FEMINIST LAW BULLETIN

NEW ZEALAND AOTEAROA
PO Box 5071 Lambton Quay Wellington

ISSUE SIX 1996
ISSN No: 1172-7977

Editors:
In 1996 Claire Baylis and Kate Tokeley are editing and writing the Feminist Law Bulletin. The Bulletin is produced with the financial assistance of the New Zealand Law Foundation.
The views expressed are those of the editors and not necessarily those of the producers and publishers of the Feminist Law Bulletin.

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.

Contents:

PROSTITUTION: THE NEED FOR LAW REFORM

The current laws relating to the sex industry have been described by Maurice Williamson when he was Associate Minister for Health as "a law written by men, for men."

Problems with the Current Law:
The most significant problems with the current laws are:
- It is an offence for a sex worker to offer sex for money in a public place, even though it is not an offence to offer to pay or to pay for sex. This absurd distinction means that it is the sex worker (usually a woman) who will be convicted of soliciting, while the male client has committed no offence;
- Several NZ cases have held that locked massage rooms are "public places" thus convicting the sex workers of soliciting;
- It is illegal to live off the proceeds of prostitution - which means that in theory sex workers cannot feed their children as the children would then be committing an offence, even though these proceeds are supposedly taxable income;
- If a sex worker has been convicted of soliciting or of drug-related offences, she cannot work in a massage parlour for ten years. This pushes these sex workers on to the streets or into private homes which is much more dangerous for them;
- The Massage Parlours Act 1978 pretends that parlours have nothing to do with sex;

- It is an offence to keep or to manage a brothel (that is, a place used for the purposes of prostitution);
- All massage parlours must be licensed and the person holding the licence can have it cancelled if either they are convicted of prostitution or one of the workers performs an act of prostitution which was facilitated by the licensee not adequately supervising the business;
- As the police can enter a parlour at any time, licensees of parlours must hide condoms and safe sex literature as these can be used as evidence;
- Massage parlour proprietors have to keep a register of all sex workers currently working for them;
- There is a high degree of selective enforcement of the law in this area at present. This is unfair to those who are convicted and shows the absurdities of the present law;
- While there is no legislation regulating Escort Agencies, newspapers will not carry their advertisements unless they are certified by the police.

The Need for Reform:

Reform of the laws relating to the sex industry concerns us all. First, this is an area where the effect of the law is to discriminate against women and to place them in dangerous situations. Secondly, a wide range of women perform sex work; and finally men of all ages and from all walks of life use the sex industry. The Prostitutes Collective points out that the law as it currently stands makes it more difficult for safe sex practices to be implemented by the sex worker. This is a serious public health issue.

Whether you believe that the sex industry is a product of the currently, male dominated society or whether you believe that sex work is as equally valuable as any other work women choose to do, it is time that the laws in New Zealand were reformed. The recent deaths in Auckland of three sex workers, show the need for safer work environments and less social stigma in the industry.

The Prostitutes Collective:

The Prostitutes Collective is a National organisation which is funded by the Regional Health Authorities. Due to the criminal offences surrounding prostitution, the Collective does not have official members because of the need for anonymity.

The Collective runs drop in centres which allow sex workers to discuss any problems and meet others in the industry. It also provides condoms and information about safer sex practices.

Another function of the Prostitutes Collective is to advice Government on policy issues which relate to the sex industry.

It is important that a rational informed approach is taken to any review of the current laws, and that the experiences and perspectives of sex workers are heard. The Prostitutes' Collective should be a significant voice in any reform proposals.

Various Australian States have begun to consider law reform in this area. New South Wales and the Australian Capital Territory have recently de-criminalised prostitution.

Options for Reform:

Sex workers should not be victimised by the law, but nor should reform reduce their choices about how they work. Any reform must ensure that sex workers do not become exploited by pimps or brothel owners and are not subject to draconian regulation of their lives.

- **De-criminalisation:** The basic proposal for de-criminalisation involves the removal of the central offences surrounding prostitution, for example soliciting, brothel keeping, and probably living off the earnings of prostitution. This increases the freedom of choice as to where

prostitutes work and allows for better communication in relation to safer sex practices. However, it would not leave the industry totally unregulated as there would still be criminal offences of, for example, disorderly behaviour, offensive behaviour and obstructing a public way. Even with de-criminalisation there would need to be laws protecting sex workers from exploitation by pimps etc.

- **Legalisation:** There are various forms the legalisation of prostitution can take. Some forms of legalisation involve a licensing scheme which could entail fingerprinting, registration and mandatory health checks. There can also be zoning schemes which restrict the locations of the sex industry. Other forms of legalisation involve regulating brothel ownership, escort agencies and single operators but maintaining laws against child prostitution, street soliciting and pimping. There have also been suggestions that there should be legal sanctions against clients and sex workers who fail to take reasonable health precautions.

GUIDELINES FOR GENDER ANALYSIS

The Ministry of Women's Affairs have recently published a booklet entitled *The Full Picture.* It provides government agencies and other organisations with a framework for carrying out gender analysis when developing and implementing policies. This analysis is essential for government departments to achieve the goals identified in the government's *Outcomes for Women* strategy. These goals include: equity, no discrimination, and a society which values the contribution of women.

The purpose of the publication is to explain the importance of considering the differences in men's and women's lives when developing and implementing policies. It stresses the need to recognise at all stages of policy development that those differences will lead to different experiences, needs, issues and priorities. It is also points out that not all women's experiences are the same and that Maori women, for example, have different life experiences, needs, issues and priorities from non-Maori women.

The Ministry do not have the resources to apply gender analysis to all policy developments in every government department. This booklet aims to assist government departments and private organisations to incorporate gender analysis into their policy-making process. The Ministry of Women's affairs is available for additional assistance.

The publication gives much needed guidelines for gender analysis at all stages of the policy process and includes helpful summary charts. Throughout the booklet pertinent examples are given as to how gender analysis can affect decision-making and there is also a detailed case study concerning a retirement income policy.

Questions:

- For reasons of practicality, the Ministry points out that the cost of implementing policies which better meet women's needs must also be taken into account. Is there a problem that decision-makers who have less commitment to gender analysis may too often use this to opt out?
- The gender analysis framework provided by the booklet is largely based on looking at the present reality of women's lives and adapting policies to this. The Ministry does point out that underlying causes also need to be addressed, but is there still a danger that by focusing on women's present reality we limit their choices to make major changes to that reality? (For example, to make it easier for women to work and look after children is a

good thing but it may never change the reality that it in most cases it is women who take the daily responsibility for child rearing.)

- If decision-makers have limited understanding of gender issues is a framework for applying gender analysis enough? Will they be able to recognise underlying causes?

JUDGE FOR YOURSELF:
G v G 1996 Unreported High Court Auckland, M535/95.

In the last issue of the Feminist Law Bulletin we discussed the case of *G v G* where exemplary damages of $85,000 were awarded to a survivor of domestic abuse. In that issue we raised the implications of women claiming exemplary damages for domestic violence in a civil case, rather than laying a criminal complaint. While this is in many ways an exciting case for women, there are some issues raised by the case which may be problematic.
The Judge found that the defendant had subjected the plaintiff to domestic violence of a physical, psychological and sexual kind, as an attempt to control her behaviour so as *"to force her to engage in sexual relations when she was disinclined and to encourage her to lose weight."* At times he had threatened to kill her and had seriously assaulted her.
The Judge awarded the damages because she said "violence against women must be prohibited and punished." In addition to referring to the Domestic Violence Act 1995, the Judge also drew on the International Declaration on the Elimination of Violence Against Women. This is important as it is only now that domestic violence is being recognised as an issue of international human rights.
The Judge agreed with a previous court that exemplary damages are focused on punishing the defendant and should not be developed to include compensation even if there are inadequacies in the current ACC scheme.

The Level of Damages:
As a result, in determining the level of damages the focus is on the defendant's behaviour, not the consequences to the plaintiff that flow from that behaviour.
The Judge decided that in examining this behaviour she should not start from a position "which permits no tolerance at all for such" violence, but rather from "a level of domestic violence which could be described as minor." Her reason for this was that in some relationships there would *"be instances of physical violence which although immature and to be deplored are no more than pushing and shoving."* She held that where this physical violence escalated to the sort *"that the criminal law might be invoked to prohibit and punish, then the violence could be characterised as outrageous and meriting condemnation and punishment."*

- Do you agree with this tolerance of "minor" domestic violence?
- The Judge seems to characterise "an underlying theme of violence" such as "kicks, slaps and punches" as minor domestic violence. Should these also warrant punishment by exemplary damages?

The Judge said that one relevant factor in determining the level of damages was whether the plaintiff provoked the defendant: *"only if the plaintiff's behaviour has in some way triggered or aggravated the situation between the parties will it be necessary to consider whether any award of damages should be modified a result. In no sense should any such findings be interpreted partly or wholly to excuse a physical response to tensions in a marriage relationship."*

- If the plaintiff's behaviour cannot partly or wholly excuse the defendant's violence, should her behaviour affect the level of damages?

In this case the defendant has assets of $180,000, earns over $50,000 and is likely to earn a salary of over $200,000 within three years. It was therefore possible for him to pay out a large sum in exemplary damages.

- A woman who is sexually abused by a man who has little money does not have the option of successfully claiming high amounts of exemplary damages. Is this a problem? Is it reason enough not to encourage other women to take these claims? Does this mean that a more wealthy batterer is less likely to face criminal charges?
- Pursuing a civil action is expensive. Is it fair that survivors of sexual abuse who are on a low income or a benefit may be faced with making a criminal complaint as their only real option? Should civil legal aid cover this type of claim? Are contingency fees another way of dealing with this problem?

Contingency Fees:
Usually a lawyer charges a client an hourly rate for their legal services. A contingency fee system operates by allowing lawyers to be paid on the basis of the outcome of the legal action. If the outcome of the case is successful, then the client will be charged a fee based on a percentage of the damages awarded. If the case is lost, the lawyer forgoes payment altogether.
In New Zealand the Law Society contemplates the possibility of lawyers charging a contingency fee, but states that it is unclear whether a modern Court would consider them valid. Some lawyers do use contingency fees here, but they are not as commonly used as in the US.

The Judge contrasted the amount of exemplary damages awarded for assault and sexual abuse cases with the amount of damages awarded for defamation. Defamation is where a person publishes something which damages the reputation of another. In the exemplary damages cases, the highest award in New Zealand until this case was $35,000 whereas for defamation, awards have been made for $400,000. *"While such awards will often be made by juries against commercial defendants enabling higher awards of damages to be made, there can be little other justification for such a contrast between the large amounts ordered for harm to a reputation and the more modest amounts for the serious physical, emotional and sometimes psychiatric consequences of violence."*

- While the comparison is interesting, is it fair to compare exemplary damages awards in sexual abuse cases to the damages awarded in defamation cases which can include both compensation damages and exemplary damages?

THE EVIDENCE OF VULNERABLE WITNESSES

In October the Law Commission published a discussion paper on the evidence of children and other vulnerable witnesses.
Generally witnesses give their evidence orally. They go into the witness box unaccompanied and usually give evidence by responding to questions from the lawyers. Vulnerable witnesses may find it difficult to give evidence in this way, which may limit the amount of useful evidence they can give the court.
In recent years modifications to the ordinary rules of witness evidence have been made for children and mentally handicapped complainants in sexual cases. Some limited protections have also been introduced for adult complainants in sexual cases (eg they do not have to appear in person at the preliminary hearing).

The discussion paper considers options for further reform in this area including:

- Allowing more vulnerable witnesses, (including defendants in criminal cases) to give evidence in alternative ways.

Vulnerable witnesses could include people with communication disabilities, the elderly, cultural minorities and victims of traumatic offences such as sexual offences. This would allow evidence in these cases to be given by closed circuit television or videotape etc;

- Allowing all vulnerable witnesses to have a support person with them when they give their evidence;
- Prohibiting personal cross examination by the defendant of any vulnerable witness. At present a defendant is only prohibited from personally cross-examining children or mentally handicapped complainants in sexual cases.

JUDGE FOR YOURSELF:
R* v *Edwards Unreported Judgment, see The Times, August 1996, 23-26.

Although the situation of a defendant cross-examining a complainant is uncommon, because the defendant is usually represented by a lawyer, it can happen in New Zealand and can be highly problematic.
In the United Kingdom recently a woman who had been held for sixteen hours and raped was cross-examined by the defendant, Edwards, for six days. Each day during the cross examination Edwards wore the same clothes as he had been wearing when he raped her and asked her detailed questions about the rape. After Edwards had been convicted, the woman called for a change in the law, to prohibit cross-examination by the defendant in these cases.

If you would like a copy of the Vulnerable Witness paper or if you agree with any of these reforms or have any comments write to the Law Commission, PO Box 2590 DX 23534, Wellington.

JUDGE'S COMMENTS ON EVIDENCE IN RAPE TRIALS

The Recent Complaint Rule:
In New Zealand there is a judge-made rule of evidence known as the "recent complaint rule." This rule allows the prosecution in cases involving sexual offending to introduce as evidence the fact that the complainant told someone else about the offence, but only if the complainant did this at the first reasonable opportunity after the offence. If there was a delay this evidence may be inadmissible.
Criticisms of the Rule:
In a recent rape case which was on appeal, Justice Thomas criticised this rule stating that it is based on "medieval thinking" and is "not so much dysfunctional as unconscionable."
He argued that the rule is based on the assumption that it is natural for a rape victim to make a complaint immediately and that if she does not, it is more likely her complaint is false. He said that this "has been one of the more enduring and pernicious of the myths which has surrounded rape." While in fact, there were many forces which might cause a complainant to hesitate in telling anyone, especially where the sexual violation occurs within a family.
Reform:
Justice Thomas believed that this "anomalous, unfair and anachronistic" rule should be reformed by the Courts. "All that is required to change it is the judicial will." However, Chief Justice Eichelbaum and Justice Heron who were also sitting on the case, stated in their Judgment that while they agreed the rule needed revising, they believed the discussion would "benefit more from a balanced objective analysis than polemics." The President of the NZ Bar Association has suggested that judges already have a discretion to admit this evidence and that the Law Commission, not the Court of Appeal should consider the issue.

WOMEN'S ACCESS TO LEGAL INFORMATION

The Law Commission has recently published a discussion paper entitled "Women's Access to Legal Information" as part of their Women's Access to Justice Project. The Commission's consultation with New Zealand women has revealed that access to legal information is "at best problematic and at worst non-existent." Women questioned during the consultation process made comments such as:

"I don't know anyone who knows about the law or where to go"

"....many Maori, especially our women, are scared of the law and perceive it as a very negative subject."

"The court procedure was very hard because at a time when you are feeling most vulnerable you have to be very pushy to get what's needed."

The discussion paper concludes that while there is a substantial amount of legal information available, the problem seems to be that women are not gaining access to that information. Some of the reasons for this include:

- a lack of knowledge about where to go for legal information;
- the view that the legal system is an alien culture which uses legal jargon;
- a lack of helpful legal information available in non-English languages;
- the difficulties and costs for women who live in rural areas of accessing the information;
- the limited resources available to the organisations which provide legal information to the public;
- that legal information is usually presented in written form. This makes it inaccessible to visually impaired woman and less appropriate for woman from an oral culture;
- that no *one* body is legally responsible for actually producing or monitoring the provision of legal information.

Questions:

- Should television and radio be used more to increase the accessibility of legal information?
- Is it inevitable that the legal system alienates some people and does it require the use of legal jargon?
- Should there be one organisation legally responsible for producing and monitoring legal information?

If you would like a copy of the Women's Access to Legal Information paper or if you would like to make comments on this issue, write to Freepost 56452 Law Commission, PO Box 2590 Wellington, or contact Brigit Laidler phone 0800 88 3453.

Where to go for legal information
Some of the organisations which provide legal information are:
Department for Courts
Community Law Centres
Citizens Advice Bureaux
Women's Refuge centres
Te Puni Kokiri (Ministry of Maori Development)
Ministry of Women's Affairs

SEXUAL HARASSMENT

Sexual harassment is a very common problem for women, especially in the workplace. Although sexual harassment is prohibited by both the Employment Contracts Act 1991 (ECA) and the Human Rights Act 1993 (HRA), most sexual harassment is not reported.

What is Sexual Harassment?
There are two general types of sexual harassment (s62 HRA, s29 ECA):

• **Quid pro quo:** this is where a harasser asks a person for some form of sexual contact or activity with either an overt or implied promise of preferential treatment, or an overt or implied threat of detrimental treatment, if they do not comply. For example, your boss keeps

interrupting your discussions about your promotion application, saying that you look sexy and if you are nice to him, he can be nice to you.

- **Hostile Environment:** this is where a harasser uses:
  - written or oral language of a sexual nature; or
  - visual material of a sexual nature; or
  - physical behaviour of a sexual nature;

which is unwelcome or offensive to that person, and is either repeated or is so significant as to be detrimental to that person.

Even if you have not told the harasser that their behaviour is unwelcome or offensive it is still sexual harassment.

In What Areas Does the Law Protect Us From Sexual Harassment?

The ECA covers sexual harassment in the workplace. The HRA covers this and also harassment which occurs in unions, education, in accessing goods and services, and in accessing places, vehicles, land and accommodation etc.

If you are harassed in the course of your employment, you can choose whether to make a complaint to the Human Rights Commission or to use the ECA.

If you are harassed by a customer or client in the course of your work, your employer has the responsibility under the HRA, if satisfied that the complaint is genuine, to take whatever steps are practicable to prevent any repetition of the behaviour. (s36 ECA).

The Complainant's Sexual Experience or Reputation is not relevant to any complaint of sexual harassment under either the ECA (s35) or the HRA (s62(4)).

Some Strategies for Dealing with Sexual Harassment:

- Try to do something - women should not have to put up with unwanted sexual attention;
- It is a good idea to get a support person. It is most useful if this is someone at your work who you trust and who understands sexual harassment. If you tell one person and they are unhelpful try another. Perhaps sound people out first on their understanding of sexual harassment;
- Only tell other people if you know you can trust them;
- If possible, deal with the harassment as soon as you can;
- Ask other women if they have had any problems with the harasser. If they have, try to act as a group;
- If you feel safe, tell the harasser that you do not like their behaviour or if you do not feel able to do this alone take a support person, or if possible a senior person who is understanding;
- Phone the Human Rights Commission or your Union for advice;
- Some workplaces have procedures set up to deal with sexual harassment specifically. Find out if your workplace has one. In any case, your employment contract will set out a procedure for dealing with a personal grievance;
- If you take the complaint further you may go to mediation. If so, the harasser does not have to be present. It is a good idea to have someone else in the mediation with you, and if you are close to reaching a settlement, consider giving yourself a bit of time to think about it before agreeing. Make sure the settlement is written down.

Men's Perceptions of Sexual Harassment:

It is disappointing that many of the same myths that surround rape also exist when a woman is sexually harassed.

Bruce Feldthusen suggests that trying to make men understand and acknowledge the problems facing women is like peeling an onion *"There are many layers. One cries. One wonders whether the core holds anything different from the outer layers."*

Bruce Feldthusen "The Gender Wars: Where the Boys Are." (1990) 4 Canadian Journal of Women and the Law 66.

The following 'layers' are based on Feldthusen's articles and can be illustrated

by the types of myths which men (and some women) believe about sexual harassment:

Layer 1: Ignoring problems experienced by women: "It doesn't happen here." "She was making it up to get back at him." "That's not harassment." "We don't need education about sexual harassment."

Layer 2: Denying the significance of gender: "I know of a woman who sexually harassed one of her male colleagues." "If you think that's harassment, you should hear the way the women carry on."

Layer 3: Viewing the problem as individual rather than systemic: "She's over sensitive." "It's only Mr so and so, that's just the way *he* is." "There's only been a couple of complaints."

Layer 4: Denying women's definitions of problems: "I'd like it if someone did that to me." "It's not harassment I was just being nice." "I didn't mean it." "It wasn't sexual."

Layer 5: Trivialising the problems: "She liked it." "It was only a joke." "I was just being friendly." "I don't know why she gets so upset." "There was no need for her to resign." "It's not discrimination." "Sexual harassment is not relevant to his promotion."

Layer 6: Blaming women: "She asked for it." "She came on to me." "She didn't tell him not to do it did she?"

Layer 7: Re-defining problems in their own terms: "If it is harassment she should just get on with it and take him to Court."

Layer 8: Defensiveness: "*I've* never harassed anyone." "It was him, not me, Love." "It's not everyone, most men aren't like that."

The Facts:

- In 1996 the Human Rights Commission fielded 758 enquiries about sexual harassment (which was 7.8% of the total enquiries made to the Commission). 55 out of 287 complaints made in 1996 concerned sexual harassment. About 95% of these cases will be resolved during the investigation process or mediation.
- Complaints of sexual harassment sometimes include rape and forced oral sex.
- Many women deal with sexual harassment by ignoring the problem, trying to avoid the harasser or resigning.
- Many harassers do not just harass one woman, they do it over and over again.
- Sexual harassment can have devastating effects on women both emotionally, and in terms of their personal relationships and careers. Eg: when the harasser is a woman's boss, even if she leaves the job she may be asked why she is not using him as a referee.

RELEVANT BOOKS

Below is some information about three books which are relevant to women and the law in New Zealand. The information is not a review of the books, but rather an overview of the content and style.

A False Economy
by Anne Else

(Tandem Press, Auckland, 1996)

In *False Economy* Anne Else analyses the New Zealand economy and argues that women's unpaid work is the foundation which supports the formal economy. She discusses women's move into the work force and the growing conflict between paid and unpaid work. Else argues that the official economy operates on the false assumption that unpaid work is not part of the economy: "When [unpaid work] is thought about at all, it is seen as simply a natural resource, like air or water. Whatever else happens, it will keep on flowing, mainly from women and mainly 'for love'."

Else argue that the economy must change, that workplaces need to become more family friendly and that jobs should be more flexible. Job sharing and working by computer from home or suburban workplaces are options which she suggests should be explored.
The book is easy to read and combines research data, interesting analysis and the personal stories of ten women and two men.

Without Prejudice: Women in the Law
by Gill Gatfield
(Brookers, Wellington 1996)
Without Prejudice is about women's experience working in law from 1896 when women first gained the right to practice law in New Zealand. As well as providing a historical perspective, Gatfield identifies problems which still exist for women working in the law. Some of the barriers to women's success which she discusses are the old boy's network, sexual harassment, that women are forced to choose between their career and their family, and the myth that if men and women are competing on the same terms this produces equality. (See article on equality FLB Issue Two, 1996.)
The final section of the book addresses how the position of women in law can be improved. She argues that judges must become fully representative, women must make full use of the legal rights we have and that all government policies should be analysed in terms of their gender impact.
Gatfield's book is an interesting and thought-provoking read. It provides a large amount of useful statistical information about the status of women in the law.

Three Masquerades
by Marilyn Waring
(Auckland University Press, 1996)
Marilyn Waring's new book *Three Masquerades* contains three essays about pretences which maintain women's oppression in society. In the first essay Waring "breaks the silence" of the abuse of women Parliamentarians in New Zealand and abroad. The abuse is "emotional battery," the pressure to "play the game' and the resulting "dualities of personality, the attempts to isolate, the punishments for not playing the game."
In the second essay goat shit leads us into a discussion of women's unpaid work. A wide range of examples, cases and statistics complement the analysis of the ways in which the economic system excludes women's unpaid work.
The final essay addresses the invisibility of women's rights in International Human Rights law. The essay also discusses the work of WAM (See FLB Issue 3, 1996).
While in some ways more academic than the other two books, *"Three Masquerades"* is a very humorous and personal book with real insights into the position of women in society. It is a passionate book with useful information and powerful conclusions: "I situate women in their own reality. We are universally half of humankind. We are guaranteed equal rights to participate in political and civil life. Nowhere do we experience this equality in reality."

STOP PRESS STOP PRESS STOP PRESS
***Baehr* v *Miike* (*Director of the Dept of Health*)**
A Hawaiian Court has ruled that same-sex marriage in Hawaii is legal. Judge Chang held that the state government had failed to prove a "compelling state interest" in prohibiting same-sex marriage. Although this is good news for lesbians and gays who want to be able to marry, the decision was only made by a lower court and is likely to be appealed. The Feminist Law Bulletin will keep you informed of any new developments.

Everyone involved in the Feminist Law Bulletin wishes you a Merry Christmas and a very Happy New Year.