THE MITCHELL ORATION 1994

"Women, Citizenship and The Law in the Coming Century"
Mitchell Oration 1994

by

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Introduction

There could be no greater honour or greater pleasure than to be invited to present the Mitchell Oration, and in doing so to have this opportunity to express the respect and admiration I have for Her Excellency, Dame Roma Mitchell, and my appreciation for the friendship and support she has shown to me and to so many other women in the law over the years. The theme I have chosen, Women, Citizenship and the Law, will I hope reflect on the significance of Dame Roma's work in the law, in human rights and in government.

In many ways Dame Roma's career symbolises the aspirations of the Australian women who worked for suffrage 100 years ago, women such as Mary Lee and Catherine Elizabeth Evatt, AO Spence in South Australia, Rose Scott in New South Wales, Edith Cowan in Western Australia, Vida Goldstein in Victoria and many others who took up the cause. I also pay them my respects in this centenary year, and I take their moment of victory in 1894 as my point of departure. My argument is that for women to achieve the equal enjoyment of citizens' rights, which suffrage seemed to offer, and for society to reap the benefits which should flow from this, women must have an equal voice in making and applying laws and policies - an equal voice in law and government.

I: Citizen's Rights

In speaking of the rights of citizens I refer to the right to participate in making and implementing laws and policies, the right to vote in free elections, and the right to have access to elective and non-elective public office, including the judiciary.[i] These rights are protected by international instruments**,** under which they must be enjoyed by women equally with men, and they must be made effective in practice as well as on paper.

How far have these rights been made effective, to give Australian women a role in the law, in the legislatures and in the courts?

The right to vote is fundamental to the rights of citizens to participate in the exercise of power. When women in South Australia won the vote in 1894 the effects were felt throughout the continent. Supporters of women's suffrage were inspired by the South Australian victory to secure provisions in the Constitution which ensured that South Australian women would also be able to vote federally. This led ultimately to women in every State having the right to vote in federal elections.[ii] By 1908, when Victoria finally succumbed, women also had the right to vote in all State elections. A reservation must be made in respect of Aboriginal women; together with Aboriginal men they were denied the right to vote in federal elections until 1962.[iii]

In addition to the right to vote, democratic principles also require that citizens have the opportunity to participate directly in the exercise of power, including the right and the opportunity to stand for election, the right to hold public offices, elective and nonelective, and the right to take part in the formulation and implementation of laws and policy at all levels, national, state and regional.[iv] Human rights principles require that these rights should be enjoyed equally by men and women.

It is remarkable that when South Australian women won the right to vote, they also won, for the first time in the world, the right to stand for election to Parliament. Once again, this paved the way for women in all states to be eligible for election to federal parliament. But it took quite a long time before the other states, some very reluctantly, recognised women's eligibility to stand for parliament; last in the line were NSW in 1918, WA in 1920 and Victoria in 1923.[v] Before that process was complete, Edith Cowan had been elected in WA in 1921 as the first woman to enter a state parliament. But it was 1943 before women were elected to Federal Parliament.[vi] South Australia was in fact the last State to elect a woman to state parliament in 1959.

Getting women into Australian parliaments has been a very slow process. In earlier times, this was partly explained by differences of opinion as to whether women should engage directly in the political system. Some were ambivalent about taking any direct role in politics, other than as voters. They wanted to educate women to develop a common political agenda outside the mainstream parties, and without entering the arena of party politics.[vii]

Even when women did align themselves to political parties, as was the case with many working women, who saw labour movement politics as a way to achieve improved working conditions, their loyalty was not rewarded with winnable seats in parliament for many years. No doubt the women's votes were welcome to the male candidates.

This does not mean that women made no effective use of their status as citizens. They worked for specific reforms of laws and policies which discriminated against women or which

were otherwise unjust, in such areas as marriage, divorce and guardianship; they secured improved working hours and conditions of work for women, entry into the professions and so on. And years latest in the 1970s, WEL was able to mobilise women voters around issues such as child care.[viii]

But women did not form a voting bloc around women's issues. If there had been ambitions of this kind, they were swamped by the ascendancy of party and class politics.

Some women put a high priority on seeing women elected to parliament. Vida Goldstein in Victoria,was a candidate for the Senate in 1903, the first of five unsuccessful attempts at election.[ix] However, she did not align herself to established political parties dominated by male values, and voters did not seem to support women candidates as such in sufficient numbers to secure their election. The problem of how to get women into parliament had been a matter of concern to Catherine Spence, who should be remembered as the first woman in Australia to stand for election - she sought unsuccessfully to be a delegate to the Constitutional Convention of 1897. Perhaps we might have a different constitution if she had been successful. She believed that proportional representation, or "effective voting" as she called it, was necessary to make women's right to representation effective.[x] She would have used human rights standards to argue that the principle of universal and equal suffrage requires a fair and equal opportunity for women, as well as men, to see representatives of their sex in the corridors of power.

Whether the Spence system would have helped establish a political voice for women, or simply helped smaller parties it is hard to say. The fact is, however, that most women who have entered Parliament have done so through the established parties. A lesson in this is that women have different needs and interests, and different political goals. Another lesson is that party structures have been quite inadequate to the task of ensuring equal representation of women.

One hundred years down the track, we can point to women in parliament, in government, as leaders of parties and governments. But the numbers and proportions are still low. Approximately 10% of the House of Representatives, 22% of.the Senate, 16% of the State parliaments and 20% of elected local government officials.[xi] There are few of non-English speaking backgrounds, or Aboriginal women.

Turning to the question of women in the legal profession, it is surprising that the right to vote and to be elected to the legislature did not lead immediately to the right to practice law. Here, too, there were many frustrations and delays for women, though it is fair to say that this State, South Australia was one of the earliest to admit women. In New South Wales women had to wait until 1918 for the right to practice, 16 years after the first women graduated in law, Western Australia had elected its first woman to Parliament in 1921, two years before women were admitted to practice law in 1923.[xii] The climate for women in the law was far from encouraging, and the numbers entering the profession were small at first. The appointment of Dame Roma Mitchell to the Supreme Court in 1965, the first such appointment, was certainly an encouragement to people like me. But it has taken 29 years for the second such

appointment, Justice Margaret Nyland, in 1993. By the 1970s, the numbers of women entering law started increasing. Women now represent a large proportion of law graduates, but there are few in senior positions in the profession. While women now hold a wide range of judicial offices, including the High Court and other courts and tribunals, their numbers amount to less than 5%.

II: The Gender Bias of the Law and Legal Institutions

This necessarily brief survey of women in the law and in government shows that, despite the hopes of a hundred years ago, women remain seriously under-represented in our legislatures and courts. Although the strictly legal obstacles have been removed, in practice women do not participate equally in these institutions or contribute equally to defining their nature and scope.

The consequences of this concentration of power go far beyond their impact on individual women who may be obstructed in pursuing careers. It means that the experiences and perspectives of women have been missing in the design and operation of these major institutions of the law. There is, in my view, a clear link between the exclusion of women from the legislature and the courts and their still small numbers in positions of influence and the failure of the legal system to deal adequately with the needs of women. And when I speak of women, I mean all women: women of diverse ethnic and social backgrounds, women whose life experiences, values and perspectives, are both diverse from each other and different from those of men. So much of this has simply not been taken into account.

The fact that parliaments, governments and the courts, the major institutions which make and apply the laws, have been dominated by the attitudes and values of those who have been almost exclusively the law makers - men - has meant that the law remains tainted by gender bias. By gender bias in the law, I mean that the law incorporates the values of an essentially patriarchal society; it incorporates attitudes based on stereotyped roles for men and women and assumptions about the respective status and capacities of men and women. Its concepts are too often based on exclusively male experience of the world, and too often silent where situations arising out of women's experience need a just answer. For example, the cohabitation rule in social security law assumes that a woman is the dependent of a man with whom she lives. The law of provocation is based on male experience of violence, rather than on women's experience.

These effects linger on. Law, as we know, is a conservative institution. It changes slowly, and its underlying values are carried forward in a myriad of rules and practices. The attitudes and prejudices which excluded women from full legal equality and capacity until well into this century have not completely disappeared.

Recent studies in North America and in Australia have analysed the legal system and found much evidence to confirm what was long understood, namely, that our legal institutions in many respects, fail to have regard to women's needs and interests because of the influence of

underlying gender bias. It makes the law less effective to protect women and to provide them with remedies. Examples of this are:

> the law's long standing failure to recognise and deal adequately with violence against women and sexual harassment;
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> rape laws which have focused too much on the male offender's belief about consent and too little on the protection of the victim's right to personal integrity;
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> assumptions about the dependency of women, and undervaluation of women's work, in family law, in personal injury compensation law and in employment;
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> the lack of credibility often ascribed to women's evidence; confusion over the application of the reasonable man test to women.

Even when the law appears on its face to provide some protection, women's lack of access to financial resources or to appropriate legal services leaves them without a remedy.

These and many other instances have a cumulative effect in demonstrating the extent to which our legal system is affected by gender bias, and explaining why women lack the confidence whiqh, as citizens, they are entitled to have in the fairness of our major legal institutions.[xiii] I should emphasise, if I have not done so already, that gender bias is not necessarily deliberate or intentional. Nor is its influence seen only in men. It permeates principles and can affect the outlook on legal issues of both male and female lawyers.

The gender bias of law is now under serious challenge. Some may see this as a threat, because it puts into question the supposed objectivity of law. I believe, however, that scrutiny of this kind will ultimately strengthen our legal institutions, by making them more fully aware of their underlying assumptions and of their impact on all citizens.

Because gender bias is often inadvertent, there is a prospect of change. Several current projects at Commonwealth and State level are dealing with problems arising from or related to gender bias in the law.[xiv] One of these projects is the reference to the Australian Law Reform Commission on *Equality Before the Law for Women.* This exercise, now approaching its final stages, has attracted a record number of submissions, oral and written.[xv] These reveal a deep public unease with aspects of the legal system as it applies to women.[xvi]

In its first stage reports the Commission has recommended[xvii]

> a National Women's Justice Program to promote equal access to justice for Australian women, covering legal aid, specialised services for women and court support schemes; here, particular attention should be given to the needs and interests of Aboriginal women for legal services specific to their needs, particularly as victims of violence;

improvements to make the Sex Discrimination Act more effective to deal with indirect discrimination, to remove certain exemptions,[xviii] and to extend the powers of the Sex Discrimination Commissioner to investigate systemic discrimination and to assist complainants;

law reform measures which would give greater weight to violence issues in family law, migration and other areas of Commonwealth law.

Legal protection of Equality

The Commission has also considered wider aspects of women's inequality, and the role which the law plays in this. I believe that there is a connection between the bias in the law and the disadvantages experienced by many women in their social and economic life. There is, for example, a connection between the way the law deals with violence and the level of violence against women, between the undervaluation of women's work and the extent of poverty among women, between attitudes which regard women as unsuited for certain roles, or as limited to nurturing or dependency roles and the failure of systems to deal adequately with the double burden which becomes their lot.

This issue of gender bias is a particular cause of concern when women turn to the law to protect their equality rights. One possible way to address women's inequality would be through an entrenched equality provision broad enough to allow legal challenges to laws, policies and programs which contribute to or perpetuate inequality for women. Australia is one of the few western nations without a general legal guarantee of equality. But laws of this kind could be undermined if the courts and lawyers involved in their application do not have a proper understanding of equality issues as they affect women. Canadian experience with the Bill of Rights suggests that this understanding should not be taken for granted. Gender bias, as described, could hamper the process of reform unless the goals of equality law are clearly stated.

Equality, on one view, means treating equals equally. However, the model of identical treatment is limited in its ability to deliver equality to women, because there are differences between the sexes which need to be taken account of, and these differences affect many areas of economic and social life. If the question is asked, when is different treatment justified or reasonable, or what differences are relevant to the purpose in question, there is a real risk that courts will adopt the benchmark of the dominant group, generally the male group, and that what is seen as the difference of women will be relied on to justify less favourable treatment or outcomes. To the extent that women and men are different from each other, the law's task is to find a way to deliver equality within the context of that difference.

A possible way forward is to develop a test which asks whether the distinction in question promotes or prevents the full and equal enjoyment of rights by men and women, [eg women might challenge a decision to grant maternity leave rather than parental leave, because it reinforces a specific view of women's role]. A distinction or difference, which diminishes the equal enjoyment of rights and freedoms would, on this view, be regarded as discrimination.

Another approach would be to consider whether the distinction in question contributes to or perpetuates the economic or social disadvantages experienced by women. In a sense, the question becomes transformed into a consideration of what sets of laws and policies will best lead to full and economic equality, and real choices for men and women as to how to live their lives and provide for their families, without placing an unfair burden or benefit on either. This is a question of social justice as much as equality.

Whatever the test of equality under any new legal guarantees which the Law Reform Commission might recommend, there is clearly a need for those involved in its interpretation to have an understanding of the issues I have outlined, and of the way that attitudes and bias prejudice women in their dealings with the law. There are various ways to do this, for example, by education and gender awareness programs. Of course,. support such programs, since it is essential to bring about a change of attitudes.[xix] However, I consider that the absence of a sufficient proportion of women from major legal institutions will make it more difficult to change the attitudes found in those institutions [since that absence tends to reinforce traditional stereotype views]. An increase in the participation of women could do as much, if not more for the law, and more quickly, than a process of education which would need to be repeated many times over.

III: Greater participation

This brings me back to my theme, that the longstanding absence of women from our major legal institutions, an absence which continued well into this century, has helped to perpetuate the inequalities of women, and their disadvantages in dealing with the law. There have been too few women in key positions so far to make a significant impact on deeply embedded gender bias, and those women who have advanced in the legal profession and the judiciary have had to contend with many obstacles, including the attitude that there is no place for women in such institutions.

What is true of the legal system and the courts is also true of our elected representatives. Despite the high hopes of the suffragists that the 20th century would be "the women's century",[xx] women do not yet have an equal voice in the making and application of laws and policies; there is thus a risk that laws and policies will not give equal weight to the concerns, needs and perspectives of women. As legislation is the only means of effecting change in the law quickly and directly, this can only impede reform. Women in parliament and government do already make an important contribution to this process. They have shown that women can exercise political power effectively, in leadership roles of all kinds. But they are among the first to argue for a considerable increase in their numbers, and for the system to be more accommodating to women.[xxi]

I firmly believe that the institutions of government and the law need an infusion of the different perspectives which Australian women of many different backgrounds can bring to bear on legal and policy issues, including a greater awareness of the interests and needs of women. I do not have in mind the replacement of a male dominated legal system by a female dominated one. Nor do I have in mind the destruction of what is most valuable and admired

about our legal and political institutions - the independence of our judiciary, the steadfastness of the law as a guardian of individual rights and our democratic traditions. On the contrary, those virtues of our legal system should be reinvigorated by the changes I have in mind.

What is needed is to put a new balance in the system, so that women's views are adequately represented and taken fully into account in drafting new laws and in policy formation, so that justice is administered equally by men and women, as magistrates, judges, solicitors, barristers and court staff, and so that women's perspectives and women's experience are drawn on in shaping legal concepts and doctrines. The effect would also give women greater confidence in the legal system ind enable women to regard the government and executive as their true representatives.[xxii]

I am aware, as are we all, that there are changes in the air, which could affect both the appointment of judges and the composition of the Parliament. When Jim Carlton MP suggested last year that federal electorates be doubled in size, and that each should return one male and one female member, it was to Catherine Spence and her ideas that he turned for support. Recent proposals to change the pre-selection rules of the Labor party, to ensure the greater representation of women may however, be more productive of change, and they are a positive development in this particular year.

The Commonwealth Attorney-General's paper on judicial appointments suggests a need to broaden the base of judicial appointments, especially in regard to women, members of ethnic communities and Aboriginal and Torres Strait Islanders.[xxiii]

What is interesting in the recent debate on these issues is that the same arguments are used by opponents of change both in regard to selection for the judiciary and for party candidates namely that "merit must prevail." Women have never opposed this principle. What we do object to are rules, procedures and standards which are based on preconceptions (or misconceptions) about male and female roles, and about what is or is not acceptable. I would also refute the argument of special treatment. Whatever steps are necessary to bring about an equal sharing of power and responsibility are necessary for that purpose. They are no more "special" than the current rules, which make the system work well for men. They are simply the steps that are needed to enable both sexes to participate, and to enjoy equally the rights and freedoms, that are guaranteed to them.

If child care, parental leave, changed hours, equal pay or other policies are needed to support parental roles, then these must be seen as the necessary conditions for equality not as grounds for excluding women from the full enjoyment of citizen's rights.

I emphasise once again that the claim for the greater participation of women is also a plea for greater diversity in our institutions and the fair representation of all groups.

These issues are important to our identity as a nation. Australian identity is created in many ways, by the lives of all the men and women who have lived here over thousands of years, and by the artists, writers, story tellers and musicians who have created their own visions. Our public and political life is also part of this identity, representing in a public way common standards, values and aspirations. One value we seem to prize is that of a "fair go". This necessarily implies that every person should have an equal opportunity to take part in the conduct of public affairs, regardless of gender, race or class, and no one should be excluded on the basis of assumptions or stereotype, or because of artificial barriers. Our commitment to equality implies that citizens, both male and female, should participate in setting the public values which help to define our society and in working for the improvement or transformation of society in equal partnership. Whether the issues concern Constitutional interpretation or child care, economic development or hospital services, the widest possible range of human experience should be brought to bear on issues that affect us all.

No one can predict what the outcome will be when women achieve the kind of equality I have been speaking of, in law and in government. Some believe that it will inevitably and irrevocably change the agenda and the way that power is exercised. Some believe that women could lead the world to a golden age; that is something to dream of. Realistically, however, it would be unwise to expect the sisterhood of women alone to put right all the wrongs that we now lay at the feet of the brotherhood of man. An equal partnership of men and women may, however, restore some balance to a disordered world.

END NOTES

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[i] Convention on the Political Rights of Women of 1952, the International Covenant on Civil and Political Rights,art 25 and the Women's Convention, arts 7 and 9

[ii] Uniform Federal Franchise Act 1902, Commonwealth.

[iii] Commonwealth Electoral Act 1962, s 3 (5); prior to that ex-service men and those entitled to vote in State elections could vote federally. Voting was made compulsory for Aboriginals in 1983, s 28(i).

[iv] ICCPR 25; Convention on the Political Rights of Women 1952, CEDAW art 7.'

[v] Tasmania 1903, Queensland, 1905, NSW 1918, WA 1920, Victoria 1923.

[vi] Dame Enid Lyons MP and Senator Dorothy Tangney were the first women to be elected to the Federal Parliament in 1943.

[vii] Judith A. Alien. *Rose Scott.. Vision, and Revision in Feminism,* 1994 p 210.

[viii] Summers, *Damned Whores and God's Police,* 1994, p 516ff, describes the work of WEL in the 1970s.

[ix] Janette M. Bomford, *Vida Goldstein: That Dangerous and Persuasive Women, 1993,* p 55.

[x] Ann Millar, *Trust the Women: Women in the Federal Parliament,* 1993 pp 24-26.

[xi] As at 31 March 1994. ALRC Report *Equality Before the Law for Women,* part 1 p 25, quoting the Dept of the Parliamentary Library Information Services, *Current List of Women Members of Federal and State Parliaments.*

[xii] Jane Mathews "The Changing Profile of Women in the Law" (1982) 50 ALJ 634. South Australia was one of the earliest.

[xiii] Regina Graycar and Jenny Morgan, "The Hidden Gender of Law" 1990.

[xiv] *Gender Bias and the Judiciary,* Report by the Senate Standing Committee on Legal and Constitutional Affairs, May 1994; *Access to Justice* Inquiry, 1994; OLAFS study, *Gender Bias in Legal Aid: an Issues Paper.* Three inquiries established by the NSW Ministry for the Status and Advancement of Women; *Gender Bias in the Criminal Justice System, Gender Bias and the Civil System, Gender Bias and the Legal Profession;* taskforce established by the CJ of WA to investigate gender bias in the judiciary. Hon Justice David Malcolm, CJ of WA: Feminism and the Law" Address to the Zonta Club Perth, 28 September 1991.

[xv] ALRC 67, Interim Report, *Equality Before the Law: Women's Access to the Legal System* 1994 para 1.8

[xvi] ALRC 67, Interim Report, *Equality Before the Law: Women's Access to the Legal System* 1994 para 1.23

[xvii] ALRC 67, Interim Report, *Equality Before the Law: Women's Access to the Legal System* 1994; ALRC 69 Part *Equality Before the Law: Justicefor Women, 1994.*

[xviii] Eg sport, religious schools.

[xix] See the Women's Convention art 5, Report of the Parliamentary Committee on Half Way to Equal, p 25.

[xx] Jan Roberts, *Maybanke Anderson, Sex Suffrage andsocial Refofm* 1993, p 12.

[xxi] *Half Way to Equal,* Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia, by the House of Representatives Standing Committee on Legal and Constitutional Affairs, (Lavarch Report) April 1992, p161.

[xxii] Madam Bertha Wilson "Will Women Judges Make a Difference?"

[xxiii] Discussion Paper: Judicial Appointments: Procedure and Criteria, September 1993. See also G BJ pxvii