

WOMEN IN LAW IN AUSTRALIA 2015: CELEBRATIONS OR COMMISERATIONS?

Bond University Women in Law Dinner

10 March 2015

The Honourable Justice Margaret McMurdo AC

*President, Court of Appeal**

I acknowledge the traditional owners of the land on which this fine university is built, the Yugambeh and especially the Kombumerri people.

I was delighted when your Asian Law Students' Society's Corporate Relations Director, Kristoffer Diocampo, invited me to speak tonight on the topic of *Women in Law in Australia 2015: Celebrations or Commiserations?* For those of you who do not know Kristoffer, he is not a woman! Why would Kristoffer, a bloke, be interested in having me speak on issues of gender equality at a Women in Law Dinner? Indeed, the Bond experience reflects the position amongst universities nationally, with women making up 63% of new law graduates. If women are numerically dominating as law graduates, what is the interest, for men or for women, in a Women in Law Dinner in 2015?

One answer is the Law Council of Australia's 2014 *Addressing Attrition and Encouraging Re-engagement of Women Lawyers Report*¹ which notes that, although for decades women have entered the legal profession at equal or higher rates than men and represent 46% of the practising profession, they hold only 19% of senior positions in law firms. Of the Australian Bar population, only 19% are women and as to Queens Counsel or Senior Counsel, only 6% are women.

* I gratefully acknowledge the assistance of my Associate, Anne Crittall LLB (Hons) for her research and editing assistance and my Executive Assistant, Kelly Morseu, for her typing and editing assistance.

¹ Hlubucek, E (2014) *Addressing attrition and encouraging re-engagement of women lawyers*, Law Council of Australia.

Another answer is the New South Wales Law Society progress report, *Thought Leadership Advancement of Women in the Profession* which notes that the estimated average income of first year solicitors in private practice in 2012 was \$71,500 for men and \$66,200 for women. The average income over all ages was \$144,100 for men solicitors compared to \$113,600 for women solicitors. In 2012 women comprised 40.8% of all private practice solicitors in New South Wales but only 23.3% of all private practice principals. By contrast, of the senior corporate solicitors completing the survey, 46% were female and 54% male, suggesting that representation of women amongst the most senior corporate solicitor roles is much closer to equal representation than in private practice. Of the government solicitors completing the survey, 59% were female compared to 41% male. And of the senior lawyers working in a legal capacity in government, 40% were female and 60% male. As with corporate solicitor roles; this suggested that more women are represented at the highest level in government practice than in private practice.

The position in Queensland reflects these national trends. In Queensland 19.7% of barristers in private practice who are members of the Bar Association of Queensland are women, although 34.2% of the employed Bar who are members of the Bar Association of Queensland are women. Of Queensland Senior Counsel, only 9.2% are women, but this is at least a little better than the national average. The Bar Association of Queensland's governing council comprises 23.5% women. By contrast, female Queensland solicitors with practising certificates comprise 48.1% of all such solicitors and 41.67% of the Queensland Law Society governing council, deliciously close to that elusive 50% figure.

For many years I have kept statistics as to the number of appearances of female counsel in matters before the Court of Appeal. This is a reasonable barometer of the success of

women at the Bar. So far this financial year, that percentage is 13.9%. Barristers appearing include both those in private practice and those employed in the Director of Public Prosecutions (Commonwealth and State) and Legal Aid Queensland. That figure is disappointingly less than the 19.7% of women barristers in private practice and much less than the 34.2% of employed female barristers who are members of the Bar Association of Queensland. But it is a real improvement since the 2005-2006 financial year when women appeared in only 5.4% of Queensland Court of Appeal matters.

The position in the Queensland judiciary is much improved since 1990 when there were no Queensland women judicial officers, not even a magistrate. In the Supreme Court of Queensland, 7 out of 27 judges or 25% are women. This seems to compare favourably when contrasted with the low number of women silks and those in senior positions in law firms in Queensland. But a few years ago, 33% of Queensland Supreme Court judges were women. The proportion of women has fallen with the recent retirements of Justices Margaret White and Margaret Wilson. I am proud to report, however, that in the Court of Appeal of the Supreme Court of Queensland over which I preside, the highest Court in the State, 50% of judges are women. In the District Court, 9 out of 40 judges are women (22%). In the Queensland Magistrates Court, 32 out of 92 magistrates are women (34%).

This all suggests that the position of women in the law in Australia seems to be improving so why are Kristoffer and I and so many others, including leading male jurists like Justice Michael McHugh AC² and Justice Michael Kirby AC CMG,³ so concerned about gender equality and the under-representation of women in the higher echelons of the profession and

² The Honourable Justice Michael McHugh AC, "Women Justices for the High Court" (Speech delivered at the High Court Dinner hosted by the Western Australia Law Society, 27 October 2004).

³ The Honourable Justice Michael Kirby AC CMG, "Women in Law – Doldrums or Progress?" (Speech delivered at Women Lawyers of Western Australia, Perth, 22 October 2003); The Honourable Justice Michael Kirby AC CMG, "Women Lawyers – Making a Difference" (1998) 10 *Australian Feminist Law Journal* 125; The Honourable Justice Michael Kirby AC CMG "Women in the Law – What Next?" (2002) 16 *Australian Feminist Law Journal* 146.

the judiciary? It is not just because as lawyers we are interested in human rights. It is not just because as feminists we advocate for women's rights on the grounds of the equality of the sexes. It is not just because of the equitable maxim "equity is equality". It is because lawyers, together with an independent judiciary, play an institutional role in a democracy like Queensland's. Lawyers have a fiduciary duty to protect and pursue their clients' rights under the rule of law, unswayed by the power, privilege or wealth of others, and subject only to their duties to the court as officers of the court. This sometimes means appearing for the most unpopular and despised members of society. Ensuring access to the rule of law for all, even unpopular litigants, strengthens our democratic institutions and the community they serve. Lawyers also play a critical role in ensuring that the separation of powers between the three branches of government is maintained, and, in particular, that the judiciary is independent of the both the legislature and the executive.

Barristers, as specialised legal advocates, are particularly well-placed to take on this institutional democratic role. That is why, if women are to attain equality and fully embrace their democratic rights, they should be represented approximately equally with men in the legal profession generally, at the Bar, and in all three branches of government, including the judiciary.

I digress momentarily to acknowledge three recent Queensland milestones, all "firsts" for women, in the legislative and executive branches of government. The first is Premier Anastacia Palaszczuk leading her party to an election win from opposition. The second is the constitution of Premier Palaszczuk's Cabinet by a majority of women. The third is the appointment of the first Indigenous woman, Leeanne Enoch, to Queensland Cabinet, as Minister for Housing and Public Works, as well as for Science and Innovation

Returning now to the concerning low female membership at senior levels of the profession generally and particularly at the Bar and on the Bench. This is not a discrete women's issue; it is, as Michael McHugh, Michael Kirby and Kristoffer Diocampo recognise, an issue which concerns everyone in the legal profession and in the wider community, men as well as women. A legal profession and judiciary with strong representation of women at all levels, enhances the strength and credibility of the profession generally, and ultimately the community's confidence in the profession.

A legal profession where women, whether solicitors or barristers, apprehend they belong, know their contributions are valued and receive equal pay for equal work will allow them to give of their best intellectually and for the long term, to the benefit of the profession and the community it serves.

The inevitable inference from the low numbers of women at the top of the legal profession and judiciary is that women leave the profession at a higher rate than men. There is a growing focus to ensure better rates of retention of women lawyers and for more women to assume senior positions in solicitors' firms, at the Bar and on the Bench. With this in mind, the Law Council of Australia conducted a survey of almost 4000 practitioners to address attrition and to develop strategies to encourage the re-engagement of women lawyers. The key findings were gloomy, especially for young people like you about to embark on a career in the law.

They included that both male and female practitioners are impacted by long working hours and poor work-life balance. Almost 1 in 3 females reported dissatisfaction with mentor accessibility and promotion opportunities. There is a perceived bias against women who adopt flexible work arrangements. Lack of senior women and the male dominated culture of

the legal profession can present barriers to progression for women. A significant proportion of both male and female respondents reported experiencing some form of discrimination, intimidation or harassment in their current workplace. One in 2 women (50%) and more than 1 in 3 men (38%) who experienced discrimination reported being bullied or intimidated. Twenty-four percent of the women and 8% of the men had been sexually harassed.

Almost 1 in 2 women (47%) who experienced discrimination reported this was on the basis of gender, whereas just over 1 in 10 men (13%) reported experiencing gender discrimination. Of those who were discriminated against, 14% of women reported this was because of pregnancy compared to 2% of men (I assume it was the men's partners who were pregnant and not the men but I may be behind the times. Perhaps Arnold Schwarzenegger's fictional role in the movie *Junior* has become reality while I have been writing judgments!). Twenty-seven percent of women compared to 11% of men who were discriminated against cited it as due to family or carer responsibilities. This audience may be interested to note that as to those who were discriminated against, 8% of women and 7% of men reported discrimination due to ethnicity.

The survey found that culture, leadership and the nature of the work were important factors for lawyers, both male and female in moving from one private firm to another; from a large to a smaller firm; and from private practice to an in-house position. About half of the female lawyers surveyed were considering moving roles in the next 5 years. Forty percent of women compared to 25% of men in private practice, were looking to move to an in-house role. Men were twice as likely as women to be considering a career at the Bar. Flexible working conditions and barriers to promotion were more important factors for women considering moving roles. Those who had left the legal profession were motivated by opportunities for better work-life balance, more flexibility and reduced stress.

These findings are confronting. It is shocking to learn that a profession whose primary concern is with rights, actually bullies, intimidates, harasses and discriminates against its own members. No wonder women and men are leaving such a profession in droves.

In helping you Gen Yers understand why the 21st century Australian legal profession has such a poisonous culture let me tell you something of the past. Things have certainly improved since the turn of the 20th century when fully-qualified women were refused admission to the legal profession because courts throughout the western world held that women were not “persons” under the statutes providing for admission of legal practitioners.

And they have improved in leaps and bounds since I was a law student in the 1970’s at what was then the only law school in Queensland at UQ. I hasten to add that these horror anecdotes I am about to share do not represent the modern UQ law school experience.

When I commenced my law degree in 1972, the major concession to the growing numbers of law students was the provision of the first dedicated women’s toilets within the law faculty. A block of previously male toilets was re-commissioned as female toilets. As a 17 year old straight from a girls’ high school, it took me a while to realise that the contraption on the wall as you entered was a men’s urinal. It remained in the female toilets throughout my years at law school, but, contrary to the jibes of some male law students, it was never used by the women.

The term “sexual harassment” was unknown in those days but, with hindsight, I can tell you sexual harassment was rife in the 1970s UQ law school. Male friends reported that the men’s toilets featured explicit graffiti about women law students. I once picked up a law report in preparation for a pending tutorial to read a decision of the well-known English jurist, Lord Justice Cockburn. In the polite English way, the judge’s name was pronounced Coburn

although spelt Cockburn. I was not impressed to see that a male law student had written the names of female law students against the name of that judge.

There was certainly no Women in the Law Dinner. Apart from the annual Law Ball, a still continuing pleasant tradition, the only social functions organised by the law students association were law “smokos”, advertised as “Porn & Prawn” evenings. These salubrious events, which I never attended, reportedly featured a Brisbane stripper who used the name, leaving nothing to the imagination of grubby 1970s male law undergraduates, “Lana Banana”.

In my first year of law school, almost 50% of students were women but only a handful attended lectures and tutorials or studied in the law library. In retrospect I realise this was because of the poisonous culture: for a young woman student, simply walking into a law lecture or the law library was an act of courage. Her presence would be met with hushed silence, leers or sniggers. No wonder so many young women dropped out in first year, or having completed their degrees, lacked confidence to enter the practising profession. Who knows how many potentially outstanding women lawyers were discouraged by such an unwelcoming, hostile environment. Male lawyers of my vintage shared my experiences but they were part of the dominant dysfunctional culture. Some have not yet outgrown it. This is, I think, reflected in the Law Council’s survey results. It is your challenge as young practitioners about to enter and take on leadership roles in the profession to ensure this poisonous culture is changed forever.

The message from the Law Council survey and to a lesser extent, from the Law Society of New South Wales’ report on gender wage inequity, is clear. To retain women and men in the legal profession, the profession must change. Here’s a novel idea. The legal profession

must obey the law and ensure its workplaces are free from discrimination, intimidation, bullying and harassment and that women receive equal pay with men for equal work. A positive, pleasant, lawful work culture will be a promising beginning in retaining experienced competent, legal professional staff. And if the Bar hopes to recruit and keep capable women, it must persuade clever women lawyers that life at the Bar offers a conducive, supportive work environment where women will be valued and encouraged to succeed.

Hearteningly, some sections of the legal profession and judiciary are leading the way as agents of positive change. The large law firm, Gilbert and Tobin, has 36% female partners; the well-known firm Slater and Gordon, has 43% women local internal equity holders; and 20% of both firms' staff participate in flexible working arrangements.⁴

For many years the Victorian Bar Council, with the encouragement of Victoria's Chief Justice Marilyn Warren AC, has been a leader in gender equality practices. It is in this respect an exemplar to other Australian Bars. In November 2013, under the stewardship of then Bar President, Fiona McLeod SC, it adopted the Quantum Leap program, which:

- Measures numbers of women at the Bar and their comparative earnings by seniority and area of practice;
- Encourages silks to pledge to promote equality and diversity;
- Promotes bias awareness training across the Bar;
- Provides formal and informal mechanisms for reporting bullying, harassment and discrimination;
- Establishes a mentoring program for women barristers at key career milestones of two and seven years and to senior/junior women;

⁴ The College of Law, "Encouraging Gender Diversity in the Legal Profession" 13 March 2014 <http://www.collaw.edu.au/insights/encouraging-gender-diversity-legal-profession/>.

- Organises re-engagement round tables to support women barristers on career breaks; and
- Undertakes exit surveys of women leaving the Bar to identify the drivers of attrition and factors assisting in retaining women barristers.

I remain disappointed and surprised that so few women take up a career at the Bar.

Success as a barrister no longer turns on an overbearing, intimidating presence, a big deep voice and drinking copious amounts of alcohol with solicitors in pubs. It turns on hard work, thorough preparation, intellectual rigour, high ethical standards, and powerful written and oral advocacy, all qualities which many women have in spades. Life at the Bar offers a high degree of flexibility. With discipline, diligence, and the confidence to not take on too much work, the Bar can provide that elusive work-life balance. If well-managed, it can be an environment where women balance family and professional success.

It is a self-evident truth that women barristers are much more likely to remain at the Bar if they are successful and that means they need briefs from solicitors. In this respect, the Law Council's 2004 Equal Opportunity Briefing Policy, rebadged in 2009 as the Equitable Briefing Policy, is a positive step. It is not affirmative action but a measured design to inform those making briefing decisions of suitable women. It requires nothing more than for the person briefing to consider whether a woman barrister is the best person to brief; to keep statistics as to the number of women briefed; and to annually review these figures. Many Queensland solicitors' firms have adopted the policy, as has the Queensland Bar. Although the Queensland government also adopted the policy for many years, it was abandoned in the recent past. I am pleased to hear that it soon may be reinstated. I would like to see those who successfully implement the policy publicly acknowledged through annual awards.

The South Australian judiciary has recently taken a modest, but still significant step to address the under-representation of women at the Bar and on the Bench. The Courts Administration Authority under the stewardship of Chief Justice Chris Kourakis (another bloke), in a response to the under-representation of women at the Bar, has created an additional special position as Supreme Court Judges' Associate, to be filled by a woman solicitor planning to go to the Bar. It is anticipated that this *Step Up to the Bar* initiative will help practising female solicitors gain the experience and confidence needed to become barristers and, ultimately, judges.

I return to the question posed in the title to this speech, *Women in Law in Australia 2015: Celebrations or Commiserations?* The answer is that, while we have much to celebrate, there are still things to commiserate about. Women have achieved enormous progress in the legal profession in the past 30 years but more needs to be done to ensure women lawyers participate equally at all levels in the legal profession and judiciary to the benefit of both the profession and the wider community.

There are future leaders of the profession, both here in Australia and throughout the world, present tonight. I am confident you all appreciate that the under-representation of women in the higher levels of the legal profession and judiciary is not a discrete women's issue. It concerns leading male jurists like former High Court Judges, Michael McHugh and Michael Kirby and current Chief Justice of South Australia, Chris Kourakis. It concerns thoughtful future male members of the profession like Kristoffer Diocampo who invited me to speak tonight. It concerns the whole legal profession and the wider community, men and women. As future leaders of the profession, I urge you not to tolerate workplaces where there is bullying, intimidation, gender pay inequality, or discrimination of any sort based on grounds of gender, ethnicity or sexual orientation. I urge you to build workplaces which respect the

need for flexible hours and practices, to strive for that elusive work-life balance and to mentor and support your co-workers. This will require leadership and courage. But if you don't do it now, who will and when? That way, irrespective of gender, you all, men and women, will work optimally, respectfully and cooperatively together as lawyers, to fully contribute your best to this wonderful profession as you fulfil your institutional democratic role for the benefit of the community, locally, nationally and globally.