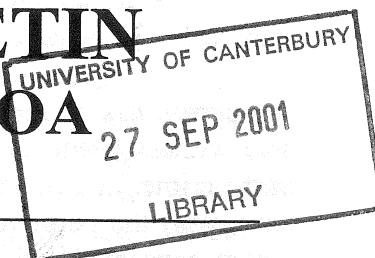


FEMINIST LAW BULLETIN NEW ZEALAND AOTEAROA

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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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Consent, The Law And Drug Assisted Sexual Assault

Jenny Fenton, Vice Chair, NZ Drug Rape Trust, Wellington, reports on a recent visit by a UK Drug Rape Trust representative and the law on rape in New Zealand.

On his recent visit to New Zealand Detective Chief Inspector Peter Sturman of the UK's Drug Rape Trust spoke publicly of the issues surrounding drug assisted sexual assault, particularly society's attitudes towards the consumption of alcohol and drugs, and the erosion of consent within the law.

He said that while victims of non-drug facilitated sexual assault (and a drug also includes alcohol) have vivid memories of the attack and their objection to it (whether it is verbal or non-verbal) victims of a drug facilitated attack do not know whether or not they consented. Consent can be given whilst under the influence of the particular drug without the victim being conscious of anything happening or having any memory of what occurred.

Victims can even consent under the influence of hypnotised drugs to something they would normally find completely abhorrent. There is frequently no sign of a struggle and the victim may realise what has happened to her/him when it is too late to collect forensic evidence of the presence of the drug in blood

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or urine. Sturman says that in 99% of cases there will be a negative toxicology result.

If a person has no memory of consenting, the sole witness becomes the alleged perpetrator of the crime. In a court of law (almost without exception) the perpetrator will assert that the victim consented and to all sorts of acts that she has no chance of negating or even answering to. His perception of her consent is always his best defence.

This is the fundamental problem with the issue of consent. If he believes on reasonable grounds that she consented and she can't remember, then the jury will acquit. The reasonable grounds can be that she was under the influence of drugs and alcohol and he didn't know the effect when he administered them to her (which actually happened in a case in Wellington recently!) This raises the question: was he reckless or negligent? In our current court system the burden of proof remains with the prosecution, therefore, these cases have an almost nil chance of success.

It is interesting to note that when given hypnosedative drugs as part of a medical procedure, patients are required to sign a consent form (informed consent being a vital part of our medical system). It is acknowledged by anesthetists that it is impossible to consent whilst under the influence of these drugs. Our legal system has a long way to catch up with modern medical practice!

To this end Dianne Yates MP has introduced a private member's bill (Drug Rape Amendment to the Crimes Act 1961) that specifies that it is impossible to consent to sexual activity whilst under the influence of these drugs.

As a crime that is essentially between two individuals: victim and perpetrator. A more equitable way of dealing with the inherent inequities of the criminal justice system would be for the complainant to take civil action against the alleged perpetrator. The balance of probabilities ensures that it is a

fairer system and evidence that may be inadmissible in a criminal proceeding is permitted. This ensures that the victim (who is merely a witness in a criminal proceeding) becomes the person behind the action taken. Whether or not legal aid would be granted to try these cases is a moot point.

There will be investigators that don't like this scenario, however, it has to be said that currently (and for forty years) the system has failed victims miserably. The conviction rate for sexual assaults rose considerably from 1981 to 1995, however fell by 26% in the following two years. Any attempt to redress the balance of lack of convictions is seen by some to be a fundamental violation of the rights of the accused. Despite this, there needs to be a stronger message sent to would-be perpetrators who know they will probably get off one way or the other. Does this mean that society accepts that rape is acceptable and pays lip service to the crime legally?

The relatively modern crime of drug assisted sexual assault is merely an escalation of a situation that has long been condoned in society. It is thought by some men to be 'acceptable practice' to loosen women up with a few drinks. These people, according to Sturman, are potential drug rapists.

Judges and potential jurors need to examine what is acceptable or not acceptable in society. The 'she asked for it' attitude has shifted from someone who wears a short skirt and tight top to someone who consumes alcohol/and or drugs and places themselves 'at risk'. We all make individual choices, according to Sturman, whether that is to consume alcohol or drugs, but that choice does not include being a victim of sexual abuse.

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Legislation Update:

Human Rights Amendment Bill

This Bill deals with the expiry of section 151 of the Human Rights Act 1993, which gives the Government an exemption from the application of some parts of the Act until 31 December 2001. The Bill addresses this by introducing a new standard, that of the New Zealand Bill of Rights Act 1990, which will apply to complaints of discrimination in relation to all Government activities except discrimination in employment, complaints concerning racial disharmony and racial and sexual harassment. In these areas the current Human Rights Act standard will continue to apply.

The Bill follows some of the recommendations of the discussion paper, *Re-evaluation of the Human Rights Protections in New Zealand* and submissions made on that paper. The paper also made a number of other recommendations relating to the need for human rights leadership, changes to the structure of the Human Rights Commission and the process for dealing with complaints.

Proposed Changes

New Definition of Discrimination

The Bill will introduce the Bill of Rights Act definition of discrimination. This means that an act or omission is inconsistent with the Bill of Rights if it:

- (a) Limits the right or freedom from discrimination; and
- (b) Is not a justified limitation on that right under section 5 of the Bill of Rights Act.

Section 5 allows only those reasonable limits that are prescribed by law that can be justified in a free and democratic society. This new definition of discrimination will not apply to employment matters - these will continue to be covered by the current law.

Changes to the Human Rights Commission

Proposed changes to the structure and processes of the Human Rights Commission include

- The Human Rights Commission will be combined with the Office of the Race Relations Conciliator
- The name of the new office will remain the Human Rights Commission with a full-time Chief Human Rights Commissioner, a full-time Race Relations Conciliator and up to 5 part-time Commissioners
- The focus of the Commissioners is to be leadership in human rights education and advocacy and strategic leadership within the Commission
- There will be an Office of Human Rights Proceedings within the Commission that will be lead by a Director of Proceedings that will deal with complaints

Changes to the complaints process

The Bill provides that the Commission, through a publicly funded problem-solving dispute resolution process, will deal with all complaints of discrimination. There will be an emphasis on mediation wherever possible or appropriate. If mediation fails or is inappropriate, the complaint may be taken to the Human Rights Review Tribunal for adjudication. This Tribunal will replace the existing Complaints Review Tribunal.

The Bill also proposes that any complaints of discrimination against a Government agency will be able to be made to the Human Rights Commission (except those in relation to employment). At present it is not possible to complain to the Human Rights Commission about a breach of the freedom from discrimination in the Bill of Rights Act. Such complaints have to be taken to the Courts. The Bill proposes that there be a publicly funded, single entry point complaints process to enable Government to be held accountable to the Bill of Rights Act anti-discrimination standard.

Amendments to other Acts

A large number of consequential amendments are made to a diverse range of enactments. These amendments are designed to align these enactments with the Government's human rights policy and, in particular to:

- extend "next of kin" status to include de facto partners of the same or opposite gender;
- replace "disability" as a ground for removal from statutory appointment with "inability to perform the functions of the office"; and
- broaden the range of religious bodies that may apply for an exemption from the requirements for solemnisation of marriage under the Marriage Act 1955 so that more diverse religious groups can solemnise marriage in accordance with their religious beliefs.

Special Issues for Women

Some key concerns for women include:

- Will mediation be required in sexual harassment cases?
- Should the Bill be amended to allow women to bring discrimination complaints on more than one ground? For example, should a Maori woman be able to bring a complaint of race and sex discrimination or must she choose one ground only?
- Will the new Bill of Rights Act definition raise or lower the non-discrimination standard which Government agencies are required to meet? Some think the effect will be a lower standard because many of the inconsistencies with the Human Rights Act identified in Compliance 2001 audits that could not be justified under the Human Rights Act "disadvantage" test, can meet the Bill of Rights "justified limitations" test. Others argue the new test will be higher because the Government will have to justify its actions on a case by case basis and this will make the reasoning behind Government policy more transparent.

The Justice and Electoral Select Committee is considering this Bill. Submissions close on Friday 28 September 2001.

Sentencing and Parole Bill

This Bill has been introduced and referred to a select committee. The main features of the Bill include:

- clear directions to judges that the most serious offences should result in sentences near the maximum possible;
- changes to the sentence of preventive (indefinite) detention to reduce the age of the offender at which this can be imposed (from 21 to 18 years) and make the sentence available in a wider range of cases;
- increase non-parole periods from 10 years to 17 years for murder;
- a single Parole Board to replace the current Parole Board and District Prisons Boards;
- those found guilty of murder may have to wait up to three years between applications for parole (once they are eligible for parole);
- reducing the number of community based sentences;
- extending the sentence of reparation of victims to compensate victims in a greater range of circumstances where they have suffered physical harm, emotional harm or property loss or damage;
- judges will be required to provide reasons if they do not impose reparation where victims have suffered loss or harm;
- allowing restorative justice principles to be taken into account when offenders are sentenced

Issues for Women, Maori and Maori women

The Bill comes against a background of increasing severity of punishments for offenders who commit serious crimes. However, there is absolutely no evidence to suggest that increased penalties or changes in

sentence and parole administration ensure that women and girls are safer.

In addition, this Bill is likely to impact disproportionately on Maori men and women. Maori men comprise approximately 50% of the prison population, but only 7% of the general population (Maori men and women comprise almost 15% of the general population). The Bill is therefore likely to increase the detention periods of Maori and to affect whanau, especially Maori women, much more than Pakeha men and women.

The Bill may also do little to address women's very high levels of fear, especially elderly women. The *Women's Safety Survey* carried out in 1998 showed that many women are extremely fearful of rape and sexual assault as well as burglary and other intrusive forms of crime. In addition, because most women are more likely to be assaulted by someone that they know, the Bill will not address the highest risk areas for women: the home.

The Bill also does not appear to address one of the key concerns of prison reform advocates - funding and providing education and rehabilitation programmes for offenders. The causes of offending, which, if addressed, might be more likely to result in less crime (and therefore less fear of crime), are not dealt with in this Bill.

Submissions on the Bill close on 5 October 2001.

From the Net

www.nz-lawsoc.org.nz/wcg

Website of the New Zealand Law Society's Women's Consultative Group.

<http://www.wvla.org.nz>

Wellington Women Lawyers Association website with information about latest events, committee members, past newsletters and submissions.

<http://www.daisy.co.nz>

This is an interactive women's website based in New Zealand.

<http://women-leadership.massey.ac.nz>

Website with information about women's leadership development in New Zealand.

<http://www.cyf.govt.nz>

Child, Youth and Family Agency's website that covers reporting child abuse and neglect, published reports, news, policies, funding advice and resources.

<http://www.law.uc.edu/Diana/index/htm>

Project Diana is an international archive of human rights legal documents that is run by the Yale Law School's Human Rights Centre. The site is designed for people working on human rights who want research and reference materials.

www.pathway.hrc.co.nz

This website provides resources for teaching human rights as part of the social studies curriculum in schools in New Zealand.

Please let us know if you have other websites that we should know about.

Women at the Crossroads: Intersectional experiences of racism, sexism and other forms of discrimination.

“Intersectionality” has become a new way to describe women and girls’ experiences of human rights and was a major theme of the recent United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance (WCAR) in Durban, South Africa.

First coined by Kimberle Crenshaw (although based on the work of many feminists before her), the term “intersectionality” is used to refer to the concept of looking at the intersection of identities (such as race, gender, status as indigenous, age, sexual orientation, culture, language, ability and so on) to see how human rights violations are experienced by those affected by them. Intersectionality is concerned with an integrated and holistic approach to reveal and address multiple forms of discrimination and to work towards building communities through meaningful community development.

An intersectional and human rights-based approach:

- Recognises that women and girls and men and boys experience race discrimination differently
- Identifies these intersecting factors as their race, age, status as indigenous, migrant, refugees, as well as their ethnicity, gender, religion, culture, ability, language, sexual orientation, and socio-economic class
- Identifies those communities that experience multiple forms of discrimination
- Addresses the way that systems, such as legislation, policies and services, overlap and may combine to perpetuate discrimination
- Seeks to create new ways to hold public and private agencies accountable for

respecting, protecting, promoting and fulfilling human rights.

At the WCAR, these intersections were explored in a number of ways including:

- the holding of a World Court on Racism against Women in which women from many different countries gave evidence from their own personal experiences of how they had been affected by racism and sexism
- workshops on the links between race, sex, and class in analysing those who are poor
- recommendations in the NGO Declaration (later presented to Governments) that the links between different types of discrimination (particularly for indigenous people) be addressed more comprehensively

The development of intersectionality has flowed in part from criticisms of white feminists by women of colour that a white feminist analysis failed to adequately deal with issues of racism. In particular, a labelling of the home as the seat of patriarchal oppression by white feminists was criticised by women of colour who argued that the home, for them, is the place where they pass on their language and culture and is often the only place of refuge from racism.

The result was that women of colour were forced to “choose their oppression” – racism or sexism, when in fact they experienced both (and often other forms of discrimination), at the same time.

Critical race feminism has developed in response to these concerns in an attempt to address the intersections of racism, sexism, and other forms of discrimination.

For more information see:
www.wildforhumanrights.com