

FEMINIST LAW BULLETIN

NEW ZEALAND AOTEAROA

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Why a Feminist Law Bulletin?

The Feminist Law Bulletin:

- identifies when feminist issues arise in policy, legislative proposals, and practice of the law
- provides an opportunity for limited exploration and discussion of some of those issues
- enables a general readership to gain an introduction to feminist analysis of the law.

International Year of the Family

In this International Year of the Family it is important that the interaction between the law and the family is explored, exposed and reconsidered.

The "family" has always been an important concept in the law which has recognised and defined "family" differently for different purposes and in different contexts.

For many years the law treated the family as "private" and would not intervene to protect women from violence.

For example, prior to 1982 women separated from their husbands had some legal protection from violence but those who wished (or were forced) to remain in their family there were not protected. The law refused to intervene and declare rape within a marriage illegal until 1986.

Neither did the law intervene to protect women from exploitation within the family. Both the Courts and Parliament refused to accord the same recognition to unpaid work within the home, as that accorded paid work outside the home: for example, when determining the value

of contributions to a marriage or de facto relationship.

One area where the law has not been reluctant to intervene is the area of reproductive control. Technological and medical advances mean the legal issues now focus on alternative "birth" technology, such as AI and IV, rather than pregnancy termination. But some would argue that the role of the law in legitimising male control over women's fertility has not changed.

The law has also had to come to terms with changing definitions and perceptions of "family". The current review of the laws on domestic violence is one example of this. By widening the scope of eligible applicants, the law is merely attempting to reflect the widening ambit of commonly accepted notions of "family". In addition, the violence within families has had to be acknowledged by the law.

The law's relationship to the continuing evolution of family structures is one worthy of further examination.

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LLB

To mark the coming into force of the Human Rights Act 1993 enclosed is a complimentary copy of the Lesbian Law Bulletin.

"LLB" is designed to raise awareness of some of the current legal issues for lesbians.

Judge for yourself...

In *RvR* (CA 240/93, 15/12/93) it was argued that a nine year old girl had made a false report because she was being teased by her school friends about her mother being gay. The Court of Appeal quashed the conviction for indecent assault and ordered a new trial allowing the defence to refer to the sexuality of the girl's mother.

The District Court Judge had refused to allow any such reference (and ordered references in the girl's video-taped evidence to be excised). The Court of Appeal overruled this. It held that such reference was permissible. The Court said "The issue is one of relevance. In the event of the mother's credibility not being in issue, it is irrelevant whether the mother was gay or not." The Court went on to find that the defendant should have been allowed to put to the jury that it was the teasing that led to the child making up the allegations against him.

Judge for yourself:

- Why would the mother's lesbianism be relevant when her credibility is in issue?
- How is it that the Court can find the mother's lesbianism irrelevant and still allow it to be put before the jury?
- Was the real issue the mother's lesbianism rather than whether or not the girl was being teased?
- Would teasing about heterosexuality be put to a jury as an explanation for a child's complaint?
- Is this another example of the Court's value judgements determining what is relevant?

What Makes A Complaints Procedure Effective?

We rely on the law to clearly state what behaviour will not be allowed in our society. We also rely on the law to state what our rights are, what we are entitled to expect. To be meaningful, the law must also declare what it can and will allow us to do if illegal behaviour is detected or our rights breached.

The Human Rights Act 1993 touches on all these aspects. It declares what forms of discrimination are illegal, it tells us what we are entitled to expect from the public and private sectors in areas like employment, accommodation and services. It also establishes a complaints mechanism to establish where breaches have occurred and to provide redress in those cases.

The following eight principles can be used to determine whether any such complaints procedure

can deliver effective redress for women. Is it:

1) Accessible to Women?

For example, can complaints be made outside normal working hours? Must the complaint be in writing? Are there any geographical barriers for rural women?

2) Understood by Women?

Do women know about the process? Is clear information widely available in a number of languages and in a variety of media? How are women kept informed of actions taken on their behalf?

3) Culturally Appropriate?

Does the process itself discriminate? Does the process respect the values of tangata whenua? Does the process allow the dominant culture to perpetuate its dominance?

4) Safe?

Is the privacy of the complainant respected? Are

there effective measures to prevent an escalation of the problem? How are the risks of retaliation minimised?

5) Affordable?

To what extent are women required to pay for representation? Will the costs of attending hearings, for example, be met?

6) Efficient?

How long will the complaint take to be resolved? How many steps are involved?

7) Effective?

What remedies are available? How are they enforced? What incentives are there to comply?

8) Fair?

Are power imbalances perpetuated eg by the rules of evidence?

Whether or not a complaints procedure is effective in practice, will depend on the courage of complainants, the resources available, and the commitment of the parties.

The Making of a Judge

Is a Judicial Appointments Commission Necessary in New Zealand?

How suitable are our judges? Are they well prepared? How are they appointed? These are just a few of the questions raised by the recent resignations of Justice Williams and Judge Grove.

These are also some of the questions driving the discussion of a need for a Judicial Appointments Commission (a matter FLB indicated it would monitor in 1994, see FLB Issue 2, page 4).

The process of appointing judges is an important one for women. Women remain conspicuous by their absence at almost every level of the judicial hierarchy. We have no women Court of Appeal Judges, 1 women High Court Judge and less than 10% of District Court Judges are women. As a consequence the law is developed and interpreted from a largely male perspective. It is a perspective that lacks awareness of the reality of women's lives.

Structural barriers prevent women's advancement and equal participation in the legal profession and judiciary. It is unlikely that time alone will rectify the current gender imbalance.

The current judicial appointments process is hidden from public view.

The law provides for the appointment of judges by the Governor-General. The practice has apparently been that senior members

of the bar would make it known that they wished to be considered. To be appointed to the High Court one used to have to be a QC but recent appointments have been made from academia and from within the judiciary itself. The Solicitor General, the Chief Justice, and the Attorney General all have a say before the Attorney General puts forward a name to the Governor General who makes the appointment on behalf of and in the name of the Queen.

Our current system, and other jurisdictions with a similar system, have been criticised for a lack of transparency, for being secretive, and self-perpetuating.

Proposals to overcome such criticisms include the establishment of a formal appointments process enshrining key attributes such as:

- the involvement of lay people;
- publicly available criteria specifying necessary qualifications and skills;
- advertisements and formal applications;
- public debate.

The proposals also push for judicial training, accountability, and a complaints procedure. That judges would benefit from training before taking up their positions seems obvious. As do the advantages of ongoing training.

Much of the traditional resistance seems to have diminished.

Local initiatives, for example, liaison between Women's Refuges and Family Court Judges, is one step in this direction. Work undertaken overseas, particularly in educating judges about gender bias, is another.

The lack of an accessible complaints procedure and public judicial accountability is another criticism levelled at our system.

At present, a complaint against a judge must be made by a lawyer to his or her district law society. The society can refer the complaint to the judge directly or to the Attorney General for comment. The traditional resistance to any complaints procedure, other than the traditional right of appeal, has been the concern for judicial impartiality. This concern seems, however, to be losing ground.

When considering any reform questions that can be considered include

- will it break down any actual or potential monopoly by the "old boys network"?
- will it result in a judiciary more representative of the community?
- is it a complete package addressing all the areas of concern?

See H. Kennedy, Eve Was Framed, 1990; Masterman, 1993; Pannick, 1990

Freedom from Discrimination The Human Rights Act 1993

The coming into force of the Human Rights Act 1993 raises the question of how effective the law is in dealing with discrimination.

Legislation will not stop discrimination but it can establish effective mechanisms for redress. This article examines the complaints procedure under that Act and the history of complaints under the previous legislation.

The complaint mechanism in the Human Rights Act 1993 is largely the same as under the 1977 Act, except that there is now a fast-track procedure.

You can complain to the Complaints Division of the Commission which can investigate, seek to settle the complaint, or refer your complaint to the full Commission.

If settlement cannot be reached, the Proceedings Commissioner may take the complaint to the Complaints Review Tribunal on your behalf.

Both the Complaints Division and the Tribunal can award damages, an apology, and an order to cease discrimination.

Historically, women have not fared well under anti-discrimination law in New Zealand.

In 1980 Air New Zealand air hostesses brought a complaint of sex discrimination to the Human Rights Commission. It took 10 years and a decision of the New South Wales Equal Opportunities Tribunal before a final settlement was made in their favour.

The complainants suffered not only from the delay but also from the hostility of their employer and their union.

The Commission has also dealt with, and continues to deal with, complaints of sexual harassment. In 1992, for example, 72 complaints were made.

Under the 1977 Act damages for loss of income, while available, have not been significant (\$750 - \$7000). Awards of compensation for humiliation, loss of dignity and injury to feelings were limited by that Act to a maximum of \$2000. This limit was removed in April 1992.

FLB will monitor the progress of complaints and the level of awards under the 1993 Act. Time will tell whether the new complaints procedure is more effective than the history of the 1977 Act would suggest it might be.

Prohibited Grounds: Human Rights Act 1993

The 1993 Act prohibits discrimination on the following grounds:

- sex (including pregnancy and childbirth)
- marital status
- religious belief
- ethical belief
- colour
- race
- ethnic or national origins
- disability (which is defined and includes physical disability or illness; psychiatric illness; intellectual disability; reliance on a guide dog or wheelchair; the presence in the body of organisms capable of causing illness)
- age (above 16)
- political opinion
- employment status (being unemployed or on a benefit or compensation)
- family status (having or not having responsibility for children or dependants; being married to, in a relationship with or being the relative of a particular person)
- sexual orientation (heterosexual, homosexual, lesbian, or bisexual orientation).

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LESBIAN LAW BULLETIN

NEW ZEALAND AOTEAROA

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Introduction

The Lesbian Law Bulletin has been produced to mark the coming into force of the Human Rights Act 1993.

LLB provides a brief introduction to some of the legal issues facing lesbians. For the first time in New Zealand it is illegal to discriminate against people on the grounds of their sexual orientation. The Act is the only piece of legislation which includes the word "lesbian".

What is discrimination?

Discrimination is not defined in the Human Rights Act. However, it can be direct, indirect, or of a personal or structural nature. Discrimination may result in less favourable treatment, disadvantage, or victimisation.

Discrimination is not something done in good faith to assist or advance persons who need assistance to achieve an equal place with others in the community.

The Human Rights Act 1993:

Can the Government still discriminate?

The Human Rights Act 1993 makes it unlawful to discriminate against lesbians in certain situations, such as employment, the provision of goods and services, and housing. Despite the fact that the Government is a major provider of such services, the Act actually allows the Government to continue to lawfully discriminate against lesbians until December 1999.

The Government has until that time to decide what it will do about existing discriminatory laws and policies.

The Government may conduct its own review to identify laws and policies that discriminate. The Human Rights Commission is required to conduct such a review and report to the Minister of Justice by the end of 1998.

The Government will then have a year to decide what it will do. It can decide to:

- do nothing, in which case the policy would become illegal
- change the law or policy so that it does not discriminate
- change the law so that the discrimination is lawful (by creating an exemption).

While the review is taking place, the Government can continue to lawfully discriminate against lesbians.

A law which currently discriminates against lesbians is the Family Protection Act 1955. That law only recognises husbands and wives as persons who can claim against their partner's estate.

A discriminatory policy is in the area of immigration. Heterosexual de facto couples can be granted permanent residence on the basis of a two year relationship. Lesbian couples must have a four year relationship.

The intention behind the review period was to give the Government a chance to put its house in order before complaints could be made against it. However, the Government has acknowledged that the Act goes too far and allows it to lawfully discriminate.

While it has announced an intention to correct the law it will be important for lesbians and others to make sure that this occurs as soon as possible. A close watch must also be kept on the general review to ensure the Government eliminates discrimination.

The law in New Zealand is that the welfare of the child is the overriding factor in deciding custody issues. In determining this issue the courts will ask "what is in the child's best interests?" The courts have considered lesbianism to be conduct relevant to the welfare of the child.

The courts have been openly judgmental about lesbian mothers. For example:

"It seems quite out of the question for her to have the upbringing of K. It [the mother's lesbianism] is the very negation of stable relationships of parent and child.": *J and J v D* (1977) NZ RL 222; and

"I should hope that she would not be dominated by aggressive lesbians or that despite her good intentions a lesbian relationship could develop which could act to the detriment of the children.": *YvY* (1981) NZ RL 302.

New Zealand courts are not alone in this. Australian, American, and English courts have taken a similar approach.

More recently, courts have claimed that they do not make judgements about a mother's lesbianism. However, it can be argued that this is not the case. For example:

"The status quo has been altered by her decision or realisation that her own orientation can no longer be heterosexual....The

future consequences for the children of the mother's new found lifestyle - not necessarily a disqualification but nonetheless one on which opinions in society differ - have not so far been explored in any way: it cannot be taken for granted that it will necessarily be beneficial for the children.": *CvC* FP 031/028/93; 5/3/93.

In England, lesbianism *per se* is not a bar to custody, but it "is still an important factor to be subject to careful judicial scrutiny....the best environment in which to bring up a child is still a conventional household with heterosexual parents....She will have to prove, not only that she is not a militant lesbian...but that she is an exemplary parent...": Standley, *Journal of Child Law*, 1992, 134 at 136.

While the focus may have shifted from the mother to the child, lesbianism *per se* is still an issue about which judgements are made.

Perhaps with the passage of the Human Rights Act 1993 lesbianism *per se* will no longer be an issue. Society's statement in that Act that discrimination against lesbians is no longer tolerable may well result in a change in judicial attitudes that is reflected in court decisions.

Protection from Violence

There is no specific protection for lesbians in violent relationships. They have to rely on assault charges and the like under the general criminal law.

Proposals to extend the protection available to heterosexual couples are contained in the Discussion Paper on the Domestic Protection Act which was released late last year (see FLB Issue 2 for a summary).

Some questions for lesbians are:

- is the Family Court an appropriate forum?
- will protection orders be any more effective for lesbians than they are for heterosexual women?
- will the Family Court be safe for lesbians or could it lead to further victimisation?
- will the Police enforce protection orders in situations of lesbian violence?
- what alternatives are there?

De facto Property Rights

A Labour MP has recently signalled an intention to introduce a private member's bill extending the scope of the Matrimonial Property Act 1976 to de facto couples, including lesbians. The intention is to provide for the presumption of 50/50 property sharing to apply.