EQUALITY AND GENDER BIAS IN THE LAW

by Justice Elizabeth Evatt AO


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The Commission has been asked to ensure the full equality of women before the law by considering what should be done to remove any unjustifiable discriminatory effects that the law or its application might have for women. The Prime Minister announced this reference to the Commission during the launch of the National Agenda for Women on 10 February this year. It is part of the Government's commitment to ensuring equality before the law.

The Commission is to consider whether there is a need to amend existing laws; to introduce new laws; to change the way laws are applied in courts and tribunals or to change the ways laws are made. We are also asked to consider non-legislative approaches to reform. This will be distinct from the project being undertaken by the Australian Institute of Judicial Administration (AIJA) although the two bodies will have overlapping areas of interest.

Background

The background to the Commission's reference includes press reports of, and the community reaction to, several rape cases which occurred over the last 18 months. First there was the *Hakopian* case, which caught public attention because of the judge's suggestion that the rape of a prostitute might be less serious, and therefore carry a lesser sentence, than the rape of a 'virtuous woman'. The Victorian Law Reform Commission (which has since been abolished) later pointed out that, while the actual impact on a particular victim is a relevant consideration, there is no evidence that a victim's occupational status or sexual experience is a good guide to the psychological impact which a rape may have. The Commission recommended that in taking into account the impact of the offence on a complainant in the course of sentencing an offender for a sexual offence, a court must not make any assumption about that impact that is based on the fact that the complainant was, or had been, a prostitute.

The second case was that of a judge who is said to have instructed a jury that the law did not prevent a husband from using rougher than usual handling of his wife in an attempt to persuade her to agree to sexual intercourse. The Court of Appeal disapproved of this comment.

These cases, and others reported by the media since, have led to strong criticisms of the judges concerned and to demands for judicial education.

This in turn has led to an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs. The distillation of that inquiry amounted to two questions:

- Is the recent publicity surrounding judicial comment in sexual offence cases a proper reflection of a failure to understand gender issues by the judiciary?
- What is the appropriate response to any such failure?

It would be a mistake, however, to see the reference to the ALRC and the work of the AIJA as simply a response to those well reported judicial comments. It would also be a mistake to see these exercises as being solely concerned with the correction of individual error by a few members of the judiciary. The underlying problem, which those comments illustrate, is far more fundamental. It is the firmly entrenched gender bias of the law which is the main cause of discrimination against women in the legal system and is the subject of the Commission's inquiry. The law and the legal system as a whole, rather than individual judges, are the issue.

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Gender bias is a form of systemic discrimination, a failure of the law to accord fair and equal treatment to women in its substance, in its application or in its procedure. Gender bias is due in part to the attitudes brought to bear by courts on issues affecting women. Regrettably, these attitudes have often been based on stereotyped roles for men and women and on assumptions about their status and capacities. Because of the role of judges in developing the law, these judicial attitudes, prejudices and biases affect not only individual cases but also the substance of law.

One of the purposes of the Commission's reference is to show whether, and to what extent, gender bias leads to discrimination, inequality and disadvantage to women. To do this it is necessary to explain some of the sexist assumptions about the roles and worth of men and women and to show how these have affected the law and led to unfair or unequal outcomes. As the major concern is the discriminatory effects of law, the starting point for this exercise is the experience of women in dealing with the law, rather than with legal principles which may not show overtly any gender bias or distinction. The experiences of *all* women are relevant to this task, as the race, sexuality, class or disability of women affects the outcome for them, as well as their gender.

Historically, the laws were made and applied by men. Women were excluded from participating and lacked legal status and capacity in many respects. Patriarchal attitudes provided the subject matter of the law, particularly in regard to family law and to violence against women.

Studies of the legal system carried out in North America — with whom we share a common legal heritage — show that male judges tend to adhere to traditional values and beliefs about the 'natures' of men and women and their proper roles in society. They found overwhelming evidence that gender-based myths, biases and stereotypes are deeply embedded in the attitudes of many judges as well as in the law itself and that gender difference has been a significant factor in judicial decision making.

Australian feminist lawyers have written convincingly that gender bias is as much a part of the Australian legal system as it is in North America. There are comparable examples to back up their arguments, such as

- the exclusion of women from participating in the law
- the law's longstanding failure to recognise and deal adequately with violence against women and sexual harassment
- rape laws which focus on the male offender's belief about consent rather than on the protection of the victim's right to personal integrity in all circumstances
- the failure of the legal system to give proper value to women's unpaid work and compensation law and matrimonial property law
- assumptions about the dependency of women, which permeate several fields of law, including social security
- the failure of the law to recognise and to enforce fully the principles of pay equity
- the failure of the law to deal adequately with the portrayal of women in media and advertising
- the failure of courts to recognise the effect of indirect discrimination against women.

Overlap with State law

We are a federal Commission but issues of gender bias often involve State judges. This becomes a federal concern because all judges at some time exercise federal jurisdiction and because standards of justice and fairness are an international human

rights obligation and cannot be compartmentalised according to the division of State and federal powers. For example, it would be impossible to address adequately women's lack of equality before the law without examining how the law responds to physical violence against women. When dealing with a problem that is systemic to the Australian legal system, useful reforms cannot be made in the federal sphere without knowing the situation in the States and Territories of Australia. The Commonwealth has a general responsibility to ensure that the standards laid down by international conventions to which Australia is a party are fully implemented in the States and Territories.

Options for reform

Extending the bias rule

Judges value highly their independence and impartiality, though they are more willing these days to accept that they are affected by many inbuilt attitudes and values. When a judge displays biased attitudes which go beyond an interpretation or application of established law, the individual's rights can be adversely affected. If a judge is wrong in law, there can be a correction on appeal but there could be a concern that the attitudes displayed in one case could affect the judge or magistrate in his or her approach to other cases. There is, of course, a legal rule against bias. If a judge has a personal interest or a predisposition in favour of or against a party, this is a disqualifying factor which should be revealed and may be relied on in an appeal. The Commission will ask whether this rule should be extended to deal with the expression of gender bias.

Another option is to regard gender bias as an occasion for judicial discipline in those jurisdictions which have established mechanisms for this purpose.

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Both these suggestions depend in the long run on a far better understanding of gender issues by lawyers and judges.

More effective protection of equality

The Commission does not interpret equality before the law narrowly to mean that men and women should be given identical treatment. Our approach is that women are equally entitled to the enjoyment of rights and freedoms and to fair treatment by the law. This means that the content of rights must be equally meaningful for women as for men. That may require revision of the substance of rights because equality before the law and fairness cannot be achieved if there is bias in the substance of the law, in legal procedures or in judicial attitudes.

One possible response to bias is a comprehensive guarantee of equality to protect women — and possibly others — from discrimination by federal or State governments or public agencies. The Constitutional Commission recommended that the right to equality be entrenched in the Constitution and drafted a provision to this effect. Equality protection could also be provided in an Act of Parliament or Bill of Rights. While this could be removed by a subsequent Act of Parliament it has the advantage of allowing the concepts included in the legislation to be tested in practice before being included in a binding constitutional document.

An equal rights or anti-discrimination provision should be broad enough in its scope to allow legal challenges to take full account of women's disadvantaged position (without restricting these equality provisions to gender issues). Entrenched equality provisions would mean that any law inconsistent with the equality principle would be invalid to the extent of the inconsistency. Women would be able to challenge all laws, policies and programs — Commonwealth, State and local — which result in unequal outcomes for women or which perpetuate their disadvantage. A general prohibition of discrimination, with legal sanctions, would give legitimacy to women's equality and thus give women some power. On the other hand, the interpretation of a Bill of Rights is left to the courts, which may be ill equipped to resolve equality issues. Their tendency to take a narrow legalistic approach is well known. Overseas experience suggests that women need to work hard to put persuasive arguments to courts on some of these issues. Unless something is done about it, gender bias could frustrate equality laws.

Removing bias in the substantive law

In dealing with the substantive law the Commission will examine the law relating to relationships to consider whether it accurately reflects the needs of society and promotes the equality of women. The nature of women's employment and the laws relating to employment will be considered to see whether they impede or promote equality. Discriminatory aspects of the Social Security Act and other related legislation will be examined to see whether they are justified. The impact on women of other aspects of economic life will be considered including sexually transmitted

debt and discriminatory aspects of company law and insurance law. These and many other aspects of civil and criminal law, and the law relating to nationality, immigration and refugees will be looked at to see whether they perpetuate discrimination against women.

Greater participation by women in the law

Women are well represented among students in Australian law schools and have been for some time. However, this has not led to an equivalent number of women moving into the higher levels of the profession. The lack of numbers creates many problems for those women lawyers who sometimes feel that they are up against a legal system which is permeated with the attitudes and prejudices of male hierarchies. Women who seek to participate in the law may have to behave in the same way as men in order to succeed. They may have to pursue personal goals of equality on male terms rather than to seek to integrate other values and attitudes into the system.

If the system is gender biased and discriminatory towards women, participation in the system could mean that women participated in their own oppression. At the same time, the absence from legal practice of women who do not want to be forced to adopt the style and outlook of the male hierarchy could serve to reinforce the effects of gender bias.

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Participation in the judiciary

Similar problems arise in relation to the judiciary. It is fairly widely accepted that the judiciary is drawn from a narrow class of people of similar background and outlook. On one view, the small number of women in the judiciary is partly the result of the attitudes already described. But would more women in the judiciary make a difference? Feminist writers believe that women *would* make a difference because they would offer their own perspective and because they could introduce a new standard of judicial neutrality and impartiality into the justice system.

The Commission will be seeking information about the obstacles to the participation of women in the legal profession to identify how far these result from gender bias and discrimination. We will also call for views on the method of selection and appointment to the judiciary and ask whether there is any discrimination against women in that regard. Proposals to broaden the base of appointments are often met with opposition on the basis that this would in some way be inconsistent with merit. If the goal *is* that of merit, it is important to be clear what standard is set and how people are assessed as meeting that standard.

Proposals for judicial education

In my view the case has been well established for the inclusion of gender bias and gender awareness in continuing judicial education programs. When programs of this kind were introduced in North America in the 1980s they were supported by a substantial number of leading male judges and educators.

Similar proposals have been made in Australia in reports to government over the last few years. In 1990 the National Committee on Violence recommended that the AIJA provide for the continuing education of judicial officers in matters relating to victims of violence generally and victims of domestic violence, sexual assault and child abuse in particular. The National Strategy on Violence against Women recommended that the training of lawyers, judges, magistrates and police include programs to promote attitudinal changes in relation to violence. The Victorian Law Reform Commission, in its report on rape, suggested that one process for change should be education of the judges by the Judicial Studies Board. The Parliamentary Joint Select Committee on the Operation and Interpretation of the Family Law Act recommended that the Family Court develop a more systematic and intensive program of judicial education in relevant non-legal matters, particularly in domestic violence and child abuse matters.

Judicial education programs of these kinds have been supported by Chief Justice Malcolm of WA and the issue has now been taken up by the AIJA. Judges shape the law and they can, within limits, choose to be responsive to the needs of the times or slavish followers of outdated concepts. It is clear that judges have prejudices and biases of which they and the public should be aware. In a sense, the reference to the ALRC is a challenge to the accumulated prejudices of lawyers and judges of the past rather than an attack on the individual. The goal is a simple one — that women receive fair and equal treatment from the law.

The consultation process

The Commission is currently distributing a discussion paper as a precursor to an extensive process of consultation around Australia, beginning in August. We will visit each State and Territory, capital cities and some regional centres. We intend to involve women of all walks of life, and especially women who have particular difficulties in their access to the law. Copies of the discussion paper are available free of charge from the Commission.

Meeting of consultants
Standing l to r: Eva Cox, Hilary Astor, Zoe Rathus, Justice Mahla Pearlman, Robyn Frost, Justice Margaret Beazley, Professor Rebecca Bailey-Harris, Jenni Mattila, Valerie Pratt, Regina Graycar, Sue Walpole, Jenny Morgan, Professor Hilary Charlesworth, Justice Elizabeth Evatt.
Sitting l to r: Nea Goodman, Matina Mottee, Kaye Loder, Annie McLean.
Photography: John Halfhide