

## **Equality before and in the law: an Australian perspective**

### **Speech to the Azerbaijani Bar Association Conference**

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Thank you for the invitation to present to the Azerbaijani Bar Association. I am sorry that I am unable to join you in Baku, but look forward to meeting you at future LAWASIA meetings.

At its heart, the legal profession is a profession of service. Service to our communities through promoting the administration of justice and facilitating the important work of the courts in upholding the rule of law.

But the legal profession and the judiciary can only command respect and public confidence if they reflect the community that they serve.

Better decision making comes from the fact that different views are considered based on a person's background, including their gender.

In recent years Australia has been on a journey to increase the representation of women in senior ranks of the legal profession and the judiciary, which has led to an increase in the talent that can be recruited into positions.

There is no doubt that the pipeline of talent in Australian law has become overwhelmingly female over the last two decades.

Women could not practice law in Australia until the first quarter of the 20<sup>th</sup> century. In my home state of NSW, women were not able to practise until the law changed in 1918.<sup>1</sup>

For the last 30 years, more women have graduated from law school in Australia than men every year.<sup>2</sup>

More than 60 percent – three in five – law students and graduates are women.<sup>3</sup>

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<sup>1</sup> *Women's Legal Status Act 1918* (NSW).

<sup>2</sup> Kate Allman and Amy Dale, 'The state of the profession 2021', *LSJ*, 9 August 2021  
<<https://lsj.com.au/articles/the-state-of-the-profession-2021/>>

<sup>3</sup> <https://www.afr.com/companies/professional-services/female-lawyers-to-wait-another-decade-for-partner-equality-20220705-p5az4z#:~:text=Women%20comprise%20more%20than%2060,an%20increasing%20number%20of%20firms.>

In Australia, female solicitors have outnumbered their male colleagues since 2018.<sup>4</sup>

Last year, there were more than 90,300 solicitors practising in Australia. 55 percent were women.<sup>5</sup>

For the last three years, there have been more female solicitors than male solicitors in every state and territory in Australia.<sup>6</sup>

And for more than a decade, the growth rate of female solicitors has been significantly higher than the growth rate for men – 86 percent compared to 32 percent.<sup>7</sup>

Women are most strongly represented in the community legal and government legal sectors, where they make up around 70 percent of solicitors in each sector.<sup>8</sup>

In the corporate legal sector – that is, solicitors working inhouse for businesses – women make up just under two thirds of solicitors.<sup>9</sup>

In 2022, women solicitors reached parity with men in private practice for the first time.<sup>10</sup>

The way that this has been achieved has been through several initiatives – there is no one single solution.

There has been an increased focus on the commercial value of diversity. There has also been an increase in governments using women lawyers and in promotion within private law firms.

But the challenge isn't over – yet.

The challenge continues to be carrying those numbers through to the top levels of the profession and the judiciary.

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<sup>4</sup> Urbis, *2022 National Profile of Solicitors* (2022) 1 <<https://www.lawsociety.com.au/sites/default/files/2023-05/2022%20National%20Profile%20of%20Solicitors%20-%20Final.pdf>>

<sup>5</sup> Ibid 2.

<sup>6</sup> Ibid 2.

<sup>7</sup> Ibid 2.

<sup>8</sup> Ibid 1.

<sup>9</sup> Ibid 2.

<sup>10</sup> Ibid 2, 3., 24.

While 62 percent of senior associates and just under 60 percent of special counsel are women,<sup>11</sup> only one in three partners at mid and top tier firms are women.<sup>12</sup>

The Australian Financial Review reported last year that women will not reach equality as partners of the largest law firms in the country for another 10 years.<sup>13</sup> That said, 46 percent of new partners in the first half of 2022 were women,<sup>14</sup> so we are on the right trajectory.

At the Australian Bar, women barristers remain significantly under-represented at all levels of seniority.

Data from the Australian Bar Association showed that in 2021, of 6,379 practising counsel, just 27 percent were women.<sup>15</sup>

Like the solicitor arm of the profession, women remain under-represented at the highest level.

At the NSW Bar, only 13.8 percent of senior counsel are women.<sup>16</sup>

However, there has certainly been increased awareness of the importance of diversity and inclusion in recent years.

There has been an increased focus on women being given important cases to run through the equitable briefing policy.

The Law Council of Australia developed an Equitable Briefing policy in 2016 to seek to ‘drive cultural change within the legal profession, support the progression and retention of women barristers, and address the significant pay gap and underrepresentation of women in the superior courts’.<sup>17</sup>

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<sup>11</sup> <https://www.afr.com/companies/professional-services/female-lawyers-to-wait-another-decade-for-partner-equality-20220705-p5az4z#:~:text=Women%20comprise%20more%20than%2060,an%20increasing%20number%20of%20firms.>

<sup>12</sup> Kate Allman and Amy Dale, ‘The state of the profession 2021’, *LSJ*, 9 August 2021 citing the *2021 Law Partnership Survey*; Chief Justice Kiefel, ‘Yesterday, today and tomorrow – a trend towards equality?’, Australian Women Lawyers’ Conference, 6 August 2022, Brisbane, 2 <<https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/Final%20edited%20for%20publication%2016.8.22.pdf>>.

<sup>13</sup> <https://www.afr.com/companies/professional-services/female-lawyers-to-wait-another-decade-for-partner-equality-20220705-p5az4z#:~:text=Women%20comprise%20more%20than%2060,an%20increasing%20number%20of%20firms.>

<sup>14</sup> Ibid.

<sup>15</sup> Cited in Law Council of Australia, *Review of the Equitable Briefing Policy* (2022) 6

<<https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Review%20of%20the%20Equitable%20Briefing%20Policy.pdf>>.

<sup>16</sup> <https://nswbar.asn.au/the-bar-association/statistics>

<sup>17</sup> <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy>

The Policy is something I promoted as President of the Law Council and the NSW Bar Association, alongside many colleagues and advocates.

The Policy encourages anyone who briefs a barrister to make ‘all reasonable endeavours to brief or select women barristers with relevant seniority and expertise, experience or interest in the relevant practice area’.<sup>18</sup> The Policy sets targets on briefing women barristers ‘for at least 30% of all briefs and at least 30% of the value of all brief fees’.<sup>19</sup>

Solicitors, organisations and barristers can all sign up to the policy, and are encouraged to provide confidential data to the Law Council each year to help track national progress towards those targets.

From 2007 to 2009, only 15 percent of barristers appearing before the High Court of Australia were women.<sup>20</sup> Over the last fifteen years, that figure has improved to 24 percent between 2019 and 2021.<sup>21</sup>

In terms of the judiciary, Australia’s High Court is leading the profession by example.

For the first 84 years of its existence, there were no women judges on the High Court.<sup>22</sup> In 1987, Mary Gaudron was the first woman appointed to serve on the High Court bench.<sup>23</sup>

Since November 2022, for the first time in our nation’s history, the Australian High Court has had a majority of female judges on the bench.<sup>24</sup>

Over the last 30 years, State and Federal Attorneys-General have generally focused on appointing more women lawyers to the bench.<sup>25</sup>

This has resulted in a marked increase in the number of women being appointed to all levels of the judiciary.

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<sup>18</sup> <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Equitable%20Briefing%20Policy%20%20updated%20Nov%202022.pdf>

<sup>19</sup> <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Equitable%20Briefing%20Policy%20%20updated%20Nov%202022.pdf>

<sup>20</sup> Chief Justice Kiefel, ‘*Yesterday, today and tomorrow – a trend towards equality?*’, Australian Women Lawyers’ Conference, 6 August 2022, Brisbane, 4.

<sup>21</sup> Chief Justice Kiefel, ‘*Yesterday, today and tomorrow – a trend towards equality?*’, Australian Women Lawyers’ Conference, 6 August 2022, Brisbane, 4.

<sup>22</sup> <https://theconversation.com/the-high-court-of-australia-has-a-majority-of-women-justices-for-the-first-time-heres-why-that-matters-191675>

<sup>23</sup> <https://theconversation.com/the-high-court-of-australia-has-a-majority-of-women-justices-for-the-first-time-heres-why-that-matters-191675>

<sup>24</sup> <https://www.collaw.edu.au/news/2022/11/16/gender-inequality-in-legal-profession>

<sup>25</sup> Chief Justice Kiefel, ‘*Yesterday, today and tomorrow – a trend towards equality?*’, Australian Women Lawyers’ Conference, 6 August 2022, Brisbane, 4.

According to the Australian Institute of Judicial Administration, 505 of Australia's 1172 judges are women.<sup>26</sup> This represents 43 percent – or two in every five judges.

The statistics are slightly lower when we focus on the superior courts of Australia only – 39 percent of superior court judges are women, compared to 46 percent of lower court judges.<sup>27</sup>

We have now reached the situation in Australia where the Chief Justice is a woman and the majority of judges on our highest court are women.

The Honourable Susan Kiefel AC was appointed Chief Justice of the High Court in 2017. In a speech last year about equality in the profession, her Honour said that:<sup>28</sup>

*Women lawyers are present in even greater numbers; they are taking leadership positions; they are succeeding and are in positions of authority. There are some areas, including at the highest levels, where women may not be being afforded the same opportunities as their male counterparts. And the reality is that family life for some will delay or render more difficult promotion or success. But generally much has been achieved towards equality in the legal profession.*

Chief Justice Kiefel spoke of two kinds of equality – equality in terms of numbers, but also equality in terms of experience.<sup>29</sup>

Why is equality in numbers important?

A critical mass is important to ensure diverse voices in the law are supported to continue to speak up and drive positive change in the legal profession, whether as lawyers and barristers, in-house counsel and partners or judges.

Having people of both sexes on the bench leads to better decisions, and promotes greater public confidence in those decisions.

Promoting diversity goes hand in glove with promoting merit because it ensures clients and Attorneys-General are presented with the widest range of suitable, talented lawyers to consider for cases and appointments as judges.

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<sup>26</sup> Australian Institute of Judicial Administration (2022) 3 <<https://aija.org.au/wp-content/uploads/2022/09/2022-Judicial-Gender-Statistics-2022-09-14.pdf>>

<sup>27</sup> Australian Institute of Judicial Administration (2022) 3 <<https://aija.org.au/wp-content/uploads/2022/09/2022-Judicial-Gender-Statistics-2022-09-14.pdf>> .

<sup>28</sup> Chief Justice Kiefel, 'Yesterday, today and tomorrow – a trend towards equality?', Australian Women Lawyers' Conference, 6 August 2022, Brisbane, 9.

<sup>29</sup> Ibid 5.

The human rights and Rule of Law considerations in favour of diversity are supported by a convincing business case. Diversity gives a competitive edge to law firms.

Equality in experience inevitably impacts on equality of numbers.

Regrettably, women in Australia's legal profession and at the Bar do continue to encounter significant inequality, discrimination and bias.

This directly affects female solicitors' and barristers' work streams, by affecting the number and value of briefs received, or the type or work opportunities and salary received.

This in turn creates challenges for retaining talented women in law.

Attrition rates in law in Australia are still high. To continue to attract and retain women, the legal profession must be an attractive place to work. Regard for basic human rights, equality and a fair go should not be unrealistic demands of a workplace.

So when bias, whether overt or unconscious, continues to deny women equal opportunities in law, whether to be briefed or appear in court or receive equal pay, it is incumbent on the profession to address this injustice.

Late US Supreme Court Associate Justice Ruth Bader Ginsburg was the second woman to sit on the highest court in America. Former President Barack Obama described her as:<sup>30</sup>

*a warrior for gender equality — someone who believed that equal justice under law only had meaning if it applied to every single American.*

Her Honour once told a university graduation that she:<sup>31</sup>

*Subscribe[s] to what Justice O'Connor wrote in the Michigan law school case: "[T]o cultivate . . . leaders with legitimacy in the eyes of the citizenry, . . . the path to leadership must be visibly open to the talented . . . individuals of every race and ethnicity." "Effective participation by members of [minority groups and women] in the civil life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."*

Her Honour went on to say that:

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<sup>30</sup> Barack Obama, 'My statement on the Passing of Justice Ruth Bader Ginsburg', 19 September 2020

<<https://barackobama.medium.com/my-statement-on-the-passing-of-justice-ruth-bader-ginsburg-5a925b627457#:~:text=And%20then%2C%20for%20nearly%20three,applied%20to%20every%20single%20American>>

<sup>31</sup> Ruth Bader Ginsburg, 'The value of diversity: Ruth Bader Ginsburg's 2009 Keynote Speech', 17 July 2009, Paris <<https://www.sciencespo.fr/en/news/the-value-of-diversity-ruth-bader-ginsburg-at-the-2009-graduation-ceremony>>

*We will all profit from a more diverse, inclusive society, understanding, accommodating, even celebrating our differences, while pulling together for the common good.*

While progress may not always be as quick as we'd like, the legal profession and the community in Australia are certainly alert to the dangers of inequality in the law and are committed to continuing to work to overcome it.

Our justice system is the better and the fairer for it.