Dame Helen Winkelmann, Chief Justice of New Zealand

Gender Ratio Report Function

Address to New Zealand Bar Association, Wellington

21 May 2025

E Papatūānuku, te whaea, e takoto nei,

E Ranginui e tū iho nei,

E ngā mate o te wā, haere, haere, haere atu rā,

E ngā manawhenua o tēnei rohe,

Tēnei te mihi.

Ki a tātou te hunga ora, e huihui mai nei:

Ngā Ahorangi Motuhake o te Ture,

Ngā māreikura o te ture,

Tēnā tātou katoa

I am grateful for the invitation to speak tonight.

I begin by thanking the New Zealand Bar Association for its continued focus on gender equity issues affecting advocacy before the courts. I thank the report writers, Ms Nura Taefi KC and Mr Kelly Quinn KC, and their team of researchers, and the Bar Association and the Wellington Women Lawyers' Association for hosting this event.

As we have heard, this is the third report prepared by the Bar Association on this issue. I really do commend the Association for maintaining its focus on gender equity. The resulting data allows us to look back over 12 years. When we do, we see that notwithstanding the growing number, and even seniority, of women within the profession, and notwithstanding worthy initiatives, too few women are leading cases in our appellate courts.

I was one of those for whom these figures came as a surprise. Impressionistically, I would have said that the number of women leading cases in the appellate courts had increased considerably in the last 12 years. I can only reflect that this absence of progress has been concealed by a practice note adopted by appellate courts, that Kelly referred to, encouraging junior counsel to take a share of presenting submissions.

That practice note was introduced because of dynamics judges observed. We saw at counsel's bench teams that were often made up of a male senior counsel, and a woman as junior counsel. That was our impression, and it was that we had in mind. Observable also was the level of support some senior counsel required from their junior to answer the court's questions.

The junior counsel practice note has been a success. The level of advocacy, and the confidence of junior counsel we see, is impressive. And it does get more women on their feet that would be the case if it were not in place.

And from the court's perspective, the practice note has reduced the significance of the senior counsel/junior counsel divide.

But of course, there is much more to leading a case than the presentation of submissions in court. The role of lead counsel is significant not for the status that might be thought to attach to it. It is significant because it is senior counsel who has final responsibility for making the judgment calls — advising parties about points on appeal to abandon or pursue, whilst also deciding the overall content and strategic direction of submissions. These are the decisions that shape the nature of the appeal, and therefore the overall content of argument. In due course, the resulting judgment will also be shaped by the arguments that have been made, or indeed that have not been made.

In short, it matters who is shaping the arguments presented in our courts. It matters who counsel leading the case is.

We have known this for a long time and there has been action. Numerous speeches have been given, protocols and guidelines issued. Given this, the question must be asked: why are we failing to improve in this area?

Firstly, I will get one notion out of the way. As a judge of 20 years' standing, I can provide confirmation, if confirmation is indeed needed, that male counsel are no better at the art of advocacy, at the skill of shaping a winning case, than are women. Women can be outstanding advocates, so too can men.

And from the perspective of 40 years in the law, my conclusion is that there are complex, systemic forces at work. I do not mean this in a deep state sense — I do not see bad actors at work. To the contrary. Throughout my career I have seen mentors, male and female, step forward, encouraging women to succeed and excel — laying pathways for them, and offering support, if support is needed, as they travel those paths. But the reality is that we are changing from a society, which only a couple of generations ago, was substantially dominated by men in the domestic, economic, political and legal spheres. There were social structures, behaviours, assumptions, and biases that underpinned that domination. What these figures tell us is that some of these are still at work.

There is other research we can look to, which shows that gendered conversational norms continue to affect even women who rise to the top of the law. For example, studies in the United States and Australia detail how women judges, in final courts of appeal, are interrupted substantially more than their male colleagues.[1] The women in this room of my generation do not need research to tell them this. Over the years we have seen the behaviours: men insisting on their right to finish making a point, while in the same meeting, talking over a woman colleague, even if unknowingly; or a woman voicing an opinion in a meeting that isn't engaged with until her male colleague makes the same point. These things in the instant seem minor but of course have a cumulative effect — they can silence good ideas, they can cause good women to step back, they produce in us an internal hurdle that must be overcome.

These patterns are not necessarily the result of bad intentions. The point is simply this — notwithstanding good intentions long-standing assumptions and patterns of being in our society persist. These are patterns we need to shift.

As the report writers accept there are no easy answers. The report does however provide some useful information for us as to the path we might follow in addressing the problem it poses. Crown Law, the writers emphasise, so regularly instructs female counsel that the exclusion of the Crown from the data, plummets the percentage of women leading from 30 per cent to 22 per cent for the Court of Appeal, and from 26 per cent to 16 per cent for the Supreme Court.

So, the first and obvious question for us, is what is Crown Law doing right? It would be wrong to think that because Crown Law is a government agency, it is somehow easy to rise to the level of senior advocacy — that it is some sort of unique and genteel environment that allows women to flourish. It would be wrong to think that, because the work that Crown Law does before the courts is amongst the most challenging. It would be wrong to think that, because behind the Crown advocacy we see in courts, sits advice and strategic calls of the highest significance.

The Solicitor-General, whose presence I acknowledge tonight, has told me about the mindful approach that Crown Law takes to people development. This is the basic framework she spelt out.

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[1] Tonja Jacobi and Dylan Schweers "Justice Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments" (2017) 103 Va L Rev 1379; Amelia Loughland "Female Judges Interrupted: A Study of Interruption Behaviour During Oral Argument in the High Court of Australia" (2020) 43 MULR 822 (a smaller study); and see Tonja Jacobi, Zoe Robinson and Patrick Leslie "Querying the Gender Dynamics of Interruptions at Australian Oral Argument" [2020] UNSWLJ Forum No 4. For a response see Amelia Loughland and Rosalind Dixon "Response: Querying the Gender Dynamics of Interruptions at Australian Oral Argument" [2021] UNSWLJ Forum No 2.

Crown Law approach developing senior counsel as a long game: Crown Law has long had a culture of recognising and developing talented people, and women are people. This has been led from the top since at least Solicitor-General Sir John McGrath's time. It is through the culture he created of deliberately encouraging and developing talented women that the likes of Ellen France J, Helen Aikman QC, Karen Clark J and Ailsa Duffy J emerged as senior counsel in the courts. And that culture has been continued, developing women who take on the tough role of senior counsel for the Crown. This is a long game. It requires identifying talent and potential when it comes through the door, providing the opportunities to develop that talent, and encouraging and supporting those people to step forward into opportunity.

Secondly, Crown Law has developed policies to support this approach: Attracting, retaining, and developing talented people to the office is deliberate. They offer flexible working arrangements, and a broad range of work types.

They have designed measures to address the issue of gender pay gaps, attempting to counterbalance the type of unconscious biases that can lead to this.

And they try to walk the talk of equitable briefing: As signatories to the Gender Equality Charter, leaders throughout the organisation consider equitable briefing. They measure and report on results — currently not as good as they wish — 25 per cent of all matters briefed by volume and 40 per cent by dollar value ($ paid).

You could describe this as bringing systemic thinking to mentoring. Another example of this systemic approach is the junior counsel protocol I mentioned earlier. This was introduced by Justice Stephen Kós, when President of the Court of Appeal, and was brought with him to the Supreme Court. It is designed to create space for junior counsel to get on their feet and speak. Having done the work of helping formulate arguments, this gives counsel the experience of presenting those arguments. I hope they come to understand that there is no one model of advocacy that works, and that it is the quality of the argument presented that counts, rather than clever words or smooth presentation.

There is also mentoring in its more conventional sense. We can all be the agents of the change we want to see. We can support and encourage women colleagues to step up into opportunities offered to them, and to pursue the opportunities they have created themselves. We can speak up when we see dynamics at work that silence or minimise a woman's contribution — those dynamics that stubbornly persist. Men and senior women have an important role to play in this regard.

I digress for a moment to trace the word "mentor" back to its origins. The Classics scholars amongst you will know that the first mentor appears in *The Odyssey*. When Odysseus departed his home in Ithaca to fight in the Trojan war, he left a man to advise his son

Telemachus. That man's name was Mentor. Years pass and the action develops as follows. Telemachus has grown up into a moody teenager moping around his Mum. To that point Mentor has obviously not been doing a great job. Meanwhile, Athena the goddess of wisdom and war, is working to bring her protégé Odysseus home. Athena is worried about father/son dynamics if Odysseus comes home to find Telemachus in this state. She wants Telemachus to go out into the world, to face some challenges, and to develop into a worthy son. Athena therefore takes on the human form of the guide Mentor, and counsels Telemachus to have the courage to go on a journey to far-off lands to learn and develop — which he duly does. And the rest, as they say, is history — or at least mythic history.

I think it is worth observing that this first mentor to appear in the written record was, in this fictional world, somehow both a man and a woman. More significantly, implicit in this mythical but successful mentoring relationship was the mentee's preparedness to step forward and take up the challenge.

This brings me to my next and final point. The practice of law requires courage. The courage I speak of is not the stuff of grand gestures, or of Homeric proportions. It is the courage to make the strategic calls and to be answerable for them. To do this on a regular basis — on disputes big and small. The courage to stand on your feet and make the arguments that you have worked to develop. And if you lose, the courage to be prepared to step forward the next time, and the next time, using what you have learned from meeting those challenges.

Having invoked a classical text about a mythical war, I feel I need to close by invoking some of Aotearoa New Zealand's own heroes. I suggest that women seeking to build a career before the courts look not to a mythical hero, but to our own heroes, to our own wāhine toa of the law. To Ethel Benjamin, the first woman to be admitted to practise law. To Lyra Taylor, the first woman to be admitted into partnership — in 1919. To Dame Augusta Wallace — the first woman judge in this country — a judge who survived a machete attack in court, and when recovered, returned to work in the same courthouse. To Dame Silvia Cartwright, the first woman to take a judicial leadership role in New Zealand, who throughout her career has worked to see that those without power can be heard. To Dame Sian Elias. Dame Sian was our first woman Chief Justice. But before that, as counsel she played a key role in arguing for the legal framework that continues to ground much of Treaty of Waitangi jurisprudence. Down to the present day — to Chief Judge Caren Fox, to Annette Sykes and to many, many more. These wāhine toa have laid down a path in the law for others to follow.

Thank you for listening to me this evening.
Otira tēnā koutou, tēnā koutou, tēnā tatou katoa