The Glass Ceiling

Jen Travers*

Abstract

The case for gender equality in the legal profession would seem indisputable, given almost equal numbers of women and men in Australian law schools in 2007. Advocates of gender equity claim women lawyers face a glass ceiling which poses significant barriers to women, who struggle against the force of dominant norms. Its effects are noted both in the crucial early years of their careers and again when women attempt to step beyond the traditional role of employed practitioner into partnership roles and positions of greater power and influence at the Bar and in the profession. Present discussion has focused on whether this is a result of discrimination, or whether there other forces at play in the legal profession. Addressing an arguably narrow aspect of gender, I consider the stinging critique of the adversarial system delivered by a Senior Crown Prosecutor in New South Wales in 2005, and consider its consequences both personally and in a decision in a case of alleged rape in 2007. In promoting victims' rights and citing actual examples in the Sir Ninian Stephen Lecture,

* LLB, LLM (Adelaide); jen.travers@adelaide.edu.au; Law School, University of Adelaide, SA, Australia, 5005. I would like to thank Anne Hewitt, Dr Paul Babie and my other colleagues at The University of Adelaide for their valuable feedback.

she arguably put the community before her own ambition. She aspired to join the senior echelons of the Bar but was not successful until six months after the appeal decision in the rape case in 2007, in her sixth application for silk, notwithstanding widespread support for many years. Through this example I reflect on attempts to create and incorporate initiatives to promote gender equality in the legal profession. Without such reform, the glass ceiling threatens to undermine public confidence in the legal system. Successful reform will greatly benefit Australia in that only then would the legal profession truly reflect the diversity of our society and help us to achieve our strategic goals in terms of retention and advancement of women lawyers and of the profession generally.

I Introduction

Advocates of gender equity claim women lawyers face a glass ceiling, as yet unshattered. Yet it is not a new phenomenon, nor one which is difficult to recognise. The phrase glass ceiling was first recorded in 1990.[1] It describes the phenomenon whereby women progress in the labour market up to a point at which there is an effective ceiling or limit on their career progressing. The existence of a glass ceiling would imply that women's career prospects fall behind those of men.[2]

Thirty per cent of Australian lawyers in practice are women.[3] Yet the representation of women at high levels in the profession is extremely low. This is not because there are no women lawyers, as there are many graduating from our universities each year.[4] The profile of law students in Australia today is

---

1 Thomas Bretscher, Dominique Buchholz, Ruth Schlittler, Joëlle Seiz and Simone Zahler, 'John Enjoys his Glass of Wine - Are there any English Words at all?' (2004) 1 *eHistLing* 59, 70 <http://www.ehistling.meotod.de/data/papers/group_e_pub.pdf> at 5 September 2007.

2 James Albrecht, Anders Bjorkland and Susan Vroman, 'Is there a Glass Ceiling in Sweden?' (2003) 21(1) *Journal of Labor Economics* 145.

3 Margaret Thornton, 'Feminist legal theory: An introduction' (2003) 83 *Reform* 5, 9.

4 Ibid, where approximately 50 per cent of Australian law students are women.

similar to the profile over a dozen years ago, when in 1994 the representation of women graduating from law schools was 50 per cent.[5]

In this paper I suggest that something must be either discouraging women from working in law or preventing their promotion. This is a serious problem. This article begins with an assessment of statistics about the legal profession and finds there are issues of both the number of women practicing in the law and the quality of work they are assigned or on which they are briefed. My present discussion focuses on whether this is a result of discrimination, or whether there are other forces at play in the legal profession.

The question arises whether there is an explanation for a sharp decline in the numbers of women in the profession after four to five years of practice.[6] The effects of barriers to career progression of women are noted both in the crucial early career years and again when women attempt to step beyond the traditional role of employed practitioner into partnership roles and positions of greater power and influence at the Bar and in the profession.

Generally I reflect on the Australian experience, although some studies of interest from the United States of America are included. Whilst this article does not test any hypothesis about why women leave the profession, it considers the implications for women of career barriers and looks at future directions for the legal profession. I open discussion about these questions in the hope that this will inspire efforts to understand the issues and that reform will embody diversity and thus accomplish significant increases in retention and advancement of all lawyers and of women lawyers in particular. In a profession

---

5 Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, Part II (1994) 176.

6 See Part IV below and Margaret Hetherton, *Victoria's lawyers: the second report of a research project on "Lawyers in the community"* (1981) 155-156 notes the trend of interruption in the career of some women lawyers is an effect of discrimination.

which upholds a responsibility to maintain justice and equality of opportunity, every law firm, Bar chamber and the entire cohort of legal institutions must embrace gender equality principles and dedicate themselves to developing a legal system which fosters greater equality in their ranks.

As a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Australian government has undertaken responsibility to implement and report on activities to achieve equal opportunity for women in all aspects of life. CEDAW's definition of equality is far broader than treating all people in the same way, as that operates

> to perpetuate rather than eradicate injustice. True equality can only emerge from efforts directed towards addressing and correcting ... situational imbalances. It is this broader view of equality that has become ... the final goal ... for recognition and acceptance of human rights of women.[7]

II Glass Ceiling

Data shows that women are not progressing through the ranks of the legal profession in proportion to their numbers, nor do they become partners at the same rate as men.[8] Further, they are more likely to leave the profession than men.[9] These statistics are important for obtaining a clear understanding of the extent of gender bias within the profession. Whilst it must

---

[7] The Office for the High Commission of Human Rights, *Discrimination against Women: The Convention and the Committee,* Fact Sheet No 22 (1995). CEDAW is the main international instrument that recognizes and protects the rights of women.

[8] Neil Oakes 'The Economics of Attrition' (2007) FMRC Legal, <http://www.fmrclegal.com/THE_ECONOMICS_OF_ATTRITION,6,61.html> at 22 October 2007. See also: Australian Law Reform Commission, *Equality Before the Law: Women's Equality,* Report No 69, Part I (1994) [2.24] and for the position in the United States of America, see below Part II C *Women Lawyers in the United States of America.*

[9] Data suggests the overall attrition rate of women lawyers is greater than that of men: Margaret Hetherton, *Victoria's lawyers: the first report of a research project on "Lawyers in the community"* (1978) 163.

be recognised there are other factors which may contribute to the absence of women in the law, such as the nature of the work, lack of flexibility and the nature of the clientele, this paper does not address these other factors.

The case for gender equality in the legal profession would seem indisputable, given that there are about equal numbers of women and men in Australian law schools.[10] Yet women continue to face difficulties, perhaps even more than their male counterparts, in terms of access to career opportunities in the law. Such hindrances pose significant barriers to women in the legal profession, both in the crucial early years of their careers and again when women attempt to step beyond the traditional role of employed practitioner and into partnership roles and positions of greater power and influence in the profession.

Whilst examining issues of gender equality in the law, at the launch of Australian Women Lawyers ten years ago, Justice Gaudron quipped: '[t]he trouble with women of my generation is that we thought if we knocked the doors down, success would be inevitable'.[11]

In that address her lucid thesis was that women are different from men. Hence, rather than copy male work patterns in the legal profession, women need to "own" their difference from male lawyers. Yet rather than being distracted by our differences, it is proposed in this article that we proactively chart our own pathway.

A Women Barristers

In 2006 Australian Women Lawyers undertook national research which provided statistical evidence of the problem of the glass ceiling, revealing that women advocates in the law, the "speaking" side, receive disproportionately less court

---

[10] Thornton, above n 3, 9.

[11] Hon Justice Mary Gaudron, 'Speech to Launch Australian Women Lawyers' (1998) 72 *Australian Law Journal* 119, 121.

work (19.2 per cent) and, in all likelihood, less of the significant court work than their male counterparts.[12]

Women are 'excluded or feel alienated from male social networks, lunching and drinking rituals and other social events',[13] which provide opportunities to get to know and to learn from more experienced barristers. This is a direct impediment for women attempting to rise to the highest echelons as advocates and to secure the opportunity to appear proportionately in superior courts across Australia. Both as a percentage of the total numbers (ie of women and men) and as a percentage when measured against the actual numbers of women at the Bar, the Victorian experience for women barristers mirrors the national experience.[14] Women barristers are underrepresented in appearances across the jurisdictions. The survey results indicate there is substance to anecdotal reports of the persistence of gender briefing patterns. Women are not being briefed to represent parties in more senior or complex matters,[15] yet women have a fundamental right to be treated the same as men, regardless of gender, under models of formal equality.[16]

---

[12] Current figures from Australian Women Lawyers, *Gender Appearance Survey Information* (2006) indicates the total number of appearances in combined surveys of women presenting in court - 19.2% of women, compared to 80.8% of men; see <http://www.womenlawyers.org.au/documents/Final_Gender_Appearance_Survey-August_2006.pdf>. See also: Victorian Women Lawyers, Victorian Law Foundation and Law Institute of Victoria, *A 360 Degree Review: Flexible Work Practices Confronting Myths and Realities in the Legal Profession* (2005).

[13] Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996) 167.

[14] Chief Justice Marilyn Warren AC, 'Speech given by the Honourable Marilyn Warren, AC Chief Justice of the Supreme Court of Victoria on the Occasion of the Tenth Anniversary of the Victorian Women Lawyers' (Speech delivered 24 August 2006) 4.

[15] The full results of the national survey and an explanatory memorandum are published on the AWL website: <http://www.womenlawyers.org.au/documents/Final_Gender_Appearance_Survey-August_2006.pdf> at 28 August 2007.

[16] Geoff Airo-Farulla, 'Dirty Deeds Done Cheap: Deconstruction, Derrida, Discrimination and Difference/ance in (the High) Court' in Ian Duncanson (ed), *Legal Education and Legal Knowledge* (1991) 102, 109.

B Women Solicitors

In 1976 only 9.3 per cent of respondents to a Victoria Law Foundation major research project, who had practicing certificates, were women.[17] But thirty years later, there were many more lawyers in practice[18] and by 2006, in the large and mid-tier firms, 62 per cent of junior employed solicitors are women.[19] It is difficult to reconcile these last two figures with the data about the percentage of women solicitors who have become partners working in legal firms.

Across Australia, a partner in a law firm is typically male, working full-time and has already worked at the firm for several years prior to becoming a partner, yet just 14 per cent of partners are women.[20] Australian women remain under represented in senior positions across the profession. Feminists regret these outcomes are not necessarily synonymous with an acceptance of either the reformist[21] or the critical dimensions of feminist legal theory.[22]

C Women Lawyers in the United States of America

In 2003, in an initiative concerning women in the legal profession, a commission reported on a series of hearings on gender equity issues facing women lawyers. Women described the challenges they face in climbing to partnership status in major law firms and to the highest level of authority and responsibility as barristers. In San Francisco the commission heard evidence that women lawyers find their careers hampered by outdated notions of their ability to juggle family

---

17 Hetherton, above n 9, 24.

18 In New South Wales, for example, in the seven years from 1999 to 2005, the number of lawyers rose by 36 per cent. It rose from 14,819 solicitors in 1999 to 20,200 solicitors in 2005: New South Wales Law Society, 2006.

19 Oakes, above n 8.

20 Ibid, and see also Victorian Women Lawyers, Victorian Law Foundation and Law Institute of Victoria, above n 12: 14 per cent of partners in firms are women, 280 women in law have reached partnership in firms.

21 See for example Australian Law Reform Commission, *Equality Before the Law: Women's Equality,* Report No 69, Part I (1994).

22 Thornton, above n 3.

responsibilities and legal practice and that "old boy networks" still effectively keep women from holding high-profile positions in bar associations and other areas of employment which are often funnels for promotion.[23]

The study identified gender bias in the profession and the existence of a glass ceiling. It concluded there are two main reasons why it must be destroyed: on grounds of equity and for commercial or economic purposes.[24] These findings suggest that barriers to the advancement of some practitioners have a deleterious effect on the profession. One very real gender issue that male counterparts do not face is child bearing[25] whilst at the same time seeking career advancement. Yet the glass ceiling is also an issue in economic terms for the entire legal profession, as suggested in the 2003 study[26] and as we shall see in Part IV when we discuss the high cost of attrition in the profession.

In another study in the United States of America, in 2006, the Women's Bar Association (WBA) of the District of Columbia identified the presence of a glass ceiling which prevented the advancement of women lawyers to the highest levels of the legal profession. The WBA sought to identify what legal firms and women perceived to be the stumbling blocks in moving more women farther faster. Secondly, the WBA sought to identify what District of Columbia firms were doing to keep and promote women? And finally, could the answers to those two questions assist in discerning new ideas and better ways to stem the departure of women from law practice?[27]

---

[23] Margaret Graham Tebo, 'Pounding on a Glass Ceiling' (2003) 89(10) *American Bar Association Journal* 84, concerning the report prepared by the American Bar Association Commission on Women in the Profession.

[24] Ibid, 84.

[25] Although clearly both males and females can adopt children.

[26] Tebo, above n 23: the report noted the negative impact upon legal profession of the glass ceiling in 'commercial' or economic terms.

[27] The Women's Bar Association of the District of Columbia (ed), *Creating Pathways to Success – Advancing and Retaining Women in Today's Law Firms* (2006) 1, 1.

In addressing the first two questions the WBA studied and analysed the data from their survey. The third provided material to chart a plan to advance successful law practices by developing guidelines aimed at advancing successful women. The WBA noted that 70 per cent of women graduates and 70 per cent of male graduates enter law firms after graduation. In 1995 14.2 per cent of women and 85.8 per cent of men were partners in law firms and in 2005, 17.2 per cent of women and 82.8 per cent of men were partners.[28]

It is clear from this study that in ten years, there has been no significant change in the representation of women in partnership. Recent years are witness to the fact that women are *entering* the profession. So it is timely to look beyond an assessment of the quantity of women qualified to work as lawyers to identify other possible reasons for the glass ceiling.

III Turning a mirror on ourselves

In this section we consider some implications of the fact that the demographic of the legal profession in Australia is changing, with particular focus upon women barristers. Australian legal scholars have turned their attention to evaluate the impact of the dramatic change in the gender profile of the legal profession in the past 40 years.[29]

As in the United States of America, it has become evident that there is dissatisfaction among women lawyers which extends beyond the quantity to the quality of legal work and assignments offered. There are repeated complaints that

---

[28] Ibid, 6.

[29] See for example, Keys Young Consultants, *Research on Gender Bias and Women Working in the Legal Profession: Report* (1995); Carrie Menkel-Meadow, 'Feminization of the Legal Profession: the Comparative Sociology of Women Lawyers', in Richard Abel and Philip Lewis (eds) *Lawyers in Society: An Overview*, (1995); Sharyn Roach Anleu, 'Women in the Legal Profession' (1992) 66 *Law Institute Journal* 162; David Weisbrot, *Australian Lawyers* (1990) 87-88.

women are not being briefed in more prestigious, complex litigation, either as junior or senior Counsel. In fact, in appeal work in the High Court, between 1996 and 2003, the number of women advocates addressing the court decreased, which could have been caused by a variety of factors, but gives pause for concern in a profession with so many women entering its ranks each year.[30]

In 1999, conclusions based on research commissioned and funded by the Victorian Bar Council[31] were published which clearly demonstrated the many ways that gender *is* relevant to practice as a barrister.[32] The research concluded that gender bias operates both in attitude towards, and treatment of, women barristers. Further, it recognised that gender has played a negative role in the career prospects of women at the Victorian Bar.

For many years women have publicised the urgent need for professional associations such as our Law Societies to take the lead in promoting women's participation and employment in the profession by acting to address gender issues, for example by developing equal opportunity and sexual harassment policies and procedures.[33] We will consider an aspect of this issue in Part IV.

---

[30] See for example: Justice Mary Gaudron, 'Speech for Women Lawyers Association of New South Wales 50th Anniversary Gala Dinner' (Speech delivered at NSW Parliament House, Sydney, 13 June 2002); Justice Michael Kirby AC CMG, 'Lesbia Harford Oration 2001: Women in the Law – What Next?' (Speech delivered to Victorian Women Lawyers Association, Melbourne, 20 August 2001) 1; Justice Michael Kirby AC CMG, 'Women in the Law – Doldrums or Progress?' (Speech delivered to Women Lawyers of Western Australia, Perth, 22 October 2003) 2.

[31] This research was undertaken under the auspices of the Centre for Employment and Labour Relations Law, Faculty of Law, The University of Melbourne, and the Justice Research Centre (which is an independent, public interest research organisation established by the Law Foundation of New South Wales).

[32] Rosemary Hunter and Helen McKelvie, 'Gender and Legal Practice?' (1999) 24(1) *Alternative Law Journal* 57, 61.

[33] Linda Kirk, 'Women in the legal profession' (1994) 16(7) *Law Society Bulletin* 10, 12.

It is clear from these limited studies that there are obstacles in the career paths of women in the law, both in Australia and overseas. The consistent statistics suggest that the barriers which women face are more than folklore. This research provides the context for some deliberations about gender equality in the legal profession.

IV Discrimination?

It is against this background that I now turn to consider whether there is an explanation for the existence of the glass ceiling.

A Attrition

As earlier discussion demonstrates, there is a dearth of women in senior ranks of the legal profession. This, in part, is explained by women leaving the profession in large numbers in their middle career years, as evidenced in 2002 New South Wales Bar statistics which showed that the number of women in practice between five and nine years was almost half the number of women in practice for up to four years. The figure dropped from 108 to 57 women during these periods.[34] Women were at the Bar younger[35] and in more junior roles than men.

That women leave the practice of law is not restricted to barristers. Recently Australian legal firms have identified an attrition rate of around 30 per cent per annum, caused in part by the failure of the legal profession to adapt to the presence of women and its changed demographic.[36] Legal firms need to recognise "the new norm" of attrition, as it has 'a significant negative economic impact', with the estimated cost of replacement of a skilled, mid career lawyer of $300,000.00.[37]

---

[34] NSW Bar Association, *NSW Bar Association Statistics Booklet: Volume 3* (August 2002), 6.

[35] The mode age of women at the NSW Bar was 35–39 years of age: ibid.

[36] Oakes, above n 8.

[37] As estimated by a top-tier law firm. Several large law firms spend approximately $2 million annually on placement agent fees alone, replacing lost talent: ibid.

In the United States of America, a 2006 study looking at the reasons that women leave the legal profession, concluded they do so when their capabilities are not valued, or their contributions are neither acknowledged nor recognized.[38]

Earlier, a study undertaken in Australia by The Victoria Law Foundation looking at the trend of interruption in the career of (some) women lawyers, notes it is an effect of discrimination.[39] It would be interesting to see an Australia wide study being undertaken, as the 1981 Victorian report arguably lacks currency. Although it would be an interesting topic to research, it does not form part of this inquiry.

B Legislation

Discrimination against women in employment in Australia is prohibited by the *Sex Discrimination Act 1984* (Cth).[40] This legislation applies to ensure that both current and potential recruits and partners are not denied opportunities in a firm, for example to become employees or partners, or to be promoted if they are already a member of the firm.[41] It is unlawful to discriminate on certain grounds including sex, marital status, pregnancy or potential pregnancy. Sexual harassment and dismissal from employment on the basis of family responsibilities is also unlawful, as is victimization associated with any of these grounds.

In 2004 the High Court's Justice Michael McHugh disparaged the 'discriminatory, systemic and structural practices of the

---

[38] The Women's Bar Association of the District of Columbia (ed), above n 27, 6.

[39] Hetherton, above n 6, 155-156.

[40] Whilst individual states and territories also have anti-discrimination legislation, such as the South Australian *Equal Opportunity Act 1984* (SA), and the *Equal Opportunity for Women in the Workplace Act 1999* (Cth), which require that an employer provide equal opportunity for women in the workplace by applying appropriate workplace programs, it is not proposed to discuss that legislation.

[41] See for example *Hickie v Hunt and Hunt* [1998] HREOCA 8, in which Marea Hickie successfully alleged discrimination on the ground of sex, by her former employer, Hunt & Hunt, Lawyers.

legal profession ... which prevent female advocates from getting the same opportunities as male advocates'.[42] Chief Justice Warren has made similar comments, and has argued the gender imbalance in the legal profession is a problem for the legal profession and 'for society at large' which 'necessitates the engagement of all the [Australian] community to secure a solution'.[43] Such conclusions about the importance of gender equality are consistent with many domestic and international equality norms. In Australia the existence and variety of sex discrimination legislation reflects society's view of the fundamental importance of women's role in Australia. The operation of impediments to womens' progress, which include discrimination in their middle career years, indicates

> that the discrimination within the legal profession is structural and entrenched. The challenge to the *Sex Discrimination Act 1984* (Cth) is to be able to redress sex-based discrimination in this form.[44]

The impaction of equality legislation will be discussed below in Part VI. It is timely for women to acknowledge their opportunities to influence and create change, and shape issues of importance, given their presence in their profession.

V The Legal Profession

This section explores some of the values and behaviours – the 'culture' – in the legal profession and their impact upon its stakeholders. It is inevitable that multiple forces contribute to the problem of gender inequality. For example, studies of gender bias and the law have identified the culture of the legal profession, both in private law firms and at the Bar, as an

---

[42] Justice Michael McHugh, 'Women Justices for the High Court' (Speech delivered at the High Court Dinner, Perth, 27 October 2004) 2.

[43] Chief Justice Marilyn Warren AC, above n 14, 4.

[44] Sally Moyle and Marissa Sandler, 'Effective law effecting change: The Sex Discrimination Act and Women in the Legal Profession' (2003) 83 *Reform* 10, 11.

impediment to women's success in the law.[45] One commentator decries the 'discriminatory systemic and structural practices' which typify the 'tribal mentality' of the legal profession.[46] Discrimination against women in the legal profession occurs in the context of the prevailing cultural attitudes and behaviours of the profession itself. It is interesting to consider what that culture consists of, so as to identify whether that can assist us to understand the complex barriers and difficulties women lawyers face.

A The amoral lawyer

There is lively debate over the morality of lawyers. Legal scholars have different views regarding the suggestion that the lawyer-client relationship requires the lawyer to be amoral and sometimes immoral.[47] But what does this mean?

In this view, lawyers operate in an occupational sphere that requires them to put what would otherwise be considered normal moral judgments out of their minds, in order to fulfil their role as amoral advocates. They are unconnected or unconcerned with distinctions between good and bad. Thus moral considerations of society at large are overridden by the lawyer's duty to serve the interests of their client. In this sense of amorality, one can explain the Watergate scandal which uncovered the involvement of a prevalence of lawyers in a cover up and postulate that this could have been the result

---

[45] Justice Catherine Branson, 'Running on the Edge' (Speech delivered to the Women Lawyers' Association of New South Wales, 15 October 1997).

[46] Carole Caple, 'Women in the Law: is Australia Making Progress?' (2006) 10 (October) Law Council of Australia Journal 2, <http://www.lawcouncil.asn.au/journal/LCA/%40theLCA/2006> at 25 August 2007.

[47] Wasserstrom says of lawyers 'that the lawyer client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind': Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1, 1.

of their role differentiated behaviour necessitating the setting aside of moral considerations.[48]

Lawyers are called upon to have no regard for the character of their client but rather to provide the technical expertise and competence – which the client does not have – to assist them.[49] Because of this disconnect in the legal profession, it was easier for lawyers, used to adopting the amoral stance, to be complicit in the Watergate cover up.

This begs the question whether the amoral world populated by lawyers is a good thing? It seems the popular view outside the legal fraternity is that lawyers should place moral considerations on every aspect of their representation. This suggests that an otherwise beneficial tactic should not be pursued if it is morally questionable.

In support of this view one can point to high profile cases where lawyers have ordered clients to undertake morally repugnant behaviour. Recent illustrations include the Enron bankruptcy[50] which, for example, led one of its Houston-based legal firm of advisors to settle litigation related to the Enron bankruptcy for US$30 million.[51]

Closer to home, the James Hardie scandal, which is one of corporate Australia's worst cases, also involves morally

---

[48] Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976) 301 notes that since Richard Nixon and many senior officials involved in Watergate were lawyers, the scandal severely tarnished the public image of the legal profession.

[49] Lawyers are required to act as 'officers of the court' under Rules of Professional Conduct in each Australian jurisdiction.

[50] Prior to its bankruptcy in late 2001, Enron was a leading American energy and communications company, with claimed revenue of US$111 billion in 2000. It has since become a popular symbol of wilful corporate fraud and corruption as many of Enron's recorded assets and profits were inflated, or even wholly fraudulent and nonexistent.

[51] Loren Fox, *Enron: The Rise and Fall* (2003) 3: the bankruptcy examiner had alleged that the law firm, Vinson & Elkins, may have committed malpractice. It neither admitted nor denied wrongdoing.

repugnant conduct by the corporation's legal advisors concerning James Hardie's liability for asbestos related maladies. In 2004, the New South Wales Government set up a special commission of enquiry to investigate a range of matters relating to the Hardie Group's behaviour.[52] It found that James Hardie Industries Ltd had misrepresented the adequacy of assets[53] to meet the legitimate claims of its victims, and that the cancellation of partly-paid shares held by James Hardie NV, although probably lawful, was arguably immoral in the circumstances.[54]

B Women in the law

Earlier, a critic of similar ethical failings in legal firms explored the moral dimensions of the conduct of its lawyers, and found that an examination of their ethics and culture is required.

> [S]omething is seriously wrong with a profession that requires its practitioners to think and act as if they were unrelated to other human beings. The ethic of competition ... clearly needs to be curbed. In this situation, the resistance of many women to competitive practices is valuable to the profession as a source of needed criticism.[55]

That is not to say, however, that women lawyers are morally superior to men in legal practice or that they necessarily

---

[52] The Jackson Enquiry, which was carried out by David Jackson QC. Among the findings was that the Foundation was likely to run out of funds by the middle of 2007.

[53] As part of a complex corporate restructure, the company established a Foundation on 16 February, 2001, which was responsible for meeting all victims' legitimate claims.

[54] See New South Wales, Special Commission of Inquiry into the Medical Research and Compensation Fund, *Final Report* (2004) ('Jackson Report'); Attorney-General's Department of New South Wales and The Cabinet Office, Review of the Dust Diseases Claims Resolution Process Report and Proposed *Dust Diseases Tribunal Regulation 2007, Final Report* (2007) <http://www.cabinet.nsw.gov.au/publications.html> at 20 June 2007. See also Peta Spender, 'Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability' (2003) 25 *Sydney Law Review* 223.

[55] Mona Harrington, *Women Lawyers: Rewriting the Rules* (1994) 149.

uphold professional ethics. But the literature indicates that women work differently from men, and women '*can* break the cultural code'.[56] It suggests the reason women can do so is that they adopt strategies such as arranging support, guidance and mentoring for other women to address issues of professional interest and concern. Such strategies can draw attention to the moral dimension of the scenarios discussed above as [s]omething is ethically wrong with a culture that validates [such] practices untempered by a sense of responsibility for their consequences'.[57]

The cultural attitudes and behaviours identified in this discussion are aspects of the legal profession which may be uncongenial to both male and female alike, but commentators identify an additional aspect of the culture of the legal profession, which acts as an impediment to women's success in the law. They observe that even though women are at the Bar, employed in law firms and 'are becoming partners ... in some sense, they are *not seen or heard*'.[58] To some lawyers,[59] women and gender barriers are invisible. This indicates there are characteristics of the legal profession which may facilitate gender discrimination, or make it harder to eliminate.

C Truth and Justice

Yet not all critics see the role of lawyers in terms of morality. Others, such as Judge Harold Rothwax, a member of the New York State Supreme Court for 25 years, look at it through the lens of truth and justice:

> truth must be a primary goal ... truth must be the goal of any rational procedural system ... Without truth there can be no justice. Our [legal] system is a maze constructed of elaborate and impenetrable barriers to truth.[60]

---

[56] Ibid, 122; emphasis in original.

[57] Ibid, 149, and see Thornton, above n 13, 290-291.

[58] Emphasis added; see Kate Eastman, 'Sex discrimination in the legal profession' (2004) 27 *University of New South Wales Law Journal* 866, 873, and Harrington, above n 55, 124.

[59] And in fact "to some people".

[60] Quoted in Evan Whitton, 'Justice or Money? 'How to Save the Law from

Is truth obscured in our legal system? Its feminist critics challenge its objectivist view of truth and the formalist conception of justice which confuses procedural with substantive justice.[61] Yet Evan Whitton accuses 'a tiny but powerful minority of vested interests who, for obvious reasons, prefer the status quo'[62] and proposes radical solutions in his quest for truth and justice which bear many of the hallmarks of the inquisitorial or 'civil law' system.[63]

This is highlighted in the following discussion about the concerns of a senior crown prosecutor concerning the use of strategies and tactics which in her opinion were unfair, in the conduct of criminal trials by defence counsel.

D An Anecdote: Disorder in the courts?

On 24 September 2005 Margaret Cunneen delivered the Sir Ninian Stephen Lecture,[64] in which she gave a stinging critique of the adversarial system. It was her belief that the emphasis on process in criminal cases comes at the expense of discovering the truth. In the lecture, she made reference to a series of brutal gang rapes by an accused identified as 'MG,' whom she had prosecuted. She discussed the rules of evidence, including admissibility of evidence.[65] She confronted the

---

Contempt' (1998) 5(4) *Murdoch University Electronic Journal of Law* [15] <https://elaw.murdoch.edu.au/.E_Law_Justice_or_Money_How_to_Save_the_Law_from_Contempt. html> at 1 March 2007.

61 Deborah Rhode, *Professional Responsibility: Ethics by the Pervasive Method,* (2nd ed, 1998) 147.

62 Whitton, above n 60, [47].

63 Whitton, above n 60, [46]. These include training judges separately from lawyers and giving them back control of trials and cross-examination, winding back the adversary system to the point where it does not interfere with the truth and abolishing the rules for concealing relevant evidence by putting jurors on the bench with the judge.

64 An annual event. The lecture is delivered by an eminent lawyer at commencement of each academic year at The University of Newcastle, New South Wales.

65 This paper makes no analysis of applicable rules and does not suggest their breach would not be serious. Cunneen was not however charged with any such breach.

"fashion" among some lawyers 'for a kind of misplaced altruism, that it is somehow a noble thing to assist a criminal to evade conviction'.[66] She stated:

> Justice [in the adversarial system] isn't achieved by ambush, trickery, dragging proceedings out in a war of attrition with witnesses. It's achieved by honesty, balance and proportion.

Clearly Cunneen personally stood to gain little from illustrating her view of the failures of the criminal justice system and emphasising the rights of victims of crime in this reformist manner. Altruistically, she proposed restoring a balance and confidence in the administration of justice, which would involve addressing the use of deception, delay and dissembling by defence lawyers and returning some focus to the victims. It is a sad but inevitable fact that, under the current system, outcomes in cases are strongly influenced by decisions of legal practitioners on matters of strategy.[67]

Subsequently MG appealed his conviction and applied to prevent Cunneen from prosecuting the retrial, on the basis her lecture indicated she was biased against him. On 5 March 2007 the NSW Court of Criminal Appeal gave MG leave to appeal and although she was not a party to the case and had not been able to defend herself, the court held that a prosecutor other than Cunneen must be appointed to prosecute the retrial.[68] Her replacement had only six days to prepare the retrial against MG.[69]

---

[66] Margaret Cunneen, 'Living Within the Law' (Lecture delivered at the University of Newcastle, 24 September 2005) <http://www.smh.com.au/news/national/margaret-cunneens-lecture/2005/09/23/1126982234942.html> at 1 March 2007.

[67] Juliet Behrens, 'U v U: The High Court on Relocation' (2003) 27 *Melbourne University Law Review* 572.

[68] *MG v R* [2007] NSWCCA 57.

[69] Brad Norington, 'Prosecutor Cut because of Lecture', *The Weekend Australian* (Canberra) 21 April 2007, <http://www.theaustralian.news.com.au/storv/0.20867,21594099-2702.00.html> at 1 May 2007.

This raises interesting questions of the amoral or the immoral lawyer. However, rather than ponder by which right MG's defence team imposed their moral views in their advocacy, Rhode would question what right, if any, do these lawyers have to evade their responsibility for the moral consequences of the decisions they made?[70]

Was Cunneen the sacrificial lamb of the profession? Was she naïve? Is this simply another case of the defence lawyers employing strategies and tactics to achieve their amoral ends?[71] Had this somehow become a gender issue? Or is it just another anecdote about the practice of the law and our contemporary legal culture? Arguably it is the latter, indicating the need to examine the structure and practices in the legal profession with the objective of creating change in the profession itself.

VI Charting a plan

This article has examined some of the apposite data, which identifies statistics about the representation and progress of women in the law. Those statistics demonstrate that the progress of women is alarmingly disproportionate to their numbers in the profession. Notwithstanding the apparent equality of educational opportunity which has existed for Australian women for over 20 years, they remain under-represented in senior positions across the legal profession.

In December 2006 the report of The Honourable Bronwyn Bishop MP, Chairperson of the House of Representatives Standing Committee Inquiry into Balancing Work and Family, was released. It examined social change in Australia since the 1960s, and matters pertinent to this paper, in particular womens' participation in the work force, our tax system, our benefits system, fertility, workplace relations, care issues, and importantly, how each of these issues interacts with the

---

[70] Rhode, above n 61, 156.

[71] Or maybe their 'sophisticated morality'? MG was acquitted at the retrial.

others.[72] It identified care and tax issues as constituting a barrier to women wanting to return to the paid workforce and a disincentive to starting families. Thus the centrepiece of the Report is a suite of recommendations concerning the tax and child care systems which are designed to make care more affordable and more flexible. However it recognised that 'the debate over balancing work and family still has a long way to go'.[73]

In March 2007 the Human Rights and Equal Opportunity Commission (HREOC) released a report on the issues identified in the 2005 Discussion Paper *Striking the Balance: Women, men, work and family.* In the Foreword The Honourable John von Doussa QC (President of HREOC, Acting Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination) described HREOC's recommendations as 'a template for action ... to create a fairer balance between paid work and family responsibilities'.[74] The report notes

> [t]oo often, balancing work and family is pigeonholed as a women's issue. It's not. While women continue to carry the disproportionate burden of family and carer responsibilities, many men are expressing an increasing desire to have a greater involvement in the lives of their children.[75]

This debunks the myth that these are simply women's issues. The report provides for the development of a new framework which recognises caring needs and responsibilities and addresses the need for equality between men and women. It proposes a series of changes to legislation, workplace policy and practice and government programs to support this new approach. Making this new framework a reality requires

---

[72] House of Representatives Standing Committee on Family and Human Services, Parliament of Australia, *Balancing Work and Family: Report on the Inquiry into Balancing Work and Family* (2006).

[73] Ibid xiv.

[74] Human Rights and Equal Opportunity Commission, *It's About Time: Women, Men, Work and Family* (2007).

[75] Ibid ix.

commitment from all stakeholders including governments, employers, communities, families and individuals because, as this discussion demonstrates, striking the balance between paid work and family is a shared responsibility.

Pragmatic solutions to the problem of the glass ceiling were proposed by the Women's Bar Association in 2006. Reform proposals were based on the need to reshape the culture in the profession so that it provides women with meaningful opportunities to undertake quality work, with access to quality assignments and involvement in key commercial work.[76] Only by adopting the objective and the challenge of creating change to structures and practices in the profession and contemporaneously reinforcing their commitment will the legal profession achieve its goal of halting the unnecessary departure of women and men from its ranks. Only then might it achieve the objective of removing the glass ceiling.

A corollary of such reform is the embodiment of diversity and the accompanying accomplishment of significant increases in retention and advancement of all lawyers, including women lawyers. The legal profession cannot afford to overlook such a possibility, in light of an attrition rate of employee lawyers of around 30 per cent per annum and the consequent financial loss to the employer.[77]

In this part we examine four reform strategies.

A Discrimination

Why have lawyers who have been discriminated against generally not resorted to the courts to advocate their rights? Eastman provides case analysis and anecdotal evidence of the issue, but points out, '[t]he reluctance of women lawyers to use available legal remedies cannot be readily explained'.[78]

---

[76] Rachael Field, 'Women in the Law School Curriculum: Equity is About More Than Just Access' (1999) 10 *Legal Education Review* 141, 150.

[77] Oakes, above n 8.

[78] Eastman, above n 58, 870.

However, it illustrates shortcomings of the legislative response to the issue. The Australian Law Reform Commission recognised in 1994 that equality for women cannot be achieved using anti-discrimination and affirmative action legislation alone.[79]

Nonetheless, in this culture, the normative effect of the *Sex Discrimination Act 1984* (Cth) (the Act) cannot be overlooked, as often the very existence of legislation influences behaviour.[80] At the Bar, particularly, this normative function is pertinent, as there is a dearth of jurisprudence about how the Act can be used specifically by barristers to address the discriminatory practices and barriers which they may face as self employed people. It would be useful, in the future, to see creative uses of the Act by members of the Bar.[81] The safeguards offered in the Act to women solicitors and partners in law firms are much clearer as these women are protected by parts of the Act which relate to employment[82] and partnerships.[83]

B Model Policy

The key to addressing the issue of gender imbalance is to recognise responses which do not result in the denial of legal redress for women. For example, equitable briefing policies, which call for consideration to be given by firms and practitioners to brief women barristers, can be designed. Such practices feature in the 2004 reforms of the Law Council of Australia, *Model Equal Opportunity Briefing Policy for Female Barristers and Advocates*.[84] The policy has been formulated for

---

79 Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, Part II (1994) [9.28].

80 In addition, case law and the interpretation of the Act by the courts, in the context of the adjudication of a legal dispute, play a vital role in the judicial process.

81 Moyle and Sandler, above n 44, 12.

82 *Sex Discrimination Act 1984* (Cth), s 14.

83 *Sex Discrimination Act 1984* (Cth), s 17.

84 Law Council of Australia, *Model Equal Opportunity Briefing Policy for Female Barristers and Advocates* (2004), <http://www.lawcouncil.asn.au/policy/2388251750.html> at 24 August 2007.

adoption throughout Australia.[85] It is a matter for the various Australian states and territories to initiate the policy. In South Australia the Model Policy has been endorsed by the Council of The Law Society, which has distributed a consultation kit for comment by members of the legal profession. Once those responses have been collated, the matter will be further considered. The Law Society has already undertaken to put the policy on its website.[86]

The Model Policy does not require women barristers to be briefed preferentially, by reference to their sex, if they are not qualified. Rather, they are to be briefed on an equal footing with male barristers, by their abilities, and their rate of engagement is to be at no less than the prevailing percentage of female counsel in the relevant practice area. However, the use of the policy is voluntary, and in South Australia, for example, it is yet to be implemented. Nonetheless, various firms, including national firms such as Mallesons and Clayton Utz, committed themselves to adopting the policy in 2004. This is not to suggest, however, that firms are *implementing* the model briefing policy, although their commitment and that of the professional associations to become more involved in the elimination of discrimination against women is encouraging.

C Data collection and research

At the time this article is being prepared, there is no data in my home state[87] about the effectiveness of the Model Policy. Until evidence is collected, there is little chance of assessing the impact of the Policy. As ideally the Policy is to be implemented nationally, this presents an opportunity for professional associations such as the Law Society or Bar Council in each state to demonstrate leadership in promoting

---

[85] See ibid, 3: 'The objective of reviewing, monitoring and then reporting to clients and to Bar Associations or Law Societies on the nature and rate of engagement is that female counsel be briefed at no less than the prevailing percentage of female counsel in the relevant practice area'.

[86] Information provided to the writer in a telephone discussion with Ms Jan Martin, CEO, Law Society of South Australia on 31 August 2007.

[87] South Australia.

women's participation in the profession, by sharing resources in the collection and assimilation of statistics and data.[88] At the same time, the professional associations could undertake further research about the legal profession to assist in defining its objectives, such as those raised in this paper and the need to embrace strategies that engage the changing demographic.

Without data and associated research, decisions on these matters are based on a range of assumptions or guesses about what will happen. Thus it is imperative there is empirical evidence on which to base these assessments. Otherwise it is difficult to have a great deal of faith in a process that involves making such important decisions.

In Part II of this paper we saw that in 2006 the Women's Bar Association collected data which identified the presence of a glass ceiling which prevented the advancement of women lawyers to the highest levels of the legal profession.[89] The study suggests the need to reshape the culture of the profession so that it provides meaningful mentoring and opportunities for women to undertake quality work, with access to quality assignments and involvement in key commercial work.[90] This requires every partner to treat all young woman lawyers as future senior partners by devising programs which support and accelerate the advancement of women. Further, the legal profession must send a consistent message of support for removing all stumbling blocks from successful progression in women's legal career.

---

[88] Rather than individual law firms collecting and analysing the demographic data, as suggested by the Women's Bar Association of the District of Columbia in 2006, we propose that professional associations undertake these tasks, on behalf of a national database. At the national level the data would be analysed and hypotheses tested about why women leave the profession.

[89] The Women's Bar Association of the District of Columbia (ed), above n 27, 1.

[90] Ibid, 7.

The need for the collection of data about the legal profession is of fundamental importance to demonstrate whether women are progressing through the ranks of the profession in proportion to their numbers at graduation and if they are becoming partners and senior barristers at the same rate as men. In order to facilitate change, accurate information is essential.

Since women lawyers are a part of the legal profession, a profession which enshrines the principle of equality, and as these issues affect all lawyers, the preparation of a database should be the responsibility of all professional associations across the nation. A national database of information would be extremely useful. The lack of a national database, to date, has thwarted efforts to obtain a clear understanding of the extent of gender bias within the profession.

D Education

To consider possible reasons for the glass ceiling, we begin by considering whether legal education has any role in the development of attitudes and values of lawyers. A study undertaken in the early 1990s analysed alternative explanations for the different experiences of women lawyers and male lawyers in the legal profession.[91] After identifying the existence of a glass ceiling, the study noted the need for systemic change by legal firms and employers, which *themselves* 'are the source of many ... problems'[92] and recommended education programs be undertaken by firms and legal employers, as a strategy for changing that culture.[93]

This suggests that a lack of knowledge contributes to the gender inequality issue, and also, it makes assumptions about the use to which such knowledge will be put. Unfortunately,

---

[91] John Hagan and Fiona Kay, *Gender in Practice: A Study of Lawyers' Lives* (1995).

[92] Hence the source of the problem of the glass ceiling was not the employees, but the firms and employers.

[93] Hagan and Kay, above n 91, 196.

it 'underestimate[s] the power of entrenched ideas about gender roles in the profession, and in the larger society'.[94] Those entrenched cultural forces were themselves a barrier to achieving substantive change, in the area surveyed. This caused Mossman, who prepared and presented gender equality seminars for major law firms, to conclude that education programs 'are not a panacea'.[95]

However, we still have the conundrum of the glass ceiling and the expressed need for education as a strategy for changing the prevailing culture. In order to correct gender bias,[96] and for lawyers to become responsive to women's needs, the legal profession must be trained to understand the issues.

Perhaps educational programs could be initiated in law schools, where the curriculum would include training on gender, women's experience and interests. In some cases, such an initiative would necessitate preparation of additional material, for example where theoretical issues are not addressed explicitly, and the socially constructed and contestable nature of law is not explored.[97] In the traditional Australian curriculum, '[a]ttitudes and values are seen as irrelevant',[98] and law is often taught in a local perspective.[99] For these reasons it has been suggested law schools take

---

[94] Mary Jane Mossman, 'Legal education as a strategy for change in the legal profession' (2003) 10(2) *International Journal of the Legal Profession* 149, 156.

[95] Ibid, 161.

[96] The commentator Rene Denfield notes that about three quarters of male Chief Executives are convinced there is no glass ceiling: Rene Denfield, *The New Victorians: A Young Woman's Challenge to the Old Feminist Order* (1995) 250.

[97] Ian Duncanson, 'Broadening the Discipline of Law' (1994) 19 *Melbourne University Law Review* 1075.

[98] Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 541.

[99] Usually at the level of the State or Territory in which the law school is situated: Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 713.

a collective approach to provide law students with the appropriate curriculum which will provide 'a co-ordinated ... approach to developing knowledge, skills and attitudes'.[100] Unless the curriculum addresses gender issues, 'it legitimises and perpetuates the existing biases in the legal system and the practice of law'.[101]

Having identified the need for education, regardless of whether a national solution is achieved by the collective approach proposed, the overarching focus needs to be upon producing graduates who have developed attitudes and behaviours which will not perpetuate the existing biases in the legal system. Ideally, children and thus law students would grow up with attitudes and values which embrace equality and reject gender bias, but we recognise the need for specialised educational programs at law schools to remedy gender inequality in the legal profession.

However it would seem a multiple number of approaches to reform are required to address issues of the glass ceiling in the Australian legal profession.

VII Conclusion

This article has suggested that for gender bias in the law to be corrected and lawyers to become more responsive to women's needs, the legal profession must be trained to understand the issues. This education needs to take place in law schools with the overarching focus upon producing graduates who have developed attitudes and behaviours which will not perpetuate the existing biases in the legal system. This will benefit solicitors and barristers alike.

---

[100] Keyes and Johnstone, above n 98, 538. The authors envisage that a wide range of law subjects / topics, in addition to gender issues, would be included in this proposal.

[101] Field, above n 76, 150.

What has emerged most clearly is that other than at the rhetorical level, removing the glass ceiling as representative of structures of injustice, is not an easy task. Yet the achievement of this objective not only safeguards womens' rights, but also leads to a more focused, more rigorous and more effective legal profession.

Equitable briefing policies will contribute to this objective. Evidence suggests there are initial positive signs in relation to the operation of the Model Policy, particularly with the more recent growth in uptake of its adoption. That said, it is too early to draw definitive conclusions about its effectiveness and whether the implementation of the policy translates into achieving a key objective of progressing women in the profession through their engagement as counsel.

The analysis in this article has suggested that notwithstanding the apparent equality of opportunity to enter the legal profession, which has existed in Australia for over 20 years, women leave it at an alarming rate after about four years. Those who remain are under represented in senior positions across the legal profession.

What this article highlights is the limitations in legal responses of the *Sex Discrimination Act 1984* (Cth) to the phenomena of the glass ceiling within the legal profession. Nevertheless the Act will continue to play a role and it is increasingly creating legal precedent and being used by a growing mass of women within the legal profession. However its use as an agent for cultural change in the legal profession has been limited. The persistence of gender bias in the law calls for a better understanding of equality and a renewed approach to ensuring women's equality in law.

In preparation for a healthy future for the legal profession, this article indicates that there is a vital need for a three pronged approach to reform, to eliminate the glass ceiling. Existing barriers are not merely a result of discrimination. There are forces which must be eradicated before the bar is raised. From the earliest stage of the study of the law at university, students

should be educated about gender equality and the culture in which legal work is undertaken. In addition, equitable briefing policies and collection and analysis of data are a vital part of the strategy. The successful adoption of the three pronged approach will result in a long overdue reshaping of the culture of the legal profession.

Finally, I hope this dialogue will continue and that it will produce a more wholesome legal system for lawyers, clients and others affected by legal institutions as we

> ... do as adversaries do in law,
> Strive mightily, but eat and drink as friends.[102]

[102] Shakespeare, William, 'The Taming of the Shrew' Act I, Scene 2, in Barnet S (ed) *The Complete Signet Classic Shakespeare* (1963) 340.