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Justice Carolyn Simpson and women's changing place in the legal profession: 'Yes, you can!'

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Abstract: Justice Carolyn Simpson had a judicial career spanning a quarter of a century – the longest-serving of any of the Supreme Court of New South Wales' (NSW) women judges. In this article, we critically examine both the image projected at Justice Simpson's elevation to the Court in 1994 and the legacy crafted about her upon her retirement. As we move forward into a new century of Australian women in law, these speeches reveal much about women's changing place within the legal profession, but also demonstrate disappointing continuity in terms of the obstacles faced by women.

Keywords: Legal profession, gender and the law, gender and judging, women

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In March 2018 Justice Carolyn Simpson retired from the Supreme Court of New South Wales (NSW) after more than two decades on the Bench. As only the second woman appointed to the Court in its almost 200-year history and the longest serving of its women judges, her Honour's retirement marked an important milestone for women in the law. The occasion was even more noteworthy because it coincided with the centenary of the *Women's Legal Status Act 1918* (NSW) that gave women the right to practise law in NSW.¹

Before that time women struggled to access spaces of legal learning and practice not least because of the twin traditions of their exclusion from public life² and the denial of

¹ Victoria was the first Australian state to allow women to practice as lawyers with the passing of the *Women's Disabilities Removal Act 1903* (Vic). Although legislation removed the formal barrier to women entering the profession, more informal barriers have been much harder to disrupt, as evidenced by the ongoing homogeneity of the profession (especially in the upper echelons), not just on the basis of sex, but also race and class.

² The separation of public and private life has been ubiquitous throughout the Western intellectual tradition, with the former connected to the masculine and latter to the feminine. On how this intersects with women's struggle for recognition in the legal profession, see Margaret Thornton and Heather Roberts, 'Women Judges, Private Lives: (In)visibilities in Fact and Fiction' (2017) 40(2) *UNSW Law Journal* 761.

their legal citizenship.³ The passage of legislation across the country in the early 20th century had tipping-point potential, but in fact it is only comparatively recently that women have become judges. Nearly 70 years after the formal barrier to entering the legal profession was removed, Jane Mathews finally took her place in the Supreme Court of NSW in 1987 as its first woman judge.

Arguably, women have now overcome the centuries of exclusion that characterised their historical relationship with the law. Some commentators have gone so far as to assert the ‘feminisation’ of the Australian legal profession.⁴ This is somewhat supported by the data: women today comprise 62.3 per cent of Australian law graduates,⁵ 52 per cent of NSW solicitors,⁶ and 23.1 per cent of NSW barristers.⁷ But while statistics show significant numbers of women at the lower levels of the profession, the apex remains more resistant to change.⁸ Only 36 per cent of Commonwealth judges are women, while in the Supreme Court of NSW only 21 per cent of its Bench are women, and fewer still are higher office holders.⁹ Further, legal scholars have been circumspect about the extent to which women’s entry into the legal profession has made actual inroads into the culture and values of the dominant regime.¹⁰

Conversation about the masculinity of the profession formed part of broader debates taking place in the 1980s and 90s. At that time, agitation for a more representative judiciary was being met with backlash decrying political correctness. There was

³ See Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Hart, 2006).

⁴ President of the Law Society of NSW John Eades remarked on the phenomenon in 2015: Transcript of Proceedings, *Ceremonial — Farewell to Hayne J* [2015] HCATrans 90, 3 (Eades). Justice Margaret Beazley (now Governor of NSW) suggested that numbers of women judicial officers were ‘a matter of record’ and appointments ‘no longer a matter of comment’ in 2018: Justice Beazley, ‘Honouring Justice Jane Mathews AO’ (Speech, NSW Bar Association, 15 June 2018).

⁵ ‘Graduate Stats & Salaries: Law – All Degree Levels’, *Graduate Opportunities* (Web Page, 2015) <http://www.graduateopportunities.com/graduate-salaries/law/law-all-degree-levels/>.

⁶ ‘Practising Solicitor Statistics’, *Law Society of New South Wales* (Web Page, 30 September 2019) <https://www.lawsociety.com.au/sites/default/files/2019-10/201909%20Practising%20Solicitor%20Statistics%20-%20Sep%202019.pdf>.

⁷ ‘Statistics’, *New South Wales Bar Association* (Web Page, 2019) <https://nswbar.asn.au/the-bar-association/statistics>.

⁸ Thornton and Roberts also make this point: (n 2) 763. Earlier, Thornton described the situation as a feminisation of the pyramidal base of legal hierarchies, cautioning against overzealous celebration of what is in fact subordination: Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) 273 (*Dissonance and Distrust*).

⁹ Australasian Institute of Judicial Administration Librarian, ‘Judicial Gender Statistics: Judges and Magistrates (% of Women)’, *The Australasian Institute of Judicial Administration* (Web Page, 6 March 2019) <https://aija.org.au/research/judicial-gender-statistics/>. The proportion of women judges and magistrates is somewhere between 31–37% across all states, with outliers being ACT 54%, Victoria 42% and Tasmania 24%.

¹⁰ Thornton, *Dissonance and Distrust* (n 8) 269; Margaret Thornton, ‘The Mirage of Merit: Reconstituting the “Ideal Academic”’ (2013) 28(76) *Australian Feminist Studies* 127 (‘Mirage of Merit’); Katie Walsh and Marianna Papadakis, ‘The “Feminisation” of Law up for Debate’, *Australian Financial Review* (online, 1 May 2015) <http://www.afr.com/business/legal/the-feminisation-of-law-up-for-debate-20150423-1mrrmmw>; Kcasey McLoughlin, ‘“Collegiality is Not Compromise”: Farewell Justice Crennan, the Consensus Woman’ (2016) 42(2) *Australian Feminist Law Journal* 241, 260–1 (‘Collegiality is Not Compromise’).

scholarly interest in the unique contribution that women might bring to the activity of judging and a growing public appetite for judicial diversity.¹¹ It was against this turbulent backdrop that Justice Simpson made her entry in 1994 to the Supreme Court Bench. As will be seen, the speakers at her welcome superficially acknowledged the presence of some of these issues – merit selection, political correctness, gender, judicial reform – but were disinclined to wade into the ‘froth and bubble’.¹² By contrast, a younger Justice Simpson expressed regret at being unable to comment due to her change in status and avoided naming the gender elephant in the room.

A quarter of a century after Simpson’s swearing-in, one wonders whether those uncertainties facing the legal system had been resolved to her liking. Certainly, her message upon retiring was one of optimism. While acknowledging the ongoing hurdles faced by women with legal (and indeed, judicial) aspirations, Simpson was nevertheless convinced they could be overcome. She argued for challenging prevailing patterns which mark the legal profession as the domain of privileged males, insisting ‘yes, you can’ in urging young women – and young men ‘without the preferred connections’, as well as ‘those of different ethnic origins’ –not to be daunted by the obstacles ahead.¹³ No doubt it was this energy that contributed to her status as a ‘trailblazing’ woman judge which featured in the media commentary¹⁴ around her retirement and, less explicitly, in the speeches commemorating the occasion. Further, she had made history as part of Australia’s first all-woman appeal Bench alongside Justices Margaret Beazley and Virginia Bell, and she had presided over a series of high-profile cases at a time when women were only just beginning to find their voices as judges.

This article uses the tradition of the ceremonial swearing in and, uniquely, also the swearing out in order to examine what speeches reveal about women judges as legal knowers. Judicial swearing-in speeches are the subject of burgeoning scholarly interest, especially with a view to interrogating how gender, sexuality and class are

¹¹ See, eg, Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982); Carrie Menkel-Meadow, ‘Portia in a Different Voice: Speculations on a Women’s Lawyering Process’ (1985) 1 *Berkeley Women’s Law Journal* 39. Note the scholarly position has changed markedly since that time. See, eg, Rosemary Hunter, ‘Can Feminist Judges make a Difference?’ (2008) 15(1–2) *International Journal of the Legal Profession* 7.

¹² Immediate past President of the Law Society of NSW John Nelson’s phrase in Transcript of Proceedings, *Swearing in Ceremony of the Honourable Carolyn Chalmers Simpson QC as Judge of the Supreme Court of NSW* (Supreme Court of NSW, 1 February 1994) 12. The transcript of Justice Simpson’s swearing-in speech is available at http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/Simpson_01021994.pdf

¹³ Transcript of Proceedings, *Farewell Ceremony for the Honourable Justice Carolyn Simpson upon the Occasion of her Retirement as a Judge of the Supreme Court of New South Wales* (Supreme Court of NSW, 27 March 2018) 94. The transcript of Justice Simpson’s farewell speech is available at http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Simpson_20180327.pdf

¹⁴ See, eg, Michaela Whitbourn, “‘Yes You Can’: Trailblazing Judge’s Powerful Message to Women in Law”, *Sydney Morning Herald* (online, 28 March 2018) <https://www.smh.com.au/national/nsw/yes-you-can-trailblazing-judge-s-powerful-message-to-women-in-law-20180328-p4z6os.html>.

framed.¹⁵ Curiously though, there has been far less interest in the farewell equivalent.¹⁶ Together, they are informative historical artefacts and demonstrate that items other than published judgments are fruitful sources of insight both individual and institutional. Most importantly, it is in juxtaposing these social scripts across time that our interest lies.

As we embark on a new century for women in the law, a little over a one hundred years on from women's formal admission into the legal profession, examining these speeches allows us to take stock and consider the changing relationship between the law and women judges more broadly – an enquiry that is perhaps all the more interesting (and important) given the relative scarcity of judicial biography in this country.¹⁷ What are the conditions of women's access to judicial authority? What has changed and what remains the same? A secondary purpose of this article is to contribute to the growing body of literature attentive to the court's 'ceremonial archive',¹⁸ demonstrating its value for the telling of Australian legal history and women's place within it. The speeches bookending Simpson's time in judicial office allow a window into women's experience of the legal profession, and it is to her swearing-in that we now turn.

Swearing in Justice Carolyn Simpson

Swearing-in speeches are about crafting legacies. Described as 'jubilees of the legal profession, marking its continuity and change',¹⁹ they speak to what it means to be a judge and what is valued by the judiciary. A key preoccupation of this institution is image management²⁰ and, as such, swearing-in speeches offer insight into the formation of individual and, by extension, institutional identity. This section examines how the gendered state of being a judge is represented in the narratives given at Justice Simpson's swearing-in ceremony. In particular, we explore the following

¹⁵ Unsurprisingly this interest has coincided with increased diversity in judicial appointments. See Leslie J Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 *Sydney Law Review* 565; Leslie J Moran, 'Forming Sexualities as Judicial Virtues' (2011) 14 *Sexualities* 273 (Forming Sexualities); Heather Roberts, "'Swearing Mary": The Significance of the Speeches Made at Mary Gaudron's Swearing-in as a Justice of the High Court of Australia' (2012) 34 *Sydney Law Review* 493 ('Swearing Mary').

¹⁶ For a unique contribution in this regard, see McLoughlin, 'Collegiality is Not Compromise' (n 10).

¹⁷ See Tanya Josev, 'Judicial Biography in Australia: Current Obstacles and Opportunities' (2017) 40(2) *UNSW Law Journal* 842. See also the extensive oral histories on 'trailblazing women lawyers' and memories of women lawyers now available in the online exhibition, 'Australian Women Lawyers as Active Citizens' at <http://www.womenaustralia.info/lawyers/>.

¹⁸ Heather Roberts coins this phrase and defends its significance in 'Telling a History of Australian Women Judges Through Courts' Ceremonial Archives' (2014) 40(1) *Australian Feminist Law Journal* 147 ('Telling a History').

¹⁹ Transcript of Proceedings, *Ceremonial Sitting on the Occasion of the Swearing-in of the Honourable Michael Donald Kirby AC CMG as a Justice of the High Court of Australia* (High Court of Australia, 6 February 1996) 20 (Kirby J).

²⁰ Leslie J Moran, 'Legal Studies after the Cultural Turn: A Case Study of Judicial Research' in Sasha Roseneil and Stephen Frosh (eds), *Social Research after the Cultural Turn* (Palgrave Macmillan, 2012) 124, 126.

themes: the problematic discourse of merit, woman's status as 'Other' or outsider,²¹ and the conditions that attend joining a masculinist Bench.

Speeches of welcome

At her swearing-in ceremony, Justice Simpson was honoured with speeches by three leaders within the legal profession: Chief Justice of the Supreme Court of NSW Murray Gleeson, President of the NSW Bar Association Murray Tobias, and immediate past President of the Law Society of NSW John Nelson. Covering conventional themes as a way to demonstrate Justice Simpson's suitability for the role, the speakers emphasised her gender in both implicit and explicit ways.

In the longest of the speeches, Tobias contextualised the changing place of gender in the legal profession.²² He remarked on the statistical increase in women members of the NSW Bar Association which had jumped from 5 per cent when Simpson was admitted in 1976 to 11 per cent at her appointment. He also noted that 26 per cent of women at the Bar in 1976 went on to be appointed to judicial office – a proportion likely to be much higher than that of their male counterparts. While commending the improving numbers, Tobias conceded they were still not enough. Like too many of his peers though, he provided a solution requiring no action: '[w]ith the passage of time more women of merit will be appointed to the Bench and that evolution is welcomed.'²³ The familiarity of this conflation of liberal progressivism, institutional change and the notion of gender makes it no less problematic. Numerosity and time arguably provide only a superficial solution, and the problems of a liberal progressivist view – that things are always getting better – are well documented.²⁴

Astonishingly, Tobias' mention of 'women of merit' was the only overt reference to Simpson's gender in the welcome speeches. He defended merit-based judicial selection and was quick to disparage agitation by politicians and 'other minnows' for 'politically correct' appointments – that is, appointments to make the judiciary representative of race, gender, ethnicity and age.²⁵ While he did concede that Simpson's appointment would enrich both the community and the Bench²⁶ (might he have had her gender in mind here?), he also declared her elevation unrelated to those calls for increased diversity: 'One thing is crystal clear; your Honour's appointment has

²¹ Thornton argues that women on the Bench are marked as 'Other'. See Margaret Thornton, "'Otherness' on the Bench: How Merit is Gendered' (2007) 29 *Sydney Law Review* 391 ('Otherness').

²² Tobias (n 12) 3–4.

²³ *Ibid* 4.

²⁴ See Thornton and Roberts (n 2) 773. See also Thornton, 'Mirage of Merit' (n 10); Thornton, 'Otherness' (n 21) 392.

²⁵ Tobias (n 12) 2.

²⁶ *Ibid* 9.

been made, as is proper, solely on merit.²⁷ Nelson too in his short speech echoed this sentiment.²⁸

By offering such extensive discussion on the merit of Simpson's appointment while skirting around the obvious fact of her being a woman, the speakers implied, even inadvertently, that being a woman and a legal knower was somewhat incongruous.²⁹ It seems that women's entry to the judiciary was a subject difficult to grapple with. Even when acknowledging other debates taking place within the profession at that time, neither speaker engaged with the position of gender in these conversations and nowhere did Simpson's status as the second woman appointed to the Court punctuate their speeches. There was only passing mention of Simpson's 'wish for equalness',³⁰ with Nelson relying on the audience's knowledge of Simpson's gender to give meaning to his remarks.³¹

With Simpson's dream for 'equalness' on the cusp of being realised, the speakers sought to justify her appointment with recourse to her personal attributes. Rebutting an imagined critique of her merit, they asserted her suitability by emphasising her soft skills rather than her legal knowledge. Themes of humility and humanity emerged through descriptions of her being reticent and modest and undertaking work pro bono.³² In this way, Simpson found herself damned with faint praise. Her entry to the judiciary was conditional: she could adjudicate in the niche areas of 'women's issues', 'radical causes', and on matters which attract 'notoriety',³³ so long as she was willing – as was necessary on her first trip to the High Court³⁴ – to rise to the occasion when unexpectedly thrown a point to argue.

Additionally, the unspoken rules of the institution were made all the more real when Tobias revealed Simpson's preference for going barefoot.³⁵ Conjuring a corporeal image of Simpson's small physical presence disappearing into her robes – not struggling to fill big shoes, but certainly too small to be dressed correctly for the role – he contrasted this with those 'other judges' who had sat trouserless on the Bench. Although attempting humour, Tobias here indicated that judges of the Supreme Court were men who 'wear the pants', and of whom Simpson was not one. It was against

²⁷ Ibid 2.

²⁸ Nelson (n 12) 10.

²⁹ Thornton gives various reasons why women are not perceived to be authoritative legal knowers. See Thornton, *Dissonance and Distrust* (n 8) 279.

³⁰ Ibid 11.

³¹ Other speakers have strategically done this in speeches of welcome for High Court women judges. See Roberts, 'Swearing Mary' (n 15) 499. On the importance of the audience in making sense of swearing-in ceremonies see Moran, 'Forming Sexualities' (n 15) 284.

³² Tobias (n 12) 5.

³³ Ibid 5–6.

³⁴ Ibid 7.

³⁵ Ibid 7.

this background, which minimised her status as a woman and subsumed it into that of the 'benchmark male',³⁶ that Simpson delivered her inaugural speech.

Simpson in her own words

Echoing the speeches made in her honour, Simpson opened her response by talking about the changing legal environment at the time of her appointment. Rather than highlighting the place of women in the profession as Tobias did, she noted the place of the *judge* and context of adjudication. Curiously, Simpson used the metaphor of marriage – until recently an inherently heterosexual institution – to explain how judicial appointment was no longer a commitment for life.³⁷ One wonders whether Simpson consciously avoided continuing this line of thought, for if appointment is the professional equivalent of marriage, then how is it that this union has generally borne only men to fathers?³⁸

In any event, the marriage metaphor introduced the theme of biological family, which figured prominently in the second part of Simpson's speech. Declaring, '[t]hese occasions are, above all else, family occasions',³⁹ Simpson shifted subjects to introduce some of the few women overall who receive a mention in the ceremony. Here they show up occupying domestic spaces or roles of biological reproduction, reinforcing the notion that women are outsiders in professional spaces.⁴⁰ Coupled with Simpson's concomitant tone of affection, this creates an implicit separation from the more serious and masculinist space of legal work conjured in the other speeches.

Importantly though, the demarcation between women's and men's spaces finds itself disrupted by the figure of Aunty Clair, who Simpson explained raised her and her siblings devotedly while maintaining a professional life as 'Dr Chalmers'. Simpson noted that her parents also challenged this boundary by recognising that 'girls can be educated too'.⁴¹ Simpson introduced these remarks on her family with rhetorical flourish: 'I have reached the point at which thank-yous are delivered to parents, spouses and children. I have none of these.'⁴² This worked to resist her categorisation into the roles of daughter, wife or mother – (gendered) tropes invoked in speeches welcoming women judges to the High Court.⁴³ No doubt this would have made

³⁶ This is Thornton's term. See Thornton, *Dissonance and Distrust* (n 8) 2; Thornton, 'Otherness' (n 21) 394.

³⁷ 'Until very recently, appointment ... was properly seen as the last stage in a legal career – the professional equivalent of marriage': Justice Simpson (n 12) 12–13.

³⁸ On this question, see Moran, 'Forming Sexualities' (n 15) 278.

³⁹ Justice Simpson (n 12) 15.

⁴⁰ Moran identifies this as a common occurrence in the speeches of male appointees. See Moran, 'Forming Sexualities' (n 15) 278.

⁴¹ Justice Simpson (n 12) 16–17.

⁴² *Ibid* 15.

⁴³ See Heather Roberts, 'Women Judges, "Maiden Speeches", and the High Court of Australia' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 113; Roberts, 'Telling a History' (n 18).

Simpson a force challenging to the existing order of the Bench and ‘benchmark man’ of law.

Furthermore, Simpson offered distinctive thanks to two women colleagues who, like her aunt, had dedicated years working in the service of others. Clerk Jan Joy and secretary Julie Briese are named and described by Simpson in affectionate terms on par with the sentimentality accorded to her biological family. Moran points out that the key difference here between Simpson and her male judicial contemporaries is not just that she mentions these women but that they do not occupy roles of professional status.⁴⁴

Of course, Simpson was no doubt all too aware of women’s place in the professional hierarchy. She did not avoid expressing gratitude for her women predecessors: ‘I thank those many women who have preceded me in the legal profession, who, by their integrity, ability and determination have made the passage of women who came later so much easier.’⁴⁵ Her reference to the ‘many’ women before her was ironic given how pioneering she herself was. Further, Simpson’s particular phrasing and use of the past tense worked to distance the struggle of those earlier pioneers from any suggestion of ongoing issues that she herself might face.⁴⁶ Thus she strategically trod carefully around tensions that presumably surrounded her appointment as the second woman to the Supreme Court.

Having opened with comments on the changing state of the profession and closed with swearing her first ever oath, Simpson committed herself to the public, the Court, and an unknown future. Her speech implicitly acknowledged the challenges faced by women in the profession, while those made in her honour yielded gendered tropes and omissions that reinforced the status quo of the male Bench at the time. As will be seen, the speeches at Simpson’s retirement suggest significant changes but also disappointing continuity.

Justice Simpson’s swearing out

The farewell speech fulfils an important public commemorative role, imbued with the characteristics of eulogy but offering the outgoing judge an opportunity to reflect on their time on the Bench before departing.⁴⁷ As noted above, scholarly attention to these artefacts has been minimal, probably in part because the farewell occasion has only recently emerged in courts’ ceremonial calendars.⁴⁸ The speeches made at

⁴⁴ Moran, ‘Forming Sexualities’ (n 15) 279.

⁴⁵ Justice Simpson (n 12) 15.

⁴⁶ Roberts identifies something similar in Justice Gaudron’s swearing-in speech as the first woman justice of the High Court: Roberts, ‘Swearing Mary’ (n 15) 505.

⁴⁷ McLoughlin, ‘Collegiality is Not Compromise’ (n 10) 248–9.

⁴⁸ Generally, comments are made upon a judge’s death rather than their retirement from the Bench. See John Michael Bennett, *A History of the Supreme Court of New South Wales* (Law Book Company, 1974). The earliest

Simpson's retirement cover themes similar to those traversed a quarter of a century earlier, but are much more comfortable acknowledging her gender and recognising her achievements.

Speeches of farewell

Three speakers honoured Justice Simpson at her farewell ceremony and, as at her swearing in, all were male leaders of their professions. Her Honour's status as a woman was directly acknowledged by two of the speakers, with Chief Justice Bathurst remaining conspicuously silent on the subject in his opening address. Topics traversed were Simpson's pre-judicial career, her character as a judge, her jurisprudential impact, and her personal qualities and interests. In addition to the moments of explicit commentary on gender, there was also evidence of a subtler gendered subtext. By and large, however, the speeches acknowledged Simpson's place as a woman who succeeded despite the obstacles facing women in this domain.

Opening the ceremony, Chief Justice Bathurst suggested Simpson had 'more than fulfilled' her earlier vow to justify the faith placed in her by her appointment, perhaps referring to the expectations attending her position as an early woman on the Bench. Rather than going on to acknowledge her achievement of having been the Supreme Court's longest serving woman judge, he instead commended her as its 'longest serving judge' and 'a significant source of consistency and continuity'.⁴⁹

It was not until halfway through the ceremony that Simpson's gender was acknowledged. In his discussion of some of the high-profile cases over which she presided, President of the NSW Bar Association Arthur Moses noted that her Honour had sat on the first all-woman bench in the history of an Australian Court together with Justices Margaret Beazley and Virginia Bell in 1999. This he framed as a 'milestone in the history of diversity in the judiciary',⁵⁰ alluding to the past struggle faced by women attempting to pursue a career in law.

Ironically though, Moses simultaneously downplayed the powerful and insidious perception that women judge 'differently'.⁵¹ Referring to *The Crown v James*⁵² appeal of a sexual assault conviction presided over by this trailblazing triumvirate, Moses noted that 'any random thoughts' that the male appellant be disadvantaged facing such a Bench had been quashed upon his acquittal by the majority.⁵³ It is hard not to read this as an understatement of euphemistic proportions that not only essentialises

farewell speech recorded on the Supreme Court website is by Chief Justice Spigelman honouring Justice Lancelot John Priestley upon his retirement on 11 December 2001.

⁴⁹ Chief Justice Bathurst (n 13) 11.

⁵⁰ Moses (n 13) 24.

⁵¹ See Gilligan (n 11).

⁵² *R v James* [1999] NSWCCA 191.

⁵³ Moses (n 13) 24.

women, but also downplays the extent of the discrimination faced by women attempting to be taken seriously as authoritative legal knowers.

President of the Law Society of NSW Doug Humphreys referred to more concrete obstacles that have faced women, such as when Simpson was excluded from a function around the time of making silk in 1989 because she wasn't 'one of the chaps'.⁵⁴ In this way, Humphreys contextualised notions of gender and success to chart Simpson's upward trajectory to forming an 'integral part of the forefront of women on the Bench'.⁵⁵ But still Humphreys distanced himself from acknowledging too intimately the struggle of women in law, referring only to hearsay – 'I am told that in those days it was very hard for a woman to survive at the law' – to support his appraisal.⁵⁶

In general, it was her Honour's humanity that persisted as a theme through all three of the speeches. Her 'concern for people' was a laudable quality noted by Chief Justice Bathurst,⁵⁷ cast as one of her many demonstrated judicial virtues. Moses similarly attested to her 'great deal of humanity' and 'insight into the human condition'⁵⁸ while Humphreys referred to her attentiveness to social context in sentencing.⁵⁹ Indeed, Simpson's legacy of humanity was actively constructed through the farewell social script, with Moses explicitly identifying her 'notable legacy' of improvements to the treatment of prison populations following her Presidency of the NSWCCCL.⁶⁰

Although no explicit link is made between Simpson's status as a woman judge and socially constructed traits associated with womanhood, the reference to 'humanity' in this context appears to be a veiled gender allusion. This is because it invokes the gender-familiar idea that being a woman means being closely connected to humanity and the human condition.⁶¹ Indeed, Humphreys' recourse to feminised imagery conjured by Michael Kirby alludes to this: 'reform to protect vulnerable minorities has always been close to the heart and mind of Carolyn Simpson'.⁶² In any event, the point here is not so much whether her Honour's approach evidenced a particular concern for humanity, but rather that this was an aspect of her judicial approach that speakers chose to emphasise.

'Yes, you can' – Simpson in her own words

⁵⁴ Humphreys (n 13) 36.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Bathurst (n 13) 6.

⁵⁸ Moses (n 13) 30.

⁵⁹ Humphreys (n 13) 37.

⁶⁰ Moses (n 13) 21.

⁶¹ McLoughlin observes a similar effect at play in Justice Crennan's farewell: McLoughlin, 'Collegiality Not Compromise' (n 10) 256–7.

⁶² Humphreys (n 13) 41.

In an address longer than all three speeches made in her honour combined, Simpson commenced with an acknowledgment of her audience. She included in her remarks a welcome to Justice Virginia Bell of the High Court and followed with a playful quip referencing her female Associate. By gathering together those of the State's leading legal minds in attendance, her Associate of 11 years, her friends and family, and herself as the longest serving woman judge of the Court, Simpson created an inclusive space of 'insider' knowledge, irrespective of gender or status. This set the scene for Simpson's commentary on gender and the legal profession to follow. Moving through three distinct topics in her speech, Simpson discussed her career trajectory, the support she received along the way, and her personal thoughts about her time on the Bench. In all, there was a notable increase in attention to the subject of gender when compared with her remarks 24 years earlier.

Simpson introduced the topic of her career trajectory with imagery of unexpected good fortune, which served as an extended thread through much of her speech:

I came to this place by a series of strokes of good luck and some acts of extreme generosity. I stumbled into law entirely by accident – what the creators of Disneyland might call the happiest accident of all. Well, I would.⁶³

Highlighting points along the road to her becoming a judge, Simpson recounted seven of these strokes of good luck. Two specific events in her list warrant attention for their relevance to the subject of gender. The first came in 1977 – a time when it was difficult, 'if not impossible', in Simpson's words,⁶⁴ for women barristers to secure chambers. (This was despite it being almost 60 years since the removal of the legal barrier to women's entry to the profession.) In contrast to mainstream narratives that might have pointed to progress already made in terms of 'letting women in',⁶⁵ Simpson wryly exposed a double standard at play: 'They no longer rejected women applicants at the outset. "We're not", they said, "against women – but we have one".'⁶⁶

Simpson's second reference to her gendered status is also bound up with the experience of women in the profession, this time at the Bench rather than the Bar. Bringing together notions of structural gender discrimination and professional gatekeeping, Simpson embraced her identity as a woman judge at the forefront of a changing judiciary: 'My final stroke of luck came when the tide of resistance to the advancement of women in the legal profession turned and I was offered appointment to this Court.'⁶⁷

⁶³ Justice Simpson (n 13) 50.

⁶⁴ Ibid 59.

⁶⁵ Thornton, *Dissonance and Distrust* (n 8) 1.

⁶⁶ Ibid 60.

⁶⁷ Ibid 62.

Interestingly she framed her appointment here as a stroke of luck whereas at her swearing in, she attributed this to the 'integrity, ability and determination'⁶⁸ of those women who preceded her. Only one woman, Justice Jane Mathews, was then a member of the Supreme Court. Further of interest is Simpson's choice of language in this passage, which worked to gloss over the presumably challenging reality of her early experience as one of only two women on the Bench. She aligned her appointment with the end of an era of resistance to women, even though numbers of women judges only slowly increased thereafter and in a courtroom filled with men in 1994, it seems unlikely she would have believed that barriers to women's professional success had been wholly removed.

In the second part of her speech, Simpson acknowledged those colleagues and leaders who supported her in her career. After offering individual thanks to the various judicial leaders under whom she served⁶⁹ and other judicial colleagues, Simpson devoted time to acknowledging staff in administrative roles, two of five being women.⁷⁰ Reflecting the intersection of gender and status in the legal profession, most of those she thanked were men, but her associate Lynn Nielsen (referred to at the outset) received a special mention, for whom 'words cannot adequately express how grateful' Simpson was.⁷¹ Her affection was clear and her tone personal, Simpson admitting that 'I will miss her terribly'.⁷² What is unsurprising about this group of individuals is that the women on the whole feature at the lower end of the professional scale.⁷³

Despite this, Simpson concluded with comments on the changing place of women in the legal landscape and signalled optimism for the future. This she offered almost as an afterthought: 'I have taken up too much of your time. But before I relinquish the microphone, I have one last thing to say', she says.⁷⁴ Simpson's message here is noteworthy in that it explicitly named the bias that women (and other outsiders) face in entering the legal profession:

To the young women and, I add, to young men without the preferred connections and to those of different ethnic origins, I say the task is not impossible. Yes, it will be difficult, there is no doubt about that. Yes, you will encounter injustice, prejudice and bias, usually unarticulated. You will encounter resistance, sometimes overt, sometimes so subtle that you will hardly know where it is coming from. You will have to struggle more than your male counterparts – but give it a go.⁷⁵

⁶⁸ Justice Simpson (n 13) 15.

⁶⁹ Justice Simpson (n 13) 66–73.

⁷⁰ The two women were Katrina Curry, Registrar of the Court of Criminal Appeal and Vanessa Blackmore, Library Manager. Ibid 82–83.

⁷¹ Ibid 81.

⁷² Ibid.

⁷³ Justice Beazley, President of the Court of Appeal, is the exception.

⁷⁴ Ibid 91.

⁷⁵ Ibid 93.

Her words are significant at least in part because they depart from the generally accepted script whereby successful women deny any barriers or discrimination.⁷⁶ Although she does not completely eschew the liberal progressivist idea that things will get better with time, she is nonetheless hopeful that ongoing challenges can be overcome: 'The obstacles are there, your challenge is to surmount them. To adopt and adapt the message of the former President of the United States, yes, you can.'⁷⁷

Conclusion

Certainly, much has changed since Simpson was sworn in some 24 years ago, but as much as things have changed, they have also stayed the same. The swearing-in speeches commemorating Simpson's ascension were replete with rhetoric about merit – two speakers invoked the concept of a 'woman of merit' in distinctly gendered ways. Although the problematic and gendered relationship between notions of merit is ongoing, the preoccupation with merit (and the peculiar politics of 'political correctness') gives us some insight into a masculinist legal order grappling with disruptions to its authority. Almost a quarter of a century later Simpson's farewell demonstrated that the subject of gender can now be raised without fear of censure, and without recourse to problematic notions of merit.

Significantly, Simpson's farewell is cautiously optimistic in what it reveals about the plight of women in the legal profession, then and now and into future. Speaking to women (and indeed, other outsiders) she encourages, 'You owe it to yourselves to give it a go and you owe it to the next generation who will, by your efforts, find it a little easier.'⁷⁸ The unsaid here, as she speaks to a new generation of women in the law, is that *her* efforts and those of her contemporaries will have made it easier for those who follow. Further reinforcing her cautious optimism, she does not shirk from acknowledging the reality of women's progress within the profession:

In a chance conversation in the lift last week with Justice Gleeson, I learned that in her four years on the Federal Court – two per cent of the silks who had appeared before her were women. This is 2018. The figures are bad, but my message is nevertheless one of optimism.⁷⁹

The source of Justice Simpson's optimism? Here she references herself, and other women judges present at the occasion of her judicial farewell.⁸⁰ Despite these 'exhibits', one theme to emerge from the speeches framing Simpson's time in the Supreme Court then is that the Bench, and indeed also the law, continues to be a

⁷⁶ This is known as the 'exceptional woman syndrome'. See Thornton, *Dissonance and Distrust* (n 8) 5.

⁷⁷ Justice Simpson (n 13) 94.

⁷⁸ Justice Simpson (n 13) 93.

⁷⁹ *Ibid* 92.

⁸⁰ *Ibid*.

normatively male environment, and one that has not necessarily been receptive to women. While there have been changes over time, women pursuing legal careers still find themselves having to dedicate particular energy to reshaping the male mould, or establishing their legal authority.⁸¹ Although the speeches presented at Simpson's swearing in and farewell are mere glimpses into one individual's relationship with a particular legal institution, we get the sense that perhaps it is only after the retirement of these early trailblazing women judges that we can begin to understand just how difficult it will be to reshape legal institutions for a new century.

Justice Simpson noted at her swearing in that her move to the Bench regrettably meant she could not be an active participant in, and commentator on, those changes that were affecting the legal profession. Notably absent was any reference to the impact that her very appointment may have had, as a woman disrupting a masculinist legal order. Twenty-four years on, she can name explicitly the ongoing issues with the place of women in the legal profession, suggesting that the liberal notion that time cures all ills does not perfectly capture the dialectical unfolding of social change. At the end of her career, she can also reflect frankly on the environment that she joined and is now able to name it for what it was and remains – an elite domain of white, male privilege. Looking forward and looking back on a judicial career spanning almost a quarter of a century, we see significant changes (most pointedly in the visibility of women on the bench), but also disappointing continuity in terms of the ongoing obstacles women face.

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⁸¹ Indeed, this is reminiscent of the phenomenon, examined by McLoughlin in 'Collegiality is Not Compromise' (n 10), of Susan Crennan's willingness to reflect on women's status within the profession, and to name some of the sexism encountered, but only at the end of her career.