

## 100 YEARS OF WOMEN IN LAW IN NSW

*The Hon Justice M J Beazley AO\**

*President, New South Wales Court of Appeal*

- 1 [SLIDE 1] In 1873, the United States Supreme Court upheld a decision refusing Myra Bradwell’s admission to the Illinois Bar. In rejecting her application, the Court declared that it was an “*almost axiomatic truth*” that “*God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws.*”<sup>1</sup> On appeal, Justice Bradley agreed with this sentiment and remarked that: “*the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.*”<sup>2</sup>
- 2 It is this school of thought – that women, by reason of their sex, are unsuited to the intellectual rigour of the law – that has been debunked, albeit grindingly slowly, over the last 100 years.
- 3 Today, I want to step you through the key milestones for women in the legal profession over the last century, and to reflect briefly on the ongoing issues and challenges. But first, let us acknowledge the incredible contributions that women have made to the development of the legal profession to date.

### **Indigenous Women as Lawmakers**

- 4 In NSW, we point to 1918 as the defining moment when women were granted the right to practice law. However, women in Australia were practising law well before 1918. Indigenous Australians had very sophisticated systems of law. In Indigenous culture, the law is indistinguishable from spiritual, social,

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\* I wish to express my thanks to my Tipstaff, Natalie Druce, and the Researcher to the Court of Appeal, Natalie Czapski, for their research and assistance in the preparation of this paper.

<sup>1</sup> *Bradwell v Illinois*, 83 US (16 Wall) 130, 132.

<sup>2</sup> *Ibid*, 141; Jane H. Mathews, ‘The Changing Profile of Women in the Law’ (1982) 56 *Australian Law Journal* 634.

economic and ecological systems. Aboriginal women have long been responsible for resolving conflict within communities and ensuring that knowledge of the law is passed down to younger generations.<sup>3</sup> I respectfully acknowledge the female law makers of Australia’s First Nations.

### **‘Lady Lawyers’: The Early Years** [SLIDE 2]

5 Although there was no law against it, it was not until 1898 that a woman was enrolled in a law school in Australia. Exercising the strategic thinking that behoves every good lawyer, Ada Evans waited until the Dean of Sydney Law School was overseas for an extended period to enrol. [SLIDE 3]

6 Although she graduated with her cohort, practice was denied to her. The *Legal Profession Act 1898* (NSW) had established a Board to approve “*properly qualified persons*” for admission to the bar – but the conventional thinking at that time was that a “*woman*” was not a “*person*” for the purposes of such legislation. This was despite the *Acts Interpretation Act 1897* (NSW) providing that “[*w*]ords importing the masculine gender shall include females”.<sup>4</sup>

7 Ada Evans, it would seem, was advised that any action to compel the Board to admit her would not be successful.<sup>5</sup> In a newspaper interview shortly after her graduation in 1902, she noted that when she had sought to be admitted, the Chief Justice had “*pointed out that women were not admitted in London, and so could not be here*”.<sup>6</sup> In 1915, Gwyneth Bebb tested that theory in London – she brought an action against the Law Society seeking a

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<sup>3</sup> Anna Woodall, ‘Prologue’ in Susan Purdon and Aladin Rahemtula (eds), *A Women’s Place: 100 Years of Queensland Women Lawyers* (Supreme Court of Queensland Library, 2005) 3, 6-7.

<sup>4</sup> For a detailed discussion, see Justice Virginia Bell AC, ‘By the Skin of Our Teeth – The Passing of the *Women’s Legal Status Act 1918*’ (Speech delivered at the Francis Forbes Lecture, NSW Bar Association Common Room, 30 May 2018).

<sup>5</sup> *Ibid* 5-6.

<sup>6</sup> ‘In Portia’s Footsteps: The State’s First Lady Lawyer, A Chat with Miss I E Evans’, *Evening News* (Sydney), 22 April 1902.

declaration that she was a person within the meaning of the *Solicitor’s Act 1843* (UK) – but without success.<sup>7</sup>

- 8 Disappointed but determined, Ada Evans campaigned tirelessly for the admission of women to the profession in NSW. She did not think “*we should slavishly follow London*”.<sup>8</sup> She succeeded but it took some time.
- 9 Victoria became the first Australian state to allow women to enter the profession, with the passage of the *Women’s Disabilities Removal Act* in 1903.<sup>9</sup> [SLIDE 4] Flos Greig graduated from Melbourne University that year, and two years later, became the first woman in Australia to practise law.<sup>10</sup>
- 10 Victoria was followed shortly afterwards by legislation in Tasmania and Queensland in 1904 and 1905 respectively.<sup>11</sup> Other states were slower to follow. In 1904, Edith Haynes applied to the Western Australian Supreme Court for an order nisi seeking a mandamus to compel the Barristers Board to admit her as an article clerk. The case turned on a question of statutory construction: did “*he*” in the statute include “*she*”.<sup>12</sup> [SLIDE 5]
- 11 The “amusing argument” referred to in this headline was the banter – if you could grace it with that appellation – from the bench and which was stunningly appalling. An argument was made that there was no prohibition on female doctors, so why was there one on female lawyers. Justice Burnside quipped: “*Medical ladies, as a rule, attend only to ladies. Will you have a legal lady attending only to lady clients?*”<sup>13</sup> In an equally disgraceful riposte that brought on a great deal of laughter, Edith Haynes’ lawyer said: “*Many lawyers have*

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<sup>7</sup> *Bebb v Law Society* [1914] 1 Ch 286.

<sup>8</sup> Evening News, above n 6. The United Kingdom first admitted female lawyers after the passage of the *Sex Disqualification (Removal) Act 1919* (UK).

<sup>9</sup> *Women’s Disabilities Removal Act 1903* (Vic).

<sup>10</sup> ‘Miss Flos Greig: Victoria’s First Lady Bachelor-of-Laws’, *Table Talk* (Melbourne), 16 April 1903, 10;

‘Miss F. M. Greig: Our First Lady Barrister’, *Table Talk* (Melbourne), 18 May 1905, 14.

<sup>11</sup> *Legal Practitioners Act 1904* (Tas); *Legal Practitioners Act 1905* (Qld).

<sup>12</sup> *Re Edith Haynes* (1904) 6 WALR 209.

<sup>13</sup> ‘Shall Women Become Lawyers? A Local Application: Reference to the Full Court, Affidavit of Miss E Haynes, An Amusing Argument’, *Kalgoorlie Western Argus*, 23 August 1904.

*lady clients whom they would be glad to hand over to lady solicitors.” (I am beginning to see where Donald Trump gets his material from).<sup>14</sup>*

12 Edith Haynes’ application was refused.

13 It would be another 19 years before the Western Australian Parliament passed legislation allowing women to practise, in 1923, making it the last Australian state to do so.<sup>15</sup>

14 In the meantime, in 1918, with the passage of the *Women’s Legal Status Act*, women were finally admitted in NSW. [SLIDE 6] The Act gave women the right to practise as a lawyer, as well as be appointed a judge of the District or Supreme Court. It also gave women the right to be elected as members of the Legislative Assembly and act as the Lord Mayor of the City of Sydney. [SLIDE 7]

15 After sixteen years of waiting for this breakthrough, Ada Evans herself declined to enter the profession. Sadly, she felt that her long involuntary absence from the law rendered her unable to give her clients the representation that they deserved.

16 At least for some contributors to the *Sydney Morning Herald*, the Act appeared to usher in a period of newfound optimism about the place of women in the legal and wider world. An article from 1921 proclaimed that:<sup>16</sup> [SLIDE 8]

“Man’s capitulation has been complete, or practically complete. The disabilities under which woman suffered have been almost entirely removed; the halls of the Legislature are now as accessible to women as smoking compartments on the train.”

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<sup>14</sup> Ibid.

<sup>15</sup> *Women’s Legal Status Act 1923 (WA)*.

<sup>16</sup> ‘Woman’s Progress’, *Sydney Morning Herald*, 11 June 1921.

- 17 Fortunately, smoking departments have been abolished – one could hope that discrimination might follow suit and also become assigned to history.
- 18 In 1924, Marie Byles became the state’s first woman solicitor<sup>17</sup> and Sibyl Morrison became the first woman barrister, although catching some by surprise. [SLIDE 9] Sibyl Morrison reportedly “*caused a flutter*” appearing at the Water Police Court when she informed the court that she was a member of the bar.<sup>18</sup>
- 19 [SLIDE 10] In 1925, Mary Kitson and Dorothy Somerville established the first Australian female legal partnership, in Adelaide. The firm was disbanded some years later when Kitson (who now went by her married name “Tenison Woods”) moved to a more established firm, having been abandoned by her husband, and left a single mother.<sup>19</sup> Ironically, Kitson had left the first firm at which she had sought partnership at her fellow male partner’s insistence that the only partnership a married woman should have was with her husband.<sup>20</sup> In 1950, Kitson was appointed as chief of the Status of Women Commission in the Human Rights division of the United Nations.
- 20 [SLIDE 11] It was at the Commonwealth Legal Convention in Sydney in 1951 that women decided that a formal association was needed to represent the interests of women entering the profession.<sup>21</sup> Women lawyers had been meeting informally in Sydney since 1941, first at the home of solicitor Veronica Pike, then at the Feminist Club on King Street.<sup>22</sup> The Women Lawyers Association was formally constituted in 1952 - the first association of its kind in Australia. Women Lawyers Australia was established as a peak body for women lawyers’ associations in 1997.

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<sup>17</sup> Stanislaus ‘SJ’ Carroll went to law school with Marie Byles and often admiringly spoke of her.

<sup>18</sup> ‘Lady Barrister: S.M. Didn’t Know Her, Water Court Incident’, *Sun* (Sydney), 18 June 1925.

<sup>19</sup> Elizabeth Olsson, ‘Three Brilliant Adelaide Girls’ (20 October 2017) *Law Society of South Australia* <[https://www.lawsocietysa.asn.au/LSSA/Media/Three\\_brilliant\\_Adelaide\\_girls.aspx](https://www.lawsocietysa.asn.au/LSSA/Media/Three_brilliant_Adelaide_girls.aspx)>.

<sup>20</sup> *Ibid.*

<sup>21</sup> Timeline, ‘First Hundred Years’, <<https://first100years.com.au/about-us/timeline/>>.

<sup>22</sup> *Ibid.*

- 21 [SLIDE 12] Although women were organising professionally by the mid 20th century, it was quite some time before their presence was felt and accepted in general representative bodies. In 1951, Margaret Degotardi became the first woman to nominate for election to the Law Society Council (then known as the Incorporated Law Institute); but it was not until 1972 that a woman, Ann Plotke, a successful commercial solicitor, was elected.<sup>23</sup>
- 22 Ann Plotke was followed onto the Law Society Council by Mahla Pearlman, who was later elected the first female President of the Law Society, in 1981. [SLIDE 13] It would take another 17 years before NSW saw another female Law Society President. Ruth McColl, now a Judge of the Court of Appeal, became the first female President of the NSW Bar Association in 1999.
- 23 [SLIDE 14] However, the following statistics still continue to tell a story:
- Since 1884, 7 out of 74 (or 9.5%) of Presidents of the NSW Law Society its predecessor have been female
  - Since 1936, 3 out of 40 (or 7.5%) of NSW Bar Association Presidents have been female (there have been 41 Presidents, but Sir Garfield Barwick served twice)
- 24 Women were also making their mark academically. [SLIDE 15] In 1955, after being accepted as the youngest ever student to study law at Sydney University, Elizabeth Evatt became the first woman to graduate with the University Medal in law. Evatt went on to have the most extraordinary career and can only be described as a ‘trail blazer’ in the legal profession and beyond.
- 25 [SLIDE 16] There are not enough hours in the day, and indeed space on this slide, to discuss the many achievements of Elizabeth Evatt in any great detail.

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<sup>23</sup> Michael Pelly and Caroline Pierce, *Defending the Rights of All: A History of the Law Society of New South Wales* (The Law Society of NSW, 2016) 150.

However, there are three particularly noteworthy achievements that I would like to mention. The first is that, from 1974 to 1977, Evatt chaired the Royal Commission on Human Relationships. Jane Mathews was her counsel assisting.

26 At about the same time, the *Family Law Act 1975* (Cth), was passed and the Family Court was established. Evatt was appointed the inaugural Chief Justice in 1976.

27 The third is that, in 1988, Evatt was appointed President of the Australian Law Reform Commission. Not only was she the first female president but she stewarded an ambitious law reform program that placed issues affecting women at the forefront of the reform agenda. [SLIDE 17] In 1994, the Commission released a report entitled “*Equality before the law*”, which focused on the key ways in which the legal system discriminated against women, and made several key recommendations as to how this could be addressed.<sup>24</sup>

28 After the early milestones, there was, at best, a slow trickle of women entering the legal profession. Even fewer made it to the bar; indeed, by the time I went to the bar in 1975 I was only the thirty-seventh woman to do so in this state.

29 The prevailing attitude in the 1960s remained that law was not a woman’s game. In 1964, fed up with being told by city firms that it was not their policy to employ women as articled clerks, Mary Gaudron and Daphne Kok approached the Women Lawyers Association of NSW as representatives of female law students at Sydney to express their frustrations. They were told that the solution lay in their hands: they should learn to touch type, forego their university studies, take the Admission Board course, and use their holidays for the exams. I don’t know it but I wouldn’t have been surprised if there was coup in the Women Lawyers Association after that response.

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<sup>24</sup> Australian Law Reform Commission, *Equality Before the Law*, Report No 69 (1994).

30 But Justice Gaudron understood the message perfectly. Reflecting upon this encounter, some years later, Justice Gaudron remarked [SLIDE 18].<sup>25</sup>

“I knew, before the meeting, that for a woman to succeed, she had to be better than her male counterpart. I knew, after the meeting, that that was as simple as learning to touch type - hardly an insuperable task. And I knew, too, that the women who offered us that advice were speaking from their own experience: the hurdles they had to jump had been much higher than those we were ever likely to confront.”

### The Slow March of Progress:

31 [SLIDE 19] In 1965, Dame Roma Mitchell was appointed to the Supreme Court of South Australia, the first female judge of an Australian Court. However, New South Wales did not have its first female judge until 1980. But let me begin with a brief Dame Roma Mitchell story.

32 In 1951, Dame Roma and her fellow female practitioner, Sesca Ross Anderson, were denied entry to the jubilee dinner of the Commonwealth Legal Conference in Sydney after being told it was a male only affair. Never daunted - somewhat a catchcry for women in the law - and having paid they found a way in and took their seats at the dinner.<sup>26</sup>

33 [SLIDE 20] Almost 70 years after Justice Burnside joked that admitting Edith Haynes to the profession might lead to a female bench, an article was published in the *Sydney Morning Herald* which referred to the following remark made by an unidentified “*distinguished law lord*” in the United Kingdom: “[s]ome day a woman will be appointed to the Bench. By that time, thank God, I will be dead”.<sup>27</sup> So say us all. [SLIDE 21]

34 Fortunately the NSW Government was a little more enlightened even if slow off the mark. Apparently, they expressed a desire for a female Magistrate as

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<sup>25</sup> Mary Gaudron, ‘Speech to Launch Australian Women Lawyers’ (Speech delivered at Australian Women Lawyers Launch, Melbourne, 19 September 1997).

<sup>26</sup> Olsson, above n 19.

<sup>27</sup> F E Moss, ‘Why No Woman Judge?’, *Sydney Morning Herald*, 26 July 1973, 7.



early as 1939, when the then Minister for Education conveyed his desire for a Female Children’s Court Magistrate to deal with “cases of female delinquency”.<sup>28</sup> [SLIDE 22]

35 But it was not until 1970 that NSW appointed its first female Magistrate, Margaret Sleeman.<sup>29</sup> She was in fact the first female magistrate in Australia, and the first woman to sit on the NSW Coroners’ Court.

36 [SLIDE 23] NSW did not see a female judge until the appointment of Justice Jane Mathews as a Judge of the District Court in 1980. [SLIDE 24] Her appointment to the Supreme Court of NSW in 1987 made her only the second woman to be appointed to a Supreme Court in Australia, Dame Roma Mitchell being the first. [SLIDE 25] Justice Jane Mathews was a most respected jurist with her sharp intellect, her penchant for hard work, and her superb judicial temperament.

37 Jane handed down many landmark judgments over the course of her long and illustrious career. To pick just one example, in a case that came before her in the Court of Criminal Appeal, she wrote the lead judgment in a decision finding that a post-operative transgender woman could be recognised as a woman under the law.<sup>30</sup> The implications of the decision, given in 1988, would be obvious to you.

38 As an aside, Jane has been an extreme and generous patron of the arts. Her active contribution to Sydney’s music scene is well known and I share this photo with you of Jane at the Ring Cycle in Melbourne as an indication of the lengths Jane will go to for the sake of music. [SLIDE 26] There are a number of musical groups in this city that would not be viable without her financial support.

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<sup>28</sup> ‘Govt. Wants Female S.M.’, *Daily Telegraph*, 28 April 1939, 1.

<sup>29</sup> ‘Woman SM’, *Canberra Times*, 28 July 1970.

<sup>30</sup> *R v Harris and McGuinness* (1988) 17 NSWLR 168.

39 It would be remiss to talk about female firsts and not discuss the life and legacy of Mahla Pearlman. [SLIDE 27] Mahla’s intelligence and ability was apparent from a young age – at the age of 10, she won the Police Department’s state-wide essay competition, and was dux of her class that year.<sup>31</sup> Mahla graduated with an LLB with Honours in 1960, and commenced practice as a solicitor. In 1966, she became a partner at Lieberman & Tobias, which in its last emanation before her appointment was Sly & Weigall. [SLIDE 28]

40 In an interview with the *Good Weekend* in 1985, she remarked on the changing attitudes towards women in the profession. She recalled:<sup>32</sup>

“I had a client who almost fell off his seat when he met me. He said: Don’t tell me this document was written by a woman. But that was 15 years ago and he’s still a client.”

41 [SLIDE 29] In 1976, Mahla became a councillor of the Law Society of NSW, and in 1981, became its first female President. Her time on the Law Society coincided with the preparation and delivery of a landmark report by the NSW Law Reform Commission into the regulation of the profession, which led to the enactment of the *Legal Profession Act 1984 (NSW)*.<sup>33</sup> During her career, Mahla would serve on all manner of peak bodies and associations – and in 1989, became the first female President of the Law Council of Australia.<sup>34</sup>

42 In 1992, Mahla was appointed as the Chief Judge of the NSW Land and Environment Court – the first woman to be appointed as the head of a superior court or tribunal in NSW.<sup>35</sup> Her performance in that role was widely lauded. Justice Peter McClellan, who succeeded her as Chief Judge in 2003, described her judgments as “*models of clear expression [which] reflect[ed] the*

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<sup>31</sup> ‘Mahla Pearlman’, *Hebrew Standard of Australasia*, 18 December 1947.

<sup>32</sup> Phillippa Gemmell-Smith, ‘How Six Women Won a Place on Sly & Russell’s Letterhead’, *Good Weekend*, 1-2 June 1985.

<sup>33</sup> ‘A First Class Lawyer of the Land’ (2012) 50(1) *Law Society Journal* 32, 32.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* 33.

*intensity of her endeavour to define the problem and reason to the correct answer”.*<sup>36</sup>

43 Under her guidance, the Court came to be internationally recognised and praised, all this at a time when the Court faced significant pressure and scrutiny and was even subject to an inquiry. That the Court survived and thrived is due in no small part to her leadership.

44 Mahla is one of a small but esteemed group of women who have been appointed as solicitors directly to the Bench. These include Margaret Sidis and Susan Gibb were both appointed as solicitors to the NSW District Court. Margaret Stone was appointed to the Federal Court from her position as a partner at Freehills, having previously had a distinguished career as a legal academic. Since then solicitors Kathleen Farrell and Brigitte Markovic have been appointed to the Federal Court. Nicola Pain has been appointed to the NSW Land and Environment Court. In 2008, Justice Julie Ward, who is now the Chief Judge in Equity, was the first woman solicitor to be appointed to the NSW Supreme Court. Many solicitors have been appointed as magistrates and tribunal members.

### **Changing Tides: the 1970s, 80s and 90s**

45 Many prominent female lawyers and jurists have taken up the mantle of advocating for women’s rights. [SLIDE 30] Justice Mary Gaudron is notable among them.

46 Mary was the arch exponent of demonstrating how existing legal principle could be used as the basis for a proper and fair outcome – including an outcome that was different from what had been established in earlier decisions. This was a feature of her advocacy and later of her jurisprudence as a judge of the High Court.

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<sup>36</sup> Peter McClellan, ‘The Land and Environment Court of NSW – Swearing in of Chief Judge, Justice Peter McClellan – Monday 25 August 2003’ (2003) 3 *National Environmental Law Review* 26, 28.

- 47 In 1972, she successfully advocated for equal pay for women in the National Wage case before the Australian Conciliation and Arbitration Commission. This was the first occasion that a woman had appeared for the Commonwealth in a national pay case. [SLIDE 31] In the 1973 National Wage Case, again on behalf of the Government, she advocated that the minimum wage should extend to women as well as males. At that time, the Conciliation and Arbitration Act had enshrined as the minimum wage a family wage fashioned on the needs of a lowly paid male with a non-working wife and two children.
- 48 I have heard Mary lament that the arguments she made in the 1970s, whilst apparently successful at the time, did not have the society-wide acceptance of equal pay that they were intended to have. [SLIDE 32] Today, some 45 years later, the gender pay gap remains an issue although it is apparently at its lowest in 20 years. Law firms, however, might be seen to lag behind business generally.
- 49 The gender wage gap nationally is at a not insignificant 14.6%,<sup>37</sup> but in the legal profession, it remains at an astounding 29.7%, double the national average for full time employees.<sup>38</sup> Earlier this year, Acritas, a legal market research firm, found that male equity partners earned on average 27% more than female equity partners across the 51 countries surveyed.<sup>39</sup> Studies also show that female law graduates earn less than men on average at the entry level, and, in some firms, the gap widens as women advance in their career.<sup>40</sup>

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<sup>37</sup> Workplace Gender Equality Agency, ‘National gender pay gap lowest in 20 years’ (16 August 2018) <<https://www.wgea.gov.au/media-releases/national-gender-pay-gap-lowest-20-years>>.

<sup>38</sup> Workplace Gender Equality Agency, ‘Legal Services Summary for 2017’ <[http://data.wgea.gov.au/industries/115#summary\\_content](http://data.wgea.gov.au/industries/115#summary_content)>.

<sup>39</sup> Acritas, ‘New Acritas Survey Reveals a 27% Global Gender Pay Gap for Equity Partners’ (19 April 2018) <<https://www.acritas.com/Stars2018ExecSummary>>.

<sup>40</sup> QILT, ‘Graduate Outcomes Survey 2017: National Report’ (January 2018) <[https://www.qilt.edu.au/docs/default-source/gos-reports/2017/2017\\_gos\\_national\\_report\\_final\\_accessiblea45d8791b1e86477b58fff00006709da.pdf?sfvrsn=ceb5e33c\\_4](https://www.qilt.edu.au/docs/default-source/gos-reports/2017/2017_gos_national_report_final_accessiblea45d8791b1e86477b58fff00006709da.pdf?sfvrsn=ceb5e33c_4)>.

50 [SLIDE 33] In 1976, Pat O’Shane became the first Indigenous barrister, practising with the Aboriginal Legal Service. Pat O’Shane’s interest in law was sparked by a case she witnessed at 21 involving two police officers who had beaten two young Aboriginal women, one of whom was 15.<sup>41</sup> She recalled the sense of outrage she felt at the insistence on framing these women, not as victims of assault, but as criminals. Following her admission, she was a fierce advocate for the rights of Indigenous Australians, serving as Head of the NSW Aboriginal Affairs Department from 1981. In 1986, she was the first Aboriginal Australian to be appointed a magistrate of the Local Courts in NSW.

51 The increasing influx of women into profession in the 1970s and 80s also forced a linguistic shift. 1976 was the first time that the minutes of the NSW Law Society’s Annual General Meeting became gender neutral.<sup>42</sup> In 1987, the appointment of Mary Gaudron to the High Court finally forced those appearing before the Court to stop addressing the judges as “*The Honourable Mr Justice*”. [SLIDE 34]

52 Like many of my contemporaries, I have amassed a huge cache of stories over the years. I was once engaged in correspondence with a would-be author of a miscellany at law who was looking for legal anecdotes. It was addressed to “*Justice*” and commenced “*Dear Sir*”. I responded as follows:

“Dear Mr X,

Thank you for your letter ... beginning ‘Dear Sir’. Perhaps your first anecdote could come from you. My first name is Margaret.”

53 Not defeated, the would-be author responded. His letter commenced “*OOPS*” and continued that he was embarrassed and would consider including the gaffe in the foreword of his book. He beseeched me again to provide him with

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<sup>41</sup> Larissa Behrendt and Steven Walsh, ‘Interview: Pat O’Shane & Patricia Boyd: From Cairns to the Courtroom’ (1991) 2(3) *Polemic* 161, 161.

<sup>42</sup> Pelly & Pierce, above n 23.

anecdotes saying “*perhaps something arises related to Her Honour’s femininity*”. So far as I am aware, the miscellany never came into existence.

- 54 References to a woman’s femininity have been a constant refrain since women were first admitted. [SLIDE 35] In 1921, when a number of NSW women were appointed justices of the peace, an article in the *Sydney Morning Herald* referred to the views of some that it represented a “*further stage in the insidious process of ‘unsexing’*”.<sup>43</sup>
- 55 In a speech earlier this year, Justice Virginia Bell of the High Court recalled attending a function at law school hosted by women in higher years where she was given tips on how to maintain her femininity.<sup>44</sup>
- 56 One of the buzzwords of the 1990s was “*affirmative action*”. In March 1994, an article was published in the *Sydney Morning Herald* which noted that there was only one female silk “*left*” in NSW. Priscilla Flemming had retired in 1989, I had been appointed to the Federal Court in 1993 and Carolyn Simpson had just been appointed to the Supreme Court. It was accompanied by this cartoon. [SLIDE 36]
- 57 All manner of problematic attitudes were prevalent at the bar during this time. As Beverley McLachlin, former Chief Justice of the Canadian Supreme Court, so astutely observed, “*prohibition is not the only way to exclude*”.<sup>45</sup> In 1995, a Federal Industrial Court judge came under fire for commenting that it was “*not unusual for a woman to sleep her way to the top*”.<sup>46</sup> [SLIDE 37] Rachelle Lewitan, now a Victorian County Court Judge, recalled that when she was

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<sup>43</sup> *Sydney Morning Herald*, above n 16.

<sup>44</sup> Bell, above n 4.

<sup>45</sup> Remarks of the Right Honourable Beverley McLachlin, P.C. ‘The Civilization of Difference’, March 7, 2003 cited in The Hon. the Chief Justice Marilyn Warren, ‘Women In My Life: Leadership Across the Generations’ (Speech delivered at the Victorian Women’s Trust, 15 November 2004). A good friend of Carroll & O’Dea. Betsy Conti recalls that when, in 1959, armed with her Commonwealth Scholarship, she told her barrister father, Cedric Cahill QC, later a member of the NSW Upper House that she “*might do law*” he immediately responded: “*Nonsense. The law’s no place for women. You’ll do pharmacy*”. Betsy graduated as a Pharmaceutical Chemist and later did a Masters of Theology.

<sup>46</sup> ‘Sex Remark Draws Support’, *Canberra Times*, 18 April 1995.

promoting the inaugural meeting of Australia’s first female barristers association in 1993, she arranged for posters to be put up in the lifts of the Owen Dixon chambers in Melbourne. It wasn’t long before someone had written “*femmo facists*” across them.<sup>47</sup>

58 This kind of treatment was perhaps what prompted Joan Rosanove QC’s highly memorable quote:

*“to be a (female) lawyer you must have the stamina of an ox and a hide like a rhinoceros. And when they kick you in the teeth, you must look as if you hadn’t noticed”.*<sup>48</sup>

59 Susan Kiefel, the Chief Justice of the High Court, described herself as a “*lonely tree*” during her early years as a barrister, an experience many of us shared.<sup>49</sup> There is a wonderful expression that captures it perfectly: “*peer deprivation*”. There were simply not the women around with whom one could share experiences and build friendships.

60 Times and attitudes have changed. Mary Gaudron’s reflection that “*very many of us became honorary men*” would not resonate with lawyers today – female or male.<sup>50</sup> But every now and then there are slippages.

61 [SLIDE 38] This has provoked a somewhat polarised debate. In 2003, Ian Harrison SC, the then President of the NSW Bar Association, was castigated for introducing hormones into the debate. He criticised the approach taken by some women’s lobby groups in emphasising the unique attributes of women

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<sup>47</sup> Paul Conroy and Mark Bruer, ‘Bias at the Bar’, *The Age*, 24 February 1994.

<sup>48</sup> Fergus Shiel, ‘Engendering a Legal Minefield’, *The Age*, 6 December 2003.

<sup>49</sup> Jonathan Pearlman, ‘A Lonely Tree Now in the Thick of it’, *Sydney Morning Herald*, 4 September 2007.

<sup>50</sup> Gaudron, above n 25.

in the law, stating that “*advocacy is at its purest form an intellectual exercise where hormones and chromosomes have no relevance*”.<sup>51</sup>

## Into the 21st Century

62 By the start of the 21st century, women were flooding into the legal profession in significant numbers. So significant, in fact, that in 2002, Kate Marshall in the *Australian Financial Review* asked – “[a]re male lawyers an endangered species?”, noting that if the trend at the undergraduate level was anything to go by, there would be far more women at the top of the profession in about 15 years.<sup>52</sup> [SLIDE 39]

63 Unfortunately, that was not a self-fulfilling prophecy. Newspaper headlines about women in law from the early 2000s say things like “*law – where men still rule the roost*”; “*talented women ignored at the bar*”, and “*one law for men another for women*”.<sup>53</sup> [SLIDE 40] Sadly, there is little to distinguish these from the headlines splashed across the front pages of newspapers in the 80s and 90s.

64 In 2002, Justice Roderick Meagher of the Court of Appeal drew the ire of Mary Gaudron, and others, when he told *Good Weekend Magazine* that the current crop of female barristers were “*hopeless*”. [SLIDE 41] He also referred in that article to “*hairy-legged lesbians*”, and lamented that court corridors were now “*thronged with unmarried mothers and abused children, people who are stoned, or were hatched in bottles, or have been raped or cloned*”.<sup>54</sup>

65 [SLIDE 42] When Justice Gaudron retired from the High Court later that year, she remained the only female ever to sit on the High Court until the

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<sup>51</sup> Michael Pelly, ‘Go For Equality, Female Lawyers Told, But Don’t Mention The Hormones’, *Sydney Morning Herald*, 9 December 2003.

<sup>52</sup> Kate Marshall, ‘Women Lawyers Raise The Bar’, *Australian Financial Review*, 25 October 2002.

<sup>53</sup> Katherine Towers, ‘Law – where men still rule the roost’, *Australian Financial Review*, 9 May 2001; Fiona McLeod, ‘Talented Women Ignored at the Bar’, *Australian Financial Review*, 25 August 2003; ‘One law for men, another for women’, *The Sunday Age*, 25 September 2005.

<sup>54</sup> ‘High Court Judge Raps Her ‘Sexist’ Colleague’, *The Age*, 15 June 2002.



appointment of Justice Susan Crennan in 2005. Justice Gaudron was replaced by Dyson Heydon. In the lead up to his retirement, Justice McHugh called for his replacement to be a woman, prompting a fierce debate regarding merit. He warned that if the High Court “*does not reflect the diversity of society at large, it will lose the confidence of the public upon which its authority ultimately rests.*”<sup>55</sup> Attorney-General, Philip Ruddock, was unimpressed.<sup>56</sup>

66 The 100 years of women in the profession is a story of talent, determination, perseverance, resilience and mutual support, though there are still systemic problems.

67 [SLIDE 43] Women continue to be vastly underrepresented in the upper echelons of the profession, making up just 24% of partners in Australia’s large law firms and only 3.4% of managing partners.<sup>57</sup> Overall, women represent just 25.8% of partners across all law firms.<sup>58</sup> [SLIDE 44] The numbers are growing, albeit slowly – last year, the *Australian Financial Review* reported that a third of new partners being appointed or hired at in Australia’s major law firms were women.<sup>59</sup> This year, a survey of those firms reported that women comprised almost two-thirds of senior associates.<sup>60</sup>

68 [SLIDE 45] The Bar remains largely a male domain – the most recent statistics from the Bar Association indicate that 23% of practising barristers

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<sup>55</sup> Justice Michael McHugh, ‘Women Justices for the High Court’ (Speech delivered at the High Court Dinner, Perth, 27 October 2004).

<sup>56</sup> ‘Judge Must be Chosen On Intellect Not Gender, Says Ruddock’, *Canberra Times*, 11 November 2004.

<sup>57</sup> Trish Mundy and Nan Seuffert, ‘Advancement of Women in Law Firms: Best Practice’ (Pilot Research Project, Legal Intersections Research Centre, August 2017) 7.

<sup>58</sup> *Ibid.* In contrast, women make up 60% of lawyers at Senior Associate level.

<sup>59</sup> Katie Walsh, ‘Glacial Pace’: One Third of New Law Firm Partners are Women’, *Australian Financial Review* (online) 29 June 2017 <<https://www.afr.com/news/glacial-pace-one-third-of-new-law-firm-partners-are-women-20170217-guf6y1>>.

<sup>60</sup> Michael Pelly, ‘Women are Taking Over the Engine Room of Law Firms’, *Sydney Morning Herald*, 12 July 2018 <<https://www.afr.com/business/legal/women-are-taking-over-the-engine-room-of-law-firms-20180708-h12ejk>>.

and 11% of senior counsel in NSW are female.<sup>61</sup> Women also spend significantly less time in court. This is especially noticeable in the higher courts, and in commercial matters. [SLIDE 46] Indeed, a newspaper article published this year noted the absence of speaking roles for women in the High Court.<sup>62</sup>

69 In 2003, the NSW Bar Council adopted an equal opportunity briefing policy, encouraging those selecting counsel to “*identify female counsel in the relevant practice area*” and “*genuinely consider engaging such counsel*”.<sup>63</sup> [SLIDE 47] The Law Council of Australia’s 2016 rebranded Equitable Briefing Policy, adopted by the NSW Bar Council, included aspirational targets, namely that senior women should account for at least 20% of all briefs and/or 20% of the value of all brief fees paid to senior barristers; and 30% for junior women by July 2018.<sup>64</sup> However, findings published in the inaugural Equitable Briefing Policy Annual Report showed that in 2016-17, senior female barristers received only 12% of briefs.<sup>65</sup> [SLIDE 48]

70 However, the achievements of women which we are here to celebrate are reflected in what is essentially a roll call of firsts and the increasing number of women taking their place in the profession more broadly.

71 [SLIDE 49] This year marks 100 years since women were allowed to enter the profession in NSW – and the wheel now turns apace, women outnumbering men in the legal profession in this state. Today:

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<sup>61</sup> New South Wales Bar Association, Statistics (2018) <<https://www.nswbar.asn.au/the-bar-association/statistics>>.

<sup>62</sup> George Williams, ‘Female Barristers Are Barely Seen and Rarely Heard in our High Court’, *Sydney Morning Herald*, 24 February 2017.

<sup>63</sup> Law Council of Australia, *Model Equal Opportunity briefing Policy for Female Barristers and Advocates* (2004).

<sup>64</sup> Law Council of Australia, Equitable Briefing Policy, June 2016 (online) <[https://www.lawcouncil.asn.au/files/pdf/policyguideline/National\\_Model\\_Gender\\_Equitable\\_Briefing\\_Policy\\_updatedversion.pdf](https://www.lawcouncil.asn.au/files/pdf/policyguideline/National_Model_Gender_Equitable_Briefing_Policy_updatedversion.pdf)>.

<sup>65</sup> Grace Ormsby, ‘Report Shows Equitable Briefing Still a Way Off’, *Lawyers Weekly* (30 July 2018) <<https://www.lawyersweekly.com.au/wig-chamber/23726-report-shows-equitable-briefing-still-a-way-off>>.

- 44% of Magistrates, 35% of District Court judges, and 23% of Supreme Court judges are female;<sup>66</sup>
- 29% of the members of the NSW Legislative Assembly are female, including the Premier;
- 23% of barristers in NSW are female;<sup>67</sup>
- 51% of practising solicitors in NSW are female;<sup>68</sup> and
- over 60% of law graduates are female.<sup>69</sup>

72 [SLIDE 50] In the last 10 years, we have seen a litany of firsts:

- the first female NSW Attorney-General – Gabrielle Upton;
- the first female federal Attorney-General – Nicola Roxon;
- the first female managing partner of one of the big six law firms – Susan Kench, now Global Chief Executive of King & Wood Mallesons;
- the first female NSW Crown Advocate – Justice Natalie Adams
- the first female solicitor appointed to the NSW Supreme Court – Justice Ward;
- the first female President of the NSW Court of Appeal - myself;

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<sup>66</sup> Australian Institute of Judicial Administration, Judicial Gender Statistics, (March 2018) AIJA <<https://aija.org.au/research/judicial-gender-statistics/>>.

<sup>67</sup> New South Wales Bar Association, Statistics (2018) <<https://www.nswbar.asn.au/the-bar-association/statistics>>.

<sup>68</sup> Law Society of New South Wales, Law Society Profiles: Surveys and Statistics (2018) <<https://www.lawsociety.com.au/advocacy-and-resources/gender-statistics/profiles-surveys-and-statistics>>.

<sup>69</sup> Solor Dor, ‘Renewed calls for gender equality in law amid uneven High Court representation’, *Australian Lawyer* (online), 1 March 2017 <<https://www.australasianlawyer.com.au/news/renewed-calls-for-gender-equality-in-law-amid-uneven-high-court-representation-232357.aspx>>.

- the first female Crown Solicitor – Lea Armstrong;
- the first female Commonwealth Director of Public Prosecutions – Sarah McNaughten; and
- First female Acting Chief Commissioner of the Industrial Relations Commission and first Muslim head of a tribunal in Australia - Commissioner Inaam Tabbaa
- In the academic sphere, Gillian Triggs was the first female dean of Sydney Law School in 2007; Joellen Riley is the current Sydney Law dean; Lesley Hitchens is Dean of UTS Law School; and Rosalind Croucher was the Dean of Macquarie Law School until 2007.

73 [SLIDE 51] These female firsts have been a long time coming, but they are symbols of change. I look forward to the day when the number of women in each of these roles cannot be counted so easily on one hand.

74 At Carroll & O'Dea Lawyers, over a quarter of the firm's partners are female, including the Deputy Managing Partner, Hanaan Indari, who kindly invited me to speak today, a clear indication that Carroll & O'Dea is a leader in the field.