
Criteria For Judicial Appointment and 'Merit'

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When Roslyn Atkinson was appointed to the Queensland Supreme Court bench in September 1998 along with two other female appointments,¹ one as President of the Court of Appeal, in what apparently is a deliberate campaign² by the current Attorney-General to make the judiciary more representative – “the under-representation of women in the court has been an open scandal”³ - the Queensland Bar Association (hereafter the Association) openly criticized her appointment. The Association questioned her appointment saying she had not been chosen on merit and attacked the Attorney General for seeking to achieve a ‘so-called representative judiciary’.⁴

This criticism calls for a revisiting of some very current⁵ issues: the concept of ‘merit’ in relation to judicial appointments and the criteria of suitability for judicial office; and the desirability of seeking a more representative judiciary, particularly as here in terms of gender. These issues have been debated widely in the past decade⁶ and raised their

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¹ Margaret McMurdo was appointed President of the Court of Appeal and Margaret Wilson was appointed to the Supreme Court bench in August 1998.

² Enquiries of Qld Attorney-General’s Department reveal no relevant policy document, but staff nevertheless acknowledge the Attorney-General’s intention as stated above.

³ Attorney-General Matt Foley quoted in ‘Lawyers Attack Woman’s Appointment to Top Court’ *Courier Mail*, 5 September 1998.

⁴ “The association considers the Attorney-General’s approach of making judicial appointments for the purpose of achieving a ‘representative judiciary’ rather than to maintain a bench of the highest legal calibre to serve the people of Queensland fundamentally wrong in principle and contrary to the interests of the community as a whole”, quoted in ‘Passion Plays Second Act’ *Courier Mail* 10 November 1998.

⁵ Sir Harry Gibbs raised the general debate on this issue again recently with similar remarks: see ‘Forget Judge’s Gender: Gibbs’ *The Weekend Australian*, February 12-13 2000; ‘‘Activist’ judiciary warning’ *Courier Mail*, February 12, 2000; see also Attorney-General Matt Foley’s response ‘Judges appointed on merit, says Foley’ *Courier Mail* February 14 2000.

⁶ A selection includes: Attorney-General’s Department Discussion Paper *Judicial Appointments – Procedure and Criteria* (Attorney-General’s Dept, Canberra, 1993); D Solomon ‘The Courts and Accountability: The Appointment of Judges’ (1995) 9(2) *Legislative Studies* 39; A Murray and F Maher ‘Judging the Judges’ (1998) 23 *Alternative Law Journal* 185; P Nicholson ‘Appointing High Court Judges’ (1996) 68 *AQ* 68; ‘No need for a commission’ (1994) 29 *Australian Lawyer* 18; ‘What sort of Judges do we want and how do we choose them? A dialogue on judicial reform’ (1999) *LSJ* 53.

head squarely in Queensland in the furore surrounding Justice Atkinson's appointment - they have not faded away. They are particularly timely, as instanced by recent comments made by Sir Harry Gibbs, which attracted much press coverage and unfavourable comment,⁷ during the course of a speech at an opening of the Queensland Supreme Court library:

A more recent heresy is that the bench should be representative and the sex... of the aspirant should be a more important consideration than merit....The bench should never be representative, for the duty of the judge is not to represent the views or values of any section of society but to do justice for all.⁸

These comments might be and have been read as casting aspersion on all female appointments or indeed the appointments of candidates from non-traditional legal backgrounds (which may say something about the former exclusivity of candidates' backgrounds).

This paper argues that the judiciary does need its personnel to be representative of society, but this will happen naturally and without any form of affirmative action (not that the author criticises such action), when modern criteria of suitability for judicial office are utilised. The attack upon a candidate with very broad qualifications such as Justice Atkinson, well documented as it was in the press, serves as a very clear illustration of this point. The criterion of 'merit' that saw her appointment criticised was flawed in itself, being based on an outdated view of the judicial role. In essence, this criterion advantages one particular group in society, ie, long experienced advocates at the senior Bar and thus operates in a discriminatory way in relation to lawyers from diverse fields of legal endeavour. Much literature, particularly of the past decade, identifies broad criteria of suitability for judicial office. It is the author's aim to illustrate why a modern view of the judicial role requires this.

'Merit' and Criteria for Judicial Office

There seems an intrinsic difficulty with the concept of 'merit', a point made by Margaret Thornton:

Devoid of any social context, it [merit] is perceived as an apolitical criterion of personal worth. A mystique of neutrality has nevertheless endowed the concept with considerable political significance and moral persuasiveness when it is invoked to justify, to criticise, or to constrain any policy proposals. Merit, so defined, has a political form that is clearly unrelated to the reality of its application as an apolitical selection criterion".⁹

⁷ See for instance: 'Laws should reflect today's values' *Courier Mail* February 14 2000; 'Misjudged, misguided misogyny' *Courier Mail* February 15 2000.

⁸ Oration by Sir Harry Gibbs, 11 February 2000 at <http://www.courts.qld.gov.au/sc&dc/speeches/gibbs110200.htm>. Sir Harry Gibbs remarks were supported by Justice Shepherdson in a speech upon his retirement: 'Judge backs Gibb's remarks' *Courier Mail* March 11 2000.

⁹ M Thornton 'Affirmative Action, merit and the liberal state' (1985) 2(2) *Australian Journal of Law and Society* 28.

This passage seems apposite when considering Justice Atkinson's qualifications for judicial appointment. Justice Atkinson's credentials included: eleven years as a practising barrister; a first class honours degree in Law from the University of Queensland with many prizes for academic performance, including the Wilkinson Memorial prize for top student of the law degree and the James Archibald Douglas prize upon graduation from the Bar Practice Course; Associate to Sir Gerard Brennan, then a Justice, later Chief Justice, of the High Court of Australia; inaugural President of the Queensland Anti-Discrimination Tribunal; Hearing Commissioner for the Human Rights and Equal Opportunities Commission; Queensland Law Reform Commissioner for six years with two years as Deputy Chairperson; member of the Social Security Appeals Tribunal.¹⁰

The layperson might shake her head in disbelief - if this isn't 'merit', what is? There can be little doubt that Justice Atkinson's legal career was meritorious, as well as diverse in its range of professional activity, even apart from her experience prior to admission to the Bar. The Association appears to have seen 'merit' only in the most traditional terms, of an experienced advocate of senior rank. It seems to require a candidate for judicial office to have spent sufficient years as a practising barrister, attaining the status and performing as Senior Counsel, although what was 'sufficient' was not delineated. Association President Bob Gotterson said Justice Atkinson had "demonstrated ability in her relatively short career as a lawyer, but not for the time and at the level necessary to demonstrate a capacity to perform the function as justice of the Supreme Court".¹¹

Traditionally advocacy skills honed through years at the Bar have been seen as the touch-stone for judicial office, for example:

If the adversary system as we know it is to operate efficiently, we should expect to see trial judges drawn mainly from the ranks of those persons who have had adequate experience in the presentation of cases in court.¹²

Former Attorney-General Michael Lavarch's discussion paper *Judicial Appointments – Procedure and Criteria*¹³ also notes there has been an assumption that advocacy skills or the skills necessary to be a successful barrister are those required of a competent judge. The Lavarch discussion paper advocates that far wider criteria be adopted. Most commentators¹⁴ and reporting bodies¹⁵ of the past decade have urged the adoption of similarly broad criteria, and politically legislative implementation of such criteria has been policy of the Australian Democrats, who tried in 1994 to have a Bill along these

¹⁰ The details were taken from the Queensland Supreme Court website on Justice Atkinson.

¹¹ 'Lawyers attack woman's appointment to top court' *Courier Mail* 5 September 1998.

¹² Sir Anthony Mason 'The Role of the Courts at the Turn of the Century' (1993) 3 JJA 156 at 159.

¹³ Attorney-General's Department *supra* n 6.

¹⁴ A selection includes: D Solomon *supra* n 6; A Murray and F Maher *supra* n 6; P Nicholson *supra* n 6; K Gould 'Enhancing Judicial Diversity – When Time is not on your side' (1998) 2 FJLR 215; R Purvis 'Judiciary and Accountability: the Appointment of Judges' (1994) 26 *Australian Journal of Forensic Sciences* 56.

¹⁵ Implementation Committee *Gender Bias and the Law: Women Working in the Legal Profession in NSW* (NSW Ministry for the Status and Advancement of Women, Woolloomooloo, NSW, 1995); Attorney-General's Department *supra* n 6; Senate Standing Committee on Legal and Constitutional Affairs *Gender Bias and the Judiciary* (Canberra, 1994).

lines accepted in South Australia.¹⁶ These criteria will include legal skills and advocacy skills, but also envisage personal qualities such as:

- Gender and cultural sensitivity;
- Willingness to understand the viewpoints of others;
- Willingness to participate in professional training;
- A sense of public service;
- A history of involvement in community organisations or activities;
- A breadth of vision.

What these proposals and commentators clearly indicate is there is a strong consensus in recent times, that the 'good' judge of the new millenium requires much more than skills developed through the presentation of cases in court. The essential flaw in promoting highly developed advocacy skills as the key attribute for judicial appointment is it fails to acknowledge that the adversary system itself is being subjected to sustained criticism and proposals for reform.¹⁷

Many of these reforms are directed to neutralising party/lawyer control of the litigation process, which gives the stronger party potential to abuse the process, and turns the courtroom into a 'gladatorial arena'. Advocacy skills *per se* are under serious scrutiny, particularly in relation to abusive cross-examination of child witnesses and rape complainants.¹⁸ All court systems in Australia have moved to using forms of case management and managerial judging,¹⁹ which originated in the civil law systems, to give judges more control of the litigation process, to help prevent abuse of the process, minimize delays, reduce costs, and encourage early settlement.

It is an inescapable fact that the judicial system has been more concerned with procedural fairness than substantive justice²⁰ - a system in which a search for truth is a modern idea²¹. It is a system which grew up with a white, Anglo Celtic male centeredness,²² simply because until very recently its "players" were white, Anglo Celtic males. As Kirby J succinctly put it:

¹⁶ See A Murray and F Maher *supra* n 6.

¹⁷ Among the voluminous literature: H Stacy and M Lavarch (eds) *Beyond the Adversarial System* (Federation Press, Sydney, 1999), which developed from the 1997 conference *Beyond the Adversarial System* hosted by the ALRC and the National Institute for Law, Ethics and Public Affairs, Brisbane, July 1997; Hon D A Ipp 'Reforms to the Adversarial Process in Civil Litigation - Part I' (1995) 69 *ALJ* 705.

¹⁸ This was the subject of the Four Corners television program 'Double Jeopardy' aired 19 July 1999. The Queensland government is currently moving to introduce reforms directly to curbing such abuse: see 'Women reform 'abusive courts'' *Courier Mail* 8 May 2000.

¹⁹ Systems whereby the courts manage the process of cases from commencement to disposition. Judges as managers become active in investigating the best way to define a dispute and present a case.

²⁰ Davies J 'Fairness in a Predominantly Adversarial System' in Stacy and Lavarch *Beyond the Adversarial System supra* n 18 at 108; J Jolowitz 'The Woolf Report and the Adversary System' (1996) 15 *Civil Justice Quarterly* at 198.

²¹ Before the middle of this century it was accepted that the ultimate purpose of the adversary system was to resolve disputes rather than an uninhibited search for the truth. See authorities referred to by D A Ipp *supra* n 17 at 712-713.

²² This is well accepted today - the major scholarship in Australia is R Graycar and J Morgan *The Hidden Gender of Law* (Federation Press, Sydney, 1990).

Any professional group which, for 700 years, has comprised solely of men is bound to have inherited attitudes which may seem unwelcoming to some new entrants... Women. Aboriginal lawyers. Lawyers from non-Anglo Celtic backgrounds. Gay and lesbian lawyers.²³

Even more importantly, there is an awareness today of how the adversary system of law works to deny real equality before the law for many litigants or potential litigants, in large measure through inability to fund legal representation. Substantial literature has demonstrated that failure to take into account women's differing experiences and perspectives in the law denies true equality before the law for many women. This is particularly so in the area of male violence to women and in relation to the woman who finally strikes back at her abuser.²⁴ Other literature documents the way in which our system recognises particular cultural imperatives, and works to the disadvantage of those who do not fit within the dominant norm, particularly the non-English speaking person or the person with limited English speaking ability in a court room.²⁵ Kirby J frankly recognised this in *Videski v Australian Iron and Steel*:²⁶

In our multicultural society it is imperative that judicial officers would avoid expecting from people of different cultural traditions the same emotional imperatives that have, until now, tended to influence Australian values.

In short, far more is expected of a judge today than mere knowledge of the system gained from acting as an advocate within it. Equality before the law is one of the fundamental tenets of the rule of law. If it is to mean anything, judges are needed who are committed to it in a real sense, who understand the system's flaws and shortcomings as well as their own, and who are committed within the scope of their judicial brief to ensuring the court room arena is an even 'playing field', not a 'gladatorial arena'. Otherwise the strongest, richest or the most familiar or comfortable with the adversarial system, or whose life situation can be 'perceived' by the judge because it mirrors his or her own life, succeeds. This of course is asking far more than was asked of the passive judge of the not-so-distant past, whose role was that of a neutral umpire to see the rules of the 'game' were observed.²⁷

In particular, to dispense justice that represents more near true equality before the law, judges need to develop more fully their empathetic qualities, alongside the long prized values of detachment, neutrality, and objectivity. It has long been exposed as a myth that judges can or are completely objective and impartial in all their work.²⁸ But true objectivity and impartiality is more closely approximated when a party is truly 'heard',

²³ Kirby J *Women Lawyers Making a Difference* speech given to the Women Lawyer's Association of NSW, 18 June 1997 at <<http://www.hcourt.gov.au/speeches/kirbyj/womenlaw.htm>>.

²⁴ There is a voluminous body of literature, but see R Graycar 'Telling Tales: Legal Stories about Violence against Women' (1996) 7 *AFLJ* 79. See particularly Madame Justice L'Heureux-Dube 'The Changing Face of Equality: The Indirect Effects of s 15 of the Charter' (1999) 19 *Canadian Woman Studies (Women and Justice)* 30 at 33-34.

²⁵ See in particular G Bird *The Process of Law in Australia: Intercultural Perspectives* (2nd edn, Butterworths, Sydney, 1993).

²⁶ Unreported NSWCA 17 June 1993.

²⁷ See DA Ipp *supra* n 17.

²⁸ See for instance K Mahoney 'International Strategies to Implement Equality Rights for Women' (1993) 1 *AFLJ* 115 at 133.

before engaging in the detachment necessary to render judgement. As Madame Justice Wilson of the Canadian Supreme Court says:

Obviously this is not an easy role for the judge – to enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that to judge. But we have to do it; or at least make an earnest attempt to do it”.²⁹

Similarly, Hon Richard McGarvie sees this quality, the ability to empathise, as an essential part of confidence in the judiciary, which occurs “where no party sees the judge as inherently remote or without understanding of that party”.³⁰ He elaborates further, quoting Professor Kathleen Mahoney:

One of the requirements of judicial decision-making is an ability to empathise with parties before the Court. Detachment must be the posture from which judges render their final decisions, but it should only be assumed after the judge has exercised his/her ability to empathise with the parties to the lawsuit.³¹

It is one of the tenets of feminist critique of the legal system that the woman’s story is not heard,³² even though there has been sympathetic development in the area of killing in the context of domestic violence, to enable the woman’s story to be heard through the evidence of psychiatric witnesses. This was the solution proffered by Madam Justice Wilson in *R v Lavallee*,³³ but it still is subject to the criticism that the court is hearing the woman’s story told by another. As Regina Graycar so aptly puts it:

Judicial notice...may resemble a window that judges try to look through, but that has reflective glass in it: so it is really a mirror. When judges look at it, they see what they think is ‘human nature’, ‘human experience’, and ‘ordinary or reasonable people’. What they are seeing is the society they know.... The glass in Justice Wilson’s mirror may have been clear, but her response – resorting to expert evidence – was analogous, in our metaphor, to asking someone else to go over to the window, look through it and tell us what is out there.³⁴

If an essential keystone of judging that will bring us closer to true equality before the law is a clear ‘window on the world’ or at least the realisation that any judge will see the world as a mirror reflecting his/her own experiences,³⁵ then judges need to be selected as much for their broad experience of life and law, or for their disposition to educate themselves about the lives of others beyond their own boundaries, as for the more traditional virtues, such as advocacy skills. The success of programs of judicial

²⁹ Wilson J ‘Will Women Judges Really make a Difference?’ (1990) 28 *Osgoode Hall Law Journal* 507 at 521.

³⁰ Hon R E McGarvie ‘Equality, Justice and Confidence’ (1995) 5 *JJA* 141 at 144.

³¹ *Ibid.*

³² R Graycar ‘Telling Stories About Violence against Women’ (1996) 7 *AFLJ* 79.

³³ (1990) 76 CR (3d) 329.

³⁴ R Graycar ‘The Gender of Judgements: An Introduction’ in M Thornton *Public and Private: Feminist Legal Debates* (OUP, Melbourne, 1995) at 262.

³⁵ For a similar view see Judge Shientag, quoted in Wilson J, *supra* n 29 at 510-511.

education in cross-cultural awareness has been shown in the Canadian context,³⁶ but how much better to set as explicit criteria for appointment those skills and qualities that draw on their insight and humanity, rather than relying on trying to educate an experienced advocate at the later stage in life, when it is usual for judges to be appointed. This is much more of an imperative as judicial training programs in ethnicity and gender set up under the former government's *Justice Statement*³⁷ have been subject to funding cuts.³⁸

The central point is that advocates operating within the system may not be those best posed to see its flaws and shortcomings, precisely because they are steeped in it in every way, including operating successfully within it to earn a living. At least one judge has argued that it is the mind-sets of judges and lawyers which are the greatest impediments to change aimed at increasing fairness, one mind-set "being the belief in the near perfection of our system".³⁹

Lessons can be drawn from the civil law systems as well. At least one German State has recognised social competency, including social empathy, which one could envisage might engage gender and ethnicity awareness,⁴⁰ as one explicit criterion for appointment to judicial office. Advocacy skills have a very small part in the criteria (probably only as developed in the practical training period) in the German Civil System, as judges are mainly appointed as career judges and apply for appointment after university, law examinations and a practical legal training period. Candidates are assessed on:

- (a) judicial competency, mainly as a result of examination results and references from the practical training period;
- (b) professional motivation, assessing the candidate's sense of justice and loyalty to the law, decisiveness, willingness to work hard, stress tolerance and solidarity;
- (c) social competency, evaluating social empathy, capacity to negotiate and settle disputes, capacity to co-operate, ability to exercise power constructively, and willingness to adhere to one's convictions.⁴¹

If Justice Atkinson were assessed against these criteria or the wide criteria advocated by most in the past decade, few would doubt her top law credentials and extensive legal experience as Law Reform Commissioner, Tribunal Member and at the Bar suggest a very high score. In particular the capacity to perform at a top level in so many arenas would indicate a high score in the (b) category. The last category, particularly social empathy, is harder to assess without in-depth knowledge. However her role in the Anti-Discrimination Tribunal and Human Rights and Equal Opportunities Commission, as well as her stated reasons for studying law, suggest that Justice Atkinson offers much in this regard. It is interesting to note that, subsequent to Justice Atkinson's first career as a

³⁶ K Mahoney 'International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts' (1993) 1 *AFLJ* 115.

³⁷ Attorney-General's Department *The Justice Statement* (1995).

³⁸ See A Marfording 'The Need for a Balanced Judiciary: The German Approach' (1997) 7 *JJA* 33 at 45. It is noted that there is a recent push, gaining some impetus, for the setting up of a national judicial college, which presumably would address training in these areas, see *ALRC Managing Justice Report No 89* (2000) [2.152].

³⁹ Davies J 'Fairness in a Predominantly Adversarial System' in Stacy and Lavarch, *supra* n 17 at 102.

⁴⁰ See Marfording *supra* n 38 at 38.

⁴¹ *Ibid* n 38 at 36.

secondary school teacher, Her Honour studied drama, later lectured in drama and literature and gave performances in prisons with a strong social justice message. It was this experience, which motivated her to study law.⁴² In short, Justice Atkinson's background and qualifications suggest a judge with a commitment to 'true' equality before the law. It is suggested this quality is more likely to be evident in a judge who can satisfy the broad criteria for selection discussed above.

In summary, if the courts today are to reflect a 21st century understanding of equality before the law, one crucial aspect is the selection of judges. This selection needs to be based on far more than legal and advocacy skills. Such skills may have served us well in former times (depending on your point of view). Today selection based on those skills is not sufficient to ensure courts are staffed with judicial officers able to recognize and meet the imperatives of legal system reform. Nor is it sufficient to ensure the many persons who currently feel disenfranchised from the legal system truly 'have a voice' and 'will be heard'. For until they do, equality before the law exists in theory, not in practice.

Seeking a 'representative Judiciary'

Whilst most commentators and investigative bodies⁴³ have advocated the need for broad criteria, which go far beyond legal skills and advocacy skills and encompass such personal qualities as breadth of vision and willingness to listen and understand the viewpoints of others, there is also a strong⁴⁴, but not uniform, call for judicial appointments to fairly reflect society. Sir Harry Gibbs and the Queensland Bar Association have argued there is something wrong in an appointment to achieve a "so-called representative judiciary".

This view suffers from an outdated view of the judicial role. The complaint reflects the traditional view that a judge represents all and one's background is irrelevant to judging "as judges are completely objective, disinterested and impartial in all their work".⁴⁵ Sir Anthony Mason expressed it this way: "But, unlike the politician, the judge is not appointed to represent anyone. The judge's paramount responsibility is to be impartial".⁴⁶ While all accept the judge's paramount duty to be impartial, there is an acceptance today that every judge brings to judicial office their own prejudices and biases. In the past at least the failure to acknowledge these biases meant that the law developed in many areas in a far from neutral manner, while pretending to be the product of neutrality and impartiality. The key example is killing in the context of domestic violence. If this is accepted, one's background becomes relevant, as well as, of course, the steps one is prepared to take to neutralize this mostly unconscious tendency to prejudice.⁴⁷

⁴² 'Passion Plays Second Act' *Courier Mail* 10 November 1998.

⁴³ *Supra* n 14 and n 15.

⁴⁴ A Murray and F Maher *supra* n 6; D Solomon *supra* n 6; P Nicolson *supra* n 6; K Gould *supra* n 14; Implementation Committee *Gender Bias and the Law: Women Working in the Legal Profession in NSW* *supra* n 15; Attorney-General's Department *supra* n 6 and authorities noted within at 7; Senate Standing Committee on Legal and Constitutional Affairs *supra* n 15.

⁴⁵ Mahoney *supra* n 28 at 133.

⁴⁶ Sir Anthony Mason 'The State of the Judicature' (1994) 68 *ALJ* 131.

⁴⁷ See B Shientag 'The Virtue of Impartiality' in G Winters (ed) *Handbook for Judges* (American Judicature Society, 1975) at 57.

While evidence that women or others outside the 'legal club' bring a different form of reasoning to their role as judges is still equivocal, an equally important part of confidence in the system is that it reflects the diversity of those judged. Shetreet makes this point; "...bear in mind...that public confidence in the courts is dependent upon how the judiciary is perceived by the public".⁴⁸ The absence of women judges on the Bench may compromise the community's ability to accept judgements, particularly where gender issues appear relevant to the outcome. Instances of remarks that have caused loss of public confidence have come to media attention, for example:

There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling.⁴⁹

There are an abundance of similar cases.⁵⁰ Lack of public confidence in the judiciary has far reaching effects. For instance, research indicates that many women do not report sexual assaults upon themselves due to lack of confidence in their dealings with the criminal justice system.⁵¹ If the appointment of more women judges helps stem that tide, it is an important end in itself.

A second string to the desirability of a representative judiciary is simply because it has an educative effect. As Cooney⁵² says, the perception of a judge in the public's mind is overwhelmingly male. The culture of the courtroom is also seen as masculine.⁵³ Judge Helen O'Sullivan explained how she frequently needs to admonish lawyers in her courtroom for sexist behavior.⁵⁴ The more frequently women are appointed the more such appointments will be seen as 'normal' rather than exceptional. Women judges will serve as powerful role models and probably by their very position will exert a powerful positive influence to negate the hostile and condescending behavior many women, professionals, litigants and witnesses experience in the courtroom.⁵⁵

Do female judges employ a different form of reasoning?

Madam Justice Bertha Wilson explains:

If the existing law can be viewed as the product of judicial neutrality or impartiality, even although the judiciary has been very substantially male, then

⁴⁸ Shetreet S 'Who Will Judge: Reflections on the Process and Standards of Judicial Selection' (1987) 61 *ALJ* 766 at 777.

⁴⁹ Summing up to jury by Judge Bollen, *R v Johns* (unreported 27 August 1992, successfully appealed Full Supreme Court unreported 27 August 1992).

⁵⁰ A list of judgements and remarks that raise gender concerns is found in Graycar *supra* n 34 at 269 to 271; also S Cooney 'Gender and Judicial Selection' (1993) 19 *MULR* 20.

⁵¹ See CASA House *To Report or Not to Report: A Study of Victim/Survivors of Sexual Assault and Their Experience of Making an Initial Report to Police* (Royal Women's Hospital, Melbourne) and M Heenan and McKelvie *The Crimes (Rape) Act 1991 - An Evaluation Report Rape Law Reform Evaluation Project* (Department of Justice, Victoria).

⁵² Cooney *supra* n 50 at 23.

⁵³ See comments with interviewees set out in S Parker 'Courts and the Public' *AJJA Report*, 1998 at 146.

⁵⁴ Queensland District Court Judge Helen O'Sullivan in a lecture to QUT first year law school class, May 1999.

⁵⁵ S Cooney *supra* n 50 at 23.

you may conclude that the advent of increased numbers of women judges should make no difference, assuming, that is, that these women judges will bring to bear the same neutrality and impartiality.⁵⁶

Sir Harry Gibbs encapsulated this view when he said that judges represent all in society and to be a representative of a particular section of society was to be "false to the judicial oath".⁵⁷ Feminist jurisprudence in particular has debunked the myth of judicial neutrality – today, most accept that decisionmakers walk into a courtroom armed not only with relevant legal texts but "with a set of values, experiences and assumptions that are thoroughly embedded".⁵⁸ Some share the confidence of Justice Wilson "...that women view the world and what goes on in it from a different perspective from men; and ..that women judges, by bringing that perspective on the cases they hear, can play a major role in introducing judicial neutrality and impartiality".⁵⁹

Justice Wilson's proposition that women view the world from a different perspective from men is based on Carol Gilligan's⁶⁰ ground-breaking research into male and female decision making processes. Her research was used to demonstrate that female children reason from an 'ethic of care' and male children from an 'ethic of rights'. The flow-on from this is that male reasoning processes orient them to an adversarial legal system, just as a care or contextual form of reasoning is alien to the system. While this research has been used widely, it stands to reason that as gender roles become more fluid, reasoning processes intermingle.⁶¹ Later studies show that women who enter professions reason just as much as their male counterparts with a rights orientation.⁶² Ann Scales argues that an ethic of care is essentially incompatible with an ethic of justice.⁶³ Thus male/female difference in the reasoning process does not seem a sufficiently solid basis for appointing women judges, despite a high level of support for Justice Wilson's views.

Justice Elizabeth Evatt, former Chief Justice of the Family Court, is reported to share Justice Wilson's view, as related by Cooney:

Because women do not share 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 recognize how claimed objectivity is marred by unconscious biases.⁶⁴

There are many other women judges who share these views.⁶⁵ However, not all agree with this view. Regina Graycar, leading Australian feminist legal writer, expresses her scepticism about a "female" frame of mind in this way:

⁵⁶ *Supra* n 29 at 511.

⁵⁷ Sir Harry Gibbs 'The State of the Australian Judicature' (1985) 59 *ALJ* 522 at 527.

⁵⁸ R S Abella 'The Dynamic Nature of Equality' in S Martin and K Mahoney (eds) *Equality and Judicial Neutrality* (Carswell, Toronto, 1987) at 8-9.

⁵⁹ *Supra* n 29 at 515.

⁶⁰ Carol Gilligan *In a Different Voice* (Harvard University Press, Cambridge, 1982).

⁶¹ See A Hass *Doing the Right Thing: Cultivating your Moral Intelligence* (Pocket Books, New York, 1998) at 111.

⁶² *Ibid* and see A Scales 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale Law Journal* 1373.

⁶³ A Scales *ibid*.

⁶⁴ S Cooney *supra* n 50 at 25.

⁶⁵ *Ibid* at 42.

It may be the case that women judges in Australia have more in common with their white, male counterparts than they have with women who are sole parents living on social security, or rural Aboriginal women, or immigrant women doing piecework.⁶⁶

Empirical studies are more equivocal. Some statistical research in the United States suggests that women judges are more likely to identify and seek to rectify gender bias.⁶⁷ On the other hand, the results of some Canadian analysis has suggested that “there is little statistically identifiable difference in the performance of men and women judges....and what modest differences can be found are in the opposite direction from those suggested by comparable research in the United States”.⁶⁸ In any event, it is often not clear what represents ‘doing the right thing for women’. Feminist legal writer Professor Claire Young recently pointed to a dichotomy – when the Canadian Supreme Court split 5:2 on gender lines on the issue of deductibility of child-care expenses,⁶⁹ with the female judges in favour of deductability - she reasoned the female judges did not necessarily advance women’s interests. Professor Young argued that it was the male judges who ‘got it right’ in terms of the tax system maximizing benefits for *most* women.⁷⁰ Nor do all female judges necessarily utilize feminist legal theory. In another leading Canadian case on the admissibility of evidence of the complainant’s sexual history in a rape case,⁷¹ both the leading judgement and dissent were written by women. The dissentient judge extensively referred to feminist scholarship in deciding for non-admissibility, while the majority judge took the more traditional view that to render the evidence inadmissible would be to prejudice a full and fair defence.⁷²

But whether women reason differently and as judges will bring a different perspective to the Bench is not the central point. As Annette Marfording aptly puts it:

The crucial issue for a representative judiciary is in any event not simply the designation of more women, but of people with varied life experiences from all groups and classes of society. Only in this way can the law reflect the different values and perspectives of society as a whole.⁷³

This echoes the view of Lynette Schifftan QC, who became Victoria’s first woman judge in 1985, who says that “different perceptions broaden and strengthen the totality of the bench”.⁷⁴ However “the ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public’s trust”.⁷⁵

⁶⁶ R Graycar *supra* n 34 at 265.

⁶⁷ E Martin ‘Men and Women on the Bench: Vive la Difference?’ (1990) 73 *Judicature* 204; Allen and Wahl ‘The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?’ (1987) 12 *The Justice System Journal* 232.

⁶⁸ P McCormick ‘Do women judges make a difference? An analysis of appeal court data’ (1993) 8 *Canadian Journal of Law and Society* 135.

⁶⁹ *Symes v Canada* [1993] 4 SCR 659.

⁷⁰ Claire Young, in the course of a lecture ‘Taxing Times for Women: Feminism Confronts Tax Policy’ delivered to staff and students of QUT Law Faculty, April 1999.

⁷¹ *R v Seaboyer; R v Gayme* (1991) DLR (4th) 193.

⁷² See Cooney *supra* n 50 at 29.

⁷³ *Supra* n 38 at 43.

⁷⁴ M Martin ‘Women Judges – when?’ (1992) 66 (5) *LIIJ* 393.

⁷⁵ Judge Gladys Kessler (former President of the National Association of Women Judges in the United States) quoted in Wilson J *supra* n 29 at 518.

Conclusion

It is tempting to analogise the Bar Association's criticisms of Justice Atkinson, with the similar attacks made on women entering universities or the legal profession late last century and early this century. After all, if the criterion is long and senior experience at the Bar, the pool of eligible women is substantially eroded as comparatively few legally qualified women seek the path of the Bar.⁷⁶ Kim Gould also documents statistics in New South Wales that show hugely increased female participation in the legal profession, which is not reflected in participation at the Bar.⁷⁷ The arguments against the admission of women to universities and later the profession included such gems as: women would corrode the sphere of rationality through their intellectual inferiority; their sexuality would have a subversive effect on men; their overtaxed brains would lead to a deficiency of reproductive power.⁷⁸ But one Honorable member proposing women be allowed into the academy cut to the quick: "...the honorable gentleman's objection to the Bill is based on the fear that, some fine day, he would be cut out, in his own particular vocation by a female..who would fight...in court and vanquish him".⁷⁹ Attorney-General Matt Foley succinctly put it this way: The Association had "allowed itself to become a mouthpiece for the old boys' club".⁸⁰

Margaret Thornton⁸¹ documented the incredible barriers women lawyers faced after finally gaining the right to practise around 1920 in most States and how most of the early legal women had to assume 'male' standards and deny the existence of any barriers in order to compete within the legal profession. In any real sense women did not enter the profession until the 1980's and even today many do not see an even 'playing field'.⁸² This long and arduous push to bring down the barriers should serve as a lesson for the need to identify clearly broad criteria for entry to the judiciary, reflecting a modern view of the judicial role, otherwise it will be another 100 years before there is a truly representative judiciary. If advocacy skills and long and senior experience at the Bar are the touchstone for judicial office, there is undue focus on one criterion of 'merit', and a criterion that advantages established 'players' in the system. This is because this criterion operates in a discriminatory way, as women's (and presumably other candidates of non-traditional background) enhanced participation in the legal profession is not reflected at the Bar.

Advocating far broader criteria is not a gendered action, even though the history of change (snail's pace change) in the profession suggests it is crying out for a form of affirmative action. It is also not saying:

⁷⁶ In 1998, 11.3% of the Queensland Bar were women, whereas 27% of Qld Solicitors with practising certificates and 51.2% of law graduates were women. These statistics were quoted by McMurdo J, President of the Qld Court of Appeal in a speech given at the 7th Janet Irwin dinner, Brisbane, November 4 1999.

⁷⁷ K Gould *supra* n 14 at 218.

⁷⁸ M Thornton *Dissonance and Distrust: Women in the Legal Profession* (OUP, Melbourne, 1996) at 42-44.

⁷⁹ *Ibid* at 45.

⁸⁰ *Supra* n 3.

⁸¹ *Supra* n 78.

⁸² *Supra* n 76 and n 77.

... that other branches of the profession are better qualified than barristers, only that the experience, legal skills and personal qualities of people who are solicitors, academic lawyers and government lawyers have previously been undervalued.⁸³

The appointment of Roslyn Atkinson was not affirmative action. It was an appointment based on strongly achieving in areas well accepted⁸⁴ as criteria for judicial office. There was no call to rely on the 'need to reflect society's diversity' criteria, which has strong support, but not uniform acceptance.

The criticisms do point to a need however. The criteria of suitability for judicial office need to be set out explicitly and possibly, implemented legislatively. Only then will future similarly broadly qualified candidates (to Justice Atkinson) get the support and recognition they deserve and no issues arise as to 'merit', because merit will have been defined. The criticism also opens the debate on training for judicial office: whether there is merit in a civil law-type judiciary, where members are trained specifically and appointed as judges from the early stages of their careers and advocacy skills form only a small part of the training.

⁸³ D Solomon *supra* n 6.

⁸⁴ *Supra* n 14 and n 15.