

## Women at the bar: Aspirations and Inspirations

The Hon Justice Melissa Perry<sup>1</sup> of the Federal Court of Australia delivered the following address at a meeting of the Women Barristers Forum

### Introduction

I spoke recently with a highly talented female solicitor who had attended a talk on women at the bar. While she had already committed to her move to the bar, she recalled that she had left the talk feeling dispirited and concerned. Indeed, she said that had she known how tough it was for women at the bar, she might well have made a decision not to move.

These comments have troubled me deeply. Have we become too focused on the negatives, on the inequalities in briefing practices, on how far women still have to go?

Certainly, the statistics and reports bear out the need for improvement and vigilance. Speaking for myself, I remember some years ago being shocked into action when Australian Women Lawyers published the findings of the Gender Appearance Survey in 2006 (AWL Survey).<sup>2</sup> This and the survey undertaken by the Law Council of Australia (Law Council) in 2009<sup>3</sup> showed the existence of systemic discrimination against women at the bar. Absent the birds-eye view that such surveys provide, discrimination is generally unseen. It lies primarily in the briefs that you don't receive and therefore of which you are unaware.

The National Attrition and Re-engagement Study (NARS) Report published by the Law Council on 14 March this year points to continuing challenges.<sup>4</sup> The Report found that nationally the number of female barristers in Australia (7% of the legal profession) is still less than half their male counterparts (15%) and expressed particular concern as to the wide gap between the number of women entering the profession and those who remain in it. Such trends have serious implications for the inclusion of women at the senior levels of the bar and for judicial appointment. The weight that can be given to the findings and recommendations made by the report is enhanced by the fact that it was based not only on statistical data but also upon detailed interviews from both men and women in legal practice, as well as some who had left practice.

But while we can still point to deficiencies, I think that it is imperative that they do not come to define us nor detract from the enthusiasm, the passion and the energy that is needed if we are to continue as 'agents of change'.<sup>5</sup> If there is one message that I would urge you to take from my paper today, it is that your attitude can itself be a powerful catalyst for change in the professional environment in which you work. In other words, to change attitudes and perceptions, we need to start with ourselves. It is for this reason that I have chosen the theme of my paper as 'aspirations and inspirations'. How far have we

Justice Dame Roma Mitchell, barrister and Supreme Court judge, first female QC and founding chairperson of the Australian Human Rights Commission. She served as governor of South Australia (1991-1996). Photo by News Ltd / Newspix.

come? Who are the women who have inspired us and brought us to this point? What aspirations should we have, and how can we work positively to achieve them?

### Inspirations

Dame Roma Mitchell<sup>6</sup> takes the list of firsts among women perhaps to unrivalled heights as the title of her official biography, Dame Roma the First, testifies.<sup>7</sup> She was born in 1913 as the eldest daughter of a war widow and her life spanned much of the last century. Such change as she must have seen is difficult today to appreciate. It is perhaps even more difficult to imagine as I look around this room of talented and committed female barristers from senior Silks to those whose career at the bar has just begun.

Dame Roma was one of the first three women to enter legal practice in South Australia after the passage of the Female Law Practitioners Act 1911 (SA).<sup>8</sup> Imagine how isolated and how proud she must have felt when in 1938 she took her seat at the bar table in the High Court as the first female barrister to do so,<sup>9</sup> and subsequently in the 1960's when she became the first female advocate whose voice was heard in that hallowed repository of legal wisdom. Shortly thereafter in 1962 she became the first woman to be appointed Queens Counsel in Australia, and in 1965 the first to be appointed to judicial office on her appointment to the Supreme Court of South Australia. From there, she became the first female university chancellor and state governor. 'The career of Dame Roma Mitchell

remains', as Justice Kirby once said, 'a beacon of hope and encouragement.'<sup>10</sup> Such was the respect and love in which she was held by the people of a state that in March 2000 'hundreds of people who, unable to squeeze into either the 1400 seat St Francis Xavier's Cathedral in central Adelaide or the marquee erected nearby, stood outside in the blistering sun listening to the funeral service of Dame Roma Mitchell...'.<sup>11</sup>

I felt that love and that respect when she spoke at a Law Society Dinner in South Australia many years ago and it made an impression on me that I have never forgotten.

The Hon Catherine Branson QC is among those who have been inspired by Dame Roma. She has spoken of the personal support that she received in the early part of her career from Dame Roma who was then in her 80's, when reflecting upon aspects of the transformation of women's legal rights in her lifetime.<sup>12</sup> Catherine Branson, in turn, served as the first female Crown Solicitor in Australia and was the second woman to head a government department, before joining the Federal Court of Australia and ultimately serving as President of the Australian Human Rights Commission.

I have no doubt that when Dame Roma and Catherine Branson embarked on their careers at the bar, they did so with all of the same doubts as beset each of us and unquestionably with greater obstacles. We must remember when we celebrate the achievements of women such as these, that they did not begin where they finished and from this, draw courage for ourselves. They too walked paths that required them to overcome professional challenges and obstacles, albeit that their paths were steeper. The optimism that I feel and have felt throughout my 21 years at the bar is borne of such role models and mentors and of my own experience.<sup>13</sup>

It is true that when I first joined the bar in 1992, the words of encouragement that I received from a male barrister as I signed the customarily large cheque for my room, were 'you know there are a lot of solicitors who won't brief you because you're a woman.' But Catherine Branson, who was then a member of my chambers in Adelaide and has encouraged me throughout my career, illustrated that it could be done - that these faceless, nameless solicitors who would not brief me need not have the final word.

### Changing perceptions

Disappointingly, in its survey in 2009, the Law Council identified a number of perceptions that had persisted and were thought to impact on the discrepancy between the number of women joining, remaining and advancing at the bar and those joining the legal profession. These include that 'advocacy work

is more suited to the masculine personality, and therefore male barristers', and that 'female barristers are not suited to lucrative commercial work at the bar performed predominantly by male barristers'.<sup>14</sup> Consistently with this, the perception is sometimes evident among clients and solicitors that it is better to have an aggressive advocate to stand up to the other side. Such perceptions may contribute to statistics that show that women are accepted as good 'worker bees' but less likely to be given the role as lead counsel.

In my experience, the assumption that women can't be aggressive is simply not the case. In point of fact, one of the most aggressive advocates that I have encountered, and dare I say, unpleasant, was a woman. More importantly, I can categorically say from my experience on the Bench, limited though it may be, and my observations over many years at the bar, that aggression is very rarely, if ever, in the client's best interests. Barristers are engaged in the task of persuasion, and judges, as intelligent and diligent decision-makers, want thorough preparation, strong analytical abilities, a deep understanding of legal principle and sound judgment on the part of the advocates who appear before them. It is the application of these skills which are the more useful to us.

These are the tools of persuasion and I can assure you that they are not unequally endowed upon any particular gender.

Equally troubling are perceptions that women are not sufficiently forceful or cannot be relied upon to stand their ground where that is required. As one respondent to a study conducted on behalf of the Victorian Bar Council is recorded as stating, '[y]ou want to be able to refer the client to a barrister who is strong enough to handle the client's problem and the difficulty, or the perceived difficulty with female barristers, is that they may not have the intestinal fortitude to handle it'.<sup>15</sup> I can equally categorically say that that is not my experience on the bench or at the bar. The courage to stand up for your client is an essential trait for an advocate: it is not a trait that is gender specific.

And so I believe that by developing and utilising the skills of persuasion to the best of our ability, we as women through our actions continue to break down these perceptions and do so more powerfully than we can through words alone. We are the most effective advocates for ourselves when we are effective advocates. And I have on a number of occasions recommended to government and other litigants who are frequently in the courts when they complain that the pool of advocates who they brief is small, to increase the pool by watching for good advocates on the other side.

The kinds of perceptions to which I have referred were particularly prevalent when I first joined the bar. At that time, the assumption among many was that, as a woman, I would practice in family law or wills and trusts. But, while I have every respect for those who practice in those difficult areas, I wanted the challenge of breaking into areas where women were not represented, such as constitutional law. I wanted to show that there was nothing about any particular area of the law that meant that women were somehow ‘not up to it’. And those who know me well, know that a challenge is like a red flag to a bull!

When I first began appearing in the High Court in 1995, women were still rarely seated at the bar table and even more rarely given a speaking part. It was somewhat sobering when I looked over statistics as to the number of female barristers appearing before the High Court between 1994 and 2011 to realise that in a number of those years I was the only female barrister who had been lead counsel for one of the parties or had a speaking part.<sup>14</sup>

Those times have changed, although appearances by women with a speaking part are still infrequent in that court and less frequent than one would wish in intermediate appellate courts. Those who pass over female counsel in these higher echelons of judicial power miss opportunities to brief some outstanding advocates, artificially limiting their field of choice. They also perhaps overlook how anomalous it must seem for a Bench, which may now be comprised wholly or by a majority of women, to view a Bar Table populated exclusively by male counsel.

I have also found members of the High Court and intermediate appellate courts to be encouraging of female advocates. I will never forget how much it meant to me when, even in the early days of appearing as a junior, Justice Gaudron would always acknowledge me as she took her seat on the bench with a nod and encouraging smile. And Justice McHugh, whenever our paths crossed at a professional function was sure to be encouraging and to remark loudly to those around us on the frequency of my appearances in his jurisdiction. One should never underestimate how much of a difference such small acts of kindness and encouragement can make.

In this regard, it is also important to bear in mind that similar perceptions have existed in varying degrees in the corporate world. The move to increase the proportion of women in high executive or governance positions has been gaining pace significantly, and the work of bodies such as Women on Boards has been instrumental and transformative. There can also be a real value in joining such bodies as well as legal professional bodies, in developing your career at the bar as a woman. They

provide opportunities to meet senior solicitors who are members and women in the corporate sector who may be supportive of briefing female barristers but lack opportunities to meet you and see just how good you are. Some of these bodies also provide training in general leadership and other skills which can be of value to women at the bar both as leaders and future leaders in the profession and in the general community.<sup>15</sup>

### Mentoring and other qualities

I have already spoken to some extent of the value of mentoring. While the NARS report found that close to one in three women expressed dissatisfaction with accessibility to mentors to support career development, it also found that some female barristers had valued the informal mentoring they had received from more senior female barristers. Lack of mentoring may feed into other findings by the report, including that close to one in three women lawyers were dissatisfied with their career trajectory compared to expectations, in contrast to less than one in five men.<sup>16</sup>

It may be that there is a value in a formal pledge by new Silks to actively advancing equality and diversity at the bar, such as now exists under the seven point plan to support the retention of women adopted by the Victorian Bar Council.<sup>17</sup> Certainly, I cannot imagine that my career would have been the same, had I not been blessed with generous and encouraging mentors, both male and female. And, while it is wonderful and necessary to have women as role models to inspire us and to teach us that there are no glass ceilings that cannot be broken, equally we must not forget that many men have been tremendously supportive of women at the bar and continue to be. I was fortunate to have the support of a number of leading male silks who saw the advocate in me and not my gender, aside from the pride that they generously felt in contributing to the development of my career as a woman at the bar.

Conversely, when we become leaders, it is incumbent upon us to assume the role ourselves as mentors. As I said at my swearing in, as a leader at the bar, I had the absolute pleasure of working with many exceptionally talented and committed juniors and solicitors, and benefiting from their intellectual input and enthusiasm. This was one of the great joys of my career at the bar and is one of the aspects that I most miss. But this doesn't mean that you require silk in order to lead. Each of us can and must play our own part by offering the knowledge and experience that we have and sharing it with those around us. Just as it is incumbent upon the silks to provide mentorship to juniors, it is incumbent upon juniors to make room and time for their readers, and readers for inquisitive law students

or aspiring associates. Closed shops and archaic cultures only persist if we allow them to do so.

We must also not forget that life at the bar can be isolating. Even small measures can make us more accessible as leaders and facilitate informal mentoring. Nothing is more intimidating than a corridor of closed doors behind which lurk that mysterious and revered species known as 'SC's'. This led me to adopt a policy that the door to my chambers was always open save when I was on the phone or in conference. If things were noisy, I would rather put in earplugs than isolate myself from chambers with all that a closed door says!

Finally, I would say that resilience is essential. Learn from your mistakes or how you could have done things better, but don't dwell on them. Remember that today's news is tomorrow's fish and chip wrapping, and the odds are that you're the only one who wasn't happy with your performance. Be bold and tenacious. Remember that part of your skill-set is to learn and to get across new materials and concepts, so don't be afraid to stretch yourself into new areas when the opportunities arise. And don't be apologetic about the need to attend to family and other commitments. If you are good enough, people will be happy (and fortunate) to get you on your terms.

### Aspirations

We all stand, as has oft been said, upon the shoulders of others. And so when we look at the statistics and the reports, it is important to celebrate how far we have come, as well as understanding what still needs to be done. When I think about Dame Roma Mitchell and all that she accomplished in her lifetime, I am reminded that the world is one of infinite opportunities. But we will not find those opportunities unless we look for them in the first place and sincerely believe that they are open to us. For only then will we truly dare to turn our aspirations into action.

### Endnotes

1. LL.B (Hons)(Adel), LL.M, PhD (Cantab). The author expresses her thanks to Alexander Smith for his generous assistance with researching and finalising this presentation.
2. Australian Women Lawyers, Gender Appearance Survey Information: August 2006 (2006).
3. Law Council of Australia, *Beyond the Statistical Gap: 2009 Court Appearance Survey* (Law Council Survey 2009) (Law Council Survey 2009): While different methodologies were used and the findings are not directly comparable, the purpose of both studies was to examine the extent to which female advocates appeared in Australian courts: *ibid*, 9. There were three key findings in the Law Council Survey 2009:
  - Male and female barristers appeared in the survey population in exactly the same gender proportion as they existed in the bar population (81 % male; 19 % female);
  - When appearing in matters resulting from briefings by private law firms, appearances by male barristers were substantially higher and those by female barristers were lower than would be expected based on the proportions that they exist in the bar population (86 % male; 14 % female); and
  - Average appearance time for male barristers was significantly longer than that for female barristers (3.8 hours male; 2.8 hours female).
4. Law Council of Australia, *National Attrition and Re-Engagement Study (NARS) Report* (2014).
5. 'Women as Agents of Change' was adopted as the 2011 Commonwealth Day Theme. See further, the Hon Catherine Branson QC, 'Women as Agents of Change: Balancing the Scales' (Speech delivered at the Commonwealth Law Ministers' Meeting, NSW Government House, Sydney, 13 July 2011).
6. AC, DBE, CVO, QC.
7. Susan Magarey and Kerrie Round, *Roma the First: A biography of Dame Roma Mitchell* (Wakefield Press, 2007). See, also, Susan Magarey (ed), Dame Roma: Glimpses of a Glorious Life (Axiom Australia, 2002).
8. The Hon Catherine Branson QC, 'Promoting Women in Leadership' (Speech delivered at the Launch of the UN Women Report Progress of the World's Women: In Pursuit of Justice, Sydney, 7 July 2011).
9. *Maeder v Busch* (1938) 59 CLR 684.
10. The Hon Justice Michael Kirby AC CMG, 'Women Lawyers - Making a Difference' (Speech delivered at the Women Lawyers' Association of NSW, Sydney, 18 June 1997).
11. Tamson Pietsch, Book Review: Susan Magarey and Kerrie Round, *Roma the First: A biography of Dame Roma Mitchell* (Wakefield Press, 2007): available at <http://www.nla.gov.au/openpublish/index.php/ras/article/viewFile/822/1069> (viewed 4 April 2014).
12. The Hon Catherine Branson QC, above n 8.
13. The Hon Catherine Branson QC made a similar observation about the optimism that she felt: see above n 8.
14. Law Council of Australia, above n 3, 17.
15. Law Council of Australia, above n 3, 21.
16. Based on the statistics collated in Vinod Mishra and Russell Smyth, 'Barrister Gender and Litigant Success on the High Court of Australia' (Discussion Paper 15/13, Monash University, Department of Economics, 2013) 40 [Table 2]; see, eg, *Momcilovic v The Queen* (2011) 245 CLR 1; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24; *Commonwealth v Yarmirr* (2001) 208 CLR 1.
17. In line with this, one of the recommendations by the NARS Report is to facilitate access to high quality leadership programmes.
18. Law Council of Australia, above n 4, 5.
19. On 6 November 2013 Victorian Bar Council adopted a seven point plan titled 'The Quantum Leap' which is designed to support the retention of women at the bar and address the reasons why women leave the bar. Other measures adopted by the plan include a new mentoring programme and unconscious bias awareness training. Information about the plan is available at: <http://www.vicbar.com.au/about-us/gender-equality-at-the-bar> (viewed 4 April 2014).