WOMEN AND THE LAW

BOOK REVIEW

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Book Reviews: Longer Reviews

Jocelynne A. Scutt, Women and the Law i-viii Preface and Acknowledgements; ix-xx Table of Contents; xxi-xxiv Title of Cases; xxv-xxx Table of Statutes; xxxi-lii Bibliography; 1-570 Text; 571-576 Index of Names; 577-596 Subject Index; Law Book Co. Limited, Sydney, $69.00.

> *"Disability" means the status of being a married woman, or a minor, lunatic or idiot. Nationality Act 1920 (Cth) s.5(1) (repealed).*

Male chauvinism is difficult to eradicate. The first reaction of many Australian lawyers on picking up this substantial book will undoubtedly be: do we still need a book on the separate subject of women and the law? Have not all the fortresses and citadels fallen? Mary Gaudron on the High Court. Deidre O'Connor on the Federal Court. Jane Mathews on the Supreme Court of New South Wales. Elizabeth Evatt - first on the Family Court and now the Law Reform Commission. The Chief Magistrate of Victoria, leading counsel, majorities in the Law Schools - even the Governor of South Australia.

Jocelynne Scutt anticipated this response. In her preface, after acknowledging the help of many co-workers (all but two women) she concludes: "We work together to ensure a future where texts on women and the law and gender, law and

equality are of passing and historical interest only".

Of historical interest in this book there is much. It prepares the reader for discrimination, often more subtle, in today's world. Indeed, much of the historical material makes astonishing reading for a modern lawyer. The first section deals with the struggle of women to enter universities, to hold public office, to gain voting rights and to enter the legal profession itself. It is an eye-opener to a lawyer on the brink of the 21st century, to read the judgments of courts just before and after the turn of the present century confronting and rebuffing the brave women who sought to gain access to learning, law and a share of power.

Typical is the judgment of Lord Neaves, the Lord Ordinary in Jex-Blake v. Senatus of the University of Edinburgh[1] recorded by Scutt. Sophia Jex-Blake applied to be admitted to the University in the Faculty of Medicine. Lord Neaves, rejecting the application, saw the admission of women as bound to pull down the average of the rest of the class because women "cannot keep pace with the rest". He made no bones about his view that Sophia Jex-Blake should be at home working in the kitchen. To see what a revolution has occurred in thinking in little more than a century, it is worth quoting the good judge's opinion:

> "Much time must, or ought to be, given by women to the acquisition of a knowledge of household affairs and family duties, as well as to those ornamental parts of education as tend so much to social refinement and domestic happiness, and the study necessary for mastering these must always form a serious distraction from severe pursuits, while there is little doubt that,

> in public estimation, the want of these feminine arts and attractions in a woman would be ill-supplied by such branches of knowledge as a university could bestow."

Miss Jex-Blake's application was rejected. So was the application of Edith Haynes to be admitted to Articles of Clerkship to a solicitor in Western Australia. The Legal Practitioners Act had provided that "any person" in possession of the stated qualifications was entitled to be so admitted. Miss Haynes rashly thought that this phrase meant what it said. Not so. The Full Court of the Supreme Court of Western Australia rejected her application. Burnside J. pointed out that, by the common law, no woman had a right to be admitted to the Bar. If such a change were to be permitted, it would have to be spelt out, in clear terms, by Parliament. McMillan J., concurring, appeared more concerned at the possibility of women becoming judges and thus elevated, as the author says, "to equal status with him" (and his brother judges). Application rejected.[2]

On and on the list of cases goes - in England, in the United States and in Australia. Male judges of undoubted erudition, integrity and learning reject applications, and rebut historical proofs to the contrary, repeatedly holding that women, as such, were incapacitated for service in one function after another. There is a special irony that during the reign of the Queen Empress Victoria - whose imperium held a greater sway than any before or since - the attempts, by legal means, to secure a little share of power for women were repeatedly thrown out. For example, a case to secure the vote in an election of local

councillors by reference to many historical precedents was abruptly dismissed.[3] Repeatedly, the judges held that there was no evidence in existence of women acting in professional or other public roles. How they could have said so with a straight face in the reign of Victoria defies understanding.[4] Australia was no better in this regard than England. Local judges even likened women, seeking the right to vote, to dead persons or dogs being enfranchised. When it was gently pointed out that a dog could not vote although a woman could, the judges were totally unconvinced.[5]

The women who fought against such discrimination and continued fighting despite so many rebuffs deserve our unfeigned admiration. They were fighters not only for women's rights but for equal opportunity for all. Their basic enemy was not just male chauvinism but that tendency of every society, however civilised, to stereotype powerless groups and to deny them access to the power by which they might change their condition. Fortunately, long before the modern women's movement, there were brave women who kept fighting by legal means to achieve equal rights. The story of the pioneer who was the first woman in Australia to qualify and to be admitted to the Bar (Ada Evans) is told in the book in the reproduction of the essay "A Woman Pioneer". (6)

And this gives an idea of the nature of Dr. Scutt's book. It is principally a collection of extracts from case books, court and tribunal decisions, reports of boards and tribunals and extracts from journals, including this journal, collected under a number

of convenient subject headings. The number of essays extracted from the Australian Law Journal is itself an indication of the support given by successive editors to attention to the serious procedural and substantive impediments faced by women in the law and its profession.

Indeed, one of the best indications of the changing times in the legal profession is to be found in the extract from the essay by Justice Jane Mathews of the New South Wales Supreme Court: "The Changing Profile of Women in the Law" (1982) 56 ALJ 634.[7]

The extracts reproduced by Dr. Scutt are shown by a marginal line. These are interrupted by text comprising commentary by the author - often quite critical of the extracts - references to developments since the extract was written and lists of topics for further discussion. The book is plainly intended for use in legal teaching. Unsurprisingly, the commentary is expressed very much from a feminist point of view. The author pulls no punches. For example, discussing M. v. M.[8] - a case of alleged sexual abuse of a child - she lumps the modern High Court of Australia, Gaudron J and all, in with Hale C.J.:

> "That four centuries after Hale C.J. made his (in) famous statement that rape is "a charge easily made and hard to be defended against, tho be he never so innocent" the High Court of Australia reiterates it without any critical analysis is disturbing. It is equally disturbing that the Family Law Council, whose task it is to be aware of present day realities, should use this as a "reason" for failing to recommend firm, decisive, yet hardly extreme action where allegations of child abuse are made in family law proceedings. By whom does the High Court (and the council) say a child sexual abuse "charge" is "easily made".

extract gives the flavour of Dr. Scutt's commentary. I no doubt that it will strike some readers as sometimes ing in scholarly objectivity. On the other hand, there is h in the book to cause a sense of grievance about the law. ly, Dr. Scutt is angry about it. Anger can be an rument of change, if properly harnessed.

chapters of the book include one on equal opportunity and discrimination laws; affirmative action and equal pay; lth and safety laws; women, property and family relations; on, children and family relations; social security and tion laws; women and crime - women as accused; and women as tim and survivor.

last chapter deals with women and law reform. On this ject, Dr. Scutt can write from experience of her own. Not ly has she taken an active part in Federal and State law orm bodies. She has been tremendously prolific in her ing and in the range and variety of topics she has tackled, lentlessly, suggesting the need for change and improvement. s critical of the bureaucratisation of law reform. In her at every step of the process "conservatism or blishment views have an opportunity of being reinforced: or reforming ideas remain susceptible to criticism or being ored". No apparent slight to women or discrimination against om escapes her eagle eye. Thus, where the Victorian Law eform Commission granted research funds to investigate assaults against children she notes acidly that all of the researchers

appointed were men. Just the same, where males show themselves to be champions of true reform, as she sees it, they gain Dr. Scutt's accolades. She says that the only dissenting reports written in the Victorian Law Reform Commission were by women commissioners. "The Deputy Chairperson in 1985 wrote the dissenting report on the reference on unsworn statements". Coyly, even curiously, she does not mention that this was herself. The existence of numerous dissenting opinions in the reports of other commissions, notably the Australian Law Reform Commission, rebuts the suggestion that you have to be a female law reformer to dissent.

Dr. Scutt's solution to the attitudinal problems within the legal profession which her book painstakingly collects is the injection of a specifically female contribution to the Law School curriculum. She records the growth in the number of women teaching law and the number of courses on anti-discrimination, "gender, law and society" and feminist legal theory being taught in several Australian law schools today. Those who are sceptical and/or antagonistic to such courses should read the extracts collected in this book in justification of them. After so much wrong and plain stupidity, correctives are clearly needed. Attitudinal changes in the legal profession may be a good place to start. One only hopes that as many men as women will take part in these courses and that the men will read the pig-headed opinions of earlier generations of judges which look so foolish in the cold light of 1991. Those opinions made me wonder how much of what today's judges are writing will, in a century's time, seem

self-evidently wrong headed and even stupid, including on issues concerning women. We are all, in part at least, the captives of our prejudices. Folly did not finish with our age.

There is plenty in this book to disagree with. For example, the treatment of pornography smacks of a revival of censorship. Dr. Scutt's extracts and views on this topic confront the liberal society with a difficult choice. There would be some who would prefer to uphold the limited role of the state in entering the bedrooms of the nation. Dr. Scutt's measurement of judicial attitudes by the employment of male and female staff may be unduly superficial. The collection of some of the extracts may seem idiosyncratic and even occasionally self-indulgent. The brevity and lack of analysis in some of the connecting commentary sometimes left this reader unsatisfied. Perhaps there was a need for fewer extracts, or briefer edited extracts and more analysis by Dr. Scutt.

But this is an important book. It plainly represents a collection of twenty years of painstaking attention to discrimination against women exhibited by the law and by lawyers. It commands admiration because of the sheer detail and intensity of the collection and the zeal which it shows for backing up assertion with examples from statute and common law.

Most of the authors of the articles extracted by Dr. Scutt are women. Most of the authors of the judicial texts are men. Like Dr. Scutt, I look to the day when this disjointed and unequal

contribution to the debates evidenced in Women and the Law is corrected. When women, entirely on their merits and not just because they are women, are found in very great numbers in the judiciary. And when feminist writing, and advocacy of equal opportunity for and non-discrimination against women is found as much in the efforts of male as of female authors.

The presentation of Dr. Scutt's book is a masterpiece of attention to detail comprising 570 closely-typed pages. The cover, by Sally Morgan, is a particularly vivid design of modernistic Aboriginal motifs on a stark black background. The participants who prepared the indexes and tables did an outstanding job. It is a book which one puts down with a sense of shock that so many apparent injustices, right into our own time, have been done to half the citizens of the country. If not all of the arguments of Dr. Scutt will be accepted readily by all lawyers, the issues she has chosen are undoubtedly thought-provoking. Her perspective commands attention. And it is likely that the contents of this book will be most influential amongst younger lawyers to whom the future belongs.

FOOTNOTES

1. (1873) 11 McPherson 784.
2. See (1904) 6 WALR 209.
3. See R v. Harald (1873) LR8 QB 418.
4. For more on this, see Dr. Scutt's essay: (1985) 59 ALJ 163, 170.
5. See Ex parte Ogden (1893) 16 NSWLR 86, 88.
6. See (1948) 22 ALJ 1.

7. (1982) 56 ALJ 634.

8. (1988) 63 ALJR 108.