GENDER AND JUDICIAL SELECTION: SHOULD THERE BE MORE WOMEN ON THE COURTS?

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[*Only a small proportion of Australian judges are women. In this article, the author explores why it might be important to ensure that women are appointed to the courts. Reasons for the relative absence of women are then considered. The author examines ways in which the current judicial selection methods could be revised to increase the number of women appointees. Possible objections to such a revision are discussed.*]

I. *INTRODUCTION*

A number of recent court decisions have been criticised because, it is claimed, the reasoning of the male judges is gendered.[1] That is, the reasoning is 'based on sex stereotypes, the perceived relative worth of women and men and myths and misconceptions about the economic and social realities encountered by both sexes'.[2] In response to these criticisms, the Federal Government has announced that the Australian Institute of Judicial Administration will develop an educational program for judges on gender issues.[3] It has also referred the question of gender bias in the law to the Australian Law Reform Commission. The reference includes an examination of the ways in which federal courts apply both legislation and the common law.[4]

One issue which arises in this context is whether there should be more active measures taken to appoint women judges.[5] There are few women judges in

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[1] See, *e.g.*, *R. v. Sandra Jane Collis; R. v. Tracey Michelle Collis* (1989) 43 A. Crim. R. 371, discussed in Carter, M., 'Judicial Sexism and Law Reform' (1991) 16 *Legal Service Bulletin* 29; *R. v. Mobilio* [1991] 1 V.R. 339, discussed in Morgan, J., 'Rape in Medical Treatment: The Patient as Victim' (1991) 18 M.U.L.R. 403; *Jayatilake v. Federal Commissioner of Taxation* (1990) 21 A.T.R. 736 (Beaumont J.); (1991) 101 A.L.R. 11 (Full Court). Special leave to appeal to the High Court refused 30 August 1991; see on this issue Scutt, J., *Women and the Law* (1990) 363. See also the cases *infra* n.12.

[2] Wikler, N.J., 'Identifying and Correcting Judicial Gender Bias' in Martin, S. and Mahoney, K. (eds), *Equality and Judicial Neutrality* (1987) 12.

[3] A special A.I.J.A. Committee was established at the A.I.J.A. Council meeting in November 1992. It is chaired by Justice Deirdre O'Connor of the Federal Court. Over half of the states in the U.S.A. have established judicial 'gender bias task forces' under the auspices of the relevant State Supreme Court. The task forces are composed of appellate and trial court judges, court administrators, legal academics, professional leaders and social scientists: see 'Five Year Report of the New York State Judicial Committee on Women and the Courts' (1992) 19 *Fordham Urban Law Journal* 315; Schafran, L., 'Gender Bias in the Courts: An Emerging Focus For Judicial Reform' (1989) 21 *Arizona State Law Journal* 237; see also Schneider, E.M., 'Task Force Reports on Women in the Courts: The Challenge for Legal Education' (1988) 38 *Journal of Legal Education* 87; Loftus, M., Schafran, L.H., and Wikler, N., 'Establishing a Gender Bias Task Force' (1986) 4 *Law and Inequality* 103.

[4] Reference made on 8 February 1993. See particularly paras (b) and (c). An interim report is required no later than 31 December 1993 and the final report no later than 30 June 1994.

[5] See, *e.g.*, 'Five Year Report of the New York Judicial Committee on Women and the Courts', *supra* n.3, 333.

Australia. Despite the fact that women have been able to practice law in every Australian state since 1923,[6] only six percent of judges on the superior courts are women.[7] Would more women judges make a difference to our courts? If it is appropriate to promote more women to the judiciary, does this entail a revision of current appointment procedures? On what basis should such a revision proceed?

This article canvasses these questions. The first part considers four arguments in favour of appointing women to our courts. The second part suggests reasons for the lack of women judges in Australia and examines whether reforms to current appointment procedures are warranted on the basis of various models of affirmative action.

II. *WHY IS IT IMPORTANT THAT WOMEN BE APPOINTED TO THE JUDICIARY?*

In this part, two categories of arguments in favour of ensuring that women are appointed to the bench are discussed. The first category concerns public confidence in the judiciary. The second concerns substantive reform of judicial decision-making.

A. *PUBLIC PERCEPTION ARGUMENTS*

1. *Judicial diversity*

One argument for appointing women judges derives from the 'fair reflection' principle. Professor Shetreet explains this principle as follows:

> An important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like. . . . The judiciary is a branch of the government, not merely a dispute resolution institution. As such, it cannot be composed in total disregard of the society.[8]

Professor Shetreet considers that the fair reflection principle flows from the requirement that the judiciary be and be seen to be impartial and independent.[9] If judges are seen to come from only one group within society, then those outside that group may believe that their perspectives are neglected in judicial decision-making. This may lessen community understanding of and regard for judicial decisions.[10]

The present composition of the courts does not fairly reflect gender differences in society.[11] It is suggested that the absence of women tends to undermine the

6 Mathews, J., 'The Changing Profile of Women in the Law' (1982) 56 *Australian Law Journal* 634.

7 Information from the Australian Institute of Judicial Administration. Less than four percent of State Supreme Court judges are women. Almost ten percent of federal judges are women, but if the Family Court is excluded, this falls to seven and a half percent. The proportion of women judges on Australian superior courts would appear to be significantly less than on comparable courts in Canada and the United States — nine percent of superior court judges in Canada are women: Canadian Centre for Justice Statistics, *Profile of Courts in Canada 1987-88* in Wilson, Madam Justice B., 'Will Women Judges Really Make A Difference?' (1990) 28 *Osgoode Hall Law Journal* 507, 517. In the U.S., between six and eight percent of state appellate and trial judges are women, as are about nine percent of federal appellate judges and trial judges: 'Different Voices, Different Choices? The Impact of More Women Lawyers and Judges on the Justice System' (panel discussion) (1990) 74 *Judicature* 138.

8 Shetreet, S., 'Who Will Judge: Reflections on the Process and Standards of Judicial Selection' (1987) 61 *Australian Law Journal* 766, 776. See also Pannick, D., *The Judges* (1987) Chapter 3.

9 Shetreet, *op. cit.* n.8, 773-8.

10 *Ibid.* 777-8. See also Pannick, *op. cit.* n.8, 59.

acceptance of court decisions which clearly involve gender distinctions. For example, recent decisions in sexual abuse cases have drawn considerable public criticism,[12] and in one instance this has resulted in an official pardon.[13] Such cases generate controversy under any circumstances, but this is exacerbated by the exclusively male court composition.

Critics of fair reflection argue that it confuses the role of a judge with that of an elected official.[14] Sir Harry Gibbs writes:

> Judges should not be seen to be representatives of particular groups; they are there to do justice to all manner of people.[15]

The first part of this objection misconstrues the nature of fair reflection. Acceptance of the principle does not entail adoption of a system of proportional representation. It simply requires that, in addition to the other criteria for judicial selection, regard be had to the present composition of a court so as to determine whether a particular appointment will enhance the breadth of experience on it. As to the second part of the objection, it is not clear why a person from a different background to that of most current appointees (white, Anglo-Celtic males) may be less likely than them to 'do justice to all manner of people'.

Another objection to the principle is based on the assertion that judges *already* have an adequate appreciation of society. It is said that they have derived this from their dealings with the local community and with their clients while they were in practice, from their observations of witnesses in trials and from their examination of social issues in the wide variety of cases before them.[16] There is, therefore, no need to broaden the range of judicial appointments.

This contention is not very persuasive. It is difficult to accept that any person can have an adequate appreciation of the vast range of human experiences simply through her or his legal work and immediate community involvement.[17] The existence of training programs for judges[18] indicates that many appointees do not have a complete understanding of legal procedures, let alone the complexity of social relations.

Ultimately, objections to fair reflection seem to be tied to the belief that the courts 'play an essentially responsive and passive role',[19] resolving disputes through analysing the facts of a dispute by means of precedents and the rules of

11 *Supra* n.7.

12 See, *e.g.*, the reactions to the sentencing remarks of Judge Jones of the Victorian County Court in *R. v. Hakopian* (unreported, 8 August 1991), *Age* (Melbourne), 9 and 10 August 1991; the remarks of the Full Court of the Victorian Supreme Court in the partially successful appeal in the same case (unreported, 10 and 11 December 1991), *Age* (Melbourne) 3, 4, 7 and 8 January 1992; the direction of Bollen J. of the South Australian Supreme Court in *R. v. Johns* (unreported, 27 August 1992, successfully appealed, Full Supreme Court, unreported 20 April 1993) *Age* (Melbourne) 9, 11, 13 and 14 January 1993; and the sentencing remarks of O'Bryan J. of the Victorian Supreme Court in *R. v. Stanbrook* (unreported 10 November 1992, successfully appealed, Full Supreme Court, unreported 16 March 1993) *Age* (Melbourne) 13 and 14 May 1993.

13 *R. v. Sandra Jane Collis; R. v. Tracey Michelle Collis* (1989) 43 A. Crim. R. 371. The sisters were granted an unconditional executive pardon: Carter, *op. cit.* n.1

14 Gibbs, Sir H., 'The Appointment of Judges' (1987) 61 *Australian Law Journal* 7; Walker, G. de Q., *The Rule of Law* (1988) 267-8.

15 Gibbs, *op. cit.* n.14, 10.

16 Walker, *op. cit.* n.14, 267-8.

17 Pannick, *op. cit.* n.8, 52-4.

18 *E.g.* those conducted through the Australian Institute of Judicial Administration.

19 Walker, *op cit.*, n.14, 164.

statutory interpretation. This implies that the background of a judge is of limited importance in comparison with her or his legal skills. This account of the judge as objective legal technician has been increasingly challenged by judges themselves.[20] Certainly, our present High Court judges will consider departing from positivist reliance on a well established principle where this 'seriously offends . . . contemporary values'.[21] This approach requires judges to be aware of what those contemporary values are. If they are all from a narrow stratum of society, judges may have a distorted view of them.

If a thoroughgoing positivism is rejected, objections to the fair reflection principle are unconvincing. On this basis it is suggested that fair reflection should be an element of the judicial selection process.

2. *The educative effect of women judges*

A related argument is that the presence of women judges has an educative function.[22] First, a greater number of women in the judiciary could lessen the condescending and hostile behaviour which women lawyers, litigants and witnesses often encounter in the male-dominated courtroom.[23] Second, the appointment of women may also help to overcome stereotyping and the undervaluing of women legal professionals generally.[24] Third, women judges may serve as role models, inspiring other women, especially young women lawyers, in their careers.[25]

The educative effect of having women on the bench is difficult to quantify, but this is no reason to discount it. At present, the image of a judge is overwhelmingly male. As women now constitute about half of all law graduates, it would seem reasonable that their participation in all aspects of the legal profession should be increasingly seen as 'normal', rather than as exceptional.

B. *SUBSTANTIVE LAW REFORM: CORRECTING GENDER BIAS*

The public perception arguments are important but they do not identify what impact significant numbers of women could have on the nature of judicial decision-making and on the legal system generally. It is here that there are more fundamental grounds for appointing women.

The central assumptions of law have been increasingly questioned by the development of feminist legal theory.[26] As Carol Smart writes:

[20] Richardson, 'Judges as Lawmakers in the 1990s' (1986) 12 *Monash University Law Review* 35; Kirby, M., *The Judges* (1983). For a review of five theories of judicial decision-making see Berns, S., 'Judicial Decision Making and Moral Responsibility' (1991) 13 *Adelaide Law Review* 119.

[21] *Mabo v. Queensland (No.2)* (1992) 175 C.L.R. 1, 30 *per* Brennan J. See also *R. v. L.* (1991) 174 C.L.R. 379, 389-90 (*per* Mason C.J., Deane and Toohey JJ.), 405 (*per* Dawson J.) and 397-402 (*per* Brennan J.); see also Wood, D., 'Adjudication and Community Values: Sir Anthony Mason's Recommendations' in Ellinghaus, M.P., Bradbrook, A.J., and Duggan, A.J., *The Emergence of Australian Law* (1989).

[22] See *e.g.* Sherry, S. 'The Gender of Judges' (1986) 4 *Law and Inequality* 159, 160; *cf.* Thomson, J.J., 'Preferential Hiring' in Cohen, M., Nagel, T., and Scanlon T. (eds) *Equality and Preferential Treatment* (1977) 22-4.

[23] See Wilson, *op. cit.* n.7, 518-9; Schafran, L. H., 'The Success of the American Program', and Wikler, N.J., 'Identifying and Correcting Judicial Gender Bias' in Martin and Mahoney, *op. cit.* n.2. See also references in n.3.

[24] This is discussed at length *infra* III.B.1.

[25] Sherry, *op. cit.* n.22; *cf.* Greenawalt, K., *Discrimination and Reverse Discrimination* (1983) 64.

[26] See *e.g.* Scales, A. C., 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale*

> The search for a feminist jurisprudence signals the shift away from a concentration on law reform and 'adding women' into legal considerations to a concern with fundamental issues like legal logic, legal values, justice, neutrality, and objectivity.[27]

Feminist lawyers thus challenge the nature and method of the law as it is currently perceived. They contend that judging is based on male-centred perceptions of society. They suggest that a substantial reform of judicial decision-making is required. The appointment of women judges may be a way of overcoming the male bias in the courts. How would this occur?

1. *The different voice*

One view is that men and women tend to perceive human relationships differently and this has an influence on judicial decision-making. This idea is based on the work of Carol Gilligan.[28] Having studied the responses of boys and girls to moral dilemmas, Gilligan believes that men tend to analyse such dilemmas in an abstract, mathematical way. They view the parties as autonomous, independent individuals[29]. Women, on the other hand, seek to examine the wider context of problems and to analyse issues in terms of human relationships.[30] She concludes that the moral approach of women has been ignored in the male-centred world:

> [I]n the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility, and the origins of aggression in the failure of connection. The failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation.[31]

Carrie Menkel-Meadow has applied Gilligan's thesis to the practice of law.[32] She considers that the law reflects only the male voice in its values of objectivity, predictability, exclusion and finding the 'right' answer and a single winner.[33] She proposes areas in which the 'ethic of care' (as distinct from the male 'ethic of justice') could influence the legal system. The 'ethic of care' would lead lawyers to be concerned for other parties to the dispute so that a more co-operative, consensual approach to an issue could be adopted as occurs in some forms of alternative dispute resolution.[34]

According to Menkel-Meadow, the different voice would also affect legal reasoning, entailing a re-thinking of concepts such as relevance, disclosure of evidence, and the binding nature of precedent.[35] Substantive law with its current emphasis on individual rights may be supplemented with or replaced by notions of inclusion, connection, collectivity and social responsibility.[36] She concedes

Law Journal 1373; MacKinnon, C.A., 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635; MacKinnon, C.A., *Feminism Unmodified: Discourses on Life and Law* (1987); Boyle, C., 'Review' (1985) 63 *Canadian Bar Review* 427; Graycar, R., and Morgan, J., *The Hidden Gender of Law* (1990); Graycar, R. (ed.), *Dissenting Opinions: Feminist Explorations in Law and Society* (1990).

27 Smart, C., *Feminism and the Power of Law* (1989) 66.

28 Gilligan, C., *In a Different Voice: Psychological Theory and Women's Development* (1982).

29 *Ibid.* 24-32. It is not asserted that these tendencies are necessarily biological, rather that there is simply some correlation between a person's sex and certain attitudes and behaviours.

30 *Ibid.* 24-32.

31 *Ibid.* 173.

32 Menkel-Meadow, C., 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39. See also Menkel-Meadow, C., 'The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession' (1986) 24 *Osgoode Hall Law Journal* 897.

33 *Ibid.* 49.

34 *Ibid.* 53.

35 *Ibid.* 58-60.

36 *Ibid.*

that women do not speak in a united voice but nevertheless maintains that 'an increasing number of women's voices could or will alter our legal sensibilities and values'.[37]

These ideas have clear implications for the role of judges.[38] Some senior women judges consider that they do approach legal problems differently from men. Madam Justice Bertha Wilson, formerly of the Supreme Court of Canada, finds merit in the Gilligan analysis.[39] She considers that in some areas of law, particularly criminal law, 'a distinctly male perspective is clearly discernible.'[40] Justice Elizabeth Evatt, formerly Chief Justice of the Family Court and now President of the Australian Law Reform Commission, agrees. She believes that because women do not have the same life experiences as men, they tend to assess legal and moral issues in a different but no less valid way. They are more likely to realise how claimed objectivity is marred by unconscious biases.[41] Many, but not all, American women judges share these views.[42] There is, then, considerable support for the view that women speak from the bench with a different voice. A greater number of women judges may lead to a less confrontational, and less adversarial style of litigation.

On the other hand, the Gilligan thesis is not without its critics. First, it is not clear that an 'ethic of care' will lead to appropriate solutions for women and other disadvantaged groups. For example, alternative dispute resolution techniques such as mediation often allow stronger parties to impose a 'mutually agreed' solution on weaker ones.[43] Second, co-operative, consensual approaches to legal disputes are not necessarily the product of gender differences. They may also be attributed to differences in culture or legal structures.[44] Again, individual variations in human behaviour make it difficult to determine whether a particular individual will act according to the 'male' or 'female' ethic. Further, many women may find that they have to assimilate to male norms of behaviour in order to succeed in the legal world.[45] These lead them to abandon the 'ethic of care'. Indeed, the ethic of care may be essentially incompatible with the ethic of justice. Thus Ann Scales writes:

37 *Ibid.* 62.

38 See, *e.g.*, Resnik, J., 'On the Bias: Feminist Reconsiderations of the Aspirations for our Judges' (1988) 61 *Southern California Law Review* 1877, 1911-4.

39 Wilson, *op. cit.* n.7, 519-21.

40 *Ibid.* 515. See also Boyle, C., 'The Role of the Judiciary in the Work of Madam Justice Wilson' (1992) 15 *Dalhousie Law Journal* 241.

41 In a discussion with the writer.

42 See, *e.g.*, Justice P. Wald (U.S. Court of Appeals, District of Columbia Circuit), 'The Role of Morality in Judging: A Woman Judge's Perspective' (1986) 4 *Law and Inequality* 3; Associate Justice R.E. Wahl (Minnesota Supreme Court), 'Some Reflections on Women and the Judiciary' (1986) 4 *Law and Inequality* 153; Associate Justice C.M. Durham (Utah Supreme Court), 'Gender Equality in the Courts: Women's Work Is Never Done' (1989) 57 *Fordham Law Review* 981. For the contrary view, see Justice R.B. Ginsburg (U.S. Supreme Court), 'Some Thoughts on the 1980s Debate over Special Versus Equal Treatment for Women' (1986) 4 *Law and Inequality* 143.

43 Resnik, *op. cit.* n.38, 1940-3. See also Germane, C., Johnson, M., and Lemon, N., 'Mandatory Custody Mediation and Joint Custody Orders in California: The Dangers for Victims of Domestic Violence' (1985) 1 *Berkeley Women's Law Journal* 175.

44 See, *e.g.*, the debate over whether Japan is a 'culturally' non-litigious society: Kawashima, T., 'Dispute Resolution in Contemporary Japan' in Von Mehren, A. T. (ed.), *Law in Japan; The Legal Order in a Changing Society* (1963); Haley, J.O., 'The Myth of the Reluctant Litigant' (1988) 4 *Journal of Japanese Studies* 359; Haley, J.O., *Authority Without Power: Law and the Japanese Paradox* (1991) Chapter 4.

45 Justice Evatt is of this view. See also Bender, L., 'Sex Discrimination or Gender Inequality?' (1989) 57 *Fordham Law Review* 941.

> Objectivity ignores context; reason is the opposite of emotion; rights preclude care. . . . [the attempt to incorporate the ethic of care with the ethic of justice] threatens to be mere co-optation, a more subtle version of female invisibility.[46]

These arguments against the Gilligan approach suggest that while there may well be differences of perspective between men and women lawyers, these are too insecure a base for reform of the legal system. Accordingly, the presence of women judges, while having some effect, will not be enough on its own. What is needed is an approach to the judicial analysis of law which systematically eliminates gender bias.

2. *Feminist legal theories*

Whereas the Gilligan approach focuses on the different modes of judicial behaviour and judicial 'ethics', other feminist legal writers have concentrated on legal epistemology and method. Catharine MacKinnon argues that the law should be analysed by examining how its norms entrench the subordination of women.[47] Law is predicated on a dominant, male, view of the world which sets itself up as the 'standard for point-of-viewlessness'.[48] According to MacKinnon, this must be countered by asking how a legal concept denies women's experience of reality.[49]

Accordingly, in reaching a decision, a feminist judge examines how the construction of law oppresses women. It is not possible here to review extensively feminist jurisprudence. However, two areas where it is contended that law is gendered may be briefly mentioned. First, feminist analyses suggest that gender bias is inherent in the maintenance of a legal distinction between the regulated 'public' domain of men — which encompasses the activities of the state, the marketplace and the workplace — and the allegedly unregulated 'private' domain of women — which includes the domestic and personal aspects of society.[50] Laws such as those governing social security, taxation, health, marriage, and crime serve to construct the private domain in such a way that women are disadvantaged.[51] Second, there is an assumption contained in the judicial insistence on the principle of 'equality' before the law.[52] The reference for determining whether treatment is equal is male,[53] so the particular experiences of women in relation to matters such as child care and sexual violence are overlooked.[54]

Feminist critiques of the law undermine claims that the law is objective. However, if there is no objective standard for legal decision-making, how are judges to proceed? New legal methodologies, based on feminist or other princi-

46 Scales, *op. cit.* n.26, 1383.

47 MacKinnon, C.A., 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635; MacKinnon, C., *Feminism Unmodified: Discourses on Life and Law* (1987).

48 MacKinnon, C.A., 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635, 638-9.

49 *Ibid.* 658.

50 See, *e.g.*, O'Donovan, K., *Sexual Divisions in Law* (1985), 81-106.

51 *Ibid.* 8-20. For examples of the effect of this division see the cases discussed in Graycar and Morgan, *op. cit.* n.26, 73-9 (work within the home), 152-7 (cohabitation) and 327-34 (rape).

52 Morgan, J., 'Feminist Theory as Legal Theory' (1988) 16 M.U.L.R. 743, 744-9; Thornton, M., Feminist Jurisprudence: Illusion or Reality?' (1986) 3 *Australian Journal of Law and Society* 5; Littleton, C.A., 'Equality and Feminist Legal Theory' (1987) 48 *University of Pittsburgh Law Review* 1043.

53 MacKinnon, C.A., *Feminism Unmodified: Discourses on Life and Law* (1987) 34.

54 See, *e.g.*, the *Mobilio* and *Jayatilake* cases referred to *supra* n.1, and accompanying critiques.

ples, must themselves avoid making excessive claims.[55] Building on the insights of both the 'different voice' and the 'subordination' critiques of law, Katharine Bartlett has formulated a feminist theory of legal method and legal knowledge which avoids making absolute assertions.[56]

Concentrating first on methodology, Bartlett identifies three feminist techniques by which a legal problem may be analysed. The first is 'asking the woman question'.[57] This involves inquiring whether women have been left out of consideration, how the omission might be corrected and what difference it might make to do so. The second method is feminist practical reasoning. This views legal solutions as 'pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives'.[58] Practical reasoning requires recognition of diversity in human experience and the examination of competing claims. For example, a legal precedent should be accorded weight but it should be asked whether it excludes other valid points of view.[59] The third feminist legal method is consciousness-raising. In the context of judging, this method promotes collaborative decision-making.[60]

Bartlett then considers different approaches to the issue of legal knowledge. She finds the current rational-empirical approach useful in that it may successfully promote law reform through an examination of 'the facts' in society.[61] However, this approach fails to acknowledge that no observation is truly objective because the reality perceived is partly a product of social construction. Bartlett next examines the theory of knowledge put forward by MacKinnon.[62] She believes that this 'standpoint epistemology', although drawing attention to the ongoing oppression of women, risks replacing one claimed objective truth with another. Bartlett also rejects the total abandonment of objectivity since this slides into a relativism where it is impossible to argue that the feminist critique of law is any more accurate than any other legal theory, including the prevailing one.[63]

In place of these conceptions of legal knowledge, Bartlett proposes a theory of 'positionality'.[64] Positionality accepts the idea that there may be truths but that, apart from the relatively rare clear cases, truth is contingent and partial. In most cases we can only speak of 'provisional truths':

> There can be no universal, final or objective truth; there can be only 'partial, locatable, critical knowledge', no aperspectivity — only improved perspectives.[65]

55 This is a criticism made of MacKinnon: see Smart, *op. cit.* n.27, Chapters 4 and 8; for a critique of MacKinnon's methodology see Bottomley, A., Gibson, S. and Meteyard, B., 'Dworkin; Which Dworkin? Taking Feminism Seriously' (1987) 14 *Journal of Law and Society* 47; for a critique from the perspective of liberal theory see Flick, R., 'The Failure of Radical Feminism' in Fullinwider, R. and Mills C. (eds), *The Moral Foundations of Civil Rights* (1986) 159.

56 Bartlett, K.T., 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829; see also the approaches in West, R., 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1; and Resnik, *op. cit.* n.38, 1916.

57 Bartlett, *op. cit.* n.56, 837-49.

58 *Ibid.* 837.

59 *Ibid.* 849-63.

60 *Ibid.* 863-7.

61 *Ibid.* 868-72.

62 *Ibid.* 872-7.

63 *Ibid.* 877-80.

64 *Ibid.* 880-7; *c.f.* Resnik, *op. cit.* n.38 and Cain, P.A., 'Good and Bad Bias: A Comment on Feminist Theory and Judging' (1988) 61 *Southern California Law Review* 1945.

65 Bartlett, *op. cit.* n.56, 885.

A decision-maker is therefore required to seek out perspectives other than her or his own, so that all positions are subject to critical examination. Other points of view need not be accepted as equally valid, but they may cause our own position to be redefined, altered or corrected. For example, positionality demands an understanding of both the mother's and the father's standpoint in a custody dispute. The solution to such a dispute is not found by reference to an absolute standard, but rather through determining what social principle is, in the context, preferable. This principle may be modified or rejected in a subsequent dispute.

3. *Feminist analyses and the appointment of women*

Feminist analyses offer a major challenge to the way law is currently conceived, maintaining that law has been constructed from a male point of view. It is suggested that an analysis such as Bartlett's proposes an alternate model of legal reasoning and legal knowledge which would help to overcome the present distortions in our law.

How, though, is the appointment of women judges connected with these analyses? Not every woman lawyer subscribes to feminist legal theory. This is dramatically illustrated in the recent decision of the Canadian Supreme Court in *R. v. Seaboyer*[66]. This case concerned provisions in the Canadian Criminal Code[67] rendering evidence of a complainant's sexual history inadmissible in a rape case. The provisions were attacked on the basis of inconsistency with the Canadian Charter of Rights and Freedoms. The leading judgment and the dissent were both written by women, Justice McLachlin and Justice L'Heureux-Dubé respectively. Both took antithetical approaches to legal analysis. Justice L'Heureux-Dubé undertook a feminist analysis of the concept of relevant evidence and referred extensively to sociological studies of rape prosecutions. She considered that the provisions were valid because they aimed to eliminate evidence based on myths and stereotypes about women's sexual histories.[68] Justice McLachlin, on the other hand, found one of the provisions invalid[69] because it prejudiced the right of an accused to present a fair and full defence.[70] However, she did not explore how misconceptions about women, entrenched both in the legal system and in society in general, may distort evidentiary rules in favour of the accused. She did not examine in detail the concept of relevance and relied substantially on previous court decisions rather than on empirical studies of rape cases. Criticising the reasoning of McLachlin J., Elizabeth Sheehy comments:

> . . . most people who hold decision-making powers in the major social, economic and political institutions of our society adhere to the patriarchal belief systems of those institutions, regardless of their own sex or class.[71]

66 *R. v. Seaboyer; R. v. Gayme* (1991) 83 D.L.R. (4th) 193.
67 Ss 276-7.
68 *R. v. Seaboyer; R. v. Gayme* (1991) 83 D.L.R. (4th) 193, 201ff.
69 S.276.
70 *R v. Seaboyer; R v. Gayme* (1991) 83 D.L.R. (4th) 193, 259ff.
71 Sheehy, E.A., 'Feminist Argumentation Before the Supreme Court of Canada in *R v. Seaboyer; R v. Gayme*: The Sound of One Hand Clapping' (1991) 18 M.U.L.R. 450, 464. See also MacKinnon, *op. cit.* n.53, 77. She agrees that the gender of persons in positions of power is 'not the real feminist issue', although she also considers it to be 'utterly essential' that women be in those positions.

This case illustrates that a judge's approach to legal method and knowledge may have greater significance on decision-making than her or his gender. Indeed, Justice L'Heureux-Dubé was supported in her dissent by Justice Gonthier — a male judge.[72] Consequently, it may be asked whether the elimination of gender bias may be more effectively addressed through judicial education programs than through appointing women judges. At another level, feminist reform strategies may be more successful if directed at institutions other than inherently conservative judicial bodies.[73]

On the other hand, while cases like *R. v. Seaboyer* indicate that the appointment of women judges alone is unlikely to transform the law, it does not follow that such appointments are not significant. Taking the question of the place of judicial institutions in reform strategies first, while there is cause for arguing that law should be 'de-centred', the courts are likely to remain an important site of public decision-making in the foreseeable future. They are one of the significant institutions where matters of concern to feminists will continue to be raised. For this reason, they merit attention. Further, despite the conservative nature of the courts, significant substantive reforms may be achieved over time.[74] Even where a majority decision is affected by gendered reasoning, the presence of a strong dissent may lead in the long term to a change of view on the court. It is important to recall that the traditional argument did not go unchallenged in *R. v. Seaboyer* and that the dissent may, as Sheehy suggests, eventually become the majority view.[75]

Second, in relation to the argument that education is the most effective factor in judicial reform, the need for such education, while instrumental in challenging gendered assumptions in the courts, does not mean that the composition of the courts is unimportant. While it may be that a court consisting solely of men adopting a 'positionality' approach could free themselves of male predispositions, such a situation is paradoxical, to say the least. It is unlikely that the unconscious assumptions in current legal reasoning and in the evaluation of evidence will be corrected unless there is a significant proportion of women judges on the courts. Male judges, in general, do not have the background experience necessary to recognise the male-centredness of law in its subtle and not so subtle forms.[76]

This intuitive argument about composition is supported by empirical investigations. While the very small number of women judges in Australia would render quantitative surveys virtually meaningless, the number of women judges in the United States is now sufficiently large to warrant statistical research. This research is still at an early stage. Nevertheless, a number of studies suggest that in cases clearly involving gender issues, women are, overall, more likely than men to decide in favour of other women.[77] Elaine Martin, who has been analysing the

[72] *R v. Seaboyer; R v. Gayme* (1991) 83 D.L.R. (4th) 193, 252.

[73] Sheehy, *op. cit.* n.71, 468 and Smart, *op. cit.* n.27.

[74] As in the case of marital rape. See *R. v. L.* (1991) 174 C.L.R. 379.

[75] Sheehy, *op. cit.* n.71, 455. It is noteworthy that the dissent in *Seaboyer* was written by a woman judge, L'Heureux-Dubé J. Her presence on the court 'made a difference'.

[76] See generally Elaine Martin's research on the different domestic positions of male and female judges, which points to quite different background experiences: Martin, E., 'Men and Women on the Bench: Vive La Difference?' (1990) 73 *Judicature* 204.

[77] Gryski, G.S., Main, G.C., and Dixon, W.J., 'Models of State High Court Decision-making in Sex Discrimination Cases' (1986) 48 *Journal of Politics* 143; Allen, D.W. and Wall, D.E., 'The

behaviour of women judges since 1981, indicates that women judges committed to a feminist perspective[78] were most likely to decide in favour of women where gender issues arose. 'Non-feminist' men were least likely to do so, with feminist men and non-feminist women in the middle.[79]

These studies are problematic in that we do not know whether a decision in favour of a woman was 'better' in any particular case, nor do we know how it was reached. However, they do suggest that decisions on gender issues *are* influenced by the gender of the judge, although a judge's general philosophical approach is also relevant. Moreover, whether progressive or conservative, women on the bench are more likely to make a pro-woman decision than their male counterparts having the same intellectual outlook. Accordingly, whether a government chooses to appoint a conservative or reformist judge, or someone in between, the selection of a woman rather than a man may generally result in decisions more favourable to other women on gender issues.

A further point indicating that the appointment of women judges is significant is the impact they may have on law reform from outside the courtroom. In the United States, women judges have played the key role in the gender bias task forces, as Judge Billings of the National Association of Women Judges comments:

> In almost every instance, in every state where a task force has been started, either a woman has chaired the task forces or has been the person behind the scenes that has persuaded the chief justice to create the task forces.[80]

If the claim that judicial decision-making is gendered is accepted, and it is also accepted that the current male-centred methods of legal reasoning should be reformed,[81] then ensuring that women are appointed to the courts is one means of implementing that reform. Ideally, such women would be informed by feminist analyses such as that of Bartlett, but, even if they are not, they may make a significant difference.

Before leaving this discussion, one further matter must be addressed. The analysis here has focused on gender issues and it may be claimed that this is too limited. Issues of judicial marginalisation of minority ethnicities or sexualities, for example, also merit consideration. The short answer to this objection is to agree. However, the selection of women is by no means inconsistent with the appointment of judges from other groups who have been disregarded in the past. Many women are, of course, part of such groups. Further, there is no reason to suggest that women judges would be any less sensitive to these groups than men. Indeed, a woman judge employing feminist reasoning such as Bartlett's may be more receptive to their perspectives.

Behaviour of Women State Supreme Court Justices: Are They Tokens or Outsiders?' (1987) 12 *The Justice System Journal* 232; Martin, *supra* n.76. Decisions on economic and criminal matters seem to depend on the judges' progressive or conservative values rather than on gender, with women adopting exceptionally strong positions either way: Allen and Wall, *supra*.

78 A person's commitment to a broadly feminist position was assessed by means of hypotheticals concerning maternity leave, violence in the home, abortion, property settlements and sexual harassment: 'Making a Difference: Women on the Bench' (panel discussion) (1991) 12 *Women's Rights Law Reporter* 255, 262.

79 *Ibid.* 259-62.

80 *Ibid.* 264.

81 The current gender bias inquiries in Australia certainly represent widespread recognition of problems in present modes of judicial reasoning.

To summarise the discussion so far, there are two categories of arguments in favour of appointing women to the judiciary, one focussing on the public perception of the judiciary, and the other on substantive law-making. One aspect of the public perception approach is that the composition of the judiciary, as an arm of government, should be seen to reflect the diversity of our society. In this context, this means that the court composition should reflect gender differences. A second aspect of the public perception approach is that the normative image of a judge should be female as well as male.

On the other hand, the focus on substantive law suggests that the presence of women judges may allow a 'different voice' to be heard in the courts. However, this voice may achieve little if it does not speak with perspectives on legal method and legal knowledge that eschew the current male bias. Such perspectives may be developed by both women and men. However, the elimination of gender bias in the courts is more likely to be advanced, in general, by the appointment of women judges.

There is, therefore, a plausible case for ensuring that there are women on the courts. The remainder of this article is concerned with the relative absence of women on the courts at present, reasons for this absence and arguments for and against various methods of improving appointment practices.

III. *WHY ARE SO FEW WOMEN APPOINTED NOW?*

A. *THE JUDICIAL APPOINTMENT SYSTEM*

Why have so few women judges been appointed to the benches of our courts? The starting point for investigating this issue is a consideration of the procedures for judicial appointments. The focus here will be on the federal process. The appointment process at the State level is similar.[82] At the federal level, judicial appointments are made by the Governor-General acting on the advice of the Federal Executive Council.[83] The legislation relating to judicial appointments offers little guidance on the requisite qualifications. Persons are eligible for judicial office if their age is below a specified maximum and they have practiced as a lawyer for a minimum number of years.[84] A great many lawyers, including women, satisfy these requirements.[85] However, because of its generality, the

[82] See generally, Winterton, G., 'Appointment of Federal Judges in Australia' (1987) 16 M.U.L.R. 185.

[83] Commonwealth Constitution sub-section 72(i); Family Law Act 1975 (Cth) sub-section 22(1); Federal Court of Australia Act 1976 (Cth) sub-section 6(1). The Commonwealth Attorney-General is required to consult the State Attorneys-General in filling a vacancy on the High Court: High Court of Australia Act 1979 (Cth) s.6.

[84] The minimum number of years is currently five in federal jurisdictions: High Court of Australia Act 1979 (Cth) s.7; Family Law Act 1975 (Cth) sub-section 22(2); Federal Court of Australia Act 1976 (Cth) sub-section 6(2); The maximum age is seventy years: Commonwealth Constitution s.72. Paragraph 22(2)(b) of the Family Law Act 1975 (Cth) differs from the other relevant legislation in specifically requiring that a potential appointee be: 'by reason of training, experience and personality, . . . a suitable person to deal with matters of family law.'

[85] *E.g.*, in 1989, there were 875 women solicitors in Victoria with at least five years experience in practice (16 percent of persons at that level) and thus eligible to be appointed a federal judge: Ewing, J., Dennerstein, L., Bartlett, C., and Hopper, J., (Law Institute of Victoria) *Career Patterns of Law Graduates* (1990), 4, Table 1.2. This study was undertaken by the Law Institute and by the Key Centre for Women's Health in Society. There appear to be well over 100 women at the Bar who were admitted to practice over five years ago (11 percent of such persons), although it is not clear what

legislation provides little assistance in ascertaining which persons are considered suitable for selection.

In the absence of detailed legislative requirements, the Executive has a wide discretion to determine which qualities are desirable for judicial office. The minister responsible for judicial appointments, the Attorney-General, recommends a particular person to Cabinet.[86] The criteria used by the Attorney-General in making his or her decision are not set out in any regulations or detailed policy statements.[87] The selection of judges principally involves informal consultations with the Chief Justice of the Court concerned, senior lawyers and government officials.[88] The federal Attorney-General's Department proposes several names of eminent legal persons to her or him.[89] Often, many of these names are proposed by professional bodies such as the Bar Councils. The 'peers' of the proposed appointee may be consulted. No special weight is given to candidates who are senior counsel — junior barristers and solicitors, for example, are also eligible if they have the appropriate qualifications. The most important qualification is usually experience in the relevant jurisdiction. Other considerations are academic achievements, professional standing, and good character (that is, the person must not have interests of a financial or other nature which could cause embarrassment to the court or to the government). In the case of the Family Court, preference is given to persons who are sympathetic and approachable.

The federal Attorney-General follows a policy of 'equal opportunity', which means in this context that gender is not considered in an appointment, although preference may be given to a woman if all other considerations are evenly balanced. When a person is chosen by the Attorney-General, his or her name is put before Cabinet for approval and then referred to the Governor-General, who makes the appointment.[90] The current appointment procedure is considered to be satisfactory and there is no intention to establish a more formal process. It is believed that codification would lead to disputes over who should be consulted and over whether any list of qualifications only set minimum guidelines or was exhaustive.[91]

Taken at face value, these criteria do not appear to prejudice women. Appointments seem to be made on the basis of a candidate's 'merits'. Nevertheless, the criteria lead in almost all cases to the appointment of men. One possible explanation is that since, until recently, comparatively few women have practiced law,[92]

proportion of these have practised continuously as either a barrister or a solicitor: 1992 Law Institute of Victoria Diary.

86 Winterton, *op. cit.* n.82, 184-8.

87 *Ibid.* 186-7. Winterton refers to Chappell, D., 'Judicial Responsibility: A Review of the Selection Process for Australian Judges' (1982) *Australian National Report for the Eleventh International Congress of Comparative Law*, 6. In 1981, Professor Chappell conducted interviews with former Attorneys-General in all jurisdictions except Western Australia and Victoria.

88 *Ibid.*

89 This and the following information on the selection of federal judges was given to the writer by Keith Holland, Senior Adviser to the then Federal Attorney-General, Michael Duffy. See also Winterton, *supra* n.82.

90 Information from Mr Keith Holland, see *supra* n.89.

91 *Ibid.*

92 In 1981, only 11.4 percent of Australian legal professionals (judges, magistrates, barristers, solicitors and legal officers) were women. By 1991, 25.1 percent of full-time lawyers and 54.4 percent

there have not been enough women in the 'pool' of senior lawyers to enable a large number of appointments to be made. If this 'time lag' alone is the principle reason for the lack of women judges, we may expect a gradual improvement in future. The increasing presence of women in the profession should eventually be reflected in many more women appointees.

Although such an explanation may account for the absence of women in the past, it is unlikely that the increase in women lawyers will be accompanied, over time, with an equivalent rise in women judges. This is because women are disproportionately affected by social and economic factors preventing them from entering the pool of senior lawyers from which judges are chosen. This point is developed in the next section.

B. *CAREER OBSTACLES TO WOMEN*

1. *The concept of merit*

The qualifications for judicial office are based on selecting the person with the greatest 'merit'. But is assessing merit a fully objective process? There are strong grounds for suggesting that it is not.[93] Clare Burton has analysed studies indicating that women fare badly where a job description requires an applicant to possess indeterminate qualifications such as 'personal qualities' or 'potential for further career development'.[94] She maintains that determining whether a person has such qualities is a highly subjective process:

> Men and women tend to rate men's work more highly than women's and men's performance on tasks more highly than women's identical performance. When the participants [in research interviews] are asked to explain the causes of successful performance of men and women, they attribute the male's performance to his ability, and the female's to the greater effort she put into the task.[95]

Closely related to the previous point is the adverse affect of stereotyping on women's careers.[96] Mary Radford has recently analysed the assumptions commonly made about professional women in the United States. These tend to prevent them from reaching senior positions.[97] She points out that practising law has traditionally been seen as 'man's work'.[98] Consequently, traits and leadership styles associated with men are considered appropriate for high status positions. These 'masculine' qualities include independence, detachment, objectivity, dominance, self-confidence and ambition.[99] On the other hand, women are perceived to be emotional, quiet, yielding and compassionate.[100] These stereotypes place women in a 'double bind':

of part-time lawyers were women: Anleu, S.R., 'Women in the Legal Profession' (1992) 66 *Law Institute Journal* 162, 164.

93 Burton, C., *Redefining Merit* (1988); Thornton, M., 'Affirmative Action, Merit and the Liberal State' (1985) 2 *Australian Journal of Law and Society* 28; Hunter, R., *Indirect Discrimination in the Workplace* (1992), Chapter 9, particularly 170-2.

94 Burton, *supra* n.93, 2.

95 *Ibid.* 3.

96 Radford, M.F., 'Sex Stereotyping and the Promotion of Women to Positions of Power' (1990) 41 *Hastings Law Journal* 471; Mossman, M.J., ''Invisible'' Constraints on Lawyering and Leadership: The Case of Women Lawyers' (1988) 20 *Ottawa Law Review* 567.

97 Radford, *supra* n.96.

98 *Ibid.* 491.

99 *Ibid.* 493-9.

100 *Ibid.*

> . . . if [a woman] is too 'feminine' she will not succeed because feminine traits typically are not correlated with success, and if she is too 'masculine' she will not succeed because she will be perceived as engaging in deviant behaviour unbecoming to her gender.[101]

A further social factor which adversely affects women is the empirically verifiable tendency for men (who usually occupy the senior positions in enterprises) to choose other men over similarly qualified women. This is because they often 'feel more comfortable' with a person similar to themselves or because they feel more confident that such a person will share their values.[102] Again, it is sometimes perceived that if a woman is appointed to a senior position, the men with whom she works will react negatively.[103] Mary Jane Mossman has confirmed that these processes affect women lawyers in both Canada and the United States.[104] She cites the following comment from the American Bar Association's Commission on Women in the Profession:

> Witnesses expressed their belief that women must still work harder and be better than men to be recognised and succeed.[105]

2. *Responsibilities associated with children*

Women are further disadvantaged in the legal profession because the birth and raising of children have a greater impact on them.[106] A project instituted by the Law Institute of Victoria shows the extent of this impact.[107] Data for the project was obtained by means of questionnaires sent to all female law graduates of the University of Melbourne.[108] An equal number of male graduates was randomly selected and matched by year of graduation so that gender differences in the graduate career paths could be measured.[109] Striking disparities were found between male and female graduates. Responsibility for child-care was a major factor distinguishing women's and men's careers. Many women had interrupted their careers for more than three months because of the birth of a child (35 percent) or other child care arrangements (24 percent). Only 1 percent of men had experienced similar interruptions.[110] Women were also more likely to discontinue legal practice because of family commitments.[111] Further, women were much more likely than men to defer their own careers for the sake of their partners'.[112] Clearly, women practitioners are disproportionately affected in comparison with their male colleagues by the birth and raising of children.

101 *Ibid.* 503.

102 Burton, *op. cit.* n.93, 5.

103 *Ibid.* 6; see also Thornton, *op. cit.* n.93, 31.

104 Mossman, *op. cit.* n.96; Jack, R. and Jack, D.C., 'Women Lawyers: Archetype and Alternatives' (1989) 57 *Fordham Law Review* 933.

105 Mossman, *op. cit.* n.96, 595, referring to *Summary of Hearings, American Bar Association Commission on Women in the Profession* (February 1988), 3-4. The Commission also noted the 'double bind' phenomenon.

106 See generally Hunter, *op. cit.* n.93, Chapter 8, particularly 159-60.

107 Bartlett *et al.*, *op. cit.* n.85.

108 *Ibid.* 7. Melbourne University was selected because a full age profile was required.

109 *Ibid.* 8. The total response to the questionnaire was 62 percent. Of these, 51 percent were women and 49 percent were men.

110 *Ibid.* 38, Table 2.28. At the time of the survey, 7 percent of women described themselves as 'temporarily absent' from the workforce as opposed to 1 percent of men: *ibid.* 14, Table 2.5.

111 65 percent of women compared to 32 percent of men: *ibid.* 34, Table 2.24. Not surprisingly, the provision of parental leave and child-care facilities was much more important to women (62 percent and 61 percent of women respectively) than to men (18 percent for both): *ibid.* 25, Table 2.17.

112 *Ibid.* 34, Table 2.24.

3. *The career paths of women lawyers*

What is the effect of the obstacles discussed here on the careers of women lawyers? It would appear that they tend to restrict women to the less prestigious positions. In the Law Institute study cited above,[113] women were much more likely to be working part-time.[114] Well over half the male graduates were partners in law firms or sole practitioners compared with less than one third of the women.[115] Men were more than twice as likely to go to the Bar as women.[116] In large firms,[117] men were three times more likely than women to become partners.[118] Women practitioners were more likely than men to work in the public, corporate, community or academic sectors.[119]

Almost half the women in the survey considered that their gender had been detrimental to their career whereas a similar proportion of men believed their gender had been beneficial to their career.[120] It is instructive to note the conclusion reached in the Law Institute study:

> despite [the] increase in the participation of women in the profession, the proportion of women who are partners in law firms . . . has remained constant [from 1980 to 1989] and their participation in other areas of practice reflects their career underachievement.[121]

The social and economic constraints discussed here[122] affect judicial selection in two ways. First, since these constraints may impede the careers of highly competent women lawyers, they may not enter the higher ranks of the profession from which judges are chosen.[123] Second, even where a woman is in the 'pool' of eligible candidates, presuppositions may work against her. The intangibility of the criteria for judicial selection increases the risk that these distorted assumptions will play a role. Given the informal consultation process with the candidate's 'peers' — who will overwhelmingly be men — it is plausible that appropriate women are often overlooked. On the current criteria, women lawyers are not in an equal position with men when selection is made for judicial office. In the

113 *Supra* n.85 and n.107 and accompanying text.

114 33 percent of women graduates worked less than 40 hours per week compared to 9 percent of male graduates: Bartlett *et al.*, *op. cit.* n.85, 17. They constituted 84 percent of part-time workers: *ibid.* 15.

115 *Ibid.* 13, Table 2.4. 58 percent of men held full practising certificates compared to 30 percent of women. 45 percent of women held employee certificates compared to 33 percent of men.

116 *Ibid.* 20, Table 2.12. 15 percent of male graduates compared to 6 percent of female graduates.

117 *Ibid.* Defined as 11 or more partners.

118 *Ibid.* 3 percent of women graduates and 9 percent of male graduates were partners in such firms. 21 percent of women graduates were employee solicitors compared to 16 percent of men.

119 *Ibid.* The corresponding percentages of women and men in these areas were: working as government legal officers: women 13 percent, men 6 percent; legal service workers: women 6 percent, men 2 percent; corporate lawyers: women 9 percent, men 6 percent; and academics: women 5 percent, men 1 percent.

120 *Ibid.* 37, Table 2.27. 'Factors affecting professional career by gender': 44 percent of women considered their gender detrimental, 46 percent of no effect and 10 percent beneficial. The percentages for men were: detrimental 1 percent, of no effect 53 percent and beneficial 46 percent.

121 *Ibid.* 56.

122 There are other factors affecting women as a whole. Graycar and Morgan, *op. cit.* n.26, 170 indicate that in 1988 96.9 percent of sole parent pensioners were women, strongly suggesting that women are by far the majority of sole parents generally. Further, 70 percent of all N.S.W. police work in that year involved domestic violence and 50 percent of marriage guidance problems related to domestic violence: *ibid.* 277. These statistics indicate the high level of violence against women in our society.

123 Slotnick, E.E., 'The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation' (1984) 67 *Judicature* 371.

absence of dramatic social and economic changes in working conditions, the constraints on women's careers are likely to persist, and women will continue to be underrepresented in the judiciary.

C. *AFFIRMATIVE ACTION AND ANTI-DISCRIMINATION LEGISLATION*

What can be done at a governmental level to overcome these impediments to women becoming judges? In this section, various forms of anti-discrimination and affirmative action measures are discussed to examine whether they are, or could be, effective in increasing the representation of women in the judiciary.

It is important to distinguish clearly between different forms of remedial action. For the purposes of this discussion, a distinction is drawn between 'anti-discrimination' and 'affirmative action'.[124] 'Anti-discrimination' refers here to measures which prohibit appointment procedures which directly or indirectly discriminate against women.[125] 'Affirmative action' refers to measures which actively promote the representation of women in an institution. These may include giving preference to women where other factors are equal, examining appointment procedures to determine why women are not appointed, and examining the pool from which appointments are made to determine whether its composition disadvantages women.[126]

1. *Anti-discrimination legislation*

Are judicial appointments non-discriminatory? The principle of non-discrimination is implemented at the federal level in the Sex Discrimination Act 1984 (Cth). The Act prohibits discrimination on the ground of sex in a number of different areas, including employment.

It is possible to argue that the Sex Discrimination Act applies to judicial appointments since it defines 'Commonwealth employees' as including a person who holds an 'administrative office'. This includes 'an office established by or an appointment made under a law of the Commonwealth'. Although legislative office is specifically excluded, judicial office is not.[127] However, this issue is not pursued here. The purpose of examining the Act is rather to examine whether *in principle* judicial appointments are non-discriminatory.

a. *Direct discrimination*

Anti-discrimination legislation is directed at two forms of unfair treatment. The first is treatment which is prima facie discriminatory. This is defined in the Sex Discrimination Act as follows:

[124] See generally Oppenheimer, D.B., 'Distinguishing Five Models of Affirmative Action' (1988) 4 *Berkeley Women's Law Journal* 42; see also Hunter, *op. cit.* n.93, 31.

[125] Oppenheimer, *op. cit.* n.124, 48-50. Oppenheimer distinguishes between 'active' and 'passive' non-discrimination. The former refers to decisions to stop or avoid discrimination whereas the latter refers to the resolution by judgment or settlement of discrimination claims. This distinction is not pursued here.

[126] These correspond to Oppenheimer's preference, self-examination and outreach models: *ibid.* 43-8.

[127] Sub-section 4(1).

> 5(1) For the purposes of this Act, a person (in this sub-section referred to as the 'discriminator') discriminates against another person (in this sub-section referred to as the 'aggrieved person') on the ground of the sex of the aggrieved person if, by reason of:
> (a) the sex of the aggrieved person;
> (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
> (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person,
> the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

Paragraphs (b) and (c) are directed at stereotyping.[128] Stereotyping occurs when, for example, an employer believes that a woman is unable to work in a certain position because women are 'unreliable'.[129]

The judicial selection policies do not appear to discriminate against women contrary to the terms of this Act. A person's sex is not relevant to the appointment criteria except to the extent that, in the federal policy at least, women may be treated *more favourably* if other considerations are equal. Moreover, there is no obvious stereotyping in the criteria. It may be that sexist attitudes play a part in the actual decision-making process. However, this would be nearly impossible to prove. Judicial selection is unlike the usual method of choosing employees. Persons are not invited to apply for a position. Rather, the appointee is only approached at the end of the process. Even if a woman were discounted because of her sex, she could not know this unless there was a departmental or Cabinet leak. Moreover, it would be extremely difficult for a person who was not approached to show that she or he had a superior entitlement.

b. *Indirect discrimination*

Sub-section 5(2) of the Sex Discrimination Act prohibits less obvious unfair treatment. It provides that sex discrimination occurs where:

> . . . the discriminator requires the aggrieved person to comply with a requirement or condition:
> (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
> (b) which is not reasonable having regard to the circumstances of the case; and
> (c) with which the aggrieved person does not or is not able to comply.

This conduct is commonly referred to as 'indirect discrimination'.[130] It occurs where a person offering employment imposes a requirement which on its face is neutral, but which disadvantages a particular sex and is not reasonably connected to the position. It would be very difficult to show that any of the judicial selection criteria constitute indirect discrimination. This is because the mechanism which determines whether indirect discrimination has occurred is ill-suited to analysing the selection process. There are two main problems.[131]

First, a woman alleging that an aspect of the selection policies was discrimina-

[128] See O'Donovan, K., and Szyszczak, E., *Equality and Sex Discrimination Law* (1988) 15-7; Graycar and Morgan, *op. cit.* n.26, 94-108.

[129] O'Donovan and Szyszczak, *supra* n.128, 15, referring to *Horsey v. Dyfed County Council* [1982] I.C.R. 755, 760. This is a decision of the English Employment Appeals Tribunal.

[130] See Hunter, *op. cit.* n.93, 4-8, and, on this provision specifically, 38 and Part 4; see also O'Donovan and Szyszczak, *op. cit.* n.128, 96-120.

[131] It is assumed that the criteria are 'requirements or conditions' for the purposes of the Act as these terms have been interpreted broadly: see *Secretary, Department of Foreign Affairs and Trade v. Styles* (1989) 23 F.C.R. 251, 257-8 (*per* Bowen C.J. and Gummow J.), 271 (*per* Pincus J.). See also Hunter, *op. cit.* n.93, Chapter 12.

tory would have to show that 'a substantially higher proportion' of men comply or are able to comply with the requirement. This phrase has been interpreted by the High Court in *Australian Iron & Steel Pty Ltd v. Banovic*.[132] In that case, the Court considered an identical provision in the Anti-Discrimination Act 1977 (N.S.W.),[133] as it applied to sex discrimination. The Court held that the provision requires a comparison to be made between (i) men complying with the alleged discriminatory requirement as a proportion of other men and (ii) complying women as a proportion of other women.[134] In order to ascertain the proportions of complying men and women, it is necessary to establish the appropriate 'base groups' of men and women. These are to be determined so as to reveal whether sex is a significant factor in compliance.[135]

The most appropriate base groups for the purposes of judicial selection appear to be those persons who are eligible under the relevant legislation. These groups have the advantage of being ascertainable by reference to a clear standard and are neither too broad nor too narrow. It is, however, virtually impossible to calculate the proportion of these persons who comply with the further qualifications for judicial appointments that are determined in the Executive's discretion. The qualifications do not appear in a definitive form.[136] Further, they would seem to be highly subjective and therefore not susceptible to precise assessment. It is very much a matter of impression whether a person has 'experience' or 'professional standing'.[137]

A second difficulty lies in showing that any of the policy qualifications are not 'reasonable having regard to the circumstances of the case'. This requires an aggrieved person to prove that the discriminatory effects of the judicial selection-policy objectively outweigh the advantages of the qualifications.[138] It would be difficult to establish that the appointment criteria (so far as they can be ascertained) are unreasonable, because they are so vague and general. 'Experience' and 'good professional standing' are requirements of most senior positions, and as such they are virtually unobjectionable.

c. *Inadequacy of the anti-discrimination principle*

Whether or not judicial selection is covered by anti-discrimination legislation, it would appear that there is no obvious conflict between appointment policies and the anti-discrimination principle. As Rosemary Hunter points out, the principle is essentially negative — preventing unfair treatment — it does not overcome the systemic disadvantages which women encounter in their legal careers.[139] This

132 (1989) 168 C.L.R. 165.

133 Paragraph 24(3)(a).

134 (1989) 168 C.L.R. 165, 178 (*per* Deane and Gaudron JJ.), 186-7 (*per* Dawson J.) and 198-202 (*per* McHugh J., with whom Brennan J. agreed).

135 *Ibid.* 178-9 (*per* Deane and Gaudron JJ.), 187 (*per* Dawson J.), and 205 (*per* McHugh J., with whom Brennan J. agreed).

136 *Supra* III.A.

137 *Supra* III.B.1.

138 See *Styles v. Secretary, Department of Foreign Affairs and Trade* (1988) 84 A.L.R. 408, 429 (*per* Wilcox J.); affirmed by Full Federal Court majority on appeal: (1989) 23 F.C.R. 251, 263-4, and by High Court majority in *Waters & Ors v. Public Transport Corporation* (1991) 173 C.L.R. 349; see generally Hunter, *op. cit.* n.93, Chapter 14.

139 *Ibid.* 40.

structural form of discrimination means that women are disadvantaged before they reach the 'pool' from which selections are made and hence before the anti-discrimination principle takes effect. In order to counteract the systemic bias against women, one must look beyond anti-discrimination and consider the applicability of the affirmative action principle.

2. *Affirmative action*

In addition to the anti-discrimination model just discussed, David Oppenheimer has identified four other models of redressing structural inequalities for women and minorities which are aspects of affirmative action.[140] These are now considered in turn.

a. *The quota model*

In this form of affirmative action, a number of places are set aside for persons from a disadvantaged group regardless of other circumstances.[141] This model could be implemented in judicial selection by setting aside a certain number of places for women. However, it is submitted that this is inappropriate. As Oppenheimer points out, imposing quotas is a simplistic solution.[142] It does not require an examination of the underlying causes of the low number of women and is therefore likely to lead to the perpetuation of incorrect assumptions implicit in the selection process. Further, a quota system is relatively easy to attack on the basis that merits are being ignored. Thus, it may weaken public support for changes to the appointment process. Again, it is unclear how the quota should be set. If it is less than, for example, 50 percent of all new appointments, it appears arbitrary and tokenistic. However, setting too high a proportion would surely arouse powerful opposition which may defeat any reforms. Consequently, the quota model should be followed only if the other models prove ineffective.

b. *The preference model*

This model would require a woman's gender to be considered more favourably than a man's in the appointment process. Unlike the quota model, though, it does not treat gender as a decisive quality in relation to specified places. It is one of a number of aspects of a person to be assessed in the appointment process.[143] Consequently, it is much less arbitrary than the quota system.

Nevertheless, the preferential model has substantial limitations. Like the quota model, preferential treatment may, if implemented uncritically, be a superficial solution. It does not require an analysis of structural obstacles to women. This is particularly so if it is applied simply to distinguish two candidates who, on current

140 Oppenheimer, *op. cit.* n.124, 43-8.
141 *Ibid.* 43-5.
142 *Ibid.* 58-9.
143 This form of affirmative action was applied during the Carter administration: Martin, E., 'Gender and Judicial Selection: a Comparison of the Reagan and Carter Administrations' (1987) 71 *Judicature* 136; Gottschall, J., 'Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals' (1983) 67 *Judicature* 165.

procedures, are otherwise equally eligible. Many women will have been eliminated before the preference can be exercised. The potential ineffectiveness of the preference model is illustrated by the fact that it is used in the present appointment process.[144] It has not greatly expanded the number of women judges.

c. *The self-examination model*

The self-examination model requires an appointing agency to examine whether the proportion of women eligible for positions within an institution is reflected in the number of women actually appointed. If there is a disparity, the appointing agency is required to examine its own processes to determine why women are not being appointed and to set goals to remedy the situation.[145]

This is the model of affirmative action which is most closely reflected in Australian legislation.[146] The legislation does not appear to apply to judicial appointments. Nonetheless, the scheme established by the Affirmative Action (Equal Employment Opportunity For Women) Act 1986 (Cth) ('the Affirmative Action Act') will be discussed here because it indicates the standard which prevails in Australia.[147] The Affirmative Action Act requires employers to implement an affirmative action program consisting of eight elements.[148] Such a program includes consultation with affected persons, particularly women, and the collection of relevant statistical information.[149] On the basis of this information an employer must take action:

> (f) to consider policies, and examine practices . . . in relation to employment matters to identify: . . . (ii) any patterns (whether ascertained statistically or otherwise) of lack of equality of opportunity in respect of women;
> (g) to set objectives and make forward estimates in the program; and
> (h) to monitor and evaluate the implementation of the program and to assess the achievement of those objectives and forward estimates.'[150]

'Objectives' are defined as qualitative measures or aims designed to achieve equal opportunity, whereas 'forward measures' are quantitative.[151]

What implications do these procedures have for the judicial selection process? First, they suggest that an affirmative action program should be devised by the relevant authority — the Attorney-General. By means of public consultation and statistical information, the present system of judicial appointments should be analysed in order to assess why so few women become judges. It would seem from the discussion above that the small number of women is at least partly explained by the career obstacles which specifically disadvantage women. The second step is to consider what policy changes could be made to facilitate the

144 *Supra* III.A.
145 Oppenheimer, *op. cit.* n.124, 46-8.
146 Hunter, *op. cit.* n.93. The most significant statutes at the federal level are the Affirmative Action (Equal Employment Opportunity For Women) Act 1986 (Cth), the Equal Employment Opportunity (Commonwealth Authorities) Act 1987 (Cth), and the Public Service Act 1922 (Cth): *ibid.* Chapter 4.
147 The Act chiefly applies to firms having at least 100 employees: ss 3 and 5. For a discussion of how affirmative action applies to legal firms see Young, M., 'Affirmative Action in the Legal Profession' (1992) 66 *Law Institute Journal* 1094.
148 Ss 6 and 8.
149 Paragraphs 8(1)(d) and (e).
150 Sub-section 8(1).
151 Sub-section 8(3).

appointment of women. This would involve two aspects. First, the specific need for women judges on the courts would be identified. This would involve consideration of the arguments advanced in the first part of this article. Second, the difficulty women have in meeting the current requirements would be addressed. One important reform would be to acknowledge that the weight given to seniority or 'experience' and 'high professional standing' prejudices the prospects of women. Another would be to revise the 'peer' consultation procedures to check the tendency for men to recommend other men.[152]

Forward estimates and clear objectives are also important. This does not necessarily mean that pre-determined numbers are set, as with the quota model, nor that 'preference' is given to women. It may instead mean the setting of notional targets, to be achieved within a specific time-frame (for example a set proportion of women judges over a set number of years). These targets, while flexible, provide a reference point for evaluating the success of reforms. Thus, if reforms were implemented, but there was no increase in the number of women appointees, the Attorney-General would re-examine their effectiveness.

d. *The outreach model*

The outreach model is concerned with enabling more women to enter the 'pool' from which appointments are made. This recognises that women may have been excluded in the past because of the way the pool is defined.[153] The 'pool' largely consists of barristers and (sometimes) senior solicitors. These groups have a lower proportion of women than other sectors of the profession. Extending judicial appointments to lawyers in those other sectors could well increase the proportion of women appointed. As this issue is tied to a wider debate about the suitability of non-advocates for appointment, it is not pursued in detail here.[154] It will simply be noted that the outreach model supports the making of appointments from groups with a higher proportion of women lawyers, such as community, public sector and corporate lawyers as well as academics.

3. *Arguments against affirmative action*

It is suggested that the self-examination and outreach models of affirmative action provide effective measures for revising appointment processes. What objections are there to implementing these measures?

a. *Loss of competency*

Some fear that a move from the current policy will reduce the overall quality of judging in Australia. Sir Harry Gibbs opposes a departure from appointment on the 'merits' as currently defined:

> The work of the judiciary is too important to entrust it to those of doubtful competence, and a bad judge may do irreparable damage, since there are some judicial errors which even the most elaborate system of appeals cannot remedy.[155]

[152] *Supra* n.102 and accompanying text.
[153] Oppenheimer, *op. cit.* n.124, 48.
[154] It has been argued that the variety of legal skills in a court may be increased if the court includes a wider range of lawyers: Winterton, *op. cit.* n.82, 190-1; Pannick, *op. cit.* n.8, 50-6.

With respect, while it is essential that our judges are competent people, an alteration of the existing policy does not mean that future judges would be less competent than those currently on the bench. First, as we have seen,[156] the present 'merit' test does not ensure an objective assessment of a person's ability. Affirmative action does not remove merit as such, it simply requires inequitable assumptions in the concept of merit to be removed.[157] Second, competence is a composite concept in judicial selection. There is no perfect lawyer. It is necessary to balance a person's weakness in one area — perhaps in advocacy skills — with expertise in other areas, such the ability to analyse a problem within a different legal framework. If a candidate has a different but relevant background and approach, this may outweigh a lack of trial experience.[158] Third, it has been shown that there are hundreds of women lawyers who are eligible to hold judicial office under the existing legislation.[159] It is implausible to suggest that very few of these women are competent enough to be appointed judges.[160]

It does not follow, then, that affirmative action will lead to a reduction in the quality of decision-making.

b. *Loss of respect for the appointee*

Another line of argument against affirmative action is that it may lead to the appointee being disrespected. Some may believe that a woman has been appointed 'because she is a woman', not because of her particular skills. Geoffrey Walker suggests that the selection of solicitors and academics, including women, to the Family Court has led to a loss of public confidence so that 'it does not appear to be generally perceived as a court of law at all'.[161] As with the competency argument, this reasoning is based on a misunderstanding of the self-examination and outreach models of affirmative action.[162] These models are concerned with eliminating unfair assumptions from selection procedures, not appointing tokens. Moreover, while the Family Court may have a higher proportion of non-traditional appointees, this hardly accounts for attacks on it. The dissatisfaction of litigants with the Court is much more likely to derive from the highly emotional nature of its jurisdiction. In any case, at least as much public criticism has, in recent times, been directed at courts with a traditional composition.[163]

155 Gibbs, *op. cit.* n.14, 10. See also Winterton, *op. cit.* n.82, 192.

156 *Supra* III.B.1.

157 Affirmative Action (Equal Employment Opportunity For Women) Act 1986 (Cth) sub-s.3(4); see also Hunter, *op. cit.* n.93, 85.

158 On the competency thesis generally, see Greenawalt, *op. cit.* n.25, 68; Sadurski, W., 'The Morality of Preferential Treatment' (1984) 14 M.U.L.R. 572, 580-2; Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (1980) 72-8.

159 *Supra* n. 85 and accompanying text.

160 Indeed, female law graduates are slightly more likely to have higher academic qualifications than men. See Bartlett *et al.*, *op. cit.* n.85, 12. 15 percent of women and 14 percent of men had a post-graduate legal qualification, 18 percent of women and 15 percent of men had a non-legal post-graduate qualification.

161 Walker, *op. cit.* n.14, 269.

162 *Cf.* Sadurski, *op. cit.* n.158, 576-7; Greenawalt, *op. cit.* n.25, 65.

163 *Supra* n.12 and accompanying text.

c. *Discrimination against men*

If the Attorney-General alters current selection procedures so that more women will be appointed to the bench, will that not constitute discrimination against men? The Sex Discrimination Act exempts actions which may prima facie appear discriminatory but which in fact aim to achieve equal opportunity.[164] Policy changes as part of an affirmative action program appear to fall within this exemption. It does not, however, follow that such a policy change would be fair. A male lawyer may claim that alteration of the current policy in favour of women conflicts with the principle of equal opportunity. This principle implies that persons with similar skills and ability should have an equal opportunity to obtain a position.[165] In the present context, male lawyers should have the same opportunity to become judges as women. A male lawyer may allege that this principle would be ignored in the proposed policy because his experience and skills would be undervalued in comparison with those of women. Further, he may acknowledge that women suffer professional obstacles in their careers, but maintain that assessment of what an individual person's status would be in the absence of unfair career impediments are liable to become highly speculative.[166] To prevent this, it would be fairer not to take gender into account at all.

These arguments are predicated on a superficial application of the equal opportunity principle which stresses formal, rather than substantive equality. They assume either that the status quo is fair or that it cannot be made fairer. These assumptions are flawed. First, the refusal to examine clear evidence — empirical, not speculative — of socio-economic disadvantage among eligible persons in a selection process is more likely to defeat than to promote genuine equality of opportunity.[167] Second, the emphasis on formal equality precludes a re-examination of the premises underlying the appointment process, such as that the current process reasonably ensures that the most appropriate person is appointed or that the 'merits' of the candidates are assessed in a suitable manner. It has been seen that both these premises are questionable and may be founded on a male standard.[168]

The self-examination and outreach forms of affirmative action aim at reviewing the assumptions underlying the judicial selection process. These assumptions demonstrably favour men because of social and economic gender inequalities. These forms of affirmative action do not entail arbitrarily favouring women over men or ignoring the fact that certain women may be more or less disadvantaged than others by career obstacles.[169] Rather, the redefining of merit, as suggested

164 Sex Discrimination Act 1984 (Cth) s.33.

165 An extensive discussion of the ethical status of affirmative action is not possible here. See Sadurski, *op. cit.* n.158; Greenawalt, *op. cit.* n.25; Fullinwider, *op. cit.* n.158; Cohen, M., Nagel, T., and Scanlon, T. (eds), *Equality and Preferential Treatment* (1977); Matsuda, M., 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harvard Civil Rights — Civil Liberties Law Review* 323.

166 See Fullinwider, *op. cit.* n.158, 102-17; Sher, G., 'Justifying Reverse Discrimination in Employment' in Cohen, Nagel and Scanlon, *op.cit.* n.165, 55-60.

167 This is argued in greater detail in Sadurski, *op. cit.* n.158, 582-7.

168 *Supra* III.B.1. See also n.48 and accompanying text.

169 These problems are overcome by making selection procedures flexible, taking into account variations in the degree to which particular women have encountered set-backs: Sadurski, *op. cit.* n.158, 589-92; see also Matsuda *op. cit.* n.165, 374-8.

above, recognises that a wider range of skills and experiences is needed in judicial selection. Consequently, if a man is not chosen for a judicial position, this is not because his abilities are being unfairly disregarded. Rather, he is not 'the best person for the job'.[170] The self-examination and outreach models of affirmative action enhance rather than diminish equality of opportunity.

IV. *CONCLUSION*

This article has explored a number of arguments in favour of increasing the presence of women in the judiciary. The fair reflection principle, the normative effect of women judges, the potential for a different judicial voice and, in particular, the need for the systematic elimination of gendered reasoning all indicate that the present composition of the courts is, in terms of gender, inappropriate. The present selection procedures, in so far as they can be ascertained, have not led to many women judges being appointed, despite the increase in women lawyers, nor are they likely to do so. This is not because the procedures are discriminatory as such. It is rather that they overlook potential flaws in the current conception of appointment on the merits and because they fail to take into account the structural impediments experienced by women in the legal profession. These deficiencies may be addressed by applying the principles reflected in Australian affirmative action legislation. The self-examination and outreach approaches are especially suitable for revising the present appointment system. Such a revision is likely to lead not to a less competent judiciary but to one with a wider range of experiences and skills. If explained clearly, the revision should not create disrespect for the appointee. Nor will it discriminate against men, since it requires no more than the abandonment of inequitable assumptions that prejudice women.

In this article, it has been possible to suggest only the general nature of the changes that should be made to the present appointment system. Practical reform of the system is likely to be a sensitive and controversial issue. It will require extensive analysis and consultation. Nevertheless, the issue is a significant one and should not be dismissed as too difficult. The recent establishment of the inquiries into gender bias provide an opportunity to investigate the issue in detail and in the context of wider efforts to overcome the male-centred vision of law. The appointment of women judges alone will not eliminate gender bias, but it is part of the process.

[170] Dworkin, *Taking Rights Seriously* (1977) 232; Sadurski, *op. cit.* n.158, 595-600; Fullinwider, *op. cit.* n.158, 233-4.