

FOLEY'S LIST EVENT: "CELEBRATION OF WOMEN IN THE LAW"

MELBOURNE, 16 APRIL 2014

Susan Crennan

Let me commence these brief remarks by thanking Michael Wyles and Foley's List for the opportunity to speak on this occasion, styled a "Celebration of Women in the Law". Our admiration for the rule of law developed over centuries, and our understanding of the history and culture of the legal profession, the courts and the judges, inevitably involves a recognition that until 50 or so years ago, women had neither a significant presence nor an accepted role. Therefore, I assume my task tonight is to speak of the contemporary participation of women in the law. Forgive me for concentrating on women advocates and Victoria. Their careers I understand best and, in a simple way, they illustrate a bigger picture of considerable complexity.

More than one historian has remarked that we best understand the complexities of the present if we understand how things were in the past¹. The Victorian Supreme Court building officially opened on 15 February 1884. This was a remarkable

¹ See, for example, E H Carr, *What is History?*, (1961) at 24; Macmillan, *The Uses and Abuses of History*, (2008) at 127.

achievement given that the court had first been constituted only 32 years beforehand. In contemporary accounts, women were nowhere in evidence².

Just six months later, in August 1884, *The Australian Law Times* published a letter from England entitled "Women and the Bar", in which it was declared that "it is the usage of the modern world to confine the practise of the law to men". The author (writing in the royal plural) continued³:

"[T]he Law Examinations of the London University are now open to women, and if they emerge from these with legal diplomas, some girl-graduates may give us all a great deal of trouble ... The art of advocacy is one in which many women excel, as any one who attends a Women's Suffrage Meeting will allow. But it is an eminently saleable gift at the Bar, and we agree with a Transatlantic contemporary, which warns lawyers they need not fancy that women will fail to get business, because 'pitting a very talkative woman against a loud bullying lawyer would make a certain kind of lawsuit a near thing'."

So much for the local 19th century perspective.

In 1869, the English philosopher John Stuart Mill published his book *The Subjection of Women* and in 1880 Freud's translation

² See Crennan, "The Supreme Court of Victoria: past and future", (1984) *Law Institute Journal* 218.

³ "Women and the Bar", *The Australian Law Times*, 16 August 1884 at 34.

of it was published in Leipzig, Germany. Mill anticipated an idea of leading feminists in the last quarter of the 20th century⁴. He believed that what he called "the nature of women" was "an eminently artificial thing", a construct which kept women in subjection, as he expressed it, by "enslav[ing] their minds". In the previous century Mary Wollstonecraft had anticipated Mill's *aperçu* that it was a lack of education which made women appear to be inferior to men⁵. However, much more was required for the liberation and advancement of women than liberal support in the 19th century world of ideas.

After Federation, at the commencement of the 20th century, the High Court was formally and ceremoniously opened in the Victorian Supreme Court building on 6 October 1903. Women were not much in evidence in public life, at least not in any professional capacity, as shown in Tom Robert's famous painting of 1903 depicting the Opening of Parliament in 1901, and in Marcus Beilby's later painting of the High Court's first sitting. However, in 1903, Flos Greig, the first woman to enrol in law at the University of Melbourne, graduated just one year after the graduation in New South Wales of Ada Evans, the first woman

⁴ See, for example, Rubin, "The Traffic in Women: Notes on the Political Economy of Sex", (1975); Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*, (1978); Butler, *Gender Trouble: Feminism and the Subversion of Identity*, (1990).

⁵ Wollstonecraft, *A Vindication of the Rights of Women*, (1792).

graduate of any Australian law school⁶. By a special Act of the Parliament of Victoria passed in 1903, women could be admitted to practise⁷; at that time, the woman who would later be the first appointed as Queen's Counsel in Victoria was seven years old.

You will recognise that I am speaking of the first woman to sign the Victorian Bar Roll, Joan Rosanove, patron of the eponymously named chambers set up in 1999. Although Joan Rosanove signed the Bar Roll on 10 September 1923, she left just two and a half years later after conspicuous discouragement from colleagues and the profession more generally. She re-signed the Bar Roll on 7 October 1949 — having established a busy practice as an amalgam — and was appointed the first woman Queen's Counsel in Victoria in November 1965, apparently after numerous unsuccessful applications. She transferred to the non-practising list not long after in 1969.

Another well-remembered woman practitioner in Victoria, Molly Kingston, signed the Bar Roll in 1962, two years before Sir Owen Dixon completed a 12 year stint as Chief Justice of the High Court. She retired from active practice in 1978. Before signing the Victorian Bar Roll she had practised as a solicitor with another woman in Western Australia. The first President of the local Law

⁶ Waugh, *First Principles: The Melbourne Law School 1857-2007*, (2007) at 69-70.

⁷ Waugh, *First Principles: The Melbourne Law School 1857-2007*, (2007) at 70.

Society came up with the brilliant idea that instead of addressing correspondence to them incorrectly as "Dear Sirs", it was best to commence a letter with a simple salutation like "Dears"⁸.

Meanwhile, Roma Mitchell had been appointed as the first woman Queen's Counsel in Australia in 1962 after some 28 years practising as a barrister, followed by her appointment in 1965 as the first woman justice of a State Supreme Court. Women in practice in South Australia in Roma Mitchell's time were treated as so egregious that on one occasion she was interviewed by an inquisitive, not to say incredulous, journalist. He asked "Are you married?" "No", she replied. Next he asked "Do you drive a car?" Again she replied "No". Possibly tired of monosyllabic answers, the journalist then commented on the fact that the Chief Justice was also unmarried and asked whether there was any chance she and the Chief Justice might "get together", as it were. "No", came the firm reply, "that wouldn't work, he doesn't drive either"⁹.

These three pioneers specialised in matrimonial causes and all of them wrote and spoke about the Bar as essentially a man's domain.

⁸ Published on Foley's List website, available at <www.foleys.com.au/GalleryMKingston.aspx>.

⁹ De Vries, *The Complete Book of Great Australian Women*, (2003) at 319.

This rather bleak account of the position of women in the law in the 1960s began to improve discernibly in the 1970s. Personal reminiscence is not a genre I have favoured over the years for myself, but luck and happenstance can play a remarkable role in life and perhaps should be acknowledged, if only to encourage others.

Straight after law school, in February 1979, I was admitted to the Bar of New South Wales. As a result of a recommendation from an accomplished patent barrister, Patricia Moore, I read with David Bennett. There were a number of women in active practice at the Bar in New South Wales. Most of them were specialists of one sort or another in patent law, matrimonial causes, local government or criminal law. I think it would have been drawn to my attention if any of them had been practising as Queen's Counsel at that time. Certainly some like Priscilla Flemming were subsequently appointed as Queen's Counsel.

In my first year of practice I was led in the High Court by Maurice Byers, Solicitor-General of the Commonwealth, and David Bennett who, many years later, also became Solicitor-General of the Commonwealth. I also appeared, a neophyte, led by several silks, who all subsequently became justices of superior courts. This is mentioned tonight only because it shows that the mentoring of new barristers, women or men, at the Bar of New South Wales combined in roughly equal parts serendipity and hard work. Just before I was admitted, a good friend in final year at law school, Alex Hutley, introduced me to a young woman judge for whom she was an associate — later Justice Mary Gaudron — then Deputy

President of the Australian Conciliation and Arbitration Commission. Mary Gaudron was to play a role in my career to which I will come.

In 1980 I was admitted to the Victorian Bar. The women in active practice were few, about 30 or so, many were specialists, and there were no women silks. Lyn Opas, who specialised in family law and became the second woman in Victoria to be appointed as Queen's Counsel, in 1984, was the only one who had signed the Bar Roll before 1970. About 80 per cent had signed the Bar Roll in the latter half of the 1970s. The exceptions were Fay Daly, Mary Baczynski, Beverley Hooper, Barbara Cotterell, Lillian Lieder and Betty King.

In the early 1980s at the airport, waiting for flights, Mary Gaudron, by then Solicitor-General for New South Wales, chided Hartog Berkeley, then Solicitor-General for Victoria, for not bringing any women juniors to the High Court. I hasten to add that Maureen Hickey had appeared for the Commonwealth, in the early 1980s, in industrial law matters led by Maurice Byers. Soon after this conversation I regularly appeared with the Solicitor-General for Victoria in the High Court, often together with the late Brian Shaw, mostly, but not exclusively, in constitutional matters. Susan Kenny regularly appeared with Gavan Griffith when he in turn became Solicitor-General of the Commonwealth. Over time, Deborah Mortimer and other women also regularly appeared on behalf of the State of Victoria and, in due course, Pamela Tate served as Solicitor-General for Victoria.

In 1989, my colleague Ada Moshinsky was appointed as the third woman silk in Victoria and I was appointed as the fourth. It goes without saying that I had never been led by a woman and the only woman judge before whom I ever appeared was Justice Gaudron in the High Court.

For the purposes of tonight's speech I consulted a couple of old fee books and was reminded of the considerable pleasure and privilege of leading a number of women of the Victorian Bar: Jenny Davies in tax matters; Michelle Gordon in constitutional and public law matters and extradition; Sara Hinchey in administrative law; Kerry Judd in criminal appellate work; and Rachel Doyle in constitutional work. Both Kerry Judd and Rachel Doyle appeared with me in the High Court. All these women were appointed as Senior Counsel and two have gone on to serve on the Federal Court. If I have accidentally forgotten others, I apologise.

In 1993, just as I was planning to retire from the Victorian Bar Council after some years, I was unexpectedly elevated from the position of junior Vice-Chair to Chair, which in due course led me to becoming President of the Australian Bar Association. In having a woman as President of its national Bar Association, Australia led America by one year and the Bars of England and Wales by several years.

When I was Chair of the Victorian Bar particularly, but regularly during 24 years in practice, I was asked from time to time to speak on the issue of "Women and the Law". In 1953 Sir Owen Dixon had said that "[t]o be a good lawyer is difficult. To master

the law is impossible". While he was addressing men on "Professional Conduct" in 1953¹⁰, he said something of universal application — that to be a good lawyer requires the acquisition of such knowledge of the law as to really know what one is doing when standing between a client and the court or advising for or against litigation. He went on to say that the practice of the law "means hard work for a long time". If, from time to time, I ventured such remarks, or echoed Joan Rosanove, and said that balancing the demands of motherhood and a busy practice was not for the fainthearted, I occasionally received rather cross visits from women barristers who regarded that point of view as somewhat unimaginative.

The efforts of feminist scholars in dealing with reform of the laws of rape and sexual assault, domestic violence and sexual harassment, and for campaigning for social as well as political equality for women all deserve to be applauded. Women barristers of my generation were exposed to what were then novel arguments, namely that confidence in the public administration of justice would be enhanced by the appointment of women judges¹¹, a proposition now established as both verity and reality.

¹⁰ "Professional Conduct", in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses*, 2nd ed (1997) at 134.

¹¹ See, for example, Wilson, "Will Women Judges Really Make a Difference?", (1990) 28 *Osgoode Hall Law Journal* 507.

A theme of resentment, which some might think marred public discourse about women and the law in the 1980s and 1990s, is well illustrated by a joke told in the Victorian Supreme Court by a Canadian visitor, Professor Kathleen Mahoney. To appreciate the punch line you need to take your mind back before the proclamation in 1989 of the second Czech Republic.

A male lawyer goes to heaven. St Peter explains that to enter he will need to pass a spelling test. He agrees. 'Spell 'God' says St Peter. 'G-O-D'. 'Okay, enter'. A second male lawyer arrives at the Pearly Gates - same story. 'Spell Man', commands St Peter. 'M-A-N'. 'Okay, you're in'. Then a female lawyer arrives at the Pearly Gates. St Peter explains the spelling test to her. When she agrees to take it, St Peter says 'Spell Czechoslovakia'.

Although the joke certainly raised a smile, I thought at the time it worked as many jokes do, by exaggerating something recognisable. You can imagine some surprise years later to find journalists assuming occasionally, and no doubt inadvertently, that the women justices of the High Court make neither a significant contribution to the Court, nor write any of the judgments published jointly. Like any fallacy in human affairs, the sooner these assumptions peter out, the better. They are all the more startling since it is now commonplace to see accomplished women with successful practices as solicitors and barristers, partners, consultants and advisors in a great range of law firms and in the corporate domain. Women have chaired Bar Councils and other professional bodies and many women, including Victoria's Chief Justice, are part of the administration of justice at all levels of the judicial hierarchy throughout Australia.

The success today of women in the law is undoubtedly a reflection of great social, cultural and institutional change. Practical liberation, changing ideas of justice and greater access to education freed women, who so chose, to take a place in the professions and the Academy, commensurate with their talents and energies and reflecting their perspectives.

It is my current privilege to count as women friends not only Justice Kiefel and Justice Bell but, around the world: Mrs Justice Davies of the High Court, Lady Justice Arden of the Court of Appeal, and Baroness Hale of the Supreme Court, all in the United Kingdom; Justice Kagan of the Supreme Court of the United States; Chief Justice McLoughlin and Justice Abella of the Supreme Court of Canada; Chief Justice Elias of the Supreme Court of New Zealand; Justice Baer of the Federal Constitutional Court of Germany; Justice Cartabia of the Constitutional Court of Italy; and Chief Judge of Lagos State Ayotunde Adeyoola Phillips. Two women with legal qualifications who preferred politics, whom I have also been privileged to meet, are Mary Robinson, seventh President of Ireland, and Christine Lagarde, the first woman Chair of the international firm, Baker & McKenzie, Treasurer in the Sarkozy government, and currently head of the International Monetary Fund. Let me employ, in respect of all women exemplars in the law, here and elsewhere, a description of universal application employed by Francis Bacon in the preface to his *Maxims of the Law*. He said the best practitioners are "able to

visit and strengthen the roots and foundation of the [law] itself; thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance."¹²

Justice is both a personal virtue, as Aristotle recognised, and for lawyers a professional necessity. Time has been on the side of women in many respects. In law schools, private enterprise, the public sector, and law reform, in both branches of the legal profession as practised in Victoria and in the wider world, women are contributing as never before to the law. Such changes are likely to continue even though the rule of law, a human instrument, is unlikely ever to be perfected, or to command unqualified respect and admiration.

Let me conclude by recording that over the last four decades it has been tremendously interesting to witness these palpable changes — and it is just, now, to celebrate them.

¹² Quoted in "Professional Conduct", in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses*, 2nd ed (1997) at 134.