SEPARATING 'WOMAN' FROM 'JUDGE'

A CASE STUDY OF CHIEF JUSTICE SUSAN KIEFEL

u6052916

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ANU College of Law, The Australian National University

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INTRODUCTION

On 30 January 2017, a historic event occurred for the Australian legal community. After more than a century since the formation of the High Court of Australia, Susan Kiefel became the first female Chief Justice to lead the Court. Never before had a woman occupied the highest position in Australia's constitutional and ultimate court of appeal.

Yet, Kiefel's experiences as a woman in the law demonstrate that the entry of women to the most visible and powerful levels of judicial authority is not enough to discard the idea that women remain 'fringe-dwellers of the jurisprudential community'.[1] Unlike Lady Justice, the 'default image'[2] of the judge is intrinsically male – what Thornton calls the benchmark man.[3] According to Thornton, the benchmark man is the 'paradigmatic incarnation of legality who represents the standard against whom others are measured'.[4] Consistent with the long history of judicial officers in the High Court, the benchmark man is white, heterosexual, able-bodied and class-privileged.[5] This male-authored history sustains the 'fiction' that objectivity, impartiality, neutrality and authority are distinguishing characteristics of the benchmark man and provides the foundation for the masculinised norm.[6] Understanding the judge, judging and judicial authority in terms of the benchmark man means that those who fall outside the standard he sets are 'other'.

Women, through the construction of the feminine in terms of corporeality, emotion and connection with others, are the paradigmatic 'other'.[7] The woman judge challenges the physical appearance and professional attributes of the benchmark man.[8] Her status as a woman defies traditional understandings of the judge as someone without identity, sex, race, class, disability,

[1] Margaret Thornton, *Dissonance and Distrust* (Oxford University Press, 1996) 3–4.
[2] Erika Rackley, *Women, Judging and the Judiciary* (Taylor & Francis Group, 2012) 127.
[3] Thornton (n 1) 2.
[4] Ibid.
[5] Ibid; Dermot Feenan, 'Women Judges: Gendering Judging, Justifying Diversity' (2008) 35(4) *Journal of Law and Society* 490.
[6] Thornton (n 1) 6
[7] Ibid 15–17.
[8] Rackley (n 2) 127.

sexual orientation and so on.[9] These 'defining' characteristics contribute to a perception that she is incapable of detaching from her 'subjective self'.[10] This is reinforced by arguments for more women on the bench. Some arguments for the greater numerical presence of women judges are symbolic: it increases the democratic legitimacy of the judiciary; it signals equality of opportunity for women who aspire to judicial office; and it provides encouragement and active mentoring for women in the profession and female law students to aspire to, seek and obtain judicial appointment.[11] Other arguments are substantive, asserting that women add a 'new dimension of justice'[12] because they bring 'different experiences to bear on their judgments'.[13] However, this gives rise to a fear that the woman judge is unable to embody the virtues of objectivity, impartiality and neutrality required by her judicial role.[14] Consequently, the experience of the woman judge has been characterised by distrust, hostility and greater scrutiny. To achieve acceptance and legitimacy, the woman judge must separate her identity as a woman – comprised of her attitudes, values and beliefs shaped by her experiences as a woman – from her role as a judge.

This research paper adopts a qualitative 'kaleidoscope' approach to examine the continuing pressure on the woman judge to separate her identity as a woman from her judicial role, focusing on the life and experiences of Susan Kiefel as a woman in the law. Conceptualising Kiefel's experiences in terms of a 'kaleidoscope' – observing different aspects of her experiences, composed of the same elements as other women judges but in a different configuration – accounts for the complex interrelationship between different historical, social and political contexts and her

[9] Although the sex/gender distinction lies beyond the scope of this research paper, this research paper recognises that sex and gender cannot be considered as discrete concepts. As Gatens points out, the subject is always sexed. As such, the terms 'sex' and 'gender' are used interchangeably: Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (Routledge, 1996) 9.
[10] Thornton (n 1) 13–14; Reg Graycar, 'Gender, race, bias and perspective: Or, how otherness colours your judgment' (2008) 15 *International Journal of the Legal Profession* 73.
[11] Rosemary Hunter, 'More than just a different face? Judicial Diversity and Decision-Making' (2015) 68(1) *Current Legal Problems* 119, 123.
[12] Sheldon Goldman, 'Should There be Affirmative Action for the Judiciary?' (1979) 62 *Judicature* 489, 494.
[13] Clare McGlynn, *The Woman Lawyer: Making the Difference* (Butterworths, 1998) 187. Cf Kate Malleson, 'Justifying gender equality on the bench: Why difference won't do' (2003) 11 *Feminist Legal Studies* 1.
[14] Rackley (n 2) 127.

responses to different circumstances.[15] This research paper cannot generate overarching conclusions about the experiences of women judges. Nevertheless, it seeks to offer important insights into the status of Australian women judges today.

This research paper argues that Kiefel has gone beyond setting aside her identity from her judicial role. Rather, she has neutralised any traces of 'otherness' to maintain an impassive 'identity-less' stance. Chapter One examines the treatment of gender and merit in Kiefel's swearing-in ceremonies in the High Court in 2007 and 2017.[16] Swearing-in speeches help to illustrate Kiefel's initial representation of her judicial role as distinct from her identity. Analysing the historical, social and political circumstances and the welcome speeches at the time will offer the necessary context to understand the role of identity in her appointments to the Court. It finds that although there was a shift in the way gender was addressed at each of Kiefel's swearing-in ceremonies, the welcome speakers were conscious to draw attention to her merit at both ceremonies. Kiefel's swearing-in speeches were largely silent about her identity as a woman.

Chapter Two explores Kiefel's judgments in a selection of cases featuring issues relating to sex and gender, and her extra-judicial comments on her role as a judge and experiences as a woman in the law. The low percentage of cases featuring issues relating to sex and gender that proceed to a formal hearing means that a miniscule proportion of cases reach the High Court.[17] Hence, most of the cases examined precede Kiefel's time on the High Court. These cases will not be definitive in answering the question of whether Kiefel's identity influences her judicial decision-making process. Nonetheless, they aim to reveal insights about the different processes of judgment in the cases at hand.[18] This chapter observes that Kiefel is forthright about her role and work as a judge. However, she has been careful to neutralise her identity in her judgments and extra-judicial

[15] Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Hart Publishing, 2006) 27; Liz Stanley, *The Auto/biographical I: The Theory and Practice of Feminist Auto/biography* (Manchester University Press, 1992) 158.
[16] It was difficult to find publicly available transcripts of Kiefel's swearing-in ceremonies at the Supreme Court of Queensland or the Federal Court of Australia, so they are not included in this analysis.
[17] According to Thornton, less than two percent of sex discrimination complaints reach the courts: Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31, 34.
[18] Erika Rackley, 'Detailing Judicial Difference' (2009) 17 *Feminist Legal Studies* 11.

comments, with the exception of her extra-judicial statement as Chief Justice on allegations of sexual harassment against former Justice Dyson Heydon.

Chapter Three assesses the strategies Kiefel has adopted throughout her career in response to the expectations placed upon her by the legal profession, political decision-makers and the public. It argues that consensus and collegiality make it difficult to discern precisely Kiefel's jurisprudential contributions on the High Court. Separate judgments that Kiefel has written in sex discrimination cases, however, illustrate a conservative approach to issues relating to sex and gender marked by a strong respect for precedent and a black-letter application of the law. Outside the courtroom, Kiefel is careful to present herself as judge first, woman second. Her statement in response to the sexual harassment complaints against Justice Heydon, however, marks a shift from this impassive stance.

Chapter Four evaluates the image of the judge in terms of the benchmark man and the effects of this understanding on Australian women judges. It argues that the ongoing association of the judge with the benchmark man, notwithstanding the presence of women in the highest judicial offices, subject women judges to heightened doubts and scrutiny about their capacity to carry out their duties objectively, impartially and neutrally. It concludes with a solution to countering the pressure to conform to the benchmark man: to change the process of High Court judicial appointments to promote greater transparency and encourage diversity.

CHAPTER ONE: SWEARING-IN CEREMONIES AND SETTING EXPECTATIONS

I. INTRODUCTION

Swearing-in ceremonies mark the inauguration of a new judge. These ceremonies begin with speeches by leaders of the Australian legal community welcoming the new appointment. The welcome speeches provide 'glimpses' into the private life of the new judge and present them as 'a subject that embodies the virtues of the judicial institution'.[19] In a legal system where appointees to the High Court of Australia are selected behind closed doors, they further help to contextualise the concept of 'merit' in a High Court appointment. Following the welcome speeches is the judge's reply. Though they are free to speak about their identity, values and principles, they are constrained by the ideal of the benchmark man. Under this constraint, the judge's swearing-in speech sets the standard of how they want to be seen as one of the seven on the Court.

This chapter examines Kiefel's two swearing-in ceremonies on the High Court and the commentary surrounding her appointment as a judge in 2007, and then as Australia's first female Chief Justice in 2017. The critical feature of these ceremonies is how each treated gender and merit. While merit was emphasised on both occasions, there was a distinct shift in how gender was addressed.

II. SWEARING-IN, 2007

Susan Kiefel was sworn in as judge of the High Court on 3 September 2007, succeeding fellow Queenslander, Ian Callinan. Her 2007 swearing-in ceremony revealed very little of her identity and

[19] Heather Roberts, 'Telling a History of Australian Women Judges Through Court's Ceremonial Archives' (2014) 40(1) *Australian Feminist Law Journal* 147, 148.

judicial philosophy. Although her gender was not openly mentioned in the welcome speeches, it influenced the ceremony indirectly through the speakers' responses to questions of merit.

Four male speakers welcomed Kiefel to the High Court, including Attorney-General Philip Ruddock. There were two key details of Ruddock's welcome speech. First, there was no explicit reference to gender. Ruddock did not use the female pronoun nor did he acknowledge Kiefel's identity as a woman. Indeed, the only speech that hinted at Kiefel's gender was that of Hugh Fraser, President of the Bar Association of Queensland, who mentioned her husband Michael Albrecht.[20] The second detail was the fleeting way Ruddock spoke of Kiefel's professional accomplishments.

The style of the welcome speeches may have been shaped by the media's response to Kiefel's appointment. With Kiefel joining the bench, the Howard Government had appointed two women to the High Court in succession. This raised questions about whether Kiefel's appointment was designed to ensure better female representation on the bench. Some lamented this idea, saying that appointments on the basis of sex does women 'no favours.'[21] Others viewed Kiefel's achievements as 'all the more meritorious' given the prejudice against women in the profession.[22] Her appointment also reopened criticisms of the selection process.[23] Some commentators described Kiefel as a 'black-letter, conservative judge', evinced by her dry wit and efficient nature as a barrister.[24] Several senior lawyers felt that this gave her an edge, given that the majority of the Court would be appointed by the Liberal-National Coalition until at least 2013.[25]

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[20] Transcript of Proceedings, *Ceremonial Sitting on the Occasion of the Swearing-In of the Honourable Susan Mary Kiefel as a Justice of the High Court of Australia* [2007] HCATrans 493, 16 ('*Swearing-In of Kiefel J*').
[21] Janet Albrechtsen, 'May the best person preside', *The Australian* (Sydney, 15 August 2007) 14.
[22] Ross Buckley, 'Gender was a factor in the latest court appointment', *The Canberra Times* (Canberra, 15 August 2007) 15.
[23] See, eg, Brendan Nicholson, 'Former chief justice urges independent selection panel to avoid 'judicial clones'', *The Age* (Canberra, 11 August 2007) 2; Geoff Davies, 'Merit must rule in choice of judges', *The Australian* (Sydney, 10 August 2007) 37.
[24] Michael Pelly, 'New judge won't rock the High Court boat', *The Australian* (Sydney, 17 August 2007) 29; Marcus Priest, 'A 24-carat barrister rises to great heights', *Australian Financial Review* (Sydney, 15 August 2007) 14.
[25] The other stand-out candidate was Patrick Keane, who at the time was a judge on the Queensland Supreme Court's Court of Appeal. Some believed that Keane's 'main handicap' was a perceived connection with the Australian Labor Party: Priest (n 24).

Responding to these comments, particularly those regarding female representation, Ruddock strongly denied that gender was an issue in the selection and emphasised merit – which he defined as 'legal excellence and independence'[26] – as the leading criteria:

> She will make an outstanding judge, it is a factual matter that there are five male judges now [and] there will be two female judges. They are both people who were appointed in their merits… Any suggestion that [Kiefel's] appointment was to secure two female appointments would be quite wrong.[27]

Ruddock felt compelled to defend the merit of Kiefel's appointment, but his welcome speech did not discuss Kiefel's impressive accomplishments. In an unconventional start to her legal career, Kiefel left school at fifteen to do clerical work. After completing her secondary education and Barristers Admission Board course at night, she was called to the Bar at twenty-one.[28] She became the first female and the youngest person to take silk in Queensland at thirty-three. These achievements clearly demonstrated an enviable legal career and recognition among her peers as a talented lawyer.

In her swearing-in speech, Kiefel did not identify herself as a 'woman lawyer' or 'woman judge'.[29] Her speech did not shed light on her identity, values or judicial philosophy, save for a brief reference to the 'outstanding example of collegiality' of the Federal Court of Australia under the leadership of Chief Justice Michael Black.[30] Kiefel's extensive list of colleagues and mentors she wished to thank did not include any women.[31] Roberts notes that this was significant given her reflections on the topic of women lawyers in her swearing-in speech as Queensland Supreme Court Justice in 1993.[32] On that occasion, Kiefel mentioned her disappointment in the relatively low

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[26] Philip Ruddock, 'Merit is the sole criterion', *The Australian* (Sydney, 14 August 2007) 12.
[27] Patricia Karvelas and Nicola Berkovic, 'Kiefel will make High Court history', *The Australian* (Sydney, 14 August 2007) 1.
[28] Cosima Marriner, 'Straight-shooter jumps the bar', *Sydney Morning Herald* (Sydney, 18 August 2007) 31.
[29] This was also the case in her speeches at welcome ceremonies across the country: see, eg, Transcript of Proceedings, *Ceremonial – Kiefel J – Welcome Brisbane* [2008] HCATrans 242; Transcript of Proceedings, *Ceremonial – Kiefel J – Welcome Sydney* [2007] HCATrans 603.
[30] *Swearing-In of Kiefel J* (n 20) 19.
[31] *Swearing-In of Kiefel J* (n 20) 19–21.
[32] Heather Roberts, 'Women Judges, "Maiden Speeches", and the High Court of Australia' in Beverley Baines et al (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 113, 126.

number of female law graduates coming to the Bar.[33] Yet, she appeared to deny that discrimination had been a feature of her career or that of women lawyers at the time.[34]

Kiefel's first swearing-in ceremony in the High Court was characterised by the absence of comments on gender and Ruddock's generalised discussion of merit. Though Ruddock appeared compelled to raise the issue of merit, it seemed to indicate a broader ambivalence on gender despite, or perhaps because of, the occasion. In her swearing-in speech, Kiefel self-consciously suppressed her identity as a woman.

III. SWEARING-IN, 2017

On 30 January 2017, Kiefel was sworn in as the thirteenth Chief Justice of the High Court, the fourth from Queensland and the first woman. It was, as Attorney-General George Brandis put it, an event of 'unequalled significance'.[35] The welcome speeches drew greater attention to Kiefel's accomplishments as a woman of 'firsts'. Nonetheless, they were also conscious to emphasise her merit as an eminent barrister and judge.

Compared to her 2007 swearing-in ceremony, three of the speakers were female: Justice Virginia Bell, who administered the oath of allegiance, Fiona McLeod, President of the Law Council of Australia, and Kiefel herself. The momentous occasion inspired many to reflect on the advancement towards greater gender diversity in the Australian legal profession. McLeod proudly stated, 'Justice Kiefel has smashed the glass ceiling in the law'.[36] Leah Marrone of the Women Lawyers' Association of South Australia welcomed her appointment, but called for efforts to tackle continuing biases against appointing women to senior positions in the legal profession.[37] Others

[33] Ibid.
[34] Ibid.
[35] Transcript of Proceedings, *Ceremonial Sitting on the Occasion of the Swearing-In of the Chief Justice the Honourable Susan Mary Kiefel AC* [2017] HCATrans 7, 10 ('*Swearing-In of Kiefel CJ*').
[36] Katie Walsh, 'A woman at the helm of the High Court an inspiration', *Australian Financial Review* (Sydney, 30 November 2016) 3.
[37] Leah Marrone, 'A female Chief Justice is a pleasing sign, but gender equity in the legal profession still has long way to go', *The Advertiser* (Adelaide, 1 December 2016) 22.

expressed admiration for her meritorious progression from 'high school dropout to Chief Justice'.[38]

In his welcome speech, Brandis expressed his pleasure and the importance of appointing Kiefel as the first female Chief Justice of the High Court. He characterised it as 'a story to inspire women and men alike' and was mindful to acknowledge the barriers faced by women in the law throughout their careers.[39] Unlike Ruddock, Brandis pointed to the many notable 'firsts' that Kiefel had achieved for women in the law: 'It has been a feature of your Honour's story – as it is of today's ceremony – that you have, at several crucial steps in your career, been the first woman to occupy a particular office.'[40] Immediately afterwards, he was keen to point out that Kiefel's success 'had nothing to do with [her] gender and everything to do with [her] intelligence, diligence and skill'.[41] At Justice James Edelman's swearing-in ceremony later that day, Brandis made no such reassurances as to his gender.[42]

> McLeod took a different approach to recognising the importance of the occasion:
>
> We celebrate this as a landmark moment for women in the history of this nation. Your Honour's oath this morning was administered by the next most senior puisne Judge of the Court, Justice Bell, presenting a powerful and enduring image of equality and an inspiration to many.[43]

Her words captured the profession's esteem for Kiefel and celebrated these historic 'firsts' for women in the law. McLeod noted Kiefel's 'characteristic self-reliance and motivation' that made her appointment a meritorious one.[44] She spoke of Kiefel's intellectual leadership and team spirit,

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[38] Jamie Walker, 'From high school dropout to chief justice', *The Australian* (Sydney, 30 November 2016) 1; Letters to the Editor, 'Justice Kiefel's story is a good example for all', *Courier Mail* (Brisbane, 1 December 2016) 42.
[39] *Swearing-in of Kiefel CJ* (n 35) 11.
[40] Ibid 13.
[41] Ibid.
[42] Transcript of Proceedings, *Ceremonial Sitting on the Occasion of the Swearing-In of the Honourable James Joshua Edelman as a Justice of the High Court of Australia* [2017] HCATrans 8.
[43] *Swearing-in of Kiefel CJ* (n 35) 15.
[44] Ibid 16.

which she considered key attributes that would define Kiefel's approach to her new role as Chief Justice.

In her swearing-in speech as Chief Justice, Kiefel acknowledged the significance of the occasion and thus, indirectly spoke of her identity as a woman:

> When I came to the Bar in 1975 there were very few women members of the profession. This is not the occasion to consider why this was so. The point presently to be made is that this has changed and so has the composition of the Court. In more recent times the appointment of more women to this Court recognises that there are now women who have the necessary legal ability and experience, as well as the personal qualities, to be a Justice of this Court.[45]

These words distinguished this speech from that in 2007 where she did not reflect upon gender at all. Regardless, Kiefel refrained from speaking about her own experiences as a woman lawyer. Similarly, when she alluded to Justice Bell's role in her swearing-in, she noted the historical significance of the moment 'on two counts' but did not say why.[46] Collegiality appeared again as an indicator of her judicial philosophy. Here, Kiefel fondly reflected on learning about the 'importance of civility and collegiality' with her predecessor, Chief Justice Robert French.[47]

Perhaps because of the momentous occasion, the welcome speeches were willing to explicitly mention Kiefel's gender. All of the speakers were careful to mention Kiefel's merit by publicly recognising her judicial experience, leadership and integrity. Meanwhile, Kiefel maintained a reserved stance when speaking of her identity as a woman.

IV. CONCLUSION

Kiefel's two swearing-in ceremonies in the High Court displayed a distinct shift in how gender was addressed. When she was first sworn in in 2007, there was no mention of her gender. The welcome

[45] Ibid 24.
[46] Ibid 22.
[47] Ibid 23.

speeches and media commentary at the time focused instead on her merit and judicial philosophy. In contrast, Kiefel's 2017 swearing-in ceremony as Australia's first female Chief Justice openly celebrated her achievements as a woman of 'firsts'. Both occasions saw Kiefel exercise restraint when speaking about her identity as a woman in the law. In doing so, she positioned herself within the masculinised mainstream of the Australian legal community close to the benchmark man.

CHAPTER TWO: KIEFEL'S JUDICIAL RECORD

I. INTRODUCTION

It has long been argued that the greater inclusion of women will add a 'new dimension of justice' because the experiences that women may bring to the bench are different to those of men.[48] Whether or not women judges actually bring different perspectives or speak in a different voice,[49] the arrival of women judges 'puts us on notice; it encourages us to both look for – and more importantly – find difference'.[50] Yet, finding causal connections between identity and judging is tough where there are high levels of collegiality, a small number of cases featuring issues relating to sex and gender that reach the courts and the pressure on the woman judge to conform with the benchmark man.

This chapter is divided into two sections. The first section examines Kiefel's judgments in select cases featuring issues relating to sex and gender during her time on the Human Rights and Equal Opportunity Commission ('HREOC'), the Federal Court of Australia and the High Court of Australia. The second section analyses Kiefel's extra-judicial comments on her role as a judge and experiences as a woman in the law.

As a judge, Kiefel is a firm advocate for collegiality and has made this a distinct feature of her Court. Consistent with the approach she adopted and expectations she set at her swearing-in ceremonies, Kiefel has been careful to neutralise her identity in her judgments and apply a black-letter method of judicial reasoning. Outside the courtroom, Kiefel has been conscious not to allow her identity to affect public perceptions of her in her judicial role. Her response to the sexual harassment complaints against former Justice Dyson Heydon, however, demonstrated how she could be an authoritative voice for women in the law.

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[48] See, eg, Goldman (n 12) 494; Sonia Sotomayor, 'A Latina Judge's Voice' (2009) 13 *Berkeley La Raza Law Journal* 87; Rosemary Hunter and Brenda Hale, 'A Conversation with Baroness Hale' (2008) 16(2) *Feminist Legal Studies* 237.
[49] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).
[50] Rackley (n 18) 16.

II. ON THE BENCH

At the Commonwealth level, issues relating to sex and gender feature in a very small number of cases. As part-time commissioner on the HREOC, now the Australian Human Rights Commission ('AHRC'), Kiefel heard several cases pertaining to sex discrimination. As a federal judge, she heard only one. Given the low percentage of people who report instances of sex discrimination to agencies like the AHRC and the even smaller proportion of these cases proceeding to a formal judgment,[51] the case law has been described as the 'tip of the iceberg'.[52] This miniscule number is a consequence of the massive obstacles complainants face in litigation. These include whether the complainant has the 'fortitude to appeal', which party has the resources to appeal and the power and influence of the legislature, executive and corporate respondents in shaping the litigation and the jurisprudence.[53] Meanwhile, judges are inhibited by the tendency to fall back on precedent to sustain benchmark masculinity.[54] The following cases are not definitive in determining whether and to what extent Kiefel's identity influences her judicial decision-making process. Nevertheless, these cases aim to reveal insights about the different processes of judgment in the cases at hand.

A. *Human Rights and Equal Opportunity Commission*

As part-time commissioner on the HREOC from 1989 to 1993, Kiefel presided over several sex discrimination cases involving inter alia sexual harassment in the workplace and claims of unfair dismissal due to pregnancy.[55] In each of these cases, Kiefel applied the law strictly, adopting a straightforward tone when giving her decisions. For example, in *A v Caboolture Shire Council*[56] and

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[51] In 2018–19, no complaints under the *Sex Discrimination Act 1984* (Cth) proceeded to court: Australian Human Rights Commission, *2018-2019 Complaint Statistics* (Report, 2019) <https://humanrights.gov.au/sites/default/files/2019-10/AHRC_AR_2018-19_Stats_Tables_%28Final%29.pdf>.
[52] Anita Mackay, 'Recent Developments in Sexual Harassment Law: Towards a New Model' (2009) 14(2) *Deakin Law Review* 189, 192.
[53] Thornton (n 17) 31.
[54] Ibid 56.
[55] See, eg, *R v L* [1992] HREOCA 7; *Duncan v Mitsuo Ueda* [1991] HREOCA 13; *Lawrence v Clark Engineering* [1993] HREOCA 10.
[56] [1991] HREOCA 11.

McCartney v Sadak and Albert Shire Council,[57] the female complainants were employed under the Commonwealth Employment Program which assisted unemployed and disadvantaged persons with employment. Discrimination on the basis of sex in the administration of Commonwealth programs is prohibited under section 26 of the *Sex Discrimination Act 1984* (Cth) ('*SDA*'). Although section 26 does not mention sexual harassment, *O'Callaghan v Loder*[58] first recognised sexual harassment as a form of direct discrimination. Following this established principle, Kiefel affirmed that '[s]exual harassment… is but a form of discrimination'[59] and there was no reason to 'read down section 26.'[60] In both cases, Kiefel held that the complaints of sexual harassment were substantiated.

B. *South Pacific Resort Hotels v Trainor*[61]

The Federal Court in 2005 deliberated the application of an employer's vicarious liability for sexual harassment by an employee in *South Pacific Resort Hotels Pty Ltd v Trainor*.[62] The complainant was sexually harassed by a fellow employee in staff accommodation provided for, and operated by, her employer outside working hours. Her harasser was residing at the same accommodation in a separate room. Non-employees were prohibited from entering staff accommodation. The Federal Court unanimously accepted that the harassment occurred 'in connection with' employment, notwithstanding that it occurred while both employees were 'off-duty' and were not performing any function of their employment.[63] It held that the expression 'in connection with' in section 106 of the *SDA* is a broad one of practical application.[64] Kiefel wrote a separate judgment that took a black-letter approach to analysing the operation of section 106 in this case. After reading the legislative provisions, the second reading speech and established case law in Australia, as well as

[57] [1992] HREOCA 9.
[58] (1983) 5 IR 320.
[59] *A v Caboolture Shire Council* [1991] HREOCA 11.
[60] *McCartney v Sadak and Albert Shire Council* [1992] HREOCA 9.
[61] (2005) 144 FCR 402.
[62] Ibid.
[63] Ibid.
[64] Ibid [41] (Black CJ and Tamberlin J).

overseas jurisdictions,[65] Kiefel concluded that section 106 was to be interpreted widely. Even though the conduct of the harasser occurred outside of working hours, Kiefel confirmed that it 'clearly constituted sexual harassment'.[66] The staff accommodation provided by the employer and the fact that non-employees were prohibited from entering the accommodation meant that the circumstances in which the conduct occurred was the responsibility of the employer.[67] Kiefel's findings were consistent with the broad approach taken by the Federal Court in *Leslie v Graham*,[68] which involved circumstances that had a relatively close connection with the working context.[69] Her judgment did not go further to consider broader policy considerations on vicarious liability in sexual harassment complaints.

C. *PGA v The Queen*[70]

In 2012, the High Court considered the historical development and validity of the proposition that a husband cannot be prosecuted for the rape of his wife at common law in *PGA v The Queen*.[71] In South Australia in 1963, when the husband and wife were cohabiting and when the rape occurred, the well-established view at common law was that a husband cannot be guilty for the rape of his wife because she was legally presumed to consent to sex by the act of marriage.[72] The High Court was called to decide upon a series of questions regarding the retrospective operation of this supposed common law rule.[73] What kind of rule was it? Did the rule ever exist? If it did exist, was it still in existence in 1963? Finally, when did it cease to exist?

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[65] Ibid [68], [73] (Kiefel J), citing *Robichaud v The Queen* (1987) 40 DLR (4th) 577 and *Chief Constable of the Lincolnshire Police v Stubbs* [1999] ICR 547.
[66] Ibid [58] (Kiefel J).
[67] Ibid [74] (Kiefel J).
[68] [2002] FCA 32.
[69] In *Leslie v Graham* [2002] FCA 32, the complainant was sexually harassed by a fellow employee at the two-bedroom serviced apartment they shared while attending a regional conference.
[70] (2012) 245 CLR 355.
[71] Ibid.
[72] Ibid 355 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[73] Ngaire Naffine and Joshua Neoh, 'Fictions and Myths in *PGA v the Queen*' (2013) 38 *Australasian Journal of Legal Philosophy* 32, 34.

Kiefel, along with Chief Justice French and Justices Gummow, Hayne and Crennan, issued a majority judgment that involved a 'selective treatment of the case law on the subject'.[74] In response to the first question, the majority did not clearly characterise what kind of rule the proposition was supposed to be. Sometimes, it was phrased as an 'immunity'.[75] At other times, the majority described the common law presumption of irrevocable consent as a 'marital exemption'[76] or characterised it as a defence to the charge of rape.[77] The majority responded to the remaining questions with a single answer: 'if the "marital exemption" ever was part of the common law of Australia, it had ceased to be so by the time of the enactment in 1935 of [the *Criminal Law Consolidation Act* (SA)]'.[78] It further added that by the time of the enactment of the *Criminal Law Consolidation Act 1935* (SA), 'if not earlier (a matter which it is unnecessary to decide here), in Australia local statute law had removed any basis for continued acceptance of [this] proposition as part of the English common law received in the Australian colonies'.[79] The majority was unclear about when marital rape became an Australian crime, suggesting that it possibly had always been one.

This decision was surprising and controversial. It removed a widely accepted feature of a serious crime. The husband's immunity from prosecution for marital rape had been sustained in South Australia until 1976 and up to the 1980s in the rest of the country.[80] It had been a settled rule of common law in 1963. Leading criminal law commentators continued to assert the existence of the marital immunity and the practices of police, the legal profession and the courts not to prosecute marital rapes at the time preserved this immunity.[81] Notwithstanding, in 2012, the immunity was quickly disregarded on the grounds of statutory abrogation.

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[74] Wendy Larcombe and Mary Heath, 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' (2012) 34(4) *Sydney Law Review* 785.
[75] *PGA v The Queen* (n 70) 357 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[76] Ibid (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); Naffine and Neoh (n 73) 34.
[77] Ibid 384 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[78] Ibid 369 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[79] Ibid 384 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[80] Ngaire Naffine, 'Admitting Legal Wrongs: *PGA v R*' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Bloomsbury Collections, 2014) 257, 259.
[81] *PGA v The Queen* (n 70) 434–444 (Bell J).

III. OUTSIDE THE COURTROOM

A. *'Collegiality is not compromise'*[82]

Off the bench, Kiefel is open about her role as a judge and the process of producing judgments. Collegiality and consensus have distinguished her strategy as a judge and leader of the High Court, evinced by her judicial record and extra-judicial commentary.

Joint judgments, whereby the author is rendered largely anonymous, have become increasingly prevalent on the High Court. In their 2017 study on the Court's decision-making and authorship practices, Lynch and Williams observed that 'the Court accorded to a higher degree with the notion that it should speak with an institutional, rather than individual, voice.'[83] This was demonstrated by the rise of unanimous judgments and the low rate of disagreement.[84] Kiefel's pattern of decision-making closely corresponded with her vision. She did not issue a single dissent in 2017 and joined with at least one other judge in all cases.[85] In 2018, she published one dissenting judgment out of fifty and participated in joint judgments more than any other judge.[86] The Court's practice of speaking in a clear voice was especially important for several matters of high political controversy in Kiefel's first two years as Chief Justice, including the disqualification of members of federal Parliament under section 44 of the *Constitution* and the federal government's postal survey on same-sex marriage. However, the sharp decline in unanimous judgments in 2019 suggests that the Kiefel Court may not be as predictable as initially thought.[87]

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[82] Justice Susan Kiefel, 'The individual judge' (Sir Richard Blackburn Lecture, Canberra, 13 May 2014).
[83] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2017 Statistics' (2018) 41(4) *UNSW Law Journal* 1134, 1153.
[84] Ibid.
[85] Ibid 1146–1153.
[86] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2018 Statistics' (2019) 42(4) *UNSW Law Journal* 1443, 1449–1452.
[87] Andrew Lynch, 'A model of diversity – definitely no groupthink on this bench', *The Australian* (Sydney, 21 February 2020) 23; Michael Pelly, 'High Court unity fades as judges agree to differ', *Australian Financial Review* (online, 20 February 2020) <https://www.afr.com/politics/federal/high-court-unity-fades-as-judges-agree-to-differ-20200219-p542g4>.

These authorship practices have generated some criticism and debate, including among the judges themselves. While on the bench, Justice Heydon warned of the potential harm to the judiciary created by 'judicial herd behaviour' and resistance against 'excessively dominant judicial personalities'.[88] In his view, the Court's growing preference for consensus through joint judgments raised important questions about the capacity for judges to exercise judicial independence.[89] These sentiments were shared by Gans, who dubbed Kiefel, Justice Bell and Justice Patrick Keane as the 'Great Assenters' for their tendency to agree, often with each other.[90] On judicial personalities generally, Waterford noted that '[t]he women have seemed a particular disappointment, especially for those who have hoped for different… perspectives.'[91]

In 2014, Kiefel defended the notion that judges may seek to influence their colleagues when reaching decisions. She centred her defence on the importance of the 'institutional responsibility' of the High Court and the 'virtue of judicial restraint' over writing individually.[92] Kiefel noted that risks to judicial independence 'may arise not from the pressure of colleagues to join in, but from a personal desire to stand out, to have one's own voice and develop one's own reputation."[93] For Kiefel, there was an appeal to joint judgment writing and avoiding the desire to write a 'vanity judgment', particularly where one 'think[s] that [they] can write an even better judgment than the one [their] colleague has produced'.[94] This aversion to 'undisciplined individualism' was reiterated in a 2017 speech where she discussed the trend towards fewer individual judgments.[95] Kiefel rebutted Justice Heydon's comments and pointed out that too many

[88] Justice Dyson Heydon, 'Threats to Judicial Independence: The Enemy Within' (Speech, Inner Temple, 23 January 2012) 215–217.
[89] Ibid.
[90] Jeremy Gans, 'The Great Assenters', *Inside Story* (online, 1 May 2018) <https://insidestory.org.au/the-great-assenters/>.
[91] Jack Waterford, 'Judges rest their writing hands', *Canberra Times* (Canberra, 7 April 2012) 16.
[92] Kiefel (n 82) 558.
[93] Ibid 557.
[94] Ibid 560, citing Lord Neuberger, 'Open Justice Unbound?' (Judicial Studies Board Annual Lecture, 16 March 2011) [24].
[95] Chief Justice Susan Kiefel, 'Judicial Methods in the 21st Century' (Speech, Banco Court, 16 March 2017) 31, citing AWB Simpson, 'Lord Denning as Jurist' in JL Jowell and JB WB McAuslan, *Lord Denning: The Judge and the Law* (Sweet & Maxwell, 1984) 441, 451.

separate judgments often resulted in delay and a lack of coherence and clarity, to the detriment of litigants and the Court.[96] Kiefel's defence of collegiality echoed late United States ('US') Supreme Court Justice Ruth Bader Ginsburg's argument that '[c]oncern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately.'[97]

B. *A voice for women?*

Kiefel is less forthright in speaking about her experiences as a woman judge. At Gray's Inn Hall in 2018, Kiefel spoke in conversation about the challenges and career highlights she faced in her journey to holding the highest judicial position in Australia.[98] She was joined by three of her fellow first female apex court judges, Baroness Brenda Hale of the United Kingdom, former Chief Justice of Canada, Beverley McLachlin, and former Chief Justice of Ghana, Georgina Wood. Kiefel began by paying tribute to the 'true trailblazers' for Australian women in the law, Joan Rosanove and Roma Mitchell.[99] Speaking about the tradition of new barristers to introduce themselves to the judges of the Queensland Supreme Court, she recalled:

> There was only one [judge] who suggested that I might give up [being a barrister] as a rather foolish idea and make my career a family… but I thought, 'You know, he probably just wants me to be as happy as his wife,'… so I didn't let that dissuade me.[100]

She then recounted a later experience where she disarmed a room full of male clients as a young barrister by hand-rolling and smoking a cigarette.[101] Although Kiefel shared these earlier experiences as one of the few female barristers in Queensland, she did not reflect on these experiences any more than was necessary to answer the question. She was also unwilling to enter

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[96] Ibid 31.
[97] Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65(1) *Washington Law Review* 133, 142.
[98] First Women of the Supreme Courts in Conversation (Penny Andrews and Genevieve Muinzer, Gray's Inn Hall, 5 July 2018).
[99] Ibid [12:43]–[12:58].
[100] Ibid [27:55]–[28:21].
[101] Ibid.

into more general discussions on the discrimination of and equality for women in the profession. When asked about how her experiences as a woman influence her judgments, Kiefel avoided responding directly to the question. Instead, she raised doubts about its premise: 'you could have a long debate about how much of an experience of being a woman actually affects judgment… and I'm not sure that we're in the best position to determine our own insights.'[102] Baroness Hale, on the other hand, maintained that there was an innate difference in experiences between men and women and openly acknowledged the treatment of women in the legal profession as 'other'.[103] Perhaps Kiefel felt that it was not appropriate to answer the question because to do so may compromise her neutrality and impartiality as an active judge. Regardless, the candid attitudes of McLachlin and Baroness Hale – both self-declared feminists and staunch advocates of equality from jurisdictions with statutory human rights protections[104] – when speaking about the gendered obstacles they faced as one of the few women in the law at the time contrasted sharply with Kiefel's muted approach.

There have been few occasions where Kiefel has reflected on the changing role of women in the law and taken action against the mistreatment of women in the High Court when it was incumbent upon her to do so. On International Women's Day in 2018, Kiefel reminded her audience that '[t]he voices of women are often heard in public discourse today. It is easy to forget that this was not always so'.[105] Two years later, when the voices of six women who had worked as judicial associates in the High Court came forward with complaints that Justice Heydon had sexually harassed them, she heard them. On 22 June 2020, Kiefel issued a strong statement

[102] Ibid [1:00:43]–[1:01:06].
[103] Ibid [53:42]–[54:21].
[104] See, eg, Owen Bowcott, 'Women are equal to everything': Lady Hale lives up to her motto', *The Guardian* (online, 21 July 2017) <https://www.theguardian.com/law/2017/jul/21/women-are-equal-to-everything-lady-hale-lives-up-to-her-motto>; Rachel Giese, 'How Canada's First Female Chief Justice Helped Define the Country's Rights and Freedoms', *The Walrus* (online, 27 March 2020) <https://thewalrus.ca/how-canadas-first-female-chief-justice-helped-define-the-countrys-rights-and-freedoms/>.
[105] Chief Justice Susan Kiefel, 'Women in the Australian Legal Profession: progress and a public voice' (International Women's Day Speech, Kuala Lumpur, 8 March 2018) 1.

expressing 'extreme concern' regarding the findings of the independent inquiry she had commissioned in response.[106] Her language was unflinching:

> We're ashamed that this could have happened at the High Court of Australia. We have made a sincere apology to the six women whose complaints were borne out. We know it would have been difficult to come forward. Their accounts of their experiences at the time have been believed.[107]

Kiefel's words spoke volumes. Her proactive victim-centred approach in immediately launching an inquiry resonated deeply with women in the legal profession.[108] In 2018, the International Bar Association confirmed the extent of bullying and sexual harassment in the legal profession, finding that one in three female respondents and one in fourteen male respondents had been sexually harassed in a workplace context.[109] The AHRC further found that male-dominated professions and hierarchical workplace structures can increase the risk of sexual harassment.[110] In making this statement as Chief Justice, Kiefel did what the esteemed men of the High Court – and many other courts – have never done.[111] She listened and responded to the accounts of the women who had been made to feel ashamed. Kiefel turned this around, expressing shame on behalf of the High Court and apologising for the systemic failure that pressured these women to stay quiet or risk losing their career.

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[106] High Court of Australia, 'Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia' (Press Statement, 22 June 2020) 1.
[107] Ibid.
[108] Michaela Whitbourn, 'High time: women in law get fair hearing', *Sydney Morning Herald* (Sydney, 27 June 2020) 18; Kylie Nomchong, 'Sexual harassment and the judiciary' (2020) 32(6) *Judicial Officers' Bulletin* 55.
[109] International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, May 2019) 8.
[110] Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (Report, 29 January 2020).
[111] Some of the complainants informed Chief Justice Gleeson and Justice McHugh of their accounts while they were associates at the Court, but no action was taken at the time: Kate McClymont and Jacqueline Maley, 'Two High Court judges 'knew of complaints against Dyson Heydon'', *Sydney Morning Herald* (online, 25 June 2020) <https://www.smh.com.au/national/two-high-court-judges-knew-of-complaints-against-dyson-heydon-20200624-p555pd.html#:~:text=Former%20High%20Court%20judge%20Dyson,former%20judge%20have%20been%20upheld>.

IV. CONCLUSION

Kiefel is open about her role and work as a judge. She is a strong advocate for collegiality and has effectively implemented this strategy since becoming Chief Justice. Yet, Kiefel has been careful to neutralise her identity in her judgments and public perceptions of her in her judicial role. She has favoured a black-letter approach on the bench and a reserved demeanour outside the courtroom. Kiefel's statement regarding the sexual harassment complaints against Justice Heydon, however, illustrated how she could adopt a powerful voice to speak about issues faced by women in the law.

CHAPTER THREE: JUDGE FIRST, WOMAN SECOND

I. INTRODUCTION

Drawing upon the analysis in the previous chapters, this chapter evaluates the strategies and responses adopted by Kiefel throughout her legal and judicial careers. It is difficult to determine precisely her jurisprudential contributions in the High Court because of her penchant for collegiality and consensus. Separate judgments written prior to Kiefel's tenure on the High Court, however, illustrate a conservative method of judicial reasoning marked by a black-letter approach to the law and a strong respect for precedent. From her swearing-in ceremonies through to her extra-judicial comments, Kiefel has sought to eschew her difference as a woman and maintain an impassive stance when discussing issues women encounter in the profession. Her statement on the allegations of sexual harassment against Justice Heydon may have been driven in part by the impact of the #MeToo movement on the Australian legal profession. Her victim-centred response to these allegations marks a shift from this impassive stance.

II. A 'GREAT ASSENTER'[112]

Throughout her swearing-in ceremonies, judicial experience and extra-judicial commentary, Kiefel has positioned herself as someone who sought to contribute to a consensus-based collegial High Court. Both of her swearing-in speeches in the High Court touched on her experiences working in the collegial environments of the Federal Court under Chief Justice Black, and the French Court. Joint judgments in the Federal Court may not have been an approach unique to Chief Justice Black. As Wilheim observed, the Federal Court like many other intermediate courts of appeal has developed a 'strong culture' of joint judgments.[113] On the other hand, trends of joint and separate

[112] Gans (n 90).
[113] Ernst Wilheim, 'Collective responsibility' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 109, 110.

judgments have varied throughout the High Court's history.[114] In 2009, Kiefel's third year on the High Court, trends reflecting consensus began to stabilise under the leadership of Chief Justice French.[115] Sometimes, Kiefel shared a preference for collegiality and consensus with her fellow women judges, Justice Bell and Justice Susan Crennan. For example, in 2013 'Justices Crennan, Kiefel and Bell were all more regular co-authors for each other and the other members of the Court than anyone else.'[116] The culture of collegiality in the Federal Court and the High Court at those times may have encouraged Kiefel to embrace cooperation and consensus over 'undisciplined individualism'.[117]

Kiefel's vigorous defence of collegiality illustrates a pragmatic no-nonsense attitude towards her role as a judge. It also appears to show some exasperation that the notion of writing 'vanity judgments' and 'standing out' should be cast as some sort of judicial virtue. Her first major address as Chief Justice rebuked the idea that judges have a 'duty'[118] to reveal his or her opinion of the case at hand by avoiding discussions with other judges and writing separately:

> A judgment written for the purpose of proving that a judge has understood the case is an unnecessary judgment… The true duty of a judge is to consider a matter properly before coming to a decision… The method by which a judge's opinion is expressed is irrelevant to it.[119]

There are clear justifications for writing joint judgments, including certainty, clarity and timeliness.[120] Speaking with one authoritative voice, especially where there is considerable controversy over political and social issues, also provides the individual members of the Court

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[114] Michael Coper, 'Joint judgments and separate judgments' in Coper, Blackshield and Williams (eds) (n 113) 367, 368.
[115] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2009 Statistics' (2010) 33(2) *UNSW Law Journal* 267.
[116] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2013 Statistics' (2014) 37(2) *UNSW Law Journal* 544, 558.
[117] Kiefel (n 95) 31 citing AWB Simpson, 'Lord Denning as Jurist' in JL Jowell and JB WB McAuslan, *Lord Denning: The Judge and the Law* (Sweet & Maxwell, 1984) 441, 451.
[118] Heydon (n 88).
[119] Kiefel (n 95) 31.
[120] Michael Coper, 'Joint judgments and separate judgments' in Coper, Blackshield and Williams (n 113) 367, 368; Enid Campbell, 'Reasons for judgment: Some consumer perspectives' (2003) 77 *Australian Law Journal* 32, 32.

with strength and safety in numbers. But these judgments tend to be restricted to a more immediate focus on the decision at hand so that its members can more readily 'join in'. This results in less creativity, flexibility and diversity of expression among those on the bench. It can also hinder the Court's law-making function by avoiding deeper deliberations on the relevant legal principles raised in the particular case. Significantly, it is 'exceptionally difficult' to critique the contributions of individual judges when there is no way of knowing how their jurisprudential contributions have come to be written into the collaboration with their fellow judges.[121] The extent to which Kiefel participated in joint judgments means that her actual jurisprudential contributions are difficult to discern. The narrower scope of the judgments she does join tend to obscure her judicial style. In countering an individualistic concept of judging, Kiefel adopted a position that highlights her collective role in upholding the Court's institutional responsibility and neutralises her identity.

III. A BLACK-LETTER, CONSERVATIVE JUDGE

A. *From 'high school dropout'*[122]…

As an early school-leaver who was not 'brought up with a privileged background',[123] Kiefel challenges the association between an upper-class background and the traditional character of the judiciary. Though her career began on an unconventional note, her practical legal education and professional experience followed a well-worn path. From the nature of the Barristers Admission Board course she took, it can be inferred that her education was largely comprised of the uncritical transmission of legal rules and principles by legal practitioners. It does not appear likely that there was much scope to evaluate the rules and principles being taught. Hence, it is probable that Kiefel acquired a black-letter approach to the law from an early age. Her rapid rise through the ranks of the Queensland Bar from 1975 to 1993 did not appear to involve occasions where she could speak

[121] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2010 Statistics' (2011) 34 *University of New South Wales Law Journal* 1030, 1047.
[122] Walker (n 38).
[123] First Women of the Supreme Courts in Conversation (n 98) [1:00:21]–[1:00:23].

her mind freely about the law. Kiefel's role as a barrister required her to set aside her 'subjective self' to represent and advocate for her clients' interests.[124] Had Kiefel been an academic like Baroness Hale or US Supreme Court Justice Ruth Bader Ginsburg or had led cases on rights issues like US District Judge Constance Baker Motley,[125] she might have been more open to reflecting on the law more critically.

The patriarchal and highly conservative environment of the Queensland legal profession in which Kiefel began her legal career further subjected her to pressures to conform to the benchmark man.[126] As Kiefel was reported as recalling, a woman in robes walking down Brisbane's streets in 1975 would 'bring hoots of laughter from council workers'.[127] Under these circumstances, Kiefel quickly developed a 'calm, professional, matter-of-fact, quietly-spoken style' to try to negate the strong stereotypes that diminished her in her world at the time.[128] This pressure to suppress her identity as a woman to navigate the aggressive, adversarial and male-dominated legal profession from a young age may have meant that she internalised these masculine qualities of the profession almost without question.

B. … *To Chief Justice*

Kiefel's judicial record on issues relating to sex and gender must first be understood within the context of the Australian legal system. Compared to most other constitutional democracies, Australia does not have a constitutional Bill of Rights. This reduces the exposure of the High Court to rights issues, such as discrimination. Sex discrimination legislation in Australia can also inhibit sex discrimination matters from reaching the courts for determination in two main respects. First, the prescriptive phrasing of the definition of 'discrimination' in the *SDA* limit the judiciary's

[124] Thornton (n 1) 13-14.
[125] See, eg, Tomiko Brown-Nagin, 'Identity Matters: The Case of Judge Constance Baker Motley' (2017) 117(7) *Columbia Law Review* 1691.
[126] Marriner (n 28).
[127] Ibid.
[128] Cosima Marriner, 'Lawyer's lawyer captive to neither side of politics', *The Age* (Melbourne, 18 August 2007) 4.

scope for identifying and shaping the meaning of 'discrimination' and a vision for gender equality.[129] Second, compulsory conciliation provides a quicker and cheaper form of resolution that may allow for outcomes like apologies, policy changes or training for staff which are not available through a court system that tends to produce win-lose outcomes. Alongside the barriers complainants face in litigation identified in Chapter Two, these factors have produced little judicial debate on these matters.

Kiefel's judicial record must also be understood within the constraints of precedent. Precedent is an important mechanism through which judges in Australia's common law system exercise their law-making role.[130] It seeks to maintain consistency, continuity and predictability in the law. At the same time, precedent can tend to resist judicial innovation, preserve the status quo and perpetuate a male-dominated narrative that tends to exclude the viewpoints of those deemed 'other'.

On the HREOC, Kiefel applied statutory provisions and precedent without reflecting on broader policy considerations. Her rulings as part-time commissioner were succinct and uncontroversial. This respect for precedent carried through to Kiefel's separate judgment in *South Pacific Resort Hotels v Trainor*.[131] The lawmaking function exercised by the Federal Court in its appellate jurisdiction provided Kiefel with an opportunity to expand on the application of section 106 of the *SDA* in the context of sexual harassment outside working hours. Yet, Kiefel did not take this opportunity and instead exercised restraint when applying the law.

The High Court's decision in *PGA v The Queen*[132] was the first opportunity for the Court to determine the historical development and validity of the long-held proposition that a husband cannot be prosecuted for the rape of his wife at common law. Kiefel, joining with the majority,

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[129] Belinda Smith, 'Rethinking the *Sex Discrimination Act*: Does Canada's Experience Suggest we Should give our Judges a Greater Role?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 235.
[130] Tony Blackshield, 'Precedent' in Coper, Blackshield and Williams (eds) (n 113) 550, 553; Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93.
[131] (2005) 144 FCR 402.
[132] (2012) 245 CLR 355.

did not use this opportunity to engage in a retrospective analysis of this proposition as a well-established legal principle in 1963. Instead, the majority decided on this issue at a more abstract level, detached from the real social consequences married women suffered as a result of this immunity at the time. Although the majority recognised legal reforms that affected the social status and rights of Australian women, it did so in a perfunctory manner such that the immunity came to make little sense. In doing so, the majority denied the law's prior authorisation of marital rape and failed to acknowledge, condemn and apologise for the deep wrong this immunity had caused to married women. Despite, or perhaps because of, her identity, Kiefel sustained a dispassionate voice alongside the majority. Had she displayed emotion or compassion in a separate judgment, she may have been perceived as disrupting the masculinised values associated with the judicial role, thereby risking her authority as an objective and impartial judge.

IV. A WOMAN OF 'FIRSTS'

At her High Court swearing-in ceremonies and in her extra-judicial commentary, Kiefel has spoken with great clarity about her professional experiences as a judge while underscoring her identity, and difference, as a woman.

Prior to Kiefel's appointment as the first female Chief Justice of Australia in 2017, female solicitors outnumbered male solicitors in the Australian legal profession for the first time, but not in senior positions.[133] Thus, her appointment was not just momentous for the history of the High Court but also for women in the profession and women in or aspiring to positions of authority. It signalled the entry of a woman to the highest position of legal power and authority that had been exclusive to the benchmark man up until three years ago. Despite the significance of the occasion, Kiefel responded to praise for breaking the glass ceiling for women in the law by saying that she perceived her appointment as 'a natural progression'.[134] Unlike former Justice Mary Gaudron's

[133] Urbis, *National Profile of Solicitors 2016* (Report, Law Society of New South Wales, 24 August 2017) 4.
[134] Walker (n 38).

swearing-in speech,[135] Kiefel spoke of her identity as a woman in a reserved manner. She could have used this occasion to highlight the progress for women in the law or the need for greater gender equality in the senior ranks of the legal profession. Her conscious effort not to draw attention to her difference as a woman – and especially as a woman of 'firsts' – made it clear that she did not want to be perceived as deviating from the masculine norms of objectivity, reason and impartiality essential to the judicial role. The accusations of bias against US Supreme Court Justice Sonia Sotomayor during her confirmation hearings when she identified her judicial personality as a 'wise Latina woman'[136] provide a clear example of the harm done to a woman judge's legitimacy when she claims a different voice.[137] Similarly, Kiefel could undermine her own judicial authority and legitimacy if she identified herself as a 'feminist' or 'woman' judge and hence, emphasised her difference from the benchmark male Chief Justices that had come before her.

After her elevation to Chief Justice, Kiefel continued to distance herself from her gender. The 2018 Gray's Inn Hall event provided Kiefel with a rare opportunity to open up in a forum celebrating women in the law. Once again, she did not take this opportunity to speak candidly about her personal achievements and challenges or reflect on the status of women in the Australian legal profession. Compared with her fellow panellists, Kiefel chose anecdotes that did not tell of struggle or rejection. Perhaps Kiefel was not confronted with explicitly gendered obstacles throughout her legal career, such as balancing her career with caring for a family or being refused a position because she is a woman. Regardless, her choice of stories seemed to deliberately eschew any appearance of difference and neutralise her identity as a woman.

Kiefel's response to the complaints of sexual harassment against Justice Heydon was a departure from the impassive stance she had taken before. As Chief Justice it was incumbent upon

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[135] Of the five women judges appointed to the High Court, only Gaudron embraced her identity as a woman lawyer in her swearing-in speech: Justice Mary Gaudron, 'Speech at the Swearing in of the Honourable Justice Gaudron' (1987) 68 *Australian Law Reports* xxxiii.
[136] Sotomayor (n 48) 92.
[137] See, eg, Charlie Savage, 'A Judge's View of Judging Is on Record', *New York Times* (New York, 15 May 2009) AO 21.

her to take a position on the topic. In the context of the growing #MeToo movement, especially in Australia's legal profession, the need to adopt institutional responsibility for these allegations on behalf of the High Court is more important than ever. Thornton's characterisation of the Australian legal community more than twenty years ago still rings true today: 'too small, too insular, and too oppressively masculine and conservative' for women to freely complain to an external agency with the assurance that her claim would be believed.[138] As Noor Blumer, one of the complainants, stated, '[t]he greatest barrier to speaking out is fear'.[139] The heightened awareness of the insidious nature of sexual harassment in the workplace might have compelled Kiefel to apologise for the conduct of one of her colleagues. Yet, the fact that Kiefel took action as Australia's first female Chief Justice, and the way she did so, was historic for the Court and for women in the legal profession.

A. *A 'natural' choice*

In the rare instances where Kiefel reflected on the absence of women from public life, in the profession and in positions of authority, she preferred to speak of it as though it was part of a distant past. For example, in 2013, Kiefel noted the progress away from the typical High Court judge in 1973 as 'a male, white, Protestant raised in Sydney, Melbourne or, less frequently, Brisbane… from an upper middle class background' to the presence of three female High Court judges.[140]

Of course, the presence of more women in the judiciary and on the High Court should be encouraged: it signals an equality of opportunity for women in the legal profession, encourages other women to aspire to higher positions of legal authority and 'upsets the aesthetic of the [male]

[138] Thornton (n 1) 259.
[139] Naomi Neilson, "This is our profession': Noor Blumer on reporting sexual harassment', *Lawyers Weekly* (online, 31 August 2020) <https://www.lawyersweekly.com.au/biglaw/29322-this-is-our-profession-noor-blumer-on-reporting-sexual-harassment>.
[140] Justice Susan Kiefel, 'On being a judge' (Public Lecture, The Chinese University of Hong Kong, 15 January 2013) 2–3.

judicial norm'.[141] Kiefel's response seemed to reflect a common belief that a 'critical mass' of female representation will improve the position of women in power and challenge the enduring association of the benchmark man with judicial authority.[142] As Opeskin's statistical profile of the Australian judiciary illustrates, there has been significant progress towards gender equality in the judiciary. [143] Prior to Kiefel's appointment as Chief Justice, the proportion of female Commonwealth judges had steadily increased from twenty-four percent to thirty-six percent from 2006 to 2016.[144]

Behind the numbers, however, lies a more complex story for women in positions of judicial authority. Appointments to the federal courts are determined by the governments of the day. The limited statutory constraints and lack of transparency surrounding the appointment process means that political decision-makers wield considerable influence in determining the composition of the courts. This was not always the case. In 2008, Attorney-General Robert McClelland introduced reforms to federal judicial appointments. McClelland committed to broader consultation, publishing selection criteria, advertising appointments, seeking expressions of interest and establishing Advisory Panels.[145] McClelland also aimed to ensure a more diverse federal judiciary, specifically in terms of gender, residential location, professional experience and cultural background.[146] These reforms were not applied to the High Court. Senator George Brandis QC quietly reverted to the traditional approach to judicial appointments when he became Attorney-General in 2013.[147]

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[141] Erika Rackley, 'Difference in the House of Lords' (2006) 15(2) *Social and Legal Studies* 163, 179.
[142] See, eg, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20/Rev.1 (1996) 205.
[143] Brian Opeskin, 'The State of the Judicature: A Statistical Profile of Australian Courts and Judges' (2013) 35 *Sydney Law Review* 489, 510–511.
[144] Australian Bureau of Statistics, *Gender Indicators, Australia, August 2016* (Catalogue No 4125.0, 31 August 2016).
[145] Attorney-General's Department, *Judicial Appointments: Ensuring a Strong, Independent and Diverse Judiciary through a Transparent Process* (Report, 2008) 2–3.
[146] Ibid 1.
[147] In a 2009 hearing by the Senate Committee on Legal and Constitutional Affairs, Senator Brandis challenged the need to add Advisory Panels to the appointment process: Evidence to Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, 12 June 2009, 73–75 (George Brandis).

In lieu of any express criteria, appointments to the High Court are often justified with reference to the concept of 'merit'. Merit is an abstract term involving a 'claim to commendation', 'excellence' or 'worth'.[148] Understood in the context of federal judicial appointments, this definition comprises certain qualifications, skills and experience that can be objectively ascertained, such as prior experience as a judge or as a legal practitioner for a defined period of time.[149] Merit also encompasses a subjective, evaluative element.[150] Qualifications and abilities are weighed in relation to other factors and compared with those of other candidates. Where candidates share similar qualifications, greater weight may be placed on extraneous factors to distinguish candidates from one another. One can only speculate about the extent to which gender, judicial record, judicial philosophy, ideological leanings or other factors shape the choice to appoint a particular individual among several meritorious candidates. To maintain some semblance of objectivity in this opaque process, merit is used as the 'guiding principle' in making judicial appointments.[151] Merit was invoked by both Attorneys-General in 2007 and 2017 in the context of Kiefel's gender to justify and legitimise her appointments to the High Court. The weight placed on merit in both instances seemed to reveal some need to address unspoken concerns that her gender was at least in part an influencing factor. Nevertheless, Kiefel's appointment as Chief Justice was a politically astute one for the Turnbull Government. Her status as the second most senior puisne judge in 2016 and her conservative black-letter method of judicial reasoning may have helped to present her as a safe or 'natural' choice.

[148] *Macquarie Dictionary* (online at 30 September 2020) 'merit' (def 1).
[149] *High Court of Australia Act 1979* (Cth) s 7.
[150] Margaret Thornton, "Otherness' on the Bench: How Merit is Gendered' (2007) 29 *Sydney Law Review* 391, 402.
[151] Kcasey McLoughlin, 'Chief Justice Susan Kiefel and the politics of judicial diversity', *Australian Public Law* (Blog Post, 29 November 2016) <https://auspublaw.org/2016/11/chief-justice-susan-kiefel-and-the-politics-of-judicial-diversity/>.

V. CONCLUSION

Tendencies towards collegiality and consensus mean that it is difficult to discern Kiefel's contributions to the High Court's jurisprudence. Kiefel's career beginnings and separate judgments written prior to her appointment to the High Court reveal a black-letter application of the law and a strong respect for precedent. These cases alone are not representative of her judicial philosophy generally. However, they illustrate a conservative and restrained approach to issues relating to sex and gender. Off the bench, Kiefel is careful to present herself as judge first, woman second. Yet, her statement in response to allegations of sexual harassment against Justice Heydon as the first female Chief Justice denote a shift away from this impassive stance. Whether this marks the beginning of a greater confidence to speak about issues faced by women in the law remains to be seen.

CHAPTER FOUR: AUSTRALIAN WOMEN JUDGES, IDENTITIES AND JUDGING

I. INTRODUCTION

The visibility of women on the High Court bench cast by the almost equal gender balance and led by a female Chief Justice makes an important symbolic statement about women's admission to legal authority in Australia. With the exception of Justice Gaudron, however, women judges appointed to the High Court have taken up strategies to separate or suppress their identity as a woman from their role as a judge.

This chapter evaluates the image of the judge in terms of the benchmark man and the effects of this association on women judges in Australia. It argues that there is a continuing pressure on women judges to suppress their difference, fostered by a presumption that women are not capable of developing the detachment and neutrality required to perform their role as a judge. Greater transparency and the inclusion of broader considerations in the judicial appointment process to the High Court is then offered as a solution to countering this pressure to conform.

II. WOMEN JUDGES AND THE BENCHMARK MAN

One of the contributing factors to the separation of the woman judge's identity is the deeply entrenched image of the judge, judging and judicial authority in terms of the benchmark man, as outlined in the introduction of this research paper. This image of the judge as objective, neutral and impartial reflects a popular understanding of the judicial role. The judge must find, interpret and apply the law, understood as a system of rules with correct and incorrect outcomes, to the facts before them.[152] He must do so free from 'influences which unconsciously affect [his] attitudes… based on race, religion, ideology, gender or lifestyle that are irrelevant to the case in

[152] Rackley (n 2).

hand'.[153] It is for this reason that the woman judge is more likely to be seen as radical, partial, subjective and different, indicated by the qualifying adjective reserved for a 'woman judge'.[154]

A. *Appointed in her merits*

Distrust of the woman judge appears to be communicated in conservative fears that women judges are appointed, or might be seen to be appointed, on the basis of their sex rather than their merit. No woman on the High Court has yet been replaced by another woman.[155] McLoughlin observes that this may reflect what appears to be a national aversion to affirmative action even when no such policy has been implemented.[156] Moreover, as Kiefel's swearing-in ceremonies illustrate, discussions about whether the appointee is the 'best person for the job' are more likely to come to the fore when the appointee is a woman.[157] Those that demand that merit must be the sole criteria and justification for appointments discount the subjective element of merit. What counts as meritorious is determined by those already in positions of power and privilege. More often than not, the decision-makers mirror the physical attributes of the benchmark man. To minimise the risk of appointing someone who does not share their broad political viewpoint, these individuals tend to favour those who are like themselves.[158] The long history of only appointing benchmark men has resulted in an understanding of merit that is deeply gendered.[159] It is therefore quite unsurprising that women appointed to the bench may tend to separate or suppress their identity to fit in with this understanding.

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153 Gerard Brennan, 'Judicial Independence' (Speech, Australian Judicial Conference, 2 November 1996).
154 Regina Graycar, 'The Gender of Judgments: Some Reflections on Bias' (1998) 32(1) *University of British Columbia Law Review* 1, 2–3.
155 For example, Kiefel was one of the candidates shortlisted to succeed Gaudron in 2003 but she missed out to Heydon: Marriner (n 28).
156 McLoughlin (n 151).
157 See Thornton (n 150) 401–402.
158 Ruth McColl, 'Women in Law' (Speech, Supreme Court of New South Wales, 3 May 2006).
159 Thornton (n 150) 404.

B. *Objective, impartial and neutral*

While women have now been 'let in' to the highest positions of judicial power, doubts linger as to the ability of the woman judge to transcend her '*natural* association' as a woman with corporeality, emotion and inferiority to develop the detachment, neutrality and authority necessary to perform her duty to administer and apply the law.[160] To assuage these ongoing doubts, the woman judge must position herself close to the benchmark man. One strategy of achieving this is to separate her identity as a woman, and all of the characteristics associated with it, from her role as a judge. From the study of Kiefel's judicial tenure, this pressure to conform may be pronounced where a woman ascends to the highest positions of judicial authority, and even more so when she is the first woman to do so. As the first woman, she does not want to be seen to 'rock the boat'[161] in order to maintain authority and legitimacy. She may pursue a strategy of collegiality and consensus in her judgments that masks her individual voice. She may detach herself from her identity in such a way that she is perceived as impassive to the underlying social issues in the cases before her, possibly to the 'disappointment' of those who thought she would decide differently.[162] Further, she may downplay her difference to adhere to the expectations of those who appointed her, even on the rare occasions where it is acceptable to speak about her personal challenges, experiences and interests both in and outside the law.[163]

The judge, whether male or female, is assumed to be able to strip themselves of their subjective values, preferences and opinions when donning their judicial robes to personify objectivity and impartiality.[164] None of this is to suggest that judges can or should incorporate all of their values and preferences into their judging, nor that judges do or should have an agenda. To do so would undermine the function, work and role of the judge. And yet, preserving the image

[160] Margaret Thornton and Heather Roberts, 'Women Judges, Private Lives: (In)Visibilities in Fact and Fiction' (2017) 40(2) *UNSW Law Journal* 761, 762.
[161] Pelly (n 24).
[162] Waterford (n 91).
[163] Thornton and Roberts (n 160) 765.
[164] Ibid 764.

of the judge in terms of the benchmark man does not necessarily preserve the virtues of objectivity, impartiality and neutrality. Rather, it perpetuates a predominantly masculine narrative that excludes the experiences of the 'other', whether in terms of gender, race, sexual orientation, disability or a combination of such identity characteristics. It undermines difference, resists change and ignores the diversity of those who are subject to its decisions, whether directly as litigants or indirectly as a society.

III. A WAY FORWARD?

A solution to disrupting the notion that judging is the preserve of the benchmark man is to introduce transparency in judicial appointments to the High Court. Greater transparency in the appointment process is important on two counts. Transparency ensures visibility of the process to outsiders. It makes it possible for them to initiate and participate in discussions about the process on the basis of the fullest possible information.[165] The second reason is that transparency enables observers to have confidence that the appointment procedure is operating as intended. The independence and integrity of the judiciary depend on public confidence and broad acceptance of its legitimacy. Avoiding any perception that political or social networks are involved in an appointment, and that all those who are properly qualified for appointment are given the same consideration,[166] is vital to achieving this end.[167]

Two steps, based on McClelland's reforms summarised in Chapter Three, can be taken to ensure transparency in the High Court appointment process. The first is to articulate and make publicly available formal criteria that give meaning and substance to the opaque concept of 'merit'. Second, where there are several meritorious candidates to choose from, any broader considerations that are taken into account must be made clear to the public. These considerations should include

[165] Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13' (2015) 37(2) *Sydney Law Review* 187.
[166] George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 164.
[167] Ibid; Ronald Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117.

judicial diversity, both narrowly in terms of legal expertise or professional experience and more generally to personal characteristics, such as gender. This will help to prevent the Attorney-General from relying solely on merit to justify the appointment of his or her 'preferred' candidate.

Wariness about openly embracing judicial diversity as a factor in High Court appointments is understandable. There remains a risk that bringing attention to an appointee's background or personal identity will send a message that this was a distinct consideration in their selection. Further, a diverse bench will not necessarily enhance public confidence; a woman judge will not necessarily, by virtue of her gender, approach or decide a particular case in a certain way. This is clear from the study of Kiefel's judicial record. Regardless, these solutions provide good first steps towards a transparent appointment process and a bench that better reflects the diversity of Australian society.

IV. CONCLUSION

The persistent association of the judge with the benchmark man, notwithstanding the presence of women in the highest judicial offices, fosters a presumption of 'incompetency, inadequacy and unsuitability' in respect of women judges.[168] Women are subjected to heightened doubts and scrutiny about their capacity for objectivity and neutrality necessary to fulfil the role of the judge. An open and transparent process of judicial appointments to the High Court presents a step towards countering this pressure on the woman judge to separate or suppress her identity to conform to the ideal of the benchmark man.

[168] Thornton (n 1) 208.

CONCLUSION

The exclusion of women from legal and political power in Australia for much of the last century makes Kiefel's appointment highly significant. With Kiefel leading the High Court of Australia, women have now occupied the peak roles in each branch of government, as Prime Minister, Commonwealth Attorney-General, Governor-General and now Chief Justice. Yet, Kiefel's story shows that the appointment of a woman to the most powerful position of judicial authority is not enough to relieve the woman judge from the pressure to separate her identity as a woman from her role as a judge.

Women judges operate within various constraints defined by the benchmark man. From the moment of her appointment, the woman judge faces competing expectations. Will she speak out on issues pertaining to sex and gender, or any other aspects of her identity, to point out prejudiced values embedded in the law? Or will she stay quiet, submitting to rules and principles established by a history of the law established by benchmark men? Will she bring different perspectives 'than from those steeped in old styles of the law',[169] or will she stick to the status quo? Such questions underline the fact that the woman judge is still perceived as 'other'. They drive the need for political decision-makers to carefully shape the gender dynamics on the Court and invoke merit to shield themselves from apparent criticisms of bias in the appointment process. Importantly, these expectations impose a burden on the woman judge to rebut this perception by separating or suppressing her identity as a woman and positioning herself close to the ideal of the benchmark man.

Throughout her judicial tenure, Kiefel has endeavoured to eschew any traces of 'otherness'. She has refrained from drawing attention to her status as a woman of 'firsts', despite praise for shattering the glass ceiling for women in the profession. She has questioned the notion that women judges make a difference in forums where it is acceptable to discuss her experiences as a woman

[169] Waterford (n 91) 16.

in the legal profession. The legacy of collegiality and consensus she has crafted and her loyalty to precedent help to obscure her jurisprudential contributions. Aside from her powerful statement in response to allegations of sexual harassment against Justice Heydon, Kiefel's responses illustrate an impassive 'identity-less' stance.

Objectivity, impartiality and neutrality have long been the domain of the benchmark man. This research paper has focused on the effects that the persistent association of the image of the judge with the benchmark man has for women judges. However, this association further excludes numerous categories of 'others' identified by their race, class, sexual orientation, disability, religion or an intersection of several identity characteristics. The High Court is yet to welcome more individuals displaying such characteristics to the bench. Judicial appointments to the High Court should include open and transparent processes and criteria that seek to encourage diversity. Only then are we able to work towards dismantling the ideal of the benchmark man and create an image of the judge that reflects and embraces a multitude of identities.

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