

**International Women's Day
Kuala Lumpur Thursday 8 March 2018**

***"Women in the Australian Legal Profession: progress and a
public voice"***

**The Hon Susan Kiefel AC
Chief Justice of Australia**

My thanks to the High Commissioner and to the former High Commissioner for the opportunity to speak to you on this important day.

The voices of women are often heard in public discourse today. It is easy to forget that this was not always so, as early writings remind us. Professor Mary Beard, who is a Professor of Classics at the University of Cambridge, in her recent manifesto *Women & Power* reminds us of what Homer had to say about social norms in the *Odyssey*, which was written almost 3,000 years ago. The King, Odysseus, is on his epic voyage leaving his Queen, Penelope, at home with their son Telemachus. One day she descends from her private quarters into the great hall of the palace where people are gathered. She is unhappy with the song which is being sung by a performer and asks him to choose another. Telemachus intervenes. "Mother," he says, "go back up into your quarters ... speech will be the business of men, all men, and of me most of all". The word he uses for "speech" apparently connotes authoritative public speech.

The point Professor Beard makes is not that Telemachus was ill-mannered or that Penelope should have asserted herself. The story demonstrates that, at the point where written evidence of Western culture starts, women's voices are not being heard in the public sphere. And, she suggests, there is still a certain deafness in contemporary society.

From the perspective of women this did not bode well for the future. Indeed with some exceptions, such as queens and saints, it would be a very long time before women would be accepted as having a public voice at all.

Like many modern women, I have been more fortunate than Penelope. Whilst a barrister I spoke for a living. I speak as a judge in court and through written judgments and I speak publicly in that capacity. The advantage of speaking as a barrister or as a judge is that you have a captive audience. People have to listen to what you say and they have to take it seriously, or at least give the appearance of doing so.

Our Foreign Minister, the Honourable Julie Bishop, spoke here last year at a dinner to commemorate International Women's Day. She explained that when she was the only woman in Cabinet she would often make a contribution to the debate, but it went un-remarked by her male colleagues. It sometimes happened that one of her male colleagues would subsequently make the same point. It would be immediately acknowledged by the other men as important. So, when more women came to be appointed to Cabinet they all agreed to make a great fuss if one of them made a comment about just about anything.

This is reminiscent of a cartoon, published by Punch Magazine in England about 30 years ago, to which Professor Beard alludes. It depicts a committee or boardroom meeting at which there is only one woman present. She has just spoken. The Chairman says: "That's an excellent suggestion, Miss Triggs. Perhaps one of the men here would like to make it".

I was admitted as a barrister well over 30 years ago. The Bar in Brisbane was not large but even so the number of women at the Bar was small. There were three of us. Nevertheless this was the first time that

there had been so many women at the Queensland Bar. And it had taken quite a long time for this to occur.

The first statute which expressly enabled women in Australia to practise law was passed in 1903. I say “expressly” because arguably the state legal practitioners Acts which preceded it already allowed that to occur. Those statutes provided that any “person” with the appropriate qualifications could practise and a “person” was defined by interpretation statutes to include women. The courts did not see the matter in this way and so legislation was necessary.

It is unlikely that the Parliaments would have been provoked to pass that legislation if challenges to the prevailing view had not been made by one or more woman. There is reason to believe that, in turn, they had been encouraged to do so because women had won the right to vote a few years earlier. And in that process they had found their voice.

It would not be until the 1970s that more than a few individual women would practise at the Bars in Australia. There are a number of reasons why it took so long. Included amongst them are stereotypes about professional persons and perceptions of the role of women. This, sadly, has not entirely abated. An article in an Australian newspaper recently profiled a young woman heart and lung surgeon¹. She said that when she answered enquiries from people about her work almost invariably they would comment that she was too young, too attractive or too something else. What they really meant, of course, is that she is not a man. I think it may also reasonably be

¹ Fenella Souter, “Heart surgeon Nikki Stamp: ‘broken-heart syndrome’ is a thing”, *Sydney Morning Herald*, 31 January 2018.

inferred that, generally speaking, in earlier times the legal profession may not have been welcoming.

Rationally there could be no reason in the past for the Bar to exclude someone who was qualified to be one of them. Historically they have always been a close knit group as true professions are. My husband, who lectured in social anthropology, calls them tribal. In medieval times they lived together and received instruction and guidance from the leaders of the Bar. They subjected themselves to rules of conduct and ethics and enforced them. This continues today. Even now, when the Bars in Australia are larger, barristers know, or know of, each other and they mix socially as a group on occasions. In short, the Bar is collegiate.

It was my good fortune that when I came to the Queensland Bar in 1975 the idea of excluding women was largely a thing of the past. The Bar could not have been more accepting and supportive of me. Most of the work I received in my early days at the Bar was as a result of recommendations from barristers. I was given a chance to prove myself and that was all I asked for.

Since then women have taken silk, which is to say become Senior Counsel and leaders of the Bar. They have become judges and Chief Justices. Consistently with the theme of this year's International Women's Day, "Press for Progress", some consideration should be given to what progress has been made at the Bar and in the judiciary.

In 1982 Judge Jane Mathews, then of the District Court of New South Wales, conducted a survey of women in the law in Australia². It provides a useful comparison with the present day position. Of the Bars she was able to survey, Judge Mathews noted that female barristers then comprised between 4% and 6% of the Bar³. Today women make up, on average, around 25% of the larger Bars of the Australian states⁴. This increase should be unsurprising since women now account for around 60% of law graduates. So far as concerns women judges, in 1982 there were ten women judges Australia-wide⁵; today there are over 140⁶. They represent about 29% of the judiciary⁷. There are three female Chief Justices of the States and Territories in Australia as well as the Chief Justice of the High Court.

I understand that there has been a significant increase in the appointment of women to the judiciary in Malaysia including to the highest court, the Federal Court. In the Court of Appeal women account for more

² Judge Jane H Mathews, "The Changing Profile of Women in the Law" (1982) 56 *Australian Law Journal* 634.

³ Judge Jane H Mathews, "The Changing Profile of Women in the Law" (1982) 56 *Australian Law Journal* 634 at 640.

⁴ New South Wales Bar Association, "Statistics", available at: <https://www.nswbar.asn.au/the-bar-association/statistics>; Victorian Bar, "Membership Statistics", available at: <https://www.vicbar.com.au/public/about/about-victorian-bar/membership-statistics>; Bar Association of Queensland, *113th Annual Report 2016-2017*, available at: <https://www.qldbar.asn.au/baq/v1/viewDocument?documentId=436>.

⁵ Judge Jane H Mathews, "The Changing Profile of Women in the Law" (1982) 56 *Australian Law Journal* 634 at 640.

⁶ Australian Institute of Judicial Administration, "AIJA Judicial Gender Statistics – Judges and Magistrates (% of Women) March 2017", available at: <https://aija.org.au/wp-content/uploads/2017/03/JudgesMagistrates.pdf>.

⁷ Australian Institute of Judicial Administration, "AIJA Judicial Gender Statistics – Judges and Magistrates (% of Women) March 2017", available at: <https://aija.org.au/wp-content/uploads/2017/03/JudgesMagistrates.pdf>.

than half of the members of the Court. Many of these appointments have been made in the past two decades.

Australia and Malaysia may share in common that in this period those whose responsibility it is to appoint judges came to recognise that women lawyers have much to contribute to the judiciary. Speaking on the occasion of the appointment of a woman to the Federal Court, simultaneously with the appointment of three more women to the Court of Appeal, the Chief Justice of the Federal Court of Malaysia made the point that their elevation was based upon merit, not to fulfil some quota⁸. The President of the Court of Appeal foresaw that “one day, the judiciary’s top four positions will be held by women”⁹.

It must be acknowledged that there was a downside to the initiative taken by governments in Australia, in the last 20 years or so, to increase the number of women judges in the superior courts. It is usual to make appointments to those courts from the senior ranks of the Bar. And so it came about that almost as soon as a woman achieved this status she was appointed as a judge and most felt duty bound to take the appointment. This denied them the opportunity to be leaders of the Bar and it denied many junior female barristers women mentors. That situation is gradually being addressed by the increasing numbers of female barristers now taking silk who are able to resist a premature call to the Bench.

⁸ “Malaysian judiciary makes history with elevation of 4 women judges”, *The Malaysian Insight*, 25 September 2017, available at: <https://www.themalaysianinsight.com/s/16029/>.

⁹ “Women will lead judiciary”, *The Star*, 29 September 2017, available at: <https://www.thestar.com.my/news/nation/2017/09/29/women-will-lead-judiciary-one-day-top-four-positions-will-be-held-by-them-says-zulkefli/>.

Statistically, it would seem that the number of women being attracted to the Bar has stabilised or only increased slightly over the past decade¹⁰. Nevertheless growth, percentage-wise, measured by reference to past decades, is significant and it is notable that the gap between new male and female barristers is closing.

My own assessment is that there has been a generational change in the attitude of women to a career at the Bar. It is not based on data, but rather on my experience with female associates who have worked for me. Associates are law graduates with excellent grades whose principal task is to undertake legal research for a judge. They may be expected to have stellar careers in the law. I have had 35 since I was first appointed a judge in 1993. Most of them have been young women. Yet despite their evident ability and a real interest in a career at the Bar not one female associate took that step for 13 years.

Many of them became partners in law firms or embarked upon careers in the academy. These achievements are not of course to be diminished. But I was curious about the reasons why some did not pursue the profession in which they were clearly interested. Rather than assume the factors at play in their decision-making, I surveyed them. Two factors were common in the answers I received. The first is unsurprising – difficulties in juggling family life with a career as a sole practitioner. Law firms and universities can be more flexible. The second was what I have wondered about: they lacked confidence. The point to be made is that in the same period young men who went to the Bar obviously did not.

¹⁰ See e.g. Victorian Bar, *Membership Statistics* (31 December 2017) at 4 (Figure 2-3). See also New South Wales Bar Association, *Annual Report 2016-17* (2017) at 12 and New South Wales Bar Association, *Annual Report 2007-08* (2008) at 16.

I think that is changing. In more recent years, the majority of my female associates are going to the Bar. I am not suggesting that this new generation of young women lawyers have achieved the same level of confidence that some of their male peers have. My point is that they are much more confident. They consider themselves to have the right to pursue the career of their choice. Arrangements will simply have to be made to accommodate it.

We have every reason today to be pleased with the progress that has been made in the legal profession, although I appreciate that some would say more should have been achieved to this point. We may be optimistic about the prospect that true equality of opportunity may be achieved in the future. We may believe that will occur because young women will demand it.

It must however be acknowledged that what is happening at the Bar and within the legal profession in Australia reflects the experience of only a very few. What has been achieved within the profession, although important as an example of what might be achieved, is not reflective of the progress being made by women more generally in our society and in the world.

We must not forget that there are many women who would aspire to an education or a career but are unable to pursue either course. We must remain aware that in many parts of the world women remain subject to the power of others to veto the choices which they might wish to make or to exclude them. We must not pretend that this does not occur in Australia or that all women have a truly equal opportunity to fulfil their potential.

Our history and that of many countries suggest that progress for women can be slow. It will be slow unless and until women attain a public

voice. When that voice is found real progress can be made. Once found it can be used for the advancement of others.