

Equal Opportunity in the Law
Speech by the Hon. Marilyn Warren
Chief Justice of the Supreme Court of Victoria
For the 19th LawAsia Biennial Conference
At the Gold Coast
On 22 March 2005

It often strikes me that difference is all too frequently portrayed in a negative light, as coming from a negative perspective. Being 'different', for instance, may not necessarily be associated with what is 'good' or desirable. Depending upon the context, use of the term 'difference' can somehow assume that there exists a norm representing a level or standard which should or ought to be attained. According to this subtle line of thinking, if one is 'different', then one risks being viewed as flawed, for failing to exist at a particular standard or live by the values of others.

I suggest that it is time to recognise difference as freed from such negative connotations. We must learn to embrace it, to recognise that difference can be a powerfully positive influence in our lives, and not least within the law and the legal profession itself.¹

Decisions such as *Mabo v Queensland (No. 2)*² illustrate the significance that decisions made by the courts of this country can have in legal, political, social and economic terms. The courts make determinations of law every day on a variety of issues which may impact on one's gender, race, religion or indigenous status. It is for this reason, amongst many others, that we strive for a legal profession that reflects the composition of our nation. Sadly, we are

¹ At the 13th Commonwealth Law Conference in 2003, I noted that a more positive approach on the focus of 'difference' in the context of equality of opportunity is needed. My speech 'Promoting Difference', which followed on from the Commonwealth Law Conference presentation, can be accessed at the Supreme Court of Victoria website: [http://www.supremecourt.vic.gov.au/CA256902000FE154/Lookup/Speeches2005/\\$file/SpeechPromDiff15May03.pdf](http://www.supremecourt.vic.gov.au/CA256902000FE154/Lookup/Speeches2005/$file/SpeechPromDiff15May03.pdf).

² *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

yet to have a legal profession that is truly representative of the Australian population. One wonders why that is the case. With that in mind, I intend to pose two questions in particular here today: First, just why is it that our legal profession has thus far failed truly to embrace 'difference'? Secondly, I ask how we go about resolving the issue of difference and how we may strive to reach real equality of opportunity within the law.

Gender: The Australian Experience

First of all, gender.

Women consist of approximately 51 per cent of the Australian population. They now also comprise somewhere between 55 to 60 per cent of all law graduates. There has been positive reform in many respects and the legal world is without doubt a different place to the one I entered thirty years ago.

But what is happening to improve the continuing gender imbalance at senior levels in the law firms, at the Bar and on the Bench?

In December 2003, the Law Council of Australia declared gender equity as its 'first priority'.³ It has since established the 'Equality of Opportunity Briefing Programme', or the EOBP, a national agenda designed for the fairer distribution of legal work to women barristers. That policy means briefing agencies are obliged to detail the gross amount and percentage of fees paid to female and male barristers and the number of matters briefed to female and male barristers. It has been strongly endorsed by the Women Barristers'

³ Law Council of Australia, 'A Level Playing Field for Australian Lawyers', Media Release, 7 December 2003.

Association and the Bar Council, together with the large majority of the legal community.

Major legal firms are already responding to the Law Council's initiative. Last year, Mallesons Stephen Jaques adopted equal opportunity briefing policies. This was in large part thanks to the efforts of Jennifer Batrouney SC, immediate past President of Australian Women Lawyers, and the strong endorsement from State government, including Attorney-General Rob Hulls. It appears that other firms may not be far behind.

As well, the well-established senior mentoring schemes ensure strong relationships between female junior barristers and more senior silks. The importance of mentoring for women is growing in solicitors' firms, where more women than ever before are gaining their articles and working in an environment where senior women lawyers and partners can provide them with encouragement and motivation in the work they do.

There is also the 'Life in the Law' program, established by the Law Institute of Victoria in 2002. This program gives young lawyers the opportunity to establish ongoing contact with a member of the judiciary. It was created to give young lawyers a broader view about the practice of the law and their role in the community, as well as giving them support and inspiration in their pursuit of a legal career. In a practical sense, this has led judges, including myself, to meet informally throughout the year with a group of participants to discuss our varied experiences in the law.

On another front, Victorian Women Lawyers (VWL) are active in their support of more experienced women lawyers through the development of

part-time partnership programmes. The VWL's recently published 'Flexible Partnership - Making it Work' report is instructive, and seeks to identify the reasons for systemic discrimination in law firms of female partners and develop practical strategies which achieve attitudinal change.

Ultimately the report demonstrates the need for flexible work arrangements to 'retain a satisfied and therefore productive partner' rather than 'lose a valuable asset'.⁴ Again, the institution of such measures has a flow-on effect that curbs the attrition rate of younger female lawyers who witness the possibilities of flexible work practices through their mentors.

The recognition of the importance of mentorship for women lawyers is something that is growing not only at home, but internationally. In North America, mentorship programmes are central to recruiting and retaining women lawyers. In a report compiled last year by the Defence Research Institute (DRI), presented by Sheryl Willert (incidentally the first female and first African-American President of the DRI), it was said that:

No action has figured as prominently in the advancement of women attorneys in their law firms as establishing and nurturing an effective mentoring relationship with a more senior lawyer in the firm. Women lawyers in private practice, judges, lawyers who have left private practice, managing partners and male defence lawyers single out effective mentoring as critical to the development and retention of women litigators in private practice.⁵

Clearly, then, mentoring is a growing phenomenon, which gives rise to all sorts of hope and possibility.

⁴ Sue Kaufmann and Georgina Frost, 'Flexible partnership - Making it Work', Victorian Women Lawyers, 2004, p 33.

⁵ S. Willert, 'A Career in the Courtroom: A Different Model for the Success of Women Who Try Cases', DRI, Illinois, 2004.

The importance of mentoring is not to be underestimated when it comes to other marginalized groups in the law. A partial solution to the lack of representation may be the provision of role models, where one is literally following in the footsteps of the trailblazers who have gone before.

Of course, a basic pre-requisite of a mentor is the ability to relate, to speak the same language. Good mentors are sensitive to the experiences of marginalized groups. It therefore can make it difficult for the student to find, and in turn be accepted by, mentors on the premise of their 'difference'.

In the law firms perhaps, one can find a wealth of mentors deriving from many different racial and religious backgrounds. This experience is not however reflected at the Bar, at least in Victoria – where there are quite a few Italians and Greeks; but to my knowledge just a few (for example) Vietnamese, Malay-Chinese or persons of Islamic background.

There is likewise very little racial differentiation on the Bench. The socio-economic profile of judges in most Australian jurisdictions has changed very little since the nineteenth century. The only marked change has been the acceptance of women onto the Bench. And there are very few women who have thus far attained judicial rank.

For Australia's indigenous population, mentors are very few and far between indeed. The legacy of our nation's past continues to haunt and raise barriers for those possessed of Aboriginal heritage.

That fact becomes clear upon a consideration of Australia's history. For much of our past, Aboriginals were for the most part excluded from the rest of

society. Then there was also an attempt to assimilate them. The tragedy of what we now call the 'Stolen Generation', which refers to the removal of Aboriginal children from their families by Australian government agencies and church missions from the time of Federation until the early 1970's, is an example of such an 'assimilation' policy.

The impact of this strategy of exclusion-assimilation is mirrored in the experience of other nations, for instance the Canadian Aborigines. Chief Justice McLachlin of the Supreme Court of Canada has spoken provocatively of the plight of indigenous people in that country following European settlement. She observed that:

'The simultaneous pursuit of exclusion and assimilation produced cultural displacement, marginalization, and tragic loss of identity and self-esteem. The policy of exclusion cut Aboriginal Peoples off from opportunities available to the rest of the country. At the same time, the policy of assimilation undermined their identity as members of a group - their shared history, language and culture. The good aspects of the group dynamic - a solid identity rooted in one's history and culture - were weakened; the negative aspects - isolation, alienation and lack of opportunity - enhanced. Despite the often good intentions of well-meaning men, it is difficult to conceive in retrospect of a more problematic approach to the other... One can only grieve the loss to our country through the exclusion and undermining of Aboriginal cultures'.⁶

I echo the sentiments of the Chief Justice as it applies to the Australian Aborigines. It is obviously not just the law that has lost out in that regard.

As it now stands, there are few indigenous Aboriginal solicitors in Victoria and other States. I personally do not know of any person of indigenous background at the Victorian Bar, although the Bar itself has maintained a long tradition of involving itself in *pro bono* work for the Aboriginal Legal Services.

⁶ Chief Justice Beverley McLachlin PC, 'The Civilization of Difference', Speech delivered at the LaFontaine-Baldwin Symposium, Nova Scotia, Canada on 7 March 2003.

At the Bench, there have been just two Aboriginal members who have attained judicial rank. They were both relatively recent additions. One is NSW Magistrate Pat O'Shane, Australia's first Aboriginal Australian barrister and public judicial officer. The second is the NSW District Court Judge, the late Bob Bellar. There is currently no indigenous representation at all in the superior courts of this nation.

So that you may further understand just why serious initiatives need to be taken, consider the following statistics. The present population of Australia is just over 20 million people. Of this figure, less than half a million⁷ may be counted as of Aboriginal or Torres Strait Islander descent.⁸ They therefore constitute just a small proportion - only 2.4 per cent - of the overall population. Nevertheless, this figure indicates that they represent a sizeable minority group in our community. According to an Australian Bureau of Statistics (ABS) survey conducted in 2002, there were more than 36,000⁹ legal practitioners¹⁰ in Australia, or to put it another way, that's roughly one solicitor or barrister for every 550 Australians. So what proportion of these 36,000 practitioners are of Aboriginal descent? I have not been able to find out

⁷ There were 410,003 Aboriginal and Torres Strait Islander people counted in the 2001 Census of Housing and Population, however, not all were accounted for. Thus the Australian Bureau of Statistics (ABS) estimates the figure to be more like 460,140 indigenous people living in Australia as at 30 June 2001.

⁸ "The 'definition' used currently by the Commonwealth is: An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she is associated. The definition involves three elements - (1) descent; (2) self-identification, and (3) community acceptance. However, this definition may present difficulties when attempting to apply it in various situations. For instance, a High Court judgment (?) in relation to the definition of "Aboriginal person" in the context of elections under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) found that "Aboriginal descent" was the only criteria that was necessary under all circumstances of the Act. The judgment noted that the second and/or third element may be required in some circumstances." (SEE this judgment).

⁹ Or more precisely, according to ABS figures, the number stood at 36,124 in mid-2002. Statistics obtained from www.abs.gov.au.

¹⁰ By "legal practitioners", I mean solicitors and barristers.

that particular figure. To my knowledge, no such research has been conducted to date. However, if one considers that less than two per cent of the indigenous population reported attending a university or other tertiary institution in the 2001 nationwide census, then one may begin to understand the problem. It indicates that extremely few indigenous people are making it in to law school in the first place. Moreover, the very high academic marks required for entry in to most tertiary law courses present another hurdle in that many Aborigines are from disadvantaged backgrounds. The tertiary education aspect is of great concern and I will return to that theme shortly.

Some Common Themes

There are some themes which are common to equalizing opportunities for all marginalized groups in the law. They include, but are not limited to, access to justice issues, maintaining community confidence in the judiciary, the view that the legal profession may be exclusive and the issue of educational opportunities for minority groups.

Access to Justice

With regard to access to justice, at present that issue would appear to be of particular relevance to people belonging to certain socio-economic backgrounds and also the indigenous people of Australia.

The President of the Law Council of Australia, John North, frequently discusses the need to diversify the types of lawyers entering the law and also how we can ensure quality legal representation in rural areas and indigenous

communities, where there is no doubt a great need for it.¹¹ The President is particularly concerned about improving legal services in rural and remote areas, and within indigenous communities. The Law Council continues to look at a number of initiatives, including ways to encourage young people from these areas to become lawyers and, just as importantly, to assist them in returning to work in their home communities.

In short, the access to justice issue raises some of the same problems that confront us when challenged by the question of equal opportunity; namely, do we need to become more inventive in permitting access to the law? That is, how do we ensure that disadvantaged groups realize equality of access to tertiary law courses around the country?

Hence, equalizing opportunities for certain groups to join the legal profession is not at all far removed from ensuring that these same people have equal access to justice.

Confidence in the Judiciary

In a speech delivered just last year, Justice McHugh of the High Court of Australia warned that where the judiciary is not seen to reflect the diversity of society at large, there lingers the risk that it will lose the confidence of the public. It was perhaps a timely reminder. It is the confidence of the public, after all, as Justice McHugh pointed out, upon which the authority of the judiciary – our third arm of government – ultimately rests.¹² His Honour noted that, by supporting a diversified judiciary, he did not mean to say that

¹¹ See the Law Council of Australia's media release 'We Need a Brave, United Legal Profession More than Ever Before' dated 16 February 2005, accessed at the Law Council of Australia's website <www.lawcouncil.asn.au> on 15 March 2005.

¹² Justice McHugh, 'Women Justices for the High Court', Speech delivered at the 2004 High Court Dinner hosted by the Western Australia Law Society on 27 October 2004.

judicial candidates should be appointed on the basis of their advocacy for a particular 'interest' such as gender, race or religion. Rather, he was saying that 'when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution'.¹³

How we go about maintaining the people's confidence in the judiciary is a theme which is closely linked to that of equality of opportunity because it also throws up the issue of the methods by which we obtain a diversified Bench, one that is accurately reflective of our society. For obvious reasons, namely the education factor, this issue also links into the access to justice issue already discussed.

Exclusivity of the Legal Profession

Before true equality of opportunity in the law is attained, we arguably must also tackle the notion that the legal profession is somehow 'exclusive', the domain of a lucky few. Perhaps that was once the case. But that should not be the case today.

Nevertheless, one can see why the idea of exclusivity may persist. To outsiders, the way in which business is conducted at the Bar must seem quite shrouded in mystery and secrecy. And as mentioned already, there is room for more diversity in the socio-economic profile of the Victorian Bar. Judges also can seem distant and apart – this distance can be a function of their role and the demands of impartiality and the separation of powers. If aloofness is perceived in some, perceptions of exclusivity would be compounded.

¹³ *Ibid.*

A career in the law must therefore seem so much more daunting for a person coming outside the Anglo-Saxon Celtic tradition. A partial response to the problem would almost certainly be to increase educational opportunities across the board. At the same time, it would seem to be necessary to help prevent barriers to entry to tertiary law courses for persons coming from disadvantaged backgrounds.

Increasing Educational Opportunity and Limiting Barriers to Entry

But what about those who do wish to study the law but find themselves prevented from doing so because of the usually very high marks required to enter law school?

The issue of academic scores for entry into high-demand university courses is fairly controversial at the moment. It is clear that the universities in this country increasingly rely on full fee-paying students for much of their revenue, many of whom come from overseas. New changes introduced by the federal government now permit the maximum quota of full-fee paying students to rise from 25 to 35 per cent of total enrolments in any course. Students can now obtain a full-fee paying place with marks below that which non full-fee paying students must make.

People are asking particularly, what does this mean in relation to firstly, rural students; and second, Aboriginal students (many of whom are also from the country). These students have traditionally been viewed as coming either from under-represented schools (particularly with respect to rural students), and sometimes, also from disadvantaged backgrounds.

On the face of it, this hardly seems fair. While some universities are responding by setting up programs to encourage increased participation by students such as these,¹⁴ only time will tell if these measures will work.

Whatever the case, rural students commonly report lack of equality of opportunity as a result of the following factors: isolationism, (sometimes) a lack of resources, and often a feeling of displacement when they eventually do go on to university. I understand that the Law Council of Australia has indicated that it is currently concerned with the issue of rural lawyers and access to education by people from these areas, and we will no doubt be hearing more about it soon.

In 2001, the Human Rights and Equal Opportunity Commission (HREOC) prepared a briefing paper for the government on rural and remote education opportunities for indigenous children.¹⁵ It is noted that there continues to be significant barriers to access and effective learning by indigenous children at both primary and secondary levels of education. These barriers included an apparent lack of relevance of the curriculum and education generally, racism and discrimination at all levels in society including the school environment and the classroom, poor health of many of the students, lack of opportunity for parents and the community to become involved in school-based delivery of education, significant levels of incarceration, high unemployment rates, a lack of appropriate role models and availability of suitable teachers.¹⁶

¹⁴ Michael Crommelin, Dean of Law, University of Melbourne, Letter to the Editor, *The Age*, 26 February 2005.

¹⁵ HREOC, "Rural and Remote Education Inquiry Briefing Paper", 2001.

¹⁶ *Ibid.*

When it comes to Aboriginal children in very isolated areas, the HREOC Report noted that School of the Air may be inappropriate for a lot of them, mainly for cultural and resource factors.

All this translates into making it very difficult for Aboriginal students, many of whom live in rural areas, to access tertiary education – let alone some of the top courses in the country, such as law.

However, there is some room for optimism. Programs now exist at most Australian universities that are designed to assist Aboriginal students to participate and succeed in their legal studies. For instance, at the University of Melbourne, the 'Access Melbourne' program helps to assist people from disadvantaged backgrounds – Aboriginal or otherwise.

There are moreover many universities throughout Australia with indigenous law centres which encourage Aboriginal students to study and broaden their knowledge of the law.

But hand in hand with education must come the vocal support of the legal community.

Programs advancing equal opportunity for Aborigines in the legal profession are widely supported by the legal community here in Australia. Justice Geoffrey Eames of the Court of Appeal of the Supreme Court of Victoria has been involved for several years with the establishment of the 'Indigenous Law Students and Lawyers Association of Victoria'. This had been a joint effort involving the Law Institute of Victoria, the Victorian Bar and members of the judiciary. Funding has been provided by the Victorian State government, with assistance being provided by both the Bar Council and currently the Law

Institute. A principal goal of the Association is to encourage Aboriginal law students to stay in the law, to complete degrees and to practise law. The encouragement and support of other Aboriginal law students and lawyers, and of judges and magistrates therefore remains vital.

Conclusion

In a speech delivered at the 13th Commonwealth Law Conference held in 2003, I made several suggestions which I said might constitute a partial answer to the problem of gender inequality.¹⁷

First of all, recognition.

By this I meant that there needs to be recognition that there are no absolute solutions. Nonetheless, solutions ought be pursued by progression. As new gender phenomena are revealed, new solutions are required.

Secondly, I discussed responsibility.

I said then that as women progress, those who succeed cannot rely solely on their example. They ought use their achievement to expressly and practically support the development and promotion of younger women in the law. Cross-generational promotion should form part of the mature ambition. It seems that there are five ages of women. The young wild years until reaching twenty. The outrageous and exciting years until thirty. The energetic and ambitious years until forty. The cool, calculating and driven years until fifty. Thereafter women assume experience and wisdom that is an untapped

¹⁷ From my Speech 'Promoting Difference', which followed on from the Commonwealth Law Conference presentation, see the Supreme Court of Victoria website: [http://www.supremecourt.vic.gov.au/CA256902000FE154/Lookup/Speeches2005/\\$file/SpeechPromDiff15May03.pdf](http://www.supremecourt.vic.gov.au/CA256902000FE154/Lookup/Speeches2005/$file/SpeechPromDiff15May03.pdf).

resource. As we progress through those years there are constantly women behind us. It is imperative that the hand be cast down to the generation below to pull up the women from the previous generation to the next.

Thirdly, I spoke about accountability.

In other words, when the opportunity for progression arises, duty ought prevail. When the offer of partnership, the difficult brief or judicial appointment comes, there is a duty to accept. A duty to gender.

Fourthly, perseverance.

Essentially, I said that the solution was to 'keep gender on the agenda'. Perseverance is the ultimate imperative in promoting difference.

Nevertheless, I suggest that all four points apply to all aspects of equal opportunity: recognition in that there are no absolute solutions as it applies to equal opportunity of all marginalised groups; responsibility given that we have a responsibility to assist others; accountability as it relates to our duty to act upon an opportunity when it is presented; and lastly, perseverance: I once urged that we should 'keep gender on the agenda'. In a time of acute awareness of human rights, we should similarly 'keep equality of opportunity on the agenda'.