

Her Honour Judge Penelope Wass DCJ

Judge of the District Court of NSW

Her Honour Judge **Penelope Wass** DCJ was sworn in as a judge of the District Court of New South Wales on 18 April 2016. Her Honour was admitted as a solicitor of the NSW Supreme Court in August 1991, and started her career at the Commonwealth DPP, where she practised for 9 years. She was called to the New South Wales Bar in February 2000 and held chambers on Sixth Floor Selborne Chambers. Her Honour had a diverse criminal and civil practice at the bar, including both civil and criminal appeals. She was appointed senior counsel in 2013. From July 2014 to April 2016, she sat as a Senior Member (Appeals Panel and Occupational Division) of the NSW Civil and Administrative Tribunal. In her spare time, her Honour enjoys ocean swimming, rowing and golf. Judge Wass spoke with **Marlia Saunders**, Partner, Thomson Geer, Sydney, about her Honour's career and thoughts on International Women's Day.

MARLIA SAUNDERS: When did you decide you wanted to become a lawyer, and what was it that inspired you to study law after completing your Bachelor of Arts degree?

JUDGE WASS: I had little idea of what I wanted to do when I finished school. I must have had some inkling as I studied some law subjects as part of my Bachelor of Arts degree. In fact, I hated studying law for the most part, and vowed to finish my studies merely because I had started them.

It was only at about the age of 24, when the inspiration to practise law took hold. In my desire to flee mid-tier commercial litigation, I took up a position as the Supreme Court's first Common Law Division legal researcher. It exposed me to the Criminal Law in all its expression of the human condition, which I found fascinating.

I was lucky to be at the Court at the time of the Royal Commission into the charging of police officer Harry Blackburn, as the then head of the Common Law Division, Jack Lee AO QC, was made Commissioner, and I was tasked to work directly for him. Justice Lee had been appointed to the Supreme Court the year I was born, and I found him to be a fierce, steely-eyed old-school and clever judicial officer. Initially I felt completely intimidated and out of my depth, and frankly there was little by way of support for young lawyers at that time; I simply struggled through. The experience was at once daunting and transformative, particularly because it exposed me to my first taste of advocacy, watching the late Chester Porter QC at the height of his powers as Counsel Assisting. The late and great journalist John Slee was thought to have described him once as the "smiling funnel web", and whilst Slee brushed that aside, it was an apt testament to Porter's courteous and beguiling performance as he lulled the unsuspecting witness into concessions. I was immediately hooked.

MARLIA: When you worked at the Commonwealth DPP, your colleagues included a number of people who would go onto become judges, including (but not limited to) Justice Payne, Justice Wigney, Justice Bromwich and Justice Fullerton – what are your reflections on your time working there, and why do you think so many of you ended up being appointed to the bench (in other words, what's the secret)?

JUDGE WASS: I joined the Office of the Commonwealth Director of Public Prosecutions at a time when the organisation was relatively new. With former judge of the Court of Appeal of the Supreme Court of Victoria Mark Weinberg AO FAAL QC as the Director, the Office at that time had a culture that required the upholding of the highest levels of probity, fairness and ethical standards. There was no "win at any cost" mentality and indeed prosecutors did not speak of winning or losing cases much. What was expected was an independent, objective and intelligent approach to the prosecution policy, a fair presentation of evidence and confidence in the jury system. Accordingly it attracted those of the calibre of the people that you have mentioned, who also, for the most part, had fled commercial law to work in this extraordinary environment. I feel privileged to have been assisted by Justice Fullerton in that regard and I was equally fortunate to work directly with the others you have mentioned, from whom I learned so much. They also remain great friends. In addition, I value the mentoring I received from Hugh Dillon, who later served as the Deputy Coroner for many years and who has also become a dear friend.

I am pleased that the great contribution made by those working in the CDPP at that time continues to be recognised, in the form of the latest District Court appointment of Penny Musgrave, whom I regard most highly for her intellect, sharp-wit and integrity.



MARLIA: What is one of the most memorable cases you have worked on?

JUDGE WASS: That's a tricky question and you'll forgive me if I talk about three that stand out.

The first was when I appeared as a barrister for the family in an inquest involving the death of Nadine Haag. The forensic evidence was fascinating, and the family was exceptional in its compassion, its attention to detail and its resolve in trying to bring justice for Nadine. It was personally and professionally challenging and at times extremely distressing and frustrating. Much has been written and said in the media about that case, with details still coming forward more than a decade on. That is often the nature of inquests and unexplained deaths, and I will say no more about it, other than that it still leaves me with an ongoing sense of sadness and regret that I was not able to see that case reach what, in my view, was the appropriate outcome. Hopefully that will not always be the case.

The second case occurred recently when I was the sentencing judge. It is reported in *R v AB* [2022] NSWCCA 3. Not only was AB an exceptional young man who offended in the most extenuating of circumstances, but the decision by the Court of Criminal Appeal has confirmed the need for sentencing judges to retain appropriate discretion to deal with the myriad circumstances that come before them, and to be able to sentence appropriately within the whole range that is open to them. It was a decision that I came to against the submissions of both the prosecutor and defence counsel in the sentencing proceedings and so it also showed me that at times judges need to be fearless and back their own judgment, even in an adversarial system, and to not fear, and indeed to welcome, that our decisions will be scrutinised.

Finally, the case of *Lee v R* [2020] NSWDC 770 comes to mind. That case provided me with an opportunity to record the need for all those involved in the legal system – judges, lawyers and journalists – to respond appropriately and respectfully to the often complex and nuanced decisions that are required, particularly in respect of those who are mentally unwell. Something which I my view is, sadly, often lacking and where we all need to do better.

MARLIA: You have mentored a lot of female barristers during the course of your career. How important is mentoring for women in law?

JUDGE WASS: The Bar is rightly proud of its “open door” tradition of mentoring, something that I have tried to carry through to my time on the Bench and I have mentored a lot of women. With still relatively few senior women in our ranks there is much to do.

I think that mentoring all young lawyers is extremely important, not only for women. It demystifies the profession, and provides an example of where young lawyers can go in their careers; it gives valuable practical experience; it provides a confidential sounding board for legal and ethical concerns; and it exposes young lawyers to networking connections otherwise not open to them. In particular, my experience of mentoring young Associates - and I try to take a new graduate every year or thereabouts - has been a wonderful one. I have made some life-long friends of both younger barristers and my Associates. Hopefully in the future they will visit me at the nursing home with their stories. I have learned as much from them as they have from their time with me.

I have tended to mentor mostly women, but that has been a result of happenstance rather than by design. I suspect it is also the case, that women approach me for mentoring because of my gender. Frankly, I long for the day when equality in the law (and not just before the law) will be such that lawyers will just be called lawyers, judged only on the attributes that contribute to the practice of law.

We tend to concentrate on trying to eliminate the gender imbalances and biases, rather than addressing the irrational fears of the “other” more generally. I suspect that this is because the march towards true equality is so slow, and those who have traditionally held positions of power in the law and who have had to give up some of that space to allow even women in, have been at times so obviously challenged by it, that change has had to come incrementally. To steal the words of the wonderful RBG, I suspect it is true that «real and enduring change happens one step at a time.” Pushing for women in a traditionally male dominated field has been that one step, but I am impatient for equality for all humans in all fields of endeavour. In my view, the job will only be done when we are all simply humans selected on our merit, without obsession about, or fear of, our genitals, our gender, or our genes.

Another thing that RBG purportedly said was, “fight for the things that you care about, but do it in a way that will lead others to join you.” For me that’s what mentoring is all about, and not just for women.

The mentoring I have undertaken with young lawyers has been a wholly satisfying experience for me. I am constantly in awe of their brilliance, hard work, senses of humour and ability to cut through the dross that despite our best efforts still surrounds them in the form of bias, bigotry and boorish behaviour.

MARLIA: The theme for International Women’s Day 2022 is #BreakTheBias, which focuses on the push for a gender equal world. Have you experienced gender bias during your career, and if so, how did you overcome it?

JUDGE WASS: Gender bias is obviously still an issue, and I have seen many examples of it over the years. It was rife in the 1980s when I started my professional life. I recall that one of the best lawyers in a firm that I worked in was made its first female partner, not because she was bright and worked extremely hard, or because she served her clients so well, or because she made so much money for the firm, but, as the head litigation partner would have it, “so they would have someone to make the tea”. No one appeared outraged, and the women awkwardly said nothing about it.

I was told once when I was a barrister, supposedly as a compliment, that I cross-examined like a man. And whilst I was not really sure what that meant, the stupid and offensive nature of it was clear. The fact that it came from another woman was and is astonishing to me. We have a long way to go in my view. The persistence of male and female stereotypes, and indeed the assumption of binary rules regarding gender, is disappointing.

I should record that I was extremely fortunate to spend my career as a barrister on Sixth Floor Selborne Chambers, where many great women, such as Governor Margaret Beazley AC QC and Chief Justice Lucy McCallum, had already made smoother the way for those of us lucky enough to follow, where the members of that floor created wonderful opportunities for all their barristers, and where I sensed no real impediment to my career by reason of my gender.

To cite an example from the Bench, although perhaps a trivial one and no doubt a clear example of the useless nature of the gendered pre-nominal, judges, who are clearly female, are still often addressed in correspondence as “His Honour”. It is telling because it provides a short sharp lesson that many still assume that judges will be men. Part of the problem is, of course, the judges come from a pool that includes barristers and only about 25% of barristers are women, despite the much higher numbers that have graduated from universities over decades. The percentages are starker in the senior positions, where female Senior Counsel account for only

about 14% of that cohort. So perhaps people simply play the percentages.

It is a perennial problem that the government, undoubtedly in seeking to move towards more equitable figures in the judiciary, does so at the expense of the senior Bar and partners in law firms. And women suffer the slings and arrows of the labels that they are “token” or “diversity” appointments, often from those who are too blind to the opportunities that have come to them, by the mere fact that they have lived their whole professional life in the bubble of male dominance and acceptance. Ironically it is often only the women who question whether they are in the position they are only because of their gender, and strive to do better as a result.

Desmond Tutu is reported to have said, “there comes a point where we need to stop just pulling people out of the river. We need to go upstream and find out why they’re falling in.” I think we know why they are falling in. We need to reconstruct the banks of the river.

In my view the problem can only be overcome by fostering all kinds of diversity at all stages; at home, at school, at university, and then finally in employment. I appreciate that it is a big river. However, only when diversity is the norm and becomes entrenched, will it endure. The answer to the seemingly intractable problem is undoubtedly to encourage and support woman to stay longer in firms and at the Bar. Unfortunately we lose good people along the way, discouraged by that lack of diversity in the first place.

MARLIA: What career advice would you give for young lawyers who have an ambition to go to the bar – or even the bench?

JUDGE WASS: Find out as much as you can about working in the law; there are so many different kinds of jobs, even in areas of specialty. Experience all areas of the law and work out what you like. If you still like the idea, do it. With the right systems in place, the Bar is intellectually and financially rewarding. It is flexible. It has a collegiate atmosphere that is rare amongst competitors in the market. Connect yourself with people as much as you can. Surround yourself with those who will lift you up and disconnect from those who undermine your confidence, because you cannot do the job without confidence and a clear sense of self. And do it, do it, do it. There is nothing to fear other than fear itself.

As for the Bench, if they want to give up all that flexibility that the Bar offers, and to move from pitching the argument, to determining issues and assisting, as best they can, people at the worst times of their lives, then I can only encourage them to pursue that. It is equally collegiate and highly rewarding.

Each of the Bar and the Bench has been wonderful in its own way and for someone who doesn’t love the law for its own sake, but realises that it is an invaluable tool to do justice, I could not have asked for a better career.