4 Gender Mainstreaming in Legal and Constitutional Affairs

In a review of a state's legal system, attention must be given to all sources, structures and processes of law. Without this information it is not possible to understand how laws and practices can be modified, challenged or repealed. Most forms of law-making require parliamentary-style formal processes to be followed, while policies and practices may be more informally amended. The legal system in most Commonwealth states is based on the common law system inherited from their colonial past. Some laws that were in force in England at the time of colonisation and became part of the law of the colonised entity, as well as statutes passed during the colonial era, will have remained in force unless repealed by the independent state. While the degree of legal change introduced since independence varies from state to state, there remains some commonality in the making and interpretation of law through state agencies. Some Commonwealth states have pluralistic legal systems through their retention of customary and religious laws.

Sources of national law are the Constitution, legislation (statute), common law (judge-made law) and religious and customary law. Most Commonwealth states have a written Constitution that constitutes the supreme law of the land. The Constitution allocates legal and political power between the organs of the state. Many Constitutions also include human rights and equality provisions (see Appendix II). The Constitution will contain procedures for its amendment which are normally more onerous than for legislative change, for example the requirement for a referendum or specified majority within the separate Parliamentary chambers.

Non-constitutional legislation can be changed through the same processes as those for enacting new legislation, normally including consideration by relevant Parliamentary committees and the appropriate Parliamentary chamber(s). The legislative process must allow for consultation and input on draft legislation from civil society, ensuring representation from women's groups. In order to achieve this, it may be necessary to disseminate information about legislative proposals more widely and in different ways than previously, for example within rural and indigenous communities. Interest groups and those with specialist expertise (for example women lawyers' groups, women trade unionists, other professional bodies) should ensure that they maintain an awareness of legislative programmes, scrutinise proposed legislation from a gender perspective and feed their comments into the process.

Once passed, legislation must be interpreted and applied by the courts. Principles of statutory interpretation normally require attention to the plain meaning of the statute's language, although interpretative aids may be resorted to where there is ambiguity or the plain meaning gives rise to an absurd result. Such interpretative aids may include international conventions. In addition many states follow the practice that, wherever possible, a statute should be interpreted so to give effect to the state's international obligations, including its treaty obligations. For example, in *the A–G of the Republic of Botswana v. Unity Dow*, the court held that it could look to

international treaties, agreements and obligations entered into before or after the legislation was enacted, to ensure conformity with those obligations. Subordinate or delegated legislation in the form of orders, rules and regulations made by bodies with legislative authority are also binding on individuals. Such subordinate legislation can generally be passed more quickly and informally than primary legislation. It is important therefore that those with delegated law-making power understand the meaning and importance of non-discrimination and of gender equity and equality.

The common law comprises the body of law and equity created by the national courts. For example, the Constitution of Ghana defines the common law as 'the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature'. A major feature of the English common law system, inherited by most Commonwealth states, is the doctrine of precedent. This rests on an integrated hierarchy of superior courts that is normally laid out in the Constitution. Under the doctrine of precedent, decisions of courts higher in the hierarchy of courts and tribunals are binding on lower courts and, except in exceptional circumstances, decisions of the highest appellate Court are binding on subsequent decisions of the same Court. This doctrine gives law-making powers to the superior judges, especially in areas where there is no statutory law, and provides stability and certainty in the law. However, it can also act as an obstacle to legal change through judicial means, for example through progressive judicial interpretation of new ideas such as those relating to gender equality. Persuasive argument by lawyers is required in which reference to cases decided by other Commonwealth courts may be useful.

Many states still retain indigenous customary law, sometimes based on religious principles, which applies alongside state-made law. Customary law is unwritten and different variations of customary law may apply to different communities within the state. The Constitution or statute may specify the relationship between customary law and state-made law, but there can be uncertainty as to which law will prevail or as to the content of customary law. In some states there have been attempts to codify customary law. In a number of African states, provisions may require that customary law should not be applied if to do so would lead to a result 'repugnant to justice and morality' (Kenya), or to ensure a just result. Such provisions allow for subjective evaluations by judges applying customary law of what is just and moral, which may be influenced by their personal understandings of women's status. States may also have religious courts (for example Bangladesh, India, Kenya, Nigeria, Pakistan) that apply laws based on religious texts. Both customary and religious law are especially applicable to personal status law and thus determine gender relations.

Preliminary Steps

A number of preliminary steps, that follow the Commonwealth Plan of Action on Gender and Development and its Update, are required at the national level for gender mainstreaming. These include data collection and an analysis of law and legal systems and of gender differences in social indicators. This understanding then needs to be incorporated into the work programme by the development of strong skills in advocacy and in participatory and consultative policy and planning methodologies.

Gender Analysis and Audit

Gender analysis and audit concerns the content of the laws in relation to the goals of non-discrimination as specified in international obligations. A situational analysis of

women and men will guide in the identification of areas where there are gaps, inadequacies or inequalities either in the content or application of the law. The current position of women and men in the particular context must be determined through quality empirical research and dissemination of the findings. In many cases this has already been carried out, or at least commenced – see, for example, the research done in Southern Africa on the problems women face in accessing the law as part of a gender audit of the administration of justice and a first step towards addressing the problems (Women and Law, Southern Africa Research Fund, 1999); and the research project of the Asian Development Bank on the socio-legal status of women in selected developing member countries (including Malaysia). Such studies provide useful models for this task.

The Committee on the Elimination of Racial Discrimination (in its General Recommendation on Gender Dimensions of Racial Discrimination, Commentary and Background Information) has suggested looking at the law, social practices, etc. under four headings:

1. The form or nature of a particular violation, hardship or discrimination under the law, for example targeting of women for abuse in conflict situations; denial of property or inheritance; subjection to personal status or religious laws.

2. The circumstances in which such adverse treatment occurs, for example in the work place, where there are no sex discrimination or sexual harassment laws in place or even labour standards; in the home, where a woman may for cultural reasons be unable to demand safe sex with a HIV-positive partner; in a single woman-headed household, where property laws or welfare laws have a disproportionately adverse impact.

3. The consequences of such adverse circumstances, which can also be gender specific, for example poverty; her or her children becoming infected with HIV/AIDS, being socially ostracised after a rape.

4. The availability of remedies or complaint mechanisms that address the particular consequences for women and men, i.e., that are also gender sensitive.

An important dimension of gender analysis is that it permits the policy-maker to more clearly delineate the differences between the roles and experiences of women and men and to draw out the meanings and implications of these differences. Examples of relevant areas of inquiry are:

- What, if any, difference is there in the direct or indirect impact on men and women of a constitutional, legislative or international law provision, legal practice or policy decision?
- What are the consequences of any such differential impact? On men? On women?
- Do constitutional/legal structures in their particular economic and political environment offer the same choices to men and women? If not, how are opportunities for advancement affected by the different choices?
- Does the law, policy or practice make any assumptions about the respective position in society of men and women? Is it based on, or does it contribute to, a stereotypical, or constructed understanding of gender?
- If there is such impact or difference (and this will not necessarily be the case in every instance) then how should this be taken into account in the advice that is offered, the structure of the project or programme and in evaluation of the project?

Documentation and sex-disaggregated data

Documentation and statistical data disaggregated by sex are important to provide both indications of the extent of problems and objective criteria for evaluation of where legal reform is necessary. For example, in the context of labour, social security and tax laws, data are required on numerous matters. Data that show that there are large numbers of women working in non-unionised sectors of the labour market might lead to minimum conditions of work legislation. An example of this is the Minimum Wages Order in Trinidad and Tobago which was amended to extend maternity protection to household assistants even before the Maternity Protection Act was passed in 1998. Data to be collected therefore might include:

- the number of women in the paid work force;
- the age spread;
- ages of women in particular forms of employment;
- educational achievement in particular forms of employment;
- women's participation in different types of employment: factory, office, agricultural, services, 'caring', professional, entertainment, etc.;
- self-employed women;
- women's representation in the public and private sectors;
- women's levels of employment: management, support staff, secretarial, etc.;
- recruitment, retention and promotion of women in particular sectors;
- women's pay brackets;
- the breakdown among women workers into full time, part time, shift, permanent, casual, agency, seasonal, etc.;
- numbers of women employed by foreign companies in the state, rates of pay and conditions of work;
- numbers of women employed in Export Processing Zones in the state, rates of pay, contractual terms (including length of contract), conditions of work;
- numbers of women heads of household in paid employment;
- length of service in particular jobs;
- urban/rural areas break down;
- foreign women workers or women working abroad;
- the breaks women take from work for child birth and child care;
- numbers of women working in unionised employment;
- level of union membership;
- positions of responsibility in unions;
- employment of women in the informal sector.

These data must be compared with that gathered about men to acquire a gendered understanding of the composition and work conditions of the paid work force. Data are also needed over a time period so that trends can be identified and taken account of.

Similarly, in the context of penal policy data are required on such issues as:

- numbers of women arrested;
- numbers of women charged with offences;
- what classes of offence: personal injury, property, public order, drug, prostitution, etc;
- severity of the offence;
- conviction rates;
- sentences given: monetary, corporal, custodial, community orders, suspended, etc.
- length of sentence served (custodial);
- location of custodial sentence;
- repeat offenders;
- age of offenders;
- marital status and maternal status;
- geographic distribution: urban or rural;

- facilities available in women's prisons (exercise, job and skills training);
- security in women's places of detention.

In the area of penal law, it is equally important to take account of men's experiences with the penal system since it is gendered factors as much as economic ones which determine contact with the penal system. These data must therefore be compared with that gathered on men to acquire a gendered understanding of penal policy. In particular it must be asked whether there are offences where a man is not criminalised for his behaviour whereas a woman is (prostitution, adultery, public behaviour such as dress) and vice versa. Questions of access to legal representation and attitudes of judicial officers to men and women offenders are also relevant. Changes in criminal law must be monitored. For example, more stringent probationary measures may be indirectly discriminatory if more women than men are given such sentences. Attention should be paid to the special circumstances of women in deciding the rules of evidence, especially related to acts of domestic violence. Sex-disaggregated data and gender analysis can also play an important role in developing policy approaches to the penal system which do not reproduce cultures of violence, including violence against women.

Analysis of other social indicators

Statistical evaluation needs to be supplemented by analysis of other social and inter-connected indicators with respect to women's position in society and their economic dependency. This would include a gender audit of laws as well as of social policy:

- access of girls and women to primary, secondary and tertiary education;
- access to skills training;
- type of skills training to which women have access;
- participation rates in these levels of education;
- length of time spent in these levels of education;
- qualifications achieved;
- average age of marriage;
- average age of first giving birth;
- laws of property holding, inheritance and dowry;
- access to banking and credit;
- divorce rates;
- laws on maintenance and custody;
- religious norms in the society with respect to women's employment;
- access to public spaces;
- availability of affordable child care,
- existence of extended families; and
- urban and rural demography.

In particular, the impact of proposed legal measures on women's economic situation must be considered. The so-called 'feminisation of poverty' needs to be understood in terms of the numbers of women living in poverty and the gendered ways in which they become poor and in which they experience poverty. Factors contributing to women's poverty need to be understood, analysed and guarded against. The linkages between poverty, prostitution and trafficking must be addressed and the connection between discrimination and poverty must also be examined. The nuances and complexities of people's lives must be deconstructed, informed by an understanding of power inequalities in society. Data and analysis should be made publicly available and public debate and discussion encouraged.

Since policy integration and co-ordination are important aspects of mainstreaming, data relevant to one sector may also be applicable to understanding another sector. A holistic view is required. For example, information about employment patterns, levels

of pay and education achievement levels may be relevant to the incidence of gender violence and society's perception of women as victims rather than as agents of change. There is therefore the need for a Management Information System, as envisaged by the GMS with overall responsibility for co-ordination and dissemination of data analysis. Where there are divisions in a state based on ethnicity, or minority, immigrant or indigenous populations, statistical analysis must be developed to take account of both gender and the other variables.

Policy Development and Appraisal

After the analysis and audit of the content of existing laws and social indicators and of the current position of women and men, policy objectives must be determined and methods for achieving those objectives identified. Policy makers need to decide at what levels the problems or limitations exist:

- substantive (the content of the law): law should be reformed, new legislation is needed, existing law should be repealed;
- structural: inadequate court processes, absence of legal aid, absence of ancillary services (for example data collection in courts);
- cultural: persons do not access the legal system because of widespread acceptance of discriminatory practices, judicial insensitivity;
- economic: persons do not or cannot access the legal system because of the costs of legal services, or cannot afford time away from work to attend court or consultations.

Options must be reality tested: are they workable? What obstacles are likely to be met? Which is likely to be most efficient in achieving change in gender relations cost-effectively? Priorities may have to be determined, according to immediate, medium term and long term objectives.

Identification of Stakeholders

The audit will also assist in identifying the stakeholders in the gender mainstreaming process. Stakeholders are those responsible for determining and formulating legal policy, applying it and ensuring its enforcement. Ongoing consultation and co-ordination between stakeholders in the formulation of objectives, strategies, projects and evaluations is central to effectively addressing both gendered differentials and the concerns of those who feel threatened by such policies.

Stakeholders include government personnel and representatives of what might be generically termed civil society. Government personnel will be stakeholders at both the substantive level (parliamentarians, legal drafters, law commissions, attorney-general departments, ministries of justice, ombudspersons, etc.), and at the structural level (law enforcement agencies, police, courts, probation departments, etc.). Civil society plays a particularly important role on the cultural level.

Exchanges of information and meetings between stakeholders from different countries can be especially valuable, for example, judicial colloquia, associations of women lawyers, and meetings between law reform commissions and ombudspersons.

Government personnel

Where governmental structures include a Ministry of Justice/Legal Affairs, it will play a pivotal role in legal reform but there will also be the need for co-ordination with

many other Ministries, for example the Home Office and Ministries of Health, Agriculture, Finance, Education, Social Services, Labour, Gender and Women's Affairs. Where there is no Ministry of Justice, responsibility for legal affairs will be dispersed between all relevant Ministries.
The role of law reform commissions in legal research, the evaluation of the feasibility of law reform and the preparation of reports and draft legislation make these especially important players. One example of the work of law reform commissions is the Australian Law Reform Commission's work on Equality before the Law, which provides a gender analysis of the legal system as a basis for legislative change. Another is the work of the South African Law Reform Commission, which is required to 'draw on the provisions of the CEDAW Convention when investigating and making recommendations regarding the harmonisation of common law and indigenous law'.

In a federal constitutional structure, there are stakeholders at the central government level and at the federal unit level (as in Australia, Nigeria and Canada, for example), as well as at local levels. Constitutional allocation of power between central government and federal units determines legal competency and may cause disputes between the levels of government and between federal and local units.

Other stakeholders include:
- government advisers, members of the civil service;
- legislators at national, provincial and local levels;
- law officers, including the Attorney-General (especially responsible for constitutional affairs) and the Solicitor General;
- law enforcement agencies, including prosecutors (for example Director of Public Prosecutions, Crown Prosecution Service), prison service, police, probation and social services and social security agents;
- the judiciary, including judges of all trial and appellate courts, magistrates, tribunal adjudicators and customs and immigration adjudicators;
- parliamentary drafters;
- human rights commissions;
- local officials, administrators and councillors;
- military personnel, notably officers and advisors;
- ombudspersons.

It is especially important that those at the highest level in each category understand and are committed to the policy of gender mainstreaming, and make this commitment known throughout the institutional setting.

Civil society

Representatives of civil society include:
- national NGOs, including women's NGOs, human rights organisations, and also organisations concerned with especially vulnerable groups such as refugees, migrant workers, immigrants, people with disabilities and women prisoners;
- men's clubs;
- educational establishments at primary, secondary and tertiary levels;
- research bodies and research funding agencies;
- skills training bodies;
- apprenticeship schemes;
- employers' organisations;
- trade unions;
- media, including electronic media;
- church and religious bodies;
- professional societies;
- private sector of industry, multinational corporations and trading organisations;

- leisure organisations;
- youth organisations;
- community leaders;
- funding bodies.

It cannot be assumed that all sectors of civil society are necessarily conducive to, or in favour of, mainstreaming gender. For example, professional societies may have policies and practices that restrict women's advancement such as large joining fees, membership dependant on periods of unbroken practice, posts of responsibility determined through seniority and professional meetings at times that are incompatible with primary childcare responsibility. Trade Unions may not be receptive to the different needs of women workers, be concerned to protect 'men's jobs' and discourage women's participation at their decision-making meetings, for example by holding meetings at times when women with family responsibilities cannot attend. NGOs may consider equality issues as a distraction from their work on 'real' human rights violations.

Consultation, collaboration and partnership between various sectors of civil society is especially important and linkages between them must be identified. Steps to facilitate community outreach should be taken, for example by identifying points of leverage and establishing systems for input into governmental policy and legal programmes. These might include:

- the formation of an umbrella NGO on women's issues that would co-ordinate NGO action, prepare documentation, share information and have access to governmental advisers and decision-makers;
- greater NGO/government collaboration and exchanges, for example, internships;
- requirements for extensive consultation before the formulation of policy;
- networking between NGOs;
- the co-opting of members of civil society with relevant expertise, for example university staff or health staff, where legal reform is under consideration, for example by a law reform commission.

Where there are ethnic, racial or other divisions in society, liaison bodies between the dominant (or governmental) group and others must include women representatives in positions of authority. Relations between majority and minority groups must not be conducted solely by male community leaders or representatives. Women in minority groups may experience difficult conflicts of interests in that they may fear that expressing concerns about inequality in the group or adverse discriminatory practices supported by the group will be perceived as disloyalty to the group and its claims. The same is true of consultations with those representing the needs of vulnerable groups such as refugees, migrant workers and people with disabilities. It is important to ensure that the particular needs of women in these groups are considered.

Consultation and input is required throughout the process and not just in the early stages. For example, the intention of the legislation can become obscure or ambiguous through the drafting process. The same can occur through implementation of legal reform by people who are not familiar with its objectives. An essential part of the consultation process is listening to capture the true essence of the impact of inequality. This takes time and cannot be achieved in brief formal consultations.

National NGOs should be assisted in working with international NGOs, for example by ensuring women's NGO representatives at international meetings (in accordance with the CEDAW Convention, article 8); by non-restrictive access to and from the country; and by the availability of foreign media. NGOs should be encouraged to familiarise themselves with international treaty provisions and the machinery for their implementation. Training sessions should be held on the international provisions to facilitate campaigns for ratification and subsequently implementation. Linkages may be

formalised, for example through lay appointments to quasi-governmental positions such as advisory bodies, regulatory bodies with respect to privatised services, statutory boards, watch dog bodies and public trusts. A full inventory of such bodies is required. Steps are needed to break the trend in male domination of appointments to such bodies. Transparency in appointment procedures would be enhanced by public advertisements, job descriptions and specified criteria. Advertisements should be placed where women would be more likely to see them, for example local community centres, as well as newspapers and electronic dissemination. Other policies that would encourage women's participation include:

- identifying appropriate women (for example through inquiry of NGOs and women's groups);
- maintaining a register of such women;
- inviting identified women to apply;
- setting a quota or target for women on such bodies and assigning responsibility for failure to reach targets;
- recognising the role women can play and the skills and perspectives they can bring to all issues through flexibility with respect to qualifications and criteria for appointment (for example experience with grassroots NGOs or local school boards should be given weight as well as formal education qualifications or experience in public, corporate or financial sectors);
- providing appropriate training for people who are willing to undertake such positions to strengthen their applications;
- providing on-going training to people who have undertaken such positions to enhance their effectiveness;
- fixing meeting times that are compatible with family and child care responsibilities (or provision of child care during meetings);
- making provision for reimbursement for time off work and to employers to ensure that time from work for the demands of the position is granted.

It is important that such policies are not restricted to boards and institutions on matters that are perceived as 'women's issues' (for example inclusion of women only on health committees, children's committees or education boards), but that they are extended to all areas of civic and political life (for example, social security, agricultural policies, integrated transport policies and financial meetings). Such bodies should not be merely advisory and co-ordinating but decision and policy-making.

Some Available Tools

Tools for gender mainstreaming have been described as analytic, educational, or a strategic mix (Council of Europe, 1998). One essential tool is the collection and dissemination of best practices across all sectors. Examples of such tools given in the Council of Europe's examples of good practices are:

Analytical tools

One example is the routine use of a gender impact assessment, similar to environmental impact assessment requirements that have been introduced in a number of jurisdictions. A gender impact assessment project provides a tool to evaluate the impact on gender relations of any policy proposal or decision at the national or local levels. The gender impact assessment is made on the basis of predetermined objective criteria before the implementation of any policy. Two sets of criteria to measure the impact on gender are suggested: equality in the sense of equal rights between women and men and equal treatment for equal cases; and autonomy, in the sense of allowing women the political and social space to make decisions about their own lives. The assessment can be qualitative or quantitative, or both.

Another analytic tool described among the good practices of the Council of Europe is SMART: a Simple Method to Assess the Relevance of Policies. It is described as comprising two questions: Is the policy directed at one or more target groups? Are there differences between women and men in the field of the policy proposal, for example with respect to rights, resources, choices, positions, representation, values and norms? Other criteria could be added such as participation, choices, obligations and dependencies.

Other analytic tools are cost-benefit analysis and statistics. None of these tools of themselves dictate the response of the policy makers. They provide a means of analysis allowing for a determination of whether to go ahead in the light of the best available information. A follow-up step could be included of formulating alternative policies where appropriate.

Another analytic tool is the capacities and vulnerabilities analysis used in development projects. This requires a full assessment of the capacities of women (and men) and identification of vulnerabilities. Programmes should seek to harness and use capacity and lessen vulnerability. Throughout such analysis there must be a willingness to think laterally and imaginatively about capacity.

Educational tools

An example of an educational tool is the secondment of gender or equality experts from other governmental units to those concerned with law and legal policy on a full or part-time basis to assist in training, identification of problem areas and offering assistance. Guidance on approaches can be found in the Concluding Comments of the CEDAW Committee to states' reports. Educational and analytical tools can be combined. Technical assistance from UN agencies (the Office of the High Commissioner for Human Rights, the Division for the Advancement of Women, UNIFEM and UNDP), the Commonwealth Secretariat, human rights institutions and regional bodies should be sought. Assistance should also be sought within the programmes of the International Financial Institutions.

Strategic mix of tools

A variety of approaches can be introduced, either sector specific or more generally. These can include: the introduction of guidelines; use of a task force of experts; publication of handbooks or reference manuals targeted at particular sectors or levels of management; formation of pilot projects with criteria for determining their effectiveness; and checklists. (See page XX for an example of how a checklist could be used to monitor compliance with the CEDAW Convention).

It is important to recognise that gender mainstreaming is an ongoing process that may require different strategies and methodologies according to the sector in question and the familiarity with the concept in it. What remain constant are the setting of a timetable for the initiative (starting date and appraisal dates) and the identification of a person with responsibility for the initiative. The following also need to be identified:

- objectives;
- targets;
- techniques and tools;
- actors;
- policy areas;
- persons, techniques and tools for monitoring and evaluation;
- follow-up.

Making Changes

Incorporating International Human Rights Agreements into National Law

Under the domestic law of some states, treaties to which the state has become a party automatically become part of national law. In others, including those based on the Westminster system, treaties have to be expressly incorporated by domestic legislation to create rights that can be relied on under domestic law. Implementing legislation is therefore required to incorporate the CEDAW Convention (and other human rights treaties) into the domestic law of many Commonwealth states, either through a general implementation statute or by subject specific legislation, where appropriate.

Legislation can be informed by the requirements of international obligations without express incorporation. Similarly, international law (including the CEDAW Convention) does not need to be formally incorporated for judges to use it as an interpretative aid to achieve gender equality. The principle of statutory interpretation that a state is presumed to give effect to its international obligations can be called into use, as has been done in some instances.

Figure 2 **A Human Rights Model**

The following model (Eide, 1987) presents states' obligations with respect to human rights guarantees in four layers:

the duty to respect	✦ checks on enforcement of health and safety requirements at work
the duty to ensure	✦ women's national health care programmes ✦ provision of affordable health services ✦ non-removal of health benefits; maternal health care programmes ✦ protected access to clean water supplies and fuel ✦ provision of safe and affordable abortion facilities
the duty to protect	✦ screening for breast cancer ✦ HIV/AIDS education ✦ restrictions on advertising for unsafe products, or false representation of their value (tobacco, 'junk' foodstuffs, breast milk substitutes) ✦ decriminalising prostitution ✦ spousal consent for abortion or contraception should not be required
the duty to promote	✦ education programmes on diet, nutritional values of certain foods, especially at different stages in the life cycle ✦ contraceptive and family planning education

In order to achieve such rulings, the Convention and relevant legislation must be argued before judges and the latter convinced of their value. The work of legal clinics and women's advocacy groups is enormously important in this regard (one good model is the Delhi Unit), as is dissemination of judicial decisions from other Commonwealth

jurisdictions that can be used for persuasive argument. Collections of this jurisprudence, such as those in the Commonwealth Law Bulletin and the Interights publications, are extremely useful. Compilations of cases on the Internet, such as that by Interights at http://www.interights.org are effective for the dissemination of jurisprudence and can be expected to grow in importance.

There are good arguments for asserting that the principle of non-discrimination on the grounds of sex constitutes customary international law and as such is binding on all states. Even without this assertion, all Commonwealth member states are UN members and thus are bound by the provisions of the Charter. In addition, many are parties to at least some of the other instruments prohibiting discrimination (see Chapter 3).

Types of Law-Making

Constitutional reform

Constitutionalism provides a framework for good governance in the rule of law and support for human rights. Use of law to achieve women's advancement assumes a rights-based approach rather than a welfare response to needs or a socio-economic development approach. Constitutional guarantees of formal equality on the grounds of sex provide a 'baseline' for rights protections, bring a state into line with its international obligations and assist in transforming women from passive beneficiaries to active agents. Using the CEDAW Convention gives clarity and legitimacy to demands for gender equality and the language to express them, for example the definition of discrimination against women in article 1. In some states the constitutional prohibition of discrimination does not include sex or gender, while in others certain areas may be excluded from the protection, for example personal status law, inheritance and abortion. Where there is no constitutional guarantee of equality, it may be difficult for discrimination to be combated through courts or tribunals.

Constitutional reform is a sign of broad societal and structural restructuring and frequently follows political transformation, for example from military to democratic government, post-conflict reconstruction or post-apartheid South Africa. It is generally a rare event since stability is a requirement of social order. Where Constitutional reform is on the agenda, it is vital that women's participation is ensured in all possible consultations at all levels of society. If this is not provided for in the process, women's groups will have to take the initiative in lobbying and demanding access, as was done for example in South Africa and Uganda. Consultations must take place in arenas to which women have free and easy access and where they are able to express their views openly and without mediation through male participants. One approach is to hold meetings between constitutional advisers and women through community organisations and women's NGOs. The use of media, including local media outlets, to express such demands is another.

It is essential that the constitution include a broadly worded equality/non-discrimination clause. The South African Constitution has the broadest such clause (see Fig. 3). By giving no priority between the heads of non-discrimination, the Constitution allows for decisions that take account of multiple forms of discrimination. Another important technique is the formulation of guidelines to inform all constitutional decision-making that call for gender representation and balance (as required by the Uganda Constitution, for example). It is also vital that the constitutional machinery, in particular any Constitutional court, includes provision for gender balance in appointments. Without such provisions it is likely that judicial appointments will continue to be made from a small group of elite, mainly male lawyers. While men can made judicial decisions

favourable to gender equality (see *Unity Dow v. A-G of Botswana* and the Indian case of *Apparel Export Promotion Council v. A. K. Chopra*, for example) there is some evidence to suggest that women may be more alert to or ready to address this issue. While most Commonwealth states have guarantees of non-prohibition on the basis of sex (see Appendix II), these do not of themselves enhance the position of women and remain empty promises unless they are supported by detailed legal provisions throughout all areas of law and include steps to ensure service delivery. Also, constitutional guarantees of non-discrimination generally bind only state actors; therefore, in any event, sex discrimination legislation is also imperative.

Figure 3 **Examples of Constitutional Guarantees of Women's Rights**

INDIA

Adopted: 26 Jan 1950

Article 15 [Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth]
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any
of them.

NAMIBIA

Adopted: Feb 1990

Article 10 [Equality and Freedom from Discrimination]
(1) All persons shall be equal before the law.
(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

SOUTH AFRICA

Adopted: 8 May 1996 (Amended: 11 Oct 1996)

Section 1 [The Republic of South Africa]
The Republic of South Africa is one sovereign democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.

Section 9 [Equality]
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Source: http://www.uni-wuerzburg.de/law/home.html

Legislative reform

The CEDAW Convention, article 2 recognises the pivotal role of law reform in achieving gender equality. Primary responsibility for this lies with the government. The Commonwealth Secretariat has developed Model Legislation for the Caribbean Region which can be used by governments which are developing domestic legislation to address women's rights issues. This can be found on the Caribbean Community (CARICOM) web site at www.caricom.org.

A holistic approach to the integration of gender in legal programmes requires a gender analysis of existing law (statute and statutory interpretation through case law). This will identify directly discriminatory laws, laws that adversely impact on women (indirect discrimination) and apparently neutral laws that fail to take account of women's circumstances and are therefore largely irrelevant to them. The CEDAW Convention provides a useful guide in this exercise. The Committee on Economic, Social and Cultural Rights in its General Comment No. 3 has stated that removal of discriminatory measures is an immediate obligation for States Parties, not one of progressive achievement. An example of apparently neutral laws are those that offer protection against publicly committed violence, for example through criminal laws relating to public order and personal injury. If such laws in word or application by law enforcement officials disregard violence committed in private spaces (for example, the home) or by private actors (family members), their ability to protect women against violence is greatly limited. While gender neutral language (avoidance of the male noun or pronoun to include the female in legislation and administrative policies) is desirable, it should not be assumed that because the language of a law is gender neutral, it will also automatically be gender-neutral in application.

Gender-sensitive analysis, making full use of the data described above, will also reveal where the legal system is based on gender-biased assumptions and myths that need to be dispelled by sociological and empirical research. Examples of such myths are:

- the notion of 'bad' women in opposition to that of 'good' women;
- that prostitutes are bad women;
- that 'bad' women are sexually promiscuous and therefore cannot be raped;
- the model of 'ideal' motherhood;
- the depiction of women as emotional and irrational and not capable of legal acts such as providing accurate and honest evidence, owning and managing property, having and maintaining bank accounts or assuming legal guardianship of children as opposed to their nurturing;
- that women are economically dependent on men and do not require 'living wages';
- that certain forms of employment are better suited to, or unsuitable for, women.

The extent to which the legal system both constructs and reinforces such gender stereotyping, and thus leaves many women without adequate legal protections, needs to be determined. Gender analysis of existing laws will clarify which ones require amendment or repeal and areas where new legislation is required. Some areas of law (family and criminal law) are more evidently amenable to gender analysis than others. However, human rights and gendered assumptions cut across accepted categories of law. For instance, providing adequate responses to gender-based violence is directly relevant to family and criminal law but also impacts on issues of civil procedure and civil remedies, criminal procedure, social security law (payment of benefits, pension systems), property law, taxation and torts (medical malpractice). It is therefore necessary to address how rights intersect with existing legal categorisations and to determine the points of entry for rights application. It is essential that all those involved in the law making, application and enforcement processes receive training in gender analysis and planning to enable them to recognise and understand prejudice and stereotypes.

It is impossible here to discuss all the areas in which legal reform may be required in order to achieve gender equality. In many instances states will have commenced this process and addressed certain areas of law. Prioritising legal reform has to be carried out in the state itself, as do the actual policies of reform. Good starting points to begin making changes are areas that are not controversial or where there is consensus as to the appropriate action. Building up an expectation of reform through pilot projects in identified contexts can also be useful. The entire legal system cannot be overhauled in one go and attempting to do so can be counter-productive. What is important is that initial steps do not become the only steps as attention is turned elsewhere in the legal system. It is also important that the impact of change in one area of law on other areas is examined. A planned programme of law reform requires an ongoing timetable for research, analysis, reform design, drafting of legislation, implementation and evaluation.

Preparation of reports for the CEDAW Committee, through an article by article consideration of the application of CEDAW in the state, can provide valuable guidance as to priorities and approaches (see Chapter 7). The Concluding Comments of the Committee to all States Parties' reports, not just a State Party's own report, are also invaluable in this regard. This process can be enhanced by seeking NGO input to the state's report or through consideration of an NGO alternative (or 'shadow') report. It also makes the reporting process work for the state rather than being a burden.

Law reform must be carried out in the context of broader social and economic policies (for example, decriminalising prostitution must be accompanied by social policies providing women with economic alternatives). Legislative reform on its own will not achieve gender equality, especially where gendered roles are rooted in custom, tradition or religion, or in deeply held philosophical beliefs about 'proper' social ordering. The CEDAW Convention in article 5 requires that:

States Parties shall take all appropriate measures: (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Women-specific strategies and gender mainstreaming can be introduced separately or together, with preference being given in specific contexts to one or the other. For example where there has been entrenched discrimination, a policy targeted at women might be more effective in the first instance than mainstreaming.

Customary Law

Customary law can present a major obstacle to gender mainstreaming. Since the latter is a new concept it will not form part of customary law. In some instances judges have been willing to give effect to constitutional guarantees in the face of customary law, for example *Unity Dow v. A-G of Botswana*. Also, in the Nigerian case of *Mojekwu v. Mojekwu*, the court of Appeal held that the Constitutional right of women to non-discrimination meant that a wife could inherit her husband's property irrespective of Igbo customary law to the contrary. In the more recent Nigerian case of *Mojekwu v. Eijkeme*, the court held that the fact that the appellants were born out of wedlock could not be used against them in exercising their constitutional rights to the estate of their deceased great-grandfather. However the 1999 Zimbabwe case of *Venia Magaya v. Nakayi Shonhiwa Magaya* shows how constitutional provisions can be interpreted to shield customary law from equality provisions. In that case customary law was used to deny inheritance rights for women. Research on the understanding of customary laws and their effect on gender equality is required, with strategies for its replacement. A

good model here is the process within South Africa, including the role of the South African law reform commission.

Where women are blocked from exercising their rights, for example by obstructive traditional laws or officials continuing to assert the validity of such laws, the urgent intervention of a statutorily empowered official, for example an ombudsperson, may be required. The powers of such an official should be well advertised, especially in less developed or rural areas and easy access must be ensured.

Substantive Issues

Some particularly important areas for legal reform are briefly discussed below. Despite their separate consideration, they are clearly connected. For example, women's effective participation in public life and the labour market are affected by laws relating to status in marriage, access to education, reproductive and other health issues and freedom from violence.

Public life

The participation of women in public life must be encouraged to ensure gender balance at all levels of government (CEDAW, article 7). Having more women in decision-making positions, particularly in parliament, is essential for law reform. The CEDAW Committee's General Recommendation 23 on political and public life provides guidelines on the appropriate interpretation of articles 7 and 8. Bangladesh, for example, has made the participation of women in all spheres of public life a constitutional principle of state policy. Awareness campaigns designed to alert women to the possibility of public service may not be sufficient to redress the gender imbalance. Positive action may be needed to promote and protect the advancement of women, for example by establishing targets or quotas both for a specified percentage of women candidates in winnable seats and for Parliamentarians. Some states have set, or proposed, quotas. Bangladesh, for instance, has reserved 30 seats for women in Parliament and 300 seats elected directly from territorial constituencies. India enacted constitutional amendments to ensure that one third of all local government seats are filled by women, and has proposed that one third of seats be held by women in the state and national legislatures. In Uganda, each administrative district has at least one woman representative and at least one third of local government seats must be filled by women. Pakistan has quotas for women's seats in municipal elections.

Quotas are not without controversy and it has been argued that they are non-democratic, compromise quality and distort the Parliamentary process. On the other hand, without such steps, real change has not occurred. The dilemma is well illustrated by the UK, where the 1997 elections saw an enormous increase in the number of women MPs without a quota system. However, the increase was confined to Labour MPs and was the direct result of all-women selection lists (which were held to be illegal but nevertheless increased the number of women elected). Without such lists, there has been no increase in the numbers of Conservative women MPs and there are still only just over 100 women MPs out of over 600. There is also a danger of low quotas being set and subsequently regarded as a maximum rather than a minimum objective.

What is clear is that whether or not quotas are adopted, they must operate alongside supplementary measures such as programmes to identify and encourage suitable candidates. Candidates also need training in many areas, such as Parliamentary procedures, political and financial issues, agenda setting, public speaking, presentation, negotiation skills and committee work. This may operate along party lines, but

responsibility must be allocated for ensuring that it is done and that appropriate and realistic budgets, including a specified percentage of the public funding for elections, are committed to it.

Political life should be reorganised to facilitate women's participation, in consultation with women in politics. All night parliamentary sittings and lack of child-care facilities in government institutions are obvious examples of where change is needed. A mentoring system for new MPs could ease the transition into parliamentary life. The formation of a Parliamentary Women's Caucus (as in Namibia, for example) or of an informal women's caucus to bring women together across party lines can provide support and ensure that women's concerns are addressed. In a Westminster-style parliamentary system, pairing of women for voting purposes can also relieve pressures of compulsory attendance. Women should not be allocated only to committees or working groups addressing 'women's' matters but should be encouraged to be active in the entire range of governmental (or opposition) affairs, including 'hard' matters such as national security, defence and public expenditure.

Public participation does not only take place at the national level. CEDAW article 8 covers equal representation and participation in the work of international organisations. Compliance with this provision is more directly in the hands of governments and would help to redress the gender imbalance in international institutions, especially at senior levels. The UN Commission on Human Rights Resolution 2000/46 recognises that gender mainstreaming will strongly benefit from the enhanced and full participation of women, including at the higher levels of decision-making in the United Nations system, and in this regard strongly encourages Member States to promote gender balance by, inter alia, regularly nominating more women candidates for election to the human rights treaty bodies and for appointment to UN bodies, the specialised agencies and other organs. Greater numbers of women in international institutions would facilitate the inclusion of women's interests on international agendas. Women would experience other systems and networking at higher governmental levels, as well as at the grass roots NGO level, would be facilitated.

Posting women in intergovernmental institutions would require the rejection of the assumption that women's advancement in their careers terminates on marriage and that their careers are subordinate to those of their spouses. It would also require recognition that women's place in international positions need not be the subsidiary one of providing social support. At the same time, there would also have to be flexibility to support changes in spousal employment where the spouse wishes to accompany the woman abroad in the way that has long been accepted with respect to women. The spouse may need a work permit and it may be necessary to pay overseas allowances to the woman as the primary employee, with possible tax repercussions. Women should be encouraged to join and be active in transnational professions and organisations, for example organisations of women judges, lawyers, diplomats and legislators. Where possible allowances should be made to enable women to participate in such organisations.

Nationality Laws

The CEDAW Convention, article 9 provides for equal rights with respect to the acquisition, change or retention of nationality. There are discriminatory nationality laws in a number of states. These typically have two aspects: discrimination against women who marry non-nationals, in that their spouses cannot acquire nationality in the same ways as can foreign women who marry male nationals, and restrictions on women passing their nationality to their children.

Such restrictions are based on the desire of states to maintain control over who receives citizenship and on gendered stereotypes of valuable citizenship. This assumes that women will go to live in the place of their husband's nationality (and thus have no need to maintain their own nationality); that children 'belong' to the father; and that foreign males entering the country impact on the paid workforce in a way that women who follow their spouses do not. Given the large and growing numbers of women migrants, the ability for women to bequeath their nationality to their children and to maintain their own is increasingly important, especially in the case of marital breakdown. Social benefits may depend on citizenship, for example employment in the public sector, free state education and access to health services. Such laws are especially ripe for gender mainstreaming.

Closely associated are conflicts of laws that assert that a woman's domicile is based on that of her husband rather than on her own intent and residence. This again might have repercussions on legal proceedings relating to divorce, maintenance and custody.

Immigration laws too are frequently discriminatory, for example as regards alien spouses or fiancé. The adverse impact may fall directly on the man, although the discrimination is against the woman. In a number of states, the foreign wives or fiancées of national men may enter the state while the foreign husbands or fiancés of national women may not. Once he has entered, a foreign man may have to satisfy more stringent residency requirements to be eligible for naturalisation than a foreign wife would. Such discrimination is based on gendered (and often racist) prejudices and stereotypes. There may be fears that foreign men will seek paid employment at the expense of local men and will disrupt the social balance in the country. Women are perceived as joining their husband's family rather than becoming a burden on the state while the opposite is the case with men. Immigration laws that accord entry to people with defined skills may constitute indirect discrimination. Laws relating to nationality and immigration should therefore be subjected to a gender audit, with a view to reform if this reveals direct or indirect discrimination.

Labour Laws

The CEDAW Convention, article 11 covers the elimination of discrimination in the field of paid labour. Requirements to achieve this include the provision for workplace equality through non-discriminatory labour recruitment, promotion and retention policies; equal pay for equal work; minimum wage; maternity protection; policies against sexual harassment in the workplace; and family friendly environments. In some states (for example Ghana) these issues are given constitutional protection. There is a large body of legislation and case law in many Commonwealth states on these issues that can be used for guidance and reference. It should be noted, however, that labour laws are mostly directed at the urban workforce and do not protect the vast number of women (87 percent of Sri Lankan women workers, for example) who work in the agricultural sector (Coomaraswamy, 1994).

A legal definition of discrimination in the work place is required. The CEDAW Convention provides a good basis for such a definition, which can be adapted to local conditions. The prohibition of discrimination covers all aspects of labour relations, including:

- Women's recruitment
  - public advertising of vacancies;
  - job specifications;
  - hiring panels including women;
  - encouraging women to apply.
- Retention of women

- equal pay for work of equal value;
- targets for inclusion of women on management training schemes;
- targets for women's employment in management positions;
- day care provision that is affordable, scrutinised for compliance with health and safety measures) and run by trained people;
- provision for day care for children from birth to school starting age a priority for low income or single parent headed households;
- day care facilities for children with disabilities, including HIV positive children;
- incentives to the private sector to provide day care;
- state sharing costs of day care with parents;
- day care for elderly people;
- leave entitlement, especially parental leave;
- job-sharing schemes;
- flexible working hours;
- transparent, objective criteria for promotion;
- accessible and transparent procedures for appealing against adverse decisions.

✦ Accordance of rights to categories of workers who are predominantly female, for example part-time workers and home-workers.

While such provisions are intended to benefit women, and can provide very real assistance to women in the paid work force, they need to be carefully monitored to ensure that they are not in fact disadvantageous or of no practical assistance. Studies in some countries have shown that this can be the undesired result.

With respect to employment in the public sector, the government can take measures to accelerate recruitment of women (Bangladesh, for example, has a quota system for female primary school teachers). However, another problem has been the tendency to undervalue the public sector, as exemplified by the wages compared to the private (commercial) sector. The recruitment of women as, for example, nurses and primary school teachers, may be accompanied by low pay, itself supported by the perception of these jobs as suitable for women. This dilemma illustrates the interlocking of gender attitudes and economic trends. As regards the private sector, governments can adopt a 'carrot and stick' approach. Female participation can be encouraged, for example, through sponsorship of affirmative action awards that recognise industry/private sector initiatives and achievements of targets (as in Australia, for example). Governments can also require the private sector to report on its equal opportunity programmes and implementation and demand periodic progress report and explanations of failure to achieve targets. The tax system or government subsidies could be used to deal with those not complying, while reporting could be waived in recognition of effective implementation of high quality schemes over a period of years (also done in Australia). Throughout labour relations, a combination of legal requirement and good work place practice is required. The role of trade unions, and especially gendered objectives in unions, also needs to be considered.

Sexual harassment in the workplace (public and private) must be recognised as a form of adverse discrimination that affects peoples' ability to perform their tasks at work and which may cause stress-related illness. Employers must accept responsibility for the harassment of one employee by another in the same way as they would for failing to provide a safe work environment. One problem is defining sexual harassment in a way that is culturally sensitive and captures the essence of the behaviour from the point of view of the recipient. The UN Special Rapporteur on Violence against Women has proposed two useful criteria: that the behaviour is unwanted by the recipient and is threatening or offensive to the recipient. Training programmes in the work place on what constitutes sexual harassment and its effects are required for both women and men. Harassment advisers at work (trained in the workplace) and unthreatening complaints mechanisms are also needed.

States should enforce labour laws, for example through administrative and legal sanctions for failure to ensure equal access to skills training and education; for references to sex or marital status in employment advertising; for pregnancy testing as a condition for employment; and for dismissal for pregnancy or after maternity leave. What must be avoided is protective legislation that continues stereotyped assumptions about appropriate work for women and in fact reduces women's choices, for example with respect to work in some factories and industries or work at night. If conditions are deemed unsafe for women, the response should be to improve safety conditions, for example to provide transport home at night, not to ban women from that employment.

While the focus is on the paid labour force, women's unpaid work must also be acknowledged in various ways, for example with respect to rights in the family property on dissolution of marriage and entitlement to maternity leave. The double burden that women bear, because even those who work full-time in paid employment assume the major burden of domestic work and child care, must also be recognised to combat stereotyping and to present a true picture of women's work.

Patterns of paid employment (location, forms of work, mobility of workforce, etc.) are undergoing rapid and far-reaching change through economic globalisation. The impact of this on gender relations needs to be kept under constant review. Particular attention should be given to the problems faced by migrant workers, who are especially vulnerable to exploitation, abuse and violence. Where there is evidence of trafficking, such women should not be subject to criminal sanctions (for example, for illegal residency) rather than those responsible. In the context of trafficking, attention must be given to prevention, protection and legal process against the wrongdoers. The human rights of migrant women and their families must be ensured.

Health and reproductive rights

The CEDAW Convention, article12 calls for an end to discrimination in the field of health, while article 16 articulates women's right to 'decide freely and responsibly on the number and spacing of their children'.

A holistic approach to health and health care for women and girls and gender sensitivity in the provision of health information and services are needed. The right to health must be seen in the framework of women's overall development, for health is a 'state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity' (Beijing Platform for Action). This includes reproductive and sexual health, at all ages. Examples of legislative initiatives that achieve compliance in this area are the Medical Termination of Pregnancy Acts of Barbados and Guyana, which decriminalise abortion. The right to health must also be seen in the wider legal context of family law, women's access to education, property and inheritance laws and criminal laws on rape and domestic violence. Attention must also be paid to the social and economic factors that affect women's health. Restructuring of the health sector and an increasing trend to privatisation of health care systems in some cases has resulted in poor quality, reduced and insufficient health care services and has also led to less attention to the health of the most vulnerable groups of women. Gender-specific health research and technology is lacking.

Women's health is also negatively affected by the unequal power relationships between women and men which often leave women unable to insist on safe and responsible sex practices. This increases their susceptibility to sexually transmitted infections, including HIV/AIDS. Health care officials and family planning officers and providers may abuse women's rights by refusing to bestow information or supplies without the consent of the male partner. In some Caribbean countries, the husband's consent is

required prior to tubal ligation or hysterectomy, a practice grounded in cultural attitudes rather than a legal system that requires equality of treatment and non-discrimination.

Columbia has introduced constitutional guarantees on health that provide a useful model. Taken together, these support the principle that women have the right to active participation in decisions that impact on their personal health, lives, body and sexuality. Explicitly, they include women's right to:

- found a family;
- decide the number of her children;
- have access to health education and information;
- the enjoyment of a healthy environment;
- health care and services.

The Committee on Economic, Social and Cultural Rights has asserted that the provision of such rights must be accessible, affordable and culturally appropriate. The CEDAW Committee's General Comment No. 24, 'Women and Health', also provides guidelines. A full analysis of laws relating to health in six African countries can be found in *Women of the World: Laws and Policies Affecting Their Reproductive Lives: Anglophone Africa* by the Center for Reproductive Law and Policy (CRLP, 1997). A similar report has been produced for Latin America and the Caribbean (CRLP, 1998).

Violence against women

There is no explicit provision on violence in the CEDAW Convention. However, the issue of violence against women is 'clearly fundamental to the spirit of the Convention', especially in article 5 which calls for the modification of social and cultural patterns, sex roles and stereotyping that are based on the idea of the inferiority or the superiority of either sex (Commonwealth Secretariat, 1989). In its General Recommendation No.19, 1992, the CEDAW Committee has also developed its understanding of gender-based violence both as a direct violation of human rights and as contributing to women's inability to enjoy other human rights guarantees. Taken in conjunction with the General Assembly Declaration on the Elimination of All Forms of Discrimination against Women (1993), this constitutes a clear obligation on states to condemn and eliminate gender-based violence, whether committed in public or in private and regardless of whether it is committed by a public official. Failure by the state to exercise due diligence to prevent and punish violence against women constitutes a violation of human rights for which it is responsible. Implementation of national laws that address gender-based violence is one very clear and pivotal way in which women's subordination can be addressed.

The Declaration recognises that gender-based violence is structural and systemic and based on unequal power relations between women and men rather than consisting of private and isolated acts. This understanding makes it clear that legal programmes that address violence directly must be located in a legislative framework that addresses other manifestations of women's inequality, including economic dependency, divorce laws (and the contribution of divorce to women's poverty), laws on the ownership of property and restrictive inheritance laws. They must also take account of social norms, including any shame and stigma attached to leaving a marriage and to divorce.

Commonwealth governments agreed in the 1995 Commonwealth Plan of Action on Gender and Development that women's human rights and the elimination of violence against women, the protection of the girl-child and the outlawing of all forms of trafficking in women and girls would be priority areas for action.

States need to identify the true incidence and causes of gender-based violence that are most prevalent in their own society. Gender-based violence is violence that is committed against women because they are women, and which does not occur to men or occurs disproportionately to women. It may include violence that occurs in the home (for example, domestic violence, marital rape, sexual assaults, dowry deaths, female infanticide, honour killings); in the community (work place violence, traditional practices, street violence, trafficking, sex tourism); and violence by state officials (in prisons, police stations, immigration offices and places of detention, state hospitals, including mental hospitals). These must be considered separately and attempts made to gain an accurate, national statistical profile of the nature and occurrence of each. This facilitates identification of the likely perpetrators and obstacles in dealing with them. It must be remembered that women as well as men support some of the attitudes that promote gender-based violence and the commission of such violence.

Some of the factors that foster an environment of violence against women and girls include:

- societal attitudes towards women as inferior, the property of men or emotional and irrational;
- son preference for cultural and economic reasons;
- the perception that women 'deserve' punishment for perceived faults such as bad housekeeping, 'nagging', 'unwomanly' conduct or actual or suspected infidelity;
- alcohol;
- the failure of police and other authorities to act when violence is reported;
- perception of such violence as private;
- high rates of acquittal by courts of those accused of such violence;
- legal defences such as 'honour' to violence;
- 'cautionary' rules of evidence, for example to treat women's evidence with caution on the premise that they habitually lie about sexual matters;
- traditional practices that continue even if formally legislated against;
- the perception of women as tenants-at-will in their marital homes who may be thrown out when the husband no longer desires cohabitation;
- behaviours, such as dress codes and non-access to public places, demanded by religious leaders and punishment for failure to conform;
- a perception of the victim as the offender, as 'bad' or 'tainted'.

The UN Special Rapporteur on Violence against Women has characterised impunity – failure of governments to ensure accountability for violence against women – as the greatest cause of that violence. The legal steps that states can take in response to gender-based violence are varied and involve:

- the criminal law (definitions of sexual assault offences that encompass the full range of abusive behaviours (for example a definition of rape that includes anal rape, insertion of other objects and forced oral sex), formulation of defences, outlawing of defences such as honour, criminal procedures that provide protection to the victim, sanctions);
- the civil law (binding over orders, protective orders, injunctive relief, orders with respect to property); and
- social services (provision of economic support, refuge, counselling and adjustment).

Reforms of criminal justice systems may require prohibition of evidence on the woman's past history (as, for example, in the Bahamas and Barbados) and prohibition of aggressive questioning and harassment in court. Abolishing the requirement for corroboration in all cases of sexual offences is desirable. Community services should include legal assistance, emotional support and crisis response. Such services may also include counselling and treatment for male perpetrators. Methods of conflict resolution that are acceptable in society, such as those that encourage self-responsibility and accountability for one's own behaviour, need to be emphasised.

Responses to gender-based violence, especially that occurring in the home, require co-operation between different branches of professionals, including lawyers, the judiciary, magistrates, medical personnel, counsellors and social and community workers. This will help to ensure an understanding of the trauma of violence and its physical and mental aftermath and to counteract prejudices about the sanctity of the family and the need to preserve it at all costs. A holistic approach is needed that looks at the causes of violence against women (including economic causes rooted in practices such as dowry and son preference), the needs of the battered person, ways of preventing recurrence, short term needs of security and safety and longer term economic, medical and counselling needs with a view to restoring self esteem and self confidence and reducing the dependency of the victim. A National Campaign on Violence against Women can be an effective way of bringing together different sectors of society (police, social workers, medical professionals, education sectors, men's clubs, religious bodies, youth clubs) around this issue.

The Commonwealth Secretariat has developed a model framework for an integrated approach, applying the principles of the Gender Management System (see Chapter 7). One outcome of this has been the provision of technical assistance to the Government of Mauritius, Uganda, Zambia and Kenya for the establishment of structures and processes to implement this framework with the Ministry of Women's Affairs, which is the Lead Agency working closely with other key ministries and NGOs.

Protective laws must be applicable to co-habitees as well as spouses. The legal disadvantage in many states of de facto relationships (not just in the context of violence) should be addressed. Victims of violence need to be able to gain civil law relief and protection from the violence separate from longer-term legal arrangements, such as divorce. There is a tendency in some states to require recourse to non-legal fora and processes for family law matters, such as mediation or other forms of alternative dispute resolution. Where such services are used, mediators must be trained to identify violence and to ensure safeguards are in place so that the victim is not placed at further risk through participation in such proceedings.

The UN Special Rapporteur on Violence against Women has drafted a model law on domestic violence. This provides a good starting point that can be adapted to local contexts and requirements. Real progress has already been made throughout the Commonwealth in extending protection to victims of domestic violence. In the Caribbean, for example, the following countries have enacted Domestic Violence legislation: Antigua and Barbuda, Barbados, The Bahamas, Belize, Guyana, Jamaica, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.

Other forms of violence against women must also be recognised. Legislation may be required to outlaw some practices, for example the prohibition of genetic testing for sex selection in India. Women who are especially vulnerable to violence must be identified and provided with legal and practical forms of protection. Some examples are migrant women (including illegal migrants and women who have been trafficked), refugee women and women in prisons and other places of detention. When these women are the victims of violent crime, the authorities must ensure that their response is to focus on the perpetrators and not to criminalise the women. Women should not have to fear prosecution (for example for prostitution) or deportation for reporting the commission of violence against them. Steps to combat the trafficking of persons require greater international co-operation through law enforcement agencies, immigration agencies, health officials, etc. Its connection with other forms of organised crime has to be recognised and taken into account.

At their Meeting in May 1999, Commonwealth Law Ministers discussed trafficking in persons and expressed their support for Commonwealth participation in United

Nations activities to prepare an international convention to combat transnational organised crime with Protocols: (a) to prevent, suppress and punish trafficking in women and children; (b) on the illegal trafficking of migrants; and (c) against the illicit manufacturing of and trafficking in firearms, ammunition and other related material. Law Ministers also felt that, in addition to the Secretariat's preparation of guidelines on administrative and legislative measures to address the commercial sexual exploitation of children, the Commonwealth should act on this issue by using existing Commonwealth schemes for mutual assistance and co-operation in criminal matters. This would constitute a solid base for co-ordinated collective Commonwealth action to fight this abhorrent practice.

Family Law

Family Law has been described as the 'litmus test in any society with regard to legal norms and the status of women' (Coomaraswamy, 1994). As article 16 of the CEDAW Convention recognises, assertions of equality in public life are of little effect unless there is an accompanying right to equality in the family. Article 16 provides for equality in choosing a marriage partner, during marriage and at its dissolution. Compliance with these provisions requires a full contextual analysis of familial relations and laws relating to the age of marriage, including: consent to marriage; registration of marriage; regimes for marital (and separate) property; rights and duties with respect to children whether or not born in the marriage; responsibilities in marriage; grounds for dissolution and annulment; and custody and maintenance proceedings. These issues will vary by country and are hence beyond the scope of this Manual.

Laws allowing either party to seek divorce are often sought. However, studies show that financially women suffer more from divorce than men and that divorce is a contributing factor to the feminisation of poverty. Women's post-divorce poverty has also been linked to judicial misunderstanding about the economic and social realities of women and men, some of which include inaccurate economic assumptions about the cost of raising children (Mahoney, 1999). Accordingly, divorce laws need to be looked at from a gendered perspective to determine the likely financial repercussions of divorce, for example the availability of paid income, pensions, distribution of property and custody of children.

It is worth noting that the CEDAW Convention is predicated on a marriage between people of the opposite sex. It does not provide for differently constituted family units, for example cohabitation without marriage, same-sex relationships, single parent households or extended families. Gender relations in all such relationships need to be considered. While legal regulation can be interventionist, exclusion can leave the more vulnerable members of the arrangement without legal protection for themselves or their property. Laws conferring on persons in cohabitational relationships rights analogous to married persons exist, for example, in Barbados, Guyana and Trinidad and Tobago.

Institutions and Personnel

These include bureaucratic mechanisms for the advancement of gender equality, the judiciary, and law enforcement agencies. Generally, all these institutions have functions of data collection and analysis in addition to their primary functions. Data collection by the judiciary, for example, feeds into and facilitates on-going evaluation of legislative policy.

Gender-sensitive government structures

Gender mainstreaming requires an examination of government structures to see whether they meet women's needs or whether there are gendered assumptions or biases that limit women's access to the law. Gender-sensitive government structures can be either specific to women or general (mainstreamed). They include legislative review bodies, monitoring bodies, implementation bodies, tribunals and bureaucratic structures. A good combination is to provide for women focal points with responsibility for gender issues in all Ministries with an allocated person to ensure leadership and co-ordination. It is especially important to have women focal points in a Ministry of Justice/Legal Affairs, where such a Ministry exists. There are numerous models of gender-specific structures in the Commonwealth. Such models include:

- Women's Ombudsman
- Equal Opportunities Commission
- Commission on Gender Equality
- Commission on Equity
- Human Rights Commission
- Commissioner for Women's Affairs on Human Rights Commission
- Inter-ministerial Committee on Human Rights (Zimbabwe)
- Sex Discrimination Commissioner
- Women's Unit, with responsibility in the Cabinet preferably directly to the Home Secretary
- Commission on Administrative Justice (Ghana)
- National Machinery for the Advancement of Women (Zimbabwe)
- Office on the Empowerment of Women (South Africa)
- National Committee of Women and Children (Nigeria).

Whatever model is chosen, accountability, access and transparency need to be ensured. Caution must also be taken that the existence of gender-specific structures is not interpreted as relieving other structures from the obligation to address gender and women's concerns. In order to be effective, the body must have the authority and resources to initiate and implement policy. Responsibility for women's issues must be at a high level (preferably a constitutional position), with independent and direct access and reporting to the highest levels of government. The Office on the Empowerment of Women in South Africa, for example, is in the Office of the President and there is a Department of Women's Affairs at Cabinet level in Namibia.

The functions of these bodies include:

- integrating women into all policy decisions;
- guiding policy formulation;
- promoting law reform;
- requiring all legislation to be vetted for consistency with gender mainstreaming;
- monitoring implementation;
- facilitating access to civil society;
- actively publicising the CEDAW Convention;
- assisting in test cases before the courts;
- intervening in litigation; and
- preparation of *amicus* briefs[1]

A number of potential problems may need to be addressed, including inadequate financial and human resources and a lack of political will and commitment. Public programmes and services for women that fall within the relevant body's jurisdiction need to be defined, costed and detailed and accompanied by budget priorities and guidelines for setting those priorities. There may also be insufficient understanding of

[1]Comments on relevant issues submitted to a court by an interested organisation/individual who is not a party to the case.

gender equality and of the need for gender mainstreaming among government structures. Prevailing gender stereotypes, discriminatory attitudes, competing government priorities and, in some countries, unclear mandates can all minimise the body's effectiveness.

Mainstreaming gender in government departments must operate at both horizontal and vertical levels, that is, it must cross-cut federal structures. Accordingly, equality must be enshrined throughout federal units and reach down to local levels: regional, city, municipal and rural councils. One example is a Women's Unit with downward reach to local panels and groups on such matters as education, health and security issues, then upwards to government and Cabinet. This is also important where there is

an isolated, or separated, area of the country. In Tanzania, for example, a Ministry of Community Development, Women's Affairs and Children has been established on Zanzibar as well as on the mainland.

Links to civil society are very important and extensive consultation is needed when drawing up policy and legislative changes. Data disaggregated by sex and age are vital, as well as gender-sensitive research and documentation. Targets need to be set and methods developed for assessing progress.

The policies and programmes of all government departments need to be examined for their impact on women. This includes the most important economic policy instrument of government: its budget. A gender budget, pioneered by the South African Women's Budget Initiative in 1996, requires the examination of budgeted spending for programmes targeted at women (women's healthcare programmes, for example) as well as analysis of all general expenditures to determine their effects on women as a category. An information kit entitled *Gender Budget Initiative* that has been produced by the Commonwealth Secretariat can be used to facilitate this process (Commonwealth Secretariat, 1999a).

The judiciary

Judges are expected to be impartial, knowledgeable, independent, practical, sensitive and fair. However, as human beings and members of a particular society they frequently base their assumptions on cultural values as well as on their particular experiences. Their decisions on social, moral, and economic issues are more likely to reflect these experiences than those of other groups of which they are not a part. The fact that the judiciary is everywhere overwhelmingly male as well as generally well-educated, middle-class and middle-aged means that certain perspectives are more likely to be held than others. This is compounded by the fact that courses on women and the law offered at university level are relatively new, and may be optional modules, so most judges and lawyers have never been instructed in gender and the advancement of women issues.

Despite the obligation that all persons are equal before the law and entitled to receive equal benefit and protection of the law (ICCPR, article 26; CEDAW, article 15), research has shown that, where judge-made law is biased, the adverse impact falls most often on already disadvantaged groups (Mahoney, 1999). Gender bias may take the form of stereotypical attitudes or misconceptions about the nature and roles of women and men and the social and economic realities they encounter. It is also found when issues are viewed from a male perspective (in the assumption of universality), so that women's problems are trivialised or oversimplified and are not given the same credibility as those of men. Examples of this include light sentences meted out for male sexual violence in many countries, because of the belief that women are somehow to blame for it, and the lesser value placed on women's testimony. Judges may also be unaware of the trauma caused to women in giving testimony of rape and fail to provide protection from abusive defence lawyers.

If gender biases are to be eradicated from judicial decision-making, therefore, judges must be given the necessary knowledge to enable them to be aware of their own prejudices and appreciate the perspectives of women, the consequences of stereotyping and the complications of intersecting characteristics such as race, class and gender, which compound disadvantages. Ongoing training in gender issues and human rights is an obvious way to address perspectives that are too limited (see Fig. 4). A gender balance in the composition of the bench, at all levels, and in all other court personnel is also required.

Figure 4 **Judicial Training: Examples from Canada and India**

The Western Judicial Education Centre (WJEC)

The WJEC is a project of the Canadian Association of Provincial Court Judges, organises continuing education programmes for judges from Western and Northwestern Canada. A key element of their judicial education programmes is peer leadership, i.e., judges are trained by other judges and 'outsiders' to instruct and lead other judges. This method of delivery challenges judges to participate and to take responsibility for their own continuing training while respecting the fundamental principle of judicial independence. At the same time, members of the broader community who are interested in improving the quality of justice delivery are able to participate in the workshops and other sessions. Women, aboriginal people, children, members of racial, cultural and ethnic minorities and other people very unlike judges describe and discuss the problems they experience in their daily lives as well as in the courts, supplying knowledge that judges require but seldom receive.

A WJEC workshop held in 1991 in Yellowknife, Northwest Territories, for example, spent two days focusing at gender equality. The workshop used a variety of teaching methods including lectures, dramatisations, panels and question-and-answer sessions. In small groups, other techniques such as discussions, brainstorming, buzz groups, videos and video commentary were used. Survivors of sexual assault as well as crisis centre workers provided the judges with first-hand information about the consequences of poverty and violence against women. Other topics on the programme looked at the issues of sexist language and credibility of men as a group compared to women as a group.

Source: Mahoney, 1999

Sakshi

Sakshi, an NGO based in New Delhi, India, organised a meeting in 1997 of 26 superior court judges and 12 lawyers from the Asia Pacific region to discuss gender bias in the courtroom. The meeting grew out of a study conducted by Sakshi in five Indian cities on the nature and extent of such bias among the judiciary, the findings from which challenged the notion of judicial neutrality. For example, 68% of the 109 judges interviewed believed that provocative dress was an invitation to rape and about half felt that women who were abused by the partners were partly to blame if they stayed in the relationship. At the same time, most judges also thought domestic violence was underreported and many expressed a willingness to participate in a training programme.

The regional meeting, Regional Perspectives on Gender Equality, brought together judges, lawyers and NGOs from India, Nepal, Sri Lanka, Pakistan, Bangladesh and Fiji, as well as from Canada and Australia. Judges chaired the sessions, putting their colleagues at ease, while NGOs provided perspectives on the realities women face. The meeting ended in the creation of the Asia Pacific Advisory Forum on Judicial Education on Equality Issues which has begun organising country level workshops. These bring together judges, NGOs, health care professionals and women complainants and use a wide variety of techniques including theatre, role-play and puppets. Judges are encouraged to explore the reasons behind their decisions and develop greater empathy for survivors of gender-based violence through visits to shelters and to women in prison.

Source: Spindel *et al.*, 2000

Judges not only interpret the law; they also have a law-making function. When the law – whether constitutional, statutory or common law – is ambiguous, uncertain or incomplete, the judge creates definitions that clarify it. In constitutional matters, judges have the opportunity to strike down or amend legislation to make it conform with the judicial interpretations of constitutional rights and freedoms and a particular vision of society. There is a large and growing body of international jurisprudence concerning women's human rights which is of value to judges and lawyers, and most common law systems allow judges scope to draw on it as an interpretative aid. Rather than mechanically following the rules laid down by the legislature, judges must interpret the rules so that they are reconciled with the wider objectives of justice found in the international norms of women's human rights. In the case of *Apparel Export Promotion Council v. A.K. Chopra* (Supreme Court of India, 1999) for example, the Court stated that international instruments (the CEDAW Convention, ICESCR, the Beijing Platform for Action) 'cast an obligation on the Indian state to gender sensitise its laws and the Courts are under an obligation to see that the message of international instruments is not allowed to be drowned'.

The dissemination of judicial decisions from other Commonwealth jurisdictions and shared understanding by Commonwealth judges can be important tools. Starting with a meeting in 1988 in Bangalore, India, the Commonwealth Secretariat has convened a number of Judicial Colloquia that looked at the domestic application of international human rights norms and – in the *Bangalore Principles* – outlined the role of the judiciary in advancing human rights (Commonwealth Secretariat, 1988). Since 1994, the Secretariat, together with the Commonwealth Magistrates and Judges Association and the Commonwealth Foundation, has organised four further judicial colloquia focusing specifically on the promotion of the human rights of women and the girl-child through the judiciary. The colloquia were attended by chief justices, judges, lawyers, academics, researchers, representatives of UN agencies and NGOs. The recommendations that emerged from these meeting – such as the *Victoria Falls Principles* – recognise the duty of an independent judiciary to interpret and apply national constitutions and laws in conformity with women's human rights. Further judicial colloquia (including attendance by magistrates) are desirable. Judges should familiarise themselves with the Victoria Falls Principles and apply them.

The following publications resulting from the colloquia provide valuable resource materials for judges, lawyers, human rights activists and NGOs working on women's human rights: *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (Byrnes, Connors and Bik, 1997), based on the Asia/South Pacific Colloquium; and *Gender Equality and the Judiciary* (Adams and Byrnes, 1999), based on the Caribbean Colloquium. The Secretariat is currently engaged in the compilation of case law dealing with women's human rights issues which will provide valuable reference material for judges and lawyers.

It must nevertheless be recognised that judges may be unwilling to adopt a forward-looking attitude towards women's advancement, as seen for example in the Zimbabwe

case of *Magaya v. Magaya* (1999) where women's equality on reaching the age of majority was denied. In a number of jurisdictions (for example Canada, Australia) a gender audit of the courts has been carried out to identify sexist attitudes and prejudices in court personnel with respect to witnesses, victims, plaintiffs, accused persons and all others who come into contact with the courts. NGOs in Bangladesh, India, Nepal, Pakistan and Sri Lanka have also conducted surveys among judges, female litigants and lawyers (Spindel *et al.*, 2000). These are a good way of identifying the problems in the courts themselves so that they can be addressed.

Women can also face challenges to their rights from non-formal, non-lawyers bodies

that exercise judicial power at the local level, for example the local councils in Uganda. Such bodies may remain outside any gender audit and changes made within the formal justice system.

Law enforcement agencies

The police have a critical role to play in protecting and promoting the human rights of women. This is particularly true in the area of violence against women. Despite the prevalence of these crimes, research from many countries, including Australia, Bangladesh, Britain, Canada, India and New Zealand, has shown that they tend to be treated less seriously by the police than crimes against men or property. This is true irrespective of explicit policies and laws in some countries that treat violence against women as any other offence against a person. Part of this is due to the fact that police attitudes are a reflection of attitudes held in the wider community and, in many countries, what takes place in the domestic sphere is seen as a private matter. There is also a tendency to 'blame the victim', particularly if – as is most often the case – the woman has been assaulted by someone she knows. This can make women reluctant to report violent behaviour and/or continue to press charges. Economic dependence also discourages reporting.

Police powers and duties in responding to domestic violence must be clarified and strengthened, for example with respect to rights of entry to property. Use of the criminal law for domestic violence needs to be backed by a police force that receives intensive training in how to deal with partner battering and other forms of violence against women, including allegations of sexual assault. This is taking place throughout the Caribbean, for example, through a collaboration between the Caribbean Association for Feminist Research and Action (CAFRA) and the Caribbean Association of Commissioners of Police. A police force that can respond sensitively to gender-based violence should include trained police officers on the ground; special police units with trained and large numbers of women, or at least a special reporting desk; private interview rooms; and female medical police staff. The practice of forced gynaecological examinations of women who have complained about sexual assault should not be followed.

The police response to violence needs to be sensitive and effective in order not only to assure the individual complainant of appropriate action but also to demonstrate that violence both inside as well as outside the family is unacceptable behaviour (see Fig. 5). Police forces need to review their methods of work and to consider seriously whether, consciously or unconsciously, their inaction is allowing men to behave in abusive ways towards women. As long as legal institutions do not take violence against women seriously, such violence is sanctioned, legitimised and even implicitly encouraged (Spindel *et al.*, 2000). If this is the case, then changes are needed so that: the seriousness of crimes against women is acknowledged by each police officer, both through informal force norms, or police culture, and through formal force policy; and the crimes are viewed from a victim-centred perspective, where the officers ask themselves what actions should be taken to assist the complainants and to curtail the criminal behaviour of the offender.

The police also need to liaise with other social and welfare organisations in tackling the issue of violence against women since it involves more than legal problems. There will need to be co-operation and co-ordination with hospitals and medical personnel, and referrals to counselling or to other agencies may also be necessary to help complainants come to terms with their experiences. Support services for victims of violence are absolutely necessary if the problems are to be dealt with effectively, and NGOs offering services to women and children can be particularly important to police

investigating family-based incidents. These organisations provide safe accommodation, advice and counselling, and include shelters for battered women, rape crisis centres, incest survivors groups and women's centres. They can also offer advice on civil law remedies to complement criminal law actions. It is important to strengthen with state assistance this partnership between the police and the NGOs working with women victims.

The police should collect data at all levels in order to inform responses to the issues of domestic and sexual crimes. Since many such crimes are not reported, non-police sources of data, such as NGOs or medical personnel, should also be used. Data collection can serve a number of different purposes, including:

- alerting the police to the seriousness of the problem, which is often underestimated;
- providing information on the causes of abuse;

Figure 5 **Creating a More Sensitive Policing System**

The acknowledgement of the seriousness of crimes of violence against women through informal police force norms and formal force policy interact to produce a more sensitive policing system. Different strategies being followed in different jurisdictions to achieve this result include:

- The recruitment of women and ethnic minority officers.
- The recruitment of officers with particular skills for responding to crimes involving violence against women. This includes, for example, the recruitment of women not only as officers but also forensic scientists and police surgeons.
- Gender-sensitive training at recruit level and later on in officer training, and placing recruits with trained partners who can act as role models.
- A rise in status for police work involving these crimes. There can be financial and promotional incentives for officers at all levels who reveal appropriate responses to training.
- The setting up of domestic violence and child protection units. These facilitate the development of expertise in investigation and can provide a career move from uniformed to criminal investigation as well as offering apprentice-type training.
- A formal policy that acknowledges the seriousness of the behaviour, including evidence-gathering approaches that remove the onus of laying a charge against the offender by the woman.
- The adoption of a pro-arrest policy for offenders who commit crimes in domestic settings.
- The development of peer pressure in police forces to shape informal attitudes to reflect the seriousness of the formal force policy.
- A formal policy that stresses the maintenance of careful records, so that the seriousness of the behaviour and the adverse effects on individual women and children and the wider community become clearer.
- Record keeping that provides information for attitudinal change in the force, as the police will acknowledge the existence of a problem if it is revealed by records.
- The introduction of victim-friendly systems for investigating and gathering evidence of crimes of violence, such as victim examination suites.
- The definition of annual objectives, such as specifying greater attention to domestic violence, which focus the organisation in directions that are in particular need of attention.

Source: Guidelines for Police Training on Violence Against Women and Child Abuse, Commonwealth Secretariat, 1999c

- providing information for the deployment of resources;
- identifying repeat offenders;
- identifying repeat victims;
- providing information for managers on police response;
- justifying the expansion of police operations;
- justifying funding and resources;
- providing a basis for police input into law reform processes.

Education and Training Programmes

Multiple strategies and a broad range of approaches to gender mainstreaming are desirable. Legal programmes alone will not be effective unless they are accompanied by public education and advocacy, for example through a public awareness campaign for gender sensitivity and respect for human rights. Such programmes should also be incorporated into school curricula in form and content appropriate to the relevant age, commencing at primary school and continuing throughout formal school education. The role of the media is crucial. Analysis should be carried out of programme time that is devoted to issues of concern to women and men respectively; on the images and stereotypes that are promoted; and on the gender balance of leading producers, presenters and directors.

Education and training of whom?

All stakeholders, especially legal policy and decision-makers at all levels and civil society, need to receive training. The CEDAW Committee's General Recommendation 19 (1992) states: 'Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention'. Training on gender sensitivity, how laws may have gendered consequences and on human rights are required throughout all levels of the judicial hierarchy, from magistrates to the Judges of the highest courts in the state. Research into gender balance within the courts in Canada has also shown that court personnel – clerks, registrars, etc. – are often also overwhelmingly male (Mahoney, 1999). They may be unsympathetic to women seeking to access their rights through legal claims and thus not offer assistance or appropriate advice when it is sought. Training should also be extended to such people, as well to state officials in positions of power over women, for example prison officers, immigration officials and social workers. A gender balance should also be sought in recruitment. Formal training programmes must integrate gender issues throughout, and not rely on a single session on women at the end of the programme that is likely to lead to early departures and be viewed as an 'add-on'.

Training and education does not just take place through formal training and education schemes, however, but continues throughout society. Public education is needed in all sectors, including health-care services, so that signs of gender violence and child abuse are recognised and dealt with appropriately. Teachers in infant, primary, secondary and tertiary establishments need training so as to understand ways of recognising and redressing cultural stereotyping, even in very young children. Human rights and gender equality should feature in primary and secondary school curricula. This also requires a review of textbooks, materials and teacher training programmes to facilitate teacher use of new materials and concepts, ensuring materials have positive images and constructions of girls and women and monitoring the registration and attendance of girls at school.

Training in what?

Training of stakeholders should include:

- Gender sensitivity and human rights. The former requires attention to the fact that decision and policy makers may have to change long-held life views (mind sets), and be willing to take seriously perspectives and attitudes different to those they have assumed.
- Active listening techniques to ensure fuller and detailed understanding of the different perspectives of peoples' lives. This is relevant at all stages, for example in consultations for determination of law reform and in judicial proceedings.
- Understanding of the CEDAW Convention, the Beijing Platform for Action and the Commonwealth Plan of Action on Gender and Development and its Update. These should be made widely available in multiple, especially minority, and indigenous languages; in simplified forms; and in picture form.
- How to train others so that people who have received some such training can themselves provide assistance to others, including to women's grass roots organisations. Combining 'bottom up' and 'top down' approaches to the issues is desirable.
- Use of internal machinery in the particular organisation including conducting a gender audit; integrating gender into the planning and implementation cycle; reviewing policy options; and determining when intervention is appropriate and who is to be targeted.
- Use of external machinery, including powers of and access to the CEDAW Committee, the Human Rights Committee and other international and regional bodies. While it is not to be expected that many people will use such processes, awareness of their existence and powers validates and strengthens internal demands and empowers women.

The Commonwealth Secretariat has produced some manuals which address different aspects of the problem of violence against women, including: *Confronting Violence – a Manual for Commonwealth Action*; *Violence Against Women – Curriculum Materials for Legal Studies*; and *Guidelines for Police Training on Violence Against Women and Child Sexual Abuse* (1999c). Background materials were collected on the commercial sexual exploitation of the girl-child and in-depth studies on the issue were carried out in six countries. These manuals are designed for use by national Women's Machineries, other relevant ministries and NGOs in training programmes designed to promote and protect women's human rights.

Societal change is unlikely to take place if only traditional methods of education are relied on. Theatre (including children's and popular theatre), dance, song and exhibitions can also be effective educational tools. The mainstream media should be encouraged to carry serious items on such issues as rape and harassment as leading stories, both to raise consciousness and to assist in lessening embarrassment and humiliation in talking about these things and in responding to questions on them.

Legal Processes and Procedures

Access to justice

It is important that legislation provides procedures and institutions (for example tribunals and courts) in which violations of gender equality can be challenged. These bodies should have the power to order effective remedies (such as monetary compensation, injunctive relief, reinstatement, protective orders and criminal sanctions). The requirement that states should ensure respect for the equal enjoyment of human rights imposes a positive obligation to provide effective and affordable legal

support to women, for example to seek legal action against violent partners as in *Airey v. Ireland* referred to above (p. 40). A women's legal defence office should be established to provide information on women's human rights (as is done for example with an Environmental Protection Agency or Defence Office or an Aboriginal Defence Office).

The competency of Ombudspersons should extend to allegations of sexual bias and harassment within bodies under their jurisdiction. Consideration should be given to appointing a Women's Ombudsperson with jurisdiction extending to the private sphere. Their recommendations on such matters should be given high profile in the appropriate reporting body and by the media. The work of Human Rights Commissions should also be highlighted.
Mediation and other forms of so-called informal justice or alternative dispute resolution are sometimes favoured as a cheaper and more flexible alternative to court processes, especially in the context of family matters. It is also argued that their participatory and consensual nature enables women to express themselves more fully than in court proceedings and allows their concerns to be addressed in the formulation of an agreement by the parties themselves. It must be realised that power imbalances do not disappear in mediation and that requiring people to attend mediation distorts the voluntary nature of the process. Mediation is not to be equated with counselling or therapy. Quality control for mediation programmes is required, for example to ensure that access is genuinely voluntary and that mediators are fully trained to recognise and deal with power imbalance. This would also provide reality checks to proposed agreements with clients to ensure full comprehension and that they are genuinely accepted and realistic. Mediators must be warned against policy preference for a certain outcome such as continuing (or discontinuing) a marriage. They must be prepared to terminate a mediation if they have concerns about such matters.

Many legal processes are technical, inaccessible for those without specialist knowledge and daunting. The difficulty that women can face in accessing the law has been compared to a maze, where the search for justice is complex, frustrating, confusing and time consuming (Women and Law, Southern Africa Research Fund, 1999). Efforts should be made to simplify legal language (plain language initiatives) and to disseminate information about legal processes in arenas frequented by women (women's centres, factories, health clinics, etc.). Legal remedies should not become unavailable through technical errors (delay in filing papers or lodging a response). Court sittings should, whenever possible, be held at the scheduled time to avoid additional loss of earnings or the need to make child care arrangements through adjournments or delays. Judges should control proceedings to ensure adjournments are not sought as a form of harassment or obstacle to justice. Courts might consider the introduction of protective devices to facilitate victims giving evidence (voice distorting techniques, use of pseudonyms, giving evidence from behind screens) where there is a real fear for the witness's security (for example in trafficking cases where there is involvement with serious crime).