

Making rights a reality

The human rights approach to stopping violence against women

“Violence against women is a human rights scandal of unparalleled dimension; it is a cultural, social and political malignancy rooted in prejudice, bigotry and discrimination whose eradication must be sought without reservation, without equivocation, and without delay.” – Kate Gilmore (2004).

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Although the ability of the human rights framework to adequately address violence against women is sometimes questioned, few activists and service providers working in the field of sexual assault would contradict the statement above by Kate Gilmore, the Executive Deputy Secretary General of Amnesty International, in her address to the Australian launch of the *Stop Violence Against Women* campaign, in Canberra on 8 March 2004.

The human rights framework draws upon the language of international human rights law and instruments, such as the *Universal Declaration of Human Rights* (United Nations 1948), and a wider theoretical base, to understand and address a range of abuses. Traditional interpretations of human rights have tended to focus on civil and political rights, and overlook most violence against women, such as sexual assault, particularly when it takes place in the so-called “private sphere”.

This article examines some of the historic and contemporary debates surrounding women’s human rights. Women’s rights activists have effectively challenged and expanded traditional interpretations of human rights, which has affected the development of Amnesty International’s own approach to the human rights of women. The development of this approach from its beginnings to the recently-launched *Stop Violence Against Women* campaign is briefly traced in this article. One of the basic tenets, and great strengths, of the campaign is the “due diligence approach”, by which governments and other authorities are held responsible for upholding women’s human rights. The last section of this article specifically examines the applications of the due diligence approach to sexual assault.

Making women’s rights human rights

Human rights law, many feminist critics have argued, was not constructed with a view to promoting gender equality, but rather to protect men from what they feared most: the power of the state (Binion 1995). The *Universal Declaration of Human Rights* (United Nations 1948) was largely influenced by earlier documents outlining the “rights of man” or the “rights of the citizen”, such as those which emerged from the French Revolution of 1789. Such documents were never intended to apply to women, and at least one early feminist activist, Olympe de Gouges, was guillotined for suggesting that they should be (Gay Levy et al. 1979).

While the *Universal Declaration of Human Rights* translated and updated these earlier documents into “gender neutral” language, it still largely reflects the concerns of elite men. This is not to say that such concerns are never shared by women or non-elite men, just that women and non-elite men face additional concerns that are not addressed in the Declaration. Such concerns are the result of structural inequalities that the Declaration does not analyse, such as those based on sex discrimination or resulting from colonisation. Thus the image of the “human rights box” has emerged in recent theory, defined as “a set of historical and structural circumstances that enables the human rights framework to gain currency among elites while limiting advances, and even creating setbacks, among the general population” (Bauer 2000: 1).

Judith Bessant and Sandy Cook (1998: 10) are particularly critical of international human rights law, arguing that: “The *Universal Declaration of Human Rights* (1948) and the *International Covenant on Civil and Political Rights* (1966):

- fail to recognise many forms of violence as violence, and are unable to address those forms of endemic violence against women;
- operate with a masculinist distinction between public and private spheres;
- assume universalising principles that cannot be transferred into action which secures basic entitlements and greater self-determination; and
- fail to compel sovereign states to give effect to international law.”

These authors demand a conception of human rights that takes into account the nature of relationships many women live in, and the forms of violence women in particular suffer.

How best to achieve this more “women-centred” conception of rights is the subject of much debate. Robyn Rowland notes that the present unequal position of women is inseparable from their historically unequal status (Rowland 1992). Centuries of argument assumed the domination of women by men was “natural”, inevitable and therefore not even to be considered in discussions of justice or rights. Some feminists have attempted to counter this non-consideration of gender by arguing for women’s rights to be respected under existing human rights provisions. They highlight situations where women’s rights have been violated *within* these parameters, and propose changes to the institutional structures which will enforce the human rights of women under existing definitions and laws (Engle 1992; Brems 1997).

Other feminist critics insist that “the diameter of the circle of *inclusion* in the realm of human rights law is entirely too narrow” (Binion 1995: 512). Even if contemporary rights theorists no longer consider the domination of women by men to be a “natural” inevitability, it does not necessarily follow that human rights law will go any way towards ending that domination. As Rebecca Cook (1995: 73) notes: “In a gendered world where sexes are not equal, the application to women of seemingly neutral laws . . . does not have a gender neutral result.”

The major feminist criticism of the traditional human rights framework is that, in focusing on the potential of the state as abuser, it fails to take into account abuses in the so-called “private sphere”. Gayle Binion (1995: 516) points out the profound consequences for women that this entails: “[Women are] rendered subject to the control of patriarchal familial authorities – fathers, brothers and husbands – with the understanding that familial matters are ‘private’, and therefore beyond the scope of governmental authority and intervention.”

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However, women’s rights activists (and, more recently, Amnesty International) have noted that “the family” may only be considered separate or autonomous from government *at the sufferance of the state*. “Governments worldwide have not endowed ‘family’ with any significant degree of autonomy. The framework for the family is everywhere within a political arena” (Binion 1995: 519). The fact that the crimes of battery, rape, imprisonment, etc. are largely ignored by the state when perpetrated by a family member is a “failure of official responsibility, not an inability to police the environment. In a feminist analysis, the state’s choice to overlook such criminal acts is as abusive of human rights as a refusal to interfere with the slave trade” (Binion 1995: 519).

Many feminists insist, therefore, that governments accept responsibility for policing human rights violations within the “private” sphere. This involves a theoretical and practical acknowledgment that private actors can and do abuse human rights, and are subject to the same international conventions that bind governments. This may seem obvious, but is frequently overlooked in traditional liberal theory which casts the state as the primary human rights violator (Kiss 1995). In order to do this, activists have made use of existing human rights norms – such as discrimination, torture, due diligence, equality before the law, bodily integrity, and the right to health and life – to draw attention to the specific abuses women suffer. For example, similarities have been highlighted between the systematic abuse of bodily integrity that is domestic violence, and traditional concepts of torture.

According to Obando (2004), the potential for human rights theory to address gender-specific abuse can be recognised as follows: it officially recognises violence against women, not as an “individual” problem, but as one which governments have an obligation to respond to; it requires States to

“guarantee the eradication of social and economic conditions which maintain and perpetuate women’s subordination”; and it provides a feminist vocabulary in an international context.

Importantly, human rights *theory* does not, in general, make any distinction between abuses perpetrated by state or non-state actors – everyone has a right to physical integrity, for instance, regardless of who might threaten that right. It is only through *interpretation* of this theory that more value is placed on public actions, which is why human rights law (and, usually, human rights organisations) respond more actively to forms of state violence and to the repression of actors within the public/political sphere.

The difficulties women’s rights activists encounter in having rape and other forms of sexual assault recognised as a human rights abuse is a case in point. Feminist activists of the 1970s challenged the public/private dichotomy and showed rape to be a systematic and “political crime of violence against women” (Barry 1979: 40). Susan Brownmiller’s development of a “rape paradigm” defined rape as a political act, which was best illustrated by “the way rape is routinely handled by the police, in the courts and by public attitudes. The response of these institutions to rape victims reveals the structure in which sexual violence and slavery thrive” (1975: 41). In positioning rape as political, these theorists attempted to make visible what had previously been considered as an isolated and “individual” crime not worthy of international or even national attention.

However, prioritisation of the “public” sphere remains: thanks to women’s rights activists, rape is now recognised as a human rights abuse under international human rights instruments, but usually only when committed by state agents. Systematic rape in armed conflict was recognised as a war crime at the International Criminal Tribunal for the Former Yugoslavia in 1996, and as a war crime or crime against humanity under the Rome Statute of the newly-created International Criminal Court in 2001¹ (Obando 2004).

This in itself was a significant, if long-awaited, step, but it goes only part of the way towards addressing rape as a human rights issue. Joan Fitzpatrick notes the contrast between rape in wartime, considered as torture, and “the rape of women in peacetime where the failure of governments to take adequate preventive and punitive efforts to combat the practice is only beginning to be seen as creating state complicity in a human rights violation” (cited in Amnesty International 2004b: 13). That is, a similar seriousness of approach needs to be applied to rape committed in places other than a war zone or interrogation cell. The nominal conviction rates for rape and sexual assault in Australia indicate a lack of recognition of this violence, which would be considered intolerable in other cases of human rights abuse.

Amnesty International’s work on women’s human rights

When Amnesty International was founded in 1961 its mandate was relatively simple: to work for the liberation of “prisoners of conscience” and to end torture. The mandate expanded somewhat over the next few decades to oppose the death penalty, extra-judicial executions and “disappearances”, but remained focused on civil and political rights abuses and to one class of perpetrator – governments, their agents and opposition groups. At the same time, the organisation defended and promoted the universality and indivisibility of all human rights, which, alongside the self-imposed limitations of the mandate, meant that inconsistencies and contradictions inevitably emerged (Watson 1997).

Amnesty International began to focus on the issue of abuse against women in 1989, when it organised formal working groups to document women’s rights violations. It concluded that women suffer more rights violations than any other group in the world, both in times of war and through traditional practices excused by culture (Bahar 1996). This study culminated in the release of *Women in the Front Line* (Amnesty International 1991), which focused on abuses perpetrated by the state and opposition groups. The women mentioned were primarily activists, but the report also noted the case of women relatives of male activists, who were similarly targeted. The report did not, therefore, detail abuses perpetrated in the “private” sphere, nor did it go any way towards a theorisation of the relationship between the “private” and “public” spheres. However, it did extensively cover the forms of gender-specific abuses women suffer at the hands of the state, such as rape, sexual humiliation, and threats while in detention, along with other abuses that men also suffer.

As Saba Bahar (1996: 107) notes in her article on Amnesty International and the family: “To address the specific violence that women experience, the organisation had to reconsider not only the private/public ►

division but also its own emphasis on state-related violence against women". In the report, *Human Rights are Women's Right*, released that same year, Amnesty International (1995: 5) noted that: "While women are under-represented in national and international decision-making structures, they are over-represented among victims of rights abuse . . . Because of their gender women are at risk of a range of violent abuses by private organisations and individuals."

The report therefore articulated an obvious verbal commitment to opposing human rights abuses against women, wherever and by whomever they were perpetrated. Despite this, because of its mandate of the time, Amnesty could not act on the vast majority of such abuses: those that take place at the hands of family members, partners or acquaintances. Also, although Amnesty had always openly proclaimed the equality, and indivisibility, of all "generations" of rights, the traditional limiting of its action to one specific "generation" was a prioritisation in itself. In women's experience, the absence of economic or social rights can quickly translate into an abuse on the integrity of their person. An obvious example is the social sanctioning of sexual assault and domestic violence, an abuse further compounded if lack of economic independence makes it impossible for a woman to leave a violent partner.

At the International Council Meeting of 2001 these anomalies were addressed in a revolutionary decision. After a four-year mandate review, the existing statute was completely changed by unanimous vote. It was noted that by limiting oppositional work to a particular set of civil and political rights, Amnesty was undermining the notion of indivisibility of all rights and damaging its own credibility. Therefore, a "full-spectrum approach" was adopted, and the new "mission" became "to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights". Amnesty would now address "governments, intergovernmental organisations, armed political groups, companies and other non-state actors" (Amnesty International 2004c). Activism would be limited only according to the gravity of the abuse, and prioritise those abuses that fell within the current Integrated Strategic Plan.

The Standing Committee on the Mandate drew up a partial list of the following gender-specific abuses by non-state actors that could be considered to be "grave violations":

- sexual slavery, forced prostitution, child prostitution;
- girl-child marriage, sale of and trafficking in children, servile marriage contracts;
- bride burning, dowry deaths or related assaults;
- female infanticide, denial of basic nutrition, health or other vital needs to the girl-child because of son-preference;
- female genital mutilation and other traditional practices affecting women's physical and mental integrity;
- other traditional practices affecting physical or mental integrity (for example, brutal or dangerous forms of scarring or mutilation);
- domestic violence (abuse of women, children and the elderly in the home);
- rape and other sexual assault; and
- forced abortion, forced sterilisation.

It is this mandate change that has made the *Stop Violence Against Women* campaign possible. Until the distinction between different categories of rights and that of state/non-state perpetrators was dropped, it was impossible to envisage a campaign that could adequately address violence against women within the organisation's mandate.

The Stop Violence Against Women campaign and conference

Kate Gilmore's framing of violence against women as a "human rights scandal", as quoted in the opening paragraph of this article, will not seem an exaggeration to activists working in the sexual assault or domestic violence fields, yet it aims to produce a sea change in public perception of human rights. When most people think of Amnesty International they think of political prisoners. When they

think of human rights abuse, they think of torture or imprisonment at the hands of state agents. The prisoner in the imagination is male; the torturer opening the cell door is uniformed. Yet that same fear of imminent violence is felt by countless women on hearing their partner or husband's key turning in the lock of their own front doors. The aim of the campaign (and the challenge for Amnesty and women's rights activists) is to enable the public, and policy makers, to make that connection.

The *Stop Violence Against Women* Australian campaign was launched at Parliament House, Canberra on International Women's Day, on 8 March 2004, and campaigning activities are scheduled to begin in October. Parliamentarians present at the launch were invited to "sign up" to stop violence against women by leaving coloured handprints on a banner – an international campaign activity linked to the message that stopping violence against women is "in our hands". A central tenet of the campaign is that: "Violence against women is never normal, legal or acceptable and should never be tolerated or justified. Everyone – individuals, communities, governments, and international bodies – has a responsibility to put a stop to it and to redress the suffering it causes" (Amnesty International 2004a: 110).

Amnesty also held a *Stop Violence Against Women* conference in Fremantle on 4-6 June 2004, in recognition, as Mara Moustaphine (National Director of Amnesty International Australia) pointed out, of the "enormous gap between the rhetoric of human rights for women and the reality so many women experience everyday". The conference served as a forum, not only for Amnesty workers, but also for representatives from Indigenous communities, women's rights organisations, government agencies, support and service providers, the judiciary and police, as well as survivors of domestic violence and sexual assault, to exchange ideas on how to "move beyond the mere legal recognition of rights to the full achievement of those rights" (Moustaphine 2004). Papers from the conference have been posted on the Amnesty Australia website at: www.amnesty.org.au/.

The campaign has a dual focus – first, on violence against women in the family and, second, on violence against women in conflict/post-conflict situations. The dual focus is not only a reflection of the sites of greatest danger for women, but is also symbolic of the organisation's new direction: "private" and "public" violence against women is recognised as a continuum. This "violence is both rooted in discrimination and serves to reinforce discrimination . . . which denies women equality with men in all areas of life" (Amnesty International 2004a: 5). Violence against women in the community, while not a focus of the campaign, is also theorised as part of this continuum.

The campaign's approach will focus on addressing government responsibility for women's rights through the "due diligence" approach. Governments must show a certain level of "diligence" to prevent violations of women's human rights, to investigate and punish acts of violence, and to provide compensation.

"Due diligence" means governments must respect, protect, fulfil and promote human rights:

- *Respect* – they must not abuse or interfere with human rights.
- *Protect* – they must take measures to prevent third parties from interfering with human rights, through instituting laws, policies and practices that protect victims of violence, provide them with appropriate remedies, and bring perpetrators to justice;
- *Fulfil* – they must ensure the appropriate infrastructure to support these laws, policies and practices, and to render them effective;
- *Promote* – they must develop specific promotional programs and measures (through education public information broadcasting, information to service users, and so on) to make women's right to freedom from violence a reality.

This will be Amnesty's first international campaign of such magnitude to be implemented under the new mandate. It will be six years long, and the first time that Amnesty has taken a clear-cut stand on ►

Federal Treasurer Peter Costello makes his mark in support of the *Stop Violence Against Women* campaign. © AIA



Shadow Minister for Employment, Education and Training, Jenny Macklin MP (left) with Kate Gilmore, AI Executive Deputy Secretary General (right) © AIA

gender-based violence as a human rights violation under international law. The organisation therefore acknowledges that there will be gaps in its knowledge, understanding and methodologies, and has specified that it will need to learn from others, particularly local service providers and activist organisations, with long-term experience in the field of violence against women.

Merryn Smith, the Convenor of Amnesty International Australia's National Women's Team, said in an interview with ACSSA that: "Amnesty has consulted with agencies in all states during the early stages of the campaign to build an understanding of the issues in the Australian context. This consultation will continue throughout the campaign, to tailor Amnesty's international campaign to local conditions, and to ensure that service providers are prepared for any increase in demand for their services that may follow Amnesty's public education campaign".

As the Secretary General of Amnesty, Irene Khan, noted at the international launch of the campaign: "[Women] are agents of change, who have led and continue to lead the struggle to expose and counter violence, to bring dramatic changes in law and practice" (Khan 2004). Amnesty is therefore keen to forge new relationships and strengthen older ones with such organisations, marking another break from its traditional, more isolated, approach.

In turn, Merryn Smith says: "[T]he campaign will offer policy makers a human rights framework, which can be used to identify, measure and close the gaps between existing policy and practice and the responsibility of all governments to respect, protect and fulfil women's right to live free from violence. Similar campaigns conducted by Amnesty International in other countries will also provide alternative models for policy that may be adaptable to the Australian context."

Amnesty has produced several documents that could be of use to activists, service providers and policy makers. The campaign report, *It's In Our Hands: Stop Violence Against Women* (Amnesty International 2004a) provides an overview of women's human rights internationally, including a broad analysis of the causes and consequences of abuse alongside individual women's stories. It also outlines international human

rights laws and state obligations, and devotes a section to "organising for change" using the human rights framework. In addition, as part of this first stage of the campaign, Amnesty has released a two-part "Activist's Toolkit" entitled *Making Rights a Reality*. The first part, subtitled "The Duty of States to Address Violence Against Women" gives a more in-depth analysis of government's legal duty to take action to address violence against women. The second part, subtitled "Building Your Campaign", is a step-by-step guide to lobbying for change. The *It's In Our Hands* report, and the two-part toolkit are available online at: <http://web.amnesty.org/actforwomen/reports-index-eng>, or by calling Amnesty International Australia on 1300 300 920.



Senator Kay Patterson addresses the launch of *It's In Our Hands* with (left to right) Bruce Baird MP, Peter Costello MP, Kate Gilmore, Jenny Macklin MP, Senator Lyn Allison and Senator Kerry Nettle looking on. © AIA

"Due diligence" in the Australian context

As part of its "Agenda for Change" (Amnesty International 2004a: 109), Amnesty urges all governments to ratify and implement the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and its *Optional Protocol* (United Nations 1979). Australia has ratified the Convention but not the Protocol. The Protocol is especially important because it "establishes a communications procedure under which individual women, or groups of women, may complain to the Committee on the Elimination of All Forms of Discrimination Against Women that their rights under the convention have been violated" (Evatt 2002: 13)².

In effect, the Protocol institutes the right to petition, and without it, "Australian women are left without either national or international recourse in areas where the Convention has not been fully implemented, such as where there are gaps in the protection of the *Sex Discrimination Act 1984*, or where it is subject to exemptions" (Evatt 2002: 13). Although Australia is a signatory to the Convention itself, areas have been identified where Australia's compliance falls short of its obligations: "The

situation of Indigenous women is well below international human rights standards in health, education and housing, life expectancy and maternal and infant mortality. Violence is also a huge problem for Indigenous women” (Evatt 2002: 11).

Importantly, the due diligence approach provides an avenue of accountability. For governments at all levels, and their authorities in the police and judicial system, the first step in the establishment of due diligence is the *respect* of human rights. Accordingly, governments and their agents must not themselves abuse such rights. In the Australian context, human rights organisations have raised concerns regarding the ongoing practice of strip-searching women prisoners (Kilroy 2004) and the effect of the immigration detention system on the mental and physical health of women detainees (Amnesty International 2002).

The second step in the establishment of due diligence is to *protect* human rights. This means ensuring punishment and redress where human rights are abused by private actors. In Australia, while the criminalisation of physical and sexual violence against women exists in all jurisdictions, extremely low conviction rates means that due diligence has not yet been achieved, and therefore that reforms are necessary. Some such reforms in regards to sexual assault are outlined in the following section. In addition, Amnesty has raised concerns that state (Federal and State/Territory) funding to enable women to escape situations of violence and to access counselling is inadequate. This means that many women continue to live in situations of violence, particularly in rural and remote communities, Indigenous communities and amongst culturally and linguistically diverse communities.

The third aspect of due diligence is the obligation to *fulfil* human rights. This means ensuring access to justice, such as through the removal of discriminatory laws. In Australia, the *Sex Discrimination Act 1985* has gone some way towards addressing this. Amnesty’s concerns regarding sexual assault include the practice of some magistrates/judges to excuse a man’s violence because they understand it to be part of a man’s “culture”. This is an illegal defence under international human rights law. Another concern is that, although most police forces now require recruits to receive some training on sexual assault, officers who received training ten or twenty years ago are not always re-trained and may be in positions of leadership, which can undermine the training recruits receive. Furthermore, for women in remote communities, lack of money, lack of transport, and/or the inability to leave a community that has condoned violence means access to justice and services is impossible. Indigenous women wishing to access Indigenous legal services face the additional obstruction of being turned away if the perpetrator has already accessed the service.

The final aspect of due diligence, and the one most often overlooked in traditional interpretations of human rights obligations, is the obligation to *promote* these rights (some readings of due diligence place this under the obligation to “fulfil”). The establishment of national plans of action to address specific forms of abuse is a due diligence requirement particularly important to the promotion of women’s human rights. The Australian Government’s *National Initiative to Combat Sexual Assault* constitutes such a plan in this field. The obligation to obtain statistics on violence against women is also being fulfilled through the 2005 *Personal Safety Survey*, being prepared in a partnership between the Office of the Status of Women and Australian Bureau of Statistics. These initiatives give us the tools to promote women’s rights to live free from sexual assault and implement strategies to address the abuse. However, ongoing evaluation is necessary to ensure that any such strategies work: that they actually stop violence against women. Where they do not work, new strategies must be found. To do this there is an identified need to work in close consultation with existing service providers and advocacy organisations.

Sexual assault as a human rights issue

Identifying women’s safety as a human right has implications for sexual assault prevention “both in terms of framing the issue of violence against women in a language recognisable to government, and also in terms of being able to access the persuasive argument of international obligations” (Lambert and Pickering 2000: 33). As Marg D’arcy (Program Manager of CASA House, Victoria) pointed out in an interview with the Australian Centre for the Study of Sexual Assault during the *Stop Violence Against Women* conference: “Saying that women should be protected is very patronising. It implies that there’s something lesser about them. Whereas if you say that women’s *rights* should be protected, that women have a *right* not to be violated, it’s a much more powerful language to use.” ➤

In this, the human rights framework has certain advantages over welfare-based models. Government and individual obligations to uphold human rights are universally recognised and undeniable, while welfare provisions are notoriously vulnerable to the political, economic and cultural exigencies of the time (which rarely prioritise women's concerns). This is not to say that welfare policy is not essential. As Rhonda Cumberland (2003: 10)³ says: "Real prevention of family violence requires a conventional welfare policy and a human rights response." The link between the two is the requirement of due diligence, whereby international human rights law demands a certain standard from domestic law and policy. Governments must show due diligence in providing a welfare system that protects and fulfils women's *right* to live free from violence.

An important aspect of the due diligence concept is evaluation. It is not enough to criminalise violence against women and put programs into place aimed at stopping it. Such initiatives must be regularly assessed to see if they *work*. Incidence data, research on "hidden" forms of violence, and women's experience of violence must be taken into account, and if legislation or policy is failing to stop such violence then it must be reviewed. Whilst such evaluation will be necessarily long-term and ongoing, Amnesty, along with service providers and researchers, have outlined several current areas of concern, summarised below.

One aspect of this re-traumatisation is the humiliation and "victim-blaming" of women through the admission of sexual history as evidence in sexual assault cases.

In order to meet due diligence obligations to fulfil women's human rights, access to justice must be ensured. This goes beyond the criminalisation of sexual assault. The criminal justice system must be accessible to all victim/survivors, and be effective in bringing perpetrators of assault to justice. Judicial responses to sexual assault at the state/territory level vary,

but due diligence concerns common to the different jurisdictions include: first, that the criminal justice response revictimises women; second, that there is a high rate of attrition in sexual assault cases; and third, that prosecution and conviction rates remain disproportionately low (Heenan and McKelvie 1996; Victorian Law Reform Commission 2003; Stubbs 2003).

Most jurisdictions have reviewed definitions of sexual assault in recent years, and have incorporated a broader definition of sexual assault, but this has not led to an increase in prosecution rates, nor diminished the re-traumatisation of women through the court process.

One aspect of this re-traumatisation is the humiliation and "victim-blaming" of women through the admission of sexual history as evidence in sexual assault cases. While feminist objections to this practice have led to states imposing varying degrees of restrictions, "there is no legislature that has introduced a blanket prohibition on its use" (Heenan 2003). Furthermore, such restrictions and regulations that do exist are subject to the discretionary power of judges to interpret and apply them, often conservatively. As a result, such restrictions do not appear to be contributing to any reduction in the admission of sexual history evidence in recent years. On the contrary, Heenan's research reveals an apparent *increase* in the proportion of Victorian trials where such evidence has been admitted since 1989. Studies have attributed this failing to definitional problems, inconsistent approaches to interpretation, and outright breaches of regulations (Henning 1996; Department for Women in New South Wales 1996). This clearly impacts on the right of women to access the judicial system (as it serves as a deterrent to reporting), as well as due diligence obligations to punish offenders and obtain redress (when used by the defence to place the complainant's credit in doubt and therefore reduce the chances of conviction).

Amnesty has also identified the very low rates of successful prosecutions for cases of sexual assault (in all jurisdictions) as a failure of state responsibility to establish a legal and administrative system to address violence against women. When asked at Amnesty's Fremantle *Stop Violence Against Women* conference in June 2004 if low conviction rates could be interpreted as a failure of due diligence, Hilary Fisher (Project Leader of the campaign) said: "Absolutely. If [a human rights] violation happens not only in the battlefield or in the community, but also in the bedroom, and the government know of that, or are aware of it, or haven't put things into place to prevent that from happening, then they have a responsibility that they're failing in."

Participants at the Fremantle conference workshop on "due diligence approaches to judicial proceedings for sexual assault cases" identified several possibilities for improvement within the current system. These included increased training on sexual assault at every level of the judiciary; the provision

of special waiting rooms in court buildings for the victim/complainant so that they are not forced to wait in the same corridor as the defendant's family; and increased explanation and clarification of the judicial process for the victim/complainant. Suggestions for more substantial reforms included the establishment of special courts to deal solely with sexual assault cases, with specialist-trained judges and lawyers; and the adoption of a less adversarial, more victim-centred trial system, such as that established by recent reforms in the Philippines.

Marg D'arcy clarified what she saw as the major problem of the current system: "[W]ith a crime that happens in private, where there's very rarely any physical evidence and very rarely witnesses, we do have to somehow recognise that a presumption of innocence for the man is a presumption of disbelief in the woman. We have to turn that around in some way. I think it's actually going to require a fundamental shift in how we think about the law and criminal justice and the rights of the defendant".

This may prove a difficult area for Amnesty to engage with, due to the organisation's historical support of defendant rights in the criminal system. However, as D'arcy points out: "The problem with sexual assault is that the evidence is the woman. This makes it different from any other crime, which means we may need to work out a way of treating it differently. It may mean rather than putting the onus on the state to prove that he committed the crime, put the onus on him to show that he actually took every step that he possibly could to know that the woman was consenting. [This] really would be a positive step. And it's the only way things are going to change."

The Australian Government's Attorney-General's Department, although not having direct responsibility for government response to sexual assault, established the Model Criminal Code Officers Committee as a means of developing uniform criminal laws between different states and territories. Following a three-year period of consultation, the Committee released a report on sexual assault laws in 1999. A review of the implementation of these recommendations at the state/territory level, (and, where implemented, their affect on access to the criminal justice system for victim/survivors of sexual assault and their impact on prosecution and conviction rates) would be immensely useful in determining fulfilment of due diligence obligations to ensure access to justice. No such review has yet been undertaken.

The 1996 "Heroines of Fortitude" report undertaken by the New South Wales Department for Women also made many important recommendations, most of which, eight years later, have not been implemented (Stubbs 2003). However, as Julie Stubbs points out, law reform cannot be relied upon as the sole means of ensuring justice for women in sexual assault cases. Past reforms, such as the restrictions on the admission of sexual history as evidence, have "been blunted by masculinist assumptions underpinning the criminal law, and the centrality of constructs such as consent which are based on understandings of women as property and sexual relations as something done to women by men" (Stubbs 2003 citing O'Donovan 1997; Hunter 1999). Stubbs notes that cultural mythologies about women and sexuality are likely to continue to subvert the effect of various law reform strategies.

In workshops focusing on sexual assault at the Fremantle conference, there was an overwhelming consensus that any strategies to address sexual assault need to go beyond harm-minimisation and aim at structural change to societal tolerance of discrimination and violence against women. The myth that sexual assault arises primarily from "stranger danger" has been effectively challenged by feminist campaigning, and it is now understood that women are far more likely to be sexually assaulted by someone they know, often in their own homes, with rarely any signs of physical violence. While physical domestic violence has been the subject of a recent national campaign, studies have shown that intimate partner sexual assault remains a largely hidden form of violence, "less likely than other types of assault to be reported [to police] and to result in the use of victim services" (Coumarelos and Allen 1999, cited in Heenan 2004). As such, it is clearly an issue that would benefit from awareness-raising campaigning.

The obligation of due diligence extends beyond ensuring access to justice, and encompasses the promotion and protection of women's human rights. In the case of sexual assault, economic and social discrimination contribute not only to its prevalence, but also to the reluctance or inability of women to report to police. As Hilary Fisher noted in an interview with ACSSA: "It's all very well to have the laws in place for a woman to be able to go to the authorities to complain about an incidence of violence, but if she doesn't have the money for the bus fare, or if there isn't a police station for hundreds of miles because she's in a rural area, if there is no refuge for her to go to, then . . . what sort of resources are available to her?"

Fisher stressed that the lack of such resources, and resulting low reporting rates, “are to do with the failure of the authorities, not just federal government, but within the states and also at a municipal level, to take violence against women seriously and to put in place measures so that women feel able to come forward”.

Economic resources are an issue for services as well as for individual women. Wendy Weeks’ national study of women-specific services found that: “de-funding, amalgamations, and ‘mainstreaming’ women’s programs and services into generalist non-government organisations” (Weeks 1998: 4), had become a trend throughout the 1990s, with “funds for advocacy, campaigns, community development, coalition and network infrastructure building . . . no longer available.” Participants at the Fremantle conference reported a need to strengthen the advocacy component of feminist sexual assault services. While the National Association of Services Against Sexual Violence (NASASV) has taken on important leadership roles, including the development of the National Standards of Practice, it was suggested that their activities are limited by a lack of funding.

The recently released report by the Victorian Health Promotion Foundation (VicHealth), *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence*, provides an economic and health model through which due diligence might also be measured. Amnesty’s campaign, and indeed international human rights law, stresses the responsibility of everyone to uphold human rights, extending the responsibility of due diligence to individuals and organisations. An obvious example of this is the duty of health professionals. In Melanie Heenan’s (2004: 19) report on male partner sexual violence, she notes the significance of “how few women are ever asked by their GPs, and other service providers, about whether they are experiencing intimate partner violence, especially when women regularly present with the kinds of injuries or symptoms that are strongly suggestive of their being subjected to regular episodes of some form of violence” (Heenan 2004: 19). This, she suggests is “symptomatic of a general reluctance by health professionals to adopt a more proactive role in supporting women who may be experiencing violence”.

“It’s in our hands”

The human rights approach to ending violence against women, while problematic according to some feminist analyses, carries with it the legitimacy of international law. As such, it allows us to demand the full achievement of women’s safety, not just as a “women’s concern” or as part of a “feminist agenda”, but according to internationally recognised conventions. Australia is a signatory to the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), which demands not only women’s safety, but also women’s right to live free from discrimination, be it economic, social or cultural.

Upholding women’s human rights is not only a responsibility of states and their authorities, but also that of each institution, and individual, in a community. The obligation not to commit acts of violence is obvious, but due diligence extends beyond this. Health professionals who fail to take action when women present injuries consistent with violence are failing in their human rights obligation of due diligence. The same is true when any individual within a society becomes aware of a human rights abuse and stays silent. Failing to call the police, for example, when a neighbour, friend or relative is suffering violence in their home, is a failure of due diligence on the part of an individual. If the police come but do not take any action, or take ineffective action, they are failing in their obligation to due diligence. If charges are laid, but the perpetrator of the abuse is not convicted, then this is a failure of due diligence on the part of the judicial system. If such failures are repetitive, ongoing and systematic then this is a failure of due diligence on the part of the state.

The ultimate requirement of due diligence is to create a society where women live free from violence and the fear of violence. This is not an ideal or a privilege, it is a basic human right. Such violence can only happen because we, as a society, allow it to happen: we find excuses for it. States and their authorities have a particular responsibility, as their “regulation of violence conveys the moral and social values that are the public face of the message about such behaviour” (Weeks et al. 1998: 2). But the responsibility lies also with communities and individuals. Amnesty’s call for the *Stop Violence Against Women* Campaign is: “I will not do it, I will not tolerate it, and I will not rest until it has been eradicated”. Ending violence against women, Amnesty says, is literally in our hands.

References

- Amnesty International (1991), *Women in the Front Line*, Amnesty International, London.
- Amnesty International (1995), *Human Rights are Women's Right*, Amnesty International, London.
- Amnesty International (2002), *Australia: Ten Years of Detention for Asylum Seekers: Time for Change*, Amnesty International Press Release, News Service No. 79, <http://web.amnesty.org/library/index/engasa120072002> (accessed 24/08/04).
- Amnesty International (2004a), *It's In Our Hands: Stop Violence Against Women*, Amnesty International, London.
- Amnesty International (2004b), *Making Rights a Reality: The Duty of States to Address Violence Against Women*, Amnesty International, London.
- Amnesty International (2004c), *Statute of Amnesty International*, as amended by the 26th International Council meeting in Morelos, Mexico, 16-23 August 2003.
- Bahar, S. (1996), "Human Rights Are Women's Rights: Amnesty International and the Family," *Hypatia*, vol. 11, no. 1, pp. 105-134.
- Barry, K. (1979), *Female Sexual Slavery*, New York University Press, New York.
- Bauer, J., Moller, C. & Duthie, R. (2000), "Silence breaking: The women's dimension of the human rights box," *Human Rights Dialogue*, series 2, no. 3, Summer, pp. 1-2.
- Bessant, J. & Cook, S. (1998), "The sovereign state and obligations to protect women against violence," *Just Policy*, no. 13, June, pp. 10-19.
- Binion, G. (1995), "Human rights: A feminist perspective," *Human Rights Quarterly*, vol. 17, no. 3, pp. 509-526.
- Brems, E. (1997), "Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse," *Human Rights Quarterly*, vol. 19, no. 1, pp. 136-164.
- Brownmiller, S. (1975), *Against Our Will: Men, Women and Rape*, Fawcett, New York.
- Commonwealth Office of the Status of Women (2002), *Budget Fact Sheet: National Initiative to Combat Sexual Assault*, Office of the Status of Women, Department of Prime Minister and Cabinet, Canberra.
- Cook, R. (1995), "International human rights and women's reproductive health," in Peters J. & Wolper A. (eds) *Women's Rights Human Rights*, Routledge, New York.
- Coumarelos, C. & Allen, J. (1999), *Predicting Women's Responses to Violence: The 1996 Women's Safety Survey*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice no. 47, New South Wales Bureau of Crime Statistics and Research, Sydney.
- Cumberland, R. (2003), "Preventing the human rights violations of family violence," *Parity*, vol. 16, no. 10, pp. 7-8.
- Department for Women in New South Wales (1996), *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*, Department for Women, New South Wales Government, Pirie Printers, Canberra.
- Engle, K. (1992), "International human rights and feminism: When discourses meet," *Michigan Journal of International Law*, no. 13, p. 517.
- Evatt, E. (2002), "Women and human rights," *Monash University Law Review*, vol. 28, no. 1, pp. 1-16.
- Gay Levy, D., Branson Applewhite, H. & Durham Johnson, M. (1979), *Women in Revolutionary Paris 1789-1795: Selected Documents*, University of Illinois Press, Urbana, USA.
- Gilmore, K. (2004), Address by the Executive Deputy Secretary General of Amnesty International to the Australian launch of the *Stop Violence Against Women* campaign, Parliament House, Canberra, 8 March.
- Heenan, M. (2003), "Reconstituting the 'relevance' of women's sexual histories in rape trials," *Women Against Violence: An Australian Feminist Journal*, no. 13, pp. 4-17.
- Heenan, M. (2004), *Just "Keeping the Peace": A Reluctance to Respond to Male Partner Sexual Violence*, Issues Paper 1, Australian Centre for the Study of Sexual Assault, Australian Institute for Family Studies, Melbourne. Also available at www.aifs.gov.au/acssa.
- Heenan, M. & McKelvie, H. (1996), *The Crimes (Rape) Act 1991: An Evaluation Report*, Rape Law Reform Evaluation Project, Report No. 2, Department of Justice, Melbourne.
- Henning, T. (1996), *Sexual Reputation and Sexual Experience Evidence in Tasmanian Proceedings Relating to Sexual Offences*, Law Faculty, University of Tasmania, Hobart.
- Hunter, R. (1999), "Having her day in court? Violence, legal remedies and consent," in Breckenridge, J. & Laing, L. (eds) *Challenging Silence: Innovative Responses to Sexual and Domestic Violence*, Allen & Unwin, Sydney.
- Khan, I. (2004), Secretary General of Amnesty International, Speech delivered at *Stop Violence Against Women* campaign launch and press conference, 5 March, London, <http://news.amnesty.org/index/ENGAFR461900320044> (accessed 13/08/04).
- Kilroy, D. (2004), Submission of Sisters Inside to the Anti Discrimination Commissioner for the Inquiry into the Discrimination on the Basis of Sex, Race and Disability Experienced by Women Prisoners In Queensland, <http://www.sistersinside.com.au/reports.htm> (accessed 24/08/04).
- Kiss, E. (1995), "Alchemy or fool's gold? Assessing feminist doubts about rights," *Dissent*, Summer, pp. 342-347.
- Lambert, C. & Pickering, S. (2000), "Violence as another name," *Women Against Violence: An Australian Feminist Journal*, no. 8, pp. 24-34.
- Moustaphine, M. (2004), National Director, Amnesty International Australia. Welcome Address. *Stop Violence Against Women* Conference, 4 June, Fremantle, WA.
- O'Donovan, K. (1997), "With sense, consent, or just a con? Legal subjects in the discourse of autonomy," in Naffine, N. & Owens, R.J. (eds) *Sexing the Subject of Law*, LBC Information Services, Sydney.
- Obando, A.E. (2004), "How effective is a human rights framework in addressing gender-based violence?" *Women's Human Rights Net*. <http://www.whrnet.org/>, last updated February 2004.
- Rowland, R. (1992), *Living Laboratories*, Octopus Publishing Group, London. ➤

Stubbs, J. (2003), "Sexual assault, criminal justice and law and order," *Women Against Violence: An Australian Feminist Journal*, no. 14, pp. 14-26.

United Nations (1948), *Universal Declaration of Human Rights*, United Nations General Assembly.

United Nations (1979), *Convention on the Elimination of All Forms of Discrimination against Women*, United Nations General Assembly.

Victorian Law Reform Commission (2003), *Sexual Offences Interim Report*, Victorian Law Reform Commission, Melbourne.

Watson, E.A. (1997), "Amnesty International and women's human rights: An organisational dilemma," *Australian Journal of Human Rights*, vol. 4, no. 1, pp.124-144.

Weeks, W. (1998), "Sites of women's citizenship? Australian women-specific services," *Women Against Violence: An Australian Feminist Journal*, no. 5, pp. 4-14.

Weeks, W., Morgan, J., D'arcy, M., Moo, A. & Cameron, J, (1998), "Editorial," *Women Against Violence: An Australian Feminist Journal*, no. 5, pp. 2-3.

Endnotes

1. The Rome Statute was recently threatened when two amendments tabled by the United States were proposed to a Canadian-led resolution on the elimination of violence against women. The amendments were intended to "weaken the language on sexual and reproductive health care services and delete language calling on states to ratify the Rome Statute of the International Criminal Court, which recognises that sexual violence . . . can constitute a war crime or a crime against humanity" (UN Commission on Human Rights *Sexual Rights are Human Rights*, Press Release 21/04/2004). The amendments were defeated.
2. Elizabeth Evatt's article contains a useful overview of Australia's position with regards to CEDAW, including where gaps exist and possibilities for activism.
3. In her article in *Parity* (vol. 16, no. 10, 2003), Rhonda Cumberland lists a number of proposals by which human rights mechanisms could be incorporated into a service framework.

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ACSSA invites your views

Human rights organisations like Amnesty have only recently begun to work on abuses by perpetrators not connected with state institutions, and as such are hoping to learn from those with greater experience in the field, such as sexual assault and domestic violence service providers.

The "due diligence" framework has likewise only recently been applied to violence against women, and standards according to which it can be measured in international law have not yet been finalised.

This is the time for activists working to end violence against women to make their views heard on this topic.

- Is "due diligence" a useful tool in applying to how we measure the success of strategies aimed at reducing or preventing sexual assault?

- How could "due diligence" be measured?
- What would a "duly diligent" society look like?
- What are some significant ways it would differ from our existing society?

The Australian Centre for the Study of Sexual Assault invites readers to discuss these issues through *ACSSA-Discuss* – a moderated email list for the discussion of topics of interest to people involved with the sexual assault field.

To join *ACSSA-Discuss* send an email to "majordomo@aifs.gov.au" with the message "subscribe acssa-discuss", and leave the subject line blank.

For more information about the ACSSA email discussion group visit the *Mailing Lists* page on the ACSSA website at www.aifs.gov.au/acssa/