Female *Friends*

Nicola Roxon and Kris Walker

Amica curiae as a vehicle for women's participation in litigation.

Women as a group are disadvantaged by both the substantive law and the operation of the legal system. There remain many legal principles which operate on assumptions about, and stereotyping of, women, and ignore women's experiences. The past and current inequality of women in society goes constantly unrecognised by the legal sector which has significant power and influence over the economic, professional and social aspects of all our lives.

Many women have insufficient funds to mount a legal challenge to practices or rules that disadvantage them; or, if they do have funding, they may be wary of entering the adversarial arena of the legal system, fearing they are likely to be treated inequitably before predominantly white, male judges who have no apparent understanding of the realities of women's lives, let alone the context or consequence of their decisions.

We do not intend to identify all the areas where inequality occurs or all the reasons for which it occurs. That has been done assiduously by many before us, in a medium more in keeping with the severity of the problem.[1] Rather, we proceed on the basis that such inequalities exist and suggest a structural change to facilitate the development of laws and a legal system which are more relevant and accessible to women.

Under the adversary system only the parties to a dispute participate in the presentation of the case before the court. This approach ignores the fact that many cases, particularly at the appellate level, raise issues of importance to numerous groups in society. There is statutory recognition of this potential to some extent – State and federal Attorneys-General have limited statutory rights of intervention and the courts have an inherent power to grant leave to a person to intervene in a case in certain circumstances. The courts also have an inherent power to allow counsel to appear as an amica curiae,* or 'friend of the court'.

We examine the procedure of amica curiae and advocate its use as a vehicle for the ventilation of women's interests and the participation of women in litigation, particularly at an appellate level.

The role of amica curiae

In our adversarial system, a judge is bound to make her or his decision on the basis of information presented by counsel. The court is not an investigatory body and could be assisted by contextual information being presented and available for decision making. Originally, the role of an amica was a narrow one. In *Leigh v Engle* (1992) 535 F. Supp. 418 it was described as:

> [a]n impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another.

Nicola Roxon is an industrial officer with the National Union of Workers.

Kris Walker teaches law at the University of Melbourne.

* The traditional term is 'amicus curiae' – the masculine form. Because this article focuses on women's participation in litigation, we have chosen the feminine form, 'amica curiae'.

There is a clear distinction between intervenor status and participation as an amica curiae. Unlike an intervenor, the amica role is not similar to that of other parties – an amica presently has no right to appeal, lead evidence or inspect documents (see *Bropho v Tickner* (1993) 40 FCR 165, at 172-3). Importantly, an amica would not generally be subject to a costs order against it.

The amica curiae role, if it were expanded beyond this traditional role (as in the US for example), would provide a way in which women could participate in cases at an appellate level without the need to become a party to litigation or to fund test cases. This would provide for a more informed judicial decision-making process. Amica briefs would also assist in the legitimation of difficult and far-reaching decisions by indicating that the court has fully considered the impact of its decision on all sectors of the community likely to be affected by the decision.

Australian amica curiae

The role of amica curiae is recognised by Australian courts, but it is little used and remains entirely at the discretion of the particular court in question. The following groups, which have been permitted to participate as amica curiae in specific litigation, indicate the breadth of groups that may be interested in such a role: the Tasmanian Wilderness Society, a State Planning Authority, the President of the Senate, the Australian Federation of Consumer Organizations and the Ballaruk people.[2]

The principles on which leave to appear as an amica curiae will be granted in Australia have been considered on a number of occasions, although not by the High Court.[3] In *United States Tobacco*, the Federal Court took a very wide approach to the courts' discretion to allow amica participants, stating:

> an amicus may be heard if good cause is shown for doing so and if the court thinks it proper. Nothing in these reasons should be understood to delimit or restrict the availability of or the effectiveness of this valuable tool. [at 536]

However, the Court's reasons make it clear that there is no *right* to be heard as an amica; a court may or may not accept the assistance of the amica. Although the potential for the use of amica curiae exists already in Australia, there is little in the way of rules of procedure or even case law to assist the courts in the use of the procedure, or to ensure that groups which should be entitled to participate as amica are not denied leave under the currently unlimited (and hence virtually unreviewable) discretion of the court.

Amica curiae in the United States

Amica curiae in the US are generally used as partisan advocates.[4] Representatives of government, professional and occupational groups and non-governmental public interest groups (for example consumer groups, minority groups, civil liberties organisations, church groups etc.) use the amica curiae device most regularly. The procedure is very common, and involves the presentation of a written brief to the court; oral argument is permitted only in 'extraordinary circumstances' At the Supreme Court level, the role is formally recognised in Rule 37 which states:

> An amicus curiae brief which brings a *relevant* matter to the attention of the court *that has not already been brought to its attention* by the parties is of considerable help to the court. An amicus brief which does not serve this purpose simply burdens staff and the facilities of the court and its filing is not favoured. [our emphasis]

The criterion is relevance and the focus is on issues that are not already before the court. The very structure acknowledges that matters of relevance to the decision may not always be presented by the parties and that further information could contribute to an informed decision-making process.

Amica briefs are permitted automatically if all the parties consent, otherwise on motion for leave of the court. Importantly, amica briefs may be filed both at the petition stage (equivalent to our special leave) and at the ultimate hearing. This is vital because it ensures all relevant information is before the court when it decides whether a case is of sufficient importance to be argued fully. In an adversarial system where interest groups are dependent on good test cases presenting themselves in the courts it is necessary to ensure that those groups participate at the stage where most matters are excluded from the courts.

The need for women's participation in litigation

There are three types of cases where we believe it is important that women's voices be heard and women's interests be put before the courts, and where this aim could be achieved through the use of an amica curiae role:

- a civil case with an individual woman litigant where the issues are of broad relevance to women (for example, the value of domestic care provided by a wife, *Van Gervan v Fenton* (1992) 109 ALR 283);
- a criminal case where a woman was a victim of crime, in which she would have no right to legal representation or to active participation in the court process (for example, the sex worker rape case *R v Hakopian*);[5] and
- a civil case with no woman directly involved which raises issues of relevance to women (for example, the sex discrimination case brought by a male doctor in relation to a women's health service, *Proudfoot v ACT Board of Health* (1992) EOC 92-417).[6]

The benefits

We propose a more expanded notion of the role of amica curiae that would allow groups representing women to put forward legal arguments relevant to a case for consideration by the court. The use of amica briefs has four major potential benefits for women:

- it would provide a women's perspective on a legal question;
- it would present a social context for decisions;
- it would provide women with a voice in the system; and
- it would be educative for decision makers, and thus assist in validating and informing their decisions.

Proposed expansion of the amica role

It may be possible for women and other public interest groups to utilise the amica role as it currently exists in the Australian context. An item in the *Sydney Morning Herald* (2.12.93) revealed a successful application by a lobby group, Women Lawyers Against Female Genital Mutilation, seeking to be heard by the Children's Court on the possible complications linked to the process. While groups should be strongly encouraged to push for such recognition under the current system, the amica role would be more accessible if it was formally recognised and defined so that courts are more likely to accept the participation of amica curiae. Currently, the courts' discretion is broad and unreviewable and amica participation is rare.

Mode of implementation

To wait for an expansion of the amica role through the common law would be unsatisfactory – it would be too dependent on the particular case before the courts, and women's groups are already hesitant about entering the legal fray. There are two preferable options:

- changing the relevant court rules, or
- legislating for such change.

An express acknowledgment by the courts or the legislature that women's interests are legitimate and should be considered by the courts would boost both women's interest in attempting to be involved in litigation and confidence that the legal system is attempting to address its own limits and biases.

Participation

In our view the role of amica should be confined to public interest groups or governmental bodies or officers. There should not be a right for any individual, corporate or human, to participate in litigation to which he or she is not a party. If participation as an amica were allowed too widely, there would be potential for the courts to become overburdened by the procedure, a result which would detract from the efficiency of the courts and the otherwise helpful role of amica.

Under this restricted approach, we hope to see the formation and participation of a group or groups dedicated to becoming involved in litigation affecting women. Such groups could be modelled on the Canadian Women's Legal Education and Action Forum (LEAF), a body which assists women to mount cases and intervenes in cases which may affect women's rights. LEAF is now a recognised intervenor and appears to have little difficulty obtaining leave from the courts to intervene.[7]

Threshold test

There would need to be a threshold test for the right to make submissions as an amica curiae. First, if both parties consent to the participation of an amica, then the group concerned would be able to participate without the leave of the court; if both parties do not consent, then the leave of the court should be required, as in the US. We consider some guidance should be given to courts as to the kinds of groups that would ordinarily be given leave to act as an amica. We also consider it would be appropriate to indicate to the courts that leave to act as an amica should be given liberally, bearing in mind the need not to hamper the efficient and just conduct of the case. In particular, the court must have an overriding power to prevent the amica procedure being used against the public interest in the limited circumstances where it might jeopardise a litigant's right or access to justice. A good example would be the threat of interference by a pro-life group in a medical negligence suit arising from a termination procedure. The participation of an amica in this situation may be such a disincentive that the woman's right to compensation may never be able to be enforced.

Guidance to the court could take the form of a list of areas in which it would generally be appropriate to allow amica participation. Such a list would be non- exhaustive, and could include:

- gender issues,
- environmental issues,
- race issues,
- human rights issues (particularly those covered by the *Human Rights and Equal Opportunity Commission Act*), and
- other discrimination issues.

There should not be any requirement for a group to demonstrate standing in the technical legal sense, but it must be demonstrated that the group has an interest in the case, either in the principles that may be formulated in the court's decision or the impact that may occur if the court takes a particular approach – whether that interest be pecuniary, social, intellectual or emotional.

The role of the amica in litigation

Participation as an amica should be limited to the filing of written submissions, with leave being granted for oral argument only in exceptional circumstances. Not only does this work with apparent success in the USA, but it provides a good balance between having all issues before the court and yet not hindering, or adding to the expense and length of, the litigation. Recent developments in Australia indicate a growing preference for written submissions, particularly in the High Court.

An amica would have to bear its own legal costs. At the same time, there should be no risk of a costs award against an amica, except perhaps in extraordinary circumstances. This should include the principle that an amica would not be required to pay for the minimal extension of hearing time possibly made necessary by its presence.

Conclusion

An expanded amica role will no doubt attract criticism as a change that could potentially reduce the efficiency of the court system. This criticism can be met by ensuring:

- amica participation is generally through written briefs;
- participation is restricted to groups and not extended to individuals; and
- the court has a discretion so it can refuse leave if, in all the circumstances, the efficiency or justice of the case might be prejudiced.

It may be alleged that material and arguments which might be put by an amica are simply not relevant to the proceedings. This criticism may be dealt with in two ways. First, because the role of an amica would be limited to appellate courts, where it is acknowledged that a law-making function exists.[8] At that level, broad social and policy issues *are* relevant to the determination of the case, which may turn on more than merely the particular factual evidence before the court. Second, the nature of the amica role will not be to call factual evidence particular to any case. Rather it will be to put forward legal arguments and/or information of a social, and perhaps general statistical or factual, nature.

Although it is easy to see from a feminist perspective the great need for issues concerning women to be expressly before the court, such an assertion will often be disputed. The use of amica by women's groups should be promoted as a part of the requirement for the courts to accord procedural fairness, not just to the parties, but to those groups which will be affected by the court's decision. It neatly falls within the requirement that a decision maker should be free of bias and appear to a reasonable observer to be free from bias. In the current climate, a reasonable observer would be justified in having severe misgivings as to the appearance of gender bias in the judiciary, whether or not it is a reality. Allowing women's interest groups to participate as amica curiae would be one way to allay fears that the decision maker was simply unaware of the important gender issues and the potential impact of her or his decision.

References

1. See, generally, Graycar, Regina and Morgan, Jennifer, *The Hidden Gender of Law*, Federation Press, Sydney, 1990; Scutt, Jocelynne, *Women and The Law*, Law Book Company, Sydney, 1990; Dahl, Tove Stang, *Women's Law: An Introduction to Feminist Jurisprudence*, Norwegian University Press, Oxford University Press, 1988; O'Donovan, Katherine, *Sexual Divisions in Law*, Weidenfield and Nicolson, London, 1985.
2. See respectively, *Commonwealth v Tasmania* (the *Tasmanian Dam case*) (1983) 158 CLR 1 at 51; *Parramatta City Council v Brickworks Ltd* (1970) 72 SR (NSW) 642; *R v Murphy (1986)* 64 ALR 498; *United States Tobacco Company v Minister For Consumer Affairs* (1988) 20 FCR 520; *Bropho v Tickner (1993)* 40 FCR 165 at 172-3.
3. See *Corporate Affairs Commission v Bradley; Commonwealth of Australia (intervenor)* [1974] 1 NSWLR 391; *R v Murphy*, above; *United States Tobacco Company v Minister for Consumer Affairs*, above.
4. See Krislov, S., 'The Amicus Curiae Brief; From Friendship to Advocacy' (1963) 72 *Yale LJ* 694.
5. Supreme Court of Victoria, Court of Criminal Appeal, (unreported, 11 December 1991). Other examples: *R v Seaboyer* (1991) 48 OAC 81; *Canadian Newspapers Co. Ltd v AG of Canada* (1985) 17 CCC (3d) 385. For further discussion see Fudge, 'The Public Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles' (1987) 25 *Osgoode Hall Law Journal* 485, 527 ff.
6. The recent High Court decision in *Capital Duplicators Pty Ltd v Australian Capital Territory [No.2]* (1993) 118 ALR 1, a constitutional tax case involving pornographic videos, is also a good example. It was possible that the Court could make an assessment of whether the videos were 'harmful' to the public. Ultimately, the case did not turn on this point, however, we argue that such an assessment would be inappropriate in the absence of representations from women's groups. See Toohey and Gaudron JJ at 42-3. See also the Canadian case *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1, a case involving discrimination against a man on the grounds of citizenship. Intervention was permitted, given the likelihood that the Supreme Court would formulate general statements about the nature of equality rights in the Charter.
7. See Fudge, above.
8. See, for example, McHugh J., 'The Law-making Function of the Judicial Process' (1988) 62 *ALJ* 15; Mason CJ, 'Changing the Law in a Changing Society' (1993) 67 *ALJ* 568; Lord Reid, 'The Judge as Lawmaker' (1972) 12 *JSPTL* 22.

Letters

Dear Editor

I should like to acknowledge Beth Wilson's useful review of my book *Community Mental Health* (in (1994) 19(2) *Alt.LJ* 97) and would like to comment on two matters raised in the review.

With regard to Beth Wilson's point that only NSW was treated in detail in the chapter on law and mental illness I should like to point out that all Australian States' legislation is required to be changed by 1998 in accordance with the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (Report of the National Inquiry into Human Rights of People with Mental Illness* [Burdekin Report] 1993, p.31 and pp.989-1005). These required changes are significant because, as the Human Rights and Equal Opportunity Commission states in its *Mental Health Legislation and Human Rights* (1992: p.1), 'The legislation in every Australian jurisdiction breaches the standards prescribed in the UN Principles in a number of ways. In some jurisdictions these breaches constitute fundamental violations of basic human rights.' Of all Australian States the NSW legislation comes closest to these UN Principles and is therefore the least likely to be changed. This is why it was dealt with at length in the chapter. There seems little point in introducing mental health students to legislation which is unlikely to remain for long on the statute books and therefore I dealt with the other States' legislation in tabular form. Beth Wilson in her review states that the table conveys a misleading impression in regard to the involuntary admission criteria in Victoria. However, even given the potential for oversimplifying the statutory provision for involuntary admission I do not believe the table does convey a misleading impression if the columns in the table are read as a whole, i.e. the criteria for own health/safety, protection of the public are read in conjunction with the existence of compulsory community treatment, the latter defined in the text (p.375) as enshrining the principle of the least restrictive alternative.

Aside from the question of Victorian law, Beth Wilson makes a general point about the text being oversimplified because of the too great a range of topics covered. It is impossible for me as author to pronounce on whether such oversimplification exists as this must be decided by appropriate experts in their fields and by experienced practitioners in community mental health but I believe that it is readily apparent that the range of topics covered was essential if the integrity of the subject were to be fulfilled. Otherwise students would have been presented with an incomplete and unbalanced perspective, highly dangerous in a complex issue such as mental illness.

Alan Puckett
Wagga Wagga