

# A Strong Woman: Justice Jane Mathews' Contribution to the Legal Profession

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I've had the good fortune of being raised by strong women – and so throughout my legal career I have looked up to, and been inspired by, strong women.

As a relatively-young, ethnic woman, about to commence my career at the Bar, I am hopeful about the legal profession's capacity to embrace diversity and change. And yet, I know that, at times, it seems that diversity and change are slow to happen.

Many of the markers of change we owe to the strong women who have come before us; the women who paved the way; the women who did it first.

At least three of these 'firsts' we owe to Justice Jane Mathews.

You may have known Justice Mathews, may have heard or read about her accomplishments and contributions to the law and jurisprudence. Her death, on 31 August last year,<sup>2</sup> was a great loss to the legal profession, and the world is forever a little dimmed for no longer having Justice Mathews in it.<sup>3</sup>

I do not say this lightly. I met Justice Mathews, very briefly, on 11 August 2017 at an awards night held by the Women Lawyers Association of NSW.<sup>4</sup> That night Justice Mathews remarked on how wonderful it is to have a platform to celebrate the achievements of women in law. I couldn't agree more. I intend to use my platform tonight to celebrate some of Justice Mathews' achievements and share with you some of her stories.

Justice Mathews is described as a 'pioneer',<sup>5</sup> a 'trailblazer',<sup>6</sup> a jurist,<sup>7</sup> an advocate,<sup>8</sup> a 'mentor'.<sup>9</sup> These descriptors are not easily attributed to any one person and yet throughout her life and legal career Justice Mathews has earned each one.

Justice Mathews began her legal journey as one of only two women who undertook the study of law at Sydney Law School that year.<sup>10</sup> She was, inevitably, the only woman in each of her law classes, and her lectures would, as matter of routine, begin with 'Lady, and gentlemen'.<sup>11</sup> But Justice Mathews didn't mind that. You could say that she was more comfortable than most with the



idea of being a pioneer. She graduated with Honours in 1962.<sup>12</sup>

She was the first female articled clerk at Dawson Waldron,<sup>13</sup> the precursor firm to what is now Ashurst. And at 24, a couple of years after practising in a firm in Wollongong, she returned to city to join Allen, Allen & Hemsley (the precursor to what is now Allens) defending defamation suits for the Packer Press.<sup>14</sup>

In 1969, she was called to the Bar<sup>15</sup> as one of only a dozen female barristers at the time.<sup>16</sup> She was tutored by Sir Laurence Street<sup>17</sup> and specialised in criminal law, at a time when every other woman barrister (with the notable exception of Justice Gaudron) were pigeonholed into family law.

Justice Mathews loved practising criminal law. In fact, she often said that she found it 'absolutely fascinating' because in criminal law 'people and events [often made] truth [way] stranger than fiction'. Yet, in her own words criminal law 'paid a pittance'.

Justice Mathews also knew prejudice and discrimination in her time at the Bar.<sup>18</sup> She recounted in an interview that she heard the phrase 'I'm terribly sorry, but the solicitor doesn't want a woman' on more than one occasion.<sup>19</sup> And saw many solicitors acting against recommendations of other barristers and briefing counsel with considerably less experience.<sup>20</sup>

Of course, over the past 40 years, we've seen some improvement in briefing practices – especially since the introduction of the Equitable Briefing Policy by the Law Council of Australia in 2016.

2020 is the year by which the Policy intended that a target be reached. A target which would see women receive at least 30% of briefs and at least 30% of the value of all briefs from each signatory organisation each year. We have seen law firms, business organisations, clients and in-house counsel embrace Equitable Briefing practices,<sup>21</sup> some with caution and some with gusto. On a personal note, I am fortunate that as I transition from private practice to the Bar, both my former colleagues at King & Wood Mallesons and current colleagues at Westpac have tuned in to tonight's lecture to show their support. But I hope that the statistics, both this year and in the years that follow, will prove that all law firms, organisations, clients and in-house counsel have embraced Equitable Briefing practices with genuine commitment.

Next, on Justice Mathews' remarkable journey at the Bar, was her appointment, between 1974 and 1977, as counsel assisting Royal Commission into Human Relationships<sup>22</sup> – which arose out of heated debate in Australian parliament at the time on the issue of abortion.<sup>23</sup>

The Commission covered a range of issues which were the subject of debate in the community, including de facto relationships, domestic violence, sexual offences and the decriminalisation of abortion, homosexuality and prostitution.<sup>24</sup> Despite making over 500 recommendations, at the time the RC's final report was handed down,<sup>25</sup> very few of the recommendations were adopted. In another example of how the law at times embraces change a little too slowly, it took six years, from the publication of the final report, for 'acts of homosexuality'<sup>26</sup> and 42 years for abortion to be decriminalised in NSW.<sup>27</sup> I think that shows that strong women, like Justice Mathews and Elizabeth Evatt (who

led the Commission), were very much ahead of their time.

In an interview Justice Mathews gave in the years that followed, she talked about how eye-opening that appointment was for her and how she 'realised just how much the legal processes victimised women who had been brave enough to report sexual offences'.<sup>28</sup>

She was also Junior Counsel Assisting the Royal Commission into NSW Prisons from 1977 to 1978<sup>29</sup> and then the first female Crown Prosecutor,<sup>30</sup> a role she held for three years.<sup>31</sup> In that time, she focussed much of her work on sexual assault cases, because one of her first appearances as Crown Prosecutor confirmed the impression with which she was left following the Royal Commission, namely that legal processes are incredibly confronting to victims of sexual violence.

She recounted that the criminal courts were:

totally an all male environment... totally hostile environment for a female victim...[and it is in large part] because of that, most victims wouldn't come forward... I [remember one time while at the private Bar, I] refused to appear for a fellow charged with a sexual offence.... [and then] when I became crown prosecutor... [I] will never forget.. two female victims/complainants in this all male court, [and] it made so much difference to them that one of them cried when they saw that the crown prosecutor was to be a woman... after that I specifically asked to appear in those cases because it [made] such a difference to the complainants.<sup>32</sup>

Justice Mathews is remembered, in her time as Crown Prosecutor, as an advocate of 'outstanding ability to sort, assess and present facts in a simple, unbiased and ultimately just, manner'.<sup>33</sup>

In another of her seminal firsts, Justice Mathews was appointed to the District Court in 1980 (at the age of 39).<sup>34</sup> She was the first female appointed to full judicial office in NSW, demonstrating her 'courage to be a ground breaker'.<sup>35</sup>

But in another one of many ways in which Justice Mathews was a role model, she spoke openly about the toll which the role of being a judge can at times take. In particular she spoke about experiencing 'physical manifestations of stress' on a number of occasions during sentencing.<sup>36</sup> She described that as 'the most difficult part of a judge's life'.<sup>37</sup>

When reflecting on her appointment, Justice Mathews commented:

The law was considerably more male then than it is now, and I was conscious of a degree of resistance and questioning of my appointment, and a questioning whether the bench was really a place for a woman...



Justice Jane Mathews AO

I was conscious of the fact that people were waiting for me to make... mistakes... But after a while we all settled down... and I think they treated me ... like an honorary chap.<sup>38</sup>

Justice Mathews served as a judge on the District Court until 1987.<sup>39</sup>

Others have written about, and later on Naomi will speak to, Justice Mathews' time and contribution as a trial judge but I cannot let go unmentioned Justice Mathews' time serving concurrently from 1984-89, as Part Time Commissioner on the NSW Law Reform Commission<sup>40</sup> and, from 1985-1987, as Senior Judicial Member of the NSW Equal Opportunity Commission,<sup>41</sup> in which role she delivered a number of landmark decisions, not the least of which are:

- (a) *Leves v Minister for Education*<sup>42</sup> – Melinda Leves was a student at Canterbury Girls' High School and she had a twin brother who attended Canterbury Boys' High School. At the boys' school, the electives available for study included computer science and industrial arts. At the girls' school, the electives were domestic science and textiles. Miss Leves lodged a complaint alleging discrimination and Justice Mathews upheld that complaint. Justice Mathews' decision was, in turn, upheld on appeal.<sup>43</sup> As a consequence,

the entire education system in NSW was overhauled, and the elective subjects, made available to boys and girls in public schools, standardised. Justice Mathews reflected that it was 'unusual for a judge to make a decision that makes a positive contribution to society and it's a real privilege to do so'.<sup>44</sup>

- (b) *O'Callaghan v Loder & the Commissioner for Main Roads*<sup>45</sup> which remains a seminal judgment on sexual harassment in Australia.

Capping off the trifecta of firsts, Justice Mathews rose to become the first woman appointed Justice of the Supreme Court of NSW in 1987.<sup>46</sup> She was only the second woman to be appointed a Justice of a Supreme Court in Australia, after Dame Roma Mitchell's appointment in 1965 to the Supreme Court of South Australia (appointments some 22 years apart).<sup>47</sup>

Justice Mathews' judgments showed remarkable insight and had a profound social impact – for instance, in the case *R v Harris and McGuinness*<sup>48</sup> which required the determination of sex under criminal law of two transgender persons, who had been charged with an act of indecency between adult males. In writing the leading judgment, with which Sir Laurence Street agreed, Justice Mathews refused to follow what was



the 'then accepted English authority that, notwithstanding that a person had had [gender] re-assignment surgery, the person remained male for the purposes of the law'.<sup>49</sup>

In 1991, Justice Mathews met with a group of international women judges and helped found the International Association of Women Judges<sup>50</sup> and in 1992, she established the Australian Association of Women Judges.<sup>51</sup> The objective was to address the 'peer deprivation' experienced by women in the judiciary.<sup>52</sup>

Of that time Justice Mathews said:

I'd been really isolated. I'd been on the bench for nearly 10 years as the only woman on my court. To suddenly be among a whole group of women experiencing exactly the same thing was amazing.<sup>53</sup>

She served as the president of the AAWJ from 2001 to 2006<sup>54</sup> and of the IAWJ from 2004 to 2006.<sup>55</sup> On 11 May 2019, the Australian Association of Women Judges awarded its first ever life membership award to Justice Mathews, honouring her contribution to the global judicial community.<sup>56</sup>

In 1994, she was appointed to the Federal Court and assumed the Presidency of the Administrative Appeals Tribunal<sup>57</sup> and Deputy Presidency of the Native Title Tribunal.<sup>58</sup>

In one of the last interviews she gave before her passing,<sup>59</sup> Justice Mathews commented on her appointment by the then Prime Minister, Paul Keating, as the reporter in relation to a claim by the Ngarrindjeri women under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to prevent the building of a bridge to Hindmarsh Island in South Australia.

Justice Mathews explained that 'the area over the water was sacred to the indigenous women, [and] it was for reasons only women were allowed to know...'<sup>60</sup> This meant that the dreaming stories could, in turn, only be shared with women.

After her nomination was challenged as inconsistent with Chapter III obligations,<sup>61</sup> the 'incoming Prime Minister [John Howard] refused [her] entreaties to also appoint a woman to deal with the Hindmarsh issue. And the Minister for Aboriginal Affairs was a man, who had to see the material and make the final decision. So the women went to water, and refused to tell their stories.'<sup>62</sup> Justice Mathews said: "I found that a very difficult and distressing time..."<sup>63</sup>

This story exemplifies to me, one of many reasons why it is imperative to have women in the legal profession, across industries and in public office. To fully bring to bear the diverse voices and experiences of women; to ensure that that which would otherwise be lost to history, is heard; and to ensure that our profession is representative of society at large, the society which we serve.

In 2001, Justice Mathews returned to the Supreme Court as an Acting Judge.<sup>64</sup>

Beyond Justice Mathews' incredible contributions to the law, she was also described as 'an Italian linguist, a distinguished patron of the Arts, horse breeder, gardener and an enthusiastic traveller, the President of the Arts Law Centre between 1989 and 1994; and trustee of the AIDS Council of NSW'.<sup>65</sup>

I gather from the articles and speeches I've read that Justice Mathews' passion for 'music, laughter, good company, good food, intellectual argument and the occasional joke', was legendary.<sup>66</sup> And so it must have been, because in May 2005, she was awarded Australia's highest honour, the Order of Australia, as an Officer (AO) in the General Division for service to the judiciary, to the legal profession, to the University of New South Wales and to music.<sup>67</sup>

In 2007, Justice Mathews became a patron of the Women Lawyers Association of NSW<sup>68</sup> and an advocate for women in law, saying: "I have long been concerned about issues regarding women in the legal profession, particularly women at the bar".<sup>69</sup>

Justice Mathews has, as the NSW Premier Gladys Berejiklian said, left an indelible mark on the State's legal profession<sup>70</sup> and shaped the lives of generations of men and women across the profession – not least, her peers at the judiciary and those she mentored at the Bar.

At the time of writing her paper 'The Changing Profile of Women in the Legal Profession',<sup>71</sup> in the early 1980s, Justice Mathews believed '[t]hat women were storming in[to] the legal profession'...

I, in those days, naively used to think that with the push of numbers from the bottom, it would inevitably happen, a generational thing, that women would make their way up to the top in similar numbers.... I was hoping for a surge-up effect. The problem is that it's only been a trickle rather than a surge.<sup>72</sup>

Let's briefly consider today's statistics:

- (a) of all Law graduates: over 60% F : 40% M<sup>73</sup>
- (b) of all barristers at NSW Bar: 23.48% F : 76.52% M<sup>74</sup>
- (c) of all Senior Counsel at NSW Bar - 11.97% F : 88.03% M<sup>75</sup>
- (d) speaking roles in court if we take the period between Sept 2017 and April 2018 as an example, across the Supreme Court of NSW and the Federal Courts, the appearance rates are: 3% female silks, 3% unled female barristers, 3% led female barristers and 87% men<sup>76</sup>
- (e) of all judges in NSW: 36% F : 63% M<sup>77</sup>

If not these statistics, recent events, across the Bar and judiciary might serve as a wake-up call to those who are inclined to think that we have achieved gender equality either in society or across the legal profession;<sup>78</sup> those who might be minded to think that discrimination and harassment are a thing of the past.

That we have made great progress is thanks entirely to strong women, like Justice Mathews, who took up the mantle for change and pushed progress forward.

As Justice Mathews said "what we aspire to: [is] a time when it makes no difference whether you're a woman or not. We're closer to it now than we used to be, but we haven't got there yet".<sup>79</sup>

I hope that each of you is as inspired by the extraordinary life which Justice Mathews led, as I am. Inspired enough, to take up the mantle in turn.

How do we do that? How can each of us play an active part in the lives of other strong women? I will leave you with three thoughts:

- (a) listen to and embrace the diverse experiences of women around you;
- (b) speak up if you ever witness an instance of discrimination, bullying or harassment; and
- (c) create and advocate for opportunities for women, both in law and out. **BN**

## ENDNOTES

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- 2 NSW Bar Association, 'Pioneering Women 1921-1975': Jane Mathews AO <[https://nswbar.asn.au/the-bar-association/bar-history/pioneering-women#/view/17\\_jane\\_mathews](https://nswbar.asn.au/the-bar-association/bar-history/pioneering-women#/view/17_jane_mathews)>.
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