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 the practice of 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.

Editors:

In 1996 Claire Baylis and Kate Tokeley will be editing and writing the Feminist Law Bulletin.
The views expressed are those of the editors and not necessarily those of the producers and publishers of the Feminist Law Bulletin.

CONTENTS:

FEMINIST LEGAL DEBATES

Theory and Practice

This year the Feminist Law Bulletin will have a series of articles which aim to introduce different aspects of feminist legal theory. The reason for doing this is that theories are tools which can increase our understanding of the practical effects of behaviour, legislation and case law.

Theory makes it easier to draw links between different individual circumstances so that patterns of gender-based oppression become more readily apparent. "In fact it has been crucial for feminists to be able to say not only that this or that woman has been discriminated against or raped, but rather that the pattern of oppression is in general terms the oppression of women by men." (Margaret Davis *Asking the Law Question* - Law Book Company Ltd, 1994 - a readable and interesting book on jurisprudence and feminism.)

Each short article will be followed by a discussion of an area of law or a case to which the theory could be applied. We hope that this might help to provide new insights for readers.

The Public and Private Spheres of Society

In New Zealand as in many other countries there has been a tendency to divide the social world into two different parts, the public area and the private area. The family, which women have traditionally been associated with, has been seen as the private domain, while men have been associated with the public areas of politics and work. In fact the world does not easily break into separate spheres, but the ideas of public and private realms of the world are helpful to consider when examining the impact of laws on women.

In the past (and to a large extent still today) it has been thought that legal regulation is only appropriate in the public areas of life. The private, family area was viewed as outside the law's domain. This helps to explain why spousal rape and domestic violence have only relatively recently been seen and actioned by the state as 'real' crimes.

The reluctance to legally regulate the private sphere is justified on the grounds that there must be some realm of life where individuals are free from the control of the state. It is argued that the private sphere has been unregulated in the past and should remain this way.

The suggestion that the private area has been completely unregulated is, however, a myth. The law has always had an ongoing role in the family sphere. For example it has shaped what is considered to be a 'proper' family; (eg the law does not recognise same sex relationships so legal marriages are not currently available to lesbian couples).

The notion that the private sphere should be unregulated so that individuals have an area of freedom from state control, fails to recognise that a lack of regulation can also create and perpetuate inequalities between men and women in that sphere.

For example, the work women have done in the home for centuries has remained unpaid and has in fact been invisible to the state; it is not considered to be 'worth' measuring as part of a country's production and growth statistics. Legal regulation in this area could significantly change women's position in the private sphere, for example by allowing childcare to be a tax deductible expense.

Men still dominate in the public sphere, for example in Parliament, in the legal system and in universities. It continues to be largely men who make the choices about which areas they define as private and largely unregulated, yet it is often women who are left to be exploited by this lack of regulation.
(For excellent further reading in this area: Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* OUP 1995.)

The following discussions on de facto property rights and on the *Cashman* case raise some of the issues discussed above.

THE REFORM OF DE FACTO PROPERTY RIGHTS

The Ministry of Justice is currently in the process of obtaining policy approval from government for proposed legislation to protect the property rights of de facto couples. The Ministry is drafting an 'options paper' which will also discuss the property rights of lesbian couples.

Doug Graham, Minister for Justice has suggested that the legislation would give the courts a discretion to decide how a couple's property should be divided when a same sex or de facto relationship broke up. This would enable the courts to take into account the non-financial contributions of each partner. This would be similar to the present situation for legally married couples where, under the Matrimonial Property Act 1976, property is generally split 50-50 if the marriage has lasted for three or more years.

However, while government policy is not yet clear, Mr Graham has commented that he believes same sex and de facto couples should have the same property rights, but **not** the same rights as legally married couples: "I think that there needs to be a recognition that there is a difference between de factos and those who wish to get married."

One difficulty with this approach is that at present couples in same sex relationships cannot legally marry. They therefore do not have the option of gaining this 'higher level' of property rights protection.

Lesbians' right to marry

The on-going issue of whether lesbians have a legal right to marry has wider consequences than solely property rights on the break up of a relationship. For example it affects adoption and inheritance rights.

The Marriage Act 1955 does not expressly prohibit a marriage between two members of the same sex. In a 1994 High Court declaratory Judgment it was held that two people of the same genetic sex may legally marry if one has changed sex by medical sexual reassignment. However the Judge in that case held that it is implicit in the Act that a marriage must be between a man and a woman.

This issue is likely to be examined in the very near future as three lesbian couples are soon to file papers in the High Court seeking the legal right to marry. Their argument is likely to be based not only on the wording of the Marriage Act, but also on the grounds that a refusal to allow lesbian couples to marry constitutes an act of discrimination under section 14 of the New Zealand Bill of Rights Act on the ground of sexual orientation.

Issues for women:

- If the law reform differentiates between "de factos and those who wish to get married", would this discriminate against lesbian couples who do not legally have the choice to marry?

- Are there advantages and disadvantages in the legal recognition of lesbian relationships?

• Should property rights for de factos be the same as for legally married couples or are people who choose not to marry, freely opting for a more private arrangement?

• In de facto heterosexual relationships are there often power imbalances which mean there are dangers in leaving property rights to the private arrangements of the partners?
(Eg: - Women are more likely to be younger than their male de facto partners - Dept of Statistics 1994 .)

JUDGE FOR YOURSELF

Cashman and others v *Central Regional Health Authority and another* (WEC 3/96 W119/95)

On January 31 the Employment Court rejected ten women's claims that they were employees of the defendants and were therefore entitled to minimum rights as employees. The Judge construed narrowly the term 'homeworker' in section 2 of the Employment Contracts Act 1991 (ECA); a term which was originally enacted to strengthen the position of workers in situations where they were vulnerable to exploitation.

The plaintiffs provide carer relief and home support to enable people with age related or other disabilities to remain independent within their homes. In the Central Regional Health Authority's (the RHA) territory there are approximately 3,000 home carers who are overwhelmingly women. Some of whom are at times being paid only $3 an hour for their work.

The Issue:

The ECA defines employee as including a 'homeworker'. The issue here was whether the plaintiffs fell within the definition of homeworkers or whether they were independent contractors.

The ECA defines 'homeworker' in section 2 as meaning:

> a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it)....

If a person fits within this definition of homeworker they are an employee regardless of whether their contracts explicitly state that they are independent contractors.

Independent Contractors and Employees
An employee works as an integral part of the employer's business. The employer has a continuing right to exercise control over the work being done.
An independent contractor is autonomous, performing services as a person on her own account. She arranges her own remuneration, holidays, and other conditions.
Employees lack that degree of autonomy and therefore benefit from protective legislation regulating minimum conditions of employment eg minimum wages and holiday pay.

The Judge's Reasoning:
Judge Palmer decided that the plaintiffs did not fit within the definition of homeworkers and therefore were not employees.

The Judge agreed that under a literal approach the words in the statute could **arguably** include the plaintiffs, but he stated that *"a thoughtfully purposive construction and application of the statutory definition convinces me that care providers-.are not 'Homeworker[s]."*

Statutory Interpretation:
The Literal Approach to interpreting a statute means giving the words their ordinary and natural meaning.
The Purposive Approach seeks to give effect to Parliament's intention in passing the statute by considering the purpose and context of the statute and other extrinsic material, eg Parliamentary papers etc. This approach helps to avoid too strict a literal interpretation, but the interpretation must still be a **natural** meaning of the words in their context, taking into account their purpose.

The Judge stated that the category of 'homeworkers' had been enacted to protect people who were vulnerable to exploitation in their working situation. He acknowledged that this was not a "static group", but believed that to include the plaintiffs would inappropriately encompass workers far removed from the traditional category of homeworkers.

The Judge believed that the characteristics of traditional homeworkers include that:
- they are skilled but little educated;
- they carry out work which would usually be performed in a "factory, commercial premise, or customarily designated place of work" but for a variety of reasons they have to perform the work from their own homes;
- they perform work which does not involve a direct transaction between the producer and the final customer.

He held that the plaintiffs did not have these characteristics and so they could not be considered to be homeworkers.

Questions:

- Do the plaintiffs fit within the literal definition of homeworkers? Can any **natural** meaning of the statutory definition of homeworkers exclude the plaintiffs?

- Does the definition of homeworker in the ECA require the characteristics the Judge identified as constituting a traditional homeworker?

- In adopting the purposive approach did the Judge overlook the vulnerability of the women's situation by focusing overly on the differences between them and the traditional homeworkers rather than the similarities (eg the imprecisely defined nature of the employment, isolation, financial hardship and vulnerability to exploitation)?

- By deciding that the plaintiffs are independent contractors and therefore not entitled to protective regulation has the Judge signified that their work situation falls in the private area,

leaving these women open to exploitation?

• Why (and by whom) are dwellinghouses not recognised as 'customarily designated places of work'? Is this another instance where the distinction between the public sphere and the private leaves women open to exploitation?

Rape: Ten Years Progress? An Interdisciplinary Conference.

This conference will be held in Wellington on 28-30 March. The conference will evaluate the changes that have occurred in the last ten years in all stages of the management of rape.

The legal changes which have occurred include:
• the enactment of the crime of sexual violation. This crime is broader than the previous definition of rape which was limited to penetration of the vagina by a penis. Sexual violation now includes the penetration of the genitalia by any part of the body or an object;
• that a person may be convicted of sexually violating their spouse;
• that the maximum penalty for all forms of sexual violation is now 20 years.
• special provisions for child victims of rape to give evidence in more user-friendly ways eg by video tape and the use of screens;
• that corroboration of a victim's evidence is no longer necessary; and
• a number of protective measures to stop inappropriate media attention, eg the suppression of the name of the victim and of the offender if that would identify the victim.

These changes have improved the laws relating to rape but the practical effectiveness of these improvements is still at issue. There may also be a need for further changes in the legal process. The rape conference will address these issues.

The overall aims of the conference are to improve the management of the immediate impact of rape and to minimise the difficulties of taking a complaint through the courts. It is hoped that this will reduce the long term effects of rape and hasten rehabilitation.

For registration and information contact : The Conference Organising Committee: Doctors for Sexual Abuse Care, C/- Auckland Hospital, Private Bag 92024, Auckland; fax (09) 3070599.

Recent Comment:

In a recent New Zealand Court Martial hearing a New Zealand army officer was found not guilty of indecently assaulting a Canadian woman officer, although he was not discharged with honour. The Defence Counsel, Major Bruce Stainton is reported to have told the Court Martial Board in his closing remarks "you have seen the complainant, with the greatest respect, it cannot be suggested the complainant is sufficiently desirable for him to jeopardise his whole career."

UPDATE

Judicial Working Group on Gender Equity

In Issue Two 1995 of the Feminist Law Bulletin we reported the establishment of this working group.

The Judicial Working Group's terms of reference do not include the making of recommendations on substantive law issues; its purpose is limited to devising an ongoing judicial education programme on gender issues. The Group is, however, working closely with the Law Commission Women's Access to Justice Project. The Commission does have the power to recommend substantive law changes to the Minister of Justice.

In the first half of this year research will be carried out into Judges' perceptions of gender issues, particularly the problems which arise for women within the court system and possible remedies to these problems. The research will involve a questionnaire survey of all New Zealand Judges with follow up interviews and focus groups. This, coupled with the Law Commission's work, will help to identify the issues to be covered by the education programme.

The education programme itself will be launched by a two day seminar in March or April 1997 to which all New Zealand Judges will be invited.
For further information contact Jill Abigail, the project manager, Department of Courts, ph(04)494 8967.

The Law Commission's Women's Access to Justice Project: He Putanga mo ngã Wãhine ki te Tika

(The following is prepared from the Project Newsletter.)

The Law Commission has now identified some areas of priority for the Women's Access to Justice Project. They are "the impact of laws, legal procedures and the delivery of legal services upon:

- family and domestic relationships;
- violence against women;
- the economic position of women."

Particular emphasis will be placed on researching the difficulties women experience in accessing and using legal services, and how these services could be made more women-friendly.

Ultimately the project will report to the Minister of Justice suggesting:

"
- principles and processes to be followed by policy makers and lawmakers;
- specific law reforms; and
- educational and other strategies;

which will promote the just treatment of women by the legal system."

The priorities emphasised by the Commission are not intended to exclude research or submissions on other relevant areas. Particularly any ideas for exploring the concerns of lesbians would be useful as the Commission has encountered some difficulties in covering this area.

Current research topics are: civil legal aid; sources of legal information; and information about lawyer's fees.

The closing date for public submissions is 31 March 1996. Send to:
Women's Access to Justice Project,
Free Post 56452,
Law Commission,
PO Box 2590, Wellington.
Or freephone 0800-88-3453 on 11 March, 15 April, 13 May or 10 June.

Issues for Women:

- While it may be necessary in practical terms for the Law Commission to focus the Women's Access to Justice Project on gender issues involved in legal procedures and the delivery of legal services, how can we ensure that there is potential for reform of gender issues in the substantive law?

- Is it problematic that the Judicial Working Group's terms of reference do not include the power to make recommendations of legislative reform where gender issues are identified or is it sufficient that the Law Commission has this power?

- At this stage it has not yet been decided whether the judicial education programme will cover gender issues in the substantive law as well as in the court process. Is it imperative that both are covered?

Why Subscribe?

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