FEMINIST LAW BULLETIN

NEW ZEALAND AOTEAROA
PO Box 5071 Lambton Quay Wellington

ISSUE THREE 1996
ISSN No: 1172-7977

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. The Bulletin is produced with financial assistance from the New Zealand Law Foundation.

Contents:

WOMEN'S UNPAID WORK

'Women As Mothers' (WAM) has made a major submission to the Human Rights Commission on the substantive inequality caused to women due to the lack of recognition of their unpaid work. The submission asks the Commission to use its general inquiry function under section 5(g) of the Human Rights Act 1993 to investigate discrimination by government and its agents in eleven main areas. WAM also claims breaches of international human rights covenants. The specific complaints include:

- discrimination caused by the lack of official recognition and economic valuing of work carried out by women within the family and as caregivers to the elderly and mentally ill;
- discrimination caused by the disparate outcomes for women in the implementation of the Matrimonial Property Act 1976;
- discrimination in the field of women's unpaid work with specific reference to accident compensation, superannuation, and the Domestic Purposes Benefit regime.

Although the Human Rights Commission has not yet informed the complainants of their response to the submission, we understand from the Commission that they are unlikely to undertake a general inquiry into the issue due to a lack of resourcing. The Commission may deal with the submission by referring it to the Women's Access to Justice Project and the Commission's "Consistency 2000" Project which is examining all NZ legislation to identify inconsistencies with the Human Rights Act before the year 2000.

- Is this the kind of issue that the Human Rights Commission should be examining under their general inquiry function due to the numbers of women affected?
- If resourcing precludes this, does this mean that the Commission cannot be fully effective in terms of its functions?

For information or to offer financial support, contact: WAM; PO Box 52079, Kingsland , Auckland

FEMINIST LEGAL DEBATES

Legal Language and Women's Invisibility

Sandra Petersson

The third article in our series on feminist legal theory examines the impact of legal language on women. Advertisers and politicians are fully aware that careful use of language influences our thinking beyond the basic message conveyed. In this article, we discuss the implied messages legal language in statutes and case law may be giving about women.

"He" or "He or She"

Before 1850, it was common to find the phrase "he or she" used in legislative drafting. In 1851, New Zealand adopted the practice of simply using "he" to specify both sexes in legislation. The Acts Interpretation Act 1924, section 4 still authorises this practice:

"In every Act of the General Assembly or of the Parliament of New Zealand, if not inconsistent with the context thereof respectively, and unless there are words to exclude or to restrict such meaning... words importing the masculine gender include females."

Some argue this merely reflects 'proper' English usage. As English does not have a neutral pronoun that means both "he" and "she", it is 'correct' to use "he" to include both. However, this 'rule' was devised by male grammarians in the late 1700's. Before then (and even now in speech) it was common to use "they" when referring to both sexes, even in the singular (eg. Everyone should cast their vote).

One problem with using "he" to refer to both women and men is its ambiguity. Despite claims that "he" is intended to include women, "he" also remains the word that describes men alone. Both meanings include men. Women, however, must always be alert for clues indicating which meaning is intended - the meaning that includes women, or the one that excludes us. The Acts Interpretation Act reinforces this uncertainty because "he" includes women only "if not inconsistent with the context".

Besides being ambiguous, using "he" implies that the standard citizen to whom a law applies is male. Including women by extending the meaning of male terms characterises women as a sub-set of men. Men are the 'norm', while women are the 'other'.

Gender Neutral Language and Invisibility

Though many writers now abandon male terms as sexist, gender neutral language may still convey bias against women. For example, changing the "reasonable man" to the "reasonable person" conceals that the original standard was constructed on models of male behaviour. A reasonable woman may have acted differently.

Though gender neutral language reduces male images in the law, it does not expressly bring women into the law. Women remain invisible in the public sphere of legal language. It is also important to remember that, in the campaign for equality, numerous courts in the late 1800's and early 1900's ruled that the neutral word "person" did not include women. For example, courts relied on the custom that had prevented women from voting, in concluding that women were not "persons" having a right to vote.

Finally, we should also consider whether the structure of a sentence is appropriate for what we want to say. Legal language frequently uses the passive voice, omitting references to the person performing the action. For example, stating "the victim was raped" links the victim to the rape but obscures the fact that **someone** raped the victim. It also obscures the fact that the rapist is likely to be a man and the victim a woman or child. Sometimes by using gender neutral language we fail to recognise the gendered nature of women's suffering. Another example of this is the term "domestic violence" which conceals the fact

The 'Other'

Simone de Beauvoir in *The Second Sex* (1949) explained how men have defined women in opposition to themselves. She wrote "[o]ne is not born a woman, one becomes one."

Men (the first sex) are the standard against which women have been compared. From the outset, women become the 'other' because men have pre-established the standard. References to "lawyers" and "women lawyers" (but not "men lawyers") illustrate how women are still distinguished from the perceived norm.

"Moreover the usual conjunction 'women and minorities' suggests that although linked, the two terms are also exclusive of each other. This use of language not only reflects and reinforces the white male norm, but also signifies and reinforces the view that 'women' means white women and 'minorities' means 'men who are not white'. Women of color are thus signified as twice removed from the norm, as all the more problematic, as slipping into invisibility."

Lucinda Finley "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 Notre Dame Law Review 886.

that the violence is usually directed by men against women.

When considering how legal language affects women, it may be useful to ask:
-Does this text clearly include women? Is it meant to?
-How does this text include men?
-Would this text be written differently if it meant to include only one sex?
-Does this text require the reader to make assumptions, eg. as to who did something or to whom someone is compared? What do these assumptions imply about women, or about men?
-When gender neutral language is used is it masking the fact that it is men oppressing women?

JUDGE FOR YOURSELF:
Quilter and others* v *The Attorney-General
Unreported, High Court, Auckland Registry M177/96 (See also Feminist Law Bulletin Issue 1 1996)
In May this year the High Court handed down its judgment on the application by three lesbian couples for a declaration that they are entitled to obtain a marriage licence. Justice Kerr rejected the plaintiffs' application, holding that marriage requires a union between a man and a woman. He held that any change to this must be enacted by Parliament.

The Issue
The Marriage Act 1955 does not explicitly define marriage. Rather than set out who can marry, the Act prohibits certain people from marrying, for example, those who are closely related. The Act does not explicitly prohibit same-sex marriages.
The issue in the case was whether the definition of marriage implicitly required unions to be between a woman and a man. The Judge used a variety of approaches to interpret the term "marriage".

The Traditional Common Law View:
The Judge found that case law in New Zealand, Britain, the US and Canada had all traditionally held that a marriage must be a union between a woman and a man.

- The Judge saw the need for a man and a woman as fundamental to marriage. Does this still reflect current social understandings of marriage?
- As this is judge-made law which Justice Kerr in this instance did not have to follow, should he have used his power to change it?

The Dictionary Definition:
The Judge also relied on the dictionary definition of marriage: "Legally recognised personal union entered into by a man and a woman...."
- Should the word marriage be defined as what the **law** recognises marriage to be?

Related Acts:
The Judge argued that other Acts would need to be changed if the Court accepted the plaintiffs' interpretation. For example, the Family Protection Act 1955 allows "the wife or husband of the deceased" to make a claim. The Judge admitted that he was not using these Acts to interpret the definition of marriage but to determine the effect of allowing same-sex marriages without statutory amendments.
- Under this provision of the Family Protection Act would any change be necessary? Would the partner in a lesbian marriage not also fit into the term 'wife'?
- These Acts are currently discriminatory to same-sex couples - is this a reason to continue the discrimination in the Marriage Act ?

The Modern View:
The Judge examined the statutory interpretation approach that holds the law must move with the times or be "always speaking". He stated that "[t]here can be no doubt that there has been a social change in New Zealand. Same-sex couples are living together. They are committed to one another." While the Judge acknowledged that community attitudes to gay and lesbian couples were more relaxed, he stated that "whether that relaxation would extend to supporting marriage of such couples, is difficult to gauge."

- If people are relaxed about same-sex couples existing, then is it likely that they would be opposed to allowing same-sex relationships to be, as the Judge says, "dignified by marriage"?

The Judge also acknowledged that legal acceptance of same-sex couples had taken place with the Homosexual Law Reform Act 1986 and that the new Domestic Violence Act 1995 explicitly allows protection for members of same-sex couples. He explained that the Homosexual Law Reform meant that:"[i]t is no longer an offence for males of 16 years or over to commit **indecencies** with each other which are consensual". (Emphasis added.)

- Does the Judge's wording betray a particular attitude to homosexual sex?
- Does the explicit reference to same-sex couples in the Domestic Violence Act 1995 show Parliament's intention on this issue of marriage?

Another change which the Judge discussed, is that where one partner has undergone sexual re-assignment surgery the couple can still get married providing there is 'visually' a man and a woman.

- If the definition of marriage can extend to include two people who are physically of the same sex at birth, one of whom changes sex later, is it a "strained" interpretation for marriage to include a lesbian couple?
- Is limiting the definition of marriage to heterosexual couples analogous to limiting the definition of person to males only? (See article above.)

The Judge did not see the relevance of a US case which had overturned a law prohibiting marriage between members of different races. He pointed out that it was still concerned with a union between a man and woman.

- When will laws that prohibit lesbian and gay marriages be recognised as being just as draconian as laws that prevented mixed racial marriages?

The Judge held that while community attitudes had changed, Parliament itself had not amended the Act to specifically allow same-sex marriages.

Bill of Rights Act

The plaintiffs' argument also relied on the New Zealand Bill of Rights Act 1990 (BORA) to argue that if same-sex couples could not marry this was discriminatory.

The New Zealand Bill of Rights Act 1990

Section 6 of BORA states that "wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

One of the rights in the Act is the right to freedom from discrimination on any of the grounds in the Human Rights Act 1993.

One of those prohibited grounds of discrimination is sexual orientation.

However, all the rights in the Bill of Rights Act are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."(section 5)

Note - the Human Rights Act could not be used in this situation as discrimination is only prohibited in certain specified areas (eg employment.)

The Judge outlined the approach of the Court of Appeal in *Noort*, that where an enactment could be interpreted to be consistent with BORA, this meaning is to be preferred to any other meaning unless it is a strained interpretation. However, the Judge held that in this case to interpret "marriage" as including same-sex relationships would be too strained an interpretation.

He argued that the Second Schedule to the Marriage Act "makes it quite clear that marriage between a man and certain of his female relations is prohibited and marriage between a woman and certain of her male relations is also prohibited." He claimed this gender specificity showed that Parliament intended marriage to be between members of opposite sexes. This was supported by the Births Deaths and Marriages Registration Act 1995 which states that a marriage celebrant must ensure the form is signed by the husband and the wife.

- Is the Judge right that the interpretation contended for by the plaintiffs' is too strained? Cooke P in *Noort* does state that the effect of BORA is "not to be approached as if it did no more than preserve the *status quo*" "...it requires development of the law where necessary."

The Judge argued that even if he was incorrect in claiming the Act could not be interpreted to be consistent with the rights in BORA, then Parliament was still entitled under section 5 to impose reasonable limitations on these rights. "Limiting marriage [to exclude same sex couples] **cannot be said to be unreasonable from a traditional or indeed modern point of view."** (Emphasis added.)

- How objective is the Judge's determination of what is or is not reasonable?
- Does this type of interpretation of section 5 mean that BORA has no real teeth?
- If it is necessary to wait for Parliament to change the Marriage Act 1955 when is this likely to happen?

WOMEN IN THE LEGAL PROFESSION

"The New Zealand legal profession has unique problems of discrimination. No other profession or industry organises its business or career opportunities in the way that lawyers do."

A report on Equal Employment Opportunities (EEO) in the Auckland legal profession written by Gill Gatfield has recently been published. The Auckland District Law Society (ADLS) commissioned the report from Equity Works Ltd. The need for EEO policies was clearly shown by the 1992 survey "Women in the Legal Profession". Recent statistics show that little has changed. (The following statistics are taken from the EEO Report unless otherwise indicated.)

- In 1992, 84% of ADLS female lawyers and 55% of male lawyers thought that sex discrimination at work was a problem.
- In June 1996, only 45 of the 431 partners in the country's ten biggest law firms were women. (Sunday Star Times 16/6/96)
- In January 1996, 12% of New Zealand judges were women. The majority of these were District Court judges.

In 1993 ADLS launched a purpose designed EEO implementation manual, yet according to the report, the effectiveness of this kit is questionable.

- Only 7% of legal worksites within the Auckland region have the manual.
- Less than 50% of the lawyers surveyed knew of a sexual harassment procedure in their workplace.
- Over 66% of employees either did not know of an EEO policy in their workplace or knew definitely that there was no policy.

The report concludes that "to implement EEO in the ADLS legal profession, the current ad hoc approach needs to be replaced with a systematic plan of action." Such a plan would aim to reward EEO leaders and provide assistance to EEO laggers.

The report makes a range of recommendations including: that ADLS should now undertake a 5 year review of EEO implementation and that it should compile and publish an annual EEO report detailing complaints, changes required and future EEO goals.

The ADLS council have resolved to support the implementation of EEO policies. The council agrees with the report's recommendations in principle, and are presently working in-house with Gill Gatfield in order to establish the best ways to implement the recommendations.

A recent Australian book on Women in the Legal Profession provides an in-depth discussion of the topic through interviews and theoretical analysis. Maragret Thornton, the author, points out that "[d]espite the fact that women solicitors now constitute an undeniable presence in law firms, the picture for senior women in the large firms is not particularly rosy." She refers to the high rate of attrition and dissatisfaction amongst women. She goes on to quote Deborah Holmes who identifies four basic categories of problems: "overwork; hierarchy, bureaucracy and

specialisation; moral conflicts; and the difficulty of combining work with childrearing. In addition, women lawyers suffer uniquely from the constraints of practising within a profession which was created by men for men."

Margaret Thornton "Dissonance and Distrust: Women in the Legal Profession" 1996 OUP Melbourne.

REPORT ON THE RAPE CONFERENCE: PART TWO

In a recent rape trial, Justice Morris said that if every man throughout history had stopped the first time a woman said no, the world would be a much less exciting place to live in. Justice Morris' comment highlights the need for judicial education in relation to sexual violation offences. However, insensitive and misinformed Judges are only part of the problem for women who bring rape complaints. At the Rape conference in March many issues were raised about the capacity of the adversarial system to deal effectively with sexual violation offences.

In the last issue of the Feminist Law Bulletin we summarised some of these issues concentrating on the reporting of rape offences, police procedures, and the substantive law. In this issue we finish this report, focusing on the trial process and sentencing.

The Trial Process:

While a number of speakers outlined the legal changes which had improved the court process and helped to mitigate the effects of the adversarial nature of the system, the majority of speakers agreed that the process was still highly problematic. Indeed Paul Dacre (defence counsel) and Justice Ellis both acknowledged that if a member of their family was raped, they would be unlikely to advise her to bring a rape charge because of the traumatic nature of the process.

Many speakers questioned the capacity of the adversarial system to protect the victim while providing a fair trial for the accused. One of the difficulties with the process as it stands is that the victim has no control and is merely a prosecution witness.The fact there have been some improvements in the process is little consolation for the victim (Young) and can lead to them having high expectations which the system fails to meet. It was pointed out that the necessity for the Crown to prove its case beyond a reasonable doubt can conflict with protecting the status and integrity of the woman complainant (Sykes).

Chief Justice Eichelbaum stated that the rate of convictions for sexual violation appeared to have remained at around the same level (57%) irrespective of the improvements to the law. While the conviction rate for non-sexual offences had also remained stable (63%), there was a gap between the two rates of about 6%, showing the difficulties in securing convictions for sexual violation. This area is particularly difficult as there are often no witnesses other than the victim, there may be no medical evidence even where there has been vaginal and/or anal rape, and there are many myths and misconceptions about rape amongst all those involved in the system as well as the media and the general public.

Changes to the Trial Process:

Chief Justice Eichelbaum outlined some of the legal changes which have impacted on the trial process. Some progress has been made in the laws relating to evidence, for example, the restrictions on questions concerning the complainant's sexual relations with people other than the accused.

The abolition of the requirement for evidence corroborating that of the complainant was another evidential improvement, but a number of speakers questioned whether Judges were still referring to this implicitly in their summing up. Indeed, one Judge did state that he still suggested to the jury that they look for corroborating evidence.

Further possible changes to the trial process that were suggested included:

- allowing new technology to be used for the complainants' evidence (eg video links);
- that questions on the previous sexual history of the complainant with the accused should not be allowed;

- that insensitive and irrelevant cross-examination questions should be curtailed;
- that witnesses, including the complainant, should be able to refer to their statements rather than having to rely on their memories at the trial, and
- that expert evidence should be used to refute stereotypical myths about how a person who has been raped 'should' act.
- that more legal consultation and advice to the victim should be given before and during the trial. This should be carried out sensitively, giving the victim a chance to have realistic expectations of the process.

Delay:
A range of speakers agreed that while there had been improvements in the length of time taken by the trial process, there were still too many delays. An accused may also want to delay the process. Possible effects of delays were outlined by Professor Warren Young as including: an increased likelihood of the defendant claiming undue delay in breach of the Bill of Rights Act; that witnesses' memories may not be as clear; and that the complainants may pull out due to the on-going stresses involved.
A number of speakers suggested options for reducing delays. Kenneth Stone (Crown Prosecutor) suggested abolishing preliminary hearings altogether unless there was a specific request. Young also advocated clearer rules on criminal discovery. Annette Sykes (Ngatipikiao lawyer) suggested that all players in the system should give personal commitments to attempt to reduce delays. If a defence lawyer was not able to prioritise a particular sexual violation case, s/he should pass it on to another lawyer.

Alternatives to the Adversarial System
Sykes believed that the justice system should give up its exclusive power in the area and that alternatives like Marae justice should be acknowledged. Other alternatives were also raised including restorative justice and traditional Pacific Islands models. The need for public education was also emphasised, so that public attitudes about sexual autonomy can be transformed.

Sentencing:
A number of speakers addressed the problems with increasing sentences for rape. These included that:
- there is little evidence that longer sentences act as a deterrent to potential rapists as this assumes that these men are acting on rational calculations (Young, Billington); and
- longer sentences may reduce the number of guilty pleas which means that the victim is put through the trauma of a defended hearing.

Toni Allwood (Rape Crisis) agreed with other speakers that longer sentences were not going to solve the problem of sexual violation.
Elisabeth MacDonald discussed her current sentencing project which highlighted the way that Judges make assumptions about exacerbating or mitigating factors in rape. For example, rape by a stranger was seen as 'worse' than rape by an acquaintance. As Allwood pointed out, the result of a rape by strangers may be a distrust of strangers, yet if it is a woman's partner who has raped her who is there left for her to trust? Allwood called for Judges not to attempt to rank which types of rape were worse using their own pre-conceptions. She emphasised the need for victims to be listened to when examining the psychological and emotional effects of rapes.

Conclusion
The work of "Doctors Against Sexual Abuse Care", the organising Committee and the speakers in making the conference a success will hopefully provide the impetus for real changes in this area. The police have already outlined some areas which they intend to work on, including raising public awareness of rape issues and developing national guidelines on the investigation of rape complaints. The recent comment of Justice Morris suggests that some members of the judiciary still have a long way to go. We hope that all those with a stake in the process will continue to seek out ways to reduce the number of rapes and to establish systems and processes which can effectively

deal with rape complaints while protecting and respecting the mana of survivors of sexual violation crimes.

"I have never seen the rape myth borne out in the courtroom. The myth is, of course, that a complaint is easy to make but difficult to defend. It is, quite simply, all too difficult for women to bring their complaints to Court. But in the face of reality these fables persist in popular culture and all too often in the courtroom."
Judge RL Young, Chief District Court Judge "Justice is Better Than Chivalry" Paper given at NZ Law Conference April 1996.

-It is encouraging to see this kind of awareness from members of the judiciary, but it is unfortunate that the wording suggests that there is only one rape myth.

AMENDMENT TO THE GUARDIANSHIP ACT 1968

In addition to the Domestic Violence Act 1995 (See Feminist Law Bulletin Issue 2 1996) another part of the legislative reforms of the domestic violence area is the Guardianship Amendment Act 1995.

The amendment prevents the court from granting access or custody to a parent who has used violence against the child, another child of the family or the other party, unless the court is satisfied that the child will be safe.

In deciding whether the child will be safe, the court considers, for example, the frequency and nature of the violence, the likelihood of recurrence, the physical or emotional harm caused to the child and the wishes of the child and the other party.

If the court decides that the child will be safe, it must still consider whether there should be any conditions placed on the order.

- Violence is defined as physical or sexual abuse. Should the protections offered by the Amendment Act also apply in the case of psychological abuse? The Domestic Violence Act 1995 does define domestic violence as including psychological abuse; should the two Acts use the same definition?
- Is there a difficulty with this legislation that it may lead to respondents being more likely to defend applications for protection orders under the Domestic Violence Act 1995 in situations where there are no 'real' grounds to do so? Are there any solutions to this problem which still achieve the protection necessary for both the child and the woman?

Information Pack on Domestic Violence Act 1995

An information pack on the Act is available from the Department for Courts. The pack contains a booklet on the Act and background information written by a variety of bodies including: Age Concern, Victim Support, Ministry of Women's Affairs, Te Puni Kõkiri and the National Collective of Independent Women's Refuges Inc.

"Police estimate that only 10% of domestic violence is ever reported. If this is the case then the 9,959 cases reported in the year to June 1995 represent about 100,000 incidents of domestic violence."
Department for Courts - "New Act at the Forefront of Social Legislation"

"Until now the law relating to domestic violence has been little help to... older people....[W]hile there are cases of battered wives who are in their 70's, most abuse against older people is by adult children who may or may not live with their parent."
Age Concern - "Age is no Barrier to Domestic Violence"

The information pack can be obtained from the Department for Courts, PO Box 2750, Wellington. Phone (04)-4948800

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