

COVER STORY



# *In pursuit of excellence*

For more than 150 years, the Supreme Court of Victoria has been the crown jewel of the state's legal system. However, the expanding jurisdictions of other courts and problems caused by under-resourcing have seen the Court's reputation lose a little of its lustre.

The Court's first female Chief Justice tells the *LII* her plans to return the Court to its former glory.



It is easy to get lost in the little-seen upstairs section of the Supreme Court of Victoria where the judges and administrative staff go quietly about their work. These corridors of legal power jink and meander, lit only by sunlight muted by blinds and frosted glass.

The burnished dark brown wood office doors, most of which are closed, bear no nameplates and are therefore indistinguishable from each other.

Yet despite these obstacles, the office of new Supreme Court Chief Justice Marilyn Warren is surprisingly easy to find: just follow the stacks of pale brown boxes containing unpacked possessions that provide a breadcrumb trail to her office door.

While these signposts are unwitting, there is a definite push by Chief Justice Warren to make sure those in the legal profession know that the door to her office is well and truly open to them.

There is just one condition: she does not want to hear a complaint without a suggested solution.

Speaking to the *LJI* a fortnight after her appointment on 25 November, Chief Justice Warren, 53, said she would use the first few weeks to engage in an “absorbing, sponge-like approach” with the Court’s stakeholders.

“I don’t see this as a one-way negative street,” she said.

“I see my role as sitting down to listen to people and to hear about ways in which the Court perhaps could have done better in the past, but also how it can do things better.”

The view of the legal profession is that the Supreme Court is under threat of losing its long-held position as the pre-eminent court in Victoria because of, among other things, the aggressive growth of the Federal and County Courts.

Victorian shadow Attorney-General Andrew McIntosh said the expansion of the jurisdictions of the Federal and County Courts meant the Supreme Court was falling behind those courts.

“To attract jurisdiction back it must first deal with problems such as its backlog of cases and appropriate resolution of disputes to make it look like a court of stature and credibility.”

Institute president Chris Dale said the Supreme Court would find it difficult to fix such problems as it was under-resourced compared to other courts.

“I look comparatively to the resourcing that’s been given to the County Court . . . and I look back at the Supreme Court and I think, ‘Why can’t the same be done there?’”

Leaders of the legal profession are also calling for reform of some Court procedures and a more aggressive attitude towards staging the largest criminal trials.

Victorian Bar Council chair Robin Brett QC said there was a need to refine, review and improve the Court’s procedures and processes. For example, he points to a need to add greater certainty to the listing system so that every case listed was heard on that day.

Criminal Bar Association chair Lex Lasry QC said it was imperative that the Supreme Court did more criminal trials, including major fraud and sex offence cases.

There are also other areas of concern, such as long delays before civil trials reach the Court and a two-year wait for non-urgent cases to be heard by the Court of Appeal.

These problems are known to Chief Justice Warren. As a Supreme Court justice for five years from 1998 she saw the Court from every angle.

She is aware of its strengths and weaknesses.

**“My immediate reaction is that I wish to see the Court at the top.”**

Her analysis is that the problems currently besetting the Supreme Court are universal to all courts and that there will be no need to “reinvent the wheel”.

However, changes will be made and all with an eye on achieving one goal.

“Excellence,” she said. “In a word, excellence.”

“My immediate reaction is that I wish to see the Court at the top, as it should be, and to have the respect of not just the state but of the entire nation and be regarded as one of the finest courts in the country.”

She has developed a set of outcomes that she wants the Court to strive for during her time as Chief Justice. They address many of the concerns raised by the legal profession.



## PROFILE Chief Justice Marilyn Warren

- Graduated from Monash University as Bachelor of Jurisprudence in 1973 and Bachelor of Laws in 1974
- Admitted to practice in 1975
- Between 1975 and 1985 worked as a solicitor in the government sector
- Made assistant Chief Parliamentary Counsel in 1984
- Went to the Bar in 1985, where she specialised in commercial law
- Member of the Victorian Bar Law Reform Committee from 1986 to 1992
- Appointed a Supreme Court justice in 1998
- Became a member of the board of the Victorian Institute of Forensic Medicine in 2000
- Was the head of the Supreme Court's Commercial List in 2001/02
- Appointed Chief Justice of the Supreme Court of Victoria on 25 November 2003

The outcomes are:

- greater certainty of trial dates;
- more expeditious judgment delivery;
- more effective processes in litigation before trial and before judgment; and
- a reduction in the cost of litigation by refining the procedures and the number of times parties come to court and what they do when they come to court.

Chief Justice Warren also confirmed that the Supreme Court would look to do more major criminal trials.

She said that this stemmed from a "very strong desire" from within the Court to preside over the most difficult and complex cases.

"The judges sitting in the criminal division are very keen to preside over significant criminal cases other than murder so that they set the example to other courts and also provide rulings that will guide trials in inferior jurisdictions in the future.

"In the civil area, similarly, this Court should be presiding over the most difficult and complex civil trials. Our judges in both the commercial division and the common law division support me entirely on that.

"There are jurisdictional limits that need to be looked at and that is under consideration by the government at this time.

"But in terms of uplifting or 'cherry-picking' – to use a colloquial term – I would like to see the Supreme Court do that on a confident and assertive basis."

When asked why the Supreme Court had not previously "cherry-picked" large trials, Chief Justice Warren said, "I'm not sure. Possibly a lack of judicial resources or other resources.

"It's certainly not been a lack of desire or application by the judges themselves. I think it's just a question of ultimately a fresh approach."

When asked to expand on the theme of resources, she said she was of no doubt that the Court was under-resourced in regards to the number of judges. However, she was not yet in a position to say how many additional judges the Court needed.

In a show of support for the new Chief Justice, the state government moved quickly after her appointment to fill two existing vacancies on the Supreme Court Bench caused by the retirements of former Chief Justice John Harber Phillips and Justice Rosemary Balmford.

Chief Justice Warren had also begun briefing sessions with the state government over its soon-to-be-released Court Strategic Directions Project and Justice Statement.

Both long-awaited documents will, among other things, attempt to give Victoria's courts greater long-term certainty with their funding. Currently, Victorian courts are given an allocation for only the financial year ahead.

In regards to the County Court, Chief Justice Warren said she believed that the transfer of some major trials from the County to Supreme Court would be done in cooperation with County Court Chief Judge Michael Rozenes.

Then there is the Supreme Court's relationship with the Federal Court.

Institute president Chris Dale, who has been a long-time member of the Supreme Court Rules Committee, said there was anecdotal evidence of disenchantment among Supreme Court judges in regards to the funding advantage enjoyed by the Federal Court.

"They judge it harshly against its competitor court, the Federal Court, which has a lot of commonwealth money thrown at it, brand new building, brand new facilities, extra workers hanging off the rafters able to help at a moment's notice."

There is also evidence that the legal profession is increasingly seeing the Federal Court as a better avenue for commercial disputes, especially since that court's jurisdiction was extended to include corporations law in July 2001.

According to the Federal Court, the number of corporations law filings increased more than 30 per cent between 2001/02 and 2002/03 from 227 filings to 302.

The Supreme Court Judges' Annual Reports show that corporations law filings fell from 1206 in 2001 to 1050 in 2002.

However, Chief Justice Warren said she did not view the Federal Court as a competitor.

"The Federal Court has areas in which it has exclusive jurisdiction and it has areas of shared jurisdiction.

"Both courts have more than enough work to do and I don't see us as being in any competition at all."

Chief Justice Warren said that while she was certain of the outcomes she wanted to achieve, the exact plan to follow to get there was, at this early stage, less clear.

Apart from discussions with Supreme Court judges, the Institute and the Victorian Bar, Chief Justice Warren has also raised the possibility of reaching beyond these traditional sounding boards for fresh ideas.

She said she was considering consulting large law firms to learn more about the way they used technology and how they used non-legally qualified people to provide services to clients.

"I have this sense from what I have seen in major litigation that many of the firms immerse themselves in litigation and do it very well and it just strikes me as logical that they must have ideas and ways of doing things that the Court can utilise."



### The 11 Chief Justices of the Supreme Court of Victoria

**Sir William a'Beckett**  
1852 – 1857

**Sir William Foster Stawell**  
1857 – 1886

**George Higinbotham**  
1886 – 1892

**Sir John Madden**  
1893 – 1918

**Sir William Hill Irvine**  
1918 – 1935

**Sir Frederick Wollaston Mann**  
1935 – 1944

**Sir Edmund Francis Herring**  
1944 – 1964

**Sir Henry Arthur Winneke**  
1964 – 1974

**Sir John McIntosh Young**  
1974 – 1991

**John Harber Phillips**  
1991 – 2003

**Marilyn Louise Warren**  
2003 –

While Chief Justice Warren has her sights firmly set on the future of the Court, there is no denying the unique historical aspect of her appointment.

Not only is she the first woman to lead the 152-year-old Victorian Supreme Court, but she is the only female to head any Supreme Court in Australia.

In a statement Chief Justice Warren released on the day of her appointment, she said it was “doubtless of significance that I am the first woman appointed to the office”. State Attorney-General Rob Hulls described the appointment as historic.

Six months earlier, then Supreme Court Justice Warren told more than 200 lawyers – the large majority of whom were female – at the Women Lawyer Achievement Awards that it was their “duty to gender” to accept all opportunities for advancement.

But when asked if she accepted the appointment to Chief Justice out of a duty to gender, she said she had not.

“One of my children reminded me of what I said in my speech.

“But I accepted the appointment out of a duty to the Court and the legal system. It sounds a bit high-falutin’, but the reality is that is what I did.

**“I accepted the appointment out of a duty to the Court and the legal system.”**

“We all feel very strongly about this Court. I certainly do and it’s really a case of stand up and be counted once again, but for a different reason than the one I said in the speech.”

Chief Justice Warren’s speech (see July 2003 *LJJ*, pages 16-20) also delivered a sobering reminder that women barristers were still being under-represented in major court work and that despite five years of attempting to remedy the situation it had, in some areas, deteriorated.

The speech led to moves by the Victorian Bar, the Institute, state and federal governments and the Law Council of Australia (LCA) to introduce measures to redress the imbalance.

Among the measures was a letter written by the Institute and Victorian Bar to all Institute members encouraging them to brief more women barristers. The Bar ran seminars for senior barristers and clerks on the role they can play in having more women barristers briefed.

The state government called on the Victorian WorkCover Authority and the TAC to brief more women, while federal Assistant

Treasurer Helen Coonan asked her department to investigate how it could brief more women barristers.

The LCA has begun drafting a national model briefing policy.

Chief Justice Warren said she has been surprised and very pleased by the impact the speech has had.

“There wasn’t anything terribly novel. I just felt some positive things had to be said.”

The public debate about the lack of senior work for women barristers and the state government’s concerted push to get the best women appointed to the Bench highlighted perceptions that elements of the legal profession, especially older male members of the Bar, were resentful of female appointments.

This perception was confirmed in many minds when *The Age* reported on 27 November – two days after Chief Justice Warren’s appointment – that a leading male silk told a legal profession gathering that it was an advantage for candidates for the Bench in Victoria not to have testicles.



## Hulls raises firm hand on briefing

State Attorney-General Rob Hulls has directed all law firms on the government's legal services panel to review their briefing practices after a report showed women barristers received fewer briefs and less fees than expected.

Reforms to briefing practices have been on the agenda since then Supreme Court Justice Marilyn Warren raised the issue in a speech in May last year. (See July 2003 *LJI*, page 16-20.)

The first annual report on the outsourcing of government legal services showed that women barristers received 17 per cent of briefs and just 6 per cent of fees from government work performed by the panel firms.

Women barristers make up 18.6 per cent of all members of the Victorian Bar.

After releasing the report on 21 November last year, Mr Hulls said he would write to all 33 firms to "express concern" at the low briefing and fee rates and to remind firms of their obligation to equal opportunity briefing practices.

"Those statistics confirm what female barristers have been saying, that often the legal fraternity is reluctant to brief women and, if they do

brief a female barrister, are inclined to offer them junior work," Mr Hulls said.

He said he was particularly keen to see an improvement in the percentage of all fees earned by women barristers.

"I see no good reason why there is an 11-point disparity between the percentage of briefs being handed to female barristers and the percentage of fees being earned.

"Such an enormous disparity raises questions as to whether some firms are serious about meeting the Bracks government's commitment to equal opportunity briefing practices or are merely handing out the odd junior brief as a token effort."

Under the new panel arrangement introduced in July 2002, all panel firms must follow the Bar's Model Briefing Policy, which asks briefing entities to consider barristers on merit rather than prejudicial factors.

The report compiled briefing figures for both the panel firms and the Victorian Government Solicitor (VGS).

According to the report:

- in administrative law and government work, female barristers received 8 per cent of law firm briefs and 35 per cent of VGS briefs;
- in commercial law, female barristers received 40 per cent of law firm briefs and 100 per cent of VGS briefs;
- in employment law, female barristers received 18 per cent of law firm briefs and 40 per cent of VGS briefs;
- in intellectual property and technology law, female barristers received no law

firm briefs and 17 per cent of VGS briefs;

- in litigation, female barristers received 22 per cent of law firm briefs and 23 per cent of VGS briefs; and
  - in property law, female barristers were not briefed by law firms and received 20 per cent of VGS briefs.
- In the federal arena, the Law Council of Australia (LCA) agreed to create a national model briefing policy based on principles agreed to at the Standing Committee of Attorneys-General (SCAG) meeting last November.

The SCAG recommendation called for the LCA to adopt a national equal opportunity briefing policy and to "endorse the principle of government entities engaging legal services with regard to equality of opportunity".

It also agreed that each jurisdiction should report on any impediments in their existing briefing practices to achieving equitable briefing practices to the next SCAG meeting.

At its final meeting for 2003, held last December, the LCA agreed to draft a national model briefing policy.

LCA president Bob Gotterson QC said the issue of gender inequity was the organisation's first priority.

"The big challenge is achieving attitudinal change," he said.

"The LCA will work hard with its constituent bodies to break down these discrimination barriers," Mr Gotterson said. ●

JASON SILVERII

Bench over the past four years.

"I object to people who try to characterise the Bar as an institution full of fuddy-duddies who are opposed to women getting any sort of appointment. It's just not true."

Women Barristers' Association immediate past convenor Fiona McLeod SC said there had been universal acclaim within the Bar for Chief Justice Warren's appointment.

She said, however, that it was safe to assume there was a level of discontent about the continuing debate over how to encourage more equitable briefing practices and the moves by the state government to increase the number of female appointments to the Bench and senior counsel.

Chief Justice Warren disputes the theory that there are elements of the legal profession who would love to see her fail.

"I am a Chief Justice ultimately and a judge of this Court and I think there is an expectation that I will perform well in this role.

"I will do everything I can to fulfil that role. Gender is irrelevant."

Leaders of the legal profession agree with her, saying that much of the cultural change that will occur will come not from Chief Justice Warren being a woman, but from being of a different generation to her predecessor, John Harber Phillips.

Shadow Attorney-General Andrew McIntosh said Chief Justice Warren's strengths differed greatly from those of the Chief Justices before her.

"I don't say this negatively, but one of the points that was made at John Phillip's farewell was that he used to write his own notes by hand in fountain pen.

"That's quaint and that was his style . . . but the [new] Chief Justice has been brought up in a generation that has been touched by electronic communication."

The combination of Chief Justice Warren's historic appointment and the exhausting work that lies ahead to redeem the Supreme Court means her time as Chief Justice will be closely scrutinised.

It will only add pressure to complete a challenge she describes as daunting, but one she is confident her 30 years of experience in the law will help her overcome.

"It might be said that an outsider would come in with a completely new, fresh approach," Chief Justice Warren said.

"But I suspect that because I come from such a varied background – I've worked in government, I've worked at the Bar, I've worked in pretty much all jurisdictions and I've been here for five years – I think I can bring a freshness that the Court will benefit from," Chief Justice Warren said. ●

JASON SILVERII

Since Mr Hulls became Attorney-General in 1999, he has appointed 26 female and 30 males to the Supreme, County and Magistrates' Court Benches.

In his speech at Chief Justice Warren's welcome on 1 December, Mr Hulls said he did not apologise for his commitment to ensuring women were considered for appointments.

He said he grew increasingly impatient with "the small-minded, unimaginative and presumably idle, who think that in doing so [ensuring women were considered for appointments] I am undermining them and their kind".

Bar Council chair Robin Brett QC said it was wrong to suggest antipathy within the Bar towards the women appointed to the