

**Australian Women Lawyers**  
**10<sup>th</sup> Anniversary Dinner**  
**address made by Chief Justice Marilyn Warren**  
**Friday 7 September 2007**

Your honours, ladies and gentlemen.

Thank you for the very warm introduction.

It is a privilege to be asked to address this very important occasion – the celebratory dinner for the tenth anniversary of Australian Women Lawyers.

In the Bernstein biography of the US presidential candidate, Hillary Clinton called *A Woman in Charge* the author sums up in concluding remarks his estimation of the candidate. He says:

“Hillary is neither the demon of the right’s perception, nor a feminist saint, nor is she particularly emblematic of her time – perhaps more old fashioned than modern. Hers is a story of strength and vulnerability, a woman’s story. She is an intelligent woman endowed with energy, enthusiasm, humour, tempestuousness, inner strength, spontaneity in private, lethal (almost) powers of retribution, real-life lines that come from deep wounds, and the language skills of a

sailor (and of a minister) all evidence of her *passion* – which, down deep, is perhaps her most enduring and even endearing trait.”<sup>1</sup>

I cannot contemplate that a male candidate would be described that way. I doubt there would be such scrutiny. For some reason, when a woman enters what is or historically has been a male domain there is a fascination with the female persona, behaviour, appearance and performance. If we stop to think about it, the presence of women in the law, on the bench, at the bar table as an advocate or lawyer in the firms as a partner, employee solicitor, managing partner or articled clerk is so commonplace that gender should not be thought about at all. It has taken a long time but I start to find myself not really noticing when I have a female advocate in court before me. In the past, the appearance of a woman counsel was invariably such a novelty that human nature dictated a mental note would be made (of course, the gender of counsel is irrelevant to the case and the argument before the court). I know there is impatience and dissatisfaction with the levels of representation of women in the courts and on the bench.

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<sup>1</sup> Bersntein, C., *A Woman in Charge – the Life of Hillary Rodham Clinton* (Hutchinson London 2007) p553 - 4

However, if we pause to reflect upon the achievements of the last 10 years the gender issue in relation to representation has changed. Ultimately, it is the performance that counts and gender for its own sake is irrelevant. Yet for some, gender remains to the fore. Let me give you another example. One of my colleagues, Justice Betty King, has presided in the last year over a number of high profile murder trials. One trial was covered extensively by the media, particularly on the occasion of the eventual plea and sentence. The judge was described by one member of the printed media as "Ugly Betty". The journalist apparently thought that describing the judge that way would give both the judge and the court a human side to his story. Partial explanation was said to lie with the practice of giving some well known criminal judges a nickname in earlier times. The difficulty was and is that the expression "Ugly Betty" carried derogatory overtones because it related to the appearance of the judge and also her demeanour.

On other occasions, individuals in the printed media have seized upon prior involvement of an individual judge with particular quasi legal or legally related bodies such as those interested in civil liberties and their protection. The commentators have taken the extra curricular involvement of individuals and joined that fact with the gender of the individual in order to question the appointment of that individual to judicial office.

Question then: how does gender rise as a relevant issue when discussion turns to judicial appointment, promotion to partnership, appointment as senior counsel, employment and engagement as an articulated clerk. Men and women are different. Now, when speaking of difference and highlighting the particular characteristics or attributes of a gender it does not mean those characteristics and attributes fail to feature in the opposite gender. I think it is accepted by scientists that women have a masculine side as well as a feminine side and similarly with men. Is it not sometimes joked about that individual men are showing their "feminine side" or their "soft side"? Professor Baron-Cohen, Professor of Psychology

and Psychiatry at Cambridge University has argued that hormonal differences and differences in the structure of the brain cause men to have a systematising brain while women have an empathic brain.<sup>2</sup>

On occasion there has been commentary on promoting difference and discussion about what one gender, particularly women, bring as attributes to their particular workplace. Professor Baron-Cohen has described that men used their lingual skills to express social dominance in order to display and demonstrate knowledge while women use language to negotiate understanding and to make people feel listened to.<sup>3</sup> This approach has been attacked by the printed media which has suggested that, if for example, women are good listeners then the commentator is suggesting that men are not. Such suggestion is preposterous. The fact remains that there are inherent feminine characteristics that most women (but not all) display to a high degree. There are other characteristics that men display (again, not all) to a high degree. It is all part of the rich fabric of human qualities that we as human beings contribute our

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<sup>2</sup> Baron-Cohen, S., *The Essential Difference* (Cambridge)

<sup>3</sup> Ibid; also Dow, S., "Man v Women", *Sunday Life*, pp26 – 37.

workplace and society generally. I will return to this theme in a moment.

Recently, *Forbes* ranked the worlds 100 most powerful women.

German Chancellor Angela Merkel was first, Dr Condolezza Rice, the US Secretary of State was fourth, Hillary Clinton was 21<sup>st</sup>. But, where were the lawyers? It seems to have escaped the world that women now sit on the highest courts across the common law world: two in Australia, four in Canada, two in New Zealand and one in the United States and the list goes on. Even more significantly, the Chief Justices of Canada and New Zealand are women. Perhaps the power of the courts over government, the executive, the corporate world and society generally is not a factor taken into account in ranking the worlds' most powerful women.

All this contributes to the culture in which we, as women lawyers, work. Last evening, a young woman I know (indeed someone close to me) in the course of conversation asked me "who is the best barrister in Australia?" I found myself running through a list across

the nation in my head (I will not divulge the names who came to mind) and as I was thinking, the young female questioner popped another question very quickly "is it a woman?" Now, that was a fascinating question. Because I must confess that as I was running through the list, although I had not finished it, all of the names who first came to mind were male. Now, why was that? It might be because the fact is the leading barristers across Australia are men, that they have practised long enough to reach that standing, opportunities to develop their skills and prowess have come their way, they have had societal advantages (such as a committed and devoted partner, are childless or someone else in their lives is able to assume the primary care role), or simply that they have been preferred on occasion over others. There might be many explanations, including, of course, that the best women barristers, so far, have been recruited to judicial office. The reasons are not important for my present purpose. I simply want to plant the thought in your minds as to why the best barrister, the best solicitor, the best judge should necessarily be a man. There is nothing wrong with the best being a man but need it always be so?

The answer may also lie in the way women operate within the workplace. My experience is that women have a very inclusive and collaborative approach to the working environment (again, let me remind you that I do not exclude those characteristics from the male population). It is said by some that the culture of the High Court of Australia changed upon the appointment of Justice Mary Gaudron and that it changed again when her Honour retired and there was no other woman on the Court. The explanation for this phenomenon may lie with the force of personality of the individual judge but my experience dictates that the feminine presence had an effect and a good one too.

There has been no research I am aware of as to how women perform as Chief Justices. I think I might be able to use my experience as a female head of jurisdiction to demonstrate that women may do things differently. During my time in office, I have, with the judges of the Court, arranged the conduct of an occupational health and safety survey of judges of the Supreme

Court. It revealed that the judges (remember they remain predominantly male) are working very long hours, for some at an unsustainable level. It has been a concern of mine to encourage judges to achieve a life balance. Their work is of critical importance to the community but for the sake of their own physical and psychological health they need respite, relationships and happiness. I now speak out openly about judicial happiness and pursue it with passion. On another note, together with the leadership group of the Court, I have embarked upon a leadership training programme. Now, I am not sure whether this type of approach is masculine, feminine or simply corporate in its style and approach. Nevertheless, it has involved the leadership group of the Court thinking beyond their judicial parameters to ensure that the Court runs smoothly and provides the highest quality justice to the community. None of these things are new in the corporate world but I suspect they are novel in the judicial world. I wonder, is this a case of feminine influence?

Justice Neave of the Court of Appeal of the Supreme Court of Victoria when Professor of Law at Monash University wrote on the gender of judging.<sup>4</sup>

Justice Neave observed:

“Men and women judges have different life experiences, which are likely to affect the assumptions they bring to the judging process. It is not suggested that all male judges have identical backgrounds: their family background; ethnicity; sexual orientation and race may influence their values and perspectives. However, gender has such a profound influence on the way a person experiences the world that the differences between the lives of men and women on the bench may be greater than the differences existing among the men or among the women.”<sup>5</sup>

Justice Neave concluded:

“It seems likely that the different life experiences of men and women will affect the assumptions and values they bring to their judicial role, thus helping to eradicate gendered assumptions and improving the administration of the justice system. Even if this is not the case, more women judges are needed [quoting Justice Wald of the United States] ‘if the legal system is to be tap the whole reservoir of human experience that ought to underlie any human and compassionate and fair system of laws.’”<sup>6</sup>

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<sup>4</sup> Neave, M., “The Gender of Judging, *Psychiatry, Psychology and Law*, p.3

<sup>5</sup> Ibid, p6.

<sup>6</sup> Ibid p17.

As long ago as 1990, Justice Bertha Wilson, then of the Supreme Court of Canada, spoke on the topic: "Will women judges really make a difference?"<sup>7</sup>:

"...Human kind is dual and must be represented in its dual form if the trap of an asexual abstraction in which 'human being' is always declined in the masculine is to be avoided. If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human."

It is easy on these sorts of occasions to tell war stories and resort back to the gender combat zone. I would like to avoid that tonight and suggest to you that Australian women lawyers have moved on to a different level. Our achievements have been extraordinary. We have not finished, there is more to be done. In the achievement of those things we should keep "gender on the agenda".

We know that the partnership numbers for women disappoint our expectations. For every good story about part time female partnerships with family leave there are sad stories of women being

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<sup>7</sup> Wilson, B., "Will women judges really make a difference?", Osgood Hall Law School, York University 8 February 1990.

forced into a different area of the law than they would like. The difference is that important organisations such as the AWL and the state and territory associations have assumed an important role in speaking out and identifying discrimination and unfair treatment in the legal workplace. The Bar and professional associations speak out also. The national experience is one of recognition of the importance of the involvement of women in the law in all aspects. Of course, we must remain vigilant but tonight is an opportunity to reflect and experience the sheer joy of the celebratory moment. Everything that the AWL and its affiliated associations have achieved across the Australian nation would have been inconceivable 10 years ago. Just imagine then what the next 10 years might bring.

For the senior women here tonight the battles of the past were hard fought but won. The next ten years of the AWL will see a new generation, sometimes called the second wave of feminism.<sup>8</sup> So what will life in the law bring for them? I forecast an expansion of women in the legal workforce – whether it is the firm, the bar or the bench. It is inevitable. Women now dominate the law school

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<sup>8</sup> Dux, M. "Loud, proud and yes feminist", *The Age A2*, 2 June 2007, p.14

enrolments and, on my observations, are starting to form the majority of candidates being admitted to practise. The workplace is changing because of the feminine presence and the dictates of the globalised world. The challenge will be for modern women to have the workplace adapt for women and men, not have women adapt to the male created workplace. I forecast a time of cooperation and acceptance. Now some might think I am naive – but think about it. Most women in this room are wives with husbands, mothers with sons, sisters with brothers or daughters with fathers, and above all women with male friends. Some are women with women partners. Nearly all women have a good male network.

I cannot conceive of my male network wishing to do anything but support me. I suggest that if the women here tonight reflect on their personal experience they will conclude that their male allies have been very important.

Most of us who have achieved in the law have had a male supporter, promoter, mentor or friend. Justice Kiefel thanked her male

mentors and friends last Monday in the number one court at the High Court in Canberra. Experience dictates that these men are our allies and supporters. They want us to succeed. Of course there will be some fools who will fight over territory. If you imagine an empty room, save for six chairs, and there are eight boys playing musical chairs, they won't like four girls coming in and insisting they are fairly entitled to three of the six chairs. If necessary the girls would fight over those three chairs. Then again, what if the six chairs are converted into a chair stack, a tunnel set or some other imaginary game? There is universal benefit and participation demonstrated by the example.

This is all a way of saying women have taken their place in the Australian legal workplace and the next ten years will be fascinating.

Happy anniversary AWL.