Speech to launch

Australian Women Lawyers

by The Honourable Justice Mary Gaudron

High Court of Australia

Friday 19 September 1997 Mayfair Ballroom

Grand Hyatt Hotel

Melbourne Victoria

Madam President, Women Lawyers of Australia, their friends and guests.

It is a little over two years since I read Helen Garner's thought provoking work *The First Stone* [1] . It prompted me to write a note to my colleague, the High Court Judge, saying:

"The trouble with the women of my generation is that we thought if we knocked the doors down, success would be inevitable: the trouble with the men of your generation is that so many still think that, if they hold the doors open, we will be forever grateful."

Of course, those statements are open to criticism on the same basis as any other generalisation or over-simplification. Nonetheless, they seem to me to contain sufficient of the truth and sufficient relevance to bear repetition on the occasion of the launching of the Australian Women Lawyers.

I say the statement bears relevance because I see the Australian Women Lawyers as the beginning of a new era for women and for women lawyers, an era in which people realise that equality, equal justice and equality of opportunity are complex ideas, difficult to implement and achievable only by the sustained efforts of those committed to those ideals. They are not achievable simply on the basis that the doors are open, be they held open or battered down.

It was in search of some assistance in door battering that, in company with a fellow student, Daphne Kok, I approached the Women Lawyers Association of New South Wales in March 1964, some 33½ years ago. Daphne and I went along as representatives of female law students at Sydney University, many of whom had been tersely informed by city firms of that era that it was not their policy to employ women as articled clerks. The minutes of that meeting record that we were informed by the women practitioners whose assistance we sought that the solution lay in our own hands: we should learn to touch type; we should forego our university studies and undertake the Admission Board course; we should use our annual holidays to do the Admission Board Exams; then we would have no difficulty finding articles.

I left that meeting much encouraged. I knew, before the meeting, that for a woman to succeed, she had to be better than her male counterpart. I knew, after the meeting, that that was as simple as learning to touch type - hardly an insuperable task. And I knew, too, that the women who offered us that advice were speaking from their own experience: the hurdles they had to jump had been much higher than those we were ever likely to confront.

One of the women present at that meeting was Marie Byles, who, in 1924, became the first woman admitted to practice as a solicitor in New South Wales. It is appropriate, on an occasion such as this, that we acknowledge the pioneering spirit of those women who, a century or so ago, set about making a career in the law and the invincible determination of those who did.

Two of the earliest to attempt the study of law were Edith Haynes of Western Australia and Ada Evans of New South Wales. Ada's application to the New South Wales Supreme Court to be enrolled as a student-at-law was rejected on the ground that there was no precedent [2] . Conversely, Edith's application was accepted in Western Australia, but with the warning that her admission could not be guaranteed. The warning became reality when, in 1904, she unsuccessfully sought admission to undertake the intermediate law examinations. She later obtained an order nisi for mandamus. Her father appeared on the return of the order nisi, but it was discharged, it being held that although the *Legal Practitioners Act* 1893 (WA) allowed for "persons" to be admitted, the Court should not take the momentous step of acknowledging that a woman was a person without the authority of Parliament [3] .

It was not possible to study law at the University of Western Australia until 1927, and the discharge of the order nisi on 9 August 1904 marked the end of Edith Haynes' legal studies. In the meantime, in 1898 Ada Evans had enrolled at the Sydney University Law School during the absence overseas of the fearsome Professor Pitt Corbett, the then Dean of the Law School. Learning of her enrolment on his return, he summoned Ada to his office and, with a fine grasp of legal essentials, informed her that she did not have the physique for law and would find medicine more suitable [4] .

Although Ada Evans graduated in law in 1902, she was not admitted until 1921: New South Wales did not pass legislation permitting that course until 1918 [5] and it was then necessary for Ada to be enrolled as a student-at-law for two years before she could be admitted. New South Wales was exceedingly tardy in its enactment of legislation enabling women to be admitted to legal practice. Legislation was passed in New Zealand in 1896 [6] , in Victoria in 1903 [7] , in Tasmania in 1904 [8] , in Queensland in 1905 [9] , in South Australia in 1911 [10] , and in Western Australia in 1923 [11] . The Victorian legislation enabled the admission, in 1905, of Flos Greig as the first woman lawyer in Australia. Agnes McWhinney became the first woman admitted in Queensland in 1915, Mary Kitson in South Australia in 1916, Alice May Cummins in Western Australia in 1930 [12] , and Helen McPhee in Tasmania in 1935. Coincidentally, women could not be admitted to legal practice in the United Kingdom until 1921, the same year as Ada Evans became the first woman lawyer admitted to practice in New South Wales [13] .

Some idea of what was involved in the political struggle to secure legislation enabling women to be admitted to legal practice can, perhaps, be gauged from a passage in a book titled *Concerning Solicitors* , published anonymously in London in 1920. It contained this passage [14] :

" It is difficult to understand why up to now there have been female surgeons, doctors and oculists in this country and female lawyers in many other countries, but no female lawyers in the United Kingdom. Clearly, both branches of the law offer as excellent an opening for the same type of celibate woman with exceptional talent as any other profession."

The author supported his thesis with this interesting polemic:

" The truth is that the differences between the sexes have been grossly exaggerated by priests, journalists and fools generally, and there can be no doubt that at least one per cent of women are quite as intelligent as any man." [15]

New South Wales may have been slow in enacting legislation enabling women to be admitted to practice, but, in 1952, 22 women lawyers banded together to establish the Women Lawyers Association of New South Wales, one of the first of its kind in Australia [16] . An association was formed in Tasmania in 1972, in Queensland in 1978, in Western Australia in 1982, in the Northern Territory in 1986, in the Australian Capital Territory in 1988, in South Australia in 1989 and, last but not least, the Victorian Women Barristers Association was formed in 1993 and the Victorian Women Lawyers Association in 1996.

Why a women lawyers' association?

It is, I think, a tribute to the women's movement, generally, and to the growing understanding that equality is a complex issue that membership of a women lawyers association or, even, participation in the activities of those associations is now regarded as professionally acceptable. It was not always so. Regrettably, it is not universally so even now.

Certainly, 30 years ago in New South Wales, many of the women then entering practice rejected membership of the Women Lawyers' Association saying, "I'm a lawyer not a woman lawyer and I have no intention of being identified as such" [17] . It was an attitude born of the belief that I then shared, namely, that once the doors were open, women would prove that they were every bit as good, and certainly no different from their male counterparts. Therein, was an insidious untruth, the effects of which are with us still. The truth is that, in some respects, we are the same but, in others we are different. And when we admit that difference, when we assert our right to be different, we are going to be significantly better lawyers. Moreover, the legal profession is going to be a better profession and the interests of justice are going to be much better served.

But as I said, 30 years ago we had little understanding of difference, little incentive to admit it and it is little wonder that membership of a women lawyers association, involving as it did even a tentative assertion of difference, was seen both by male and female practitioners alike, as something that was not really professionally acceptable. Indeed that attitude persisted until very recent times.

It was as recently as October 1989 - not quite eight years ago - that I was travelling to Western Australia with my judicial colleagues in an Air Force plane, the more normal method of transport not being available as a result of what some people describe as "the Pilot's Strike". There was a certain camaraderie in the plane until, by way of general conversation, I informed my colleagues that I would be speaking to a gathering of women lawyers in Perth. It might have been better if I'd started dancing the Can-Can. It was clearly inappropriate for me to attend, much less speak at such a gathering; there was no need for women to have separate professional organisations; there was no discrimination in the legal profession; in any event, I was being discriminatory by attending and, by way of final judgment on the ignominy of what I was about to do, "not even Lionel would have done such a thing". Their attitude was short-lived, not because of anything I did but because they discovered on their arrival in Perth that the judicial protocols, which had been observed with respect to the High Court sittings in Perth since 1903, simply could not accommodate a woman Justice of the High Court.

It has been said for many, many years that it is only a matter of time until women are properly represented in the various fields of legal endeavour. Well, how much time? It is close on 100 years since we've had women lawyers, since the doors have been formally open. Its 45 years since we had a women lawyers' association in New South Wales; for over 30 years we've had women silks, with Roma Mitchell's appointment in South Australia in 1962 and Joan Rosanove's in Victoria in 1965; we've had anti-discrimination legislation in three States for 20 years [18] and at a national level since 1984 [19] . For the past 20 years women have represented in excess of 30% of all law graduates and now represent more than half.

Where has this progress got us: we are under-represented at the level of senior partnerships: we are under-represented among the leading advocates, as the Chief Justice acknowledged this morning in his "State of the Judicature" Speech: we are under-represented in the judiciary, as was also acknowledged this morning by the Chief Justice. Let me illustrate the extent of that under-representation at the level of the High Court. In the year 1 July 1996 to 30 June 1997, 73 matters came before the Full Court, with women presenting argument only on two occasions. On the assumption that there were two parties to each of the Full Court matters - an assumption which errs considerably on the side of caution - the percentage of women to total advocates was 1.4%. They were slightly more visible and more audible in special leave applications, with women appearing in the role of advocate on 14 occasions out of 276, giving an overall percentage of 2.5.

I have, I confess, heard many explanations for the under-representation of women in the ranks of leading advocates. I have, for example, been told that women with merit will inevitably be granted silk and get the briefs they deserve. This is a theory I might accept if there were evidence that merit is the universal yardstick for the granting of silk to men or, even, for the success of male barristers.

A more recent theory, and one propounded by the New South Wales Bar Association in its dissenting report on Recommendations on Judicial Appointment to the Ministerial Committee on Gender Bias and the Law [20] is not that there is discrimination at the Bar, but that women are making decisions early in their careers not to pursue the opportunities available [21] . In other words, they are deciding not to go to the Bar. Could it be that the work practices at the Bar are not congenial to women? Could it be that the cost of establishing chambers has a different impact on women who may need to interrupt their careers by reason of motherhood? Could it be that the system of patronage, which, after all, is about maintaining the status quo, is inimical to women? Could it be that the environment that men have created is hostile?

Worse, by far, than the under-representation of women is the fact that notwithstanding the progress that has been made by women in the law and notwithstanding the existence of anti-discrimination legislation, the law is no more accessible than it was, say, 30 years ago, no more affordable, no more efficient and barely more responsive to the needs of women and minorities [22] .

It is often said that, for a woman to succeed in a traditional male area, she has to be better than her male counterparts. We know this is true. We also know that it is not very hard to be better than the average male [23] . For those reasons, we might reasonably have expected two things. We might reasonably have expected that women lawyers would be better represented than they are; and we might reasonably have expected that male lawyers would have been improved by the competition with the consequential improvement in the availability and quality of legal services.

What went wrong? In a real sense, what went wrong was that, for all sorts of reasons, women did not really dare to be different from their male colleagues, did not dare to be women lawyers. To be different, to challenge the codes of conduct derived, as often as not, from rules developed on the playing fields of Eton for the male members of the British aristocracy, would have been to invite ostracism, perhaps, even, the attention of the Ethics committee; to assert that women were different with different needs would have been construed as an acknowledgment of incompetence; to question the bias of the law would have been to invite judgment as to one's fitness to be a member of the profession. And, thus, very many of us became honorary men. We thought that was equality and, on that account, we rightly deserved the comment of the graffitist who wrote "Women who want equality lack ambition".

In his "State of the Judicature" Speech today, the Chief Justice acknowledged, as did Sir Anthony Mason four years ago [24] , that "[o]ther things being equal, it would strengthen the judiciary to have an increase in the proportion of women judges and judges drawn from minority groups". I do not treat that statement as directed only to the maintenance of public confidence in the judiciary, although that, in itself, is a matter of great importance. Rather, the statement acknowledges, I think, that justice is done only if irrelevant distinctions are disregarded and, if proper account is taken of the genuinely different needs and circumstances of those who come before the courts. And that is a task that can properly be undertaken only if members of the profession and

the judiciary ignore those irrelevancies and are sensitive to those differences. Let me illustrate by reference to a case in which I was involved a little over 25 years ago.

My client was a young aboriginal mother who had been gaoled for a minor offence and whose young daughter had, in consequence, been made a ward of the State. Later, the child was placed in the care of a white Australian couple. On her release from prison, the mother sought to regain custody. On the day on which the matter was listed for hearing, she failed to appear. I obtained an adjournment, although not without difficulty. The solicitor was able to locate her with the help of some aboriginal contacts and she was brought to chambers. I asked "why did you not come to court?". I was devastated by her answer - "I did not want to go to gaol", an answer that told eloquently of her only experience of the law, namely, of going to court through one door and coming out several months later via prison. And it need hardly be said that she didn't get her daughter back, partly because her failure to appear at the earlier hearing was taken to indicate a want of genuine concern for the welfare of her child.

The need to reject irrelevant distinctions but, at the same time to take account of genuine differences emerges from an interesting debate to cross purposes between John Stuart Mill and Sir James Fitzjames Stephen QC. In 1869, John Stuart Mill wrote that "the principle which regulates existing social relations between the two sexes ... ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side nor disability on the other" [25] . Stephen rejected that view, asserting that a law which treated marriage as a contract between equals "would make women the slaves of their husbands" [26] . He pointed out that upon a marriage a man "incurs no doubt, a good deal of expense, but he does not in any degree impair his means of earning a living" whereas "[w]hen a woman marries she practically renounces in all but the rarest case the possibility of undertaking any profession but one" [27] .

The debate between Mill and Stephen is instructive, if only because Stephen treated equality as meaning "sameness". But, of course, we are all different, with different talents and virtues, having different circumstances, different ethnic, social and economic backgrounds, and different needs. Equality is not blind to those differences; nor is it antipathetic to excellence, individualism or, even, the desire to be different. On the contrary, equality involves the recognition of genuine difference and, where it exists, different treatment adapted to that difference. So much is now established constitutional principle [28] . Surely, it is not too much to hope that it will soon be the reality, if for no other reason than the failure to acknowledge and tolerate difference is, in truth, cruel oppression.

I welcome the formation of the Australian Women Lawyers because, it seems to me, that it is an acknowledgment by women lawyers, albeit, perhaps belatedly, that they are different and an assertion of their right to be so. I welcome it because, it seems to me, to have implicit in it a demand that the legal profession take stock of itself and of those practices which have resulted in the under-representation of women in important areas of legal practice and in the judiciary, not because women should have a larger share of the spoils of legal practice, but because they have the potential to improve the law and the administration of justice.

I mentioned earlier that many of us became honorary men who neither questioned the way in which legal practice was organised nor articulated the possibility of the law's bias. Today we should also honour and acknowledge the feminist legal academics and legal theorists who have drawn attention to the ways in which the law fails to protect women and fails to respect their equality and, thus, denies them equal justice. In this area, I

would like to single out Jocelynne Scutt, Regina Greycar, Jenny Morgan, Margaret Thornton and Mary Jane Mossman.

I believe that having acknowledged and asserted their difference, women lawyers can, with the assistance of feminist legal theorists, question the assumptions in the law and in the administration of the law that work injustice, either because they proceed by reference to differences which do not exist or because they ignore those that do. And having become sensitive to those matters, it will not be long before there is a realisation of the need to be sensitive of the different experiences and circumstances of others, to articulate those differences when necessary, to question the assumptions of the law as it affects them. In short, to be sensitive to the needs of justice.

So, in launching Australian Women Lawyers, I say to the women lawyers here today just two things: Go to it! Go be yourselves!

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1 Garner, *The First Stone* , (1995) Pan MacMillan, Melbourne.

2 See "A Woman Pioneer", (1948) 22 *Australian Law Journal* 1 at 2.

3 See Byrne, "Just Dears - Western Australia's first Women Lawyers", (1994) 21(4) Brief 13; Thornton, *Dissonance and Distrust: Women in the Legal Profession* , (1996) at 57-62, Oxford University Press, Melbourne. See also *In re Edith Haynes* (1904) 6 WAR 209.

4 "A Woman Pioneer", (1948) 22 *Australian Law Journal* 1 at 2; Bennett (ed), *A History of the New South Wales Bar* , (1969) Law Book Company, Sydney.

5 *The Women's Legal Status Act* 1918 (NSW).

6 *Female Law Practitioners Act* 1896 (NZ).

7 *Women's Disabilities Removal Act* 1903 (Vic).

8 *Legal Practitioners Act* 1904 (Tas).

9 *Legal Practitioners Act* 1905 (Q).

10 *Female Law Practitioners Act* 1911 (SA).

11 *Women's Legal Status Act* 1923 (WA).

12 Alice May Cummins was admitted under reciprocal arrangements with South Australia, but did not practise in Western Australia. Enid Russell was admitted to undertake articles in 1926, and admitted to practice in 1931.

13 Although admitted, Ada Evans did not practice at the Bar. She took the view that so much time had elapsed since her graduation that she was incapable of practicing and did not wish "women's standing in the profession to be undermined by a show of incompetence" ("A Woman Pioneer", (1948) 22 *Australian Law Journal* 1 at 2).

14 *Concerning Solicitors* , (1920) at 46, Chatto & Windus, London.

15 *Concerning Solicitors* , (1920) at 48, Chatto & Windus, London.

16 During the course of this speech, I was informed by Justice Rosemary Balmford that a Victorian women lawyers association, known as the Legal Women's Association, was founded prior to the Second World War and continued to function into the 1950s. See further: Thornton, *Dissonance and Distrust: Women in the Legal Profession* , (1996) at 212, Oxford University Press, Melbourne.

17 On early women lawyers' reluctance to identify themselves as different by virtue of their sex, and on their silence when faced with their struggles, see, Thornton, *Dissonance and Distrust: Women in the Legal Profession* , (1996) at 67-70, Oxford University Press, Melbourne.

18 *Sex Discrimination Act* 1975 (SA) (this Act was repealed and replaced by the *Equal Opportunity Act* 1984 (SA)); *Anti-Discrimination Act* 1977 (NSW); *Equal Opportunity Act* 1977 (Vic) (this Act was repealed and replaced by the *Equal Opportunity Act* 1984 (Vic) which was in turn repealed and replaced by the *Equal Opportunity Act* 1995 (Vic)). See also the *Equal Opportunity Act* 1984 (WA).

19 *Sex Discrimination Act* 1984 (Cth).

20 New South Wales, Department for Women, *Gender Bias and the Law: Women Working in the Legal Profession - Report of the Implementation Committee* , (1996).

21 New South Wales, Department for Women, *Gender Bias and the Law: Women Working in the Legal Profession - Report of the Implementation Committee* , (1996) at 30.

22 See generally, Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System* (Report No 67 - Interim) (1994); Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report No 69 - Pt 2) (1994); Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (Report No 69 - Pt 2) (1994).

23 The view that women have to be better than men but that, fortunately, this is not very difficult was first articulated by Charlotte Whillon, a former mayor of Ottawa.

24 "The State of the Judicature", (1994) 68 *Australian Law Journal* 125.

25 Mill, *The Subjection of Women* , (1869), London.

26 Stephen, *Liberty, Equality and Fraternity* , (1793) at 214-215, Holt and Williams, London.

27 Stephen, *Liberty, Equality and Fraternity* , (1793) at 214-215, Holt and Williams, London.

28 *Cole v Whitfield* (1988) 165 CLR 360; *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411. See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.