Remarks of the Hon. Marilyn Warren AC
Chief Justice of Victoria
on the occasion of the

Women Barristers' Association
20th Anniversary Dinner

"Joan Rosanove would be happy"

Wednesday 5 June, 2013

I am delighted to be speaking at this auspicious occasion to celebrate the first 20 years of the Women Barristers Association. I would firstly like to thank the Committee of the Association, and in particular the Convenor, Diana Price for organising such a wonderful event, and for inviting me to speak.

The establishment of the WBA 20 years ago is attributable to the courage, determination and persistence of Rachelle Lewitan[1]. In the face of extraordinary opposition and resistance Rachelle persisted. She made a very clever strategic decision. When the time came to address the Bar Council about the proposal for the establishment of the WBA Rachelle took one of the most senior members of the Bar with her to help advocate the case: Brian Shaw QC. Brian in his

[1] Now her Honour Judge Lewitan of the County Court of Victoria

inimitable style stared the Bar Council down and told them in the most direct terms that it was time for discrimination to stop and for women to be supported by the Bar. He was very persuasive. Together, Rachelle Lewitan supported by Brian Shaw saw the Bar Council give way and accede to supporting the establishment of the WBA.

From the outset, the WBA worked to improve the working conditions of women barristers by instigating a review into issues of equality at the Victorian Bar. The review committee was chaired by the Justice Stephen Charlesand included Marcia Neave.[2]

Their report included very frank findings regarding discrimination against women at the Bar. In order to combat such clear discrimination the Association started developing networking opportunities for women barristers, a collegiate support network and focused on providing professional development seminars specifically for women at the Bar. Aside from the practical assistance offered by the WBA, the Association also advocated for and achieved the removal of some systemic barriers for women who have carer responsibilities which require the fine balancing of work and home

[2] Now the Hon. Justice Neave AO of the Court of Appeal of the Supreme Court of Victoria

life. Historically, little consideration was given to creating such a work/home life balance and the pressures on women.

The WBA was also instrumental in the introduction of a paid parental leave policy and developed a system where chambers fees would be reduced for six months. The proposal was met with vehement opposition in some sectors at the Bar. Many men argued against the facility and questioned why they should subsidise women. However, the WBA continued to press for this very important change which in turn has supported and facilitated many women at the Bar in maintaining their practice during periods of leave for child raising. The Association lobbied the government of the day to introduce the model briefing policy, which requires those who undertake government work to identify and genuinely consider engaging female counsel. As a result many firms and government offices engage women to appear as counsel. This was particularly evident, for example, during the Bushfires Royal Commission when the government agencies included strong female representation in the counsel briefed.

These are achievements to be extremely proud of.

Since these dramatic improvements in working conditions and opportunities for women at the Bar, women have become a strong and visible presence both at the Bar and in the legal profession as a whole.

Furthermore, the Bar Council took an active interest in the treatment of women through the establishment of the Equality Before the Law Committee chaired by Alexandra Richards QC. The Committee ensured appropriate representation of women members of the Bar among the portraits and photographs displayed on the ground floor of Owen Dixon East and West. These were modest matters in the overall scheme of things but, nonetheless, important reminders of the presence of women.

In 1993, before the WBA was formed, there were 289 women at the Bar and four female silks. Now, in 2013, there are 508 women at the Bar and 25 current female silks. Over the last 20 years many women including women silks have been appointed to judicial office.

The 'Roll Call' of firsts is an extensive one.

Victoria has seen the first woman Chief Magistrate in the Hon. Sally Brown AM who later went onto the Family Court of Australia, the

first female Supreme Court judge, the Hon. Rosemary Balmford AM, the first female judge on the bench of the Federal Court in Victoria, the Hon. Justice Susan Kenny, the Chief Justice of the Family Court, the Hon. Justice Diana Bryant AO following her appointment as Chief Federal Magistrate, the first Victorian woman appointed to the High Court of Australia, the Hon. Justice Susan Crennan AC. There have been four women chairmen of the Victorian Bar (Susan Crennan[3], Kate McMillan[4], Melanie Sloss SC and Fiona McLeod SC) and I was appointed to the Supreme Court of Victoria 15 years ago and appointed Chief Justice 10 years ago. There are now 13 women judges and a judicial registrar on the Bench of the Supreme Court of Victoria, just under a quarter overall.

However, despite all our achievements over the last 20 years women still face challenges. It might be easy enough to reflect on the achievements and presence of women at the Bar, particularly those with a high profile, and reflect that enough has been done. Yet I would suggest there are three challenges for the modern woman barrister and in particular the WBA to consider. First, the question of whether there is equitable access to the better briefs for women. Secondly, how the continued pressures of managing parental responsibilities with maintaining and developing a practice

[3] Now the Hon. Justice Crennan AC of the High Court of Australia
[4] Now the Hon. Justice McMillan of the Supreme Court of Victoria

are to be supported. Thirdly ensuring the unwavering persistence of achieving the realisation of true professional equality at the Victorian Bar.

Turning then to access to the better briefs by women. Anecdotally I am able to say that women are not consistently being briefed in the better cases in the Supreme Court. Speaking to my colleagues Justices Davies and Ferguson they see the same sea of dark suits in the Commercial Court that I witnessed as the Judge-in-Charge nearly fifteen years ago. The appearance by a women is notable because it is unusual. In the Court of Appeal we see few women in both the criminal and civil jurisdictions. When Pamela Tate SC[5] was Solicitor-General and Karin Emerton SC[6] was Crown Counsel they would regularly be briefed and appear. Those appearances have not been replaced by other women. I can provide a personal example in the last month. I have presided in two large commercial appeals in the Court of Appeal. In one case there were nine barristers, zero women. In the other case there were eight barristers, zero women. I cast no aspersion or criticism in any way on the male barristers appearing in those or indeed any cases before the Court of Appeal and the Commercial Court. However, it is a matter of some astonishment that women are not being seen.

[5] Now the Hon. Justice Tate of the Court of Appeal of the Supreme Court of Victoria
[6] Now the Hon. Justice Emerton of the Supreme Court of Victoria

Occasionally in the Court of Appeal in criminal appeals we see some women but not often. In criminal trials in the Trial Division of the Supreme Court we see a woman prosecutor from time to time and a woman defence barrister rarely. I note in the Common Law Division of the Supreme Court women again are not seen save occasionally. In the large Kilmore East bushfires case before the Hon. Justice J Forrest there are rows of barristers but notably few women.

Until fairly recently criminal prosecution work was not a regular source of briefs for women.

Statistics released by the Office of Public Prosecutions at the end of 2012 revealed that in 2011-12 OPP prosecutor appearances were spread evenly between genders, with 51% of appearances made by men and 49% made by women. However, 68% of the trial briefings across the Supreme and County Courts went to men, while only 32% of the briefs went to women. This suggests the bias towards giving more complex briefs to men still exists.

As a result, the OPP is making a concerted effort to brief female barristers from the pool offered by the clerks for criminal hearings, with 41% of all OPP briefings for the 2012-13 financial year going to female barristers.

The Director of Public Prosecutions and the Office of Public Prosecutions are to be congratulated for their endeavours to ensure that a more equitable briefing policy is achieved.

In commercial areas, it appears that women are less likely to be selected by solicitors to appear in large complex cases, whether a clerk recommends a female or not. Many firms have a core group of barristers they like to engage, which they have replenished with recommendations from their own network.

The Victorian Equal Opportunity and Human Rights Commission has published a report, *Changing the Rules: the experiences of female lawyers in Victoria*. The report highlighted the significant attrition rate for women lawyers. The report also touched on the cultural and systemic aspects of the legal profession that make it difficult for women to firstly pursue a career in the law and secondly to succeed in a legal career. The investigation and findings of the Equal Opportunity Commission are truly shocking. The report reveals frightening facts of bullying and sexist treatment of women in the legal profession. Fortunately, the Law Institute of Victoria has commenced the challenge of meeting the findings of the report. In

March 2013 the Institute convened a round table discussion. More are planned.

Many of the female practitioners surveyed by the Commission also reported unfair allocation of the quality work to men, particularly after women have children, and a reluctance to allow women (and men) to work flexible hours. If this kind of discrimination is occurring in the wider legal profession it may be the prevailing attitude that underlies such treatment of women in practice is permeating through to attitudes in determining whether or not to allocate briefs to women barristers.

So what are women and the WBA to do about ensuring equal access to the better briefs?

Could I suggest network, network and network. I understand from speaking to some of the clerks that the firms these days prefer to brief directly and rely on word of mouth and experience in determining barristers to be briefed. There are many ways that the firms may be penetrated and encouraged to have competent women identified to them.

Another mechanism would be to raise the fact of the inability of women to consistently achieve the better briefs in discussions at the Bar Council. Perhaps a symposium could be organised?

Another mechanism would be to suggest that silks at the Victorian Bar expressly include a woman junior in their nominations for junior counsel when asked. This was in fact a technique implemented by many senior silks in the past, particularly in the commercial jurisdictions which enabled many women to be identified and progress through the ranks of counsel quickly.

Opportunities for new and varied means of practice and developing jurisdictions can be pursued. For example, raising the profile of women in alternative dispute resolution especially mediation. Then there are other new areas such human rights law and environmental law.

I encourage an analysis to determine how greater equality may be achieved in the 21st century at the Victorian Bar for women. It will require the support of the senior Bar, the clerks and, of course, the Bar Council.

I now turn to the second area that is very important in supporting women barristers' practices – the parental pressures they face.

The parenting role of a woman barrister is difficult and demanding when trying to develop and promote a practice. It may be timely to revisit the topic of supporting women barristers with the courts and senior counsel about unnecessary or unreasonable demands such as sitting on or convening conferences on short notice. There is nothing wrong with informing a court that personal domestic arrangements may need to be made. The modern bench, provided the request is not unreasonable, would generally be accommodating.

Mentoring is another opportunity that is not sufficiently utilised so far as women barristers seem to be concerned. There are many senior women on the bench and at the Bar who have lived the demanding and telling experience of raising children and juggling a practice. It is not impossible and does not last forever. Women like me are available to talk to women barristers about our experiences and the way in which we coped. I am sure it would be very helpful and supportive.

However the Bar is not always a part-time employment alternative compatible with children. The Bar is a highly competitive and combative profession. Hence, women barristers need support. It is very difficult for a women barrister to succeed without mechanisms

of support, organisation and back-up. It should never be underestimated how women barristers may be supported by their clerks. I have spoken to a number of clerks and they certainly make every effort to support the women on their lists. Nonetheless, it is important to be self-sufficient as a woman barrister and independent. It is better not be a constant burden to a clerk and only seek urgent and ad hoc support when really necessary. It is best not to develop a reputation for being unreliable and returning briefs at the last minute. If a woman barrister has mechanisms in place for support, organisation and back-up crisis can usually be avoided. Nonetheless there will be times when a woman barrister has no choice but to resort to the urgent assistance of her clerk. I had one serious crisis during my time at the Bar and my clerk was supportive in a way that was unforgettable. That said, I only had the one crisis.

I remember not long after the WBA was established there was talk of the provision of a childcare centre in or close by Owen Dixon Chambers. Perhaps 20 years later the idea is one that warrants revisiting.

The third topic I turn to is the matter of persistence.

In this regard judicial appointment is significant and is in fact the culmination of a successful career as a barrister. I acknowledge the presence this evening of the Attorney-General. He oversees the recruitment and appointment of judges, predominately from the Victorian Bar.

Judicial appointment is an excellent phase of a legal career. I highly recommend it. If the opportunity arises to be appointed to judicial office women should be encouraged. It is important to have women on the bench. However, after a significant phase of female appointments to courts something is happening and opportunities are being foregone. In the last five years nationally there have been seven Chief Justice appointments at State, Territory and Federal level. They have all been men. There have been three appointments to the High Court of Australia one of which was a woman, the Hon. Justice Virginia Bell. I cast no aspersions on my male colleagues, but, the predominance of male appointments is something organisations such as the WBA might monitor. They might also take the opportunity to agitate with Attorneys-General for due consideration of suitable women for appointment.

It is also important that there be no barriers or disincentives to entry for women barristers when it comes to appointment to judicial office.

In 1995, the pension entitlement age for Victorian judges was raised to 65 years with 10 years' service (or 20 years with no entitlement age). The Courts have consistently submitted to the State government that the eligibility criteria should be amended to restore the entitlement age to 60 years with 10 years service to restore parity with federal and interstate judges. The present qualification effectively operates as a statutory discrimination.

There is a marked gender aspect to the operation of the provisions. Under the present arrangements, on average, current female Victorian Supreme Court judges will be required to serve 15 years before they are entitled to a judicial pension compared to an average of 11 years for their male colleagues. In the County Court on average female judges will be required to serve 17 years.

As an historical point the qualifying age was altered before the first appointment of a woman to the office of judge of the Supreme Court. In the last ten years, even recently, a number of male judges have taken the option of retiring upon completion of 10

years service before the age of 65, an opportunity which has been denied to any woman because none were appointed to the Supreme Court before the legislative change. Of course to date the recruitment pool of women has proved to be younger at the time of appointment and so they generally need to serve a longer period before qualifying for a pension. They are to be contrasted to quite a number of men who ran their successful practices at the Victorian Bar well into their fifties and then took appointment leaving them in the position of only having to serve 10 years before being eligible for the pension.

The current age qualification acts as a disincentive to appointment for female candidates in the Supreme and County Courts of Victoria.

Conclusion

The last yards will be the hardest yards but possibly the best. That being said, through their talent, legal skills, intellects and capacity for hard work, women have achieved permanence in the legal landscape. Now the extent of that presence needs to be relentlessly pursued.

The continued advocacy and support of organisations such as the WBA will be vital to this process.

Tonight we gather to celebrate twenty magnificent years of achievement of the WBA. Congratulations to everyone involved.