

Notes for Speech presented at Southbank Institute of TAFE International Women's Day Luncheon on 7 March 2003

Opportunities for women arising out of changes in our legal system

- women affected by our legal system: as citizens, as members of juries and offenders, victims, witnesses and in civil litigation;
- women as participants as lawyers, both as solicitors and as barristers and increasingly as judges;
- why does it matter: equality as a fundamental right; women in leadership positions;
- to ensure that justice is done and seen to be done equally to men and to women for and by men and women;

- the under-representation of women in the judiciary and indeed until the appointment of Roma Mitchell to the Supreme Court of South Australia in 1965, their complete absence, led to women being treated not as equals but as what Simone de Beauvoir referred to as the *other* – beings with a different, less rational and hence less reliable view of the world. This reflected itself in the type of legal reasoning which was applied to women. Let me give an example.

- The evidence of women and children was historically treated with suspicion in the criminal courts. In part this was due to the insidious influence of myths and stereotypes and in part, particularly where they claimed to be victims of sexual offences, it was due to rules relating to the corroboration of the evidence of

such witnesses. Why should the evidence of certain witnesses be considered unreliable? If, for example, two people commit a crime together and one gives evidence implicating the other as having greater responsibility, a jury may be entitled to treat the evidence of the accomplice with some suspicion, particularly if that offender has been given immunity from prosecution. Judges therefore often warn juries that it is dangerous to convict on the uncorroborated evidence of an accomplice.

- Unfortunately, however, the rule did not stop there. Let me give a reasonably recent example of the way the rule extended, offensively, to put victims of sex crimes in the same category as accomplices. As recently as 1987, the Law Lords who comprise the Judicial Committee of the Privy Council in London held:

“The rule requiring a warning to be given to a jury of the danger of convicting on uncorroborated evidence applies to accomplices, victims of alleged sexual offences and children of tender years. It will be convenient to refer to these categories as ‘suspect witnesses’.

It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called ‘suspect witnesses’ may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence.”

- The generations of judges to whom they refer did not include women. There has never been a female judge in the House of Lords, England's highest court of appeal. there is no longer a woman on the High Court, the highest court in Australia;
- I am a member of a court, the Supreme Court of Queensland, where major inroads have been made into the historic under-representation of women as judges. On a wall of the floor of our Court which contains the Judges' chambers, there is a collection of photographs of judges on significant occasions. Every year we hold a two day conference immediately before Easter. The photograph taken at Easter 1998 shows a lone female judge with her 22 male colleagues. By the following year there were four female judges; then by Easter 2000, there were 6 female judges. Now on a court of 24 judges, 7 are female and 17 male. At almost 30% this is the highest proportion of female judges in any superior court in Australia. While 27% of the Family court judges, 12% of the Supreme Court of Western Australia are female, only 8.5% of the Federal Court, 8.6% of the Supreme Court of New South Wales, 7% of the Supreme Court of South Australia; in 2002 the number of female judges on the Supreme Court of Victoria doubled to 12%; and there are no female judges in Tasmania or the ACT or on the High Court.¹

¹ Approximations based on the following statistics: Family Court of Australia – 14 female judges out of a total of 51 judges; Supreme Court of Western Australia – 2 female judges out

- May I suggest that the appointment of women as judges has two linked effects, although neither is easy to quantify. The first is that it demonstrates in a very tangible way that women have a right to take their place, an equal place, amongst those who govern our society, and secondly that justice should be dispensed by, as well as for, women as well as men.
- Women as judges should and will, in my view, make a difference to the vindication of the rights of all people. Empirical research in the United States has tended to confirm this. In an attempt to determine the decision making patterns of women judges, research was undertaken into the decision making of state supreme court judges from 1982 to 1998 in two substantive areas of law not generally identified as “women’s issues”: obscenity and death penalty sentencing. Controlling for other variables, the research found that women judges in state supreme courts tended to make more liberal decisions to uphold individual rights in both death penalty and obscenity cases. Interestingly, and as the researchers said, equally importantly, the presence of a women on the court tended to increase the probability that male judges would adopt a similar position.

of a total of 17 judges; Federal Court of Australia – 4 female judges out of a total of 47 judges; Supreme Court of New South Wales – 4 female judges out of a total of 46 judges; Supreme Court of South Australia – 1 female judge out of a total of 14 judges; Supreme Court of Victoria – 4 female judges out of a total of 34 judges.

- The point is not to replace a judiciary which has been perhaps unconsciously biased in favour of a male point of view with one which is biased in favour of a female point of view but to ensure that the public has faith that the court will be impartial and be able to recognise and therefore eliminate unconscious bias. This can only happen if we do not confuse objectivity as being defined by a male point of view or perspective.
- The Senate Committee of the Australian Parliament, which reported on Gender Bias and the Judiciary in May 1994, noted the arguments in favour of the appointment of more women to the judiciary were first that, to maintain public confidence in the judiciary, it must be *seen* to reflect the different parts of the population it serves and to offer role models for women. And second, the appointment of significant numbers of women is likely to affect the nature of judicial decision-making through potentially different decision-making styles, and by redressing areas of law developed from distinctly male perspectives such as those dealing with women's sexuality.
- Justice Mary Gaudron said on the formation of the Australian Women Lawyers in September 1997:
“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 to 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.”

IWD is a very special day for all women and therefore for all people. Let us approach it in a spirit of celebration of what we have achieved; while not losing sight of what we have yet to achieve.