

Why gender, in this perfectly legal world, really does matter

By Kim Rubenstein

WHEN Attorney-General Philip Ruddock announced the appointment of Susan Crennan to the High Court bench on Tuesday, he beat the male drum of merit: her appointment was based solely on merit: "I have never announced these appointments on the basis of gender", he claimed, as if they were mutually exclusive. But why isn't gender relevant to merit in the position of High Court justice?

Underlying the Attorney-General's statement is an assumption that needs challenging. The issue of "merit" is complicated; people who determine merit often presume that it is an objective reality. Ruddock stated that merit in this instance "of course means legal excellence, a capacity for industry; a temperament suited to performance of the judicial function". And at the moment a predominantly male conservative Cabinet decides who the "best" person is for the job. Indeed, Australia's century-old experience of judicial selection has shown that when Cabinets gaze at the available pool of potential High Court appointees, they traditionally see reflections of themselves, and what they understand as depictions of merit.

Yet, as Ruddock rightly acknowledged this week in appointing Susan Crennan, "we have very able women who are able to serve at the very highest level on the basis of their skills, ability and talent". Indeed, the characteristics wanted in High Court judges include the following: integrity, wisdom, intellect and judgment. It is not as though these characteristics stop at the divide between male and female (although because men have traditionally exercised public positions of power, there is a subtle implication that men better reflect these characteristics).

But Ruddock's statement about gender being irrelevant ignores other matters that are important to the position of High Court justice, and are an extension of the notion of what is meant by judicial office. They include: reflection of the community, responsiveness to the community's needs, life

experiences which reflect those of the community. This is because law is not just a scientific tool used to determine answers — it is full of values, and values are developed through life experience. In exercising her judgment, her legal skills, her ability and her talent, a woman's experience of living her life as a woman impacts upon the way she makes decisions. It is not the only aspect to her life experience, but it is an important one, and an important one in her exercise of judicial office.

In Australia, the diversity of the community needs to be reflected in the High Court of Australia, and gender is one of the meritorious matters that must be considered in the appointment process and should have been relevant to Susan Crennan's appointment.

Others include the geographic base of the judge.

Moreover, our multicultural society is relevant to the appointment also. Some argue that paying attention to gender and other personal attributes is an unnecessary exercise of affirmative action. In counterpoint, however, it is difficult to dispute that we already have a system of affirmative action that favours white, Sydney-based men.

Do men really merit this outcome or is the system, by unspoken assumption, looking after them?

When the next three vacancies to the High Court bench require appointment in the next 3½ years, the government should not be complacent in having one woman out of seven High Court justices.

It is fundamental to the achievement and perception of justice in Australia that Susan Crennan not be the sole woman voice on the High Court.

Other women, including women from different geographic regions in Australia, and of different cultural backgrounds (of which there are others with the necessary skills ability and talent) should be appointed to join her.

■ Kim Rubenstein is Associate Professor of law at the University of Melbourne, and the Designate Professor and director of the Centre for International and Public law in the Law School at the Australian National University, where she will take up her position in 2006