



The Law Society of Western Australia

Luncheon to Celebrate International Women's Day

Keynote address

by

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Introduction

I am greatly honoured to have been invited to address this luncheon organised by the Law Society of Western Australia in order to celebrate International Women's Day, and in particular to promote the 2016 International Women's Day campaign theme of "Pledge for Parity". I will return to that theme a little later in these remarks.

Before going any further, however, I wish to acknowledge the traditional owners of the lands on which we meet, the Whadjuk people who form part of the great Noongar clan of south-western Australia and pay my respects to their Elders past and present and acknowledge their continuing stewardship of these lands.

Amongst the reasons I am greatly honoured to have been given the opportunity to address this gathering is the fact that I am singularly ill-qualified to address these important issues. Not only am I a man, but I also have the dubious distinction of heading a Court which has the lowest proportion of women members of any court at any level in any jurisdiction in the country. At present, only three out of the 21 judges on the Supreme Court of Western Australia are women - a percentage of 14%, which is exactly half the national average over all jurisdictions of 28%, and one-third of the percentage of women comprising the High Court, which is 43%. Worryingly, the percentage of women on the benches of the Supreme and District Courts of Western Australia has decreased over the last 10 years, rather than increased.

The Problem is Not New

This imbalance cannot be attributed to the recent arrival of women into the legal profession. For more than 40 years now, women have comprised the majority of graduates from Australian and Western Australian law schools, and in the almost 10 years that I have been conducting admission ceremonies at the Supreme Court of Western Australia, generally comprise about 60% of those admitted to legal practice. The attrition rate in the legal profession is surprisingly high for both genders, but women are significantly over-represented in those who leave the profession after admission.

Imbalance in the Senior Profession

The imbalance in the representation of women at the senior levels of the judiciary reflects an imbalance at the senior levels of the profession, where only 16% of senior counsel appointed in Western Australia over the past 15 years have been women,¹ and the 2014 Women Lawyers of Western Australia review of former Chief Justice David Malcolm's Taskforce on Gender Bias reported that only about 19% of the partners in top commercial law firms in Western Australia are women.² As judicial appointees are generally drawn from the senior ranks of the profession, there is obviously a strong connection between the high attrition rates for women in the profession, the structural barriers that appear to be preventing women from moving to

¹ Supreme Court of Western Australia, Media Statements 2001-2015 of Senior Counsel appointments in Western Australia.

² Women Lawyers of Western Australia (Inc), *2014 20th Anniversary Review of the 1994 Chief Justice's Gender Bias Taskforce Report* (September 2014)149.

the senior ranks of the profession, and the imbalance in the judiciary to which I have referred.

I believe that the community wants and deserves a legal profession and judiciary which better reflects the gender balance of the community which the profession and the courts serve. If we are to achieve that objective, we must act, as well as talk.

Pledge for Parity

The Pledge for Parity campaign is an excellent way of translating noble sentiments into action. It provides participants in the campaign with the opportunity to pledge to actually do the things that will assist to overcome the barriers which appear all too intractable in the legal profession, including specific actions grouped by reference to the following important objectives:

- Helping women and girls achieve their ambitions
- Challenging conscious and unconscious bias
- Calling for gender-balanced leadership
- Valuing women and men's contributions equally
- Creating inclusive flexible cultures

The Gender Pay Gap

Although most Australian jurisdictions have had laws which prohibit discrimination on the ground of gender for decades now, those laws have not succeeded in overcoming the structural disadvantages which women experience in the workforce. A simple objective measure of

those disadvantages is the pay gap. Despite our efforts in this area, over the last 20 years the pay gap has worsened, increasing from 16.5% to 17.3% nationally.³ In Western Australia the gap is even worse, at 24.9%.⁴ Within the Australian legal profession, there is perhaps a positive sign with the gap in the industry category which include the legal profession closing during the last year, but nonetheless standing at 22.6%.

In that context, the recent steps taken by the Law Society of New South Wales to encourage employers to pledge to reduce that gap, starting with a pledge to deliver equal pay to male and female law graduates within 12 months, are most welcome.⁵

Women and the Law

Family and Domestic Violence

Moving from women in the law to women and the law, recent years have seen a significant community focus upon the scourge of family and domestic violence, stimulated by the great work done by last year's Australian of the Year, Rosie Batty. This increased focus is most welcome and long overdue. Judges and magistrates have been immersed in the consequences of family and domestic violence for many years, and are well aware of its devastating effects, even if some at times some would question their response. Happily, however,

³ Workplace Gender Equality Agency, *Gender pay gap statistics* (August 2013) 1; Workplace Gender Equality Agency, *Gender pay gap statistics* (March 2016) 2.

⁴ Workplace Gender Equality Agency, *Gender pay gap statistics* (March 2016) 2. Workplace Gender Equality Agency, *Gender pay gap statistics* (March 2016) 5.

⁵ Nicola Bervic, 'Same pay central to draft charter on gender equity', *The Australian* (26 February 2016).

better awareness of the context of violence and the urgency of responding appropriately and effectively is growing not only within the instruments of government but more generally.

The Influence of Legal Culture

There is a legitimate debate in the literature on the extent to which family and domestic violence is linked to gender inequality. I do not have time today to review the competing points of view. As a lawyer, however, it seems to me to be indisputable that the legal discrimination to which women were subjected over centuries of the common law contributed to a culture in which violence towards women became normalised. In the 18th century, Judge Francis Buller famously was attributed with observing that a man could chastise his wife physically as long as the stick was no thicker than his thumb.⁶ It was not until the 1970s and 80s that all Australian States made rape in marriage a crime.⁷ Even today, the rights recognised by law, which men often enjoy to the exclusion of their female partners, such as the receipt of income from their employment, their rights as tenant and homeowner etc, create a significant disincentive to women reporting the physical and sexual abuse to which they may be subject. In my view, any policy developments in this important area must focus strongly upon the barriers to reporting which inhibit so many women

⁶ Although the observation was never directly reported, James Gillray satirised Judge Buller in a cartoon entitled 'Judge Thumb' in 1782, and 'His memorable opinion, of the right of the husband over the wife, to exercise the *thumb-flick*' was published in 1790 (Leman Thomas Rede & Edward Wynne, *Strictures on the Lives and Characters of the Most Eminent Lawyers of the Present Day...* (1790) 109.)

⁷ Wendy Larcombe & Mary Heath, 'Case Note: Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' [2012] *Sydney Law Review* 34:785, 786.

from seeking the assistance of the justice system, and the various social agencies which can support women and children subjected to violence.

Cultural change is vital in this area. The report published by the federal government last November on the subject of the attitude of young people towards violence against women, was extremely depressing. That report concluded that by allowing young people to tolerate gender inequality and develop attitudes of disrespect for women is linked to violence towards women, we are raising our children to perpetuate the problem.⁸ This is where husbands and fathers, like me, have such a significant role to play.

Migrant, Refugee and Indigenous Women

I would like to complete these remarks with some observations about the special needs of two minority groups - migrant and refugee women, and Indigenous women. There is good reason to think that women in these groupings are at greater risk of disadvantage than women generally. Using funding generously provided by the federal government, the Judicial Council on Cultural Diversity, which I chair, has embarked upon a project to assess the special needs of migrant and refugee women, and Indigenous women, when they intercept with Australia's justice system. The first major portion of the project has involved nationwide consultations with women and representatives of organisations representing women in each of these groups. I will be

⁸ Particularly non-physical forms of violence – see TNS Australia, *Reducing violence against women and their children: research informing the development of a national campaign* (2015) 1.

launching our reports on the outcome of those consultations in Melbourne on 17 March.

The detailed outcome of those consultations will, of course, be in the reports, which I will not pre-empt prior to their formal release. However, it is sufficient to say that our consultations have left us in no doubt that there is much that all those involved in Australia's justice system, including police, the legal profession, corrective services and courts can do to improve access to justice for women in these groups, who are at significant risk of disadvantage in the operation of the justice system.

I commenced these remarks with an acknowledgement of country, and it is appropriate to finish on the special interests of Indigenous women. Many studies have shown that the fastest growing group of prisoners in the Australian justice system is Indigenous women. To take just two of many available statistics, the percentage of Indigenous women in Australia's prisons rose from 21% of all women prisoners in 1996 to 36% in 2015,⁹ and in 2013 the rate of Indigenous women's imprisonment was 404 per 100,000 of adult Indigenous women, whereas the corresponding rate for non-Indigenous females was 17 per 100,000 - so that Indigenous women were 23 times more likely to be in prison than non-Indigenous women.¹⁰

⁹ Eileen Baldry & Chris Cunneen, 'Imprisoned Indigenous women and the shadow of colonial patriarchy', (2014) *Australian & New Zealand Journal of Criminology* 47(2):276,279; Australian Bureau of Statistics, 4517.0 - *Prisoners, Australia* (2015).

¹⁰ Peta MacGillvray & Eileen Brady, 'Australian Indigenous Women's Offending Patterns', *Indigenous Justice Clearing House Brief*, 19 (June 2015).

Many statistics also show the gross over-representation of Aboriginal women as victims of crime. Those who work in this area, including me, are only too aware of the revolving door between victimology and offending behaviour. I have seen far too many cases in which women have been subjected to prolonged physical and sexual abuse, often starting as a child, and have come to regard violence as normalised behaviour or have become involved in other offending behaviour related to substance abuse as a result. Today's victim is likely to be tomorrow's offender. There are so many of those cases, it is impossible to escape the conclusion that the justice system is conspicuously failing to break this cycle of self-perpetuating violence and other related offending. I share the views of the many who promote the notion of a greater emphasis upon a therapeutic and rehabilitative response to such patterns of behaviour including a focus upon identifying and responding effectively to the causes of such behaviour.

Conclusion

In the short time available today I have only had the opportunity to touch upon some of the issues involving the intersection between women and the legal system. There are many more important issues, and I do not pretend that these issues are in any way exhaustive. However, it is clear from the topics I have addressed, that there is much more to be done in each of the areas I have identified, and therefore every reason for functions such as this to continue to focus attention upon the need for action.