BUT WON'T THEY FRIGHTEN THE JUDGES? WOMEN AT THE BENCH AND BARTABLE

Jocelynne A. Scutt

High Court Justice Michael Kirby's address to the Lesbia Harford Oration in Melbourne on 20 August 2001 examined the barriers women face when seeking to rise through the ranks in the legal profession — including a work culture insensitive to the needs of principal child carers and a bias towards male lawyers. An extract of his speech was reprinted in the Melbourne *Age* the following day titled "A law against women". Tasmania's Anti Discrimination Commissioner Dr Jocelynne Scutt (*Age*, 23.8) responded to Kirby J's comments, arguing that judges themselves should take more responsibility for the shortage of women appearing in court. Her article is reprinted here in full:

Well, of course, there *was* a law against women. No need to ask the question, and as Michael Kirby (*Age*, 21.8) knows, it was his brothers on the Bench who created and enforced it. Early last century, Edith Haynes sought entry into the practising profession, and was denied it. Not because Parliament passed any law to keep her out, but because judges said she had no right to do her apprenticeship-in-law, much less appear before them. Because the *Legal Practice Act* said any 'person' qualified in law was entitled to go into practice, Edith Haynes was told she was not allowed. 'Person' meant 'men only'. Women, not being persons, were banned.

The argument was easy, said the judges. After all, a married woman was no person, she being subsumed within her husband the instant 'I will' was said. With room for only one person in a marriage, he was that one. Single women were more difficult. But the men on the bench rose to the task. A single woman might marry any moment, swept up, up, up and off into the sunset. The master to whom she was articled would be left in the lurch as she transformed herself into the non-personhood of the married woman. Her clients, had she graduated to fully fledged practice, would be without representation as she rode away the arms of her knight-prince. Judicial expediency demanded that the single woman be consigned to the realm of the non-person, too.

Perhaps judges sought, thereby, to keep the benches for themselves?

In every state apart from Tasmania, women asked Parliament to change this judge-made law, by passing *Women's Legal Practice Acts* to say that *women* qualified in law were entitled to go into practice. In New South Wales, it took almost 20 years for Ada E. Evans to be admitted, from her graduation in 1902, until what became known as the 'Ada E. Evans Enabling Act' passed through Parliament. In the upshot, she didn't go into practice because she believed that in waiting so long, she may have lost her punch.

Punch, however, is not what it's about — unless one's speaking of the sledging women are subjected to once they get in. 'Vainglorious', 'a megalomaniacal approach', 'churlish' and 'childish' are words flung in the direction of women having the temerity to believe that, being qualified in law, we have a right to practice it. In the courtroom, the bartable may be addressed as 'gentlemen', even if one seated there isn't. And if the man on the bench addresses counsel in that way, when one of them is patently female, is *he* a gentleman? In the boys club, does it matter?

Last century, demands that women wear 'proper' clothing in court meant 'no trousers allowed' on female legs. The dictat was overturned only 15 years ago. Still, women's court dress is criticised in ways men's never is. One women was told his Honour 'would not see her' until she fixed up her wig. A single stray hair whisped over her forehead. Men turn up in verdigris gowns, grubby wigs, and curls skewwhiff. Judges see, and say nothing.

In the courtroom, 'good girls' are not meant to answer back, however bullying their opponents, however rude the bench. In 1998, one woman was threatened with a report to the Bar Council because she referred to the 'hockey team' of solicitors seated in what was supposed to be a closed court. Male barristers' references to 'football teams' and more are commonplace, eliciting no judicial murmur.

Speaking frankly, unlike Justice Kirby, I don't think it's 'childcare' that is the problem. It's the lamentable failure of judges to refuse to 'hear' the bully boys, rather than turning their wrath on 'bad girls' who stand up to these tactics. It is the failure of Bar Councils to discipline male counsel, like the one who told his female opponent, in front of her client, their juniors and the attendant: 'I had a nightmare last night — I was in bed with you and I'll tell you later what we were doing.' It's the failure of the bench to control the shiaking, snide comments, running commentary critiquing female opponents. If you're a sole practitioner, female, beware: they'll be calling you unethical, declare they faxed you this and that weeks ago. No matter you've never received it, saying so is met with the raised eyebrow, and 'boys together' exchanges with the bench.

It's also about the capacity of the judiciary to listen. Comprehension is not automatic, but judicial training should be. Judges cannot stand above it all, blaming everyone but themselves for the lack of women in the courtroom. Judges began by discriminating against women as women. The judiciary must begin again, by ensuring that they lead the legal profession into compulsory, regular and continuing education classes designed to have them re-look at their decision-making processes, their capacity to think along other than the grooved lines that have affixed themselves firmly to their brain-channels years ago. Judicial complacency results in judicial myopia.

The eyes on the bench must go way, way beyond counting numbers in the well of the court. They, after all, are in charge of their own courtrooms. It is they, after all, who create the atmosphere in which male and female barristers work. It is they, ultimately, who have the power to change the courtroom dynamic.

They must turn their eyes upon themselves first.