GENDER SECTION NEWSLETTER

Published by the Commonwealth Magistrates' and Judges' Association Gender Section

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*This edition is a special edition to commemorate the passing of **Dr Clover Thompson Gordon, OD, JP** former Chairperson of the Gender Section who passed away on 15 February 2015*

Greetings From the Chairperson

We lost a devoted Honourary Life Vice-President of the CMJA last February. It is very fitting that this newsletter is published on the anniversary of her passing and is dedicated to her.

Clover Thompson Gordon was dedicated to the aims and objectives of the CMJA and in particular it's Gender Section - promoting female jurists and ensuring women have equal access to the law.

Clover was described by The Minister of Youth and Culture in Jamaica as "a master educator and an astute leader who contributed enormously to the socio-cultural development of the Jamaican society".

It is my honour to serve as Chair of the Gender Section recognizing that we have the responsibility of continuing and promoting the work of this section that began under Clover's leadership.

We look forward to encouraging interest in the Gender Section, support of its aims and objectives and ongoing publication of this newsletter in which we can share perspectives respecting the advancement of women, overcoming hurdles women face in achieving equality and legislative changes affecting women.

This Newsletter is the opportunity for you, as Members of the CMJA, to provide input on any issues that might fall within our remit in the Gender Section.

We would be pleased to hear from you with your stories, experiences and knowledge of these issues

Justice Lynne Leitch
Chairperson

Objectives of the Gender Section

Aims

- To promote the interests of judicial officers throughout the Commonwealth
- To ensure wherever possible, equal access to the law

Objectives

- To provide a forum for judicial officers to be able to consider ways of redressing any gender imbalance:
  a) Gender Bias and other colleagues;
  b) Gender Bias and the Public both specifically and generally;
  c) Institutionalised Gender Bias and the Justice System.
- To exchange information among judicial officers;
- To encourage the advancement of women;
- To promote and encourage women to be aware of their legal rights;
- To address women's groups on issues relating to the law and their legal rights.

Seeking Regional Representatives of the Gender Section

The New Council of the CMJA was elected in September 2015.

Justice Carolita Bethell from the Bahamas was appointed Gender Section Representative for the Caribbean.

Mrs Olubunmi Ayobowale Akokhia (Bunmi Akokhia) was appointed the Representative for West Africa.

However the CMJA did not receive any nominations for all Gender Section representatives at the Regional Meetings held before the General Assembly in Wellington,

New Zealand on 14 September 2015. We are currently seeking nominations for the following regions:

- Atlantic and Mediterranean
- East Central and Southern Africa
- Indian Ocean
- Pacific

CONTACT: Dr Karen Brewer at the CMJA: kbrewer@cmja.org if you would like your nomination to go forward for any of these regions

Duties of the Regional Representative

Each Regional representative would be expected to galvanise activities within their region and promote the aims and objectives of the Section (see below for further information on the objectives)

Each regional representative would have authority to call on active judicial officers in each of the countries in their region to advance the aims and objectives or assist with information on developments on gender issues.

Each Regional Representative would submit an annual report to the Gender Section Chairperson in time for the chairperson to report back to Council on activities.

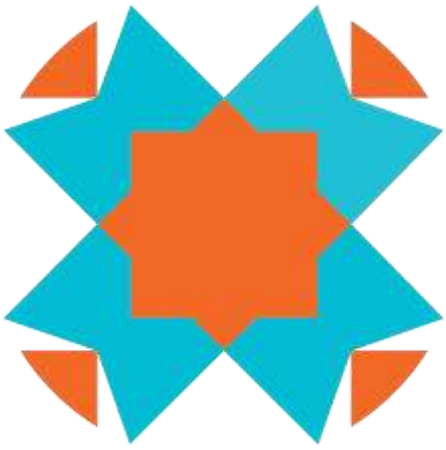
Commonwealth Women's Forum

The following is a report by Dr Karen Brewer, CMJA Secretary General, who was invited to attend and speak at the Forum.

I attended the Women's Forum held at the Intercontinental in Malta from 22 -24 November. Over 350 participants attended the Forum. The Theme of the Forum was **"Women Ahead: Be All that you can**". This was the first time that a Women's Forum had been held in the wings of the Commonwealth Heads of Government Meeting. The Forum was opened on the evening of 22 November 2015 by the President of Malta, Her Excellency Marie Louise Coleiro-Preca and there was also a speech by the Commonwealth Secretary General .

The first working day of the Forum was on Monday and this was a day of panel sessions. The Opening Speech was given by the Prime Minister of Malta's wife, Mrs Michelle Muscat.

Dr Brewer had been asked to speak in the first session on Women in Leadership. She spoke on Women in Leadership in the Judiciary. The Session was chaired by Prof Tagaloatele Peggy Fiarbairn-Dunlop (originally from Samoa but now at the University of Auckland). The lead speaker in the session was the Hon. Margaret Wilson (former Speaker of Parliament and former Attorney General of New Zealand). Other speakers were Joanna Maycock (Secretary General of the European Women's Lobby) speaking on Leadership in Politics and Dr Shaheena Janjuha- Jivraj (Senior Lecturer at Henley Business School and co-founder of BroadWalk) speaking on Corporate Leadership. There was also a session on Women, Media and Technological Development. Presenters spoke about the portrayal of women in the media and the need for a change in the mindset as well as the need to ensure that girls were encouraged to go into technology .



We also heard a good speech from Her Excellency Natasha Stott Despoja, Ambassador for Women and Girls from Australia.
The third panel related to Women in Social Development with speakers

on Women in Education, in Health and Social Enterprise. There was a very moving and graphic presentation by Ms Khadija Gbla from Sierra Leone, a young woman who had been subjected with her sister to FGM, instigated and carried out by her own mother when she was only 9. Her sister was only 5. The first day was extremely interesting with varied inputs on all issues which made the sessions very interactive and educational with time for discussions.

We were all asked to present full researched papers which will eventually be available in the report to be produced after the meeting. The second day was devoted to workshops. There were 5 workshops:

- Women in Political Empowerment
- Preventing and Eliminating Child, Early an Forced Marriages in the Commonwealth
- Women in Enterprise Development
- Gender and Youth Leadership
- Gender and Education

I attended the Workshop on Preventing and Eliminating Child, Early and Forced Marriages. Unfortunately this was not as dynamic a session as the plenary sessions and relied heavily on input from Ministers and Human Rights Commissioners, (mostly male) who were attending a fringe meeting of the Commonwealth Forum on National Human Rights Commissions also meeting in Malta at the same time. This meant that the presentations were a series of lectures about what government policies were in this area and there wasn't adequate time for questions. However, we were informed that the Commonwealth had agreed a Declaration on the issue in May 2015.

The Kigali Declaration is available from : http://thecommonwealth.org/sites/default/files/press-release/documents/Early%20and%20Forced%20Marriage%20-%20Kigali%20Declaration.pdf

I raised the point that there was no mention of child widows in the Kigali Declaration and yet they suffered even more from discrimination than child brides. The Northern Ireland Human Rights Commission whom I met in the wings of the Workshop were keen to hear more about the issue and she was able to give them some background information from the research she had undertaken as a trustee of Widows Rights International which they were interested in following up. The representative from the BBC World Service who attended the forum was also interested in this issue.

The Forum was a good networking opportunity with people interested in advancing the equality of women in the Commonwealth, including the newly appointed Commonwealth Secretary General, Baroness Patricia Scotland, whose appointment was announced at the end of the Heads of Government Meeting.
The Outcomes Statement from the Meeting is available at: http://thecommonwealth.org/sites/default/files/news-items/documents/CHOGM%20Women's%20Forum%20Outcome_1.pdf

The Report which includes all the papers from the Women's Forum is due to be published online by the end of February.

Women's Day is celebrated on 8 March 2016

Send us your stories about how you or your jurisdiction celebrated Women's day.

Canada's "New Approach" to Protecting Sex Workers

The following article was written by the Chairperson, Justice Lynne Leitch

Introduction

Prostitution is the so-called oldest profession. In Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] S.C.J. No. 72, the highest court in Canada simply defined prostitution as "the exchange of sex for money" and noted that prostitution, in and of itself, is a lawful activity in Canada. This decision marked a huge step forward for sex workers' rights and human rights in Canada.

In Bedford, the Supreme Court of Canada ruled that three provisions of Canada's Criminal Code, s. 210 (keeping or being found in a bawdy house), s. 212(1)(j) (living on the avails of prostitution), and s. 213(1)(c) (communicating in public for the purpose of prostitution) violate the s. 7 right to security of

the person protected by the Charter of Rights and Freedoms (Charter). All three laws were struck down.

Terri Jean Bedford, Amy Lebovitch and Valerie Scott (the "applicants") who had worked as prostitutes applied to the Ontario Superior Court of Justice for a declaration that the provisions criminalizing behaviour relating to prostitution violated s.7 of the Charter. Section 7 states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The applicants' case was based on the premise that the Criminal Code provisions inhibit prostitutes from conducting their legal enterprise in a safe environment. The applicants asserted that their liberty was violated as a conviction may lead to imprisonment. Likewise, the offenses substantially contributed to the violence faced by prostitutes, thus, raising the violation of security of the person.

The applicants submitted that s. 210, the bawdy-house provisions, should be struck down. The women took the position that violence is significantly reduced or eliminated in most indoor settings. Section 212(1)(j) prevented the women from hiring managers, drivers, and security personnel who help in reducing or eliminating incidents of violence. The applicants argued that the prohibition against communicating in public for the purposes of prostitution (s. 213(1)(c)) forced prostitutes to make quick decisions without adequately screening customers, thereby increasing their exposure to dangerous situations.

The Applicants' Perspectives

Terri Jean Bedford had 14 years of experience working as a prostitute. She had encountered significant violence while working as a street prostitute. In her personal experience, indoor prostitution was safer than prostitution on the street.

In the mid-1980's, Ms. Bedford ran an escort service from her house, and later, from a studio. She was not aware of any incidents of violence towards her employees. Ms. Bedford felt that this work environment provided the escorts with safety and security. In 1986, Ms. Bedford was charged with a number of prostitution-related offences. Ms. Bedford eventually served 15 months in prison. In 1989, Ms. Bedford moved to Toronto and found work as an administrative assistant. Shortly thereafter, she was laid off and ineligible for unemployment insurance. With few employable skills, she returned to work at massage parlours and was charged multiple times with being an inmate in a bawdy-house.

In 1993, Ms. Bedford opened the Bondage Bungalow. She only experienced one incident of "real violence" at Bondage Bungalow when a client choked her. She called for help, and her male employee intervened. In 1998, she was convicted of unlawfully keeping a bawdy-house. Ms. Bedford wanted to return to work in a secure, indoor location. She was concerned however, about being exposed to criminal convictions. Moreover, Ms. Bedford did not want the people assisting her to be subject to criminal sanctions due to the living on the avails of prostitution provision.

Amy Lebovitch worked as a prostitute since 1997. She had worked as a street prostitute, an escort, and in a fetish house. At the time of the original trial she worked as a prostitute, independently out of her home. Ms. Lebovitch feared being charged and convicted under the bawdy-house provisions. She was also concerned that her live-in partner would be charged with living on the avails of prostitution. Ms. Lebovitch had never been charged with any criminal offence. Ms. Lebovitch is a spokesperson for Sex Professionals of Canada (SPOC), a political group that works towards decriminalization.

Ms. Lebovitch decided to work as a street prostitute in order to make money quickly. She did not experience severe violence during her year on the streets. She went to work at an escort agency after seeing other street prostitutes who had been badly beaten. Working through an agency gave Ms. Lebovitch greater control over her environment than she had on the street. Nevertheless, she admitted that out-calls "still carry with them the potential for danger".

In 2001, Ms. Lebovitch decided to work independently as a prostitute from her home. She indicated that she took security precautions and felt safer in her home. Ms. Lebovitch stated that if she was attacked by a client, she would not likely report the incident to the police as she wants to avoid prostitution-related charges. She further indicated that the fear of being criminally charged for working out of her home has caused her to

work on the street on occasion. Ms. Lebovitch likes her job and hopes to continue working.

At the time of trial, Valerie Scott was the executive director of SPOC. In the past, she worked as a prostitute on the street, in massage parlours, and independently from her home or in hotels. Ms. Scott wished to recommence working in prostitution in an indoor location but abstained from this work due to the penalties of the bawdy-house provisions. Ms. Scott started working as a prostitute at the age of 24. She worked from home by responding to newspaper advertisements. Ms. Scott stated that she would ask clients for their home or office telephone number and their name, which she would verify using the telephone book. She screened clients by meeting new clients in public locations, such as a library or a cafe. She maintained that she never experienced significant harm working from home.

Sometime in 1983-1984, Ms. Scott, who was aware of the AIDS epidemic, turned away clients who refused to wear condoms. She saw a significant reduction in business. Ms. Scott felt forced to work as a street prostitute. While working on the street she experienced threats of violence, verbal and physical abuse. Ms. Scott described some precautions street prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable.

In the mid-1980s, Ms. Scott joined the Canadian Organization for the Rights of Prostitutes (CORP), a group which advocated decriminalization of prostitution. In 1984, Ms. Scott provided submissions to the Legislative Committee where she warned that the enactment of the communicating law would result in the death and injury of street prostitutes. Following the enactment of Bill C-49 in 1985, Ms. Scott issued an emergency resolution with the National Action Committee on the Status of Women, which called for the repeal of the new law, as well as the bawdy-house and living on the avails provisions. Ms. Scott stated that following the enactment of the communicating law, CORP received an increased number calls from women working in prostitution reporting bad dates.

Ms. Scott helped establish Maggie's, a drop-in and phone centre for people working in prostitution in Toronto. Maggie's began compiling bad date lists that were distributed to prostitutes. In 2000, Ms. Scott formed SPOC, and began a new bad date list. As executive director of SPOC, she testified before the 2005 House of Commons Subcommittee on Solicitation Laws about legal reform. Ms. Scott estimated that she has spoken with approximately 1,500 women working in prostitution. Ms. Scott expressed a desire to operate an indoor prostitution business. While she recognized that clients may be dangerous in both outdoor and indoor locations, she would institute safety precautions such as checking identification of clients, making sure other people are close by during appointments to intervene if needed, and hiring a bodyguard.

Social Science Evidence

The trial judge, Justice Susan Himel, had over 25,000 pages of evidence before her. There were multiple interveners and the court surveyed at length the extensive factual record placed before it. This included evidence from former and practising sex workers; expert evidence on prostitution and its social impacts; evidence from police officers and Crown Attorneys; government debates and inquiries; and evidence of the practices and experiences of other countries that had decriminalized, legalized, or partially legalized prostitution. What follows is a summary of Justice Himel's examination of the expert evidence:

Expert testimony demonstrated that most prostitutes in Canada are women and that approximately 80 per cent of prostitution occurs predominantly in indoor locations (exact number is unknown). Street prostitution was described as being divided between low and high "tracks" or "strolls" (which are areas where prostitutes congregate). Prostitutes working the low track were described as being on the bottom of the spectrum of prostitution in terms of health, safety, and earnings.

Many of the applicants' experts gave opinions on stereotypes and misperceptions about the sex trade in Canada. For example, some experts challenged the notion of the prostitute as a victim, maintaining that some turn to prostitution not out of desperation, but because

they see it as a better option than other opportunities, such as unskilled labour. As well, evidence was led that homeless, drug-addicted prostitutes represent a small percentage of prostitutes, also known as "survival sex workers." Some experts opined that pimping is far less prevalent in Canada than some popular literature and media depictions would hold, and that the "mythology of the pimp" is rooted in racial and sexual bias.

Violence in prostitution is primarily inflicted by male clients against female prostitutes. The applicants' experts maintained that street prostitution is much riskier, in terms of violence, than indoor prostitution. Some of the experts stated that street prostitutes are more likely to be victims of homicide than other prostitutes and much more likely than women in the general population. Factors that can increase safety levels for indoor prostitutes include greater control over their physical environment, close proximity to others who can intervene if help is needed, the ability to better screen out dangerous clients (taking names and credit cards in advance for example), a more regular clientele, the use of drivers to get to and from appointments, and response plans for dangerous situations.

The applicants' experts did not state that working in indoor locations eradicates the risk of violence; they agreed that there is always the potential for danger from any client. Additionally, in some of the experts' opinions, conducting indoor in-call work is relatively safer than indoor out-call work. Some of the dangers associated with out-call work include that it is difficult to assess the safety of a destination beforehand, the client may not be alone, and exit routes may not be easily identifiable or accessible. As well, many of the applicants' experts asserted that how an indoor location is run (for example, what screening measures and other safety precautions are taken) can have an impact on the level of safety.

Many of the applicants' experts provided the opinion that the impugned provisions increased the level and risk of violence against prostitutes. For example, they contended that the provisions at issue:

a) Limited the places and ways in which prostitution can be practised that can lower the risk of violence;
b) Sustained stigmatization of prostitutes and prostitution; and
c) Created a conflicting victim/criminal status in the eyes of the police, which leads many prostitutes to believe that the police are not willing to protect them.

Thus, according to the applicants' experts, safer ways to conduct prostitution are criminalized, whereas riskier ways are not. For example, the applicants' experts tended to agree that working in-call is the safest way to conduct prostitution; however, it is illegal due to the bawdy-house provisions. Working out-call can be done without violating the law, but carries its own set of risks. Some strategies to reduce these risks, such as hiring a driver or bodyguard or meeting a client in a public place beforehand, run afoul of the law, according to the experts.

Dr. John Lowman, one the applicants' key witnesses, is a Professor at the School of Criminology at Simon Fraser University. Dr. Lowman reported how various law enforcement initiatives to enforce the communicating provision in Vancouver have had the effect of displacing street prostitutes from some of the city's traditional strolls into a more isolated commercial and industrial area. Dr. Lowman described this area as an "orange light district," which was not actively patrolled by police in order to diminish complaints from residents in more populated areas. He says that from 1995 to 2001, approximately 50 women who worked in this orange-light district went missing.

Prostitutes were described by the respondent's experts as a vulnerable, victimized population. Most of the prostitutes interviewed by their experts were street prostitutes or victims of trafficking. Some of the experts opined that childhood abuse overwhelmingly precedes entry into prostitution. One expert's view was that the average age of recruitment into prostitution in Canada is 14 years old. Some of the respondent's experts went into detail explaining tactics that pimps use to control and manipulate prostitutes. Finally, the respondent's experts commented that the vast majority of prostitutes want to "exit" or leave prostitution, but face difficulties in doing so.

The court held that in general the impugned provisions were "<u>contributing to danger</u> faced by prostitutes" (emphasis in original) by criminalizing methods of safer practice, such as in-call sex work and

the hiring of drivers and bodyguards. The Court concluded that s. 7 could not be saved by s.1 of the Charter. Section 1 states that "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Court further held that the offence of communicating for the purposes of prostitution further violated the right to freedom of expression in s. 2(b) of the Charter.

Ontario Court of Appeal

On appeal, a 3:2 majority of the Ontario Court of Appeal allowed the Crown's appeal in part. The appeal court found that the application judge erred by holding she was not bound by the Supreme Court of Canada's decision on the communication offence in Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 SCR 1123, [1990] 4 WWR 481. The Court of Appeal affirmed the decision of the Superior Court of Justice that the other two provisions violated s.7: the bawdy house and living on the avails provisions were overbroad and grossly disproportionate, although neither was arbitrary. Neither could be saved in its present form by s.1.

Supreme Court of Canada

The Supreme Court of Canada released Bedford on December 20, 2013. This decision was penned by Chief Justice Beverley McLachlin. She is the first woman in Canada to hold this position, and the longest serving Chief Justice in Canadian history.

McLachlin C.J. held that ss.210, 212(1)(j) and 213(1)(c) of the Criminal Code – which make it a crime to keep a bawdy-house, to live on the avails of prostitution, or to communicate in public with respect to a proposed act of prostitution – infringe the s.7 Charter rights of prostitutes by depriving them of security of the person in a manner that is not in accordance with the principles of fundamental justice. The unanimous 9 panel court held that none of the provisions were saved under s.1.

The three Criminal Code provisions negatively impact the security of the person of prostitutes and thus engage s.7. In determining whether a claimant's s.7 security interests are engaged, the standard of causation is a flexible "sufficient causal connection" standard. In Bedford, the impugned provisions "do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks." Specifically, the bawdy-house provision makes the safety-enhancing method of in-call prostitution illegal. The law against living off the avails prevents prostitutes from hiring bodyguards, drivers and receptionists. The communication prohibition prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses.

The negative impact of the bawdy-house prohibition on prostitutes' security of the person is grossly disproportionate to its objective of preventing public nuisance. The harms of preventing prostitutes from working in safer fixed indoor locations and from resorting to safe houses are grossly disproportionate to the law's objective. Second, the living on the avails prohibition is overbroad. Its purpose is to target pimps and the parasitic, exploitative conduct in which they engage. However, it punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes, such as legitimate drivers, managers, or bodyguards. It also includes anyone involved in business with a prostitute, such as accountants or receptionists. The law thus includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. Third, the communication provision, which prevents street prostitutes from screening clients, is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

Chief Justice McLachlin rejected the argument that the living on the avails provision must be drafted broadly in order to capture all exploitative relationships, which can be difficult to identify. The law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists and accountants who work with prostitutes. The law is therefore not minimally impairing. Nor is the law's effect of preventing prostitutes from taking measures that would increase their safety outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.

Bedford also addressed the issue of the degree of deference to be accorded to the application judge's

findings on social and legislative facts. McLachlin C.J. held that the standard of review for findings of fact – whether adjudicative, social, or legislative – remains palpable and overriding error. The application judge's findings on social and legislative facts (i.e., facts about society at large, established by complex social science evidence) were entitled to deference. The Supreme Court of Canada expressed a preference for social science evidence to be presented through an expert witness. The assessment of expert evidence relies heavily on the trial judge and their role in preventing miscarriages of justice flowing from flawed expert evidence.

Bedford recognized that "while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so." The Court went on to comment that ".... street prostitutes, with some exceptions, are a particularly marginalized population. Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money." The Court concluded by stating that "these are not people who can be said to be truly "choosing" a risky line of business." Bedford also confirmed that it is the "conduct of pimps and johns" that is the most prevalent source of the harm suffered by prostitutes.

Bedford does make reference to the context of prostitution and its harms but there is no discussion of the gendered and racialized nature of these harms. Any reference to "women" in the judgment is limited to the Court's analysis of the applicants' evidence and reference to other decisions. This approach is in opposition to the Ontario Court of Appeal (Bedford v Canada (AG), 2012 ONCA 186) where Justices MacPherson and Cronk noted that the majority of sex workers are marginalized women. This lower level court also rejected the suggestion that individuals who choose to participate in the sex trade are not worthy of the same constitutional protections.

Finally, McLachlin C.J. held that while each of the challenged provisions violates the Charter, this does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes. The regulation of prostitution is a complex and delicate matter. Parliament was left to devise a new approach, reflecting different elements of the existing regime. Considering all the interests at stake, the Court held that the declaration of invalidity should be suspended for one year.

Current State of the Law

Bill C-36, also known as the Protection of Communities and Exploited Persons Act received Royal Assent on November 11, 2014. Bill C-36 is Parliament's response to Bedford. Bill C-36 amends the Criminal Code in an attempt to address the particular dangerous conditions underlying the determination of unconstitutionality. Simultaneously, Bill C-36 also alters the statutory scheme in a way that creates different conditions that restrict the ability to engage in prostitution. Bill C-36 has amended the Criminal Code by:

- making it an offence to obtain for consideration, or communicate with anyone for the purpose of obtaining for consideration, the sexual services of a person;
- creating the offence of advertising an offer to provide sexual services for consideration;
- repealing the offence of living on the avails of prostitution and recasting it in a modified form as the offence of receiving a material benefit derived from the commission of an enumerated offence; and
- narrowing the scope of liability for communicating in a public place for the purpose of engaging in prostitution.

There has been considerable debate and discussion surrounding these new prostitution laws. Some legal commentators contend that these new laws would likely be unconstitutional because Bill C-36 makes prostitution dangerous in the same way the old laws did. The Bedford decision gave Canadians a unique opportunity to think about and debate the kind of prostitution laws they wanted. In introducing Bill C-36, the then Minister of Justice, Peter MacKay, stated that the bill was a new "Canadian Model" dealing with sex work. However, critics of the Bill suggest that the opportunity to take a new approach was squandered as the new laws may also be challenged.

It remains to be seen what the next chapter in this area of reform will be. However, Bedford and the responding legislation have been the catalyst for much public

consideration and discussion of sex trade workers and their rights.

It Is All About Merit And Other Myths

By Justice Susan Glazebrook, Supreme Court of New Zealand
This is an updated and condensed version of other papers given by the author. These papers contain full references and are available at www.courtsofnz.govt.nz

Introduction

As at February 2015, only some 22 per cent of partners in large law firms in New Zealand were women. The figures for Queen's Counsel were even worse, with only 20 (17.55 per cent) of the 112 Queen's Counsel as at 1 February 2015 being women. The percentage of women judges in New Zealand is somewhat better, close to 29 per cent in 2015. New Zealand is not alone. Other Commonwealth jurisdictions share similar statistics. For example, in Australia, in 2013–2014, only 35 per cent of Commonwealth judges and 23 per cent of all State Supreme Court and Court of Appeal judges were women. In the United Kingdom, as of 2015, one out of 12 Supreme Court, eight out of 34 Court of Appeal, and 21 out of 106 High Court judges are women. While this is only a representative sample, the issue of gender inequality pervades much of the Commonwealth.

It is not just the lack of women in senior positions, in the legal profession, that is the issue. There are also financial disadvantages in being female. According to a 2011 study of the New Zealand workforce conducted by Goldman Sachs, females earn 17 per cent less on average than males on a full time equivalent basis. In no industry in New Zealand do women earn more on average than their male counterparts. Similar studies have been undertaken overseas with similar results.

Whichever way you look at them, these figures are woeful. So why is the situation so dire and what can we do about it? I will first address a number of myths that persist in the area.

Myth busting

It is just a matter of time

The first myth is that we just have to wait and the weight of numbers will eventually cause a "trickle up" effect. Well the figures I have just given you would suggest that it is not
happening very fast. In the latest round of QC appointments, only 33 per cent were women. Only 28.4 per cent of judges appointed in New Zealand over the five years up to September 2009 were women. Similarly, only 29.6 per cent of all judicial appointments made since the beginning of 2010 have been female.

This is despite the fact that, since the 1990s, there have been roughly equal numbers of women and men at New Zealand law schools and that admission to the profession for women has ranged from 26 per cent in 1980, climbing to 46 per cent in 1990 and reaching 60 per cent in 2014. Given that over 40 per cent of lawyers entering the profession since 1990 in New Zealand have been women (ie for over 25 years), one would have expected more movement in the figures than has been seen to date, or, at very least, that the rate of female appointments to senior positions over the last five to ten years would be starting to be evenly balanced.

Everything is OK before the glass ceiling

The next myth is that everything goes swimmingly for women until they hit a glass ceiling at senior levels. Well no, sorry. The gender gap begins from the first day of work. A study in 2010 by Statistics New Zealand found that male graduates receive on average a starting salary that is $1890 (6.5 per cent) higher than female graduates. Five years in, male graduates received significantly more than female graduates, with male graduates who left university in 2005 receiving 18.2 percent more than female graduates.
This is not just a New Zealand phenomenon. In Australia, the 2014 Grad Stats report shows a median full time starting salary for male graduates of $55,000 compared to $52,000 for women. The current graduate gender pay gap across all occupations is 4.4 per cent. A study conducted in the United States of MBA students from top programmes worldwide shows that women are behind in level and pay from the moment of graduation, even when prior work experience, industry, region and other relevant factors are taken into account. The gender gap widens as careers progress.

Women choose different career paths

Well, one possibility is that women go from law school to careers other than law and that women fall out of the legal profession in greater

numbers than their male counterparts.

However, the New Zealand statistics suggest that, if women are leaving the profession, the rates are similar to those of men leaving. The phenomenon whereby, after three to five years in private practice, women lawyers in New Zealand leave private firms to move to a corporate or public-sector law job does, however, appear to have validity.

It is also true that there are differences in the types of law in which women specialise but the question may be whether this is really through choice or through stereotypes. For example, 70 per cent of family lawyers in New Zealand are women and 63 per cent of those in health law. By contrast, almost 70 per cent of those who specialise in banking and finance law are men and men make up 65 per cent of those who specialise in civil litigation and company and commercial law.

It is all to do with family responsibilities

It has been suggested that women do not wish to advance because of child rearing responsibilities. A US study examined this argument by looking at the position of women who do not have children and the position of women who, despite family obligations, do aspire to advancement. They found that, even from the start of their career, these women still lagged behind men. Further, the gender gap increased as their careers progressed.

This is not to suggest that family friendly policies are not important. One obvious structural change, however, is to make it easier to have a family and succeed, adapt workplace polices, practice and culture not to only allow for maternity (and paternity) leave but also for family time more generally. This will be of benefit to male and female employees, their families and society generally.

Mentoring is the key

Over recent years, there has been a real effort to mentor and develop women. It has been suggested that this, while laudable, does not suffice. A US study of the career progression of recent MBA graduates shows that, while men and women are just as likely to receive mentoring, the benefit that men gain from mentoring is significantly greater. On average, men are 93 per cent more likely in their first post-graduation job to be placed at a mid-manager level if they are mentored; the figure for women is only 56 per cent. There are also major pay differentials.

One explanation for the differential between men and women with mentors may be that men's mentors tend to be higher placed in an organisation. The US Study found that women with high profile mentors were promoted at the same rate as men with the same level mentors, though women still received less compensation. This suggests that what women really need are sponsors at a high and influential level who will advocate for them when advancement decisions are being made. Women tend to be over-mentored and under-sponsored relative to their male peers.

Women should network more

The Old Boys Club is certainly alive and well. Women have been fighting back with their own networks. These can be valuable (and very supportive) but not at the expense of keeping up general cross-gender networks. It has even been suggested by one commentator (Avivah Wittenburg-Cox) that initiatives aimed at women are doing nothing to advance gender balance. She says that women's networks are popular both with women and men. Women often feel more comfortable with other women and men enjoy feeling that they have given women equal opportunities, even if separate. She suggests that these types of initiative "confirm in everyone's minds that the lack of balance is because of women and their choices. The reality is that the lack of balance is usually because of the mind sets and cultures introduced and maintained by the majority currently in power". Unless these prevailing views are confronted, in her view, women's clubs will do little to reduce gender inequality in any material way.

It is all about merit

One of the prevailing myths is that appointments are made on merit in a gender (and ethnicity) neutral manner. Yet when gender disguising measures are taken, this has been shown to be incorrect.

For example, in the 1970s, females only constituted around 10 per cent of the members of the top American orchestras. This had increased to 35 per cent in the mid-1990s. The increase has been attributed to the introduction of musicians auditioning behind a screen so that the gender of the players was unknown. There are many similar

examples. Another example had identical CVs (apart from a male or female name) sent to potential employers. The male applicant was rated as significantly more competent and hireable than the (identical) female applicant. Participant employer members also selected a higher starting salary and would have offered more career mentoring to the male applicant.

Women can also be judged differently from men. One experiment sent a (objectively impressive) CV to student participants. The only difference was that one set had a male name as candidate and one a female name. When asked to judge the male applicant, students judged him to be effective and likeable. By contrast, when it came to the female applicant, while they judged her competent, they thought her aggressive and would not want to work with her. Similar responses were received from both female and male student participants, showing that gender stereotypes are internalized by both sexes.

In terms of attitudinal changes, leadership is often seen the key to success. It has been shown that people associate men and women with different traits. Women are associated with communal qualities, which convey a concern for the compassionate treatment of others. By contrast, men are associated with qualities like assertion and control.

Perceptions of what makes a good leader are changing. The irony is that the so called 'female characteristics' that have often been viewed in a negative light are now understood to be highly beneficial in leadership roles. It has even been suggested that women are more likely than men to bring a more complete range of the qualities needed by modern leaders, including self-awareness, humility and authenticity.

It is important that decision-makers learn to identify and rely on the strengths that particular candidates actually possess (whatever their gender), rather than relying on stereotypes. It is also important that decision-makers identify the right mix of skills actually needed to do the job. Diverse viewpoints and skills improve, rather than inhibit, performance.

Women need to employ the right strategies to succeed

A recent US study found that high potential women and men employ very similar tactics to get ahead. However, the strategies paid off for men more than they did for women in terms of pay and advancement. The view that women simply need to be more strategic or promote themselves more overlooks the fact that women who do so are often viewed in a negative light. As numerous studies have shown, self promotion by women may prejudice career progression. Until gender stereotypes and unconscious biases are overcome, women will struggle to make it to the top of regardless of the strategies they employ.

We are doing you a favour

Ensuring gender quality in the work place is far from providing a favour to the female population; to the contrary, it is economic commonsense. As was noted in an article in *The Economist*, the increase in female employment in the modern developed world has been the main driving force of growth in the past couple of decades. The surge in female employment has also contributed more to global GDP growth than new technology or the new global economic powers.

A number of studies now also confirm that companies with a gender balance perform better. Where there are more than two or three women on a board, improvements are seen in the ethical practice and accountability, scrutiny and unity, and transparency of a company. Companies with high levels of gender diversity also outperform others in their sector in terms of stock price growth, return on equity and operating result. Even if not causally linked to the presence of women as such (and some say it is), the better performance of more diverse companies may just be because they are not wasting talent.

There is, however, also an ethical case for diverse workplaces, based on our commitment to human rights, such as the right to be free from discrimination.

Women do not help other women get ahead in their careers

The argument here is that those few women who make it to the top view other upcoming women as a threat and may even actively keep them down to ensure that their own position is not challenged. Certainly, there are instances where this occurs (but men can behave this way too and we may be more tolerant of such behaviour in men). However, a recent study found that this, as a general phenomenon, was not correct. Women are actually more likely than their male counterparts to assist the development of others, especially

other females. I suggest that this myth may be attributable to unrealistic expectations of how much even those women who are in senior positions can do to close the gender gap, without the accompanying structural changes.

Prejudice is a thing of the past
People may now be more wary of expressing prejudice. They may even think they have none. The Harvard Implicit Association Testing (IAT) tests, however, show that it is alive and well, and translates into actual discrimination and stereotyping. Such unconscious bias is in many ways more difficult to combat as, by definition, it is hidden.

What can be done?
Are there solutions to this issue? Women can overcome hesitations, put themselves forward and do more self- promotion. They can decide not to wait until they are 100 per cent qualified before applying; make like the men and apply at 60 per cent qualified. But for real progress there must be structural and attitudinal change, including tackling unconscious bias.

At the centre of the issue is a disproportionate number of men in senior positions. Any real change will require those males at the top to commit to ensuring that the playing field is levelled. And it will be our task to encourage, cajole, persuade and, finally, to insist that they do so.

Early and Forced Marriages

The following article is an extract from the report which appeared on the Commonwealth Secretariat's website on 7 May 2015.

Commonwealth National Human Rights Institutions agreed a new Declaration – the *Kigali Declaration* – to prevent and end child marriage, after a two-day working session in Kigali, Rwanda in May 2015.

Participants acknowledged that child, early and forced marriage presents a serious and persistent violation of the rights of young women and girls and causes irreparable damage to victims and society as a whole.

The *Kigali Declaration* sets out a comprehensive framework for national human rights institutions to take forward and strengthen and calibrate their efforts to prevent and eliminate early and forced marriage in their respective countries.

The Declaration contains a number of key commitments, which includes the monitoring of the enforcement of legislation; improving data collection and promoting compulsory education for girls.

Wanjala Wafula, Founder and Director of the Coexist Initiative, a Kenyan community-based organisation working with men and boys to tackle gender-based violence, described the *Kigali Declaration* as a "milestone" in efforts to protect girls and young women.

He further added: "This Declaration represents a united front. Commonwealth National Human Rights Institutions will be able to bring about change by joining forces in the drive towards eradicating child marriage, an egregious violation of the rights of women and girls."

It is estimated that over the next decade 140 million girls under the age of 18 years will be forced to marry without their consent, which amounts to a rate of 39,000 girls a day. Half of these girls live in Commonwealth member countries.

Early and forced marriage exposes girls and women to innumerable risks. Subjected to a forced and traumatic initiation into sex, as well as unplanned and frequent pregnancies, child brides suffer long-term, life-threatening physical conditions and illnesses, including HIV/AIDS.

The Declaration follows a mandate to address early and forced marriage issued at the Commonwealth Heads of Government Meeting in 2013.

Kigali Declaration Moving from aspiration to action to prevent and eliminate child, early and forced marriage in the Commonwealth

We, National Human Rights Institutions and members of the Commonwealth Forum of National Human Rights Institutions (CFNHRI) attending a working session on the imperative to prevent and eliminate child, early and forced marriage, on 5-6 May 2015 in Kigali, Rwanda:

Affirm the values and principles contained in the Commonwealth Charter.

Cognizant of the commitments made by Heads of Government at the 2011 and 2013 Commonwealth Heads of Government Meetings; as well as the Human Rights Council Resolution 23/24 of September 2013 *Strengthening efforts to prevent and eliminate child, early and forced marriage: challenges, achievements, best practices and implementation gaps".*

Note that participants to the 2013 Commonwealth Roundtable on Early and Forced Marriage *"recognised the unique added value of NHRIs in the promotion and protection of human rights in relation to EFM. This includes human rights education, conducting enquiries, receiving individual complaints and providing redress to victims (…) Participants recognised the educative role that civil society organizations (CSOs) and NHRIs can play in building the capacities of the judiciary, the police, parliamentarians and other actors. Participants also felt that NHRIs and CSOs could play a role in monitoring, data collection, research and analysis."*

Concerned by estimates that over the next decade 140 million girls under the age of 18 years will be forced to marry and that half of these girls live in Commonwealth member states.
Concerned that child, early and forced marriage disproportionately affects girls as it is cause and consequence of entrenched gender inequality and unequal relations of power between men and women, boys and girls.

Concerned that child, early and forced marriage impedes girls and women's enjoyment of human rights, including the right to education, employment, participation, the right to health including sexual and reproductive health rights, and the right to freedom from violence and exploitation.

Recognise that child, early and forced marriage remains one of the most debilitating human rights violations facing women and girls.

Recognise that child, early and forced marriage results in lower education, personal agency, empowerment and economic productivity of girls and women and therefore also undermines overall family, community, national, regional and global development efforts.

Reaffirming the human right to full and free consent to marriage as established by the International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights as well as the Convention on the Elimination of Discrimination Against Women and the need to protect children as established by the Convention on the Rights of the Child.

The Commonwealth

Affirm our commitment to respect and promote the core values and principles set out in the Commonwealth Charter, in particular the importance of access to health and education, gender equality, and the roles of young people and civil society.

Inspired by recommended actions in the 2014 Joint General Recommendation on harmful practices by the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child.

Having explored the specific causes and consequences of child, early and forced marriage in our countries as well as the adequacy of national laws and enforcement mechanisms, awareness and training, support and services for victims.

Having shared best practices from NHRI interventions and collaboration with governments, civil society organizations, parliaments and national, regional and international organizations to address child, early and forced marriage through improved data collection, monitoring and reporting of prevalence; legal reform and enforcement; education and empowerment; awareness raising; service delivery; and monitoring and assessment of impact.

We declare and commit as follows:

1. To develop practical action plans for our institutions to support the prevention and elimination of child, early and forced marriage;

2. To advocate and support further sustained collaboration among stakeholders in regard to implementation of international and regional obligations relating to child, early and forced marriage;

3. To strengthen our institutional capacity to handle complaints and conduct investigations;

4. To strengthen our monitoring of the enforcement of laws;

5. To develop and/or strengthen effective referral to appropriate services;

6. To promote effective implementation and monitoring of the state's international and regional obligations through greater engagement with human rights mechanisms;

7. To support our governments by advocating for legal reform including bringing the age of marriage in line with international standards and strengthening systems for the registration of marriages and births;

8. To support and advocate for reliable data collection on prevalence of child, early and forced marriage as well as on the impact of strategies to prevent and end early and forced marriage;

9. To encourage dialogue and promote partnership collaboration with local, traditional and religious leaders to prevent and eliminate child, early and forced marriage;

10. To encourage dialogue with men and boys to prevent and eliminate child, early and forced marriage;

11. To advocate and promote compulsory quality education for all children at primary and secondary education levels;

12. To advocate for and support the inclusion of human rights education in the school and tertiary curricula;

13. To collaborate with relevant stakeholders to develop the capacities of professionals working in health, education, law enforcement, justice, and child welfare;

14. To work with relevant stakeholders to identify vulnerable communities, provide protection and promote empowerment within the identified communities;

15. To advocate for and support national and regional policies and strategies for the prevention and elimination of child, early and forced marriage;

16. To advocate for and support ongoing Commonwealth efforts to prevent and eliminate child, early and forced marriage;

17. To seek technical assistance and cooperation from the Commonwealth Secretariat to operationalize this Declaration for the benefit of girls and women at risk of child, early and forced marriage in the Commonwealth.

Adopted at Kigali, Rwanda, 6 May 2015

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Further information about the Gender Section and its aims can be found on the CMJA's website at:
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Ideas? Suggestions? Comments? Contributions?

We would like to hear from you. If you have comments, suggestions, ideas, or concerns please send us an e-mail at info@cmja.org

If you have an interesting story to tell, please send these too!