

# **THE BILL OF RIGHTS — A WOMAN'S PERSPECTIVE**

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## THE BILL OF RIGHTS - A WOMAN'S PERSPECTIVE

The purpose of this paper is to present a perspective of some women on the proposed Bill of Rights. It does not pretend to speak for all women, as such a diverse group has no one voice, but it does raise questions about the possible or likely outcomes for women should the Bill be passed as it stands.

We propose in Part I of this paper to look at the Government's choice of civil and political rights being those most worthy of enshrining in New Zealand's law. We assess the relevance of these for women.

In Part II we look at those who will be interpreting the Bill and, based on their track record to date, whether women should have confidence in the process of law-making proposed under the Bill. A comparison of the judiciary with the legislature is made.

Part III deals with the lessons learned from another jurisdiction having a long standing constitution. The Constitution of the United States has played a major part in inhibiting the advancement of women in that country. This will be discussed, along with the principles of similar concern to the women of Aotearoa.

Part IV examines the discrimination that some call "positive discrimination" or "affirmative action" and its future under the proposed Bill.

Part V makes comment on each Article, with reference to some implications for women. It includes recommendations necessary for the realistic recognition of the rights of women should the Bill become law.

Part VI concludes.

### PART I

The United Nations Declaration of Human Rights, proclaimed by the General Assembly in 1948 (New Zealand being among the first signatories), dealt with a variety of 'rights'. They included those that are labelled "civil and political" - including the well-worn life, liberty, property, as well

as having our privacy guarded, the right to equality before the law, to be free from torture, slavery or arbitrary arrest, to be entitled to an open and fair public trial, and the freedom of thought, conscience and religion, opinion and expression, to join others in peaceful assembly and association and to take part in the government of the country.

The Declaration went further however, including what are often called "social, cultural and economic rights". This was because the General Assembly recognised that the possession of certain civil and political rights would be of no value without the simultaneous enjoyment of other rights to make those possible. Thus such rights included the right to work and to an adequate standard of living, meaning sufficient food, clothing and shelter along with medical and social services. Mothers, the Declaration stated, should, along with children, be entitled to special care and assistance.

The General Assembly recognised that all the generally recognised rights, regardless of their label, were indivisible and interdependent.<sup>1</sup> The writers take this view also, and are concerned that the New Zealand Bill deals only with civil and political rights - these being "value free".<sup>2</sup>

We contend that the choice of rights covered by the Bill of Rights is in no way value free. The Bill's emphasis on the rights of the individual immediately makes it a child of the Western world. Many cultures, including a number in Aotearoa, value group or community rights more highly than those of the individual within the group.

In the same way, the values espoused by the Bill tend to be principles of major importance to men rather than to women. We have had the same political rights as men for nine decades, and yet that has not significantly brought women to a place of economic or social equality in Aotearoa. 47% of all New Zealand women aged 15 years and over are in the paid

workforce.<sup>3</sup> As at February 1985, for every dollar our male counterparts earned, we earned 75¢<sup>4</sup>. This means a difference on average of approximately \$80.00 per week. This gap between earnings is widening in percentage terms to the disadvantage of women. In August 1984 women were earning 76¢ for every dollar of men's incomes.<sup>5</sup> Women not in the paid workforce are primarily dependent on either another earner or State funded benefits.

Women in the paid workforce are clustered into seven main areas, with five of those traditional occupations (clerical, sales, typing, book keeping, clothing), being under threat from new technology.<sup>6</sup> The consequences for women are obvious. The fundamental right to work will be of crucial importance to women.

The disproportionate representation of women as single parent heads of household (81.5% of all single parent households) means that we are also over-represented amongst the beneficiary group.<sup>7</sup> The societal barriers to single parents (and other women with children) being able to obtain work, combined with our increasing dependence on the State, work together to place women in lower socio-economic status than our male counterparts.

The Bill does not address the major concerns of women in Aotearoa. In 1984, twenty-one Women's Forums were held throughout rural and urban New Zealand. The thousands of women attending came from diverse backgrounds. They listed their priorities. Of seventy concerns, two of the top four most commonly agreed upon issues were employment related matters, e.g. job sharing, flexible working hours and part-time work. Legislation concerning violence towards women rated the second most important issue for New Zealand women.<sup>8</sup> The bulk of the issues raised were matters covered in the International Covenant on Economic, Social and Cultural Rights, ratified by New Zealand simultaneously with the International Covenant on Civil and Political Rights.

The right to work, and to a decent standard of living are of more obvious concern to women than some of the legal process rights contained in the proposed Bill. We also note that the Bill allows no right to privacy (this has generally been classified as a "civil" right), and are greatly concerned that the effects of its exclusion will be of greater significance for women than for men. Women's Forum's priorities echo this concern.

The White Paper's dearth of examples or references to women clearly shows a lack of account being taken of half of the population.

Therefore, whilst there can be no objections in principle to incorporating civil and political rights in supreme law, they are not rights which will generally touch in any real way on the reality of life for most women in Aotearoa. Rights to freedom of expression and thought are meaningless for women, as for all people, unless they are also matched with the right to economic survival, best reflected in a Bill of Rights, in a right to work. Pakeha middle class males, the drafters of the Bill, earn most in the employment category and are employed in greatest numbers of any category. Their right to work and to good food and shelter may not need protection. For many other people, including women, this is not the case. The Bill will not protect or reflect women's or many other citizen's primary concerns. It will be largely irrelevant unless, like the Universal Declaration of Human Rights, it also incorporates basic economic and social rights.

## PART II

Besides having a major concern about the choice of rights which are to be enshrined in a New Zealand Bill of Rights, we are also concerned at the concept of judicial review of legislation, central to the Bill. Under it the judiciary will be elevated to being the final and unchallenged law makers in Aotearoa. The entire judicial system will

consequently be raised in status.

Our legal system is not values free. For some time now in Aotearoa there has been a strong challenge to it from New Zealanders who are not male, pakeha or middle class. We all have said that the legal system does not represent our interests; it is not concerned about them and it does not protect them. When we look at the herstory\* of our relationship with the justice system, we see our great-grandmothers' struggles to be able to study law at all, our grandmothers' impoverishment after court settlements of matrimonial property, our cousins, aunts, mothers and sisters continued non-protection from violence. In any woman's assessment of the effects of the proposed elevation of the judiciary under the Bill of Rights, this herstory cannot be forgotten.

Women's relationship with the justice system is not inspirational. In 1914 in London, Ms Bebb applied to be articled<sup>9</sup> to a solicitor with a view to joining the legal profession. She was declined and turned to the courts. Lord Coke, Master of the Rolls, held that a 'woman' was not a 'person' within the meaning of person in the Solicitors' Act 1843. In other cases in this era, women were not persons and so could not gain University degrees, become doctors, or do a multitude of other things.

In New Zealand we nominally had 'person' status earlier than in the United Kingdom. A Female Law Practitioners Act was passed in 1896, although there was no provision for our appointment as judges. However, until the seventies only a few brave pioneering women practised law in Aotearoa. Most women performed their 100 hour plus working weeks, usually doing part-time, unskilled work for poor pay and full-time domestic work for no pay at all. They were too tired and constrained by unshared domestic responsibility and too lacking in time or money to study law. So the women before

\* Where the term "history" is used in this paper it refers to the sequence of men's events - where women's past lives are recalled, the term "herstory" is used.

us have not studied graduated law, have not studied law, graduated, become barristers and then judges as men have done. Today in 1985, there are no Court of Appeal women judges, of the High Court members, none are women, and only two District Court women judges join their 85 brethren, making us less than two percent of the judiciary.<sup>10</sup> A small percentage of practising barristers and solicitors are women, these being predominantly junior members of the profession.

True, women are now entering law school in equal numbers to men and performing academically considerably better than their male counterparts<sup>11</sup> Despite this equal entry into law school however, there are major obstacles to change in the sex composition of the judiciary in at least the next two decades. First there is sexism in the legal profession. In the 1981 Report of the Auckland District Law Society into women in the profession it was discovered that 40% of women had experienced overt sex discrimination and 80% some form of covert discrimination, i.e. they felt that the fellowship of the profession had not been unreservedly extended to women. The report showed that women lawyers suffered discrimination in employment opportunity, salary, areas of work and admission to partnerships.

A law degree and professional status is not going to guarantee a woman an opportunity for a stimulating and challenging career in the legal profession. She has many more barriers to face than a man to reach a standing of eligibility for appointment to the judiciary. As well as this sexism, she faces a profession largely inflexible in adapting to the requirements of her unique status as bearer of the next generation. One hears little of maternity leave, parental leave or job-sharing amongst solicitors.

A second barrier to any change in the sex composition of the judiciary is the tradition of appointment of judges.<sup>12</sup> They are selected from those who have practised and gained a sound reputation for some years at the bar, usually many more years than the statutory minimum of seven. One of the

areas of discrimination against women referred to in the 1981 report is in the type of work. Women are proportionally less represented in court work - they are channelled elsewhere into conveyancing and family law work. Since judges are traditionally appointed from those practising before the bar, even fewer women are heading in a direction of eligibility for appointment to the bench. Considering this, and women's junior status in the profession, there are very few women able to be appointed to the judiciary in the next two decades at least. This is true particularly of the High Court, and consequently the Court of Appeal, where it can be anticipated the major test cases on the Bill of Rights will be decided.

Not only will the benches, for at least the next twenty years, be predominantly male, but they will be males drawn from a very narrow strata of society. Hodder in a 1974 Law Journal article, summarises his research into judicial appointments in New Zealand in the following way; "The person appointed to be a judge in New Zealand in the years since the Second World War is a middle-aged Caucasian male, and he is a successful and prominent member of the legal profession and, as such, is almost certainly wealthy, a member of the upper middle-class and lives in an urban environment"<sup>13</sup>. Maori women, women of non-European culture, rural women, working-class women, young women, women on benefits, women who have never experienced 'status' - .... The reality of these women's lives and concerns is very far removed from these men.

In fact, the Bill of Rights will mean that, for the foreseeable future, power for ultimate law-making is vested nearly entirely in men. The men will be white middle-class from privileged economic backgrounds. It will be this male perspective which will be determining the "reasonable limits" of Article 3 of the Bill and whether they can be "demonstrably justified in a free and democratic society".

The lack of representation of women on the judiciary has

dire effects on women. We instance one area of our lives where the justice system, because of its totally male perspective has, we submit, completely failed us. It has not to date been able to establish any justice at all for thousands of women and children who have been sexually abused, assaulted, raped and harassed. Male violence is an ever present concern for women, be it in the home, school, at work or on the streets, in public or private places. It is the base line that entirely controls many, many of our lives. It touches all our lives. The following is a quote from a New Zealand Times report of a rape trial held in the Wellington High Court earlier this year. It comments for us on the justice system's inability to respond to violence against women.

"A YOUNG woman stands in the witness box, a lonely figure in the cold cavern of Wellington's High Court. She faces the Crown counsel who's questioning her about an alleged rape.

The woman is the complainant. The accused is a man charged with raping her.

Counsel asks, was she saying the accused had hold of her nose. She doesn't answer.

Did she understand the question, he wants to know. She nods.

So the accused was kneeling astride her and had hold of her nose. What happened then? Silence. What was the state of her clothes? Silence.

The woman hangs her head and hugs her body, protecting herself from the hated memory she can't bring herself to describe again in the harsh reality of this courtroom.

The judge tells her to answer the question. She is silent.

Is it that she doesn't remember or doesn't want to tell the court? She remembers, she says, but she doesn't want to talk about it.

Is she going to answer any more questions? The seconds tick by into a long minute. She shakes her head. Is she going to answer any more questions, she's asked again?

She indicates no.

Counsel decides to call the case off.

"You are free to go", the judge tells the accused. He marches out of the courtroom out the front door of the building. The woman huddles in the witness box, sobbing.

The woman gave evidence at a preliminary hearing in Wairarapa, then again at a High Court trial in Wellington. A mistrial was declared on technical grounds after the jury retired.

This week's case was the third time the woman had been publicly questioned on intimate matters she probably found hard to describe to her own sister." 14

Sexual violence, this most primitive and raw weapon of male power, goes almost unhindered by the system of justice in this country. Rapists and harassers go free; we continue with no protection. The problems are two-fold: first the attitude of some judges. The District Court Judge in Howse (1979) is reported as stating "The only reason I will not send you to jail is that the woman you assaulted was your defacto wife and by that very fact she is no good and I'm not too upset you assaulted her".<sup>15</sup> The second concern is the justice system's obsession with male developed principles of justice; this obsession time and again obstructs any attempts to detect, try, and punish these men for their crime. The problems come up with many of the evidential and procedural rules, deriving from these natural justice principles. It is these principles, espoused in Articles 17 and 18 of the proposed Bill, these human rights for men usually given at women's expense, that are to be enshrined into sacred fundamental law. This in itself is alarming.

Of further concern is the safety of the proposed changes to the rape law, promised after years of exhausting, high pressure lobbying by women. These reforms could be challenged under the natural justice articles in the Bill and, if

upheld, return women to the present situation. Most women today have no faith in even approaching the justice system when they become victims of violence. They do not want to go through a second rape under the guise of a court case. Women's confidence in the justice system in this area is so shaky, our frustration so deep, and anger at the institutionalised favouritism by men towards men is so strong that even now society may be on the verge of a new era, where an alternative justice system is developed, administered by women, which will by-pass the male legal system of trial and punishment totally. An example of the frustration has been seen in the recent resort by women to ropes and trees.<sup>16</sup>

We accept there are some judges who have shown enlightenment and concern for women, whether in deciding custody cases and apportioning matrimonial property or as victims of violence, but for these ones there are many more who have shown no enlightenment or understanding that the reality of life for women in Aotearoa is very different than that for men. Nevertheless, we contend that justice for all, including all women, cannot be a reality until we are fully and adequately represented on the judiciary. Then true representation of our interests will be taking place and will be seen to be taking place. This of course, goes not only for our sex but for our race and class as well.

However, it is not just in our relationship with the justice system that women have felt let down and poorly treated. It has been just one of many social institutions to ignore our interests and usually actively block them as well. Our experiences with the education system, the churches, and the major law making body, Parliament, as well as the courts, reveal a grim herstory.

For most of Aotearoa's Pakeha history, half of the population, women, have lived under laws over which they have had very little control in formulating, passing or administering. New Zealand did not have any women Members of Parliament until the mid-1930s. Currently 12.6% of its

Members are women.

However, with the latest wake of the women's movement, beginning in the 1960s, women have made perceptible changes in the parliamentary sphere. In our struggle to control our own destiny and set our own priorities, rather than live under male proscribed values and structures, we set our target on Parliament.

Women's Electoral Lobbies were founded, and flourished during the seventies. Their aim was to compel women's issues to be identified and heard by Parliament and to make it responsive to women's needs. Strategies were developed for this. Questionnaires were issued to all political candidates before elections, on issues of concern to women, thereby forcing these issues into the minds of all Parliamentarians and all candidates to Parliament. They had to address themselves to these issues, to take a stand on them and at the same time to be aware that they were being assessed for this stand. Their responses were collated and information sheets were published. Hence all the Jane Citizens of Aotearoa could assess the candidates' commitment to matters of concern for women, regardless of party, and for once Jane Citizen could vote to influence women's issues.

Special issues women's groups, including grass roots ones such as Rape Crisis Centres, have developed skills in using the media to highlight issues of concern to women, in lobbying individual Members of Parliament, and in preparing and making representations to Parliamentary Committees hearing representation on legislation. There has been a small but steady increase of women Members of Parliament. At 12.6% this is still pitifully short of 50%, but in last year's election the largest number of women ever to sit in Parliament was elected.

For the first time in the history of both major political parties there are women presidents. In this position they must have considerable influence on policy and direction.

There have been some positive legislative changes corresponding in time to women's new awareness of Parliament; the Equal Pay Act 1973, the Human Rights Commission Act 1977, the Matrimonial Property Act 1977, and hopefully some Rape Law Reform amendments soon.

Our activities have given us skills and strategies in working for change through the Parliamentary system. In recent years we have felt that we have had some influence and valid input into the system. The Ministry of Women's Affairs, in its function of being a monitor on all legislation coming into the House and its effect on women, will, it is hoped, further aid in making Parliament more accountable to women.

Thus while women have no cause for great confidence and celebration in either the judiciary or Parliament, our recent herstory gives us more faith that Parliament will be a fairer forum in which ultimate law-making power should be vested. Women are represented in greater numbers there than on the benches, and there is more likelihood in the next decade that such representation will continue to increase at a greater rate than on the judiciary. Parliament has in some ways shown itself to be accountable to women. Members of Parliament can be voted in and out. We have no similar influence over the judiciary. We are not represented amongst them and we cannot vote them out for anti-women comments and attitudes. Their tradition is one of aloofness from popular pressure.

Besides its lack of representation of women, a second major concern for us at the Bill's use of the judiciary as the final arbiter and law maker concerns the ability of women to enforce their rights. Despite legal aid, justice in New Zealand is generally only for those who can pay for it. Our current legal aid system is woefully inadequate.<sup>17</sup> Criminal legal aid is falling apart at the seams. This is an open secret. A means test so mean, assistance so poor, exclusions so wide, that there is hardly any net at all.<sup>18</sup>

Article 18(d) of the Bill refers to legal assistance without

cost. The White Paper makes no comment on this. Presumably we can expect, assuming a woman without means manages to get 'the means' to place an argument of insufficient legal assistance before the court, that the present level and type of legal assistance may be considered adequate in terms of Article 18(d).

Most women do not currently, and will not be able to, pursue their rights under the Bill. As in other economically deprived groups, their legal rights are and will be meaningless in their day to day lives. Many women are in the poorest group of citizens - those of single mother families, and share only an infinitesimal amount of the economic pie - all of it going to subsistence living.

Besides economic barriers, a woman will only be able to enforce her rights if she has "standing" before the courts. The Bill is worded in an individualistic way, e.g. "anyone who believes their rights have been infringed", yet the reality is that those whose rights are being infringed will be those with no individual power - they will not have knowledge of their rights, the confidence, contacts or morale to pursue these through a confusing and alienating court system. The White Paper refers to the usual rules of standing applying. This is not sufficient. If the Bill is to be credible and the rights in it accessible to all people, including all women, then it must be specific on this. Interest groups or class actions must be specifically permitted so that the rights of individual women, particularly those from non-Pakeha and non-middleclass backgrounds, can be enforced.<sup>19</sup>

Situations where women's human rights are being attacked or abused have only tended to come to light in our herstory as a result of social action groups. Thus it was Rape Crisis Centres and Women's Refuges which monitored problems for women in their dealings with police and the courts on sexual violence matters, They brought them to the attention of the media and Parliament. Such groups have standing as women's

representatives in any court action on a breach of the Bill's articles.

Our concern at the Bill's use of the judiciary as the final law maker is that the judiciary is not representative of women. The men who will be making decisions affecting our lives will have had very little contact with us, or understanding of our concerns. They will not be accountable to us. Our herstory, as well as our present day experiences with the judicial process, give us great reason to mistrust such power being vested in them. Furthermore, women may not be able to enforce their rights under this Bill. Financial constraints and practical inability to pursue a case could well render their rights token only.

### PART III

The next part of this paper examines the effect for women in the United States of America of judicial review under their Constitution. Research was done on the experiences of Canadian women with a Bill of Rights more similar in content to New Zeland's than the American Constitution. However, we are not aware that, as yet, the Supreme Court of Canada has determined any issues touching essentially on matters of major concern to women. The relative infancy of the Canadian Bill of Rights would account for this. Whilst the rights contained in the proposed New Zealand Bill of Rights are not completely similar to the rights contained in the American Constitution, the systems of judicial review of legislation and place of ultimate law-making power is similar. This portion of the paper examines American women's experiences with such a system.

The original Constitution of the United States, ratified in 1787, did not include protection to the individual citizen. It was only later that these protections were incorporated as a Bill of Rights in the first ten amendments. Constitutional liberties often emphasised today were not considered in the Constitutional Convention at Philadelphia. Those concerned with constructing the Constitution were pre-

occupied with collective duties rather than individual freedoms.

Today the Bill of Rights, comprised in the first ten amendments, is perhaps the best known and most cherished feature or portion of the Constitution. Such guarantees of civil liberties can be traced back in time to such documents as the Magna Carta of 1215. These protections or guarantees of citizens are looked at as absolute and moral, unlike the remainder of the Constitution which is seen merely as expressions of governmental policy. Because this part of the Constitution is readily visualised as separate from the rest, it has acquired its own name - The Bill of Rights.

The United States' system is based on a Constitution, ten Articles amending the Constitution declared in force in 1791 which are known as The Bill of Rights, and a few other amendments that fall into obvious time groups. We are concerned here with the thirteenth, fourteenth and fifteenth amendments which became known as the Civil War Amendments and were ratified between 1865 and 1870. The nineteenth amendment to the Constitution, adopted in 1920, stated:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex..." (emphasis added)

The factious twenty-seventh amendment was proposed on 22 March 1972 and was finally defeated in 1982. This amendment, known as the Equal Rights Amendment, stated:

Section 1 Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2 The Congress shall have the power to enforce by appropriate legislation, the provisions of this article.

Section 3 The amendment shall take effect two years after the date of ratification."

Despite the non-ratification of the Equal Rights Amendment

there has, since 28 July 1868, been in force the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment, incorporating the "Equal Protection Clause", states:

"Section 1 All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..." (emphasis added)

This amendment was adopted as a response to the so-called 'Black Codes' which were passed by the Southern States after the Civil War in an attempt to reduce freed blacks again to virtual slavery. The Fourteenth Amendment was designed to prohibit state governments from enacting such laws, and its specific intent was to protect blacks.

However, the Fourteenth Amendment decisions have reached further than a race issue. The Fourteenth Amendment has become synonymous with protection from government tyranny and discrimination for both blacks and whites. But it was not until 1971 in the case of Reed v Reed<sup>20</sup> that the United States Supreme Court finally extended its protection to women, that is it was not until 1971 that the definition of 'persons' (in the Fourteenth Amendment) was extended to include women.

In the first 80 years following the ratification of the Fourteenth Amendment women brought no equal protection claims to the Supreme Court. In the Slaughter-House Cases<sup>21</sup> in 1873, the Court expressed the view that the Equal Protection Clause was "So clearly a provision for [the black] race", the Court doubted whether any other form of official discrimination would "ever be held to come within [its] purview."<sup>22</sup> The

Slaughter-Houses Cases established a narrow scope for privileges and immunities of United States citizens. Around the turn of the 20th Century Lochner v New York<sup>23</sup> set up a precedent for the "widespread belief that woman's physical structure, and the functions that she performs in consequence thereof, justifies special legislation restricting or qualifying the conditions under which she should be permitted to toil". Women, after all "having in view not merely [their] own health but the wellbeing of the race [itself]", had to be protected from "the greed as well as the passion of men"<sup>24</sup> Lochner was the stumbling block to any extension of women's working rights and only the success of decisions in the late 1960s and early 1970s put the United States back on the track. The binding precedent of Lochner, the central character of judicial review, meant that supposed "women only" protective laws were retained by most of the states well into the 1960s.

Goesaert v Cleary<sup>25</sup>, in 1948, was the first major effort by women to invoke the Equal Protection Clause. In this instance the Court upheld as "rational social legislation" a Michigan law allowing women to serve tables in taverns but barring them from working as bartenders. The Court held that if the state legislation was minimally rational the courts would leave it alone. The rationale was that the state could exercise the power to exclude women from this occupation because bartending by women might give rise to social and moral problems.

These stereotypical assumptions continued to flourish and thus in the 1961 case of Hoyt v Florida<sup>26</sup> the Supreme Court unanimously held that limiting jury service by women to only those who volunteered was no violation of Equal Protection or due process, within the ambit of the Fourteenth Amendment. This meant that lay participation in the administration of justice was virtually all male. The complainant in Hoyt had been convicted of second degree murder. She urged that female peers on the jury roll might have produced a panel more competent to assess her plea of temporary insanity. She had

been charged following an altercation in which she claimed her philandering husband had insulted and humiliated her to breaking point. The state "rationally" spared women the obligation to serve for they are "the centre [sic] of home and family life".<sup>27</sup>

Up to the 1960s, chivalrous legislators and jurists had rationalised separate and unequal regulation of the sexes as a favour to women. Restrictions limiting women's opportunities and confining their responsibilities to the home were explained as measures designed for women's benefit and protection. In the 1960s two measures were enforced that affected discrimination in the job market. The first was the Equal Pay Act 1963 and the second was Title VII of the Civil Rights Act 1964. Title VII prohibited discrimination on the basis of an individual's race, religion, sex, or national origin in hiring, firing and all terms of conditions in employment. In the late 1960s women brought their complaints to court by virtue of Title VII, charging that hours and other limitations applicable only to women operated to deny women access to better paying positions and promotions. These claims did not generally meet with success, due again to the protectionist precedent espoused by Lochner.<sup>28</sup> In fact, what these laws protected most was men's jobs from women's competition.

The first case in which the Supreme Court showed some recognition of the disadvantages of women in sex based classifications was Reed v Reed.<sup>29</sup> There the Court considered the constitutionality of a state statute providing that, when two individuals were otherwise equally entitled to appointment as administrator of an estate, the male applicant should be preferred to the female. The female appellant claimed that this statute violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court unanimously agreed.

In Frontiero v Richardson<sup>30</sup> the Supreme Court was concerned with the right of a female member of the uniform services

to claim her spouse as a 'dependent' for the purposes of obtaining allowances and benefits on an equal footing with male members. Under the governing statutes, a serviceman could automatically claim his spouse as a 'dependent' but a servicewoman's male spouse was not considered to be a 'dependent' unless he was in fact shown to be dependent on his wife for more than half of his support. The Court found this disparity of treatment constitutionally invalid. In this case four justices regarded sex classifications as inherently suspect and as demanding close judicial scrutiny. Justice Brennan identified a number of reasons why sex should be added to race, alienage and national origin as "dis-favoured classificatory traits". These reasons were:

- 1 There was a long and unfortunate history of sex discrimination. It had been rationalised as romantic paternalism but in practical affect such attitude restricted women.
- 2 Sex, like race and national origin, was an immutable characteristic determined solely by the accident of birth.
- 3 The sex characteristic frequently bore no relationship to ability to perform of contribute to society.

Therefore the United States' Supreme Court has used two different tests to determine whether a state law violates the Equal Protection Clause. The first test is basically a test of reasonableness. Did the State have a reasonable purpose in passing the law? Is there some difference between the two classes of people that makes it reasonable to treat them differently? If the answer to both questions is yes, the law is valid. While this approach sounds fair, it has proven virtually meaningless because of the Court's refusal to apply the test to the facts in any real sense! Goesaert v Cleary<sup>31</sup> and Hoyt v Florida<sup>32</sup> illustrate this.

The second test used by the Supreme Court to decide whether a state law violates the Equal Protection Clause is much more stringent. It is a test that the Court has generally applied to racially discriminatory laws or to laws affecting certain fundamental rights, such as the right to vote. Consequently, the use of the test is triggered by a law that

sets up a 'suspect classification'. The test is called 'Strict Scrutiny' because the Court scrutinises the law very closely. The questions are:

- 1 Does the state have a purpose of overriding public importance in passing the law?
- 2 Is the classification established by the law necessary to accomplishing that purpose?

That is, both the law's purpose and difference between the two classes of people affected by the law looked at very closely.

Frontiero<sup>33</sup> is important in recognising the second test, but only four of the nine judges in the Supreme Court acknowledged that sex classifications were a 'suspect criterion' for legislative line drawing. This was one short of a majority which could possibly be related to the fact that adoption of the Equal Rights Amendment was pending. Justice Powell cautioned that eighteenth and nineteenth century constitution makers did not consider the question of women's emancipation and therefore any change was a matter for constitutional amendment (i.e. by federal and state legislators) and not for constitutional interpretation (the judiciary's role). This has important ramifications for the entrenchment article in New Zealand's proposed Bill of Rights.

The Burger Court is the only court to begin to take steps in the right direction. In 1971 the Burger Court opened the judicial door to the Women's Liberation movement by finding sex classifications in a state law unreasonable under the Equal Protection Clause of the Fourteenth Amendment (Reed v Reed)<sup>34</sup>. The justices have been liberating women from inferior statuses on a case-by-case basis, according to their own attitudes towards women's place in society.

The large number of sex equality cases fought after Reed makes the attitudes of judges towards the role of women in American society relevant to the feminist movement, just as the judicial attitudes towards the role of radicals,

Blacks, and workers in American society were important in earlier struggles to change social policies.

In America, as in New Zealand, if a judge personally envisages women as mothers, wives and volunteers, and men as chivalrous protectors and decision makers, then treating women as a special class for which restrictions are beneficial will seem natural and 'reasonable'. Sachs and Wilson, in "Sexism and Law", which assessed the American and British systems, concluded that "the prevailing conception of womanhood proved to be a far more compelling determination of judicial behaviour than the terms of a statute or the words of the Constitution". To expect the modern court to sweep away old social forms abruptly upon a plea for women's rights is to ignore the court's institutional norms and the judges' socialisation. In taking their judicial oath, the judges tacitly promise to give weight to precedents and history, which have approved institutional sexism.

From 1971 the Supreme Court treated sex based discrimination cases brought to it as occasions for ad hoc rulings. There was one exception and this was the Court's 1973 performance in the abortion cases. In the historic opinions of Roe v Wade<sup>36</sup> and Doe v Bolton<sup>37</sup> the Supreme Court struck down unwarranted state intrusion into the decision of a woman and her doctor to terminate her pregnancy. The decisions hardly mention 'women's rights'. They are not tied to any equal protection or equal rights theory. Rather they are anchored to concepts of bodily integrity, personal privacy or autonomy derived from the due process guarantee in the Fourteenth Amendment.

However the Court took a backward step in a trilogy of decisions announced on 20 June 1977. In Beal v Doe,<sup>38</sup> Maher v Roe<sup>39</sup> and Poelker v Doe<sup>40</sup> the Supreme Court held by a majority that the state could not interfere arbitrarily with the decision of a woman able to pay for an abortion, but the government could pursue a policy of encouraging child birth

by refusing to finance an indigent woman's elective abortion. An editorial in the New York Times on 22 June 1977 described the decisions as, "A cruel scythe aimed directly at the poorest and least sophisticated women in America".<sup>41</sup> On 28 June 1977, Wicker wrote in the New York Times, "[T]o make the poor alone ineligible for abortions defies justice, common sense, rational policy in the federal budget".<sup>42</sup>

In the original abortion decisions (Roe v Wade and Doe v Bolton) Justice Blackman glorified the American position as conscientious and sympathetic, motivated in the practice of medicine by a concern for the best interests and desires of his patient. For better or worse, judicial respect for medical discretion has, in the abortion rights context, better served feminist interests than has the woman's claim to reproductive freedom in her own right. In the area of sterilisation abuse however, judicial deference to medical discretion jeopardises that same freedom. In Walker v Pierce,<sup>43</sup> Dr Pierce stated his sterilisation policy thus:

"My policy was, with people who were unable to financially support themselves, whether they be on Medicaid or just unable to pay their own bills, if they were having a third child, to request they voluntarily submit to sterilisation following the delivery of the third child. If they did not wish this as a condition of my care, then I requested that they seek another physician other than myself".<sup>44</sup>

In reversing a jury decision against Dr Pierce - and the \$5 judgement entered against him - the Capital Court of Appeals for the Fourth Circuit upheld the defendant's right to practice medicine in accordance with his chosen policies: "We perceive no reason why Dr Pierce could not establish and pursue the policy he has publicly and freely announced. Nor are we cited to judicial precedent or statute inhibiting this personal economic philosophy".<sup>45</sup> (emphasis added)

Subsequent legislative attempts to regulate the abortion decision and procedure by dictating medical practice have

often been invalidated by the courts in deference to medical judgement and the doctor-patient relationship. The same high regard for the physician as judge of women's best interest even reappears in the defence of the doctor charged with sterilisation abuse. Ironically, judicial respect for the physician interest in the unencumbered practice of medicine has led, on the one hand to the invalidation of regulations concerning abortions and, on the other, to the vindication of self-styled eugenic practices. From a feminist perspective, the judicial deference to the generally male physician is seen as inherently offensive. Ideally, the right to abortion would be recognised as an aspect of the woman's right to privacy. Ironically, in upholding the male domain of medical discretion, the judiciary has served feminist interests.

The lack of regard to women's fertility control as a women's issue by all the Justices comes through clearly. Whilst the popular debates centre around this point, the Justices' refusal to acknowledge this gives rise to concern for New Zealand judicial interpretation, even acknowledging Article 12 of the proposed Bill. Further, the non-definition of "life" in Article 14 of the proposed Bill will give rise to more problems for the women of Aotearoa than the American women, as we do not have the constitutional guarantees to privacy that they do.

Until 1977 the American Supreme Court's performance in the area of sex discrimination was solid, predictable and dependable. Discrimination on the grounds of sex was consistently affirmed. The Supreme Court has been reluctant to interpret the Equal Protection Clause dynamically in support of women, because it is historic fact that neither the founding fathers nor the Reconstruction Congress had women's emancipation on the agenda. When the post-Civil War amendments were added to the Constitution, women were denied the vote, now recognised by the Supreme Court as the most basic right of adult citizens. Married women in many states could not contract, hold property, litigate on their own behalf

or even control their own earnings. Despite the guarantee of the equal protection of laws the Fourteenth Amendment left all that untouched.

An examination of the Burger Court toward female roles in American society indicates that the justices decide cases on the basis of their personal value systems rather than by the application of neutral legal principles. Although not admitting the supremacy of ideals over law, Justice Blackmun in his opinion in Roe v Wade<sup>46</sup> recognised that:

"One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude towards life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to colour one's thinking and conclusions..."<sup>47</sup>

#### PART IV

Justice Blackmun's apt observation is applicable to judiciary throughout the world. In Aotearoa, we have a concern that the lack of women's philosophy in the judiciary will have negative implications for programmes designed to rectify the effects of past discrimination.

In the area of employment, New Zealand women do not earn as highly as their male counterparts. Despite the fact that we have been in the paid workforce for decades we have not achieved the same positions as men.

New Zealand's largest employer is the Government. The introduction in 1960 of equal pay for public servants made the Government an attractive employer to women. Accordingly we are well represented in the public service, comprising 36.5% of the total employment figures<sup>48</sup>. This is slightly higher than women's representation in the total paid workforce (34%)<sup>49</sup>. The Public Service has an occupational classification system with a set of gradings within each classification. The largest occupational group is the executive/clerical class of which women comprise 54.2%. Despite our 'equal

opportunity, we make up only 0.0% of those of the grading 007.107 and above. In dollar terms this represents an income of \$27,000<sup>50</sup> plus pa. This situation is not unique to women employed by the Government. It would appear therefore that in order to see an equality of achievement of female workers with their male colleagues, some steps to redress the imbalance may be necessary. Affirmative action is endorsed by the Public Service Association,<sup>51</sup> the largest union in the country, having a significant female membership.

The United States Supreme Court was first called to rule directly on the constitutionality of affirmative action in Regents of University of California v Bakke<sup>52</sup> in 1978. Bakke, a white engineer, was denied entry to the Davis Medical School in 1973 and 1974. In those years 16 out of 100 places were set aside for minority applicants - Blacks, Chicanos, Asians - and some admitted under this special programme had lower academic grades than Bakke. Bakke claimed this exclusion amounted to unfair discrimination because of his race. His claim to admission was upheld.

Bakke's case illustrates the uncertainty surrounding the area of affirmative action. Four of the nine Justices found that Title VI of the Civil Rights Act 1964 provided that exclusion of any person from federally funded programmes because of race per se. Another four Justices interpreted Title VI as no more stringent than the Equal Protection Clause of the Fourteenth Amendment and therefore the effects of past discrimination were "sufficiently important" to justify race criteria in admissions.

Justice Powell delivered the deciding opinion of the Court, finding that the University of California's preferential programme disregarded individual rights guaranteed by the Fourteenth Amendment. In essence, Justice Powell's view allows Universities (and other institutions) to consider the race of an applicant in making admissions decisions, but rigid quota and place reservation systems for minorities only are disfavoured.

Popular interpretation of the Bakke decision varied. The

Executive Director of the National Association for the Advancement of Coloured People called the decision a "clear-cut victory for voluntary affirmative action", while Jesse Jackson, then Chairman of Operation P.U.S.H., warned that the part of the decision striking down the minority admission programme might be received as a signal to cut back on existing affirmative action programmes.<sup>53</sup>

That nine men, steeped in legal learning, could be so equivocal and lacking unity of thought in Bakke, does not augur well for affirmative action programme judgements to be made in New Zealand.

Aoteroa has a pervasive philosophy of egalitarianism. We are taught to think in this country, that if people do not succeed, it is only because they have not taken advantage of the opportunities available. It is generally not recognised

"that the practical relative freedom of every individual to achieve is determined, first, by the willingness of the society to grant to that individual a degree of status, second, by the power and influence of the social groups of whom he or she is a part and, third, if at all, by laws requiring fair treatment.

So long as racist and sexist attitudes persist, objective measurement of merit is simply not possible."<sup>54</sup>

The drafters of the Bill have specifically chosen to exclude a provision for affirmative action. As we have shown, such action is necessary to remedy defects in our measurement systems which have burdened women with the effects of institutionalised sexism.

Should the legislators decline to include any provisions for positive measures to be taken to redress past discrimination, we are of the opinion that our socialisation is such that it will be believed that equal or same treatment is sufficient to ensure an equality of opportunity. This,

in the long term, has the effect of perpetuating past inequalities for women onto future generations.

Women in Aotearoa, along with women in the United States, will be subject to philosophy, experience, religious training, to name but some of the influences on judges which Justice Blackmun referred to. Whilst the judiciary remains nearly exclusively consisting of white middle class males, women have little reason to believe their interests will be addressed.

The American experience has shown most clearly that a judiciary acts in the interests of those who constitute it. We do not believe that the inclusion of "sex" in Article 12 of the New Zealand Bill of Rights will give New Zealand women the protection that American women were denied. The Fourteenth Amendment could have been interpreted so as to give women equal protection, but this did not happen. There is enormous room for interpretation and flexibility in judicial decision making. Article 12 is no safeguard for the representations of our interests and concerns under a virtually all male, all white, all middle-class judiciary.

#### PART V

In this section we shall make brief comments on implications for women, as we see them, of each Article. Some comments may repeat, in summary, points made earlier in this paper. The headnotes only are cited of each Article.

Preamble: Dealing with the four main tenets upon which the Bill is founded, the preamble alerts us to the "human rights" that it selects to protect, viz. those covered under the International Covenant on Civil and Political Rights. As discussed earlier, these are not the matters of major concern to women.

#### Article 1. New Zealand Bill of Rights Supreme Law:

As the "Supreme Law", the Bill could be said to lead to the philosophical stratification of laws. As argued

earlier, the real issues affecting women in New Zealand are social and economic rather than civil and political. Thus a supreme law of no especial significance to women leads to the viewing of legislation specifically protecting or upgrading women, as having lesser status. The implications for matters affecting women are far reaching. The uncertainties created by a Supreme Law were well illustrated in the Regents of the University of California v Bakke<sup>55</sup> as earlier discussed. We are concerned that issues of concern for women (e.g. abortion, affirmative action) are not kept indefinitely delayed by the workings of judicial review.

#### Article 2. Guarantee of Rights and Freedoms:

This guarantee is implicit in our current legislation and common law. This article will, on the face of it, extend the responsibility of our governing bodies and will not, we hope, be too delimited by judicial interpretation. We note, however, that other major non-governmental bodies that have a significant, and often negative, impact on women (e.g. drug companies) will not be subject to the same scrutiny.

#### Article 3. Justified Limitations:

As earlier stated, this article creates enormous judicial discretion in looking at "reasonable limits", "demonstrably justified" and "a free and democratic society". As the US experience has shown, what is "rational" to the judiciary, is not necessarily "rational" for women. Among other things, this section may allow affirmative action to balance the effects of past discrimination. However, "demonstrably justified" appears to place a heavy burden of proof on the party claiming a justified limitation.

#### Article 4. The Treaty of Waitangi:

This is one of the more positive articles in the proposed Bill, as the rights recognised in the Treaty of Waitangi are elevated in status. Given that the Treaty remains

outside the legislation (and thus is not subject to legislative change) and that the overall spirit of the Tiriti is to be enshrined, then this looks to be a positive provision.

Article 5. Electoral Rights:

New Zealand, although the first country to grant votes to women, still has an electoral system that sees a low percentage of women in Parliament (although it is certainly growing), and a lesser percentage of women voting compared with their male counterparts. Despite the struggles of our foremothers, this right has not meant significant advancement for women in our parliamentary representation and representation of women's issues.

Article 6. Freedom of thought, conscience and religion:

The actions involved in invoking one's freedom of thought and religion will have implications for women. The April 1985 Supreme Court of Canada decision in H M the Queen v Big M Drugmart Ltd,<sup>56</sup> if followed by New Zealand judges, will have implications for Christian women, union and working women, and small business women. In that case Big M Drugmart successfully challenged The Lords Day Act as being unconstitutional to the extent that it binds all to a sectarian Christian ideal, compelling, on religious grounds, the universal acceptance of the day of rest preferred by one religion, to the exclusion of others. Our Shop Trading Hours Act 1977 and Public Holidays Act 1955 are similarly based on Christian teachings and may well be not "justified in a free and democratic society".

Article 7. Freedom of Expression:

This is stated in the White Paper to be of "central importance in a democratic state". However, open freedom of expression impinges on the rights of others. The balancing of the "greater good" is often weighed against women. Many women's groups ranging across the political

spectrum have been appalled at the decisions of the Film Censor in its passing of pornographic, anti-women material for public viewing. This material has a direct influence on men's image of women<sup>57</sup>, bringing immediate danger to our physical and emotional wellbeing. We do not endorse the liberal cloak of freedom of expression to allow for the acceptance of pornography in any form.

Article 8. Manifestation of religion and belief:

This section has led, in public, to the great anti-homosexual law reform debacle. As there are anti-race churches (e.g. the All-White Church of Odin) there could be more blatantly anti-women churches. Many argue that conventional churches have long kept women in subordinate positions - note how few have ordained women and how long and hard the struggle was for those women who do hold church positions. The phenomenal rise of the fundamental Churches, with their restrictive philosophies on the place of women in society, does not, to the writers, indicate that freedom to manifest one's religion publicly necessarily advances rights for women.

Article 9. Freedom of peaceful assembly:

We are concerned that this article should not inhibit the right to have single sex gatherings, which have been an important and necessary part of women's growth.

Article 10. Freedom of association:

The main effect on women would appear to be in Article 10(2). Large numbers of women are employed in numerically small workplaces. As such, they are more vulnerable to employer-imposed conditions. Accordingly the safe guard offered by a trade union system is to women's advantage. It is noted however, that unions themselves have not always acted in the best interests of their female members.

Article 11. Freedom of movement:

This appears to have no special effect for women. A

woman's socio-economic status has more effect on her movements than legal restrictions.

Article 12. Freedom from discrimination:

The freedom from discrimination being delimited to the grounds enumerated may not be of advantage to women. The Human Rights Commission Act includes marital status, and its exclusion from the Bill is of concern to us. Many women experience discrimination not because of sex per se but because of their sex combined with another factor, e.g. married women have greater difficulty in receiving the unemployment benefit, women in de facto relationships and lesbian women still receive public opprobrium, women with children find it hard to get employment, solo women are not as successful as their male counterparts in obtaining loans. It is the writers' opinion that one of the major barriers to women obtaining equality of opportunity in Aotearoa is their child-bearing and rearing role. It is of concern to us that neither maternal nor parental responsibility has been considered by the Bill.

Canadian legislation specifically allows for affirmative action to redress the imbalance created by past discrimination. The implication of this inclusion is that the legislators thought that affirmative action may not be "demonstrably justified in a free and democratic state" and wanted to remove all doubt to aid the judiciary. Unless such a provision is incorporated into New Zealand's Bill of Rights, Article 12 may ultimately be to the disadvantage of women.

Article 13. Rights of minorities:

While the writers in general applaud the sentiment behind Article 13, it is not clear why those rights should be limited to minority groups or why the ambit should not be extended to include cultural groups.

Article 14. Right to life:

This article bypasses the pivotal question of when life begins. The United States and Canada have experienced

protracted battles around this issue. New Zealand's history has see-sawed through legislative change, and attempts at legislative change. Since the writers believe that child-bearing should be by choice, not force, this section must be more definitive to avoid the contentious continuation of the pro-choice/anti-abortion debate. The making of abortion legislation should be excluded from the jurisdiction of the courts and remain in the hands of those more accountable to the people, i.e. Parliament.

Article 15. Liberty of the person:

- (1) This subsection is more important for men as, in general, women are arrested at a lesser rate than men.
- (2) These basic civil rights are positive measures for all people.
- (3) Given that the only women's security prison is in Christchurch, this subsection will be to the advantage of women, since it is not humane to centre someone up to 1600km from their family and community. Recent reports of the treatments of women under detention give rise to the concern that women may be more at risk because of their sexual vulnerability, and accordingly some protection recognising this would be in order.

Article 16. Rights on arrest:

Again this would appear to have more importance for men than women, due to men's greater arrest rate.

Article 17. Minimum standards of criminal justice:

The "natural justice" principles enshrined in Articles 17 and 18, raise some serious issues for women who are victims of sexual violence.

- (1)(a) Public hearings are a source of great stress and humiliation to women victims. The degradation of the initial act is compounded by repeated public reconstructions of the facts. Suppression of name in the media does little to alleviate this humiliation.
- (1)(b) Greater consideration should be given to whether the

burden of proof in sexual violence cases should rest on the accused. This notion of "reverse onus" is not new in Aotearoa, e.g. Misuse of Drugs Act 1975. The present onus serves to mitigate against women's reporting of, or police pursuance of complaints, leading to many offenders not being held accountable for their crimes.

Article 18. Rights of persons charged:

- (b) This must be balanced against a woman victim's need to have the case dealt with expeditiously in the interests of her mental health.
- (c) This right should be extended to women victims in choosing prosecuting counsel, a right they do not currently have.
- (d) As referred to earlier in this paper, women and economic minorities suffer because of woefully inadequate legal aid.
- (f) The presence of the accused during the giving of the victim's evidence usually causes her increased suffering and distress. Whilst recognising the accused's right to hear all the evidence, modern technology could allow this to be done without the physical presence of the victim.
- (i) We support the assistance of an interpreter and further recommend that victims of sexual crimes have the right to the presence at all times of a companion providing moral support, both before and during the trial.

Articles 17 and 18 therefore need revision, taking into account victims' rights. Proposed changes to the law on rape suggest a positive guideline that could well be followed by the Bill.

Article 19. Search and Seizure:

An addendum that "reasonable" search of the person requires adequate privacy is needed in this article.

Article 20. No torture or cruel treatment:

- (1) As stated in the comment on 15(3), imprisonment away from friends and family, as is the reality for New Zealand

women prisoners, could constitute disproportionately severe punishment.

- (2) Herstory has shown that large numbers of women have undergone unnecessary hysterectomies and radical mastectomies based on the "advice" of their doctors<sup>58</sup>. The Dalkon Shield file reports numerous cases of women's major health problems from using that particular IUD<sup>59</sup>. All these operations could well be defined as "experimentation" within the meaning of the Bill.
- (3) This provision looks positive for women, since it implies, along with 20(2), the right to knowledge. The hoped-for demystification of the medical profession, and the importance of doctors being aware of their accountability to women can only be of benefit to both sides.

The writers conclude that this article could have positive advantages for women over current legislation.

#### Article 21. Right to justice:

The comments made under Articles 17 and 18 about the rules of natural justice are relevant here, an example of concern being the Equal Opportunities Tribunal hearings of sexual harassment complaints under Part II of the Human Rights Commission Act 1977.

#### Article 22. Other rights and freedoms not affected:

Other rights and freedoms are of necessity affected by a Supreme Law. Rights and freedoms outside the scope of the Bill may be repealed by a simple majority, thus confirming a stratification of rights. For example, freedom from discrimination on the grounds of marital status under the Human Rights Commission Act 1977, accords lesser protection than the Bill. The writers consider that should the Bill become entrenched law, greater rights or freedoms conferred by other legislation should have the same status as the Bill.

#### Article 23. Interpretation of legislation:

As argued earlier in this paper, the check provided by

judicial interpretation may not provide the balance that will truly represent women as part of society.

Article 24. Application to legal persons:

No comment.

Article 25. Enforcement of guaranteed rights and freedoms:

This article may not guarantee women their enforcement rights. Women are often lower earners, or have no fixed income; combined with inadequate legal aid, this gives them less access to the judicial system. The article does not currently give standing to people or groups whose rights have not been directly infringed. Many major civil rights issues have been highlighted by special interest groups, representing the victims, rather than the victims themselves, who may not be in a position to seek justice. A recent example would be ACORD's representation to the Human Rights Commission on the treatment of young people in Social Welfare Homes.<sup>60</sup>

Article 26. Reference to Waitangi Tribunal:

A general comment of concern is that if te Tiriti is to be honoured, the Tribunal's limitation to opinion rights only does not imply commitment to the principles of Article 4. In the writers' opinion this article should bind the court to accept the Tribunal's advice, except where that is contrary to provisions of the Bill of Rights.

Article 27. Intervention by the Attorney-General:

In cases where women are involved in pursuing an action, intervention by the Attorney-General could lead to delays, the consequence of which, given women's limited monetary resources, may mean the abandonment of the initial action.

Article 28. Entrenchment:

This provision supports Article 1 in its statement of the Bill being Supreme Law. Entrenchment will mean that positive changes, not currently envisaged, may suffer the same fate of the Equal Rights Amendment in the United

States. It was defeated by the strict conditions required to amend the Constitution.

As the original drafters of the Constitution did not have the foresight to accurately predict the myriad turns their society would take, our legislators may well be lacking that vision also. Minority group rights\* are rarely seen as important by the majority to whom they do not apply. A 75% requirement for passage means an elevation of minority rights in the future to the status of other rights in the Bill will be nigh impossible.

#### PART VI

In summary, we find that the choice of rights to be enshrined in law bypasses the concerns of women. The enforcement mechanism available denies women realistic pursuit of their rights. The use of the judiciary means that, for the foreseeable future, women's concerns will not be realistically represented within the ultimate law-making body. Many articles, as they currently stand, offer little protection for women. Positive changes for women may be barred by the Bill.

In conclusion, therefore, this Bill of Rights is not the constitutional safeguard desirable in Aotearoa.

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[\* Minority group, whether in terms of numbers or power.]

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