

## ISSUE FOUR MAY 1994

### Why a Feminist Law Bulletin?

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.

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### Gender Bias: the Australian Experience of Women's Access to the Law

#### Background

In 1993 the Australian Law Reform Commission was asked to report to the Commonwealth Attorney-General on whether changes should be made to Commonwealth laws. The aim was to remove unjustifiable discriminatory effects of those laws to ensure full equality for women before the law.

Following the release of its discussion paper *Equality Before the Law* (see FLB Issue 2 page 7) 570 submissions were received, 65% of which referred to violence against women.

The Commission has now released its interim report: *Equality before the law: women's access to the legal system*.

That interim report acknowledges that the legal system's tolerance of violence against women underwrites women's inequality before the law. The Commission considered that women can not be equal until the legal system responds effectively to violence. Until women are treated as equals, violence against them will not be reduced. Sue Tongue, Deputy President, Australian

Law Commission, put it this way:

"The Commission knew that violence was a serious problem for women but the intensity and uniformity of the submissions demonstrated that the link between women's inequality and violence was fundamental...The Commission decided there was a clear and urgent need to improve access to justice as a response to violence against women..." (30 March 1994).

#### The Interim Report

The interim report is full of information - almost every statement is backed up by supporting data and current statistics.

The record number of submissions the Commission received are summarised. The barriers to access are identified. The link between violence against women, equality issues, and women's access to justice is considered. The final chapter contains a range of wide reaching recommendations. The key recommendation is the proposal to establish a National Women's Justice Program, described as "*fundamental to creating equal access to justice for women*".

This program would

"operate as a central focus for advancing women's access to the legal system and ensuring that the legal system responds to Australian women in an appropriate and adequate manner" (page 50).

The Commission recommends that the program (which is modelled

on the National Health Policy and Program) should have at least 6 areas:

- legal representation
- legal advice and referral
- community legal education
- development of the law
- research and data collection
- court processes and facilities.

**Legal Representation, Advice, and Referral**

Existing specialist women's legal services were seen as too few and not able to adequately respond to the needs of indigenous women. Indigenous services' policies also mean these women miss out. For example, policies that prioritise criminal work or prohibit acting for one indigenous person against another.

To address this the Commission recommends:

- (1) further funding of specialist women's community legal services;
- (2) the establishment and funding, on a pilot basis, of legal resource and advocacy centres for Aboriginal and Torres Strait Islander women;
- (3) services should be required to respond better to the needs of women of non-English speaking backgrounds;
- (4) extending telephone services to ensure all women in Australia with access to a telephone have access to a telephone advice and information service.

**Development of the Law**

The ALRC acknowledges that "to pursue their rights [women] have had to enter an arena where men

have historically had control, and where men have constructed the rules" (page 49).

To overcome this barrier

"judges need to be aware of the realities of women's lives." (pages 60-61)

This judicial awareness can be achieved through education and test cases. The Australian Institute of Judicial Administration currently provides programs on gender awareness. Test cases

"bring accurate and relevant information about women's lives into the courtroom" (page 61).

To enable this to happen the Commission recommends that the National Women's Justice Program include a component for funding test cases.

**Court Processes and Facilities**

Problems with court processes and practices could be addressed through a client focussed court charter (as in the United Kingdom) which would

"increase staff sensitivity to the needs of clients...promote greater public confidence...provide, for all those coming to court, adequate and appropriate information about court processes and facilities..." (page 65).

**The Next Step**

The final report will be published in 2 parts. The first part, due to be released in June, will cover

- equality, the Sex Discrimination Act, and legislative measures to provide for equality
- access to justice and legal aid issues
- legal needs of indigenous women
- family law and violence against women.

*FLB thanks Jane Wangmann, Australian Law Reform Commission for her assistance in providing information.*

**Special initiatives are not discriminatory**

"special initiatives which enhance women's access to justice do not involve discrimination against men. Women do not currently enjoy access to justice on the basis of equality with men...An access to justice program specifically designed to address women's experiences does not disadvantage men but rather responds to women's inequalities..." (page 53 ALRC Interim Report No 67).

**Bill of Rights Act 1990**

This Act was amended by the Human Rights Act 1993. Section 19 of the Bill of Rights now states that discrimination on the grounds outlined in the Human Rights Act is unlawful. More significantly, section 19(2) of the Bill of Rights has also been amended. That section states that measures taken in good faith for the advancement of minority groups does not amount to a breach of the Bill of Rights Act.

It has been this type of provision that has been relied upon in places such as Canada to legitimise such measures as affirmative action programmes.

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## Finding Your Way Around The Law Reform Process

Issue 2 of the Feminist Law Bulletin produced some basic guidelines for making effective written and oral submissions.

However, submissions are only one aspect of the law reform process. In this issue we have drawn together a list of some of the publications, people, and places you can go to for information about the different parts of the law reform process.

### The Parliamentary Bulletin

This Bulletin is produced about every week or so that Parliament is sitting. The Bulletin provides information on:

- membership of select committees
- the work of select committees in that week (including sitting times)
- the business of Parliament for the week including petitions presented, private member's bills introduced, and reports presented or considered.

You can also find out what and when legislation was introduced, which select committee it was referred to, when submissions close, and the dates on which Parliament will be sitting.

The Parliamentary Bulletin is available in most public libraries or on a subscription basis from Legislation Services, PO Box 12418, Thorndon, Wellington.

### Hansard

Hansard is the record of what is actually said in Parliament. It reproduces the speeches given by MP's in debates on bills and the Budget, questions and answers, and so on.

Hansard also contains a list of all of the current MP's and their electorates.

Hansard is usually printed each Parliamentary session in the form of a dark blue hard back book. However, during the session smaller pink covered paper volumes will be published (known as the "Hansard pinks"). Hansard should be available in or via a public library. Copies can also be purchased from some bookshops.

### Select Committees

The clerk of a select committee is an invaluable source of information. The clerk should be able to tell you

- which MP's are on a select committee
- when and where the committee will be sitting
- whether the hearings will be open to the public
- which government department is responsible for any legislation and will be providing advice to the committee when it is considering submissions
- how many copies of a submission you should forward and to whom
- exactly where the bill is in the law reform process.

Select committee clerks work in Parliament, Wellington (phone (04) 4719 999).

### Capital Letter

This weekly ~~LIBRARY~~ letter is available in most public libraries.

It includes information on statutes which have recently been introduced or passed, regulations, and recent High Court and Court of Appeal cases of significance.

### Ministerial Offices and Government Departments

The office of a Minister can provide you with copies of Minister's speeches or press releases on proposals. The office should also be able to identify the relevant person in a government department to talk to or, alternatively, obtain the required information from that person for you.

Officials may be able to provide information on the detail of proposals, the background to them, or relevant research or statistical data.

### New Zealand Gazette

This Gazette is published weekly on a Thursday. The Gazette contains notices on a range of matters including:

- bankruptcy
- companies (eg winding up applications or receivers)
- Incorporated Societies
- Charitable Trusts
- Friendly Societies and Credit Unions

Information on newly released regulations is also included.

The Gazette is available on subscription from the Department of Internal Affairs. It is also held in public libraries.

## The Good, the Bad, and the Ugly

### In *Q v Crime Appeal 406/92* *Court of Appeal; 23-3-94* the

Court of Appeal overturned a sentence of imprisonment for incest. The Court replaced it with a non-custodial sentence which consisted of: 8 months periodic detention; supervision for 2 years with 14 conditions including residence and counselling for the abuser and members of his family (which he had to pay for).

This case establishes for the first time that non-custodial sentences can be imposed for incest.

The judgment contains a number of contradictory statements, all of which appear to have been taken into account in reaching its decision. We reproduce some of those under the headings the good, the bad, and the ugly.

### The Good

"prosecution and conviction....with a relatively short period of imprisonment, can serve to mark the community's denunciation of a particularly insidious and harmful type of conduct and to underscore values which are important to the health of the community. Prosecution and punishment are seen to be an observable repudiation of the intrafamilial patriarchal power structure which underlies so much of the reported incestuous behaviour, a confirmation that the child is an innocent victim and that the perpetrator is solely responsible for his improper conduct, and a re-affirmation that it is unacceptable for an older person, especially one in the dominant position of a father,

to violate and exploit the relative weakness of his children."

"contrary to some popular opinion, the child victim of incest does not enjoy the incestuous relationship..."

The Court reiterated evidence that

"the therapy must counter the possibility, or even likelihood, of undue pressure on the victim by the father and the family to avoid the incarceration of the father and keep the family unit intact."

The Court went on to address the perpetrator's reactions, noting that

"genuine acceptance of responsibility is not easily achieved...perpetrators commonly seek to rationalise or minimise their behaviour. Self-exculpatory excuses are advanced."

### The Bad

"Evidently there had been some lack of warmth in the appellant's marriage..."

"certainly there was affection between father and daughter."

"the professional consultants think...the offending had 'arisen out of naive and inappropriate belief, rather than out of malicious and erotic intent.'"

The court took into account his apparent belief that

"he was actually helping his daughter in some way."

"The offending apparently did not involve any violence in the ordinary sense of the word."

"It is crucial in sentencing not to allow a natural revulsion to overcome more objective considerations."

The facts of a previous case of incest were described as "commencing with minor manual

interference with an 8 year old girl..."

### The Ugly

In addition to its own comments, the court cited without disapproval comments made in the leading English case on sentencing in incest cases not involving rape, including comments that aggravating features included "If the girl had become pregnant by reason of the father failing to take contraceptive measures."

and

"if the incest had been accompanied by perversions abhorrent to the girl ie buggery or fellatio."

The English case also considered that mitigating features included

"where there has been a genuine affection on the defendant's part rather than an intention to use the girl as an outlet for his sexual inclinations...[or] where the girl had previous sexual experience...[or] made deliberate attempts at seduction..."

In discussing applicable sentencing principles the New Zealand Court of Appeal Court said:

"while condemnation and punishment may act as a deterrent, it may destroy the family of which the victim is a member. She in turn is faced with a crisis after disclosure if it leads to punishment of the father and the rest of the family by his imprisonment..."

"victims of child abuse are undoubtedly more severely affected than the victims of most kinds of crime"

The victim may

"not only feel guilty about the past behaviour but also endures guilt for the disruption to the family and the possibility that the family unit will be destroyed."

The court saw a need to "balance the need for protection of children with the need to *rehabilitate the family*" (emphasis added).

#### Court proceedings

"can undoubtedly exacerbate the damage to the victim."

By way of conclusion the Court noted

"The sentencing dilemma is that the best interests of the victim may point against sanctions reflecting the seriousness of the offending and community abhorrence. There appears to be little evidence that fear of a prison sentence influences potential offenders willing to violate the accepted social norms, although there certainly is evidence that ... the perpetrator may become strongly motivated to co-operate in programmes that will enable him to avoid imprisonment."

## Sentencing Purposes

Sentencing can be:

**rehabilitative** (seek to ensure a person does not reoffend);

**restitutive** (seek to put the victim of offending back in the position they were in);

**restorative** (seek to restore both the victim and offender);

**punitive** (seek to punish the wrongdoer);

**preventative** (seek to eliminate further offending);

**deterrent** (seek to prevent others offending by making an example); or

**a combination** of some or all of these.

### Sentencing for Rape

The Court of Appeal recently set the starting point for sentencing in a defended rape case at 8 years imprisonment: *R v Arps* CA 513/93 18/3/94 Cooke P.

## De facto Property Rights

The Legal Services Board is planning a de facto property rights education campaign.

The campaign will run from 6 June 1994 and aims to

"lay to rest the widely believed myth that de facto couples who have lived together for two years are protected in law" (Gisborne Herald 1/3/94 and see also FLB Issue 1, page 4).

The Labour Party has indicated it wishes to introduce a Private Member's Bill to provide some statutory protection for de facto couples. Issues raised include

- the definition of 'de facto relationship', for example, the length of the relationship
- whether the law will extend to lesbian and gay relationships
- whether the Matrimonial Property Act should be extended or different legislation enacted specifically for de factos
- whether the existing Matrimonial Property Act is fair (for example, research suggests that women are disadvantaged by the current law).

### Property Settlements:

#### Beware

The Feminist Law Bulletin has been told of the following situation. A couple agreed that the husband would buy the wife's share of the matrimonial property and that he would remain living in the home paying the mortgage. Some 10 years later she is pursued by the bank for mortgage arrears because her name was never taken off the mortgage.

## Women on Select Committees: An Update

Issue 1 of FLB examined women's involvement on Parliamentary select committees. FLB showed that while women MP's were doing their fair share of select committee work, 9 out of 19 committees had no women on them and only 1 committee was chaired by a woman.

The 1993 General Election resulted in a record number of women being elected as MP's. We update you on the changes in representation of women on select committees.

Of the 75 MP's who are currently members of select committees, 18 are women (24 % compared to 15.7% in 1993). Of the 135 positions on committees, 27 are filled by women (20%, compared to 13.8% in 1993).

Three out of 20 committees are chaired by women (compared to 1 out of 19 in 1993).

Of the 20 select committees women are not represented on four, namely:

- Labour
- Primary Production
- Privileges
- Regulations Review.

This compares to 9 out of 19 committees in 1993.

This quick update indicates that there has been a significant improvement in the situation for women MP's since 1993. Both the level of representation for women and the level of responsibility women are being given on Parliamentary select committees appears to have improved.

## Asset-Testing: Issues for Women

The 'asset-testing' debate concerned eligibility for government subsidies to help with the costs of long term hospital care for the elderly.

In essence, everyone aged over 65 years old who enters long term care is required to pay the full cost of that care if they can afford it.

Whether or not a person can afford it (and the extent of the financial assistance a person can receive from the Government if they cannot afford it) depends on the outcome of two tests: an asset test and a means test of income.

In July last year the law governing asset-testing for these subsidies was amended. In order to qualify for government assistance a single person had to have assets worth \$6500 or less. A married couple could have a combined asset value of no more than \$13,000 (if they were both in care) or assets worth up to \$20,000 if one of them was living at home (in these cases the family home, its contents, and car were excluded from the list of assets).

### *The Issues for Women*

Women live longer than men. Pakeha women in New Zealand have an average life expectancy of 77.4 years compared to 71.3 years for pakeha men. Maori women have an average life expectancy of 68.5 years, compared to 63.8 years for Maori men.

Women outnumber men by two to one among those aged 80 and over. In addition, 71% of people aged between 85-90 live at home in the community.

The distribution of wealth among women and men and the differences in their average incomes means that asset-testing is more likely to affect women than men.

### *The Controversy*

The introduction of asset-testing laws last July lead to a great deal of controversy. Some considered that the levels of allowable asset value were set too low. Others considered it was unfair to ask the elderly to be asset-tested when other people who might require long term hospital care were not asset-tested (such as a young person with a broken neck).

It was this latter concern that lead to claims that the law changes were in breach of the Human Rights Act ie because it discriminated against persons on the basis of age.

The disproportionate impact of asset-testing on women did not appear to be raised as an issue of discrimination. This is despite the fact that the human rights legislation has prohibited discrimination on the grounds of sex since 1977.

### *The Private Member's Bill*

Following this controversy the Labour Party tried to introduce a private member's bill designed to do away with asset-testing altogether ("The Repeal of Asset Testing for Elderly Long Stay Care Bill.") However, introduction of the bill was not agreed to. Instead the Government

drafted its own amendments to the asset-testing scheme.

### *The Amendments in 1994*

The Government changes were that the asset test threshold for married couples where one spouse was in long term care was increased from \$20,000 to \$40,000. Prepaid funerals were also excluded from the asset test and this exclusion applies to married couples, single and widowed people.

### *Conclusion*

The issue of changes to asset-testing of the elderly caused a large amount of concern and controversy. It is doubtful, however, that the real issues of concern for women were adequately identified and/or debated.

## Women and the Legal Aid Dollar

Access to legal aid is an important aspect of access to the legal system.

In Australia

"women currently receive a much smaller share of the legal aid dollar than men do. In 1992-93 men received 63% of net legal aid expenditure in Australia...As fewer cases can be funded, the priorities for approving legal aid have become narrower. Priority is given to the needs of criminal defendants. There is less legal aid available therefore in family law matters and in other areas of law which are particularly important to women" (page 53 ALRC Interim Report No 67).

In New Zealand, the Legal Services Board, which is responsible for the administration of legal aid, is unable to identify how much of the legal aid budget is given to women.