

'Women in the Law'

Speech delivered at the ANU Law Students' Society Women in Law Breakfast

University House, ANU

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I acknowledge the traditional custodians of this land. I recognise their continuing connection to land, waters and culture. I pay my respects to their Elders, past, present and emerging.

I extend my respects to all First Nations' people who may be present today. I hope that you are influential among the next generation of Australian and international lawyers.

I myself am almost an alumni of the ANU Law School. I was accepted to the Law School here, but at the last minute elected to go to UNSW, excited by the prospect of joining the second ever intake to what was then a very progressive law faculty. As it transpired, my dreams of moving to Canberra and attending the ANU were realised in 1978 when I started my first job as a lawyer here, which meant undertaking Practical Legal Training at the ANU.

We are here to talk about women in the law. When I use the term 'women,' I mean those who identify as women.

I will speak to you for about 15 minutes then open up discussion.

Although I am speaking about women in the law, the experience of women in law contains lessons for law students from all backgrounds.

Where are women lawyers today?

You are probably more or less familiar with how women are tracking within the Australian legal profession.

For a generation, more than half of Australian law graduates have been women. Women are well represented among solicitors – nationally, 50.1 percent of solicitors are women.¹ In the ACT, 55.8 percent of solicitors are women.² Of practitioners in their first 14 years of practice, women represent 59 percent of solicitors nationally.³

However among solicitors who have been admitted for more than 15 years, the percentage of women drops dramatically to 36 percent.⁴ Women comprise 24 percent of law firm partners,⁵ but only 3.4 percent of managing partners.⁶

¹ Law Society of New South Wales, *National Profile of Solicitors*, 24 August 2017, 4.

² Ibid.

³ Ibid 14.

⁴ Ibid.

⁵ Marianna Papadakis and Edmund Tadros, 'Women now 24pc of law firm partners,' *Australian Financial Review* (online), 16 December 2015, <<https://www.afr.com/leadership/women-now-24pc-of-big-law-firm-partners-20151216-glp6ly>>.

⁶ Leanne Mezrani, 'Law's disappointing gender report card,' *Lawyers Weekly* (online), 27 November 2014, <<https://www.lawyersweekly.com.au/news/15901-Law-s-disappointing-gender-report-card>>.

Women are also poorly represented at the bar, especially at the senior bar. In 2015, only 23 percent of Australian barristers were female.⁷ Currently, for female participation at the bar, the ACT is the worst performer of all jurisdictions: only 11 percent of barristers are women.⁸ This sounds bad, and it is. But it looks much better if you consider that, in 1981 when I went to the bar, less than 5 percent of the Sydney bar was female.

Nationally, the pay gap between male and female barristers for the 2014-2015 financial year was an astonishing 72 percent, making it one of the most unequally paid occupations in Australia.⁹

The underrepresentation of women at the bar is a problem not least because the bar is the traditional route to the benches of the intermediate and superior courts.

Nationally, only a quarter of State and Territory Supreme Court judges are women.¹⁰ The position is similar in many other Western nations.

On a brighter note, the ACT Supreme Court and the ACT Magistrates Court are the first to have achieved gender parity among judicial officers.¹¹ For a brief period, the Council of Chief Justices of Australia and New Zealand comprised six men and six women (we are now five women and seven men). And the High Court is also doing well.

This demonstrates significant progress over the last century, although not as much as we may have wished.

Where have we come from?

The enactment of the Victorian *Women's Disabilities Removal Act*, in 1903, enabled women to practise law in Australia for the first time. In 1905, Flos Grieg became Australia's first female solicitor, moving the Chief Justice of Victoria, Sir John Madden, to remark upon the "graceful incoming of a revolution".¹²

In 1918, New South Wales passed the *Women's Legal Status Act*. In 1924, the state's first female solicitor, Marie Byles, and first female barrister, Sibyl Morrison, began to practise.

⁷ Law Council of Australia, *National Model Gender Equitable Briefing, Annual Report (2016-2017 Financial Year)*, 2017, 6.

⁸ Ibid.

⁹ Ibid 5. Cf figures revealed in raw data from the Australian Taxation Office in the 2013-2014 Financial Year, which places the pay gap at 114 percent: see Jessica Irvine, 'Australia's top 10 jobs with the biggest gender pay gap revealed,' *Sydney Morning Herald* (online), 9 June 2016 <<https://www.smh.com.au/opinion/australias-top-10-jobs-with-the-biggest-gender-pay-gap-revealed-20160609-gpezg8.html>>.

¹⁰ Australian Bureau of Statistics, *Gender Indicators, Australia*, August 2016, <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Democracy,%20Governance%20and%20Citizenship~10012>>.

¹¹ Australasian Institute of Judicial Administration, *AIIA Judicial Gender Statistics – Judges and Magistrates (% of Women)*, March 2019 <<https://aija.org.au/wp-content/uploads/2018/03/JudgesMagistrates.pdf>>.

¹² 'Lady admitted to the Bar', *The Register (Adelaide)*, 1 August 1905, 1 <<http://trove.nla.gov.au/newspaper/article/55825018/>>.

It was not until 1923 that women were permitted to practise in Western Australia, but that did not stop Edith Haynes from applying to the Western Australian Supreme Court in 1904 'for an order nisi seeking mandamus to compel the Barristers Board to admit her as an article clerk'.¹³ The application was refused on the basis of statutory interpretation; that the term 'he' did not include 'she'.¹⁴

In 1976, less than 10 years after the Referendum leading to the inclusion of Aboriginal and Torres Strait Islander people in the census, Pat O'Shane became the first Aboriginal woman to go to the bar. Later, Pat became Australia's first Aboriginal Magistrate; she served on the Local Court of NSW from 1986 to 2013. Pat and I were fellow students at UNSW. Among the feisty and outspoken cohort of law students, Pat was a standout; she had an unrivalled talent for calling a spade a shovel, or worse. She took this talent with her to the bench, where she revelled in calling out sexism and racism, regardless of what the Judicial Commission of NSW might think about it.

Initially, the reluctance of the profession to admit women was justified on the basis that, if women became lawyers, they may sacrifice that most precious possession, their "femininity".¹⁵ There were also concerns about their small stature and high-pitched voices, which were considered to be inadequate for forums of importance, such as court rooms.¹⁶ I hope that you can all hear me today.

An ongoing concern has been that women are "too emotional" to perform well in the bear pit of the court. I want to put that idea out there because I am going to return to it.

Regrettably, through most of the last century, women lawyers had to deal with gender stereotyping.

Ruth Bader Ginsburg (RBG), falsely stated her reason for studying at Harvard Law School, as being to 'learn about [her husband's] work so that [she] might become a more patient and understanding wife' to her husband, who was in the cohort above her.¹⁷

The NSW Women Lawyers Association advised the young Mary Gaudron (later, Australia's first female High Court judge), that she should devote herself to learning how to touch type, thereby increasing the chance that a law firm would hire her as an articulated clerk, and she could then study law on weekends.

Until recently, gender stereotyping has meant that women barristers have attracted family law briefs, family work being "women's work". Also, being women's work, it

¹³ The Hon Justice M J Beazley AO, *100 Years of Women in Law in NSW*, speech delivered at Carroll & O'Dea Lawyers, Sydney, Australia, 18 October 2018, 3 [10].

¹⁴ *Re Edith Haynes* (1904) 6 WALR 209, 213-4.

¹⁵ Beazley J, above n 13, 14.

¹⁶ Fergus Shiel, 'Engendering a legal minefield,' *The Age* (online), 6 December 2003, <<https://www.theage.com.au/national/engendering-a-legal-minefield-20031206-gdwvpy.html>>.

¹⁷ Jill Lepore, 'Ruth Bader Ginsburg's Unlikely Path to the Supreme Court,' *The New Yorker* (online), 8 October 2018, <<https://www.newyorker.com/magazine/2018/10/08/ruth-bader-ginsburgs-unlikely-path-to-the-supreme-court>>.

was regarded as less important work; consequently, few men were interested in it. When I went to the bar in 1981, I (and other women of that era) had to take the financially challenging decision of whether to reject the only sort of brief that was guaranteed.

Gender stereotyping was also apparent in judicial appointments; while many women gained appointment as a magistrate, few were considered for appointment to higher courts. One reason was that the work of the magistracy was considered to be less important than that of the higher courts; hence, there was a greater political willingness to appoint women to the magistracy. Another reason was that, while there were few women at the bar (the usual source of appointments to higher courts), appointments to the magistracy are more commonly made from the solicitors' branch of the profession. Finally, women themselves did not "lean in"; they accepted appointment to the magistracy rather than holding out for a more prestigious appointment.

One of the most insidious problems faced by women in earlier times was rivalry with other women, associated with the idea that, as only a few opportunities were available to women, their competitors were other women, rather than both men and women.¹⁸ Unfortunately, tokenism was a reality. But women didn't have to accept it.

Is survival enough?

When we look at the early – and current – leaders of our national and international sisterhoods of lawyers, their common characteristic is resilience.

What would have become of Elle Woods, if she had accepted Warner's negative comments and surrendered her legal ambitions early in the movie? Or if RBG had followed her own advice?

Law is a profession that demands resilience of any lawyer. Despite what barristers may tell you about their many glorious victories, statistics tell us that, on average, they lose 50 percent of their cases; it takes resilience to survive that sort of failure rate. Judges must also be resilient; it's never pleasant to be told by an appeal court that you got it wrong at first instance. So all lawyers need resilience.

But women lawyers may need even more resilience. Joan Rosanove QC, the first female barrister in Victoria, once said:

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.¹⁹

Resilience is not just about toughing it out. What I mean by resilience is the capacity not only to survive hardship, but to gain strength through hardship. To move on optimistically, with a "Thank U, Next".²⁰

¹⁸ See, for example, Sam George-Allen, 'Introduction,' in *Witches – What Women Do Together* (2019, Penguin).

¹⁹ Quoted in Shiel, above n 16.

²⁰ Ariana Grande, 'Thank U, Next' (2018, Republic).

We are all born vulnerable, so why do some of us develop more resilience than others?

Resilience is built by facing and processing adversity, so that you are better equipped to handle it the next time; there will always be a next time. Partly, it's a case of "what doesn't kill you makes you stronger", but resilience is not about mere survival; it's about learning through adversity. "You may not control all the events that happen to you, but you can decide not to be reduced by them".²¹

I said that I would return to the idea of "emotionality", a characteristic commonly attributed to women. Resilience is not the opposite of emotionality. Resilience is not about denying your emotions; it's about accepting them. If you accept that a difficult situation or failure has made you angry, deflated or even depressed, it's important to recognise that emotion. This is where women may have an advantage; they may be more willing to acknowledge a challenge or failure, work through it rationally with their friends or mentors, and develop a strategy for handling such situations in the future.

Australian Millennials have grown up in a very different world from that of the baby boomers. What worries us baby boomers is that, because of the different environment in which you have been raised, you may lack resilience. Your world of relentless technological connectivity and tiger parenting may have isolated you from the real, physical world where many of my generation learned their early lessons in resilience.

Our childhood world involved playing in the bush at the end of the street (usually, our parents had no idea where we were), falling from trees and stubbing our toes. In some ways it was a simpler world. It was certainly a more innocent world. But it was also a world in which physical adversity was a common event. Your childhood may have made it more difficult for you to develop resilience and, almost as a corollary, it may have exposed you to a higher risk of mental illness.²²

Today, we are all sensitive to the evils of bullying and sexism in the workplace. It was not always thus.

Despite my childhood frolics, in 1978 when I became a Legal Aid advocate and in 1981, when I went to the bar, I was not resilient. As the product of an elite all-girls school and a progressive 70s law faculty, I had no personal experience of discrimination.

It was a pretty wild ride.

²¹ Maya Angelou, *Letter to My Daughter* (2009, Random House). The quote continues: '... Make every effort to change things you do not like. If you cannot make a change, change the way you have been thinking. You might find a new solution.'

²² See, eg, Suzanne Lucas, 'Why You Should Be Terrified of the Rising Millennial and Gen-Z Workforce,' *Inc.* (online), 28 September 2015 <<https://www.inc.com/suzanne-lucas/why-you-should-be-terrified-of-the-rising-millennial-and-gen-y-workforce.html>>; Rajvinder Samra, 'Millennial burnout: building resilience is no answer – we need to overhaul how we work,' *The Conversation* (online), 22 January 2019 <<https://theconversation.com/millennial-burnout-building-resilience-is-no-answer-we-need-to-overhaul-how-we-work-109759>>.

On one occasion, in a courtroom packed with lawyers, a senior male practitioner told me “young lady, I was doing this when you were still in nappies”.

Then there was the time when another very junior woman barrister and I were summoned by a senior member of the Bar Council. In those days, the Bar Rules prohibited advertising by barristers. My friend and I were committee members of the WLA, which had published short profiles of each committee member (including us) in its newsletter. The senior member demanded to know how and why this had occurred. Why should my friend and I gain this impermissible advantage over other barristers (95 percent of whom were male and the majority of whom belonged to the old boys’ network in which advertising was a redundant concept)? My friend and I relied upon our right to silence. The senior member became redder and redder. Finally, he sent us packing, telling us that it should never happen again. This incident occasioned great hilarity among our small group of about 35 practising women barristers in a sea of about 600.

This is not just a story about the need to tough it out or the importance of the right to silence. It’s also about “networking”. Not networking in the sense of “what can other people do for me” or “how can I simultaneously balance a canapé, a champagne and a handbag”. I’m talking about networking in the sense of nurturing mutually supportive relationships – at best, friendships – with people who are travelling the same professional path as you. “Think not of what your network can do for you, but what you can do for your network”.²³

While the next generation of women barristers will find the bar to be a much more supportive environment than that of the early 80s, if they are to prosper they will still need a lot of resilience. As will any lawyer.

Where to from here?

You may be familiar with RBG’s statement that there will be enough women on the US Supreme Court when there are nine – there are only nine judges on the US Supreme Court.

More realistically, Justice Mary Gaudron has said:

We’ll know that there is gender equality in judicial appointments when the government starts appointing women of mediocre ability.²⁴

Justice Hilary Penfold, the first woman on the ACT Supreme Court, expressed that sentiment more bluntly when she said:

We will have equality on the bench when there are just as many dopey women judges as there are dopey men judges.

That’s about the numbers, and numbers are important; they send a message about inclusion and acceptance of all Australians at the highest levels of our justice system.

²³ Claire Hooper, ‘First you get the network, then you get the power,’ *The Pineapple Project (ABC Radio)* (podcast), 10 February 2019.

²⁴ Quoted in Fergus Shiel, ‘A different kind of Justice’, *The Age* (online), 9 December 2002, 3.

However, it is also true that “any woman who wants equality with men has a low level of ambition”.²⁵

Thank you for coming this morning.

I wish you all the very best for the academic year and for your futures.

²⁵ Quoted in Eva Cox, ‘Has Feminism Lost its Way?’, *The Saturday Paper* (online), 29 March 2014
<<https://www.thesaturdaypaper.com.au/opinion/topic/2014/03/29/has-feminism-lost-itsway/139601>>.