

7TH ANNUAL JANET IRWIN WOMEN'S DINNER  
PARLIAMENTARY ANNEX ALICE STREET BRISBANE.  
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WOMEN IN THE LAW THE PAST, THE PRESENT AND THE FUTURE

Women in the Law Past

Those of us who love Shakespeare know what great foresight he showed in his plays. The recent RQTC production of "The Tempest" demonstrated that admirably. So too did his portrayal of Portia, the woman as advocate and lawyer, in "The Merchant of Venice" 400 years ago. But it was to be another 300 years before women lawyers and advocates became a reality.

The Western Australia Court in 1896 was not prepared to allow Edith Haynes play Portia: she was refused admission under the *Legal Practitioners Act* 1893 (WA) which referred to "any person" in possession of qualifications being entitled to be admitted by way of articles as a solicitor. Haynes, who must have been a remarkable woman, was allowed by the Barristers and Solicitors Admission Board to have her articles registered and took the preliminary examinations, but she was warned by the Board that it could not guarantee her admission. In time, the court refused her right to sit for the final examination and, on appeal, stated:

"I think that the right of a woman to be admitted is a misnomer. ) The common law of England has never recognised the right of women to be admitted to the Bar. It is said that out here we have a statute which confers this right and the learned counsel who appeared to represent the applicant said the statute says 'every person' ) You must bear in mind that through the civilised world, so far as we know, we have not been able to ascertain any instances under the common law of the United States which is based on the common law of England, or of any instance in England or in any British speaking colony where the right of a woman to be admitted to the Bar has ever been suggested. That being so, it is said here that it should exist, because the words in the statute are 'every person'. That does not appear to me to be very forcible. The counsel representing the applicant said that there were lady doctors, why not lawyers? The *Medical Act* says 'every person, male and female, may be a doctor'. Those are different words from what are used in the *Legal Practitioners Act*. I am unable to find any instances where any right has been conferred. It is not a common law right, it is a privilege which has been conferred by the courts originally and then been regulated subsequently by statute from almost time immemorial, and

which has been confined to the male sex. ) I am not prepared to start making law. When the legislature in its wisdom confers the right on women, then we shall be pleased to admit them. But we must leave it to the legislature to decide on the desirability or otherwise of such legislation."

Of course, the legislature comprised only men!

In 1911 in South Australia, the *Female Law Practitioners Act* was passed to allow women to practise law. But that was not the answer to female lawyers' prayers. The court was able to use the passing of this Act to prevent another feisty woman, Mary Kitson, from becoming a Public Notary under the *Public Notaries Act* which again referred to "any person". The Supreme Court once more held that no woman, however well qualified, could be a Public Notary under that Act.

Queensland's first female solicitor, Agnes McWhinney, was admitted in December 1915. She was a Townsville solicitor and I celebrated this speeches I gave in July when the Court of Appeal travelled on its inaugural Northern sittings to Townsville. The firm that employed Agnes, Wilson Ryan and Grose, to mark its centenary published its history in 1995; understandably Agnes featured.

Her elder brother, Joseph, was a lawyer at Wilson Ryan and Grose and in 1910 the firm took the then revolutionary step of allowing Agnes to commence her articles.

Agnes was among the early women students of Townsville Grammar School, a co-educational institution, ahead of its time; she was an attractive and intelligent young woman, and originally determined to study medicine, but the nearest medical school was in Sydney and the course was very expensive. As she watched Joseph at work, she developed an interest in legal work and decided to study law instead of medicine. At this time there were only two women who had qualified in law in Australia: Ada Evans graduated in law from the University of Sydney in 1902 but as the New South Wales *Women's Legal Status Act* was not passed until 1921 she was not permitted to practise until then. Victoria's women lawyers' enabling Act was passed in 1903 and in 1905 Greta Flos Greig was admitted to practise. In Western Australia, no women were admitted until 1930 and in Tasmania the first female admission was in 1935. Agnes was therefore the first Queensland woman solicitor and possibly the second in Australia to practise. Not surprisingly, she is described as "a remarkable and strong minded young woman with confidence in her own ability, determined to succeed. Her daughter reminisces that the Northern Supreme Court Judge, Mr Justice Pope Cooper, was not impressed with the idea of a woman entering his legal profession and became distinctly choleric at the very mention of her name. In the end, he was unable to fault her qualifications and conduct and eventually had to admit her. She practised as a solicitor with the firm until 1919 when she left to marry. As was the wont in

those days, she did not again undertake paid employment after marriage but used her skills in community service, in later years becoming a judge of cookery! It is interesting to note that her time in practice coincided with World War I when so many young men, including her brother Joseph, went to war.

The firm's records indicate that no payments were made to Agnes although she was working as a solicitor: her salary was paid to her brother Joseph, who was serving in the armed forces in foreign climes.

The firm did not employ another female article clerk until, 1971!

Things did not change quickly.

Joan Rosanove, who signed the Roll of Counsel of the Victorian Bar in September 1923 became a very successful family law barrister, combining career, marriage and children. She said that to be a successful woman 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." Like Portia, Joan battled prejudice, not only as a woman but also as a woman of Jewish background. After years of unsuccessful attempts, Joan finally obtained silk in 1964 with the appointment of a new Chief Justice.

Roma Mitchell, now Dame Roma Mitchell, who was admitted to the Bar in South Australia in 1936 ran up a string of firsts. She was Australia's first woman QC, first woman Supreme Court judge, Vice-Chancellor of the University of Adelaide and first woman Governor of South Australia, indeed the first woman to hold Vice-Regal office in Australia. Dame Roma was exceptional, not the norm.

Quentin Bryce will tell you what a novelty (which sounds better than oddity or freak) she was as a woman law student at the University of Queensland in the early 60s. When I graduated in Law I at least had the benefit of the role models provided by Quentin Bryce and Margaret White, clever, articulate and gorgeous tutors in law, managing to live the superwoman myth, successfully combining work and family commitments. There were of course no women law lecturers, let alone professors.

In 1976, when I was admitted as a barrister, the Bar Association had 350 members, 4 or 1.1 per cent of whom were women. The Queensland Law Society had 1,250 members, 45 or 3.6 per cent of whom were women. In 1976, the University of Queensland Law School, the only Law School in Queensland, produced 76 graduates, 13 or 17 per cent of whom were women.

The number of women law graduates has steadily increased. For many years now the various Queensland Law Schools have produced at least 50 per cent female graduates who consistently beat the males in achieving the glittering prizes.

## Women in the Law Present

In 1998, 51.2 per cent of university law graduates in Queensland were women. Despite this, women are not represented at the top echelons of the legal profession as judges, silks and high income earning partners in the big firms. Of the 541 members of the Queensland Bar Association only 61 or 11.3 per cent are women. Of the 4,525 solicitors with practising certificates 1,224 or 27 per cent are women. The reasons for this are complex. We have been told that things will change in time but, women ask, in how much time? Twenty one years ago, when a group of us, led by Leneen Forde, formed the Women Lawyers Association of Queensland, we believed that in 20 years time there would be no need for such an Association because equal opportunity would have been achieved. Twenty one years has not been enough time.

As to judicial appointments, Justice Mary Gaudron was the first and remains the sole woman appointee to Australia's High Court of 7 judges. In Queensland, we have one woman Federal Court judge from a bench of 9; four women Supreme Court judges, of which I am one, from a bench of 24; one woman Family Court judge from a bench of 9; four women District Court judges from a bench of 35, and 10 women magistrates out of a bench of 78.

Why are women still so under-represented in positions of power and influence in the legal profession? Justice Catherine Branson, a Federal Court judge based in New South Wales, notes that the philosophy behind equal opportunity legislation of the 1970s and early 1980s was that women should be free, should they choose, to live their lives as honorary men. One of the reasons why women are still under-represented in the upper echelons of the legal profession is because women have chosen not to do that. Most do not wish to work 100 hour weeks year in year out; nor are most women driven by the pursuit of excessive economic wealth.

Justice Branson noted in the 1995 Mitchell Oration that:

"There is no genuine equal opportunity in allowing women to enter traditionally male institutions, but only on the basis that the value of such establishments and the way that they are run are to remain unchanged. The freedom to be an honorary man, or alternatively, an outsider, is a freedom few women aspire to."

In 1997, at the launch of the Australian Women Lawyers Association, Justice Mary Gaudron pondered rhetorically:

"Could it be that work practices at the Bar are not congenial to women? Could it be that the cost of establishing chambers has a different impact on women who need to interrupt their careers by

reason of motherhood? Could it be that the system of patronage, which after all, is about maintaining the status quo, is inimical to women? Could it be that the environment that men have created is hostile?"

Justice Branson suggests the slow changes to women's involvement in the legal profession are because women remain outsiders within the legal profession, running on the edge of it. They work in an environment in which power is almost exclusively exercised by men and the prevailing culture is based on male values and behaviours. Justice Branson suggests that women lawyers and judges should develop work places in which all lawyers, female and male, can feel comfortable and find support and encouragement and where attempts, conscious or unconscious, to maintain a male based culture are exposed, so that the legal profession is a profession truly open to all who are properly qualified to serve the public as members of it.

## Women in the Law Future

The challenges for women lawyers as we enter our second century include the challenges all lawyers face: to defend and uphold our revered democratic institutions including the vital third arm of government, an independent judiciary; and to ensure our society is conducted according to the rule of law, with equal justice and opportunity for all and with equal access to the protection of laws, entitling all to live in freedom and dignity, regardless of gender, race, colour, religion, wealth, or physical or mental disability. But this must be done within a work place in which female lawyers feel as comfortable as male lawyers.

As in every field, computers will play an expanding role, enabling the electronic filing of documents in the courts. The recording of court proceedings and case management will also be streamlined by the use of computers and computerised court books. Discovery will become a less costly and more effective pre-trial measure through the use of electronic searches and the availability of material on disk.

I fear that two forms of justice may develop; an expensive "Rolls Royce" model for those who can afford it, and a budget Mini Minor model for those who cannot. One of the big challenges for lawyers will be to ensure access to justice for all and to moderate the cost of justice, extending legal aid through pro bono work.

Mediation and alternative dispute resolution will continue to be an important source of work for lawyers and will remain popular with consumers as a quick, less expensive way to finalise litigation with parties having direct input in the result. It should never and will never replace the role of the courts, but will be an important alternative.

An additional challenge for the women and men in the legal profession will be to ensure that the future is one in which women and other non-stereotypical lawyers of the past are not outsiders running on the edge but become an integral part of an honourable and essential profession, serving and protecting the public. For women, "being there" in sufficient numbers and at all levels will change the male dominated culture of the legal profession.

The Courier-Mail Legal Affairs Reporter, Sue Monk, wrote on 16 October 1999 that lawyers who are working up to 16 hours a day are being encouraged to "get a life". "The emphasis on long hours was likely to change with the increasing number of women who are more attuned to family commitments and generation Xers who give a higher priority to quality of life." Balance will also be important to male lawyers who will play an active hands-on role in the raising of their children; male lawyers who prefer to work shorter hours in less stressful areas of law will have the freedom to choose such an option.

As the number of women in the legal profession increase and they play a more powerful and high profile role, the legal profession and the community it serves will better understand and deal with issues such as domestic violence and rape and the legal profession will become more empathetic with the needs of all members of the society it serves, including women.

## Conclusion

Women have come a long way in the legal profession in the last 103 years since Edith Haynes' Gallipoli-like attempt to gain admission as a solicitor. During the next 100 years I am confident women will be equitably represented at all levels of the legal profession to the great benefit of society as a whole.

Gender equality in the legal profession will be achieved not only when there are greater numbers of women in the profession, but when women of mediocre ability, like men of mediocre ability, attain success; when no reference is made to gender when describing a lawyer who happens to be a woman or in announcing the appointment of a judge who happens to have an XX chromosome and when young women practitioners feel just as comfortable within their profession as young male practitioners. As more and more women enter the profession and take up roles of power and responsibility, changing the culture and mentoring younger women, the snowball effect will speed up change. Who can say how quickly this change can be wrought? Do not under-estimate the power of voting women, especially lawyers, working together effectively in a democracy. Who would have thought 18 months ago that in Queensland a Chief Stipendiary Magistrate, the Chief Judge of the District Court, the Deputy President of the Queensland Industrial Relations Commission and the President of the Court of Appeal would all be women?