

## CHANGING THE WORLD?

*An address to the Australian Women Lawyers' Conference at the Sofitel Hotel, Melbourne, Australia on Friday 13 June 2008*

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For my secondary schooling, many years ago, I went to an old-established church school in Auckland. It was an all-female school and all of our teachers were female. Around the walls of our beautiful wooden hall were inscribed biblical texts in gold letters. One which always struck me as incongruous was “Let us now praise famous men and our fathers that begat us”.

And it seemed to me for many years afterwards that famous men were all we had to praise. Indeed, for those women who studied law in the 1960s, in a climate which veered between outright hostility and amused tolerance, we heard nothing of famous women. And for the diminished group which eventually entered the profession, the heroes of legal practice were entirely male.

Nothing changed very fast. Indeed, I was greatly taken aback a few years ago to read a history of the legal profession in New Zealand which does not acknowledge the entry of women into the profession until the 1980s. The few of us who thought we were making an impact during the preceding decade were clearly invisible to the writer. And he goes on to say that the profession became duller during the 1980s. He does not, it is true, suggest strict cause and effect between the entry of women and what he calls the “greying” of the profession but the golden age he invokes is that of the boozy bar dinner reminiscences. Perhaps nostalgia for those times could only survive while the profession remained a male club.

Although the custodians of the centennial history of the New Zealand profession published in 1969<sup>1</sup> did not think to mention it, the long, if

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\* The Right Honourable Dame Sian Elias, Chief Justice of New Zealand. This speech was delivered at the Australian Women Lawyers' Conference in Melbourne on 13 June 2008. It has not been updated for publication in this Journal.

<sup>1</sup> Robin Cooke (ed) *Portrait of a Profession* (AH and AW Reed, Wellington, 1969).

not prominent, history of female participation in the legal profession of New Zealand should have been a matter of pride. New Zealand was one of the first countries in the Commonwealth to permit women to practise law with the enactment of the Female Law Practitioners' Act 1896.

The enactment of this legislation was just in time to allow Ethel Benjamin into the profession in 1897. Now Ethel Benjamin does not even rate a mention in the "national" section of the centennial history of the New Zealand Law Society published in 1969, dealing with notable figures of the profession. Instead, she rates two brief references in the section of the history dealing with the District of Otago, as of provincial interest only.

The entries themselves indicate the steel in this slip of a woman. Ethel Benjamin studied for her LLB with no assurance that she would be able to work in law because the legislation that allowed her to practise had not been enacted when she began her studies at Otago University. The only law library available to students in Dunedin was that maintained by the Law Society. Ms Benjamin's application to use the library is the subject of the first entry relating to her. It caused some consternation. Eventually, however, the Council resolved that she could be given a permit to read in the Judge's Chamber Room, "there being no rule applicable to her case".<sup>2</sup> This permit was solemnly renewed from time to time. The only other mention of Ethel Benjamin in the centennial history of the profession relates to the embarrassment caused by her insistence on participating in the procession through Dunedin to mark the opening of the Royal Courts of Justice in 1902. Despite the fact that by then she had been practising as a member of the Society for five years, no one was prepared to walk beside her in the procession. Eventually Mr JM Gallaway who, it is said, "had always been a champion of her cause", "came to the rescue and walked with her".<sup>3</sup> For which I think the women lawyers of New Zealand should remember Mr Gallaway with gratitude.

It would be nice to be able to report that Ethel Benjamin confounded the sceptics and had a fulfilled and honoured career in law. In fact, she was frozen out from conventional work, as from the society of her fellow practitioners. In an act of defiance that could only have been prompted by deep anger and the realisation that she was beyond further humiliation,

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2 At 336.

3 At 339.

she took out advertisements for work in the Law Society newsletter. When that failed to shame the profession into some support, she threw herself in to representing women who were the victims of domestic violence or, being abandoned by men, were destitute. Her practice might charitably be described as fringe. Eventually, disheartened, she turned to other work and gave up law. She opened a restaurant. Then finally she left the country and settled in the United Kingdom where she died during World War II. Her history was largely overlooked in New Zealand until the Otago Women Lawyers took up her story in the 1980s. I did not hear of her until that time. But she remained a folk memory in Dunedin. When Silvia Cartwright (later successively Judge of the District Court, Chief Judge of that Court, the first woman Judge of the High Court and Governor-General of New Zealand) applied for jobs in Dunedin in the 1960s she encountered some reserve because of the example of Ethel Benjamin “and the trouble she caused”.

One hundred and ten years on from Ethel Benjamin, how are women doing in New Zealand, both generally and in law? The report card is not so good. The Human Rights Commission of New Zealand has recently published a census of women’s participation in our society.<sup>4</sup> The survey showed that former incremental progress has slowed or stalled. Despite New Zealand’s reputation for progress in gender representation, the position on the ground gives no cause for self-congratulation:<sup>5</sup>

- i) 14.8 per cent of editors are women;
- ii) 19.2 per cent of university professors and associate professors are women;
- iii) 29.2 per cent of the New Zealand Police force are women; and
- iv) 25.8 per cent of judges are women.

Despite a government commitment to achieve parity between men and women in government-appointed boards by 2010, the gap is still eight per cent. The representation of women in the corporate sector remains “dismal”.<sup>6</sup>

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4 The Human Rights Commission *The New Zealand Census of Women’s Participation* (2008).

5 At 11.

6 At 2.

Nor does the position in the profession give cause for satisfaction. Only 16.8 per cent of partners in larger legal firms are women.<sup>7</sup> Overall, they are 19.3 per cent of the partners in firms of all sizes.<sup>8</sup> Although women currently comprise 62 per cent of the admissions to the profession and have been above 50 per cent for more than ten years, they comprise 41.6 per cent of the legal profession.<sup>9</sup> Proportionately fewer women law graduates than men end up in legal practice.

Thirty-five per cent of barristers sole in New Zealand are women.<sup>10</sup> In a profession which is fused and in which the pattern until recently has seen the most successful practitioners emerge from firms at a comparatively late stage, usually to qualify for taking silk, the numbers of women practising at the junior bar may not be a good sign. Many have resorted to practise at the bar either because it is easier to juggle with child-rearing responsibilities (that was certainly the reason I went to the bar at an early stage), or because promotion within legal firms has not been available to them.

Few objective measurements, such as have been attempted in Australia, are available for assessing the success of women at the bar and in particular their ability to attract high quality work. Judges at all levels remark however upon the absence of women counsel and the dominance of male leaders. The impression in New Zealand has of course been demonstrated in Australia. The gender appearance survey conducted by the Victorian Bar confirms what is our experience too that women are a minority of counsel appearing before judicial officers.<sup>11</sup> It confirms also that the participation of women declines in the “higher end” work.

In New Zealand, of the 90 practising Queen’s Counsel, 11 are women. The Human Rights Commission reports that:<sup>12</sup>

At least 15 years after the free flow of women to the bar began, few are appearing in appellate matters or in big commercial cases, although the reasons for this are unclear.

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7 At 11.

8 At 67.

9 At 67.

10 At 67.

11 Australian Women Lawyers *Australian Women Lawyers’ Gender Appearance Survey Information* (August 2006).

12 Human Rights Commission, above n 4, at 67.

The one stand-out statistic that the Human Rights Commission publishes about women's representation in the judiciary is that 100 per cent of the Chief Justices of New Zealand are women.<sup>13</sup> Speaking for them all, I am very conscious that I accepted appointment to the bench in 1995 at the urging of male colleagues, whose view (based on their lack of success in recommending me for briefs) was that I would never get instructed in the cases I aspired to lead. I went on the bench to practise law.

For those in practice, my impression is that they still feel the chill that buffeted Ethel Benjamin. Only those who cannot seem to attract work know how it gnaws at self-esteem. And for many able women, those are still the conditions under which they practise. It is not surprising that women in the legal profession continue to exhibit the restlessness shown by Ethel Benjamin. Her movements in and out of the profession, her attempts to regroup and change direction, are still familiar patterns today. There are still women lawyers who, like Ethel Benjamin, operate restaurants, try unlikely specialities, set up their own firms or go to the bar with no work assured to them, and who throw themselves into poorly paid and unfashionable work because they feel invisible and undervalued by the profession and excluded from traditional practice.

Quite apart from the exclusion of women and discrimination against them, there are signs of growing disenchantment with legal and judicial work among women. Some of their concerns are shared by their male colleagues. And there is no doubt that the expectations of firms today and the mindlessness of many of the tasks they require of young lawyers are turning off a generation. But I do not think it fanciful to think that the price paid by women lawyers falls more heavily in many cases on them and is a price fewer of them are willing or able to pay. A New Zealand Law Society committee in a 2005 survey sought to identify matters which were of key concern to women practitioners.<sup>14</sup> Their four most significant concerns as reported were:

- i) hours of work;
- ii) professional support;
- iii) advancement; and
- iv) salary.

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<sup>13</sup> At 69.

<sup>14</sup> New Zealand Law Society Women's Consultative Group *Women Lawyers' Survey* (August 2005).

The concern about hours of work and salary were echoed in a cohort survey of male lawyers. But all surveys in Australia and New Zealand show that it is women who lag in the salary stakes. Men too rated advancement as a concern, but it was a less acute preoccupation for them than for the women. And again, the information about how women are doing in the firms and at the bar suggests that the anxiety of women is well-founded; their prospects of advancement are more limited. Most tellingly, the men did not report similar concern with professional support. I think this may be an important finding, wrapped up with the culture of legal practice, a theme I want to explore further. It is echoed in the experiences of women judges. In the United States, Judge Patricia Wald has referred to the “peer deprivation” of being a woman judge.<sup>15</sup> And most of us would, I think, recognise similar deprivation in our own careers, as practitioners and on the bench. Even where peer deprivation should have receded because the numbers of men and women are more even in particular areas of practice or on specific courts, women remain apart, remarked upon as “women practitioners” or “women judges” in public estimation. They are measured against standards they do not set and may not value. In the Supreme Court of Canada, Justice Claire L’Heureux-Dubé speaking in 2001 of the “continuing struggle for equality” thought women judges remained “outsiders” at least in public perception.<sup>16</sup> It would be wrong to leave the impression that the inside perception of female colleagues within courts or chambers or firms is very different from the public perception.

What is more, few male colleagues are able to be entirely easy about serious attempts to redress the imbalance in gender representation in the profession and on the bench. It means that there will be fewer jobs for the boys. I do not suggest that there is any conscious or vicious self-interest at work here. But the insistence on “merit” (which is self-reflective) and the blind faith (against the evidence) that self-correction is only a matter of time and numbers must now be seen as denial.

As it is becoming clearer that the impediments to women’s participation in the legal profession are not confined to those that block the door but include patterns of behaviour and work which women do not accept or cannot meet, strategies for overcoming these impediments may collide with legal culture or

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15 Patricia Wald “Some Real-Life Observations about Judging” (1992) 26 *Ind L Rev* 173 at 179.

16 Claire L’Heureux-Dubé “Outsiders on the Bench: The Continuing Struggle for Equality” (2001) 16 *Wis Women’s LJ* 15.

give rise to fears that women are to receive advantages. Young women with family responsibilities cannot keep up with ridiculous billing hour requirements or demonstrate commitment by working unhealthy work hours. Nor should their male colleagues, but they seem more willing to do so. And if they are, the chance for a shift in the legal culture recedes and accommodation for others is resented as favoured treatment. Those who obtain it are said to “lack commitment”. Even on the bench, strategies to relieve women judges with young children of circuit responsibilities may not be well-received. And yet in the United Kingdom growing fears are being expressed that qualified women are turning down appointment to the bench because of such inflexibility.

This Association has called for a fairer and more transparent judicial appointments system. One day I will have the emotional strength to say something of my own experience at the receiving end of the unfairness of the anonymous soundings and semi-public humiliations which go with the traditional process. So I do not mean to be negative about the initiative. But I do not think it is sufficient strategy. And I think that is being demonstrated by the difficulties being encountered by the new appointments process in the United Kingdom. No one can seriously doubt the commitment to a more representative judiciary of the Commission and its impressive chairman, Baroness Prashar. It is early days. And it may be that the critics of the Commission are shedding crocodile tears when they say it is failing to deliver on the appointment of women and minorities. But perhaps the problems are more deep-seated than can be cured by good process in appointments. 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 part, and the cultural impediments women face in our societies more generally.

Should we be surprised that, nearly 40 years after women started entering the profession in numbers, their position in the profession remains ambivalent? Certainly, although I felt and was treated as something of a freak 39 years ago when I first tried to get employment with my shiny new degree, I told myself, as I developed the hide of a rhinoceros, that this was a transition. I comforted myself with the confident view that my granddaughters would find the experiences I had unbelievable. I expected to be laughing in 2008 about the way things were in 1969.

In retrospect, much was very funny. And for a time it did seem that we were in the middle of a fundamental shift in attitudes and opportunities. Many

of the more ridiculous prejudices against women in law melted away when male practitioners confronted the reality of women practitioners. Having morning tea or lunch together no longer became unthinkable. Women's voices *did* carry in court. Women *could* think like lawyers — and even out-think their male opponents. Writing in 1983, Justice Bertha Wilson, the first woman to be appointed to a final court in the Commonwealth, thought that a sure platform for the advancement of women had been created by the social and political upheavals of the 1960s and 1970s.<sup>17</sup> And it is true that through them we came to see that this cause was just and that equality of opportunity for women and racial minorities was a human right. But we did not see that this wave, too, would recede. We bought into the lie that the advancement of women in the legal profession was just a matter of time and numbers. And that merit would out.

The intractability of the issue of gender equality in our societies more generally and in the international community is now evident. Despite international commitment to the equal rights of men and women since the Charter to the United Nations was adopted and recommitment through the international instruments which followed it, there remains in all societies a gap between the expectations and the reality of women's lives. The manifestations of inequality may be different in affluent societies like ours, but they are real enough. The extent and effect of violation of women's rights is staggering. In employment, education, and income in all societies women come in well behind men. No country is immune from the problems of domestic violence against women. Such violence, as the United Nations Committee on the Elimination of Discrimination Against Women has recognised, is "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".<sup>18</sup> Under-reporting of such violence means that we see only the tip of the iceberg. Domestic violence is a main inhibitor to the social advancement of women, but laws and enforcement agencies have been slow to respond. What is clear is that there are cultural inhibitors to the achievement of equal protection of the law for women. Whatever the positive law statements about equality, the reality of women's lives is shaped by the culture they live within, including the legal culture. No woman is an island. We should not expect to see wealthy and educated women fully accepted in

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17 Bertha Wilson "Law in Society: The Principle of Sexual Equality" (1983) 13 Manitoba LJ 221.

18 Committee on the Elimination of Discrimination Against Women General Recommendation 19 XI (1992) at 1.



the legal profession while the standing of women in the wider community languishes. That insight has implications for the scale of the struggle and for the role of an Association such as this. We need to change this world, as the suffragettes saw.

In launching this Association more than ten years ago Mary Gaudron was absolutely right to say that its formation in 1997 should be seen as an acknowledgement “perhaps belated” that women are different and are asserting their right to be different.<sup>19</sup> For too long we thought it was enough to break down the doors and be admitted as “honorary men”. Gaudron says that what went wrong was that women “did not really dare to be different from their male colleagues, did not dare to be women lawyers”. It should not have taken so long for the penny to drop. We should have remembered the example of the suffragettes. For them, the vote was not the end, but the beginning. There was no point in gaining the vote if women were not to change the world. The suffragettes aimed to make the world a better place, through practical gains for real people in our communities. In the same way, when astonished and exhausted some of us find ourselves partner, or Queen’s Counsel, or Chief Justice, we have lost the plot if we think it is the end.

The first wave of women lawyers’ associations provided networking to help women lawyers gain access to the profession. We looked forward to the time gender need not be on the agenda. The ambition of access was too limited. As Mary Gaudron said, the aim must not be to give women — more accurately, affluent, well-educated women — “a better share of the spoils”, but to improve law and the administration of justice for all.<sup>20</sup> If the new horizons are the old horizons, we have failed. If the positions we achieve do not lead to changes for better justice in our societies — for all women, for men as well as women, for children as well as adults, for all races — we will have failed.

To make a difference in this way women lawyers have to be good lawyers. That is why in a conference such as this we want to talk about law and judicial method. The claims we have to equality of treatment are claims of legal entitlement under the rule of law and constitutional principle. These are themes Mary Gaudron paid special attention to as a judge. Indeed, it has been said that “non-discrimination” emerges in her judgments as an “organising

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19 Mary Gaudron “Speech to Launch Australian Women Lawyers” (1997) 72 ALJ 119 at 123.

20 At 123.

principle” of the constitution.<sup>21</sup> And discrimination she recognises to arise as much out of the “equal treatment of unequals” as out of the unequal treatment of equals.<sup>22</sup>

To make a difference, women lawyers also have to understand that the experiences and perspectives they bring as women are important and valid considerations for their work. Sandra Day O’Connor<sup>23</sup> once said that the fact that she was a woman who gets to decide cases is more important than the fact that she decides cases as a woman.<sup>24</sup> I agree that the visibility of women lawyers and judges is critical in breaking down stereotypes and is important for that reason alone. I have elsewhere said that I think the assumptions about gender roles displayed by the judges when I first practised law (which led them, for example, to be hostile to matrimonial property legislation) could not have arisen had the judges had women colleagues. I think in any event that the distinct experiences and perspectives of women are critical if law is to be applied in the context of modern society. Contextual application of law is essential. What we see as discrimination, for example, is a social and ethical insight which must be made in the context of the values of the society in which the assessment is made. Richard Posner illustrated this point by reference to the Supreme Court decision in *Brown v Board of Education*.<sup>25</sup> The about-face from the separate but equal doctrine accepted in *Plessy v Ferguson*<sup>26</sup> did not come from “brooding over the text of the words ‘equal protection of the laws’” but from the Court’s insight that there had been a change in the nation’s ethical and political climate.<sup>27</sup>

The judges who in my time in practice thwarted New Zealand’s matrimonial property legislation because of sexual stereotyping were judges who prided themselves on scrupulous legality. They did not have the insight to see that their construction of the legislation was heavily influenced by their

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21 Henrik Kalowski “Gaudron, Mary Genevieve” in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, Oxford, 2001) 293 at 295.

22 *Castlemaine Toobey Ltd v South Australia* (1990) 169 CLR 436 at 480.

23 The first woman appointed to the Supreme Court of the United States, serving on the Court from 1981 to 2006.

24 Kathryn Mickle Werdegar “Why A Woman on the Bench?” (2001) 16 Wis Women’s LJ 31 at 40.

25 *Brown v Board of Education of Topeka* 347 US 483 (1954).

26 *Plessy v Ferguson* 163 US 537 (1896).

27 Richard Posner *The Problem of Jurisprudence* (Harvard University Press, Massachusetts, 1990) at 307.

personal values and that those values were out of touch with the values in society. Why would women make a difference to this sort of dissonance? I think because their life experiences have been different from those of their male colleagues. Elizabeth Evatt<sup>28</sup> thought that women and minority judges are more likely to realise how often claimed objectivity is marred by unconscious biases.<sup>29</sup> Justice Anthony Kennedy illustrates the point by reference to Justice Thurgood Marshall: "... the compassion of Thurgood Marshall is Exhibit A for the proposition that judicial reason cannot be divorced from the life experience of judges".<sup>30</sup>

The same thing can be said of women judges like Mary Gaudron or Brenda Hale or Beverley McLachlin. I do not think it is fanciful to see in their judgments a different take on matters: an emphasis on human dignity; a greater scrupulousness not to wound or slight; a willingness to express doubt and to revise opinions previously held; and a sense of obligation to explore underlying principle in order to lay out the full reasons for decision and clear away suggestions of an undeclared major premise. Their evident compassion, like that of Thurgood Marshall, comes from their very different experiences from their colleagues who have had more traditional careers. They too in their work are Exhibit A for the benefits of diversity in appointments and in legal practice.

Women such as these have a heightened insight into the disadvantage of those who come before the courts. This insight helps when colleagues occasionally display lack of understanding about the reality of the lives of those who appear before them, or when they act in a way that may be seen as overbearing or hurtful. The experiences of male colleagues have not generally entailed the humiliations and set backs all women practitioners will have experienced. Their practices have usually been less chaotic, more successful. The different experiences we have had shape women. They are strengths they bring to legal practice and to judging.

In New Zealand the women of my generation looked with admiration across the Tasman. I have mentioned Elizabeth Evatt and Mary Gaudron, two women lawyers we too hold in admiration and affection. But I would not

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28 The first Chief Judge of the Family Court of Australia, holding that position from 1976 until 1988.

29 Sean Cooney "Gender and Judicial Selection: Should There Be More Women on The Courts?" (1993) 19 MULR 20 at 25.

30 Anthony M Kennedy "The Voice of Thurgood Marshall" (1992) Stan L Rev 1221 at 1222.

want to omit to mention the incomparable Roma Mitchell.<sup>31</sup> I met her at a time when I was feeling discouraged about legal practice. I was working in an area that the profession did not value, because it was all the work that came my way. That was not so bad in itself because I knew that this work was worthwhile and mattered very much. But I was beginning to feel invisible within the profession. I was asked to speak to the International Association of Women Judges which was meeting in Wellington about the work I was doing for Māori. After it, a woman I did not know swept me into a hug. It was Roma Mitchell. She said that she had never before regretted leaving practice but that, hearing of the work I was doing, she wanted to change places with me. No one had ever spoken to me like that before. I will never forget her warmth, generosity and encouragement.

I started by mentioning the praise we have given to our forefathers. We have not done enough I think to praise our foremothers, the women who gave us the opportunities we now enjoy and which they could never hope to have. They were not famous. They worked for future generations in optimism. I mentioned my old school. Despite the inscriptions on the hall walls, it was founded by independent minded women who believed in the progress of women. We were taught by inspirational teachers. I have always been amused by the difference between the mottoes of boys' and girls' schools. In Auckland the boys' schools had thrusting mottoes about reaching for the stars through hard work or through manliness. The motto of our school, founded by pioneering women educators was "to serve". I do not think that reflected a modest view of a woman's place. I think it was an understanding of where real strength lies. And through service we can change the world.

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31 Australia's first female Queen's Counsel (1962), judge (1965–1983) and state governor (South Australia, 1991–1996).