

Reflections on Women in the Law

**Extraction from Inaugural Shirley Smith Address given by Hon
Margaret Wilson 18 September 2008**

Two matters have recurred for me throughout my legal and political life. They are the importance of the rights of women being recognised legally and politically, and secondly the fundamental importance of the principles of natural justice being adhered to in all circumstances. For me these two matters underpin the legitimacy of our democratic system of government.

What follows are some reflections on 30 years of struggle in pursuit of the elusive goal of equality for women.

What strikes me when I reflect on my involvement in the campaigns for women's rights in the 1970s is that my focus was on changing the law to provide women with rights and remedies. I was aware not all feminists pursued a strategy of working within the system because their analysis demonstrated the fundamental social, economic and cultural factors that denied women full equality. I had much sympathy with this analysis and still do. It seemed to me, however, that there was an obligation to at least try to work through the system, which for me meant the legal and political system, until it was obvious no progress could be made.

For me looking at the changes over the past 30 years, I think it is fair to say that real progress has been made but we still have a way to go.

The agenda for change was set out in the 1975 Select Committee Report on the Role of Women in New Zealand Society. The Select Committee provided the first opportunity for women to learn about political lobbying. We learnt to prepare and to present submissions to Parliament. Much of the research for those submissions was provided by the work of the Society for the Research on Women. It played a significant role in preparing the rational reasoned arguments for those of us who then took them into the social and political marketplace. It was during this time we formed the Women and the Law Research Foundation that provided information, research and assisted women with accessing the political process to lobby for change. We lobbied, we argued, we demonstrated and eventually we realised we needed to be where the decisions were made – the Parliament, the courts, the

practices, the classrooms. Good argument and research alone did not guarantee action.

The campaigns of the 1960s and 1970s were about creating the community awareness and acceptance of the need for change. The United Women's Conventions of the 1970s played a significant role. I recall being asked to speak at the first Convention on women and employment and to convene workshops on women and the law. I had no idea of the significance of that gathering or how challenging it would be for me personally. For example, I vividly recall being confronted by two women demanding to know whose rights should prevail on the breakdown of a marriage – the first or the second wife. Nothing in law school had prepared me to answer this question. The experience, however, provoked me to look at matrimonial property rights in a new way.

The Conventions were also about women learning how the legal and political system worked. On reflection, I see that all this activity displayed a confidence in our democratic system that it would eventually produce the justice sought.

Even with those conditions, it became obvious that the real problem was that the work women undertook was undervalued in the economy. Further, the labour market was unprepared to cope with the reality of the rhythm of women's working lives - in particular, their child care responsibilities. These are the underlying structural issues that still remain today.

The struggle has been to get not only the law to recognise that equality before the law requires an acknowledgement of difference, but then to get those who interpret or apply the law to recognise the equality of difference. Equal employment opportunity, paid parental leave, flexible working hours, the right to breast feed at work, work/life balance were amongst the policies that were now pursued in law and practice.

The struggle around women's matrimonial property rights has clearly identified that the legal system is still much more comfortable in enforcing financial value, normally associated with the exchange of money and not non-financial services. What women have been seeking again is that women's experience should be equally recognised by the

law as of value. In other words, for the law to be truly equal it must acknowledge the difference of women. It is the social and cultural embedding of the notion of traditional roles for men and women that has made political and legal change so difficult.

In my legal policy work it has also become obvious that the courts should not be viewed as instruments of social change. Their role is to enforce the law as enacted in legislation. Through the interpretation of the law, a common law is created that provides guidance to individuals who seek to know and enforce their legal rights and remedies. As it was unrealistic to expect the courts to deliver gender equality, it was important that those of us working on legal change in the 1970s devised a new legal instrument to redress systemic discrimination.

Time was lost in the 1970s and 1980s however though experience was gained. It became clear to me at that time that I needed more experience in legal institutional design if the right formula could be found to provide a real remedy for women. It was why I fought so strongly for issues relating to maternity leave, that arose from the Maternity Leave and Employment Protection Act 1978, being heard in the then Industrial Court. It seemed that that court had a greater understanding of the realities of the workplace and therefore may have a greater chance of enforcing the limited rights they gained under that Act. For me also that experience taught me the power and influence of the bureaucracy and how difficult it was for women outside the public service and politics to have any influence on the form and shape of legislation. I learnt that the devil really does lie in the detail.

Working for women through the Labour Party seemed a logical extension of the NGO work in which I had been involved. I, and others, had been part of a strategy to develop a women's equality policy and also to promote women into political decision-making positions. The policy work resulted in the 1984 Women's Equality Policy of the Labour Party, which set out what in effect became the agenda for the next 20 years.

New Zealand has always been proud of being the first country to give women the right to vote. We were not the first however to give women the right to represent themselves in Parliament. That first belongs to Finland. It was also not until 1933 that the first woman Elizabeth McCombs was elected to Parliament, and it was not until the mid 1990s

that women in any numbers were elected to Parliament – a hundred years after women got the vote.

Ethel Benjamin was our first woman admitted to the legal profession in 1897.¹ Yet it took until the 1970s before women in any numbers started to enter the practice of law.² Women were first appointed to the bench in 1975 with Augusta Wallace's appointment to the District Court, and 18 years later in 1993 Silvia Cartwright was appointed to the High Court. Both appointments were considered exceptional and coincided with International Women's Year in 1975 and the Suffrage Centennial Year in 1993. I am pleased to say the events-based approach to judicial appointment for women has not continued. It is obvious, however, that there has been no floodgates principle operating as far as women entering the legal profession or the judiciary.

What is the position today? The Human Rights Commission has recently published a census of women's participation in New Zealand society, including participation in the law.³ Women currently comprise 62% of the admissions to the profession but comprise only 41% of the legal profession. Only 16.8% are partners in large law firms, and 19.34% of the partners in firms of all sizes. 35% of barrister sole are women and of the 90 practising Queens Counsel, 11 are women. Women comprise 25.76% of judges, with the highest percentage being appointed to the Family Court.

So what do these numbers tell us? It is obvious that some progress has been made over the past 110 years, but also that women are still a minority at all levels of the profession and the judiciary. Is this a cause for concern may be the next question? I would argue that it is. Apart from the waste of human potential and sense of loss of well-being, the country suffers from the loss of talent and skills that women could contribute through their employment. I sometimes wonder when I hear the critiques of why New Zealand has such low productivity why there is no recognition of the harmful effects of discriminatory management practices.

1

2

3

The new challenge for women in legal practice would appear to lie in the current management practices of firms and appointment practices rather than changes to the law. Unfortunately there is a management practice that has failed to assist women - the notion of merit being the basis for appointment or advancement. I recall the debates around whether or not New Zealand should adopt affirmative action strategies in the 1970s and 1980s to redress the discrimination experienced by women. Those strategies were rejected and reliance was placed on a merit approach to ensure women were treated fairly. It was felt that the merit approach was fairer and would be more culturally acceptable. The problem with merit is that it is in the eye of the beholder and unless an incredibly professional process is undertaken, merit cannot be relied on to produce a fair outcome. Where there is a strong prevailing notion of what are the 'right' qualities for a position, it is difficult to introduce any change. I found this was particularly the case with judicial appointments and appointments to Queens Counsel.

I believe there is a fundamental clash between much of the current legal culture and the reality of women's lives. I would note, however, there are a number of men who are also experiencing a similar frustration at the resistance to change. I do sense, however, that there is a real shift within the community towards demanding a greater participation in the decisions that affect us. We are searching for new ways of organising our lives and governing ourselves. Women are seeking ways of work that enable a better balance in their lives. There is a greater sharing of roles between men and women. These initiatives are still taking place within the existing system, however. There is still no real perceived need to radically change the way we do things. Difference is tolerated as long as it does not fundamentally interfere with existing practices.

Colleagues,

The WDLs Women the law Committee invite you to reflect; to seize your opportunity to participate in the debate; to be where the decisions are made; to make a difference; to celebrate difference; to demand the equality of difference . Carpe Diam, as Shirley Smith would say.