

'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

JUDGES AND INAPPROPRIATE BEHAVIOUR

At a recent gathering of health providers a judge of a certain Supreme Court thanked the organisers for inviting him to speak. 'Judges', he said, 'don't get many invitations these days and it is a sign of the times that I was asked to address a conference on inappropriate behaviour'. The meeting was about anti-social personality disorders.

And, oh dear, haven't our judges been in a bit of bother recently. There was the *Hakopian case* in which it was said that prostitutes don't suffer as much as other women, then Judge Bollen approved of a bit of rougher than usual treatment for wives who don't want to have sex with their husbands. Judge Bland, ex-heavyweight boxing champion of the University of Melbourne in his student days, climbed onto the bandwagon making sure the media were present, and clearly illustrated the need for judicial education by deliberately thumbing his nose at reformers. In his experience of rape cases 'no often subsequently means yes' and the rape of a teenager was likened to a roll in the hay, country style. This was in spite of the fact that the rapist had pleaded guilty.

Judge Bland also made gratuitous comments about the defendant's ability to complete the sexual act after he had consumed so much alcohol. Judge O'Bryan's comments that trauma was not experienced by a rape victim while she was unconscious and had her throat cut didn't exactly inspire public confidence. Unbelievable stuff, but only the tip of the iceberg and the comments are not new, nor have our judges' standards suddenly taken a dive. The real problem is that we have tried to make judges out of men.

The judicial reaction to the intense media interest in the topic has been interesting. Justice P.W. Young in the *Australian Law Journal* (May 1993) identified the problem as being one of 'vociferous' feminists calling for the sacking of a judge and even went so far as linking 'feminists' with 'politicians' (fair go, Your Honour!). Relying on a

recycled piece by Padriac McGuiness, Justice Young, who prefers to be known as Mr Justice Young, endorsed the following sentiments: 'the last thing we need is educated judges. Educated, that is, not in the law but in the various fashionable theories and political orthodoxies which are current among feminists, environmentalists, social reformers, deconstructionists, or whatever'.

Justice Young, like many others, has argued that if a judge gets it wrong we needn't worry too much because that will all be fixed up on appeal. Interesting to recall that it was the judges themselves, all those years ago, who blocked moves to establish a court of appeal. Such a court, they argued, would not be 'natural'. Judges, like everyone else, can become enmeshed in the social processes of the day and history shows they have often blocked reforms to protect their own interests. In spite of the public reaction, however, Girlie remains paranoid, fearing not that the judges are out of touch with community attitudes, but that they reflect them.

MITIGATING FACTORS

While some judges do not believe they are accountable to the community, this is not the view taken by the Court of Criminal Appeal in Victoria. In *R v John Raymond Wayland* (14 September 1992) the court heard an appeal against the sentence imposed on a stepfather found guilty of offences including incest. The court acknowledged that there has been a significant increase in the number of child abuse offences coming before the courts in recent years. It said that whether that increase is due to an increase in commission of the crimes themselves or is due to an increase in the detection rate following media publicity designed to facilitate reporting was not to the point:

The courts, and particularly this court is, I consider, bound to respond to the legitimate community concern with the response placing emphasis on the need in particular to have sentences give effect both to specific and general deterrence.

The Victorian Court of Criminal Appeal also overturned Justice O'Bryan's sentence on appeal and stated that his remarks had tended to 'depreciate unduly the rape'. The facts of that case were particularly shocking. The rapist had struggled with his victim during which time she tried to grab his knife and cut her hand. He then punched her hard in the face some four or five times, raped her and while she was unconscious slit her throat from ear to ear.

Girlie also concedes that the press has chosen the most dramatic parts of Justice O'Bryan's remarks and published them in isolation. Read as a whole the remarks are actually sympathetic to the victim, but it must also be said that, whether or not the remarks have been taken out of context, they could still have been put more sensitively. These kinds of comments obviously have the potential to be extremely hurtful to the victim and send a negative message to women.

THERE'S A LIGHT SHINING IN THE WEST

Lest we forget, there are some genuine attempts being made in Australia to come to terms with problems of judicial gender bias. Margot Kingston reported on this in the *Canberra Times* (17.5.93). David Malcolm, Chief Justice of Western Australia, confesses that when he was first confronted with the idea of gender bias he was immediately on the defensive: 'I thought to myself, I am no chauvinist, my impartiality and sense of equality is perfectly intact. I was quickly convinced, however, that this line of thinking actually revealed the existence of the problem. The comfortable self-image of neutrality suppresses the very sensitivity which is necessary to achieve the necessary level of equality'.

Justice Malcolm was describing his reaction to the 1990 Edinburgh conference on Equality and the Administration of Justice: Gender, Race and Class. Two years later he addressed a seminar which he organised for the legal estab-



ishment in Perth called *Gender Bias in the Administration of Justice*. He has subsequently acquired State Government funding for an education program in his court.

LECTURER DROPS SUIT

A law lecturer who had threatened women students with a defamation action when they complained of his excessive use of sexual assault references in evidence classes has dropped the charges. Mr Peter Wraight, according to the *Australian* (28.4.93) has instead circulated a written defence against the allegations to his colleagues.

MEANWHILE IN NEW JERSEY. A MAN OF THE MONTH

Guess who said this:

There's no room for gender bias in our system. There's no room for the funny joke and the not-so-funny joke, there's no room for conscious, inadvertent, sophisticated, clumsy, or any other kind of gender bias, and certainly no room for gender bias that affects substantive rights. There's no room because it hurts and it insults. It hurts female lawyers psychologically and economically, and witnesses, jurors, law clerks and judges who are women. It will not be tolerated in any form whatsoever.

These words come *not* from vociferous, strident feminists, but from His Honour Chief Justice Wilentz of the Supreme Court of New Jersey.

WOMEN AND THE LAW CONFERENCE

In June 1993 the Australian Women's Research Centre at Deakin University organised a very successful conference on Women and the Law: Judicial Attitudes as They Impact on Women. The first speaker was the Federal Minister for Justice, Duncan Kerr, who expressed concern at the lack of women on the Bench and listed qualities in addition to being an excellent lawyer, which might be taken into account in selecting judges. Feminist Lawyers were thrilled as the Minister recounted the very same qualities suggested by them in letters to the *Age* and the *Australian*.

The keynote address was delivered by Professor Kathleen Mahoney, who detailed major reforms in Canada since 1986. These have identified gender bias, led to judicial awareness educa-

tion and have resulted in some legal principles being altered to ensure fairness to women. The Conference certainly got its ounce of blood from Professor Mahoney who was also the after dinner speaker. A certain Federal Minister received a chilling stare from none other than Joan Kirner when he momentarily 'drifted off'. Still he'd had a big day and his call for a judiciary more representative of the Australian society was well appreciated by delegates.

President of the Australian Law Reform Commission, Elizabeth Evatt, described the Commission's work on its 'Equality Before the Law for Women' reference and canvassed the idea of a disciplinary tribunal for errant judges. Moira Rayner, Victorian Commissioner for Equal Opportunity, Federal Sex Discrimination Commissioner, Susan Walpole, and academic, Rosemary Hunter, addressed the problems surrounding the development of sex discrimination law in Australia including the technical hurdles which the courts have placed in its way.

Sally Brown, Victoria's Chief Magistrate, in a witty and perceptive address spoke of her own experiences on the Bench and expressed concern that the most recently appointed magistrates have all been men. Jenny Coate, Magistrate, addressed the vexed issue of victim impact statements suggesting that these are not appropriate at a trial but are vital in the crimes compensation process. Justice Jane Mathews of the Supreme Court of New South Wales explained why more women prosecutors are needed, especially in cases of sexual assault.

The over all messages of the Conference were that gender bias, race bias and class bias are rife in Australia's legal system; our judges are unrepresentative; and there is a crisis of confidence. Suggested solutions were to have more women on the Bench, gender, race and class bias awareness programs for existing judges and changing the law so that these issues are taken into account. Of the male speakers Justice David Malcolm, Chief Justice of the Supreme Court of Western Australia, fared best. Instead of wasting the delegates' time apologising for the present system (as one other male judge did) he paid us the courtesy of acknowledging that it is the male judiciary which requires education, not us. Further he outlined the steps already taken in the west and those planned for the future.

GIRLIE'S FIRM OF THE MONTH

All praise to the enlightened law firm Holding Redlich which sponsored 13 women lawyers to the Women and Law conference. It was a major highlight of Girlie's career to witness half a dozen of these feisty young feminists bailing up a County Court judge during the recess, challenging his precariously held views on gender.

GIRLIE'S COUNTERBLAST

Girlie has the gripes concerning a forthcoming publication entitled *Wind Breaks, Coming to Terms With Wind*, sponsored by the Gut Foundation and written by Rosemary Stanton and Terry Bolin. The learned authors boldly claim that men pass more wind more often than do women. But how could they possibly know this? Girlie does not recall ever having been asked to fill in an appropriate survey form and is unaware of any researchers following her about, anemometers in hand.

This sort of social control mechanism can be blown right out of all proportion leading to the further repression of women and girls in our society – to say nothing of the dastardly digestive disorders which might inadvertently develop. The not so subtle message is that it's alright for blokes to emit as much hot air as they like, but we are severely rationed, according to the authors, to 12 daily emissions. Don't give me the bum's rush – Girlie for one has already exceeded her quota for the next decade!

GIRLIE'S QUIZZICAL CORNER

In which case did the High Court of Australia rule that a judge's remarks about sexual assault victims should be case specific rather than general comments about victims as a class? Correct answers will win that highly elusive and keenly sought after prize – Girlie's approval.

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