

Women In The Law - Address To The Anglo-Australasian Society Of Lawyers

**WOMEN IN THE LAW
ADDRESS TO THE ANGLO-AUSTRALASIAN SOCIETY OF LAWYERS
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In Alan Bennett's play "*The History Boys*" [1] there is an exchange between the history boys and the only female character, Mrs Lintott, a history teacher in which she asks them, rhetorically:

"Can you, for a moment, imagine how dispiriting it is to teach five centuries of masculine ineptitude? ... History's not such a frolic for women as it is for men. Why should it be? They never get round the conference table. In 1919, for instance, they just arranged the flowers then gracefully retired. History is a commentary on the various and continuing incapacities of men. What is history? History is women following behind with the bucket ..."

What does this exchange say about my allocated topic "*Women in the Law*"?

It reminds us (should we need reminding) that it is men who have substantially shaped our world. That it is a world in which, historically, women have played a supporting part – a bit part – rather than taken centre stage. And thirdly it suggests, perhaps states, that not all of those men can be regarded as successful, exemplary or worth emulating.

This extract from "*The History Boys*" seemed an apt introduction to this address, in the light of some rather dispiriting exchanges in the media recently concerning the appointment of women to the judiciary. These exchanges suggest that, for in the minds of some lawyers, the correct model of the legal profession is one in which women continue to follow behind with the bucket.

What has inspired this outpouring?

In February the Attorney-General of Victoria, the Honourable Robert Hulls announced the appointment of Professor Marcia Neave to the Victorian Court of Appeal. Professor Neave is a distinguished academic lawyer with an enviable national, indeed international, reputation. I do not doubt that she will be a great jurist.

However even she anticipated her appointment might attract controversy commenting, "some people will wonder if my appointment is appropriate". Never a truer word was spoken. The immediate occasion for controversy was the fact Justice Neave had never practised law.

One commentator (who many would regard as rather on the conservative side of journalism) Andrew Bolt of the Herald-Sun, observed that once one had to "have practised in the Supreme Court for years to be even considered" for the Court of Appeal. He opined that the Victorian Attorney-General, whom he christened the Government's Robespierre, "had the eligibility rules changed so that lots of Supreme Court experience was no longer required". [2] He attacked the Attorney-General as "a man who seems too eager to smash the culture of our courts to replace it with one that's more activist and less democratic." The radical steps which the Attorney-General had apparently taken to achieve this outcome was to feminise the law. In gasping tones, Mr Bolt trotted out the list of women who filled almost every top legal job in Victoria: Chief Justice, Children's Court President, Solicitor-General, Law Reform Commission Chairman and CEO of the Legal Services Board as well as the Chief Commissioner of Police.

"Justice in Victoria", Mr Bolt said "now wears a dress".

It would be easy to dismiss Mr Bolt's rather predictable article as an exemplar of shock-jock,

headline-grabbing journalism. But, to my mind, his comments should not be too readily dismissed. The Herald-Sun has, I believe, the largest circulation of any Australian newspaper. Mr Bolt's remarks may well raise concerns in the minds of a significant proportion of those readers about how justice is administered.

The controversy was taken up a month or so later in the Australian Financial Review in a article entitled "Hulls takes on the Old Guard" which picked up Mr Bolt's theme of the "politically correct" steps Mr Hulls was said to be taking in his judicial appointments.

Mr Hulls was described as refusing to be intimidated by the "boy's club of the bar complaining about sexist judicial appointments". He was quoted as saying robustly:

"The train of reform to bring the legal profession into the 21st century has well and truly left the station. There are some at the bar with an insular 19th century mindset who have clearly missed that train." [3]

A flurry of "Letters to the Editor" of the AFR ensued. All were from male lawyers, substantially asserting that Mr Hulls' appointments breached what one correspondent described as the "gold standard for a judge": the "core qualities of intellect, personality and experience." "All three" were said to "make up the only relevant criterion for appointment: "merit". This correspondent blithely then tossed in the observation (some might regard as a trifle defensive) that:

"Gender just doesn't come into it. When the merit criteria is downgraded because the Government wants to advance gender equality or multiculturalism or political acceptability, it is litigants who suffer."

He rounded off his letter by saying that:

"Using any criterion other than merit in judicial appointments will not just shake up the boys' club. It will lower the quality of the judiciary and interfere with the due administration of justice." [4]

I will not subject you to the remainder of the correspondence which proceeded in like vein.

It is a sad fact that at least half a century, if not more, of debate about deconstructing entrenched ideas about what constitutes "merit" in terms of suitability for judicial appointment does not appear to have any effect upon these (all male) correspondents, who cleave to a model of judicial appointment which would comfortably exist in the world described by Mrs Lintott – where only men got around the conference table, or in this case should I say, got to the bench?

As Dame Brenda Hale has pointed out, "[t]he word 'merit' only emerges when the appointment of women and other non- standard candidates (to the judiciary) is being discussed." [5] And yet many informed commentators recognise that " 'merit' is a constructed idea, not an objective fact, and that judicial appointments based on 'merit' are largely mythical." [6]

Indeed, according to a paper delivered by Justice Jim Wood to the AIJA, "[t]he convention by which appointment on merit was established in England is in fact relatively recent" having occurred during the Attlee government (in 1946) when Lord Jowitt was Lord Chancellor.

Lord Halsbury, at the turn of the century, was said to have packed the bench with judges of his own political complexion, apparently considering that service to the Tory Party was sufficient qualification for appointment to the High Court Bench. No less than seventeen Tory MPs or candidates attracted his favour. [7]

Once embraced, however, "merit" tended to be "defined by senior lawyers [who saw] no exception to the general tendency for people to see merit in those who exhibit the same qualities as themselves" with the unsurprising result that the people appointed ... tended to be those who had a traditional practice and profile-male, silk, and all-round decent chap" to the exclusion of women and members of other disadvantaged groups." [8]

It is indisputable that Mr Hulls is concerned to set aside this aspect of legal culture. While I do

not criticise his motives, I suggest, with all due deference, that while a rather bull in a china shop approach may be suitable for the rough and tumble of politics, a belligerent approach to the "old guard" is not a particularly constructive way to achieve change. Controversy of the sort stirred up by the AFR article cannot assist public confidence in the administration of justice. Further, it may well be counter-productive in terms of discouraging eminently qualified, but what I will call non-standard, candidates from considering judicial appointment.

What is really needed, in my view, if notions of "merit" are to be dragged into the 21st century is a thorough review of the judicial appointments process to establish a system which is transparent, accountable and which, while based on appointment on merit, acknowledges and is able to accommodate issues of diversity.

I suggest that one of the reasons the correspondents to the *Financial Review* appear to be relatively unreconstructed or, to use a more neutral expression, traditionalists in their ideas of judicial appointment, is because there has been relatively little governmental consideration in Australia of the system of judicial appointment, let alone the role diversity plays in that process.

There was a flurry of such discussion, albeit brief, in the early nineties in the last years of the Labor Government. In 1993 the Attorney-General, Michael Lavarch, released a discussion paper on judicial appointments which recognised that the fact men of Anglo-Saxon or Celtic background held nearly 90% of all federal judicial offices indicated "some bias in the selection process, or at least a failure of the process to identify suitable female and persons of different ethnic backgrounds as candidates". [9] The Australian Law Reform Commission looked at the issue in its 1994 report on *Equality before the Law* and supported a judicial commission, in the nature of an advisory body, as the preferable method of judicial selection. It saw such a body as "offer[ing] the best chance of achieving greater diversity on the bench". [10]

The Senate Standing Committee on Legal and Constitutional Affairs also considered judicial appointments in 1994 as part of its examination of the issue of *Gender Bias and the Judiciary*. It recommended that criteria should be established and made publicly available to assist in evaluating the suitability of candidates for judicial appointment, that the Commonwealth Attorney-General establish a committee to advise on prospective appointments to the Commonwealth judiciary and urge the Attorneys-General of the States and Territories to follow that course too. [11]

None of these recommendations went anywhere. To all intents and purposes the subject died.

Most recently, however, Justice Sackville took up the cudgels in 2004 in his discussion paper, prepared for the Judicial Conference of Australia, in which he identified the advantages of an independent judicial commission with responsibility either for actually making judicial appointments or, at least, making recommendations to government concerning appointments. [12]

In contrast the last decade has seen significant work in the United Kingdom to transform the process of judicial appointment.

How has the United Kingdom reached this point?

Early in the British Labour Party's first term in Government, the Lord Chancellor, Lord Irvine, launched a consultation paper to explore the proposal that a Judicial Appointments Commission should be established. One of the concerns this consultation process was to address was that the judiciary was seen as "too white, male, middle class, privately and/or Oxbridge educated." [13]

Significantly while Lord Irvine always made it clear that he regarded the overriding principle for judicial appointment as merit, he did "not regard advocacy experience as an essential requirement for appointment to judicial office". [14]

In 2001, following upon recommendations by Sir Leonard Peach the Commission for Judicial Appointments was established to act as an independent auditor of the process of judicial appointments. One of its functions was to review the processes of judicial appointment to establish whether appointments were being made in accordance with the principle of selection on merit. [15] Its work has complemented and informed the work undertaken by the Department of Constitutional Affairs which was also reviewing the judicial appointments system.

None of the Commissioners was, or had been, a practising lawyer or a holder of any judicial office. Early in the piece they recognised that, as at 2001, the judiciary comprised “overwhelmingly white, male[s] from a narrow social and educational background” and did not reflect the makeup of “the potential pool of applicants ... (thus raising) questions about equality of opportunity”. [16] It accepted “there [were] strong arguments in favour of increasing the diversity of the judiciary” while ensuring “the principle of selection on merit ... continue[d] to be of paramount importance, if the public [was] to retain confidence in the integrity and ability of the judiciary”. [17]

Significantly the Commission recognised that “[f]undamental questions of how ‘merit’ [was] defined and how it should be measured [were] far from clear cut” and that “there [was] scope for widely diverging interpretations about the meaning of ‘merit’ generally”. [18] It commented that while it had “no reason to believe that the present system result[ed] in the appointment of people who do not have the required qualities, ... for judicial office ... [t]he issue [was] whether others, who also [had] the required qualities, [were] not being fairly considered or selected due to flaws in the processes and systems, and how this impact[ed] on confidence in judicial appointments and consequently the whole legal process.” [19]

By 2003 the Commission had concluded the system of judicial appointments was biased against women and ethnic minorities. It rejected the notion that the “trickle-up” effect could redress gender and ethnic imbalance in the judiciary. It had concluded there was a need for an independent Judicial Appointments Commission to achieve, among other goals, overcoming obstacles to diversity in the judiciary. On 12 May 2003 the British Government announced its intention to create such a body. [20]

By the time the Commission had been in existence for four years it had identified “diversity concerns [as] an integral and essential element of selection on merit” [21] a view shared by the Lord Chancellor, Lord Falconer and Lord Woolf of Barnes, the Lord Chief Justice. [22]

Lord Falconer, in particular, decried the notion that “merit” required candidates for judicial appointment to conform to a stereotype. He said that appointments made in the image of predecessors, looking and sounding like a judge has always looked and sounded, ... [was] the enemy of diversity”. He saw “appointment on merit [as meaning] that decisions are made with all the assessments of the candidate available, against published competencies or criteria for the post, and substantiated by clear evidence of the candidate’s suitability for appointment.” [23]

A month ago, on 3 April 2006, the independent Judicial Appointments Commission, established pursuant to the *Constitutional Reform Act 2005* (UK) commenced operation. It will, at the Lord Chancellor’s request, conduct a selection process and then recommend candidates for appointment to judicial office in England and Wales. This selection process will apply to appointments from the Lord Chief Justice down. Selection must be solely on merit but, subject to that requirement, the Commission will also be required to have regard to the need to encourage diversity in the range of persons available for selection for appointment. [24]

One of the objectives of establishing the Judicial Appointments Commission is to open up the bench to candidates who might not have thought it worth applying in the past and to provide better transparency and accountability in the selection process. [25]

The Commission for Judicial Appointment’s remit ended in April with the advent of the Judicial Appointments Commission.

It concluded its final report on a rather despondent note, however, observing that “...the culture of the professions and the judiciary may prove to be hard to change; and it is culture, rather than process which acts as the real brake on diversity”. It saw “[a]chieving change ... as be[ing] as dependant on the continuing commitment of the Lord Chief Justice and the Lord Chancellor to the publicly proclaimed ambition to achieve a more representative judiciary as on the leadership of the Judicial Appointments Commission.” And it saw a continuing need “to challenge the culture and behaviour which impeded progress towards a more representative judiciary, not just to reform the selection processes.” [26]

The Commission’s work provides a telling insight into how entrenched attitudes perpetuate discriminatory selection processes. Its conclusion that change is as much a matter of altering the culture of the legal profession (and, no doubt, society too) as well as the process may not be remarkable but, having regard to the depth of work the Commission undertook in its 5 years of

operation, should critically inform any review of the judicial appointments process in Australia.

None of what England's Commission for Judicial Appointments learned over its five years of operation would come as any surprise to most of you, I suspect.

However what is remarkable is that while the United Kingdom has undertaken this profound examination and reform of its judicial appointments process, including meeting head-on the issue of the extent to which that system accommodated women and ethnic minorities, virtually nothing of a formal nature to address these issues has taken place in Australia since the early nineties.

It may be that Mr Hulls is seeking to implement his own system of judicial diversity, but how much better would it be if any reform to the process of judicial appointments in Australia was undertaken in the transparent and accountable manner the English have adopted.

I would commend the English reforms to the both Government and Opposition parties at both Federal and State levels. It seems to me at least, to be highly desirable to consider whether a judicial appointments process similar to that adopted in the United Kingdom can be adopted in Australia. A uniform approach is clearly desirable. Merit should clearly be the criterion for appointment, but "merit" as Lord Falconer had outlined it, not as the traditionalists would have it. I accept that the federal structure makes a uniform approach difficult, but if SCAG can agree on uniform defamation laws, it strikes me that agreement on a uniform judicial appointments model, subject to any constitutional issues, should not be impossible to achieve.

But, as the Commission for Judicial Appointments recognised, a Judicial Appointments Commission is not the only solution to issues of diversity in the legal profession, let alone on the Bench. Cultural change is needed too.

I swore when I started to prepare this address that it would not become, as so many speeches concerning women in the law do, yet another recitation of indigestible and depressing statistics contrasting the number of women graduating from law school with outstanding academic qualifications with the number of women in the profession, let alone on the Bench. Some of us, I am sure, could recite these statistics in our sleep.

An examination of these statistics reveals, what we all instinctively know, that change is not linear, let alone straight-forward but, rather, can be "unpredictable and dynamic ... chaotic, messy and full of conflict and compromise". Those who have practised at the coal face of the legal profession as well as been intimately involved with not only its politics, but also the politics of the women's movement, know that it can be truly said that "change can be a dance, though not very smooth, with three steps forward and two tugs backward, one pulled sideways and onward." [27]

Senior members of the profession, having regurgitated these statistics, have for years exhorted solicitors to make their workplaces more attractive to women practitioners in a bid to stem the "trickle-out" effect and to brief more women in order to ensure not merely equality of briefing practices but, too, that they obtain the experience said to be an essential prerequisite for judicial appointment.

A reading of such exhortations over the comparatively recent period of 1997 – 2004 convinces me that they are to little, or no avail. Real change will never, or at least rarely, come from within the ranks of the legal profession. It is only when leaders of the profession drive the process of change that the position will really improve and it will be recognised that "merit comes differently packaged".

Traditionalists decry change and call for a return to the model of judicial appointment with which they are comfortable – a model which has substantially ensured that the profession and the judiciary they see is one that reflects the image they see in their mirror – one which reflects the white male pool of lawyers which was the only available pool some 30 or so years ago, but which has been increasingly eroded by women and ethnic groups.

The time has long past for that model to be abandoned. The legal profession of 2006 bears no resemblance to the legal profession of even twenty or thirty years ago. It is a false hope to cling to the notion that the Bench should reflect a bygone era.

I would hope that the English reforms provide a stimulus for a formal and thorough examination of the process of judicial appointments in Australia. If such a process is undertaken with the transparency and honesty with which the topic has been addressed in the United Kingdom then, it might be truly be hoped that the position of women in the law in Australia (and I should add any non-traditional group) and, in turn, the administration of justice will be well-served.

If I could adapt Mrs Lintott's metaphor, no longer will women's usual role be that of trolley pushers or juniors, but, rather, they should, and will, achieve their rightful place of equality in the legal profession.

I cannot leave this address without observing, what, of course, we all know, that whatever the system of appointment, no judicial officer is free of frailties. Few can live up to all of the lofty criteria said to be essential to occupying judicial office.

For example, Lord Eldon, said to be one of the great, and most famous, Lord Chancellors [28]. was said to have a dilatory disposition. Administrative difficulties plagued the Chancery during his period, "... [a] situation in practice" said to have been "far worse than could have been foreseen due in no small measure to Lord Eldon's vice of perpetual vacillation and insufferable dithering. Cargoes rotted while the great man cogitated." [29]

Closer to home, Philip Ayres, has revealed in his recent biography of Owen Dixon, that the man widely regarded as one of the greatest jurists of the twentieth century, wrote judgments for another High Court Justice, Sir George Rich. [30] On one occasion, having prepared a dissenting judgment in *R v Brislan* (1935) 54 CLR 262, he assisted Rich J write his non-dissenting judgment. [31] In another case, which he felt no compunction about noting in his diary, he wrote Rich J's judgment at first instance [32], then sat on the appeal, upholding (as, too, did Latham, and McTiernan JJ) Rich J's (his own) first instance judgment. [33]

It is singular that when Ayres' biography was published these episodes were recounted with wry amusement as more of a comment on Rich J than Dixon J. I hesitate to think how a revelation of judicial conduct of that nature would be treated in today's media. I leave the headlines to your imagination. Let alone the letters to the editor!

End Notes

1. Alan Bennett, *The History Boys*, Faber and Faber Limited, 2004 at pp 83 – 85.
2. Andrew Bolt, *Herald-Sun*, Law wears a dress, 1 March 2006.
3. *Australian Financial Review*, 6 April 2006, "Hulls takes on the law's old guard.", Katherine Towers.
4. *Australian Financial Review*, 11 April 2006, letter from David J Jackson QC, Brisbane, Queensland
5. "Equality and the Judiciary: Why should we want more women judges?" The Rt. Hon. Dame Brenda Hale, [2001] Public Law 489 at 493.
6. Cheryl Harris, "Whiteness as a Property", 106 *Harvard Law Review* 1709 (1993); K Johnson and L Fuentes-Rohwer "A Principled Approach to the Quest for Racial Diversity on the Judiciary", UC Davis Legal Studies Research Paper No 33 (February 2005), cited in "Judicial Diversity in the United Kingdom and other Jurisdictions", by Dr Cheryl Thomas a review commissioned by the Commission for Judicial Appointments, November 2005 at 66.
7. "Selection and induction of judicial officers", paper delivered by Justice James Wood to the 17th AIJA Annual Conference at 6.
8. See Commission for Judicial Appointments, Annual Review 2005 at 25, para 3.22 quoting the Chief Justice of Canada, Beverley McLachlin PC.
9. Attorney-General's Department *Judicial appointments - procedure and criteria* AGPS Canberra 1993.
10. Australian Law Reform Commission, Report 69, Ch 9, paras 9.39-9.41; recommendation 9.3.
11. "*Gender Bias and the Judiciary*", Report by the Senate Standing Committee on Legal and Constitutional Affairs, at xvi.
12. Sackville J, "*Judicial Appointments: a discussion paper*", 14 *Journal of Judicial Administration*

117.

13. Judicial Appointments Commission, A Consultation Paper, 1997, at 2 (<http://www.dca.gov.uk/constitution/reform/draftconsult.pdf>)
14. Dame Brenda Hale, *op. cit.*, at 496
15. *Ibid* at 5
16. Commission for Judicial Appointments, First Annual Report, 2002, para 6.10
17. *Ibid* at 6.11, 6.14-6.15, 6.18.
18. *Ibid* at 6.24.
19. *Ibid* at 8.6.
20. Commission for Judicial Appointments, Annual Report, 2003 at 5.43, 5.47, 5.5, 5.6.
21. *Ibid* at para 3.2.
22. *Ibid* at 3.3-3.4.
23. *Ibid* at 3.23.
24. See *Constitutional Reform Act 2005* (UK), ss 61 – 96.
25. Increasing Diversity in the Judiciary, Department of Constitutional Affairs, Consultation paper,25/04 at 1.23.
26. *Ibid* at para 6.6 –6.7.
27. Last Word – How does Change Happen, Development 2006, Vol 49 at 156.
28. Meagher, Gummow and Lehane “*Equity, Doctrines and Remedies*,” First ed. at [114].
29. Rossiter, CJ and Stone, Margaret, “The Chancellor’s New Shoe,” 11 *University of New South Wales Law Journal* 11 (1988) at 12-13.
30. See Owen Dixon, Phillip Ayres, the Miegunyah Press, 2003 at 57, 73 and 93-94
31. *Ibid* at 73.
32. *Associated Newspapers Ltd v Commissioner of Taxation* [1938] ALR 498.
33. *Sun Newspapers Ltd & Associates Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337.