

Speech to Women Lawyers Achievement Awards, Melbourne

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The Hon. Diana Bryant, Chief Justice, Family Court of Australia

There is no question that women are slowly but surely becoming prominent in the Australian legal community and more particularly on the bench. At a regional leadership conference for Australian and New Zealand Heads of Jurisdiction, the first of its kind ever held in Australia, there were seven women Heads of Jurisdiction out of a total of 30. The proportion may not seem great but the imagery is, particularly when they are spread evenly across all jurisdictions, from the Chief Justice of New Zealand to Federal, Supreme, District and Magistrates' Court. That group and its representation heralded in my view the positive side of the appropriate recognition and appointment of women to judicial office.

Similarly, the number of women being appointed to Judicial office is increasing in what I suggest is a generally satisfactory way. For example, on the NSW Supreme Court in 2002 there were four women on the bench. There are now nine. The percentage has gone from 6.25% to 15.25%. In Victoria, there were four in 2002. There are now seven. The percentage has gone from 11% to 20.5%. In South Australia there was one and now three, the percentage going from 7% to 21.5%. In Western Australia there were two, now four, the percentage rising from 11% to 20%. In Queensland there were seven, now eight, rising from 24% to 33% of the bench. In Tasmania

there is now one. The Northern Territory has remained constant with one and in the ACT there are now two. Those figures are quite significant in my view.

In District and County Courts (not including Reserve Judges but including Acting Judges), in NSW there are 17 women Judges up from 14 five years ago, forming nearly 26% of the bench. In Victoria there are 20 women Judges up from 15, forming nearly 33% of the bench. In South Australia, two up from one, forming around 11%; in Western Australia, eight up from two, forming nearly 30%; and in Queensland seven up from five, forming 20% of the bench.

Women have also been appointed to Courts of Appeal. In NSW there are two, in Victoria there are two (including the Chief Justice) and in Queensland there are two.

As far as federal courts are concerned there is of course one woman on the High Court, 14 on the Family Court representing just over 34%, 6 on the Federal Court representing 12.5% and 12 in the Federal Magistrates Court representing 25%. In the federal appellate Division, all of the women Judges in the Federal Court sit on the Appeal Division and in the Family Court four out of the nine appeal Judges are women, including myself, and it is common now to have an all-female bench consisting of members of the Family Court Appeal Division.

The High Court deserves mention, as it always does. We would now, as we have for many years, found it unthinkable for the High Court bench not to include a woman.

In real terms the percentage of just over 14% lags behind most of the other superior courts and an appointment of a second woman to the High Court bench would certainly send a positive message to the community at large and the legal community about the status and appropriate recognition of women.

We should not forget that the Canadians have seen fit to appoint four women Judges to the Supreme Court, one of whom is the Chief Justice. We seem to be a little way off achieving that just yet.

In general though, as far as Judicial appointments are concerned, the percentage of women on the bench is increasing and significantly so in the last five years.

The appointment of women to benches throughout Australia have been made by Governments who are generally electorally aware that almost half of their constituent voters are women and have been influenced by an awareness of systemic discrimination against women and the need for some activism.

Gender analysis has played an important role in raising awareness of issues confronting women in the law. The growth in feminist jurisprudence has been remarkable and many Australian women

academics have contributed enormously to its development and growth, including Jenny Morgan, who is justly a recipient of an award tonight. Feminist legal theory is now an accepted part of university curricula and a number of law journals are devoted exclusively to discussion of women and the legal.

The profession has also responded to growing awareness of systemic discrimination against women by developing responsive policies and practices. The Law Council of Australia adopted a national model equal opportunity briefing policy for female barristers and advocates in March 2004. Since that time, private firms, insurance companies and government agencies have adopted the policy, including some of the top tier firms.

Should we then congratulate ourselves on our achievements and sit back and relax? I hardly need to ask, let alone answer, that rhetorical question at a function such as this. The very giving of achieving awards, which acknowledge professional excellence and influencing and assisting the progress of other women, makes it obvious that the Victorian Women Lawyers and the Women Barristers Association do not believe that their work is anything like completed yet.

Regrettably, not all members of the media have yet accepted the legitimacy of women as lawyers and particularly as appointees to senior Judicial office. You will remember the articles written at the time of the appointment of Marcia Neave to the Court of Appeal, one with the title *Justice Wears a Skirt*. When the Attorney-General took

issue with the thesis of the writer, the author then feigning the air of someone who is heard and misunderstood, suggested that it was about 'politics' and not 'gender'. The problem about this is that no similar comments seem to have been made about men.

These are curious comments from the media at a time when the Judiciary is coming under increasing public criticism for being "out of touch" and "elite." It is strange that there would be support for a narrow conception of merit that perpetuates the appointment of stereotypical Judges.

I regret to say that the editor of the *Australian Law Journal* appears from time to time to be a fellow traveller of this kind. You will recall that the article in question argued that the law was being 'feminised' by the appointment of women to top legal Judge jobs, including the Victorian Chief Justice, the Solicitor-General and the then President of the Children's Court.

One would hope that those whose views are so stridently expressed are dwindling in number and potency, particularly when the subjects of their criticism are performing well – indeed, as well – as their male counterparts.

At about the time that these articles were appearing in the press I gave a speech to the Australian Women Law Students Collective

which I entitled, subtly enough I thought, *Shutting the Stable Door* – women and judicial office. I posed the question at one point “are we now satisfied with these achievements? Has the ‘horse’ of gender equality now bolted so quickly and so far that we can confidently shut the stable door, secure in the knowledge that our profession has eschewed discriminatory practices and views?”

As I have already said, this function itself indicates that the two organisations concerned believe that there is still much to do.

And there is. One of the effects of the appointment of senior and experienced women to courts is that it is diminishing the number of senior women in the profession and at the Bar in particular. Women are still seriously under-represented at the level of senior partnerships in solicitors’ firms.

The appointment of senior women from the Bar has not been matched by the appointment of Senior Counsel. I use Victoria as an example. At present there are 343 women at the bar and 16 women members of Senior Counsel out of 1671 barristers in total and 227 members of Senior Counsel. Women represent 20.5% of all barristers but only 7% of members of Senior Counsel.

Of the 16 women members of Senior Counsel at the Victorian Bar, only two have more than six years’ experience. One of who is Alex

Richards, a recipient of an award tonight. Ten of them have less than four years' experience as Senior Counsel and the numbers being appointed are concerning as well. In 2004 there were four from 23, a total of 17%. In 2003 there were 6 from 21, a total of 28.5%. In 2004 there were 2 from 11 appointments, 18.9%. In 2005 there was one from 15, 6.7% and in 2006 one from 13, 7.7%.

The concerning figures come from the last three years and the last two in particular: two and then one in the last two years.

This is not because the Chief Justice of the Supreme Court is not supportive of the appointment of women as Senior Counsel. She is a clear supporter of the advancement of women. But the problem I think is two-fold. One is the few women who have sought to become Senior Counsel in the last few years. It is hard to know whether this is a lack of experience, those more experienced women having already been made Senior Counsel or appointed, or whether it is simply a reluctance to take on that role because of its obligations.

If it is the former, then we all need to encourage women in the law in whatever areas to obtain appropriate experience in all aspects and, at the Bar particularly, in all courts and if it is the latter then we all have an obligation to encourage other women to aspire to appointment as Senior Counsel.

Clearly it is too early to shut the stable door.

In 2005 in a speech at this function, Pamela Tate described the Bar's subtle pressure on her not to apply for silk. I would hope that that kind of pressure would not be applied now and I think it can also be said that the 'horse' of gender equity and the law has by no means bolted. Perhaps we can say it's been taken out for a short trot under a tight rein.

And for all of the hyperbole by some members of the press *The Age* editorial can be relied on for good common sense. On 25 September 2005 the editorial said "That the appointment of women to high legal office is still seen as peculiar reflects poorly on the community as a whole."

As I have the opportunity this evening to talk to you I want to say something about the Family Court and its role in the wider judicial landscape. I do so because as someone who has been involved in the practice of family law for over thirty years, as a solicitor, as a barrister, and as a Judge and Head of Jurisdiction in two courts, there has been a theme, at some times more obvious than at others, that family law is somehow a soft option and that it is not real law. This has sometimes been made worse by the fact that there are a number of women who practice in family law. Many do so by choice but as with systemic discrimination, there is the added twist that if women's

status is not seen as being comparable with men's, then the areas in which they predominantly practice will suffer a similar regard.

At some times, more in the past than the present I hope, women have been pushed into doing family law against their wishes. This has led to somewhat of a backlash, which I think is unfortunate. For example, whilst I understand the reasoning I think it was unfortunate that the Bar's survey of women in Courts did not include a survey of women who practice in the Family Court. It was the only Court that was excluded. And intentionally or not it sends a message, which I think is unfortunate.

Recently the Family Court has pioneered a new way of hearing cases about children; that is, parenting cases, through the Less Adversarial Trial, or LAT.

LAT is a significant change in the approach to trial procedures in Australia. It has major benefits for those experiencing family breakdown and who require a hearing before a Judge. It is consistent with the broader trend in civil litigation towards stronger case management and more active judicial involvement. It is also consistent with the Family Court's role as a specialist superior court, which tailors its practice and procedure to best meet the needs of separated families and particularly children.

This much was acknowledged by Chief Justice Gleeson at the recent 35th Australian Legal Convention when he said “As its name implies, the Family Court is a specialist court, and in certain respects its procedures are atypical, and tailored to its special role. In particular, disputes concerning children are dealt with in a fashion that is self-consciously less adversarial than the ordinary civil trial process.”

The two evaluations reports commissioned by the Family Court demonstrate that, in its pilot phase at least, a less adversarial approach brings significant benefits to litigants when compared with a traditional trial.

A less adversarial trial is a proceeding that does no harm to relationships, that tries to change parties from combatants into cooperative parents, that tries to help parents deal with issues which we always understood were there but not dealt with, to provide them with outcomes that will prevent further conflict, not sustain it.

I think it is also of enormous potential benefit to practitioners and advocates, including of course women.

It is a furphy that all lawyers crave the ‘cut and thrust’ of trial and relish the opportunity to decimate their opponent. It is precisely this fallacious view of advocacy and the qualities a lawyer must possess to be an “effective” advocate that I suspect is contributing to the

unprecedented number of law graduates who are turning away from legal practice as a career choice.

The Less Adversarial Trial provides a forum in which counsel can exercise their skills without being combative and aggressive. It is a process that encourages the use of incisive and creative reasoning and rewards the ability to think and act constructively rather than destructively.

I see the Less Adversarial Trial as presenting an opportunity to encourage more people – men and women – to undertake family law. It is an exciting, innovative and, ultimately, rewarding experience.