

LOOKING THROUGH THE GLASS: GENDER INEQUALITY AT THE SENIOR LEVELS OF NEW ZEALAND'S LEGAL PROFESSION

By

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Tonight I have been asked to address the question as to whether there is such a thing as a woman-lawyer or just women who are lawyers? The obvious question behind the topic we have been given is: are women lawyers different from male lawyers? The obvious and immediate answer would appear to be in the affirmative, at least if you look at the participation of women at the higher echelons of the legal professions. As at the latest census by the Human Rights Commission in 2008² only some 17 odd percent of partners in large law firms were women.³ Of the 90 practising Queens or Senior Counsel only 11 were women which amounted to a figure of 12 per cent.⁴

The percentage of women judges in New Zealand was a bit better with a figure falling slightly below 26%.⁵ However, only 28.4 percent of judges appointed over the last five years have been women.⁶ Barrister Jane Glover has stated that:⁷

¹ Judge of the Court of Appeal of New Zealand. Talk to the annual 'Chapman Tripp – Women in Law event' organised by the Victoria University Law Students' Society on 16 September 2010. My thanks to Court of Appeal intern Ricarda Kessebohm and Court of Appeal clerk Natasha Caldwell for their assistance with this speech. Any errors remain my own and this speech does not necessarily reflect the views of the Court of Appeal.

² There is a 2010 census due to be published in November 2010. The New Zealand Human Rights Commission in *Human Rights and Women: Draft for Discussion* (2010) at 11 has stated that early indications for the 2010 census are that improvement in many areas is likely to be minimal and has in some cases regressed.

³ New Zealand Human Rights Commission *New Zealand Census of Women's Participation* (2008) at 71. It must, however, be noted that these levels of participation are higher than the 8.65 per cent of women who hold board directorships of companies listed on the New Zealand Stock Exchange: *New Zealand Census of Women's Participation* at 17; Jane Glover "Women on the bench" *New Zealand Lawyer* (16 April 2010) <<http://www.nzlawyermagazine.co.nz>>.

⁴ *New Zealand Census of Women's Participation*, above n 3, at 70. While the figure of 12.2 per cent women Queens or Senior Counsel is low, it is interesting to note that this percentage is higher than that of many Australian States. As outlined by Justice Margaret McMurdo AC in "State of the Profession" (paper prepared for the Australian Women Lawyers Third National Conference, Brisbane, 7 August 2010) at 3 the current percentages of women Queens and Senior Counsel in the Australian States is as follows: 2.3 per cent in Queensland; 6.8 per cent in New South Wales; 9.5 per cent in Victoria; 11.1 per cent in Western Australia; 5.3 per cent in Australian Capital Territory; and 0.0 per cent in Tasmania. The two states with higher percentages than that of New Zealand are 14.7 per cent in South Australia and 16.7 per cent in the Northern Territory.

⁵ As at 28 September 2009, noted in Glover, above n 3. As noted in Susan Glazebrook "Gender Equality in the Workforce: A Work in Progress" (speech given to the Annual Professional Women's dinner organised by the

Assuming most judicial appointments are made when applicants have around 15-20 years' experience, judicial appointments made over the last five years should comprise roughly equal numbers of men and women. This has not proved to be the case.

So why do we have such low numbers in the higher echelons of the profession? Is it that law in itself is an inherently unattractive profession for women? Well it appears not if you look at the percentage of women at our law schools. Since the 1990s there have been roughly equal numbers of women and men at our law schools⁸ and the latest report released by the Equal Employment Opportunities Trust stated that 62% of law graduates in New Zealand are women.⁹ And I must say that, if the candidates that we see during the Court's hiring processes are any guide, women seem to do at least as well, if not better, academically than the men.

It is not just common law countries like New Zealand that have apparent gender inequalities within the upper levels of the profession. Interestingly, there are issues with women's advancement in the judiciary even in civil law countries where judging is a career path entered into straight after graduation, based on academic excellence.¹⁰ Gender imbalances in

Canterbury Women's Legal Association, Christchurch, 22 October 2009) at 7 the percentages in October 2009 were as follows: Family Court 37.78 per cent; District Court 27.41 per cent; Maori Land Court 37.50 per cent; Associate Judges of the High Court 14.3 per cent; High Court 25 per cent; Court of Appeal 22.22 per cent; and Supreme Court 20 per cent. As outlined by McMurdo, above n 4, at 6-7 the percentages of women judicial officers in Australia are as follows: 28.3 per cent in the Commonwealth; 26.3 per cent in the Northern Territory; 31.1 per cent in Queensland; 31.8 per cent in New South Wales; 36.4 per cent in Australian Capital Territory; 37.1 per cent in Victoria; 25.0 per cent in Tasmania; 26.0 per cent in South Australia; and 30.2 per cent in Western Australia.

⁶ Glover, above n 3, was provided with figures from the Ministry of Justice in September 2009, pursuant to a request made under the Official Information Act 1982, which stated that only 28.4 per cent of judges appointed over the last five years in New Zealand have been women.

⁷ Glover, *ibid.* Note in Gill Gatfield *Without Prejudice: Women in the Law* (Brookers, Wellington, 1996) it is noted that 1989 was the first year in New Zealand where the same number of women as men graduated in law. In 1976 the percentage of women law graduates was 19.6 per cent and in 1986 the percentage was 39.8 per cent.

⁸ Glover, *ibid.*

⁹ Equal Employment Opportunities Trust *Workplace Age and Gender: Trends and Implications* (2009) at 11. The position has changed markedly over the last fifty years. For example the Hon Margaret Wilson, Speaker of the House of Representatives, said when she commenced Law School in 1966, she was one of six female law students in a class of around two hundred (Inaugural Shirley Smith Lecture to the Women in Law Committee, Wellington District Law Society, 18 Sept 2008).

¹⁰ In Germany, judges are picked from the ranks of a "unitary jurist" (Einheitsjurist). All law graduates take the same university courses followed by state legal apprenticeship, totalling seven to eight years (down from ten years), and must pass two legal state examinations. Successful candidates who aspire to the judiciary must have top marks (among the top 15 per cent) in the state examinations and undergo a rigorous competition for the small number of available openings. Screening includes workshops and a six-month probationary period at the appeal court: Ulrike Schultz "The Status of Women Lawyers in Germany" in Ulrike Schultz and Gisela Shaw (eds) *Women in the World's Legal Professions* (Oxford: Hart Publishing, 2003) 271 at 279-81. See also David S Clark "Germany" in Herbert M Kritzer (ed) *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* (ABC-CLIO, California, 2002) 580 at 588. In France, judges and prosecutors attend a thirty-

the civil law judiciaries are well illustrated by the fact that in the Netherlands, France, Spain and Italy, women have the highest representation at the lowest levels of the judiciary, and every step on the career ladder takes women judges longer than their male counterparts. The door to senior judicial appointment remains shut to most women even in jurisdictions such as in Italy,¹¹ France and Spain where women now comprise over half of all judges or new appointments to the judiciary.¹²

Research by the European Social Affairs Commission has shown, for example, that 60 per cent of successful applicants to the Italian judiciary are women.¹³ However, despite this promising start, the figures for women in the higher echelons of the judiciary in Italy remain woeful – only 7.9 per cent of all senior judicial positions in Italy are held by women.¹⁴

Just as telling is research conducted in the Netherlands where two separate routes to the judiciary exist. The first route is knowledge based directly from University and the other is experience based where appointees have to have at least six years legal experience. The vast majority of those entering the judiciary via the experience based route are men and women's success in gaining appointment to the judiciary has primarily been through the knowledge based route. Again in the Netherlands women have the highest representation at the lowest levels of the judiciary and every step on the career ladder takes women judges longer than their male counterparts.¹⁵

Therefore, it is quite apparent that gender inequality in the senior levels of the profession is not a problem that is unique to New Zealand. So what explanation can we give for the poor percentages of women at the higher echelons of our profession?

month course followed by an examination at a school created in 1958 for their training: Anne Boigeol "Male Strategies in the Face of the Feminisation of a Profession: The Case of the French Judiciary" in Schultz and Shaw at 401.

¹¹ For a history of the Associazione Donne Magistrato Italiane (the Italian Association of Women Judges) see Graziana Campanato "Italian Association of Women Judges" in Mary-Ann Hedlen, Susan Glazebrook, Arline Pacht and Jill Wainwright (eds) *The IAWJ: Twenty Years of Judging for Equality* (2010) at 112–116. For a copy of the IAWJ history and further information on the International Association of Women Judges see <www.iawj.org>.

¹² Cheryl Thomas "Judicial Diversity In The United Kingdom And Other Jurisdictions" (2005) <http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Diversity.pdf>.

¹³ *Ibid*, at 67.

¹⁴ 86 of the 1129 "Executive" and "Semi-Executive" judicial positions in the Italian judiciary: M Civinini, Italian Higher Council for the Judiciary (Consiglio Superiore della Magistratura) and Referendary at the Italian Supreme Court.

¹⁵ L de Groot-van Leeuwen "The Equilibrium Elite: Composition and Position of the Dutch Judiciary" (1989) 25 *Netherlands Journal of Social Sciences* 141.

Well one possibility is that women go from Law School to careers other than law. That probably does happen, but it is not clear that there is a differential between men and women in this regard. It appears that there is an equal split between men and women in the lower levels of New Zealand's law firms.¹⁶

Another possibility is that women fall out of the legal profession in greater numbers than their male counterparts.¹⁷ This is not necessarily borne out by the statistics as, in 2010, 43% of practising lawyers were women.¹⁸ However, the phenomenon whereby after three to five years in private practice women lawyers in New Zealand leave private firms to move to a corporate or public-sector law job has been observed by those within New Zealand's legal profession.¹⁹

A common explanation for women not progressing in the profession that is often offered is that women do not progress due to family responsibilities. It is, however, necessary to emphasise that such a choice may not necessarily be freely made.²⁰ For instance, a United States study has found that a third of working mothers who left law firms and corporate organisations blamed workplace inflexibility as the main driver for their resignation, along with the poor quality of their work assignments.²¹

Such issues may in part be driven by unconscious stereotypes regarding working mothers that may be held by senior partners in law firms. For instance, research by the Project for Attorney Retention in the United States has found that partners often believe that women lawyers with children are less committed to their legal careers, so that they may be likely to interpret a woman's absence from the office as a sign that she is home with her children,

¹⁶ Gill South "Through the Glass Ceiling" *New Zealand Herald* (22 May 2010).

¹⁷ In South, *ibid*, it is noted that formal statistics surrounding the attrition rates of women in New Zealand's legal profession are notoriously hard to find. However, South notes that there appears to be agreement amongst members of the profession that substantial numbers of women choose to leave the profession every year. In the United States, research has been conducted with regard to the attrition rates of women in the legal profession. For instance, *Workplace Age and Gender: Trends and Implications*, above n 9, refers to research undertaken in the United States which states that the loss of 50 per cent of women from the profession in their first five years can be attributed to the billable-hour system and 100 hour working weeks.

¹⁸ Figures provided by the New Zealand Law Society.

¹⁹ Sarah Catherall "A rare breed of legal eagles" *The Dominion Post* (3 November 2007).

²⁰ Eli Ward "Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes and the Future of Women Lawyers at Large Law Firms" (2010) *Fordham L. Rev.* 2245 at 2255 argues that the free-choice explanation avoids any beneficial examination of the gender imbalance that exists in the legal profession. He argues that, even if it were assumed to be true, it must be asked why women lawyers would opt out in such disproportionate numbers.

²¹ Catherall, above n 19.

rather than with a client. Moreover, it was argued that the belief that a mother will often be distracted by childcare issues can lead to selective perception, a finding that was supported by research establishing that many women lawyers receive poor evaluations for the first time in their careers after returning from parental leave.²² Such attitudes have been reported to exist in New Zealand²³ and it is only recently that family friendly policies have been introduced into law firms.²⁴

However, differential family responsibilities cannot be the total explanation for the gender imbalance that currently exists at the senior levels of New Zealand's profession. It is apparent that a female lawyer may have to confront gender inequality in the workforce even at the earliest stages in her career. For instance, a study in 2005 by Statistics New Zealand found that five years out after completing their studies, male incomes were consistently higher than those of females across every field of study, including law.²⁵ The pay differential suggests that men were progressing more rapidly than women and differential family responsibilities cannot have had much influence on these figures, particularly as people tend to start their families later now.²⁶ This pay differential is not just a private sector

²² Research by the Project for Attorney Retention cited in Ellen Ostrow "When All Efforts Fail to Retain Them, Unintentional Biases May be at Work" (2008) www.law.com/jsp/nyli.com.

²³ For instance, in Paul Smith "Partners Under Pressure" *Management Magazine* (March 1995) at 46 it was reported that, in a survey examining the legal profession in New Zealand, men had described women's family commitments as a 'handicap'. It must also be noted that in Amy Mansfield "The Battle of the Hats" *New Zealand Lawyer* (4 April 2008) Ms X, a female partner at a large New Zealand law firm who did not want to be named, noted that the difficulties are compounded for solo parents. Ms X claimed that solo-parenting did not necessarily fit the profile of a profession that was largely dominated by the white middle-class and thus being a solo parent could prejudice one's progress through the profession.

²⁴ For instance, in 2006 the New Zealand law firm Chapman Tripp started the Women in Chapman Tripp project by commissioning a former partner to interview women lawyers on their career aspirations and steps the firm might take to further their advancement. Partner Brigid McArthur has stated that Chapman Tripp is improving parental leave and it is now acceptable for a partner to work part-time. In the same year, the Equal Employment Opportunities Trust in "Setting work-life priorities in demanding law firm" (2006) <<http://www.eeotrust.org.nz>> applauded the practice of law firm Meredith Connell in which a number of mothers work one to four days per week; partners can and do work part-time; many staff have remote access to the firm's computer network; and a number of older staff members work part-time.

²⁵ Statistics New Zealand "Male's Income 20 Percent Higher than Females' Five Years After Leaving Study" <<http://www.stats.govt.nz>>. It also must be noted that in the report prepared by Nancy M Carter and Christine Silva *The Promise of Future Leadership, A Research Program on Highly Talented Employees in the Pipeline* (2010), which presented findings from an online survey conducted by the Catalyst organisation of 9,927 alumni who graduated between 1996 and 2007 from MBA programmes in leading business schools in Asia, Canada, Europe and the United States, it was outlined at 3 that even after taking into account and individual's previous experience, women were still more likely than men to start in their post-MBA job at a lower level and men had higher starting salaries. These salary differences were not due to different aspirations or parenthood.

²⁶ As noted by the Ministry of Women's Affairs, "Women in New Zealand" (2008) <<http://www.mwa.govt.nz>> the last 50 years have seen major changes in the characteristics of families and the ways in which they are formed. Women are having children later in life, giving birth at a median age of 30 years with a median age of giving birth to a first child of 28 years. Fertility rates for women 30 years and over have increased over the last decade. Women aged 30-34 now have the highest fertility rate. Mary O'Dwyer, who was convenor of the

phenomenon either. A number of pay and employment equity reviews in the public sector over the last four years found almost consistently that there were gender pay gaps in the public service that varied in size from 3 per cent to 35 per cent.²⁷

There is, however, no doubt that there are structural barriers related to the way lawyers work that are not conducive to women (or indeed men) living a balanced life which includes proper family time. It is well acknowledged that many law firms (at least in the past) have demanded long and inflexible hours, which in turn means that clients can expect instant responsiveness and total availability.²⁸ These structural barriers have to remain part of the explanation for the disparities of men and women in the upper reaches of the profession.

So what other explanations have been proffered? I think in this company I can discount explanations that relate to differentials in competence between men and women.

One cause that has been pointed to consistently is the existence of male networks (and related mentoring) that encourage and promote males lawyers at the expense of females.²⁹ For instance, Deborah Hollings QC, former president of the Auckland Women Lawyers Association, has argued that the lack of mentoring provided to young women lawyers, as opposed to young males, is one of the major factors underlying the gender imbalance at partnership level in law firms.³⁰

It is clear that the mentors can play a crucial role in the career progression of young lawyers. A recent Canadian survey of successful women lawyers found that having a mentor was a

Women's Consultative Group and is now a District Court Judge has, however, argued that in the first five years of work there is still a perception that women's life choices will affect what they are going to earn and that there is a reluctance to progress them at the same rate in terms of pay increases because of the perception that they will at some stage have children: cited in Diana Dekker "The Great Divide" *The Evening Post* (9 March 2002).

²⁷ Human Rights Commission "Legal opinion firm on state sector chief execs equal employment role" <www.hrc.co.nz>.

²⁸ Ward, above n 20, at 2256. It must be noted that the New Zealand Law Society Women's Consultative Group in its *Women Lawyers' Survey* (2005) embarked on a survey to identify matters which were of key concern to women practitioners. The most pressing concerns for women practitioners were identified as being: professional support; advancement; salary; and hours of work.

²⁹ Australian Centre for Leadership for Women *Women Getting into Boards* (2009); Teresa Shreves "One woman's experience of commercial practice" (1993) 23 VUWLR 121 at 124; Richard Brent "Mixing It Up" (2010) 9 *Managing Partner* <www.mpmagazine.com>.

³⁰ Cited in "Mentors Crucial on Law Partnership Route" *New Zealand Herald* (2 September 2002). In light of the importance of female mentors the Auckland Women Lawyers Association runs its own mentoring programme by and for women lawyers.

key element in the success of the majority of those surveyed.³¹ Thus, if Hollings' comments that "mentoring happens with the boys ... not the girls" remains the case in 2010, this would clearly be a significant hindrance to ensuring the achievement of gender equality at all levels of the profession.

In the United Kingdom another way in which the existence of male networks has been seen to impede women's development has been through the system of judicial appointment. The system in the United Kingdom was criticised for a long time as operating on the basis of "not what you know but who you know".³² This was one of the major drivers for setting up a Judicial Appointments Commission in 2005 in the United Kingdom. This Commission has the statutory responsibility to appoint people to the lower courts of the United Kingdom. Appointments are solely on merit but the Commission is also tasked with increasing the diversity of people available for judicial selection.³³

A related explanation for disparity has been the differing perceptions of men and women in society. A study undertaken by two psychologists in the US in 2007 found that people associate women with communal qualities which convey a concern for the compassionate treatment of others. By contrast, men are associated with qualities which convey assertion and control.³⁴ In most people's minds those qualities more associated with men fit in with a traditional view of the qualities required for leadership positions. For example, it has been suggested that "appropriate" leadership skills are often viewed to embody the "masculine" characteristics of dominant, assertive and decisive behaviour, rather than the supportive behaviours which are often identified with women.³⁵

The question thus arises as to why leadership skills and masculinity are often seen as intrinsically entwined. One reason that has been propounded for the notion that so-called "masculine" qualities equate with leadership success is that it has become difficult to separate the qualities associated with leadership from the qualities associated with masculinity in light

³¹ Helen Burnett-Nichols "Survey Probes Secrets of Successful Women Lawyers" *Law Times* (26 October 2009) <www.lawtimesnews.com>.

³² As an aside I have the impression that the phenomenon of approved social networks is much more prevalent in the UK than in New Zealand.

³³ Constitutional Reform Act 2005. See generally, <<http://www.judicialappointments.gov.uk/>>.

³⁴ Alice H Eagly and Linda L Carli "Women and the labyrinths of leadership" (2007) *Harvard Business Review* at 3.

³⁵ Marie-Therese Claes "Women, Men and Management Styles" (1999) 138 *International Labour Review* 431 at 436.

of the fact there has been a long history of male domination in leadership roles.³⁶ Interestingly, psychological research has established that there is a strongly held societal perception that the traits associated with successful leadership are also those associated with successful lawyers.³⁷ This means that women have to surmount significant obstacles created by societal perceptions if they aspire to positions of seniority within the legal world.³⁸

Moreover, it has been argued that the perceived incongruity between the female gender role and the typical leader role tends to create prejudice toward female leaders and potential leaders in two ways:³⁹

- (a) Less favourable evaluation of women's (than men's) potential for leadership because leadership ability is more stereotypic of men than women; and
- (b) Less favourable evaluation of the actual leadership of women than men because behaviour commonly associated with leadership is perceived as less desirable in women than men.⁴⁰

Such consequences have been seen to create a behavioural double-bind for women who strive to attain positions of power. It has been argued that the propagation of gendered stereotypes has created a "femininity/competency bind" for women who seek to advance to positions of leadership in society.⁴¹ This theory is predicated upon the societal assumption that acting in a "feminine" manner is associated with incompetence, while masculine traits are associated with competence. Accordingly, the argument is that to succeed as a female leader one must be "unfeminine" to be competent.⁴² However, if a woman adopts "masculine" behaviours, she then can be criticised for displaying such characteristics as they do not fit within

³⁶ Eagly and Carli, above n 34, at 5.

³⁷ Ostrow, above n 22.

³⁸ Katherine Giscombe "Women in Corporate Leadership: Status and Prospects" in Barbara Kellerman and Deborah L Rhode (eds) *Women and Leadership: The State of Play and Strategies for Change* (John Wiley & Sons, San Francisco, 2007) at 389.

³⁹ Alice H Eagly and Steven J Karau "Role Congruity Theory of Prejudice Toward Female Leaders" (2002) 109 *Psychol Rev* 573 cited in Alice H Eagly and Mary C Johannsen-Schmidt "The Leadership Styles of Women and Men" (2001) 57 *Journal of Social Issues* 781 at 785.

⁴⁰ It is interesting to note that negative reaction to Justice Sonia Sotomayor's assertive nature on the Supreme Court bench has been attributed to sexist attitudes. See Lauren Collins "Number Nine: Sonia Sotomayer's High Profile Debut" (2010) 85 *The New Yorker* 42.

⁴¹ K H Jamieson *Beyond the Double Bind: Women and Leadership* (Oxford University Press, New York, 1995) cited in Judith G Oakley "Gender-based Barriers to Senior Management Positions: Understanding the Scarcity of Female CEOs" (2000) 27 *Journal of Business Ethics* 321 at 325.

⁴² Oakley, *ibid*, at 324 and 325.

behaviour recognised as acceptable for women. Adherence to such attitudes has been seen as hindering women in the legal profession.⁴³ Ironically, the modern approach to leadership would suggest that the transformative style of leadership which uses the so-called female traits is in fact more effective leadership but that is a discussion for another day.⁴⁴

Having briefly explored some of the possible reasons as to why there is currently a gender imbalance within the senior levels of New Zealand's legal profession, the question must be asked: so why should we worry about the gender disparities that currently exist? Do they matter? I suggest that they do and I want to speak in particular today about the need for gender diversity on the Bench but many of the points made apply more generally.⁴⁵ They also apply equally, if not with more force, to ethnic and cultural diversity.

Diversity on the Bench ensures that courts are representative of the societies they serve. A more diverse bench is also important in a symbolic manner as it signals our society's commitment to equality.⁴⁶ It can also help to counter those stereotyped views of women's role in society and to provide role models for generations to come.⁴⁷ I cite my colleague, Judge Carolyn Henwood:⁴⁸

I do believe that the judiciary should represent society as a whole. As women are so often the victims of criminal behaviour they should be represented in the implementation of the law. Having women judges broadens the base of the judiciary. The face of justice should show people coming from all types of background, all walks of life.

⁴³ Ostrow, above n 22; Wald, above n 20, at 2256. A related issue is the difficulty women may have in promoting themselves. My fellow panellist, Victoria Heine, a partner at Chapman Tripp, refers to this as the "good girl phenomenon" where many women sit back and expect that their hard work and competence will be recognised. However the double bind may operate here as well so that women who do promote themselves may be regarded negatively as pushy. I would suggest that we need to find different ways of measuring worth that value hard work that may be behind the scenes and "unsung" competence.

⁴⁴ For discussion of the transformative style of leadership see Alice H. Eagly and Mary C Johannsen-Schmidt "The Leadership Styles of Women and Men" (2001) 57 *Journal of Social Issues* 781 at 795.

⁴⁵ See generally Chief Justice Beverley McLachlin in "Why We Need Women Judges" (Speech delivered at the International Association of Women Judges 8th Biennial Conference, Sydney, Australia 3-7 May 2006) and the keynote address by New Zealand's Chief Justice Sian Elias "Changing Our World" (Speech delivered at the International Association of Women Judges 8th Biennial Conference Sydney, Australia, 3-7 May 2006). The speeches are available at: <www.iawj.org>. For a summary of these speeches see Mary-Ann Hedlen and Susan Glazebrook "Forward" *The IAWJ: Twenty Years of Judging for Equality*, above n 11, at 3-5.

⁴⁶ Martha Nussbaum "Women in Office Break Stereotypes" *Philadelphia Inquirer* (24 November 2008).

⁴⁷ Erika Rackley "Judicial diversity, the woman judge and fairy tale endings" (2007) 27 *Legal Studies* at 74-94. Caroline Kirton "Has The System Failed Women" (paper presented to the Australian Bar Association Judicial Appointments Forum, Sydney, 27 October 2006).

⁴⁸ Cited in Janet November "A woman's place is ... on the bench" (1993) 23 *VUWLR* 85 at 98.

Lord Justice Terence Etherton of the Court of Appeal of England and Wales has recently offered a similar argument. He argues that reflection of diversity in the composition of the judiciary is necessary for maintaining respect for both the judiciary and legal processes. For instance, he states that, in a diverse community, reflection of that diversity in the composition of the judiciary gives legitimacy to the courts because the composition of the judiciary can then be seen to reflect the values of which they are guardians- human rights and the equality inherent in a liberal democracy.⁴⁹

A further reason for diversity is the more prosaic one of being the best use of available human resources. Economic loss results from failing to promote and develop the talents of a trained lawyer. Indeed there is now global recognition that women are the most powerful engine of global growth.⁵⁰ Accordingly, it is not only women but society as a whole that has an immense amount to gain from the promotion of female participation in the workforce, including in the legal profession.

Finally, and possibly more controversially, women have been seen as bringing different perspectives to their role on the Bench.⁵¹ For example, in 1990, Bertha Wilson, the first woman to sit on the Canadian Supreme Court suggested that the increased presence of women on the bench would “bring a new humanity to bear on the decision-making process”.⁵²

One potential danger with relying too heavily on the rationale that women may decide cases differently, however, is that it may perpetuate the gendered norms and stereotypes that can be seen to have stymied women’s progression in the legal profession. For instance, Chief

⁴⁹ Sir Terence Etherton “Liberty, the Archetype and Diversity: A Philosophy of Judging” [2010] PL 727 at 743.

⁵⁰ United Nations Development Programme *Asia-Pacific Human Rights Development Report: Power Voice and Rights, A Turning Point for Gender and Equality in Asia and the Pacific* (2010) at 27.

⁵¹ Charles M Cameron and Craig P Cummings “Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in Federal Courts of Appeal 1971-1999” (2003) *Columbia Law Review*, and Cass R Sunstein *Why Societies Need Dissent* (Harvard University Press, Massachusetts, 2003). B Wilson “Will Women Judges Really Make a Difference?” (1990) 28 *Osgoode Hall L.J.* 507 at 519 ff. Chief Justice Beverley McLachlin, above n 45 and Chief Justice Sian Elias, above n 45.

⁵² Cited in Erika Rackley “In Conversation with Lord Justice Etherton: Revisiting the Case for A More Diverse Judiciary” [2010] PL 655 at 657.

Justice Beverley McLaughlin in criticising the notion that males subscribe to an ethic of individuality as compared to the female emphasis on community⁵³ has stated that:⁵⁴

in fact, men and women are diverse, come from different cultural and social backgrounds and possess a variety of values. To suggest a single feminine worldview discounts the incredible variety and diversity of women. Second, one may question whether the female "ethic of caring", to the extent it exists, is not the product of a gender-based social role.

For myself, I am inclined to agree with those who say that, while there may be such different philosophies and world-views among judges, they are not necessarily gender based. Further, I also agree that normally one would not expect the actual decisions of courts to be influenced often by the gender of the judge. Women and male lawyers are all trained in the same way. Once they become judges, all, irrespective of gender, swear the same judicial oath. All judges are required to sit in public and produce reasons for their judgments. All are constrained by the judicial method, legal principles and appellate review.⁵⁵ In the end in most cases, according to the Chief Justice of Minnesota, Mary Jeanne Coyne, "A wise old woman and a wise old man reach the same conclusions".⁵⁶

It is still true, however, that people bring their life experiences to the Bench with them and that women's life experiences tend to be different from those of men. This is beneficial. The Chief Justice McLachlin has put it in the following way:⁵⁷

For cultural, biological, social and historic reasons, women do have different experiences than men and those personal circumstances, experience and perspectives can make a difference to how a case is heard, how judgment is given and sometimes might affect the outcome.

Lord Justice Etherton has argued that a judge's personal outlook and judicial philosophy will inevitably play a critical role in decisions on the cases where knowledgeable and experienced

⁵³ This concept was outlined by Carol Gilligan in *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Massachusetts, 1982) cited by Chief Justice Beverley McLachlin, above n 45.

⁵⁴ Above n 45.

⁵⁵ Judge J Dempsey Klein "Women Justice: Does She View the Law Differently?" (1989) 26 Court Review 18, 22.

⁵⁶ Cited by Lady Hale in "Welcome to the white men's club" *The Guardian* (2003) <www.guardian.co.uk> and also cited by Chief Justice Beverley McLachlin, above n 45. Following the same reasoning, it can be argued that this statement would presumably be applied also to those who are not so wise.

⁵⁷ Above n 45. I note Chief Justice McLachlin's final reason for a more diverse Bench (a bit tongue in cheek). She suggests that women have humanised the Judges' common rooms. She points out that, since she has been Chief Justice the Supreme Court common room has acquired a piano and offers yoga.

jurists could disagree as to the result. He states that it seems obvious that, when eminent judges disagree about hard cases that are policy laden or concern human rights or constitutional rights, this is simply because their individual world-views will influence the decision that they have made.⁵⁸ This is in fact as it should be but it emphasises the need for diversity on the Bench so that different world views are accommodated.⁵⁹

In conclusion, in answer to the question posed tonight, I do not think there is such a thing as a “woman-lawyer”. In fact, adherence to such a view can serve simply to perpetuate the gendered stereotypes that have constituted one of the barriers that have hindered women’s advancement in the legal profession. It is unfortunate that the gender discrepancies that currently exist at the senior levels of New Zealand’s profession still require us even to consider the concept and it is my hope that in the not so distant future such a question will no longer have to be asked.

⁵⁸ Etherton, above n 49, at 740.

⁵⁹ Justice Keith Mason in “Unconscious Judicial Prejudice” (2006) 75 ALJ 676 at 687 notes that consciously or unconsciously appellate and trial judges frequently give effect to views and attitudes which are products of their individual life experiences. He argues that this is both inevitable and defensible, subject to a genuine commitment to strive for neutrality and impartiality, according to the tenets of the judicial oath. Chief Justice Sian Elias, above n 44, acknowledges that women and minority judges are also more likely to realise how often claimed objectivity is marred by unconscious biases.