GENDER IN THE LABOUR LAW AND OCCUPATIONAL HEALTH AND SAFETY LAW CURRICULUM

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INTRODUCTION: TRADITIONAL LEGAL SCHOLARSHIP AND THE LABOUR LAW/OHS CURRICULUM

The primary bodies of law which regulate the paid work of women are labour law and occupational health and safety law (OHS law). Other areas of law such as anti-discrimination law or company law certainly impact on women but women's experience of paid work is most affected by labour and OHS law. Despite the importance of these areas of law for women, labour law and OHS law curricula have remained gender-biased and women have been largely invisible within mainstream teaching (and research). They have been confined to what are effectively the "women's pages" of the curriculum, that is issues such as equal pay, affirmative action and protective legislation.[1]

Labour law curricula have been dominated by technical questions of constitutional interpretation, by traditional analyses of the contract of employment and by statutory analysis emphasising the legal issues relevant to the control of trade unions and industrial action. They have been constructed according to traditional views of legal scholarship and have consequently emphasised the complexities of the legal issues arising from court decisions and statutory provisions. In this short paper it will be argued that the *sine* qua non for a gender inclusive curriculum is the rejection of traditional legal scholarship and a focus on the legal issues which are of concern to working women.

Traditional legal scholarship hampers the adoption of a gender inclusive curriculum in a number of ways. First it focuses on textual analysis of cases and statutes. In other areas of law feminists have used textual analysis of cases to highlight the gendered assumptions made by the judiciary about women. In labour law, however, the scope for a primarily textual analysis is slight, at best. Only a sophisticated understanding of how gender, work and law interact can expose the fallacy of gender neutrality in labour law. A gender inclusive curriculum in labour law requires that labour laws be placed in their economic, industrial and social context and that a very broad concept of law is used. In other words it requires either that feminists engage in empirical work or that they draw on empirically based disciplines such as industrial relations.[2] To understand, for example, why contract of employment laws discriminate against women it is necessary to understand the typical employment patterns of women (intermittent, temporary), their location within the labour force (typically in service occupations), their position with respect to trade unions (more likely to be covered by weaker unions) and the role of employers (particularly their industrial relations strategies.[3] When these various elements are put together it is possible to see how contract of employment rules (such as the primacy of written documents) allow employers to structure work in ways which oppress women.

It is also essential to expand the concept of law within the curriculum. In some circumstances, for instance, the interpretative activities of enforcement agencies may be of more significance to women workers than those of the judiciary. This fact is obscured by a concept of law focussed on cases and on doctrinal analysis. It is necessary to do more than a textual analysis of how two or more substantive bodies of law interact. The bodies of law which at the end of the day determine the position of women workers include arbitral decisions, work rules, trade union rules, court rules covering procedure and the bodies of

law covering regulatory agencies and settlement procedures. In the area of occupational health and safety[4] an expanded concept of law would allow questions such as the following to be addressed: How do the procedures for identifying occupational illness effect women's chances of securing workers compensation? Do settlement rules produce lower settlements for women due to their weaker bargaining position?

Even where cases specifically and overtly appear to rest on gender-biased assumptions it is necessary to go beyond the text of the case to assess the significance of gender. When cases are taken out of their historical context it is easy to attribute an inflated significance to the gender prejudices of the judiciary.[5] This can also occur in the contemporary context. It would be easy, for example, to assume that decisions that family day care workers were not employees somehow rested on assumptions about the proper role of women whereas the reality is that the legal categorisation of these women had much to do with the federal government's need for a cheap labour force in the area of childcare.[6] Gender was a crucial factor here but not in any simple sense of the judiciary's view of women's appropriate role. The prerequisite for a more balanced curriculum is thus a rejection of traditional legal scholarship and of alternatives which are primarily textual in nature. Political, social and industrial relations material must be integrated into the curriculum.

THE GENDERED NATURE OF ISSUE SELECTION AND EMPHASIS WITHIN LABOUR LAW AND OHS LAW

It was stated earlier that gender is dealt with in the context of "women's issues" such as EEO, protective legislation or equal pay and that the lack of attention to women within mainstream labour law and OHS law curricula reflects a degree of gender-bias. Labour law courses, text-books and case-books, for instance, devote large amounts of time to the law governing industrial action but very little to that concerned with award enforcement. This reflects a historical bias in several disciplines (labour history, labour law and industrial relations) with questions relating to discipline rather than equity. Discussion in case-books,[7] texts and journals focuses almost exclusively on the enforcement of legislation against trade unions rather than against employers. This privileging of the discussion of certain forms of enforcement over others reflects the gendered nature of labour law and contributes to the exclusion of women from mainstream concerns since it is issues relevant to enforcement against employers which are of more importance to women.

This is because patterns of industrial action and award/ minimum conditions evasion are gendered. In other words male workers are more likely to engage in industrial action while women are more likely to lose out on award or other entitlements. With respect to industrial action it must be stressed that the higher participation rates of males in industrial action — particularly in militant action — does not reflect an industrial passivity on the part of women. Rather women are disproportionately represented in those sections of the economy where there is a much lower rate of industrial action for both men and women, areas, for example, like the services sector where conditions are not conducive to industrial action. In other words in those sectors of the economy where job turnover is high, there is a preponderance of small business and labour is easily replaced. In such areas neither male nor female workers are in a position to take industrial action and women are disproportionately found in such sectors of the economy. For the same reasons that militancy is low award/minimum conditions evasion is high. High rates of award evasion are associated with small business, workers in a poor labour market position (ie easily replaced) and weak or nonexistent unionism. In other words there are structural differences between men's and women's work which mean that the legal issues which are important to them are also different. The refusal to recognise these structural difference contributes to the invisibility of women in traditionally constructed curricula. The curriculum is dominated by issues which are relevant to the workforce experience of men rather than women.

Similarly in the area of occupational health and safety law the legal position of women is crucially affected by the law (and policy) governing the practice of regulatory agencies. Changes to legislation which governs the legal rights of individual workers may mean little, for instance, to casual retail workers who are not in a position to claim their legal entitlements. The impact of such laws on their workplace will depend on the role taken by the relevant regulatory agencies. In the past decade the move to downgrade the role of such agencies to an educative one has probably had more impact on the health of such women than any

changes to the substantive law covering their "rights". Such issues do not form part of mainstream analysis particularly that focussed on doctrinal work. A prerequisite for a move to gender balance in the curriculum is a rejection of traditional legal scholarship since it does not provide the theoretical tools necessary to understand the role of law in women's working lives.

Gender differences also play a significant role in shaping the nature of statutory labour law. A good example of how differences between male and female workers translate into conflicts over labour law (which women tend to lose) was provided by the last round of changes to the federal *Industrial Relations Act.* In these changes unions were offered a trade-off: procedural constraints on the use of secondary boycotts legislation in return for non-union bargaining units. This appealed to male-dominated unions hit hard by secondary boycotts legislation in the building, mining, and meat industry. With this legislation nobbled they could deal more effectively with non-union employers. In the services sector, however, non-union deals meant erosion of one protection provided to weak female dominated unions without any corresponding advantage since they are rarely, if ever, subject to secondary boycott legislation due to their industrial weakness. The trade-off, however, was accepted by the ACTU. The more powerful unions and the ACTU won the day, reinforcing the gender bias in labour law. Such divisions between unions are essential to understanding the pattern of legislative change in Australia although labour lawyers do not deal with issues of legislative development in this way. Analysis of this sort is exceptional in traditional labour law studies. Yet this example illustrates the point that not only is it discriminatory to exclude gender from mainstream labour law but that an understanding of the pattern of development of labour law requires the incorporation of gender.

GENERAL METHODOLOGICAL ISSUES AND TEACHING STRATEGIES

Although labour law has been treated as a category somehow essentially dominated by the figure of the full-time male breadwinner the reality is that there is no such monolithic entity "labour law" dominated by a particular male construct. Rather there are many different labour laws arising from various legal institutions (tribunals, courts, legislatures) and it is not possible to say a *priori* that they will be dominated by one particular patriarchal ideology.[8] Indeed it has been argued that the major contemporary danger to the working conditions of women lies in changes to practices which are justified by "feminism".[9] When considering the totality of women's lives (both paid and domestic) labour law and OHS law have overwhelming significance yet this is not recognised in the practice of feminist legal scholarship. There are relatively few feminist scholars working in these areas and the major sources of research lie in non-law journals.

When teaching it is thus necessary to draw heavily on work done in disciplines such as labour history, industrial relations and the field of gender and work. Journals such as the *Journal of Industrial Relations, Labour History* and *Gender and Society* contain essential work. Books, such as that recently written by Rae Frances on gender and labour in Victoria, draw on sophisticated theoretical traditions with which feminist legal scholars are generally unfamiliar.[10] The use of material of this sort can bring the historical experience of women workers alive whilst not oversimplifying the conditions which produced it. It is important, however, to be careful when using overseas material since it often has a limited applicability to Australia. Both Australian labour law, and the conditions which produced it, are historically specific to this country.

More overt attention to gender in the labour law and OHS law curricula is necessary for both scholarly and political reasons. This does not mean, however, that one of the organising principles underlying the curriculum should be a male/female opposition. Gender analysis in the areas of labour and OHS law is far more complex than this. It is important to recognise that women and men should not be treated as undifferentiated categories. Gender is mediated by class, age, work force status (full-time or not), race and occupation. In practice the conflicts of interest that are created and mediated by law do not occur purely on gender lines although they generally have a gender dimension. The fact that elements such as race and class come into the picture complicates gender analysis and means that for some issues, at least, gender cannot be analysed in purely oppositional terms.

A good illustration is provided by the current fashionable issue of non-standard work. Whilst it is true that women are disproportionately found outside standard full time work (as casuals, outworkers,

contractors, part-timers etc) it is not the case that non-standard work is a patriarchal ploy aimed only at women.[11] A number of industries dominated by male workers have been unsuccessfully fighting non-standard work (sometimes for decades as in the case of transport). The fight against independent contracting in the building and meat industry, for instance, has seen unions spending millions fighting employer attempts to individualise the industry through court actions involving the economic torts and secondary boycotts legislation. To see non-standard work as a patriarchal ploy is to ignore the fact that employers (ie capitalists) have engaged in an offensive over the past ten years to redefine typical work and that that has had very selective effects on particular industries, some female dominated, some male.

In the conflict between standard and non-standard work, moreover, there will be times when women workers will be divided by work force status. Full time female factory workers in the clothing industry, for instance, can see the primary threat to their jobs as coming not from male workers but from the female outworkers who undermine their conditions and threaten their employment. In this context female factory workers may identify their interests more with male factory workers than female outworkers. Similarly outworkers may be ambivalent about a substantial upgrading of their conditions since it may threaten their employment. In other words (as unions have always understood) any substantial upgrading of outworking conditions is likely to eliminate outwork from the industry and radically cut the number of workers involved. There is an objective conflict of interest between the women workers in different sections of the industry. To ignore the complexities inherent in how this process works through various industries and its various effects is to render gender analysis effectively irrelevant to the difficult issues which women workers face in the real world where conflicts are neither simple or clear cut.

This example also illustrates the need to come to terms with how gender articulates (interrelates) with economic structures. The form that gender takes, and the law's role with respect to it, depend in contemporary Australia on how employers respond to their economic context. The major policies which have shaped labour law in the past decade, such as the move to enterprise bargaining, the attack on minimum standards and the flexibility push, cannot be understood purely through patriarchal analysis. The nature of law and its impact on women cannot be divorced from its economic context.[12] To attempt to do so is to close off the possibility of an effective strategic response. Gender analysis which relies too heavily on patriarchy as an explanation whatever its appeal operates at the expense of women workers — particularly working-class ones. It fails to recognise that conflicts of interest occur between women workers and that, on occasion, particular groups of women workers will have more in common with similarly situated male workers than with other women.

There is no easy way of dealing with women's invisibility in the mainstream curricula of labour and OHS law. In the context of these areas of law gender can only be properly accommodated through a rethinking of legal scholarship, the integration of other disciplines into the curriculum and the adoption of a form of gender analysis which is sensitive to the role that economic and other factors play in structuring gender. Particularly important here are race, ethnicity and class and this, in itself, must pose a major challenge to most scholars in law schools whose experience of working-class dead-end jobs and of the problems of race and ethnicity is slight, at best.

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1 The reader is referred to any of the Australian casebooks or textbooks in the areas of labour law or employment law.

2 This might help explain why relatively few feminist scholars work in the area of labour law. For an excellent example of comparative empirical analysis (done by a non-lawyer) which examines the efficacy of different legislative strategies for women see G Whitehouse, Legislation and Labour Market Gender Inequality: An Analysis of OECD Countries (1992) 6 *Work, Employment & Soc'y* 65.

3 A good account of the structural position of women in the Australian workforce is provided by Department of Industrial Relations, *Submission to the Human Rights and Equal Employment Opportunity Commission's Inquiry into Possible Sex Discrimination in Overaward Payments* (Canberra: AGPS, 1992).

4 See, for example, the papers collected in D Blackmur, D Fingleton & D Akers eds, *Women's Occupational Health and Safety. The Unmet Needs* (Brisbane: QUT & Women's Consultative Council, 1993). Although not necessarily dealing with legal issues they do indicate the sort of areas where legal research needs to be done.

5 See, for instance, L Bennett, Legal Intervention and the Female Workforce: The Australian Conciliation and Arbitration Court 1907–1921 (1984) 12 *Int'l J. Soc. L.* 23.

6 L Bennett, Women, Exploitation and the Australian Child Care Industry: Breaking the Vicious Circle (1991) 33 *1. Indus. Rel.* 20 and L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Sydney: Law Book Company, 1994) ch 7.

7 R Hunter, Representing Gender in Legal Analysis: A Case/ Book Study in Labour Law (1991) 18 *Melb UL Rev* 305.

8 Cf R Graycar, Legal Categories and Women's Work: Explorations for Cross-Doctrinal Feminist Jurisprudence (1994) 7 *Can J Women & L* 34, at 41.

[9] L Bennett, Women and Enterprise Bargaining: The Legal and Institutional Framework, in M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) 112.

[10] R Frances, *The Politics of Work: Gender and Labour in Victoria* 1880–1939 (Cambridge: Cambridge University Press, 1993).

[11] Cf R Owens, The Peripheral Worker: Women and the Legal Regulation of Outwork, in M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995).

[12] For empirical work on the effects of enterprise bargaining see P Hall & D Fruin. Gender Aspects of Enterprise Bargaining: The Good, the Bad and the Ugly, in DE Morgan ed, *Dimensions of Enterprise Bargaining and Organisational Relations*, Industrial Relations Research Centre Monograph (Kensington: University of New South Wales, 1993).