

AUSTRALIAN BAR ASSOCIATION
JUDICIAL APPOINTMENTS FORUM

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"Has the System Failed Women?"

About two weeks ago when I was photocopying some articles in chambers, a colleague stopped at the photocopier for a chat. I mentioned that I was going to speak at this forum and that my topic was "*Has the System Failed Women?*" My colleague, knows that of recent times I have been President of Australian Women Lawyers and he exclaimed "Well you lot should be pretty happy about things!". Even though I have known him for many years and we have been opposed in a number of matters, I had no idea whether he was joking or being serious. I had to actually ask him what he meant.

What he meant was, as so many women have been appointed to the Bench in recent times, how could I possibly not be happy? As I struggled to think of a diplomatic response, it struck me that there was a serious divide in perception between myself and my colleague.

My colleague is a great bloke and we have chambers near each other in Melbourne. We both practice in the same area of law. He refers work to me, if he is too busy and I reciprocate. We bounce legal problems off each other. We oppose each other in Court. I would describe him as a conservative mainstream barrister, in his early fifties.

I have been troubled by this difference in perception between myself and my colleague, in relation to the topic of judicial appointments for women. There seems to be two fundamental beliefs underlying my colleague's perception. Firstly, the belief that extraordinarily large numbers of women have recently been appointed to the bench and secondly, that these appointments have somehow been unwarranted.

The perceptions held by male members of the profession about the appointment of women under the current appointment system, is an important matter and one to which I will return to later.

Turning now to the question posed for this forum "*Has the System Failed Women?*" My answer is yes, the judicial appointments system has failed women lawyers and so has the legal profession as a whole. In my view it is not possible to examine the failures of the judicial appointments system, insofar as it relates to women lawyers, without considering the failure of the legal profession as a whole, to ensure the advancement of women within the profession.

The Board of Australian Women Lawyers ('AWL') supports the establishment of an independent judicial commission or commissions (as the case may be), charged with the responsibility of identifying and recommending suitable persons to become judges. The Board supports a system which is "transparent, accountable and which, while based on appointment on merit, acknowledges and is able to accommodate issues of diversity"¹.

I do not intend to now proceed to undertake a detailed analysis of the various models advanced for the establishment of such commissions. There are other speakers today who will provide such analysis. I will say however, that it is the Board's view that it is desirable that the commissions be constituted in such a way, that appointments to the commissions are not directly controlled by the executive. The Board also prefers a model which limits the executive's ability to refuse to select a candidate from a panel of names provided to the government.

There are two main reasons that AWL supports the establishment of independent judicial commissions. These are: -

- (1) Firstly to ensure a more transparent and consistent selection process; and
- (2) Secondly to ensure that more women continue to be appointed in significant numbers, so that women achieve equality of representation in the Australian judiciary.

I will now examine in more detail the rationale behind each of these reasons for supporting the establishment of independent judicial commissions.

¹ Justice Ruth McColl AO, "*Women in the Law Address to the Anglo-Australasian Society of Lawyers*", Sydney, 3 May 2006, 3.

Secrecy and Lack of "Consultation"

The present system is shrouded in secrecy and rife with gossip. No matter what political 'spin' or rhetoric is used to support the current system, the inescapable fact is that the process of selecting and appointing judges in Australia is a secret. This should be a matter of concern to all lawyers and not just women lawyers.

The first question is, who is actually consulted in the appointment process? Former Federal Attorney General Professor Michael Lavarch has recently expressed his concerns candidly about the narrow confines of the "consultation" process and said: -

"The present consultation process tends to identify candidates who are familiar to judges. Outstanding candidates in the ranks of solicitors, government, corporate and community lawyers and legal academics don't readily come to their attention".²

The second question is, even if "consultation" does take place, what weight if any, does the executive place upon the views of those consulted?

The extent to which any consultation actually takes place, whether it be on a State or Federal level is quite unknown. No one outside the executive really knows. Nor is it known the extent to which the executive places any weight upon the views of those consulted.

The Law Council's 'Policy on the Process of Judicial Appointments'³ supports the development of Judicial Appointment Protocols that acknowledge that "...the Attorney-General may consult such other persons as the Attorney-General thinks fit and state that wide consultation is encouraged". The Law Council Policy also suggests that such consultations could include, by way of example "...office holders of organizations, such as the peak national women lawyers association"⁴.

Since I started on the Board of AWL in November 2004, the Board has regularly discussed whether the State and Territory Attorneys have consulted with the various women lawyer associations around Australia, in relation to proposed judicial appointments. The result of

² Michael Lavarch, Australian Financial Review, 20 October 2006, "Opinion: Judicious Selection Needed".

³ Law Council of Australia, "Policy on the Process of Judicial Appointments", 16 March 2002.

⁴ Ibid., paragraph 7.

these discussions is essentially that there has been some consultation in one or two states and in the others none at all. On a Federal level, in May 2005 there was a meeting between the then President of AWL Noor Blumer and the Federal Attorney General. At this meeting Ms Blumer presented the Attorney General with a confidential list of names of women which AWL considered appropriate for appointment to the High Court. This list of names had been compiled from advice received from the women lawyer associations of each State and Territory. This meeting had been requested by Ms Blumer and the presentation of the list was at the initiative of AWL. The names on the final list were known only to Ms Blumer. In the month or so after the May 2005 meeting, AWL was invited to participate in some further consultation in relation to other federal appointments. Subsequently no further request for any consultation has been received by AWL in relation to any Federal appointments.

To summarise, I regret to say that it appears to me that any "consultation" on a State, Territory or Federal level with the various women lawyer organisations around Australia has been largely non-existent in recent times.

Ensuring a More Diverse Bench

I now turn to the second reason that AWL supports the establishment of independent judicial commissions. AWL seeks to ensure that more women continue to be appointed to the bench in significant numbers, so that women achieve equality of representation in the Australian judiciary. A more diverse Australian judiciary will thereby be achieved.

A diverse judiciary is desirable for three main reasons: -

- (1) Firstly, to facilitate public confidence in the judiciary. Where a section of the community "...feels that its perspectives and needs are not being taken adequately into consideration by the judiciary – due in part to the fact that the judiciary does not reflect their presence in society – then this can result in a lessening in regard for and confidence in, judicial decision-making".⁵

⁵ Commonwealth of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *"Gender Bias and the Judiciary"*, 1994, 96.

Mary Gaudron has said:-

“It is essential there are judges who come from as wide a background as possible, who understand how their decisions affect people of different cultural and socio-economic backgrounds, and sometimes people of a different sex...it is absolutely crucial for public confidence in the judicial process...to have a wide and different experience of life”.⁶

Justice Michael McHugh has also recently stated that “...when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution”. His Honour warned that “...unless we redress the gender imbalance in judicial appointments, there is an ever-increasing risk in the society of today that the public support on which the legitimacy of the judiciary rests will erode”.⁷

- (2) Secondly, a diverse judiciary is desirable to ensure that the judiciary reflects the make-up of the Australian legal profession. It is important that women working in the legal profession have role models of women judges on our superior courts⁸.

I note that in November this year the Victorian Women Barristers Association will be having a celebratory dinner and will commemorate the fact that it is ten years since Justice Rosemary Balmford was the first woman to be appointed to the Supreme Court of Victoria. For my part, I had been in practice as a barrister for six years before seeing a single woman on the bench of the Supreme Court of Victoria. Unfortunately it took over fifteen years of practice as a barrister, before I saw Justice Marcia Neave being appointed this year as the first woman to the Victorian Court of Appeal. It is fitting that Justice Neave will be the speaker at our celebratory dinner.

- (3) Thirdly, a diverse bench is also important to assist in overcoming “...continuing and pervasive stereotypes both within the profession and the substantive law, and would generally perform

⁶ Natasha Robinson, *The Australian*, 16 September 2005, “High Court Needs a Woman: Gaudron”.

⁷ Justice Michael McHugh, “*Woman Justices for the High Court*”, Perth, 27 October 2004, 4.

⁸ Justice Michael Kirby AC CMG, “*Women in Law – Doldrums or Progress?*”, Perth, 22 October 2003, 2.

a critical educative role".⁹ It is important that men within the profession, be they counsel or solicitors, learn to become accustomed to women on the bench¹⁰. It is also important for male litigants, witnesses and men in the community generally to become accustomed to women in a serious decision making role.

The Under-Representation of Women on the Bench

Women continue to be under-represented in the Australian judiciary. This is despite the fact that women have been admitted to practice in most jurisdictions for a century or more and graduating from law schools around Australia in equal, if not more numbers than men for many years now. Over the last 20 years, female representation in undergraduate and graduate law programs has been more than 50 per cent on a national basis.¹¹ Women now form half of those entering the profession each year.¹²

So how many women are today on the bench of the superior courts of Australia? Last week I reviewed the internet sites of each of the superior courts around Australia, to confirm how many women are currently appointed to the judiciary. I have also taken into account the appointments to the Family Court of Western Australia and the County Court of Victoria, announced this week on 24 October 2006. I have set out in tables appended to my paper the detailed results of this review and I will now summarise these results.

For State appointments to the Supreme Courts and Courts of Appeal of the States and Territories, and the Family Court of Western Australia, the percentage results were as follows: -

⁹ Rachael Davis and George Williams, "A century of appointments but only one woman", *Alternative Law Journal*, Vol. 28, No.2, April 2003 54, at 55.

¹⁰ Kirby, loc. cit.

¹¹ Chief Justice Marilyn Warren AC "Speech given by the Hon. Marilyn Warren AC Chief Justice of the Supreme Court of Victoria on the Occasion of the Tenth Anniversary of the Victorian Women Lawyers", Melbourne, 24 August 2006.

¹² Law Council of Australia, "2010: A Discussion Paper. Challenges for the Legal Profession", 2001, 18.

State	Total number of Judges Currently Appointed to the Court	Number of Women Judges Currently Appointed to the Court	Percentage of Women Judges Currently Appointed to the Court
ACT	4	0	0%
Northern Territory	9	1	11.11%
New South Wales	56 (Including Judges and Associate Judges)	7	12.5%
Tasmania	6	1	16.67%
Victoria	34	6	17.65%
South Australia	13	3	23.08%
Western Australia	25	7	28.00%
Queensland	24	8	33.33%

It is most disappointing that New South Wales, the State with the most judges appointed to the bench of the Supreme Court, should have so few women appointed. Only the Northern Territory and the ACT (which has no women appointed) have worse results. The Supreme Court of Queensland clearly has the best results.

For appointments to the State District and County Courts, these results are as follows: -

State	Number of Judges Currently Appointed to the Court	Number of Women Judges Currently Appointed to the Court	Percentage of Women Judges Currently Appointed to the Court
South Australia	19	3	15.79%
Queensland	36	7	19.44%
New South Wales	70 (Including Judges and Associate Judges)	16	22.86%
Victoria	64 (Including Acting Judges)	19	29.69%
Western Australia	26	8	30.77%

The overall national percentage of women appointed to the superior State and Territory Supreme, District and County Courts and the Family Court of Western Australia, yields a national average of 21.03%. That is a little more than one-fifth of State and Territory appointments.

In relation to the Federal Court, only 12.5% of all appointments nationally are women. The one appointment of a woman to the High Court represents only 14.29% of the Court. This yields an overall average national percentage of women appointed to the Federal Court and the High Court of 12.73%. The statistics are quite different when the Family Court of Australia, traditionally the domain of women advocates, is added in. In the Family Court of Australia 40% of all the judges, including the Chief Justice, are women. This statistic is a far more acceptable outcome for the goal of achieving equitable representation of women on the benches of our national superior courts. When the Family Court is added into the national average percentage for Federal Courts, the percentage increases from 12.73% to 24.21%. This is still unacceptably low, being just less than one-quarter of all Federal judges.

The fact that only two women have ever been appointed to the High Court is a graphic illustration of the manner in which the current judicial appointments system has failed women. Australia has a "poor record of appointing women to its highest court, when compared with that of other common law jurisdictions".¹³

After Justice Gaudron was appointed to the High Court in 1987 there were seven male appointments¹⁴ made by successive Labour and Liberal governments. Last year the Shadow Federal Attorney General Nicola Roxon said that it was "almost beyond belief that in 2005 Australia does not have a woman on its highest appellate and constitutional court".¹⁵ Ms Roxon also acknowledged that there were problems "associated with the informal selection process".¹⁶

¹³ Davis and Williams, *op. cit.*, 54.

¹⁴ Chief Justice Murray Gleeson and Justices Michael McHugh, William Gummow, Michael Kirby, Kenneth Hayne, Ian Callinan and Dyson Heydon.

¹⁵ Nicola Roxon MP, "Speech to the Woman Lawyers' Association, ACT: Gender, Geography and Philosophy – What Gets a Look-In for the Next High Court Appointment?", Canberra, 7 September 2005, 5.

¹⁶ Nicola Roxon MP, "Speech to the Woman Lawyers' Association, ACT: Gender, Geography and Philosophy – What Gets a Look-In for the Next High Court Appointment?", Canberra, 7 September 2005, 9.

It was 18 years after the appointment of Justice Gaudron to the High Court, before Justice Susan Crennan was appointed in September 2005. I should add that Justice Crennan was the first appointment to the High Court by the current Attorney-General.

Looking at the overall picture of judicial appointments of women to all the State and Federal superior courts in Australia, 109 women have been appointed nationally. Out of a total pool of 504 judges appointed to these courts, women represent a national average of 21.63%, just over one-fifth of all appointments.

In reviewing these statistics I acknowledge that there has been change and there has been an increase in the number of women appointed to the Courts around Australia. I also cannot help but conclude that many of these appointments have been as a result of individual attorneys embracing the need to have more women on the bench. For example in Victoria, Attorney-General Rob Hulls has over the years been a constant vocal supporter of the goal of achieving a diverse bench in all Victorian Courts.

Unfortunately in some States and Territories the Attorneys have not been so enlightened and the result is that women represent just over one-tenth of the judiciary in those particular States or Territories.

It is the view of AWL that progress in appointing more women to the judiciary should not be contingent upon the good will and enthusiasm of individual State or Federal attorneys. It is preferable that progress is made through judicial appointment commissions, systematically and impartially assessing candidates by way of objective criteria, which places value upon diversity.

It is also important that appointments of women are seen by the profession and the community to be appointments made after a systematic and impartial assessment of candidates and not the result of what some conservative factions within the profession consider to be an over zealous attorney-general¹⁷.

Justice McColl has recently warned that adverse media reports relating to the appointment of women "may raise concerns in the minds of a significant proportion of...readers about how justice is administered".¹⁸ Her Honour also warned that controversies stirred up by adverse

¹⁷ Andrew Bolt, Herald Sun, "*Law Wears a Dress*", 1 March 2006.

¹⁸ McColl, *op. cit.*, 2.

media reports may well discourage “eminently qualified...non-standard, candidates from considering judicial appointment.”¹⁹

Failure of the Legal Profession

Even though there has been progress in appointing women to the judiciary, Chief Justice Warren has observed that “there is impatience that change is not occurring more rapidly” and that “There is irritation at on going discrimination against women”.²⁰

I expect that some listening to the statistics which I have just summarised will be complacently thinking, ‘Well considering the number of women who are practicing at the various independent bars, how can you expect much better?’ This is where the legal profession as a whole has failed. There is a much broader problem in the Australian legal profession and that is the severe under representation of women in the senior ranks of private law firms, the Bar and the judiciary. This is a problem for the whole of the profession and is not simply another “*Woman’s Problem*”.

It is also a problem for the community. Chief Justice Warren has recently said: -

“The Victorian Community suffers from an under-representation of women as advocates and in senior legal positions in law firms. Too often this is dismissed as a problem for women alone. It is not. This is a problem for society at large and necessitates the engagement of all the community to secure a solution.”²¹

In a speech given to launch Australian Women Lawyers nine years ago, Justice Gaudron said: -

“The trouble with women of my generation is that we thought if we knocked the doors down, success would be inevitable”.²²

They thought that if the formal barriers to entering and practicing in the profession were dismantled, it would only be a matter of time before women rose to positions of seniority within the profession.

¹⁹ McColl, op. cit., 3.

²⁰ Chief Justice Marilyn Warren AC, “*Promoting Difference*”, Melbourne, 15 May 2003.

²¹ Chief Justice Marilyn Warren AC, “*Speech given by the Honourable Marilyn Warren, AC Chief Justice of the Supreme Court of Victoria on the Occasion of the Tenth Anniversary of the Victorian Women Lawyers*”, 24 August 2006, 4.

²² Justice Mary Gaudron, “*Speech to Launch Australian Women Lawyers*”, Melbourne, 19 September 2006, 1.

Success has not been inevitable. In August this year AWL released the results of its national Gender Appearance Survey of the superior Australian Courts. The object of the survey was to ascertain the rate at which women were appearing as advocates, the types of matters in which they were appearing and the average length of time of cases in which they did appear. The survey was not designed to monitor the appearances of women as members of an independent bar in any jurisdiction, but simply to record the appearances of women in an active speaking role.

The results of the survey indicated that there was substance to anecdotal reports that gender briefing patterns persist and that women are not being briefed to appear in more senior or complex matters. The full results of the survey and an explanatory memorandum are published on the AWL website www.womenlawyers.org.au, however I will indicate some of the results and I propose to firstly use Queensland as an example.

In Queensland: -

- o Only 7.2% of all appearances in the Supreme Court were by women.
- o No women appeared as senior counsel in civil or criminal matters in the Supreme Court.
- o No women appeared as junior to senior counsel in civil matters in the Supreme Court.
- o In the District Court of Queensland, the average length of hearing for a male who was junior to senior counsel for criminal hearings was 115 hours, whereas for a female junior counsel in the same position, it was 1 hour.

The results for the other states and territories were also disheartening. The results for the Federal Court proved no better.

In the Federal Court: -

- o Only 5.8% of the appearances by senior counsel were by women.
- o The average length of hearing for male senior counsel was 119.7 hours, whereas for female senior counsel the average length was 2.7 hours.
- o The average length of hearing for a male who was junior to senior counsel was 223.6 hours, whereas for a female junior counsel in the same position it was 1.4 hours.

Although Victoria was not surveyed²³ Chief Justice Warren has said in relation to the AWL survey that the “Victorian experience mirrors the national experience”.²⁴

The standard explanation for these types of statistics is the “*Trickle Up Theory*”, namely that women of merit will eventually rise within the profession and achieve positions of seniority. Justice Gaudron has described this standard explanation as “dishonest” and one which she had been “hearing for more than 20 years”.²⁵

Another explanation for these types of statistics is simply, as stated by a recent commentator, “the relative recency with which women have become a substantial proportion of the legal profession”.²⁶

Neither of these explanations takes into account the conclusions reached in 2001 by the Law Council in its “2010: A Discussion Paper. Challenges for the Legal Profession.” In this discussion paper the Law Council concluded six years ago, that the assumption that “given time, the number of women entering at the bottom of the profession would be reflected in senior ranks had not materialised”.²⁷

Nor do these explanations take into account what Justice McHugh has recently described as the “discriminatory, systemic and structural practices of the legal profession...which have prevented female advocates from getting the same opportunities as male advocates”.²⁸

One of these “discriminatory” and “systemic” practices is the manner in which “merit” has been interpreted for the purposes of judicial appointments.

²³ The reasons that Victoria was not surveyed are set out on page 1 of the Explanatory Memorandum accompanying the Gender Appearance Survey, which is available at www.womenlawyers.org.au.

²⁴ Chief Justice Marilyn Warren AC, “*Speech given by the Hon. Marilyn Warren AC Chief Justice of the Supreme Court of Victoria on the Occasion of the Tenth Anniversary of the Victorian Women Lawyers*”, Melbourne, 24 August 2006, 2.

²⁵ Justice Mary Gaudron, “*Speech for Women lawyers Association of New South Wales 50th Anniversary Gala Dinner*”, Sydney, 13 June 2002, 4.

²⁶ The Hon. Geoff Davies AO, “*Appointment of Judges*”, Brisbane, 31 August 2006, 12.

²⁷ Law Council of Australia, “*2010: A Discussion Paper. Challenges for the Legal Profession*”, 2001, 132.

²⁸ Justice Michael McHugh, “*Women Justices for the High Court*”, Perth, 27 October 2004, 2. See also Justice Michael Kirby AC CMG, “*Victorian Women Lawyers’ Lesbia Harford Oration, Women in the Law- What Next?*”, Melbourne, 20 August 2001, 4.

The Merit Myth

I now turn to "the Merit Myth". Justice McHugh has described women as being "disadvantaged in competing on merit, as that term has been defined and understood in a male dominated profession".²⁹ Justice Kirby has described this merit as being "'merit' of the kind that produces persons just like themselves".³⁰

The Law Council's 'Policy on the Process of Judicial Appointments' states that the "sole criterion for judicial appointment should be merit".³¹ The policy sets out a list of "Attributes of Candidates for Judicial Office". This list describes the 'legal knowledge and experience', the 'professional qualities' and the 'personal qualities' that candidates should have. Justice McHugh has described this list as being "so abstract" as to "provide little if any, concrete guidance to an Attorney-General when making a judicial appointment".³²

Whatever "merit" is, it is "a constructed idea and not an objective fact and judicial appointments based on "merit" are largely mythical"³³. Professor Michael Lavarch has recently observed that 'merit' is a very "pliable concept" and capable of "shades of interpretation depending upon your world view".³⁴

Unfortunately discussions about "merit" usually surface in the context of the appointment of a woman. It is used to emphasize that the appointment was not made because the candidate was female. An example is the following commentary from Radio National's "Breakfast" website, which stated: -

"Announcing the appointment of Federal Court Justice Susan Crennan, Attorney General Philip Ruddock was at pains to stress that gender was not a consideration and that Justice Crennan got the nod on merit alone"³⁵.

²⁹ Justice Michael McHugh, "*Women Justices for the High Court*", Perth, 27 October 2004, 2.

³⁰ Justice Michael Kirby AC CMG, "*Women in the Law – Doldrums or Progress?*", Perth, 22 October 2003.

³¹ Law Council of Australia, "Policy on the Process of judicial Appointments", 16 March 2002, 2, para. 2.

³² McHugh, *op. cit.*, 3.

³³ Justice Ruth McColl AO, "*Women in the Law Address to the Anglo-Australasian Society of Lawyers*", Sydney, 3 May 2006, 3.

³⁴ Professor Michael Lavarch, "*Commentary by Professor The Honourable Michael Lavarch, Executive Dean on the QUT Public Lecture "The Appointment of Judges" delivered by the Hon Geoff Davies AO*", 31 August 2006, 2.

³⁵ Radio National "Breakfast" website, 21 September 2005.

Discussions about “merit” surface when a woman has not been appointed. The appointment is said to have been based on “merit”, with the implication being that no woman had sufficient “merit” for the appointment. And unfortunately, discussions about “merit” surface in circumstances where a group of men are upset because a female appointment does not conform to the particular mould that they consider is most suitable for appointment to a superior court.³⁶

“Merit”, like beauty, is very much in the eye of the beholder. The notion of merit needs to be “dragged into the 21st century”³⁷. We need a judicial appointments system with objective assessment criteria that are based on “merit”, but this notion of “merit” must accommodate issues of diversity. AWL supports the view expressed by Lord Falconer that: -

“...appointments on merit (mean) that decisions are made with all the assessments of the candidate available, against published competencies or criteria for the post, and substantiated by clear evidence of the candidate’s suitability for appointment”.³⁸

AWL supports the approach taken by the British Appointments Commission. Pursuant to the *Constitutional Reform Act 2005 (UK)* selection by the Commission must be solely on merit. However subject to that requirement, the Commission is also required to have regard to the need to encourage diversity in the range of persons available for selection for appointment.³⁹

The Dark Side

I want to speak about those who resent the achievements which women have made in the law in recent years. Those individuals actively work behind the scenes in the current secretive appointment process, to attempt to restrict the opportunities for more women to be elevated to the bench.

Chief Justice Warren has referred to those who criticise and undermine the promotion of women in the law, as being on the “*the dark side*”. These are individuals who for example, according to the Chief Justice “make damning media statements about female appointments to the bench on an anonymous basis, declining to be named” and others who

³⁶ For example: Chris Merritt, *The Australian*, 21 July 2006, “The Meltdown Inside the Queensland Bar: New Boss to Seek Judicial Reforms”.

³⁷ McColl, *op. cit.*, 3.

³⁸ Commission for Judicial Appointments, *Annual Report*, 2003 at 3.23.

³⁹ Sections 61 to 96 *Constitutional Reform Act 2005 (UK)*.

“complain about women moving in on their traditional court work and litigation territories”.⁴⁰

In the view of the Solicitor-General for Victoria Pamela Tate SC, there is a fundamental problem in the legal profession. This problem has meant that time alone has not led to women participating equally in the legal profession. This problem is a belief by some men: -

“...that the legal system, while it might allow women lawyers to have a place, does so on the condition that women recognise that they owe their place to the grace and favour of men. It follows that they are not to take property which men believe is rightfully theirs”.⁴¹

Pamela Tate SC has spoken out against those men within the profession, who have a “deeply ingrained sense that men have a right of property to the fruits of the profession”⁴². These ‘fruits of the profession’ of course include the appointment as silk and judicial appointment.

So in summary, where the judicial appointment process is: -

- Secret.
- Where it is not known who is actually consulted.
- Where it is not known what criteria are actually used for assessing the suitability of a candidate.
- Where it is not known how the candidates are actually selected in the first place.

I am not satisfied that this attitude of resentment does not permeate the views of those who are actually “consulted” or permeate the views of those bureaucrats who actually assess candidates for short lists for the attorneys. An independent judicial appointments commission which is transparent and accountable, is a preferable mechanism for assessing suitability for judicial office.

⁴⁰ Chief Justice Marilyn Warren AC “Speech given by the Hon. Marilyn Warren AC Chief Justice of the Supreme Court of Victoria on the Occasion of the Tenth Anniversary of the Victorian Women Lawyers”, Melbourne, 24 August 2006, 12.

⁴¹ Pamela Tate SC, “Keynote Speech to the Women Lawyers Achievement Awards in Melbourne on the 2nd of June 2005”, Melbourne, 2 June, 4.

⁴² Pamela Tate SC, “Keynote Speech to the Women Lawyers Achievement Awards in Melbourne on the 2nd of June 2005”, Melbourne, 2 June, 5.

Are Barristers the Best for the Job?

AWL does not accept the proposition advanced by Geoff Davies, that practice as a barrister over a lengthy period is basically the only way of acquiring "relevant experience" for judicial appointment⁴³. The Board agrees with comments made by Baroness Usha Prasher this year that: -

"There are many advocates who are very fine judges but it is not a pre-requisite for the job and that perception prevents many talented and well-qualified people from seeking Judicial Office".⁴⁴

The Board supports the appointment of academics, solicitors and other legal practitioners to the judiciary. There are many highly skilled women who fall into these categories and would be most suitable for judicial appointment. The appointment of Justice Marcia Neave, an established academic with an international reputation and a former Law Reform Commissioner, to the Victorian Court of Appeal is but one example. There is no need for any standards to be "compromised" in appointing women to the bench⁴⁵.

The Board also recognises the importance of judicial training, and agrees with Professor Michael Lavarch, that judges should not commence sitting before undergoing a "tailored program of judicial training"⁴⁶.

A successful career at the Bar is however an excellent way to prepare for appointment to the judiciary. But it should not be the only path to the bench.

I said at the commencement of this paper, in my opinion is impossible to assess the current system of judicial appointments, without considering the failure of the legal profession as a whole to ensure the advancement of women within the profession.

The independent Bars and the legal profession have failed persistently over a prolonged period of time to ensure that there is a significant number of women practicing as barristers. For many years now there

⁴³ The Honourable Geoff Davies AO, "Appointment of Judges", Brisbane, 31 August 2006, 7.

⁴⁴ Baroness Usha Prasha, "Speech at the Annual ILEX Luncheon", 17 May 2006, para 12.

⁴⁵ Davies, *op. cit.*, 13.

⁴⁶ Professor Michael Lavarch, "*Commentary by Professor The Honourable Michael Lavarch Executive Dean on the QUT Public lecture "The Appointment of Judges" delivered by the Honourable Geoff Davies AO on Thursday 31 August 2006"*

have been repeated complaints that women are not being briefed in the senior, complex litigation, either as junior counsel or senior counsel⁴⁷.

The AWL Gender appearance survey released in August this year, provided statistical evidence that this was still occurring on a national basis. For many years now there have been repeated complaints about the "discriminatory, systemic and structural practices of the legal profession...which have prevented female advocates from getting the same opportunities as male advocates".⁴⁸

Alexandra Richards QC, Chair of the Victorian Bar Equality Before the Law Committee and founding President of AWL has eloquently described: -

"the matrix of numerous and subtle ways which operate at the various interlocking planes of life at the Bar which come together to form a seemingly major hurdle for women in practice."⁴⁹

In a paper delivered earlier this year Justice Ruth McColl said that many senior members of the profession have been for years exhorting solicitors to: -

"...brief more women in order to ensure not merely equality of briefing practices but, too, that they obtain the experience said to be an essential prerequisite for judicial appointment".⁵⁰

Her Honour has come to the conclusion that: -

"A reading of such exhortations over the comparatively recent period of 1997-2004 convinces me that they are to little, or no avail. Real change will never, or at least rarely, come from within the ranks of the legal profession. It is only when leaders of the profession drive the process of change that the position

⁴⁷ For example: Justice Michael Kirby AC CMG, "*Victorian Women Lawyers Association, Lesbia Harford Oration 2001, Women in the Law – What Next?*", Melbourne, 20 August 2001, 1; Justice Michael Kirby AC CMG, "*Women in the Law – Doldrums or Progress?*", Perth, 22 October 2006, 2; Justice Mary Gaudron, "*Speech for Women Lawyers Association of New South Wales 50th Anniversary Gala Dinner*", Sydney, 13 June 2002 .

⁴⁸ Justice Michael McHugh, "*Women Justices for the High Court*", 2.

⁴⁹ Alexandra Richards QC, "*The Thin Edge of the Wedge*", Bar News, Winter 2005, 41 at 42.

⁵⁰ McColl, op. cit, 6.

will really improve and it will be recognised that “Merit comes differently packaged”.⁵¹

By way of concluding comments, if the independent Bars want to ensure that their members are the “primary resource when seeking appointments to the bench”⁵², as the current President of the Queensland Bar Association is reported by The Australian newspaper to have said, then the independent Bars will have to do a better job at encouraging more women to remain in practice as barristers.

There needs to be real cultural change within the independent bars and also within the ranks of all the solicitors who brief barristers.

The Board of AWL calls upon the Australian Bar Association and the Law Council of Australia to commission national academic research into the reasons which lie behind: -

- The persistent inequity in opportunities for women at the independent Bars.
- Why so few women choose a career at the independent Bars.
- Why so many women leave their careers as barristers.

Such research should also include strategies for the future, based on the findings of the research.

If there is not real cultural change, it is the view of the Board of AWL that the Attorneys will increasingly look to appoint women to the judiciary who are not members of the independent bars.

⁵¹ McColl, *op. cit.* 9.

⁵²Chris Merritt, *The Australia*, 21 July 2006, “The Meltdown Inside the Queensland Bar: New Boss to Seek Judicial Reforms”,

SUMMARY OF WOMEN APPOINTED TO SUPERIOR COURTS IN AUSTRALIA*

Table 1 - Appointments for Superior Courts for the States and Territories

State	Court	Total Number of Judges Currently Appointed to the Court	Number of Women Judges Currently Appointed to the Court	Percentage of Women Judges Currently Appointed to the Court
Australian Capital Territory	Supreme Court	4	0	0%
New South Wales	Supreme Court and Court of Appeal	56 (Including Acting Judges and Associate Judges)	7	12.5%
New South Wales	District Court	70	16	22.86%
Northern Territory	Supreme Court	9 (Including Acting Judges)	1	11.11%
South Australia	Supreme Court	13	3	23.08%
South Australia	District Court	19	3	15.79%
Tasmania	Supreme Court	6	1	16.67%
Queensland	Supreme Court and Court of Appeal	24	8	33.33%
Queensland	District Court	36	7	19.44%
Victoria	Supreme Court and Court of Appeal	34	6	17.65%
Victoria	County Court	64 (Including Acting Judges)	19	29.69%
Western Australia	Supreme Court	20	4	20.00%
Western Australia	Family Court	5	3	60%
Western Australia	District Court	26	8	30.77%
Total		386	86	22.28%

Table 2 – Appointments for State and Territory Supreme Courts and Courts of Appeal

State	Total Number of Judges Currently Appointed to the Court	Number of Women Judges Currently Appointed to the Court	Percentage of Women Judges Currently Appointed to the Court
Australian Capital Territory	4	0	0%
New South Wales	56 (Including Judges and Associate Judges)	7	12.5%
Northern Territory	9	1	11.11%
South Australia	13	3	23.08%
Tasmania	6	1	16.67%
Queensland	24	8	33.33%
Victoria	34	6	17.65%
Western Australia (Including Family Court of Western Australia)	25	7	28.00%

Table 3 – Appointments for State District Courts/County Court

State	Total Number of Judges Currently Appointed to the Court	Number of Women Judges Currently Appointed to the Court	Percentage of Women Judges Currently Appointed to the Court
Australian Capital Territory	-	-	-
New South Wales	70 (Including Judges and Associate Judges)	16	22.86%
Northern Territory	-	-	-
South Australia	19	3	15.79%
Tasmania	-	-	-
Queensland	36	7	19.44%
Victoria	64 (Including Acting Judges)	19	29.69%
Western Australia	26	8	30.77%

Table 4 – Total Percentage of Women to Appointed to the Superior Courts of Each State or Territory

State	Total Number of Judges Currently Appointed to the Superior Court/s	Number of Women Judges Currently Appointed to the Superior Court/s	Total Percentage of Women Judges Currently Appointed to the Superior Court/s
Australian Capital Territory	4	-	0%
New South Wales	149 (Including Judges and Associate Judges)	23	15.44%
Northern Territory	9 (Including Acting Judges)	1	11.11%
South Australia	32	6	18.75%
Tasmania	6	1	16.67%
Queensland	60	15	25.00%
Victoria	98	25	25.51%
Western Australia	51	15	29.41%
Total	409	86	21.03%

Table 5 – Federal Courts

Court	Total Number of Judges Currently Appointed to the Court	Number of Women Judges Currently Appointed to the Court	Percentage of Women Judges Currently Appointed to the Court
High Court	7	1	14.29%
Federal Court	48	6	12.5%
Family Court of Australia	40	16	40%
Total	95	23	24.21%

* These tables are based upon information published by each of the courts on their internet sites as at 20 October 2006 and also take into account the appointments announced on 24 October 2006 to the Family Court of Western Australia and to the County Court of Victoria.

