Keynote Speech by Justice Sally Brown delivered to the Victorian Women Barristers' Association*

This speech was not prepared for publication. It draws heavily on published and unpublished articles by a number of Canadian academic writers including Dr Sheila Martin, Professor Kathleen Mahoney, Professor Mary Jane Mossman and Professor Lynn Smith, to whom I am indebted.

It is not new to suggest it may be hard for judges to be impartial. Lord Scrutton is often quoted as having said "... the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish". This comment was made in the context of class bias.

Similarly, judges have written of innate biases towards particular classes of arguments. Lord MacMillan wrote that: "The ordinary human mind is a mass of prepossessions inherited and acquired, often nonetheless dangerous because unrecognised by their possessor ... every legal mind is apt to have an innate susceptibility to particular classes of arguments".

What may be new is to question judicial use of stereotypical assumptions and untested beliefs, which may result in us tending to judge people on the basis of their group membership rather than their individual characteristics. It is important to question whether the traditional safeguard against judicial error, the appellate process, can deal adequately with manifestations of this sort of bias.

You do not want a history lesson, but it is worthwhile to look at the long, systemic and sometimes systematic exclusion of women from the law and legal profession to better appreciate dynamics and consequences of it in the present. Perhaps lawyers are particularly susceptible to established norms, as the notion that prior acts are precedents is so entrenched in our thinking. For whatever reason, lawyers seem particularly resistant to change, and the response that "this is just the way things are done in the law" is often the response if change is mooted. Customs very easily develop into traditions which are stronger than law, and tend to remain unchallenged long after the reason for them has disappeared.

If you are feeling glum, remember that for many years women were not allowed to be lawyers and couldn't vote. Restrictions on our ability to practise in Victoria were removed in 1903 when an A*ct to Remove Some Anomalies in the Law Relating to Women* was passed. At that time women could not vote; the male Members of Parliament who passed that legislation were elected by men only.

In 1908 the *Adult Suffrage Act* was proclaimed, giving Victorian women the right to vote in State elections, but only the right to vote for men. It was not until 1923 that women were eligible to seek election to the Victorian Parliament.

When Miss G (Flos) Greig, the first woman in the Commonwealth of Australia to be admitted to practice, commenced her articles in 1903 she could not vote in State elections, or stand for the Victorian Parliament. The first woman elected to a Parliament in Australia was Edith Cowan in Western Australia in 1921; the first women elected to Federal Parliament were Dorothy Tangney to the Senate and Enid Lyons to the House of Representatives in 1943.

A Canadian Royal Commission on Equality and Employment in the 1980s defined discrimination as an arbitrary barrier which stands between a person's ability and his or her opportunity to demonstrate it. If there are barriers to women's fair and equal participation in the legal profession this constitutes discrimination.

When women first sought admission there were lots of splendid judgments in the United States, Canada and the United Kingdom which asserted that it was against order, morals and decency for women to become lawyers. Judges found that they should be excluded on the basis that their proper place was the home; more suitable roles for women were available; that women lacked the capacity for logical reasoning; that they would wreak havoc with juries and disrupt the proper order of society. And what about clothes? And toilets?

I say that although the formal barriers to women's entry into the profession have long been removed, many of these stereotypical views still operate as a starting point for how some people think of it. There is still a tendency for men to define women in the law as outsiders, as different and as if acts of generosity are necessary if they are to be included. The language encapsulates this; women were *given* the vote and *allowed* entry into the profession. By whom?

Now barriers to women's careers in the law are usually ascribed to legal practices' inability to accommodate female parents with family responsibilities. If you don't have such responsibilities it is assumed you soon will, to such an extent that one almost needs proof of menopause before the barriers lift.

This is particularly relevant to the Bar. Last Saturday's *Sydney Morning Herald* had an article on John Coombs, the retiring President of both the New South Wales and Australian Bar Associations. The article states:

> "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 ex-wife used to say that the Bar is not just your job, it's your mistress too, and it is like that.' "

It goes on to say that his own family have endured his obsession 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.

If Mr Coombs is quoted accurately and did speak of personal sacrifice, to whose sacrifice is he referring? His own? Or that of his wife and children? If it is his own, and the sacrifice was an inability to spend time with his children, you might ask what is the equivalent sacrifice for a female barrister? Is it not to have children?

Equality before and under the law and equal protection and benefit of the law are central to the debate. If we keep this

in mind we can ask what Dr Sheila Martin, Dean of Law at the University of Calgary, calls "How Could" questions.

How could a senior partner pander to the perceived prejudices of clients by withholding or withdrawing a file from a woman rather than defend the competence of a female colleague?

How can law firms hire out their own lawyers to draft employment equity policies when they have none themselves?

How could a conference panel on the changing demands faced by lawyers have only male speakers?

In a way, it was easier to argue the case when the exclusion of women from the legal profession was categorical, total and formal. Today, aspects of exclusion are systemic, circumstantial and less formal and when blatant forms of discrimination become unacceptable, they often go underground.

The arguments against female lawyers have proven surprisingly durable or have been retooled for modern times. Biologically-based justifications still predominate and our biological capacity to procreate is too often reinterpreted and imposed as a limitation.

We are often told that we shouldn't 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 Sheila Martin asserts, lawyers would certainly counsel a client against accepting such a disadvantageous settlement if they truly believed that client had an entitlement, and this was all that was offered.

Many male lawyers who think that there are already enough women in the profession and that they have sufficient opportunity, 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.

Justice Rosalie Abella of the Ontario Court of Appeal says that equality is evolutionary and that what constitutes adverse discrimination changes with time, with information, with experience and with insight. People say "things are better now". They are. But the statement can be simultaneously self-congratulatory and renunciatory; taking the credit for changes but disclaiming the need for future struggle. Such statements are based on a preference for allowing equality to simply evolve with the passage of time, without further action or turmoil. Sometimes they are proffered as the reason why the profession can take a rest from reform and many of us ourselves may proffer them as a reason why we do not have to confront the reality of inequality, or take risks for other women by speaking out when we know there are real costs for doing so. If the operative belief structure is that generally there is sex equality in the profession, but a few problem areas remain, examples of existing exclusion will be defined and potentially dismissed as isolated exceptions to the general rule of inclusion.

SOME IDEAS TO FOSTER CHANGE

Don't resort to past practice

The only way a discriminatory past can contribute to an egalitarian future is if we learn from and refuse to repeat the lessons of history. We should therefore expect that the changes required to achieve genuine equality in the legal profession will be like nothing we have seen before, troubling as this is to a profession schooled in precedent. We must also be prepared for some suggested solutions not to work or to raise unanticipated problems. There is no simple solution, and those who foresee a one-shot remedy will not only be disappointed but may also unjustly label persistent equality-seekers as chronic complainers.

Operate as if we truly believe that women have entitlements in the legal profession

There is a tendency to characterise the unfairness in the profession as a women's issue rather than as a structural flaw. In attempting to make a case that exclusion continues we do so under the very conditions of sex inequality we seek to change, and this itself means that we are sometimes seen as less credible participants. Discrimination in the legal profession must be defined and treated as a problem of the profession rather than a problem of the women who suffer its consequences.

Attention should be focused on what is said, not how it's said

Too easily questions of voice and tone predominate. No good advocate wants to alienate his or her tribunal, but women who press for change are often labelled strident, shrill, angry or upsetting, adjectives which are never applied to women making the case for the status quo.

It is ironic that whilst the stereotype is that women are emotional, we are often denied the opportunity to express anger, especially on our own behalf.

Change requires individual action, personal responsibility and hard work

All that the passage of time will do is make us old. It is arguable that the participation of women has itself changed the structure of the profession's hierarchies, so that instead of rising to the top with time, the top is redefined to keep us out.

One of the hardest things for men and women 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. I suggest we must think systemically, but act individually. The law is essentially a self-regulating profession, and there are many people with the power to effect significant change, both by decision-making authority or moral persuasion. Every lawyer should have a personal commitment to equality.

Cardinal Newman, in a famous letter to the Duke of Norfolk, wrote: "I drink to the Pope - but to conscience first".

May I follow his lead and say:

"I drink to the Law - but to equality first". ❑

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