

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
FRANCIS FORBES SOCIETY AUSTRALIAN LEGAL HISTORY
‘A TOUGH NUT TO CRACK’¹: THE HISTORY OF THE LEGAL PROFESSION IN
NEW SOUTH WALES
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INTRODUCTION

1. I would like to begin by respectfully acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. As I will discuss later in this tutorial, the first legal system in Australia belonged to that of Australia’s Indigenous people. We acknowledge and respect the ongoing laws and customs of the traditional custodians of this land.
2. If any of you are here to hear about the development of the law of New South Wales or the history of its courts, you are sure to be disappointed. To console you there will be plenty of these lectures during the Court’s bicentenary in a few years’ time. This speech is about the profession itself, not the law, Courts or judiciary.
3. A traditional view of the advent of the legal profession in New South Wales would focus exclusively on the advent of solicitors, both free and former-convict, and barristers in the emerging penal Colony. However, far too often we conflate the start of the legal profession in New South Wales with the start of the legal profession *for men*. The advent of the legal profession for women did not occur until over a century later, and regrettably, even later for Australia’s Indigenous peoples.
4. Rather than framing the beginning of the legal profession in the emerging Colony of New South Wales in the eighteenth century, this tutorial will adopt a

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¹ Ursula Bygott and K J Cable, *Pioneer Women Graduates of the University of Sydney 1881-1921* (Sydney University Monographs, 1985) 43.

more inclusive historical approach. Instead of focusing exclusively on this mainstream historical narrative of the history of the legal profession for male solicitors and barristers, I will also highlight the beginnings of the legal profession for women and Australia's Indigenous peoples. It is time that we discuss the history of the legal profession in all its diversity. It is time that these 'alternate' histories gained the prominence that they deserve.

5. As the first male lawyers in colonial New South Wales were pioneers, so were the first female and Indigenous lawyers. This tutorial will illustrate that pioneers are a constant presence in the legal profession in New South Wales – whether that applies to the first lawyers in the emerging Colony that became New South Wales, to the first women agitating for admission to the profession in the early twentieth century, and later the advent of Indigenous solicitors and barristers.
6. I will discuss the barriers encountered by these pioneers, particularly those faced by women and Indigenous people in gaining admission to this learned profession. From the early years of the penal Colony in New South Wales, our legal profession has been marked by rigid norms on what we expect of lawyers. This has resulted in significant hurdles for individuals who did not conform to these norms, be they ex-convict solicitors, women or Indigenous peoples. Even after these groups were formally 'let in', or admitted to the legal profession, these barriers continued, and continue to impact the legal profession today. As has been accurately described, the "law proved a tough nut to crack" for many members of our legal profession.²
7. This tutorial is structured into four sections to exemplify these alternate histories. First, I will discuss that on one view, the advent of the legal profession occurred tens of thousands of years ago with the traditional laws of Indigenous peoples. Second, I will discuss the traditional advent of the legal profession in the emerging Colony. I will then skip forward into the next century to the pioneering female solicitors and barristers in New South Wales,

² Ibid.

and then finally propel us forward another 50 or so years to the first Indigenous barrister.

THE FIRST LEGAL SYSTEM IN AUSTRALIA

8. When one thinks of the 'law' in a post-colonial setting, particularly as we sit in Banco Court surrounded by the hallmarks of our legal system, it is possible to forget that there are other legal systems in Australia. As Kirsten Anker, an Australian scholar of Indigenous law has stated, "the 'law' ... is assumed because the state has such an imaginative monopoly on the idea of law that we mostly don't think about it as referring to anything else".³ However, it is essential to recognise that there existed, and continue to exist today, rich and complex Indigenous legal systems that were the first legal systems in Australia.⁴
9. On one view, the advent of the legal profession in New South Wales began with the traditional custodians of this land who practised law for tens of thousands of years and continue to practise this law today.⁵ Despite the many injustices inflicted on Indigenous communities, including the dispossession of many Indigenous peoples from their land, Indigenous legal systems continue to exert "a real controlling force in the lives of many".⁶
10. Indigenous communities are shaped by complex legal structures and traditions that vary substantially across communities.⁷ Indigenous laws constitute "both a body of rules backed by sanctions, ... a set of dispute

³ Kirsten Anker, 'Teaching 'Indigenous Peoples and the Law': Whose law?' (2008) 40 *Alternative Law Journal* (2008) 132, 132.

⁴ Irene Watson, 'Racism in Legal Education Special – Some Reflections on Teaching Law: Whose Law, Yours or Mine?' (2005) 6(8) *Indigenous Law Bulletin* 23, 23; Irene Watson, 'There is No Possibility of Rights without Law: So Until Then, Don't Thumb Print or Sign Anything' (2000) 5(1) *Indigenous Law Bulletin* 4, 4.

⁵ Martin Nakata, 'The Cultural Interface' (2007) 36 *The Australian Journal of Indigenous Education* 7, 9; Brooke Greenwood, 'First Laws: The Challenge and Promise of Teaching Indigenous Laws in Australian Law Schools' (2016) 24 *Waikato Law Review* 43, 52.

⁶ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986) 29.

⁷ *Ibid* 28.

resolution mechanisms... [and] a series of accepted behaviours”.⁸ The specific community and considerations of kinship are influential in determining the role of individuals in maintaining the law.⁹ On one view, these individuals who practised and maintained these complex legal systems are in fact the first lawyers in New South Wales.

‘FIT AND PROPER PERSONS’: LAWYERS IN THE EMERGING COLONY

11. The rich traditions of the legal profession were transplanted from the United Kingdom into the rugged New South Wales landscape in 1788. An entire tutorial could easily be filled discussing the ancient history of the legal profession in the United Kingdom, having been first regulated by Edward I in the thirteenth century.¹⁰ In the interests of sending you home before dawn, I will skip forward some 500 years to the other side of the world where we now sit.

12. As Sir William Blackstone wrote in *Commentaries on the Laws of England*, it was the birth right of every English colonist of an uninhabited country – which regrettably was taken to include countries with Indigenous peoples¹¹ –to bring with him so much of the current law of England as was applicable to the Colony.¹² At a ceremony on 7 February 1788, Deputy Judge-Advocate David Collins, a Naval Captain with no legal training, read the Governor’s Commission. This Commission granted Governor Phillip the authority to appoint justices and officers for the purpose of “putting the law into execution”, the Act which authorised the establishment of a criminal court, and the

⁸ Ibid. See also D Bell, ‘Aboriginal Women and the Recognition on Customary Law in Australia’ (1983) *Papers on the Symposium on Folk Law and Legal Pluralism, XIth International Congress of Anthropological and Ethnological Sciences* (August 19-23 1983, Vancouver, Vol 1) 491, 503.

⁹ Australian Law Reform Commission (n) 29.

¹⁰ J M Bennett, *A History of Solicitors in New South Wales* (Legal Books, 1984) 3.

¹¹ Sir Victor Windeyer, ‘A Birthright and Inheritance’ (1962) 1 *University of Tasmania Law Review* 636, 668.

¹² Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1st ed, 1765) vol 1, 105.

Charter which created that court and provided for a court with civil jurisdiction.¹³

13. Collins was the Colony's first Deputy Judge-Advocate, commonly known as Judge Advocate and remained in office from 1788 until 1796. Apart from Governor Phillip, Collins was the sole legal authority in the settlement.¹⁴ The early Colony at this time was "a military administration of civil affairs" with the meting out, as J M Bennett describes, of a "rough sort of justice".¹⁵

14. It is unsurprising that the justice meted out was "rough" given Collins' non-existent legal background and the absence of any trained lawyer in the Colony at the time.¹⁶ The closest thing to legal advice was Collins' access to "a collection of the basic law books of England (including *Statutes at Large* and Blackstone's *Commentaries*)" that had survived the voyage to the Colony.¹⁷ As was ironically stated, "no one could be represented effectively, yet they could be flogged or hanged".¹⁸ It was not until 1798, that Richard Dore arrived in the Colony, as the first Judge Advocate with legal qualifications.¹⁹

15. Prior to the arrival of the first solicitors who had immigrated to the Colony in 1815, ex-convicts with prior legal training in the United Kingdom or Ireland were the closest the Colony had to lawyers. Former convicts practised in New South Wales for 20 years before free solicitors sailed for Sydney.²⁰ The LPAB would have had a field-day.

¹³ Bennett, *A History of Solicitors in New South Wales* (n 10) 11.

¹⁴ J M Bennett, 'The Status and Authority of the Deputy Judge-Advocates of New South Wales' (1956-58) 2 *Sydney Law Review* 501, 502.

¹⁵ Bennett, *A History of Solicitors in New South Wales* (n 10) 11.

¹⁶ J F Nagle, *Collins, The Courts & The Colony: Law and Society in Colonial New South Wales 1788-1796* (University of New South Wales Press, 1996) 54.

¹⁷ Bruce Kercher and Brent Salter, 'Resurrecting our First Superior Courts: Reporting the Law of Colonial NSW' (2007) *Australia & New Zealand Law & History E-Journal* 1, 5.

¹⁸ *Ibid.*

¹⁹ Bennett, 'The Status and Authority of the Deputy Judge-Advocates of New South Wales' (n 14) 503.

²⁰ Bennett, *A History of Solicitors in New South Wales* (n 10) 358

16. These individuals occupied an unusual position, being viewed as 'agents', not 'attorney's until such time as respectable solicitors were sent out to the Colony.²¹ Ellis Bent, Judge-Advocate wrote in 1815 that he was "most reluctantly induced from what appeared to be the necessity of the case to permit three persons, Crossley, Eager and Chartres, who had been transported to this Colony, to practise in the Court of civil jurisdiction, not as attorneys, but as the agents specifically appointed to such suitors chose to employ them to conduct their causes".²² Despite this, the ex-convicts regularly advertised themselves as attorneys and claimed in their petitions to the new Supreme Court that they had been admitted.²³

17. Who exactly were these former convicts that had an effective monopoly on practising law in the Colony? Can these crooks be blamed for the many jokes about the depravity of the legal profession? Probably not because they post-date Shakespeare and pre-date Dickens. George Crossley, Edward Eager and George Chartres were three of the most notable former convict lawyers. Eager was an Irish attorney who had been granted a conditional pardon in 1813 after being sentenced to death in 1809 for uttering a forged bill.²⁴ Chartres was another Irish attorney who had been sentenced to seven years transportation for fraud in 1810. He was granted a ticket-of-leave soon after his arrival in the Colony and by 1812 was advertising that he was available to render his service "as might appear requisite for the Prosecution and Defence of Suits".²⁵

18. Crossley was perhaps the most infamous of the ex-convict barristers, described as "a man notorious in the annals of Westminster", whose "infamous and base character is well known to most practisers in His

²¹ Letter from Ellis Bent to Earl Bathurst, 1 July 1815; see also Bennett, *A History of Solicitors in New South Wales* (no 10) 13.

²² C H Currey, 'Chapters on The Legal History of New South Wales 1788-1863' (LL D Thesis, The University of Sydney, 1929) 232.

²³ Bennett, *A History of Solicitors in New South Wales* (n 10) 362, footnote 125.

²⁴ Alex C Castles, *An Australian Legal History* (The Law Book Company, 1982) 107.

²⁵ *Ibid.*

Majesty's courts at home".²⁶ Crossley had practised as an attorney at Adelphi Terrace in London for 24 years prior to being struck off the role of the King's Bench for forgery.²⁷ Prior to this, Crossley had purportedly "resorted to the ingenious device of putting a living fly into the mouth of a dead man" and subsequently swearing "that he saw the testator sign the Will with his own hand while life was in him".²⁸ Ingenious indeed. Crossley was described as a "clever scoundrel who made good use of his talents", by unofficially assisting the Judge Advocate at the time, Richard Atkins.²⁹

19. Despite his clearly questionable ethics, Crossley fared extremely well in the Colony. The Irish newspaper, the *General Advertiser* reported in 1804 that "Crossley and Robinson two convicted attorneys who were transported thither from the Capital have realised considerable sums of money they having for some years engrossed or rather divided between them the whole of the legal business of the Colony in their professional way".³⁰ The same year, Governor King complained to Lord Hobart of "the litigious and fraudulent conduct of George Crossley and Mich'l Robinson who... have produced much litigious and iniquitous proceedings, in all which they have been the open or secret advisers, actors and promoters".³¹ Despite this, ten years later, Crossley himself claimed to manage the legal concerns of nine-tenths of the respectable people in the territory.³²

20. Sir Victor Windeyer has described that "no elaborate machinery was needed for the administration of the law for the 1,036 persons, men, women and

²⁶ Letter from Ellis Bent to Earl Bathurst (n 21).

²⁷ Richard Clive Teece, *The Law and Conduct of the Legal Profession in New South Wales* (The Law Book Company Co. of Australasia, 2nd ed, 1963) 10.

²⁸ Sir Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (Sydney University Press, 1974), 74-75.

²⁹ Currey (n 22) 232.

³⁰ *The General Advertiser* (Dublin, 29 November 1804) cited in Bennett, *A History of Solicitors in New South Wales* (n 10) 13.

³¹ Letter from Governor King to Lord Hobart, 14 March 1804 cited in Bennett, *A History of Solicitors in New South Wales* (n 10) 13.

³² Currey (n 22) 232.

children who made up the total population at the beginning”.³³ However, by 1810, there was increasing need for a more developed legal profession. The population of the Colony had swollen to 10,000 people and the commercial trade and material wealth of the Colony was burgeoning.³⁴

21. The situation had not improved when Governor King wrote to the Colonial Office in 1810 about the lack of “proper agents and attornies”, requesting three or four attorneys come to the Colony.³⁵ The lack of any free lawyers in the Colony had obvious consequences. In 1811, the Judge Advocate at the time, Ellis Bent stated that, “In consequence of the want of regular counsel and solicitors to afford legal advice to those who may have occasion to apply for it, the Judge Advocate is constantly called upon to give his advice upon all occasions where an action is about to be brought or defended... Another unpleasant consequence arising from the want of regular advocates and solicitors is that, as, in most cases, the parties themselves appear in person to prosecute or defend the actions in which they are concerned, they bring into Court with them all the passions and enmities towards each other by the effect of which Justice is much obstructed, order subverted, solemnity and decorum set at defiance, and an inconceivable degree of discredit thrown upon the proceedings and authority of the Court”.³⁶ The more things change, the more things stay the same.

22. Like Governor King in the years earlier, Ellis Bent also “earnestly recommended” that two Barristers and two Attorneys be induced to come to the Colony.³⁷ In February 1814, Earl Bathurst informed Macquarie that he had selected two Solicitors to immigrate to the Colony, with a salary of £300 per annum to practise in Sydney.³⁸ Earl Bathurst warned that “under that amount, I find it impossible to obtain the services of any persons of

³³ Sir Victor Windeyer (n 11) 652.

³⁴ Bennett, *A History of Solicitors in New South Wales* (n 10) 13.

³⁵ *Ibid* 14.

³⁶ Currey (n 22) 232.

³⁷ *Ibid*.

³⁸ Bennett, *A History of Solicitors in New South Wales* (n 10) 21.

respectability and knowledge”.³⁹ Under this scheme, the first solicitor admitted to practice in New South Wales was William Henry Moore who arrived in January 1815, followed by Frederick Garling.⁴⁰ For the next ten years after their arrival, Garling and Moore acted as both barristers and solicitors.⁴¹ Earl Bathurst’s warning proved correct with Moore eventually dismissed from the Crown Solicitorship in 1834 for “gross incompetence and insubordination” and lost his “stipend”.⁴²

23. Fortunately for the legal profession, Crossley, Eager and Chartres were the last ex-convict practitioners.⁴³ They were barred from practising through the operation of Section 10 of the *Third Charter of Justice* in 1823,⁴⁴ which forbade the Supreme Court from admitting any person who had been lawfully convicted of any crime which, according to the law then in force in England, would have disqualified him from appearing and acting in any Court of Record at Westminster.⁴⁵

FUSED OR DIVIDED?

24. Today the divide between barristers and solicitors is so established in this state that it is hard to conceptualise of anything other than this rigid division. However, the separation of the two branches of the profession was a later addition to the colonial legal landscape in New South Wales, and heavily contested at that.

25. The first barristers in the Colony, Robert Wardell and William Charles Wentworth were admitted in the Supreme Court on September 10, 1824.⁴⁶

³⁹ Currey (n 22) 232.

⁴⁰ Bennett, *A History of Solicitors in New South Wales* (n 10) 21-23.

⁴¹ J R S Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (The Law Book Company, 1979) 32.

⁴² Currey (n 22) 232.

⁴³ Bennett, *A History of Solicitors in New South Wales* (n 10) 20.

⁴⁴ *Letters Patent pursuant to the New South Wales Act 1823*, 4 Geo 4, c 96.

⁴⁵ Currey (n 22) 233.

⁴⁶ Saxe Bannister, the first Attorney General for New South Wales was admitted to the profession on 17 May 1824: Forbes (n 41) 34.

Both Wardell and Wentworth had been recently admitted to the English Bar.⁴⁷ They were described by Chief Justice Forbes in 1825 as “gentlemen of very respectable legal talents and knowledge, but a little inclining against the powers that be”.⁴⁸

26. Immediately after their admission in this Supreme Court, Wardell and Wentworth sought an order for the division of the profession, requiring attorneys to show cause why they should not be restricted to “their own province”, as was the practice in England.⁴⁹ Wardell was quoted in *The Sydney Gazette* as imploring that “the gentlemen at present practising as solicitors and acting as barristers ... retire from the Bar”.⁵⁰ Wentworth had expressed a desire “master my profession” and “lead the Colony”. He evidently thought that a fused legal profession was a barrier to his headstrong ambition.⁵¹ In an impassioned statement, Wentworth said that he had been “degraded against my will to a level with the old practitioners”.⁵² There was even in my time a former Chief Judge in Equity who held the same view. You can guess who it was but it was not Justice Ward or Justice Bergin.

27. The solicitors in the Colony at the time were understandably “alarmed and incensed”.⁵³ Mr Rowe, one recently arrived solicitor “bordered on waxing wroth” as he told Chief Justice Forbes that he had emigrated from England under the understanding that he would be accepted as a first-class citizen of the legal world in Sydney, although he was only an attorney in England.⁵⁴

28. After a day that the *Sydney Gazette* described as replete with “convincing and thundering arguments”, the Chief Justice dismissed the motion for the division

⁴⁷ J M Bennett and J R Forbes, ‘Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century’ (1971) 7 *University of Queensland Law Journal* 172, 182.

⁴⁸ Forbes (n 41) 36; Currey (n 22) 233.

⁴⁹ Currey (n 22) 233.

⁵⁰ *The Sydney Gazette* (Sydney, 16 September 1824) 2.

⁵¹ Forbes (n 41) 36.

⁵² Bennett and Forbes (n 47) 183.

⁵³ Currey (n 22) 234.

⁵⁴ Forbes (n 41) 36.

of the profession. He held that Section 10 of the Charter of Justice was intended to create a single body of lawyers entitled to engage in advocacy.⁵⁵ Section 10 of the Charter empowered the Supreme Court to admit to practice persons who had been admitted as Barristers or Advocates in Great Britain or Ireland; or as writers, attorneys or solicitors in one of the Courts at Westminster, Dublin or Edinburgh; or as proctor in any ecclesiastical Court in England. It expressly provided that persons admitted may practise in each branch of the profession. For many years thereafter, solicitors were described as solicitors, attorneys and proctors. You can look up what a proctor is. However, Chief Justice Forbes stated that he hoped that “the period was not far distant when the separation now sought for would be obtained”.⁵⁶

29. The amalgamation of the different branches of the profession proved short-lived. In September 1829, the judges of the Supreme Court ruled that “the business of the profession of the law be divided in this court in like manner as the same is divided in England”.⁵⁷ The rule could not take effect until Royal Assent was granted which was announced five years later, on November 1, 1834.⁵⁸ On this day, the judges of the Supreme Court announced that it was too late for any non-barrister “practitioners” to elect to join what they described as the “higher branch”.⁵⁹ News of the division “flew amongst the ranks of the profession like lightning”,⁶⁰ an early testament to the speed of Bar gossip. Angry scenes at the Court were reported in *The Sydney Gazette*.⁶¹ From this point on, advocacy was confined to those already enrolled as barristers or advocates in a Court of the United Kingdom.⁶²

⁵⁵ Ibid 37.

⁵⁶ Ibid.

⁵⁷ Julian Disney et al, *Lawyers* (The Law Book Company, 2nd ed, 1986) 29.

⁵⁸ Ibid; Forbes (n 41) 39.

⁵⁹ Forbes (n 41) 41.

⁶⁰ *The Monitor* (Sydney, 15 November 1834) 2.

⁶¹ *The Sydney Gazette* (Sydney, 6 November 1834).

⁶² Currey (n 22) 234.

30. A peculiar result of this rule was that individuals, who had been born in Australia but could not proceed to England to qualify, were unable to qualify for admission to the bar.⁶³ This was not the case with solicitors. An individual could qualify as a solicitor by being articled to a practising solicitor in New South Wales and undertaking a clerkship of five years, or alternatively, having been a clerk for five years in the office of the Supreme Court.⁶⁴ When reform to allow Australians to qualify for the Bar was first suggested in 1840, the Legislative Council was of the view that “the time had not yet arrived for throwing the Bar open to the natives of a Colony”. The Council were concerned that the educational institutions in New South Wales were not yet sufficiently established to equip gentlemen for a profession which “must have such a powerful influence on the destinies of a Colony only just emerging”.⁶⁵
31. It was not until 1848 that Wentworth introduced a Bill that enabled Australian-born individuals who satisfied local tests to be admitted to the Bar.⁶⁶ The Bill was passed as the *Barristers’ Admission Act 1848* (NSW). Despite this, it is interesting to note that in a book published by Wilfred Blacket KC in 1927, he described that it was only a recent trend that the fact that a barrister was Australian-born is “not now counted to his discredit”, and such a barrister no longer “had to battle along until he overcame the local prejudice against him”.⁶⁷
32. The opportunities at the nascent Sydney Bar were not too dissimilar to those today. Sir James Dowling, the second Chief Justice of New South Wales wrote to his son revealing the reality of the Sydney bar in November 1840: “The market *here* is a good one for talent and industry, and every day there are new avenues opening for advancement, and really clever fellows are wanted and cannot fail of getting on. The chaps here, who are *working men*,

⁶³ Ibid 235.

⁶⁴ Ibid 234.

⁶⁵ Ibid 234-235.

⁶⁶ Ibid 235.

⁶⁷ Wilfred Blacket, *May It Please Your Honour: Lawyers and Law Courts of the Olden Times in New South Wales* (Cornstalk Publishing Company, 1927) 167-168.

do well. Idle dunderheads *here*, as *every-where*, stick by the way in spite of interest, and huggery ... All the new fellows who have any talent are doing well. a'Beckett, Windeyer, Broadhurst and Darvall who are all nearly new men, are in full business, and the latter, who is the least, is making £1000 a year.... Had they remained in Westminster they would not have got powder for their wigs in half a century. We have two or three *leatherheads*, who do little or nothing, but they get as much as they deserve, for they are all idle fellows".⁶⁸ I hate to think about who Sir James Dowling would describe as the "idle dunderheads" and "leatherheads" of the Sydney bar some 179 years later. I hope none of the current applicants for silk fall into that category.

PIONEERING WOMEN

33. Whilst the early fusion of the legal profession may have been removed in favour of the current divide between solicitors and barristers, the profession remained 'fused' in terms of gender until the early twentieth century. Ada Emily Evans was the first woman to graduate in law in 1902 from the University of Sydney. By Evans' own account, she was not only the first woman in New South Wales or Australia to qualify for admission, but the first woman in the Commonwealth.⁶⁹

34. I hasten to add that Evans was not simply admitted to study law with open arms. In fact, Evans was only accepted as a student as the dean at the time, Professor Pitt Cobbett was on leave.⁷⁰ With a stroke of luck for the legal profession, Professor Jethro Brown, sympathetic to Evans' cause, had filled the position temporarily. On Professor Cobbett's return, he contemptuously

⁶⁸ Letter from Sir James Dowling to James Sheen Dowling, 14 November 1840 cited in J M Bennett, 'Some Reflections on a History of the New South Wales Bar' in Geoff Lindsay and Carol Webster (eds), *No mere mouthpiece: Servants of all, yet of none* (LexisNexis Butterworths, 2002) 69.

⁶⁹ See Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) 115.

⁷⁰ Daphne Kok, Joan O'Brien and Ruth Teale, 'In the office and at the Bar: Women in the legal profession' in Judy Mackinolty and Heather Radi (eds) *In pursuit of justice: Australian women and the law 1788-1979* (Hale & Irmeonger, 1979) 182.

asked the librarian, “Who is this woman?”.⁷¹ This was followed by doors slamming, chairs banging on floors and bells ringing.⁷²

35. Professor Cobbett summoned Evans and attempted, thankfully unsuccessfully, to dissuade her from continuing her studies. Professor Cobbett informed Evans that she did not have the suitable physique for the study of law and suggested medicine as a more suitable career path.⁷³ Professor Brown wrote to her encouraging her to persist with her studies, “If you cannot reap all the rewards of your toil, the greater glory will be yours of sowing that others may reap – the glory of the pioneer”.⁷⁴

36. Regrettably, Professor Brown was correct in prophesising that Evans would not be able to reap all the rewards of her toil. Evans applied to this very Court, the Supreme Court of New South Wales to be registered as a student-at-law, however her application was refused on the basis of a lack of precedent.⁷⁵ The English Bar similarly denied her application for admission.⁷⁶ Despite being properly qualified, Evans was not admitted to practice because of the prevailing view that a woman was not a “person” for the purposes of the *Legal Practitioners Act 1898* (NSW). This was despite the Act stipulating that gender-neutral ‘properly qualified persons’ were eligible for admission as a barrister.⁷⁷ Furthermore, the Act had been passed subsequent to the *Interpretation Act 1897* (NSW) which provided that “words importing the masculine gender shall include females”.⁷⁸

⁷¹ Bek McPaul, ‘A Woman Pioneer’ (1948) 22 *Australian Law Journal* 1, 2.

⁷² *Ibid.*

⁷³ ‘By Two of Them’, ‘Sisters-In Law’ in Thomas Bavin (ed), *The Jubilee Book of the Law School of the University of Sydney* (Halstead Press, 1940) 63.

⁷⁴ *Ibid* 62.

⁷⁵ McPaul (n 71) 2.

⁷⁶ Justice Virginia Bell, ‘By the Skin of Our Teeth – The Passing of the *Women’s Legal Status Act 1918*’ (Francis Forbes Lecture, 30 May 2018).

⁷⁷ See Section 4; Thornton (n 69) 49.

⁷⁸ See section 21(a).

37. The issue then became whether Evans, as a woman, was a 'properly qualified person'. This vexed question resulted in differing views. Attorney-General Wise in February 1904 indicated that legislative reform was needed to admit women,⁷⁹ and expressed the view that "women are not adapted either physically or intellectually in the work of advocacy in Courts of Law".⁸⁰ Contrastingly, Attorney-General Wade in August 1905 viewed legislative reform as unnecessary, instead viewing it as a matter for the rules and practice of the Supreme Court.⁸¹ It has been aptly described that "[t]he barrier to Evans was not the law, but the ingenuity of the Judges in interpreting it to keep law as a male reserve".⁸²

38. Despite the efforts of Evans and the Feminist Club of New South Wales in seeking legislative reform to admit women,⁸³ it was not until the passing of the *Women's Legal Status Act 1918* (NSW) in December 1918 that women were allowed into the profession. The Act provided that a person shall not "by reason of sex" be prevented from being admitted to practice as a barrister or solicitor. I regret to say that New South Wales lagged behind in enacting legislation to enable women to enter the legal profession. New Zealand had led the way, passing equivalent legislation in 1896.⁸⁴ Victoria was the first state in Australia to admit women to the legal profession with the *Women's Disabilities Removal Act 1903* (Vic), followed by Tasmania in 1904, Queensland in 1905 and South Australia in 1911.⁸⁵ There is a tragic irony that whilst New South Wales takes the glory for being the first state in which to

⁷⁹ Rosalind Atherton, 'Early Women Barristers in NSW' in Margaret Thornton (ed), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths, 2002) 118.

⁸⁰ Judith Allen, 'Breaking into the public sphere: the struggle for women's citizenship in NSW 1890-1920' in Judy Mackinolty and Heather Radi (eds), *In pursuit of justice: Australian women and the law 1788-1979* (Hale & Iremonger, 1979) 112.

⁸¹ *Ibid.*

⁸² Joan M O'Brien, 'A History of Women in the Legal Profession in New South Wales' (MA Pass Thesis, The University of Sydney, 1986) 15.

⁸³ Kok, O'Brien and Teale (n 70) 182.

⁸⁴ See *Female Law Practitioners Act 1896* (NZ).

⁸⁵ See *Legal Practitioners Act 1904* (Tas); *Legal Practitioners Act 1905* (Qld); *Female Practitioners Act 1911* (SA); see also Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Hart Publishing, 2006) 157.

permit women to study law at university, we were also the last state to let these female graduates become lawyers.

39. However, the passing of legislation to admit women was not the last hurdle in Evans's way. To comply with the barristers' admission rules, Evans was required to be registered as a student-at-law for two years. And so two years later, on 12 May 1921, Evans finally became the first woman, amongst 168 male barristers admitted as a barrister of the Supreme Court of New South Wales.⁸⁶ The media has a field day with one newspaper stating that after her admission, she was "pursued by a flight of photographers and cinema-men",⁸⁷ and another describing her admission as a "a rather unique spectacle".⁸⁸

40. It is important to reflect upon the passage of time involved in the eventual admission of women to the legal profession. Evans was admitted a staggering 19 years after she graduated from law. One thing is for certain, whilst the law graduates of today may complain about doing their Practical Legal Training, it certainly doesn't compare to Evans's 19 year quest to be admitted.

41. Despite telling newspapers at the time of her admission that she intended to practise,⁸⁹ Evans never accepted any briefs at the bar. It was said that "poor health, family commitments and the long absence from the law, combined to ensure that, despite offers of briefs, she would never practise".⁹⁰ Evans stated that she declined briefs "on the ground that she considered herself incapable of handling them, not wishing women' standing in the profession to be undermined by a show of incompetence".⁹¹ Professor Brown was unfortunately correct in prophesising that Evans would be unable to reap the rewards of her toil. However, he was correct in predicting that Evans will

⁸⁶ Thornton (n 69) 120.

⁸⁷ 'Woman's Letter', *The Bulletin* (Sydney, 19 May 1921) 42.

⁸⁸ *The Daily Telegraph* (Sydney, 13 May 1921).

⁸⁹ 'Woman's Letter' (n 87) 42.

⁹⁰ Bygott and Cable (n 1) 43.

⁹¹ McPaul (n 71) 1.

forever have “the glory of the pioneer” for female lawyers in New South Wales, Australia and the Commonwealth more broadly.

42. In talking about history, one often hears a lot of talk about the ‘first’. A tendency I have certainly fallen into tonight. An interesting question is when did the ‘first’ in a field become notable? How long did it take for their pioneering achievement to be celebrated, if at all?
43. One would think that the landmark admission of a woman to the University of Sydney Law School would be worthy of at least a mention in *The Jubilee Book of the Law School of the University of Sydney: 1890-1940* published in 1940.⁹² Despite forewords by the Prime Minister Menzies, and Chief Justice Latham of the High Court, and a chapters dedicated to the period when Evans studied, no mention is made of Evans. Furthermore, the book routinely continues to refer the Law School “producing men”.⁹³ Instead, Evans’s sole mention was in the chapter written on ‘Sisters-in-Law’ by ‘two of them’.⁹⁴ The ‘two of them’ began the chapter by writing, “Everyone knows that Ada Evans was the first sister-in-law in New South Wales”. Despite ‘everyone’ knowing, it certainly was not thought worthy of a mention until their chapter late in the book.
44. Although women in the legal profession may have been formally ‘let in’ by the passing of the *Women’s Legal Status Act*, they continued to face barriers in obtaining articles and finding employment. There was a significant gap before the next women sought to enter the legal profession. It took another 22 years after Evans graduated, until two more women graduated from law school. This was hardly surprising given that for most of that period, women were prohibited from utilising their hard-earned law degree.

⁹² Thomas Bavin (ed), *The Jubilee Book of the Law School of the University of Sydney 1890-1940* (Halstead Press, 1940).

⁹³ *Ibid*, Editorial.

⁹⁴ ‘By Two of Them’ (n 73) 62

45. The next female law students, Marie Byles and Sybil Morrison, graduated in 1924.⁹⁵ Marie Byles became the first female solicitor in New South Wales and Morrison went on to become the first woman to actually practise as a barrister in New South Wales.⁹⁶ Morrison's admission to the Bar was moved by Attorney-General Hall, who had supported women's admission, and subsequently briefed her.⁹⁷ In Morrison's admission ceremony to the Bar it was described that the Chief Justice was "in quite a twitter"⁹⁸ and "the well-worn phrases preceding the admission absolutely would not trip readily off his tongue".⁹⁹ Sitting on six admission ceremonies each month, I appreciate that it must take quite something to stop those lines tripping off the tongue.

46. It was reported in the press that a male barrister asked Morrison "point blank" how many briefs she had attracted in her first year, clearly seeking to elicit "an admission of failure".¹⁰⁰ Morrison "looked unbelieving" and answered eleven briefs. She asked him "Why, how many have had yourself this year?", to which he responded, "blushing and stammering", "two".¹⁰¹ Morrison accepted briefs in crime, divorce, bankruptcy and family maintenance. She was frequently briefed by two female solicitors, Marie Byles and Christian Jollie-Smith.¹⁰² Morrison subsequently moved to England in 1930 and was admitted to the Middle Temple.

47. Newspaper articles about Morrison exemplify the difficulties society had in accepting Morrison as a member of the legal profession. Her femininity was continually questioned. The press, arguably reflective of society more broadly at the time, adopted a binary view that Morrison's femininity was inconsistent

⁹⁵ Linda Kirk, 'Portia's Place: Australia's First Women Lawyers' (1995) 1(1) *Australian Journal of Legal History* 75, 77.

⁹⁶ Atherton (n 79) 122.

⁹⁷ Juliette Bordsky, 'Sybil Morrison', *New South Wales Bar Association*, (Web Page) <https://www.nswbar.asn.au/the-bar-association/pioneering-women/#/2_sybil_morrison>.

⁹⁸ 'Nervous Nod Makes Mrs Morrison a Barrister', *The Daily Guardian* (Sydney, 3 June 1924) 4.

⁹⁹ *The Sun* (Sydney, 15 October 1924) 11.

¹⁰⁰ 'Mrs Morrison's Horseshoe', *The Daily Guardian* (Sydney, 5 December 1925) 6.

¹⁰¹ Ibid.

¹⁰² Bordsky (n 97); Atherton (n 79).

with legal talent. You can almost hear the interviewer from the *Brisbane Daily Mail* breathe a sigh of relief when they wrote that Morrison was “stitching busily during the interview which was evidence that her studies and profession had not supplanted her womanly attributes”.¹⁰³ I wonder whether Morrison simply brought along a piece of stitch work to interviews to appease the interviewers. Drawing on an unusual dichotomy, it was also reported that “in spite of her legal mind, Mrs Morrison is a great housekeeper and she is noted for excellent cooking”.¹⁰⁴ What a relief that is.

48. Only nine women were admitted to practise in the 1920s in New South Wales, not all of whom actually practised.¹⁰⁵ The figures were similarly small in the 1930s with eight women were admitted as solicitors and three called to the Bar. However, of these 11 women, only three solicitors, and one barrister remained in practice.¹⁰⁶ Women had difficulty obtaining articles, often having to rely on connections “prepared to break precedent and employ a woman”.¹⁰⁷ More women joined the profession in the 1940s, with 29 women being admitted as solicitors.¹⁰⁸ It is also important to note that the first women admitted in the legal profession typically exhibited a class and Eurocentric bias.¹⁰⁹ These women were frequently assisted by the use of their familial connections in securing clerkship and employment.¹¹⁰

‘LET INTO’ THE PROFESSION: THE REALITY FOR FEMALE LAWYERS IN NEW SOUTH WALES

¹⁰³ Barbette Smith, ‘A Lady of Law’ (1995) *Bar News* 39.

¹⁰⁴ *Ibid.*

¹⁰⁵ Kok, O’Brien and Teale (n 70) 183.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* 184.

¹⁰⁹ Thornton (n 69) 32.

¹¹⁰ *Ibid.*

49. It is hardly surprising that women did not quickly infiltrate the legal profession in these early years after the passing of the *Women's Legal Status Act*.¹¹¹ The mere act of 'letting in' women to the legal profession did not eradicate the ongoing prejudice, discrimination and systemic barriers they continued to face.
50. As an example of the difficulties encountered following the formal admission of women to legal practice, take the barriers encountered by Marie Byles, the first female solicitor in New South Wales. Byles encountered difficulties in both obtaining articles and employment. In response to Byles' father approaching solicitors to place her in an office, one elderly solicitor exclaimed in horror: "A girl? Thank goodness I shall soon be out of it!",¹¹² and another solicitor suggested that she "would be better occupied pounding a typewriter".¹¹³ Byles finally obtained articles with the assistance of a neighbour. However, whilst the usual premium a master solicitor asked for an articulated clerk was £100, Byles' master solicitor asked for £200, with an additional clause that her father would provide her with "all manner of necessary and becoming apparel".¹¹⁴
51. Following the completion of her articles, Byles again encountered difficulties in securing employment as a solicitor. After being unable to find work despite searching for six months, she was about to commence a Master's degree when the Dean of the Faculty of Law at the University of Sydney, Sir John Peden, intervened and was successful in securing employment for her.¹¹⁵ Like many other early female practitioners who had trouble securing employment, Byles established her own firm out of necessity, specialising in

¹¹¹ Justice Jane H Mathews, 'The Changing Profile of Women in the Law' (1982) 56 *Australian Law Journal* 634.

¹¹² Joan O'Brien 'The Remarkable Career of Marie Byles, First Female Solicitor in NSW' (1984) 22 *Law Society of New South Wales Journal* 558, 558.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Thornton (n 69) 65.

probate and conveyancing, which she maintained for more than half a century in Eastwood.¹¹⁶

52. The attitudes of the legal profession towards these young female law graduates is exemplified in a book titled *Concerning Solicitors: By One of Them* published in London in 1920.¹¹⁷ The anonymous solicitor lulls you into a false sense of optimism as to his progressive views by stating, “The truth is that the differences between the sexes have been grossly exaggerated by priests, journalists, and fools generally, and there can be no doubt that at least [now wait for it] one per cent of women are quite as intelligent as any man”.¹¹⁸ The book is replete with other pearls of wisdom. Another gem is the author’s comment that “One would think twice before taking a female solicitor into partnership, and it will perhaps become a great advantage for an aspiring female lawyer to be plain without being repulsive”.¹¹⁹

53. Flos Greig, the first woman to be admitted to practice in Australia in 1905 in Victoria wrote an opinion piece on ‘The Law as a profession for women’ published in the 1909 edition of the *Commonwealth Law Review*. The preface to the piece stated that “Nowhere in the British Empire is conservatism more marked than in the legal profession, which renders the action of a woman to seek entrance to its ranks a bold undertaking, and one calling for exceptional qualities to make it successful”.¹²⁰ The reality that successful female lawyers needed to possess exceptional talents has persisted. As Justice Gaudron stated in 1997 that “we know [that it] is true” that “for a woman to succeed in a traditional male area, she has to be better than her male counterparts”.¹²¹

¹¹⁶ Ibid.

¹¹⁷ *Concerning Solicitors: By One of Them* (Chatto & Windus, 1920).

¹¹⁸ Ibid 48.

¹¹⁹ Ibid 50.

¹²⁰ Flos Greig, ‘The Law as a Profession for Women’(1909) 6(4) *Commonwealth Law Review* 145, 145.

¹²¹ Justice Mary Gaudron, ‘Speech to launch Australian Women Lawyers’ (Speech, Australian Women Lawyers, 19 September 1997).

54. Greig wrote that, “The first women lawyers are hardly likely to make fortunes. The pioneer never does. The first man that finds his way into the primeval forest exhausts his strength in clearing the ground; the second continues the work and sows the seed and erects the buildings; the third man comes along and reaps the profits of the others’ labours”.¹²² It is interesting to reflect upon what stage Greig would say the current New South Wales legal profession is at 110 years later. Certainly, it was women like Greig, who cleared the ground in the first stage. She may describe the proliferation of female solicitors and barristers in the twentieth century as the second stage. Perhaps she would not be satisfied that we have truly achieved the third stage, where female solicitors and barristers fully reap the profits of the early legal pioneers of women in the legal profession.

55. Women continue to face persisting and underlying barriers that inhibit their success in both branches of the profession. Only 11.35 per cent of Senior Counsel in this state are women.¹²³ Women represent only 28.2 per cent of partners in private firms in New South Wales.¹²⁴ The history of the development of the legal profession for women has not finished yet.

ADMISSION OF INDIGENOUS LAWYERS

56. I will now turn to the final section of this tutorial: the advent of Indigenous barristers and solicitors. It is regrettable that there is a paucity of scholarship and commentary on the advent of this sector of the legal community. So much so, that sources often mistake the first Indigenous law student and first Indigenous barrister in both New South Wales and Australia. Whilst it has been widely reported that Patricia O’Shane was the first Indigenous law student and first Indigenous barrister this is actually not the case. In addition, regrettably, no information could be found on the first Indigenous solicitors in New South Wales.

¹²² Ibid.

¹²³ ‘Statistics’, *New South Wales Bar Association* (Web Page) <<https://www.nswbar.asn.au/the-bar-association/statistics>>.

¹²⁴ Women Lawyers Association of New South Wales, *2018 Law Firm Comparison Project Women Lawyers Association of New South Wales* (2018)13.

57. In fact, the late Mullenjaiwakka, formerly known as Lloyd McDermott, was Australia's first Indigenous barrister who was called to the New South Wales Bar in June 1972.¹²⁵ He was also the first Indigenous man to represent Australia in test rugby.¹²⁶ Unfortunately, although perhaps unsurprisingly, more seems to have been written about him in this context than his role as a trailblazer for both Indigenous Australians and the Australian legal profession.

58. In a remarkable story, Mullenjaiwakka did not go to school until he was nine, his mother teaching him via correspondence from the tent in which they lived in central outback Queensland.¹²⁷ He won scholarships to study at Brisbane's Church of England Grammar School and then to study law at the University of Queensland.¹²⁸ Mullenjaiwakka went on to be junior counsel to the Honourable Jeff Shaw QC, then Attorney General of New South Wales in the first determination of native title in New South Wales.¹²⁹

59. Mullenjaiwakka's admission to the bar in 1972 was followed just under four years later with the admission of Patricia O'Shane to the New South Wales bar. O'Shane was therefore the first female Indigenous barrister in Australia,¹³⁰ and went on to become the first Indigenous magistrate in the New South Wales Local Court.¹³¹ The third Indigenous barrister was Robert, or Bob Bellear who was called to the bar in 1979.¹³² Bellear attested his motivation to study law to him witnessing the injustices suffered by his

¹²⁵ 'Mullenjaiwakka', New South Wales Bar Association (Web Page, 8 April 2019) <<https://inbrief.nswbar.asn.au/articles/cdb25a7c087884e2216dfe1426006b11>>.

¹²⁶ Ibid.

¹²⁷ Robert Milliken, "A New Confidence" in Michelle Grattan (ed), *Reconciliation: Essays on Australian Reconciliation* (Bookman Press, 2000) 121-123.

¹²⁸ Ibid.

¹²⁹ See *Mary-Lou Buck on behalf of the Dughutti People v New South Wales and Ors* [1997] FCA 1624; see also 'Mullenjaiwakka' (n 125).

¹³⁰ Trove, 'O'Shane, Patricia (1941-)', *National Library of Australia* (Web Page) <<https://trove.nla.gov.au/people/621074?c=people>>.

¹³¹ Nikki Henningham, 'O'Shane, Pat', *The Encyclopaedia of Women & Leadership in Twentieth-Century Australia* (Web Page, 2014) <<http://www.womenaustralia.info/leaders/biogs/WLE0771b.htm>>.

¹³² 'Third Aboriginal Barrister', *The Catholic Leader* (No 3521, 15 July 1979).

community in Redfern in the 1970s.¹³³ Bob became the first Indigenous person to be appointed to any court in Australia, as a Judge of the District Court of New South Wales in 1996.

60. Another first was achieved by Tony McAvoy who was the first Indigenous silk appointed in 2015,¹³⁴ some 43 years after Mullenjaiwakka was called to the bar. In a sobering comment McAvoy made to the *Australian Financial Review* in 2015, he stated that “It certainly feels to me like there are more kids going to jail than there are getting law degrees”.¹³⁵

61. Unfortunately, there remains a severe underrepresentation of Indigenous members of the legal profession. There are 9 Indigenous barristers practising in New South Wales at the moment, which represents a meagre 3.7 per cent of the total number of barristers. Furthermore, it is revealing that the New South Wales Bar Association’s online records have only ever identified 12 Indigenous barristers, including those deceased. The situation is little better if we turn to solicitors. Amongst solicitors in 2016, 1.6 per cent of the profession identified as Indigenous Australians.¹³⁶

62. As it can be seen, there remains a long way to go to address the severe underrepresentation of Indigenous Australians in the legal profession. Like the significant barriers faced by women in both entering and succeeding in the legal profession, there remain ongoing barriers that inhibit Indigenous Australian members of our profession. This ongoing concern has prompted the development of initiatives such as the Indigenous Barristers’ Trust, The Mum Shirl Fund and the New South Wales Bar Indigenous Law Students Clerkship program.

¹³³ Australian Human Rights Commission, ‘Indigenous judge a crusader for his people’s rights’ (Media Release, 18 March 2005).

¹³⁴ Australian Human Rights Commission, ‘First Indigenous person appointed Senior Counsel’ (Media Release, 25 September 2005).

¹³⁵ Katie Walsh, ‘Tony McAvoy: Indigenous barristers still rare’, *Australian Financial Review* (online, 8 July 2015) <<https://www.afr.com/companies/professional-services/tony-mcavoy-indigenous-barristers-still-rare-20150708-gi857j>>.

¹³⁶ The Law Society of New South Wales, *National Profile of Solicitors 2016 Report* (2016) 6.

63. McAvoy stated in 2015 to the *Australian Financial Review* that, “There is a really strong and encouraging movement into the practice of law and we’re attracting the brightest Indigenous students. I’m sure that there will be many to follow”.¹³⁷ The advent of Indigenous solicitors and barristers in New South Wales remains in a pioneering phase. Whilst there are certainly Indigenous barristers and solicitors, there remains a severe underrepresentation of the Indigenous community in our profession. More needs to be done.

LESSONS LEARNT

64. It is poignant to reflect upon the significant passages of time in between these pioneering lawyers. From the rise of ex-convict and ‘free’ colonial lawyers in New South Wales, it was only in 1921 that the first female barrister, and 1924 the first female solicitor were admitted. A further 51 years passed after the first female barrister was admitted before the first Indigenous barrister was admitted. Furthermore, even after women and Indigenous peoples were formally ‘let in’ to the profession, there remained, and continue to remain significant barriers to their success in our profession.

65. What lessons can be learnt from this slow and staggered history of the legal profession in New South Wales? Undoubtedly, the description that the “law proved a tough nut to crack”¹³⁸ has held true. The legal profession has been reticent to change and slow to evolve in our understanding of who a lawyer is and what they look like. It has only been as a result of these pioneers in the legal profession, that there are some causes for optimism. In stark contrast to the stories of Ada Evans and Sibyl Morrison, as at 30 June last year, 51.29 per cent of solicitors in New South Wales were female.¹³⁹ As I see every month when presiding over the admission ceremonies, the majority of

¹³⁷ Katie Walsh (n 135).

¹³⁸ Ibid.

¹³⁹ The Law Society of New South Wales, *Annual Report 2018* (2018) 7.

solicitors entering the profession are also women and the profession is more diverse than ever before.¹⁴⁰

66. However, it is clear that there remains an underrepresentation of women, Indigenous people and those with diverse cultural and socio-economic backgrounds in the legal profession. There will be many more pioneers in our legal profession. The history of the development of the New South Wales legal profession is certainly not finished yet.

¹⁴⁰ 'Gender Statistics', The Law Society of New South Wales (Web Page)
<<https://www.lawsociety.com.au/advocacy-and-resources/advancement-of-women/gender-statistics>>.