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VICTORIAN WOMEN LAWYERS' ASSOCIATION

LESBIA HARFORD ORATION 2001

MELBOURNE 20 AUGUST 2001

WOMEN IN THE LAW - WHAT NEXT?

The Hon Justice Michael Kirby AC CMG

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SPEAKING PARTS

Soon after my appointment to the High Court of Australia, I was invited by the Women Lawyers' Association of New South Wales to address them on the subject of women in the law.

In my remarks, I recorded the fact that, in the first eighteen months of my service on our country's highest court, I had heard about two hundred barristers argue their cases; but only six women. They were the six with "speaking parts". I did not count in my list the women who had junior briefs to the leading advocates in the big cases or who had prepared written submissions. These are valuable experiences and a great training for really big speaking parts in the future, if conditions remain favourable. But confining myself to

* Justice of the High Court of Australia.

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those who had actually addressed the High Court from the central rostrum, I could name only six women.¹

Looking at their names today I can see that three of them have been appointed judges. In Australia, it is politicians who appoint judges. Whatever their party, they are under pressure to reduce the gender imbalance of the Australian judiciary. A leading woman advocate is very quickly offered judicial preferment. Many accept because, whatever are the defects of other parts of the legal profession, the judiciary generally allows its members to organise their lives in a more rational way. Organising our lives, and reserving a proper space for a full and rounded existence as a human being, is one of the big challenges facing the legal profession of this country. Humanising the life of the legal profession is a demand that can be postponed no longer.

In the intervening years since I drew this disproportion of "speaking parts" for women to notice, things have not really improved much. The proportions remain substantially the same. The faces change somewhat; but the central rostrum for advocates at the High Court of Australia is still, overwhelmingly, a male preserve. In the past year the number of women who had speaking

¹ M D Kirby, "Women Lawyers - Making a Difference" (1998) 10 *Australian Feminist Law Journal* 125.

parts before the Full High Court was six². This is not steady as she goes. We have hit the doldrums.

Why is this so? Is it inevitable, so that I should just be silent and accept the imbalance as a fact of life?

The reasons usually offered for the disproportion (in the High Court and in my 13 years earlier in the Court of Appeal of New South Wales) remain much the same. Such courts see the top performers in the law. There is a glass ceiling and women find it harder than men to break through. When they do, like three of the six star performers of my last list, they are quickly whisked away to become judges. Inevitably, many of the cases in the High Court tend to involve the big law firms. There is evidence that many of these have a bias towards briefing male barristers³. Doubtless they

² During the year past before the Full High Court, Ms Annabelle Bennett SC presented the respondent's case in *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 75 ALJR 518. Ms C J McClure QC argued the successful appeal in *Rosenberg v Percival* (2001) 75 ALJR 734 and soon after was appointed a judge of the Supreme Court of Western Australia. Dr M A Perry made submissions following the Solicitor-General for the Commonwealth in *The Commonwealth v Yarmirr* (reserved); Ms R J Webb made submissions in the *State of Western Australia v Ward* (reserved) following the Solicitor-General for the Northern Territory as did Ms N Johnson QC for one of the parties; and Ms L J Clarke, Director of Public Prosecutions for Queensland argued *Doggett v The Queen* [2001] HCA 46. Ms M.M. Gordon and Ms D. Mortimer argued the substantial chamber summons of *Cabal v United Mexican States* (2001) 180 ALR 593. I have not included appearances in special leave applications but they are also few.

³ A Williams, "Women at the Bar", (1999) 25(5) *Brief*, 5 at 8.

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often explain this fact on the basis that it represents their clients' expectations, not their own. Even senior women solicitors often seem to favour male advocates. Males represent the ordinary face of the Bar in Australia. No one can accuse a woman solicitor who briefs them of gender favouritism. But the problem is an escalating one. To become very good in the law, like surgery, you need lots of experience at the top. Unless a women advocate can break into the magic circle, she will not get that experience. She will remain a comparative outsider.

In response to my earlier remarks, I was urged by many, males and females, to face the reality of the biological facts that disadvantage most women in the hectic, demanding life at the peak of the legal profession. If a woman wants to have a family life, with children, a window of opportunity opens and closes effectively in her late twenties and her thirties. After early training as a solicitor and before it is too late, she must interrupt her career. The length of the interruption may depend on many factors. One of these may be escape from the culture of "successful" lawyers. The woman lawyer, as mother, may come to realise that there can be other and more fulfilling goals in life than working seven days a week and being at the beck and call of case-managing judges and demanding clients.

Men do not need to interrupt their professional career to have babies. They can sail along leaving such matters to their spouses or

female partners. We are told that the biological interruption and its aftermath of child caring and rearing, impose on women lawyers who have children, inescapable difficulties that most of their male counterparts do not experience. That's life, they say. Literally.

SOLICITORS

But since my earlier remarks, important surveys of the legal profession of Australia have reinforced the difficulties that women commonly face and of which my six with "speaking parts" represent but the tip of the iceberg.

In New South Wales, surveys of women working in the legal profession in the 1990s have investigated the disparities between the high representation of women amongst law graduates and their low representation in the senior levels of the legal profession. Although the first such survey was conducted in 1995, it was not until later that the State Attorney-General and the State Minister for Women's Affairs established a Committee to monitor implementation of the ensuing recommendations.⁴ The report and its follow-up revealed how, although women now represent about 50% of the

⁴ S F Israel and K McDonald, "Gender Issues for the Legal Profession - A Report on the Keys Young Survey" (1999) 37(4) *Law Society Journal* (NSW) 60; S F Israel, "Disparities Continue Between Women and Men in the Legal Profession - Gender Issues in the 1999-2000 Practising Certificate Survey" (2001) 39(1) *Law Society Journal* (NSW), 63.

graduates of most Australian law schools, five years out of law school there has been a big attrition. Women are significantly under-represented amongst the partners of law firms⁵. They tend to congregate at the lower scale of earnings. Often they are confined to less interesting work⁶. Whilst males push their way forward remorselessly into partnerships and higher salaries, women tend to cluster just below the glass ceiling⁷.

Various explanations are given for this reality. The "broken career syndrome" is usually cited; but this would not explain this feature of legal practice in Australia in every case. The increasing number of women who opt for part-time work is said to put them out of favour with clients who want their lawyer at their beck and call twenty-four hours a day⁸.

If you ask women, and the experts who survey the legal profession, about female disadvantage the explanations are rather

⁵ E Campbell, "Achieving Real Equality", (2000) 74(1) *Law Institute Journal* 27 at 28.

⁶ *Ibid*, 28.

⁷ Keys Young Practicing Certificate Report 1995: J Bourke, "Gender Bias in the Legal Profession - Time for Change", (1997) 35(1) *Law Society Journal* (NSW), 52.

⁸ R Hunter and H McKelvie, "Gender and Legal Practice" (1999) 24(2) *Alternative Law Journal* 57 at 60. L Lester, "Long Hours Still Worn as a Badge of Honour", *Australian Financial Review*, 10 August 2001.

more complex. At least in part, they appear to revolve around the culture of the legal profession, especially that in the big firms. These are often places where extraordinarily long hours of work are the norm and are expected. They tend to be places oblivious to the fact that childcare facilities mostly close at 6 p.m.⁹. Many women lawyers also complain that they find the masculine social networks alienating. Drinking rituals and football tipping that sometimes dominate social life in the top legal establishments is reported as off-putting¹⁰. In such a world, it is unsurprising that many women feel themselves to be strangers¹¹. Come to think of it, I would feel a stranger there myself.

Last week one of the large law firms in Melbourne began to address the loss of female lawyers and the problem that so few of them make it to partnerships. A special forum for women was established to help raise issues facing them in practice. According to the report, women in the legal profession were concerned that they faced their strongest opposition to change in the culture of big law firms not from the old lawyers who know nothing different but from young male lawyers who were most resistant to the part-time partnerships and other flexible working arrangements that are often

⁹ Campbell, above n 5, 28.

¹⁰ Hunter and McKelvie above n 8, 60; ; Campbell above n 4, 28.

¹¹ M Brown, "Workplace Change - Needed to Retain Women" (2000) 74(9) *Law Institute Journal*, 26 at 27.

needed to find a space for women in senior legal practice¹². Exasperated with the lack of progress, the two women partners of this law firm created the forum. One of them is currently working part-time. They demand more than "lip service" for the idea of equal opportunity for women lawyers in the big firms. But to the extent that gaining equal opportunity will require a new balance between professional work and personal lives, any change will have to confront deep-seated work practices in the law that go back not decades but centuries.

BARRISTERS

On the face of things, one would expect that life as an independent barrister would be easier. Some women report that it is indeed easier at the Bar. They urge women who want to escape the glass ceiling to escape to the Bar. There, they hope, they will advance on their merits. Skills of analysis and communication are not determined by gender. They are partly inborn and can be improved and refined, if only the opportunities offer.

Yet if one looks at the Bar in Australia, it too remains, overwhelmingly, a male preserve. The proportion of full-time women advocates varies slightly. In Victoria it is 16%. In Queensland 13%.

¹² L Scott, "Women Lawyers at Deacons Find a Voice in a Man's Profession" in the *Legal Insider*, 15 August 2001.

In South Australia 12.5%, in New South Wales 12% and in Western Australia 8%¹³. So if the Bar is such a congenial place, offering equal opportunity for women, why does this branch of the legal profession attract such a small proportion of women when for many years women have represented about 50% of the nation's law graduates? Part of the explanation is the time it takes to correct the old disproportions. In my years at law school there were but seven women in our class of a hundred students. Now it would be fifty-fifty. So why such a big imbalance?

The answers to this question are easier to find since a major survey of the Victorian Bar was reported in July 1998. The report showed the same discouraging phenomena as in the big legal firms. Women tend to be disproportionately engaged in shorter cases and cases involving family and criminal law. Men still get the lion's share of big, important cases. Men are not stereotyped as specially suitable for any branch of legal practice¹⁴. Men, it seems, are suitable for everything. Women barristers still report instances of the alienation at the Bar akin to that their sisters find in the big firms. Although active hostility has probably diminished since an earlier

¹³ C Wall, "Women: Barristers v Barriers", (2000) 22(9) SA Law Society *Bulletin*, 23.

¹⁴ *Equality of Opportunity for Women at the Victorian Bar*, report on the 1998 Bar Council Report, in *Victorian Bar News*, 26 at 29.

survey in Melbourne in 1993¹⁵, there are still reports of alienating gameplay and barriers to entry into the mainstream of advocate's practice¹⁶. Women are less likely to be briefed regularly than men¹⁷. Amongst the ten largest Melbourne law firms it was discovered that 91% of the briefs went to male barristers. Some government departments had an unblemished record of never briefing a female advocate.

All sorts of unconvincing excuses have been offered over the years for these practices. Women it was said were shorter in stature and might not be seen. They have high pitched voices that did not carry in Australian courtrooms¹⁸. What an unconvincing excuse that is, second only to the old excuse that there are insufficient female toilets to allow the appointment of women judges. I remember vividly the squeaky voice of Sir Owen Dixon - probably Australia's greatest lawyer. Then it is said women have fewer mentors than their male counterparts¹⁹. They find it more difficult to break into the big time because of what Justice Gaudron has called

¹⁵ F McLeod, "Equality of Opportunity for Women at the Bar: The Victorian Bar Council's Response" (1999) 12 *Australian Feminist Law Journal* 111.

¹⁶ *Victorian Bar News*, above n 14, 17.

¹⁷ *Ibid*, 17.

¹⁸ *Ibid*, 29.

¹⁹ *Ibid*, 29.

the "Old Mate's Act",²⁰ a statute you will not find in the library or even on the internet. Judges too are sometimes blamed for insensitivity, as for example in pressing the hearing of cases beyond the normal court hours without regard to the needs of women advocates, in particular, to attend to their family responsibilities²¹. Yet if complaint is made about such practical problems, women advocates may be denounced as grizzlers who would not, or could not, face up to the practical necessities of life in a gruelling profession.

On top of all these problems, there are, sad to say, continuing reports of sexist conduct and even harassment targeted at young women lawyers. An old curmudgeon may mean no great harm by telling a young women lawyer that she is nice to look at²² or playing santa claus at the firm's Christmas party and insisting that all the young women lawyers and interns sit on his knee. But such personal behaviour would not be something he would dare attempt with male counterparts. In a professional world, whatever the stresses, people are expected to control their conduct in such matters. Reports of such harassment come from time to time to the

²⁰ M G Gaudron, "A Happy Coincidence of Self-Interest and the Public Interest: Equality of Opportunity for Women at the Victorian Bar" (1999) 12 *Australian Feminist Law Journal* 117 at 118.

²¹ *Ibid*, 120.

²² Campbell, above n 5, 29.

attention of the judges, mainly from the young female associates who are shocked that, for peace-sake, the targets all too often accept such behaviour without complaint. "Dobbing" is alien to the professional culture of the law.

The beginning of wisdom is the knowledge of a problem. The Victorian Bar report identified many of the difficulties faced by women advocates. It did so with uncensored honesty. It collected a number of practical suggestions. These included the incorporation of standards of equal opportunity and prohibition on sexual harassment in the professional rules of the Bar. They also included support for women advocates by relief from fees for chambers and clerks during absence because of pregnancy. A major step forward in this area would be the provision of a tax deduction for working mothers who can only keep up their earning capacity by paying for childcare. This would seem a reasonable contribution for society to make if we are serious about responding to the constant loss of highly trained female professionals. Their departure from the workforce comes at an economic cost to the country. Making it easier for women lawyers to stay in work is in the country's interest. Pregnancy leave is not enough. Children make unrelenting demands for many years after birth. Most of those demands fall on women. If they are professional women, the need for childcare is no luxury.

One interesting point to come out of the study of the Victorian Bar was that even male advocates are now finding it more difficult

to find a domestic partner willing to put up with the hours that, until now, have been standard to the life of a top lawyer. Dutiful wives and partners of years gone by are not, it seems, available in the same numbers today²³. Eighty percent of the barristers surveyed in Victoria said that their wives were the principal carers for their children. Not one of the fifteen female barristers surveyed had such a pliable partner²⁴. Perhaps the pressure for a change in the work routine of advocates will come about not because of more women barristers but because males find it more difficult to gain the domestic support that they took for granted in the past. A radical change of outlook is necessary to come to that conclusion. But the past experience of the legal profession is pretty discouraging.

JUDICIARY

The judiciary lies at the end of the legal profession's food chain. Judges represent a very small proportion of those who, as advocates or solicitors, have been chosen for public service. The proportion of women in the judiciary remains low in Australia, especially when compared with most countries of Europe. In the High Court with one of seven Justices, women have taken 15% of the places. In the Federal Court it is 9%. The average for State

²³ Hunter and McKelvie, above n 8, 59.

²⁴ *Ibid*, 59.

Supreme Courts is about 6%. In the Family Court it is 40%. In the District Court 25%. In the magistracy the proportion is higher and perhaps this is because of the more open procedures of recruitment and selection that apply. The Chief Magistrate of New South Wales told me with satisfaction recently that she was going to a farewell function for one of her magistrates who was taking maternity leave. The judge was having a baby! That is a real breakthrough for the judiciary. But the day will come when it is not even a matter for comment.

If in the big legal firms women still cluster below the glass ceiling and if amongst the advocates they still lack the speaking parts in the biggest cases, the high road for women to the judiciary in Australia will remain full of obstacles. The high road to the highest courts will remain, for the foreseeable future, largely a male preserve.

Some will say that we should not be too concerned about these facts. After all, the judiciary is a technical job, merit is the sole criterion for appointment and it matters not who performs the role of the judge. I disagree. The law is not just another business. The bench is not just another workplace. Judges of our legal tradition have choices that they make in interpreting the Constitution, the Acts of Parliament and the common law. It is important that the experience of half the population, women, should be brought to bear fully in the exercise of those choices.

Moreover, women are not just men who wear skirts. They have a different life's experience. They sometimes have a different way of looking at problems. Occasionally, they demonstrate less combative tendencies - to "kick heads" and to "thump tables" - and more skills in conciliation and the rational resolution of disputes. The real loss in the lack of female advancement in the legal profession is not just the frustration of particular women's careers. It is not simply the economic loss that is inherent in failing to promote to the full the highly refined economic talent of a trained lawyer. The biggest loss, it seems to me, lies in the failure to bring the skills of women to bear on the administration of the law. Women bear many of the enduring burdens of life. They are better at it because those burdens are usually foisted on them and they just have to make the best of things. Whilst one must not stereotype men or women, it is my experience that women often see legal issues from a different perspective. That perspective should be available in full proportion to the judiciary, the bar and the legal firms, corporate lawyers, the law schools, and government departments of Australia. It needs to be available to the whole community which the law serves.

I reject as the explanation of the glass ceiling for women in the law the "broken career syndrome". It is an excuse that has been done to death. It is not excuse enough.

When I was a young barrister my table was full of briefs. But in 1970, my partner and I decided to travel overland from India to England. We drove in a Kombi van. We did this to win back a human life. The briefs were returned. My colleagues, ashen-faced, warned me that my "broken career" would never recover. Indeed, that it was the end of my legal career, if not the end of civilisation. It did not prove so. On the contrary, on my return to practice a year later, I was able to change the direction of my practice and to cut away work that I did not want to do. We went overland again for a year in 1973 and the same warnings were given. But I was not a victim of the broken career syndrome. I was male. Bigger and better work flowed in. So do not tell me about the broken career syndrome. Of course, my interruption was not followed by babies and nappies, and school functions and the demands of children that mostly fall on women. But let us at least drop the excuse about interruptions. Sometimes interruptions can renew a jaded lawyer's zest for the excitement of legal practice. Sometimes I have to tell young lawyers: get a life, as I did.

Speaking generally, women are no better at law than men. And no worse. They often have a few extra problems because in our society they usually end up as the principal child carers. It should not be beyond the wit of the legal profession to address and help solve these extra problems. And as for the rest, in solicitors firms, at the Bar and in the judiciary, what is needed is a healthy dose of realism, more open minded discussion, more flexibility, and

an end to the stereotyping of women lawyers as second class. In the law schools, women gain more than their share of the top prizes. When they ultimately reach that central podium, women shine or they fade according to their talents and the merits of their clients' cases. Just like the males.

In the remaining years I have in the High Court of Australia, I trust I will see more women rise to speak to the Court. By the time I fold up my robes, I hope that "condescension, indifference and hostility"²⁵ to women is no more. That even unconscious systemic bias has been realised and banished²⁶. That equal opportunity in legal practice is a daily reality²⁷. That the tectonic plates of the law have moved to bring to practice the same virtues of fairness and non-discrimination that the law itself in Australia is supposed to preach.²⁸ And that we will have caught a fair wind and escaped the doldrums in which legal practice in this respect appears to be becalmed at this time, despite all the hopes of the new millennium.

²⁵ Bourke, above n 7, 53 citing K Hall, "Unconscious Bias in the Judicial System" (1993) October, *Australian Lawyer*, 34-35.

²⁶ Bourke, above n 7, 53 citing A O Ferrers, "Australia Calling: Canadian Bright Star Convention Highlight" (1996) January, *New Zealand Law Journal* 9-13 at 9.

²⁷ Gaudron, above n 20, 120.

²⁸ But see P Easteal, *Less than Equal: Women and the Law* (2001, Butterworths); C Wells, "Ladies in Waiting: The Women Law Professors' Story" (2001) 23 *Sydney Law Review* 167.