

# 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 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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### Prostitution Reform Bill

This small (11 clause) but important reform aims to decriminalise prostitution by repealing laws like the Crimes Act (which makes the procurement of sex for money with a woman illegal as is living off the earning of the prostitution of another person), the Massage Parlours Act (which licenses massage parlour operators but does not mention sex occurring in them) and the Summary Offences Act (which makes offering sex for money in a public place illegal, but not paying or offering to pay for sex). The repeals are aimed at ending this legal double standard where those providing sexual services for money are acting outside of the law while consumers of these services commit no offence.

The bill is the result of sustained lobbying by the New Zealand Prostitute's Collective (NZPC). Catherine Healy, spokesperson for the NZPC, says that the law reform proposal should go a long way toward improving the working conditions of sex workers, although she expects some opposition to the changes. While it's time for the legal double standard to go, and laudable to provide employment protection to workers in the sex industry, state regulation and control could also have its downside.

The bill decriminalises, rather than legalises prostitution. That is, penalties will be removed as opposed to the creation of 'legal'

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prostitution in defined circumstances (which inevitably leads to 'illegal' sexual services, creating a two-tier system, as has happened in the Australian state of Victoria).

The definition of prostitution changes. The current law defines prostitution as offering one's body for purposes amounting to common lewdness for payment (Massage Parlours Act). Under the new law, "prostitution" means commercial sexual services. These in turn are defined as 'sexual services provided for monetary or material reward' (clause 4). The new turn of phrase certainly sounds more polite, but the essence of the sex-for-money transaction remains, albeit with increased state protection.

The bill aims to protect sex workers, noting that current legislation renders sex workers vulnerable to violence and exploitation. Protection is offered by bringing sex work within occupational health and safety laws and the Employment Relations Act. Certainly better working conditions and freedom from exploitation for sex workers are laudable aims. Anecdotal evidence of poor working conditions, arbitrary withholding of payments and coercive elements abound.

However, tapping in to the raft of employment law protections must be done with the wellbeing of sex workers in mind. We wouldn't want to see the kind of outcomes recently experienced in Holland, where health and safety rules running to 15 pages of regulations, drawn up by well meaning officials, required absurdities such as the provision of separate changing rooms for men and women in brothels and adequate amounts of daylight in rooms.

There appears to be little analysis of the unique features, such as the need for privacy, of sex industry workers. The success of the change is heavily reliant on how it is implemented, and whether agencies such as the police and OSH will apply the new employment protections in a way that promotes the needs of sex workers. For example, a rigorous enforcement of health

and safety regulations could send many operators out of business, a situation that would decrease work options. In Australia, prostitute's collectives have drafted their ideal health and safety policy. In New Zealand, the NZPC is ideally placed to be consulted on how the changes could be implemented.

There's an attempt to deal with the issue of under-age sex workers. The provisions outlaw child prostitution and remove any criminal liability from the young sex worker. At the moment, underage sex workers are in danger of getting a criminal record if caught. Child prostitution becomes an offence with a penalty of up to 7 years imprisonment. Charges can be laid against any person involved in the transaction, apart from the child. A child is defined as a person under 18 years and it is no defence that the child consented or that the person charged reasonably believed that the child was 18 or over.

This creates a 'strict liability' offence, which means that if the young person is under 18 years old, the "client" would be prosecuted whether or not he knew or believed the young person to be 18 years old. This contradicts the approach in the Crimes Amendment Bill which is also being considered by Parliament. That bill makes it an offence to engage in sexual activity with a prostitute under the age of 18 but creates a defence of reasonable belief that the person is 18 years or older. The discrepancy begs the question of who is really being protected by laws that give clients a defence of reasonable belief, where the young person is in fact under age. A strict liability offence puts the onus on clients and brothel operators to take responsibility for finding out how old the young person actually is. A defence of reasonable belief, is not as strong a protection for young people.

Brothel operators will be required to promote safer sex practices, as a further way of offering protection to both workers and clients of the sex industry. Currently there is a reluctance to promote safer sex products like condoms in case they are used as evidence in

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## Review of Child Guardianship, Custody, and Access Laws

court cases. Section 147 of the Crimes Act, the section that outlaws running a brothel, states as much. Improving health protection for sex workers and increasing safer sex practices is a key driver in the reforms. The NZPC found that the law worked against their efforts to encourage the use of condoms. Operators would not accept safer sex literature on the grounds that if the police found such material on the premises the business could be shut down.

Coercing anyone into providing commercial sexual services also becomes an offence under the proposal, as does forcing someone to hand over money earned by providing these services. Coercion of sex workers is a huge and often hidden problem in the sex industry, with the existing illegality making it impossible for sex workers to challenge improper practices, compounding their vulnerable position.

The commentary to the bill notes that the interests of the public are already protected by existing provisions that prohibit street harassment, money laundering of ill-gotten gains and acts of violence. Public interests are, of course, also met in the promotion of safer sex practices. Overseas experience, however, shows that the interests of the wider community can sometimes conflict with the interests of the sex industry. For example, in NSW local authorities have refused to allow brothels (as commercial enterprises) to operate in residential areas. The broad definition of brothel in the Prostitution Reform Bill could lead to similar problems here. These could be overcome by providing a statutory distinction between one or two person businesses and larger concerns.

Although the bill received the support of 87 MPs to proceed to select committee, the initiative needs support. It's been an arduous journey attempting to overturn what must be one of the most glaring and longstanding gender inequities in the law. The Prostitution Reform Bill has gone to the Justice and Electoral Select Committee. Submissions close 26 February 2001.

Submissions on this review closed on 30 November (see FLB Issue 5 2000). Three hundred and twenty submissions were received and they are being considered by the Ministry of Justice. Overseas trends in this area raise serious concerns. In the UK and Australia, exchanging 'custody' and 'access' for 'residence' and 'contact' hasn't done a great deal to shift fairly embedded concepts of children as parental possessions. Not only have the fights over children remained the same, in the UK concerns have been raised over the strong presumption that all contact is good for the child and that shared parenting works best. These assumptions arose in Muriel Newman's Shared Parenting Bill, which we perhaps haven't seen the last of yet. (The latest from Dr Newman's office is the Family Courts (Openness of Proceedings) Amendment Bill, which would make sittings of the Family Court open to the public and to the media, except where justice, morality or the privacy of persons require otherwise.)

In Australia, where shared parenting plans are now common, similar problems have surfaced. Again opposing any parental contact is increasingly difficult, particularly so on the grounds of domestic violence. This is extremely worrying, given recent research findings that spousal violence is the norm rather than the exception for divorcing couples. (The study also found that women experiencing this kind of violence frequently received less than 40% of the matrimonial property; Sheehan, G. and Smyth, B. 'Spousal Violence and Post-separation Financial Outcomes' (2000) 14 AFLJ 102).

In part the law changes in these countries, along with many Canadian and American states, were driven by concerns raised by father's rights groups. These groups have rapidly gained mainstream acceptance, borrowing feminist notions of equity and

equality, and promulgating their views widely and quickly via the Internet.

The kind of problems currently experienced in these jurisdictions sound a note of warning about some of the negative implications of changes being proposed in New Zealand.

Proposals for change in light of the review are likely to be considered early next year.

## Review of Adoption Laws

Submissions in response to the Law Commission's Report on adoption (*Adoption and Its Alternatives: A Different Approach and a New Framework*, Report 65, September 2000) close on 31 January 2001 and should be sent to the Government Administration select committee.

Although the initial discussion paper raised the question of whether the adoption concept was viable in the 21<sup>st</sup> century, it remains a central focus of the subsequent report. The Law Commission argues that the legal effect of adoption should be reformulated. Instead of creating a legal fiction that the child was born to the adoptive parents, adoption should become a transparent process for the permanent transfer of parental rights and responsibilities (para 102).

Guiding principles place the interests of the adopted person at the centre of the adoption process and reassert the paramountcy principle. Preference is given to placement within the extended birth family where possible. This is seen as having congruence with whangai practices.

There is a proposal that two birth certificates be drawn up – one with the names of all birth and adoptive parties and the other containing only the name of the child and adoptive parents. The latter would form part of the public record and be accessible to all. The full

version could be accessed only by the parties named on the certificate. The idea is to promote open adoption practices while offering privacy to the parties involved. Accessing official records, which extend to CYF files, hospital records and so on, becomes a right of all parties in the adoption 'circle' (formerly the adoption 'triangle').

Other recommendations include extending the period in which a mother may not consent to the adoption of her baby from 10 to 28 days after the birth and for state funded counselling sessions for all parties, to a maximum of ten sessions. For birth parents, this counselling is to be provided both prior to, and after, the birth.

The 'new framework' aspect of the report proposes the Care of Children Act, covering the responsibilities and rights of parenthood, with adoption situated within this broad framework as one option for the permanent placement of a child. This Act would incorporate aspects of the Guardianship Act and the Children, Young Persons and Their Families Act, signalling a potential overlap between adoption policy and the review of guardianship, custody and access laws.

## Property (Relationships) Bill

The Property (Relationships) Bill inches closer to becoming law. Updating the earlier FLB commentary on the bill (Issue 3 2000), several new and important changes have emerged. After receiving 79 petitions concerning the protection of the 'special status' of marriage and receiving 1330 submissions opposed to the one-size-fits-all approach of the law reform proposal, the select committee has recommended the re-insertion of 'husband' and 'wife' alongside 'partner' and 'marriage' alongside 'relationship'. While this may seem counter-intuitive to plain English advocates, it is

worth noting that the tests for the division of property remain the same for all those coming within the ambit of the law, be they married, de facto or same-sex couples. The clumsy name change is a minor issue alongside these more important shifts.

Guiding principles are added. These are that;

- men and women have equal status
- all forms of relationship contributions are treated as equal
- just division of property requires having regard to economic advantages and disadvantages arising from the relationship
- cheap, simple and speedy dispute resolution should also guide the application of the Act.

A de facto relationship is now defined as “a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)-

- (a) who are both aged 18 years or older; and
- (b) who live together as a couple; and
- (c) who are not married to one another”

In determining whether a relationship exists, all of the circumstances of the relationship are to be considered including its duration, common residence, sexual relationship, a shared life, and the care and support of children. In contrast to social security law, there is no requirement to show financial interdependence.

The commencement date for the law is pushed out to 1 February 2002 (and 1 August 2001 for the contracting out provisions). The criteria that the parties wished to achieve certainty as to the status, ownership and division of property for consideration is added to the contracting out provisions. Empowering provisions allow for regulations containing a model form of contract as a way to cut costs, although parties must still obtain independent legal advice.

## Same-Sex Couples and the Law

The Ministry of Justice discussion paper *Same-Sex Couples and the Law* was published in October. It provides a summary of responses that predictably oppose legal recognition of same-sex relationships. A total of 3546 submissions were received, with 76% of respondents opposing legal recognition. This discussion paper was commissioned by the former Minister of Justice Tony Ryall, with the effect of putting the De Facto Relationships (Property) Bill on hold. Phil Goff had asked for the bill to be amended to include same-sex couples. The change of government has meant that same-sex couples have been included in the Property (Relationships) Bill, which is perhaps a reason for the fairly muted response to the publication of the report.

The report shows there is a kaleidoscope of views, even among lesbians and gays, about the need for and types of law changes needed. Copies of the report are available from the Ministry of Justice, PO Box 180, Wellington.

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## Human Rights

The Ministry of Justice has released its discussion paper on the *Re-evaluation of the Human Rights Protections in New Zealand*. Submissions close on 20 December. One of the recommendations in the paper is to merge the offices of the Race Relations Conciliator, the Human Rights Commission and perhaps the Commissioner for Children's office. The new 'national human rights institution' could be given the task of facilitating discussion, research and education on the relationship between the Treaty of Waitangi and both national and international human rights laws. The report also suggests that an institutional redesign could become a precursor to a revision of the NZ Bill of Rights Act to ensure its primacy over other legislation.

## Prohibition of Child Pornography

Submissions closed on 15 November for the Films, Videos and Publications Classification (Prohibition of Child Pornography) Amendment. The bill brings child pornography within the definition of objectionable material, effectively making child pornography an exception to the freedom of expression provisions of the NZ Bill of Rights Act. This would remove the need for the Classifications Board to demonstrate that its decisions in relation to child pornography impinge as little as possible on the right to freedom of expression.

The Government Administration select committee is due to report to the House by 15 February 2001.

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## Student Loans

The Education and Science select committee is conducting an inquiry into the Student Loans Scheme Act, reporting back to the House in July 2001. This scheme has a gendered impact, with women predicted to take three times as long as men to pay back their loans. The policy is predicated on a market oriented male breadwinner model and takes little account of women's workforce participation patterns. The scheme that was aimed at removing barriers to tertiary education may have replaced that barrier with the formidably high hurdle of a lifetime of student loan debt repayment.

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## Conference

The Research Concentration in Women, Children and the Law at Queensland University of Technology is hosting the Feminist Legal Academic Workshop in Brisbane, February 14 – 16 2001. This

conference brings together feminist lawyers and speakers include Kathleen Sullivan of Stanford Law School, Hilary Charlesworth of ANU and Rosemary Hunter of Griffith University. For information and to register, contact [j.donaldson@qut.edu.au](mailto:j.donaldson@qut.edu.au).

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## From the Net

<http://www.athens.net/~rblum/fivers.html>

FIVERS stands for Feminists against Intimate Violence through Empowerment, Energizing, Education, Exchange, Resources, Resistance, Research and Support. This site provides access to an e-mail discussion list that focuses on all aspects of intimate abuse and examines the phenomena from a feminist perspective.

[www.feminist.com](http://www.feminist.com)

A US based website that offers a wide variety of information about social, political, health and economic issues affecting women. The sites also has some good international inks to other feminist sites.

[www.iccwomen.org](http://www.iccwomen.org)

Site of the women's caucus for gender justice at the International Criminal Court which seeks, among other things, to ensure war crimes against women are brought to international justice.

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## A Woman's Place is in the House

For an interesting discussion on why it could be disadvantageous for women if the review of MMP results in a public referendum see Nicholl, Rae (2000) 'The MMP Review: Should Women be Concerned?' *Women's Studies Association Newsletter*, Vol 21, No 2, November, pp 8 – 10.