Keynote Speech to the Women Lawyers Achievement Awards in Melbourne on the 2nd of June 2005

by
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A former Justice of the High Court, Mary Gaudron, once said that "the trouble with the women of [her] generation [wa]s that [they] thought if [they] knocked the doors down, success would be inevitable."[1] They thought that if the formal barriers to entering the legal profession were dismantled, it would only be a matter of time before women were properly represented in all fields of legal endeavour.

The formal barriers have now been down for some time. The first piece of legislation to enable women to be admitted to legal practice in Australia was passed in Victoria in 1903, the quaintly named *Women's Disabilities Removal Act*.[2] Yet, over one hundred years later, women remain seriously under-represented at the level of senior partnerships in solicitors' firms, at the level of senior counsel and at the level of the judiciary. The most recent survey of briefing practices revealed that the inequities continue. While the Victorian Government's panel firms have briefed women on behalf of Government clients in 25% of matters, women received only 14% of the fees.[3] This is despite the efforts of the Women Barristers' Association and others to see the Victorian Bar's Equality of Opportunity Briefing Policy take effect.

For me, the most revealing fact is that one cannot yet look down the daily court list in the High, Supreme or Federal Court and have the reassurance that women are *running* matters - that is, having the ultimate carriage and responsibility for them as barristers

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1 The Honourable Justice Gaudron, *Speech to Launch Australian Women Lawyers* (1998) 72 *Australian Law Journal* 119, at 119.

2 (Vic) No 1837 of 1903

or solicitors - in proportion to their numbers in the legal profession. If, one day, we satisfy this "daily court list_test", then we will have arrived closer to the ideal of equality of participation. But we are not there yet.

There have been many explanations for the continuing under-representation of women in the ranks of leading lawyers. Some have attributed it to hostile work practices, although, thankfully, there has now been significant progress in the move towards flexible working arrangements – including flexible partnerships – through the efforts of Victorian Women Lawyers.

Others have attributed the under-representation more generally to a lack of sensitivity to difference and a failure to see that equality requires embracing and accommodating difference. Yet others have identified the flaw in the legal profession to be the system of patronage that persists – the desire to create people in one's own image, to perpetuate the *status quo*.

I believe that all of those matters are part of the explanation but that there is more to it than that. Let me explain what I see as a fundamental problem in the profession.

Some of you may remember a night about 18 months ago that was reported in the Melbourne *Age*. The article concerned a celebration of a significant achievement. The celebrations gave rise to an incident which became notorious. It was in early November 2003: the time of year when the names of the new crop of barristers who have taken Silk are announced. When the announcement is imminent, small huddles of barristers can be seen at each corner of William Street placing bets on the likely winners. In the cafes surrounding chambers the black Bar diaries containing the

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[3] *Victorian Bar – Equality of Opportunity Briefing Policy : 2003-2004 Barristers Briefing Report* (April 2005), Table 4.

names of all practising barristers in Victoria are surreptitiously extracted from briefcases and with a degree of high excitement (coupled with a duty to be frank) the names of those who have probably applied (applications to the Chief Justice being confidential, of course) and those who will probably be successful, are picked over. On first observing this tradition, a friend of mine once said, "all that was missing was the knitting needles."

I should add that taking Silk is a milestone in a barrister's career. It is seen as a recognition of excellence and self-confidence in one's advocacy. Applications must be supported by Judges acting as independent referees. No cowards need apply. Responsibility for appointment lies with the Chief Justice of the Supreme Court and, at this time, ultimately lay with the Attorney-General, on the recommendation of the Chief Justice.

The announcement was made: 15 men and six women. The previous year, 2002, there were 19 men and six women, of whom I was proud to be one. The year before that, there were 15 men and one woman.

In 2003, one of the names on the list was a male criminal barrister for whom a celebration party was held. As they say, a few drinks were had. The time came for speeches. A senior criminal Queen's Counsel, Robert Richter Q.C., rose to his feet to sing the praises of the new Silk whom he thought should have made it on to the list years earlier. Begrudging the delay, he quipped (and, one might say, it was quite out of character) that it was obviously an advantage for a candidate for Silk not to have testicles. Unsurprisingly, the comment caused offence, prompting the incident of which the *Age* reported, a walk out by one of our esteemed award winners, Her Honour Judge Hampel. Had I been there, I would have joined her.

For my part, I entered the fray when, the next day, I emailed all my known fellow women lawyers with the question: "Whatever made Robert Richter think we don't have testicles?"

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Behind Robert's quip lay a distressing attitude. What the quip implied was, that the new male Silk had been delayed in his appointment, that he had been forced to wait before he could take what was rightfully his. There was a sense that the presence of women at the Bar – and indeed women who could command the support of the judiciary in their application for Silk – had dislodged the man's entitlement, had compromised his property right. What was seen as justifiably belonging to the man had been taken from him – or, at least, its timeliness had.

What lay behind the quip, in my view, was a belief that the legal system, while it might allow women lawyers to have a place, does so on the condition that women recognise that they owe their place to the grace and favour of men. It follows that they are not to take property which the men believe is rightfully theirs.

I offer this as an explanation for the quip partly on the basis of my own experience when applying for Silk. Having applied, I was surprised to find that I was summonsed to the chambers of a man in authority at the Bar to "have a word". I had never worked with the man and he did not know me well. This was no part of the process, formal or informal.

Nevertheless, I was naïve enough to be gratified when he said, as soon as I walked into his room, that the Bar was delighted to support my application as I was an excellent and outstanding candidate. I was initially taken aback to find that the senior

echelons of the Bar had any decisive role to play. But I had generally found the Bar a supportive professional environment so, feeling chuffed, I smiled. My smile didn't last long. I remained standing as did he.

Against that background, came the puzzling question. "There [wa]s only one matter the Bar needed to clarify, was I serious in wanting to take Silk?" I responded that I was "absolutely serious" and I asked whether it was the case that some people applied who did not mean to. He muttered that for some people it "carried financial risks." By this stage, I was bewildered. No one at the Bar had ever shown concern about my financial welfare before. No one would ever presume to know the details of another barrister's Fee Book and this encounter did not have a shade of paternalism about it – misplaced or not. I realised that I was in George Orwell territory. I was being faced with "double speak".

I was pretty sure no man had ever been asked if he was serious when he had lodged his application for Silk. What I did not realise at the time was that a message was being given to me in code that I should consider withdrawing my application – ironically, because my application had a good chance of success. The problem was that, if successful, I might dislodge another applicant – perhaps a man whose success might be delayed, although his time was "due".

It is this deeply ingrained sense that men have a right of property over the fruits of the profession - that their entitlements are not to be dislodged by women - which is the explanation I support for why it is that time alone, and the elimination of overt barriers, has not led to equality of participation in the legal profession.

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The assertion by men of property rights over things to which they have no moral entitlement is to be found in many aspects of our legal system. Let me consider just one.

Recently, there has been much debate about the criminal defence of provocation and its proposed abolition.[4] I have heard many women and men say that the issue raises no question of gender bias, as the defence is as available to women as to men – that is, just as a man can seek to rely upon provocation as a partial defence to a murder charge so too a woman can raise the defence if the circumstances allow. Indeed, it is pointed out that many women have successfully relied upon the defence having faced years of violence and abuse which ultimately led to a loss of control. In those circumstances, it is asked: why would one wish to abolish the defence of provocation?

The reason must lie in the manner in which the defence has operated. As the Victorian Law Reform Commission's report demonstrates unequivocally, the circumstances in which men and women kill, and then rely upon the defence of provocation at trial, are vastly different.[5] Some would say they are "not only vastly different; they are incommensurable."[6] Women defendants almost always kill in the context of a long history of brutal violence which is ultimately beyond endurance.

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4 The Attorney-General for Victoria announced his intention to revoke the defence of provocation on 21 January 2005 in accordance with the recommendations of the Victorian Law Reform Commission Report, *Defences to Homicide: Final Report* (October, 2004) (**VLRC report**).

5 Ibid. 1.40.

6 Adrian Howe, "Reforming Provocation (More or Less)" (1999) 12 Australian Feminist Law Journal 127. See also Jenny Morgan, "Provocation Law and Facts: Dead Women Tell no Tales, Tales are Told about Them", (1997) 21 Melbourne University Law Review 237, at 256 where she says: " I found no reported Australian cases where women were provoked into killing men who left them or who 'confessed adultery'. This pattern of male violence is confirmed by empirical research. Polk and Ranson studied all homicides in Victoria between 1985-6 using coroners' files. A major theme identified in homicides involving intimates was 'homicides in situations of sexual intimacy where the violence represented an ultimate attempt by the male to control the life of his female sexual partner'. Within this category, 'a major variation involved male partners reacting to the woman's attempt to move away from his

Men raise the defence when there has been a sexual or other slight to their "honour". The "provocative" incident for men is most typically where the woman threatens to leave or has left the relationship, or where she has started a new relationship.[7]

As Professor Jenny Morgan and others have noted, a violent assault at the time of separation "aims at overbearing [the woman's] will as to where and with whom she will live, … coercing her in order to enforce connection in a relationship." [8] Abolishing the defence will show, as one member of the judiciary in Canada has said: "[a]t law, no one has either an emotional or proprietary interest in a spouse that would justify [or excuse] the loss of self-control"[9] exhibited in an intentional killing.

The reason I am in favour of the abolition of the defence of provocation is that the gender-biased nature of its operation[10] perpetuates the myth that, at some level, women are still the property of men and that violence is explicable – even, perhaps, natural - when those property rights have been usurped or defeated.

But what of those women who have lived in a domestic relationship involving a history of sustained physical abuse? If provocation is abolished, are they to be left with lesser defences than they would otherwise have?

The Victorian Law Reform Commission has also recommended that self-defence be codified in statute. This would make it clear that a person – be it man or woman –

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control'. " See also Kenneth Polk, "Homicide: Women as Offenders" in Patricia Easteal and Sandra McKillop (eds), *Women and the Law* (1993) 149. See also VLRC report, p. xxv.

7 VLRC report, p.xxv; 2.22; 2.23.

8 Jenny Morgan, " Provocation Law and Facts: Dead Women tell no Tales, Tales are told about Them", (1997) 21 Melbourne University Law Review 237, at 248, quoting from Martha Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 *Michigan Law Review* 1, at 65-6.

9 *R v Thibert* (1996) 104 CCC(3d) 1, at 22 (Major J (in dissent), Iacobucci J. concurring), (Supreme Court of Canada). See also *R v Mawbridge* (1707) Kel 119; (1707) 84 ER 1115, Ian Leader-Eliot, " Passion and Insurrection in the Law of Sexual Provocation" in Rosemary Owens Ngarie Naffine (ed) *Sexing the Subject of Law* (1997), 155.

may act in self-defence where they believe that the threat of serious harm is inevitable rather than immediate. A partial defence of excessive self-defence would also be introduced where a person honestly believed his or her actions were necessary in self-protection, but used excessive force.

The statutory changes are "intended to ensure that these defences are more readily available to people who kill in response to family violence."[11] It is my belief that the operation of these defences would be supported if they applied against the background of a Charter of Rights.

Under the models adopted by the United Kingdom, New Zealand and the A.C.T. for their Human Rights instruments, the courts are directed to interpret and apply the law to render it as compatible as possible with the rights and freedoms contained in their respective Charters of Rights.[12] If Victoria adopted a Charter of Rights(as is currently under discussion between the Government and the community) one could imagine a court in Victoria interpreting the newly-proposed self-defence provisions of the *Crimes Act* in the light of the right to freedom of movement[13], the right not to be

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10 See VLRC report, paras. 2.18-2.25; The VLRC sees the problems with provocation as going beyond gender bias.

11 VLRC report 1.55.

12 See s.6 of the *Bill of Rights Act* 1990 (N.Z.) : " Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." See also s.30(1) of the *Human Rights Act* 2004 (ACT): " In working out the meaning of a territory law, an interpretation that is consistent with human rights is as far as possible to be preferred." See further s. 3 of the *Human Rights Act* 1998 (U.K.) which requires that all statutes and regulations are, as far as possible, to be read and put into effect in a way that is compatible with the European Convention on Human Rights.

13 The International Covenant on Civil and Political Rights (**the ICCPR**) article 12, *Human Rights Act* 2004 (ACT), s.13, *Canadian Charter of Rights and Freedoms,* s.6, *Bill of Rights Act* 1990 (N.Z), s.18.

treated in a cruel, inhuman or degrading way[14], the right to liberty and security of person[15] and indeed, the right to equality before the law.[16]

In determining whether a woman who had been subjected to a history of abuse had acted in self-defence by protecting herself, or preventing the unlawful deprivation of her liberty, a court in Victoria might well look to those rights declared under a statutory Charter of Rights to be fundamental to a person's integrity. A Judge might look to the Charter to determine whether in the circumstances of a history of abuse, the woman accused was acting to protect something to which she had a right. In my view, the public recognition of rights in a statutory Charter or Bill of Rights would provide a framework to support the availability of the defence of self-defence in a context of a history of family violence.

This has been recognized in Canada, where a Judge of its Supreme Court, Madam Justice Claire L'Heureux-Dubé, in delivering judgment in 1999, said: [17]

> Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. … sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women." These human rights are protected by … the *Canadian Charter of Rights and Freedoms* and their violation constitutes an offence under the [Criminal Code].

The current Chief Justice of the Canadian Supreme Court, the Right Honourable Beverly McLachlin, agreed.[18]

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14 ICCPR, article 7, *Human Rights Act* (ACT), s. 10(1)(b), *Canadian Charter of Rights and Freedoms,*s.12, *Bill of Rights Act* 1990 (N.Z), s.9, *Human Rights Act* 1998 (U.K.) s.1 and Schedule 1.

15 ICCPR, article 9, *Human Rights Act* (ACT) s.18(1), *Canadian Charter of Rights and Freedoms,* s.7, *Human Rights Act* 1998 (U.K.) s.1 and Schedule 1.

16 ICCPR, article 26, *Human Rights Act* (ACT), s.8(3), *Canadian Charter of Rights and Freedoms*, s.15, *Bill of Rights Act* 1990 (N.Z), s.19, *Human Rights Act* 1998 (U.K.) s.1 and Schedule 1.

17 *R v Ewanchuk* [1999] 1 SCR 330, [69], referring with approval to the judgment of Cory J. in *R v Osolin* [1993] 4 SCR 595, 669.

18 *R v Ewanchuk* [1999] 1 SCR 330, [103].

Where does all this leave the question of the under-representation of women in the senior ranks of the legal profession? How can we address the failure of the daily court list to reveal the equal participation of women? What do we say to the testicular quips we hear?

In my view, it is important to recognise that many of these issues have the same source. We should expose the quips for what they are, an express or implied assertion of a property right. Seen as such, it is clear that they have no moral justification.

In the same way, there is no moral justification for the assertion by men in any context, domestic or otherwise, of property rights over women. Nor is there any moral justification for men's express or implied property rights over judicial appointments, appointments to senior counsel, the presentation of oral argument in any court or tribunal, the taking of witnesses, the preparation of court documents, the taking of instructions – nor over the myriad of senior institutional decision-making roles throughout the legal profession. If the profession recognises clearly and fundamentally that the decision-making roles do not belong to men, the advancement of women within the profession will not meet with the resistance that women are dislodging men from that to which they are entitled.

While there is no simple or single solution, genuine changes in attitudes and beliefs of this sort might bring us closer to the ideal of equality of participation. It might allow us to see everywhere, everyday, in the ordinary operation of the legal system, women lawyers of achievement.