

10th Ethel Benjamin Commemorative Address

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“Extending the boundary of right” - Flos Greig, Joan Rosanove and Mary Gaudron –
Three Australian Women lawyers

1. It is a great privilege and honour to have been invited to present the 10th Ethel Benjamin Commemorative address, and I thank you for the opportunity. On a personal note, I am particularly delighted to deliver this address in the city in which I was born, Dunedin, and on a day, the 22nd of September 2006, which, as one of life’s happy ironies would have it, is 27 years to the day on which I left New Zealand to undertake postgraduate study at Oxford University, the 22nd of September, 1979. I have enjoyed returning to Dunedin many times since, on one occasion staying for 18 months, and am very pleased to be returning today for such an auspicious occasion.
2. One of my earliest memories of Dunedin was as a young girl, aged about five, accompanying my father to watch the formal procession through the town, of members of the University Council and academic staff for the University graduation ceremony. Dunedin being rather cold, I recall being dressed in a blue double-breasted coat of which I was particularly proud, made of sturdy Scottish cloth. I stood hand-in-hand with my father as we watched the array of coloured hoods and gowns of the academics in the procession and then, in an air of excitement, joined the gallery in the Town Hall to watch the graduates being “capped”. My only other recollection of the event was that there was an eruption of applause at regular intervals although it was not clear to me at the time precisely what this was for. It also seemed, from where I stood, that the ceremony went on rather longer than it needed to.
3. While a graduation ceremony was perhaps an odd choice as an outing for a young girl, it had the effect, which no doubt my father intended, of conveying clearly to me that tertiary education was something to be prized. It

conveyed to me that an endorsement from this type of institution was something to aspire to and, perhaps subliminally, that being female would be no bar to its achievement. The ceremony caused me to share the view of Flos Grieg, the first woman to be admitted to legal practice in Australia, who asked rhetorically, “Who that once possessed it, would yield education for any bribe the universe could offer?”¹

4. The importance of tertiary education for women was clearly understood by Ethel Benjamin, both for the intellectual fulfillment that it offered, and for the opportunity it could provide to women to become economically independent, integrated persons in “body, mind and soul” and autonomous moral agents.² Otago University invited Ethel Benjamin to reply to the address of the Vice-Chancellor at her graduation ceremony, as you well know. This befitted an institution known for its encouragement of the education of women and for the value it accords to academic excellence. In what must have seemed at the time an extraordinarily brave statement she referred to Sarah Grand, the English 19th century feminist, and said:

“For centuries women have submitted to the old unjust order of things, but at last they have rebelled, and as Sarah Grand has it:

‘It is the rebels who extend the boundary of right, little by little narrowing the confines of wrong and crowding it out of existence.’ ”³

5. What I wish to speak about today are three Australian women lawyers, rebels if you will, whose professional lives have extended the boundary of right. I have chosen to discuss the stories of three women who practised law at different historical stages over the last century in order to present what might be called “the Australian story”.

¹ Quoted by Ruth Campbell in “*That Girl with the Terrible Name*” (1975) 49 (Victoria) Law Institute Journal 502, 502.

² Carol Brown, “*Ethel Benjamin – New Zealand’s First Woman Lawyer*” (B.A. (Hons.)thesis, University of Otago) (1985), 20 (quoting from Ethel Benjamin’s address in reply at the Graduation Ceremony to the *Otago Daily Times*, (10 July 1897), 6.)

³ Ibid 21.

6. The first woman whose life I wish to discuss is Flos Greig, whom I mentioned a moment ago, admitted to practice in 1905, the second is Joan Rosanove, the first woman in the State of Victoria to sign the roll of counsel in 1923 and later to take Silk (become Queen's Counsel) in 1964, and the third is Mary Gaudron, the first woman to be appointed Solicitor-General in New South Wales and thus in Australia in 1981 and later the first woman appointed as a Justice of Australia's ultimate appellate and Constitutional Court, the High Court of Australia, in 1987. I wish to discuss the lives of these women, their clear individual merit, and the professional hostility and exclusion they experienced despite that merit. I wish to consider these women not simply as individuals but as representing stages of acceptance for women within the legal profession in Australia, stages that you will not be surprised to learn have not in all respects proceeded in a linear fashion. I want to look at the common themes of these women's lives, their experience of the legal profession and of law as an institution. I also wish to consider the challenge which remains to further narrow the confines of wrong.

Flos Greig

7. Perhaps the closest Australian counterpart to Ethel Benjamin is Flos Greig. Born Grata Matilda Flos Greig, she embarked on her law degree not knowing whether she would ever be admitted to practice, just like Ethel Benjamin, yet she had first determined to be a barrister and solicitor from when she was "quite a child, a school girl".⁴ She was known not for "the trouble she caused"⁵, as Dame Sylvia Cartwright mentioned of Ethel Benjamin in the 1997 commemorative address, but rather as "that girl with the Terrible Name".⁶
8. She was not the first woman in Australia to be intent on studying law. In 1900 in Western Australia Edith Haynes' application as a student-at-law

⁴ Ruth Campbell, *op. cit.*, 502.

⁵ Dame Sylvia Cartwright, "*The Trouble She Caused*", (Speech delivered at the Ethel Benjamin Commemorative Address, Otago Women Lawyers' Society, Dunedin, New Zealand, 8 May 1997), 33.

under articles was accepted by the Barristers' Board (as it was called) but she was warned that her admission as a legal practitioner might not be approved. The Board wrote to Edith Haynes in these terms:

“[t]he Board cannot guarantee ... admission, even if you comply with all of the provisions of [the *Legal Practitioners Act* of 1893] and of the regulations framed thereunder.”⁷

9. In order to ensure that its message was clear, the Board continued:

“It must be distinctly understood by you that you accept all risk of the Court eventually refusing your application.”⁸

10. The refusal came earlier than the stage of admission to practise. When Edith Haynes sought to undertake the intermediate law exams, the Board refused to permit her to do so. She obtained an order nisi for mandamus from the Supreme Court of Western Australia to compel the Board to allow her to sit the exams. Her father, a Silk, appeared for her on the return of the order nisi. He did not argue for any guarantee that Edith be admitted to practise. Admission was two years away and he argued only that she be permitted to take the intermediate law exams continuing to accept the risk that admission to practise might ultimately be refused.

11. The Full Court of the Supreme Court rejected the Haynes' argument and discharged the order on the ground that to make it absolute would be futile, “the time and money which would be expended would be quite wasted”.⁹ While the *Legal Practitioners Act* permitted qualified “persons” to be admitted, the Court considered that it would be an extreme step to consider that a woman was a person without express legislative sanction. Counsel for the Board argued that “the fact that no woman has been admitted raises the very strong presumption that they have no right to be admitted.”¹⁰ Justice Burnside agreed and said:

⁶ Campbell, op. cit., 502.

⁷ *In re Edith Haynes* (1904) VI W.A.R. 209, 211.

⁸ Ibid 211-212.

⁹ Ibid 212 (Parker A.C.J.) (See also McMillan J, 212).

¹⁰ Ibid 210 (argument of Pilkington).

“I am not prepared to start making law.”¹¹

12. Edith Haynes never completed her legal studies.
13. Reasoning of the same form, as you will know, was used elsewhere. Although the word “person” was governed by a rule of statutory interpretation to include both men and women, that rule could be displaced when the context revealed or made manifest a contrary intention. The Western Australian Supreme Court held that because no woman had previously been admitted to practise law under the relevant legislation, the legislation made manifest a contrary intention with the consequence that, in that context, the word “person” referred only to men. In particular, this reasoning was adopted in South Africa in the case against the *Incorporated Law Society* in 1909¹² and in the case of *Mabel French* in Canada in 1906¹³ to exclude women from the practice of law. As Margaret Thornton has argued, under the guise of neutrality the courts endorsed the proposition that a person’s gender was the “primary determinant of whether a person should be permitted to practise law.”¹⁴
14. In New South Wales women fared no better. In 1898 Ada Evans enrolled at Sydney University law school when the much-feared Dean was on sabbatical leave. As Bek McPaul tells the story:

“On his return, [the Dean] Professor Pitt Cobbitt demanded to know: “Who is this woman?” There followed a series of doors slamming, chairs banging on floors and bells ringing. Professor Pitt Cobbitt summoned Miss Evans to his presence and attempted to dissuade her from continuing her course, pointing out in his own crisp manner that

¹¹ Ibid 214.

¹² *Schlesin v Incorporated Law Society* (1909) Transvaal Supreme Court Reports 363 referred to by Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Hart Publishing) (2006), 157-158.

¹³ *Re French* (1905) 37 New Brunswick Reports 359 referred to by Mossman, *op. cit.*, 156-157 and by Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (O.U.P.) (1996), 58, fn.67.

¹⁴ Margaret Thornton, *op cit.*, 59.

she did not have the physique [for law] and suggesting Medicine as much more suitable.”¹⁵

15. Ada Evans persisted with her studies and graduated in law in 1902.¹⁶ She was then required to be registered after graduation as what was then called a “student-at-law” for two years. She applied to the Supreme Court of New South Wales for that registration and was rejected on the ground of absence of precedent.¹⁷ She sought admission to the English Bar but was again refused on the same basis of an absence of precedent.¹⁸
16. By contrast, Flos Greig did not take the path of commencing litigation. We know that she knew of Ethel Benjamin and presumably thus of the legislative option and the enactment of New Zealand’s *Female Law Practitioners Act* in 1896. In an interview she gave to *The New Idea* in 1905 she referred to “Miss Ethel Benjamin, who had been practising in Dunedin, New Zealand, since 1896 or 1897”.¹⁹ It may have been that Ethel Benjamin provided for Flos Greig the necessary precedent, not to persuade a court, but to support her efforts and those of her friends²⁰ in lobbying for a legislative amendment to allow women to enter the legal profession in the State of Victoria.²¹
17. In April 1903 the Victorian Parliament passed the *Women’s Disabilities Removal Bill*,²² also known as the “Flos Greig Enabling Act”,²³ which amended the *Legal Profession Practice Act*. The private members’ Bill was passed, as a matter of “the very greatest urgency”,²⁴ five days after Flos Greig became the first woman to graduate in law from the University of

¹⁵ Bek McPaul, *A Woman Pioneer* (1948) 22 (1) *Australian Law Journal* 1, 2.

¹⁶ See Ruth Campbell, *op. cit.*, 503.

¹⁷ McPaul, *op. cit.*, 2; (see also Linda Kirk, “Sisters Down Under: Women Lawyers in Australia” (1996) 12 *Georgia State University Law Review* 491, 494).

¹⁸ McPaul, *op. cit.*, 2.

¹⁹ Ruth Campbell, *op. cit.*, 503 (see also 502, fn 1).

²⁰ *Ibid* 503.

²¹ *Ibid* 503; Linda Kirk, *op. cit.*, 493. In 1894 an earlier attempt to amend the *Legal Profession Practice Act* had been unsuccessful: see Linda Kirk, *op. cit.*, 493.

²² Linda Kirk, *op. cit.*, 493.

²³ *Ibid* 493; Ruth Campbell, *op. cit.*, 503. The long title was “An Act to remove some Anomalies in the Law relating to Women.” The short title was the *Legal Profession Practice Act 1903* which was to be “read and construed as one with the *Legal Profession Practice Acts 1891 to 1895*”.

²⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 March 1903, 2821 (Mr Mackey).

Melbourne.²⁵ The member of the Legislative Assembly who proposed the Bill, John Mackey (also a lecturer in Equity at the University of Melbourne) said:

“If this House passes the Bill, it will remove one of those anomalies, one of these inequities of the law that have given rise in the minds of women to the belief that they cannot get justice from a Parliament that is composed solely of men.”²⁶

18. The Act was passed before women achieved suffrage in the State of Victoria, New Zealand of course having led the way yet again.²⁷ Indeed, in the Victorian Parliament, the passing of the Act was urged by one Parliamentarian on the basis that it would show that, as he put it:

“it is not necessary for women to have the suffrage in order that we shall have a Parliament that is prepared to do justice to them, and place them on an equality with men in the occupations of life.”²⁸

19. So much perhaps attests to the somewhat difficult relationship between those women who sought entry to an otherwise exclusively masculine profession and those who sought legal equality by means of the right to vote, a relationship the complexity of which the North American academic, Mary Jane Mossman, has recently written.²⁹
20. The Victorian Parliamentary Debates also record concern that, if the Bill were to be passed, a woman “might become Crown Prosecutor, Chief Justice or Acting Governor”.³⁰ The concern expressed is ironic because Victoria’s current Chief Justice and Lieutenant-Governor is a woman, viz. Justice Marilyn Warren. However, there was no cause for immediate panic as her

²⁵ Linda Kirk, *op. cit.*, 493-494.

²⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 March 1903, 2821.

²⁷ In New Zealand women were afforded the right to vote in 1893. In Australia the franchise was extended to women in South Australia in 1894, Western Australia in 1899, New South Wales in 1902, Tasmania in 1903, Queensland in 1904 and Victoria in 1908. The federal franchise was extended to women in 1902.

²⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 March 1903, 2821 (Mr Mackey). Later Mr Mackey repeated (at 2821): “I said it had nothing to do with the female franchise”.

²⁹ See Mary Jane Mossman, *op.cit.*, especially 24, 32-33.

³⁰ Linda Kirk, *op. cit.*, 493.

Honour's appointment as Chief Justice took place in 2003, exactly 100 years after the Flos Greig Enabling Act was passed.

21. Flos Greig expressed some comments of her own on the chop-logic of her time when she said:

“I notice that most men, when it comes to an argument as to what women could or could not do, generally argue: ‘You have not, ergo, you cannot.’ Even those who have studied Whately and Mill. They will rarely make allowance for the fact that men for generations have been trained to do what women are now doing for the first time. The best swimmers are those that have lived by the sea; the best axemen are those whose early home was in primeval bush. Opportunity is everything ...”³¹

22. Flos Greig thus became the first woman to be admitted to practise law in Australia on 1 August 1905, completing two years as an articled clerk after the passing of the enabling legislation. She was soon retained as legal advisor to the Australasian Women's Association and assisted in the drafting of the legislation which established the Children's Court.³² However, her belief that “opportunity is everything” is something which Mary Gaudron was later to challenge.

23. The other five States soon passed enabling legislation similar to Victoria's: Tasmania in 1904,³³ Queensland in 1905,³⁴ South Australia in 1911,³⁵ New South Wales in 1918³⁶ and Western Australia in 1923.³⁷ The status of Ethel Benjamin as precedent was a critical factor in the passing of this legislation as was the consequential desire by Australia not to be thought of as backward. In the South Australian Parliamentary debates, New Zealand was

³¹ Flos Greig, “The Law as a Profession for Women”, (1909) 6 *Commonwealth Law Review* 145, 150.

³² Jill Ewing, “Laying the foundation stone for legal women” (1992) (Victorian) *Law Institute Journal* 159, 160.

³³ *Legal Practitioners Act 1904*.

³⁴ *Legal Practitioners Act 1905*.

³⁵ *Female Law Practitioners Act 1911*.

³⁶ *The Women's Legal Status Act 1918*.

³⁷ *Women's Legal Status Act 1923*.

expressly referred to as a place in which there were female practitioners.³⁸ As the Honourable Mr Duncan said:

“Regarding the Bill, if it obtained in other States, and particularly in New Zealand, they could not go far wrong in giving ladies here the same advantage.”³⁹

24. Some of the members of the South Australian Parliament were more cynical. Some considered allowing women to practise law was a thing of no importance – it would do neither good nor harm and the legal profession as an institution would remain impervious. That remained to be seen. In an off-hand remark, the Honourable Mr Moulden said the admission of women to the legal profession would be:

“Like chips in porridge, they won’t do much harm”.⁴⁰

25. As for Ada Evans in New South Wales, who had suffered the wrath of Professor Pitt Cobbitt, she arranged a deputation to the Attorney-General for legislative change and it was because of her efforts and the efforts of the Feminist Club of New South Wales in joining her in that deputation that the *Women’s Legal Status Act 1918* was passed.⁴¹ Ada Evans obtained the registration as a student-at-law she had sought and was admitted to practise as a barrister of the Supreme Court of New South Wales in 1921. This was now 19 years since she had graduated. She was soon offered briefs but refused them on the ground, as Bek McPaul writes:

“that [by then] she considered herself incapable of handling them, not wishing women’s standing in the profession to be undermined by a show of incompetence.”⁴²

26. At first sight this reaction to an offer of work may seem extraordinary from someone who had made such protracted efforts to participate - perhaps also a

³⁸ South Australia, *Parliamentary Debates*, Legislative Council, November 16, 1911, 535.

³⁹ Ibid 536.

⁴⁰ For another example of the use of this expression see Dryden’s *Limberham*, Act IV, Scene I: “[T]hat [a note] is a chip in porridge; it is just nothing.”

⁴¹ Linda Kirk, op. cit, 494-495, and see also 494, fn. 21. An earlier Bill had been introduced in 1916 but was shelved after the Second Reading.

reaction that is disappointing. However, it seems to me that it is explicable if considered in the then Australian context in which the standing of women within the legal profession was clearly fragile. This was not something to be risked, perhaps particularly so for someone who had had the courage to engage with the university administration, the judiciary and the legislature to achieve a degree of professional acceptance for women.

Joan Rosanove

27. Had Joan Rosanove been able to engage in conversation with Ada Evans, and perhaps also with Flos Greig, she would have conveyed to them what her experience of professional life taught her; as she famously said:

“To be a lawyer you must

Have the stamina of an ox, and a hide

Like a rhinoceros, and when they

Kick you in the teeth you must

Look as if you hadn’t noticed it.”⁴³

28. And kicked in the teeth she was. Like Ethel Benjamin, she was also a member of a cultural minority, born into a Jewish family, the significance of which Chief Justice Beverly McLachlin spoke of in her Ethel Benjamin commemorative address in 2003.⁴⁴ According to Joan Rosanove’s biographer, Isabel Carter, Joan Rosanove herself attributed her determination to fight against entrenched prejudice, in order to establish herself as a woman barrister, to be due to the tradition throughout history of the Jew’s battle against persecution.⁴⁵

⁴² Bek McPaul, op. cit., 2. See also Linda Kirk, op cit., 495.

⁴³ Isabel Carter, *Woman in a Wig*, (Lansdowne Press) (1970).

⁴⁴ “*Building a Bridge to Equality: A Duty for Lawyers*”, (speech delivered at the Ethel Benjamin Commemorative Address, Otago Women Lawyers’ Society, Dunedin, New Zealand, 29 April 2003), 42.

⁴⁵ Isabel Carter, op. cit., 4.

29. Joan Rosanove attended court from the age of 17 as clerk to her father, a solicitor. Before that, at the age of 15, she had walked with her father through the “traditional Melbourne home”⁴⁶ for barristers, Selborne Chambers, and had said to him: “I am going to be here some day.”⁴⁷ Barristers’ chambers in Melbourne are arranged rather like the Inns of Court in London, with barristers congregating together.
30. Joan passed her compulsory university law exams in 1917 and was admitted in 1919, at the age of 21, having completed her articled clerks’ course. She was used to being inside courtrooms and made many successful court appearances early in her career, including cross-examining the then Prime Minister in a libel case, with several members of the junior Bar jealously watching.⁴⁸ In 1923 she took what she later described as the “blindly optimistic”⁴⁹ step of signing the roll of counsel, undertaking to work exclusively as a barrister, and was the first woman in Victoria to do so.
31. The local newspaper, the *Evening Sun*, commented upon her and her dress, noting that:

“[W]hen she argued her case ... admiration of her eminently legal mind was added to admiration of her appearance.”⁵⁰

The paper went on to say:

“It was frankly admitted that she was there on terms of equality – even superiority in many cases – with members of the stronger sex.”⁵¹

32. For the first three years at the Bar she had little work. She was unable to obtain a room in the principal set of barristers’ chambers and rented a tiny backroom office in a dilapidated building. She has been described as like “a

⁴⁶ Ibid 125.

⁴⁷ Ibid 125.

⁴⁸ Isabel Carter, *op. cit.*, 20-22.

⁴⁹ Ibid 33.

⁵⁰ As reported by Isabel Carter, *op. cit.*, 34.

⁵¹ *Idem.*

fringe-dweller on sufferance [and not as she wished to be, occupying] a place among barristers on equal terms.”⁵²

33. What work came she made the most of, appearing in appeals as well as at first instance. On one matter, she took her place at the elongated Bar table in the High Court, the first woman ever to appear there. As she did so, flanked by male King’s Counsel and their juniors, one of the most senior barristers rather patronizingly said:

“And with whom is my learned friend appearing?”

Joan responded in her ebullient and quick-witted way:

“I am appearing with myself. I am the leader of the female Bar.”⁵³

34. But those who wielded power within the establishment did not welcome her presence. She was to come face to face with the brutality of professional exclusion. In 1925, a male colleague of hers, Philip Jacobs, was about to leave for London for a year and offered her the temporary use of his room in Selborne chambers. He made the offer, as he put it, “to get the fellows used to having a woman there.”⁵⁴ Practising from Selborne would have been a symbol of unequivocal professional acceptance. The male establishment was to have none of it. A protest meeting was called and the directors of Selborne chambers told Philip Jacobs that if he allowed Joan Rosanove to use his room, they would have no option but to cancel his lease.⁵⁵ While they could not stop her appearing in court, the profession could ensure that within its social and cultural practices it remained impervious to her presence.
35. Humiliated, Joan Rosanove left the Bar and worked as a solicitor from home, and later a city office, not returning to the Bar for more than another twenty years. I might add that the Victorian Bar has since sought to atone for the wrong it committed, and perhaps to narrow the confines of that wrong, by naming a new set of chambers “Joan Rosanove chambers” which it opened in

⁵² Isabel Carter, *op. cit.*, 125.

⁵³ *Ibid* 36.

⁵⁴ *Ibid* 42.

April 2000. Given that history, I am especially proud to have my chambers there.

36. In the years away from the Bar Joan Rosanove developed a hugely successful practice, dealing with some criminal matters, including murder trials, but largely with what were then called matrimonial causes as “streams of women”⁵⁶ sought her advice on suing their husbands for maintenance. She lobbied politically against the inequalities for men and women in the divorce laws;⁵⁷ at the time a woman could be divorced in some States for one act of infidelity alone but a man could not be so divorced without the infidelity being coupled by cruelty or desertion.⁵⁸ She said she felt personally ashamed that in spite of all her attempts to achieve parity she had never been able to alter the provision that a woman might not sue for divorce after one act of adultery by her husband.⁵⁹ She wrote scholarly and exhaustively in favour of establishing uniformity of grounds for divorce throughout Australia⁶⁰ and, on behalf of women, argued that they should not lose their nationality when they married foreigners.⁶¹ The relevant legislation was changed.⁶²
37. In 1949 Joan Rosanove re-signed the Bar roll. She was opposed in a divorce matter by another barrister who has also been admitted on the same day back in 1919.⁶³ Almost immediately after their renewed contest, he was appointed a Supreme Court Judge.⁶⁴ The contrast with Joan’s situation was great. She could still not secure a room in Selborne chambers and so decided to conduct her affairs in the Supreme Court library. Somewhat similar to Ethel Benjamin’s circumstances, the rest of the Bar considered that her use of the Supreme Court library should be restricted. She was eventually able to practise from Selborne Chambers but only by purporting to “read” with a male barrister much her junior whose room she remained in when he moved

⁵⁵ Ibid 42. See also the Honourable Sir James Gobbo A.C., Governor of Victoria, “Official Opening of Joan Rosanove Chambers” (2000) 112 *Victorian Bar News*, 53.

⁵⁶ Isabel Carter, op. cit., 58.

⁵⁷ Ibid 65.

⁵⁸ Ibid 146.

⁵⁹ Ibid 146.

⁶⁰ Joan Rosanove, “Australian Divorce Laws”, (1954) 27 *Australian Law Journal* 672.

⁶¹ Isabel Carter, op. cit., 65. See also 145.

⁶² See the *Nationality and Citizenship Act 1948* (Cth).

⁶³ The barrister was Arthur Dean. See Isabel Carter, op. cit., 126.

inter-state.⁶⁵ If this was to be her professional home she was to make it to her liking by painting the walls in pink, mauve and yellow with a blue ceiling and lace curtains. Her practice blossomed.

38. Despite the success of her practice, acceptance by the institutional agencies of the law proved much more difficult, in particular the taking of Silk.
39. I should perhaps digress for a moment to explain, at least to the non-lawyers in the audience, the process in Australia, and in Victoria in particular, of taking Silk. Much like New Zealand, taking Silk or becoming a Queen's Counsel, now Senior Counsel, is a milestone in a barrister's career because it is seen as a recognition of excellence and usually involves taking on only the more complex work where a second barrister or "junior" accompanies and assists the Silk. The application must be supported by Judges acting as referees. While practice varies between the States, where in some instances the granting of Silk is now in the hands of the Bar alone, responsibility for appointment in Victoria lies with the Chief Justice of the Supreme Court.⁶⁶
40. In 1954 Joan Rosanove applied to become a Queen's Counsel. The Chief Justice, Sir Edmund Herring, interviewed her and asked her for a record of her earnings for the previous year. The earnings were so high he assumed they it could not have been a typical year. The day after the interview he wrote asking her for a record of all her yearly receipts since she had resigned the Bar roll. She provided records for the previous six years which showed the earnings to be consistently high.⁶⁷ The Chief Justice wrote to her in these terms:

"I have given very careful consideration to your application for Silk. ... The granting of Silk is never a matter of course. It is primarily the exercise of a judicial function. ... Consequently personal considerations cannot enter the matter, and sex is immaterial. Nor can

⁶⁴ Isabel Carter, *op. cit.*, 126.

⁶⁵ *Ibid* 127.

⁶⁶ Until recently, the Attorney-General made the announcement on the recommendation of the Chief Justice. This was so in Joan Rosanove's time: see Isabel Carter, *op. cit.*, 152, 156. In Victoria responsibility now lies solely with the Chief Justice.

⁶⁷ Isabel Carter, *op. cit.*, 153.

the duration of the applicant's practice or the income derived therefrom be regarded as in any way decisive. These matters are proper to be considered, but only with such important considerations as the nature of the practice, the Courts in which it is carried on, the importance of the cases handled by the applicant ... [and so on]. I have very reluctantly come to the conclusion that it would be wrong for me to grant your application.”⁶⁸

41. Joan had predicted such a rebuff when she had given a talk to a meeting of the Legal Women's Association some years earlier. While she recognized that the Bench were courteous and unprejudiced, she said:

“[I]f any of you suffer any illusions that women lawyers receive any real recognition, whatever their ability and qualifications, it is time those illusions were dispelled.”⁶⁹

42. Rumour had it that the Chief Justice considered Joan's work too specialized. Eventually he retired and the new Chief Justice granted Joan's repeated application in 1964, ten years after she had first applied.⁷⁰ Eventually, her legal career spanned 50-years and she acted in more than 20,000 matrimonial cases.⁷¹

43. During the course of the years in which Joan's application for Silk was refused, another woman applied in South Australia and was successful, Roma Mitchell (later Dame Roma Mitchell).⁷² Indeed, Dame Roma was to become the first woman judge of a superior court in Australia.⁷³ The then South Australian Chief Justice, in his 80's, wanted all judges to be referred to without distinction. He issued a direction that Roma Mitchell was to be known as “*Mr Justice Mitchell*.”⁷⁴ Fortunately, he was later persuaded of the absurdity of this.

⁶⁸ As reported by Isabel Carter, op. cit., 154.

⁶⁹ Isabel Carter, op. cit., 155.

⁷⁰ The new Chief Justice was Sir Henry Winneke.

⁷¹ Isabel Carter, op. cit, 163.

⁷² In 1962.

⁷³ Susan Magarey (ed), *Dame Roma: Glimpses of a Glorious Life* (Axiom Publishing) (2002), 68

⁷⁴ Ibid 66. The Chief Justice was Sir Mellis Napier.

44. Dame Roma was later Acting Chief Justice in the last few months of her judicial career⁷⁵ and became Governor of the State of South Australia.⁷⁶ She was held in enormous esteem by the profession but there was clearly a friendly rivalry between Roma Mitchell and Joan Rosanove.
45. Joan was known for her rich but dry sense of humour. She was in San Francisco when she heard of the announcement of Roma Mitchell as the first female Q.C. in Australia; with the edge of sarcasm for which she was noted, she quipped:
- “I couldn’t have heard about it in a nicer place.”⁷⁷
46. Joan Rosanove’s husband, Mannie, must have shared her sense of humour for, in another incidental remark which is close to my heart, when asked what sort of cook Joan was, he replied “As a cook, she was a brilliant lawyer.”

Mary Gaudron

47. The need for single-minded determination and pluck, together with a passion for the law and the encouragement of law reform in the face of obvious injustice - “extending the boundaries of right”, as Ethel Benjamin would have it - is illustrated also in the career of Mary Gaudron in the context of a more recent stage of the participation of women in the legal profession. Her career, while inspirational for all women in the law throughout Australia, also illustrates the continuing imperviousness of the legal profession in its institutional character, even in contemporary times.
48. Mary Gaudron was appointed to the seven-member bench of Justices of the High Court of Australia in 1987 and retired in 2003. She learnt of the existence of Australia’s written federal Constitution at the age of eight at the time of the referendum to amend the Constitution to ban the Communist Party. Doc. Herbert Evatt (who was later to become a High Court Judge,

⁷⁵ Ibid 83, 193-195.

⁷⁶ Ibid 252-267.

⁷⁷ Isabel Carter, op. cit., 156.

Federal Attorney-General and actively involved in the creation of the United Nations⁷⁸) was campaigning on the back of a truck through small country towns for the “No” vote which was ultimately successful. Mary was growing up in just such a town. She asked him what was this “Constitution” was all about and he sent her a copy.⁷⁹ She was ultimately to deliver judgment in the High Court in about 115 substantial Constitutional cases.⁸⁰

49. Mary obtained a scholarship to the University of Sydney, and obtained the University Medal at Sydney University Law School after studying part-time and while nine-and-a-half months’ pregnant when sitting her final exams.⁸¹ She completed her articles, lectured in Succession at the University, signed the New South Wales Bar roll and applied for membership of a good floor of barristers’ chambers at the Sydney Bar.
50. Acceptance of that application would have been symbolic – just as it would have been for Joan Rosanove – of unambiguous acceptance into the heart of the legal profession. Between the time when Joan Rosanove faced hostility in 1925 and the time when Mary Gaudron, a medal-winning student, was applying for chambers in 1968, many more women were studying law and much social and cultural progress had been made generally in relation to the status of women. Surely there would be no repeat of the exclusion Joan Rosanove experienced.
51. This time the humiliation of exclusion came with an attempted reassurance. Mary Gaudron was told her application for chambers had been rejected but that she was to understand that her rejection was not based on “anything personal” – it was just that “she was a woman”.
52. One might be tempted to explain the address she gave a few years later to the annual Bar and Bench dinner, representing the junior Bar, as an example of revenge as a dish best served cold. The “junior” speech for the night is a

⁷⁸ Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP, Melbourne) (2001), 253.

⁷⁹ Ibid 293.

⁸⁰ Cheryl Saunders, “Interpreting the Constitution” (2004) 15 *Public Law Review* 289, 289.

brief to amuse – I have myself had to deliver this form of address and it requires a toast and a “roast” of the new judicial appointments, all to be done with unerring tact.

53. Mary began her speech⁸² by criticizing the legislation recently introduced by the State Attorney-General on the grounds that it infringed civil liberties. She then said that she was about to come to his appointments. I understand that the room was “deathly silent”.⁸³
54. Mary said that she had checked the biography of all of the appointments in *Who’s Who*. She went on to say:
- “That check ... revealed that his appointments all had a single common characteristic. It was not their religion, their politics or their schooling but it was something so apparent that one should be able to use it to predict future appointments.”⁸⁴
55. While the room remained breathless, a senior Judge from the New South Wales Supreme Court stormed out, declaring noisily that he did “not propose to listen to any more of this rubbish.”⁸⁵ Uncharacteristically, Mary was silenced and did no more than propose a toast to the Attorney. On later inquiry it was revealed that, with respect to each of the new judicial appointments, *Who’s Who* had made mention of the appointee’s father but there was no mention of a mother. Mary had intended to say: “Presumably, to be eligible for appointment to judicial office under this Attorney one needs to be motherless.”
56. Mary Gaudron continued to thrive despite the early hostility and built a practice in which she appeared in all jurisdictions, with a focus upon industrial and defamation law. She appeared, unled and successfully, before

⁸¹ David Bennett, “Mary Gaudron’s “Mr Junior” Speech and High Court debut”, Geoff Lindsay and Carol Webster (eds), *No Mere Mouthpiece: Servants of All, Yet of None* (Butterworths) (2002), 262-263.

⁸² This account of the speech is based on the description given by David Bennett Q.C., in *No Mere Mouthpiece: Servants of All, Yet of None*, op. cit., 263.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

the High Court in her second year at the Bar⁸⁶ and appeared before the Commonwealth Arbitration and Conciliation Commission in the major *Equal Pay Case*.⁸⁷ This led to her appointment as a Deputy President of that Commission, where in particular she contributed to a decision in a significant test case providing for maternity leave to be included in an industrial award.⁸⁸

57. In 1981 she was appointed the Solicitor-General for New South Wales and appeared frequently in the major Constitutional cases of the day before the High Court. She gained a reputation for “outstanding and ingenious advocacy”⁸⁹ and I now find, in also occupying the role of a State Solicitor-General, that I often rely upon arguments she presented successfully to the Court which invariably illustrate a depth of understanding of Australian federalism and the integrated system of federal and State courts.⁹⁰
58. In 1987 Mary was appointed to the High Court at the age of 43, one of the youngest appointments to the Court.⁹¹ On the bench she became known for her towering intellect, a formidable grasp of logic and an unremitting urge to make theoretical sense of what lay before her. She insisted on “the inalienable responsibility of courts and their judges to maintain an open, free and just society ... [acting] in accordance with the judicial process”⁹² – marked by impartiality and independence from the legislature and the executive.⁹³
59. She delivered significant judgments in the area of discrimination, direct and indirect.⁹⁴ She developed more generally a theory of discrimination based upon the recognition that discrimination can arise in the uniform treatment of

⁸⁶ *O’Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166.

⁸⁷ *In re State Equal Pay Case* [1973] AR 425.

⁸⁸ *F.M.W.U. v A.C. T. Employers Federation* (Maternity Leave Case) (1979) 218 CAR 120.

⁸⁹ Blackshield, Coper and Williams (eds), op cit., 294.

⁹⁰ See, for example, *Forge v ASIC* [2006] HCA 44 at 22 which applied the reasoning in *The Commonwealth v Hospital Contribution Fund* (1980) 150 CLR 49 at 50 where the High Court had accepted Mary Gaudron’s argument as State Solicitor-General for New South Wales.

⁹¹ Blackshield, Coper and Williams (eds), op. cit., 295.

⁹² Justice Susan Kenny, “Concepts of Judicial Responsibility: the Contribution of the “One of Seven”, (2004) 15 *Public Law Review* 283, 284.

⁹³ *Ibid* 7 (citing the *Hindmarsh Island Case* (1996) 189 CLR 1 at 25 (Gaudron J.)).

⁹⁴ *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

those who are not the same but who require, because of their circumstances or history, additional or special differential treatment; as she put it, discrimination “lies [not only] in the unequal treatment of equals but in the equal treatment of unequals”.⁹⁵ She also contributed to the recognition of an implied right under the federal Constitution to freedom of communication on political and governmental matters,⁹⁶ culminating in the decision in *Lange v Australian Broadcasting Corporation*.⁹⁷

60. Might I say, parenthetically, that Australia is forced to rely upon an implied constitutional right as there is no express right of freedom of expression at the federal level equivalent to s 14 of the *New Zealand Bill of Rights Act 1990*. The State of Victoria has sought to remedy that, in so far as it can, by the enactment of its own *Charter of Human Rights and Responsibilities*, but that is another story.
61. Since retiring from the High Court of Australia, Mary Gaudron sits as a Judge of the Administrative Tribunal of the International Labour Organisation in the Hague, and has continued to champion the rights of women. For the record, she was replaced on the High Court by a male Judge. However, during the course of the last year, the second female Justice of the High Court has been appointed, Justice Susan Crennan.

Internal Reform of the Profession

62. I have reflected on the individual circumstances and achievements of each of these three women, Flos Grieg, Joan Rosanove and Mary Gaudron, to illustrate that Ethel Benjamin and her successors in New Zealand have had their counterparts with parallel lives in Australia. But I have also sought to do more than this – by demonstrating in detail both the professional capacity of these women and the hostility and exclusion which they faced despite that capacity, I have sought to identify with some precision the particular site of

⁹⁵ *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 480. See also *Street v Queensland Bar Association* (1989) 168 CLR 461.

⁹⁶ For example, *Nationwide News v Willis* (1992) 177 CLR 1.

that hostility. I have sought to show that it is ownership by men over the formal and informal symbols of acceptance within the profession which has restricted women's lives.

63. Mary Gaudron once said that the trouble with the women of her generation was that they thought if they knocked the doors down, success would be inevitable.⁹⁸ They thought that if the formal barriers to entering the legal profession were dismantled, it would only be a matter of time before women were properly represented in all fields of legal endeavour. However, while women have been graduating from the law schools in droves for some years, the decades which have followed Mary Gaudron's entrance to the profession have not seen, in Australia at least, proportionate representation of women in complex court matters nor in the decision-making institutional roles.
64. I will spare you all of the statistics but the most recent survey published by Australian Women Lawyers in August of this year was revealing. Monitoring court appearances by gender,⁹⁹ it revealed disproportionately low rates of appearances by women in the superior courts around Australia when compared to their numbers within the profession. The survey revealed that women were not appearing in major trial work but rather in matters of short duration - for example, in the Federal Court the average length of a proceeding for male senior counsel was 120 hours, whereas for female senior counsel the average length of a proceeding was 3 hours.
65. The survey also showed that women were appearing much more frequently before Masters than in appeals.¹⁰⁰
66. The explanation for under-representation of women, viz. that it will only be a question of time, has long since been rejected as "dishonest".¹⁰¹ As the Australian Women Lawyers put it, "the 'trickle up' theory is not working."¹⁰²

⁹⁷ (1997) 189 CLR 520.

⁹⁸ Mary Gaudron, 'Speech to Launch Australian Women Lawyers', (Speech delivered at the Australian Women Lawyers Launch, Grand Hyatt Hotel, Melbourne, Victoria, 19 September 1997).

⁹⁹ Australian Women Lawyers Gender Appearance Survey (August 2006) (**Gender Survey**).

¹⁰⁰ For example, in the New South Wales Supreme Court 27.8% of the appearances before a Master were by women, whereas only 9.9% of the appearances before the Court of Appeal were by women.

67. As a further instance of irony, when the Australian Women Lawyers sought to advertise their Inaugural Conference which is to be held in Sydney next week, to discuss why the trickle-up theory has not worked, they were confronted by the very resistance I've described in detail today. The New South Wales Bar was happy to transmit by email to all its members information about the annual Bench and Bar chess match, and the cancellation of such an important event as the Australian Lawyers Surfing Association's annual general meeting. However, it refused to allow its email service to be used to advertise the conference of the Australian Women Lawyers.¹⁰³ Unless I am mistaken about the popularity of surfing, even in a place like Sydney, the refusal cannot have been on the basis that it would be of interest only to a minority.
68. As we have seen, the formal barriers to women's practice of the law came down with the early enabling legislation. The statutory obstacles or impediments to opportunity were thus removed. As Flos Greig thought "opportunity was everything".
69. The lives of Joan Rosanove and Mary Gaudron demonstrate that the removal of formal legislative impediments, while necessary, are not sufficient and indeed do not go far in achieving acceptance for women in the legal profession.
70. The focus of the enabling legislation may in this sense have been misconceived – might I suggest that the ideal should not have been couched in terms of equality of opportunity (as Flos Grieg thought, or as did Mary Gaudron and women of her generation early in their careers) but rather as equality of participation.
71. If the ideal for women lawyers is equality of participation in the profession then the forms of hostility and exclusion in the lives of the women I have

¹⁰¹ Mary Gaudron, 'Speech for Women Lawyers Association of New South Wales' (Speech delivered at Women Lawyers Association of New South Wales 50th Anniversary Gala Dinner, New South Wales Parliament House, Sydney, New South Wales, 13 June 2002).

¹⁰² Caroline Kirton, President, Australian Women Lawyers, Explanatory Memorandum to the Gender Survey, 6.

¹⁰³ See Marcus Priest (ed), 'Hearsay', *The Financial Review* (Sydney), 4 August 2006.

described can be seen not as merely incidental to the development of the women's professional lives but as directly contradicting that participation. The symbolism attendant upon the refusal to be accepted into barristers' chambers, the exclusion from the professional home, is thus not simply an annoyance or a hindrance to the development of a professional career to which the women otherwise had an equality of opportunity. It is, rather, a direct repudiation of their participation.

72. So too the repeated refusal to award Silk to a candidate of clear merit and proven practice also reflects an unwillingness genuinely to accept female participation in the profession.
73. The site of hostility is not to be identified (or identified any longer) with the Legislature. Nor can it be identified with the modern Executive. It is my view that we should see the history of exclusion of women from equality of participation as lying in the belief by the profession that as an institution the legal profession was, and should remain, impervious to women. This view has it that women should be permitted to practise law but that should not be seen as requiring any other change by the profession – the profession should remain just as it was, something to which men have an entitlement and in relation to which women are naturally outsiders. The profession is thus seen as the property of men.
74. It is this attitude which was expressed in 1911 in the South Australian Parliament by the Honourable Mr Moulden, that the admission of women to the legal profession would be a matter of no consequence. As you will remember, he said:
- “Like chips in porridge, they won't do much harm”.
75. If the site of professional exclusion and hostility to women is seen as occurring within the internal cultural practices of the profession – and the associated symbols of formal and informal acceptance – then it is possible to see the array of rejections suffered by all the women whose lives I have described as traceable to the same source. We should see those rejections for what they are – that is, express or implied assertions of property rights by

men over the symbols of professional acceptance and confirmation, without moral justification. This is so whether the symbols take the form of appointments as senior counsel, presentation of oral argument in courts and tribunals, the taking of witnesses, the occupying of chambers, or the myriad of senior institutional decision-making roles throughout the legal profession.

76. If the profession was to recognize clearly that these symbols do not “belong” to men, that there is no moral ownership of those symbols by men, then the latter-day successors of Flos Greig, Joan Rosanove and Mary Gaudron, will not be seen as dislodging men from that to which they are entitled. They ought perforce not be subject to the same rejections or resistance.
77. Finally, might I say that Flos Greig, Joan Rosanove and Mary Gaudron and the other Australian women I have mentioned have lived glorious and inspirational lives – as did Ethel Benjamin. They lived their lives in good grace with resilience, good humour and singled-minded determination over extended periods. Their passion for the law and their respective efforts at law reform extended, as Ethel Benjamin would have hoped, the boundaries of right. We must trust that we, together with the profession which those women chose to join, can crowd the wrongs out of existence.
