

STATE OF THE NATION — TAUĀKĪ O TE MOTU

Three women in the law provide their perspectives about the current issues facing women as well as what we can do in the future to improve the situation of women within and effected by the law.

The future of Māori women in the law — Hon Deputy Chief Judge Caren Fox*

I am honoured to contribute to the first issue of the Journal my thoughts on the future of Māori women in the law.

When I was a student at Victoria University in the 1980s, there was little in the core subjects that we studied that identified Māori issues in the law. There has been a sea change since then, too large in nature to canvass in this column. What I will note is that whereas in the 1980s the Waitangi Tribunal had only just gained jurisdiction to hear historical claims, as it stands the Tribunal has only three active historical district inquiries left to complete. After their completion and report production by 2020–2022, the historical claims period as we have known it since the establishment of the Waitangi Tribunal will come to an end. The courts are now well familiar with the Treaty of Waitangi, Māori customary law or tikanga and Māori issues. Thus the focus for Māori communities into the future will be on:

- i) the post settlement governance entities of the tribes and their legal needs for the future;
- ii) the social, health, economic and cultural issues that raise challenges for the continuing relationship between the Crown and Māori; and
- iii) the thematic issues that impact on all Māori such as constitutional reform, natural resource ownership or management and Māori land

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development, the role and status of Māori women, the role of the Māori language in main stream education and so on.

This legal environment will require a nimble well trained bar of lawyers who can provide advice on topics as diverse as commercial restructuring and intellectual property rights through to human rights law. Māori women lawyers need to be prepared for this shift and many already are. However, their ability to practise law is significantly affected by issues identified by the Māori Law Society, such as:

- i) race barriers in the legal profession and a general failure within law firms to understand the importance of Māori culture and perspectives;
- ii) adverse gender perceptions of women in the law;
- iii) inflexible working arrangements and failure to accommodate motherhood;
- iv) a lack of self confidence to act and/or be at the table; and
- v) a lack of role models and role modelling for wāhine Māori (Māori women); the counter-factual position being that wāhine Māori in senior roles are required to be all things to all people.

Strategies are needed to overcome these issues and these include developing policies within law schools and law firms that provide for:

- i) legal education on Māori issues in the law;
- ii) recruitment and retention programmes;
- iii) flexible work arrangements;
- iv) accommodation of Māori culture and perspectives;
- v) opportunities to develop a sound gender policy for promotions;
- vi) career advice and allocation of work that will generate the development of skills needed in areas of the law relevant to the Māori community for the decade commencing in 2020; and
- vii) mentoring programmes with appropriate senior Māori and non-Māori women members of the profession.

Such an approach would equally benefit other ethnic groups. The benefits of engaging in such developments are many and would result in a far more diverse and, in my view, innovative profession.

“Unconscious Bias” is too kind — Lady Deborah Chambers QC*

I PROGRESS AND WHY IT MATTERS

First the good news. There are more women practising than ever before. There are more women partners than ever before, more women judges, more women QCs and more women in powerful positions in the New Zealand Law Society and Government.

In areas the central government has control of, there has been real progress. We have had a series of progressive Attorney-Generals, Geoffrey Palmer QC, Margaret Wilson, Michael Cullen and Chris Finlayson QC, who have taken deliberate and positive steps to promoting women generally, and this is reflected in the judiciary and QCs. Judges are more diverse than the lawyers who appear before them. Elected governments are more responsive to fighting discrimination than the private sector.

We have come a long way baby — certainly from the days when I started work in 1983 when my employer, Butler White and Hanna, later Simpson Grierson, had a policy of ‘no women partners’.

Our progress matters. Not just for us, but for women generally. Women lawyers and other professionals are at the vanguard of the significant fight for justice for equality for 51 per cent of the world’s population. Senior women in the legal profession are in a position to take on some key issues that effect women so dramatically in our lives:

- i) the treatment of rape survivors who still have to give evidence in front of a jury needs desperate change;
- ii) domestic violence against women is a critical front in the change women seek for society;
- iii) the battles to control the power of the liquor industry and the tragic effect of cheap alcohol available at all hours on women and children is another battlefield;
- iv) equal pay and women’s representation on company boards; and
- v) the ability of women to speak out in the public eye without having

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a barrage of personal insults or questions about their reproductive capacity. Queen Victoria ruled the widest empire the earth has ever known for decades and gave birth nine times.

Neurobiologists now know there is no discernible difference between male and female brains at the point of birth. The only obstruction to women's capacity to lead is the willingness of those around them to accept their command.

II THE BAD NEWS: THE PRIVATE SECTOR IS DISMAL

The big issue for women remains the private practice of law where the trenches are still dominated by legions of penis-bearing bloviating nitwits who are elevated rapidly and far beyond their leadership capacity. The private sector has failed to treat women lawyers equally. It is the trenches in the private firms that are the frontline for women in law.

A The issues in the private sector

1 Equal pay — the most basic of criteria and our profession fails

The pay gap in New Zealand has remained static at about 12 per cent for a decade, and although recent research found women were more qualified than men in a range of fields, the gap has not narrowed. Worse still, the gender gap is about 18 per cent in the top professions and it gets more pronounced as we age. The research shows that it is driven by straight out sexism.¹

There is no research directly on equal pay amongst employed solicitors. Partnerships routinely insist employees keep their pay rates confidential. But there is no way there is equal pay for women in the legal profession. One contributor is the fact that women take a great deal longer to reach partnership. All one has to do is regularly read the announcements of people being made partners in the Law Society magazines where it is very obvious that women only make partnership after much longer periods of service than the men who are on a gender escalator. Approvals to take partnership without the usual mandatory three years' recent practise in the law are dominated by male applicants. About 85 per cent of those applications to the New Zealand Law Society Practice Approval Committees are from young men being promoted to partnership.

¹ See the research conducted by Dr Isabelle Sin at Motu Economic and Public Policy: Susan Edmunds "Reports says women paid less even when as productive" (29 August 2017) *Stuff* <www.stuff.co.nz>.

2 *Partnership*

We know that women are still not being made partner at the rates men are. Close to 70 per cent of law graduates are women, yet women make up less than 30 per cent of those who are partners or directors in law firms. This is despite more women graduates in law who are performing better at law school than their male colleagues. The big firms in particular, where so many women graduates work after law school, are failing women. A prime example is Bell Gully, which has seven women partners and some 36 male partners at a time when 47 per cent of practising lawyers are female.

That's right ladies, immediately below all these fabulous men who apparently deserve partnership is a huge tier of women "senior associates" and "special counsel", no doubt often being the brains and workers behind the people with penises since we consistently outperform men at law school. Not many are men — they have all been made partners. If women do not make equity partnership where the really significant income is earned or are much slower to reach it, it is inevitable that they will earn less.

When push comes to shove, we know that a significant portion of the gender pay gap is caused by straight out discrimination. Men resist having women in leadership roles just as they still do in regard also to minorities. And what fuels that resistance to equality is the sense of entitlement men have after thousands of years of patriarchy: that deeply ingrained mono-culturalistic thinking where people promote people who are like them. They are the ones who deserve promotion. The *Lean In* survey shows a pervasive sense amongst women that they face structural disadvantages: they are less likely than men to believe that they will be able to participate in meetings, receive challenging assignments or find their contributions valued.² The bleakest perceptions are from minority women. I have no doubt the same applies here for women from working class backgrounds, Māori, Pacific Island, Asian, and non-Pākehā women. Those double discriminations make it even tougher.

3 *Working mothers*

Half a century ago Betty Friedan stated that if housewives across the western world would embark on careers instead, they would be happier and healthier,

² *Women in the Workplace: 2017* (Lean In and McKinsey & Company, 2017).

their marriages more satisfying and their children would thrive. She was right. Repeated studies have shown that working mothers are physically healthier than their stay-at-home counterparts. Working mothers are also far less likely to feel sad or have clinical depression. We also know that working mothers spend more time with their children than housewives did in the 1950s and that household income is a bigger predictor of childhood academic development than time spent with parents.

In short, women lawyers should, like other women, not ditch their job upon having children. Yes, being a working mother is busy. Yes, you may have less leisure time than what you wish to have. But, there is no corresponding discussion about working fathers.

For lawyers and other women in high earning occupations, children are particularly damaging to their careers. Some women work less once they have children, but many do not, and employers pay them less too, seemingly because they assume they will be less committed, research shows.

The American Economic Review paper, which is the most up-to-date and thorough research in this area currently, establishes that even when mothers cut back at work, they are not paid proportionately less.³ When their pay is calculated on an hourly basis, they are still paid less than men for the hours they do. The pay gap is larger for university graduates because their earnings are higher, and men dominate the highest paying jobs. Legal jobs, like other graduate jobs, place more value on long, inflexible hours. The bulk of the pay gap, 73 per cent according to this American research, is from women not getting pay rises and promotions at the rate of men within companies, which of course we know comes down to discrimination.⁴ Seniority and experience pay off much more for men than for women.

These are not pipeline issues. I have been watching the pipeline for 34 years. There is real bias. There is no other logical explanation for the statistics. We have got to force it to change now.

Yet, many women work in companies with public commitments to diversity and clear policies against discrimination, with many men who sincerely believe they want to advance. That makes the subtler ways women

3 Erling Barth, Sari Kerr and Claudia Olivetti *The Dynamics of Gender Earnings Differentials: Evidence from Established Data* (The National Bureau of Economic Research, February 2017).

4 At 5.

encounter bias more pernicious than blatant discrimination, the Harvard Business Review meta-analysis found.

Yes, there are men who truly want women to succeed. Yes, business understands that a changing customer base means that they fail to diversify at their peril. No one wants to give in to defeatism. But the long path to the top and the loneliness at the summit are forcing a reckoning.

III WHAT CAN BE DONE?

A Firms

The gender pay gap is a reflection of women's position in the legal profession. No one is going to speak out in favour of it. Men have daughters too and fairness and equity are pretty hard to argue against.

1 Acknowledge it, get the numbers, have internal policies and address it

Law firms can tackle this. As Westpac Chief Executive Officer David McLean puts it:⁵

Closing the gender pay gap is the same as any other business problem – and once it is seen that way people take it very seriously ... We've made it one of our core business objectives. We broke the problem down, measured it, made people accountable for it, and set a three year target.

As a result of that programme, Westpac now has 51 per cent of its leadership roles occupied by women.

Some law firms are taking the same action. Russell McVeagh, for example, has a diversity project which developed, implemented and tracked the success of women within the firm in order to properly embed change. The female partnership numbers at Russell McVeagh are now up close to 30 per cent of the partnership, whereas 15 years ago this was only three per cent. Thirty per cent is still not great and still reflects discrimination, but at least this firm acknowledges the issue and is putting resources in.

Voluntary action by firms is to be commended, but progress has stalled and we certainly do not need more research. The research is all pointing to an underestimated visceral recoil against women taking leadership roles in any arena. Exhibit 1: Hilary Clinton. Women in law firms are high achievers

⁵ *Closing the gender pay gap: actions for employers* (Ministry for Women, 2017) at 2.

accustomed to knocking down barriers, not riding up against them. But we do.

Firms can commit to guaranteeing that junior female lawyers participate in the same number of trials, court appearances and client meetings as their male counterparts. They can ensure that every trial team has at least one woman. They can promote bright, aggressive women to leadership positions in the firm as department heads and managing partners. That will ultimately effectively serve their clients. Firms must stop paying lip service to diversity and take concrete steps to change.

There are other steps that can address the effect of motherhood on the gender pay gap and women succeeding in law other than not having children. Firms could place less priority on long hours and face time. Women lawyers need to push the Government to provide preschool care in the same way that they do for primary school and better parental leave than the current 18 weeks.

2 Quotas

For 34 years I have been talking about the issues of women in the profession, observing this, living this and experiencing it. The big answer is quotas. When you have a particular status quo, you need to create a paradigm shift which is actually going to move the dials.

It has always taken “ludicrous amounts of artificiality and intervention” to assure women’s rights. As Fran O’Sullivan states:⁶

Ridiculously, women had to chain themselves to lamp posts and create civil disturbances before they were ‘given the vote’ a century ago.

It took a concerted campaign led by unions and women before equal pay legislation was passed in 1972.

Many countries, including Germany, France and Sweden have now imposed quotas for female representation on company boards to no obvious ill effect. Indeed, the statistics show companies with greater diversity enjoy higher returns to shareholders. And with the ranks of tertiary qualified women now outnumbering those of men, arguments about a lack of qualified females do not hold water. Indeed, if talent is evenly distributed among the genders, quotas can only improve the average performance of law firms by removing

6 Fran O’Sullivan “Women still fighting with media mindset” *The New Zealand Herald* (online ed, Auckland, 26 July 2017).

dud men and replacing them with the most qualified women.

What about the argument that quotas are an unnecessary intervention because progress towards gender equality is only a matter of time? Well, if you are arguing we are close, then surely it will not do much harm to marginally bring forward the inevitable. Governments intervene all the time to enhance efficiency. Gender quotas, like competition laws, correct an obvious market failure to produce a more efficient outcome for shareholders and society alike. The thing about quotas is that they work, and fast. Quotas need to be imposed by central Government. A weaker alternative is that Government and local bodies are directed not to give work to any firm that does not have a particular percentage of women partners. That would certainly help. But a straight out quota in regard to gender and minorities required by legislation would achieve what everyone says they want to achieve.

The legal profession is traditionally associated with human rights, fairness, justice and protecting an individual's rights against large organisations. In that context, it is particularly distressing to see that although we have made progress, we who are 47 per cent of practising lawyers are a long way from being treated equally in our own profession.

B Judges

How many times do judges see a male lawyer leading an argument having to repeatedly confer with junior lawyers whilst on his feet because she knew the case and he did not. Judges can suggest that the lawyer who wrote the submissions or prepared the witnesses should be the one to argue. Often it is a woman. Judges should bear some responsibility to ensure that the lawyers who speak in court are as diverse as the bench.

C Clients

Corporate clients particularly can demand that their legal teams be diverse. They should recognise that diversity is now an asset in our courtrooms. Judges and juries now reflect the community. Facebook, Oracle and Hewlett-Packard have demanded that firms representing them field a diverse team of leaders. New Zealand corporations need to follow. Banks and other industries who are so conscious of gender equity within their businesses need to consider engaging

only women lawyers to address the issues in the legal profession, which must stand out like dogs balls to them as well.

D We, the women

Women need to talk to their male colleagues about their salary levels. That is the only way women are going to find out whether they are being underpaid. Women should ignore their employers' requests that they do not talk about their wages. Those requests for secrecy are only there, sisters, to cloak discrimination.

Make sure your partner steps up at home in regard to the division of labour so that it is equal. We must insist on equality in the home as well if we are to achieve equality at work.

To achieve real gender diversity, women in the legal profession need to speak up and not hesitate to confront the very real problems. And when they do, we need to support them doing it. We need to stand together.

Women lawyers' associations need to be there to speak out when employees cannot. They need to be far more vocal for those women publicly. Public embarrassment and actually naming names is a valuable weapon.

Women need to boycott firms that on statistics do not promote women. Check out their partnership gender balance before you accept a job offer. It is the only way to change them and, frankly, why would you work your butt off in a firm that is simply going to discriminate against you when you reach a certain level of seniority. There is no point working there sisters, go to a more progressive firm. Better still, apply for a job there and when it is offered, reject it and tell them why. They need us and if they carry on as they are, they will fail on more fronts than just diversity.

Progress for women has been elusive. The barriers to real change have been more daunting than I expected. I do believe that together, working with our progressive male colleagues, we have the power to make it happen. The road map to change is clear. We need to win this battle. It is time we stepped up and got more radical. It is time, like the Suffragettes, that we started chaining ourselves to the foyer in the Vero Centre and letting out our barely suppressed fury.

It is not optional: diversity and inclusion are critical to the success and sustainability of the legal profession

— Kathryn Beck*

I THE ISSUE

The business case for having more women on boards and executive positions is well established. Studies have shown that teams of mixed gender can lead to improved decision-making and ultimately lead to increased productivity and profitability. We have spent too long arguing about this and we now need to act.

Diversity and inclusion in the legal profession and the judiciary is essential. Lawyers have the privileged position of being an integral part of a democracy. We have a role in supporting the rule of law and the administration of justice. Without lawyers, the justice system would not work. The profession is a central player in the development of our laws and society — to maintain that position and our credibility we must ensure the profession, including the leadership of the profession, is as diverse as the society it serves.

The last couple of years have seen some notable milestones for women lawyers. On 13 June 2017 the Supreme Court sat with a majority of women on the bench for the first time. In July 2017, on the other side of the world, Lady Hale was appointed President of the Supreme Court of the United Kingdom. And, of course, this year marks the 120th anniversary of Ethel Benjamin's admission to the bar in 1897. She became the first woman admitted in New Zealand and the first woman lawyer to appear in a court in the British Empire.

Nearly 100 years later, in 1993, half of all law graduates were women. And in recent years women have made up close to 70 per cent of law degree graduates. As at 1 October 2017, New Zealand had 6,362 practising female lawyers and 6,454 male lawyers — tantalisingly close to a perfect gender balance. In any group of 10 lawyers you will find a gender-age difference. Our female lawyers are younger — 20 per cent are currently in their 50s, while 50 per cent of our male lawyers are in their 50s and older.

Yet women are severely underrepresented in leadership roles. Women comprise 31 per cent of judges across all courts. And, while women make up

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47 per cent of lawyers who work in law firms with more than one practitioner, they make up less than 27 per cent of partners or directors in those firms. Although 61 per cent of in-house lawyers are women, that proportion is not reflected in leadership roles in corporate and government legal teams. A paltry 26 out of 110 Queen’s Counsel appointed since 2002 are women barristers.

The hourly charge out rate for women is lower than males by an average of seven to 10 per cent. The annual New Zealand Law Society & Hays Legal Salary Guide does not break down salary figures for lawyers by gender. However, the highest-paid lawyers are partners in law firms and Queen’s Counsel, and the numbers of women occupying both those positions in New Zealand remain very low. While an equal number of male and female lawyers earn \$100,000–\$150,000, only 15 per cent of female lawyers earn above \$150,000 compared with 41 per cent of males.

II FOSTERING POSITIVE CHANGE

The New Zealand Law Society’s Women’s Advisory Panel was charged with coming up with practical solutions to support the retention and advancement of women in the legal profession. It is chaired by my predecessor, Immediate Past President Chris Moore. The Panel is made up of a cross section of lawyers at different stages of their careers from different areas and types of practice. And not just influential female lawyers but also male lawyers, all leading the way together.

A Recognising and challenging our unconscious bias

The Women’s Advisory Panel recommended that unconscious bias training should be embedded at key stages of legal careers. Unconscious bias refers to unconscious beliefs and attitudes — often based on stereotypes — that can affect behaviour, and is increasingly recognised as a barrier to a diverse and inclusive professional culture.

As a result of the Panel’s work, the Law Society commissioned NZLS CLE Ltd to develop a free webinar on unconscious bias for lawyers. The live webinar was held on 28 February 2017 and attracted an audience of over 1100. It is still available to view on the NZLS CLE Ltd website.⁷ This webinar and the accompanying course materials are now a compulsory part of Stepping Up

7 “Unconscious Bias in the Workplace” (February 2017) NZLS CLE Ltd <<http://www.lawyerseducation.co.nz/Courses/Free+Recordings.html>>.

— the course that all lawyers wishing to practise on their own account must complete.

The Law Society is also exploring how unconscious bias training can be embedded in law degrees. In March 2017, we collaborated with Victoria's Law School to include unconscious bias sessions as part of the Ethics and the Law course, which is compulsory for students wishing to qualify for admission to the bar.

B Charter to accelerate the progress of and retain women in law

One of the significant pieces of work that the Women's Advisory Panel has been engaged in is developing a Gender Equality Charter for the profession. In developing the charter, the Panel has considered developments overseas and in other professions. We have also consulted widely with the legal profession and, specifically, with key groups in the profession to ensure that the charter targets the areas that will make a real difference to the retention and advancement of women in the law.

The proposed charter is voluntary but requires organisations and in-house teams that sign up to:

- i) *Lead from the top* by assigning responsibility for meeting charter commitments to a named, senior level individual within an organisation/in-house legal team.
- ii) *Make a plan and take action*, specifically in the areas of unconscious bias training, conducting gender pay audits, encouraging and supporting flexible working for all lawyers, not just women, and reviewing areas of business with a diversity and inclusion lens (such as recruitment, retention and promotion practices, tenders for new work, publications, speakers at seminars etc).
- iii) *Measure progress* by collecting and sharing with the New Zealand Law Society information on practical strategies that make a real difference, as well as data that enables the Law Society to track overall progress. The Law Society plans to publish a report every two years on the overall progress of the profession in improving gender diversity and inclusion.

The Law Society is also developing free tools and resources that will be made available online to support the profession in driving change and meeting the charter requirements.

Many have asked why the focus is on women, instead of diversity more broadly. We continue to tackle the wider issues. And we do expect that the work done to promote gender diversity will flow through to other areas. However, for the moment we are focusing on the glaring problem of the retention and advancement of women, and making it easier for those women who do want to progress in the law to do so.

III ON THE HORIZON

A Equitable instructions and briefing

We see ensuring equitable instructions and briefing of women lawyers both at the bar and in law firms as an important step to changing the culture of the profession and ensuring that our best women are retained and advanced within the profession. Men still significantly outnumber women at the bar and as partners in the civil litigation area. We know that unconscious bias can play a part in our selection of lawyers we want to run our large litigation cases. Indeed, sometimes we continue to brief the same people simply out of habit and familiarity with what we know and are comfortable with. This leads to a continuation of the status quo. We know that there are many able and talented women litigators. Clients should have the best lawyers available to them, whether they are male or female.

When our young women lawyers see males dominating the higher ranks of the profession they are daunted. Without senior women role models many then opt out. They need to be able to see the pathways to achieving their goals. We want our young women lawyers to have the best opportunities for advancement and be able to go where their skills and aspirations take them. This means encouraging those in power to look again at who they are instructing and to show them the benefits of taking diversity into account when instructing lawyers.

As part of the charter commitments, signatories will be required to adopt equitable briefing and instruction practices. The charter and accompanying guidance will make it clear that this can be achieved in a number of different ways. We are currently looking at the good work being done in this area by the New Zealand Bar Association and some large firms. It is likely that this work will form part of the resources available to support the charter commitments.

B Queen's Counsel — are there structural barriers for women lawyers?

We need to examine whether there are some structures that are still blocking promotion of women, particularly for Queen's Counsel. Only 548 women practise as barristers and most of those may not have the typical level of experience to be considered for appointment. The average length of service of a QC at appointment is 27 years — many women who have that service who might qualify are already on the bench. Are there unintended consequences of women lawyers being appointed to the judiciary at a younger age? In addition, many women lawyers who have the expertise to qualify for the rank of QC are ineligible for appointment because they work in firms and are not barristers. The appointment criteria may not be suited to modern practice. Some consideration might need to be given to whether it is the criteria that inhibits some of our best women from being appointed. The reality is, we cannot simply continue to do things as we have always done them. What that change looks like is a matter for informed discussion but we know something needs to be different.

IV WALKING THE TALK

The New Zealand Law Society has to walk the talk. So we are also actively ensuring there is more gender diversity throughout the Law Society, for instance, on our committees. We have just completed the biennial appointment round of lawyers to our specialist law reform committees, and 43 per cent of the members are women. Seven of the 16 convenors are women. This is a major increase from the membership of the 2015–2017 committees. With equality of numbers, why should there not be equality of input and involvement in all things lawyers do — including reform of the law?

V THE LONG-TERM SUSTAINABILITY AND SUCCESS OF THE PROFESSION

These issues are not unique to the legal profession and in some ways we are ahead of other professions. We do at least have women entering the profession in large numbers. The retention and advancement of women in the workplace is relevant to New Zealand society more generally. These issues are complex and multi-faceted. It is fair to say that there are different views within our

profession; some still say it is only a matter of time, while others are calling for quotas and regulation to ensure women progress in the law.

Retaining and advancing our women lawyers involves taking a good look at our culture and the traditions of our profession. Perhaps we need to look at some of our sacred cows. This includes examining the myth that lawyers need to be in the office or on call at all hours for clients. Promoting more flexible working practices and better use of technology can make a big difference to those who are juggling other commitments. We may also need to look at how we value and charge for our work. Is time costing still relevant? As good employers, colleagues and clients we need to think about how we practise and the way this impacts on those around us. We should examine our practices with a diversity lens and see where we can make changes. We aim, as a profession, to continuously improve what we do and how we do it. This area should be part of that process.

While a lot is being done there is so much more that we can all do to encourage diversity and inclusion within our profession. Progress has been made but it is too slow. The legal profession has a real opportunity right now to harness the “diversity dividend” and support each other in driving cultural change. Let’s not waste it.