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FEMINIST LAW BULLETIN

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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 exploration and discussion of some of these issues;*
- *Enables a general readership to gain an introduction to feminist analysis of the law.*

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Legal Aid Changes – Issues for Women

The Legal Services Board announced controversial changes to civil and criminal legal aid payments and remuneration instructions in June. The changes come into effect on 1 August 1998 and apply to new grants. The main changes are:

- Payment based on the type of proceedings (how serious, which court or tribunal is involved) and the lawyer's experience;
- New definitions of "experience" to spread experience levels over at least nine rather than five years;
- New preparation times to apparently reflect the complexity of the case;
- An increased number of "fee for the job" maximum fees;
- Lower rates for some proceedings but higher rates for more complex proceedings;
- The need for "real" special circumstances before guideline maximums can be changed;

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- "Encouragement" to consider alternatives to defended hearings.

The Legal Services Board has said the changes are driven by a number of factors including:

- Increases in expenditure on civil legal aid, especially since the Domestic Violence Act was passed;
- The need to reduce waste and improve national consistency in legal aid grants and payments;
- A desire to ensure "proper value for money";
- The need to ensure the legal aid system is "expeditious and efficient".

However there are concerns that the Board has acted with undue haste and without adequate consultation. For example, while the Domestic Violence Act is said to be one factor for the changes, the Report of the New Zealand Judiciary shows that applications for protection orders are around 550 per month. This is down from over 700 per month in January 1997, indicating a decline in the numbers over time. This sort of decrease is to be expected in any situation where there is new legislation that is still "bedding in." This also suggests it may have been preferable to wait longer before making changes in this area.

In addition, the Domestic Violence Act provides that those who qualify for legal aid are not liable for the $50 contribution or for legal aid charges. However, the exemption is very narrow and only applies to the application for a protection order, not to associated applications or orders under either that Act or any other. This narrow application was strongly argued for by the Board itself in its submission on the Domestic Violence Bill in 1995.

There has been no clear explanation of what are the cost drivers as a result of the Domestic Violence Act. For example, are the costs being driven by applications simpliciter, or because of an increase in the number of defended applications? Alternatively, are the costs being driven by the development of new case law on the Act, something that should settle over time?

In addition, women or their lawyers have sometimes written to this Bulletin seeking financial assistance in Family Court cases. These women have been concerned they will not be able to get final protection orders because their legally aided lawyer has not been able to have extensions to a grant of aid where the respondent has hired a non-legally aided lawyer. Alternatively, proceedings may have been unnecessarily protracted by the actions of the non-legally aided lawyer, which increases the legal aid cost.

Submissions to the Women's Access to Justice Project also show difficulties with lawyers costs in Family Court matters. Reducing the rate of payment to lawyers for women on low incomes may do little, if anything, to ensure these women have adequate access to justice – it is not clear if it will make things worse. It is not possible to tell, therefore, if the changes amount to discrimination in the provision of services under the Human Rights Act.

District law societies are considering a legal challenge to the Board's decision. Although this article has focused on issues relating to the implications of the Domestic Violence Act there are many other areas where legal aid rates have been affected. The precise relative effect of the Domestic Violence Act and these other factors (such as differing rates across district legal services committees) is not clear.

However ultimately the Board is merely a service provider for Government. Accordingly, the Board's changes raise other much more significant issues including:

- The need for increased funding of legal services to reflect changes in demand and the priority this spending should be given by Government;
- The need for improved analysis of the extent of domestic violence in New Zealand to assist in estimates of funding and other resources required;
- The possible impact of the increases in applications under the Domestic Violence Act outside the legal profession, for example for community groups (such as demand for Women's Refuge services, counselling and education programmes and so on);
- The detrimental effects or impacts on community groups (such as demands placed on law centres for free legal advice) from the Board's proposed changes and how these community groups are to be expected to manage these within their own small budgets;
- Whether the enforced reduction in legal representation means it is time to seriously consider whether other alternatives, such as greater use of lay representatives, legally trained advocates who are not lawyers, or public defender offices;
- Whether the process for setting budgets for Government Departments and Crown Owned entities (such as the Legal Services Board) needs changing to ensure increased funding;

More information on the changes can be found in a special edition of the Board's newsletter, *Sounding Board*, Issue 24, June 1998 and in *Legal Aid, Counting the Costs*, Legal Services Board June 1998.

Judge For Yourself

Court of Appeal Policy Less Than Exemplary

Earlier this year the Court of Appeal decided that exemplary damages couldn't be justified "where the criminal law has intervened or is likely to intervene" in civil proceedings in cases of sexual assault (see CA 86/96, 12 February 1998).

The decision of the four judges (Richardson P, Gault, Henry and Keith JJ) involved a set of four different cases (which the Court heard together) in which each plaintiff was seeking exemplary damages for rape, sexual assaults or similar crimes against them. The Court examined the issues of principle the cases as a whole raised, balancing the rights of a victim and of an offender, and considered these in the context of functions of the criminal law process. The Court also held that:

> *"there is no justification for using the Accident Compensation legislation as a reason for reconsidering and altering the role of exemplary damages, whether in the field of tort in general or in that part of it concerning personal injury in particular."*

The Court said the purpose of exemplary damages was punishment and "through the instrumentation of the Court, they reflect society's condemnation of the particular conduct." Such damages were thought to have had a close relationship to criminal law both in history and purpose.

The Court said that there was no bar to exemplary damages by law (notwithstanding section 26(2) of the Bill of Rights Act or section 10(4) of the Crimes Act – which say a person can not liable to be punished twice for same offence.)

However, the Court decided to make policy decisions in this area. The Judges considered the role of the victim in the criminal justice system. Since there were opportunities for a victim impact statement and powers to order payment of a fine or reparation to a victim, the Court said "there is no statutory constraint which prevents account being taken of any outrageous or contumelious conduct on the part of the offender." In other words, the Court said there were already ways that outrage at the crimes could be expressed by a victim and taken account of in the criminal process, so another claim exemplary damages (which punish the outrageous behaviour) could not be justifed.

The law in Canada, the United Kingdom, Australia and the United States and various law reform agency reports was considered. However, no clear line of authority emerged, although some of these jurisdictions did allow exemplary damages for rape and other sexual assaults where there had been a criminal conviction.

Henry J, in delivering the judgment of the Court, said:

> *"In the end, what is now required is a policy decision, not previously required of this Court, which properly reflects today's society and its expectation of the justice system in this area of meeting both public and private interests.... While accepting that the issue is not free from difficulty, and that the opposing arguments each have their respective points of strength, we are satisfied that when due regard is had to all relevant factors, particularly to the purpose of exemplary damages, the present ability of the criminal law to meet the need for punishment of conduct deserving punishment by the Court on behalf of society, and the recognition in the criminal process of the interests of the victim, retention of exemplary damages for criminal conduct which has resulted in conviction can no longer be justified."*

In fact, the Court went further and said there was no right to exemplary damages at all in three types of cases:

(a) where there has been an acquittal;

(b) where a prosecution has been commenced but not finished;

(c) where there has been a conviction.

Exemplary damages claims can only be brought where there has been no criminal prosecution. However, even in these cases the claims are subject to the rules for all other cases on the time for filing proceedings. Such claims are therefore "time barred" (can't be taken) if it has been more than six years since the cause of action (the assaults) occurred. In the case of a child or young person, the six years starts to be counted from the time they reach 16 years.

Judge for Yourself:

- Police Guidelines on preparation of victim impact statements (VIS) and decided cases make it clear the VIS must be restricted to the impact of the crime on the victim, and cannot include recommendations as to penalty or be retributive. Is it right to say that there are already ways for victims to express outrage and seek retribution?
- To what extent, really, are VIS prepared and taken into account at sentencing? A study in 1993 showed the use of VIS was variable, with over half of respondents considering they were not used often enough (Victim's Needs – An Issues Paper, Department of Justice, 1993). Does this mean the Court's reliance on the use of a VIS was wrong?
- The Court of Appeal did not say how often a victim is actually awarded part payment of a fine or reparation. Can it really be said that these options are adequate if they are rarely, if ever, used?

- There is no general time bar for prosecuting criminal cases. Why, then should there a time bar in civil proceedings, especially for conduct the Court of Appeal has indicated raises exactly the same issues?
- In 1997 the National Collective of Rape Crisis New Zealand released statistics, which showed that the average length of time between an act of sexual assault and contacting Rape Crisis is **13 and a half years** (if there is no contact in the first year). In addition, 80% of sexual assaults resulting in conviction involved victims under 17, almost half of these were against persons under 12, and over 80% involved young women and girls. About a third of all criminal convictions in 1997 related to criminal offending committed before 1990 – **more than six years prior to conviction.**
- In light of these statistics, should any time bar be applied to sexual assault cases in civil claims? Does such an application amount to gender bias? Whose interests do the application of the rule of limitations serve?
- In *Quilter*, the lesbian marriage case (see Issue 2, FLB 1998), the Court of Appeal (including some of the same judges in this case) refused to make a policy decision in relation to the right of lesbians and gays to marry, saying this is "the function of Parliament". In this case the Courts said extension of the law was a policy decision which the Court could be required to make in a way that "properly reflects today's society." Are these two approaches consistent and, if not, what are the reasons for this inconsistency on "policy" issues?
- Is it time to renew energy to have the ACC scheme restored to cover lump sum payments for sexual abuse?

New Zealand Reports on CEDAW

The New Zealand Government presented the combined third and fourth reports on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in June. The report covered the period between January 1994 and February 1998, noting "the progress that New Zealand women have made since our previous presentation." The report covers 16 articles of the Convention including anti-discrimination measures, acceleration of equality between men and women, sex roles and stereotyping, political and public life, education, health, employment, economic and social life, rural women, marriage and family life, and equality before the law.

The Government report (prepared by the Minister of Women's Affairs and the Associate Minister of Women's Affairs) states that there has been progress for women in the areas of legislative reform, policy development, health programmes, education and information, resulting in improved education, health and employment outcomes for women. The Report lists "significant landmarks" as including:

- introduction of the Domestic Violence Act;
- funding of a time use survey;
- national breast screening programme;
- free doctor's visits for children under six years;
- appointment of a Health and Disability Commissioner.

Women's non-governmental organisations were consulted in preparation of the

Government report. However, for the first time a shadow report was prepared and presented to the United Nations by non-governmental organisations. The report was presented to the CEDAW Committee in New York in late June and painted a very different picture from the Government one.

Three women, Mereana Pitman, Tania Rei, and Toni Allwood were chosen to represent the NGO groups. The NGO report challenged the Government report which did not mention the plight of Maori women or women on low incomes nor the issues of housing and foodbanks. The NGO report highlighted persistent obstacles to women's equality, gaps and inconsistencies in the Government report, and areas of concern.

The CEDAW Committee responded to the NGO report by asking Ministers 96 questions, many of which flowed directly from the NGO report.

The Committee's questions were aimed at the impact of Government restructuring on women and one Committee member (Dr Schilling) commented:

> *"It seems to me that the New Zealand Government has undertaken (sic) restructuring without a perspective of how it would impact on women. It doesn't even want to confront the reality that it may have, and I think it does have, impacted more negatively on women than on men and this amounts to discrimination"*

At the time of going to print, the New Zealand Government had just finished presenting its report. The next step is for the CEDAW Committee to issue preliminary comments in response. These are due by the middle of July.

The Committee's response can be seen at its website:

www.un.org\womenwatch\daw\cedaw\19thsess.htm

International Conference on Maori and Criminal Justice - He Whaipaanga Hou: Ten Years On

Ten years after Moana Jackson's report, He Whaipaanga Hou, an international conference on Maori and Criminal Justice is to be held. The Conference will run from 15 to 18 July at Te Herenga Waka Marae and the Law School of Victoria University of Wellington.

The Conference aims to review and discuss

- the relationship of Maori and other Indigenous Peoples with existing criminal justice systems;
- operational or proposed models for dealing with offending;
- strategies for preventing offending;
- the conflicts and compatibilities between Maori and other Indigenous systems and those of different States;
- the Treaty of Waitangi and criminal justice.

There are four conference themes including criminal justice systems in context, criminal offending, criminal justice and the Maori experience, restoring instead of just punishing, and the crime of colonisation and the colonisation of crime.

For more information contact Nga Kaiwhakamarama I Nga Ture, Maori Legal Service, PO Box 1268, Te Whanga-nui-a-Tara, Phone (04) 473 1249, Fax (04) 473 1781.

Legislation Update

Paid Parental Leave Bill

This Private Member's Bill, sponsored by Alliance MP Laila Harre, would amend the Parental Leave and Employment Protection Act 1987 to provide that the first 12 weeks of maternity leave are paid. Leave from work because of the birth or adoption of a child is a legitimate reason for being temporarily absent from the workforce and the Bill would ensure it was treated in the same way as other forms of paid leave (such as sick leave, bereavement leave or public and statutory holidays). The Bill therefore proposes payment for leave related to earnings, rather than payment at a flat rate or by way of social security benefit.

The Bill provides for an employee to be paid at 80% of his or her earnings out of a central fund (the Parental Leave Fund), with a proviso that no employee is to be paid more than the average male weekly wage. The Fund will consist of payments collected from all employers at a prescribed rate based on the total payroll of the employer. Every employer will have the right to claim from this fund for any paid maternity or paternity leave taken by employees under the Act.

The Bill has had its first reading and now awaits its second reading where Members of Parliament vote on whether to send the Bill to a Select Committee for public submissions. The second reading could happen in August (although a date has not been set)

SheMore Magazine is currently running a promotion of the Bill (including a postcard campaign). For more information contact the Paid Parental Leave Campaign, PO Box 24-005, Wellington, or Laila Harre (Parliament Buildings, Wellington (postage to Parliament is free)).

Community Magistrates Bill

This Bill, which amended the District Courts Act and the Summary Proceedings Act has now been passed. There will be Community Magistrates appointed by the Governor-General to hear a range of summary offences. A Community Magistrate is to be appointed on the basis of their "personal qualities, experience, and skills in performing the functions of a Community Magistrate" (section 11A District Courts Act 1947).

The Magistrate cannot be a lawyer, Police or traffic officer, a Justice, Courts, or Corrections departmental employee, or an officer of the High or District Court. A Chief Community Magistrate is to be appointed, and that person must have been a lawyer for at least five years.

The purpose of this new system is to allow Community Magistrates to hear "low level" summary offences. Some examples are preliminary hearings in indictable offences, defended and non-defended minor traffic cases, sentencing for offences of up to three months' imprisonment, and enforcement of fines.

The New Zealand Law Society, and other groups, opposed the Bill on the basis there are few "straightforward" criminal cases, and that this move would lower the quality of justice administered. In addition to hearing summary cases, Magistrates will have power to grant or refuse bail or impose conditions on bail. The law of bail is currently under review by the Ministry of Justice, which issued a report earlier this year for discussion.

The Community Magistrates Bill is another step in the trend to move cases away from the Courts in order to "better target" Judge's time. Similar reasoning was used to justify the Summary Proceedings Amendment Bill

(No.3) 1997 which gave extended powers to Court Registrars in non-disputed or administrative matters, a new power to attached fine repayment orders to benefits, and empowered Registrars in pre-trial matters, such as the taking of pleas.

This trend may pose risks for women both in the way in which the alternative systems are structured, and whether these will meet the needs of women. For example, a great deal of effort has been made to change and enhance judicial appointments processes, but it is not clear whether this new process will apply to appointment of Community Magistrates. In addition, women's treatment in the criminal justice system has been characterised by judicial gender bias (such as viewing women's offending as based on mental illness or punishing it more severely). However, it is not clear whether Community Magistrates will receive gender bias training.

The 1997 Report of the New Zealand Judiciary

This Report, released in June, contains some useful information on how the judiciary is structured in New Zealand and the work of judges over the last year. The Chief Justice, Sir Thomas Eichelbaum, comments on the need to maintain public confidence in the judiciary and the need for the judiciary to keep its traditions, philosophies and processes appropriate to current conditions. The Chief Justice also notes that the quality of the judiciary is dependent on a range of factors, primarily quality of personnel, the standards of the legal profession, the willingness for lawyers to become judges, and adequate resourcing by the Government.

Issues for the future included a code of judicial conduct, performance evaluation of judges by their peers and the Bar, and a Courts Charter to inform the public of what they could expect from the judicial system. A proposal to allow part-time judges "in the context of the diversity of Judges" is also being considered following mostly supportive submissions on a discussion paper.

The Report notes the Gender Equity Conference held in May 1997, which was "part of an ongoing strategy of continuing education for Judges." An evaluation of the conference "shows that it increased understanding of gender issues for a large percentage of Judges and that most would change their approach to some degree as a result." The materials gathered at the conference "will be developed for use in annual orientation programmes for new Judges."

However, the future work of the Judicial Working Group on Gender Equity is unclear.

Judicial Appointments Process – The Minister of Justice Responds

In Issue 5, 1997 of the Bulletin we included an article about the new judicial appointments process which asked some questions about how the new process would work and the criteria for appointment. In May this year the Bulletin received a letter from the Minister of Justice written in response to that article. Unfortunately, space does not allow the full text of the Minister's letter to be reproduced.

However, the Minister did comment that he is "actively encouraging applicants from under-represented groups" by taking specific measures, such as contacting women's lawyers groups and asking them to encourage members to apply. The Minister also commented that the appointment process:

> *"is more open; there is now a proper appointment panel; the composition of the selection panel is public as are the people consulted on appointments. There is also a process for people to "express interest" in being a judge ... a development which I believe will help spread the net more widely and make appointment more accessible to groups currently under-represented."*

The criteria for appointment are:

- Professional qualifications and experience;
- Personal honesty and integrity;
- Impartiality and good judgment;
- Good health and the ability to make a contribution in a job which makes considerable demands on the time and energy of the judge;
- Communication skills;
- Management and leadership skills;
- Knowledge of the community;
- Knowledge of cultural and gender issues;
- Acceptance of public scrutiny.

The Minister intends "to monitor the appointments process over the next year" although no actual review is planned. Needless to say, many legal and community groups are also monitoring the new processs (see also the article belown 1996 and 1997 changes).

Draft Bills on Judicial Appointments

In addition to the changes to the appointments process, Labour Shadow Attorney-General Lianne Dalziel, is seeking support for draft legislation on the appointment of judges and the process of setting standards for the judiciary. The two Bills are in the Parliamentary ballot, but have not been selected for introduction (selection is by random ballot).

The Judicial Commission Bill would establish a commission of nine members to receive and consider complaints about judges, establish a mediation process, make reports and recommendations to the Attorney-General on complaints, approve standards of conduct and continuing education for judges, and approve programmes for judicial performance evaluation.

Human Rights Update

Cabinet has decided that the only area needing exemption from the Human Rights Act is social welfare. Social welfare requires an exemption:

- in reviews of eligibility and recovery of overpayments (in relation to young people who had moved back home and wer no longer eligible for incoem support); and

- to meet the needs of different "target groups" when deciding on income support (such as allowing Maori children and young people to be cared for by Iwi Social Services.

Cabinet has also agree to let the Defence Force set reasonable minimum fitness level,

standards for personnel based on readiness for active service. An amendment to the Human Rights Act will also be made to calrify that the Act does not prevent different treatment based on individual need for and ability to benefit from health and disability services.

Legislation to amend the Human Rights Act is planned for later this year will end the Consistency 2000 Project and state that that Act does not override other legislation.

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Women Judges – So What are the Numbers?

Based on figures in the 1997 Report of the New Zealand Judiciary, in 1997:

- there are 164 Judges in New Zealand (including Court of Appeal, High Court, District Court, Employment Court, and Maori Land Court);
- 22 were women (13.4% of judges).

In comparison, in 1996:

- there were 159 Judges in New Zealand;
- 19 were women (11.9% of judges).

This represents a 1.5% increase in the number of women judges in New Zealand in the last year. Ethnicity data on the judges was not included in that report.

At this rate it will take 24 years to achieve an equal number of men and women who are judges

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