



Auckland Women
Lawyers' Association Inc.

PO Box 6568,
Wellesley Street,
Auckland
awla@xtra.co.nz
www.adls.org.nz

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This issue's editor:
Anita Killeen

NEWSLETTER

JULY 2004

From the President...

Our mid-winter dinner on 18 June was a success. We were delighted to have the Prime Minister attend the dinner and speak to us and equally delighted that the Attorney-General, Margaret Wilson, could also attend. Margaret was one of the founding members of the AWLA 20 years ago, as was Helen Melrose who was also at the dinner. Some 60 women turned up to the first ever meeting of the AWLA 20 years ago, few would have thought that we would now have a female Governor General, Prime Minister, Attorney-General and Chief Justice. Hopefully, in another 20 years time, we will make up 50% of all the positions in the legal profession.

We were only sorry that we had restricted numbers for the dinner. We had booked the venue before the Prime Minister said she was able to come. Hence our restricted numbers (128).

We also had a successful careers evening at Auckland University on 19 May. There is a report of that evening in the newsletter. Laila Harre, Sarah Katz, Marie Dyhrberg and Lianne Meyer who spoke about the different reasons they became lawyers and the wildly different career paths they have followed. Listening to the speakers, you could only admire the pluck and resourcefulness they had each shown at different times. If, in a couple of years time, there are 50 Marie Dyhrberg "wannabes" running around, also with large numbers of children, it all started at that careers evening.

There are some people who the Executive wishes to particularly acknowledge. The first is Sharyn Larkin the AWLA's secretary. Sharyn

is the highly efficient person (also a law student), who gets all the AWLA information organised and out to you. Secondly, Suzie Abdale and Natalie Fraser who organised the mid-winter dinner. They worked closely with the very accommodating team at the Pavilion Café and Restaurant to make the dinner the success it was. We also want to thank Katherine Anderson, a Principal at Chapman Tripp, who offered to draft submissions for the Association on the amendments to important definitions in the Crimes Amendment Bill. The submissions are in this newsletter and we are grateful to Katherine for preparing them. We are only too happy if members who have a special interest in a particular area volunteer their services and so welcome any offer of help.

On 30 June Dr Judy McGregor, the Equal Employment Opportunities Commissioner, released a report entitled *The Census of Women's Participation in Governance and Professional Lives*. The contents of the report should be widely reported and there is a link to it on the Commission's website at www.hrc.co.nz/leoo if you want to take a look. In the next newsletter, we will try to bring you some comments from Dr McGregor on the census and let you know what the report reveals and the conclusions that can be drawn from it.

However, in keeping with the Executive's "no surprises" policy, we are confidently predicting that the census will reveal (yet again) that more women are needed in these positions.

Regards, **Mary Peters**

"... the audience found Laila both humble and inspiring and were delighted as she quoted her son as once saying, 'but Mum, I thought only girls could be lawyers?'"

"Sarah emphasised the value of being mentored and advised students how to go about finding a mentor."

"Marie realised her passion for justice early on during her Catholic upbringing and now prides herself on being able to relate to 'all walks of life.'"

"Lianne has found a unique way of balancing these competing demands by going into Partnership with her husband."

AWLA Careers Evening 2004

On the 19th of May, AWLA hosted the annual Careers Evening at the Law School. While it was anticipated that the impressive line-up of speakers would attract a respectable audience, it is quite possible that some sort of record was achieved as approximately one hundred students, graduates and practitioners turned up for insight and inspiration.

The evening began with wine and nibbles in the Staff Common Room which was utterly buzzing as the guest speakers were greeted on Eden Crescent and brought up one by one. Soon after 6:00pm, everyone proceeded down to the Algje Lecture theatre with glass in hand for the structured part of the evening.

AWLA President, Mary Peters, welcomed and introduced this year's speakers: **Laila Harré, Sarah Katz, Marie Dyhrberg and Lianne Meyer**. This group of women were invited to speak about their diverse career paths and experiences in the context of their shared passion for the law. Each delivered an astonishingly honest account of their careers to date and provided a glimpse into their current adventures of life at the top of their profession.

Our first speaker, Laila Harré began by recalling her brief taste of corporate law which abruptly ended after being told she was too much of a 'leftie.' Laila spoke of her experiences in parliament and of her most recent aspirations with the NZ Nurses Organisation regarding pay equity. She acknowledged public perceptions of her character have been somewhat misplaced due to the career she has embraced. However, the audience found Laila both humble and inspiring and were delighted as she quoted her son as once saying, "but Mum, I thought only girls could be lawyers?"

Sarah Katz followed with a humorous account of how her family has multiplied faster than anyone thought possible. She advised young students to consider choosing supportive partners if they wish to both raise a family and aim for partnership. In summarising her career path to her present position as Litigation Partner at Russell McVeagh, Sarah emphasised the value of being mentored and advised students how to go about finding a mentor.

While Sarah was recently headhunted by Russell McVeagh, Marie Dyhrberg said with a smile that she too receives calls from headhunters, not the same sort of headhunters mind you. Marie realised her passion for justice early on during her

Catholic upbringing and now prides herself on being able to relate to 'all walks of life.' Marie was the second woman in New Zealand to open a law practice and also walked fresh tracks as President of the Criminal Bar Association. Marie works in an area of law which is by its nature both male-dominated and isolated at times. However, she manages to find humour in the tough persona she seems to have acquired and finds inspiration in those that depend on her.



Lianne Meyer concluded the evening with a description of her journey from junior solicitor at Russell McVeagh to Partner at Rick Williams Associates where she works alongside her husband while raising five children. Lianne feared she would be boo'ed off stage as she gave students a brutally honest perception of the challenges involved in combining professional life with raising a family. However, Lianne has found a unique way of balancing these competing demands by going into Partnership with her husband. With the ability to share clients with her husband and with the added assistance of a 'brilliant office manager,' Lianne has the luxury of working part-time which enables her to be a full-time mum.

Unfortunately many students had to leave mid-way through the evening as the Stout Shield was scheduled for the same night at the High Court. However, feedback from the audience clearly indicated that students were both impressed and inspired, and appreciated the honesty with which the speakers' told their stories.

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AWLA Careers Evening 2004 – Continued from page 2

AWLA would like to sincerely thank the speakers for generously giving up their time to participate in this year's Careers Evening and also for the enthusiasm with which they approached this event.

AWLA also wishes to extend a thank you to:



for kindly sponsoring this year's Careers Evening and for enabling us to provide the function free of charge for students.

Ronelle Barnes



From Left: Laila Harre, Sarah Katz, Lianne Meyer and Marie Dyhrberg.

A.W.L.A. EXECUTIVE COMMITTEE 2004 – CONTACT DETAILS

NAME	CONTACT DETAILS	ADDRESS	NAME	CONTACT DETAILS	ADDRESS
President Mary Peters	Ph: 367 8222 Fx: 367 8163 Mobile: 021 659 325	Russell McVeagh P O Box 8, Auckland DX CX10085 mary.peters@russellmcveagh.com	Anita Killeen	Ph: 303 0121 ext 814 Fx: 303 0142 Mobile: 021 149 0287	Serious Fraud Office P O Box 7124 Wellesley Street, Auckland akilleen@sfo.govt.nz
Jennifer Caldwell Vice President	Ph: 357 9396 (DDI) Fx: 358 2055 Mobile: 021 624 162 Home: 524 6146	Buddle Findlay P O Box 1433, Auckland DX CP24024 jennifer.caldwell@buddlefindlay.com	Jane Norton	Ph: 373 7599 ext 89705 Mobile: 027 477 4773	Apt 2D 2-4 Lorne Street, Auckland j.norton@auckland.ac.nz
Maria Dew Treasurer	Ph: 307 5251 Fx: 307 5292 Mobile: 027 275 9442	Princes Chambers P O Box 1879, Auckland maria.dew@barrister.gen.nz	Linda Robinson	Ph: 359 7717 Fx: 373 2123	Baldwin Shelston Waters PO Box 5999, Auckland DX CP24055 linda.robinson@bsw.com
Sharyn Larkin Administrative Assistant	Mobile: 021 107 7974 Home: 817 6778	AWLA P O Box 6568, Auckland 77B Konini Rd, Titirangi, Auckland awla@xtra.co.nz	Nikki Dines	Ph: 977 5173 Fx: 977 5083 Mobile: 021 954 790	Simpson Grierson Private Bag 92518 Wellesley Street, Auckland DX CX 100092 nikki.dines@simpsongrierson.com
Suzie Abdale	Ph: 309 9636 Fx: 309 9733	Crescent Chambers P O Box 46 281 Herne Bay, Auckland suzie@crescentchambers.co.nz	Laraine Vickars	Ph: 300 3814 Fx: 303 2311	Phillips Fox PO Box 160, Auckland laraine.vickars@phillipsfox.com
Natalie Fraser	Ph: 309 9636 Mobile: 021 711 776	Crescent Chambers P O Box 46 281 Herne Bay, Auckland NKF@xtra.co.nz	Ronelle Barnes Student Representative	Ph: 418 3624	14A Moore St Hillcrest, Auckland ronelleb@arkon.co.nz
Tammy McLeod	Ph: 915 4386 Fx: 9154389 Mobile: 021 711 320	Davenports Harbour PO Box 302 558, Auckland tammy.mcleod@davenportsharbour.co.nz	Vicki McCall	Ph: 479-6992 Mobile: 021-114-0012	14 Nereus Place Mairangi Bay, North Shore City vixtermcc@hotmail.com
Sarah Carstens	Ph: 353 9990 Fx: 353 9701	Minter Ellison Rudd Watts P O Box 3798, Auckland DX CP24061 sarah.carstens@minterellison.co.nz	Usha Patel WCG Representative	Ph: 360 1186 Fx: 361 2602 Mobile: 025 366 378	P O Box 47 345 Ponsonby, Auckland ushapatel@xtra.co.nz
Lucy Hudson	Ph: 359 7734 Fx: 373 2123	Baldwin Shelston Waters P O Box 5999, Auckland DX CP24055 lucy.hudson@bsw.com	Sandra Aloffivae WCG Representative	Ph: 263 9120 Fx: 263 9124	KAM LEGAL Lawyers and Mediators P O Box 75621 DX EP 75541 MANUKAU salofivae@kamlegal.co.nz

Dean of Law appointed Acting Deputy Vice Chancellor

By Jane Norton



“Despite all these academic successes she describes her academic career as an accident as when she was younger it was always her intention to be a courtroom barrister.”

With the departure of the University of Auckland's Vice-Chancellor, Dr John Hood, to take up the same post at the University of Oxford, Professor Raewyn Dalziel has become the acting Vice-Chancellor with Professor Julie Maxton taking up her post as Deputy Vice-Chancellor (Academic).

This prestigious and demanding position has her working on the academic strategy of the university and chairing numerous committees and planning groups. It is one she knows well as she also held it earlier this year while Professor Dalziel was on sabbatical leave.

Originally from Scotland, as a high school student Julie was awarded a scholarship to study law at University College London. Awarded an LLB(Hons) from UCL Julie went on to gain an LLM(Hons) and a PhD from the University of Canterbury in New Zealand.

Before taking up her lecturing position at Auckland, she lectured at the University of Canterbury. She currently holds a chair in commercial law and teaches in the area of equity and commercial obligations.

Julie is a member of the Legislative Advisory Committee and Legal Research Foundation,

has contributed to the Laws of New Zealand, co-authored two books on trusts and provided a number of chapters in the Butterworths loose-leaf service, *Wills and Succession*. Julie is interested in the practical application of law and has delivered a number of seminars to practitioners for the New Zealand Law Society and the Auckland District Law Society.

She has also spent a period as a Distinguished Visiting Fellow at the University of Hong Kong. Despite all these academic successes she describes her academic career as an accident as when she was younger it was always her intention to be a courtroom barrister. This is a dream she still lives out on occasion as she has appeared in the Privy Council, the Court of Appeal and the High Court arguing points of law in equity, restitution and matrimonial property.

Ask anyone who has worked with Julie Maxton what they think of her and a common theme emerges: she is highly intelligent; very witty, and really really nice. As her research assistant, I have come to the conclusion that she is by far the funniest adult I know and an absolute inspiration to work for. Not only has she completely transformed the law school in her three years as Dean into a dynamic, innovative and exciting international school, but she has chaired the University's successful Student Life Commission, and taken on the roles of acting Director of the Graduate School and Deputy Vice-Chancellor performing both brilliantly. And she still manages to run countless kilometres in a week, fiercely follow football, and be friendly to everyone. One wonders if she ever sleeps.

“She is by far the funniest adult I know and an absolute inspiration to work for.”

CIVIL UNION BILL

The Civil Union Bill was introduced in Parliament in June 2004 supported on a conscience vote by 66–50. It provides for different sex couples who want formal recognition of their relationship but do not wish to marry and for same sex couples who cannot currently receive legal recognition of a loving and committed relationship.

What the politicians said:

Chris Carter, New Zealand's first openly gay Cabinet minister, said the bill would allow him and his partner of 31 years, Peter Kaiser, to publicly register their relationship and to obtain proper legal protection. Since meeting in 1973 they had done everything together including sharing in the parenting of three children, he said. "He has a son aged 13. I have a 14-year-old daughter and a nine-year-old son. We love our children very much. We watch over them, nurture them and educate them in the same way that good parents try to do all over New Zealand. "In every respect our relationship is fundamentally the same as the tens of thousands of long-standing marriages shared by New Zealanders everywhere, with one crucial difference. One of us is the wrong gender."

NZ First deputy leader **Peter Brown** said the bill experimented with children. "By passing this bill we are going to be one step closer to allowing gay people, gay males in particular, to adopt children. I can't go along with that."

National's Rakaia MP **Brian Connell** said the bill tore the social and moral fabric of New Zealand asunder. "This bill is a calculated and carefully promoted strategy to undermine the role of marriage and families of New Zealand society."

ACT MP **Stephen Franks** described the bill as "a copy of the Marriage Act with the word marriage twinkled out" but voted to send it to a select committee. However, he said he would not support it further without significant changes.

Brian Donnelly, one of only two NZ First MPs to support the bill, challenged opponents of the legislation to tell him how its passage would damage his marriage. "The answer is it will not make one iota of difference," he said.

Gay Labour backbencher **Tim Barnett** said the legislation protected the children of "rainbow" families and harmed no one.

It was voted for by all but nine of Labour's 42 MPs, five National MPs including leader Don Brash, the nine Greens, six of ACT's eight MPs and the two Progressive MPs.

The bill was referred to the justice and electoral select committee for public submissions.

"This bill is a calculated and carefully promoted strategy to undermine the role of marriage and families of New Zealand society."

"Women were treated differently because many married women historically did not work and had difficulty finding work when they were suddenly single," Ms Wilson said in her report. "It was difficult to see that a man with the same responsibilities was in a different position," she said."

The Relationships (Statutory References) Bill – Benefits for women not likely to apply to men

While the Civil Union Bill has put the spotlight on welfare laws that discriminate against men, the Government is sending signals that they are unlikely to be changed.

At present, women whose husbands die can get a widows benefit and women over 50 whose relationships break up can get a "woman alone" benefit, neither of which require them to work.

But men who are widowed and older single men get less money on the dole – \$164 a week compared with \$171 – and are expected to find work.

The discrimination was highlighted in a report by Attorney-General Margaret Wilson, looking into the Relationships (Statutory References) Bill that accompanies the Civil Union Bill.

The bill tweaks a plethora of different laws so they do not discriminate against same sex and de facto relationships. Lesbian women and those in de facto couples will soon be eligible for widows and women alone benefits.

"Women were treated differently because many married women historically did not work and had difficulty finding work when they were suddenly single," Ms Wilson said in her report. "It was difficult to see that a man with the same responsibilities was in a different position," she said.

Acting Social Development Minister Ruth Dyson said while it seemed anachronistic women faced greater difficulties. She indicated the benefits were unlikely to be dumped.

“Almost two years post-enactment, the paid parental leave scheme has justifiably been considered a ‘resounding success.’ ”

“The real inadequacies tend to be revealed when New Zealand’s scheme is compared to those in other countries. Over 120 countries had some form of statutory paid parental leave before New Zealand caught up.”

“Although New Zealand’s paid parental leave scheme has taken leaps considering its historical absence, areas for improvement still exist when making international comparisons.”

PAID PARENTAL LEAVE IN NEW ZEALAND: AN INTERNATIONAL COMPARISON

Given the recent amendments to New Zealand’s paid parental leave scheme, it is a timely opportunity to assess its effectiveness to date and reflect on how the scheme measures up against those in other countries and against international standards.

Prior to its introduction, studies revealed that enterprise bargaining had failed to establish paid parental leave for the majority of women employees. Even those that had the bargaining power to secure such clauses, they rarely met the International Labour Organisation standard of 12 weeks. The provision of statutory unpaid leave appeared to have minimal impact being a luxury few employees could afford.

Almost two years post-enactment, the paid parental leave scheme has justifiably been considered a “resounding success.”¹ Both employees and employers have responded positively to its implementation and almost 100% of parents took advantage the full 12 weeks whereas under the old scheme 20% of mothers would return to work within 12 weeks after childbirth.² The Department of Labour evaluation in 2003 reported some dissatisfaction with the entitlements, however the Government has since responded by extending the duration of leave available and by reducing the eligibility requirements. Whether these amendments satisfy the alleged inadequacies can be assessed in light of an international comparison.

Two of the most relevant and influential organisations on labour standards are the United Nations and the International Labour Organisation. By merely introducing paid parental leave, New Zealand satisfied the United Nations Convention on the Elimination of All Forms of Discrimination against Women which requires state parties to take appropriate measures to introduce maternity leave with pay in Article 11.2(b). However it should be remembered that New Zealand maintained a reservation against this Article for almost twenty years while countries far poorer

than New Zealand managed to meet this standard.

The International Labour Organisation on the other hand does not allow reservations to be made and strict reporting requirements are imposed on member states. Maternity Protection Conventions have been introduced since 1919 and the duration of paid maternity leave required to be provided by member states has been gradually increased to the current standard of 14 weeks at two-thirds of previous earnings. Although the recent extension to 14 weeks will be in force by the end of next year, New Zealand has not ratified any of these Conventions and still falls short of the current standard by having a ceiling at \$334.75 a week. It should also be noted that the International Labour Organisation issued a recommendation in 2000 to extend paid maternity leave to 18 weeks at 100% of previous earnings. It is therefore realistic to anticipate New Zealand will continue to face international pressure to both ratify the latest Maternity Protection Convention and work towards the extended recommendation, particularly as labour standards become increasingly important under a globalised and competitive world economy.

The real inadequacies tend to be revealed when New Zealand’s scheme is compared to those in other countries. Over 120 countries had some form of statutory paid parental leave before New Zealand caught up. Many of these go beyond the International Labour Standards and provide 100% of previous earnings for at least 14 weeks. Sweden is one country often cited for its generous policy as it provides up to 15 months of wage replacement with universal eligibility. However, it has been said that high taxation ensures parents return to work once parental leave is over.

The United States and Australia are now the only OECD countries which have no provision for statutory paid leave.

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1 Clark, Helen. (8 March 2004), *Government extends paid parental leave scheme*, <http://www.beehive.govt.nz> (Accessed: 15 April 2004).

2 Gravitas Research and Strategy Limited. (27 August 2003), *Evaluation of the Implementation of Paid Parental Leave: Prepared for Employment Relations Service, Department of Labour*, <http://www.ers.dol.govt.nz/parentalleave/evaluation.html> (Accessed: 8 April 2004).

3 Australian Human Rights and Equal Opportunity Commission. (2002), *Paid Maternity Leave: A Time to Value*, http://www.hreoc.gov.au/sex_discrimination/pml2/index.html (Accessed: 11 April 2004).

Equal Employment Far From A Reality in New Zealand

A report into equal employment opportunities finds New Zealand is falling behind other countries and women are still far behind men in terms of labour force equality.

The report by the Equal Employment Opportunities unit of the Human Rights Commission also found little progress, if not regress, in the employment position of people with disabilities and ongoing workplace disadvantages for Maori and Pacific Island people.

The report found that of the four EEO target groups – women, Maori, Pacific peoples and people with disabilities – women had achieved the most progress. However, this progress had been limited, and equality with men in participation rates, pay and seniority across occupational classes remained a far-off goal.

The report, produced by Dr Michael Mintrom and Dr Jacqui True of the University of Auckland, is the first broad overview of the status of EEO across public and private sectors. It looked at what those sectors were doing to encourage EEO, how traditionally disadvantaged groups were faring and how New Zealand rated against Britain, the United States, Australia and Canada.

It found this country's EEO policies had not kept pace with changes and improvements elsewhere, and the reality for many New Zealanders did not match the rhetoric of a "fair go for everyone at work".

Insufficient efforts had been made to create new opportunities for traditionally disadvantaged groups in the New Zealand labour force.

The report detailed EEO failings in all four target groups.

For women:

- Average weekly earnings amounted to 79 per cent of men's.
- In the top 500 New Zealand companies, women comprised just 2.4 per cent of senior managers, and were paid less.
- Evidence of direct and indirect discrimination and sexual harassment.
- Women with young children not enjoying the same employment opportunities as their male peers (including men with young children).
- Women over-represented among clerks and service and sale workers.

Recommendations from the report included introducing new legislation to put strong positive duties on all employers, starting with large organisations, to develop and implement EEO plans and regularly report on the outcomes. It also called for improvements in the state sector through incentives-based models to promote EEO as part of a renewed commitment and new efforts to ensure public service departments exhibited exemplary EEO practice.

Ruth Dyson, Minister of Women's Affairs and Minister for Disability Issues, said the Government would not ignore the findings of the report. It was putting in place active labour market strategies to ensure the place of women and disabled people was supported. That included working through the recommendations of the Paid Employment and Equity Taskforce, looking at not just pay gaps but access to childcare, transport issues and more family-friendly work practices.

"... the reality for many New Zealanders did not match the rhetoric of a 'fair go for everyone at work'."

"In the top 500 New Zealand companies, women comprised just 2.4 per cent of senior managers, and were paid less. "

Paid Parental Leave in New Zealand – Continued from page 6

United States federal law provides 12 weeks unpaid leave after one year's employment but no extended or paid leave. Similarly, only unpaid leave is available in Australia despite mounting debate. However, eligibility requirements in Australia provide a useful comparison as they currently extend unpaid leave to casual workers and are considering a proposal to include self-employed women in a 14 week government-funded paid maternity leave at minimum wage.³

Although New Zealand's paid parental leave scheme has taken leaps considering its historical absence, areas for improvement still exist when making international

comparisons. While the duration of leave and level of wage replacement will continue to be assessed in light of what New Zealand society is willing to support, the extension of eligibility to casual workers and self-employed women is somewhat of an equity issue which should be prioritised. Self-employed women have recently been targeted for consideration, but identifying those who are genuinely self-employed is said to be problematic. Looking at foreign ideas and assessing their success is just one way to overcome this next hurdle.

Ronelle Barnes

BOOK REVIEW

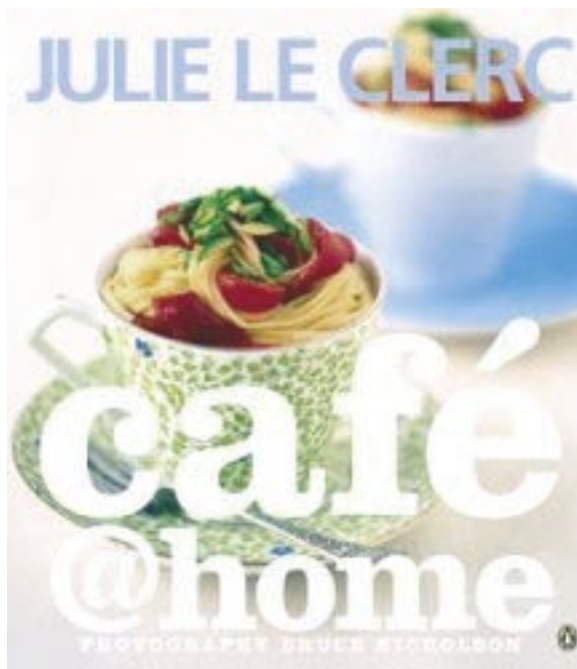
Café @ Home by Julie Le Clerc

Reviewed by Tammy McLeod

"Café @ Home, is a play on the modern trend towards all things 'cyber'."

"Beautiful photographs (many taken by Julie herself) of eclectic collections of tea cups, tea cosies and retro flour and sugar canisters emphasise Julie's premise that modern café food is often a re-take on the old fashioned favourites which Grandma used to make."

"Café @ Home is modern New Zealand style eating at its best."



New Zealand has many great food writers and Julie Le Clerc is one of them. Having owned her own café on Garnet Road in Westmere, Julie is familiar with

the type of modern food that makes café eating a unique experience. If not already, Julie is soon to be a household name in the Auckland region as she is the new food editor of the Viva section of the *Herald*. She is also a regular contributor to *Cuisine* magazine and has written five successful books all centred around modern café eating.

The title of Julie's new book, *Café @ Home*, is a play on the modern trend towards all things "cyber". The book itself is a hard covered book which lies flat easily and has a handy elastic band attached to the back cover to use as a book mark to hold the book open at the relevant page. Beautiful photographs (many taken by Julie herself) of eclectic collections of tea cups, tea cosies and retro flour and sugar canisters emphasise Julie's premise that modern café food is often a re-take on the old fashioned favourites which Grandma used to make.

However, it is the recipes which are the stars of this book. The chapters are divided into useful sections such as brunch, morning tea, portable food and sweet treats. Julie shows how to take a classic, such as a simple lemon syrup cake and give it a modern twist by adding fresh basil to the syrup – and it works! Her cheese scone recipe is based on the good old kiwi Edmonds recipe book, but Julie makes a difference by adding parmesan and smoked paprika.

There are fresh new ideas as well, such as a delicious tuna and potato salad with a tapenade dressing (quick and easy to make when there's not

much in the cupboard!), irresistible little orange cakes called magdalenes or a new favourite in our household, tomato and parmesan rice cakes. The recipes are not scary as the ingredient lists are simple and the methods, straightforward. *Café @ Home* certainly does inspire you to try café food at home for family and friends.

Café @ Home is modern New Zealand style eating at its best. Julie shows us that it is easy to entertain or to create meal ideas for your family by using a few interesting ingredients to "jazz up" those old favourites or establish some new favourites!

Tammy McLeod

In her spare time, Tammy runs a catering business called Tammy's Wee Treats. AWLA members have already benefited from her treats and she comes with high recommendations.



"... getting to the top in law is like getting to the top in politics. 'It takes sheer persistence, bloody mindedness, self esteem, helped by strong support systems, stickability, thick skin and staying calm and pleasant.' "

"Officers were alerted to changes through memos, internal publications and updated hard copy and electronic manuals."

"Instructions relating to the handling of internal inquiries had only changed slightly since 1985."

"The Commissioner of Police in the early 1980's specifically instructed police to treat criminal complaints against Police as they would other cases."

AWLA Annual Mid-Winter Dinner

AWLA held its annual mid-winter dinner on Friday 18 June at the Pavilion Café, Vero Centre on Shortland Street. It was an enjoyable evening and chance to celebrate the 20th anniversary of the AWLA.

We were honoured to have the Prime Minister, the Rt Hon Helen Clark as the guest speaker. Also in attendance was the Attorney General, Margaret Wilson, as well as other notable members of the AWLA, such as Judith Potter and Helen Melrose.

After finishing the pre dinner drinks, freshly baked bread, antipasto platter, and a choice between a main course of chicken breast stuffed with pesto, Sicilian pasta parcel, or salmon escalope, AWLA president Mary Peters introduced the Prime Minister.

The Prime Minister was a personable and candid speaker and spoke about the issues faced by women in the law. She referred to a new report, produced by the Human Rights Commission, which shows that women are far from achieving equality with men in terms of participation rates, pay and seniority.

She identified several issues such as achieving equality with male counterparts and achieving a work/life balance. The Prime Minister said that getting to the top in law is like getting to the top in politics. "It takes sheer persistence, bloody mindedness, self esteem, helped by strong support systems, stickability, thick skin and staying calm and pleasant."

The Prime Minister congratulated the AWLA on 20 good years but noted that its work is not yet done. After her speech, members had the rare opportunity to question the Prime Minister on any topic. The Prime Minister was very approachable and graciously answered a diverse range of questions.

After the formal part of the evening was concluded, a dessert of chocolate truffle tartlette with cream was served, followed by tea and coffee.

Overall, it was a successful and interesting evening, and a great opportunity to meet and catch up with other members.

Larainne Vickers

Police Sex Complaint Handling Explained

The New Zealand Police have outlined their procedures for dealing with sexual complaints and complaints against other Police Officers to a Commission of Inquiry hearing, convened after allegations of sexual offending by Police Officers.

The Commission of Inquiry will put Police and the way they have handled complaints of sexual abuse by Officers during the past 25 years under the spotlight.

The Commission will hear how Police Officers were expected and required to respond when an allegation of sexual assault was made against another police officer.

In January, Rotorua woman Louise Nicholas alleged she was pack-raped and violated with a police baton by three Police Officers in 1986 when she was aged 18.

Police National Planning and Policy Manager Dave Trappitt outline that there had been several different policies and procedures, over the 25 years covered by the Commission, relating to how sexual complaints and internal investigations against other Police Officers were handled.

While policies and procedures were changed several times, Officers were alerted to changes through memos, internal publications and updated hard copy and electronic manuals. Included in these policies and procedures were specific instructions relating to how rape inquiries and inquiries relating to other Police Officers should be handled. While these

had been streamlined over the years, instructions relating to the handling of internal inquiries had only changed slightly since 1985.

Internal memoranda from the Commissioner of Police in the early 1980's specifically instructed police to treat criminal complaints against Police as they would other cases. Police were instructed not to warn complainants of the possible consequences of making a false complaint against a Police Officer. They were also instructed to notify Police Headquarters of all serious criminal complaints against Police.

Two officers alleged to have raped Ms Nicolas, Bob Schollum and Brad Shipton, have since left the police. The third, Auckland Commander and Assistant Commissioner Clint Rickards, has been stood down on full pay. All three men deny the allegations. Former Rotorua CIB Chief John Dewar is accused of having failed to properly investigate Mrs Nicholas' original complaint. Following the allegations, another senior Police Officer, Kelvin Powell, has also been stood down on full pay while Police investigate complaints of sexual offences. He has denied any wrongdoing.

In the Commission's first public meeting in March, Justice Robertson, who heads the inquiry with Dame Margaret Bazley, said he was unsure whether it could report back to the Government by its November deadline.

REVIEW OF PAROLE BOARD

"... give the public and victims of crime greater access to more information as to why offenders were given parole ..."

"Of 2035 people in home detention from March 1 2003 to March 31 this year, 38 offended."

Mr Goff told National Radio on 25 June 2004 that a review was under way of home detention and how to make the Parole Board more accountable. This could give the public and victims of crime greater access to more information as to why offenders were given parole. The review will look at the board's processes, and could result in legislative changes.

Parole Board decisions have been put under the spotlight by the case of William Bell, among others. Bell was on parole when he carried out a triple homicide at the Panmure RSA, in Auckland approximately 2 years ago. The husband of one victim is suing the Government for \$5 million over the murders being committed while Bell was on parole. The Corrections Department released Bell from prison on parole a few months before the RSA murders took place.

Mr Goff made the following comments on National radio:

"The Parole Board needed to be more open and communicative about its decisions. It makes a decision, but it doesn't always give the reasons why it has reached that decision. Lay people – including myself at times – are left wondering why would they have made this decision in this particular case, when I don't have all the information, but on the surface it appears a very hard decision to explain. There can be changes to the Parole Board to ensure that its decisions, the reasons for its decisions, are communicated adequately to the public, and in particular to the victims.

"The paramount consideration of the board was to ensure public safety was not compromised. Only 28 per cent of parole board applicants were paroled on their first appearance, so release could not be said to be willy-nilly. The clearest guidance that Parliament can give is to say that there must be no undue risk to the community or any individual in it. In reaching that decision it is important

there is some openness, some transparency, in the reasons that caused the Parole Board to reach that decision.

"Home detention was "by and large" working quite well. Of 2035 people in home detention from March 1 2003 to March 31 this year, 38 offended. 1.9 per cent, I guess, is an acceptable level compared to other sentences that people may be sentenced to (in the community).

"There are a couple of aspects that worry me about it ... we've got a fairly complex system. We want to examine whether you could have a more straightforward system where simply the judge decides as a range of sentences available.

"At present a judge refers suitable cases to the parole board, which makes decisions on who should get home detention. At the moment you get home detention three months before you are eligible for parole. The question is whether the person should serve the whole of their sentence up to the point that they are eligible for parole, and then home detention added on to it at that point. That will mean more people in prison, that would put pressure on a prison system that's already getting far more inmates because of tougher sentencing laws, but I think it might be regarded by the public as fairer."

Sensible Sentencing Trust spokesman Garth McVicar told National Radio he welcomed the review, though he doubted it would go far enough. New Zealand Council of Civil Liberties spokesman Tony Ellis said opening up the decision making process did have a down side. "There is more public accountability. If that turns into public pressure on members of the Parole Board so they have to make politically correct decisions ... then they may become political appointments. (That) would defeat the purpose of having an independent Parole Board."

ADVANCEMENTS AND FAILURES OF CURRENT JURISPRUDENCE TO PROTECT WOMEN IN ARMED CONFLICT

By Elena Nikitenko LL.M. Student, University of Auckland, Law School

“However, women continue to suffer and to be the main victims of enemy-combatants in armed conflicts.”

“... women are still unprotected in armed conflict and their rights continue to be violated.”

“... the international law of human rights is an inadequate response to the needs of women because it has been developed in a gendered way ...”

“Because the legal system is focused on public actions by the state, violence against women is not adequately addressed by international law and not included into the scope of the right to life.”

The main task of this paper is to find out whether recent jurisprudence has solved any of the problems women face in armed conflict, what ways the law should be enforced and what barriers there are to its enforcement. Many studies have been undertaken to try to understand the ways in which women are affected by armed conflict. Indeed greater insight and research is required in this issue, because the ways women face war and post-war situations are multi-faceted. The various ways women are affected by armed conflict should be specifically considered through the prism of a particular conflict; the surroundings, nationality, ethnicity of women, and many other factors.

Recently there has been a significant increase in the issuing of international humanitarian legislation, which incriminates violence and abuse of women during international and non-international armed conflict. There are in fact few areas in international law that actually provide for protection for women in armed conflict. These pieces of legislation incorporate numerous available instruments such as regulations, guidance, conventions, tribunal statutes and procedural rules of prosecution.

The primary research undertaken was convincing in that the legal regulation of protection of women in armed conflict seems sufficient and enough from the point of general normative requirements. However, women continue to suffer and to be the main victims of enemy-combatants in armed conflicts. Moreover, they continue to face numerous consequences of wars in post-conflict situations; often with their position becoming even worse than it was before the conflict. Firstly, the reason for continuing violation of women's rights is the lack of sufficient enforcement of legal norms. Hence, protection provided by legislation is inefficient due to lack of enforcement. This leads to other more serious consequences arising, such as the issue of the general inequality of women in our global and local societies. Gender injustice is found to be the main reason for continuation of the abuse of the rights of women and atrocities committed against women.

Historical precedents were created and important contribution to the law of

sexual violence was made by the following cases: *Prosecutor v Akayesu*,¹ recognising rape to comprise a genocide crime; *Prosecutor v Kvočka*² and *Prosecutor v Delalic*,³ recognising that rape can constitute torture; *Prosecutor v Kunarac*,⁴ holding that rape and sexual enslavement can constitute a crime against humanity; *Prosecutor v Furundzija*,⁵ recognising rape to represent violations of the laws and customs of war. In particular, all the cases contributed towards equalising the status of men and women under international law by means of delivering indictments that were equally against men and women, evidenced by procedural participation of women as experts and Judges, or by means of almost identical civilian protection of women and men. Overall, these precedents are entitled to influence further trials before the International Criminal Court⁶ and will definitely significantly affect the position and protection of women in armed conflict.

However, despite the establishment of International Tribunals prosecuted gender-related crimes and the undertaking of other practical measures, women are still unprotected in armed conflict and their rights continue to be violated. Therefore, reasons for such injustice should be searched for both globally and in the approach adopted by international humanitarian law in general. Charlesworth and Chinkin claim that the international law of human rights is an inadequate response to the needs of women because it has been developed in a gendered way.⁷ One example of such an approach is that most of the 'general' human rights instruments use only the masculine pronoun.

Considering human rights groups separately, the above-mentioned authors found that first generation rights, political and social rights, inadequately address the public and private spheres. The public sphere is prioritised, whereas most violence against women derives from the private sphere. Women bear the risk of forced abortion, malnutrition, less access to health care and domestic violence. Because the legal system is focused on public actions by the state, violence against women is not adequately addressed by international

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“... ‘the law of armed conflict incorporated a gendered hierarchy in the sense that the rules dealing with women are regarded as less important than others and their infringement is not taken as seriously’... ”

“Protection of women against sexual violence is drafted in terms of ‘honor’. It was drafted by men and signifies honor of women’s male protectors, their husbands. It has nothing to do with what women perceive as their own ‘honor’ and the way they experience sexual violence, where rape is experienced as torture.”

“Law does not consider the realities of women’s lives. Law should take into account not only gender issues but also cultural specificity. Moreover, law simply overlooks the contributions that women make during and after war.”

Advancements and Failures of Current Jurisprudence to Protect Women in Armed Conflict – Continued from page 11

law and not included into the scope of the right to life.

Many feminist writers support this approach. On the approach of international law Gardam writes:

“... These provisions are totally inadequate and, moreover, that the law of armed conflict incorporated a gendered hierarchy in the sense that the rules dealing with women are regarded as less important than others and their infringement is not taken as seriously.”⁸

The author thinks that the existing provisions of international humanitarian law “protect women in terms of their relationship with others, such as when pregnant or as mothers, not as individuals in their own right.”⁹ In other words special norms created for the protection of pregnant women or women in detention, are good, but not good enough as a response of international humanitarian law to protect women in armed conflict, as they only relate to the sexual and reproductive aspects of women’s lives. Besides that, protection of women from sexual violence is shaped through the notion of their “honor”, which was constructed by men and for their purpose. Women experience sexual violence in a different way to how men perceive it.

Gardam and other feminist writers¹⁰ claim that human rights law and humanitarian law do not adequately address women’s needs in a situation of armed conflict and provide the following arguments:

1. Human rights are drafted as male’s rights (men as drafters, usage of only male pronouns).
2. Human rights are concerned only with the public sphere of life, where men live, and not with private life, where women live.
3. Humanitarian law favors combatants more than civilians (specific norms on treatment of prisoners of war, wounded and sick in the field, weapons causing unnecessary suffering).
4. Humanitarian law favors male civilians more than female ones.
5. Equal protection of male and female civilians is not sufficient, because warfare impacts them in distinctive ways; women are affected more, especially in a post-conflict situation.

6. Protection of women is concerned only with others and with women’s reproductive and sexual functions, not with women as individuals or their own rights.
7. Law of armed conflict incorporates a gendered hierarchy in the sense that the rules dealing with women are of lesser importance and their infringement is less important. This approach follows the main classification and hierarchy within human rights groups: civil and political rights (first generation rights) and social and cultural rights (second generation rights). The consequences are the following:
8. Geneva law (humanitarian law) is drafted in different languages with provision for protecting combatants and civilians; that is in terms of protection rather than prohibition.
9. Because women’s status is protected, their position is comparable to the position of the environment. It needs to be protected, but no one really does so. Instead of this model, the protection of women should have been drafted in the manner of criminal codes, which everyone must obey.
10. Protection of women against sexual violence is drafted in terms of “honor”. It was drafted by men and signifies honor of women’s male protectors, their husbands. It has nothing to do with what women perceive as their own “honor” and the way they experience sexual violence, where rape is experienced as torture.
11. Females are not equal to males in legal systems in general. The law is phrased in a way that their status is to be protected, but not to be equal to males. This position of females causes disrespect of women and allows for abuse.
12. The term “humanitarian law” is misleading because it is based not on humanitarian considerations, but on improving of state military efficiency in warfare. Military necessity is actually a barrier to protecting women.
13. State sovereignty is a barrier for international humanitarian law to regulate domestic conflicts and to protect women. However, in the recent development of collective actions of peacekeeping missions, the states’ impunity became weaker.

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“ Women and girls have habitually been sexually violated during wartime, yet even in the twenty-first century, the documents regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention these crimes. Until the 1990s, men did the drafting and enforcing of humanitarian law provisions; thus, it was primarily men who neglected to enumerate, condemn, and prosecute these crimes. ”

“Exclusion of women from combat duties denies them equality with men. This is not a call for everyone to go to war and fight. However, women should receive equal rights with men to battle and serve in military in order to change the general view and perceptions of women’s weakness and vulnerability. ”

Advancements and Failures of Current Jurisprudence to Protect Women in Armed Conflict – Continued from page 12

14. Law does not consider the realities of women’s lives. Law should take into account not only gender issues but also cultural specificity. Moreover, law simply overlooks the contributions that women make during and after war.
15. The separateness of women in the domestic legal system is emphasized and worsened by the structure of international law, with its main accent on an abstract entity of state and total exclusion of women from participation in its process.
16. The regional, pro-European and pro-western states perspective dominates international humanitarian law, which eastern and Asian countries little recognize.

Finally, Gardam argues that reform based on the equality model is “a singularly blunt instrument to achieve any change for women in a world where they do not live out their lives as the equal to men.”¹¹ She also proposes that the time has come for a separate declaration of women’s rights, a Protocol to the Geneva Conventions to Protect Women in Times of Armed Conflict. This she believes will diminish all the shortcomings mentioned above and encompass a new gender approach to protection of women in armed conflict.

Are women vulnerable and needing protection? A positive answer will place women in a position of weakness and adopt an unequal approach towards women. Women being “protected” in wartime are considered as men’s property. This approach leads to the situation where the other side of the conflict tries to get over the trophy – women of their opponents. This has been the approach through the history of humanity, and with world religion coming to the scene, it was canonised. This is why women as the main civilian population during war time have been more often abused and killed. Sexually manifested violence in armed conflict, which has clearly been evidenced in nearly every armed conflict, is one aspect of the subordinate position of women globally. Charlesworth and Chinkin confirm this idea and argue that consideration of women as property leads to the situation, where rape of a woman would mean to disgrace her community.¹²

“Women and girls have habitually been sexually violated during wartime, yet even in the twenty-first century, the documents regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention these crimes. Until the 1990s, men did the drafting and enforcing of humanitarian law provisions; thus, it was primarily men who neglected to enumerate, condemn, and prosecute these crimes. ”¹³

However, the position of women during armed conflict is undergoing slight change. Empirical evidence illustrates situations where women’s active participation in nationalist and revolutionary struggles has led to recognition of their social and political rights, such as during World War II or the recent Golf War between Iraq and Iran. They are however only peripheral participants in armed conflict. Only a few states permit women to hold military posts that involve combating, such as Belgium, Canada, Luxembourg, the Netherlands, Norway, Venezuela and Zambia.¹⁴ In some countries such as Israel women have started to participate in wars as combatants and are obliged to serve in the military.

The official excuse for excluding women from the military sphere is that they are unsuited for such activity. Some countries, such as Australia, Austria, Germany, New Zealand, and Thailand made official withdrawals of reservations to the Convention on the Elimination of all Forms of Discrimination Against Women in relation to provisions of gender equality in public life.¹⁵ Exclusion of women from combat duties denies them equality with men. This is not a call for everyone to go to war and fight. However, women should receive equal rights with men to battle and serve in military in order to change the general view and perceptions of women’s weakness and vulnerability.

The Presence of women in criminal courts is another important issue. It requires separate consideration because of its great positive influence on the drafting and further enforcing of legal norms, aimed at the protection of women’s rights. However, the real figures of women’s representation at the international courts at June, 2002 were the following:

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- 1 *Prosecutor v Jean-Paul Akayesu* (Amended Indictment, ICTR Trial Chamber) [June 1997] ICTR-96-4-T, (Judgement) [2 September 1998], ICTR, Trial Chamber, International Criminal Tribunal for Rwanda.
- 2 *Omarska and Keraterm Camp (Prosecutor v Kvočka)* (Judgement) [2 November 2001] No.: IT-98-30/1-T, ICTY.
- 3 *Celebici (Prosecutor v Zejnil Delalic)* (Judgement, ICTY Trial Chamber II) [16 November 1998] No. IT-96-21.
- 4 *Foca (Prosecutor v Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic)* (Judgement) [22 February 2001] Case Nos.: IT-96-23-T and IT-96-23/1-T; (*Prosecutor v Gagovic et al*) (Indictment, ICTY, Trial Chamber) [26 June 1996] No. IT-96-23/2, (Judgement, Appeals Chamber) [12 June 2002].
- 5 *Lasva Valley (Prosecutor v Anto Furundzija)* (ICTY Trial Chamber II) [10 December 1998] No. IT-95-17/1, (Judgement, Appeals Chamber) [21 July 2000].
- 6 Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (17 July 1998), adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 ("Statute of the ICC").
- 7 H Charlesworth, C Chinkin *The Boundaries of International Law, A Feminist Analysis* Juris Publishing, Manchester University Press, 2000, 231.
- 8 J Gardam "Women and the Law of Armed Conflict: Why the Silence?" [1997] 46 ICLQ 55, 56.
- 9 Ibid 57.
- 10 H Charlesworth, C Chinkin and S Wright "Feminist Approaches to International Law" in F E Olsen (ed) *Feminist Legal Theory* vol II, New York University Press, Reference Collection, New York, 1995, 255.
- 11 Ibid 58.
- 12 H Charlesworth, C Chinkin *The Boundaries of International Law, A Feminist Analysis*, above n 1, 254.
- 13 K D Askin "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles", above n 12, 288.
- 14 H Charlesworth, C Chinkin *The Boundaries of International Law, A Feminist Analysis*, above n1, 258.
- 15 Ibid.
- 16 Ibid 19.
- 17 Ibid 18.
- 18 *Prosecutor v Furundzija*, above n 9, (Decision on Defence Motion to Strike Testimony of Witness A) [16 July 1997] No. IT-95-17/1-T.
- 19 *Prosecutor v Pauline Nyiramasuhuko and Shalom Nthabali* (amended indictment) [26 May 1997] No. ICTR-27-21-I, International Criminal Tribunal for Rwanda.
- 20 J Linehan "Women in Public Litigation" above n 26, 5.

"Women's representation among judges of international courts has been minimal. Currently, among the seventy-five judges at the WTO, ICJ, ITLOS, ICTY, and ICTR, only five are women. Only one female permanent judge is at the ICTY ... three at the ICTR ... The low number of female judges at the ad hoc tribunals contrasts with their professional category. Currently, thirty-seven percent of the professional category at the ICTR are female, and forty-one at the ICTY."¹⁶

Prior to the establishment of ICTY and ICTR women have never been presented at such a high level in international organisations and other international tribunals. Mainly, it is a great achievement of female non-governmental organisations, which have been advocating of women's interests since the establishment of the United Nations. Female judges have played a crucial role in the ICTY and ICTR by attracting public attention to crimes committed particularly against women. Female judges also provided significantly for the formation of rules of evidence and procedure and greatly influenced several key case decisions. The role of Judge Pillay, particularly, at the ICTR was highly acclaimed by many scholars as she persisted to question female witnesses, finally leading to allegations of rape and sexual assault in the Akayesu case.¹⁷

Anti-feminists may find that female judgement can not be objective and in cases of sexual violence crimes, they may be thought to indict men in any case. However, in *Prosecutor v Furundzija* the Tribunal denied the view that female Judges with gender advocacy backgrounds are naturally prejudiced against men accused of rape crimes.¹⁸ Moreover, recent experience of the ICTR shows that even women can be prosecuted for crimes committed by means of rape. This is seen in the case of Pauline Nyiramasuhuko,¹⁹ (mentioned earlier in this report) who was the first woman charged with genocide and also the first women charged with rape. This case shows that the law is equal for everyone and for both genders, males and females, and, therefore, they should be provided with equal rights and guarantees. Equal representation from both genders at the international litigation is required in order to established justice and to provide comprehensive investigation and prosecution of criminals. "International

courts and tribunals should not be seen as outside the general movement towards equal participation of women in national and international institutions."²⁰

This paper looked at the position of women in armed conflict and in the international arena in general. The scope of legal norms aimed at protecting women in armed conflict seems sufficient enough to address most women's needs. The reasons for continuing violations of women's rights are insufficient enforcement of legal norms in practice and lack of respect of these norms in general. The International Criminal Tribunal for Rwanda and International Criminal Tribunal for the Former Yugoslavia contributed greatly to the enforcement of laws concerning the rights of women. Moreover, the Criminal Tribunals established new precedents for prosecuting gender-related crimes; for example rape which has been recognised to constitute genocide, torture, a crime against humanity and a war crime. These developments will greatly affect the practice of the International Criminal Court in the future.

Another finding of this paper, that the general inequality of women in the international scene is basically the core reason for the lack of provision for relevant protection of women. International humanitarian law and international law of human rights are based on a gendered method. Women lack fair representation in political and social life, and even in criminal tribunals which are called to prosecute gender-related crimes. However, women have become more active, for example greatly contributing to just and comprehensive prosecution carried out by ICTY and ICTR. The prosecution itself and indictment charged have significantly moved towards equalising the status of men and women under international law.

Women are also actively participating in numerous non-governmental organisations and conferences, aiming at the empowerment of women. Women's Movement For Peace is an example of a strong female network, which is able to improve the position of women in the situation of armed conflict, as well as in peace-time. Consequently, this paper suggests that recent jurisprudence has been only partly concerned with the position of women in armed conflict, and that the general place and role of women needs to be revised and women empowered both globally and locally.

16 APRIL 2004

SUBMISSION

To the: Law and Order Committee

On the: **CRIMES AMENDMENT BILL (NO.2)**

INTRODUCTION

- 1 This submission is made on behalf of the Auckland Women Lawyers' Association (AWLA) regarding the Crimes Amendment Bill (No. 2), introduced on 9 December 2003.
- 2 We wish to appear before the committee to speak to our submission. Contact details are as noted in our covering letter.

GENERAL

- 3 This submission addresses:
 - 3.1 The issue of whether the term "rape" should be retained and used in the Crimes Act 1961;
 - 3.2 Aspects of the proposed reforms AWLA supports; and
 - 3.3 Further aspects of reform that should be enacted alongside those contained in the current Bill.

(A) THE TERM RAPE IS OUTDATED AND SHOULD NOT BE USED

- 4 AWLA recognises that the task of determining whether the term "rape" should be retained and used in the Crimes legislation is an extremely difficult one. This issue will no doubt be subject to vigorous debate, before the committee and elsewhere.
- 5 Factors favouring the repeal of the term from the Crimes Act include the fact that:
 - 5.1 The definition of rape is currently limited to male/female sexual genital assault. That definition is out of step with the fact that male/male and male/female anal sexual assault occurs. A gender neutral approach, through a generic offence of unlawful sexual connection, would reflect reality and would be consistent with the (positive) trend in the reforms to use gender neutral language;
 - 5.2 Many forms of sexual offending are horrific. Any victim who has suffered a degrading form of abuse, but not penetration, should not be made to feel that what he or she has endured is less serious because it is not technically "rape". Providing a single category of offence (unlawful sexual connection) would more accurately reflect our society's aberration of all forms of sexual abuse, no matter the nature of the abuse; and
 - 5.3 A shift away from the term "rape" may reduce the adverse impact of the "rape myths"¹ that have evolved over many years. Rape myths have long been suspected of impacting on the low conviction rates for rape. Any steps to lessen the effect such myths have on decisions as to whether charges can be laid and/or the prospects of victims achieving real justice through the trial process are to be encouraged. While AWLA recognises that removal of the term "rape" from the legislation will not immediately halt the negative influence of rape myths, such a change would be an important first step.
- 6 Counterbalancing the factors identified above are those that indicate the term "rape" should be retained, including:
 - 6.1 The fact that rape is a concept that members of the jury can readily relate to. It can therefore be a powerful concept for a prosecutor to use in court;
 - 6.2 For some members of our society, the cultural consequences of non-consensual genital and/or anal intercourse are such that the level of abhorrence for both those acts warrants special provision for them in our legislation.

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Crimes Amendment Bill (No.2) Submission – Continued from page 15

- 7 If the term rape is included, AWLA suggests the definition should be expanded to include anal rape, expressed in gender neutral language.
- 8 The issue is finely balanced. AWLA tends towards repeal of the term "rape", although this is not the view of all members.

B) ASPECTS OF THE REFORMS AWLA SUPPORTS

- 9 In general the move to use gender neutral language and to address the well recognised "drug rape" issue are positive. AWLA supports including a reference to alcohol in the new s 128A(4).

Section 28A: when consent is not given

- 10 AWLA agrees that it is beneficial to set out expressly in the Crimes Act the circumstances in which a person does not consent to sexual connection (proposed new section 128A). However there are some problems with the manner in which the proposed section is expressed.
- 11 It will be reasonably uncontroversial that the new s 128A(1) leaves open the possibility that there will be a need for the judge or jury to examine the issue of whether consent was given, and reasonably believed to be given (unchanged from the position under the current form of s 128(1)).
- 12 However, in the circumstances specified in subsections 128A(3) to (7), the issue of whether consent was given, and reasonably believed to be given should simply not arise.
- 13 For those circumstances where consent cannot reasonably be in issue (victim asleep, drugged, or incapacitated etc), a better approach is to include those circumstances in a separate section that **deems** consent not to be given in those circumstances and provides that it would be **unreasonable** for any person to believe that consent was given in those circumstances. Proposed s 128A would then retain the new s 128A(1), (2) and (8). The matters covered in proposed subsections 128A (3) to (7) would then be dealt with in a separate section, together with a catch all provision to the effect that consent is deemed not to be given in:

"any other circumstance in which the complainant is incapable of consenting".

- 14 If the changes to s 128A proposed by AWLA were to be adopted by the committee, there would be a reduced possibility of a defendant arguing that despite the sleep/ drugged state, etc, the defendant reasonably believed consent was given. Under the current form of proposed s 128A, AWLA sees that there is a risk of such arguments being run.

(C) FURTHER REFORMS NEEDED

- 15 In addition to the need to revise s 128A, AWLA notes the following matters for consideration by the committee.

Incest provisions

- 16 Proposed s 130 should provide in subsection (b):

"(b) the person charged knows or ought to know of the relationship."

- 17 Such a change would clarify that constructive knowledge is sufficient: a person should not be able to escape prosecution on the basis that they wilfully closed their mind to the existence of the relationship.

- 18 For the avoidance of any doubt, new s 130 could also include a new subsection as follows:

"(3) It is not a defence to a charge under this section that the person charged believed that the relation consented".

Crimes Amendment Bill (No.2) Submission – Continued from page 16

19 A change to that effect will ensure consistency with new s 132 (inconsistency in drafting leaving room for argument that Parliament intended a different legal test as to consent under s 130 to that under s 132).

Penalties

20 It is difficult to understand why sexual offending involving family members should be subject to lesser penalties than sexual offending by strangers (incest: maximum 10 years imprisonment; sexual conduct with family member under 18: maximum 7 years imprisonment; compared with sexual conduct with child under 12: maximum penalty 14 years imprisonment).

21 In AWLA's view it is important that the law clearly signal that sexual abuse by family members is no less serious than abuse by a stranger. AWLA requests that the committee give further consideration of the policy basis on which the scale of penalties is based.

Onus of establishing consent/reasonable belief in consent

- 22 The shift in onus of proof is an important aspect of reform that has been sought for many years, primarily to bring greater humanity to the trial process.
- 23 It is well documented that victims of sexual crimes often feel re-victimised by the trial process,² especially when consent is put in issue. An important step in redressing the situation where the victim feels the onus is on him or her to prove they did not consent (and therefore facing the difficulty of proving a negative), is to place the legal onus on the defendant to prove consent and reasonable belief in consent.
- 24 AWLA submits that in the current reform process the opportunity should be taken to expressly provide that where a defendant asserts consent and/or a reasonable belief in consent, the onus is on the defendant to establish beyond reasonable doubt that consent was given and he or she believed on reasonable grounds that consent was given.
- 25 AWLA therefore asks that the select committee take the opportunity to include a new provision that makes it clear the onus of proving consent and reasonable belief in consent rests with the defendant.

Implementing aspects of the Law Commission's Evidence Code

- 26 As noted in the explanatory note to the Bill, this is the first opportunity for many years to amend the law relating to sexual offending.
- 27 An important aspect of reform not included in the Bill is implementation of the provisions of the Evidence Code relating to methods by which evidence may be given and other aspects of the trial process relating to sexual offending:
- 27.1 sections 39 and 42 of the Code: relating to "good character" evidence;
 - 27.2 section 46 of the Code : restriction on questions about complainant's sexual experience;
 - 27.3 section 85 of the Code: restrictions on unacceptable questions; and
 - 27.4 section 103 of the Code: other forms of giving evidence permissible.
- 28 These important reforms appear to have languished since the Law Commission reported in 1999.
- 29 While there have been spasmodic indications that some or all of those provisions would be enacted, nothing has come to fruition. AWLA asks the committee to include in the current reform process further important reforms under the provisions of the Code referred to above.

*Crimes Amendment Bill (No.2) Submission – Continued from page 17***Redressing the balance in the trial process**

- 30 The committee is well placed to investigate the desirability of other reforms that will assist in redressing the balance in the trial process when the complaint is unlawful sexual connection.
- 31 There is plainly a need to overcome the widely perceived reluctance of victims of sexual offending to subject themselves to the criminal trial process.³
- 32 Unless reporting levels are improved, we have an important sector of our society that are not properly accessing the justice system. In addition the scale of the problem to be addressed is hidden.
- 33 To redress these matters, the committee should investigate and consider implementing the following:
- (a) Prohibition on a defendant personally cross examining a complainant when the charge is unlawful sexual connection;
 - (b) Enacting restrictions on oppressive or degrading cross examination in trials of sexual offences, including the possibility of cross examination questions being put through the presiding judge;
 - (c) Provision for separate legal representation for victims of sexual crimes, funded through legal aid; and
 - (d) Establishing a separate court with specialist (and specially trained) judges for hearing trials of sexual offences.
- 34 While AWLA does not have a fixed view that any or all of the matters noted in the preceding paragraph should necessarily be actioned, it recognises the need for those matters to be investigated. The committee is well placed to do so.

CONCLUSION

- 35 AWLA is heartened at aspects of the reforms proposed.
- 36 However the opportunity to implement other much needed reforms should not be lost. AWLA asks that the committee use the current opportunity to implement the changes discussed in paragraphs 3 to 28 above and to investigate the matters discussed in paragraphs 3 to 7 and 32 above.
- 37 AWLA is happy to assist the committee should the committee consider that would be useful.

1 Examples of rape myths that have influenced the development of law and the prosecution and conviction rates for sexual offences include:

1. Genuine victims will complain at the first reasonable opportunity, reluctance to come forward then said to indicate the complaint may be fabricated;
2. There is a greater risk of false reporting of rape than for other crimes (rape (incorrectly) said to be a charge easily made and hard to refute).

2 Law Commission report *Seeking Solutions Options for the New Zealand Court System*, page 41, 44 to 47.

3 Law Commission report *Seeking Solutions Options for the New Zealand Court System*, page 41, 44 to 47.