

Notes from a woman lawyer in government

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Napoleon: *I can't stand women meddling in politics.*

Madame de Stael: *Sire, in a country where women have been sent to the guillotine you can't blame them for asking why this happens to them.*¹

For many years the catch-cry of feminism was "the personal is political." Women, if they were to advance their own personal cause or even, as Madame de Stael suggests, to survive, seemed to realise that they needed to be involved in politics and in parliament. Politics and parliament are, of course, the complete embodiment of patriarchy. I have always considered in this sense that women were the instrument of government rather than that government was the instrument of women (contrary to those political ideologists who would have us believe in government by the people). It was, after all, by means of parliament that women were "given" the right to vote in 1893, but not of course, the right to stand for parliament until 1919. How curious it is that women in New Zealand are this year celebrating 100 years of suffrage when men have always presumed the right to vote and be decision-makers whether on the basis of status among their social groupings, property ownership or economic standing.²

Parliament and those elected to it have for centuries made the laws which affected all our lives. It may seem that women have the absolute rights which Parliament has deigned to give them. These "rights" were often granted after hard fought social and legal battles. But in fact many of our rights are really qualified rights. Women have only had *presumptive* division of matrimonial property on the basis of half shares for 16 years, an outlawing of rape within marriage for eight. The Human Rights Commission Act 1977 was only enacted 16 years ago. We still require two doctors to certify abortions. Even now, perhaps, these hard fought battles for qualified rights are all but taken for granted.

Women lawyers working in government are not very often heard from in the legal profession or in feminist discussion of the law. It seems appropriate therefore that some comments are made about what it is like to work in this area. First, I describe some of the processes involved in New Zealand policy formulation and legislative drafting. The purpose of this part is to identify some of the ways in which it is possible for women to be involved in the processes of policy and law making and to comment on these from a feminist perspective. Secondly, I offer some thoughts on the differences between working in government as opposed to working in private practice.

1 Madame de Stael (1766-1817).

2 Universal suffrage for men took centuries to develop, of course, and Maori rights of representation and suffrage have a different history again. See *Report of the Royal Commission on the Electoral System; Towards a Better Democracy* (Government Printer, Wellington, 1986) Appendices A and B.

I LEGAL POLICY

It is only by understanding the process of policy making that it is possible to comment on it from a feminist perspective. A brief outline is therefore necessary.

Policy proposals can come from a variety of sources. They may be part of a political party's manifesto, ideas of a particular Minister, submissions from the public or particular pressure groups, or from government agencies who consider there to be a need for reform of the law in a given area.

Wherever the policy drive comes from, the process for formulation, acceptance and enactment of the policy is generally the same. Different government departments have different roles to play in this process. The Treasury will always be consulted on policy which has financial implications. The Police or other enforcement agencies (such as the Ministries of Customs, or Agriculture and Fisheries) will need to be consulted on issues of enforcement law. The Ministry of Women's Affairs will be consulted on policy which is perceived to raise issues of importance to, or which will impact upon, women. In short, any number of departments may be involved in the development of a particular policy.

The role of each department is to fight for the respective interests of themselves or their Minister. A great deal of manoeuvring takes place amongst the officials of the various departments. Disputes which cannot be resolved must be settled by Ministers either informally or at Cabinet Committee level. All major policy decisions must be approved by Cabinet. Without this it is impossible for approval to be given for the enactment of legislation.

Once a particular policy has been determined the department sponsoring it has responsibility for preparing drafting instructions for any legislation that might be required. Drafting instructions take the form of written instructions to the Parliamentary Counsel Office.

Take a brief browse through any number of legal journals and you could be forgiven for thinking that this process of policy and law making was an objective legal process, or even for thinking that the process was an instrument of the law. The truth is that the process is the political arm of patriarchy.

It might be thought, however, that access to this process offers new hope for feminist lawyers. Participation in policy formulation and the drafting and enactment of legislation appears exciting and is an opportunity to have input into a decision-making process previously a predominantly male preserve.

I have my doubts, however, that a feminist lawyer is likely to find this process any easier to influence, though it may be easier to participate in. It remains the case that there is a very small number of feminist women involved at these upper levels of the political process. Although this number is growing all the time, it is still possible to

go to meetings and be the only woman present; to hear apologies at such meetings for the fact that there are no "dolly birds" available to help pour the tea.

The rules for formulation of policy and draft legislation have been devised, for the most part, by men. The language of legislation itself is, in my view, the language of men (certainly of male lawyers). The introduction of gender neutral language in legislation, for example, is very recent and still greeted with derision in some quarters.

The principles and concepts that are brought to bear in the policy making and legislative process have many what I call "objectification traps" for women lawyers. By this I mean that the policy can become separated from the people it is intended to apply to and from the people who are a part of it.

For example, policy advisers talk about "offenders" instead of rapists and abusers; consider sexism can work both ways; talk about one law for everyone instead of equity of justice for all; talk about labour law and equal bargaining power; structure legal remedies around adversarial court systems and consider these are suitable remedies for everyone. Policy advisers also talk about "censorship" instead of pornography. They continue to pass over to judges responsibility for interpreting the law because it is anticipated they will bring the same value judgments to it that parliament does, even if at times judges don't quite get the law "right".

There are other traps as well. Many people talk about women and other "minority" groups when women outnumber men in this country. Some still consider that if women really wanted to they could make the most of the system and get the same out of it that men do and wonder why women still don't do it. They wonder why women need special treatment in this day and age and sigh dismissively when women's groups demand recognition of those needs. They consider instead that if women are given the same rights as men then women will have the equality they keep demanding and wonder why women keep insisting this isn't so.

Departments often work for their own interests instead of working with others to achieve a defined goal. They consider that their interests and the interests of the public or the public good are the same and that the public would realise this if only they understood what the process was all about. From a feminist perspective this can be particularly problematic when it comes to asking how it might be that the particular interests of women are determined, taken into account, or protected.

Influencing the policy itself can be difficult for a feminist because some of the "new" initiatives in public policy have at their base concepts which can be described as anti-women. The "level playing field" and "free market" concepts fail to understand the very nature of power and its inequitable spread among people. Women, for example, generally have less economic power than men. Women are discriminated against. From a feminist perspective the "free market" is a sexist market and the "level playing field" is tilted against women.

And so we might wonder why it is that there are not more women "meddling in politics" and why it is that there are not more women who continue to challenge and continue to argue that the process is not open or fair or impartial.

II LEGISLATION

Legislative drafting is a different process again. Once the policy has been decided it becomes necessary to consider the actual enactment of it in more detail. For example, should the policy be implemented by means of a statutory code of rights and responsibilities? Is a general statement of principle more appropriate? What are the key aspects of the policy which must be expressly stated in legislation? What can be left implicit? Should the objectives of the policy be set out fully or is a short title in the statute sufficient to do the job? What will be in the legislation and what can properly be dealt with by regulation? What should the structure of any offence provisions be? Are offence provisions needed at all? Which offences should contain elements of mens rea and to what degree? Should the offences be absolute or strict liability? What are the appropriate penalties? In other words, what level of culpability is appropriate and how should offences be punished? Is a fine appropriate or should imprisonment be considered?

In addition, there are enforcement powers to think about. Should search warrants be allowed? Which enforcement agency should exercise these powers? (a particularly important question in the age of devolution of government power and contracting out). Other issues include consideration of the New Zealand Bill of Rights Act 1990, the Treaty of Waitangi, regulation-making powers, statutory powers of decision and who should have them and so on.

These questions are not asked in a legal vacuum. There is a whole range of standards by which they are judged. The Legislation Advisory Committee, for example, has published guidelines on the preparation of legislation. There also exist guidelines on such subjects as search and seizure procedures. In fact there is a huge amount of material by which a department might be guided.

In discussing this process it is easy to imagine it takes place in a calm neutral environment in which difficult legal issues are worked through to suitable legal solutions. However, in my view, the drafting of law is not like this at all. For example, it is easy to think of the structure of offence provisions as a purely legal process. But determining the structure of such provisions involves asking yourself what harm it is you are trying to avoid or police.

The question of "harm" can be very subjective. What is the harm, for example, if the offender in a domestic assault case does not go to the anger management course that the Court directs him to? On one view it is possible to say that the only harm is to the Court since its order has been disobeyed. Applying a legal perspective it is possible to look at the matter entirely in relation to other aspects of the law - what are the penalties for other, similar offences, and so on. On this line of argument a fine, for example, might be imposed as the appropriate sanction.

It seems to me, however, that a feminist would view the matter rather differently. The consequences for the woman assault victim may be far greater. The harm may be the re-occurrence of violence, perhaps even more severe. What should the sanction for non-attendance be if this view is taken? Imprisonment? The point is that the notion of harm is subjective. The structuring of offence provisions could similarly be subjective.

So too could many other parts of the legislative drafting process. What are the grounds upon which a judge should exercise his or her discretion, what are the relevant factors to be taken into account? ("relevant" is another subjective notion.) What rules of evidence will be used - will there be presumptions for the defendant to rebut or will the prosecution have to prove the case? Such questions and their answers can have incredible consequences for women. For example: a woman may have to give evidence without the aid of a screen from her attacker; he may be bailed back to her house; the onus will be on her to give evidence; her consent will be presumed unless she can prove otherwise.

It is clear then that the drafting of legislation can have direct consequences for women. It will continue to do so while the law is objectively applied to them rather than developed by them with regard to their demands. For a feminist the challenge is to always ask - why does this happen, who says it must, what are the alternatives, and how can we do this better?

III ANTS' NESTS AND BEEHIVES

In the relatively brief time that I have been involved in government it has seemed to me that more and more women, especially feminist women, are leaving the fields of private practice to work in the public sector. Having worked in private practice for a while it has occurred to me that there might be a number of reasons for this.

First, law firms are businesses. Like any other business they aim, for the most part, to operate at a profit. The result is a natural emphasis on the generation of the greatest possible fees by staff solicitors and partners for the minimum amount of time and with the minimum amount of cost necessary to do a proper job. Fee targets, billable hours, and productive and unproductive time have long been a part of the every day jargon for legal professionals.

Secondly, women's history in the field of legal business practice in New Zealand dates back to May 1897 when Ethel Benjamin was admitted to the Bar. A chequered history of women in the law followed until probably at least the 1950s.³ Since then, and especially in the last decade, more and more women have been studying and practising law. One could be forgiven, therefore, for thinking that many male lawyers would be used to having the female of the species around and, in this day and age, to the presence of feminist lawyers.

3 See generally J Mayhew "Women at Law" [1992] NZLJ 85.

In my experience, however, many male lawyers in private practice remain very distrustful of feminist lawyers. Many are unsure what exactly a "feminist" is, although there are probably a few (perhaps even a growing number) who consider they would know one if they saw one. This in itself can make life in private practice difficult for feminist lawyers. I remember well the partner of a law firm who told me his job was to "break down" the new law students and "re-mould them" so that their minds were set to the channel of his firm. This did not bode well for young feminist lawyers who, presumably, were viewed as something of a challenge!

My own view is that the true aim of feminist principles is to ensure that the special qualities which generally only women have and the particular skills which most often they bring are treated as an integral part of their make-up as a lawyer and not secondary or subsidiary to it. Working in private practice can make it difficult for these skills to be recognised.

These views are not, however, confined to private practice but also apply to women lawyers working in law generally, including those who choose to work in the government. It seems to me that the law itself can be a feminist lawyer's worst enemy. The extrapolation of a case scenario into "objective" facts and the application of law to those facts is a skill taught from the first day in law school. We are all taught that good lawyers remove their own personal feelings from a case scenario and look at the situation from a dispassionate and neutral legal perspective. So it is that we are taught to believe that good law is objective.

A natural extension of this is objectification of women who work as lawyers - provided a woman can do her job as well as the next man it doesn't matter that she is a woman. The point is that she is a good lawyer. Consider, for example, the following comments made by the President of the Court of Appeal on the occasion of the admission to the Inner Bar of Sian Elias and Lowell Goddard:⁴

New Zealand was early in giving women the right to vote - 1893. It could be said that we lagged behind in according them equality in the professions But I think the point to be made is a different one. Lowell Goddard and Sian Elias ... have not become Queen's Counsel because they are women who practise as barristers. They have achieved the rank because they are barristers who have shown in practice the necessary qualities, including integrity, ability, responsibility, learning, and judgment. They happen to be women as well.

So, too, it seems to me, is it by way of this process that it can be argued that women are in fact made objects in the practice of law.

This view might be thought particularly useful for male lawyers for a number of reasons. On the one hand it tends to result in women lawyers having very male ways of working and thinking. Feminist (or even, shudder to suggest, feminine!) ways of

4 The address of the President of the Court of Appeal, Sir Robin Cooke, is reproduced in full at [1988] NZLJ 147.

working are carefully controlled and weeded out. On the other hand, it can be argued, the view can be compellingly attractive to women lawyers as well. Many women lawyers tell me they are lawyers first and women second. What a tribute to the objectification of the law! A woman may decide she does not want any special treatment "just because" she is a "woman." Alternatively she may be happy to be in the back offices "just doing a good job." The result, it seems to me, is that male lawyers are doubly victorious - not only do women lawyers end up thinking as their male colleagues do, they expect themselves to and see it as a sign of weakness to think otherwise.

Of course, this is the very antithesis of what feminism seeks for women and what a feminist lawyer might want to achieve. It is one thing for us to know the system and be able to operate within it with the necessary level of skill and professionalism required. It is quite another for the effect of learning the system to be a loss of our feminist way of looking at cases and of interpreting them - indeed, for the loss of those very skills for which feminism demands recognition.

There are, of course, women lawyers in government who also consider themselves lawyers first and women second. Nonetheless, on the whole I found the government working environment much less *overtly* hostile to women, including feminist women. Naturally this results in a more pleasant working environment. The problem with it is that it can lull you into a false sense of security. As all feminists know, the fact that there may be large numbers of women working for an organisation does not mean there is equality or equity of employment.

Nonetheless, all government departments are required to have in place equal employment opportunity plans and the implementation of these is checked.⁵ These plans may not be the best way of achieving recognition for feminist women (or other groups). It is easy to pay lip service to EEO as many bureaucrats do. However the public sector is undoubtedly considerably more mature and advanced in its thinking and practice of equal employment opportunities than most private sector employees and certainly, I should think, all legal businesses.

One thing that particularly struck me when working for government was that no-one had any difficulty with calling me "Ms" instead of "Miss". I could listen to a speaker talking in gender neutral language with apparent ease. A marked contrast to private practice where male lawyers will still refuse to apologise for using "he" to refer to women and men by snidely referring to the Acts Interpretation Act 1924 as authority to do so! In addition, because private practice is a business, lawyers can be reluctant to upset their sexist clients who, for example, don't want a woman lawyer (it still happens) or who must constantly call you by the wrong title. Small examples of the lack of respect for women can speak volumes.

It may be that women are attracted to working for government because of the nature of the work environment. Of course there are women who find it difficult to work in

5 State Sector Act 1988, s 56.

government, perhaps because the work environment is so different from private practice or, perhaps, because it is not different enough.