ABSENT FROM THE TOP
— A critical analysis of women's underrepresentation in New Zealand's legal profession

Nicole Ashby*

The underrepresentation of women in the senior levels of New Zealand's legal profession is a reality that cannot be justified by choice or time. This article considers: the underrepresentation of women within the framework of women's structural disadvantage and subordination; the fusion of male dominance with political and corporate models; the role of the law and its realm of 'truth' and the overrepresentation and dominance of New Zealand Europeans in the legal profession. A deeper understanding of the ongoing subordination of women is obtained by considering the issue within this framework. This article applies that understanding to the judiciary to support the need for diversity on the bench and the centralisation of equity and fairness.

I INTRODUCTION

The story of Ethel Benjamin is as relevant today as it was in 1897.[1] She was the first woman to attend law school in New Zealand and the first to be admitted to the legal profession. She broke barriers, fought for women who were disadvantaged by male-dominated ideologies and proved to be an able, intelligent and determined woman. But her road to success was beset with difficulty and the opposition to women's entrance into the legal profession did not cease.[2] Some argued against women appearing in court in the same

* LLB(Hons). Solicitor, Simpson Grierson. The author would like to thank Grant de Lisle for all of his support over the years as well as Sirron and Tehya for their patience. Also a big thank you to Julia Tolmie, Khylee Quince and Taylor Gray.

1 Janet November *In the Footsteps of Ethel Benjamin: New Zealand's First Woman Lawyer* (Victoria University Press, Wellington, 2009).

2 At 55; Female Law Practitioners Act 1896, s 2 provided: "Notwithstanding anything to the contrary contained in 'The Law Practitioners Act, 1882,' and the Acts amending the same, any woman of the age of twenty-one years and upwards may be enrolled as a barrister or solicitor on passing the examinations required to be passed by males, and on payment of the fees and compliance with the law in that

attire as men, as practising without bonnets "was hardly fair and would ensure pitying glances from 'the other ladies' in court".[3] The Otago District Law Society allowed Ethel to use the law library but she was to read in the Judge's Chamber Room to protect male members of the profession from "unnecessary and distressing contact with a woman".[4] Other law societies failed to extend invites to Ethel,[5] and took issue with advertising her services.[6] Even when Ethel diversified her career portfolio beyond the law, through property management and investment, the barriers to her progression continued.[7]

Over 100 years later, the relevance of Ethel Benjamin's story is surprising. Only 20 years ago, female law students continued to be excluded from legal events,[8] and courtroom attire and vocal presentation posed a real threat to the practice of law for some female lawyers. One lawyer, for example, was not spoken to or acknowledged by a Judge because she was not wearing a skirt.[9] More recent forms of this problem present themselves in less obvious ways such as the pay gap, charge-out rates and seniority within legal practice.[10]

This article analyses the position of women in the legal profession and the reasons why women struggle to reach its senior levels. The statistics are dismal. The number of women entering the profession does not flow through to senior positions. Further, those women who do reach partnership or the judiciary continue to experience gendered treatment. To complicate things

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behalf."

3 November, above n 1, at 64.

4 MJ Cullen *Lawfully Occupied* (Otago District Law Society, Dunedin, 1979) as cited in November, above n 1, at 57.

5 At 68.

6 At 69.

7 November, above n 1, at chapters 8–11.

8 Elizabeth Chan "Women Trailblazers in the Law: The New Zealand Women Judges Oral Histories Project" (2014) 45 VUWLR 407 at 421 where Goddard J recalled gender discrimination in the annual law school dinner to which women were not invited: "There was a law school dinner every year, which was a black tie affair, and women just were not invited to it. So in my second or third year the female students were there, Margaret Wilson, Sian Elias and myself, we went along to the dinner."

9 Personal conversation with Khylee Quince, Associate Head of School, School of Law, AUT (in or about May 2013). In 1997, Khylee appeared as counsel in the High Court of Auckland. The Judge refused to acknowledge her. A senior counsel pulled Khylee aside and informed her that that particular Judge did not speak to female counsel who were not wearing a skirt — Khylee was wearing trousers. See also Chan, above n 8, at 424 where the importance of female courtroom attire is discussed. In other personal conversations I have had with practising female lawyers, the importance of "sounding like a man with a deep voice" and "not coming across as a nagging wife" were stressed.

10 Geoff Adlam "Charge-out rates information released" *LawTalk* (online ed, 28 July 2016).

further, there is the persistent view that there is no problem at all. Common misconceptions here include the view that women do not rise in the profession because they choose to leave the profession to have children or that the nature of the profession is simply unsuited for them. This article dismisses such misconceptions and embarks upon a deeper analysis into the structural inequities inherent within the legal profession.

It must be remembered that it is not only the legal profession in which women struggle to progress. This is an important point and one that suggests there is a need to place any gendered discussion within the context of the historical position of women and their progression in a world that was formerly controlled by men. When the position of women today is considered against this social framework, a nuanced understanding of the source of women's subordination becomes apparent.

In crafting a solution to the problems faced by women in legal practice, there are two vital considerations; institutionality and intersectionality. Throughout history, the placement of women within society has been shaped around male priority. Law today remains heavily influenced by historically determined social ethos and it would be futile to attempt to reach gender equity in the legal profession without addressing this reality. Further, the prospects of resolution would be limited if intersectional factors are ignored.

II THE ABSENCE OF WOMEN FROM SENIOR POSITIONS

Since the 1980s, the number of women entering the legal profession has consistently increased and, since 1993, women have outnumbered men being admitted to the profession.[11] In 2015, 61 per cent of barristers and solicitors admitted to the legal profession were women.[12] Recent statistics from the University of Auckland Faculty of Law also show that women consistently outnumber men as Honours graduates.[13] With great prospects of success at

11 Geoff Adlam "Snapshot of the Profession 2016" *LawTalk* (online ed, 10 March 2016) [2016 Snapshot] at 21.

12 At 21.

13 Statistics received from The University of Auckland, Faculty of Law on 14 December 2015. In 2013, 173 females graduated with Honours compared to 142 males. In 2014, 182 females graduated with Honours compared to 141 males. In 2015, 169 females graduated with Honours compared to 145 males. See also Frank Neill "Women face variety of challenges" (30 June 2016) New Zealand Law Society <www.lawsociety.org.nz>.

one end of the legal profession, it needs to be questioned why the position of women is reversed at the other. For instance, only 27.6 per cent of partners or directors of law firms in New Zealand and, since 1907, only 27 out of the 282 Queen's Counsel appointees have been female.[14]

While the Supreme Court bench sat with a majority of women for the first time in 2017 (and continues to sit with a majority of women),[15] the visibility of women within the judiciary as a whole is no different to the position of women in the legal profession generally. A lower proportion of New Zealand's judges are women when compared to other common law jurisdictions.[16] Today, women make up less than a third of New Zealand's judiciary.[17] The homogenous nature of New Zealand's judiciary has been criticised as "predominantly white, male and middle-class".[18] This concern has also been shared internationally.[19] This is not to say that the visibility of women on the Supreme Court bench is not significant or that it is not beneficial. For the reasons outlined in this article, the visibility of women on the bench is one step towards improvement.

But it is a mistake to think criticisms surrounding the judiciary are confined to the numbers. Female judges have described their treatment on the bench in a manner not dissimilar to women at lower levels of the profession. Former Canadian Supreme Court Judge, Justice L'Heureux-Dubé, has noted:[20]

> I believe that women and members of minority groups who beat the odds and attain an appointment to the bench in our countries are still very much treated as "outsiders," interlopers in a white, male-dominated judiciary. The working image of a judge continues to be that of an upper middle class white man.

14 2016 Snapshot, above n 11, at 24.

15 "New Zealand Supreme Court makes history" (13 June 2017) New Zealand Law Society <www.lawsociety.org.nz>.

16 Geoff Adlam "New Zealand's Judiciary and Gender" (11 November 2015) New Zealand Law Society <www.lawsociety.org.nz>.

17 Emile Donovan "Law's glass ceiling exposed by numbers" (15 September 2017) Radio New Zealand <www.radionz.co.nz>

18 David A R Williams "The Judicial Appointment Process" [2004] NZ L Rev 39 at 48; and Adlam "Judiciary and Gender", above n 16.

19 Lord Chancellor's Department, The Commission for Judicial Appointments *Annual Report 2002* at [6.10] as cited in Williams, above n 18, at 48; and see also Senate Standing Committee on Legal and Constitutional Affairs *Gender Bias and the Judiciary* (The Parliament of the Commonwealth of Australia, May 1994).

20 Claire L'Heureux-Dubé "Outsiders on the Bench: The Continuing Struggle for Equality" (2001) 16 Wis Women's LJ 15 at 21 (footnotes omitted).

The notion of women as 'outsiders' on the bench has been consistently expressed in the literature and by other female judges.[21] Commentary from Australia refers to the consequences of 'tokenism', or the idea that women on the bench are only there to embody the presence of an equal bench.[22] Thus, aside from the barriers women face in reaching the senior levels of legal practice, those levels once reached can become a bittersweet accomplishment.

A Denial and justification for the absence of women

Despite extensive research documenting women's absence in senior positions of the legal profession, there is no consensus that a problem exists. The denial of women's continued subordination is a popular response, whereby both men and women demonstrate little interest in the topic before dismissing it completely. Eli Wald calls this the "no-problem" problem.[23] According to Wald, advocates of the "no-problem" theory do not question the findings of empirical evidence; rather they rely on three interrelated arguments to challenge the existence and the seriousness of the problem.[24] The first of these arguments is that it is just a matter of time before numbers equalise (the "trickle-up" theory). The second argument is that women *choose* to leave law, and the third concedes to the problem in theory but denies it exists in particular instances.[25]

Justice Glazebrook, in a paper presented in 2013, tackled the arguments behind this "no-problem" theory.[26] Her Honour quickly dismissed the "it is just a matter of time" idea by reference to the numbers:[27]

> Given that over 40 per cent of lawyers entering the profession since 1990 have been women (ie for over 20 years), one would have expected more movement in the figures than has been seen to date, or, at very least, that the rate of female appointments to senior positions over the last five to ten years would be starting to be evenly balanced.

21 See, for example, Patricia Easteal *Less Than Equal* (Butterworths, Chatswood, 2001) at 210; and Sian Elias, Chief Justice of New Zealand "Changing our World" (address given to the International Association of Women Judges' Conference, Sydney, 4 May 2006).

22 Easteal, above n 21, at 224.

23 Eli Wald "Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms" (2010) 78 Fordham L Rev 2245 at 2246.

24 At 2253.

25 At 2254.

26 Susan Glazebrook, Judge of the Supreme Court of New Zealand "It is just a matter of time and other myths – the gender gap" (paper presented at Get up and Speak, Wellington, August 2013).

27 At 5.

Wald also provides the following example in demonstrating how much time would be needed in order for equality to be achieved:[28]

> Suppose Law Firm has 100 male partners and no female partners. Suppose further that Law Firm hires every year forty first-year associates, that it eight years later promotes four associates to partnerships, and that one partner retires every year. Assume that Law Firm begins to hire women associates at the same rate as male associates and promotes them equally. That is, every year Law Firm promotes two male and two female associates to partnership. Finally, assume that the retiring partner is always a male partner. In this simplified example, it will take Law Firm one hundred years to achieve equality within its partnership ranks!

Yet even in the face of such evidence of the difficulties in maintaining the trickle-up theory, advocates of the "no-problem" problem then maintain that women either *choose* to leave law or *choose not* to seek partnership or judicial appointment. This particular argument is used not only as a stand-alone justification for women's positioning in the legal profession, but also to mitigate the evidence that dismisses the trickle-up theory. In response to Wald's 100-year estimate, for instance, it is argued that women choose to leave the legal profession and therefore it will, of course, take longer.[29]

This perception of choice is particularly pernicious as it is both true and false: true to the extent that women are not overtly excluded as a gender from the law and its senior positions (and the choice can therefore be individualised) but false because such 'choices' are not made so simply. It is possible to conclude that women choose to leave the law, or leave behind the prospect of promotion, because the circumstances in which they tend to operate are unsuited to a career within the law. For instance, as women "are the sex which can bear children and who tend to shoulder most of the childcare responsibilities", there is the view that women have the opportunity to leave the law and are therefore more likely to take up that opportunity.[30] It has been stated "[i]t is easier for women socially to leave for a smaller role or stop working to care for children, than it is for men".[31] This view is popular amongst both men and

28 Wald, above n 23, at 2253 (footnotes omitted).

29 At 2255.

30 Judith Pringle and others *Women's career progression in Auckland law firms: Views from the top, views from below* (AUT University, Auckland, 2014) at 34 [GDRG study].

31 At 33.

women. Here, the culture of legal practice as well as the realities of pregnancy and parenthood are perceived as naturally existing in opposing domains. But, as will be discussed, the dangers attached to this view vastly outweigh any truths behind the argument.

III STRUCTURAL INEQUITIES: WOMEN BEAR THE BIOLOGICAL AND STRUCTURAL BURDEN OF REPRODUCTION

The Auckland Women Lawyers' Association contracted the Gender and Diversity Research Group (GDRG) to explore the reasons for the scarcity of women at senior levels in large law firms.[32]

This research involved voluntary participants from non-partner to partner level but, like other studies, contained limitations. For instance, the sample size was 144 respondents from large Auckland law firms only. Further, female respondents were overrepresented in the sample.[33] The overrepresentation of New Zealand Europeans is unsurprising, however, when compared to the legal profession as a whole.[34] This overrepresentation will be discussed further later. Notwithstanding such limitations, GDRG's findings provide insight into the views of both men and women who are employed in large law firms in New Zealand.

A Motherhood versus career progression

A key finding of the GDRG study was the perception by many women who were not partners that having children constituted a significant, if not fatal, barrier to becoming a partner, despite perceiving adequate levels of career support within their respective firms.[35] One of the study participants stated "[i]t is unadvisable to breed if you have partnership aspirations".[36]

32 GDRG study, above n 30.

33 As at the 2013 Census, New Zealand Europeans comprised 71.6 per cent of the New Zealand population whereas the percentage rate of the New Zealand European respondents in the study was 95 per cent. The study was therefore not representative of the New Zealand population around the time it was conducted.

34 For instance, 80.4 per cent of New Zealand lawyers were New Zealand European as were 85.4 per cent of New Zealand's judiciary as at the 2013 Census.

35 At 30.

36 At 30.

Two issues arise here. The first is the accommodation of the need for part-time and flexible working arrangements that often accompanies parenthood. It is said that the hypercompetitive nature of the legal profession demands excellence, commitment, dedication, availability to clients and instant responsiveness.[37] As one participant in GDRG's study stated:[38]

> Performance is often measured as a function of hours worked not actual productivity, with the result that lawyers with commitments outside of work (principally women with childcare commitments) are disadvantaged.

Legal scholars have concluded that legal careers are largely shaped by men with families but who are able to commit to the workplace and sacrifice family life when needed.[39] Even in an age where flexible working arrangements are statutorily recognised,[40] the hypercompetitive nature of the legal profession fundamentally ignores the value attached to the arrangements. Instead they are considered to be counterproductive to the legal profession's objective. Consequently, the value attached to motherhood (and its requirements around part-time and flexible working arrangements) is accorded a lesser status, with the consequence that women are perceived as lacking commitment and a desire to progress.[41]

The second issue is that women are generally seen to pose a higher risk of leaving the firm several years down the track, given their biological ability to reproduce. As a consequence, women lawyers are deemed less deserving of investment in mentorship and training than their male counterparts,[42] resulting in less opportunity and further subordination. Here, women are stereotyped and disadvantaged by virtue of their womanhood. This particular issue affects women regardless of their familial prospects and sees all women essentialised, marginalised and structurally subordinated.

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37 Wald, above n 23, at 2283.

38 GDRG study, above n 30, at 32.

39 Holly English *Gender on Trial: Sexual Stereotypes and Work/Life Balance in the Legal Workplace* (ALM Media, 2003) at 230 as cited in Wald, above n 23, at 2283; Nancer H Ballard *Equal Engagement: Observations on Career Success and Meaning in the Lives of Women Lawyers* (Center for Research on Women, Working Paper No 292, 1998) at 22–26 as cited in Wald, above n 23, at 2283; and Joan C Williams "The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the 'Cluelessness' Defense" (2003) 7 Empl Rts & Emp Poly J 401 at 412–48 as cited in Wald, above n 23, at 2283.

40 Employment Relations Act 2000, pt 6AA.

41 See generally GDRG study, above n 30, at 9, 31 and 101.

42 Wald, above n 23, at 2275.

B Family responsibility

The position of female partners in GDRG's study was similar to those of non-partner women regarding the issue of children and alternative working arrangements. A crucial element for success, according to female partners, was the need for a supportive partner and/or home help. Supportive wider networks were considered to be crucial to both reaching and maintaining partnership status. Interestingly, virtually none of the female partners argued that it was the responsibility of the law firm to assist partners with dependents in order to manage work-life competition.[43] One respondent alluded that many male partners had housewives and additional in-home support such that they were not exposed to many of the household responsibilities to which many female partners remained bound.[44]

Wider support networks, although allowing some women the ability to reach and maintain partnership, require women to mitigate their life circumstances to alleviate what would otherwise be a significant barrier to partnership. This is commonly described as a choice or individual responsibility. There is the perception that the mitigation of life circumstances that are commonly experienced by women are rightly required to be individualised because they are choices that were made at the expense of other, more career-focussed, outcomes. It is here that some women could feel that because they have not experienced overt gendered discrimination, they are instead supported in their career. This view generates individualised responses that stop short of questioning deeper organisational structures. In other words, the fact that women tend to feel supported in their careers by virtue of the fact that gendered discrimination is not identified ameliorates the reality that the law and its practice is fundamentally structured upon male values.

It is evident that the road to partnership structurally favours men because the legal profession is based on the male life-path.[45] Partnership is most likely to occur within the mid-30s, which poses a clash of life stages for women; one

43 GDRG study, above n 30, at 74.

44 At 74, where the respondent stated, "these males' partners - the wives are at home. They're running the household … So the guys just don't have an appreciation at all, as to the real world. They don't have to deal with anything. They don't cook. They can go out and drink with the boys or with the clients. That's the real difference".

45 GDRG study, above n 30, at 10 and 69.

based on a biological determinant, the other on a professional norm.[46] These stages are not mutually exclusive and overlap almost completely,[47] posing an institutionalised and structural inequity for women that is absorbed and mitigated on an individual level.

C Networking

The legal profession is hierarchical in nature; law graduates start at the bottom and work their way up. Networking becomes an integral part of this journey. There was widespread agreement in GDRG's study that networking was key not only to promotions but also for business.[48] And, of course, bringing in business favours a promotion. Lawyers yet to reach partnership, whether male or female, are equally dependent upon the ability to network in order to progress for promotion. This often involves another individual advocating for the advancement of their junior.[49] But, as will become evident, networking is a fickle enterprise.

1 Diversity deficiency

One respondent in GDRG's study stated, "there is nobody in a leadership role who has to balance children and work and I think that's really telling of how they treat mothers".[50]

Women who are not partners not only struggle to find female mentors generally, but more specifically, female mentors who can relate to their realities. Instead, women who are yet to reach partnership are faced with some female partners whose life circumstances tend to resemble those of men, in that their parental and home-based responsibilities have been alleviated through external sources. "Queen Bee" syndrome is yet another barrier that non-partner women face, where women who have reached partnership advocate the "no-problem" theory, taking the firm view that they have progressed without the need for any assistance.[51]

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46 At 10.

47 At 69.

48 At 52.

49 Nancy M Carter and Christine Silva *Mentoring: Necessary but Insufficient for Advancement* (Catalyst, 2010) at 1 as cited in Glazebrook, above n 26, at 8.

50 GDRG study, above n 30, at 53 (citation omitted).

51 At 53.

As Natalya King suggests, the challenge becomes the ability "for businesses to create an environment where female-dominated skills are also valued".[52] Until such skills are valued, the trickle-down effects of a uniformed and one-dimensional senior level will continue to benefit men to the detriment of women.

2 *Modern nepotism crafting the concept of value*

The displacement of nepotism by meritocracy is a common point of discussion. Galanter and Roberts, for example, describe this movement as from "kinship to magic circle" whereby the practices of large law firms in London shifted from nepotistic promotions and elite families, to a more egalitarian project.[53] In the 21st century, it is said that the legal profession runs on a "hypercompetitive meritocracy" where the financial bottom line, rainmaking, long hours and client-focused representation are dominant features.[54] Regardless of the perceived changes to underlying ideologies, the fact remains that the profession sits within a pyramid whereby those at the apex retain excessive power and influence. Fragments of preference and privilege continue to influence the profession.

The endurance of class privileges and other social conditions affixed to the senior levels of the legal profession perpetuates the struggle of women to access powerful mentors or sponsors to advocate on their behalf. But this is not a one-way problem. Research suggests that those in higher positions prefer to mentor juniors with socio-economic and cultural characteristics similar to their own.[55] Factors such as wealth, education, influential connections and social standing, for example, create a unique perception of the world. Consequently, this paradox distorts the concept of 'value'. What is and is not accorded value depends on the standards by which value is calculated. As those standards are determined by those who tend to gravitate towards others who are "alike", the value-calculus becomes narrowly constructed and narrowly applied. This could be described as an impenetrable barrier for women because it distorts

52 Natalya King *Raising the Bar: Women in law and business* (Thomson Reuters, Wellington, 2014) at 181.

53 Marc Galanter and Simon Roberts "From kinship to magic circle: the London commercial law firm in the twentieth century" (2008) 15(3) International Journal of the Legal Profession 143 at 145 and 167.

54 Wald, above n 23, at 2273.

55 David B Wilkins and G Mitu Gulati "Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms" (1998) 84 Va L Rev 1581 at 1608–1613 as cited in Wald, above n 23, at 2276.

the perception of what is and is not to be accorded value, what is not confined to white middle-class men nor kinship, and is unable to be displaced by merit alone. The lack of value attached to women's work and life circumstances renders the equation used to calculate merit unbalanced and biased towards a narrow and one-dimensional set of values.

IV BROADER CRITIQUES OF THE BARRIERS PRESENTED BY GENDER

This article has discussed the popular justifications that arise in response to the lack of progression of women within the law. Through that examination, structural inequities, as opposed to individualised deficiencies, became evident. Those structural inequities must now be placed within their historical contexts to grasp the extent of women's subordination.

It is prudent to consider the absence of women in the senior levels of the legal profession in conjunction with the wider contexts in which women operate (given that the subordination of women is not a problem confined to the law).[56] This is because the progression of women in a space that was once only open to men bears direct relevance to the experience of women today more generally.

A Male dominance

Catherine MacKinnon argues that male dominance produces women's subordination and institutional structures maintain gendered power relations.[57] Mackinnon states:[58]

> [Feminism's] project is to uncover and claim as valid the experience of women, the major content of which is the devalidation of women's experience.
>
> This defines our task not only because male dominance is perhaps the most pervasive and tenacious system of power in history, but because it is metaphysically nearly perfect.

56 Human Rights Commission *New Zealand Census of Women's Participation 2012* (Wellington, November 2012) at 14.

57 Vanessa E Munro *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart Publishing, Oxford, 2007) at 87.

58 Catherine A MacKinnon "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635 at 638 (footnote omitted).

Labelled as "radical" and "deterministic", MacKinnon's dominance thesis rests on the patriarchal power and privilege men exercise over women.[59] More fundamentally, MacKinnon alludes to the idea that as a result of patriarchal logic, institutional structures in which we organise our lives are infused with male dominance, which prevents women from achieving true equality.

Despite its "impetus for feminist political activism and reform", MacKinnon's radicalist approach has been heavily criticised.[60] It has been said that MacKinnon's theory engages in the worst form of essentialism as it presupposes an essential experience for all men and women.[61] Following from this is the criticism that MacKinnon's view ignores intersectional categories and disparities within and between men and women.[62]

Another criticism of MacKinnon is that "this reification of an ethos of disempowerment makes it difficult to see how women, individually or collectively, can bring about change in the dominant structure".[63] This criticism holds force. It is true that if male dominance is infused in every conceptual aspect of modern life it may be impossible to bring about change in any realistic sense. But that cannot and should not discourage discussion of the issue.

1 The development of the conceptual structure in the legal profession

Modern political and corporate models guide their respective ventures through pre-determined norms and standards. The conceptual structure of the legal profession is a fundamental player in the ongoing subordination of its female participants.

Men have held positions of political and legal power for far longer than women in most parts of the world. It was not until 1902 that women in Australia were granted the right to vote and seek election to political office.[64] The same rights were granted to women in Canada from around 1919.[65] In

59 Munro, above n 57, at 28.

60 At 30.

61 At 30.

62 Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan L Rev 1241, as cited in Munro, above n 57, at 33.

63 Munro, above n 57, at 88.

64 See "Australian Women in Politics" (21 September 2011) Australian Government <www.australia.gov.au>.

65 William Dunn and Linda West "Women get the vote 1916-1919" (2011) Canada: a Country by Consent <www.canadahistoryproject.ca>.

New Zealand, although women were granted the right to vote in 1893, they were not permitted to enter Parliament until 1919.[66] Further, it was not until 1933 that New Zealand had its first female politician. But the fact that women have been formally provided with the same rights and opportunities as men does not mitigate the effect of the circumstances on women before such formal equality.

Before women were able to enter the workforce, they were confined to domestic and private duties. Men generally reserved for themselves the ability to govern countries, run businesses and practise law. Naturally, the factors that implicated men's operations did not necessarily incorporate the factors that women's operations require today. For instance, the need to include children's requirements and routines were not something men had to undertake, as this task was reserved solely for women. Consequently, political and corporate models were developed based on the experiences and values of men. Even when women were able to enter the workforce, the models, values and powers that were embedded into that sphere did not recognise the factors that were not specific to men.

Hence, the formal equality provided to women amounted to a somewhat empty victory because women still faced inherent disadvantages when compared to their male counterparts. Women had to strive to succeed in a competitive male dominated world, whilst also managing the significant responsibilities that attached to mothering — a burden that the men they were competing with did not have.

MacKinnon tends to articulate this domination of men as one deriving from a man's desire to sexually dominate a woman. According to her, the "liberal state coercively and authoritatively constitutes the social order in the interests of men … It achieves this through embodying and ensuring male control over women's sexuality".[67] Many feminist writers disagree on this point. Although agreeing with MacKinnon to the extent that male domination lies at the heart of the current problems women face, the argument put forward here is that such domination arises not out of sexuality and eroticisation, but as a natural and evolutionary development of the historical position of both men and women because of their familial roles.

66 See "Past politicians" New Zealand Parliament <www.parliament.nz>.

67 MacKinnon, above n 58, at 644.

2 *Consequences for Māori women*

The fusion of male dominance and corporate models is fundamentally disadvantageous for women for the reasons discussed above. This fusion poses an enhanced form of disadvantage to women to whom it is culturally unnatural. The above discussion was centred on the historical development of conceptual structures for New Zealand Europeans. But this cannot be mistaken for the experience of all women in New Zealand. For Māori women, the imposition of patriarchy and male domination was, and still is, catastrophic. Christianity and the 'nuclear family' destroyed the harmonious relationship that had previously existed between Māori men and women.[68] Entrenched in political and corporate models, therefore, is an amplified facet of disadvantage for Māori women that must be considered.

Pre-colonial New Zealand offered Māori women a place in society that was well respected and highly valued. Because of their reproductive ability, women were considered essential to the linkage between the past and the future.[69] Whānau dynamics ensured that women were respected by their husbands and that child-rearing remained a collectively performed task. This allowed Māori women to engage in a wide range of roles, including leadership.[70] The colonisers, however, did not approve of this 'wonder woman' status,[71] and sought to remould Māori women into a nuclear family arrangement. Here, "the husband/father was head of household and thus in control; women and children were chattels to be used and abused by the paterfamilias as he chose".[72] The consequences for Māori women were colossal. Gender-specific roles were introduced, as was the domination/subordination divide. Māori collectivism and social structures were undermined. Following land loss and a decrease in population, Māori women were forced into urbanisation, became dependent on their husbands as

68 Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Wai L Rev 125 at 133.

69 Ani Mikaere "Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Maori" (2005) 8 Yearbook of New Zealand Jurisprudence 134 at 141.

70 At 141.

71 K Jenkins "Working paper on Māori women and social policy" written for the Royal Commission of Social Policy and quoted in the Report of the Royal Commission on Social Policy (1988) Vol III 161 as cited in Mikaere "Cultural Invasion Continued", above n 69, at 143.

72 Jocelyn A Scutt *Even in the best of homes: violence in the family* (Penguin Books, Victoria, 1983) at 11 as cited in Mikaere "Cultural Invasion Continued", above n 69, at 150.

breadwinners and increasingly isolated.[73] The concept of women as leaders was beyond the comprehension of the settlers.[74] Consequently, the strength, respect and value that attached to Māori women dissipated. Māori women had their mana torn away; replaced by inferiority and conflict.

The legacy of colonisation is directly felt today. Māori women remain worse off when compared to not only New Zealand European women and men, but also Māori men. Māori women have lower incomes, less education, poorer health and are more likely to have sole charge of dependent children.[75] Māori women experience higher levels of victimisation, particularly within the context of intimate partner violence.[76]

B The role of the law

If it is accepted that the present conceptual structure of the legal profession is based upon male-dominant experiences and values, the law can be seen to carry these further into its realm of 'truth'. As Carol Smart notes:[77]

> … the judge does not remove his wig when he passes comment … He retains the authority drawn from legal scholarship and the 'truth' of law, but he applies it to non-legal discourses … He combines the Truth claimed by socio-biology with the Truth claimed by law …

In this light, the law "extends itself beyond uttering the truth of law, to making such claims about other areas of social life".[78] The law retains the power to extract a social-norm or concept from non-legal structures and subsequently grant it an authoritative meaning. Ideologies such as the role and status of women can thus become a powerful source of 'truth' that then continues to be imposed upon women. By way of example, Smart cites a statement in Lord Denning's 1980 book *The Due Process of Law*:[79]

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73 Mikaere "Cultural Invasion Continued", above n 69, at 152–153.

74 Mikaere "Māori Women: Caught", above n 68, at 132.

75 Khylee Quince "Maori and the criminal justice system in New Zealand" in Julia Tolmie and Warren Brookbanks *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 349.

76 Ministry of Justice *Strengthening New Zealand's Legislative Response to Family Violence: A public discussion document* (2015) at 5.

77 Carol Smart *Feminism and the Power of Law* (Routledge, London, 1989) at 13.

78 At 13.

79 Lord Denning *The Due Process of Law* (Butterworths, London, 1980) at 194 as cited in Smart, above n 77, at 13.

> No matter how you may dispute and argue, you cannot alter the fact that women are quite different from men. The principal task in the life of women is to bear and rear children: … He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds. These diversities of function and temperament lead to differences of outlook which cannot be ignored. But they are, none of them, any reason for putting women under the subjection of men.

As Smart states, "[i]n this passage both law and biological determinism are affirmed, whilst law accredits itself with doing good".[80] The detrimental effects of such judicial statements upon women are significant.

Even in the 21st century, women remain bound by the same connotations, particularly where motherhood is involved. For instance, it has been observed that it is mothers who are primarily charged under failing to protect and failing to provide provisions.[81] In addition, the "glorification of motherhood" is a prominent justification for the punitive treatment of women who fail to fulfil the socially constructed, yet legally affirmed, requirements attached to motherhood.[82] Furthermore, traditional views regarding the role and sexuality of women continue to pose significant difficulty for women in areas of law including the offence of sexual violation,[83] family proceedings,[84] and domestic violence.[85]

Despite the connotations attached to womanhood manifesting in more subtle forms, 21st century law remains burdened with historical truths. Although it is tempting to consider the issue of women in the legal profession within the confines of the profession, doing so fails to recognise the contextual realities that inform the profession. It also fails to address the source of women's

80 At 13.

81 Crimes Act 1961, ss 151 and 195A; and Julia Tolmie "Criminalising failure to protect" [2011] NZLJ 375.

82 Jonathan Herring "Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?" [2007] Crim LR 923 at 932.

83 See Wendy Larcombe "The 'Ideal' Victim v Successful Rape Complainants: Not What You Might Expect (2002) 10 Feminist Legal Studies 131; and Stuart Taylor Jr and KC Johnson *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case* (Thomas Dunne Books, New York, 2007).

84 See Julia Tolmie, Vivienne Elizabeth and Nicola Gavey "Imposing Gender Neutral Standards on a Gendered World: Parenting Arrangements in Family Law Post-separation" (2010) 16 Canta LR 302.

85 See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*" (2014) 38 MULR 666.

subordination, which consequently limits the ability to effectively cure the position of women generally; be it professionally or otherwise. Recognising the relationship between the role of the law and gender is critical in crafting a solution to the issues which women in the law face.

V DE-CENTERING THE EXPERIENCES OF THE PRIVILEGED

Uniformity heightens in the senior levels of the legal profession. As at 2015, 93 per cent of New Zealand's judiciary were New Zealand European,[86] as were 90 per cent of partners at large law firms.[87] Both numbers are over-representative of the New Zealand European population. Although the homogeneity of the senior levels of the legal profession is a well-known complaint usually made with reference to white middle-to-upper class males, it is also true for women. In GDRG's study, for instance, all female participants at partnership level, apart from one, identified as New Zealand European.[88] Statistics also show that over 90 per cent of New Zealand's female judges are also New Zealand European.[89]

Two issues fall for discussion here. The first is the centrality of white female experiences in gender discourse and the second is the structural barriers that are created as a result of the centrality of white privilege.

A White privilege and centrality

The intersection of class and race upon a single-axis framework is a particularly important aspect of the current discussion. The tendency to treat race and gender as mutually exclusive categories of experience distorts the experiences of those for who these categories intersect.[90] Further, these different systems of oppression tend to be based around the experiences of the dominant group

86 Geoff Adlam "Snapshot of the Profession 2015" *LawTalk* (online ed, 27 February 2015) [2015 Snapshot] at 18. I note that there are no more recent statistics available on this.

87 Statistics in relation to New Zealand Europeans at partnership level retrieved via information held by the New Zealand Law Society on 14 January 2016.

88 GDRG study, above n 30, at 61.

89 2013 Census information compiled by Geoff Adlam for the author, New Zealand Law Society (13 January 2016). The author notes that there is a lack of collection of statistics relating to ethnicity in the New Zealand legal profession. The statistics referred to were obtained directly from the New Zealand Law Society.

90 Kimberlé Williams Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" in Adrien Katherine Wing (ed) *Critical Race Feminism: A Reader* (2nd ed, New York University Press, New York, 2003) 23.

— notably, white middle-to-upper class men and women. Without exploring the impact of race and class in conjunction with gender, those who are disadvantaged by the former become theoretically absorbed, and consequently erased, within discourses based upon the latter.

The concept of white privilege in New Zealand can only be defined within wider social and historical contexts. The conflict inherent in the transformation of New Zealand into a British colony was not limited to confrontation between Māori and Pākehā parties. Class and sex conflicts were also imported conditions that continued to pose further tensions upon an already strained encounter. These conflicts were closely associated with access to and ownership of land, as "[l]and provided the means of survival … formed the productive basis of the migrant household and structured relations between the sexes".[91] A major preoccupation of the British was the problem of determining individuals' appropriate status with reference to property, skills and occupation.[92] Whilst Māori were concerned with collectivism and balance, the British operated upon individualism, hierarchy and divide.[93]

Ani Mikaere comments that colonisation is not a finite process: it "is not simply part of our recent past, nor does it merely inform our present. Colonisation *is* our present."[94] Modern New Zealand culture is fundamentally grounded in experiences of dominance, assimilation and subordination. Thus, when defining white privilege within the New Zealand context, the complex entanglement of assimilationist concepts, inherent within imported hierarchical social structures, and the continued domination of non-colonising groups become vital considerations. That is the context in which New Zealand is shaped: domination of the colonised by the colonisers. Today the effects of this domination continue to be felt, not only by Māori, but also by other ethnic minority groups such as Pacific peoples. Both of these groups are located within multiple systems of oppression (such as racism and financial hardship) resulting in high rates of imprisonment and unemployment, poor health and other related outcomes.[95] For women who benefit from white

91 Bev James and Kay Saville-Smith *Gender, Culture, and Power* (Oxford University Press, Auckland, 1989) at 16.

92 At 16–31.

93 See generally Mikaere "Cultural Invasion Continued", above n 69.

94 Mikaere "Cultural Invasion Continued", above n 69, at 142 (emphasis in the original).

95 See Naomi Simmonds "Mana wahine: Decolonising politics" (2011) 25 Women's Studies Journal 11 at

privilege, their experiences as women in the law are mitigated through their race and class privileges. Yet women who experience racism and financial disadvantage experience their gender in a materially different sense that results in qualitatively and quantitatively different outcomes.

B Structural outcomes of white privilege

White privilege is a significant platform to the senior positions within the legal profession. It is also structurally absorbed into the conceptual make-up of the law and its practice. The cumulative effects of male domination and white privilege produce results that are visible today — the underrepresentation of women in senior positions and the overrepresentation of New Zealand Europeans.

Kimberlé Crenshaw discusses the structurally absorbed consequence of white privilege within the context of *Moore v Hughes Helicopters Inc,* an unsuccessful sex discrimination case brought by a black female plaintiff in the United States:[96]

> Discrimination against a white female is thus the standard sex discrimination claim; claims that diverge from this standard appear to present some form of hybrid claim. More significantly, because Black females' claims are seen as hybrid, they sometimes cannot represent those who may have "pure" claims of sex discrimination. The effect of this approach is that even though a challenged policy or practice may clearly discriminate against all females, the fact that it has particularly harsh consequences for Black females places Black female plaintiffs at odds with white females.

In this case, the plaintiff claimed that her employer discriminated on the grounds of both sex and race in promotional practices. The plaintiff was a black employee and adduced evidence demonstrating a significant disparity between the advancement of black females in the workplace. According to the Court, however, the plaintiff's claim as a black female "raised serious doubts as to [her] ability to adequately represent white female employees".[97] Crenshaw stated:[98]

13; and Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission, February 2016) at 43–44.

96 *Moore v Hughes Helicopters Inc* 708 F 2d 475 (9th Cir 1983) as cited in Crenshaw, above n 90, at 26.

97 *Moore*, above n 96, at 480.

98 Crenshaw, above n 90, at 26.

> The court rejected Moore's bid to represent all females apparently because her attempt to specify her race was seen as being at odds with the standard allegation that the employer simply discriminated "against females."

This case demonstrates the centralisation of white experience. The anti-discrimination doctrine could only be claimed for discrimination against women *or* discrimination against black people. But in *Moore*, those actions were not maintainable nor were they at issue. The evidence demonstrated discriminative practices against *black women* — not women generally and not black people generally. As a result the "hybrid" claim was rejected.[99]

At a fundamental level, *Moore* demonstrates the reality that powerful institutions, such as the law, are structurally centred upon white experience and privilege. In the context of the legal profession, this has two outcomes: the advancement of those who the profession structurally favours and the subordination of those who present as structurally incompatible.

The white centralised ideology that is structurally inherent in the legal profession is achieved and perpetuated through a causal nexus. We can see this perpetuated in two key ways. First, the conceptual understanding of 'value' is moulded according to white-centralised conceptions of good and bad. Such conceptions include a good education and connections in influential positions and familial success. Thus, the profession becomes structurally biased towards those who are 'valued', and structurally biased against those who are not. As a result, those who benefit from white privilege are filtered into and bolstered upwards in the legal profession. This is not to say that those who occupy the senior levels of legal practice have not earned their positions. I argue that the conceptual structure of the profession is fundamentally favoured towards those who present as compatible so that those individuals find themselves swimming with the tide rather than against it; their experiences, work and achievements are recognised by the profession as valuable.

Secondly, hiring and promotional practices become pervaded by implicit biases. Research shows that, in the employment context, people are persuaded by implicit biases and stereotypes.[100] These persuasions are often associated with commonalities that are held by both the employer and employee, with

99 At 145.

100 Linda Hamilton Krieger and Susan T Fiske "Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment" (2006) 94 CLR 997.

the employer being more likely to hire or promote someone who is more like themselves. Here, hiring and promotional practices become influenced by unspoken behavioural and contextual correlations.[101] In a profession where the concept of value is narrowly defined, implicit biases and stereotypes become the medium through which white ideology and privilege is structurally centralised and perpetuated.

C Equality is not enough

Equality is often the term used when talking about the rise of women. In a LawTalk article, for instance, then Minister for Women, Louise Upston MP, promoted the need for equal rights, opportunities and choices for women.[102] Worldwide movements also look to equality as the solution for women's uprise from multiple forms of subordination.[103] Although equality has been advocated for historically, the continued subordination of women in the 21st century deserves re-examination.

The concept of equality is misleading. On the one hand, equality can be used in the formal sense to mean that the same opportunities are granted to all individuals regardless of the fact that people are differently and unequally placed. On the other hand, equality can be used in the substantive sense to mean that people are treated differently to arrive at the same outcome. As Justice L'Heureux-Dubé has stated, "true equality requires substantive change and accommodation rather than simple formalistic egalitarian treatment".[104] The danger of failing to recognise this distinction is that women's subordination can quickly become reduced to a mere triviality when equality is understood in a formal sense. Here, for instance, advocates of the "no-problem" problem hold that opportunities are equally available to women as they are for men, before proceeding to use one of the arguments mentioned earlier to justify women's absence in the legal profession. The concept of substantive equality is also limited in nature, despite its attractive appearance.

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101 At 1049.

102 Sasha Borissenko "Women & the Legal Profession" *LawTalk* (online ed, 5 November 2015) at 11.

103 See the HeForShe Solidarity movement for gender equality as initiated by the United Nations: HeForShe <www.heforshe.org>.

104 L'Heureux-Dubé, above n 20, at 20; and Claire L'Heureux-Dubé "Conversations on Equality" (1998) 26 Man LJ 273 at 276.

The historical development of the Canadian Charter of Rights and Freedoms (the Charter) is a useful comparison of the different interpretations of equality.[105] Prior to the Charter, the Canadian Bill of Rights was enacted in response to ongoing inequalities experienced by minority groups and provided Canada's first equality guarantee.[106] Judicial interpretation of the legislation saw women and other minority groups being granted equality "only to the extent that they were no different from white, able-bodied men".[107] Equality became a dead end for those considered to be outside the social norm because their differences were not accommodated for. As a result, the Charter was introduced in 1982.[108] This included the concept of equality without discrimination or substantive equality. According to Justice L'Heureux-Dubé, this nuanced understanding recognised equality as a comparative concept that did not always require treating people the same; sometimes it required treating them differently.[109]

Discussion over formal and substantive equality is popular throughout feminist literature.[110] But both approaches have been considered to fail the feminist ideal, as both presume that men are the benchmark against which women, as either equal or different, are to be measured.[111] Formal equality, as noted above, has failed to achieve equality in fact because women are differently placed and, in particular, bear the sociological and biological burden of reproduction. Likewise, a "difference" approach tends to theoretically locate women within the private sphere whilst maintaining the male aspirational benchmark. For example, biological differences between men and women are such that they tend to see women destined for a home-maker or housewife role. Although today's employment legislation provides for both maternity leave and partners/paternity leave,[112] other embedded factors see most women

105 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982, being schedule B to the Canada Act 1982 (UK) 1982 c 11.

106 Canadian Bill of Rights RSC 1985 App III, s 1(b); and L'Heureux-Dubé "Conversations on Equality", above n 104, at 275.

107 L'Heureux-Dubé "Conversations on Equality", above n 104, at 275; see *Bliss v Canada* [1979] SCR 183 and *Canada (Attorney Canada) v Lavell* [1974] SCR 1349.

108 L'Heureux-Dubé "Conversations on Equality", above n 104, at 276.

109 At 276.

110 See, for example, Joanne Conaghan *Law and Gender* (Oxford University Press, Oxford, 2013) at 81; and Catherine MacKinnon "Substantive Equality: A Perspective" [2011] Minnesota Law Review 1 at 4, 14 and 15.

111 Smart, above n 77, at 82.

112 Parental Leave and Employment Act 1987, pts 1 and 2.

taking the majority of time off work in order to care for their families. Those factors vary, but practically speaking it is usually the parent who earns the greater salary that tends to stay in work, and realistically speaking, this tends to be men.[113]

Equality jurisprudence creates a further tension between oppressed social groups.[114] Intersectional analysis, as discussed earlier, is a broader facet to the issue of women in the legal profession. Thus, to seek equality, whether it be formal or substantive, creates conflict between dominant and minority groups whilst simultaneously affirming the male benchmark.

For the reasons already discussed it becomes difficult to consider the resolution equality could provide. It is therefore sensible, in 21st century New Zealand, to demote the goal of equality from its long-reigning idol status.

D Equity

Equity is an ethical concept grounded in principles of distributive justice and fairness. The concept is often used in the health sector,[115] where it can be defined as:[116]

> [T]he absence of systematic disparities in health (or in the major social determinants of health) between social groups who have different levels of underlying social advantage/disadvantage—that is, different positions in a social hierarchy.

Defining equity within the context of feminist critique is no simple task. But what is clear is that equity is different from equality.[117] In contrast to equality, equity does not have a presupposed benchmark.

Seeking equity for women in the legal profession centralises fairness. Fairness becomes the guiding principle by which equity is achieved. Just as equity in health requires focus on the distribution of resources and other

113 "Gender pay gap" (1 September 2010) Ministry for Women <www.women.govt.nz>.

114 Darren Lenard Hutchinson "Identity Crisis: 'Intersectionality,' 'Multidimensionality,' and the Development of an Adequate Theory of Subordination" (2001) 6 Mich J Race & L 285 at 298.

115 P Braveman and S Gruskin "Theory and Methods: Defining equity in health" (2003) 57 J Epidemiol Community Health 254; and Family Violence Death Review Committee, above n 95, at 48 where the concept of equity is applied to family violence.

116 Braveman and Gruskin, above n 115, at 254.

117 At 255.

processes that drive health inequity,[118] equity in the legal profession requires focus on the structural inequities that drive gender imbalance. By centralising fairness, the differences between gender, race and class can be accounted for. This requires a reconstruction of concepts that have become fundamental to the model of the legal profession.

VI SEEKING DIVERSITY ON THE BENCH

So where to from here? It is clear that the absence of women at the senior levels of the legal profession extends beyond numerical asymmetry. At most, it is a starting point. While a single solution will not rectify the issue, a particularly important aspect of the position of women within the law is the judiciary. As Rt Hon Chief Justice Elias stated at the Australian Women Lawyers' Conference in 2008, "the visibility of women lawyers and judges is critical in breaking down stereotypes and is important for that reason alone".[119] Before discussing the potential of the judiciary to assist in women's uprise, we must not overlook the fact that the judiciary is a part of legal practice and therefore bound by current structural defects.

A Judicial appointment processes

As previously mentioned, women are underrepresented as judges. Judicial appointments are made by the Governor-General upon the recommendation of the Attorney-General. In addition to the legislative requirements, the Attorney-General provides guidelines regarding the procedures for judicial appointment.[120] The purpose of the criteria is to aid the Attorney-General in determining the suitability of prospective candidates, and includes the assessment of legal ability, qualities of character, personal technical skills and the candidate's reflection of society.[121] As David Williams QC has stated, the latter of these criteria is the only one that may be debatable.[122] It reads:

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118 At 255.

119 Sian Elias, Chief Justice of New Zealand "Address to the Australian Women Lawyers' Conference" (Australian Women Lawyers' Conference, Melbourne, 13 June 2008) at 8.

120 Christopher Finlayson "Judicial Appointment Protocol" (April 2013) Crown Law <www.crownlaw.govt.nz>. The procedures for judicial appointment must be made in accordance with the Senior Courts Act 2016, s 93.

121 At 3–4.

122 Williams, above n 18, at 44.

> *Reflection of society:* This is the quality of being a person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness.

According to Williams, this criterion "encompasses the fashionable, politically correct, but imprecise concepts of diversity and representativeness".[123] Such concepts are popular — particularly where women's uprise is concerned. Diversity, for instance, is popular because it confronts the male-dominated structure of the law and its practice by questioning its conception of value and other fundamental ideologies that permeate women's subordination.[124] By seeking diversity in people, ideologies are forced to diversify in their self-determining standards. However, what having a 'representative' or 'diverse' bench means is not clear and caution must be exercised in using either term as a guise for equality.

One interpretation of diversity on the bench envisages courts as being representative of the societies they serve, both in the name of democracy and in a commitment to equality under the rule of law.[125] As Chief Justice Elias stated extra-judicially, "judiciaries lack democratic legitimacy if they are comprised of white middle class men".[126] Counter to this view, however, is the argument that courts are not representative bodies. Therefore, to require democratic representation on the bench is "misguided" or "absurd".[127] There is a concern that by promoting diversity the fundamental concept of meritocracy is undermined. One of the essential elements of a sound judicial appointment system is that it ensures the individual with the greatest merit and ability is the candidate appointed.[128] As Williams states:[129]

123 At 44.

124 The term "diversity" is used constantly by today's legal profession and law firms to describe and examine staffing, see, for example, "Three law firms commit to diversity reporting framework" (31 May 2017) New Zealand Law Society <www.lawsociety.org.nz>.

125 See Susan Glazebrook, Judge of the Supreme Court of New Zealand "Looking Through the Glass: Gender Inequality at the Senior Levels of New Zealand's Legal Profession" (paper presented at the annual Chapman Tripp — Women in Law event, 16 September 2010) at 9; and Alysia Blackham "Court Appointment Processes and Judicial Diversity" (2013) 24 PLR 233.

126 Elias, above n 21, at 3.

127 Williams, above n 18, at 49, 50 and 53.

128 At 47.

129 At 51.

> … it is necessary to stress the danger and the temptation of allowing diversity to permit only moderately qualified candidates to be selected ahead of much better qualified candidates in terms of practical experience in the law and intellectual and analytical ability.

This tension between diversity and meritocracy is a common theme throughout various attempts at improving judicial appointment processes, and will be returned to shortly.

1 Reform: United Kingdom

In the United Kingdom, the Lord Chancellor established an Advisory Panel on judicial diversity to identify barriers to judicial diversity and make recommendations on how to achieve a more diverse judiciary at every level and in all courts.[130] Upon the recommendations of the Advisory Panel, the Crime and Courts Act 2013 (UK) was passed with the aim, amongst others, of promoting judicial diversity.[131] Amendments were made to the governing judicial appointment legislation,[132] widening the scope of the Supreme Court select commission by stating that they are "not prevented from preferring one candidate over another for the purposes of increasing diversity where two candidates are of 'equal merit'".[133] Other amendments included attempts to facilitate part-time judicial appointments and more diverse selection commission members for Supreme Court appointments.

It has been said that a more diverse collegium has not been achieved.[134] In a speech presented at a conference marking the ten year anniversary of the Judicial Appointments Commission, Lady Hale noted the homogeneity of the 13 recent appointments:[135]

> All of those 13 appointments were men. All were white. All but two went to independent fee-paying schools. All but three went to boys' boarding schools. All but two went to Oxford or Cambridge. All were successful QCs in private practice, although one was a solicitor rather than a barrister. All

130 See Blackham, above n 125, at 235.

131 See the Crime and Courts Act 2013 (UK) (explanatory note) at [339].

132 Constitutional Reform Act 2005 (UK), pt 3.

133 Blackham, Judge of the Supreme Court of the United Kingdom, above n 125, at 236.

134 Lady Hale "Appointments to the Supreme Court" (speech presented at the conference to mark the 10th anniversary of the Judicial Appointments Commission, University of Birmingham, 6 November 2015); and "More diverse Supreme Court has not happened, says Lady Hale" (10 November 2015) New Zealand Law Society <www.lawsociety.org.nz>.

135 Lady Hale, above n 134, at 3.

> but two had specialised in commercial, property or planning law. None had spent much, if any, time as an employee.

2 *Reform: Australia*

There has been similar dissatisfaction with homogenous judicial comprisal and vague appointment processes in Australia.[136] On 26 May 1993, the Senate referred matters involving gender bias and the judiciary to its Standing Committee on Legal and Constitutional Affairs.[137] Of the many findings made by the committee, it was noted that gender issues represented a systemic problem within the law, as opposed to an individual problem with judges.[138] As a result, the Standing Committee recommended changes to the judicial appointment process. According to the committee, by having a more transparent appointment process the orthodox pool of candidates would be widened, thus increasing the likelihood that a more diverse bench would be achieved.[139] It was within this context that the "McClelland reforms" were eventually introduced in 2008. The then Attorney-General, Robert McClelland, gave his assurance that:[140]

> … everyone who has the qualities necessary for appointment as a judge or magistrate is fairly and properly considered … This will increase the likelihood of greater diversity in the Government's appointments as well as ensuring their quality.

Three pillars of the McClelland reforms were: the articulation of publically available criteria; the advertisement of vacancies and call for nominations; and the use of an advisory panel to make recommendations to the Attorney-General. By allowing candidates to self-nominate, for example, it was thought that the appointments process was "better placed to find talent and increase the diversity of the Bench".[141]

It must be pointed out, however, that the McClelland reforms have been recently discontinued and judicial appointment practices have reverted back

136 Senate Standing Committee, above n 19, at [5.46].

137 At ix–xi.

138 At 75.

139 At 100–101.

140 Robert McClelland "Judicial Appointments Forum" (speech delivered at Bar Association of Queensland Annual Conference, Gold Coast, 17 February 2008) as cited in Elizabeth Handsley and Andrew Lynch "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13" (2015) 37 Syd LR 187 at 195.

141 Handsley and Lynch, above n 140, at 196.

to the traditional approach. In any event, research suggests that its attempts at reaching diversity failed to materialise.[142] Whether the McClelland reforms would have yielded greater results had they continued will remain unknown.[143] However, reference to the United Kingdom's experience of reform would suggest that clear criteria and transparent processes are not sufficient to promote or increase judicial diversity.[144]

B Failure to effect structural change

Chief Justice Elias has commented that the problem of diversity in the judiciary may be more "deep-seated" than what could be cured by an appointments process: [145]

> If we are serious about achieving a more representative judiciary perhaps we have to tackle the culture of the profession, of which the judiciary is a part, and the cultural impediments women face in our societies more generally.

This line of thought is also evident in the Senate Standing Committee's report on gender bias, which stated that there is no singular solution to the problem of bias towards women under the law.[146] Although focus on the judiciary is one necessary avenue when considering women in the law, this focus should not blind us from reality. The tendency for gendered issues to become diluted amongst other related issues results in excessive reliance on a 'solution' and the risk the solution loses sight of its objective.

The Senate Standing Committee's report, for example, was one of few triggering mechanisms to the McClelland reforms. The comprehensive report focused solely on bias towards women within the law. The reforms, however, did not reflect the deep-rooted nature of the issues discussed in the report. Instead, the reforms tended to focus on public transparency and the need to keep judicial appointment procedures free from political influence. Although necessary objectives, these measures fail to alter judicial diversity because the requisite standards and values surrounding that process remain unchanged.

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142 Brian Opeskin "The State of the Judicature: A Statistical Profile of Australian Courts and Judges" (2013) 35 Syd LR 489 at 509–512.

143 Handsley and Lynch, above n 140, at 189 suggest such reforms are still attractive and are likely to be reintroduced at some point.

144 Blackham, above n 125, at 238.

145 Elias, above n 119, at 6.

146 Senate Standing Committee, above n 19, at [5.1].

1 Part-time judicial appointments

As part of the United Kingdom reforms, part-time judicial appointments were introduced.[147] Despite having the potential to allow for more diverse appointments to the bench, such as appointing those who need to factor in childcare responsibilities, it remains to be seen whether this change is sufficient to make part-time work an acceptable option for judges.[148] Working part-time in the legal profession can have career limiting affects and there is no tenable reason to think that the position would be any different on the bench. This amendment is cosmetic. There is a concern that notwithstanding the amendment, qualified women will continue to turn down judicial appointment because of the inherent inflexibility of the role.[149]

2 Meritocracy and diversity

Another failure of the reforms is the failure to address the tension between merit and diversity. The concept of merit is embedded in the current judicial appointment process and remained that way throughout the English and Australian reforms. To seek diversity without altering the fundamental understanding of merit is to embark on a futile enterprise.[150] As discussed thus far, the inability of the stringent model to value circumstances common to women inhibits women's uprise.

Merit is a consistent theme in legal practice and governs the senior levels of the profession. It is through merit that the profession allows, or disallows, its participants to advance. The question therefore becomes whether merit and diversity can co-exist. It seems that they cannot. For instance, even those in favour of diversity on the bench hold that once equally meritorious candidates are identified, the deliberate appointment of a woman, for example, would be justified through the objective of diversity.[151] Here, diversity remains subject to merit and because it is a self-determining and narrowly designed concept

147 Section 23 of the Constitutional Reform Act 2005 (UK) was amended to provide that the Supreme Court must be composed of a maximum of 12 full-time equivalent judges.

148 See Blackham, above n 125, at 236–237; and Elias, above n 119, at 5 where the Chief Justice states "[e]ven on the bench, strategies to relieve women judges with young children of circuit responsibilities may not be well-received".

149 Elias, above n 119, at 5.

150 See Margaret Thornton "'Otherness' on the Bench: How Merit is Gendered" (2007) 29 Syd LR 391.

151 Williams, above n 18, at 51.

it becomes hard to see how diversity could bring about any *real* difference. In essence, true diversities are phased out after passing through this meritorious domain.

Another view in opposition of coexistence is the argument that diversity detracts from merit. Williams, for example, stresses the danger of permitting "only moderately qualified candidates to be selected ahead of much better qualified candidates".[152] The concern here is that by promoting diversity, other abled candidates will miss out — resulting in a less able judiciary. But the assumption that meritocracy renders one's personal views redundant is highly misconceived, as is the assumption that judges are neutral agents of the law. Perhaps in theory they are, or at least should be, but in reality they are not. Despite swearing the same judicial oath and being required to produce legal reasons for their decisions, judges nonetheless bring their life experiences to the bench with them.[153] To argue that diversity replaces or is irrelevant to merit is incorrect.

If merit, in its plain and ordinary meaning, purports to be an objective standard how does one explain the higher proportion of women graduating with Honours but the scarcity of women at partnership or the judicial level? As already demonstrated it is not as simple as saying that "it is just a matter of time" or "women choose to leave the law". The questioning of merit has also taken place when considering the scarcity of female judges in civil law jurisdictions, where appointment is made based on academic excellence and entered into straight after graduation.[154] There, women have the highest representation at the lowest levels of the judiciary. As Justice Glazebrook noted in 2010, with regards to civil law jurisdictions, "[t]he door to senior judicial appointment remains shut to most women even … where women now comprise over half of all judges or new appointments to the judiciary".[155]

C Targeting the bench in New Zealand

The judiciary is an appropriate starting point in revolutionising New Zealand's legal profession and its structural design. The judge is the quintessential figure

152 At 51.

153 Glazebrook, above n 125, at 11.

154 At 2.

155 At 3.

of the law as both a profession and an institution. In this regard, it is not simply about achieving numerical symmetry on the bench. It is about provoking change in the perception of value, merit and womanhood.

Incorporating diversity within judicial appointment processes is crucial. However, the noticeable failures of attempted international reforms should serve as a warning to New Zealand's incorporation of diversity in the Attorney-General's guidelines. First, diversity must mean diversity. This means that homogeneity is eradicated, meritocracy is reconstructed and the constitution of value is broadened. In support of this approach, the extent of women's subordination must be fully appreciated. The fact that women are numerically underrepresented in the senior levels of the legal profession is only one aspect of this.

Secondly, the goal of equity must be kept in mind. Because equity does not presuppose any benchmark, the concept of diversity is truly supported. Equality, on the other hand, justifies diversity with reference to sameness and, by extension, ignores intersectionalities or true diversities. Equity centralises fairness, accommodates difference and supplements diversity.

VII CONCLUSION

From the historical story of Ethel Benjamin to the statistical under-representation of women today, the legal profession and its senior levels is the embodiment of inequity. Neither time nor choice can justify the reality that the numbers of female graduates entering the profession do not flow through to the senior levels.

Although it is tempting to accept the realities of the law and its practice, we must not become complacent. Women must not be disheartened or tempted to accept the "choice" between progression and family. Value must be seen in difference for there *is* value in difference. Through diversity on the bench, such changes can begin to take hold. But we must not leave diversity conditional to merit. If value is seen in difference, merit would naturally include that value.

A range of scenarios, from having the highest grade point average, completing law school in the face of serious hardship, exceeding billable targets, to meeting targets whilst juggling multiple family commitments, hold inherent value that demonstrates excellence. Diversity must be unconditionally embraced. And true diversity on the bench means that we can target both the

law and its practice. Through targeting the law, negative social constructions will not become 'truth' so easily. Following this, legal practice will become unable to rely on its current understanding of value, merit and womanhood.

Addressing women's absence from the senior positions of the legal profession requires change in a number of areas. However, if equity is the goal and diversity is achieved on the bench, deep inroads can be made towards the uprise of women in the legal profession.