

## GENDER BIAS

### It's time to educate

#### HELEN MCKELVIE discusses issues and some overseas initiatives.

In recent years significant community concern and extensive public debate have surrounded a number of issues which highlight that gender stereotypes, myths and misconceptions about the social and economic realities of women's and men's lives are operating in our courts. These issues are becoming increasingly mainstream, pointing to a recognition of gender bias as something that seriously compromises fairness in the administration of justice and has repercussions, not just for the women it directly affects, but for the whole society the justice system serves.

Creating an atmosphere in which the elimination of gender bias can occur is not simple. Scrutinising the way in which untested beliefs and assumptions about gender affect the administration of justice is squarely at odds with the ideal of judicial neutrality and the notion that legal practitioners and court personnel understand and adhere to their duty to act fairly. Traditionally, critiques of judicial decisions have focused on the logic of their legal analysis and its relationship with precedent, rather than assessing them for their conception of society or stereotypic treatment of individuals.

More recently, critical analysis of the judicial process has examined the fact that it is constituted by individuals, whose attitudes, expectations and values are shaped by social processes, resulting in witting or unwitting reliance on traditional, inaccurate stereotypes that limit the system's ability to dispense equal justice.

Recent media coverage of particular case decisions and areas of the law that highlight gendered discrimination is enhancing the general community's knowledge of these matters. (For those working 'in the field' this can be seen as documenting only the tip of a better known iceberg.) In the last two years, the media has given unprecedented prominence to:

- the need for rape laws and related procedural laws that reflect women's experience. This includes not allowing stereotyped notions of women's behaviour and sexuality to be relied on in court proceedings;
- domestic violence and issues surrounding safety and security of women;
- the *Hakopian case* in which the offender was given a lighter sentence on the grounds that the victim was a prostitute and would therefore have suffered less trauma as a result of being raped – and the outcome of the appeal in which the court failed to comment on the trial judge's reasoning regarding the victim's occupation;
- the absence of women on the Supreme and County Court benches and the slow progress of women into the senior ranks of the legal profession;

- the lack of legal sanctions available to deal with degrading pornographic depictions of women and the employment of women to work topless or naked in the hospitality and retail industries;
- Justice Bollen's comments to the jury in a rape case regarding 'rougher than usual handling' being acceptable for a man to 'persuade' his wife to have intercourse with him;
- Judge Bland's comments when sentencing an offender who had pleaded guilty to a charge of rape that in his long experience of the law 'no often subsequently means yes'.

Academic interest in gender bias in the law has also been growing. Feminist legal theory courses are becoming established in Australian law schools, and the body of relevant literature is expanding and includes teaching texts such as *The Hidden Gender of Law* (Regina Graycar and Jenny Morgan, The Federation Press, 1990) which documents a comprehensive theoretical framework for the operation of gender bias in the law.

These factors have contributed to a climate in which practical steps can and are being taken – not to impose a feminist agenda on the courts, but to assist in providing a knowledge base from which justice can be better administered with the objectivity, fairness and impartiality that are the goals of the legal system.

#### Australian and overseas initiatives

On a national scale, the Australian Institute of Judicial Administration (AIJA) and the Australian Law Reform Commission (ALRC) are both currently undertaking projects which aim to increase awareness of gender bias in the legal system, and which work towards eliminating it. The AIJA has planned two seminars on the operation of gender bias, with a view to developing a more extensive program. The ALRC has received a reference to report on legislative and non-legislative reforms to 'remove any unjustifiable discriminatory effects of laws or their application to women, with a view to ensuring their full equality before the law'.

Despite these progressive initiatives, Australia is lagging behind a number of overseas jurisdictions, most notably Canada and the United States, in tackling the problem of gender bias at a practical level. In 1986 the American National Conference of Chief Justices and the National Conference of State Court Administrators opened the educational segment of their joint meeting with a program on gender bias in the courts. In 1988, the two conferences adopted resolutions urging the Chief Justice of each State to establish a task force 'devoted to the study of gender bias in the court system'. By 1990, at least 27 States had established such bodies and reform programs are currently being implemented. In Canada, in 1986, a conference on 'The Socialization of Judges to Equality Issues' provided a broadly based, national interdisciplinary forum to examine the relationship between judicial neutrality and social equality. Judicial education programs and other reforms have followed in a number of Canadian jurisdictions.

In both the United States and Canada, the investigation of the problem of gender bias and the implementation of resulting recommendations have involved leading judges, lawyers,

academics and representatives of women's groups and other relevant organisations. This broad representation of the legal and lay community brought together individuals with a range of expertise, and added to the credibility of the call for reform in those jurisdictions. The process has also been a powerful self-educator for those involved:

The experience of the New Jersey and New York task forces show that the members who start out with no knowledge of gender bias in the courts or even a conviction that the idea is nonsense, emerge from the data collection process convinced that the problem is real and has deeply serious implications for the administration of justice.<sup>1</sup>

The types of research undertaken by the US task force include:

- reviewing relevant case law, interviewing judges who sit in relevant areas,
- analysis of statistical material and studies of relevant State and federal agencies,
- meetings with the legal community,
- surveying judges, lawyers and court personnel, and
- collection of data at public hearings organised for the purpose.

Some of the areas of the court system found to be affected by gender bias in those jurisdictions include:

#### ***Criminal law***

*Women as perpetrators:* Women who engage in traditionally female offences are perceived as likely to be treated more leniently by the courts whereas women whose behaviour is perceived as unfeminine (i.e. violent) are likely to be treated more harshly than their male counterparts especially if they do not conform to the conventional female role.

*Women as victims:* In administering domestic violence and criminal legislation judges are reluctant to use their discretion to give legal relief to battered wives. This has been interpreted by researchers as stemming in part from destructive cultural myths about the nature of the female psyche – that is women are masochistic and accordingly many of the crimes are victim precipitated.

*Sexual assault:* In proceedings dealing with sexual assault there is a marked reluctance on the part of judges to disallow the use of gender stereotypes to discredit complainants. Shorter sentences are imposed on defendants who were acquainted or had a relationship with the victim.

#### ***Family law***

The creation of a new economic underclass has been attributed to decisions of the family courts – arising in part from judges' undervaluation of a homemaker's contribution to a marriage, misconceptions about the cost of raising children, and women's lack of opportunities for employment, earnings and remarriage.

#### ***Treatment of women as participants in the legal system***

The subtleties of the courtroom environment affect women as court attendants, lawyers, litigants and witnesses. They are affected by sexist jokes and remarks, inappropriate forms of address, the accordance of less credibility to the performance or testimony of women than men.

#### ***Judicial selection process***

The selection process for the judiciary presents significant barriers to entry for women.

#### ***Civil damages awards***

Injured homemakers are frequently disadvantaged by judges' perceptions about the value of household services. Personal injuries affecting appearance are better compensated for in the case of women than for men.

A wide range of reform measures has been developed in both Canada and the US. These include the establishment of courtroom protocols, effective data collection mechanisms, changing priorities for allocation of resources, amendment of rules governing members of the legal profession, and most importantly, education and training programs. These were recommended for judges, lawyers and court personnel. As the key players and those directly responsible for the proper administration of justice, particular priority has been given to educating judges. Judicial education programs have been developed with the input of relevant experts from community organisations to specifically address the problems identified in Canada at the 1986 conference, and in the US by the data collection process undertaken by the task forces.

Hopefully the experience of other jurisdictions (taking into account legal and cultural differences) will make the task of investigating the operation of gender bias and implementing education programs and other reforms in Australia easier. Not surprisingly, the response to these initiatives from judges and lawyers in the US and Canada has been mixed. The reform agenda is a long-term one and assessing its effects will also take time.<sup>2</sup>

Fortunately, resolution of a problem that is becoming more and more visible and difficult to ignore is not being left only to time. Waiting for generational change through more women and students of feminist legal theory joining the profession and eventually being appointed to the bench can be circumvented and the desired outcome achieved, by the judiciary, the legal profession, experts from other relevant fields and the community all participating in the process.

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#### **References**

1. Schafran, Lynn, 'The Success of the American Program', in *Equality and Judicial Neutrality*, Sheila Martin and Kathleen Mahoney (eds), Carswell, 1987, p.414.
2. In the first few American States to undertake task force investigations, initial monitoring has revealed that measures aimed at addressing courtroom interaction problems were more positively received than those dealing with more substantive matters.