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## Feminism, women judges, judicial diversity and the High Court of Australia

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In this paper I am interested in what the arrival of women judges (particularly women judges who have eschewed feminist identities) to the High Court of Australia reveals about judicial diversity.<sup>1</sup> In particular, I seek to reflect on how we understand diversity<sup>2</sup> and the ongoing case for diversity in light of shifts in thinking that (in my view, rightly) propose that *feminist* judges<sup>3</sup> rather than *women* judges might disrupt the law and masculinist approaches to legal reasoning. The appointment of women judges to Australia's highest court implies that decision-makers have taken heed of repeated calls for greater diversity in judicial appointments. But the fact that the women appointed have for the most part eschewed feminist identities not only serves as a reminder to avoid conflating woman and feminist, it also raises questions about the plausibility of seeing feminist judges appointed. These questions are especially pointed given the politics of judicial of appointment that have seen diversity framed in ambivalent if not negative terms. How diversity is understood and agitated for matters because it has a bearing on the extent to which changing the face of the judiciary might actually transform the law. I argue that valuing judicial diversity as a public good is an important step in securing feminist judges as it serves as a reminder that

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<sup>1</sup> Shortly after the Diversity and Legal Reasoning workshop at which this paper was delivered in November 2016, it was announced that Susan Kiefel would replace Robert French as Chief Justice of the High Court of Australia. Chief Justice Kiefel was sworn in on 30 January 2017. Parts of this paper are extracted from a piece I wrote in response to her Honour's appointment. See McLoughlin, K. 2016. Chief Justice Susan Kiefel and the politics of judicial diversity, on AUSPUBLAW (29 November 2016) <https://auspublaw.org/2016/11/chief-justice-susan-kiefel-and-the-politics-of-judicial-diversity>. In addition, some of the arguments about the politics of judicial diversity were published in McLoughlin, K. 2015. The Politics of Gender Diversity on the High Court of Australia. *Alternative Law Journal* 40(3): 166-170.

<sup>2</sup> My discussion here is limited to an examination of gender and the judiciary prompted by the appointment of women to the High Court with increasing regularity since 2009, but this is not to discount the importance of claims based on race, ethnicity or sexuality, nor the fact that such claims are not mutually exclusive. As Hunter acknowledges many of the arguments for gender diversity in the judiciary also apply to claims based on race, ethnicity or sexuality. See Hunter, R. 2015. More than Just a Different Face? Judicial Diversity and Decision-Making. *Current Legal Problems* 68: 119-141.

<sup>3</sup> See e.g. Hunter, R. 2008. Can *Feminist* Judges Make a Difference? *International Journal of the Legal Profession* 15(1-2): 7-36.

law is the result of human processes of reasoning informed by experience, values and knowledge. While such an acknowledgment certainly does not guarantee the appointment of feminist judges, appointments that undermine the homogeneity of the Court are steps in the right direction in disrupting the notion that judging is the preserve of men.

For most of its existence the High Court of Australia has certainly been the preserve of men judges. In 1987 the first woman judge, Justice Mary Gaudron, took her place on the Court. Gaudron's replacement with a man saw the Court returned to its traditional composition of seven men, thus prompting questions about when a woman would again sit at the apex of the Australian judiciary. The subsequent appointment of three women to the High Court in relatively quick succession (Justice Susan Crennan in 2005, Justice Susan Kiefel in 2007 and Justice Virginia Bell in 2009) might readily be construed as a triumph for the politics of diversity and gender inclusion. For a brief period in 2015 following Justice Crennan's retirement there were only two women serving, but since then the appointment of Justice Michelle Gordon and the elevation of Susan Kiefel to Chief Justice means the condition of a near-equal gender balance has returned. Of the five women ever appointed the High Court, only the first, Justice Mary Gaudron, could be said to have evidenced a willingness to reflect on the possible relationship between gender and judging.

The appointment of women judges to the High Court of Australia has typically produced a predictably contradictory gendered rhetoric. On one hand the appointment of women judges has been seen as a victory for feminists (often in ways that denigrate such appointments as tokenistic or lacking in merit), and on the other, it has been suggested that the women appointed to the High Court are a disappointment to the feminists who agitated for their appointment.<sup>4</sup> The latter issue is a potentially thorny one for feminists insofar as it raises significant questions about why diversity matters, what it looks like, and what it might achieve.

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<sup>4</sup> See McLoughlin, K. 2015. A Particular Disappointment? Judging Women and the High Court of Australia. *Feminist Legal Studies* 23(3): 273-294 for a discussion of the contradictory gendered rhetoric that arose around the appointment of women judges.

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Much has been written about the elusive nature of difference.<sup>5</sup> It is no revelation to note that women judges have not necessarily disrupted law and legal reasoning in the ways that were originally hypothesised<sup>6</sup> by (some) feminist legal theorists. This explains why expectations about the kind of difference women judges might make have been reconfigured to propose that *feminist* rather than women judges might have the capacity to challenge gendered legal concepts, understandings and narratives. But the appointment of feminist judges presents its own challenges. Given what we know about the masculinist nature of legal and political institutions, it is not surprising that those making judicial appointments might be especially reticent to appoint feminist judges. Nor is it surprising that appointees might want to actively eschew a feminist identity since the desire is to fit in, to be worthy of the honour of appointment. Hence, like all appointees, women to varying degrees seek the safety of what Rackley terms ‘the guise of the default judge’, which means that they invariably try to present ‘themselves as *exactly the same* as their male counterparts: a lawyer first *and* second, neither man nor woman’.<sup>7</sup> This is not to suggest that women judges are necessarily concealing a hidden feminist identity—rather, it is to observe how entrenched the notion of the default judge is. Law propagates a fiction of the genderless judge, so much so that to speak *as a man* judge is not to speak *as a man* at all; it is simply to speak as the judge.

How we, as feminist theorists, conceptualise and value diversity is therefore significant. Van Marle’s concern with ‘how diversity is often treated in law or legal reform projects is one of adding, with the view of bringing more diversity’<sup>8</sup> is apposite here. She argues that ‘a mere adding of categories or even opening up to

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<sup>5</sup> See e.g. Hunter, R. 2008. Can *Feminist Judges Make a Difference?* *International Journal of the Legal Profession* 15(1-2): 7-36; Douglas, H., Bartlett, F., Luker, T. and Hunter, R. 2014. Reflections on Rewriting the Law. In H. Douglas, F. Bartlett, T. Luker, and R. Hunter, eds. *Australian Feminist Judgments: Righting and Rewriting Law*. Oxford: Hart Publishing; Kenney, S.J. 2008. Thinking About Gender and Judging. *International Journal of the Legal Profession* 15(1): 87-110; Kenney, S.J. 2013. *Gender and Justice: Why Women in the Judiciary Really Matter*. New York: Routledge; Dixon, R. 2010. Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-examination. *Yale Journal of Law and Feminism* 21(2): 297-338.

<sup>6</sup> The literature is vast but see for e.g. Menkel-Meadow, C. 1985. Portia in a Different Voice: Speculations on a Women’s Lawyering Process. *Berkeley Women’s Law Journal* 1: 39-63; Sherry, S. 1986. The Gender of Judges. *Law and Inequality* 4: 159-169.

<sup>7</sup> Rackley, E. 2013. *Women, Judging and the Judiciary: From Difference to Diversity*. Oxford: Routledge, 137.

<sup>8</sup> Van Marle, K. This issue, 2.

diverse ways will not sufficiently destabilise current systems and the culture and privilege attached to them'.<sup>9</sup> This is another way of articulating the distinction between understanding diversity as simply adding women (who are expected to uphold existing power structures) and adding feminist judges who might have the capacity to disrupt those structures. Of course it might be argued that masculinism is so deeply embedded within existing legal frameworks that the culture and privilege attached to them might be immovable. If such a destabilisation is possible, it will take the appointment of feminist judges who are not only aware of the importance of equality and the gendered nature of law, but also, willing and able to articulate that awareness. In this paper I begin by outlining the gendered politics of Chief Justice Kiefel's appointment (and judicial diversity more broadly) before turning to a discussion about the continuing feminist case for judicial diversity. Specifically, I want to reflect on the case for judicial diversity in light of shifts in our understanding and expectations about *who* and *how* the destabilising transformation once promised by gender diversity might be achieved.

### **The politics of judicial appointment and gender diversity**

Nothing in the Australian constitutional<sup>10</sup> framework calls for diversity in judicial appointments, but it is clear that political expediency has meant that there is some political currency in adopting more inclusive appointment practices. Yet, the appointment of women judges to the High Court over almost three decades has never involved any explicit statement from those making the appointment about the importance or value of gender diversity (or indeed diversity more broadly) in judicial appointments. Instead, announcements of the appointments of women judges<sup>11</sup> to the High Court have generated a discourse that centres on merit. Where women appointees are concerned, at least from the perspective of those making the announcement, merit discourse steers carefully away from linking their gender to the

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<sup>9</sup> Ibid.

<sup>10</sup> The Australian Constitution provides little direction regarding appointment processes. See *Commonwealth Constitution s 72* which specifies that Justices of the High Court 'shall be appointed by the Governor General in Council'. In practice the appointment is generally made by the government of the day with the Attorney-General directing the process and in most cases presenting a nominee to Cabinet. The person is then formally recommended for appointment to the Governor-General.

<sup>11</sup> See McLoughlin, K. 2015. The Politics of Gender Diversity on the High Court of Australia. *Alternative Law Journal* 40(3): 166-170. Here I examine the political discourse around the appointment of each of the women judges to the High Court of Australia in more detail.

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job. This is in contrast to the appointment of men (whose gender is the taken for granted norm) where their suitability is similarly acknowledged, but usually without the need to provide any reassurances that the appointment was based on merit. The value of diversity in judicial appointments has been acknowledged in various contexts but has been almost entirely absent from the political rhetoric that has attended the appointment of women judges. This in turn shapes how diversity is understood and even implicitly, it suggests that gender considerations are somehow illegitimate.

Attorney-General George Brandis' announcement that Justice Kiefel would be elevated to Chief Justice therefore followed a familiar pattern in emphasising that the appointment was a merit based appointment and therefore to assuage any concerns that hers was a 'gender based appointment'. The Attorney-General was keen to point out that every step that had been taken in Justice Kiefel's career was 'a step that she took on merit'.<sup>12</sup> Curiously, in announcing the replacement for retiring Chief Justice French, Justice James Edelman, there was no retreat to the specific terminology of merit. Of course, his Honour's achievements were canvassed—with some emphasis on the particularly precocious nature of his achievements given his Honour is aged only 42.

There was an unspoken and gendered dimension to the narrative presented about Kiefel's elevation within the profession as her trajectory 'from legal secretary to Chief Justice' featured in the commentary about her appointment. It is no accident that we would struggle to find examples of men judges' elevation from the typist pool to the powerful echelons of the profession, although the gendered nature of administrative work is now arguably less pronounced than it was in the 1970s. Justice Kiefel has never embraced an identity as a woman judge or aligned herself with feminist<sup>13</sup> causes or concerns. Her elevation was presented as an important milestone for Australian women but in a way that did not disrupt the notion of the default, genderless judge. For example, the observation that, according to one female barrister,

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<sup>12</sup> Brandis. G. 2016. Appointment of the Hon Susan Kiefel to Chief Justice of the High Court. <https://www.pm.gov.au/media/2016-11-29/joint-press-conference-attorney-general-senator-hon-george-brandis-qc>.

<sup>13</sup> For a discussion of the manner in which Kiefel has presented herself as a genderless judge, see Roberts, H. 2012. Women Judges 'Maiden Speeches' and the High Court of Australia. In B. Baines, D. Barak-Erez and T. Kahana, eds. *Feminist Constitutionalism*. New York: Cambridge University Press.

Her Honour did not like ‘lipstick feminists’<sup>14</sup> featured in the discourse around her appointment. The accuracy of this statement notwithstanding, such comments not only serve to distinguish Her Honour from feminists—but by extension, no doubt surely serve as reassurance about her suitability for the role.

This might be evidence of what Thornton termed the ‘exceptional women syndrome’.<sup>15</sup> This syndrome allows women judges (and women in other positions of power) ‘to be distinguished from other women, so that the masculinist character of the office is not diminished’. In extra-curial remarks, Mary Gaudron spoke to the existence of such a syndrome, positing that women did not dare to be different:

To be different, to challenge the codes of conduct derived, as often as not, from rules developed on the playing fields of Eton for the male members of the British aristocracy, would have been to invite ostracism, perhaps, even, the attention of the Ethics committee; to assert that women were different with different needs would have been construed as an acknowledgment of incompetence; to question the bias of the law would have been to invite judgment as to one’s fitness to be a member of the profession. And, thus, very many of us became honorary men. We thought that was equality and, on that account, we rightly deserved the comment of the graffitist who wrote “Women who want equality lack ambition”.<sup>16</sup>

Is the appointment of women who might be described as ‘honorary men’ something of a pyrrhic victory for feminists? Not necessarily, but when diversity is understood as simply ‘adding women’, this will limit the transformative potential of judicial diversity. The fact that High Court appointment practices have thus far favoured a particular kind of appointee is certainly not to critique any of the appointees or appointments. However, it does reveal some of the complexities that arise around the

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<sup>14</sup> In the Sydney Morning Herald Editorial, the quote was not embedded in article text, but rather, appeared underneath a photograph of the judge. See Editorial. 2016. Susan Kiefel is a worthy and inspirational Chief Justice. *Sydney Morning Herald*, 30 November 2016. <http://www.smh.com.au/comment/smh-editorial/susan-kiefel-worthy-and-inspirational-chief-justice-20161128-gszn78.html>. The quote from the unnamed woman barrister appeared in text in a piece published in the *Australian Financial Review* alongside the observation that ‘lawyers familiar with her work regard her as broadly conservative’. See Patrick, A. 2017. Conservatives look for free speech ally in new High Court chief Justice Susan Kiefel. *Australian Financial Review*, 10 January 2017. <http://www.afr.com/business/legal/conservatives-look-for-free-speech-ally-in-new-high-court-chief-justice-susan-kiefel-20161213-gtafa9>.

<sup>15</sup> Thornton, M. 1996. *Dissonance and Distrust: Women in the Legal Profession*. Melbourne: Oxford University Press, 203.

<sup>16</sup> Gaudron, M. 1997. Australian Women Lawyers. Speech, 19 September 2017. Melbourne: High Court of Australia. [http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gaudronj/gaudronj\\_wlasp.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gaudronj/gaudronj_wlasp.htm).

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gendered politics of judicial appointment and, perhaps more pointedly, prompts questions about the plausibility of seeing feminist judges appointed to the peak of Australia's judiciary.

The appointment was no doubt a politically astute one for the Government. Justice Kiefel's status as the second most senior puisne judge and her contributions to the Court to date mean her elevation to Chief Justice was not a radical appointment. In addition to having already appointed more women justices to the High Court than the Labor Party, the Liberal-National Coalition now boasts having appointed the first woman Chief Justice of the High Court. It is perhaps important here to acknowledge, and give context to, the broad ideological differences between the Liberal-National Coalition and the Labor Party regarding the appropriateness of measures to advance women's political participation. Although the gender politics (in terms of their policies concerning women and the prospects for women parliamentarians) of both major parties have oftentimes been problematic, it is noteworthy that the Labor Party formally supports affirmative action for women in pre-selection,<sup>17</sup> whereas the Liberal Party does not.<sup>18</sup> Of course, there are important differences between political and judicial power and I do not suggest that any appointments to the High Court have been the result of such a policy. But the politics around the legitimacy of such measures in the legislative branch is significant in that it illuminates the precarious and contested *value* of gender diversity.

In a democratic setting, the tenets of democracy will always impose certain limitations on political actors seeking to make judicial appointments. In fact, in democratic nations the world over we have seen pressure placed on decision-makers

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<sup>17</sup> The Australian Labor Party has adopted quotas since 1981, the most recent of which is a 40:40:20 quota system. A Parliamentary Research Paper on quotas for women in Australia noted that '[t]his means that 40 per cent of seats held by Labor will be filled by women, and not less than 40 per cent by men. The remaining 20 per cent may be filled by candidates of either gender'. The views about quotas within the party ranged 'from concern about tokenism and preserving the concept of merit, to those who point to the results in the number of Labor women in parliament'. McCann, J. 2013. Electoral quotas for women: an international overview. Research Paper. Canberra: Parliamentary Library, 13. <http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2840598/upl>

<sup>18</sup> Although 'the merit principle' is commonly invoked as an argument against measures to enhance women's representation within the Liberal Party, that is not to say that there is consensus regarding this issue. Liberal Senator, the Hon Judith Troeth argued '[i]f it's demeaning for women to have quotas, it's equally demeaning to sit in a Parliamentary party room for 20 years without seeing a progressive increase in the number of women members. As if those handful of women members who are there were the only "women of merit" who put themselves forward for preselection!' Cited in McCann, J. Ibid.

by the intersection between judicial selection processes and the idea, as Resnik explains, which stems from democratic theory ‘that all kinds of people are entitled to participate as political equals and that access to judgeships ought to be more fairly distributed across groups of aspirants’.<sup>19</sup> In the current political space, notwithstanding the different views about the appropriateness of explicit measures to secure women’s advancement in the legislative branch, when it comes to judicial appointments at the peak of Australia’s judiciary, there seems to be little room for a discussion about the importance or desirability of diversity in judicial appointments. While we are frequently reminded that merit must be the guiding principle in making all judicial appointments, discussions (and sometimes, doubts) about an appointee’s merit are more likely to come to the fore when that appointee is a woman. This is arguably reflective of what appears to be a national aversion to ‘tokenism’ or affirmative action even when no such policy has been invoked. Those who demand that appointments must be made on merit without any other consideration discount the subjective nature of merit itself. As Thornton has argued, what counts as meritorious is determined by those already in positions of power and privilege and ‘[i]ts claim to produce an objective “best person” is a rhetorical claim designed to maintain the judiciary as a gendered regime’.<sup>20</sup>

Granted, criticism about current High Court appointment practices (and the disinclination of successive Governments to consider reforms to appointment processes) should be tempered with the reality of what have been clear gains for women. Space quite literally had to be made for women on the highest judicial benches simply because getting women into positions of judicial authority was a departure from the overtly gendered regimes of the past. It might be countered that if this strategy is working (e.g. the current composition of the Court certainly points to marked progress), then there is no need to formalise any measures to secure a more diverse judiciary. But hard won gains in improving the representativeness of our public institutions are by no means guaranteed—it might stagnate or even go backwards. Moreover, because diversity has been framed in such a way (no formal

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<sup>19</sup> Resnik, J. 2005. Judicial Selection and Democratic Theory: Demand, Supply and Life Tenure. *Cardozo Law Review* 26(2): 584-658, 584.

<sup>20</sup> Thornton, M. 2007. Otherness on the Bench: How Merit is Gendered. *Sydney Law Review* 29(3): 391-413, 397.

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commitment to judicial diversity, piecemeal progress that is at best about adding to existing categories rather than transforming them) it has not opened up the space for debates about what a truly diverse judiciary might look like—or why it matters.

### **Why does diversity (still) matter?**

Two broad streams of argument have been used to justify the appointment of women to judicial roles—difference and equality. Although these arguments are now well worn, they warrant revisiting, at least in terms of thinking about how agitating for the appointment of feminist judges might fit within, or challenge existing arguments for judicial diversity. Arguments on the basis of ‘difference’ contend that the quality of justice available will be improved because women offer something different, perhaps by ‘speaking in a different voice’ or by bringing an ‘ethic of care’ to the judicial role,<sup>21</sup> whereas arguments premised on equality contend that the ‘principle of equity requires that women have an equal opportunity to participate in public decision-making institutions and that their absence undermines the democratic legitimacy of those bodies’.<sup>22</sup>

Malleson explains the superficial appeal of arguments based on difference:

The argument that the quality of justice in the courts will be improved by the differences which women bring to the bench are superficially very persuasive. The popularity of difference theories in their various guises is understandable since, if correct, they provide an almost unanswerable claim for the participation of women in the judiciary. In addition, they counter the traditional dominance of perceived masculine attributes and validate some of the traits which are designated as feminine and which have been marginalised or denigrated in public life.<sup>23</sup>

There has always been a certain danger for feminists in the arguments from difference, however, and this danger is alluded to in the responses of some women judges in their eschewal of difference. Difference can be a double-edged sword, capable of being used in ways that support and subvert feminist goals—contested as those goals might be. As we know, historically, women’s difference has been used as

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<sup>21</sup> See e.g. Gilligan, C. 1982. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge (Mass.): Harvard University Press.

<sup>22</sup> Malleson, K. 2003. Justifying Gender Equality on the Bench: Why Difference Won't Do. *Feminist Legal Studies* 11: 1-24, 14.

<sup>23</sup> *Ibid*, 4.

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a justification for excluding them from many of the benefits of civil and public life. The tension embedded in the very notion of difference is made out in Eisenstein's distinctions between the different views of 'difference'. The first view regards 'differences as diversity' and is therefore able to 'acknowledge the differences among and between women'.<sup>24</sup> The second is more problematic because it 'focuses on "difference" as homogeneity, meaning women are different, all in the same way, from men'. In emphasising the way that discussions about difference and women can lead to 'an unconcern about specificity and differences' Eisenstein drew on the work of French feminist, Luce Irigaray.<sup>25</sup> The result of this unconcern was that '[w]omen are treated as like men—or not like men—but not specifically as women'. In turn, '[w]omen are generalized in terms of their "difference" and therefore lose their specificity' while 'men are privileged by presenting themselves as non-different'.<sup>26</sup> Although Eisenstein asserted that '[m]en and women are much more similar than they are different' she did not advocate abandoning difference as either a concept or a method. Instead, she contended that the significance of sex and gender differences must remain 'open-textured' while we do our best to 'sort through a meaningful notion of equality that does not preclude differences and is not simply based in sameness'.<sup>27</sup>

It is clear that the 'difference dilemma' remains unresolved and therefore some of the debates around the rationale for appointing women judges remain in a state of flux. Perhaps we are not quite sure why we want women judges if actually getting them is going to be more 'business as usual' rather than the manifestation of difference some feminist theorists hoped for. For this reason, in agitating for more women on the bench, feminists are on safer ground premising their arguments on a need for diversity so that the judiciary is comprised of individuals who are more representative of society as a whole. Justifications for women judges are therefore now far more commonly couched in terms of equity or representation rather than difference because

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<sup>24</sup> Eisenstein, Z. 1988. *The Female Body and the Law*. Berkeley: University of California Press, 32-33.

<sup>25</sup> Irigaray, I. 1985. *The Sex Which is Not the One* (trans. Catherine Porter, with Carolyn Burke). Ithaca (New York): Cornell University Press (first published 1977), 78.

<sup>26</sup> Eisenstein, Z. 1988. *The Female Body and the Law*. Berkeley: University of California Press, 32-33.

<sup>27</sup> *Ibid*, 32.

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‘their persuasiveness or validity is not determined by what woman do on the bench’.<sup>28</sup>

Yet, as Kenney has pointed out, ‘strangely, findings of no difference never seem to challenge the fundamental assumption of difference, nor deter the search for it’.<sup>29</sup> With empirical studies producing varied results, and a divergence of opinion not just amongst feminist theorists but also amongst women appointed as judges, the study of gender and judging remains fraught. Because ‘gender is not a proxy for feminist’<sup>30</sup> some feminist theorists have posited that it is more plausible to expect *feminist* rather than *women* judges to make a difference insofar as their approach to legal reasoning is concerned. As a consequence, there have been calls for a change in strategy on the part of feminists to focus more directly on the demonstrated jurisprudential commitments,<sup>31</sup> rather than on the gender, of future judicial nominees when it comes to agitating for judicial appointments. It is important to note that feminist judging, understood in either a theoretical sense or on real life benches, is not about deciding *for* women but rather an approach to judging which is simultaneously consistent with the judicial oath and feminist principles (broadly construed). To this end, there has been focused examination of the jurisprudential contributions of self-described feminist judges, or judges whose approach might nonetheless align with feminist sensibilities.<sup>32</sup> For example, the jurisprudential contributions of Baroness Hale,<sup>33</sup> Justice Gaudron<sup>34</sup> and Justice Neave<sup>35</sup> have been examined with a view to assessing

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<sup>28</sup> Ibid, 17.

<sup>29</sup> Kenney, S.J. 2008. Thinking About Gender and Judging. *International Journal of the Legal Profession* 15(1): 87-110, 105.

<sup>30</sup> Kenney, S.J. 2013. *Gender and Justice: Why Women in the Judiciary Really Matter*. New York: Routledge, 181.

<sup>31</sup> See Dixon. R. 2010. Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-examination. *Yale Journal of Law and Feminism* 21(2): 297-338. Dixon claimed (at 297) to challenge the ‘feminist orthodoxy’ about the connection between a judge’s gender and ‘pro-feminist’ jurisprudential contributions, by analysing the experiences and contributions made by women judges on the Canadian and United States Supreme Courts. Dixon’s argument aligns with Hunter (2008) and Kenney (2013) regarding the need to avoid conflating ‘woman judge’ and ‘feminist judge’. In making her argument that feminists should support nominees on the basis of their feminist credentials rather than gender she also advocated that feminists should support men judges who support feminist goals.

<sup>32</sup> See e.g. Baines, B. 2013. Must Feminist Judges Self-Identify as Feminists? In U. Schultz and G. Shaw, eds. *Gender and Judging*. Oxford: Hart Publishing.

<sup>33</sup> Rackley, E. 2006. Difference in the House of Lords. *Social and Legal Studies* 15(2): 163-185.

<sup>34</sup> There has been considerable interest in Justice Gaudron’s jurisprudential legacy, and no doubt much of this interest arises from her status as the first woman appointed to the High Court of Australia. Recognising the ‘distinctive contribution of the first and only woman High Court Justice of Australia’ was referenced in Rubenstein’s introduction to the *Public Law Review* collection honouring Justice Mary Gaudron. See Rubenstein, K. 2004. Introduction to the Public Law Review Collection Honouring Justice Mary Gaudron. *Public Law Review* 15: 281-282.

whether a feminist difference could be discerned in their judicial voices. That being said, the nature of legal reasoning means that ‘even for judges who are willing to be feminist activists, opportunities to do so might be few and far between’.<sup>36</sup>

### **The gender dynamics of the High Court: how plausible are feminist appointments?**

It is obvious that explicitly feminist judges (rather than women judges) might offer more in the way of a deliberate and conscious challenge to gendered legal concepts, understandings and narratives. Therefore we need to think about the strategies involved in securing their appointment. Given the public discourse around feminism and the whiff of controversy which arises when notions of affirmative action are raised (even if no such policy or anything like it is invoked), this might prove difficult. What was once conceived as the antithetical relationship between gender and judging has been disrupted in important ways but hesitancy still exists. As Justice McMurdo acknowledged at the launch of *Australian Feminist Judgments*,<sup>37</sup> the reticence of lawyers and judges to call themselves feminists arises at least in part from ‘feminism’s PR problems’.<sup>38</sup> But it is not just about identifying as a feminist (although that is a separate issue which I do not seek to pursue here), it is about the way legal reasoning is understood. Justice McMurdo echoed the sentiments of the editors of the book she was launching when she emphasised the synergy between feminism and the judicial oath:

the judicial oath or affirmation is in largely identical terms throughout the common law world: to sincerely promise and swear or affirm to at all times and in all things do equal justice to the poor and rich and to discharge the duties of office according to law to the best of the judge’s knowledge and ability, without fear, favour or affection. How could the contextually appropriate advocating of women’s rights on the ground of equality of the sexes result in a reasonable apprehension of bias? There is complete synergy between feminism and the judicial oath.<sup>39</sup>

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<sup>35</sup> Hunter, R. 2013. Justice Marcia Neave: Case Study of a Feminist Judge. In U. Schultz and G. Shaw eds. *Gender and Judging*. Oxford: Hart Publishing.

<sup>36</sup> Hunter, R. 2015. More than Just a Different Face? Judicial Diversity and Decision-Making. *Current Legal Problems* 68: 119-141, 133.

<sup>37</sup> H. Douglas, F. Bartlett, T. Luker and R. Hunter eds. 2014. *Australian Feminist Judgments: Righting and Rewriting Law*. Oxford: Hart Publishing.

<sup>38</sup> McMurdo, M. 2014. Address at the Launch of the Book ‘Australian Feminist Judgments: Writing and Re-writing Law’. Speech. 2 December 2014. Banco Court, Brisbane, 1. <http://www.law.uq.edu.au/documents/afjp/Justice-McMurdo-Launch-speech-021214.pdf>.

<sup>39</sup> Ibid, 2.

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McMurdo's point is more far-reaching than identifying with feminism or even identifying as a feminist judge. Feminist reasoning, by its very nature seems so disruptive because masculinist legal reasoning was simply legal reasoning. The possibility and plausibility of real life feminist judicial reasoning is undermined by a system of law which entrenches masculinist approaches in a polity in which the public authority of women is contested and compromised. Feminist interventions in the law are rendered less likely (but not impossible) where a powerfully masculinist public sphere dictates the circumstances in which feminist judges might don judicial robes by directing judicial appointments.

It remains to be seen what kind of contribution Chief Justice Kiefel will make to the High Court. Her jurisprudential contributions and extra curial comments indicate that the Kiefel Court, like the French Court before it, might be a Court marked by consensus.<sup>40</sup> Whether she evidences (like the now retired Justice Crennan<sup>41</sup> before her) a growing willingness to reflect on the changing role of women in the law, and the frustrations associated with the gendered ways in which her legacy might be received, will also remain to be seen. The gender dynamics on the High Court have thus far been carefully crafted. No woman has ever replaced another woman—lest anyone get the idea that there are seats reserved for women. Nevertheless, at least for now, the presence of women as members of the Court seems secure. Assuming Chief Justice Kiefel stays on the bench until she is 70 years old, a woman will serve as Chief Justice until 2024. If Justice Michelle Gordon stays on the Bench until her mandatory constitutionally required retirement, we are guaranteed at least one woman until 2034. United States Supreme Court Justice Ruth Bader Ginsburg's response to queries about when there will be 'enough' women judges is salutary:

So now the perception is, yes, women are here to stay. And when I'm sometimes asked when will there be enough [women on the Supreme

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<sup>40</sup> For a discussion of Her Honour's views about consensus and judgment writing, see Kiefel, S. 2014. *The Individual Judge*. Speech delivered at the 2014 Sir Richard Blackburn Lecture, 13 May 2014. Canberra: ACT Law Society. <https://www.actlawsociety.asn.au/documents/item/944>.

<sup>41</sup> See McLoughlin, K. 2016. "Collegiality is not Compromise": Farewell Justice Crennan, the Consensus Woman. *Australian Feminist Law Journal* 42(2): 241-271. I examine the legacy Justice Crennan and others sought to craft upon her retirement from the Court and I argue that her remarks in the year of her retirement represent a marked shift in her impression of (or even willingness to speak publically about) the interaction between gender and judicial identity.

Court]? And I say when there are nine, people are shocked. But there'd been nine men, and nobody's ever raised a question about that.<sup>42</sup>

The point is a powerful one because it reveals how normalised an all-man bench is, especially when juxtaposed against the seemingly fantastical idea of an all-woman bench. The visibility of women on the bench, literally and figuratively, cast by the almost equal gender balance and our new Chief Justice, makes an important symbolic statement about women's admission to legal authority in Australia. But this appointment does not negate the need for continuing conversations around the importance of diversity or for amendments that would properly enshrine the value of diversity into the formal appointment process.

The case for diversity is multifaceted and by extension, what a diverse judiciary might look like is neither fixed nor certain. Advocating for a more diverse judiciary on the basis that it might transform existing approaches is obviously more radical than asserting that the judiciary should be representative of the society from which it is drawn. But these arguments need not be mutually exclusive. Appointments that undermine the homogeneity of the Court are steps in the right direction in disrupting the notion that judging is the preserve of men. Once we acknowledge the value of judicial diversity we are able to have important conversations about the scope and content of reforms which might then secure a truly diverse judiciary. And then, for feminists, there might even be more space to think about strategies for securing the appointment of judges who are not only aware of the importance of equality and the gendered nature of law, but also, willing and able to articulate that awareness.

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<sup>42</sup> Filipovic, J. 2012. Justice Ginsburg's distant dream of an all-female supreme court. *The Guardian*, 1 December 2012. <http://www.theguardian.com/commentisfree/2012/nov/30/justice-ginsburg-all-female-supreme-court>.

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