



## **Leading from the Bench: Women Jurists as Role Models**

*Remarks by the Honourable Marilyn Warren AC, Chief Justice of Victoria on the occasion of American Chamber of Commerce in Australia 'Women in Leadership' Breakfast at Crown, Melbourne*

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### **Précis**

Women currently account for about one third of the Australian judiciary; an extraordinary achievement in a relatively short time. This figure is echoed in the United States. The Hon. Chief Justice Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria, celebrates the women who paved the way for judicial equality and who continue to act as role models and inspire others to continue the journey.

### **Introduction**

Women are a relatively recent addition to the practice of law in Australia. It was just over a century ago in 1902 that Australia saw its first female law graduate, Ada Evans.<sup>1</sup> Legend has it that her enrolment at the Sydney Law School was aided by a small stroke of good fortune or, rather, good timing. The Dean of Law at the time would never have accepted a woman,

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<sup>1</sup> Mary Gaudron, 'Australian Women Lawyers' (Speech to delivered at the launch of Australian Women Lawyers, High Court of Australia, 19 September 1997).

however luckily for Evans he was on leave at the time and her enrolment was accepted in his absence.<sup>2</sup> Upon his return the Dean told Evans that ‘she did not have the physique for law’.<sup>3</sup> However it was too late; Evans was not deterred. History had been made and the trailblazing had begun.

Evans’ American counterpart was Carrie Burnham, a young woman who in 1870 applied to the law department of the University of Pennsylvania and was rejected.<sup>4</sup> Burnham then approached the Dean of Law directly and asked if she could purchase tickets to his lectures. He replied that if a woman was admitted he would resign.<sup>5</sup> Like Evans, Burnham was not deterred. For the next decade she fought hard for women to have the opportunity to study law until she was finally able to purchase her ticket in 1881. US Supreme Court Justice Sandra Day O’Connor later described Burnham’s plight as the beginning of ‘the path for women judges’.<sup>6</sup>

We have made significant progress since those times. Three years after Ada Evans’ graduation Flos Greig became Australia’s first woman admitted to practice.<sup>7</sup> In 1965 Dame Roma Mitchell became Australia’s first female Supreme Court Justice and just over two decades later, in 1987, Mary Gaudron was appointed to our High Court. Half a century on, women now constitute about one third of the Australian judiciary.<sup>8</sup> Among them are two High Court Judges, three

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<sup>2</sup> Joan O’Brien, Evans, Ada Emily (1872-1947) (1981) Australian Dictionary of Biography <<http://adb.anu.edu.au/biography/evans-ada-emily-6118>>.

<sup>3</sup> Gaudron, above n 1.

<sup>4</sup> Sandra Day O’Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (Random House Inc, 2003) 186-187.

<sup>5</sup> Ibid citing Elizabeth K Maurer, ‘The Sphere of Carrie Burnham Kilgore’ (1992) 65 *Temple Law Review* 827, 833.

<sup>6</sup> Ibid 186.

<sup>7</sup> Ruth Campbell and J Barton Hack, Greig, Grata Flos Matilda (1880-1958) (1983) Australian Dictionary of Biography, <<http://adb.anu.edu.au/biography/greig-grata-flos-matilda-7049>>.

<sup>8</sup> Ruth McColl, ‘Celebrating Women in the Judiciary 2014’ (Speech delivered to New South Wales Women Lawyers, 27 February 2014); Australian Women Lawyers, ‘Gender in the Australian Judiciary 2013 v 1995’ (Media Release, 4 July 2013) 1.

Chief Justices and four women Presidents of their respective Courts of Appeal.<sup>9</sup> Similar figures are echoed in the United States where about one third of state and federal judges are women.<sup>10</sup>

This is an extraordinary achievement in a relatively short time. Breaking free of the kinds of attitudes of the past has been no easy feat. It has required good examples, good role models; not only to change the minds of the men who once dominated the legal profession but also to encourage other women to pursue it. Indeed it still does. Justice O'Connor has said:

‘As women achieve power, the barriers will fall. As society sees what women can do, as women see what women can do, there will be more women out there doing things, and we’ll all be better off for it.’<sup>11</sup>

While over half of the law graduates in Victoria are women, many of them leave the profession before reaching the upper echelons.<sup>12</sup> Having women on the Bench is therefore very important. Women need to see that they can be successful at the highest levels.

I would like to take the opportunity this morning to celebrate these achievements and the women who, through their courageous trailblazing, have made them possible; women who have paved the way for judicial equality both in Australia and the United States and who continue to inspire others to continue the progress. I will speak about some of the first women to sit on our highest courts, who have made particularly remarkable contributions to women and the law, and have inspired many, including myself, to aspire to a career on the Bench.

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<sup>9</sup> McColl, above n 8, 2.

<sup>10</sup> Ibid 3.

<sup>11</sup> Ruth Bader Ginsburg, ‘A Tribute to Justice Sandra Day O’Connor’ (2006) 119(5) Harvard Law Review 1239, 1240 quoting Sandra Day O’Connor, ‘Women in Power’ (Speech delivered to the Sixteenth Annual Olin Conference, 14 November 1990).

<sup>12</sup> Victorian Equal Opportunity and Human Rights Commission, ‘Changing the Rules: The Experiences of Female Lawyers in Victoria (Report, December 2012).

**Justice Sandra Day O'Connor**

I will start with Sandra Day O'Connor, who in 1981 became the first woman appointed to the United States Supreme Court. Ruth McGregor, a former clerk of Justice O'Connor's and later the Chief Justice of the Arizona Supreme Court wrote that:

'[w]ith Justice O'Connor's confirmation, the axis of the legal world for women shifted, never to return to its old position'<sup>13</sup>

Justice O'Connor proved to be an excellent jurist and an exceptional role model, and indeed showed not only the legal profession, but also the nation and the world, just what women can do.

Her Honour adopted a balanced, common sense approach in her judicial opinions<sup>14</sup> and earned the respect of jurists worldwide not only for her influential legal reasoning and meticulous preparation but also her 'open-mindedness'.<sup>15</sup> The longer O'Connor sat on the Court, the more influential she became. Although her Honour had initially aligned herself with the Court's conservative bloc, she moved away and earned herself a reputation as the Court's 'swinging vote'.<sup>16</sup> Her position was cemented in 1992, with her decisive fifth vote in the case of *Planned Parenthood v Casey*<sup>17</sup> which helped to strike down a Pennsylvania law requiring spousal

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<sup>13</sup> Ruth V McGregor, 'A Tribute to Justice Sandra Day O'Connor' (2006) 119(5) *Harvard Law review* 1245, 1245.

<sup>14</sup> Stephen G Breyer, 'A Tribute to Justice Sandra Day O'Connor (2006) 119(5) *Harvard Law Review* 1242, 1244.

<sup>15</sup> Ginsburg, above n 11, 1242.

<sup>16</sup> Abigail Perkiss, 'A look back at Justice Sandra Day O'Connor's court legacy' on *Constitution Daily* (2 July 2013) <<http://blog.constitutioncenter.org/2013/07/a-look-back-at-justice-sandra-day-oconnors-court-legacy/>>.

<sup>17</sup> 505 US 833 (1992).

awareness of abortions. Indeed, Justice O'Connor has been described as 'America's most powerful jurist'.<sup>18</sup>

Justice O'Connor's unique position was perhaps a product of her diverse experiences. Her Honour brought to the Court not only the intellect, independence, professionalism and energy required of a Supreme Court Justice, but also a wealth of experience that the other members of the Court did not possess; 'the experience of growing up female in the 1930s, 40s, and 50s, of raising a family, [and] of doing all manner of legal work' from government service to private practice.<sup>19</sup>

While her Honour's presence on the Court alone did much for women in the law, she continued to work tirelessly for the cause outside the courtroom. Justice O'Connor actively supported women's organisations and spoke out against limitations faced by women.<sup>20</sup> She was known for being an 'accessible' justice.<sup>21</sup> While most Supreme Court justices were viewed as somewhat 'distant and aloof', Justice O'Connor had a remarkable rapport not just with the legal profession but also with the public.<sup>22</sup> Her influence was widespread. Her Honour made it a personal goal of hers to speak at least once in each of the nation's 50 states; by her 19th year on the Supreme Court, she achieved that goal. As Justice Ruth McGregor has put it '[her Honour] could have remained in her Court chambers and made some difference. Instead, she left her chambers and made a substantial difference.'<sup>23</sup>

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<sup>18</sup> Diane Lowenthal and Barbara Palmer, 'Justice Sandra Day O'Connor: The World's Most Powerful Jurist?' (2004) 4 *University of Maryland Law Journal of Race, Religion, Gender & Class* 211, 211.

<sup>19</sup> Ginsburg, above n 11, 1239.

<sup>20</sup> McGregor, above n 13, 1246.

<sup>21</sup> *Ibid* 1245.

<sup>22</sup> *Ibid* 1247.

<sup>23</sup> *Ibid*.

Justice O'Connor's story is a particularly charming one. Born in El Paso, Texas and raised on a cattle ranch in rural Arizona, 'Supreme Court Justice' may have seemed an unlikely career path for a young Sandra Day O'Connor, who, by the age of eight could 'mend fences, ride horses, fire a rifle, and drive a truck.'<sup>24</sup> To all those who later heard her Honour speak of her journey it must have sounded somewhat like a fairytale. However, as is the case for many women in the law, it was not all smooth sailing and she suffered from the same discrimination and setbacks many women face in the workplace. Despite graduating third in her class at Stanford University, O'Connor received just one job offer, as a legal secretary at a law firm. In those days the large law firms were not in the business of hiring women as lawyers. O'Connor persisted however and eventually found work as a county attorney before going on to work in a number of interesting roles that would hone her legal skills and broaden her horizons, including as a civilian attorney in Germany, the founder of a 'neighbourhood law office' back home in Arizona<sup>25</sup> and even as a State Senator.

Justice O'Connor also suffered personal setbacks. During her time at the Court her Honour fell ill with breast cancer and had to endure months of rigorous treatment.<sup>26</sup> During this time her Honour did not miss a sitting day<sup>27</sup> – proof of her perseverance, endurance and dedication to her office.

Justice O'Connor was undeniably an exceptional role model. She showed society, and indeed women, what women in power can do, and with that the barriers fell and the path for women on the US Supreme Court was paved.

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<sup>24</sup> Breyer, above n 14, 1242.

<sup>25</sup> Laurence Bodine, 'Sandra Day O'Connor' (1983) 69 American Bar Association Journal 1394, 1396.

<sup>26</sup> Ginsburg, above n 11, 1240.

<sup>27</sup> Ibid.

**Justice Ruth Bader Ginsberg**

The next woman appointed to the Court was Ruth Bader Ginsburg. Justice Ginsburg's appointment came in 1993 and her Honour remains on that bench today. More outspoken in her views on women's rights than Justice O'Connor, she has been described as 'the architect of the litigation strategy that made gender constitutionally relevant'.<sup>28</sup> Her Honour's impact on the law, and particularly on women's rights, has been significant and began long before she joined the Supreme Court. As a lawyer in the 1970s, she led a successful campaign for gender equality in the Supreme Court, filing briefs in nine of the major sex discrimination cases in that decade, and presenting oral arguments in six, five of which she won.<sup>29</sup> Until the appointment of Chief Justice Roberts in September 2005, her Honour was in fact the only member of the Supreme Court to have actually argued before it.<sup>30</sup>

At that time gender-based discrimination was rife and not something most people, including jurists, took seriously; differential treatment of men and women was, in her Honour's own words, viewed 'not as malign, but as operating benignly in women's favour.'<sup>31</sup>

And so, within what remained a somewhat hostile environment for women, a young Ruth Bader Ginsburg set out to change the status quo and to rid the statute books of discriminatory laws.<sup>32</sup> Ginsburg launched her campaign in 1971, co-writing the plaintiff's briefs in a case that

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<sup>28</sup> Sarah E Valentine, 'Ruth Bader Ginsburg: An Annotated Bibliography' (2004) 7 *New York City Law Review* 391, 392.

<sup>29</sup> Herma Kay Hill, 'Tribute to Justice Ruth Bader Ginsburg' (1997) *Annual Survey of American Law Review* xxii, xxv. See also Peter J Rubin, 'Justice Ruth Bader Ginsburg: A Judge's Perspective' (2009) 70(4) *Ohio State Law Journal* 825.

<sup>30</sup> Valentine, above n 28, 392.

<sup>31</sup> Ruth Bader Ginsburg, 'Forward to Symposium: Women, Justice and Authority' (2002) 14 *Yale Journal of Law & Feminism* 213, 214.

<sup>32</sup> *Ibid.*

saw the Supreme Court, for the first time in history, hold a gender-based classification to be unconstitutional.<sup>33</sup> The case was *Reed v Reed*<sup>34</sup> and the decision was unanimous. The plaintiff, Sally Reed, had sought appointment as the administrator of her son's estate following his tragic death. So did the boy's father, from whom Ms Reed was divorced, although his application was later in time. The governing statute provided that: as between persons 'equally entitled to administer' a deceased's estate, 'males must be preferred to females.' An Idaho court had therefore appointed the father. The State Court said that the statutory preference for men was "neither an illogical nor arbitrary method" to resolve an issue that would otherwise require a hearing.<sup>35</sup> The Supreme Court overturned that decision, stating rather that the statute was arbitrary and forbidden by the Constitution's Equal Protection Clause.<sup>36</sup>

In *Reed*, Ginsburg had laid the foundations for reform. After *Reed*, case-by-case, she continued to pave the way. Her Honour was patient and meticulous in her strategy. She was selective in the cases she ran, taking great care to demonstrate that discriminatory laws could harm both men and women and often representing male plaintiffs to illustrate her point.<sup>37</sup> As such, her clients included:<sup>38</sup>

- a young father who, following the death of his wife during childbirth, was left with sole responsibility for his child but did not qualify for maternity leave; and
- young men who could not purchase near-beer until they were twenty-one, while their female companions needed only to attain the age of eighteen.

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<sup>33</sup> *Ibid.*

<sup>34</sup> 404 US 71 (1971).

<sup>35</sup> Linda Greenhouse, 'Learning to Listen to Ruth Bader Ginsburg' (2004) 7 *New York City Law Review* 213, 215.

<sup>36</sup> *Ibid.*

<sup>37</sup> Hill, above n 29, xxiv.

<sup>38</sup> *Ibid.*



By the time her Honour was appointed to the Bench, there was relatively little left to do. Through her advocacy she had successfully transformed the culture on the Supreme Court on the issue of women's rights, such that as a Justice she was able to silently join majority opinions on the issue to which 'there was nothing she needed to add.'<sup>39</sup>

Despite being very assertive and liberal in her visions, Justice Ginsburg has been described as a 'careful, moderate judge' who understands the judicial role and the importance of well-founded argument.<sup>40</sup> Her Honour was incredibly methodological in her decisions, which were often written quite narrowly.<sup>41</sup> Such restraint enabled her to 'speak to both sides of the court' and to win the respect and affection of her colleagues.'<sup>42</sup>

To sum up her Honour's extraordinary career to date, I will quote Herma Hill Kay, a classmate and friend of Ginsburg who became the Dean of Law at the University of California,<sup>43</sup> who said:

'[Justice Ginsburg] proved beyond dispute the power of a compelling argument, modestly phrased and asserted with caution, in the hands of a skilled advocate who understands both the limitations and the creative authority of the judiciary in the American legal system. By taking one step at a time, she has moved our society closer to a new legal era of equality between the sexes.'<sup>44</sup>

## **Justice Sotomayor**

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<sup>39</sup> Greenhouse, above n 35, 217.

<sup>40</sup> Valentine, above n 28, 395.

<sup>41</sup> Ibid.

<sup>42</sup> Greenhouse, above n 35, 218.

<sup>43</sup> Hill, above n 29, xxvii.

<sup>44</sup> Ibid.

The third woman appointed to the Supreme Court was Sonia Sotomayor, who assumed office in 2009 after being nominated by President Barak Obama. Justice Sotomayor's journey is really quite remarkable and since her appointment to the Supreme Court her Honour has earned herself a reputation as 'the people's justice' and become somewhat of an icon for the American dream. From modest beginnings in a Bronx housing project, to Princeton, to Yale, to the Bench of the nation's highest court, her Honour's journey 'serves as a hopeful reminder that one's starting point need not limit one's aspirations.'<sup>45</sup> Her Honour is always humbled her achievements. For example she has described how, as she received the phone call from the President confirming her Supreme Court nomination, she had the cell phone in her right hand, her chest in her left, and just as she caught her breath she started to cry.

Justice Sotomayor embraces the fact that she is a public role model.<sup>46</sup> Her Honour believes in leading by example and is ardent about remaining accessible. As a result, she has been very open with the public about her humble beginnings. Following in Justice O'Connor's footsteps she has spoken all over America about her journey and in her recent memoir *My Beloved World* her Honour wrote intimately and candidly about the challenges she faced growing up,<sup>47</sup> which, I might add, were many. Her Honour has said that her goal in writing a memoir was twofold: first, to make her 'hopeful example accessible', and second, to ensure she does not lose sight of where she came from.<sup>48</sup> Her Honour has joked:

'I figured if I get too heavy, my family and friends could use [the book] to hit me over the head.'<sup>49</sup>

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<sup>45</sup> Rebecca K Lee, 'Sonia Sotomayor: Role Model of Empathy and Purposeful Ambition (Book Review) (2013) 98 *Minnesota Law Review Headnotes* 73, 74.

<sup>46</sup> *Ibid* 73.

<sup>47</sup> *Ibid*.

<sup>48</sup> Sonia Sotomayor, *My Beloved World* (Alfred A Knopf, 2013) Preface.

<sup>49</sup> Sasha Galbraith, 'Justice Sonia Sotomayor's Advice for Women Today: Know When to Fight' on *Forbes, Leadership* (2 May 2013) <<http://www.forbes.com/sites/sashagalbraith/2013/02/05/justice-sonia-sotomayors-advice-for-women-today-know-when-to-fight/>>.

I will take you briefly to Justice Sotomayor's humble beginnings. Her parents had each migrated to New York from Puerto Rico in the 1940s, her mother voluntarily in the Women's Army Corps, her father driven by economic hardship.<sup>50</sup> She grew up in the Bronx, surrounded by her extended family, few of whom spoke any English. By the age of eight, she had been diagnosed with juvenile diabetes and learnt to administer her daily insulin shots herself.<sup>51</sup> Her father was an alcoholic and died when she was nine.<sup>52</sup> After that, her mother worked six days a week to support the family.<sup>53</sup>

Such circumstances do not ordinarily promise success.<sup>54</sup> However, Sotomayor's mother worked hard to secure for her daughter a solid catholic education and Sonia remained optimistic about achieving her dream of becoming a judge.<sup>55</sup> It was a dream fashioned by her Honour long before she went to law school. Initially she had wanted to become a detective, however she knew that her diabetes would preclude her from a career in the police force. The young Sotomayor's solution to this dilemma was to become a lawyer instead.<sup>56</sup> That way, she thought, she could at least work alongside detectives. Then, after watching the fictional TV series Perry Mason about a defence attorney by the same name, she formulated the 'ultimate' goal of becoming a judge. Her Honour describes in her memoir her fascination with the judge as the character who made the final decisions – 'a personification of justice'.<sup>57</sup>

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<sup>50</sup> Sotomayor, above n 48, 12.

<sup>51</sup> Ibid 4.

<sup>52</sup> Ibid 13.

<sup>53</sup> Barack Obama, 'Nomination of Judge Sonia Sotomayor to the United States Supreme Court' (Remarks on the occasion of the nomination of Judge Sonia Sotomayor to the United States Supreme Court, The White House, 26 May 2009).

<sup>54</sup> Sotomayor, above n 48, 4.

<sup>55</sup> Lee, above n 45, 76.

<sup>56</sup> Sotomayor, above n 48, 179-81.

<sup>57</sup> Ibid 81.

When it came time to apply to universities, on the advice of a friend Sotomayor applied for the suite of ‘Ivy League’ colleges, though she had never heard that term before. At the time Sotomayor had little understanding of the admissions processes, let alone the part ‘affirmative action’ could play, as this was something the Ivy Leagues were still experimenting with.<sup>58</sup> She received many offers: Columbia, Radcliffe and Yale but finally settled on Princeton.<sup>59</sup> Her Honour recalls that it was not until the news spread and the congratulations flooded in that she fully began to appreciate what ‘Ivy League’ meant.<sup>60</sup>

So her Honour completed her undergraduate qualifications at Princeton, graduating with the highest degree of honours as well as the prestigious Moses Taylor Pyne Honour Prize (which, like ‘Ivy League’ her Honour had never heard of). She went on to study law at Yale, one of 40 or so women in a class of 180 (women had been attending Yale since 1918). While there she was an editor of the Yale Law Review and did a summer associateship at a top Manhattan law firm. However, while many of her classmates were aiming for high-paying jobs at prestigious law-firms, Sotomayor’s own ambitions were less concerned with such inducements and she began her career as a prosecutor at the Manhattan District Attorney’s office.<sup>61</sup> However, her Honour also experienced corporate life and went on to become a corporate litigation partner at a law firm before being appointed to the Bench. Her Honour recognised the good that could come from such a path. She knew that in order to advance minority groups in the profession they needed to move ‘where the money and power move’.<sup>62</sup> Her Honour was leading by example and opening doors for others to follow.

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<sup>58</sup> Ibid 119.

<sup>59</sup> Ibid 119.

<sup>60</sup> Ibid 124.

<sup>61</sup> Ibid 184.

<sup>62</sup> Ibid 185.

On the occasion of her nomination, President Obama described some essential qualities for judicial nomination, such as rigorous intellect and a commitment to ‘impartial justice’.<sup>63</sup> He said however that such qualities alone are insufficient, that something more is needed – experience; experience being tested by and overcoming barriers and hardship. This, he said, gives a person ‘a common touch and sense of compassion’ and an understanding of how ordinary people live.<sup>64</sup>

Related is a second quality, borne out of experience: empathy. Justice Sotomayor certainly has no shortage of either. She has overcome numerous challenges, personal and professional, and despite achieving one of the law’s highest honours she has not lost sight of her humble beginnings. Her Honour believes that her experiences have helped her to appreciate different people’s perspectives and to always consider the real-world consequences of her decisions. These are qualities that will no doubt enhance the quality of justice she delivers.

Justice Sotomayor remains down-to-earth and approaches new challenges with a charming sense of humour. To illustrate, her Honour recently took up an invitation to bowl the first pitch at a Yankees game and has appeared alongside the likes of Abby Cadabby on Sesame Street a number of times.<sup>65</sup>

Her Honour continues to be an exceptional and accessible role model and I have no doubt that we can expect more great things as her career on the Supreme Court continues.

### **Justice Mary Gaudron**

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<sup>63</sup> Obama, above n 53.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

Shifting back to Australia now, I will speak about one more eminent female jurist – our first female High Court Judge, Justice Mary Gaudron, appointed to Australia’s highest Court in 1987, six years after Justice Sandra Day O’Connor had set the precedent in the US.

Like Justice Sotomayor, Justice Gaudron also came from humble beginnings. She grew up in Moree, a ‘relatively poor’ outback town in NSW.<sup>66</sup> Unlike Justice Sotomayor however, Justice Gaudron is a very private person and has largely kept her private life out of the public realm. Her Honour has always considered herself to be an ‘ordinary woman’<sup>67</sup> and has dismissed the endless praise and flattery she has received, famously declining the award of Companion of the Order of Australia.<sup>68</sup>

Her Honour’s first encounter with the law was in 1951 when, at eight years old, she met the then leader of the Australian Labour Party [and former High Court Justice], Herbert Vere Evatt. Evatt was campaigning in Moree to persuade people to vote ‘No’ in the referendum to amend the Constitution to outlaw the Communist Party in Australia, which he saw as an attack on freedom of speech and association.<sup>69</sup> Mary had accompanied her father to see him speak. Curious about all the talk of ‘the Constitution’, she put her hand up and asked: ‘Please sir, what’s a constitution?’<sup>70</sup> Upon Evatt’s explanation, Mary asked him where she could get a copy, to which he replied: ‘You can write to me, Dr H V Evatt, Parliament House, Canberra, and I will send you one.’<sup>71</sup> Her Honour did, and Evatt honoured his word.

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<sup>66</sup> Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) 11.

<sup>67</sup> Mary Gaudron (Speech delivered at the Australian Women Lawyers’ Reception held for Justice Gaudron’s retirement, Centennial Park Restaurant, 25 January 2003).

<sup>68</sup> Margaret McMurdo, ‘Speech Proposing a Toast to Retiring Justice Mary Gaudron’ (Speech delivered to an Australian Women Judges Dinner, Sydney, 22 February 2003).

<sup>69</sup> Burton, above n 66, 1.

<sup>70</sup> *Ibid* 2.

<sup>71</sup> *Ibid*.

Justice Gaudron would go on to deliver many significant constitutional judgements, the most famous of which was of course the landmark Mabo case, which recognised the rights of indigenous Australian's to their land for the first time under the principles of 'native title'. Growing up in Moree, home to the second largest indigenous group in eastern Australia the Kamilaroi people, Gaudron witnessed firsthand the disadvantage and discrimination faced by indigenous peoples.<sup>72</sup> They were not allowed to enter the Town Hall or other council buildings or to use public toilets; they were not allowed to ride the bus or swim in the local swimming pool.<sup>73</sup> Her Honour was always troubled by such treatment.<sup>74</sup> Indeed it no doubt stirred in her the sense of justice that guided her career, throughout which she 'consistently sought to uphold the rights of the disadvantaged' whether it was indigenous people, workers, accused persons or women.<sup>75</sup> She truly believed in equality.

Throughout her life, Gaudron also experienced endemic gender-based discrimination. Walking into the 'women's common room' at Sydney University for the first time, her Honour discovered that it had been used as a men's urinal. Her law lectures began with the salutation 'gentlemen'<sup>76</sup> and it was a commonly held belief that women were there merely to obtain 'Bachelor of Marriage' degrees.<sup>77</sup> She proved otherwise when she graduated with first class honours and the University Medal in Law. She was also working part-time and pregnant with her first child at the time. When she approached a local solicitor for an articulated clerkship however, the solicitor, blinded by her gender, told her that she 'had set her heights too high',

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<sup>72</sup> Ibid 19.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid

<sup>75</sup> Commonwealth, Parliamentary Debates, House of Representatives, 4 February 2003, 10711-10712 (Nicola Roxon MP).

<sup>76</sup> Burton, above n 66, 45.

<sup>77</sup> Ibid 47.

that ‘girls [didn’t] do law’.<sup>78</sup> When she eventually secured a job at the Commonwealth Crown Solicitor’s Office, she was paid less than her male counterparts and when her Honour married in 1963, the Public Services Act (Cth) dictated that she resign.

At the NSW Bar her Honour had difficulty finding chambers – nobody wanted a women on their floor.<sup>79</sup> She was denied many briefs due to her gender - many firms at the time had policies against briefing women.<sup>80</sup>

Those who did brief her were not disappointed; Gaudron proved to be an exceptionally talented advocate. With just two years’ experience as a barrister, she appeared alone before the High Court in a difficult defamation case and won.<sup>81</sup> She went on to represent the Whitlam Government in the 1972 Equal Pay Case, the first woman to represent the Commonwealth in a national wage case.<sup>82</sup> Although ‘equal pay’ had been secured in 1967, it only applied to certain occupations traditionally occupied by men, and the existing minimum wage protection did not apply to women.<sup>83</sup> In the 1972 case, Gaudron successfully advocated for the concept of ‘equal pay for work of equal value’ which would encompass the work traditionally done by women.<sup>84</sup> Clyde Cameron described her performance:

Gaudron was absolutely brilliant; for she not only gave compelling reasons why females should have the same pay as men but demonstrated that given the opportunity, a woman’s performance could equal a man’s.<sup>85</sup>

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<sup>78</sup> Ibid 38.

<sup>79</sup> Ibid 78.

<sup>80</sup> Ibid 79.

<sup>81</sup> Ibid 89.

<sup>82</sup> Ibid 112-134.

<sup>83</sup> Ibid 115.

<sup>84</sup> Ibid 119.

<sup>85</sup> Ibid 124.



Justice Gaudron continued to advocate for women throughout her career, especially during her time as a Commissioner of the Australian Conciliation and Arbitration Commission, where she was able to further address issues of equality in the workforce, such as maternity leave.<sup>86</sup> Her Honour chaired the NSW Legal Services Commission and was the founding patron of Australian Women Lawyers. She achieved a number of ‘firsts’ for women: the first woman appointed to the NSW Bar Council, the first woman to take silk in NSW, the first female Solicitor-General of any State<sup>87</sup>, and of course the first female High Court Judge.

Upon her retirement from the High Court there was endless praise and Australia grieved the loss of a remarkable judge, woman and role model. Some of the comments at the time included:

Gaudron’s career is a classic example of talent and industry triumphant over limited opportunity.<sup>88</sup>

She has provided a role model to all Australian women and men, but especially young women and girls. She has been proof that no doors are permanently closed, even if sometimes they do not seem very open.<sup>89</sup>

Justice Gaudron has continued to use her skills and experience to ‘give back’ following her retirement from the Bench. She has spoken out on a number of social justice issues (such as refugee rights) in a way that she felt she was unable to do as a judge.<sup>90</sup> She has taught at the University of NSW on topics such as inequality and minority rights, and taken up a part-time

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<sup>86</sup> Ibid.

<sup>87</sup> Her Honour was the Solicitor-General of New South Wales.

<sup>88</sup> Michael Coper and George Williams, *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 293.

<sup>89</sup> McMurdo, above n 68.

<sup>90</sup> Burton, above n 66, 382.

appointment to the International Labour Organisation's Administrative Tribunal in Geneva advocating for the workers' rights. Her Honour has never stopped being a role model.

### **Still a way to go**

Despite all Justice Gaudron's achievements, she maintains her self-proclaimed status as an 'ordinary' woman. She says women who succeed are just that – ordinary women.<sup>91</sup> Each of the women I have spoken about this morning may have been ordinary, but what they have achieved has been nothing short of extraordinary. What they have achieved is, against significant odds, a change in a long-held status quo. They helped to persuade a profession, of the value of women's participation. Not only in the workforce, but at the highest levels of it. They did so by doing their job exceptionally well, by demonstrating that given the opportunity, a woman's performance can not only equal a man's, but also contribute something unique, a different perspective. Through their courage, talent and determination these women have paved the way for judicial equality. We are all beneficiaries of their achievements.

Of course there is still much work to be done – we are far from equality on the Bench. Sometimes when reflecting on our achievements to date, we can get caught up and reflect that enough has been done.<sup>92</sup> Of course we are better off than we ever have been. We now take for granted rights which those women before us had to fight hard to secure.<sup>93</sup> However while women have achieved permanence in the legal profession, their presence fades towards the higher echelons. Despite their weight in numbers among graduates, institutional barriers to family leave arrangements and flexible work practices continue to challenge women in their

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<sup>91</sup> Gaudron, above n 67.

<sup>92</sup> Marilyn Warren, 'Joan Rosanove Would Be Happy' (Speech delivered at the Women Barristers Association 20th Anniversary Dinner, 5 June 2013).

<sup>93</sup> Sheryl Saundberg, *Lean In: Women, Work and the Will to Lead* (WH Allen, 2013) 4.

rise to the top.<sup>94</sup> Additionally, as Sheryl Sandberg explored in her recent book *Lean In*, women also battle with ‘internal’ barriers such as lack of confidence. As a result, women remain significantly underrepresented among law firm partners, barristers (particular senior counsel) and the judiciary.<sup>95</sup> This underrepresentation resonates throughout the corporate world: four per cent of the Fortune 500 CEOs are women, only 12 per cent of the ASX 500 CEOs are women.<sup>96</sup>

A few years back the Victorian Equal Opportunity and Human Rights Commission published a report on the experience of female lawyers in Victoria. Its findings were truly shocking. 23 per cent of women lawyers surveyed had experienced sexual harassment and 40 per cent had experienced discrimination.<sup>97</sup> More recently, the Law Council of Australia’s National Attrition and Re-engagement Study confirmed these issues are echoed Australia-wide. Obviously these things impact significantly on women’s mental health and aspirations and contribute to their attrition from the profession. They are unacceptable and hold us back from equality.

## **Conclusion**

Justice Gaudron once wrote:

‘The problem with the women of my generation is that we thought that if we knocked the doors down, success would be inevitable’.<sup>98</sup>

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<sup>94</sup> Marilyn Warren, ‘Patron’s Message’ (2014) *Portia: The Annual Journal of Victorian Women Lawyers* 3.

<sup>95</sup> For recent statistics on women at the Victorian Bar see Victorian Bar, *Bar Statistics* (December 2014) <<http://www.vicbar.com.au/about-us/about-the-victorian-bar/bar-statistics>>. For recent statistics on women partners see Chris Merritt, ‘Partnership still possible for women’, *The Australian* (Australia) 19 December 2014, 24.

<sup>96</sup> Sandberg, above n 93, 6.

<sup>97</sup> For example, discrimination in work allocation or remuneration. See Victorian Equal Opportunity and Human Rights Commission, above n 12.

<sup>98</sup> Gaudron, above n 1.

Thanks to her Honour and others the doors are open, but it seems we must continually work to keep them that way, especially among the higher echelons. There remains barriers to be broken down, and attitudes to be shifted. Good role models are invaluable in that process as they continue to support and inspire women's aspirations to follow their lead. They keep the doors open. By reflecting on those who have gone before we are reminded of just how far we have come, and the exceptional things women in power can achieve. Let us all be inspired to continue their progress. There is still much work to be done.

Thank you.