SPEECH TO WOMEN AND LEADERSHIP AUSTRALIA

Rydges Hotel, Brisbane, 28 May 2015

Thank you for your kind invitation to speak to you to share my experiences of women in leadership. May I first acknowledge the traditional owners of the land on which we meet in this beautiful place by the Brisbane River where no doubt Aboriginal women met and still meet to share their insights and discuss their concerns.

As I have been a Judge now for over 16 years, it is interesting to consider the changes to the legal landscape since I was appointed and the role of women in the important decision-making capacity of the third arm of Government at that time and now. I want to speak about the positive contribution made by women to the justice system in this country in particular through judicial office.

The first woman to become a Judge of a superior court in Australia was Dame Roma Mitchell, who was appointed to the Supreme Court of South Australia in 1965. In 1986, as the first woman appointed to the High Court of Australia, Justice Mary Gaudron publicly paid tribute to Justice Mitchell[1] and later expressed to me the opinion that Dame Roma should have been the first woman appointed as a High Court Judge.

Fortunately there has been a significant change in the proportion of Judges and Magistrates who are women in the 20 years since 1995. I am able to give precise figures of the difference between 1995 and 2013 due to some excellent research undertaken by the Australian Women Lawyers.[2] In 1995, only 3.62 percent of Supreme Court Judges in Australia were women. In fact, there were only five female Supreme Court Judges: two of them were from New South Wales, one from Queensland, one from South Australia and one in the Northern Territory. No other State or Territory had any female Judges at all.[3]

However, by 2013, that number had substantially increased. By then, there were 42 female superior court Judges: 12 in Victoria, 11 in New South Wales, nine in Queensland, three in Western Australia, two in each

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[1] 'Ceremonial Sitting on the Occasion of the Swearing-In of the Chief Justice The Honourable Sir Anthony Mason KBE and the Swearing-in of The Honourable Mr Justice Toohey and The Honourable Justice Gaudron as Justices of the High Court of Australia' (1986) 68 ALR xxxiii, xxxvii-xxxviii.
[2] See generally Australian Women Lawyers, 'Gender in the Australian Judiciary 2013 v 1995' (Media Release, 4 July 2013).
[3] Ibid 3.

of South Australia, Tasmania and the Northern Territory and one in the ACT.[4]

As you might expect, the numbers improve as you go down the ranks. The percentage of women Judges in County and District Courts has changed from 5.95 percent in 1995 to 29.02 percent in 2013.[5] In the Magistrates Courts the change was from 9.11 percent in 1995 to 40.13 percent in 2013.[6] Unsurprisingly, there have always been more women in the Family Court, family law being seen as the traditional area in which for women to practise.[7]

You might ask, why does it matter? This has of course been a subject of strenuous discussion within the judiciary, although now more women have been appointed, the need to argue for the advisability of having women as Judges seems to have almost disappeared since it is now self-evident that it is a good idea.

An example of where it might appear self-evident occurred when I was sitting on an appeal with two other judges. In 2008, an Aboriginal woman from Mornington Island had been sentenced with regard to an offence of unlawful wounding.[8] The victim of the offence was her mother. The offender pleaded guilty, had never previously served a term of imprisonment, had completed an intensive correction order and was considered suitable for further community based orders. She was willing to deal with her alcohol problem, which was significant as it appears that she was affected by alcohol whenever she offended. During her childhood in which she had endured violence towards herself from her mother. In spite of that, it appeared that she was herself a very responsible mother of seven children, ensuring that those of school age attended and excelled at school and breastfeeding her baby. There was no suggestion that she had repeated the familial cycle of violence with her own children.

The appeal concerned whether she should have been required to serve time in custody or placed on parole. Ordinarily, if a woman who is breastfeeding goes into prison, arrangements may be made for her baby to be with her. However, that was not possible in this case as she would have to leave the island on a government plane to go into custody and

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[4] Ibid.
[5] Ibid.
[6] Ibid 2.
[7] Ibid.
[8] *R v Chong; ex parte A-G (Qld)* [2008] QCA 22.

babies were expressly forbidden from travelling on the plane. Counsel opined that it would not be any real hardship to her or the baby as she could recommence breastfeeding after serving three months in prison. I looked around me rather incredulously but no-one else seemed to find this strange. Of course, I was the only female lawyer in the court room. The other judges, the prosecution and defence counsel were all male. As the only person present who had breastfed, I was immediately able to inform them that was just not a possibility. If I had not been there, I presume they would all have sagely nodded and passed on to the next point.

There also existed in the common law until recently a most unpleasant stereotyping of women by Judges who were almost exclusively male. For example, as late as 1987 the Law Lords who comprised the Judicial Committee of the Privy Council in London held:

> "The rule requiring a warning to be given to a jury of the danger of convicting on uncorroborated evidence applies to accomplices, victims of alleged sexual offences and children of tender years. It will be convenient to refer to these categories as 'suspect witnesses'.
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> …
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> It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called 'suspect witnesses' may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence." [9]

The generation of Judges on that Court did not include any women.

The most telling reason for the inclusion of women is, however, that the best institutions in society flourish when they consist of the best people available in that society rather than having some artificially excluded by reason of an irrelevant consideration such as gender.

The Senate Committee of the Australian Parliament which reported on gender bias and the judiciary in May 1994 identified three major arguments in favour of the appointment of more women to the judiciary.

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[9] *A-G of Hong Kong v Wong* [1987] AC 501, 509, 511.

These were first, that, to maintain public confidence in the judiciary, the institution must been *seen* to reflect the different parts of the population it serves; second to offer role models for women; and third, the appointment of significant numbers of women is likely to affect the nature of judicial decision-making through potentially different decision-making styles and by redressing areas of law developed from a distinctively male perspective, such as those dealing with women's sexuality.[10]

I am afraid that the battle is far from over. Recently there has been some controversy around judicial appointments. In March 2014, the President of the Court of Appeal in Queensland, who was the first female Judge appointed in that State and has 24 years' experience as a Judge, gave an address to Queensland Women Judicial officers and barristers. That speech was entitled "A Report Card on Gender Equality at the Queensland Bar and Bench and the Invisible Women".[11]

The President reminded the audience why it is important that women are approximately equally represented at the Bar and on the Bench. It is, she observed, because lawyers, together with an independent judiciary, play an institutional role in democracy. 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 broader community. 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 both the legislature and the executive.

The President observed that, if women are to fully embrace their democratic rights, they should be represented approximately equally with men at the Bar and in the three branches of Government, including the judiciary. So far as recent appointments were concerned, she pointed out that the then Queensland Government, since coming to office about two years earlier, had appointed 17 judicial officers: four Supreme Court Judges, including two to the Court of Appeal; three District Court Judges, including the Chief Magistrate; and 10 Magistrates. All of those appointees, apart from one Magistrate, were men.

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[10] See generally Commonwealth, Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (May 1994).

[11] President Margaret A McMurdo (Speech delivered at Brisbane, 21 March 2014).

Whilst in no way detracting from the talents of the new judicial officers, the President expressed concern about the lack of gender diversity amongst them. She noted that the decline in female judicial appointments was not because of any dearth of talented, experienced and in every way meritorious women candidates and questioned whether there was an unconscious bias on the part of those recommending and making the appointments such that well-qualified women candidates were invisible to them and not considered. Unfortunately, these balanced and considered remarks were met with scandalous personal comments made about the President by politicians.[12]

At least since then, there has been an increase in the appointment of women to judicial office in Queensland. Full credit must be given to the President for speaking out on this important topic. The community is now served by a court with a diversity of members from both genders and all social backgrounds. Like many of my colleagues, I was the first in my family to attend University. Indeed, neither of my parents had the opportunity to finish their secondary school education.

It is a great privilege to serve as a judge, but with judicial office comes great responsibility. Over the past fortnight, for example, I have dealt with cases as important to the litigants involved as a decision to prevent a man who unlawfully killed his mother inheriting under the will she made just a month before he killed her; a decision as to whether a settlement made in favour of two infants whose mother was killed in an horrific motor vehicle accident was sufficient to be in their best interests; a decision as to whether a woman whose husband disappeared while surfing off Bali, leaving a grieving and increasingly financially stricken wife and dependent children, could swear to his death so that his estate could be dealt with under the laws of succession; and an application to dissolve an adoption order over a man who was psychologically damaged by the order that had been made in favour of his step-father, who brutally abused him in the days where such behaviour was hidden or not perhaps regarded so seriously. In relation to this last matter, I should say that I am unaware of any such decision previously having been made in Queensland.

In the same fortnight as all of this, my father died and I had both to deal with my grief and organise his funeral, while also being unwell with a

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[12] See, e.g., Renee Viellaris, 'Court of Appeal President Margaret McMurdo Takes a Swing at Attorney-General Jarrod Bleijie', *The Courier Mail* (online), 24 March 2014 <http://www.couriermail.com.au/news/queensland/court-of-appeal-president-margaret-mcmurdo-takes-a-swing-at-attorneygeneral-jarrod-bleijie/story-fnihsrf2-1226862751980>.

chest infection. But we were short a Judge and our fellow citizens were depending on quick and just resolutions to their problems. This is why we do what we do. It is the practical application of the rule of law for the people of Queensland.

I will now share with you some more of what I have learnt over the last 20 years. This is only what I have learnt through my own experiences. You must adapt them to your own.

The first and most important of the lessons I have learnt is the very reason why I believe that you cannot just take on other people's strategies and expect they will bring you success in leadership. The lesson I learnt very early on is that as a leader, you are quintessentially yourself. I was surprised when I first became a Judge how much I learnt about myself. I thought the task would be to learn about managing a courtroom, the case, the law and the witnesses, and understanding the issues in writing judgments, but I was very surprised to find out that in addition to all those things, it was a great lesson in self-awareness. I became acutely aware of my personal attributes, my weaknesses and my strengths. If you are an extrovert, you will be an extrovert as a leader. If you are by nature co-operative or collegial, you will be that as a leader. If you are a quiet achiever, then you will lead by example through your quiet achievements.

The next serious lesson I think I have learnt is to approach decision-making in a principled manner. This is relatively obvious to a Judge in Court, since one is obliged to apply common law principles and statutes to the case in hand, but there are many decisions a Judge has to make outside Court as well. The only yardstick one can use is to apply principle to those questions.

Unfortunately, there are times when I have been tested and all I can say to you is that one must apply a principled rather than a pragmatic approach both inside and outside court. An example of a principled, rather than a pragmatic, approach occurred when the Queensland Law Reform Commission was given a reference to make recommendations for law reform with regard to the division of property on the breakdown of de facto relationships.[13] The law at that time was very complicated and uncertain. When we looked at it, I could see no reason in principle why the law which applied to same sex couples should be any different to that applying to opposite sex couples. So we made that recommendation, among many other recommendations. The other recommendations were

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[13] Queensland Law Reform Commission, *De Facto Relationships*, Report No 44 (1993).

accepted by the Queensland government; but not that one. However, just a few years later it was picked up by the ACT government and then incrementally by State governments around Australia and then finally by the Commonwealth government. Leadership in law reform comes from taking a principled approach.

I have had the opportunity to be involved in many innovations both as Chair of the Queensland Law Reform Commission ('Commission') and a Judge of the Supreme Court. Let me give you an important example.

In 2008, the Attorney-General referred to the Commission a review of the directions, warnings and summing up given by a Judge to jurors in criminal trials in Queensland.

The Commission published Discussion Papers and received input from a wide variety of sources, including the public and the legal profession. This led to the publication in December 2009 of Report No. 66, *A Review of Jury Directions*.[14]

The first point we made is that juries — made up of non-lawyers — have the most difficult task in the trial of many serious criminal offences: to determine whether the defendant is guilty. Numerous studies, including a survey of jurors commissioned by the Commission, have shown that juries are too often confused or unsure about the law that they have to apply and the issues that they must resolve. To help give jurors the assistance that they need and deserve to reach their verdicts on the evidence and in accordance with the law, the Commission recommended a suite of reforms, some requiring statutory change and others requiring changes to the practices adopted by judges and lawyers in preparing and presenting criminal cases to juries.

The Supreme Court has implemented a number of the reforms recommended by the Commission in the conduct of criminal trials. In 2013, after further careful consultation the then Chief Justice published a Practice Direction which I had drafted dealing with the case management of complex criminal trials. Of course most of the criminal trials in the Supreme Court are complex and the Practice Direction is therefore frequently followed.

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[14] This report was published in three parts:
a Summary of the Report (<http://www.qlrc.qld.gov.au/reports/r66_Summary_web.PDF>),
Volume 1 (<http://www.qlrc.qld.gov.au/reports/r66_vol_1_Web.PDF>) and
Volume 2 (<http://www.qlrc.qld.gov.au/reports/r66_vol_2_Web.PDF>).

It provides for a series of pre-trial hearings and an exchange of memoranda by the prosecution and the defence. The matters required to be covered are wide ranging and have introduced many innovations into the conduct of criminal trials. They have assisted in the efficient and fairer conduct of criminal trials in Queensland.

Most recently, I was able to conduct the trial of Brett Peter Cowan, who was convicted of the murder of Daniel Morcombe, using many of these innovative techniques. It meant that the trial lasted about half as long as it had been set down for and the jury was much better and more accurately informed as to exactly what they had to decide. What a difference that makes for all involved: the family of the victim who want answers and justice for their loved one, the defendant accused of a terrible crime; the witnesses who have to go through the ordeal of giving evidence; and importantly, the public who need to have confidence that the criminal justice system is fair and the outcome just.

This is not easy. Judges must act with fairness and impartiality at all times, no matter their personal views. The Judge must ensure that the defendant has a fair trial and assist the jury in every way that the Judge can to reach their verdict by applying the facts, as the jury find them to be, to the law explained to them by the judge. As I have said, we have introduced at the court a number of innovative ways of assisting the jury with their important task.

This is but one example of the way in which the Court, of which I have been proud to be a member for more than 16 years, has modernised, been progressive and led change, often resisted from outside the Court. There are many other examples: participation in the International Framework for Court Excellence; intensive case management of civil proceedings in the court ensuring that cases are brought to trial or otherwise resolved as quickly and fairly as possible; participation with assisting psychiatrists in a specialised Mental Health Court; special lists and practice directions for many different situations, such as self-represented litigants or prisoners who fall within the ambit of the Dangerous Prisoners (Sexual Offenders) legislation; electronic trials; the publication of an Equal Treatment Benchbook (the first in Australia); giving of evidence by video link; and production of judgment summaries in cases which attract particular public interest. As early as 1999, I gave out a summary of my decision that the registration of the One Nation party was invalid to reduce the prospect of its being misunderstood. There are many, many other examples. We are and always have been interested in practical suggestions to make the justice system work better: fairly and more efficiently, treating people with dignity and equality.

I am afraid my next piece of advice is rather predictable when applied to women. Unfortunately, I think the old adage that a woman has to work twice as hard to be regarded half as good is still true. We are obliged to work very hard, to be utterly prepared and to be very careful in what we do. Intense preparation involves informing and communicating with others who are or will be working with you to ensure they come with you and share any insights or doubts they might have.

I think a constant battle for women is whether to be pragmatic and strategic or to be forthright and call a spade a bloody shovel. The danger is that by being forthright as a woman, one might be regarded as aggressive rather than as appropriately strong and decisive. I have always taken the only stance of which I am capable, which is to call things as I see them and take on battles even when it is far from strategic to do so. A personal example might suffice.

I was sitting once in Mt Isa, a large mining town in northwest Queensland, on the first sex discrimination case brought in that State. The complainant was a young woman who had been one of the first of two women employed as apprentices to become diesel fitter mechanics at the mine. She suffered gross and offensive discrimination from her co-workers and supervisors, to the extent that she felt forced to abandon her ambition to be a diesel fitter mechanic, which she had held since she was a child working on machines with her father. She then brought a case for unlawful discrimination.[15]

The mine insisted that I take a tour underground. I observed in silence the sexist graffiti in the lift going down to the mine and everywhere underground. I endured in silence catcalling from a group of workers when I walked past a room in which it appeared to be common knowledge that I was there to consider a sex discrimination case. But one night I went out with my Registrar to a local restaurant to eat. The walls were painted with blackboard paint and covered with offensive graffiti. I decided to ignore it. My Registrar was incensed but I told her it was best to ignore it. As we were leaving she said something very mild about it to the café owner, who told her in very aggressive tones that no one had ever complained about it before and that whenever they did, he told them that they could get a wet cloth and wipe it off if it offended them. Not observing my own advice, I immediately supported her and told him what he had said was incoherent and that his racist and sexist graffiti was offensive to ordinary decent people who might want to be patrons in his

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[15] See *Hopper v Mt Isa Mines Ltd* [1997] QADT 3

restaurant. I do stand up to bullies. I always have and I hope I always will.

However, the case itself was very important to the elimination of sex discrimination. In that case, a far-sighted manager at the mine had decided that it was important to end discrimination in the appointment of apprentices but no education had been undertaken of the other apprentices or her other co-workers and immediate supervisors. The mine was liable for that failure and I was able to draw attention to the steps that should have been undertaken to assist companies to make the appropriate management decisions in the future.

I am not a model of restraint and strategic thinking and probably never have been. I think it is probably useful to success in life not to be that sort of person, but as I am not, I cannot really advise you that that is one of my tips for success. Nor do I advise you to be as forthright as I have always been. As I said before, you can only succeed in life by being true to yourself and to your own beliefs, principles and manner of dealing with the world.

However, I do regard it as an important aspect of leadership to attempt to defuse rather than confront or exacerbate conflict. Let me give some examples from my own experience. I conducted a highly charged murder trial in the Supreme Court which had resulted from the death of one person and injury to other members of a particular racial and ethnic group. The death occurred after a fight in a park between that group and another composed of younger and fitter men of a different racial and ethnic background who were armed with weapons. The capacity for racial tension breaking out into open conflict and violence during the trial, both within and outside the Court, was very high. With the assistance of the head of security of the Court, we worked on every method we could to defuse the potential conflict: providing separate and large spaces for the expected members of each group to gather, being respectful to the traditions and beliefs of each culture inside and outside Court, appealing to the leaders of each group to organise and control members of their groups. Not only were we successful in subduing any conflict during the long trial, but at the end of it when it came to sentencing, there was a genuine rapprochement between each of the sides in that dreadful conflict and a greater mutual understanding.

I often have difficult witnesses in the highly charged atmosphere particular to a criminal trial, but treating them with calmness and refusing to respond to displays of extreme hostility and emotion with a similar

display of emotion or irrationality has so far managed to calm every situation in which I have found myself.

Sometimes even wry humour can assist. In March 2005 I was invited to be part of a group of international lawyers making presentations to a group of Iraqi Judges, Prosecutors and Judicial Investigators on international human rights law and its relevance to the conduct of criminal cases in Iraq. Two of the prosecutors but none of the Judges were women. The female prosecutors were strong and impressive. At that time it was not possible for a woman to be a Judge in Iraq. The training sessions lasted a very full five days. The topic for the final day was women's rights in the administration of justice.

I spoke about the relevant international legal instruments as well as women's rights to legal personality, their right to equality before the law and to equal protection of the law. I traced the development, since the commencement of the United Nations, of women's rights as human rights, which had led to the absolute rule, to be guaranteed in all circumstances and at all times, that women have a right to legal personality on an equal basis with men. I introduced the topic of women's rights to respect for their lives as well as their physical and mental integrity; to equality as to marriage; to equal legal capacity in civil matters; and to an effective remedy, including the right of access to the courts and due process of law.

A South African Judge spoke on women's right to equal participation in public affairs, including elections. His knowledge of electoral processes in many countries, including that of Iraq, made this presentation particularly compelling. In addition, a Tunisian lawyer, himself a Muslim, gave a presentation which demonstrated that the idea of equal rights for women was not inconsistent with Islamic thinking. This view was shared by many, although not all, of the participants.

One of the younger male Judges was very confrontational in the question he asked of me about the differences between men and women. He asserted that in his culture and tradition, men and women were regarded as quite different and that, as men were bigger and stronger than women, they could never be regarded as equals. I answered his question by saying that it was true that some men are bigger and stronger than some women – indeed it may be thought that many men are bigger and physically stronger than many women – but if that was the case, we could leave the construction of roads, bridges and buildings to the men and they could leave the thinking, judging and ruling to us. There was a pause while it was translated into Arabic. I must admit I had time to regret

using humour across languages, cultures and religions. However I need not have worried. The response was one of delight and amusement and then an open, less inhibited discussion about the rights of women.

A discussion was then initiated by the Iraqis about the need for reform of particular criminal laws in Iraq that discriminated against women. Some suggested that it was important for a woman to enjoy financial independence and that it was traditional for women to keep their own names. One of the Iraqi Judges observed that Islam required that women be treated with dignity and respect and that this was not inconsistent with the right to education and work.

After that session, many of the participants sought me out for further engagement and discussion.

One tip I think is probably true for most people is that you should not to be defeated by opposition but ought to regard it as a challenge. I am surprised when people assume that if they tell me that something cannot be done, I will give up. I always regard such a statement as an invitation to consider how it can be done. After all, if you run into a wall it is always better to look for a way around that wall than to keep butting your head up against it or take the arduous climb over it – particularly if someone has placed barbed wire on top of it. In circumstances like that, it is always useful to be innovative, to think of solutions rather than problems and to try to work out a new solution to what might be a complex and apparently intractable problem.

The last piece of advice I would give is that you should be generous. You should look out for your colleagues, male and female, care about their welfare particularly in times of crisis or stress, but not only then. That is why, in spite of everything, the Judges of the Trial Division and Court of Appeal have been able to continue to do our work. We are and have for many years been able to work harmoniously together in spite of our diversity. It is also imperative to mentor those who are following you. I think it is very important to hold the ladder for women who are coming up after you, not pull it up behind you. I am very fortunate that every year I have the opportunity to appoint a new law graduate to work as my Associate for a year. I take that role very seriously and have learnt much from the diversity of people I have employed. And they have used my mentoring well. Two have become Rhodes Scholars; and one is a Cabinet Minister in the new government in Queensland, the first with a majority of women in it.

I do hope that all of what I have said is of some use to you; but my main message remains that you should be yourself and be the very best person that you can by being true to yourself. As Polonius said to Laertes in *Hamlet*:

> "This above all; to thine own self be true,
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> And it must follow, as night the day,
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> Thou canst not then be false to any man."

Or indeed to any woman!

Justice Roslyn Atkinson AO

28 May 2015