

## **Australian Women Lawyers' Conference - 6 August 2022, Brisbane**

*"Yesterday, today and tomorrow - a trend towards equality?"*

### **The Hon Susan Kiefel AC Chief Justice of Australia<sup>1</sup>**

I am honoured to speak to you today. I was pleased to accept the invitation to speak at this Conference.

The theme of this Conference looks to the future. This often requires in the first place, reflection upon the past and consideration of how things presently stand. Today I intend to undertake such an exercise, focussing on equality.

I was admitted to the Bar in 1975. In the early 1980s I was contacted by Jane Mathews, then a judge of the District Court of New South Wales, subsequently the first woman to be appointed a judge of the NSW Supreme Court and a judge of the Federal Court. Later in our judicial careers we would become firm friends. The purpose of her call was to obtain information about the number of women practising at the Bar in Queensland – there were just 10 – just 4 percent of the number of practising barristers then at the Queensland Bar.

Jane obtained information from a number of sources and published an article in 1982 in the Australian Law Journal<sup>2</sup> entitled "The Changing Profile of Women in the Law", having previously presented it as a paper at a conference. She was tracking the pattern of change in the numbers of female law students, solicitors, barristers and judges. Jane found that there had been a dramatic change in the 1970s throughout the law schools of

Australian universities - the number of female law students had increased dramatically to the point where in 1982, for the first time ever, women entering at least one law school in the country had passed the 50 percent mark<sup>3</sup>. Similarly, the number of female solicitors had increased significantly. In NSW, the number had risen from women comprising just 4 percent of solicitors in 1971 to nearly 12 percent in 1982<sup>4</sup>. At the New South Wales and Victorian Bars, from 1966 to 1981, the number of women in practice had increased respectively from 2 percent to 5 percent and 0.6 percent to 6 percent<sup>5</sup>.

So what then is the current position? How do the present statistics on law students, solicitors, partners and barristers stack up? We now know that the number of female law students at universities continues to exceed the number of male law students. The 2021 National Profile of Solicitors, published by the Law Society of New South Wales in June<sup>6</sup>, presents a demographic picture of the Australian legal profession. According to the National Profile, women make up 54 percent of solicitors<sup>7</sup>. Women first outnumbered men in the profession in 2018, following a steady increase in the proportion of women solicitors. Since the Law Society commenced this reporting in 1997, the number of female solicitors has grown more than four-fold (from 4,099 to 19,917) while the number of male solicitors has grown less than two-fold (from 9,310 to 17,269)<sup>8</sup>.

The overall ratio of female partners of law firms in Australia is now at 32.1%. According to the latest Law Partnership Survey conducted by the Australian Financial Review, reporting on figures from the first half of 2022, 46% of new partners are women. It amounts to a 1.1 percentage rise in the proportion of female partners in the six months reviewed. This was the largest increase since July 2020. It was also reported that at this rate parity

between the numbers of female partners and male partners will be reached around 2031<sup>9</sup>.

The websites of the various Bar Associations in the States and Territories reveals that the percentage of women barristers has risen to the low to mid 20th percentile in New South Wales, Queensland, South Australia, the Australian Capital Territory and Western Australia and 31.5 percent in Victoria and the Northern Territory.

The overall picture is one of significant growth.

At the risk of boring you with more statistics, I thought I would bring this account closer to home and provide you with the results of a small survey that I asked the High Court's Legal Research Officer, Rebecca Lucas, to undertake. I was curious to ascertain to what extent the number of women appearing in the High Court had increased (as I assumed it had) since my appointment to the Court in 2007. She reviewed each decision of the Court handed down across six years in two periods - 2007 to 2009 and in the last three years, 2019 to 2021. Her conclusion was that the number of women appearing before the Court has improved in the last 15 years. Somewhat.

Around 15 years ago the picture was rather bleak. From 2007 to 2009 of the barristers appearing before the High Court, only an average of 14.9 percent were women (that includes both junior and senior counsel). In the last 3 years, 2019 to 2021, that figure appears to have increased to over 24 percent.

Focussing on senior counsel, 15 years ago only 5.6 percent of senior counsel appearances were by women senior counsel, and of the 26 appearances by women senior counsel identified across 2007 to 2009,

10 were by the Victorian Solicitor-General and a further 6 appearances were by senior counsel who appeared as junior counsel to male senior counsel and so did not speak. Moving to the last 3 years, the disparity in the number of women silks appearing has not improved significantly. It is less than 13 percent. And again, of the 47 appearances by women senior counsel in the period reviewed, over 20 percent are accounted for by appearances by Solicitors-General for Victoria and the Northern Territory who are women.

The areas of law in which women appear may also be instructive. It seems they appear more often in matters involving family, criminal and public law. But their appearances in commercial matters continue to lag behind.

I must say I had thought the figures would be better. There always seems to be a substantial representation of women in the courtroom for hearings. I had perhaps assumed that female representation on the bench and a female Chief Justice would have had a greater impact. But at least they appear to be improving. And the possibility that my mini survey may not be truly representative must also be taken into account.

It is also important to note that while these statistics on female Silk appearances are quite low, they are largely consistent with the percentage of female Silks at the bar. And representation at the bar table cannot improve much more until there are higher numbers of female Silks at the Bar.

There is at least one obvious reason for the numbers of female Silks not increasing more significantly. Since the 1990s most State and Federal Attorneys-General have pursued a policy of appointing women as judges. So far as concerns courts this often means, depending on the appointment process, offering appointment or encouraging a woman to apply for appointment quite soon after a woman takes Silk. This may be good for the

courts and society more generally, but the Bar and the women in question pay a price. The Bar loses female mentors and examples to younger women lawyers of senior women appearing in the highest courts and assuming leadership positions at the Bar. The female Silks who quickly accept appointment may also lose the experience of leading a litigation team and the responsibility of being the principal advisor and decision-maker. Such experience is very important to the confidence which is necessary to carry out the office of a judge.

Now so far my discussion today has largely focussed on trends revealed by statistics. When we consider equality, there is often a discussion of representation as a matter of numbers, but equality also requires a conversation on equality of experience. Has there been a noticeable improvement in the way women are treated as lawyers, particularly by the male members of the profession? To answer this question, it is necessary to go back to earlier times to enable a comparison to be drawn.

When I undertook legal studies, I was encouraged to do so by most of the barristers I worked for. I recall a particular act of encouragement, which meant a great deal to me, by the then Gerard Brennan QC. He approached me one day, having heard that I had commenced legal studies with the Barristers Board. He offered me the loan of his text books on Roman Law, because they were hard to find. It was such a thoughtful act from a kind man. We were all saddened of his passing in June this year.

As a clerk in a law firm, I was given much the same work as my male counterparts. But from time to time I would be asked to act as a secretary. None of my male colleagues were, but then they couldn't type. The partner who headed the litigation section tried to dissuade me from going to the Bar. None of my cohort male colleagues were intending to be

barristers, but I would doubt that he would have held the same concerns about their ability to cope with the vicissitudes of practice at the Bar.

When at the Bar I was aware, from time to time, of briefs being withheld from me because I was a woman. Sometimes it was because of the client. Some ethnic groups in particular would not have a woman acting for them. On other occasions the male solicitors. Some firms had a policy of not briefing women at all. I decided not to bother too much about the obvious discrimination. As long as I was busy enough it did not matter if I missed out on a brief. And if the briefs were getting low I went to the cinema. Miraculously when I returned there were always new briefs.

On the whole I was treated very well by the other members of the Bar. I may have been regarded as something of a curiosity but I do not recall being treated other than with courtesy and respect. The Queensland Bar was then much smaller and very collegiate. The doors of senior barristers were always open to me as they were to any very junior barrister. No request by me for assistance was ever refused. I do not myself recall an occasion when I was treated differently from a male opponent in court. But I was reminded some time ago by a male barrister of the same vintage as me of one such occasion. On an application for an injunction the judge was virtually winking and nodding at my male opponent in a way which suggested that they, but not I, were men of the world. I was glad to hear that my colleague said that he and others who observed this performance were shocked by it.

On the other hand, on one occasion I was positively assisted by a judge. In a very early appearance in the High Court having dealt with a question from the Chief Justice Sir Garfield Barwick, I lost my way in argument. Whilst I was mute, Sir Harry Gibbs came to my aid, by suggesting

the point that he assumed that I was about to make, consistently with my argument.

So, my personal experience of those early days at the Bar were a little mixed but were overall quite positive. And they became more so when I took Silk. It disappoints me that I know not all women can say the same. Jane Mathews had such a quite different experience.

In her article, which I mentioned earlier, Jane said she suffered "severely" from prejudice and discrimination at the Bar, particularly in the early days<sup>10</sup>. She referred to being patronised by judges. She recounted her experience of her first case in the Court of Criminal Appeal. The then Chief Justice completely took over the conduct of her case, leaving her with nothing more to say than "Yes, Your Honour". He then proceeded to find in favour of his own arguments and told her that her eloquence had been successful.

I assume and hope that young lawyers today, regardless of gender, would be mystified about the discrimination which women in the law suffered from earlier. All should consider themselves to be entitled to equal treatment.

Most of my associates have been young women lawyers. Of the 43 associates I have had since 1993, 33 have been young women lawyers. This was largely due not only to young women doing so well at University, but also to how they presented in interview. And over this time, these young women lawyers have impressed me, one and all, with their intellect, enthusiasm and organisation.

It is one of the joys of being a judge, to observe former associates making their way in their chosen career. I have former associates who are at

the Bar in Australia and in London. I would expect they will take Silk in the near future. Some are partners in large law firms. One specialises in international arbitrations and includes sovereign nations amongst her clients. Some undertake the important role of teaching law. Many have undertaken post-graduate degrees in Universities in Australia, England and the United States. Some have published and one is writing a major text on international law. One now works for the United Nations in New York after completing her PhD in public international law and spending some time on the International Court of Justice. Another has just been appointed an Associate Professor at a University in the United States. They are brilliant, strong and highly capable women.

But in an informal survey of some of my former female associates, , I was discouraged to hear from a few that they, and other women barristers, consider that sometimes they are treated differently from male barristers, including not being taken as seriously as men, particularly by male solicitors..

Another enquiry of my former associates was whether women lawyers are given an equal opportunity to succeed or whether there are barriers. The response was pretty much as I had predicted. The principal issue identified was the effects of the demands of family life. It was observed that, generally speaking, solicitors' firms were able to and do offer support and assistance by way of maternity leave and some flexibility in working days and hours. The Bar cannot offer so much, though some progress is being made in individual sets of chambers. Life in the time of COVID 19 has taught that there can be greater flexibility about work places. But working from home is not always a possibility for barristers.

Of course, acknowledging that the demands of family life may affect a woman's career raises the question about whether those demands

are shared equally with the partner or whether one career is given priority over the other. But these are personal decisions.

It is only rarely that one hears of a woman being advanced on account of her having the greater responsibility for the family. But I have such a story. I was in Berlin not long after the wall came down and was talking with some judges who had been involved in the process of assimilating former East German judges into the wider German judiciary. Those judges were invited to apply for appointment. At the same time, it was made clear that applicants would be subject to background checks. Those checks concerned the past involvement of the applicant with the organs of the East German Government.

It had been the case that trials of political prisoners in East Berlin were held on Saturdays. To have participated in them was a potentially disqualifying factor. But that worked to the advantage of the women judges, because it was a rule that women were not required to work on Saturdays so that they could attend to their assumed family responsibilities. As a result many more women judges were appointed from East Berlin than male judges.

In conclusion, where have we got to? Women lawyers are present in even greater numbers; they are taking leadership positions; they are succeeding and are in positions of authority. There are some areas, including at the highest levels, where women may not be being afforded the same opportunities as their male counterparts. And the reality is that family life for some will delay or render more difficult promotion or success. But generally much has been achieved towards equality in the legal profession. And the Australian Women Lawyers has played a vital part in that.

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- <sup>1</sup> ..... My thanks to Rebecca Lucas, Legal Research Officer at the High Court for her assistance.
- <sup>2</sup> ..... (1982) 56 *Australian Law Journal* 634.
- <sup>3</sup> ..... Mathews, "The Changing Profile of Women in the Law" (1982) 56 *Australian Law Journal* 634 at 636.
- <sup>4</sup> ..... Mathews, "The Changing Profile of Women in the Law" (1982) 56 *Australian Law Journal* 634 at 639.
- <sup>5</sup> ..... Mathews, "The Changing Profile of Women in the Law" (1982) 56 *Australian Law Journal* 634 at 640.
- <sup>6</sup> ..... Law Society of New South Wales, *2021 National Profile of Solicitors* (June 2022) ("National Profile").
- <sup>7</sup> ..... National Profile at 6.
- <sup>8</sup> ..... National Profile at 6.
- <sup>9</sup> ..... Pelly, "Female Lawyers to await another decade for partner equality", *Australian Financial Review*, 7 July 2022.
- <sup>10</sup> .... Mathews, "The Changing Profile of Women in the Law" (1982) 56 *Australian Law Journal* 634 at 640.