

# **Australian Women Lawyers 5<sup>th</sup> National Conference**

***Adelaide***  
***3 October 2014***

Ms Claire O'Connor SC recently wrote that 'gender inequality is not a glass ceiling that might hit you part way through your professional life but a slippery ladder that begins on day one of your employment.'

The evidence leaves no doubt about the truth of that observation.

Before I turn to some of that evidence, let me just pause to thank my Associate Emily Brown for her research and considerable assistance in the preparation of what I am about to say.

For too long now, more than 50 per cent of law graduates have been women. Female solicitors comprise 58% of those admitted in the last 10 years and close to 50% of the profession as a whole. Yet, of lawyers aged over 40, two thirds are men and nationally only 22% of partners and principals are women. South Australia fares only slightly better than the national average.

Representation at the Bar remains poor. In South Australia, there are 48 women and 165 men at the Bar and only 17% of Senior Counsel are women. But that unacceptably low proportion of senior counsel nonetheless surpasses all other Australian jurisdictions which hover around 9-10%.

Male barristers are more likely to practice in the commercial field and are more likely to actually appear in court than their female counterparts. A 2009 Law Council of Australia gender study revealed that 81% of appearances in Australia's superior courts were by males.

In South Australia the situation is dismal. In 2012, only two female counsel appeared in civil Full Court appeals and another two junior male counsel. For this

same period, there were 72 appearances by men and a further 44 appearances by men as juniors.

Dame Roma Mitchell was appointed to the Supreme Court of this State in 1965. On her appointment Dame Roma said "Women should be able to take whatever place they are fitted to take in the professions. I do not mean that a woman should ever be appointed to any significant office merely because she is a woman. But a woman's intellectual and other attainments should be recognised objectively. I am sure they are being more widely appreciated nearly everywhere in today's world". Dame Roma's confidence was misplaced and she remained the only woman holding high judicial office when she retired in 1983. It was more than two decades after Justice Mitchell's appointment that Justice Matthews was appointed to the Supreme Court of New South Wales.

Australia's judiciary now includes 340 women, 34% of the total number of judicial officers. There are three women on the High Court, three female Chief Justices, three female Presidents of their respective Courts of Appeal, and one female Chief Judge. There is also one female Chief Magistrate, Chief Magistrate Elizabeth Bolton in South Australia.

The tripling of the percentage of female judicial officers in the last two decades from about 8% to 24% gives little cause to celebrate. Women remain chronically and massively under-represented relative to both the general population and the profession.

Australia's poor performance in achieving gender proportionality on the bench parallels the position in other common law jurisdictions. In the United Kingdom 22.5% of judges in the lower courts are women, with the higher courts having considerably less representation – there is a single female justice of the Supreme Court and only 15.5% of High Court judges.

Canada seems to be faring better with about a third of the Federal Judiciary being women. The position in the Northwest Territories, however, deserves closer study than I can give it today, with all four judicial officers being women.

The common law world lags behind other law areas. According to the 2011-2012 UN Women report, *Progress of the Worlds Women*, Central and Eastern European and Central Asian countries have the highest percentage with over 40% of female judges. Western Europe ranges between 20% to 40%.

The under-representation of women in leadership is not peculiar to the legal profession.

The proportion of Australian women working as doctors in 2009 was 36%. The proportion is rising but in a familiar story female representation amongst specialists is only 25%. The accountancy profession suffers similar problems of attrition with women leaving the profession in droves between the ages of 26 to 33.

In 2012 only 3.5% of Australia's top 200 companies had female chief executives and only 15% of their board members were women.

Here there has been legislative intervention. The *Workplace Gender Equality Act of 2012* (Cth) requires companies with more than 100 employees to report on gender equality indicators and to implement strategies to address gender imbalance.

I am conscious that these statistics are well known to you. I expect that you will hear of them again tomorrow in a presentation by Fiona McLeod. I repeat them not to remind you of the professional struggle in which many of you are constantly engaged. I have no wish to generate either anger or despair.

I marshal these figures to urge a radical investigation of the systemic causes which they so clearly evidence and to encourage continuing action by the men and women of our profession.

For my part, I start by asking is there something inherent in legal practice which spawns business models which hinder the advancement of women or have those practices been designed, by and for men, on the premise that their domestic responsibilities will be shouldered by women. It is probably the latter. Many of the

elements of those legal practices are as bad for the administration of justice as they are for women. They include:

- the amassing of billable hours on pointless tasks
- litigating instead of negotiating – at least until the money runs out
- aggressive rather than collaborative lawyering
- wars of chest beating correspondence which often commence at about the same time as the child carers horror hour and which subside shortly after most children are asleep.
- the rewarding of the rainmaker over the good lawyer.

I turn to practice at the Bar. I strongly support the common law adversarial method to resolve major intractable legal disputes but adversarial does not mean angry or hostile. It does not mean those aggressive behaviours which come so naturally to some men. When the judge is in court, they are generally confined to such things as snide *Sotto Voce* asides and smug chuckles on one side of the bar table. During adjournments, that conduct can escalate to intimidation. Those practices too are bad for women and bad for the administration of justice. Judges are not helped by a barrage of strongly delivered assertions. Judges seek intelligent, insightful and balanced engagements. A task that women can do, let us say, at least as well as men.

Finally, the question of judicial appointments. The assumption that the best judicial officers come from the ranks of the bar has remained largely unchallenged. At a time when the rules of evidence were much more rigid and when there was much more civil trial work, there was good reason for the practice. However, leaving aside criminal trials, the judicial work of today requires a range of skills which often will be found in the ranks of solicitors and academics.

The Law Council's National Attrition and Re-engagement Study (NARS) identified the predominance of men in senior positions as a cultural barrier to progression. The report found that gender discrimination, including being allocated different types of work, being denied access to opportunities, and wrongly being rejected or judged as less competent by clients and colleagues were common.

Discriminating practices of those kinds have no place in the 21<sup>st</sup> Century, let alone in a profession which is charged with the responsibility of upholding the rule of law. Most worryingly 50% of women, and one in three men, reported being intimidated in the workplace. Similar rates of intimidation were reported in the 2012 Victorian Equal Opportunities Commission Report.

The NARS report found the causes of attrition to be many. They include women leaving the law to raise a family, the lack of promotional opportunities, the lack of mentoring of women who move into senior roles, and the unacceptably high levels of discrimination.

The Australian Securities and Investments Commission set targets for women on publicly listed boards and the four big Australian banks have set high targets for women in senior executive roles. Elizabeth Broderick, the Federal Sex Discrimination Commissioner, has urged the top 100 law firms in Australia to publish similar targets in their annual reports.

Law firms could also develop strategies to promote or mandate increased female representation, set targets that can be visibly monitored, introduce gender-neutral systems for evaluating performance and launch programs to assist women and also men to make the transition to becoming working parents.

The concept of modern families involves men being more involved in caring responsibilities. However, the traditional full-time male bread winner and female caregiver model still predominates.

Society's expectation that women, more than men, bear the responsibility to raise children nudges too many highly educated and trained women out of full-time work in all professions. An Oxford University study has predicted, and I have no idea how, that it will not be until 2050 that men will have an equal load of domestic duties.

This is, of course, a deeply rooted societal problem. In that respect I acknowledge my own failing. The problem has both human rights and human resources dimensions. It has recently been placed high on the global agenda by the

United Nations through the HeForShe campaign which aims to galvanize one billion men and boys as advocates for ending the inequalities that women and girls face globally. Importantly, the campaign's objectives are not only to break conventional limitations on women's roles and aspirations but to encourage men to make choices outside the accepted male paradigms.

For both human resources and human rights reasons, it is in the interests of law firms to promote the sharing of potential responsibilities with flexible and part-time working arrangements for the child bearer in their parenting responsibilities.

To encourage women to join the Bar, the legal profession should look to adopt promotion and briefing practices which, as a minimum requirement, the appointment of women to the position to be given active consideration.

On the question of judicial appointment, I make the following comments:

- Unless and until gender balance is achieved, I am wary of establishing judicial appointment commissions, comprising current or former judges, to make recommendation. They may simply replicate the largely grey suited judiciary we have now. A repeat of the successful surge in the appointment of women to the bench in Queensland at the turn of the century is unlikely to have happened under such a model.
- Active consideration should be given to the appointment of solicitors, in particular litigation solicitors, and academics to judicial office.
- Organisations like Australian Women Lawyers and the Association of Women Judges should be consulted.
- The profession should support judicial promotion from tribunals to courts and through the judicial hierarchy, at least as a temporary special measure which is necessary to redress gender imbalance in the judiciary.

Having strong women in senior positions to not only represent but also advocate for the needs of women in the profession is essential. Only when women are

better represented in these senior positions, especially at the Bar, can the gender imbalance in the judiciary be fully addressed.

That is why this conference is important.

I wish to congratulate the organisers on a full program of high quality which ranges from the ethics of gender bias in the law to practical business management and substantive law sessions.

I commend all of you for your commitment to your profession, and the cause of equal opportunity, which is manifest by your attendance here in great numbers.