Speech for

Women Lawyers Association of New South Wales

50th Anniversary Gala Dinner

by The Hon Justice Mary Gaudron,

High Court of Australia

at NSW Parliament House, Sydney,

13 June 2002

Madam President, Women Lawyers, Distinguished Guests and Friends

Some of you will remember Yossarian, the main character in Joseph Heller's *Catch-22*,who, hoping to live forever or, at least, until he finished his tour of duty as a bomber pilot in the Second World War, pursued a life of boredom on the theory that, that way, time would go more slowly – perhaps so slowly that he would live for ever. It may be that, tonight, I will be able to extend your lives by the same process. However, if the reverse is true, there may be some reason to think the days of the Women Lawyers Association of New South Wales are numbered.

The past 50 years have been action-packed and interesting years both for the women lawyers of New South Wales and for the Women Lawyers Association. Those 50 years have seen women graduate from our law schools in numbers that, I suspect, the founders of the Women Lawyers Association could never have anticipated; they have seen women excel academically and become respected legal academics here and abroad; they have seen women enter legal practice in greater and greater numbers, and, perhaps, more significantly, they have seen women remain in practice thereby achieving the status and professional respect that, despite the merit theory, still accompany seniority; they have seen women elected leaders of their professional associations; they have seen them become partners and senior partners in the large law firms; they have seen them become members of the senior bar and accept appointment to every level of the New South Wales and Federal judiciary. Women lawyers have achieved a measure of success and recognition that, I suspect, was not dreamed of when the Women Lawyers Association held its first meeting at the Women's Club on 6 March 1952.

Of the 22 women who attended the inaugural meeting, at least 12 are here present tonight. A little later, I shall say something as to how the Association came to be formed. Before doing so, however, I should give you a thumbnail sketch of the first women lawyers in New South Wales, some of whom also became active members of the Association.

The first step in the history of the women lawyers in New South Wales begins with the Senate of the University of Sydney, a body on which a former president of this Association, Daphne Kok, served with distinction for many years. In 1881, the Senate resolved to open the University to women and "to afford them all its rights and privileges in complete equality with men" 1. – a move ridiculed by *The Bulletin* as "a farce" on the basis that "a girl who has received a higher education is generally a prig or a poseur". 2.

Eighteen years later, during the absence overseas of the Dean, Professor Pitt Corbett, Ada Evans enrolled in the Faculty of Law. On his return, the Dean summoned Ada to his presence and, with a fine grasp of legal principle, informed her that she did not have the physique for law and would find medicine more suitable.3. This notwithstanding, Ada graduated in law in 1902 and, so, this year marks not only the 50th anniversary of the Women lawyers Association, but the centenary of the graduation of the first woman lawyer in New South Wales.

Although she had graduated, Ada was refused registration as a student at law on the ground that there was no precedent.4. Indeed, there was none. Instead, there was a line of judicial authority, testimony to the creative genius of the common law as administered by men, that women were not "persons" and could not avail themselves of rights or privileges not specifically conferred on women.5.

There then began a political campaign, not only in New South Wales, but in the other States and in the United Kingdom for legislation that would enable women to practice law. It was a campaign which some men supported, one even asserting as late as 1920 and anonymously, that:

> "both branches of the law appear as excellent an opening for the same type of celibate women with exceptional talent as any other profession".

He added:

> "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 percent of women are quite as intelligent as any man."6.

Ada's political campaign culminated in the *Women's Legal Status Act* 1918 (NSW) which enabled her to become enrolled as a student-at-law and, in 1921, to be admitted to the bar. However she never practised, taking the view that too much time had elapsed since she took her degree and that she did not wish "women's standing in the profession to be undermined by a show of incompetence".7.

Three years later, three women were admitted to practice: Marie Byles as a solicitor, Sybil Morrison as a barrister, and later, in the same year, Chris Jollie-Smith, transferred from the Victorian Roll to the Roll of Solicitors in New South Wales. Sybil Morrison practised briefly at the bar, before going to England in 1930. Marie Byles, a buddhist, a bushwalker and nature lover, and Chris Jollie-Smith, a Communist and civil libertarian, were still in practice 40 years later when, in 1964, Daphne Kok and I became student liaison officers for the Women Lawyers Association.

Gradually others came along. Nerida Cohen, a noted feminist, was admitted to the bar in 1935 and practised until 1942 when she accepted appointment to the Women's Employment Board. Jean Malor, the first woman to graduate with first class honours in law and a foundation member of the Association, was admitted in 1937 and became senior legal adviser to the Law Book Company; Veronica Pike, roving ambassador for the Women Lawyers Association until her death in 1986, and also a foundation member of the Association, was admitted as a solicitor in 1940. And so on, as one by one, through the 1940's, another 48 women were admitted to practice.8.

During the 1940's, some women lawyers met regularly in the Feminist Club in King Street. From time to time, one or other of them claimed to represent women lawyers generally or to speak on their behalf, often expressing views not fully shared by younger women practitioners bent on making a career in the law.

Thus, it was that Marie Kinsella, Peggy Crawley, Zena Sachs and Judith Selig – all of whom are here tonight – determined to form the Women Lawyers Association and set about drafting its constitution. Let me say a word about each of them. Marie Kinsella, later Marie Sexton, went to work in the Attorney-General's Department in Canberra, there compiling the *Annotated Constitution*, a book which, although now out of date, never leaves my side; Peggy Crawley is still in practice and, in the 1970's, successfully challenged the AJC's refusal to admit women to membership with the consequence that she and Cecily Backhouse became its first two women members; Zena Sachs was research assistant to Professor Julius Stone and, as Graduate Assistant, ran the Department of Jurisprudence at Sydney University Law School for many years; Judith Selig married Senator Sam Cohen and, later, became Justice Cohen of the Australian Conciliation Commission.

It was Judith Cohen who, with the draft constitution in her briefcase, called on Nerida Goodman and invited her to be the Association's first president. Nerida accepted and, as you know, the first meeting was held in the Women's Club on 6 March 1952 with 22 women lawyers then forming the Association. Other foundation members who are here tonight are Pat Oldfield, Joan Spruitt, Pat Hinch, Judy Clayton, Joan O'Hara, Beck McPaul and Jean Hill.

One who was present at the meeting, as a student, was Elizabeth Evatt, the first woman to win the University Medal in Law. Elizabeth later became the first female deputy president of the Conciliation and Arbitration Commission and, later, Chief Justice of the Family Court. Elizabeth, who is also with us tonight, did not join the Association in 1952. She took the view – a view which she has long since abandoned but which persisted with many, at least until the 1970's – that the Association was unnecessary and that women lawyers should and would take their place alongside men as their equals in the profession in the ordinary course.

The 1950's saw more women admitted to the profession, both as barristers and solicitors. Many of them joined the Association, which saw its role as improving the lot of women and children. To this end, the Association campaigned for the rights of illegitimate children, as they were then so cruelly called, and for legislation enabling women and children to seek proper provision from the estates of their husbands and fathers. Both campaigns were to continue throughout the 1950's and 1960's.

The decade of the 60's was a decade of revolution, and not just the sexual revolution. The Commonwealth Scholarship scheme made it possible for more women to study law; the contraceptive pill made it possible to pursue marriage and a career in the law. But the profession was less than welcoming. By way of example, in the 1960's, the Chief Justice's admission day speech, which concentrated heavily on pregnant black clouds on our northern border – a metaphorical reference which might then have been apt had the Chief Justice realised that our northern border was the Tweed and not the South China sea, was varied whenever a woman was admitted to the bar to include the observation that a woman barrister was mother nature's only mistake. Presumably the pregnant black clouds were part of her grand design!

With the growing influence of feminism in the 1970's and the enactment of anti-discrimination legislation, blatant rudeness and discrimination went underground in the profession, save in the case of the wilfully unreconstructed who, I should think, included Roderick Pitt Meagher. I mention him because, only recently he was reported as saying:

> "The bar desperately needs more women barristers [because] there are so many bad ones that people may say that women ... are hopeless by nature".9.

It is and always has been relatively simple to dismiss such remarks as the mutterings of male malcontents who, for very good reason, fear dealing with women on equal terms. However, the natural and probable consequence of a remark of that kind, when made by one of the most senior judges of this State's Court of Appeal, is that few, if any, women barristers will be briefed to appear in that Court. We should not insult Justice Meagher's intelligence by pretending that he did not and does intend that very consequence. Indeed, it is fundamental to the law that a person is presumed to intend the natural and probable consequences of his or her acts.

I do not propose to go through developments in the decades following the 1970's except to note that, from the late 1970's, women have numbered more than 30% of all law graduates and, for at least five years, they have numbered more than half. Which brings me back to where I started – 50 action-packed years for women lawyers and the Women Lawyers Association, but with what result?

Let me quote the headline of Kate Marshall's article in the *Financial Review* of 31 May this year:

> "Highest courts still lack women".10.

The highlighted "key points" for those too busy to read the article in its entirety:

> "Women are still severely under-represented in Australia's judiciary. Only magistrates' courts and the Family Court are making headway".11.

In that article, Chief Justice Michael Black is quoted, I think quite accurately, as saying "there are far too few women judges, but ... the problem [is] the lack of numbers at more senior levels of the profession."12. Indeed, the numbers are depressing. In New South Wales seven women are members of the senior bar, out of a total of 308. Australia-wide, there are approximately 30 out of 700. The standard explanation for these dismal statistics is one that is as insidious and counter-productive as Justice Roddy Meagher's ingenuous argument in support of more women going to the bar. The standard explanation, which I have been hearing for more than 20 years, is that women of merit will inevitably be granted silk and its only a matter of time until they are.

That explanation is dishonest. And it is calculated to ensure that the number of women taking silk remains pathetically low. It is dishonest because it slyly conveys the message that men of silk are men of merit – a proposition which, if true, would mean that there were many, many fewer than 300 men with silk in New South Wales, and many, many fewer than 700 Australia-wide. It is doubly dishonest because it is predominantly those men who have benefited from not having to compete with women on equal terms who decide what constitutes merit, a task at which they have often enough demonstrated something short of complete competence. And the explanation is calculated to ensure that the number of women who take silk remains low because it conveys the message that those who have sufficient years of practice do not have the necessary ability, thereby ensuring that they are not given the briefs which would indicate their ability to carry silk. So catch-22 – back where we started.

The merit fiction is by no means the sole deterrent to women's success at the bar. Perhaps the most significant barrier is patronage. Patronage still governs who gets the chambers and where; it still governs the passing of briefs, the selection of juniors and, to the extent briefing patterns result from recommendations, briefing itself.

On another occasion13., I explained to the New South Wales Bar what is wrong with patronage. I will do it again. Patronage is about creating people in one's own image, about perpetuating the status quo, securing conformity, protecting the prevailing ethos and stifling originality of thought. Patronage means that merit is not the sole criterion for success; it explains why, for some, mere incompetence is no handicap and, for others, outstanding ability is no guarantee against failure. Patronage is, thus, inequality; patronage is discrimination and, ultimately, patronage is contrary to the interests of justice. And if it works for women, it works only for those who are prepared to be moulded by their makers.

I know there are individual men of good will at the bar who wish to advance the interests of women barristers. Sadly, I do not believe they can or, at least, not within the existing organisational structures. Perhaps, the picture is rosier for women solicitors.

At least numerically, women solicitors fare somewhat better than their sisters at the bar. Let me read you some statistics compiled by my Associate from the current Law Almanac as to the number of partners, consultants and/or special counsel in Sydney's large law firms who are women:

> Mallesons: 16 out of 91 – 17.6%
>
> Freehills: 22 out of 101 – 21.8%
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> Allens: 14 out of 92 – 15%
>
> Blakes: 17 out of 82 – 20.7%
>
> Clayton Utz: 21 out of 75 – 28%
>
> Deacons: 9 out of 74 – 12.2%
>
> Gilbert and Tobin: 8 out of 39 – 20.5%
>
> Minter Ellison: 7 out of 74 – 9.5%
>
> Phillips Fox: 12 out of 47 – 25.5%
>
> Pricewaterhouse Coopers Legal: 11 out of 33 – 33%

However, let me read you something from *The Australian Financial Review* of last Tuesday, 11 June 2002, headed "Female lawyers out of practice".14. The article begins:

> "Despite years of women dominating legal courses and the rank and file of law firms, a landmark report has revealed that inflexible work practices at partnership level continue to force women out of the profession at the height of their career."

The article concludes:

> "the legal profession [is] inflexible and insensitive to the private lives of solicitors, ... the careers of men and women 'dramatically diverge[]' within five years of graduation and ... the expectation that women will have children 'profoundly affects' their career prospects."

Let me turn to the hours young women solicitors are required to work in the large law firms. I have heard them described by a very senior male partner in one of our largest law firms as "inhuman". If not inhuman, they are exploitative and indicative of incompetent practice management. The nature and probable consequence of the hours which young women solicitors are required or pressured into working is that they will leave the profession because of exhaustion, burn-out and the inability to combine work with any sort of social or family life. Given the presumption that persons intend the natural and probable consequences of their acts, one is driven to conclude that large firms are deliberately adopting work practices to ensure that a goodly number of women are driven from practice.

Nothing that I have said would matter a fig were it not for the fact that the profession needs and the interests of justice demand the greater involvement of women in the law. The law is indispensable to a well-ordered society and, indeed, to the commercial and economic life of the nation. The wellbeing of those individuals who together constitute our society and the security of the nation's commercial and economic life both depend on just legal outcomes. In times of rapid social and economic change, such as we have seen in the past decades, just legal outcomes depend on the law being kept in good and serviceable order. That in turn requires lawyers to understand the nature and extent of the commercial and human issues that are being driven by change, to articulate the nature of the issues which have thus emerged and to effectively advocate the interests of those they represent.

Regrettably, I do not think that the still male-dominated legal profession has performed these functions well in the recent past. Had they done so, I am sure that, today, we would not be having the debate we are about the "insurance crisis" and the need for tort law reform. Ideally, the relevant laws – and not just the law of tort – would have evolved so that the debate would never have been necessary. But even if the law had evolved to that point, I think the debate would be about very different issues, including the enforcement of health and safety laws, the desirability of a national insurance scheme and the regulation of the insurance and re-insurance industries.

Equally, I believe that had the legal profession been effective servants of justice, the rights of individuals would have been much better protected. Tonight is not the occasion to give chapter and verse of the profession's failings in this regard. It is sufficient to note that, as I read the banner headlines confirming "the Mickelberg Stitch" earlier this week, I was reminded of the corrupt practices of police officers revealed in New South Wales not so very long ago. Those practices by which the police fabricated evidence to improve a prosecution case jeopardised the most basic of our rights – the right to a fair trial. Those practices could flourish only because our judges and lawyers, again mostly male, were not equal to the task of preventing them.

Whatever else may be said, it seems to me that the failures of the law and legal profession cannot be blamed on women. By a process of elimination and with only a slight leap of faith and logic, I am driven to the conclusion that women lawyers are the law's only real hope for the future.

There is a more worrying conclusion to which I am driven. It is this: women simply cannot rely either on their legal talent or on the goodwill of enlightened men in the profession – and there are some – to achieve the measure of success that they deserve and that the interests of justice demand. If we are to achieve the measure of success we deserve and make our own distinctive contribution to the law and justice, we must do it by ourselves. We must assert our difference. We must reject patronage and professional structures and create new ones. And I believe we can.

Modern technologies already render much of the way in which the profession is organised outmoded, inefficient and ridiculously expensive. At the very least modern technology exposes the requirement that young solicitors spend long hours in the office as a cruel hoax and suggest a myriad of ways to limit the cost of going to the bar and, ultimately the cost of justice.

Change is inevitable. We must make it work for us and in the interests of justice. We should seize the opportunities which now present themselves. We must refuse to be exploited, demeaned and humiliated. We need only dare to be different and have confidence in ourselves.

Would you please join me in a toast to the future of women lawyers, the future of the Women Lawyers Association and the foundation members with us tonight, without whom we might never have had a future at all.

1.	Senate minutes of 6 April 1881, quoted in Joan M O'Brien's MA thesis "The History of Women in the Legal Profession of NSW" (1986).
2.	See Joan M O'Brien's MA thesis (1986) referring to Margaret Mulvaney's "History of Women in Medicine", *RPA Magazine*, Winter 1982.
3.	Bennett JM (ed), *A History of the NSW Bar*, (1969) Law Book Co.
4.	See McPaul B, "A Woman Pioneer", (1948) 22 ALJI.
5.	See, as to New South Wales, *Ex parte Ogden* (1893) 16 NSWLR 86.
6.	Chatto, "Concerning Solicitors" (1920) at 46-48.
7.	(1948) 22 ALJ 1 at 2.
8.	See Joan M O'Brien's MA thesis (1986) at 3.
9.	*SMH Good Weekend Magazine*, May 4, 2002 at 46.
10.	*The Australian Financial Review*, 31 May 2002 at 56.
11.	*The Australian Financial Review*, 31 May 2002 at 56.
12.	*The Australian Financial Review*, 31 May 2002 at 56.
13.	Bench and Bar Dinner, 15 May 1988.
14.	*The Australian Financial Review*, 11 June 2002 at 6.