know given the lack of media coverage.<sup>77</sup> Generally, only prominent, individual athletes receive broad coverage. This is with the exception of Olympic athletes and teams, given the Olympics are an extraordinary context and more coverage of female athletes is expected.<sup>78</sup> Some successful female athletes, including Ellyse Perry, the youngest person to represent Australia in cricket and in soccer, Caroline Buchanan, five-time world champion and Olympian in BMX and mountain biking, and netball world champion Laura Von Bertouch are relatively unknown,<sup>79</sup> especially in comparison to such household names as Ian Thorpe and Michael Clarke. The underreporting of female athletes leads the public to believe that they are not as important and their accomplishments are not recognised.<sup>80</sup>

The lack of media exposure also makes it difficult for female athletes to secure sponsors, which adds to the discrimination that women suffer in sport.<sup>81</sup> Men's sport has dominated media coverage for decades, and this in turn naturally affects sponsorship deals. But it is important to remember that the commercial market for the broadcasting of male sports received major public subsidies, access to public assets, and protected market development,<sup>82</sup> to be as successful and profitable as it is today. The increase in popularity of female sports such as tennis, swimming, and even Mixed Martial Arts, demonstrates that as soon as women's sports get more attention and visibility they become popular and generate more revenues.<sup>83</sup> Thus, the lack of media coverage correlates with the ability for sportswomen to attract sponsors, thereby contributing to the disparity in earnings.

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<sup>77</sup> Tracey Holmes, 'After homophobia let's tackle prejudice against women's sport', ABC, 10 April 2014 <<http://www.abc.net.au/radionational/programs/lifematters/after-homophobia-lets-tackle-prejudice-against-womens-sport/5381930>>.

<sup>78</sup> Sherry, Osborne and Nicholson, above n 73, 4.

<sup>79</sup> Paterson and Matzelle, above n 74, 92; Felicity Harley, 'Raw deal: women's sport', Mamamia.com, 18 October 2011 <<http://www.mamamia.com.au/social/whos-the-better-role-model-rihanna-or-ellyse-perry/>>.

<sup>80</sup> Eoin J Trolan, 'The impact of the media on gender inequality within sport' (2013) 91 *Procedia Social and Behavioural Sciences* 215, 217.

<sup>81</sup> Pfister, above n 41, 42.

<sup>82</sup> Rowe, above n 32.

<sup>83</sup> Netivist.org, 'Gender inequality in sports: are professional athletes salaries fair for women?' (2016) <<https://netivist.org/debate/gender-inequality-in-sports>>.



The 'conundrum' is what comes first?<sup>84</sup> Is it interest in women's sports or promotion of the sports that creates the interest? The argument and commercial assumption that the public is not interested in women's sports is not supported by recent research.<sup>85</sup> For example, 50 million people worldwide watched the women's team win the 2013 Cricket World Cup and SBS recorded an almost 50 per cent jump in ratings when it broadcasted a Matildas World Cup quarter final game.<sup>86</sup> Recently, the AFL announced that the ratings for the inaugural women's competition exceeded all expectations, as discussed further below. There have been other positive developments in this area, such as Channel TEN's live broadcast of the WBBL in prime time since 2016,<sup>87</sup> and Netball Australia's broadcast deal with Nine Network and Telstra, including a Saturday night live double-header on Nine, which is expected to secure sponsors and eventually increase salaries.<sup>88</sup> Therefore, coverage figures from 2015 to the present should demonstrate some increase, particularly due to these developments, although a jump from 7 per cent to near 50 per cent seems highly unlikely.

#### VI THE 2017 INAUGURAL AFLW COMPETITION

On 25 March 2017, the Adelaide Crows made history by becoming the inaugural AFLW champions, a historically significant match, and a win for women and sport generally. The road to this success was not without significant hurdles. After much speculation and negotiation, the AFL reached an agreement with the Football Players' Association ('FPA'), just months before the competition was due to start. Initially, the base salary was going to be \$5000, with \$10 000 for higher profile players, and \$25 000 for the top stars, and there had been no commitments as to further entitlements received by the players' male

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<sup>84</sup> Holmes, above n 76.

<sup>85</sup> Sherry, Osborne and Nicholson, above n 74, 3.

<sup>86</sup> Holmes, above n 77.

<sup>87</sup> Women on Boards, above n 51, 17.

<sup>88</sup> Max Mason, 'Nine and Telstra sign Netball Australia broadcast deal', *Sydney Morning Herald*, 19 May 2016 <<http://www.smh.com.au/business/media-and-marketing/nine-and-telstra-sign-netball-australia-broadcast-deal-20160518-goyknu.html>>.

counterparts.<sup>89</sup> AFL chief executive Gillon McLachlan explained that the lack of broadcast and sponsorship deals was the main issue.<sup>90</sup>

The AFL eventually agreed to pay marquee players \$27 000, priority players \$12 000, and the remaining players \$8500 for the 7 match season, which will increase to \$27 946, \$12 846 and \$9276 respectively in 2018.<sup>91</sup> Importantly, the minimum wage was set at a pro-rata amount of the male rookie salary. The players also received boots and runners, travel allowance, income protection, and an allowance to pay for a carer for those players with a child under 12 months. The AFL recognised that in order for the AFLW to succeed and evolve into a fully professional competition, the women needed the ‘same opportunities to thrive’ as their male counterparts.<sup>92</sup>

The AFL secured their broadcast on the 7 Network’s 7Mate and the opening round of the 2017 AFLW season attracted more than 1.7 million viewers nationally, with more than 50 000 fans in attendance at the venues.<sup>93</sup> The very first game drew a crowd of over 25 000, with over a thousand denied entry when the stadium reached capacity. Dr Greenwood, co-author of the 2010 report *‘Towards a Level Playing Field: sport and gender in Australian media’*, stated that it was a ‘dream scenario’ that the AFLW was being broadcast and receiving the level of support it was.<sup>94</sup> Of course, the competition was scheduled for February–March, the off-season for the male competition, and entry was free to all the games, including the grand final. In any event, the attendance demonstrates the public’s interest in an AFLW competition. The football itself was described as ‘tough’, ‘unbelievably ferocious’, and ‘very physical’.<sup>95</sup> Observers noted that the

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<sup>89</sup> Eliza Sewell, ‘AFL Players’ Association rejects female pay proposal for new comp’, Herald Sun, 2 September 2016 <<http://www.heraldsun.com.au/sport/afl/afl-players-association-rejects-female-pay-proposal-for-new-comp/news-story/006b11c2f8ad1869b47b8b16111c5063>>.

<sup>90</sup> Colasimone, above n 45.

<sup>91</sup> Australian Football League, ‘AFL Women’s payment terms agreed’, 10 November 2016 <<http://www.afl.com.au/news/2016-11-10/afl-womens-payment-terms-agreed>>.

<sup>92</sup> Ibid.

<sup>93</sup> David Mark, ‘AFLW: What do we know after round one?’ 6 February 2017 <<http://www.abc.net.au/news/2017-02-06/aflw-what-do-we-know-after-round-one/8245286>>.

<sup>94</sup> Damian McIver, ‘AFLW: Media coverage of women’s competition “almost inconceivable”’, 6 February 2017 <<http://www.abc.net.au/news/2017-02-06/aflw-almost-inconceivable-coverage-breaking-new-ground/8245672>>.

<sup>95</sup> Mark, above n 93.

skills of the players did fluctuate, although this can happen — albeit to a lesser extent — to the men.<sup>96</sup> Naturally, the more training the women receive and the more often and longer that they play, the more their skills will improve, as with any player in any sport.

There are promising signs for the future of the AFLW, however, it is important to note that women have been playing Australian football for over 100 years.<sup>97</sup> Therefore, the issue is that it took this long to see women on the same stage, with the same career opportunities, and earning the same (or close to the same) money, as male AFL players.

#### VII DEVELOPMENTS AND FURTHER RECOMMENDATIONS

Sex Discrimination Commissioner Kate Jenkins states that ‘confronting entrenched community attitudes and invisible systemic barriers’ is still required to achieve gender equality in our society, and that sport is, and can be, an ‘important signal of the progress’ that has been made so far.<sup>98</sup> It is imperative that female athletes receive parity of salaries, prizes, and endorsements. This can only be achieved through a mutual recognition by governments, sporting organisations, and sponsors that female athletes deserve equal remuneration for their contribution to sport. Further progress is needed, and addressing wage inequalities through targeted policy development is an important first step.<sup>99</sup> Financial incentives for organisations that do have gender equality and sanctions for those who do not is an excellent idea.<sup>100</sup>

Recent positive developments in this area include the Victorian Government’s ‘*Safe and Strong*’ framework, which aims to deliver gender equality through reforms in law and policy over the next 5 years.<sup>101</sup> Sport and recreation are

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<sup>96</sup> Ibid.

<sup>97</sup> Brunette Lenkic and Rob Hess, ‘Play On! A hidden history of women’s Australian Rules Football’, 3 September 2016  
<[https://issuu.com/echopublishing/docs/play\\_on\\_extract\\_with\\_cover](https://issuu.com/echopublishing/docs/play_on_extract_with_cover)>.

<sup>98</sup> Jenkins, above n 42.

<sup>99</sup> UNDAWDESA, above n 40, 29.

<sup>100</sup> Pfister, above n 41, 44.

<sup>101</sup> State Government of Victoria, above n 43, 31.

included along with education, work, leadership, health, and media. The Government has recognised the importance of sport in the state's culture and identity as having 'the capacity to challenge gender stereotypes and discriminatory attitudes, and promote core values of fairness and respect.'<sup>102</sup> The Government's strategies to address the issues in sport include working with sporting associations to pilot gender equality using sporting ambassadors, working with local government and the associations to promote equitable provision of infrastructure and facilities, and calling on the Commonwealth Government to mandate a minimum amount of female sport coverage on the Australian Broadcasting Corporation. These strategies were based on the recommendations from the '*Inquiry into Women and Girls in Sport and Active Recreation*', which recognised that females, who make up half the population in Victoria, have skills, knowledge, and experience equal to men, and that 'not tapping into that talent pool is inequitable and wasteful'.<sup>103</sup>

In 2016, it was announced that the AFL, NRL, Australian Rugby Union, and Netball Australia will work together with Our Watch to eliminate violence against women and achieve gender equality by promoting women's participation and opportunities in sport, challenging gender stereotypes and roles, and encouraging respectful, healthy, and equal relationships on and off the field.<sup>104</sup> The National Sporting Organisations Initiative is the first initiative of the Sports Engagement Program by Our Watch, and will work with these sporting associations until July 2018 to implement these strategies and develop standardised policies, tools, and resources for NSOs to implement gender equality.<sup>105</sup> This is a significant initiative to combat not only inequalities within sport but also the entrenched subordination suffered by women in society in general, including the issue of domestic violence.

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<sup>102</sup> Ibid.

<sup>103</sup> State Government of Victoria, *Inquiry into Women and Girls in Sport and Active Recreation: A Five Year Game Plan for Victoria* (November 2015) 8.

<sup>104</sup> The Daily Telegraph, 'Rugby, NRL, AFL, Netball commit to Our Watch for gender equality and to end violence against women', 18 June 2016  
<<http://www.dailytelegraph.com.au/sport/swoop/rugby-nrl-afl-netball-commit-to-our-watch-for-gender-equality-and-to-end-violence-against-women/news-story/d8a794117bbb3ea55298125b7b54ceeb>>.

<sup>105</sup> Our Watch, 'Sports Engagement Program' (2017)  
<<https://www.ourwatch.org.au/What-We-Do/%E2%80%8BSports-Engagement-Program>>.

However, further progress is needed to change the perception of female athletes and women's sports, particularly in the media. Sport and the media combined have great power to influence social values, beliefs, and practices,<sup>106</sup> and thus, have the responsibility to promote gender equality and eliminate discrimination. For example, the ASC recommends utilising the variety of media devices and social media channels to deliver increased coverage of women's sport, and creating interest in women's sport by ongoing dialogue with the public.<sup>107</sup> The ASC predicts that creating a 'critical mass' of highly engaged consumers by 2017 will, in turn, drive demand for an increase in media coverage.<sup>108</sup> Also, sponsors can be innovative and respond to the need for creating interest in women's sport, while also promoting their brand and getting good returns on their investments. The Commonwealth Bank's strategy is one good example. As long-term sponsors of the Southern Stars (as well as the male teams with Cricket Australia) they have invested in their own social media channels to create effective and targeted advertisement campaigns featuring stories of the female cricketers, with a video of Ellyse Perry racking up over a million views.<sup>109</sup> By utilising content marketing, brands 'have an opportunity to spread the stories of women athletes and increase their visibility.'<sup>110</sup>

Providing more opportunities for women to participate in sport at all levels and in all roles,<sup>111</sup> including management and coaching; challenging stereotypes and bias by accepting a gender-neutral view to shift the focus onto the sport rather than the sex of the players;<sup>112</sup> eliminating rule differences in male and female sports; and parity in ticket prices are just some of the other recommendations for changes needed to achieve gender equality in sports.<sup>113</sup> These changes can be

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<sup>106</sup> Trolan, above n 80, 224.

<sup>107</sup> Paterson and Matzelle, above n 74, 9–14.

<sup>108</sup> Ibid 15.

<sup>109</sup> James McGrath, 'A new era in women's sport sponsorship?' 10 April 2016 <<http://www.sbs.com.au/topics/zela/article/2016/04/10/new-era-womens-sport-sponsorship>>.

<sup>110</sup> Ibid.

<sup>111</sup> Pfister, above n 41, 44.

<sup>112</sup> Eileen McDonagh and Laura Pappano, *Playing with the boys – why separate is not equal in sports* (Oxford University Press, 2008) 254–255.

<sup>113</sup> Ibid.

supported by recognising sport as a specific area within all anti-discrimination legislation, with explicit provisions that prohibit discrimination in the areas of remuneration and media coverage, among other things. The current 'strength, stamina and physique' provisions may serve to entrench the underlying discriminatory attitudes about women as inferior to men in sport.<sup>114</sup> Removing or altering these provisions and adopting provisions that promote gender equality in all areas of sport would assist in eliminating the discrimination still suffered by many female athletes.

### VIII CONCLUSION

ASC's former executive director Simon Hollingsworth predicted that 'the past 12, 18 months will be seen as a significant turning point for women's sport' due to the high performance results,<sup>115</sup> increased participation, and commercial growth of women's sport. Recent developments in AFL, netball, cricket, and soccer are encouraging, however, closer inspection of the realities for most female athletes, and the place of women's sport in our society, demonstrates that more change is needed. In some cases, current legislation appears to hinder the progress of women in sport and allows the legal exclusion of women based on physical attributes. Sport sustains gender discrimination against female athletes through unequal pay, prize money, and sponsorships. It is apparent that lower pay and lack of sponsorship is affected by the considerably scarce media coverage of women's sport. Evidence suggests that despite equal pay legislation, sporting organisations may be reluctant to enforce it, however the recently enacted Queensland legislation appears to give the QIRC more power to be proactive in this area.<sup>116</sup>

Challenging the gendered assumptions and stereotypical beliefs about the value of women's sport is vital. Sportspeople, sports organisations, fans, media organisations, and governments must continue to collectively speak out against

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<sup>114</sup> Bradford, above n 10, 14.

<sup>115</sup> Pierce, above n 1.

<sup>116</sup> See, eg. *Industrial Relations Act 2016* (Qld).

gender discrimination in sport and lead progressive change.<sup>117</sup> Most importantly, society must overcome its general subordination of women. Once this desperately needed revolution occurs, then female athletes will be on par with their male counterparts.

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<sup>117</sup> UNDAWDESA, above n 40, 30; Rowe, above n 32.

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