

Promoting Difference

Address by the Hon. Justice Marilyn Warren

Supreme Court of Victoria

to the Victorian Women Lawyer Achievement Awards Presentation Dinner,

Parliament House, Victoria, 15 May 2003.

At the recent 13th Commonwealth Law Conference I was privileged to join a panel of speakers led by the Women Barristers Association and the Victorian Women Lawyers on the topic of "Women and the Law". A number of eminent speakers participated.¹^[1] At the completion of each speaker's contribution three eminent panellists were invited to respond.²^[2]

My topic was "Promoting Difference". I had a number of remarks to make. Unfortunately, due to time constraints I was able only to say a lot less than I originally intended. Nevertheless, I made my remarks essentially from a platform of positivism rather than negativism. I will return to that theme shortly.

Beforehand, in order that you understand my direction it might be useful if I provide the context, that is, where I have come from in order to reach that position.

I was admitted to practice in 1975. I came from a law school where in every lecture and tutorial there were nine men to every woman.³^[3] I served my Articles in a law office of ten solicitors, all of whom were male.⁴^[4] In 1976 as a first year out solicitor and as a lawyer who had an intense interest in the criminal law, I applied for a position in the then criminal law branch of the Crown Solicitor's Office. Although I did not have criminal experience my academic and legal qualifications were such that I was well-suited to the junior position I applied for. I attended an interview with the Assistant Crown Solicitor who was in charge of the criminal law branch. He was a notoriously pleasant and kind man. The interview commenced with polite discussion that seemed to go for longer than I expected. Eventually the interviewer, with some awkwardness, informed me that I would not be considered for the position because the then Crown Solicitor did not consider women should be employed in the criminal law branch. I was told that even the typists were male because the Crown Solicitor did not consider that women should read the matters contained in depositions in nasty cases such as rape trials.

Now in 1976 there was no equal opportunity legislation.⁵^[5] Eventually, the successful candidate was a male who had not completed his law degree or, for that matter, been admitted to practice; but he had experience as a legal officer within the criminal law branch. I exercised my appeal rights under the Public Service. I argued my case on appeal as to why I was the better candidate. At the end of my submission I raised the matter of discrimination

¹^[1] The Hon. Justice Dato' Siti Norma bte Yaacob, Federal Court, Malaysia; The Hon. Judge Sandra Oxner, Chair, Commonwealth Judicial Education Association, Canada; The Hon. Dora Byamukama, MP, Parliament of the Republic of Uganda; Ms Cherie Booth QC, United Kingdom.

²^[2] The Hon. Justice Michael Kirby, High Court of Australia; The Hon. Justice Michael Black AC, Chief Justice, Federal Court of Australia; The Rt Hon. Dame Sian Elias GNZM, Chief Justice, New Zealand.

³^[3] Monash University 1968-1973.

⁴^[4] The Solicitor to the Public Trustee 1974-1975.

⁵^[5] The *Equal Opportunity Act (Victoria)* did not come into operation until 1977.

that had been put to me in interview. I have to say that it caused an extraordinary kerfuffle and the Chairman of the Appeals Board^{6[6]} sought an explanation from the law department.

My appeal was not successful. My attempt to make a foray into the criminal law failed. However, within three months a woman solicitor was appointed to the Crown Solicitor's office. Within a year the first woman solicitor was employed in the criminal law branch. Twenty five years on the Solicitor for Public Prosecutions is a woman, Ms Kay Robertson, and the Office of Public Prosecutions has a large number of women solicitors instructing in difficult criminal trials on a daily basis. I understand the Office even employs women typists. Moreso in that 25 years there have been a number of outstanding women Crown prosecutors, one of whom headed up the National Crime Authority at one point and almost all of whom have been appointed and preside on a daily basis over the most difficult and complex criminal trials. I refer, of course, to their Honours Judge Elizabeth Curtain, Judge Carolyn Douglas, Judge Meryl Sexton and Judge Betty King. Now I tell you this story not to suggest for one moment that I played the watershed role in the opening up to women of the criminal law on the prosecution side. It is a simple story to demonstrate the change that has occurred and which is sometimes overlooked. As for me, on 20 January this year I sat for the first time in the criminal jurisdiction of the Supreme Court and through the year have presided over murder trials and more recently sat in the Criminal Division of the Court of Appeal. So you see, I eventually did manage to find a way into the criminal law although it took me a long time and much perseverance and patience.

In my almost 30 years in the law I have seen dramatic change. Back in 1974 as an articulated clerk I remember attending one day to instruct in the old 14th Court, then the Practice Court of the Supreme Court. It was an intimidating sea of men in dark suits. At one point the sea opened and a person gracefully sailed past, robed, through the crowded foyer outside the 14th Court. It was a woman barrister. I had never seen one before. I enquired of my principal as to who she was. He said with much warmth and admiration "Oh that's Molly Kingston". Nowadays there are many women barristers, robed, seen on the streets and in the foyers and in the courts. They are not an unusual sight. Such a change. There are now significant numbers of women on the other side, that is the Bench, also robed looking out at that sea of dark suits in front of them.

From my experience change did not start to occur on any noticeable basis until agents of change committed themselves to it. In the early 1980s the Hon. John Cain, then Premier and Attorney-General of Victoria effected symbolic but nevertheless significant change. The period of change followed measures initiated by the Hamer Government in the late seventies, these included the enactment of the *Equal Opportunity Act* 1977 and the appointment of an advisor to the Premier on women's affairs, Yolanda Klempfner. The *Equal Opportunity Act* was amended.^{7[7]} Membership of the Melbourne Cricket Club and the Victoria Racing Club were opened up to women. I remember once, at Flemington, stepping over the notorious "white line" only to have a commissioner step forward and tell me "Madam, women are not allowed!" I resisted the temptation to bowl him over. These types of changes were important because they extended change in the prevailing culture. It permeated through our local society. It was embraced by the subsequent Attorney-General, the Hon. James Kennan SC who adopted an informal policy of briefing women, particularly in significant cases, wherever practicable. Hence, Elizabeth Curtain was briefed to represent the State of Victoria in relation to litigation concerning access to in vitro fertilisation. Later Susan Crennan QC was briefed as leading counsel assisting the Royal Commission investigation Tri-Continental. A tremendous first for women. These changes were continued and perpetuated later by the Hon. Jan Wade, Victoria's first woman Attorney-General through the appointment of women to the Bench, including the appointment of Victoria's first woman Supreme Court judge, the

^{6[6]} The Promotional Appeals Board.

^{7[7]} The *Equal Opportunity Act* 1977 was substituted by the *Equal Opportunity Act* 1984 with significant changes and expansion of proscription of discrimination.

Hon. Justice Rosemary Balmford. Change has continued to be effected by the present Attorney-General, the Hon. Rob Hulls, MP with an affirmative action programme in the appointment of women as judges and magistrates and the government briefing policy.

Between 1975 and 1985 I worked as a solicitor within the government sector. Predominantly, the officers were male but there were women located in key positions: Rowena Armstrong QC and Jan Wade, both then assistant parliamentary counsel. Eventually, Elizabeth Proust was appointed Secretary of the then Law Department. The change was continuing. Women were taking their place in senior positions in the public service.

In 1985 I went to the Bar. I moved from an environment where women were not unusual and their work was respected and admired. I was struck immediately by the prevailing masculine culture of the Bar. Nonetheless, I immersed myself in performing my work to the best of my ability and working very very hard. I believed that that was the way to succeed. Around that time in the late 80s there were a number of Silks who consciously or unconsciously, I suspect consciously, seemed to engage in a policy of having women juniors. In particular, although not exclusively, they were Alan Goldberg QC, Ron Merkel QC, Bernard Bongiorno QC and Ray Finkelstein QC. There was a small core of women who regularly worked with those Silks as their juniors – Ada Moshinsky, Susan Crennan, Susan Kenny, Cate McMillan and, luckily, me. It was no coincidence that each of those women subsequently took Silk and two were appointed to superior courts.^{8^[8]}

In my time at the Bar I saw significant changes in relation to women: increased numbers, women moving through the ranks of seniority, women taking Silk, women conducting complex civil and criminal trials and an increase in the number of women instructing in trials. I saw a woman elected as Chairman of the Victorian Bar.^{9^[9]} I saw, also, a powerful agent for change occur with the establishment of the Women Barristers' Association. Beyond the Bar I saw women appear more and more often in court instructing in trials and women starting to appear in positions of partnership in the firms. Outside the profession I saw women elected as President of the Law Institute of Victoria,^{10^[10]} a woman elected as President of the Australian Bar Association.^{11^[11]} I saw the appointment of a woman to the High Court of Australia. I saw women appointed to the Supreme Court of Victoria and the Court of Appeal and the Federal Court of Australia. I saw many women appointed as magistrates and judges of the County Court to the point that there now seems to be a critical mass of women presiding in those jurisdictions. Their presence cannot be ignored. It is no longer minor or token.

Despite all these changes there is impatience that change is not occurring more rapidly. There is irritation at ongoing discrimination against women.^{12^[12]}

Having observed the Victorian experience over almost 30 years and seeing the changes that I have, and they have been significant changes, I was surprised by the prevailing negativity at the "Women and the Law" session at the recent Commonwealth Law Conference. It seemed

^{8^[8]} The Hon. Justice Susan Kenny was appointed to the Court of Appeal of the Supreme Court of Victoria in July 1997 and later to the Federal Court of Australia in September 1998; I was appointed to the Supreme Court of Victoria on 13 October 1998.

^{9^[9]} Susan Crennan QC.

^{10^[10]} Ms Gail Owens and Ms Tina Millar.

^{11^[11]} Susan Crennan QC.

^{12^[12]} Much has been said on the topic especially by women at the highest levels, for example, address of the Hon. Justice Gaudron, launch of the Australian Women Lawyers, 19 September 1997; address of the Hon. Justice Branson, "Running on the Edge", to the Women Lawyers Association of New South Wales 15 October 1997; R. McColl SC, "Ally McBeal – A Reflection of the Paradigm Lawyer and the Law Firm?", speech at the Women Lawyers Association NSW, 17 May 2000; The Hon. Justice Gaudron, speech for Women Lawyers Association for NSW, 13 June 2002.

to me that the time had come to recognise and celebrate the achievements of our gender in the law and assess strategies for moving forward. Before doing that I state that my observations are based on 30 years in the legal profession. My experiences range the full spectrum from law student to a commercial and equity specialist judge who has recently made a foray into the criminal law. My remarks are devoid of footnotes and sources, they are based entirely on the scientific method of empirical research – that is, my life in the law.

What then is Promoting Difference about?

Difference, when used in the context of women and the law, provokes negativity. The identification of difference is so often interpreted as confronting discrimination on the one hand and a feminising and softening of legal rigour on the other hand. Complaint of discrimination leads to the utterance of defences: "There are women judges"; "women silks"; "large numbers of women solicitors"; and "vast numbers of women law graduates". Complaint of discrimination leads to the converse utterance in reply: "Women are not sufficiently represented on the Bench"; "There is disproportionate representation of men at appellate levels"; "Women are under represented at partner level in the major firms"; "Women are not briefed in major litigation or at best fill minor roles"; "Women are mainly briefed in traditional areas (family law, conveyancing and criminal prosecutions)".

The identification of difference incites the protection of territory and the gratuitous dismissal of women as "having achieved so much" or "having done so well".

Promoting difference on one analysis is provocative, negative and in terms of conventional dialogue is unfulfilling and static.

This approach displays negative rigidity in the debate – a closed approach to the gender dialectic.

Discussion of promoting difference on another analysis involves recognition and embracing of change. From such alternative perspective promoting difference contemplates lateralism, creativity, moving forward. In the context of the intellectual debate about legal gender politics I suggest that alternative approach.

Taking the second approach, in examining women and the law and considering promoting difference a question is prompted: What is the difference that women bring to the law?

First, a different perspective. Women are represented in the law as judges, barristers, solicitors, attorneys-general, law makers and court administrators. They identify an issue quickly, focus on it and persuade rather than dictate. Mostly, women who work in the law are goal oriented. They readily identify their litigation goal, their judgment goal.

Women provide perspective. They search out the resolutions.

Women have finely honed organisational skills (hence they make excellent juniors and instructors in litigation, sometimes of itself a distinct disadvantage).

Women are adaptive and flexible. They have identified the open and closed areas of legal practice. Thus, women have remained in the traditional fields of family law, conveyancing and criminal prosecution but expanded into relatively new areas, taxation and revenue law, planning and environmental law, administrative law, human rights law and indigenous land rights law. In so doing they have avoided the more adversarial, combative zones of commercial law and common law.

Women bring to the law a strong sense of method. This is borne out in the judgment writing of women in the superior courts. They approach judgment in a chronological manner with a strong sense of method and stepped analysis. Let me provide an example, the judgment of Lady Justice Arden of the English Court of Appeal in *Stevens & Ors v Bell & Ors*,¹³^[13] a complex superannuation trust case. The Canadian Reports are replete with the contributions of Chief Justice McLachlin and Madam Justices L'Heureux-Dubé and Arbour. We watch with interest the contributions of Madam Justice Deschamps. New Zealand, of course, has led the promotion of difference vis-à-vis women from the recognition of women's suffrage to the appointment of women to highest office, Chief Justice Elias. In Australia, the contribution of Justice Mary Gaudron to the High Court particularly in the areas of the criminal law and industrial law was applauded upon her recent retirement.

Women bring a combination of typically feminine characteristics to the law: energy, patience, humour and insight. These characteristics they apply to their work and it has a ripple effect on colleagues, clients, staff and litigants as the case may be.

My list is not exhaustive. It is intended to highlight the difference that women bring to the law.

Yet, in the legal gender context the negative side of the debate dominates. I suggest the positive side receive much greater prominence. What is the positive side? It is the seeking out of solutions. What are the solutions?

I make some suggestions and that is all they constitute, mere suggestions.

First, recognition.

There needs to be recognition that there are no absolute solutions. Nonetheless, solutions ought to be pursued by progression. As new gender phenomena are revealed new solutions are required. Recently the Victorian Bar with the co-operation of the courts re-visited the surveys conducted in 1998 as to the break-up by gender of appearances of counsel.¹⁴^[14] Sadly the situation seems to have deteriorated. The numbers of women appearing in cases has largely declined. My own empirical research as a judge sitting in the Commercial List and Corporations List for some years¹⁵^[15] is that women are simply not being briefed in commercial trials. Indeed, appearances by women were so rare that I can name (without the assistance of a note) the five women who appeared before me (as juniors) in commercial and corporations trials and the three women who appeared before me on contested interlocutory applications. Indeed, on Friday directions days in a period of three and a half years in the Lists I invariably had before me a sea of men in dark suits. I am surprised by this phenomenon. Surprised because the profession has been told at the highest levels how competent and able women are as counsel. Chief Justice Black of the Federal Court of Australia stated the position in plain and emphatic terms in an address to the profession and the Bar.¹⁶^[16]

I will return in a moment to other strategies but the recent survey from the Victorian Bar as to the appearances of women is critical. Of itself the survey is a useful document but it is vulnerable to criticism on an obvious basis. I reflected on the calibre of women I would expect

¹³^[13] Unreported judgment, English Court of Appeal, 21 May 2002.

¹⁴^[14] Victorian Bar survey of appearances – summary October to November 2002 (Supreme Court and County Court).

¹⁵^[15] Commercial List from 1999 – 2002; Corporations List 1999 – 2000.

¹⁶^[16] The Hon. M.E.J. Black AC, Chief Justice of the Federal Court of Australia, keynote address, seminar on equality of opportunity for women at the Victorian Bar, 5 April 2000; see also, The Hon. Justice Michael Kirby AC CMG, "Women in the Law – What Next?", Victorian Women Lawyers, 20 August 2001.

to have seen appear in the commercial and corporations jurisdictions and for that matter in the criminal and appellate jurisdictions where I have presided. Looking at the list of names one point became obvious to me. Almost all of the women I thought of are sought after, very busy and probably very difficult for practitioners to brief. It might be said, therefore, that there are simply not enough women at this time. Before such suggestion is howled down I raise it because, as I say, the survey is vulnerable to criticism. It seems to me that what is needed is a further updated survey of women barristers themselves as to their experience, the jurisdictions they practise in and the extent of their briefings. It is now five years since the previous work by the Victorian Bar. It needs to be updated so that the catch cry that "they have achieved", "women are Silks", "women are briefed" and "women are judges" can be demolished.

It seems to me that also it is time for leadership. I mention my experience of the leading Silks who tended to have women juniors. Each of those Silks has been appointed. It seems to me that few have taken up from where they left. I would suggest that the leaders of the Victorian Bar should do everything they can to promote the inclusion of women juniors in their court teams. The best way of advertising women and their competence is for them to be seen in court. The Chairman, Deputy Chairman and members of the Bar Council who are Silk could perhaps be surveyed as to how many of their juniors in the past two years have been women. The same questions might be asked of the inner Bar. My suggestion applies equally to women and men Silks.

Ruth McColl SC in her capacity of President of the New South Wales Bar Association has referred to the resolution passed by the New South Wales Bar Council in April 2000 concerning the quality of women at the Bar.¹⁷^[17] The resolution included a request for heads of chambers to take a leadership role in relation to the encouragement of equal opportunity for women, setting objectives, establishing support groups and connections between the Bar Council and the New South Wales Law Society to eliminate sexually discriminating practices. It must be said that the Victorian Bar has done a lot for women. But having done that work it must be recognised that the solution needs to be ongoing. The work is unfinished. I suggest it is time for a re-appraisal of equality of opportunity for women at the Victorian Bar.

Turning to the profession I do not need to re-visit the arguments concerning maternity leave and family leave. The Law Institute of Victoria and the Victorian Women Lawyers have done enormous work in this regard.¹⁸^[18] At the launch of the Partnership Programme of the VWL I, perhaps cynically, remarked "How will you stop the report being put in the bottom drawer of the managing partners?" Fortunately, and significantly, the VWL has very energetic leaders. The report does not seem to be lying in a drawer somewhere lost. Meetings have been convened with managing partners of law firms and the need for flexible work arrangements to accommodate women discussed. Nonetheless, the campaign must continue and the Law Institute should maintain its support and commitment.

The bottom line is that women as a resource in the law is a very very valuable gold lead. It demonstrates sheer commercial stupidity to mine the alluvial gold and not make the long term investment in the infrastructure to facilitate the mining of the deep, pure leads of gold. In my own case, I was the beneficiary of maternity leave when an employee of the Victorian Public Service. Some years afterwards I left the service but in a sense I have returned to it. I would like to think that my contribution to the law is the reaping of the investment made by my employer when I benefited from flexible maternity and family leave arrangements years ago.

Secondly, I turn to responsibility.

¹⁷^[17] Ibid, p.3.

¹⁸^[18] Victorian Women Lawyers, "Flexible Partnership – Making it Work in Law Firms".

As women progress, those who succeed cannot rely solely on their example. They ought use their achievement to expressly and practically support the development and promotion of younger women in the law. Cross-generational promotion should form part of the mature ambition. It seems that there are five ages of women. The young wild years until reaching twenty. The outrageous and exciting years until thirty. The energetic and ambitious years until forty. The cool, calculating and driven years until fifty. Thereafter women assume experience and wisdom that is an untapped resource. As we progress through those years there are constantly women behind us. It is imperative that the hand be cast down to the generation below to pull up the women from the previous generation to the next.

Thirdly, accountability.

When the opportunity for progression arises, duty ought prevail. When the offer of partnership, the difficult brief or judicial appointment comes there is a duty to accept. A duty to gender. Without seeing myself as a self-appointed recruiting agent for the government I made a point in recent months on an informal basis of speaking to women who I thought might be potential appointees to partnership or judicial office. I was shocked and disappointed to find, based on my own imperfect surveys, that women think and are being encouraged (generally by men) to "wait a while yet", "stay as a Silk for a while", "enjoy myself for a while" and "there will be plenty of opportunity later on". Was I really that foolish in October 1998 when I answered the call and accepted my appointment? Could the same be said about Justice Elizabeth Evatt? Justice Mary Gaudron? Justice Susan Kenny? President Margaret McMurdo? You see each of the women I mentioned were relatively young women at the time they were approached to accept appointment. They could so easily have postponed the moment. But let me postulate this question: if these women had declined appointment who would have taken their place? And so I say that if the call comes to take judicial appointment, to accept partnership, to take on the difficult complex brief or file, ask yourself this: if I do not accept who will? At the end of the day there is no use complaining about the absence of women if you yourself are not prepared to stand up and be counted.

Fourthly, perseverance.

Essentially the solution is this, keep gender on the agenda. Perseverance, is the ultimate imperative in promoting difference. Perhaps you might recall my story about my efforts to enter the criminal law.

Epilogue

In the legal gender debate it is frequently suggested that as women make up fifty per cent of the population there ought to be no barrier to women achieving proportionate representation in practice, at the Bar and on the Bench. I suggest an additional way of approaching representation. Contemplate the difference that women are able to make to the development of the law and contemplate whether their contribution will develop better law.

I declare my bias on the suggestion. Nonetheless, in making the suggestion I urge your reflection on how the law will develop with the promotion of the feminine difference.

Some of my remarks I stated previously at the Commonwealth Law Conference but I think they are important and need to be re-stated. It was suggested to me that in speaking to you tonight my purpose was to provide inspiration. In the presence of this audience I think that is totally unnecessary. You have all achieved extraordinary heights. As we look at one another we all know how difficult it is. I had contemplated telling you some of the stories of the difficulties of juggling a career and motherhood and the like but, quite frankly, it became too depressing. If I was to tell you about the time when I was starting out at the Bar and rushing to get to Prahran Magistrates' Court for a short conference before a contest at 10.00 and as I delivered my two year old son to the door of the creche he vomited all over me and became quickly and dramatically quite ill, it would be no more than another typical story in the hard life of a working woman. There is nothing special about me or what I have done.

For the purposes of this evening I had approached a raconteur extraordinaire to provide me with some levity in my speech, the Hon. Justice John Coldrey, a very senior criminal judge of the Supreme Court of Victoria. I requisitioned a joke about sexism and misogyny. Subsequently, I reflected that these matters are not joking matters, they are serious. Nevertheless, his Honour provided me with some fascinating material part of which I shall now recount. His Honour suggested I say this:

"I was recently reminded of some of my judicial colleagues when, browsing in a shop displaying Chinese herbal remedies I came across an intriguing bottle. It was not just that it was labelled 'aphrodisiac', but what really caught my attention was the description: 'for elderly men suffering from importance'."

Discrimination is a horrible, immoral thing. Like many of you I have suffered it on occasion. By 1996 as a barrister I, at times, advised in a niche area of the law at the highest levels of government. One day, sitting in my Chambers, busily writing an opinion, a partner of one of Melbourne's major firms telephoned me and asked me to appear in a matter for one of his significant clients, the trustee of a superannuation fund of an important organisation. The area was the niche area I mentioned. We discussed the case for about ten minutes. I agreed to accept the brief and the papers were to be sent up to me a little later. I put the phone down and continued my work. In less than five minutes the phone went again. Same solicitor. He said: "Sorry, Marilyn, wrong gender". At first I could not comprehend who was on the phone or what he was talking about, then, the penny dropped. The solicitor told me that he should have spoken to the client before he briefed me and that the client would not accept a woman barrister. The solicitor was at fault. I was never given the opportunity to clarify my skills or experience in the area. I was dropped because I was a woman. There was nothing my clerk or the Bar Council could do. About two weeks later I was appearing before the Hon. Mr Justice Beach in the Practice Court. I obtained orders in a difficult Mareva injunction application. I packed up and turned around and there waiting to come on before his Honour was that same solicitor, the misogynist client and the replacement barrister – a male, many, many years my junior. I walked away reflecting "what is the use". But you see justice does prevail, sometimes it just takes time and patience. About another two weeks later I happened to look in the law list to check my case for the day and what did I see, the case involving that

solicitor and that client listed before the newly appointed Supreme Court judge, Her Honour Justice Rosemary Balmford.

Thank you for the honour and privilege of speaking to you this evening. I congratulate the winners of the awards. They are so deserved.