

## Law Week Dinner

14 May 2014

The Lobby Restaurant, Parkes ACT

*Chief Justice Murrell\**

### **Why should we advocate for equal representation of women in the legal profession?**

There are at least five reasons why the community needs equal representation of women at all levels of the legal profession:

1. *It is un-Australian to prevent individuals from having a fair go.* We pride ourselves on being a diverse and egalitarian society.
2. *It will strengthen our democracy.* Justice Margaret McMurdo, President of the Queensland Court of Appeal said earlier this year:

lawyers, together with an independent judiciary, play an institutional role in [democracy] ... If women are to fully embrace their democratic rights, they should be represented approximately equally with men, at the Bar and in the three branches of government, including the judiciary.<sup>1</sup>

3. *Credibility of the profession.* If the legal profession is to be credible and representative of the community, its composition must reflect the community. Roddy Meagher, formerly of the NSW Court of Appeal once famously suggested that:

An ideal legal profession should obviously be composed of 5% convicted criminals, 5% drug addicts, 5% dole bludgers and 30% cretins – just like the rest of the community.<sup>2</sup>

I would respectfully suggest that if the percentage of women in the profession was increased there would be a different result.

4. *Strengthening of the profession.* The profession will struggle to maintain excellence if there is a systemic legal brain drain.<sup>3</sup> Generally, law schools admit

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\* Chief Justice of the Supreme Court of the Australian Capital Territory. I acknowledge and thank my legal researcher, Anneke Bossard, for her valuable work.

<sup>1</sup> Justice Margaret McMurdo, 'A Report Card on Gender Equality at the Queensland Bar and Bench and the Invisible Women' (Speech delivered to Queensland Women Judicial Officers and Barristers, Brisbane, 21 March 2014) <<http://archive.sclqld.org.au/judgepub/2014/mamcmurdo210314.pdf>>.

<sup>2</sup> A Stephens, 'Roddy Meagher: A Law Unto Himself', *Sydney Morning Herald* (Sydney), 5 December 1992, 39 quoting Roddy Meagher.

the top 1% of secondary students. More than half those students are women. If a significant percentage fail to progress to the top of the legal profession, then the profession will not be led by the best available minds.

5. *Return on investment.* Full participation of women in the legal profession ensures a 'return' on the investment of legal training at university and beyond. The estimated cost of replacing a lawyer of five or more years' seniority in the private sector is over \$120,000.<sup>4</sup>

Women lawyers started from a low baseline in the 70s. How far have we come since then?

I want to take a brief look at three areas: the Bench, the Bar and the profession generally.

### **Where are we now with judges?**

Until the latter half of the 20<sup>th</sup> century, few women met the basic qualifications for judicial appointment; professional seniority and extensive advocacy experience.

However, for more than 20 years, women have comprised more than half our law graduates. In fact, women now make up 63% of law graduates.<sup>5</sup> But they are not equally represented in the senior ranks of lawyers.<sup>6</sup>

Our male colleagues have often resisted affirmative action for women, maintaining that there will be an inevitable "trickle up" effect. But the input at the bottom has not resulted in a corresponding "trickle up". Perhaps this is due to a flaw in male logic; as far as I am aware, the laws of gravity do not favour a "trickle up".

On that note, let's examine how far women have "trickled up" within the judicial arm of government.

The representation of women in the judiciary is much improved on the position in 1980, when Jane Matthews was appointed a Judge of the District Court of NSW, the first woman on a NSW District or Supreme Court. In 1987 she was appointed to the

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<sup>3</sup> Chief Justice Marilyn Warren, 'Victorian Women Lawyers 10<sup>th</sup> Anniversary' (Speech delivered on the occasion of the Tenth Anniversary of the Victorian Women Lawyers, Victoria, 24 August 2006) <[http://assets.justice.vic.gov.au/scv/resources/0d71fe1b-a337-4ef8-be6f-5e08f3dc8e8c/speech06\\_vic\\_womenlawyers10thanniversary.pdf](http://assets.justice.vic.gov.au/scv/resources/0d71fe1b-a337-4ef8-be6f-5e08f3dc8e8c/speech06_vic_womenlawyers10thanniversary.pdf)>.

<sup>4</sup> FMRC Pty Ltd, *Driving Profitable Practice Workshop* (2007) <<http://www.fmrc.com.au/>> cited in Patricia Eastel (ed), *Women and the Law in Australia* (LexisNexis, 2010) 351.

<sup>5</sup> Graduate Careers Australia, *Law: Bachelor Graduates (All)* (2014) <<http://www.graduatecareers.com.au/Research/GradJobsDollars/BachelorAll/Law/index.htm>>.

<sup>6</sup> Nor are female graduates paid as much as their male counterparts. The starting salary of a male law graduate is around \$4,300 higher than a female law graduate: Graduate Careers Australia, *GradStats: Employment and Salary Outcomes of Recent Higher Education Graduates* (December 2012) <<http://www.graduatecareers.com.au/wp-content/uploads/2011/12/GCA-GradStats-2012.pdf>>.

Supreme Court of NSW, the first female judge of that Court, and the second woman to be appointed to any Supreme Court in the country.<sup>7</sup>

By 2006, 21% of NSW District Court judges were women, and 13% of NSW Supreme Court judges were women. Now, 33% of NSW judicial officers are women (including magistrates).

The first appointment of a woman to judicial office in the ACT was in 1993 when Magistrate Karen Fryer was appointed.<sup>8</sup> In 2008 Justice Hilary Penfold was the first woman appointed to the ACT Supreme Court.<sup>9</sup> In the ACT now, 50% of judicial officers are women.

Elsewhere, the representation of women on the Bench ranges from 38% in Victoria to 28% in South Australia. Tasmania gets the wooden spoon; only 25% of Tasmanian judicial officers are women.

With the exception of the ACT, the representation of women is generally much better at the lower levels of judicial office. In NSW 42% of magistrates are women but only 18% of Supreme Court judges are women. Similarly, in Victoria 43% of magistrates are women but only 26% of Supreme Court judges are women.

Nationally, Australia's judiciary includes 338 women, or 33% of the total number of judges. While this is a significant increase from 18 years ago when 9% of judges were women, judicial gender composition across the nation is far from equal.<sup>10</sup>

In part, the improvement may be due to the introduction of more transparent selection processes, at least at a Federal level, in the ACT and in relation to the selection of magistrates in most jurisdictions.

The old "tap on the shoulder" system of judicial appointment is rife with opportunities for nepotism. It reminds me of another relic of the early Middle Ages. To avoid the indignity of handing over cash, a barrister's fee was placed into the pocket hanging over the shoulder on the back of his gown; it was often referred to as a "backhander".

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<sup>7</sup> The Women's College, University of Sydney, *Jane Mathews* (2014) <<http://www.thewomenscollege.com.au/jane-mathews.php>>.

<sup>8</sup> Magistrate Karen Fryer was appointed on 6 September 1993: Justice and Community safety Directorate, ACT Government, *Former and Current Magistrates* (18 December 2013) ACT Law Courts and Tribunal Administration <[http://www.courts.act.gov.au/magistrates/about\\_the\\_court/former\\_and\\_current\\_magistrates](http://www.courts.act.gov.au/magistrates/about_the_court/former_and_current_magistrates)>.

<sup>9</sup> Justice Hilary Penfold was sworn in on 1 February 2008: Justice and Community safety Directorate, ACT Government, *Current Judges and Master* (28 November 2013) ACT Law Courts and Tribunal Administration <<http://www.courts.act.gov.au/supreme/page/view/740>>.

<sup>10</sup> Australian Institute of Judicial Administration, *Gender Statistics* (12 March 2014) <<http://www.aija.org.au/JudgesMagistrates2014.pdf>>.

In 2008 the Australian government introduced a selection process that involved advertisement and interview for Federal appointments. However, it seems that this process has been abandoned recently. A one liner appearing on the Attorney-General's Department website now states: 'There are no current judicial appointment processes' for federal courts.

We should not assume that progress is necessarily nurtured and built upon. It pays to be vigilant.

Recently, Justice Margaret McMurdo presented a "report card" on gender equality at the Queensland Bar and Bench. She reported that, since coming to office about two years ago, the current Queensland government had appointed 17 judicial officers of whom all but one (Magistrate Hay) were men. She said that:

This decline in female judicial appointments is not because of any dearth of talented, experienced and in every way meritorious women candidates.<sup>11</sup>

And she asked:

Could it be because of an unconscious bias by those recommending the making of appointments so that well-qualified women candidates are invisible to them and not considered?<sup>12</sup>

Her Honour suggested that a judicial appointments process should be considered; that such a process may make suitably qualified women candidates more visible to the judge-makers.

One would have thought that her Honour was cautiously raising an issue that was neither new (there has been discussion and research about unconscious bias in the law since the 1980s), nor controversial (insofar as it makes logical sense).

One would have been wrong. Her Honour's statement prompted the State Attorney-General to make public a private conversation with Justice McMurdo. Ironically, the ensuing media feeding frenzy largely starred men (with commentary provided by the now former Solicitor-General and a prominent Queensland barrister). And the point that Justice McMurdo had made was lost in the frenzy.

We should pause to reflect on the attitudes that underpinned the responses of both the Attorney-General and the media to what was really a statement of the obvious.

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<sup>11</sup> Justice Margaret McMurdo, 'A Report Card on Gender Equality at the Queensland Bar and Bench and the Invisible Women' (Speech delivered to Queensland Women Judicial Officers and Barristers, Brisbane, 21 March 2014) <<http://archive.sclqld.org.au/judgepub/2014/mamcmurdo210314.pdf>>.

<sup>12</sup> Justice Margaret McMurdo, 'A Report Card on Gender Equality at the Queensland Bar and Bench and the Invisible Women' (Speech delivered to Queensland Women Judicial Officers and Barristers, Brisbane, 21 March 2014) <<http://archive.sclqld.org.au/judgepub/2014/mamcmurdo210314.pdf>>.

## What about the Bar?

One of the most beloved pioneer women barristers in NSW is Janet Coombs. She is both a strong feminist and a committed Catholic. From the mid-1970s she led a campaign to remove an erotic Geoffrey Proud painting that hung in the NSW Bar Association common room. It may have been adapted from a pornographic magazine photograph. In any event, it depicted a naked woman who was masturbating. In a somewhat incongruous fashion, it was hung in pride of place among pictures of male dignitaries who were fully clothed, even wigged and gowned. It had been donated by a group of male barristers. When the request for removal was refused, Janet offered to donate a companion picture of a naked male. The offer was declined on the basis that the proposed picture lacked the artistic merit of the Geoffrey Proud painting. It was not until 1994 that the offensive painting was finally removed.

Even when I was called to the Bar in 1981, I was among the first 50 women ever to be admitted to the NSW Bar – I believe that I was number 48. Only a handful of those women were actually practicing. Some were academics and some had retired.

By 2006, 15% of the NSW Bar was female. Currently, women make up 20% of the NSW Bar.<sup>13</sup>

A year after the Geoffrey Proud painting was removed, in 1995 (less than 20 years ago), I was the 10<sup>th</sup> woman to be appointed silk in NSW. By way of contrast, in the last two years 19 women have been appointed silk in NSW.<sup>14</sup> Women now make up 9% of NSW's silks.<sup>15</sup>

While the ACT is leading the way in relation to the appointment of women to judicial office, we are lagging behind when it comes to the number of women at the Bar and the number of those women who are silk.

Of the 73 barristers who hold ACT practicing certificates, nine are women (12.3%).

Fourteen silks hold an ACT practicing certificate; one is a woman (6%). In the past 10 years, nine silks have been appointed; only one has been a woman.

Even Queensland is faring better; 22% of Queensland barristers are women and 9% of silks are women.

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<sup>13</sup> New South Wales Bar Association, *Find a Barrister* <<http://archive.nswbar.asn.au/findabarrister/>>.

<sup>14</sup> In the past 3 years 21 women have been appointed silk in NSW. In 2011, of the 98 silk applicants only 10 were women, and of the 10, only two were successful. In 2012, of the 117 silk applicants 32 were women, and of the 32 applicants, 12 were successful: Justice Rachel Pepper (Speech delivered on the Occasion of the 2013 New Senior Counsel Announcing Their Appointment to the Hon Justice Pepper, Sydney, 9 November 2012) <[http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011711808/pepper\\_speech\\_on\\_the\\_occasion\\_of\\_the\\_2012\\_new\\_senior\\_counsel.pdf](http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011711808/pepper_speech_on_the_occasion_of_the_2012_new_senior_counsel.pdf)>.

<sup>15</sup> New South Wales Bar Association, *Find a Barrister* <<http://archive.nswbar.asn.au/findabarrister/>>.

Why are there still so few women at the Bar and an even lower representation of women among silk?

When it comes to practising women silk, the Bench's gain is often the Bar's loss. It may be very difficult for women at the Bar to decline a judicial appointment; it is a privilege that offers a much more regular lifestyle than does the Bar.

The National Attrition and Re-engagement Study (NARS) Report released on 14 March 2014 says that, compared to women lawyers working elsewhere, female barristers are twice as likely to experience sexual harassment at their workplace. They are also more likely to experience bullying or intimidation, and discrimination due to family/carer responsibilities.<sup>16</sup>

But discrimination is not the only reason women struggle at the Bar. The bottom line is that women don't get briefed. There is unseen systemic discrimination against women barristers.

The 2006 Australian Women Lawyers national Gender Appearance Survey revealed that women advocates in the law, the "speaking" side, receive disproportionately less court work and, in all likelihood, receive less important court work than do their male counterparts.<sup>17</sup>

The Law Council of Australia 2009 Court Appearance Survey painted a similar picture.<sup>18</sup>

### **What of women in the profession generally?**

The 2014 NARS Report shows that women are leaving the profession in droves and that discrimination is rife.

- Half of all women report discrimination due to their gender, compared with one in 10 men.
- One in four women had experienced sexual harassment in their workplace.
- One in four women said they had been discriminated against due to family or carer responsibilities.
- 50% of women and more than one in three men reported having been bullied or intimidated in their current workplace.

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<sup>16</sup> Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (14 March 2014) 80.

<sup>17</sup> Australian Women Lawyers, *Australian Women Lawyers' Gender Appearance Survey Information* (August 2006) 200.

<sup>18</sup> Law Council of Australia, *Beyond the Statistical Gap: 2009 Court Appearance Survey* (2009) 15.

When the NARS Report was released, Fiona McLeod SC, Vice President of the Australian Bar Association, and former Chair of the Victorian Bar, described female attrition as a symptom of a profession that still caters to men:

Our problem is not with women, they are just the canaries in the coal mine; our problem is with the profession and the fact that we're still operating basically as a men's only club where some women get let in on a case-by-case basis.<sup>19</sup>

### **Why in 2014 are women still the “canaries in the coal mine”, the first casualties of the systemic problems with the legal profession?**

Of course the “problem” is not confined to the legal profession and it is not confined to Australia.

For example, the percentage of Australian women judges is similar to that in the United States, where about 33% of state and federal court judges are female. In the United Kingdom, 22.5% of the judges in the ordinary courts are women.<sup>20</sup> However, the numbers diminish as one ascends up the judicial hierarchy and in the Supreme Court there is only one woman, Lady Hale.<sup>21</sup>

Women's overall level of representation in Australian parliaments in 2012 was only 30%. Currently, we have one woman in Cabinet, and only five women in the Ministry (17%).<sup>22</sup> Just like the Bar, just like the Bench, women occupy the lower levels.

One of the main reasons that women are poorly represented in the profession is their inability to tolerate or refusal to accept the culture of the legal profession. The profession tolerates bullying and harassment, particularly of junior lawyers.<sup>23</sup> It is competitive and profit-driven. Many women do not value “winning” highly and they did not study law primarily to achieve material success. Inevitably, the culture of the legal profession reflects that of broader society, which is market-driven and where success is measured in financial terms.

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<sup>19</sup> Leanne Mezrani, 'Law is Failing and Hurting Women', *Lawyers Weekly* (online), 14 March 2014 <<http://www.lawyersweekly.com.au/news/law-is-failing-and-hurting-women>> quoting Fiona McLeod.

<sup>20</sup> UN Women, United Nations, *2011–2012 Progress of the World's Women: In Pursuit of Justice* (2011) <<http://progress.unwomen.org>>.

<sup>21</sup> Lady Hale, 'Equality in the Judiciary' (Speech delivered at the Kuttan Menon Memorial Lecture, 21 February 2013) <<http://supremecourt.uk/docs/speech-130221.pdf>>.

<sup>22</sup> Commonwealth, *Commonwealth Government: Abbott Ministry* (19 March 2014) Parliament of Australia <<http://www.aph.gov.au/~media/03%20Senators%20and%20Members/32%20Members/Lists/minlist.pdf>>.

<sup>23</sup> Leanne Mezrani, 'Law is Failing and Hurting Women', *Lawyers Weekly* (online), 14 March 2014 <<http://www.lawyersweekly.com.au/news/law-is-failing-and-hurting-women>>.

Many women agree with the 1970s feminist badge that proclaimed:

Any woman who wants equality with men has a low level of ambition.<sup>24</sup>

It is not just the legal profession that is problematic; it is the “whole system”.

Anne-Marie Slaughter argues that the representation of women in leadership positions is only half the measure of female equality; the other half is valuing family life: ‘If family comes first, then work does not come second.’<sup>25</sup>

So when we women of a certain age ask: “Why over our professional lifetimes have women lawyers failed to achieve equality with their male counterparts?” are we asking the right question? Do we even want “equality” that is defined in male terms?

### **What can we do?**

Changing the “whole system” sounds ambitious, even for lawyers. But practising lawyers are problem solvers. Rather than pondering, “Why is it so?” we prefer to ask, “What can we personally do about it?”

Here are a few practical things that you might like to think about.

#### 1. *Mentor your women colleagues*

When Mary Gaudron commenced practice as a barrister in 1968, she had difficulty obtaining chambers because she was a woman. Janet Coombs offered to share her chambers with the future High Court judge (who was also the first woman to be appointed silk in NSW).

In the 1970s, Janet Coombs (with the support of all members of chambers) established the Women’s Room in Frederick Jordan Chambers. The Room provided accommodation for women barristers in their first year at the Bar. This room helped launch the careers of many women, including Justice Virginia Bell of the High Court and Justice Elizabeth Fullerton of the Supreme Court of NSW.

Life at the Bar can be competitive and isolated; if the profession is a coal mine then women barristers are the canaries at the lowest level of the mine. They need mentoring. Senior women barristers are in the best position to provide mentoring but senior male barristers also have an important role to play.

The same observations apply to other parts of the profession; women need to be mentored, and the mentoring does not have to come from other women.

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<sup>24</sup> Quoted in Eva Cox, ‘Has Feminism Lost its Way?’, *The Saturday Paper* (online), 29 March 2014 <<http://www.thesaturdaypaper.com.au/opinion/topic/2014/03/29/has-feminism-lost-itsway/1396011600>>.

<sup>25</sup> Anne-Marie Slaughter, *Can We All “Have It All”?* (June 2013) TED <[http://www.ted.com/talks/anne\\_marie\\_slaughter\\_can\\_we\\_all\\_have\\_it\\_all](http://www.ted.com/talks/anne_marie_slaughter_can_we_all_have_it_all)>.

Men can be feminists too.

2. *Support affirmative action in briefing, including briefing quotas*

What goes around comes around. Just as Mary Gaudron was supported by Janet Coombs, she herself became a great champion of women barristers. As NSW Solicitor-General from 1981 to 1987, she demanded that the NSW State Government deliver a healthy quota of briefs to women barristers, providing me and many others with the only quality briefs that came our way in the early days, and starting a convention that continues.

All practitioners need to review their briefing policy and ask: Is there a woman at the Bar who could do just as good a job? And if the answer to that question is “I don’t know”, then you should find out. Consider imposing a quota; that one in two or even one in four or one in 10 briefs will go to a woman. Ensure that the briefs that do go to women are not just “girly” briefs.

Has your firm adopted the Law Council of Australia’s Equitable Briefing Policy, which has been formulated for voluntary adoption by clients and legal practitioners throughout Australia? The Policy requires that, when selecting counsel, all reasonable endeavours are made to identify and genuinely consider engaging female counsel.<sup>26</sup>

3. *Speak out against bullying and harassment in the workplace and support others who speak out.*

There are laws.

4. *Women, take a risk*

In Canberra, we are not used to hardship or unfairness. The Bar is tough it is and unfair. There is no guarantee that you will succeed. But you should consider taking the risk.

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<sup>26</sup> Law Council of Australia, *Equitable Briefing Policy for Female Barristers and Advocates* (June 2009) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Equitablebriefingpolicy.pdf>>.