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Spotlight on women in the *Equality before the Law Bench Book*

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This month, the Commission published a new chapter on Women in the *Equality before the Law Bench Book*. President of the Women Lawyers Association of NSW (WLANSW), Larissa Andelman, reviews the chapter and highlights issues of pressing concern for women today in NSW.¹

In 1997, the Honourable Justice Mary Gaudron, the first woman to be appointed to the High Court of Australia, gave a speech at the Australian Women Lawyers Conference,² in which she referred to a note she sent to a fellow High Court judge saying:

The trouble with the women of my generation is that we thought if we knocked the doors down, success would be inevitable: the trouble with men of your generation is that so many still think that, if they hold the doors open, we will be forever grateful.

In NSW, while more women have graduated as lawyers than men for the past two decades, women continue to be underrepresented in partnerships, senior leadership roles and as senior counsel.³ In 2020 there is substantial evidence to demonstrate that gender equality will not occur simply with the passage of time. We see this in the evidence, such as in the WLANSW's Law Firm Comparison Project⁴ and data published by the NSW Bar Association⁵ and the NSW Law Society.⁶

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1 An external panel reviewed the chapter including the executive team of the Women Lawyers Association of NSW Inc (WLANSW) (Larissa Andelman, President; Renée Bianchi, Vice President; Holly Lam, Immediate Past President); Ms Philippa Davis, Principal Solicitor, Women's Legal Service NSW; and Professor Simon Rice, OAM, Kim Santow Chair of Law and Social Justice, University of Sydney. The Judicial Commission is grateful to the reviewers for their time and expertise.

2 M Gaudron, "Speech to launch Australian Women Lawyers", *Australian Women Lawyers Launch*, Melbourne, 19 September 1997.

3 WLANSW, *Law Firm Comparison Project*, at <https://womenlawyersnsw.org.au/resources/lawfirm-comparison-project/>, accessed 28/9/2020.

4 *ibid.*

5 For example, only 12% of senior counsel in NSW are women: NSW Bar Association, Statistics, at <https://nswbar.asn.au/the-bar-association/statistics>, accessed 28/9/2020.

6 Law Society of NSW, Surveys and Statistics, at www.lawsociety.com.au/advocacy-and-resources/gender-statistics/profiles-surveys-and-statistics, accessed 28/9/2020.

FEATURES

Spotlight on women in the *Equality before the Law Bench Book*

Larissa Andelman93

What do judicial officers think of the 2018 sentencing reforms?

Pierrette Mizzi and Una Doyle . . .95

REGULARS

Case updates97

Legislation update102

Continuing Judicial Education Program update102

JIRS update.102



Success for women in the legal profession, if judged as the representation of women in leadership positions, has not been inevitable because it is not about holding the door open into a culture and structure created overwhelmingly by men for men. It is about culture and structures adapting to women, adapting to people with caring responsibilities and becoming a profession that is more respectful of difference, more transparent and inclusive.

Women do bring a distinct contribution to law because of their particular experiences and backgrounds. The difference makes the profession stronger and more able to be an effective servant of justice and the rule of law on which our economy and society depend. According to the Australasian Institute of Judicial Administration, the percentage of women judges and magistrates in NSW as at 30 June 2020 was 36%, a reduction of 1.1% from 2019.⁷ The Commonwealth, Victoria, Queensland, ACT, NT and WA have a higher representation of women in judicial office and there is no reason why at least 50% of judges and magistrates in NSW should not be women. Until we achieve formal equality, we need to be focused on appointing a greater number of women to the judiciary. It is not a question of time but a question of action.

This brings me to the chapter on Women in the *Equality before the Law Bench Book*. What I particularly consider to be beneficial about the chapter is the analysis of disadvantage. Disadvantage that is not only suffered by women but exacerbated by socio-economic factors and other intersectional attributes such as gender, race, disability, age, and sexual orientation.⁸ The research carried out and recommendations in the Law Council of Australia's "The Justice Project"⁹ also provide a wealth of evidence as to significant social and economic disadvantage affecting certain parts of our communities. And, as noted in the chapter, the COVID-19 recession is having a greater financial impact on women due, in part, to a higher proportion of women than men employed on a casual basis.¹⁰

The imprisonment rates of First Nations women is a matter of utmost concern. The chapter identifies the impact of imprisonment on women, particularly those who are carers and mothers, and provides information about alternatives to imprisonment (where relevant).¹¹ The tremendous work being carried out by Elizabeth Evatt AC and others through the Community Justice Coalition¹² and Domestic Violence NSW through programs such as the Miranda Project,¹³ a Community Restorative program providing services to women affected

by domestic violence and at risk of involvement in the criminal justice system, are resources that provide alternative pathways to imprisonment.¹⁴

Violence against women in domestic settings is a blight on our society. The various forms of abusive conduct are often difficult to identify and prove. Often a particular conduct on its own is not necessarily violent or abusive. The chapter describes "coercive control" that we know underpins many abusive relationships.¹⁵ There is an interest in Australia in legislation that would criminalise such conduct as a "course of behaviour".¹⁶ Evidence which currently may not be considered to be relevant would be admissible to demonstrate a pattern (two or more) of abusive behaviours on an objective basis. Australia is fortunate to be able to draw on the experience of similar laws that have been successfully introduced in Scotland.¹⁷

The chapter also addresses sexual harassment and the judiciary¹⁸ to which I would like to add bullying. The *Us Too? Report* published by the International Bar Association in 2019 on bullying and sexual harassment in the legal profession found that women reported significantly higher rates of bullying in judicial workplaces compared to men.¹⁹ In 2018, the Victorian Bar Association released a report detailing unacceptable levels of bullying by judicial officers in court²⁰ as a result of which it published a judicial conduct policy.²¹ It would be a positive step to implement a similar policy in NSW.

Any discussion about women in the law in 2020 cannot be complete without reference to the findings made by a lengthy independent investigation into allegations that a former High Court justice sexually harassed six young women who were former staff members of the court.²²

It was a rare moment on 22 June 2020 that would forever reverberate in Australia as it finally lifted the cone of silence about sexual harassment in the legal profession. It was our own peculiar #MeToo moment. A moment of absolute horror and hope. A rare moment where a decision maker spoke publicly about the conduct. Chief Justice Kiefel said that the six women were believed and she thanked them for coming forward and that their insights and suggestions for change were valued.²³ As someone who practices in employment law, based on my experience, it was extraordinary that the investigation report was not kept secret but provided to the complainants.

Pauline Wright, Law Council President, issued a statement on the same day saying: "The attrition rate of women lawyers is

7 AJJA, Judicial gender statistics, at <https://ajja.org.au/research/judicial-gender-statistics/>, accessed 28/9/2020.

8 Judicial Commission of NSW, *Equality before the Law Bench Book*, Women, at 7.2 and 7.4.

9 At www.lawcouncil.asn.au/justice-project/final-report, accessed 29/9/2020.

10 *ibid* at 7.2.

11 *Equality before the Law Bench Book*, above n 8, at 7.6.2.1.

12 www.communityjusticecoalition.org/about-us/who-is-cjc, accessed 28/9/2020.

13 For information see www.crcnsw.org.au/services/miranda-project/about/, accessed 28/9/2020.

14 *Equality before the Law Bench Book*, above n 8 at 7.6.2.2.

15 *ibid* at 7.5.3.

16 The *Domestic Abuse (Scotland) Act* 2018, s 1, defines domestic violence as a "course of behaviour". Two private members' Bills have been introduced into NSW Parliament this year: the Crimes (Domestic and Personal Violence) Amendment (Coercive Control—Preethi's Law) Bill 2020 and the Crimes (Domestic and Personal Violence) Amendment (Coercive and Controlling Behaviour) Bill 2020.

17 *Domestic Abuse (Scotland) Act*, commenced 1 April 2019.

18 *Equality before the Law Bench Book*, above n 8 at 7.3.1.

19 At <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>, accessed 28/9/2020.

20 Victorian Bar, Quality of working life survey, *Final report and analysis*, October 2018, reported that 59% of respondents had experienced judicial bullying, at p 18.

21 Victorian Bar, *Judicial conduct policy*, at www.vicbar.com.au/public/about/governance/judicial-conduct-policy, accessed 28/9/2020.

22 The High Court commissioned Dr Vivienne Thom AM to investigate the allegations.

23 Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia, at <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>, accessed 28/9/2020.

high, and experiences of sexual harassment are a key reason why women leave the law. This is damaging and costly — for individuals, for firms, and for the current and future standing of the legal profession.”²⁴

The Chief Justice of NSW, the Honourable Tom Bathurst AC, acted swiftly to introduce a new policy to deal with sexual harassment.²⁵ All courts in NSW must accompany policies with information and practical opportunities to discuss and model respectful workplace culture. There is a responsibility on all of us, but particularly those in leadership roles, to call out inappropriate conduct when it is observed or reported, whether this occurs on a formal or an informal basis.

It is now October and the Commonwealth has not taken any steps to avert this abhorrent conduct occurring in the future. This is despite the Australian Human Rights Commission’s 2020 *Respect@Work: Sexual Harassment National Inquiry Report*²⁶ urging significant law reform²⁷ along with demands from the Law Council for amendments to the *Sex Discrimination Act 1985* (Cth) to extend the laws to judges, other statutory office holders and barristers²⁸ and a renewed long-standing call for a federal judicial commission to receive and investigate complaints about judges.

I commend the Judicial Commission on publishing an updated chapter on “Women” — it is timely and important.

24 P Wright, Law Council President, “Statement regarding sexual harassment in the legal profession”, 27 June 2020, at <https://www.lawcouncil.asn.au/media/media-releases/statement-regarding-sexual-harassment-in-the-legal-profession>, accessed 27/9/2020.

25 “Supreme Court Policy on inappropriate workplace conduct” at www.supremecourt.justice.nsw.gov.au/Documents/Home%20Page/Announcements/2020_07_02_Workpace%20Conduct%20Policy_v4.0_FINAL.pdf, accessed 27/9/2020.

26 At <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>, accessed 28/9/2020.

27 See for example recommendations 16 and 17.

28 P Wright, “Statement regarding sexual harassment in the legal profession”, above n 24.