Legislative changes in the criminal justice systems: women's issues and victim legislation since 1975

Hon Judge C Henwood

I studied law at Victoria University and commenced practice in Wellington as a barrister and solicitor in the mid to late 1960s. Since that time there have been a number of developments in the criminal law and the administration of our criminal justice system in response to the growing cry for fair treatment from the women and children of the world. New Zealand has on the whole followed trends from Britain on legal matters but in respect of some issues has developed its own innovative legislation.

This year New Zealand celebrates 100 years of women's suffrage and this has caused me to reflect on the progress that has been made since those early days in New Zealand, and in particular on what has happened in more recent times following the heady days of the 1960s and 1970s and the growth of feminist ideas worldwide.

I vividly recall reading Germaine Greer's book *The Female Eunuch*[1] and I am as deeply struck today as I was then at the ideas Germaine Greer unleashed in her book. Even the illustration on my copy is striking: a body of a woman headless, legless and armless, a mindless torso hanging like so much clothing on a coathanger.

I recall her speaking at Victoria University student union building and the blush that we had on our faces when we knew she was prosecuted in our Magistrates' Court for saying "bullshit" in a public place. Someone in these small islands of ours could not handle her radical ideas: freedom for women to choose the direction of their lives.

Times and events have moved on. In 1975 New Zealand held a very significant convention in Wellington to celebrate United Nations Women's Year, and thousands of women attended. I was there and what an exhilarating and empowering experience it was. Women graduates from Victoria University law school joined together to host the women and the law sessions.

I mention the 1975 convention because it was a significant international event emphasising and legitimising women's issues. When the United Nations endorsed the year as Women's Year the Women's Movement became more mainstream and broader issues of justice became more important. A large number of women joined the Women's Movement and it was no longer outlawed as a radical, left, feminist movement by middle class New Zealand society. Women had empowered themselves and many wanted to bring about change in a more specific way.

---

1 G Greer *The Female Eunuch* (Paladin, London, 1971).

Now as we look back on history and ask the question "Did the feminist movement make a difference?" we would have to concede that in the western world at least the impact of the feminist movement has been astounding. Some would say that the whole concept of the family has been redefined to the detriment of traditional values and religious beliefs, striking at the whole heart and fabric of society. Still others would acclaim the Women's Movement for allowing women to be educated, to make career choices and to control their fertility.

Many men would rejoice now to be free to shake off the macho image, to spend time with their children and to have marriages on a more equal partnership basis, both financially and emotionally.

In this article, however, I will confine my comments to one or two changes in the criminal justice system which illustrate some of the protections for women and children that now have been brought into the criminal law by legislation after 1975. I will then move on to consider the Victim's Movement which began in the 1970s and flourished in the 1980s, forcing governments to develop completely new legislation never seen before. The New Zealand example is the Victims of Offences Act 1987.

I EXAMPLES OF LEGISLATIVE CHANGES IN THE CRIMINAL LAW PROTECTING WOMEN AND CHILDREN

A 1977

Section 23A of the Evidence Act 1908 amended the common law to provide that where a person is charged with or is to be sentenced for certain cases of a sexual nature, no evidence shall be given, and no questions shall be put to a witness, relating to the sexual experience of the complainant with a person other than the accused, or relating to the reputation of the complainant in sexual matters, except by leave of a judge. A judge may not grant leave unless the evidence to be given is of direct relevance to the facts in issue or the appropriate sentence.

There is also a proviso which states:

> any such evidence or question shall not be regarded as being of direct relevance by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.

In rape trials "consent" is often a defence raised by an alleged offender, and this amendment curtails the defence being able to run a smear campaign on the complainant at the trial regarding her reputation or prior sexual experience.

It is also interesting to note section 23AB which removes the need for corroboration of the complainant's evidence before a defendant can be convicted.

B 1985

New Zealand also changed the criminal trial procedures to provide that the complainant witness cannot be compelled to give evidence at the preliminary hearing of certain cases of a sexual nature or be subject to cross-examination at the preliminary hearing, unless the complainant wishes to do so or unless the court orders. In times gone by, the complainant always had to give oral testimony at the preliminary depositions hearing and also at the jury trial, thereby facing cross-examination twice.[2] The change which occurred in 1985 allowed a complainant victim to make a written statement of her evidence so that she need not suffer the trauma of facing the defendant on more than one occasion and is an excellent provision; it not only protects the victim but shortens the preliminary hearing thereby saving time and resources.

C 1989

In 1989 there were changes to the Evidence Act 1908. Section 23D to 23I of the Evidence Act and section 185CA Summary Proceedings Act 1957 allowed for the use of screens in certain cases and video-taped evidence in the courtroom to protect children from the horror of giving evidence at the hearing of sexual cases in the manner that they have had to do in the past. Regulations were passed in 1990: the Evidence (Videotaping of Child Complaints) Regulation 1990. They are used regularly on a day to day basis in trials.

The fundamental difficulty for society is to balance fairly the competing interests of an offender and his or her right to a fair trial and the complainant victim who has suffered emotional harm, injury and damage at the hands of the offender. The United States Supreme Court has become involved from time to time in this issue and in the case of *John Avery Coy* v *Iowa* the Supreme Court found that the placement of a screen between the child witness during the testimony of a sexual abuse trial to be violation of the defendant's right to face his accuser "face to face".[3] However, Justice O'Connor added, in a separate opinion:[4]

> [such] rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony.

As previously mentioned, New Zealand in 1989 passed legislation to allow the use of screens in court on application to a judge. A defendant may not cross-examine a child complainant directly even though conducting his own defence and a judge may approve an indirect method of cross-examination as deemed appropriate. On balance, therefore, New Zealand has decided to protect the child from a face to face confrontation with a defendant whilst protecting the defendant's rights to challenge the evidence through a lawyer or an approved third party.

---

2 Compare, Summary Proceedings Act 1957, s 185C.
3 101 L Ed 2d 857 (1988).
4 Above n 3, 868 (Justice White concurring).

These are just some of the changes that have in their small way made a huge difference to today's women and children who have had to face not only the original sexual assault or violation, but have had to relive it all over again in court and be able to answer questions designed to challenge their integrity.

II WOMEN'S ISSUES AND VICTIMS' ISSUES OVERLAP IN THE 1970s AND 1980s.

The victims' movement concerns all of society, men, women and children, but many of the concerns of the victimologist would, I suggest, overlap with the concerns of the women's movement. An obvious example is the unacceptable level of domestic violence in our society, where for the most part the victims are women and children.

I understand that the victims' movement began to attract support in the early 1970s. In his paper "Changing Victim Policy", Matti Joutsen, Director of the European United Nations Institute, said:[5]

> [f]eminist organisations in the United States and in England established hot-lines, shelters and other support activities for the victims of sexual assault and domestic violence... .
> Why did the first strands of victimology and the victims' movement develop primarily in the United States and not in Europe? Possible reasons include the severity of the problem, the strength of research and an American activist tradition.

We know that New Zealand was in the forefront of these world trends in the 1970s when the women's movement began to be active, and hot-lines and women's refuges were set up. 1973 saw the first women's refuge open in Christchurch.

The seeds of the victims' movement were planted worldwide and other groups began to develop, including consumer activists and individuals with specific concerns about offences such as drink driving offenders. The victims' movement, like the women's movement, is a political lobby group, but in its development, particularly in the United States, it has attracted support from a much wider cross-section of society, with many and varied objectives.

Some people sought vengeance on behalf of the victim, lobbying for longer and harsher sentences, others sought equal rights for the victim in the criminal justice system, claiming, with some justification, that the system could "victimise" a complainant a second time with all the state's resources and attention being focused on an offender, while the victim was virtually forgotten and unrepresented and left without adequate compensation. Another group sought changes in the law to enable victims' issues to be resolved for the benefit of society at large, believing that the resolution of victims' issues in the long run was the only path to a safer society in the future.

---

5 See M Joutsen, "Changing Victim Policy" Conference Paper, 7th International Symposium on Victimology, Rio de Janeiro, 1991.

In 1985 the United Nations General Assembly adopted by consensus the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. New Zealand responded with the Victims of Offences Act 1987 and established the Victims Task Force. Its functions were to develop guidelines and to promote the principles of the Act set out in sections 3 to 11 of the Act and, in order to achieve this, as a matter of priority, to work with judges, registrars, prosecutors, government departments and community organisations involved with victims.

It has been necessary for judicial officers to re-evaluate the procedures that are used in the criminal justice system in the light of the principles set out in the Victims of Offences Act 1987. Whilst I was in Washington in 1991 I spoke to the directors of NOVA (National Organisation for Victims Assistance) for the United States, which I believe tries to steer a middle line in the political dilemma. It is not possible to examine in depth in this broad paper all the arguments put forward by the victimologists but some of the important issues that have been highlighted to me are:

(i) it is claimed that victims in criminal cases do not have equal rights with the offender. The victim is a witness only, as the state is traditionally the prosecutor taking control of the case. The victim does not have any opportunity to have a say in plea bargaining, and often is not consulted when charges are dropped or reduced. Nor are victims consulted when reparation is waived by the court;

(ii) the rights that they have been given in legislation are usually statements of principal only and are not enforceable rights. Often the authorities, such as police officers, traffic officers and court prosecutors, overlook the victims and their opportunity to be involved is lost. This can happen even though they are entitled to make a victim impact statement;

(iii) they have little influence in the length and type of sentence that is imposed;

(iv) it has been argued in the United States that even when victims have been given a right by the legislators, judicial nullification tends to erode that right in the court system; and

(iv) the practical administration of the criminal justice system can victimise the victim again. Victims have no independent advocate at the hearings. Long delays occur before cases are heard and determined. The courtroom procedures and formalities can make for a very unpleasant experience for the victim.

In the United States the victims' movement has made significant gains in nearly every state. The United States has gone further than New Zealand. Some states allow allocution by the victim on issues of sentencing, nature and type of sentencing. On some occasions friends and families may be heard on sentencing.

In New Zealand the Victims of Offences Act 1987 has gone some way to highlight the needs of the victim. The provisions that seem most useful in the context of the criminal justice system in my view are: victim input on bail, victim impact statements

and Section 3 of the Act which sets out the manner in which victims are to be treated in a "Declaration of Principles":

> [m]embers of the police, prosecutors, judicial officers, counsel, officials and other persons dealing with victims should treat them with courtesy, compassion and respect for their personal dignity and privacy.

Section 10 provides protection of victims by allowing them input on bail applications through the prosecution:

> [o]n an application for bail in respect of a charge of sexual violation or other serious assault or injury, the prosecutor should convey to the judicial officer any fears held by the victim about release on bail of the alleged offender.

And section 9 provides that the residential address of a victim should not be disclosed in court.

Sections 9 and 10 have a very important day to day application, and if the prosecuting officers are well briefed there is no doubt that a judicial officer would receive submissions from a victim regarding bail, and either bail can be denied or such conditions imposed on a defendant that are designed to keep a victim safe and his or her whereabouts free from publication. The success of this protection depends upon a victim making his or her fears known to the officer in charge of the case and the prosecutor fully briefing the judge at a bail hearing. The final decision, however, will rest with the judge but can be appealed to the High Court by either party if the decision is not accepted.

Section 8 is a very significant provision allowing for victim impact statements:

> (1) Appropriate administrative arrangements should be made to ensure that a sentencing Judge is informed about any physical or emotional harm or any loss of or damage to property, suffered by the victim through or by means of the offence and any other effects of the offence on the victim.
> (2) Any such information should be conveyed to the Judge either by the prosecutor orally or by means of a written statement by the victim.

The provision for a victim impact statement is an innovative piece of legislation and an example of where New Zealand has legislated a role for the victim on sentencing whereas Britain has not. The victim impact statement has for the time being at least been rejected by Britain. In New Zealand the victim impact statement in the early days presented some real difficulties for the court. Some victims used it as an opportunity to include irrelevant prejudicial comment or hearsay evidence concerning events and alleged offences other than the matters that were before the court on that day. A common example would be a statement from a wife victim of a domestic assault by her husband:

> [y]our Honour, this is the fourth time that he has hit me, and I have had enough. I refuse to live with him again because of his violent behaviour towards me for years.

Such a statement, of course, refers to a history of violence and prior assaults for which no charges have been laid but if taken into account by the judge may show the defendant in a more negative light and result in a harsher sentence. It is open, however, to a defendant to challenge the content of the victim impact statement and if this occurs evidence would have to be called to clarify the true facts.

The Victims Task Force has worked very hard to educate the makers of victim impact statements to present them in appropriate form and many of the original difficulties have now been overcome.

There can be no doubt that the provision for a victim impact statement is invaluable to the sentencing judge who has in the past had little or no detail of the victims' current circumstances or the impact that the crime has had on his or her life.

These are matters that are relevant on sentencing and the New Zealand Court of Appeal has made it quite clear that the victim impact statement is relevant and will be taken into account. In *R* v *Potatau* the New Zealand Court of Appeal said:[6]

> a serious impact of an offence on the victim [is] relevant on sentencing. In this case the impact on this victim of the indecent assault and robbery in her own home by an intruder at night can be expected to blight the rest of the life of this 75-year-old lady.

In some cases where the impact of sexual abuse on a young child is being assessed for a victim impact statement, the Court of Appeal has allowed hearsay evidence of a registered clinical psychologist in a victim impact statement, notwithstanding objection from the family.[7]

A lesser impact on a victim may mitigate sentence while a severe and devastating impact may be a factor resulting in a longer prison sentence, for instance, for the defendant. No doubt these principles may have often been in a judge's mind when sentencing especially the more serious crimes in the past, but now this legislative provision enables a judge to obtain information on the victim in every case.

There are, however, some difficulties with the Victims of Offences Act 1987. The Act is a declaration of principles only, and many victimologists would immediately highlight the fact that the New Zealand Act has no compulsory provisions or clear method to enforce its provision if the officials do not rise to the minimum standard of treatment of victims, or if they fail to obtain a victim impact statement.

The Act does not go as far as many would like and I suggest there would be much debate if New Zealand went further and victims were invited to make oral statements on sentencing or recommendations as to the type and length of sentence that a judge should impose.

---

6 (1988) 4 CRNZ 552, 554.

7 See *R* v *Guptill*, Unreported, 15 August 1991, Court of Appeal, CA 77/91.

It must be borne in mind that not all victims seek harsh sentences and many in fact plead for leniency on behalf of the defendant. A sentencing Judge is constantly placed in a difficult position when sentencing, trying to balance the competing interests of the offender and the victim in the light of the facts of the case, the severity of the offence, the public interest and the statutory penalties involved.

Those who are actively involved in supporting victims of domestic violence are well aware that a large percentage of women victims minimise the extent of the crime and impact of the violence on them at sentence in order to save their husbands from a custodial sentence. For reasons of guilt or to save the family, a female victim will often shoulder the blame for the offence, even though in many cases she has no reason to do so and may even be prolonging and extending the cycle of violence.

The Victims Task Force in October 1992 published a discussion paper *Advocacy for Victims of Crime*. The document illustrates at least fifty points of conflict where a victim may need advocacy through the criminal justice process. At this time the Victims of Offences Act 1987 does not provide for a victim's advocate and yet an offender can apply for legal aid and, if appropriate, have his or her rights protected by legally aided counsel at his trial. The Task Force does not suggest that victims require legally aided lawyers to assist them but there is a crying need in some cases for an advocate to assist victims to negotiate their way through our criminal justice system.

III CONCLUSION

I am drawn to the inevitable conclusion that since 1975 there have been some legislative changes that have made a difference for women. It is usually my view that New Zealand tends to over-legislate and over-regulate, but when it comes to the protection of the victim I believe that legislation is necessary to provide compulsory procedures in the criminal justice system if victims' rights are to be taken seriously.

There is as yet no long-term custodian of the Victims of Offences Act 1987. The Victims Task Force has been dissolved and we await the plans and strategies to be put in place by the policy makers to protect future victims of crime.

Legislation can assist the less powerful in society, many of whom are women, but the progress of women in attaining the freedom to choose the direction of their own lives will depend upon matters beyond the law, matters of power and privilege, gender bias, culture, custom and of course matters economic.