
A toast to

Sally Brown

***Women deserve no less,
men deserve no more.***

I want to look at two arguments, often proffered by the sort of men who say that they are not biased against women; indeed, they love women and have wives and daughters. The first is the argument of the maturing women, an argument particularly attractive to female, as well as male, lawyers and observers. Proponents assert that in the fullness of time female lawyers will assuredly find their rightful place and their rightful part in the milieus where justice and legal power are exercised. The notion of the glass ceiling is a myth. If there are few female silks or women partners in private law practices, if there are few women presidents or members of the executive of different Bar Associations and Law Societies, if there are few women judges, it is simply because the pool of women who have the required seniority is not large enough. All we need do is wait and the natural order will reassert itself.

This argument, which is frequently invoked in the face of evidence of systematic discrimination, has an attractive logic. Besides, it is not completely false.

It was only in 1903 that an *Act to Remove Some Anomalies in the Law Relating to Women* was passed in Victoria, which allowed women to practise as solicitors. That year the first woman to be admitted in the Commonwealth, Ms G. Flos-Grieg, commenced articles. At that time she could not vote in Victorian Parliamentary elections, as women in Victoria only gained that right in 1908, when the *Adult Suffrage Act* was proclaimed. Even then they only gained the right to vote for men; not until 1923 were women eligible to seek election to the Victorian Parliament.

We should not conceal the fact that the situation of women lawyers has singularly improved during the past 20 years, and this corresponds with an appreciable increase in our numbers within the profession. However, it is arguable that the participation of women has itself changed the structure of the profession, so that instead of rising to the top with time, the top is redefined to keep us out.

The arguments against female lawyers have proven surprisingly durable. Biologically-based justifications still predominate, and our biological capacity to procreate is too often re-interpreted and imposed as a limitation. Early attempts by women to become lawyers in the US, Canada and UK were met by arguments that this was against order, morals and decency. Judges found that we should be excluded on the basis that our proper place was the home; more suitable roles were available; we lacked the capacity for logical reasoning; we would wreak havoc with juries and disrupt the proper order of society. And what about clothes and toilets?

Has anything changed ?

Not all these colourful claims are decades old. In an essay in the book 'Investigating Gender Bias, Law, Courts and the Legal Profession', edited by Joan Brockman and Dorothy Chunn, Maureen Maloney, Dean of Law at the University of Victoria in British Columbia quotes Lord Denning who had this to say about equality:

The Honourable Justice Sally Brown is a judge of the Family Court of Australia.

This speech was delivered to the Feminist Lawyers' Annual Dinner on 10 December 1993. It was not prepared for publication and is not the product of original research. It draws heavily on published and unpublished papers by a number of academic writers, particularly Dr Sheilah Martin, Dean of Law at the University of Calgary, and Professor Lyn Smith, Dean of Law at the University of British Columbia.

We ought to remember that there has been one time previously in the history of the world when women achieved a considerable measure of equality. It was in the Roman Empire, and it should serve as a warning of the dangers to which equality may give rise . . . This freedom proved to be disastrous to the Roman Society. Morals decayed. The marital tie became the laxest the Western world has seen. Bertrand Russell has expressed the position in a sentence; 'Women who had been virtuous slaves became free and dissolute, divorce became common, the rich ceased to have children'.

And Lord Denning ended with a customary flourish:

This decay of morality was indeed one of the factors in the fall of the Roman Empire. Let us look upon this and take heed.

We are often told that we should not complain because things are somehow better now. This is true in a limited sense, but better is a relative concept. Better relative to what and to whom? Is the scale good, better, best or is it something more like terrible, bad, less bad, almost good. The tardy removal of a limited number of the more obvious barriers is a very limited form of progress, and as Dr Sheilah Martin from the University of Calgary asserts, lawyers would certainly counsel their clients against accepting such a disadvantageous settlement if they truly believed their clients had an entitlement to equality and this was all that was offered.

The statement that 'things are better now' can be simultaneously self-congratulatory and renunciatory, taking the credit for changes but disclaiming the need for future struggle. If the operative belief structure is that generally there is sex equality in the profession but a few problem areas remain which will disappear with time, examples of existing exclusion will be defined and potentially dismissed as isolated exceptions to the general rule of inclusion.

I think that many of the male lawyers who endorse this view may have internalised the 19th century cultural expectation that women are not supposed to be lawyers. If this is your starting point it is easier to claim that we should be thankful for the gains that have already been made, and dismiss goals of numeric equality, structural change and full participation as an alarming set of circumstances which simply go too far. The motives for women's endorsement are perhaps more complex. At best they may be based on a preference for allowing equality to simply evolve with the passage of time, without further action or turmoil. If you take this view, reform is not something for which you are responsible; you do not have to confront the reality of inequality or take risks for other women by speaking out when you know there are real costs for doing so. At the other end of the spectrum are women who are happy to become one of the dominant insiders.

Exclusion

The process of exclusion is about power and privilege; it is a process which involves a hierarchy between the dominant insiders and the excluded outsiders. It is about power because someone has the ability to decide who receives what. In the case of the legal profession, the male insiders defined women as outsiders, as different, and made them both separate and unequal. The process is also essentially political because it tends to confer on the included what it withholds from the excluded. When a process simultaneously creates burdens and distributes benefits, the resulting inequalities do more than unfairly disadvantage the excluded; they actually privilege those with the power to exclude. One needs to focus not only on the disadvantaged but also on the insiders who seek to retain their entitlements and further entrench their opportunities. If the men who endorse this position (and the few women allowed to be their honorary



The Honourable Justice Sally Brown

brothers) were to acknowledge that they have controlled the legal profession, limited competition through exclusion and set the standard mostly in their own image, it would be very difficult for them to justify their elevated positions on the basis of their individual or collective merit.

One of my friends says that the only thing that the passage of time will do is make us old. Change requires individual action, personal responsibility and hard work. One of the hardest things for both men and women lawyers to accept is that passive acceptance of a flawed status can contribute to the creation of disadvantage. The faces of gender bias are intensely personal ones. Whilst we must think systemically we must act individually.

A second popular argument at the moment is that the reason women have not worked their way through the ranks of the legal profession is that they are not prepared to work hard enough. This is particularly relevant to the Bar, but also to women practising in private law firms. The *Sydney Morning Herald* (4.12.93) had an article on John Coombs, the retiring President of both the New South Wales and Australian Bar Associations which stated:

Coombs maintains he has been a keen supporter of women at the Bar, although given their numbers (just 115 out of 1756 barristers in Sydney) this is one area where he has not been successful. Coombs suggests that although 50 percent of law students are women, they are not willing to make the personal sacrifice necessary to survive. 'The job is so demanding that you have to be very dedicated to it. My wife used to say the Bar is not just your job it's your mistress too, and it is like that.'

The article goes on to say that his own family have endured his obsessions and that his daughter, now 23, remembers that if she was especially missing him when she was a little girl he used to take her to his chambers for the day and even into court with him.

Whose personal sacrifice is he talking of? His own, or that of his wife and children? If it is his, I assume it is not spending time with his children, contributing financially but not otherwise to family life. What is the equivalent sacrifice for women? Perhaps it is not to have children or a family life.

Changing the workplace

You will not be at all surprised to learn that studies of practising solicitors and barristers in Canada have shown that men, whether they have children or not, work about the same number of hours. Both are likely to say of women that if they can't stand the heat they should get out of the kitchen. As one Canadian writer has said, a more thoughtful reply would be to ask what is wrong with the kitchen that so many bright, competent and committed people find it difficult to work there. As women have entered the workforce, both women and the workforce have changed. What still has to change are the workplace and men.

Judge Judith Kaye has challenged law firms in the United States to apply their enormous resources to provide leadership in creating an integrated workforce of men and women lawyers which would be a model for all society as it struggles towards gender equality. She sees three identifiable phases in the participation of women in the profession. The first was the pioneering stage when law firm doors were barely opened to women, which in Australia probably includes women who became lawyers before 1970. Once the entry barriers fell there was a second 'super woman stage' when women lawyers were intent on conforming to or even outstripping the standards that had been set by the men, on remaining childless or as she says 'willingly revising loan agreements in the labour room while giving birth'. Judge Kaye believes women have reached a third stage where the hard won prize is being examined and weighed against the rest of life. Women in this stage may begin to question the price being exacted for what may be received in return, and many have and will drop out. Obviously, the stages overlap so that some women may be in the stage of questioning the price while others are performing the feats of super women, and others may be experiencing their position as pioneers in some areas of legal practice. In this room there may be women who

have in fact experienced all three stages at different points in their careers.

I would assert that law schools and professional organisations as well as the judiciary need to recognise that treating women as equals is not just a matter of good manners, good taste or being nice, but is a matter of professional responsibility and ethics. Gender equality should be seen as a norm of conduct such that a lawyer who violates it is viewed in the same way as a lawyer who cannot be trusted on an undertaking. Equality before and under the law is a core value of our justice system; it is a human right. Handbooks or codes of practice should include explicit statements about equality rather than relying on the interpretation of general statements such as 'the lawyer must discharge with integrity all duties owed to clients, the court, other members of the profession and the public'.

I would assert that there is a duty on lawyers to refrain from discrimination and to promote equality. The harm done to victims of discrimination is real and enduring. The freedom to harm others by discriminating against them has been restricted late in this century in the same way that the freedom to harm others by selling them defective goods was restricted earlier in it. Those lawyers who say that the offence that people feel when treated with disrespect based on their gender, race, disability or sexual orientation is only a matter of social nicety, must realise that it also carries the risk of seriously affecting the respect in which the legal profession and the justice system are held.

This has been a very serious speech for a Friday night. It was Gloria Steinem who said that women can either be feminists or masochists and the choice is up to us. To have sat so politely listening to this suggests it may be possible to be both. May I conclude with a toast. To Justice — women deserve no less, men deserve no more.

TIM McCOY TRUST 1994 TIM McCOY DINNER

The Trustees invite you to join them at the annual dinner to commemorate the life and work of Tim McCoy. This year's dinner is to be held at the Hawthorn Social Club on Friday, 11 November.

Guest Speaker: Sharon Firebrace
Victorian Co-ordinator, Australians for Reconciliation
National & Victorian Aboriginal Businesswoman of the Year

We have a limit of 150 places and each year is sold out, so it is vital that you book. Please phone Allan Nicoll or his secretary, Pam Stange on 607 0342 to book. If you are organising a table, please provide us with the names of each person on the table. A table seats 10. Vegetarian meals are available - tell us when booking. The club is fully licensed for bar and table service. If you BYO, corkage is charged.

Time: 7.30 p.m.

Date: Friday, 11 November 1994

Venue: Hawthorn Social Club, 37 Linda Crescent, Hawthorn

Cost: \$35

The Trustees will announce the winner of the fourth 'Tim McCoy Award' for a special contribution to the community and legal aid issues. The prize is \$1000 awarded to an individual or organisation that the trustees feel best reflect the ideals that Tim McCoy worked for.