

CELEBRATING WOMEN IN THE JUDICIARY 2014

Address to New South Wales Women Lawyers

**The Honourable Justice Ruth McColl AO
Court of Appeal
Supreme Court of New South Wales
Union, University and Schools Club
27 February 2014**

I acknowledge the Gadigal people of the Eora nation and pay my respect to their elders, past and present for they hold the memories, the traditions, the culture and hopes of Indigenous Australia.

Distinguished guests

- 1 This evening is an occasion for celebration and also, some reflection and a bit of exhortation.

The celebration

- 2 First the celebration.
- 3 This evening we celebrate the achievements of women appointed to courts at all levels of the Australian judicial hierarchy, save for the High Court.
- 4 Now is not the occasion to delve into the specific attributes of each of this evening's special guests. Their accomplishments were published at the times of their appointments and swearings-in and I am sure are familiar to you all.
- 5 However, as a general observation, reviewing the speeches made at their swearings-in or from personal acquaintance, it is manifest that they all possess in ample quantity the intelligence, independence of

mind, strong work ethic, drive, discipline, fortitude and enthusiasm necessary to occupy judicial office. In addition, they demonstrate a quality which is not a prerequisite for all occupants of judicial office, but is for most women: the courage to be a ground breaker. All too, I have no doubt, have that other quality women lawyers need to have mastered: the ability to be a multi-tasker, being able, colloquially speaking, to walk and chew gum on many levels!

6 Among their numbers are two, the Honourable Justice Helen Murrell, Chief Justice of the ACT Supreme Court and my colleague, the Honourable Justice Margaret Beazley AO, President of the Court of Appeal, who are entitled to entry to what Professor Regina Graycar once described to me as the “FW2”¹ club, that is to say, they are the “first women to” occupy their very senior positions in the judiciary.

7 We should also celebrate the fact that it might be said Australia is doing very well in terms of senior women judges:

- ❖ 3 women on the High Court: Justice Crennan AC, Justice Kiefel AC and Justice Bell AC.
- ❖ Three women Chief Justices: Chief Justice Diana Bryant (Family Court), Chief Justice Warren AC (Victoria) and Chief Justice Murrell
- ❖ 3 Women Presidents of their respective Courts of Appeal: Justice Beazley AO (NSW), Justice McMurdo AC (Qld) and Justice McClure (WA)
- ❖ 1 woman Chief Judge of a District Court: Chief Judge Patsy Wolfe (Qld) and
- ❖ 1 woman Chief Magistrate, Judge Elizabeth Bolton in South Australia.

8 Insofar as the judiciary as a whole is concerned, Australia’s judiciary currently includes 340 female judges which constitutes 33.53% of the total number of judges. This is a significant increase from the 8.77% of female judges that were presiding 18 years ago.²

- 9 But look at the position when this Association's patron, Justice Jane Mathews, became a judge. She is entitled to three memberships of the FW2 club: first woman appointed to the District Court (and, indeed, to any New South Wales court) in 1980, first woman appointed to the Supreme Court in 1987 and first woman President of the Administrative Appeals Tribunal.
- 10 I hope her Honour will forgive me if I relate to you her recollection that she "suffered severely at the Bar from prejudice and discrimination, particularly in the early stages".³
- 11 However, by May 1982 Justice Mathews was sufficiently impressed by the changing attitudes to women reflected in the increasing percentages of, in particular, women at the Bar, to be optimistic that "if the present trend continues, the image of the law as a male-dominated profession cannot last much beyond the 1980's".⁴ That optimism proved unfounded such that, in July 1998 (at about the time when women constituted 8.77% of Australian judges) her Honour expressed dismay about the "shameful paucity of women Judges in Australia, particularly on the superior Courts".
- 12 Interestingly the percentage of Australian women judges is approximately that in the United States where, about 33% of state and federal court judges are female, which is slightly above the global average of 27%.
- 13 In the United Kingdom, 22.5% of the judges in the ordinary courts are women. However, the numbers diminish at the apex of the judicial hierarchy: only 15.5% of High Court judges are women; 10.5% of Court of Appeal judges; none of the five heads of a division is a woman and in the Supreme Court there is still only Lady Hale.⁵
- 14 According to the 2011-2012 UN Women report, *Progress of the World's Women*, Central and Eastern European and Central Asian countries

have the highest percentages of female judges – over 40%.⁶ Insofar as Europe is concerned no doubt their system of a career judiciary is a significant factor in their strong numbers.

- 15 And so it might be said of women judges, to coin a slogan used in an old cigarette advertisement: “you’ve come a long way baby”. (OK – I know “baby” is profoundly politically incorrect, and a measure of the sexist premise of the ad, but it was early feminist days). The cigarette company which used this slogan is said to have done so in an attempt to link smoking to “women’s freedom, emancipation and empowerment”.⁷ I don’t want to promote smoking in any way, but the slogan is apt to underline the fact that women’s empowerment, not least of course in the legal profession, is a journey. While the journey to judicial appointment, or promotion as the case may be, may be over for this evening’s guests, the journey’s end is not yet in sight for the legal profession.

Reflection

- 16 And so to some reflection on the journey so far.
- 17 I haven’t drilled down into the process by which the appointments of those 340 Australian women judges were made.
- 18 No doubt many, including all those at least on this State’s Supreme Court, were appointed by what can be described as the traditional route. That is to say, insofar as identifying the suitable candidate was concerned, by informal consultation by the Attorney General with whomsoever he or she thought fit, usually including the head of the relevant jurisdiction, and perhaps the Presidents of the Bar Association and Law Society, then recommendation to Cabinet, and, if approved, to the Governor-General or Governor as the case may be. That “system” if it can be called that, was much criticised as lacking transparency, as

encouraging patronage and political appointments, and limiting diversity on the Bench.

- 19 Moreover, to the extent the relevant Attorney General had regard to “merit” as one of the criteria for appointment, merit was found (and you will appreciate I’m looking way back in history now) in those who exhibited the same qualities as themselves “with the unsurprising result that the people appointed ... tended to be those who had a traditional practice and profile: (that is to say) male, silk, and all-round decent chap” to the exclusion of women and members of other disadvantaged groups.⁸
- 20 Even before women started agitating for a more transparent system of appointment, distinguished jurists such as Sir Garfield Barwick, then Chief Justice of the High Court, had declared in 1977 that ‘the time [had] arrived’ for the curtailment of the exclusive executive power of appointment through the creation of a judicial appointments commission”.⁹
- 21 Although the idea of a more formal judicial appointments process found early support from people such as Chief Justice Barwick, it seems fair to say that the pressure for their establishment came from the movement to create a more diverse judiciary, in particular, to ensure equal gender representation.¹⁰ The real impetus seems to have emerged in this country in the early nineties. Tonight is not an occasion to rehearse the history – you can find it in many places including, if you wish, in a speech I gave in 2006 to the Anglo-Australasian Society of Lawyers which is on the Supreme Court website.¹¹ Suffice it to say that an Australian Law Reform Commission report supported a judicial commission, in the nature of an advisory body, as the preferable method of judicial selection and as “offer[ing] the best chance of achieving greater diversity on the bench”¹² and the Senate Standing Committee on Legal and Constitutional Affairs came up with something along the same lines.¹³

- 22 However those recommendations went nowhere then. In contrast in 2006 the United Kingdom established an Independent Judicial Appointments Commission, pursuant to the *Constitutional Reform Act 2005* (UK). The Commission was tasked with responsibility for conducting a selection process, then recommending to the Lord Chancellor candidates for appointment to judicial office in England and Wales. While selection was to be solely on merit, subject to that requirement, the Commission was required to have regard to the need to encourage diversity in the range of persons available for appointment. One of the objectives of establishing the Commission was to open up the bench to candidates who might not have thought it worth applying in the past and to provide better transparency and accountability in the appointments process.¹⁴ In short, the United Kingdom had rejected the notion that the “trickle-up” effect could redress gender and ethnic imbalance in the judiciary.
- 23 Is such a formal system of judicial appointment the answer to the imbalance of genders in the judiciary?
- 24 In the United Kingdom, by 2009 there was still concern at the slow rate of progress in the appointment of women and ethnic minorities. Further studies were undertaken aimed at increasing diversity. As Lady Hale observed “[t]he main message to emerge from all this activity is that the process of choosing the best candidates is only part of the story” and that there were still systemic problems which tended to disadvantage non-standard candidates, “ranging from the ‘education system, which, ... ‘tends to perpetuate disadvantage’, or ... ‘tends to perpetuate advantage’,” to the family unfriendly nature of the barristers’ branch of the profession and stereotypes about who gets what sort of judicial job.¹⁵
- 25 In the UK, this led in 2010 to the principal recommendation of the Neuberger Advisory Panel on Judicial Diversity that “[t]here should be a fundamental shift of approach from a focus on individual judicial

appointments to the concept of a judicial career. A judicial career should be able to span roles in the courts and tribunals as one unified judiciary".¹⁶ As at February 2013, when Lady Hale referred to this recommendation, it did not appear to have been progressed.

- 26 Back to Australia. The notion of a system, perhaps with some degree of lesser formality, but analogous to, a system involving applications for positions, interviews by a committee and recommendation like the English Judicial Appointments Commission has received favour in some jurisdictions.
- 27 Such a system exists in the Local and District Courts in New South Wales and it also exists in some form at all levels of the judiciary in Victoria,¹⁷ in Tasmania¹⁸ and in the ACT.¹⁹ At the level of the magistracy there is a process of advertising for expressions of interest, followed by interview and selection in all States.
- 28 Such a system also existed, until recently, in the Federal judiciary, with the exception of the High Court, and the most senior position on each federal court.
- 29 In early 2008, the Australian Government implemented new processes for the appointment of federal judicial officers aimed to ensure greater transparency, so that the public could have confidence that the Government was making the best possible judicial appointments, that all appointments were based on merit, and that everyone who had the qualities for appointment as a judge or magistrate was fairly and properly considered.
- 30 The aim of the process was to ensure the evolution of the federal judiciary into one that better reflected the diversity of the Australian community. In short, the process involved a system of advertisement, interview by an Advisory Panel which produced a list of recommendations from which the Attorney-General identified the

potential appointee, then the usual process of recommendation to Cabinet and the Governor-General's approval.²⁰

31 That position has now changed. According to the Commonwealth Attorney-General's Department website as at 22 February 2014 "There are no current judicial appointment processes" for any of the federal courts.²¹ There was no announcement, so far as I am aware, as to why the process which had prevailed under the previous government since 2008 had apparently been abandoned.

32 Read what you like into that rather Delphic statement on the Attorney-General's Department website. However, an available inference is that the current "system" for judicial appointment to the Federal Court has reverted to what I earlier described as the traditional method.

33 This could be a worrying sign. The adoption of a more formal process of judicial appointment as you can see from the brief history I have recounted, has been hard won. Perhaps its adoption is part of the reason the percentage of women on the bench grew from 8.77% in 1996 to 33.53% last year. Perhaps that growth represents the increase in the pool of women lawyers suitable for appointment? Who knows? The possibility that it is partly attributable, at least, to a formal appointment process that enabled women (and others not in the traditional pool) to identify themselves as available for judicial selection cannot be excluded. Any move that strips away progress towards greater equality of judicial appointment is, at the very least, highly problematic.

Worrying signs: going backwards?

34 And there are other worrying signs.

35 Last year, the Adelaide Advertiser reported that District Court Chief, Judge Geoffrey Muecke and recently-retired Supreme Court Justice

Margaret Nyland said South Australia had gone backwards in judicial equality. According to the article, “[s]even years ago, [the State] boasted enough female judges for an historic all-women sitting of the Court of Criminal Appeal”, whereas as of August 2013, there were only two female Justices and eight female judges in South Australia compared with 27 male jurists.²² In 2011 Ainslie Van Onselen, writing in *The Australian*, commented that the “Gender gap in the judiciary is still way too wide”.²³

36 In some South American countries, the number of female judges has also declined.²⁴

37 Moreover, headlines around the world demonstrate that there are many jurisdictions in which the rate of appointment of women to the judiciary is perceived to be slow. I have already referred to the United Kingdom. Here are a couple more:

- From the USA, “Women in the Federal Judiciary: “Still a long way to go”, *Judges & The Courts*, National Women’s Law Centre Fact Sheet, December 12, 2013,²⁵
- From South Africa, “Too few women in judiciary” – NGO 18 February 2014, *news24*.²⁶

38 On a more general level, there are other worrying signs, at least in the federal sphere, which have the potential to impact on women’s appointments to the judiciary. On 26 March 2014, on what is being described excitedly as “Repeal Day”, the Federal Government is planning to lift the gender diversity reporting requirements of companies from those with more than 100 employees, to those with 1,000 or more staff. The objective is said to be cutting red tape and reducing expenses. However, as the President of Chief Executive Women wrote in yesterday’s *Financial Review* “taking our eye off [the]

ball” of gender diversity and making measurement optional leads to the numbers going backwards.²⁷ And, as Caroline Hewson observed on Radio National this morning, measurement and monitoring of the numbers of women in the workforce is the only way of ensuring progress.

- 39 These are clearly early days in terms of what I have described as “worrying signs”. But they are sufficient to remind us that we need to be vigilant to ensure that there is no back sliding in women’s hard won advancement in the law.

Women’s appearances in courts: excoriation

- 40 This brings me to my next topic, excoriation, which focuses on women’s appearances, or should I say, non-appearances in courts. I should make it clear that I am principally speaking of my observations in the last 11 years on the Court of Appeal.

- 41 It is a truth, universally acknowledged, that most judges are appointed from the senior ranks of the Bar. There are, of course, notable exceptions, including some of this evening’s distinguished guests.

- 42 When the ranks of women silk were somewhat smaller, the influx of women to the Bench frequently came at the cost of senior women at the Bar. New South Wales has considerably lifted its game in this regard recently by appointing 19 women silks in 2012 – 2013. However, before they are likely to be considered as candidates for judicial appointment, they should be able to demonstrate “a sustained track record of personal and professional achievement”.²⁸

- 43 We can only ensure that the rate of appointments of women to the judiciary does not fall behind, or stagnate, but increases, if women advocates gain the same sort of experience as their male counterparts.

Yet they do not appear to be being given the same opportunities to develop that “sustained track record”.

- 44 In June 2004, the New South Wales Bar Council adopted the Law Council Model Equal Opportunity Briefing Policy for female barristers with the objective of changing the attitudes of solicitors and eradicating gender inequality in briefing practices.
- 45 From my position on the Court of Appeal, it is difficult to see that that policy has had any real effect. Speaking appearances by women in our court are rare. Indeed, once Judge Norton was appointed last year, they fell by almost 100% - and had fallen by 50% in 2011 when Justice Adamson was appointed to the Supreme Court. Together they were the only women practitioners who I can say consistently appeared in the Court of Appeal. Regrettably they have not been replaced.
- 46 This phenomenon is not confined to the Court of Appeal. Justice Kirby calculated that only about 13 percent of those who appeared before the High Court in his time were women, and even then, not all of them had “speaking parts”.²⁹
- 47 This does not mean we see no women in the Court of Appeal. We do quite frequently see a woman junior (i.e. with a non-speaking role) and, most significantly, a large percentage of those instructing counsel are women.
- 48 Interestingly, in 2009, the Law Council’s Court Appearance Survey found that female barristers appeared in statistically the same proportions as they exist at the Bar, but on average, all male barristers appear for significantly longer periods of time when compared to all female barristers (3.8 hours for males and 2.8 hours for females). Further, compared to other entities such as government agencies, private law firms were far more likely to brief male barristers.³⁰

49 That indicates to me that there is still a long way to go in terms of changing the culture of solicitors' briefing practices and, too, changing the culture among their clients. I doubt that if a solicitor told a client that a female barrister was the best qualified to undertake a brief, that that client would reject the advice. As Chief Justice Warren said recently, "women are excellent litigators [and] advocates" and too, it is important to remember that "advocacy is about persuasion not aggression".³¹

50 Perhaps, too, the New South Wales Bar Association needs to think of adopting something like the "Silks' Undertaking" recently initiated in Victoria, which encourages leaders of the bar actively to commit to advancing equality and diversity at the bar.³²

51 Thus, while it is apparent from the rate of judicial appointment, that some degree of cultural change has been achieved in the ranks of those appointing the judiciary, the same cannot be said for those briefing barristers in the areas where their potential for judicial appointment is most likely to be appreciated. I hope raising this issue will galvanise all those who brief barristers (and I include our sister solicitors as much as their male counterparts) always to consider whether there is a woman barrister who they could brief, even if not as leading counsel, but as a junior with a speaking part!

52 That was the excoriation bit.

Wrap

53 The final message for the evening is of course to celebrate what tonight's distinguished guests have achieved

54 In doing so we should never forget the battles many, including I am sure our guests, have fought to get to where we are today. But, we should not lose sight of the fact that there are still battles to be fought to

ensure we don't go backwards, don't just maintain but improve what has been achieved. We might have come a long way, but there's still a long way to go.

55 We must be ever vigilant. We will know we have reached the end of the journey when we share the freedom our male colleagues enjoy of being able to pursuing our legal career knowing that our gender is irrelevant to our success.

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9 85. <http://www.lawschool.cornell.edu/womenandjustice/Featured-Articles-and-Reports/upload/Women-in-Robes-Final.pdf> – accessed 21 February 2014
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33 accessed 26 February 2014
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35 independent judiciary through a transparent process", 2008,
36 <http://www.ag.gov.au/LegalSystem/Courts/Documents/JudicialApptsEnsuringastrongandIndependentjudiciarythroughatransparentprocess.pdf> accessed
37 <http://www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx> (see reference
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40 benches, Tessa Akerman, *The Advertiser* August 2, 2013
41 <http://www.adelaidenow.com.au/news/south-australia/judges-lawyers-and-graduates-call->

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