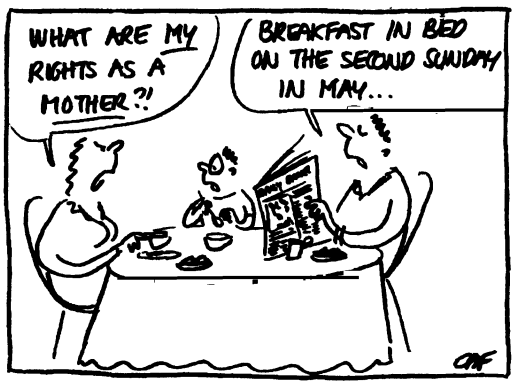
Dealing with SEXUAL DIFFERENCE

Marilyn Lake

100 years of feminist reform.



Marilyn Lake is Professor in History, LaTrobe University. Professor Lake's study of the history of feminism in Australia *Getting Equal* has recently been published by Allen and Unwin.

During the last 100 years, feminist activism in support of women's rights has moved away from protectionist reforms predicated on the significance of sexual difference in women's lives towards the ideal of non-discrimination, towards the assumption that equality requires that all people be treated in the same way, without distinction. The problem is that in a political/legal system whose paradigmatic figures — the liberal individual, the citizen and the worker — though masquerading as neutral are in fact masculine in conception, the granting of equality has all too often rested on woman's disavowal of her sexual difference and her capacity to fill the part of an honorary man.

Women's claims thus come to seem paradoxical: we must assert the significance of sexual difference, while refusing sexist discriminations. But the dilemma for feminist politics goes even deeper, as Joan Scott has pointed out in her study of French feminism *Only Paradoxes to Offer*:

> In the age of democratic revolutions, 'women' came into being as political outsiders through the discourse of sexual difference. Feminism was a protest against women's political exclusion; its goal was to eliminate 'sexual difference' in politics, but it had to make its claims on behalf of 'women' (who were discursively produced through 'sexual difference'). To the extent that it acted for 'women', feminism produced the 'sexual difference' it sought to eliminate.[1]

The sexual difference produced by Australian feminism 100 years ago represented women as violable and men as violators, women as powerless and men as powerful. In making claims on behalf of such women, it is arguable that feminists helped to produce the vulnerable bodies they then sought to protect and govern.

A vote for protection

In 1903, following the achievement of women's right to vote and stand for election to the federal parliament, Vida Goldstein formed the Women's Federal Political Association in Victoria to guide the exercise of women's new political power. Women should use the vote, she said, 'to protect themselves and their children'. Post-suffrage feminists interpreted their mission as a protective one. Emphasising the vulnerability of women and girls at the hands of predatory men, they embarked on the project of establishing a maternalist welfare state to free the female sex from exploitation and secure their status as inviolable self-governing citizens.

Turn-of-the-century feminists conceptualised women's subordination as a matter of 'degradation'; reforms were necessary to secure women's self-respect. A major goal, symbolically as well as actually, was to raise the age of consent, which Rose Scott called the 'age of protection'. In 1891, in Victoria, the Woman Movement claimed credit for legislation which raised the age from 12 to 16 years, a pattern soon followed in other colonies. As Scott reported with satisfaction: 'In West Australia women had the vote a year when they got the age of protection for

young girls changed from 14 to 16 and that is one of the first steps [enfranchised] women take'.[2] As president of the post-suffrage Women's Political Education League in New South Wales, Scott campaigned long and hard for the age of consent in that State to be lifted to 17 years, but had in the end to settle, in 1910, for 16. The platform of Vida Goldstein's Women's Federal Political Association called, unsuccessfully, for the age in Victoria to be further raised to 21 years.

In New South Wales, the Women's Political Education League claimed credit for several pieces of protective legislation passed during the first decade of the century: the *Juvenile Smoking Suppression Act* (1903), the *Infants' Protection Act* (1904), the *Neglected Children and Juvenile Offenders' Act* (1905), *the Police Offences Amendment Act* and the *Prisoners' Detention Act* (both 1908) as well as the *Crimes (Girls' Protection) Amendment Act* (1910).

Increased 'protection' also meant increased surveillance and intervention in family life by the state — as some working class and Aboriginal mothers soon would learn. In 1909, for example, new legislation in New South Wales extended the *Neglected Children and Juvenile Offenders Act* to specifically provide for the creation of a 'Board for the Protection of Aborigines' authorised to remove Aboriginal children from their mothers and control them if they were deemed to be neglected. A further amendment in 1915 extended its powers providing that:

> The Board may assume full control and custody of the child of any aborigine, if after due enquiry it is satisfied that such a course is in the interest of the moral or physical welfare of the child.
>
> The Board may thereupon remove such child to such control and care as it thinks best.
>
> The parents of such child so removed may appeal against any such action on the part of the Board to a Court as defined in the Neglected Children and Juvenile Offenders Act, 1905, in a manner to be prescribed by regulations.

Policies of protection could reinforce the subordination of those they were intended to benefit, but the maternalist sense of the vulnerability of children was strong.

Child welfare, declared Ada Bromham, the independent feminist candidate for Claremont in the 1921 Western Australian elections, was 'the woman reformer's foremost plank'.[3] The establishment of separate Children's Courts, first introduced in South Australia, was a matter of particular pride and in feminists' own accounts of their work on behalf of children, South Australia held pride of place. The pioneering path laid down by Caroline Clark and Catherine Spence in establishing the 'boarding out system' which enabled impoverished but respectable (white) mothers to keep their children with them, had been followed by the formation of the State Children's Council. Subsequent developments were elaborated in a glowing tribute by the Women's Non-Party Association of South Australia to the extent of the regulatory apparatus they had achieved in the 1920s:

> From the work so begun has grown the present State Children's Department with its numerous foster-mothers, its Receiving Homes, reformatories, Children's Courts and the great army of officials, inspectors, probation officers, matrons and others who carry on this magnificent work ... The Mothers' School, now known as the Mothers' and Babies' Health Association has carried on its work along the lines of similar child welfare societies which are now well established throughout the world. There are now 42 centres for weighing babies in the Metropolitan area, as well as several pre-natal clinics.[4]

The better protection of women and children was also the goal of the newly appointed women police officers.

During World War 1, most Australian States had responded to the pressure of women's organisations to make such appointments for the first time. Policewomen, said the *Woman Voter*, journal of the Women's Political Association, were required so that they might patrol the streets and make arrests when necessary, 'but more particularly to act as guardians of women and young people, who frequently get into trouble because there is no motherly person at hand to warn and advise them in moments of danger'.[5] By 1924 there were ten women police at work in South Australia, whose 'preventive and protective work' was also praised by *Dawn*, the journal of the Women's Service Guild in Western Australia. Their official duties were to:

1. To patrol streets, parks and open places and to deal with loitering and soliciting.
2. To undertake observation of theatres, dance halls, cinemas, show grounds, railway stations, markets.

Protection necessitated observation and supervision. One effect of inter-war feminists' maternalist orientation was their outspoken opposition to the specific oppressions suffered by Aboriginal women, especially their sexual abuse at the hands of white men and the removal of their children by the agencies of the state. In Western Australia, they were successful in having a Royal Commission appointed in 1933 to enquire into these abuses, and as witnesses they supported the courageous Aboriginal women, who also came forward to protest at the loss of their children.

The rights of wives and mothers

Post-suffrage feminists also emphasised, however, the importance of enhancing women's capacity for self-protection. The key strategy here was to secure women's economic independence and as most women worked as mothers and housewives, feminist campaigns between the wars focused on achieving the economic independence of the married woman. For while women depended on men they were, in effect, 'sex slaves'. The entry of single women into paid work simply highlighted what labour organiser Jean Daley called 'the slavery of the married woman'. Women across classes and parties came together in the 1920s in support of their three plank program of motherhood endowment, childhood endowment and equal pay.

To dismantle the family wage, paid to men as breadwinners, another means of supporting those dependents needed to be put in place. Hence the joint proposals for motherhood and childhood endowment, which labour women and non-party feminists argued for before the Royal Commission, appointed in 1927, to enquire into their feasibility. As one witness, Lena Lynch, secretary of the Women's Central Organising Committee of the New South Wales branch of the Labor party explained:

> in the Industrial Court women and children are not recognised as individuals at all, they are just appendages to men ... endowment recognises the women citizens and the child. It is an individual right which is passed over by the Court.[6]

Women, like men, had a right to an individual income; and workers should be paid the rate appropriate to the job, and not the sex of the worker. Labour organiser Muriel Heagney envisaged that this new basis of wage fixation would lead to a revolutionary change in the relationship between the sexes. But it was not to be. The Royal Commission declined to recommend what they too saw as a

revolutionary change in family relations entailing a radical challenge to the power of men. A Minority Report supported a scheme of childhood endowment, but it too drew the line at motherhood endowment: 'the idea of treating the wife as a separate economic unit on the pay-roll of the state' would, in by-passing the husband, introduce 'a very powerful solvent' into 'family life as we know it'.[7]

Another strategy to secure a measure of economic independence for married women was Jessie Street's proposal that legislation be passed requiring men to allocate the appropriate portion of their family wage to their wives, to its intended beneficiaries. She spelt out the degradation of the wife's position under existing law in an interview on Radio 2GB:

> She is not entitled to any money, for housekeeping or for any other purpose. The husband may order all the supplies for the house itself. Indeed he may even order or buy his wife's clothes and she has no cause for complaint. So long as he houses, clothes and feeds her at a standard in keeping with his income, he need not give her a penny piece, and she can do nothing about it.
>
> Do you mean to say that a wife is not entitled to enough money to even buy her own clothes and other personal necessities?
>
> This is just what I do mean.
>
> She-is-not-entitled-to-any-money-whatever-for-any-purpose-whatsoever.[8]

In the 1940s, Street also proposed that legislation be passed to ensure women's ownership of household savings. Neither proposal was successful.

The difficulty entailed in having men acknowledge the value of women's distinctive household labour was made clear in the response by the Professor of Public Administration at the University of Sydney, F.A. Bland, to a suggestion by a group called the Wives' and Mothers' Union that the 'vast army of unpaid workers' should be remunerated by the state. For them the logic of their claim was evident:

> No sane person can ignore the claim of wives and mothers if only as essential workers who perform such a multitude of vital household tasks and who also risk their lives in motherhood and are responsible for bringing into existence, maintaining and caring for the most important product of mankind — human beings.

Professor Bland said that such proposals caused him 'great hilarity': 'Services can have an economic value only when they are marketed. The services of wives and mothers cannot be marketed — they are above all price'.[9]

Increasingly it became clear that women would only achieve economic independence by following men into the labour market and transforming their demand for economic independence into one for equality — equality of access, conditions and wages in the workforce. This discursive shift is evident in Muriel Heagney's pivotal text *Are Women Taking Men's Jobs?* published in 1935, in which she defended women's right to work in the context of Depression-generated attacks on women's (especially married women's) employment. Pointing to the nonsense of the claim that women were taking men's jobs in a country in which there was such a high level of sex segregation in the labour market, Heagney, nevertheless, reiterated the argument that women, as individuals, as taxpayers and voters, had the same right to work as men.

Political claims made on the basis of women's difference, in particular in terms of their status as mothers, began to rebound on women, locking them into dependence and subordination. The discourse on the rights of children seemed only to undermine the rights of mothers. They were said to be out of place in the paid workforce; in 1932 the New South Wales government passed legislation banning the employment of married women as teachers and lecturers. At the same time their newly won custody rights over their children were rendered conditional on their devotion to motherhood. One of the most hard fought campaigns for women's rights between the wars was to secure recognition of married women's custody rights in law. But the victory, when it came, was a double-edged sword.

In New South Wales, the Emilie Polini case, in which a court had denied a mother custody of her child and thus the right to take her overseas while she worked as an actress, led to a massive feminist mobilisation involving some 70 women's organisations representing around 70,000 women. In his ruling, Justice Harvey had made his reasons for denying custody to Polini clear. Although she was a 'gifted and successful actress' with not 'a breath of suspicion' against her character, her failing was that she 'had never allowed her maternal affection to interfere with the call of her profession'. In pursuing her profession, she had forfeited her rights as a mother. He explained that if Polini

> were settling down in a home in Australia I should be of the opinion that it was clearly a case in which the custody of the child should be shared between them turn and turn about.[10]

The resultant campaign, which included the staging of a play by J.C. Williamsons called *Whose Child?* written by feminist leader Millicent Preston Stanley (the first woman to be elected to the New South Wales parliament in 1925) finally achieved equal custody rights for women in 1934, but it was not the victory feminists had hoped for. As Heather Radi has noted in her study of this case, the Act denied any right resided in the mother as mother:

> It formally acknowledged that a mother's wishes should count equally with a father's, but it explicitly stated that the welfare of the child was the 'first and paramount consideration'.[11]

The child's rights compromised those of the mother. And it seemed that a child had a right to expect different commitments from a mother than a father. A mother's right of custody was conditional not on her being a good citizen like a man, but on being a good woman: white, married, chaste and economically dependent on a husband. The priority accorded to children's welfare, in part the outcome of feminists' own efforts, served to lock women into an ever more demanding 'role'. Feminists continued to insist, however, that motherhood should not lock women into a degrading dependence on men. Thus from the 1940s, 'child care' began to be articulated as a new right, conceptualised as the pre-condition for women's equal participation in the workforce and public life.

Equality through non-discrimination

In the late 1940s international feminists, including Australian Jessie Street, became active participants in the drafting of the Charter of the United Nations and the Universal Declaration of Human Rights, documents that enshrined equality as a matter of non-discrimination. Article 2 of the Universal Declaration of Human Rights declared:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This guarantee would be used by activists campaigning in Australia for women's and Aboriginal rights during the 1950s and 1960s. Feminists campaigned for both causes within this framework. For example, in 1949, the United Associations (UA) in Sydney wrote repeatedly to the Kempsey Council on the north coast protesting against the exclusion of Aborigines from the public swimming pool. This action, they said, violated every principle of the UN Charter. As the UA explained to the Town Clerk, its members had:

> concerned themselves with this matter because one of the Objects of our Association is the removal of discriminations which operate unjustly against individuals. In this we ally ourselves with that clause of the UN Charter which affirms 'there shall be no discrimination on account of race, colour, creed or sex'.

The reply from the Aboriginal Welfare Board unwittingly highlighted the logical connection between the principle of non-discrimination and policies of assimilation, assuring the UA that in furtherance of its 'policy of assimilation' it was anxious that 'Aboriginal children should have every opportunity in association with other children and ... it was felt their attendance at the baths afforded an excellent opportunity in this regard'.[12]

Eight years later, in 1957, veteran campaigner for Aboriginal rights, Mary Montgomerie Bennett published her book *Human Rights for Australian Aborigines* to 'publicise the principles of the Universal Declaration of Human Rights which do not apply to Aborigines' and feminist, Jessie Street helped launch the petition for the referendum to make Aboriginal welfare a federal responsibility. The wording of the preamble to the petition, written in her hand, echoed the United Nations emphasis on non-discrimination:

> believing that many of the difficulties encountered today by Aborigines arise from the discrimination against them in two sections of the Commonwealth Constitution, which specifically exclude Aborigines from the enjoyment of their rights and privileges enjoyed by all other Australians ...

In this conceptual framework there was no room for recognition of the constitutive nature of sexual and cultural difference; equality would be achieved by treating all Australians, Aboriginal and non-Aboriginal, men and women, as abstract individuals, alike.

Thus campaigns for women's rights in the 1950s and 1960s increasingly focused on the goal of non-discrimination in the public domain — at work, on Boards and Commissions, in the constitution of juries, in government and the professions and importantly, in that quintessentially Australian institution, the public bar.

In 1951, the United Associations asked candidates in the forthcoming federal election, among other things, whether they would agree:

- To grant women equal pay, status and opportunity in the Commonwealth Public Service, thereby giving an impetus to outside bodies to follow suit.
- To rescind sec. 49 of the Commonwealth Public Service Act and sec. 170 of the Commonwealth Bank Act, 1945, both of which forbid the employment of women after marriage regardless of their ability.
- To hold a Referendum to provide for a Blanket Bill giving women equal rights, status and opportunity with men and stipulating that any sex discriminations embodied in any laws or regulations be invalid.[13]

In New South Wales, feminists achieved a measure of equality with their admission (but not on the same terms as men) to jury service in 1951 and the granting of equal pay for State public servants in 1958; there was a further triumph with the removal of the marriage bar in the Commonwealth Public Service and banks in 1966.

One place in which many Australian women experienced the most blatant discrimination was in that paradoxically men's only public space, the public bar, where State laws prevented women being served alcohol. During the late 1960s and into the 1970s, women took direct action in occupying bars and demanding to be served on the same basis as men. The first such action, which created remarkable media interest, occurred in Brisbane at the Regatta Hotel when Merle Thornton and Ro Bognor chained themselves to the footrail and asked to be served a beer. They pointed out that the law effectively discriminated against women as citizen/workers, as 'journalists who can't pick up bar gossip; [as] businesswomen who can't make contacts in the bar; [as] women at various conferences and meetings who can't adjourn to the bar with the others'. Thornton elaborated on the meaning of their action, by pointing out that the 'protection' of women also subordinated them and she condemned legislation that set out 'to protect women who don't want to be protected'. It was 'a principle of prime importance', she said, 'that all normal adult citizens, irrespective of race or sex, should be treated exactly in the same way under the same law'. 'There is wide agreement on this principle', she added, 'which is incorporated in the United Nations Charter of Human Rights'.[14]

The principle of equality as non-discrimination was further implemented in the Commonwealth Arbitration Court's equal pay decisions in 1969 and 1972, and in the anti-discrimination legislation passed in the various States from the 1970s and the federal parliament in 1984. But the limited effects of these undoubted gains for women point to the limitations of non-discrimination as a strategy, of a politics aimed at bringing about equality solely by treating everyone in the same way. As earlier feminists had realised, women as sexually embodied citizens, had distinctive experiences and suffered distinctive harms as mothers, wives, domestic drudges and as the victims of sexual assault. Hence the need for legislative and other reforms that also address domestic violence, rape, unwanted pregnancies, women's excessive workloads and women's relative poverty.

In 1947, when feminists sought to amend the Draft Declaration of Human Rights to write in rights specific to women, they were rebuffed by those who insisted that the rights so defined must be 'universal' in nature, able to apply to all individuals without distinction. Feminists wanted, for example, the Declaration to specifically recognise 'the rights of mothers'; they wanted, in a radical challenge to political tradition, to inscribe the mother not as a figure in need of protection, but as a rights-bearing citizen. They were unsuccessful and had to accept Article 25's positioning of mothers, alongside children, as persons in need of special care and assistance. In the debate, the Canadian delegate, Mr Smith, took the opportunity to ridicule the idea that breast-feeding mothers might have rights. Yet had the idea of the mother as a rights-bearing citizen won acceptance, then the experience of all those mothers, Aboriginal and non-Aboriginal, who had their children taken away in the 1950s and 1960s might have been different. Had the idea that mothers had rights gained currency, then maybe the authorities who apparently thought little of taking women's children from them, often without the women's knowledge, let alone consent,

Continued on p.278

> As this provision of the *Bill of Rights 1688* forms part of the Australian constitutional fabric it would be improbable in the extreme that Parliament would attempt to require or permit the infliction of cruel and unusual punishment. Therefore an extremely heavy presumption arises that it has not done so, so heavy that only unmistakable language could displace it. In the Act under consideration a word such as 'mandatory' would be needed.
>
> If Parliament purported to require the infliction of cruel and unusual punishment, there would be a question of its competence to pass such a law.

On 25 March 1999, the Bill was passed in the Queensland Parliament. On 13 April we received a letter from the Minister's Executive Officer in response to our submissions:

> In view of the fact that the Corrective Services Legislation Amendment Bill 1999 has been passed by the Parliament ... it appears that the need for a meeting has now been overtaken by events. Mr Barton has asked that I convey his apologies to you.

A response to queries from the Parliament's Scrutiny of Legislation committee was somewhat more fulsome. The Minister's office prepared a briefing paper emphasising that the regime was for administrative segregation, not punishment, and that adequate food and natural light would be provided. The crux of the briefing was that 'The MSU is not a 'black hole' like the infamous 'black hole' at Boggo Road'. It did not address the majority of the concerns raised in our submission.

Unlawful segregation

On 28 July 1999, Justice Moynihan of the Queensland Supreme Court held that the segregation of our clients in the MSU from their placement in the unit until 2 April 1999, when they were placed on Special Treatment orders under s.39, was unlawful. The prisoners are now exploring their options in relation to potential claims for damages.

Minister Barton has called it an 'empty' victory and said that he makes 'no apology' for being tough on the 'worst of the worst'. He and the Queensland government seem unperturbed that they and their predecessors have acted without any lawful authority whatsoever.

Four of our clients have been moved back into the mainstream following the ruling. The remainder have been placed on Maximum Security Orders under the new legislation and new litigation is already underway in relation to these new orders.

What next?

Minister Barton has indicated that there will be a review of the new Maximum Security provisions as part of an overhaul of the entire *Corrective Service Act* in 2000. We remain ever hopeful that input from prisoner advocates may be considered relevant to that process.

In order to satisfy the demand for solitary confinement facilities from jittery prison managers concerned about sensational escapes and riots two new Maximum Security Units are currently under construction at the Sir David Longland and Arthur Gorrie Correctional Centres and will open next year. No information about their design or construction has been made available to stakeholders.

In California the supermax craze has developed to such an extent that 1500 supermax cells have been constructed at the Pelican Bay Special Housing Unit (SHU), dedicated to the indefinite solitary confinement of prisoners suspected of affiliation with ethnic gangs. These cells are designed to reduce human interaction with the inmates to nil through the use of mechanisation. Uncooperative prisoners are subject to standard 'cell extraction' techniques which employ gas and stun guns and batons because prison officers are too terrified to interact with prisoners who have nothing left to lose.

Many people ask us why we have sunk so many resources into providing legal assistance to the 'worst of the worst' in Queensland prisons and one important answer is: Pelican Bay.

The 'supermax' solution is a slippery slope. Prisoners who have been in solitary for long periods can become extremely dangerous because of their disorientation and loss of emotional control. Having created these prisoners the prison administration is forced to continue to segregate them because no prison manager will accept them back into mainstream.

The demand by prison officers and managers for more and more security is apparently insatiable. Every 'management problem' becomes a candidate for supermax and each new supermax facility fills to capacity as soon as it is opened. We believe that unless the myth of the 'supermax solution' is challenged today we will be faced with Pelican Bay tomorrow.

Lake article continued from p.268

might have been rather more cautious. To this day the mother remains one of the few figures not to be acknowledged as a rights-bearing political subject; unlike the worker, the child, the indigenous person, the national minority, the woman, 'the mother' has no rights recognised in international covenants or conventions.

The challenge for activists and law makers interested in advancing the rights of women remains a philosophical as well as a political challenge. It is a challenge posed by paradox, that is, the necessity of refusing sexist discrimination, while demanding acknowledgment of sexual difference, but in such a way as to prevent sexual difference becoming the ground for the political subordination that defines relations of protection.

References

1. Scott, Joan Wallach, *Only Paradoxes to Offer French Feminisms and the Rights of Man*, Harvard University Press, Cambridge, 1996, pp.3–4.
2. Scott, Rose, 'Why Women Want the Vote', Scott papers, Mitchell Library, ML MSS 38/38.
3. *West Australian* 12 February 1921.
4. South Australian Women's Non-Party Association, 'Women's Work for Child Welfare in South Australia', League of Women Voters papers, MS SRG 116, South Australian Archives.
5. *Woman Voter*, 10 March 1913.
6. Royal Commission on Child Endowment, Commonwealth Parliamentary Papers 1929, Minutes of Evidence, p. 923.
7. Royal Commission on Child Endowment, above, Majority and Minority Reports, pp.1343–4,1392.
8. Jessie Street Radio Broadcast, 1 November 1936, NLA, Street papers NLA MS 2683/3/641–3.
9. *Daily Telegraph*, 29 January 1943.
10. Radi, Heather, 'Whose Child/' in Judy Mackinolty and Heather Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788-1979*, Hale and Iremonger, 1979, p.128.
11. Radi, Heather, above.
12. CL Scrimgeour to Minister for the Interior, 6 September 1949, and to Aboriginal Welfare Board, 4 October 1949, Aboriginal Welfare Board to UA 18 October 1949, UA papers, ML MSS 2160/Y791.
13. UA to candidates, 12 April 1951, UA papers, ML MS 2160/Y789.
14. Thornton, Merle, *Women are Members of the Public*, pamphlet, 1965; 'Women in Chains', *Woman's Day*, 10 May 1965; *Telegraph*, 5 April 1965.