

International Academy of Family Lawyers

Audrey Ducroux Memorial Lecture

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Crown Metropol Hotel, Melbourne

Professor Gillian Triggs

Abuse of power and harassment: a global issue

I am honoured to give the Audrey Ducroux Memorial Lecture: Audrey was a young and rising star of the Lyon Bar. She was president of the Academy's European Chapter from 1994 to 1996, and died tragically just as she was about to become the first woman President of the international body.

As a young practitioner Audrey worked in London with Lady Helen Ward and developed a strong interest in international family law. In addition to her intelligence and professional skills, I am told she was very French, thoroughly chic, charming and stylish; she loved Australia and saw the Dryza-Bone raincoat as a fashion statement.

Her death was a great loss to the Academy.

My topic this morning is the phenomenon of abuse of power, domestic violence and harassment, especially sexual harassment, and the impact of this on the fundamental rights of women throughout the world.

You will all be aware of the #Metoo campaign that has exposed systemic abuses of power in the theatre, film and entertainment industry; a campaign that is variously seen as a much needed break-through in calling to account those responsible for sexual assault/rape and harassment or, at the other end of the spectrum, a travesty that denies the principles of natural justice to men (and occasionally women) who have little chance of defending themselves other than through the highly dangerous, unpredictable laws of defamation. Whatever one thinks of the #MeToo campaign, it has shone a penetrating light on the reality of women's lives at home, in the workforce and in the community.

In my role as President of the AHRC, I learned that harassment, especially sexual harassment, is a pervasive and systemic fact of life for women globally and that a root cause is gender inequality – imbalances in power and control- that create a fertile ground for abuses of all kind.

My key message today is that gender inequality is a global challenge, that -as lawyers- we can address by employing our legal and advocacy skills. Family lawyers are in a special position to observe the power imbalances that especially affect women within the family and workplace and to alert authorities to the risks and employ legal tools to ensure rights to non-discrimination and safety.

The international character and universality of the subjugation of women was amply demonstrated just a few weeks ago when a young 18-year old Saudi woman, Rahaf al-Qunun,

left her family while they were holidaying in Kuwait. Alone, she took a flight through Bangkok on her way to Australia. She was stopped by authorities in Thailand and her passport was taken from her in violation of her right to freedom of movement, pending extradition back to Saudi. She claimed asylum from Australia on the grounds of physical and psychological abuse: she had for example been imprisoned in her room for 6 months for cutting her hair. She has renounced Islam, and rejected her family, asking for a new life of freedom. On her detention in Bangkok, she locked herself in a Thai hotel room to prevent her forced return to Saudi. She knew the power of social media and used her phone to good effect to reach out to those who could help her. Sadly, Australia was too slow; Canada granted her asylum immediately.

While Rahaf's case is an extreme example of subjugation and abuse, I expect we will see many more such dramatic bids for liberty as access to information and social networks, prompt world-wide recognition. So too, family lawyers can bring their skills to bear to ensure basic rights and freedoms are respected.

As an international lawyer for over more than 50 years, I have not practiced family law, but I have always had a meeting of minds with family lawyers because they often understand, rather better than others in the legal profession, the principles of private international law and the vital role of treaties in ensuring the rule of law in international family disputes.

Family lawyers have a special insight into the impediments for women as they struggle at the bottom of society's pyramid with insecure work, casual, part-time short-term contracts, leading to economic insecurity, retiring on less than 50% of male superannuation and in Australia, women over 55 are now the fastest growing group of homeless persons. It seems to me that family lawyers are well placed to observe and report the abuse of women in its various forms and to work as a profession to ensure women's right to a safe environment, at home and at work.

While I know that each of you will be well informed about the plight of women in your own country, I would like to explain the situation in Australia, both as matter of fact and of law.

First: what are the facts? The World Economic Forum researches gender equality across four indices globally: education, economic empowerment, political engagement and health.

- As an aging 1960's feminist I am especially disappointed that, while Australian women and girls are ranked no 1 globally by the for educational attainment. we are ranked number 39 generally against all other nations, slipping down the ranks 24 points since 2006 when we were ranked 15th. Australia is now ranked 103th for health, 46th for economic engagement and 49th for political engagement.
- We slipped yet again in the 2018 assessment because of the widening of the gender gap and the reversal of wage equality. Perhaps we should take note that Australia is ranked behind Serbia, Albania, Estonia, Costa Rica and Cuba... with apologies to those worthy advanced countries!

- It is estimated that on current policies it will take Australia 202 and 107 years respectively to close the gap for women on political empowerment and engagement in the labour force.
- These are distressing rankings made more urgent when it is understood that 1 woman a week is killed by her current or former partner and that intimate partner violence is the leading cause of illness, disability and death than any other factor for women 25-44.

The Global figures are mixed. The WEF reported a continuing average gender gap globally of 32% across the four indices. The largest gap lies in political empowerment at 77% which is reported to be widening globally. With respect to economic participation and opportunity the gap 42%, with labour force participation slightly in reverse. In stark contrast to these figures, major gains for women have been achieved in education, the gap being as low as a 4% and health at 5%. Counter-intuitively, gender parity is improving for the developing world and slightly declining in Western countries.

If these facts are indicative of gender inequality, what contribution is the law making?

The international legal regime has been in place for many decades with the Convention on the Elimination of Discrimination Against Women (CEDAW) and the jurisprudential elaboration of the law by the UN Committee for Women and the human rights principles adopted by the UN's Sustainable Development goals. The law has been articulated and generally agreed. The key question is how effectively have these international legal obligations been implemented in national laws? Implementation is I believe is the challenge for the 21st century.

Let us look at the position in Australia and ask, where is Australia's Ruth Bader Ginsburg?

You will recall that as a long-serving judge of the US Supreme Court, RBG as she is affectionately known, began her career fighting cases in court using the Bill of Rights provision, the 14th amendment on equality before the law. What is perhaps a surprise to many, is that Australia is the only Western democracy and only common law country in the world that does not have a Charter or Bill of Rights to protect citizens from abuses of government power or to ensure that the courts can provide a check against both the executive and Parliament that have failed to protect women's rights over many decades.

In trying to understand Australia's isolated and exceptional position in failing adequately to protect human rights, I should acknowledge that Australia has been a good international citizen in promoting the rights of women through international law since the days of the Covenant of the League of Nations in 1919 and with the work of the great Jessie Street who ensured the rights of women were recognised. The 1948 Universal Declaration on Human Rights, passed by the General Assembly under the Presidency of the feisty Australian lawyer Dr HV Evatt, set the foundation for Australia's active engagement in building contemporary human rights law through negotiation of the global treaties.

However, this early commitment to international human rights, Australia has not followed through at the national level. While Australia has ratified almost all the major human rights treaties, most have not been given national effect through parliamentary legislation. (ICCPR, CROC, Refugee Convention, ICESCR etc) The practical consequence is that in Australia we do not speak the language of human rights in the ways that similar jurisdictions do, most particularly, Canada, the UK, the US, much of Europe and our cousins across the Tasman New Zealand that adopted a Human Rights Act 29 years ago.

Our courts do not have the legal tools to deal with breaches of fundamental freedoms and rights, but more importantly, our public officials are not aware of and do not take account of the human rights obligations Australia has accepted in international treaties such as ICCPR, CRC, Refugee Convention etc.

An important exception to this pattern of failure to implement international obligations in national laws is the *Sex Discrimination Act* of 1984 that given legislative effect in Australian law to the Convention for the Prevention of Discrimination Against women and which includes a prohibition on sexual harassment. The SDA has provided a vital legal tool through which to challenge discriminatory laws and practices.

Role of the AHRC

While recognising the importance of the SDA, it does not provide direct access to the courts to enforce non-discriminatory laws. Any complainant must first be made to the AHRC where the President has the obligation to investigate and if possible, conciliate the complaint. Of the 2000 formal complaints each year, about 8% concern sexual discrimination, and most are settled quietly in the offices of the Commission. Only a tiny number of complaints that have not been settled will proceed to the federal court, and most of these are dismissed. In fact, the disappointing reality is that very few women complain about or even report sexual harassment or abuse. This of course is a global phenomenon. In short, the problem is not the lack of laws, although they can always be improved, but the reluctance of women to take the channels that are available to them. Harassment, sexual abuse and assaults remain hidden until they erupt in the most extreme cases of assaults, rape and murder.

Teoh's Case

In setting out the legal position in Australia, one should be aware of a controversial decision of the High Court of Australia, a decision that will not be seen as particularly astonishing to most western lawyers, but was a radical articulation of the role of human rights treaties before our courts.

“Legitimate expectations” and natural justice

I would like to tell you about two projects I have led on abuse of power and harassment.

AHRC: Change the course

One was the globally unique research and survey into the incidence of sexual assault and harassment in the 39 Australian Universities. Prompted by the Hunting Ground film in the US, we conducted a qualitative survey of 30,000 students who responded from all 39 universities and qualitative individual stories gathered from about 2000 submissions.

Findings:

- The Report called, *Change the Course*, confirmed other research by the Commission and government over many years that while 21% of those surveyed reported being sexually assaulted in a university setting, only 1.6% reported it to the authorities.
- This is a core problem, universities have not been successful in either ensuring a safe environment for women, nor in providing a confidential and effective complaint and counselling service.

Recommendations:

- The Commission called on all university VC's to exercise personal direct leadership in creating a culture based on inclusiveness, gender equality respect and accountability for breaches of the law.

UNAIDS

Sexual harassment in the workplace and the home is replicated globally, even in UN institutions.

I believe the first time a UN body, in this case UN AIDS (800) employees was subject to an independent, expert review of allegations, many of them in the public arena of abuse of office, bullying and harassment including sexual harassment. As Chair of this review over the last 5 months, I reported to the Board of UNAIDS in Geneva last December.

Findings:

- 58% reported some form of ill treatment by supervisors and peers in previous 12 months, 4% sexual harassment, 14% discrimination and 43% abuse of authority.
- Fewer than 1% reported the matter to several bodies: ethics officer, ombudsman (and I stress, this was a man not a woman) Investigation and complaints unit, or supervisor.
- Even if reported, 86% said no action taken or unsatisfied with the process that could take well over a year, no accountability, people acted with impunity knowing they would be protected, led in part by fear of reprisals, gossip travels fast, and people are easily identified as trouble-makers.
- Imbalance of power and control, women invariably at the bottom of the pyramid.

- Favouritism and inequality of application of regulations and norms re high level valuable employees, homogeneity, lack of diversity and inclusion, isolated employees
- Most agreed that the laws and policies are in place, but do not work.

Recommendations:

- Accountability of leadership; end to impunity; managers set the tone of an organisation and must lead by example.
- External complaints process that is confidential and private.
- Training and education of managers about the rights
- Must give substance to the mantra of zero tolerance

The report led to the Executive Director standing down and a renewed determination to ensure that sexual harassment in particular, is subject to external complaints processes and that those responsible for a culture of sexual abuse of any kind will be held personally accountable.

China and DFAT / Bilateral Ministerial talks on human rights implementation.

Gender inequality, power imbalances and discrimination against women are not only first world issues; they apply similarly in developing countries throughout the third world for the same reasons, cultural, political and economic subjugation of women and resulting inequality and imbalance of power.

Relatively little is known in the public arena of Australia's Bilateral Ministerial meetings with China's Ministry of Foreign Affairs on human rights. It is a rather formulaic exercise in which each country takes it in turns to raise human rights concerns with the other. More usefully, they agree on a series of projects to improve human rights that are for the most part implemented through the AHRC in the China Human Rights Cooperation Program.

Australia is supporting work to address domestic violence in China through the China-Australia Human Rights Technical Cooperation Program (HRTC). Established following the inaugural China-Australia Human Rights Dialogue in 1997, the HRTC has focused on legal reform, women's and children's rights, and ethnic and minority rights. The All-China Women's Federation (ACWF) has been a key partner of the HRTC for more than 15 years, with addressing domestic violence a focus area. Key achievements include support for the drafting of China's national domestic violence legislation; promoting the introduction of domestic violence protection orders in specialised pilot courts around the country; establishing four pilot domestic violence crisis intervention centres; and establishing domestic violence emergency hotlines and complaints handling centres in a number of provinces.

The HRTC has supported a number of workshops for domestic violence survivors, including a workshop with UN Women China which focused on increasing access to justice for domestic violence victims. The workshop examined how to obtain necessary evidence for

the courts in the form of police and medical reports and how to transform a dismissive response toward domestic violence by officials into a more proactive and effective one.

Lessons learned from these projects?

We have played by the rules, but progress in the workplace for women, (along with the disabled, older persons and those of diverse cultural and linguistic backgrounds has been glacial).

If the core systemic problem is inequality of women in the workplace, we need to find way to achieve equality in real terms for all women.

Henry Ford is reputed to have said, *“if you keep doing the same thing, don’t be surprised if you get the same result”!*

We have been talking about the right to legal equality for a very long time and have legislated against sexual harassment with slow change for most women. The laws are largely in place, the research is endlessly replicated with the same essential findings, so what do we do now?

I suggest it is time we started to rattle the cages, to disrupt and to challenge practices that keep women in a secondary position in Australia.

- Importance of leadership, of course at the top, but throughout the organisation, each of us has opportunities to display leadership within our circles of influence, let us use it.
- Serious gender gap in politics: Emily’s list of liberal coalition, adoption of quotas.
- In considering inequality there has been a tendency to focus on electing women to positions of influence and power and appointments to boards. We need to start to protect the interest of those at the bottom of the pyramid: the women who typically do not belong to unions, on the factory floor, para-medics and cleaners in hospitals and corporate office, the women who dominate in hospitality industry, a teachers and nurses who are paid poorly but have no prospect or interest in joining a board or parliament.
- Safe and more effective confidential reporting mechanisms: need to build independent external bodies for complaint handling to build confidence and trust.
- Build confidence: Lean in: silk selection, confidence and education.
- Slogan’s must be followed up by real action, substance: zero tolerance, “Create upstanders not bystanders”, draw the line campaigns, the #Metoo campaign should be #weto; all sound wonderful, but they tend to wither on the creative vine because they become empty phrases with no funds or structure to back them up
- End the mythologies: work life balance: “women can have it all, but not all at the same time”; do what you can when you can.

- **Explain the business case:** growing evidence that an inclusive diverse and gender fair workplace will increase productivity, shareholder value, initiative and morale.
- Fact-based policy making and transparent processes
- Employer training: amazing how little senior executives know about human rights law or the operation of the SDA, RDA, Disability and Age discrimination Acts.
- Education policies: civics/ constitution

In conclusion, I have come to the view that we need a legislated Charter of rights at the Federal level in Australia

We do not speak the language of human rights and need to infuse community expectations through a human rights lens.

The SDA is vital foundational law in Australia, but we need to build a culture backed by more comprehensive human rights-based laws to give the courts the power to hold Government and the Parliament to account for inequality of pay, access to affordable child care and maternity leave and the maintenance of superannuation payments while on carers leave; the right of every person to affordable and safe housing. Such laws will help to address the inequality and, in turn, to give women greater power to stand up to bullying, harassment and sexual harassment.

I do appreciate that those of you from other countries may well say, but we have a legislated or constitutionally entrenched Bill of Rights but this has not significantly improved the unequal situation for women. It is true that some of the most authoritarian countries have Charters of Rights. However, a Charter is not a single solution. To be effective they must apply within a democratic liberal democracy. This is where the legal profession is so important. We are educated to understand threats to democracy and we have a responsibility to stand up for the law against abuse of power in all its forms.

I wish you a successful conference in considering these challenges for the future.

Thank you.