



2015 Law and Justice Address

Will women ever be able to have it all?

The Hon. Catherine Branson QC

Justice Awards, 15 October 2015

Thank you, Paul, for your kind introduction.

I join with you in acknowledging that we are on the traditional lands of the Gadigal people of the Eora Nation and paying my respects to their Elders past and present. It is appropriate at this event to note that the Gadigal people have been concerned with law and justice in this place for approximately 40,000 years.

I also thank Aunty Norma for her generous welcome to country.

I thank the Law and Justice Foundation of NSW for its invitation to speak this evening and I commend the Foundation for hosting this heartwarming annual event and for its ongoing work, in particular its research work. Its Access to Justice and Legal Needs research program, for example, is a wonderful contribution to evidenced-based decision-making in these areas. I also note that this year we celebrate 40 years of the Community Legal Centre movement in NSW and congratulate the movement's founders and those carrying on their proud tradition.

I was asked to speak tonight about something arising from my career in the law. My choice has been to speak about discrimination and, in particular, discrimination against women. In various ways this has been a topic that has followed me throughout my career.

My key themes, though, have a wider application. They are, first, that equality is not to be equated with justice and that the demands of justice may require us to depart from strict equality. Secondly, that what constitutes justice can only be identified within a particular society at a particular time – and that the extent and rate of change within our society makes it critical that we pay ongoing attention to what constitutes justice.

It will soon be 50 years since I started studying at the Adelaide Law School. I was one of ten female students in a cohort of 110. The number of female legal practitioners in Adelaide at the time would not have reached double digits. Indeed, my parents thought that the best way for me to ensure that I got a job in a good legal firm post-graduation would be to obtain secretarial qualifications. This was probably not surprising at a time when the employment pages of the local papers had 'Men & Boys' sections and 'Women & Girls' sections.

After my graduation, indeed after I had taught at the Adelaide Law School for two years, I found that attitudes had not changed much. As an articled law clerk I was introduced to the senior partner of one of Adelaide's oldest law firms. This led to his discovering that I was a graduate in law and arts. His spontaneous response: 'Good heavens, someone has wasted a lot of money on your education!'

These stories date from a time before Australia had sex discrimination legislation. South Australia passed Australia's first Sex Discrimination Act in 1975. The passage of that and

subsequent legislation helped change attitudes but change didn't come quickly and even today it is far from complete.

We need to remember the aim of that early legislation. Women were fighting to be treated the same way that men were treated. That was the injustice that they had experienced – being excluded from certain types of work simply because they were women.

Remember the case of Deborah Wardleyⁱ, the first sex discrimination case to reach the High Court? This case illustrates the kind of discrimination being experienced by women in the late 1970s. Deborah was a general aviation flying instructor. After being rejected for Ansett Airlines' pilot training for two years, she complained to the Victorian Equal Opportunity Board. Ansett Airlines acknowledged that it had a policy of only employing male pilots claiming that women's menstrual cycles made them unsuitable to fly passenger planes. Incidentally, one of the joys of my early career was appearing in the High Court as junior counsel for South Australia intervening to support Deborah Wardley.

The early sex discrimination legislation was, unsurprisingly, not enough to ensure substantive equality for all women. It principally assisted women (like me) who for one reason or another were not filling the traditional female roles of bearing and nurturing children and caring for family members.

I illustrated this point in 2003 in an address to a Feminist Legal Academics Workshop. I compared the circumstances of the then female members of the Federal Court and the Supreme Court of NSW with those of the then male judges of the Federal Court resident in Sydney. Of the ten women in my sample only four were married and only three had children. Of the three who had children, only two had pursued a traditional career at the bar and each of them had done so with full-time paid domestic help. By contrast, all but one of the 15 males in my sample was married and the other had been married and was then living in a marriage-like relationship. All but two of the men had children and none had full-time paid domestic help while his children were at home – presumably because that was where his wife was to be found.

This illustrates what we know to be true – if you treat equally those who in a significant respect are not equal, you will not see equality of outcomes. Although some efforts have been made more recently to address the difficulties that women face in accommodating work and family responsibilities it is plain that those efforts have not been sufficient to achieve an even playing field.

The Workplace Gender Equality Agency has reported that the representation of women steadily declines when moving up the management levels with women comprising only 26% of key management personnel; one third of employers have no women who are key management personnel; and the gender pay gap for full-time base remuneration is 19.9% and 24.7% if full-time total remuneration is measured.ⁱⁱ The former Sex Discrimination Commissioner has recently pointed out that fewer big Australian companies are run by women than by men called Peter.

Over 60% of law graduates are women but only 28% of the total Australian judiciary are female.ⁱⁱⁱ More than half of academic staff in Australia's universities are female but just over a third of staff above the level of senior lecturer are female.^{iv}

Unsurprisingly, there is a significant gender gap in retirement savings with many women living their final years in poverty. The average superannuation payout for women is approximately a third of that for men.

These are the outcomes after we have removed formal barriers to women entering paid work, after we have enacted laws proscribing sex discrimination and laws providing for maternity leave and subsidised childcare and as we are starting to attend to the workplace consequences of domestic violence.

It is now recognised that working women are a national productivity imperative. They should not face serious financial and other penalties for also undertaking the caring work that is vital to our society.

So what is to be done? This takes me to my first key theme. We tend to think of the fight against discrimination as a fight for equality. In one sense, of course, it is but more fundamentally it is a fight for justice.^v

We accept in many areas that the national interest is advanced by laws that impact differently on those whose circumstances are not the same. Few object to the rich and the poor paying income tax calculated at different rates; few complain that veterans and their dependents enjoy favourable medical and social security benefits when compared with the general population; few argue against businesses being required to make reasonable adjustments to employ persons with disability. We see the justice of these measures even though they depart from strict equality.

We need to be alert to the need for other departures from strict equality in the interests of justice. Such departures might include things like compensating women, perhaps through special payments into their superannuation accounts, for their time away from full-time work and targeted mentoring programs for women that keep them in touch with their workplaces while they are on maternity leave. Others will be better equipped than me to think of the full range of possible initiatives.

This takes me to my second theme: that as society changes what constitutes justice will also change.

When I entered the workforce, women were uncontested outsiders in the law. It was not uncommon back in the late 1970s and early 1980s for me to be asked with barely concealed antagonism: ‘Why do you want to do this? My wife wouldn’t want to be working here, I wouldn’t want my daughter doing what you are doing’. The implicit message was intended to be derogatory: what you are doing is not feminine; you are not the sort of woman that is attractive to men. It was not only men who were antagonistic to female professional success. Shortly after becoming senior counsel, I was introduced to the wife of a very senior silk at the NSW Bar. She immediately accused me of being one of those women planning to take the jobs that should go to her sons.

If one is seen as an outsider it is not easy to get the rules changed to accommodate your needs – you are not the norm, your experiences are not the experiences that matter. You are unlikely to be seen to be one to whom justice is due.

We tend in Australia to think of ourselves as generous, fair-minded and democratic. No doubt this is in large measure true – but our national ethos, our national mythology, has focused on

the rugged white male and been touched with a significant degree of misogyny. But we are seeing a new openness to change (perhaps more evident today than even a few weeks ago) – not only so far as women are concerned but towards acceptance of diversity in Australia more generally.

Feminism can take some credit for this. As someone else has put it, feminism has helped by ‘*arresting the runaway heroic spirit and forcing us to attend to what has been neglected*’.^{vi} An illustration of this must surely be that in the centenary year of the Gallipoli landing, the standout drama on ABC television was **ANZAC Girls**.

Another, and probably related, change in our society is the increasing involvement of men in their children’s upbringing. Some are becoming primary caregivers but more are truly sharing responsibility with their partners or former partners. Some, perhaps many, men would be happy to play a larger role. My hope is that this significant contemporary dynamic will prove to be a powerful force towards the achievement of improved work-life balance for everyone.

Let me tell one last personal story. I married, for the first time, at about the same time as one of my female friends. Neither of our households had much money. Over a shared informal meal one evening the four of us decided that a capital expenditure that we could ill afford could be avoided if, rather than buying washing machines, we used the local Laundromat. It was agreed that for six months my friend and I would meet each Saturday morning at the Laundromat and that the men would do the same over the following six months. What happened? My friend and I did as agreed and precisely six months and one week later each household took possession of a washing machine. The point of this story is, of course, that priorities and outcomes change when problems once seen as women’s problems become men’s problems.

If we really want gender equality we must stop thinking of work-life balance as a women’s issue. We must stop thinking of family responsibilities as women’s responsibilities. We need to learn to value workplace leadership and caring equally, to think that managing a business or practice and managing a household full of other human beings are equally valid and valuable occupations.

Just as claims that women’s menstrual cycles render them unfit to fly passenger planes are now dismissed as mere prejudice so can claims that men are inherently unsuited to looking after the young, the elderly and the sick.

My conclusion – the time will come when women can have it all. What we need is significant numbers of men making the case that justice for men requires that they be able to spend time caring for their families without significant cost to their careers and to their long-term financial security. Women will be able to have it all – but only when men can also.

ⁱ Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237.

ⁱⁱ Workplace Gender Equality Agency data for 2013-2014.

ⁱⁱⁱ www.aija.org.au/index.php/judicial-gender-statistics.

^{iv} The Australian online, 9 March 2012, 12:00noon.

^v See Julius Stone, Justice in the Slough of Equality (1978) Vol 29 The Hastings Law Journal 995.

^{vi} David Tacey: Edge of the Sacred – Jung, Psyche, Earth. 2009 Daimon Verlag, Einsiedeln, Switzerland.