

Women, the Bar and democracy

By Dominique Hogan-Doran

The following paper was delivered on 16 March 2004 as one of a series of lunchtime lectures entitled: 'Liberty's defence? Women and the law', held at St James Church, King Street, Sydney.

Introduction

I was fascinated to read the other day that apparently the first 'computers' were in fact women. The term derives not from the machines that now control our lives but from women who worked in observatories, particularly Harvard University. These women spent their lives studying photographic plates of the stars, in the early part of the last century, making computations - hence the name.

As Bill Bryson describes in his book *A short history of nearly everything* the lives of these computers were 'little more than drudgery by another name'.

The system was unfair, but it did have, as Bryson describes, certain unexpected benefits: it meant that half the finest minds available were directed to work that otherwise would have attracted little reflective attention. When the work did receive reflective attention it led to some of the great discoveries of space by the likes of Edwin Hubble.

It also ensured that women ended up with an appreciation of the fine structure of the cosmos that perhaps eluded their male counterparts. I suspect also it led many women to eventually progress in area of science otherwise dominated by men.

We can see a similar pattern in the law. For many years women have outnumbered men in law schools. Having ground away as 'computers' in the 'observatories of the law' in the telescope gazing at the legal galaxy, we are now more visible in partnerships, the Bar and the judiciary.

Promoting liberty and equity

Notwithstanding the surge of women from the law schools, you may be surprised to learn that over the last ten years there has been no substantial increase in the number of women coming to the Bar - we are never more than a quarter of each twice-yearly intake. And because women tend to leave the Bar quicker and in greater numbers than do men, there has been no demonstrable rise in our overall number - we constitute less than 14 percent of the almost 2000 barristers.¹

Women at the Bar face difficulties on many fronts, some of which I propose briefly to explore. Most insidious perhaps is that their advocacy on their own behalf and on behalf of clients speaks not only for themselves, but for their colleagues as well. For, as Bar President Ian Harrison remarked at the ceremonial sitting to mark the retirement of the Hon Justice Meagher from the Court of Appeal, 'when a male barrister makes a mistake he makes it for himself. When a female barrister makes a mistake she makes it for all women'.

But a (fairly) quiet revolution is happening in the promotion of women at the Bar. Indeed, last December the Law Council of Australia enthusiastically declared that gender equity is its 'first priority'.²

So, much is being done by the Bar itself to welcome women.

This includes:

- visits by groups of university women to sow the seed of a career in advocacy,
- discrimination policies to make life at the Bar less forbidding;
- an emergency child care scheme to provide a back up when all else fails; and
- creating mentoring schemes to foster and keep women at the Bar.

Some steps are being taken to promote part-time work. The take up rate for women undertaking part time work in the law is poor. Women in the legal profession are three times less likely to work part time than women in the general workforce. To help promote family life we ought to recognise and accept there can be part-time practice, even if only for a time. It requires a long term view and openness to innovation.

Yet fostering the demand for women barristers is our greatest challenge. If there is no work to do, there is no point in coming or staying.

The Victorian and NSW Bars agree that it is in the interests of clients that the best and the brightest are briefed to appear. So it is no surprise then that our new Bar President has said that advocacy is at 'its purest form an intellectual exercise where hormones and chromosomes have no relevance'.³

One can accept that, but it nonetheless carries a critical assumption. The problem is that women barristers cannot practice 'advocacy at its purest' unless and until they have a seat at the Bar table.

Choosing barristers requires a well-informed market. Women are small in number, we lack visibility, so we may not be immediately called to mind. And sometimes, arbitrary and prejudicial factors operate to exclude women from consideration at all. That these perceptions are antithetical to good briefing practice is borne out by testimonials to the profession from its most senior law officers, including Chief Justice Black of the Federal Court of Australia, and Justice Michael Kirby of the High Court, as to how competent and able women are as counsel.⁴

It is here that equality of opportunity briefing policies can be designed to address these fundamental issues. At its heart, such policy simply calls for practitioners and clients to identify women barristers and give genuine consideration to briefing them.

Just last week Mallesons, the second largest law firm in the country, committed itself to using the National Equal Opportunity Briefing Policy drawn up by Australian Women Lawyers.⁵ Clayton Utz too looks set to adopt the policy.⁶ The action of these firms follows the earnest implementation of the policy by the Victorian government, and I expect the federal

government and other state governments will follow with the meeting of the Standing Committee of Attorneys-General this week.⁷

There is of course a difference between adopting a policy and implementing it but commitment is always the first step. It is one thing for government to make a commitment, but when the large private firms take the same step, it seems to me practical implementation of the policy is inevitable. Nonetheless, the visible and vocal commitment by the leadership of our professional associations and our senior judicial officers will be critical to giving clients the necessary comfort in their actions.

And I am confident that once firms take an active look at *all* counsel on offer, women barristers will seize that opportunity to shine.⁸

‘In my view, the Bar will and should be a source of political talent, of both genders. It is important that it is so in the same way that the diversity of our judiciary goes to legitimacy of those institutions.’

The argument from liberty to democracy

However, I also wanted to take this opportunity to reflect on why, in my view, it is important to our society that this revolution takes place at the Bar. It is more than a mere 'gender equity' issue. It is vital for the continuing development of a mature liberal democracy such as ours.

The new - and first female - Chief Justice of Victoria, Marilyn Warren, has spoken of what her Honour perceives are the valuable differences that women bring to the law.⁹ There is some delicacy in advancing this proposition, both at a factual and strategic level. On the first count, there is more substantial commonality between male and female lawyers than there is not. On the second count, the promotion of difference could serve to enforce the perception that the points of difference mark out women as something 'other' to the acceptable standard.

Even so, as we all know traditionally, the judiciary draws from the ranks of the Bar. In the past this process has been criticised as cloistered and a narrow approach not providing a broad range of people representative of our community. Whether this is right or wrong, the slowly increasing strength of women at the Bar should allow for change in this perception.

The diversity and representativeness of our judiciary goes to the heart of the credibility of those institutions. There are women lawyers of merit, women who in any fair assessment of their integrity, their wisdom, their intellect and their judgment, are appropriate for appointment. In that knowledge, we ought feel a keen sense of disappointment for our society that no

other woman has been appointed to the High Court since Justice Mary Gaudron was in 1987.¹⁰ It would be comforting to be confident that the next appointment will correct that trend.

As long as it remains true that the Bar is the best breeding ground for the Bench - and on balance, in my view, it is usually so - we have no hope of making any substantial inroad into achieving that democratic objective unless we ensure that women have a seat at the Bar table.

There is another reason why women at the Bar are important to democracy. Traditionally the Bar has been an incubator for political talent. One only has to look at the honour roll of past presidents in the Bar Association to see that - Sir Garfield Barwick and Tom Hughes QC to name just two. Neville Wran QC and the late Lionel Murphy QC were prominent silks who entered politics. Our present Supreme Court has two former silks that have served as attorneys general in this state and the Minister for Communications Technology and the Arts, the Hon Daryl Williams AM QC MP, was federal attorney-general until taking up his current portfolio.

In my view, the Bar will and should be a source of political talent, of both genders. It is important that it is so in the same way that the diversity of our judiciary goes to legitimacy of those institutions.

Yet whilst this too comes with a responsibility there is also, in my view, a unique opportunity. There has been much recent criticism and political capital made about the judicial and parliamentary superannuation schemes. It stems from a perception that politicians and to a lesser extent judges gain financial advantage from occupying a public office. The



January 21, 2004: Deputy Lord Mayor, Councillor Dixie Coulton walks along harbour foreshore at Rushcutters Bay in Sydney.
Photo: Rohan Kelly, News Image Library.

opportunity for women (and men) who seek to serve in the judiciary or politics is to demonstrate that the prime reason one serves in a public office out of a sense of civic duty.

I have heard Tom Hughes QC, a former federal attorney-general himself, lament that fewer people from the Bar seem to be putting their hand up to serve in politics. It is heartening thus to observe that a female member of our own Bar, Dixie Coulton, has done just that in her campaign for Lord Mayor of the City of Sydney. The present NSW Justice Minister, John Hatzistergos, is of course a long time member of the Bar.

Like the computers of Harvard, we have done our grinding work and now take on responsibility - and opportunity - of service to the law in its many guises. We come to it with an appreciation of the legal and social cosmos - that may perhaps elude some of our male counterparts.

Epilogue

I remember well the interview for my first paid job out of law school. It was with the then chief justice of New South Wales, the Hon Murray Gleeson, for a position as his research director. We managed to discuss three heretical topics: sex, politics and religion. It seemed as if we disagreed on all three counts. I left the interview confident I would be utterly rejected, but liberated that I had said my piece nonetheless.

Reflecting on what I have raised today, it rather seems there are some uncanny parallels - although I have left religion to venue alone. I can only hope that this time my first reaction will be confounded again, and that my second reaction engenders the same in you.

- 1 The New South Wales Bar Association regularly issues statistical analyses that are available at www.nswbar.asn.au
- 2 'A level playing field for Australian Lawyers' Media Release 7 December 2003 available at www.lawcouncil.asn.au/read/2003/2388554493.
- 3 President's message, *Bar News*, Summer 2003/2004. The text was selectively reported by Michael Pelly in 'Don't mention the hormones, female lawyers told', *Sydney Morning Herald*, 9 December 2003.
- 4 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.
- 5 Chris Merritt, 'More equal before the law', *Australian Financial Review*, 5 March 2004, p.51.
- 6 Katherine Towers, 'Utz set to stress skill over mateship', *Australian Financial Review*, 5 March 2004, p.51.
- 7 At its 14 November 2003 meeting, the Standing Committee of Attorneys-General endorsed 'the principle of government entities engaging legal services with regard to equality of opportunity'. SCAG will meet again in on 18 and 19 March 2004 to consider, and hopefully adopt, a National Equitable Briefing Policy developed by Australian Women Lawyers and the Law Council of Australia.
- 8 Katherine Towers, 'All we want is an opportunity to shine', *Australian Financial Review*, 5 March 2004, p.53.
- 9 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, published at http://www.womenlawyers.org.au/promoting_difference.htm. An edited version was published in *The Age* as 'The feminine effect on law', 27 November 2003, p.15.
- 10 See http://www.womenlawyers.org.au/high_court_vacancy.htm; *ABC Law Report*, 'Changing of the guard at the High Court' 4 February 2003, at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s774889.htm>.

Equity is equality

An edited version of the address given by Madame Senior, Christine Adamson SC, at the 2004 Bench & Bar Dinner.

It was the end of January. It had been weeks since I had produced a drop of adrenalin.

Ian Harrison phoned.

'Will you do me a favour?' An ominous question. 'I want you to speak at the Bench & Bar Dinner.'

At first I said, 'I don't go to those dinners.' Then, as part of his duty of full and frank disclosure, he told me that Justice Meagher would also be speaking.

If ever there were a situation that called for a right of reply this was it.

Of course I said yes. What greater honour could there be? Philip Selth told me that I would not have to pay for the dinner

in cash - only in sweat and tears. He added, 'I hope blood won't be necessary.'

Anyway, I thought to myself, it can't be more difficult than:

- (a) trying to get an adjournment in the District Court from Judge Garling;
- (b) trying to work out what the High Court meant in *Perre v Apand*; or
- (c) trying to get chambers to replace the carpet.

But at least in court, judges needn't find what you say amusing. In fact, it's probably better if they don't. Indeed, sometimes the sweetest words to hear in court are, 'Ms Adamson, we do not need to hear from you', but if you said that to me tonight, I confess, I would be offended.