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WOMEN LAWYERS OF WESTERN AUSTRALIA

PERTH, 22 OCTOBER 2003

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This week Dame Brenda Hale of the English Court of Appeal joins the House of Lords. She is a Lord of Appeal in Ordinary (sic). After hundreds of years, she takes her seat in that noble court as the first woman judge ever. In the end, the excuse about the absence of female toilets in the Law Lords' Corridor ran out. In the law, you will agree, we tend not to rush things.

I follow in Justice Mary Gaudron's footsteps in addressing Women Lawyers of Western Australia. When she retired from the High Court, in February 2003, she made me swear a blood oath to keep alive certain traditions that she had established. In particular, I am to take over the provision of a reception for new women Silks who take their bows in the High Court in February each year. At least, I am to do so until another woman Justice is appointed.

Although they are not onerous, I hope that the transfer of these duties to a woman Justice, will not be long delayed. I confess to missing Justice Gaudron. Inevitably, since her retirement, the High Court is a more "blokey" place. I welcome Justice Heydon as a judicial brother. As the profession will have seen in Perth, he is a most accomplished and civilised judge and man. It is no reflection upon him, or any other male

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lawyer, that I express the hope that the next appointment to the High Court will be a woman. I also expect that it will be so. Women bring additional perspectives to the law, as to other things in life. Their experience of law, and of life, is different from that of men. It is important that their perspective, shared by half the population, should be seen and heard in a nation's final court.

There are many demonstrations of this point from Justice Gaudron's judgments. One case, decided just before she retired, illustrated the clear importance of having a woman lawyer's perspective in the final court. I refer to the decision in *U v U* (2002) 191 ALR 289. Justice Gaudron's strong dissenting opinion in that case is a classic. It has provoked much analysis, such as Joanne Roebuck's note "A chauvinistic approach to relocation?" (2003) 17 *Australian Journal of Family Law* 208. It is a commentary that is worth reading as are all the opinions in that appeal. I shared Justice Gaudron's dissenting view. But that matters not. It is important that all perspectives be heard, and desirable that they be reflected, in such cases.

When people say that appointments to the High Court, and other courts, must only be made on "merit", they use that word in different ways. For some, it simply means "merit" of the kind that produces persons just like themselves. Yet in the judiciary, especially, it is important to have a variety of experience. Clone-like reproduction of a monochrome judiciary ill serves Australia's diverse society. As Dame Brenda Hale once said, it is wrong to imagine that experience in large commercial litigation is the only prerequisite to the wisdom and foresight to be expected of the highest judiciary. I agree.

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Every lawyer knows that judges must make choices. They do so in interpreting the Constitution, in construing ambiguous legislation and in filling the gaps in the common law. Inevitably and properly, these choices are informed by background, experience, values and training. To deprive the nation's highest court (and indeed courts generally) of the experience of women, inflicts a serious deprivation on the choices that judges make and on the richness and variety of the elements available to argument and decision-making.

Leaving the High Court to one side, the participation of women in courts throughout Australia can only be described as "steady as she goes". In the Federal Court of Australia, women make up about 9% of the Bench. In State Supreme Courts, they constitute about 6%. The proportion of women rises in the lower branches of the judiciary. In the District Courts it is about 25% and higher in the magistracy. The proportion of women in the higher judiciary is still low by comparison to the proportion of women in Australian parliaments, now about 26%. It is approximately the same as the proportion of senior women executives in the private sector in Australia, about 8.2%. Perhaps the unique feature of our judiciary, drawn as it is from the private practising legal profession, has influenced these comparatively low proportions.

An important counterpoise to private sector failings has been the encouragement recently given to women lawyers in the public sector in some parts of Australia. Recently, the Queensland Director of Public Prosecutions, Ms Leanne Clare QC, presided over the simultaneous appointment of nine women to the State office of the Director of Public Prosecutions. In other States, including Western Australia, legal aid authorities have had a consistent policy of equal opportunity in

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appointments and have adopted employment practices that take into account the special needs of women lawyers as mothers and child carers.

Governments of all political persuasions are now under pressure to ensure that there are more female judges. The appointments to the Supreme Court Bench in Western Australia of Christine Wheeler QC, Carmel McLure QC and Narelle Johnson QC add greatly to the lustre of the Court. I also congratulate Magistrate Vicki Stewart on her recent appointment as a Stipendiary magistrate. These appointments provide outstanding role models for women lawyers; but also for men.

The President of the Law Council of Australia, Mr Bob Gotterson QC, recently warned that "studying law ... runs the risk of becoming an elitist option available only to the wealthy". If this proves so, it will be a bad thing not only for the law but for society. Similarly, the effective exclusion of many women from equal participation in every branch of the profession is elitist and wrong.

Amongst advocates in the courts, it is my experience that the position of women has not much improved in recent years. Since my appointment to the High Court of Australia in 1996 the number of women advocates actually addressing the Court from the central rostrum in appeals has fallen. True, this attrition is probably affected, in part, by the appointment to the judiciary of leading women counsel. The appointees to the Supreme Court of Western Australia, whom I have mentioned, all appeared before me in the High Court. They were accomplished lawyers and advocates. This week, during the appeals heard in Perth, only two women were counted at the Bar table. Both were juniors. Neither addressed the Court. In New South Wales, for example, only ten of the

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330 Silks are now female. It should be said again, as Mary Gaudron put it, skills of lawyering and persuasion are not found on the Y chromosome.

The proportion of full-time women advocates varies between the States. The highest proportion at the separate Bar is in Victoria (16%). Most States comprise about 12%. In Western Australia it is 8%. I set out to find why this was so.

Some women advocates told me that, at the Bar in Perth, they still face a culture that is somewhat unwelcoming. I only saw two women barristers at the drinks kindly offered to the High Court Justices by the Western Australian Bar Association this year. One thing that has to change is the name of the Bar common room. To call it "The Mess" is to suggest a distinctly male, even military, environment. That name has to go. One woman practitioner told me that, when she mildly complained about the lack of friendliness and the stand-up bar, she was told "You will get used to it". In my experience, that is not a universal female trait. Women typically either opt out or set about trying to change such environments to make them more congenial. Justice Gaudron did the latter in the High Court. It does not always succeed. But when it does, it is value added.

In legal firms many women still appear to hit a glass ceiling in Australia. They now comprise 50% of law graduates. Yet they are seriously under-represented in legal partnerships. Their salary levels show a gap when compared to male counterparts. *Lawyers' Weekly* recently described the differential as "alarming". On average, Australian women lawyers earn \$20,225 less a year than males.

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In firms too the culture is sometimes off-putting. Some women solicitors in Perth have told me that even those who have no children do not advance at the same rate as men. Men are offered partnerships so that the firm "will not lose them". With women, there is commonly an assumption that their careers will be interrupted anyway. The culture of work hours is often inimical to child raising. There are fewer mentors for women lawyers. In Victoria, the Women Lawyers have now instituted a series of lunches led by women judges and successful women practitioners to give guidance and encouragement. Practical issues such as child minding, part-time work, flexible hours, help from domestic partners and a welcoming environment need to be discussed. Attitudes of condescension and hostility must be identified so that things can improve.

Women lawyers must be willing to take leadership roles in professional associations. They must learn to lobby politicians who can sometimes influence the distribution of government briefs and decisions on judicial appointments. The former Federal Attorney-General (Mr D M Williams QC) did not apparently favour special policies of this kind. I suspect that the new Federal Attorney-General, Mr Ruddock, whose wife is herself a distinguished lawyer, may prove more receptive. Of the Federal Ministry, Senator Helen Coonan, Assistant Treasurer, herself an experienced barrister, has spoken publicly in favour of a fair share of important legal work for women practitioners. The point should be made that this is an aspect of "merit" - the merit of equal opportunity and diverse experience, new insights and different perspectives. Depriving the legal profession of so much talent is not a "meritorious" policy. The law is not simply another occupation. It is a profession with its hands on the development and application of the law, with law's considerable impact on the rules of social control.

My own life's experience has taught me to be very sensitive to unjust discrimination, wherever it appears. We still have cases of injustice and discrimination in Australia. But Australians do not have to accept them as inevitable and unalterable. Women make a difference in the law. At the moment, in our profession, we seem to have hit the doldrums. We must search for a fair wind that will ensure that the high aspirations and considerable power of our profession is shared according to talent, without discrimination against women or any other social group. In the second century of the High Court of Australia, in this respect, we must do much better than we have done in the first.

FURTHER READING

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H Coonan, "The rise and rise of women", address to Women Lawyers' Association of NSW, 2 September 2003.

J Massoud, "No bars to practice for Feb 9", *Lawyers Weekly*, 10 October 2003, 4.

J Massoud, "Gender salary gulf widens", *Lawyers Weekly*, 24 October 2003, p 1.

R McColl, "Gender equality requires change in lawyer culture", *Australian Financial Review*, 26 September 2003, 52.

G Noonan, "Law on Elitist Path QC warns", *The Age* 17 May 2003, 5.

K Towers, "Vic move to lessen male grip on bar", *Australian Financial Review*, 10 October 2003, 51.