

KEYNOTE ADDRESS: NATIONAL INTERVASITY WOMEN'S MOOT

Introduction

- 1 Thank you for inviting me here this evening, and congratulations to all of the speakers – it was a great privilege to see such a group of eloquent, talented and dedicated young lawyers at work.

- 2 I speak at events such as these with relative frequency, and indeed have spoken at this dinner in previous years. Sometimes I wonder what I can say that is new – either new for me to say, or new for an audience as switched-on and socially conscious as you are to hear.

- 3 It is rare that I speak directly on the question of gender. I have good reason for that. Gender can be overdone, and often without a proper focus on the real questions – the questions that go beyond personal experience. More importantly, it is one of the issues where saturation point is reached relatively quickly. It is a good question to ask why that is so. At least one answer is that people who are not affected by discriminatory conduct, but fall into the class of discriminators, do not want to take a step outside their comfort zone, however, sympathetic or empathetic they may be to the issue.

- 4 It is unwise therefore, to say nothing of being ineffective, to allow that saturation point to be a turning point – a turning point away from the issue. It is important therefore to ask, how often should we raise questions of gender? To whom should we raise these questions? What do we mean by gender? And, most importantly: are we even asking the right question, and are we sending the right message?

- 5 The framing of the right question is a fundamental skill of the lawyer. Questions are not formulated in a vacuum. They are formulated against a background of facts and principle in order to seek right outcomes.

- 6 So notwithstanding my view that routinely good performance is the best answer to discriminatory practices; that quantitative analysis is better than a string of stories; and that reticence can be seductively powerful, sometimes it is worth making a statement. Tonight's moot topic has stirred me into speaking directly on gender.
- 7 I was admitted to the bar in 1975. I was only the 37th woman to be admitted in the whole history of the NSW bar. The very first barrister was admitted to the NSW bar approximately 150 years before that.
- 8 In the United Kingdom last year, a senior Law Lord stated it would be 50 years before women would achieve equality with men. I asked whether he had thought why it had not occurred in the previous 50 years – and perhaps it was because of the self-supporting and exclusionary culture that was integral to his view. This moot, in many ways celebrates the work of those women barristers who have paved the way for you, Your stunning performances tonight – and, I have been told, throughout this competition – demonstrate that the road paved by your barristerial ancestors was not only well paved, it was a truly worthwhile endeavour.
- 9 Let me tell you first of an extraordinary example of gender bias. The male-only Melbourne Club had, I am told a provision in its rules that Honorary membership would be afforded to the Chief Justice of the State. When Marilyn Warren was appointed Chief Justice, the rules of the club were changed and her Honour was not offered an Honorary membership. How different was the position in New Zealand where, when there was a female prime minister, a female attorney general and a female chief justice, the rules of the New Zealand Club also changed – to admit women. But then New Zealand has always been progressive – universal suffrage was introduced in New Zealand 1893, making it the first country in the world in which women had the right to vote in parliamentary elections, almost a decade before New South Wales in 1902 and 15 years before Victoria in 1908.

10 Earlier this year, *The Australian* newspaper published an article listing 24 of Australia's top commercial silks. Not a single woman was named. A number of other senior members of the judiciary, including the Chief Justice of this State, the Chief Justice of the Federal Court, the Chief Justice of Victoria, the President of the Victorian Court of Appeal, and myself, got into a minor spat – I can say this because it's all on the public record – with the paper. We wrote a letter which said:

“To imply that the ‘elite’ level of the Bar is exclusively male ignores the commonly known facts. It does a serious disservice to the Australian Bar.”

11 The *Australian*, to their credit, published the letter – but they also published another piece by the original author, effectively doubling-down on his approach. Attack being the best form of defence, the journalist dug out a statement of the Chief Justice of the Federal Court who, in an earlier public statement, had intimated that there were not enough female barristers in the 50-55 age group to “*get parity*” in terms of judicial appointments – and suggested that perhaps consideration could be given to appointments from the solicitors branch.

12 The Chief Justice's comment, used against him in this way, indicates why it is so important to ensure the message is consistent and correct.

13 One might ask, however, what the media was seeking to achieve by its article in the first place. There was no underlying analysis in the article as to why its list threw up the names it did. It was written, it was said, following a survey of “*leaders of the bar*”. It might be thought therefore that the methodology was circular. It was certainly self-fulfilling. The article did not ask why the survey threw up these results. Was it because those who brief barristers are simply blinkered when it comes to choosing the barrister? Does the lack of diversity in the briefing choices reflect the attitude of the briefing solicitors or is it reflective of the attitude of the client? Does anyone, including the journalist, have the courage to say: “*it's time*”?

- 14 You might have seen an article by Jessica Irvine in the *Sydney Morning Herald*, published a few months ago, that claimed that men at the bar earn 184 per cent more than women – a vast gender pay gap by any standard. The article caused a minor stir. Was this the courage that I was speaking about? Was this the quantitative analysis that needs to be done to wake the world up? One would hope so. There was one problem with the article: the figures were subsequently debunked, as a matter of statistical analysis, by Ingmar Taylor SC in an article in the *Bar News*.¹
- 15 But Taylor did find that there was a significant gender pay gap at the bar – about 62 per cent as at 2014. Part of that gap could be explained by the fact that, on average, women are more junior – in terms of years spent at the bar – than their male counterparts. That is because women have been coming to the bar in (relatively) large numbers only relatively recently – a fact which in some ways supports what Chief Justice was alluding to when he was speaking about appointments in the 50-55 years age group.
- 16 But the other element of the gender pay gap, according to Taylor, was more surprising, and perhaps more troubling. She found that, even adjusted for seniority, women at the bar charge a lower hourly rate than men – men of equal seniority. Thus, for instance, 26 per cent of male barristers with between 5 and 10 years of experience at the bar charged more than \$400 per hour, while the figure for female barristers was only 7 per cent.
- 17 I had a comparable experience when I was at the bar, when a male barrister, junior to me in years at the bar and in silk seniority, was briefed by the Australian Government Solicitor and was paid a substantially higher brief fee than I was being paid for comparable work. When, with some trepidation I raised the issue, the AGS after all being a significant briefing solicitor for me, I was told that I got a lot of work from them and this barrister didn't. It was hard

¹ Ingmar Taylor SC, 'What do women barristers earn?', *Bar News*, Spring 2016, 48.

to understand the logic. Comparable work is comparable work and we must be strong enough to say so – or at least have others say so.

- 18 I said earlier that we really need to question the concept of gender itself. Gender is, increasingly, understood as a complex physiological and psychological aspect of the individual person, as was made apparent in the Court of Appeal's 2013 decision in *Norrie v NSW Registrar of Births Deaths and Marriages*.²
- 19 Likewise, we need to expand our notion of gender as part of the diversity of society. There is research to suggest that, at least for some purposes, diversity in socio-economic and educational background is as important as gender (or ethnic) diversity, if not more so. We need to be as supportive of these diverse aspects of a well-functioning society.
- 20 This takes me directly to the point I want to make tonight. The phrase the 'glass ceiling' was a very catchy phrase to explain a social, professional and economic phenomenon that was certainly real. The statistics demonstrate that women have and continue to face additional challenges in progressing to senior careers at the bar or in other areas of legal practice. This year's example is telling – of the 101 applicants for silk in the most recent round, still only 12 were women.
- 21 However, can I stress that the difficulty with using a concept such as the 'glass ceiling' is that it creates a barrier in itself. It is as though we have giving naming rights to discriminatory conduct. Could I suggest that the real game changer is your individual personalities and your individual talents. Tonight's moot demonstrates that I have been addressing a roomful of sheer talent.

² [2013] NSWCA 145 (Beazley JA, Sackville AJA and Preston CJ of LEC).

22 I commenced tonight's talk by reference to the pilgrim road. Not only will you walk that road, you will ensure that it is preserved and bettered for those who follow you.
