FEMINIST LAW BULLETIN

NEW ZEALAND AOTEAROA

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SEXUAL ABUSE, RECOVERED MEMORY, AND DEFENCE LAWYERS

In the last issue of FLB we looked at recovered memory syndrome (page 7, Issue 2 1995). We noted that in New Zealand there has been no prosecution where recovered memory syndrome has formed the sole source of evidence against an abuser. We also noted that a recent case involving so-called recovered memories had been used by some defence lawyers to argue for time limits to be put on the prosecution of sexual abuse cases. One of the complainants in that case wrote to FLB confirming that the case had little to do with recovered memories. She wrote:

> "As one of the complainants I am writing to put the record straight. Both my sisters gave evidence that they had *always had some outline of memory of sexual abuse* at the hands of our father. The evidence I gave related only to events I have *never forgotten*. **Peter Williams QC [the lawyer for the accused], used the elements of this case which did relate to recovered memories to discredit all the other memories we had** ...
>
> ...I should like to share with you the questions asked by the jury as they deliberated. These questions had nothing to do with 'recovered memory' (indicating that this case should not be used as a precedent for recovered memory cases). The jury simply wanted to know how sure you had to be to meet the standard of beyond reasonable doubt (and what a hung jury is).
>
> We always knew that beyond reasonable doubt was a very high standard, and in a case of historical sexual abuse, getting a conviction would be difficult. After seven hours of deliberation the jury came back with a not guilty verdict: **And after years of being silenced I got the opportunity to tell a court exactly what my father did to me. My only fear is now that this case will be misconstrued to effectively silence other women from speaking out about their abusers.**" (bold emphasis added).

Sincere thanks to the complainant for her consent to publish this extract.

IN THE INTERESTS OF JUSTICE:

An evaluation of Criminal Legal Aid in NZ (A paper released by the Legal Services Board in March 1995).

The current law provides that criminal legal aid can be granted to a person who is charged with a criminal offence where such aid is in the interests of justice and that person lacks sufficient means to pay for a lawyer herself/himself.

This report identifies six main objectives of a criminal legal aid system, namely:

- equity: ensuring access to aid for those in similar circumstances
- targeting: directing aid to those in greatest need
- quality: providing a competent service that results in client service satisfaction and an appropriate verdict/sentence outcome
- efficiency: producing effective systems and processes which minimise transaction costs and allow the management of fiscal risk
- cost-effectiveness: achieving the lowest sustainable and fair unit price for a specified level of service
- transparency: establishing clearly who has access to the scheme and where the various accountabilities and responsibilities lie.

The Report has a specific section on women, who comprised around 8 per cent of the survey sample (which is roughly the same percentage of women accused). That section notes:

- women were less likely than other recipients to apply for legal aid without advice from others
- almost half of the women were helped with the filling out of forms (compared with only 33 per cent of applicants generally and 37 per cent of Maori applicants). Private lawyers most often helped
- of the 34 women receiving aid, 22 pleaded guilty
- almost half of the women said their sentence was more severe than they expected
- nearly half said that without legal aid they would have done better or the same.

The report concludes the section on women with the statement that: ***"While the sample is small, this suggests that women may feel particularly marginalised in the criminal legal aid system and or the justice system. Further research is needed before a more conclusive understanding can be developed."***

This recommendation lines up with a number of others including recommendations to improve serious deficiencies in 'equity and targeting', quality control and efficiency and fiscal management.

However, there is no indication of whether this research is likely to occur or, if so, its priority for the Board. Without adequate and informed research, women's needs in this important area will not be addressed.

Specific research issues include whether there are differences in the rates at which Maori and Pacific Islands women apply for and receive legal aid when compared to women generally; the reasons for refusal of legal aid and whether there are any gender differences in those reasons; women's general knowledge of their rights in the criminal legal aid system; and the extent to which others influence a women's decision to apply for legal aid (such as attitudes of family, lawyers, registrars and judges).

BILL OF RIGHTS :

In *Martin v Tauranga District Court* the Court of Appeal stayed (stopped) the prosecution of three charges of sexual violation because of delays in bringing the case to trial.

Martin was charged with three acts of sexual violation of his sister in law between 1 and 2 December 1992. She complained to Police on 3 December 1992 and Martin was arrested and charged on 18 December 1992. A trial date was eventually set for 4 and 5 November 1993.

However, the Crown Solicitor unilaterally vacated that date because the police officer in charge of the case was on holiday. Martin was tried on unrelated assault charges in March 1994 but a trial on the original sexual violation charges had still not taken place by May 1994. Martin then applied under the Bill of Rights Act for the prosecution to be stayed because of the 17 month delay without trial. Section 25 of the Bill of Rights gives an accused person the right to be tried without "undue delay."

In deciding whether the delay was "undue" in this case the court looked at the following factors:

- the length of delay
- waiver of time periods
- the reasons for delay including any inherent time requirements of the case, the actions of the accused, actions of the Crown, and limits on institutional resources
- the prejudice to the accused

The Court of Appeal decided that the delays up until November 1993 were not "undue." However, the unilateral decision of the Crown Solicitor to adjourn the trial because a police officer was on holiday made subsequent delays in getting a trial date "undue." Martin's rights under the Bill of Rights had been infringed and the question was what should be done. The Crown prosecutor in this case did not argue about the remedy - it was agreed that if the court found there was a breach of the Bill of Rights, the appropriate remedy was a stay of the proceedings.

However, the court said a stay was not always the right remedy. In some cases the answer would be to hurry up the trial. Doing this would be more likely to be in the wider public or societal interest in prosecution of crimes and the victim's interests.

Judge for yourself:

- **Would the case have turned out differently if there had been a voice for the victim in the prosecution process (so, for example, the victim was consulted about decisions on adjournments)?**
- **Who were the real winners and losers - the accused, the Police or the victim?**
- **What will be the effect on women deciding whether or not to complain to the Police?**

In 1993 we surveyed 138 Bill of Rights Act cases and found the vast majority were men invoking the Bill of Rights where they faced prosecution for criminal offences against women and children (FLB Issue 1, September 1993). Two years on it seems little has changed!

AT THE BOUNDARIES OF THE LAW:

In this article we report the broad outline of a discussion on lesbians and legal philosophy at the Lesbian Studies Conference held in Wellington on 20 and 21 May 1995.

A brief summary of the key parts of the panel presentation and group discussion is provided. The ideas and questions raised are of interest to feminists looking at issues for women and the law generally.

The discussion was lead by a panel of speakers followed by questions and a general discussion.

The discussion was in two parts: a discussion of "equality" and a discussion of "ideology and practice".

Equality

The key point in the panel discussion was the recognition that equality in the law has been equated with sameness, as determined by white middle class men. Lesbians, and to a lesser extent women generally, have been rendered invisible by this assumption rather than accorded truly equal status, recognition or legal protection.

Key points/questions from the general discussion included:

- the difficulty with the Human Rights Act was that by focussing on discriminatory behaviour in the personal realm (that is, as a personal dispute between two individuals), structural power issues were disregarded
- the inclusion of heterosexuality in the definition of sexual orientation (a prohibited ground of discrimination) was seen to open the way for a backlash against lesbians
- there was an agreed need to work towards a reality where lesbian diversity was recognised
- using heterosexual standards or concepts meant lesbians did not have the power to name themselves or their lifestyles
- more flexibility in the definitions of "family" and "relationship" would enable a movement away from the existing heterosexual norms by which everything was measured or judged. For example, definition of a relationship as "in the nature of partnership" instead of "in the nature of a marriage"
- issues of dependency, independence and autonomy were different in lesbian relationships and required different measures
- lesbians are not "equal" to (ie the same as) heterosexuals - acknowledging and understanding difference was the key

- is equality an outdated concept - will "equity" be more important in the future?

Ideology and practice

This part of the panel discussion looked at the particular philosophical approach to the development and/or implementation of the law and how legal policy influences the impact of the law on lesbians.

Legal policy approaches include the sin perspective (lesbian behaviour is sinful and therefore will not be recognised or protected under the law), the illness perspective (lesbians are sick and in need of legal protection or detention under mental health legislation), the neutral approach (lesbian behaviour is ignored under the law, either because it is seen as irrelevant because everyone is equal, or perhaps denied totally), or the social construct approach (sexual behaviour is not seen in the abstract but as a construction of society, and it is therefore acknowledged but not accorded any particular weight).

Special issues noted were whether lesbians want the same treatment in all cases or different status for different purposes? Should they be treated the same under tax, benefit and family laws?

Issues towards the year 2000 (and review under the Human Rights Act of discriminatory policies) include education (of lesbians and others) and information (such as how to ensure lesbians access good information) about lesbians rights and remedies.

Questions that arose in the course of the general discussion included:

- are lesbians better off using the current law as and when they choose (for example, taking out wills and powers of attorney, using contract law to govern property allocations etc) or should more appropriate laws be developed?
- if lesbians were to develop legal processes, laws and structures, would these end up any fairer than the current ones?
- how would/could lesbians go about the development and putting into practice of lesbian community justice?
- in the meantime how do we ensure that lesbians have true access to legal remedies?
- how will the Law Commission's project on women's access to justice deal with issues for lesbian women?

WOMEN IN PRISON:

Research on women in prison and debate about issues for women in prison in New Zealand is scarce. In this article we look briefly at issues for, and the needs of, women who end up in prison.

Issues for women in prison

Women in prison face special issues, in part, **firstly,** because of their low numbers. There is only one women's prison in New Zealand - Arohata in Wellington. There are, however, women's units attached to men's prisons in Christchurch (Rolleston) and Auckland (Mt Eden).

Second, women who live in other parts of the country and who are sentenced to imprisonment immediately face the prospect of isolation from family and support. Restrictions on communication (such as phone calls and correspondence) can emphasise and make worse that sense of isolation.

Third, distinct issues can arise for women wanting information about what is happening in their families such as when their children are unwell or unhappy. Women may feel isolated and cut out of family decision-making.

Fourth, Maori women in prison may face racism - from other prisoners as well as prisons guards - and a lack of culturally appropriate services. Migrant women may face language and other difficulties.

Finally, women in prison generally face the social stigma of being perceived as "bad girls" and, even worse, "bad mothers."

Women prisoner's needs

Overseas research indicates a significant portion of women in prison will have a drug abuse problem (up to 50%). Many will be in debt, be single parents, and unemployed. Research in Canada has shown that 80% of women in prison have histories of physical and sexual abuse.

This means women need opportunities for work and skills development to help prevent the cycle of re-offending. Counselling for drug abuse and assistance with health needs may also be needed.

Specific strategies such as one-on-one case management, appropriate liaison between the prison and probation services, proper pre-release courses, and maintenance of an on-going relationship with probation officers on release may all be necessary. Assistance with budgeting and financial advice, accommodation and employment will be critical, especially where women are to return to their home cities after months or years in prison.

Issues/Questions

- how can women at high risk of re-offending be identified early in their sentence?
- should a more proactive and interventionist approach be taken?
- how can women be monitored after release and who should do this?
- what steps can be taken to ensure co-ordinated services for women?
- what assistance should be given to pregnant women, especially first time mothers?
- should new approaches be adopted which will maintain strong family ties for women eg developing policies on when children and family members can visit, appropriate communication, parent programmes and home detention for mothers?
- what are the alternatives to prison for women?

Extra Reading: "Voices From the Margins" Elizabeth Cormack (University of Manitoba, Canada), "The New Etiology", Lisa Maher, New South Wales, "The Needs of Female Prisoners", Alison Morris, VUW Institute of Criminology.

FACTS ABOUT WOMEN IN PRISON IN NEW ZEALAND

A census of prison inmates taken in November 1993 showed there were 117 women and 3644 men in prison. That census showed:

- the average age of women and men prisoners was the same, 31 years
- 53% of women identified as Maori compared to 46% of men
- women were most likely to be in prison for violent offences (44%), property offences (33%) or drug offences (14%). Men were most likely to be in prison for violent offences (61%) or property offences (19%)
- the most common type of offences women were in prison for were murder or manslaughter (20 women), fraud (13 women), aggravated robbery (11 women) or theft (11 women).

The most recent figures on women in prison (April 1995) show that there were 137 sentenced women inmates and 13 women on remand (compared to 3755 sentenced men and 520 men on remand).

Source: Policy and Research Division, Department of Justice

GENDER EQUALITY - OVERSEAS UPDATE:

Towards Justice for Women, (British Columbia, Canada) is the first of annual reports on action taken for the fair and equitable treatment of women in the justice system. The report may be a useful resource in the light of the proposed Law Commission project on women's access to justice in New Zealand.

The 48 page report, released in January 1995 and covering the period from September 1993 to December 1994, provides an overview of the British Columbian justice system and the Ministry of Women's Equality progress on equality issues for women.

Major issues include:

(1) dealing more effectively with issues of violence against women and children

(2) protecting women and children from victimisation and providing them with supportive services

(3) emphasising the criminal nature of 'wife assault'

(4) additional funding for community services for victims and men's treatment programmes

(5) improving internal systems to identify and monitor wife assault cases going through the justice system

(6) recognising the need for training and education for justice system personnel.

The focus for the British Columbian Gender Equality Initiative in 1995 is on:

(a) improving training for people working in the justice system

(b) improving consultation and information sharing with the women's community and justice system partners

(c) identifying emerging issues such as class action legislation for breast implant patients and the use of drunkenness as a criminal defence

(d) a new policy program and legislative initiatives in the areas of enforcement, prosecution, crime prevention and victim services.

Copies of the report are available from Ministry of Women's Equality, Parliament Buildings, Victoria, British Columbia V8V 1X4, CANADA.

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The Feminist Law Bulletin:

- Identifies when feminist issues arise in policy, legislative proposals, and the practice of the law;
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- Enables a general readership to gain an introduction to feminist analysis of the law.

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