

# **2022 Speech for New South Wales Bar Association's International Women's Day Event on Breaking the Bias and Racial Equality**

8 March 2022

Judge Dina Yehia SC

*Judge of the District Court of New South Wales*

## **BREAKING THE BIAS**

I commence by acknowledging the traditional owners of the lands upon which we gather – in my case, the Gadigal people of the Eora Nation – and pay my respects to their elders past and present.

I acknowledge the ongoing impact of colonisation and dispossession, but I also acknowledge the strength and resilience of First Nations peoples and their continuing connection to lands, waters, and culture.

It is a little disconcerting to be giving this speech over zoom. I wish that we could have been celebrating in person. But, I will do my best and hope that you don't switch off or switch out.

I want to send a message to all those practitioners who are affected by the floods. I have friends who work in Lismore and the surrounding courts. I have heard terrible stories of your offices being damaged; losing files; and dealing with the destruction caused to your houses. The courthouse is going to be closed until 21 March 2022. I want you to know that you are not alone.

I thank the President of the Bar Association for inviting me to speak on this very special day – International Women's Day. Frankly, I believe that women should be celebrated every single day, but I acknowledge the importance of today and am very honoured to be giving this speech.

I thank Melanie Cairns and Uche Okereke-Fisher for organising the event and the Diversity and Equality Committee, led by Kate Eastman SC, for the work the Committee has done in developing, implementing and promoting strategies, policies and initiatives designed to attract and retain barristers from diverse backgrounds.

I acknowledge and thank my co-speaker, Ms Sally Penni MBE.

I am looking forward to hearing from you and learning from your experience in the United Kingdom. The best way to develop, grow our ideas, and institute policies and strategies that have the best prospects of succeeding, is to have a conversation that extends beyond our limited borders.

There have been many women who have sacrificed and worked tirelessly to achieve progress for other women in the profession. They are too many to name in the short time that I have. As a woman from a diverse background who migrated to this country at a young age without connections or language, I applaud those women and express my deepest gratitude to them.

I also want to acknowledge the support of our male allies, those men in the profession who understand the importance of not just mentoring women, but sponsoring them to ensure that women get briefed, not only as juniors but as lead counsel, and to promote them into positions of leadership.

The reality is that the power in the legal profession still rests overwhelmingly with men from a certain background of privilege. To those of you who recognise the barriers facing women – and, in particular, women from diverse backgrounds – and who help in a meaningful way to break down some of those barriers – I thank you.

To proceed without acknowledging the progress made by women in the law over the last two or three decades would fail to do justice to the hard work, the advocacy, the sacrifice, and the enormous effort of women in the law.

This morning the Chief Justice of the Australian Capital Territory, Justice L McCallum, was sworn in, continuing the tradition of strong women in positions of leadership in the Australian Capital Territory.

I acknowledge the appointment of Justice Ward as the President of the New South Wales Court of Appeal.

I acknowledge the achievements of the New South Wales Bar Association's Senior Vice President and Junior Vice President, both women of high intellect, enormous work ethic and discerning judgement.

That these women are in leadership positions is worthy of celebration. That there has been progress is undeniable, but that there is a long way to go, and that too is also undeniable.

The campaign theme of this year's International Women's Day for the New South Wales Bar is "**break the bias**". The theme is aimed at raising awareness of the barriers women of colour (and, indeed, men of colour) face in court and at the Bar, and to inspire women of all colours to feel included at, and to join, the New South Wales Bar.

Promoting diversity in the profession, amongst the ranks of solicitors, barristers, senior counsel, and the judiciary, is not a new objective, although its realisation is proving to be a very slow process.

Diversity on the Bench is fundamentally important to continuing community confidence in the judiciary. A judiciary that fails to reflect the make-up of the society from which it is drawn, will sooner or later lose the confidence of that society.

It is essential that we encourage and mentor lawyers with diverse backgrounds, not only to enter the profession, but to remain in the profession; to go to the Bar and remain at the Bar; and to reach the senior ranks of the Bar. This is one way of ensuring that the judiciary will become more diverse and reflect the society from which it is drawn.

I believe I was asked to speak because of my experience both in my capacity as Chair of Diverse Women in Law ('DWL') and as Chair of the Walama Working Group. It may well be that being one of a handful of female judicial officers from an ethnically and culturally diverse background also had something to do with it.

When I speak of diversity, I am not referring to gender diversity only. We must recognise the significance of intersectionality when we speak of diversity. Some women in the law have to contend with more than one obstacle or barrier.

DWL's target audience self-identify as women from one or more of the following backgrounds:

- Culturally and linguistically diverse;
- Aboriginal and Torres Strait Islander;
- LGBTQI;
- People with disability;
- People who are, or have, experienced socioeconomic disadvantage; and/or
- People with caring responsibilities.

So, when we speak about diversity, I want us to think about it in those broader terms.

A moment ago, I identified some of the achievements and progress made by women in the profession. I also said there is still a long way to go, and, no doubt, this audience knows exactly what I mean by that.

In preparation for this speech (assisted by my incredible Associate, herself a diverse woman who has already achieved a great deal and will continue to shine), I looked at the statistics relating to women in the profession in New South Wales and was surprised at the absence of detailed statistics in relation to women from diverse backgrounds in the law.

But even without that granular detail, the statistics clearly support the contention that there is still a long way to go. This is particularly so in respect of women progressing to the senior ranks of the profession, including as partners; senior counsel; and judicial officers.

Currently, women make up 60% of law school graduates. Only 23% of practising barristers in New South Wales are women, and only 11% of senior counsel are women. I was unable to find the figures as to how many of the 11% were women from diverse backgrounds.

I am unaware of any comprehensive study measuring the number of female practitioners and judges in NSW who come from diverse backgrounds. The absence of such research is problematic. Arguably, it deprives us of the evidence required to support advocacy for change.

What I was able to find out was that in 2020, only 0.7% of all female solicitors in Australia were Indigenous. Of the 144 Magistrates in New South Wales, only 1 is Indigenous. In the New South Wales District Court, there has been 1 Indigenous Judge, Bob Bollear. He was a larger-than-life personality. He was smart, engaging, and compassionate.

He served as a Judge of the District Court of New South Wales from 1996 until his death in 2005. There has been no Indigenous Judge appointed since.

In 2019, a study was conducted by some of Australia's leading commercial firms including Baker McKenzie; Herbert Smith Freehills; King Wood and Mallesons; Clayton Utz; and Ashurst. The study found that only 8% of partners and non-partner lawyers were from diverse backgrounds. No distinction was made as to how many were women.

This morning, the Secretary of the Department of Communities and Justice published a report on the Premier's Priority Diversity Target for Women in Senior Leadership. The Secretary stated that the 2021 workforce profile showed that *"53.7% of our senior leadership roles are occupied by women"*. Once again, there appears to have been no identification of how many of these women are from diverse backgrounds.

The law firms I mentioned earlier, and others, have instituted policies and charters with the objective of promoting cultural diversity within their workplace. Indeed, many of these firms have supported DWL over the last three years. They have partnered with us and are among our sponsors.

In 2021, Legal Aid published a comprehensive diversity and inclusion plan. I applaud these strategies. I also take this opportunity to express my gratitude to those who have supported DWL.

Notwithstanding these measures, we continue to witness low numbers of diverse women in the senior ranks. I accept that change can be a slow process. But we are better informed as a profession than ever before – we should be able to speed up the process – to commit to change in a meaningful way. We should be able to constantly assess our progress and be innovative about the future.

I do not think I need to labour the point any further – what then are the solutions?

None of the suggestions I am about to make are radical or new. Many women, and some men, have spoken about these solutions in the past and continue to advocate for them.

They include mentoring programs for women, in particular women from diverse backgrounds.

I acknowledge that a number of mentoring programs exist. Indeed, it is heartening to see that things have changed in that regard. 30 years ago, when I started out as a practitioner, there were no formal mentoring programs. Mentoring was an informal hit and miss experience – if you were lucky enough, you found a mentor that provided you with the all-important guidance and support that is so necessary, particularly when you are starting out.

DWL has, for the past three years, instituted a mentoring and networking program for female law students from diverse backgrounds. Last year, we commenced a senior mentoring program for women from diverse backgrounds. I am hopeful that we can develop a further program which allows for mentoring of junior women by senior women in the profession who come from diverse backgrounds.

It is important for female law students and entry-level solicitors from diverse backgrounds to see that they can achieve great things. It is important for them to see women of colour at the Bar and on the Bench. It is important for them to see people like themselves progressing in the profession.

Often, they have migrated to Australia with their families at a young age not speaking English. If they are first-generation Australian, they grow up in a household where English is a second language. Sometimes, they are the first in their family to go to university.

They don't have family friends who are lawyers or judges. They are constantly aware of the difference, questioning whether they are good enough and whether they will ever be able to fit in.

Their cultural experience, their home life, the restrictions placed upon them, and the expectations placed on them are different. They have to navigate all of that in addition to their law degrees and trying to find a job in a very competitive profession.

During my work with DWL, I have been asked by women from diverse backgrounds, on more occasions than I can count, about my personal and professional journey as a migrant. They want to know. They want to believe that they can also achieve. They want to be reassured that the fact they are different is not an impediment.

But more than mentoring, what is required is sponsorship. While mentoring is extremely important, and I am sure we are all the beneficiaries of at least one mentor in our professional lives, I have come to the view that much more is required.

There must be sponsorship of women, in particular women from diverse backgrounds. What I mean by sponsorship, is actually giving women the work; briefing women, not just as junior counsel, but as lead counsel; and recruiting managers and appointing partners to reflect the abundant skill and capacity for work that women have.

I mean, think about – some women in the profession are not only working 10 to 15 hour days, in their capacity as solicitors or barristers, but in the main, they are the ones looking after the children and attending to the day-to-day needs of the household. Women have proven again and again their capacity for multi-tasking, their resilience and capacity for hard work. Isn't that what is required when briefing someone? When thinking about who is next in line for a partnership? When appointing a judicial officer?

I also believe that we must keep better statistics about women from diverse backgrounds in the profession. Arguably, such evidence will better inform policy and debate about such things as targets and quotas.

But something even more fundamental than all these practical solutions is required – it is a change in culture or a shift in mindset. There remains a degree of implicit, or unconscious, bias in recruiting and briefing practices.

When I was a Public Defender conducting back-to-back trials, both in the District and Supreme Courts, how many times did I hear that a particular matter required briefing a man? There was a misconception that men were more aggressive than women and, therefore, better advocates. I am sure that mindset persists in some quarters.

I can tell you that during my seven years on the Bench, the best advocates have been the measured, well-prepared, and succinct advocates, not the loud, table-thumping kind.

It is a stereotype that is long past its due date.

Another stereotype that is well past its due date is that women of colour, women from diverse backgrounds, are better suited as solicitors than barristers or judicial officers.

Many of the young women I mentor through DWL have raised with me the unease and discomfort they feel when they are applying for a job and are conscious that they are the only black woman in the pool of applicants, or are conscious of the fact that their surname immediately identifies them as something different – as the other. Rarely is anyone on the interviewing panel black or of colour. No one on the panel is wearing a hijab.

How does that impact upon their confidence and performance? How do they relate, in that interview process, the very qualities, informed by their diversity, that make them the applicant best suited for the job?

More importantly, how does it impact upon those doing the recruiting or briefing. Is there an implicit bias against these applicants or advocates?

Some people in the profession are in denial about implicit bias, just as they are about institutionalised or systemic racism. Implicit bias is difficult to address because by its very nature, it is unconscious. It potentially afflicts us all.

We all believe that we are well intended. I think most of us are. We believe that we are progressive. We believe that we do not make decisions driven by bias or prejudice. But we have to be measured by the objective evidence. Something is going on, given the statistics.

In “Don’t Look Like A Lawyer: Black Women and Systemic Gendered Racism”, Tsedale Melaku, American sociologist, stated that in the legal profession women of colour, namely: “***you don’t look like a lawyer***”.

According to Melaku’s research, a successful and powerful lawyer (noting that she is writing in the United States) is based on appearance, namely, the appearance of a usually white and usually male lawyer. Women of colour are categorised as the “***invisible other***” and are required to work extra hours and on complex matters in order to receive any form of recognition.

I pause there to tell you a very short story that highlights this phenomenon of implicit bias, where well-intentioned people can make decisions or proceed in a way that is underscored by prejudice. This was a story told to me a couple of years ago by a very close friend who had started as a young lawyer in criminal law, appearing in the Local Courts. She is an intelligent, capable, resilient, strong and forthright young Indigenous woman.

On one of her first days appearing in the Local Court list, she happened to be first at the Bar table when the Magistrate came onto the Bench. She was about to get up to mention one of the matters, when she was asked by the Magistrate where her solicitor was and told to sit in the public gallery until her solicitor arrived.

Now, this was not an overtly racist Magistrate. What it demonstrated, however, is the degree of implicit bias that can operate. This woman told the Magistrate that she was in fact the Legal Aid lawyer appearing in the list and got on with her work. But in the telling of that story, she revealed the impact upon her – the assumption made was because she was black, she must have been an offender before the Court.

Tackling bias with blind screening, blind interviewing and blind hiring may be one way of addressing the issue in some areas of the profession – perhaps when hiring solicitors. It becomes more difficult when briefing a barrister or appointing a judicial officer.

Educating the profession about implicit or unconscious bias is important. But again, education by itself is not the complete answer. I have come to the view that what is required is making sure that those in positions of power, those who are

responsible for recruiting and briefing, are not only educated, but are required to demonstrate in some tangible way that they are changing their practices to be more inclusive of women and, in particular, women from diverse backgrounds.

That could be done through setting targets. It could be done through a process of making information about hiring practices in individual firms; the make-up of individual chambers; the appointments in individual courts – not only public, but easily accessible. We must be able to make individuals, organisations and institutions accountable.

I echo some of the remarks of the Chief Justice (as he then was) of the New South Wales Supreme Court, Justice T Bathurst, in his swearing out speech last week. His Honour referred to two ongoing issues that continue to pose challenges and still need to be confronted. He said:

*“the first is the need to increase diversity in the court, not only gender diversity but cultural diversity. With the number of lawyers from which judges are drawn becoming increasingly gender and culturally diverse, it is tempting to think diversity will occur over time without any focus on the issue. However, I do not think there is room for complacency. The increase in diversity in this court has not kept up with the increasing diversity in the profession. Those involved in the selection and appointment of judges should have regard to this issue so that, to the extent possible, the lack of diversity is remedied”.*

When I was first appointed to the District Court of New South Wales, I was able to access the corridors of the floors where chambers are located. On the walls of some of those corridors, are photographs of District Court judges from years past.

It is important to acknowledge and celebrate all judicial officers who have served the community in this distinguished role. However, it struck me that for decades, the photographs were exclusively of white men.

Of course, that has changed. I am very proud to say that in the New South Wales District Court, nearly 40% of the judges are women. But I do look forward to the day when I walk around those corridors and look up to see photographs of judges from diverse backgrounds, and particularly photographs of women of colour.

## **INSTITUTIONALISED RACISM**

I want to now move to a different, but related, topic. I said earlier that I think one of the reasons I was asked to speak is related to my experience in my capacity as Chair of the Walama Working Group.

For those of you who do not know, the Walama List is an Indigenous Sentencing List in the New South Wales District Court. It commenced on 31 January 2022. Its objectives include reducing the disproportionate rate of Indigenous people in custody by providing a more holistic approach to sentencing of Indigenous offenders that includes engagement with Elders and Respected Community members and referral to culturally appropriate rehabilitation programs.

I have talked about barriers facing women from diverse backgrounds in the legal profession. I want to now talk about different barriers – those facing women of colour who appear in court, not as lawyers and barristers, but as offenders.

I want to talk about implicit bias in a different context.

The disproportionate rate of First Nations Peoples, men women and children, in our gaols and juvenile detention centres is a crisis in this country. The Uluru Statement from the Heart conveyed the profound nature of this crisis in simple words that we should all reflect upon and do something about. I will repeat some of those words here:

*“Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future”.*

Given the theme of today, I will focus on First Nations women who come before the criminal justice system. Indigenous women are overrepresented in the sentenced population, with a 49% increase since 2013 compared to a 6% increase among non-indigenous women. At present, Aboriginal and Torres Strait Islander women constitute 32% of women in custody.

80% of these women are mothers. In the majority of cases, they have been victims of domestic violence and sexual violence; intergenerational trauma; removal of their children; poverty; mental illness; and substance abuse.

If they are incarcerated for more than six months, it is likely they would lose their public housing. In a report published by the Australian Law Reform Commission in 2018, the Australian Law Reform Commission found that the rate at which Aboriginal and Torres Strait Islander women are imprisoned is a reflection of the multiple and layered nature of the disadvantage they face. The links between entrenched disadvantage, including social, cultural, and economic forms, and increased rates of criminal justice contact are well-established. A cycle of ongoing disruption, caused partly by repeated low-level offending and short terms of incarceration, can exacerbate existing disadvantage and make it extremely difficult for the woman to reintegrate into the community.

I want to add to this thesis by suggesting that we need to have a more honest and meaningful conversation about the role that implicit bias has in our sentencing practices. Does it factor in and to what degree?

Most of the judicial officers I know are alive to the disproportionate representation of Indigenous people in the criminal justice system. I believe that there are very few racist Magistrates or Judges. I acknowledge, of course, that there have been some cases where racist views have been expressed from the Bench – not so long ago a judicial officer told an indigenous mother who was being sentenced by him that she probably got drunk on pension day and “*abandoned your kids in that great indigenous fashion*”.

But I believe these examples are few and far between. What I am really speaking of is reflecting upon and questioning the extent to which implicit bias operates in a negative way in our decision-making processes. In that same way that the Magistrate assumed that my friend was an offender before the Court rather than the Legal Aid solicitor, many of us may be making decisions based on misconceptions and assumptions that we must recognise and question.

Again, this involves a process of educating the profession, including judicial officers.

In the context of our First Nations peoples, the Ngara Yura Committee’s primary role is to increase awareness among judicial officers about the history of our First Nations peoples and about contemporary Aboriginal social and cultural issues.

The Judicial Commission established the Ngara Yura program in 1992 in response to the final recommendations of the Royal Commission into Aboriginal Deaths in Custody, namely, that judicial officers should receive instruction and education on matters relating to Aboriginal customs, culture, traditions and society.

Our activities, events and excursions are not limited to judicial officers, but are open to members of the profession. The Committee supported by staff of the Judicial Commission, who do a fantastic job, understands that judicial officers and other members of the profession have an important responsibility to listen and learn.

This is one way to address implicit bias – to educate ourselves. Another very important way is to actually listen to the voices of our First Nations peoples, to be guided by them as to the answers required to address the injustices.

The Walama List endeavours to do just that by adopting an approach to sentencing that includes the presence of Elders and Respected Community Members, and by engaging with grassroots Aboriginal organisations who have developed culturally appropriate rehabilitation programs, to assist the Judge in arriving at an appropriate sentence.

What is encouraged is making room in the sentencing proceedings for an Aboriginal narrative – a “re-storying” (as Dr Thalia Anthony puts it). It is by these means that we try to avoid implicit bias and, in the context of sentencing, endeavour to arrive at more meaningful ways to address offending conduct and reduce recidivism.

Instead of incarcerating Aboriginal women, we endeavour to provide culturally appropriate rehabilitation and support programs and caseworkers – so that these women can keep their children; their houses; their dignity and self-worth.

### **CLOSING REMARKS**

I like to end on a note that provides some practical steps for the future – an action plan of sorts. I commend these suggestions to you for further discourse and action:

- More sessions run through the Bar Association, Law Society and Judicial Commission (and other Judicial bodies) on implicit bias – how to recognise it and deal with it?;
- More sessions in workplaces and university settings regarding cultural training and awareness;
- More sessions run through the Bar Association and the Law Society regarding career opportunities for diverse women in the legal profession;
- I call on senior members of the profession to get involved in mentoring and sponsoring women from diverse backgrounds in the law;
- I call on the legal profession, both government and non-government sectors, to engage in meaningful discussions about the setting of targets or quotas for the recruitment and promotion of diverse women;
- For those sectors that do not have them, I urge you to adopt an Equity and Diversity Plan or Charter, supplemented by an Equity and Diversity Committee run by women from diverse backgrounds that oversee and track the recruitment and promotion of diverse women; and
- Finally, register for events held by the Ngara Yura Committee and Diverse Women in Law - our next Ngara Yura event is a webinar entitled “A Story of Resistance:” which is going to be presented by Emeritus Prof John Maynard. It will take place on 15 March 2022 between 5:00PM and 6:30PM.

I leave you with these suggestions. Once again, I am very grateful for the opportunity to speak on this very special day.