FEMINIST LAW BULLETIN

NEW ZEALAND AOTEAROA

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Why a Feminist Law Bulletin? Why Subscribe?

The Feminist Law Bulletin:

- Identifies when feminist issues arise in policy, legislative proposals, and the practice of the law;
- Provides an opportunity for limited exploration and discussion of some of these issues;
- Enables a general readership to gain an introduction to feminist analysis of the law.

By subscribing to the Feminist Law Bulletin community organisations will be better prepared to make informed and comprehensive comment and submissions. Policy makers will have ready access to a feminist analysis of proposals. Lawyers will be assisted in their development of a feminist legal analysis.

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The Law in 1993 - What Women Lost and Gained

Suffrage centennial year has seen a flurry of activity with events throughout the country. In the area of the law we have seen the first woman appointed to the High Court Bench, the women's law conference, the International Women Judges Conference, and seminars led by the Ministry of Women's Affairs, the Law Commission and the Legal Services Board, to name a few.

But what does it all mean? Has any of the activity made a difference? What might be the effect for the next 100 years?

Below is a list of just some of the changes which happened in the law in 1993 that are important for women. Make up your own mind about the lasting effects of women's suffrage year.

- Following on from the ARCI Act, new regulations including counselling qualifying times and earner premiums.
- Legislation increasing the maximum penalty for sexual violation from 14 years to 20 years.
- MMP under a referendum authorised by electoral law.
- Citizens Initiated Referenda Act (from 1 July 1994)
- New censorship laws (Films, Videos, and Publications Classification Act 1993).
- Privacy Act 1993
- Broadcasting Amendment establishing Te Reo Whakapuaki Irirangi (to promote Maori language and culture).
- Te Ture Whenua Maori Land Act.
- Conservation Amendment Act 1993 (provides for covenants for the protection of natural, spiritual and cultural values which Maori associate with the land).
- First temporary Health Information Code (pursuant to the Privacy Act).
- Health and Disability Services Act 1993.
- Human Rights Commission Act - amended to widen the protected grounds.
- Ratification of the United Nations Convention on the Rights of the Child.
- Social Welfare Reform Bills - Asset testing the elderly in rest homes, removal of protections from answering Social Welfare questions, and information matching with the Inland Revenue Department.
- Maori women file a claim in the Waitangi Tribunal.

- Confirmation of a worker's right to pay as well as time in lieu for statutory holidays.
- Recognition that entering a female student's room in a hostel without reasonable excuse or a good cause is not trivial behaviour warranting a discharge without conviction for a male law student. (*Dillon v Police* Penlington J, HC Hamilton. AP44/93 12 July 1993).
- First rape conviction in New Zealand on a confession alone, where no victim had been identified. (*R v Panga* CA 164/93, 23 April 1993).
- Recognition from the Employment Court that the standard of proof in personal grievance cases is the same, regardless of whether sexual harrassment or any other employer behaviour is the basis for the grievance (*Z v A*).
- Recognition of 'battered women's syndrome' as an explanation of women's allegedly criminal behaviour. (*R v Manukau* HC P. North Nov. 93)
- Recognition that strongly held views on abortion are not grounds to excuse trespass.
- Decisions by the Tenancy Tribunal, District Court and Auckland High Court that notices of rental increases for a state house tenant were of no effect.
- The High Court confirmed that under new ACC laws women have no right to sue for damages for emotional harm caused by medical mistreatment. (*Kingi v Partridge* Thorp J Rotorua CP16/93 2 August 1993).
- The Court of Appeal quashed the hope that SOE's were accountable and subject to judicial review: whether they meet their statutory criteria of exhibiting social responsibilities is a political, not judicial, decision. (*AEPB v ECNZ* 45/93; 8 Sept 1993).

Judge for Yourself

(1) Judge for yourself and compare these two sentences:

Three months imprisonment (reduced from five months by the Court of Appeal) for deliberately grabbing the testicles of a fellow rugby league player where no permanent injury sustained (*Chrichton v Police*, Tipping J HC ChCh AP382/92; 17/12/92).

Three months imprisonment (reduced from 12 months by the Court of Appeal) for indecent assault of a 7 year old girl by a 70 year old man. (*R v Gallagher*, CA 417/92; 23/2/92).

(2) Earlier this year the High Court upheld fines of $250 each imposed upon five women striptease dancers who performed in a Christchurch bar because *"This was entertainment for profit and performed entirely in a commercial context"*. Judge for yourself:

- Who profits from striptease dance entertainment?
- Should the "commercial" context be relevant where women performed on the instructions of men?
- Who are the offenders in these cases?

(3) On the question of whether indecent assault of a "girl" aged seventeen had occurred where there had been touching on her thigh through her sleeping bag, the High Court considered it had not where she had allowed him to come and sleep in the same tent and where the touching was *"little more than an embrace between two people on a very cold night when commonsense might also have suggested that it was in their interests to huddle together to keep warm"*. Judge for yourself:

- Are you consenting to physical intimacy because it is a cold night?
- Who is defining "commonsense" in these circumstances?

Gender Bias or Sexism?

In a recent visit to New Zealand Justice Elizabeth Evatt, President of the Australian Law Reform Commission discussed the Commission's recently released paper on gender bias, *Equality before the Law*; and the severe criticism Australian judges have received for comments reportedly made about rape complaints.

She doubted whether there was any real difference between gender bias and sexism. "Gender bias" in the law is seen as arising from stereo-typed assumptions about the roles of women and men. Ask yourself:

Is this just a new phrase for sexism? Is there any difference? Is gender bias a subdivision or more refined classification of sexism? Or is it an attempt to rename and thereby neutralise sexism?

Why is it safer to talk of "gender bias" than it is to talk of sexism?

Copies of the ALRC report are available from GPO Box 3708 Sydney 2001 Australia or a summary is available from the Feminist Law Bulletin.

Legal Writing by Women - A Survey of Writing by Women in NZ

The history of women's writing has been described as a pendulum, swinging from sound to silence over the centuries (Dale Spender *Man Made Language*, 2nd. ed, 1985).

Anne Finch, Countess of Winchilsea (1661-1720), wrote that a 'woman who attempts the pen' was 'an intruder on the rights of men'. 150 years later, John Stuart Mill observed that "...women who read, much more, women who write, are in the existing constitution of things a contradiction and a disturbing element".

The law is made and recorded in writing - in statutes, case law and articles. This written tradition strongly influences the jurisprudence, discussion, and development of legal theory and practice.

Publication of articles in recognised law journals can legitimise the value of arguments that are being developed, and, in turn, sustain those arguments. For this reason, it is important that women are able to participate in legal writing at all levels.

Whilst it can be interesting to look at history, this can lead to a view that matters of concern are in the past, not the present. Almost 150 years on from John Mill, what can be said of women's writing of or about the law in Aotearoa/New Zealand? Do publications reflect an equal or at least proportionate level of participation by men and women?

We took a survey of five legal periodicals in an attempt to find out. We looked at issues published in 1979, 1982, 1985, 1988, 1991 and 1993. The five periodicals were the New Zealand Law Journal, the Auckland University Law Review, the Victoria University of Wellington Law Review, the Canterbury Law Review and the Otago Law Review. A total of 1139 articles were surveyed. The names of the authors of articles ("articles" included case notes, legislation notes, editorials and book reviews) were examined and, where possible, their gender identified. The authors of 104 articles (9%) could not be gender identified and these were subsequently removed from the sample.

Of the remaining 1035 articles, 161 were written by women (approximately 16%).

None of the publications showed a consistent representation of women. The highest percentage of articles written by women occured in the Victoria Law Review in 1988 with 43% and in the Auckland Review in 1993 (39%). The Canterbury Review had no identifiable women contributors in 1988 or 1991. The Otago Review had no identifiable women contributors in 1979 or 1985. A table summarising our findings is below.

The number of women in the profession increased between 1979 and 1993. In 1981 8% of all lawyers were women and this increased to 22% in 1992. The figures for 1993 are not yet available. This total may exclude women academics. In 1993 there were 42 women academics - a number too small to have a significant effect on the overall percentage of women in the profession.

These results indicate that women have never had, and do not currently have, an equal participation in legal periodicals in New Zealand. It is also apparent that between 1979 and 1988 published writing by women remained at approximately 10% despite the fact that their numbers in the profession increased during that time.

% of Women Published in Particular Year and the % of Gender Identified Articles

Year	NZLJ		Uni. Law Reviews		Total/year of all publications	
	# of articles	% of women				
1979	122	5%	14	21%	136	7%
1982	146	10%	55	20%	201	12%
1985	123	11%	34	9%	157	10%
1988	160	6%	39	31%	199	11%
1991	125	20%	32	22%	157	20%
1993	140	20%	24	38%	164	23%
Suffrage Eds	None		21	95%	21	95%
TOTALS including suffrage specials:	816	11%	219	29%	1035	16%

Note: 1993 NZLJ excl. Dec and only Auckland and Victoria Reviews were recorded for that year.

Figures for 1991 and 1993 indicate a greater proportion of publication by women, but the 1993 figure excludes the Canterbury and Otago Reviews, which do not have a good record of publication of women authors.

There may be a number of reasons why 84% of articles written in these journals are written by men. Spender argues that there has been and continues to be a taboo on women writing in the public sphere (such as works of drama and literature for men) as opposed to the private sphere (such as general works of fiction suitable for women). Legal writing clearly falls within the public sphere. This taboo may be why so few articles written by women are published. The taboo may also account for why women themselves do not write - they may feel it is improper or that what they have to say is unimportant. The taboo may prevent those who do write from being taken seriously or from being published.

There may, however, be other reasons. Women may be choosing not to write. Women may feel writing is not important, or that the areas they feel are important are not ones likely to be published. Women may face competing priorities. Men's control over publication may pose an almost insurmountable barrier.

1993 has provided an opportunity for women's writing to be published as never before. It is important that the 1993 suffrage specials do not remain an aberration, but herald a new era of consistent representation of women's published writing.

The Law in 1994

Feminist Law Bulletin identifies the following as some of the issues we will keep you up to date with through 1994:

- Alternative Dispute Resolution ('ADR') has come to encompass all non-court or non-adversial attempts to settle legal disputes. These range from civil arbitrations for matrimonial property determinations by an independent solicitor, to mediation and settlement conferences run by judges.

Little research has focused on the effectiveness of ADR for women. Advocates of Dale Spender's writing would argue that women speak less often than men and may be more inclined to waive their rights to achieve a restoration of relative peace.

Others may say that ADR must be better for women than the current system. Much of the support for ADR is from this source - the courts are often too expensive and may be an inappropriate forum for resolving the dispute.

ADR seems likely to become the focus of greater attention in 1994.

- Reform of the Domestic Protection Act (see page 7).
- Revamp of the Family Courts. The fate of many of the Boshier Report's recommendations is yet to be decided. That report envisaged sweeping reform of Family Court matters, including compulsory 'mediation' for all but serious or violent disputes involving women and children.

With the increasing pressure on legal aid expenditure, particularly in the Family Court, reform in this area appears likely in the near future.

- Progress on the Children, Young Persons and Their Families Amendment Bill (mandatory reporting of child abuse).
- Any steps towards a Judicial Appointments Commission.
- Any advancement on the question of replacing the Privy Council as the arbiter of final appeals in New Zealand.

1994 will be a challenging year. Feminist Law Bulletin will monitor the impact of the new political composition on legislation that has particular significance for women.

"The presence of women in the legal profession is not unlike mountain air: the higher your climb, the rarer it gets". Borenstein, Sexism and the Legal Profession, Quebec, 1991.

UPDATE

Issue One informed you of the Health Information Privacy Code 1993 (Tempory). This Code is now being reviewed by the Privacy Commissioner. Written submissions are invited by 21 December 1993 to Manager, Codes and Legislation, Privacy Commissioner, PO Box 466, Auckland.

Making Effective Submissions:

Whether you are working in the community, in private practice, in a government department, or in a university, there will inevitably be times when you or your organisation will need to make submission to government on new laws or policy proposals. Some basic guidelines for making both written and oral submissions are produced here to help you do this more effectively.

Written submissions

Written submissions, whomever they are made to, can be the only opportunity you or your organisation has to have your views heard. Sometimes your submission will be one of hundreds. You need to ensure that your submission is well presented so that it will be noticed and taken seriously. Here are some suggestions for how to achieve that:

Think Before you Write:

Be clear about what has been proposed and why. Think about the implications for you (or your organisation) as well as others in the community. Check whether there have been similar suggestions for change in the past and if so, what happened to them. Find out when submissions are due and plan your time to allow for consultation, writing, proof reading, as well as postage.

Talk to Others:

You may need to consult with others (eg your organisation or the community). See who else is making a submission, and on what topic. You may be able to join together or concentrate on areas which are not being dealt with by others.

Plan Your Submission:

Set out a plan which has an introduction, background (including details of you and your organisation, what it does, who it represents), the key points you wish to make, a summary and a conclusion.

If you are making submissions on a bill, it can be helpful to have a section that deals with general comments on the main policy issues, followed by detailed comments on the specific clauses of the bill you wish to comment on. This will help make your submission appear more structured and will make it easier for you if you later make an oral submission.

If you are making submissions on a discussion paper the same principle can apply.

Know the Process:

What will happen after submissions have been received? Who will be analysing them and what will they do with the results? This information may determine how you write, what you write (and what you don't), as well as any subsequent follow-up you decide to undertake.

Know who you Represent:

Know the history and philosophy of your organisation, its current membership and activities, and the breadth and depth of its support base. Be clear about why your organisation has an interest in the area and what that interest is. Be clear about your organisation's experience and expertise in the area.

Use the KISS Principles:

Keep It Simple Stupid!

Make your submission as clear and as easy to follow as possible. Use headings and paragraphs to help break up the page and improve readability. Use diagrams (including graphs and cartoons) if appropriate.

Check for Errors:

Once you have written the submission, check it for typographical errors and other mistakes. A poorly presented submission will distract the reader from what you are really saying no matter how interesting or important it is. Try giving the submission to someone else to proof read.

Send Your Submission:

Send or take your submission to the relevant person. Think about sending the submssion to others who might be interested such as other departments, community groups, Ministers or MPs. You may be able to gain support and work more effectively by making such contact.

Follow Up:

It is important to make sure that your submission does not disappear into the bureaucratic maze! Check that your submission has been received or whether any extra information is required, and, if so, provide this as quickly as you can. Check again later for progress so that you can arrange meetings or further submissions.

Oral Submissions

If you have made a written submission and wish to make an oral submission, or if you want to make an oral submission only, here are some ideas and things to think about when you prepare. They could relate to submissions to a select committee, Minister or your local MP.

Know the Process:

This is important as it allows you to identify at what stage of the process you are speaking. This will affect not only the type and content of your submission, but also the extent to which it is possible for changes to be made.

Be Prepared:

Think about what you are doing and why. Check current events so that these can be incorporated in your submission, and be aware of issues that may be in the minds of your audience.

If you are making a submission to a select committee try to be early so that you can listen to other submissions. This will help you gauge the current thinking of the committee.

Allow time to get there, find the room, and catch your breath. Be prepared to wait to be heard - this means flexible child care arrangements, extra parking meter money and so on.

You may not be heard at all - be ready to ask for another time.

Be prepared for questions. Think before hand about what they could be, and the extent to which you are able to respond to them. Do you have a mandate from your organisation to answer questions, or will you have to limit your answers?

Be prepared for dismissive or non-committal responses to your submission. While people may not be rude, they may not give you positive feedback, because, for example, they have heard a number of other submissions which are similar to yours. Think about how you can make your submission different.

Talk to people who have presented submissions before (either in your organisation or in others) and learn from their experience.

Know the Audience:

The audience will affect the way you address them, the formality of your presentation, your dress, your language, and the assumptions that you can legitimately make.

Know Your Submission:

You must be able to demonstrate a familiarity with the content and scope of your submission. This will enable you to focus on key aspects and avoid being side-tracked. It will also enable you to demonstrate that your views are well thought out and will prevent you being caught unawares by questions about your submission.

Know Your Strengths and Weaknesses:

This includes those of your organisation, the submission, and yourself. Think about these in advance and plan how you can capitalise on your strengths and minimise or overcome your weaknesses. For example, if you are not confident speaking in public but have the detailed knowledge about the submission, arrange to have another person present the submission and make yourself available as the person who can provide extra information or clarify issues that arise. Alternatively, practice delivering the submission beforehand.

If your submission has limitations, for example, only dealing with part of the area, or your experience base is narrow, be up front about that. You do not need to apologise for this.

Be Persuasive:

Your presentation should be clear, concise and easy to understand. Try explaining the submission to a thirteen year old - if they can't understand it, it is unlikely anyone else will!

Try to gauge the reaction you get as you present your material and expand or summarise on details if you think it necessary.

Be flexible in your delivery - vary your intonation and try to give quick responses to questions - this will make your presentation more interesting. A sound knowledge of your submission and good preparation are the key to this flexibility.

Be Confident:

If you believe what you are saying they may too.

The Domestic Protection Act 1982 : A Discussion Paper

Submissions due February 1994

The Discussion Paper was released by the Minister of Justice in early November. Domestic violence is an issue that has been receiving increasing attention. The Paper's release follows the Busch Report, the final report of the Victims Task Force, and a forum on women and violence held by the International Women Judges Conference. It follows the effective funding cuts for Women's Refuges and steadily increasing demand for domestic protection agencies.

The community is being encouraged to make submissions on the paper and has until 28 February 1994 to forward these to the Justice Department, PO Box 180, Wellington.

The community will have another opportunity to make submissions when a bill is introduced and sent to a select committee. This will happen after submissions on the Discussion Paper are analysed and proposals for change presented to Cabinet for approval.

To assist with the second opportunity to make submissions you may wish to ask the Department of Justice to publish a summary of submissions on the Paper.

The Paper brings together the many and varied submissions, studies, and calls for reform that have been made over the past ten years. The current law is clearly set out dispelling some myths and misconceptions, such as the rules surrounding joint counselling.

On a feminist analysis, we live in a patriarchal and violent society. This violence manifests itself in a wide variety of ways, including inthe media, sport, language and pornography. Tinkering with laws about domestic violence is unlikely to result in real change to that society.

Whilst the paper acknowledges this in passing, meaningful change requires that those issues be addressed. Most domestic violence never comes before the courts. The violence that does is trivialised and marginalised. It might, therefore, be unrealistic to expect laws about male violence, developed and implemented largely by and for men, to work effectively for women.

Without a sound analysis of the causes of domestic violence it is questionable whether meaningful solutions can be found.

The Paper also fails to address why it is that women should continue to pay for orders to protect themselves from violence. Generally, lawyers fees are high. Legal aid, when available, is a loan not a grant. An indication of the cost of obtaining an order can be gained from the maximum $900 fee allowed by the Legal Services Board. In contrast, some Australian states have provided state-funded domestic violence advocacy services (where lawyers work to obtain protection for women) for many years. In some states costs are recovered where possible from the violent men themselves.

The more general issue of the treatment of women by the judiciary is not addressed. It might be thought that until the Court is a safe place for women it is unlikely they will obtain the real benefits of any changes to the law.

Questions about the Discussion Paper that you may wish to consider when making your written submission include:

Is the real issue where violence occurs, not who it occurs between?

Is there any difference (that should be reflected in the law) between single and repeated acts of violence?

What should the overall framework of the Act be? To remove blame from the woman should the authorities intervene and sanction? Or should the woman retain some control over the response of the authorities?

In which Court should applications for protection orders be made and why?

Should the primary focus be the protection and needs of the victim or the punishment of the offender?

Does intervention by arrest really work for everyone, or only for those who would otherwise never be in contact with the Police?

What other options should the Act make available?

Whose interests are really served by the requirements for the respondent to attend counselling?

Should the Act allow for different methods of resolution, such as those based on a marae?

Should community groups have funding secured by statute?

Victims

1993 has been significant for victims of crime.

The Victims Task Force established in 1987 (under the Victims of Offences Act) reached the end of its term.

It has not been replaced. There is, therefore, no body charged with advocating for victims on policy issues.

Instead, the 1993 Budget approved funding for four pilot Victims Court Assistance Officers.

The role of the officer is to :

- provide information to victim.
- answer victims questions
- help victims participate in bail hearings, preparation of victim impact statements, etc
- refer victims to other agencies.

The pilot project will run until the end of June 1994. Following an evaluation, futureextensions of the pilot will be considered. The aim of the project is not to give victims greater rights - just to ensure they get what they are entitled to.

The project could be seen as a lukewarm response to the calls for greater victim participation in our criminal justice system. Whether or not the project can meet some of the concerns of victims (such as lacking information about the progress of their case) remains to be seen. Victims of crimes not reported or where no offender is charged will not be assisted at all - the needs of this group remain ignored.

The New Zealand Bill of Rights Act 1990

Monitoring developments, analysing cases, reviewing literature

Exemplary Damages for Sexual Abuse?

A recent civil claim for sexual abuse was dismissed as an "abuse of process" where it was made against a defendant who had already been tried and convicted of offences relating to the abuse.

Because the award of damages would be based upon the same principles as the Court imposed when sentencing, the claim amounted to "double jeopardy" (section 26 of the Bill of Rights) and the Court would not criticse the sentence imposed *P v P* [1993] DCR 843.

Feminist Law Bulletin is produced by C. Dot Kettle with assistance from lawyers with experience in working with women, community organisations, and the Parliamentary process.
We welcome your comments, suggestions and ideas.