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FEMINIST LAW BULLETIN
NEW ZEALAND AOTEAROA
PO Box 5071 Lambton Quay Wellington

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15 JAN 2002
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ISSUE FIVE
ISSN No: 1172-7977

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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Superannuation : to benefit or not to benefit?

The last issue of FLB discussed income and asset testing of elderly women in long term hospital care. We noted that the legislation's disproportionate impact on women was not raised as an issue of discrimination under the Human Rights Act 1993. This issue of FLB discusses a related issue, namely the case about discrimination in the provision of superannuation benefits under a private scheme.
BHP Steel Company, which ran a superannuation scheme for employees, applied to the High Court for a decision on how the Human Rights Act 1993 affected the benefits paid to employee members. The company paid benefits to the spouses of employees after the employee's death, but did not provide any corresponding benefit to the estates of single employees or to the partners of those who were not legally married. In other words, single employees and employees in de facto relationships who made exactly the same contributions did not get the same benefits under that company's scheme.

The issue was whether this was unlawful discrimination on the basis of marital status.
The High Court decided that it was.
Justice Thomas said the case raised *'...a matter of direct and major significance to tens and possibly hundreds of thousands of members and spouses of superannuation schemes: and in the context of the New Zealand economy the latter will principally be the wives of employee members of superannuation schemes'*
The Judge was concerned about the consequences of having to provide equivalent benefits to de facto spouses or the estates of single people. He thought the consequence would be a reduction in the level of benefits paid to widows.
Discrimination on the basis of marital status was outlawed by the Human Rights Act 1977 but no case had been brought before the courts

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on the legality of spousal pensions. It wasn't until the 1993 Act was passed that the trustees looked at whether or not the scheme was discriminatory. On finding that this scheme was discriminatory, the Judge noted that it would be a long, expensive, and uncertain task to determine how, if at all,other superannuation schemes might be affected by the Human Rights Act. He called for Parliament to deal with this through legislation, rather than the courts.

Any legislative response should address the following questions:

- what should happen to people who might have been discriminated against in the provision of superannuation benefits on the grounds of marital status since the 1977 legislation came into force?
- how do you retain the integrity of existing schemes and the integrity of anti-discrimination law?
- are the different interests of different groups of women met in an equitable way (i.e. women who benefit by making direct financial contributions and women who benefit from the financial contributions made by their partners)?
- how should the balance between competing interests be met eg the interests of trustees of superannuation schemes, employees, and partners?

The case raises more general issues about:

- how well understood the 1977 human rights legislation was
- what would have happened if the trustees had not applied for a declaration - would the discrimination have gone unchecked?
- who will be or is able to bring other issues before the courts?
- general issues about women's access to legal information and redress
- what other discrimination has been practised contrary to the 1977 Act eg has Social Welfare been illegally discriminating under the 1977 Act by paying different benefit rates to married and single people?
- the Government has until 1999 to determine which discriminatory practices it will exempt from the 1993 Act, but what criteria should be used to determine whether an exemption will be given?
- who will determine the criteria?
- what will be the process for developing the criteria?
- how relevant will issues of administrative convenience and economics be compared to matters of principle?
- how is the intent of the legislation to be determined?
- whose world view will dominate when there is a need to weigh up competing interests?
- does the case signal that exemptions will be determined by Government well before 1999?

Judge for yourself

"clients repeatedly returning for non-molestation orders are likely to raise the question: should the taxpayer fund this": Council Brief, July 1994.

Judge for yourself:

- shouldn't the question be how to stop the violence?
- does this statement reflect a lack of understanding about the cycle of domestic violence?
- why shouldn't the taxpayer fund it?
- why should women pay to protect themselves from violence?
- is the message for abusers if you hit her enough she won't be able to get an order?
- how compatible is this with the view expressed by women at the LSB Suffrage seminar that women should get free domestic violence protection orders?

Assisted Reproductive Technology: the ART of the something or other

The Ministerial Task Force on Assisted Reproductive Technology ("ART") recently presented its report to the Minister of Justice.

ART includes surrogacy (using one woman's body to carry a child for another), in vitro fertilisation (fertilisation outside the body), fertility treatment (drugs to stimulate or enhance production of ova), use of donated sperm, and embryo flushing (transplanting an embryo from one woman to another).

The Task Force believed that the development of policy and practices in ART should be done on the basis of widely accepted principles. It believed those principles should flow from an "ethic of care" and that those principles were:

- respect for human life and dignity (all human tissue has mana; dignity of choice)
- autonomy (freedom of choice subject to the interests of the wider community)
- Treaty of Waitangi
- justice (equality; non-discrimination; privacy; protection of the vulnerable; legality)
- the best interests of the offspring
- right to know genetic origins
- accessibility
- quality services and accountability

Do these principles enable feminist concerns with ADR to be addressed? Will these principles be sufficient to ensure that the processes and structures recommended by the Task Force meet the diverse needs of women?

Feminist concerns with ART include:

- who controls the technology and ensures there are adequate safeguards for women?
- what safeguards are there to ensure that ART will not turn into another "unfortunate experiment" (Cartwright Inquiry Into Cervical Cancer Screening)?
- is ART being carried out at the expense of research on prevention and understanding of infertility?
- will the medical profession allow itself to be regulated independently?
- is the development of ART an extension of issues about ownership and control of women's bodies and children?
- what is the appropriate role of private business interests in research?
- how likely is it the concerns of women will be met in the context of a "business" model of health services?
- will safety be determined by its cost?
- under a business model how will equitable access be achieved?
- what should the measure of success of ART be: the number of live births or the integrity of the process?
- how safe is ART for women and how informed are women of the risks associated with different ART techniques?
- who is defining what infertility is?
- the status of and society's treatment of infertile women and men
- equity and access issues generally and for specific groups such as single women, lesbians, older women
- culturally appropriate ART

The Task Force report provides an opportunity for women to lobby the Government to ensure women's concerns are adequately addressed in the area of ART.

Update on Bill of Rights Act Cases

The Court of Appeal recently considered whether monetary compensation could be awarded for a breach of the Bill of Rights Act 1990. In doing so, the Court may have opened the way for public officials to be held accountable under that Act.

This is important because women are more likely to be the subject of bad conduct on the part of public officials, than they are to be before the courts on criminal charges.

The first case arose because the Police searched the wrong house. A search warrant was obtained for what turned out to be an innocent elderly woman's home, not that of a suspected drug dealer. The search was a breach of the Bill of Rights because the search was unreasonable. The issue was what was the appropriate remedy for the breach?

In other Bill of Rights cases, the remedy of exclusion of unlawfully obtained evidence has been the most effective redress.

In this case, exclusion of evidence was not possible (because the woman was not charged with any offence) and a declaration that the search was unlawful would have been "toothless." The Court said Police must be accountable for their actions. The fact that they had acted in good faith (in getting the search warrant) was not decisive.

The Court considered there was no reason for New Zealand to lag behind other jurisdictions where compensation is a standard remedy for human rights violations.

The Court warned of the need to guard against giving "lip service to human rights in high-sounding language, but with little or no real service in terms of actual decisions."

It was held that damages could be sought and that a trial should take place accordingly.

The same result was reached in *Auckland Unemployed Workers Rights Centre v The Attorney General*. In that case a police raid on the Auckland People's Centre was carried out on the basis of an invalid search warrant.

The cases are important because they establish that public authorities such as the Police can be sued even where they act mistakenly but in good faith.

(*Baigent v The Attorney General* CA 207/93, 29 July 1994; *Auckland Unemployed Workers Rights Centre v The Attorney General* CA 242/93 29 July 1994)

Alternative Dispute Resolution

Alternative dispute resolution (ADR) refers to methods other than court action to resolve disputes. The alternatives include negotiation, mediation, conciliation, mini-trial, neutral evaluation, and arbitration.

ADR methods are typically characterised as:

- involving parties to resolve a dispute in a relatively inexpensive, fast, and durable way
- preserving, rather than destroying, the relationship between the parties
- protecting a person's interests (often commercial) through confidentiality.

In New Zealand, ADR is currently practised in a variety of areas and forums, including in family law (conciliation), employment law (Employment Tribunal mediation), commercial law (arbitration), human rights law (conciliation), and in less serious disputes (mediated or negotiated resolution in Disputes Tribunals and police diversion in criminal cases).

Women's experiences of ADR

Little evidence is readily available on women's

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experience of ADR in New Zealand. However, concerns have been raised about compulsory joint counselling and mediation in the Family Courts. The concerns include intimidation of women by violent husbands when 'negotiating' the settlement of matrimonial property disputes or disputes about custody and access.

Future directions

The trend in New Zealand is to promote ADR for commercial disputes through contracts which oblige parties to try ADR before resorting to litigation or arbitration. The Arbitrators Institute recently launched a Code of Ethics for its members in recognition of the growth in ADR and the need to ensure good standards

In family disputes, however, the trend is to make ADR mandatory rather than leaving it up to the parties to decide. The Report of the Family Court Review Committee (the Boshier Report) recommended the establishment of a Family Conciliation Service to provide mediation for disputes. Recourse to the Family Court was to be restricted to urgent and serious matters (such as domestic violence, child abuse and child abduction).

Issues for women -

ADR (in its various forms) is a growing industry. Care needs to be taken that political and economic considerations do not override issues of safety and appropriateness for women.

Lawyers are expressing some eagerness to be involved with ADR and women may need to be questioning whether that involvement is either necessary or desirable in a particular case.

Issues for women in family law-

Inequalities in family relationships may mean that mediation actually perpetuates the conflict and harm it purports to reduce in the area of care and protection of children.

Women may need to be careful to ensure that power imbalances within relationships are addressed in a meaningful way.

Mediators will have their own personal and professional biases which may include sexist views about women. ADR specialists need to be highly trained to avoid their own prejudice inadvertently affecting the outcome.

Is Government funding mediation at the expense of funding review and overhaul of existing justice systems?

Types of ADR

Mediation

- an impartial intermediatory facilitates negotiation between the parties to resolve a dispute. It has been used in commercial, resource management, consumer, neighbour and family disputes

Conciliation

- a third party assists the parties to resolve the dispute and may recommend a solution

Negotiation

- the parties themselves attempt to reach a settlement

Neutral evaluation/expert appraisal

- an independent expert provides an impartial assessment of the disputed facts to help the parties decide how to resolve a dispute

Mini-trial

- both parties present their side of the argument either to representatives of each side who are charged with trying to find a resolution or to a neutral adviser who assists the parties to find a resolution

Arbitration

- a third person who is a professionally recognised expert determines the dispute

Citizens Initiated Referenda and Petitions

The proposal for a referendum on the number of seats in an MMP Parliament has highlighted the new citizens initiated referenda legislation (CIR). In this article we explain what CIR is and the difference between CIR and petitions. We also suggest some issues for women with CIR in an MMP environment.

The Citizens Initiated Referenda Act 1993 allows any person to ask that a national referendum be held.

A referendum means that all eligible voters are required to vote on the answer to a question(s) the referendum asks. The question(s) must be in a form which allows a "yes" or "no" answer to be given on a voting paper.

The questions are circulated as a petition to see whether there is sufficient public support for a referendum. A referendum will be held if at least 10% of all eligible voters want one ie sign the petition. If they do, a referendum must be held within a year. The results of the referendum are not binding on the Government.

While CIR is new, petitions are not. Petitions have a long history of use by New Zealand women including in suffrage (signed by nearly 30,000 women), pay equity(signed by 18,000 women), and the current paid parental leave campaign.

Petitions are addressed to the House of Representatives and ask the House to take some action on an issue. A petition must be in a particular style and form (eg be in English or Maori and signed in person).

A petition won't be accepted if:

- the issue can be investigated by the Ombudsman,
- the petitioner hasn't taken a court case if this was possible,
- the petition is similar to one which has already been considered.

Petitions get referred to a select committee which might seek more information from the person who organised it or ask for submissions from other people. Once the select committee has decided what to do with the petition it can report to the House with or without recommendations.

The use of CIR in an MMP environment might pose some problems for women because of the general lack of awareness of, or sympathy for, issues of concern to women.

The first CIR may be a "Chickens Initiated Referenda" as it seeks to address the issue of battery farming of chickens!

Remember Suffrage?

The first petition on women's right to vote was signed by nearly 10,000 New Zealand women over the age of 21 and was presented to Parliament in August 1891. The following year a petition with over 20,000 names was gathered. The final successful petition in 1893 represented nearly 30,000 women - almost one quarter of the adult New Zealand women at the time.

Evaluation

In this issue of the Feminist Law Bulletin we enclose an evaluation sheet.

To help us measure support for, and satisfaction with, FLB please complete and return this evaluation by 30 September.

For your convenience, the self addressed form can be folded into thirds and sellotaped so that the address is clearly visible. Thank you.