Seven White Men: A Case for Diversity on the High Court

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On 11 February 2003, Justice Dyson Heydon was sworn in as the new Justice of the High Court of Australia. The appointment of Justice Heydon, replacing Justice Mary Gaudron upon her retirement, has not been without controversy. While there is little doubt amongst the legal profession that Justice Heydon is a worthy candidate[1], there has been much debate in political and legal circles about the lack of diversity on the High Court[2]. Justice Heydon's appointment means that the Court is now constituted by seven men, five of whom are from New South Wales and all of whom share similar socio-economic and cultural backgrounds.[3]

The question must therefore be asked: is diversity on Australia's highest court important? If diversity is important, what arguments can be used in support of the case for gender equity? And do such arguments in support of diversity fit comfortably in a constitutional system underpinned by the doctrines of Separation of Powers and the Rule of Law?

Women on the Bench: Fact and Theory

Advocating the case for gender diversity, Australian Women Lawyers (AWL) considers that in circumstances where there are women jurists of merit, those women ought to be appointed[4]. In AWL's view such women exist. Following Gaudron's announcement of her retirement, AWL was asked by the Attorney-General to provide the names of women judges they considered appropriate for appointment to the High Court and consequently a number of female judges, including Federal Court Justices Keifel, Kenny and Branson and West Australian Supreme Court judge, Justice Wheeler, were identified.

Many argue against such a notion of affirmative action on the basis that a woman should not be appointed for the reason that she is a woman. Such comment, however, exhibits an inherent misunderstanding of positive discrimination, its objective and its premise. In advocating gender equity, positive discrimination does not mandate the appointment of a woman for the simple fact she is a woman. Positive discrimination is the recognition that there is not an equal playing field, that historically women were excluded from professional life (women were excluded from the legal profession until well into the 20th century[5]), and that there are many socio-cultural reasons for continued gender inequity. Positive discrimination, therefore, seeks to promote women of merit to positions which they have been otherwise denied for historical reasons, or continue to be denied or discouraged from pursuing for various socio-cultural reasons[6].

In Australia, despite the increasing numbers of female graduates from law school, who, in many instances, now exceed the number of male graduates, there remains a disproportionately small number of women among the upper echelons of the legal profession, the judiciary, senior members of the bar and partners of law firms. Amongst the judiciary, women nationally make up about 15% of the judges of our superior state and territory courts[7] and the federal courts.

With the retirement of Justice Gaudron, the only woman judge to have been on the High Court, Australia now stands alone amongst Western liberal democracies with no women on its highest court. And Australia stands in contrast to Canada, a comparable democracy, where of the nine judges on Canada's highest court, three are women, one of whom is the chief justice.

Many women in the legal profession believe that women judges have a different world-view which they bring into their decision-making[8]. Indeed, at her farewell reception on 5 February 2003, Justice Gaudron expressed her disappointment about the fact that she was not replaced by a woman and remarked, "There will be women and there must be women, because we do make a difference".

Do Notions of Women Making a Difference Undermine Principles of Judicial Neutrality?

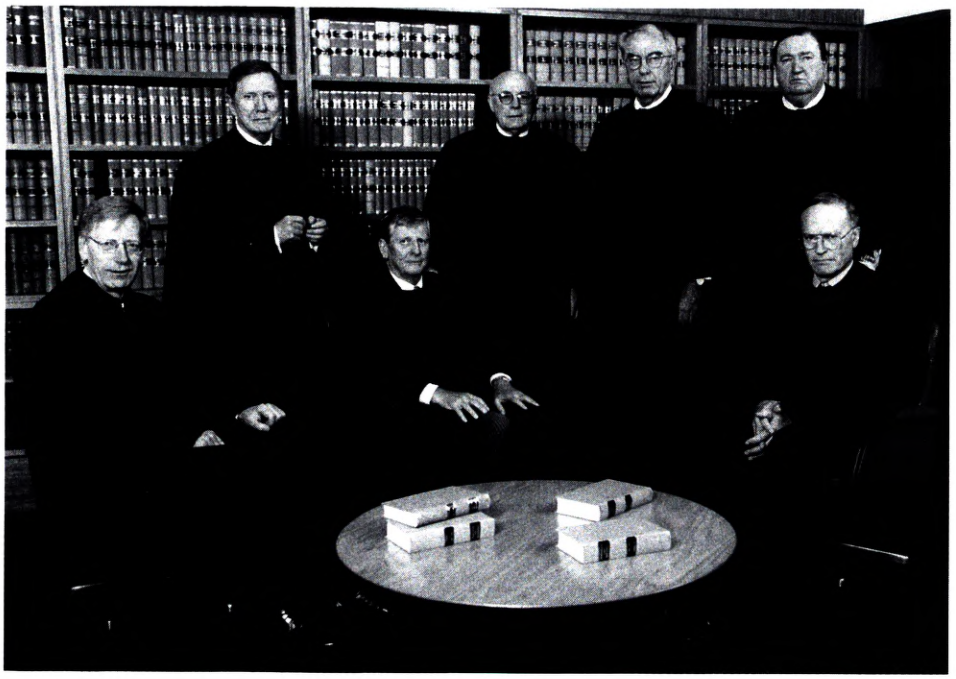
How does an argument supporting the appointment of women on the premise that women make a difference to the substantive law fly in the face of the constitutional principle of judicial independence, impartiality and neutrality? If judges are truly neutral, then how can it be argued that diversification on the bench will promote change in the law? And if it is so argued, then is not the fundamental premise from which the judiciary draws its legitimacy – that it is a neutral and impartial institution – undermined?

In a speech entitled, "Will Women Judges Really Make a Difference?"[9] Bertha Wilson, a former judge of the Canadian Supreme Court, suggested that the question of whether gender equity on the bench will make a difference to the substantive law depends on the way in which judicial neutrality is conceptualized and concluded that:

"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".

Echoing Wilson's sentiments that some areas of the law, in particular, human rights and discrimination, demand a response that has insight into the particular issue and not a detached black letter impartial response, Ruth McColl, a leading Sydney barrister and former President of the NSW Bar Association, remarked on what she thought Gaudron's contribution to the law has been:

"I think [Justice Gaudron] *had an extraordinarily humanizing effect on the law...There are cases which call for a black letter response and in those, that's the response she would typically give. But I think that the strong views she expresses in cases involving discrimination and like issues, are very influential and important in the development of the law in those areas... she has brought too, a particular intelligence and an insight into women's issues, which is important, and obviously has been important in the development of the law since she has been on the High Court."*[10]



From left to right: Justices Ken Hayne, Michael Kirby, Chief Justice Murray Gleeson, William Gummow, Michael McHugh, Ian Callinan and Dyson Heydon (seated).

Gender equity on the bench is also critical in more indirect ways. In particular, a woman judge on the High Court may be a powerful symbol and role model for women lawyers. It may also serve an educative function helping "to shatter stereotypes about the role of women in society that are held by male judges and lawyers as well as by litigants, jurors and witnesses".[11]

Does a Lack of Diversity Threaten the Appearance of Judicial Impartiality?

The idea that advocating diversity on the basis that it will make a difference to the development of the law may threaten the concept of judicial neutrality has been raised above. On the flip side of the coin is the argument that the lack of diversity may, of itself, threaten the appearance of judicial impartiality.

The public perception of an independent judiciary is paramount in a democratic society. The public perception of an independent judiciary is a necessary prerequisite for the people to have confidence in the legal system. Without that confidence, the legal system loses its legitimacy.

When the courts are considering cases involving or which impact on serious human rights issues, the overt contrast between the lack of diversity on the bench and the wide diversity of Australian society is perhaps even starker. A lack of diversity may prompt a lack of faith.

Where to from here?

The arguments advocating the need for diversity on the High Court, whether on the basis of gender or geographic or other points of difference, raise real and live issues which cannot be ignored. In light of the recent debate surrounding Justice Heydon's appointment, there perhaps needs to be a review of the considerations which the Government has regard to in deciding High Court appointments. Such a review will need to consider all the issues of diversity – theories of positive discrimination, whether diversity will make a difference to the substantive law and the relevance of principles of neutrality in the debate. And in time perhaps our judiciary will reflect the multifaceted society that Australia is. ■

1 Some members of the profession have criticized the appointment of Justice Heydon. The concern is that his Honour's appointment was made a certainty following a speech his Honour gave at a Quadrant dinner late last year attacking "judicial activism" and the years of the High Court while it was under the auspices of former Chief Justice Sir Anthony Mason: see Dyson Heydon, "Judicial Activism and the Death of the Rule of Law" Quadrant January-February 2003.

2 Cultural and other aspects of diversity are recognised as important by the author but are not the subject of this paper.

3 Following Justice Heydon's appointment, criticisms have also been directed at the appointment process. In a speech given in February 2003 at New South Wales Parliament House marking the centenary of the High Court, Sir Anthony Mason expressed concern about the fact that Attorney General Daryl Williams had interviewed those candidates for the position with whom he was unfamiliar and raised the threat such an approach poses to the court's independence and the threat it poses to the depoliticised nature of the Court: see Merritt, C. "Inquiry sought on secret High Court interview", *Australian Financial Review*, 25 February 2003.

4 The President of Australian Women Lawyers, Dominique Dogan-Horan, speaking on The Law Report, Radio National on 4 February 2003.

5 See Jane Matthews, "The Changing Profile of Women in the Law" (1982) 56 *Australian Law Journal* 634.

6 For example maternity leave issues, workplace flexibility for part-time work and childcare arrangements.

7 Queensland has the highest number of women amongst the state's judiciary with almost 30% of its Supreme Court judges being women.

8 Cultural feminists would see the issue of judicial diversity as far wider than gender, that the sameness/difference debate should encompass or embrace differences within gender, including race, religion and so on.

9 Fourth Annual Barbara Bethherman Memorial Lecture, Osgoode Law School, York University, February 8, 1990. See further Graycar, R.and Morgan, J. *The Hidden Gender of Law* Federation Press, 1990.

10 The Law Report, "Changing of the Guard at the High Court", Radio National (4/2/2003). For transcript see www.abc.net.au .

11 See Sherry, S. "The Gender of Judges" (1986) 4 *Law and Inequality* 159.

Quotables – Is there a 'Gay Test'?

The following is an excerpt from the decision of the Refugee Review Tribunal ("RRT") rejecting an application for a protection visa by an Iranian applicant claiming persecution in Iran because he was a homosexual. The RRT stated:

"The Tribunal... well understands that it should not expect all or any homosexual men in Iran to take an interest, for example, in Oscar Wilde, or in Alexander the Great, or in Naguib Mahfooz, or in Greco-Roman wrestling, or in the songs of Egypt's tragic muse Oum Khalsoum, let alone, say, in the alleged mystique of Bette Midler or Madonna. There are always political, social and potentially intangible cultural considerations to take into account. However, the Tribunal was surprised to observe such a comprehensive inability on the Applicant's part to identify any kind of emotion-stirring or dignity-arousing phenomena in the world around him."

In finding that the Tribunal did not act in bad faith, the Full Federal Court stated:

"...it is understandable that the RRT might test the veracity of the claim by reference to knowledge or attitudes which members of the relevant religion, social group or political party might be expected to possess. As a matter of common sense, this is a perfectly legitimate fact-finding technique for an administrative decision-maker."

Minister for Immigration & Multicultural & Indigenous Affairs v SBAN [2002] FCAFC 431 at par 65 per Heerey and Kiefel JJ.