

## RESPONSE: QUERYING THE GENDER DYNAMICS OF INTERRUPTIONS AT AUSTRALIAN ORAL ARGUMENT

AMELIA LOUGHLAND\* AND ROSALIND DIXON\*\*

### I INTRODUCTION

In ‘Querying the Gender Dynamics of Interruptions at Australian Oral Argument’ published recently on the *UNSW Law Journal Forum*,<sup>1</sup> Tonja Jacobi, Zoë Robinson and Patrick Leslie engage with the empirical study ‘Female Judges, Interrupted: A Study of Interruption Behaviour during Oral Argument in the High Court of Australia’ (‘the original study’).<sup>2</sup> Theirs is a thorough, detailed empirical analysis that takes up the invitation of the original article<sup>3</sup> to verify whether the gendered patterns which were observed in a smaller sample of oral argument in the High Court could be replicated over a longer period of study.

We are delighted that the authors have taken up this challenge and have valuably extended the academic conversation regarding gendered power dynamics in Australia’s highest judicial institution. It is particularly rewarding to have Professor Jacobi, one of the original authors of the American foundational study on judicial interruptions,<sup>4</sup> to comment and engage so thoroughly with these findings in an Australian context. The response to both studies has ignited valuable public and academic debate over the existence of unconscious biases and gendered norms within the legal profession.

The purpose of this comment is to address some of the limitations of the original study and consider further areas of research and analysis that are raised by the authors’ data.

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\* Solicitor, and Fellow, Gilbert + Tobin Centre of Public Law UNSW.

\*\* Professor of Law, UNSW Sydney.

<sup>1</sup> Tonja Jacobi, Zoë Robinson and Patrick Leslie, ‘Querying the Gender Dynamics of Interruptions at Australian Oral Argument’ [2020] (4) *University of New South Wales Law Journal Forum* 1–19.

<sup>2</sup> Amelia Loughland, ‘Female Judges, Interrupted: A Study of Interruption Behaviour during Oral Argument in the High Court of Australia’ (2019) 43(2) *Melbourne University Law Review* 822.

<sup>3</sup> *Ibid* 846.

<sup>4</sup> Tonja Jacobi and Dylan Schweers, ‘Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments’ (2017) 103(7) *Virginia Law Review* 1379.

## II THE ORIGINAL STUDY

The original study arose in the context of a research paper at the encouragement of Professor Rosalind Dixon. Its purpose was to test whether the results of Professor Jacobi's landmark study in the United States ('US') (which found that female judges on the US Supreme Court suffered much higher rates of interruption than their male colleagues)<sup>5</sup> could be observed in the Australian context. Given the appointment of Australia's first female Chief Justice to the High Court of Australia, it seemed particularly pertinent to interrogate the gendered dynamics of the country's highest court.

The period of the study (mid-2015 to the end of 2017) was thus not selected as a random sample to test the hypothesis of interruptive behaviour, but was intended to test whether there was any discernible difference in the behaviour of the judges and advocates at the High Court when led by a woman for the first time. Loughland was fortunate to have had the assistance of Professor Jacobi in developing the research methodology for the Australian study, which analysed all transcripts for hearings in *en banc* (seven-judge) hearings in the High Court. That study found an indicative trend for a higher number of interruptions by male advocates as against female judges, and also observed that the nature and pre-emptive type of interruptions experienced by female judges may have disadvantaged their participation during oral argument in the High Court.

Since the publication of both studies, several academics and barristers have taken issue with the use of transcripts as a reliable method of recording interruptions of speech. That is a separate contention, and one which does not need to be addressed in the context of considering the relative contributions of the present two studies. Nonetheless, (as has been suggested in responses to both papers) it would be a fascinating new avenue of research in this field to conduct firsthand research in courtrooms and determine how the observed results differed from the court transcripts, and whether similar interruptive trends could be identified.

Other commentators have also queried whether the broader significance of the study's findings is limited by the fact that it was confined to Australia's highest court with its particular set of practices and norms. The original study did not intend to make claims about gendered interruption behaviour in all Australian courts. Rather, it sought to investigate whether in the highest judicial institution, judges at the peak of high-status careers were still subject to gendered conversational dynamics. Although the original study only sought to speak for the High Court, it would be another interesting pursuit for further research to investigate the extent to which the indicative findings from the original study were evidenced in other institutions such as the state courts of appeal and the Federal Court.

Putting those questions aside, Jacobi, Robinson and Leslie's own empirical analysis of High Court transcripts over a 25-year period found that female judges

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<sup>5</sup> Ibid 1482.

were indeed interrupted more than their male colleagues in 2015–2017,<sup>6</sup> which was consistent with the trend identified in Loughland’s initial findings.

But they also found that this trend could not be reliably generalised to a broader empirical statement about gendered interruptions on the Court.<sup>7</sup> In particular, the authors found that being female was not positively correlated (at least to a statistically significant degree) with a higher number of interruptions and that there were more years across the period of study in which male justices were interrupted at higher rates than female justices, although senior female justices were more likely to be interrupted than their similarly situated male colleagues.<sup>8</sup> The authors identified several interesting alternatives for interruptions based on their statistical analysis, in particular noting that female judges were more likely to be interrupted as they became more experienced on the Bench.<sup>9</sup>

This, for example, might be explained by the fact that judges tended to talk more or ask more questions, and interruptions are measured in absolute not relative terms, or because countering a judge’s scepticism through a pre-emptive interruption might be perceived as more important to counsel’s chance of succeeding in their argument. Consistent with this, Jacobi, Robinson and Leslie also find that judges are more likely to be interrupted as they engage in more ‘speech episodes’, or active forms of questioning; interruptions against female justices also appeared at their highest average rate in 2002–2003, when Justice Gaudron was about to retire from the Bench, and her Honour’s influence was arguably at its peak.<sup>10</sup>

We are incredibly grateful to the three authors for approaching this question with such empirical rigour over a longer time period. As was noted in the original study, we were aware that such a small sample size would not produce a statistically significant result across the history of the High Court. Similarly, the original study was quite open about the fact of employing relatively simple statistical tools, which involved counting and hand-coding each interruption and considering its qualitative effect on the speaker during oral argument. Nonetheless, the study provided an interesting indicative trend – albeit in a short time frame and small sample size – in a pivotal moment in the High Court’s history; when it was first led by a female Chief Justice. While these findings might not be able to speak for a broader statistical fact about the High Court as an institution, the original study and especially its qualitative analysis provided at least some evidence that female judges were spoken to differently on the contemporary High Court, in a way that was reminiscent of the conversational norms women have come to expect in everyday conversations and the workplace.<sup>11</sup> For this reason, it seemed

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<sup>6</sup> Jacobi, Robinson and Leslie (n 1) 8.

<sup>7</sup> Ibid 15.

<sup>8</sup> Ibid 8–9, 15–16.

<sup>9</sup> Ibid 16–17.

<sup>10</sup> Ibid 8 Figure 2, 16.

<sup>11</sup> See, eg, behavioural studies that have found that men tend to interrupt women in everyday conversation at a far higher rate than vice versa: Don H Zimmerman and Candace West, ‘Sex Roles, Interruptions and Silences in Conversation’ in Barrie Thorne and Nancy Henley (eds), *Language and Sex: Difference and*

important to open the conversation around the potential gendered dynamics on the Court, in the way that Jacobi, Robinson and Leslie have also so valuably done.

The response to the publication of Loughland's study at the beginning of 2020 also suggested that, beyond whether such interruptions could be statistically proven, the experience of being interrupted even as the most senior person in the room resonated with many women. This, coupled with the fact that men constitute the overwhelming majority of advocates appearing before the High Court,<sup>12</sup> confirms the importance of interrogating underlying norms about what it means to have an authoritative 'voice' in the legal profession.

### III WHAT STILL CAN BE LEARNED

Jacobi, Robinson and Leslie's study has added new insights to the public conversation around gendered dynamics on the High Court of Australia. The breadth and rigour of their data also offer new opportunities for further avenues for research in this field.

In particular, their data<sup>13</sup> suggests a spike in interruptions of women justices in around 2002–2003 followed by a significant drop in 2005 and then a gradual but consistent increase until 2019.

From 1995–2007, there was only one woman on the High Court at any one time,<sup>14</sup> with a two-year gap (from 2003–2005) where there were no female judges on the Court at all. From 2007 when Justice Kiefel (as her Honour then was) started serving on the High Court to 2019, there have been at least three female judges on the High Court. This means that for almost half the period of the study, there was only one woman on the Court, as compared to at least six male judges who in some years received a higher number of interruptions than their female colleagues.

When the authors' data becomes publicly available, it would be interesting to consider two possible scenarios further. First, it would be interesting to consider how the authors' findings interact, or are modified by, the number and particular judicial personality of the judge on the Court at that time. As mentioned, there was a substantial period – from 1987–2003 – in which Justice Gaudron was the only female member of the Court. Justice Gaudron's tenure alone thus accounts for almost half the relevant period of study (from 1995–2019). And while in 2002–2003, Justice Gaudron was the female judge most likely to be interrupted (compared to historical averages), she was also less likely to be interrupted than later justices for much of her tenure on the Court.

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*Dominance* (Newbury House Publishers, 1975) 105, 116–17; see also Marianne LaFrance, 'Gender and Interruptions: Individual Infraction or Violation of the Social Order?' (1992) 16(4) *Psychology of Women Quarterly* 497.

<sup>12</sup> Winsome Hall and George Williams '100 Years of Speaking: Gender Equality among Barristers before the High Court' (2020) 94(12) *Australian Law Journal* 960.

<sup>13</sup> See especially Jacobi, Robinson and Leslie (n 1) 8 Figure 2.

<sup>14</sup> Justice Gaudron served on the Bench from 1995–2003; Justice Crennan from 2005–2014; Chief Justice Kiefel was appointed as a puisne judge from September 2007; Justice Bell was appointed in February 2009 and Justice Gordon was appointed in June 2015.

Justice Gaudron was also a very distinctive judicial figure: she was an outstanding intellect, an outspoken feminist,<sup>15</sup> and judge with a sharp wit, who had an important coalitional role on the Bench.<sup>16</sup> There was therefore a particular detriment to counsel's prospects of success if they interrupted Justice Gaudron, unless perhaps it was in response to an especially direct and probing question from her Honour.

Jacobi, Robinson and Leslie go some way to considering this in their existing study, noting that they cluster their standard errors by judge.<sup>17</sup> But their article does not fully explain or unpack what this means for understanding the role of specific female judges over time, and especially the disproportionate influence of Justice Gaudron on their overall findings. It would thus be interesting to test, in a formal way, the possibility of a 'Gaudron fixed effect' on the overall rate of interruptions of female justices on the Court. At the very least, through further qualitative and empirical analysis, it would be helpful to consider this possibility as one explanation for why Jacobi, Robinson and Leslie may not find a consistent gender effect in interruptions.

Secondly, the fact that average interruptions against women appear to drop significantly while Justice Crennan was the only woman on the Court, but then steadily increase until 2019 (as compared to the historical averages of interruptions against women), raises other questions about the effect of multiple women on the High Court at one time. It is possible that at some level advocates are more self-conscious about gender issues and the fact of interrupting when there is only one woman on the Court, who is a judicial anomaly. This would also suggest that the presence of multiple female judges on the Court at one time could normalise the presence of women to the extent that advocates no longer self-consciously modify their behaviour to account for gender dynamics.

This itself could be a significant sign of progress: it suggests that a critical mass of female judges may reshape professional and institutional norms and behaviours in ways that lead to a less pervasively gendered way of interacting. But it may also have dangers, if in ordinary life men are accustomed to interrupting women but are not aware that they tend to do so. In this case, the presence of a greater number of women on the Bench may lead men to begin to speak and interact with female judges in the same manner as research has suggested they would the other women in their lives – ie, by speaking more frequently and interrupting more often, even when they are not aware of doing so.<sup>18</sup>

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<sup>15</sup> See, eg, Justice Mary Gaudron, 'Speech for Women Lawyers Association of New South Wales 50<sup>th</sup> Anniversary Gala Dinner' (Speech, NSW Parliament House, 13 June 2002) <[https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gaudronj/gaudronj\\_wlansw.html](https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gaudronj/gaudronj_wlansw.html)>.

<sup>16</sup> See, eg, Justice Gaudron's high concurrence rate on the High Court, as reported in Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years' (2003) 26(1) *University of New South Wales Law Journal* 32. See especially at 58–60.

<sup>17</sup> Jacobi, Robinson and Leslie (n 1) 14 n 51.

<sup>18</sup> LaFrance (n 11) 498.

This would also add weight to the discussion in the original Australian study which queried whether the mere presence of women is sufficient to transform traditionally male-dominated institutions.<sup>19</sup> Instead, depending on the outcomes of that additional analysis, such norms underlying the Court must be directly addressed. This idea is supported by Iris Bohnet,<sup>20</sup> who pointed out the need for intentional design of institutions by setting prescriptive norms and self-consciously designing interventions to address gender bias, rather than simply assuming that institutions will change organically.

That is, if women are treated deferentially as the ‘exceptional woman’ but are more likely to be interrupted when their presence on a court has been normalised, the Court could be considered a microcosmic representation of gendered conversational norms, regardless of the presence of powerful women, and further evidence of the need for structural interventions to challenge implicit gender bias.

Jacobi, Robinson and Leslie suggest that this does not seem to be the case,<sup>21</sup> but it would be useful to further test and explore this possibility, focusing on both the number of women on the Bench at a given time, and judge specific effects.

Finally, the authors query the suggestion from Loughland’s original study that male Chief Justices may be more effective than their female counterparts in addressing gendered interruption behaviour.<sup>22</sup> The authors found no support for the ‘claim’ that male Chief Justices reduce the rate of interruption of female justices, noting in particular that the rate of male advocates interrupting judges plateaued during Chief Justice French’s reign and began to reduce again in Chief Justice Kiefel’s reign.<sup>23</sup>

This is another fascinating empirical insight of the authors’ study. However, it misunderstands the nature of the claim made in the original study. The study did not argue that male Chief Justices were *in fact* better at preventing interruptive behaviour than their female colleagues. Rather, Loughland suggested that, once the Court was made aware of the indicative findings of the study, a male Chief Justice might be more effective in policing that behaviour as they are less likely to be accused of partisanship towards female colleagues (and indeed all judges), in light of the norms which require female judges to over-perform ‘impartiality’ rather than identifying themselves with a feminist issue.<sup>24</sup>

The opposite may also be true: male Chief Justices may be subject to the same forms of implicit gender bias that lead to greater interruptions of female justices by male advocates, and yet have significantly more power to interrupt – because of their role in presiding over oral arguments. There is certainly evidence that Chief Justice John Roberts has been both self-consciously willing to correct gendered forms of interruption in the US Supreme Court,<sup>25</sup> and unconsciously subject to

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<sup>19</sup> Loughland (n 2) 842.

<sup>20</sup> Iris Bohnet, *What Works: Gender Equality by Design* (Harvard University Press, 2016).

<sup>21</sup> Jacobi, Robinson and Leslie (n 1) 15 n 54.

<sup>22</sup> Loughland (n 2) 822, 845.

<sup>23</sup> Jacobi, Robinson and Leslie (n 1) 4, 11–12.

<sup>24</sup> See, eg, Rosemary Hunter, ‘Can Feminist Judges Make a Difference?’ (2008) 15(1–2) *International Journal of the Legal Profession* 7, 16.

<sup>25</sup> Adam Liptak, ‘Nice Argument, Counselor, but Let’s Hear Mine’, *The New York Times* (online, 4 April 2011) <<https://www.nytimes.com/2011/04/05/us/05bar.html>>.

gendered and ideological biases in his approach to interruptions during recent telephone hearings.<sup>26</sup>

Alternatively, there may be no difference at all between Chief Justices in this respect; or that any differences are not differences due to gender, or the interaction between a Chief Justice's gender and the gender composition of the Bench, as opposed to a Chief Justice's individual approach to their role. But given the widespread academic and media discussion of interruptive behaviour on the Australian High Court, it would be interesting to conduct a follow-up study that assessed whether, and to what extent, judges changed their behaviour and were more active in preventing advocates from interrupting their colleagues.

#### IV CONCLUSION

The publication of Loughland's pilot study on judicial interruptions triggered a public conversation in Australia about the possibility that women, even at the height of prestigious careers, are treated differently to their male colleagues.

The findings resonated with the anecdotal experience of many women at the bar and the Bench who attested to their exasperation at being spoken over and interrupted by male colleagues, and male barristers who cited their new consciousness of interruptive behaviour during oral argument. The broader public interest in Loughland's work further suggested that similar dynamics exist beyond the legal profession.<sup>27</sup>

Jacobi, Robinson and Leslie's research has added a layer of empirical depth to this research, by giving us cause to reconsider the extent to which it is fair to say these norms have been replicated in the High Court as a general or longer-term proposition. Their data also opens up opportunities for further research and the potential for new insights, such as the effect of particular judicial personality, and the interaction effect of multiple female judges on the High Court and whether this suggests a loss of self-consciousness over gender issues over time.

But it is important to recall the original insights provided by Jacobi's own research in the US in this context, namely: that gendered patterns of interruption can and do occur at the highest institutional levels, in ways that suggest that these

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<sup>26</sup> Leah Litman and Tonja Jacobi, 'Does John Roberts Need to Check His Own Biases?', *The New York Times* (online, 2 June 2020) <<https://www.nytimes.com/2020/06/02/opinion/john-roberts-supreme-court.html>>.

<sup>27</sup> See, eg, Julia Hare, 'Girl Interrupted: Talking over the Top of Female Judges', *BroadAgenda* (Blog Post, 11 February 2020) <<https://www.broadagenda.com.au/2020/girl-interrupted-if-it-happens-to-high-court-judges-rude/>>; Michaela Whitbourn, 'Female High Court Judges "Far More Likely" to Be Interrupted than Male Peers: Study', *The Sydney Morning Herald* (online, 5 February 2020) <<https://www.smh.com.au/national/female-high-court-judges-far-more-likely-to-be-interrupted-than-male-peers-study-20200204-p53xjw.html>>; 'Overcoming Disproportionate Interruptions Faced by Female Judges', *The Lawyers Weekly Show* (LawyersWeekly, 6 March 2020) <<https://www.lawyersweekly.com.au/podcast/27645-overcoming-disproportionate-interruptions-faced-by-female-judges>>.

patterns are likely even more pervasive in ordinary life.<sup>28</sup> Loughland's original study, and the reaction to it, have provided important, even if temporally limited, support for that point in an Australian context.

Further, both Loughland's original study and Jacobi, Robinson and Leslie found that<sup>29</sup> men were over-represented in speaking roles at the High Court and did the overwhelming amount of interrupting compared to their female colleagues. This means that there is still a long way to go in addressing the gendered construction of voice and power in the legal profession, and the gendering of conversational norms in law, as in life.

It is a privilege to be a part of that important conversation.

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<sup>28</sup> See, eg, Adam Liptak, 'Why Gorsuch May Not Be So Genteel on the Bench' *The New York Times*, (online, 17 April 2017) <<https://www.nytimes.com/2017/04/17/us/politics/why-gorsuch-may-not-be-so-genteel-on-the-bench.html>>; Ann-Marie Alcántara, 'It's Not Just You – Women on the Supreme Court Are Constantly Interrupted by Men, Too' *Popsugar* (online, 19 April 2017) <<https://www.popsugar.com/news/Female-Supreme-Court-Justices-Interruption-Study-43413662>>; Katerina Ang, 'Even Ruth Bader Ginsburg Gets "Maninterrupted" at Work: What to Do When It Happens to You' *Moneyish* (Blog Post, 14 April 2017) <<https://www.marketwatch.com/story/even-ruth-bader-ginsburg-gets-maninterrupted-at-work-what-to-do-when-it-happens-to-you-2017-04-14>>; Jim Axelrod, 'Female Supreme Court Justices Interrupted More than Male Colleagues, Study Says', *CBS Evening News* (online, 12 April 2017) <<https://www.cbsnews.com/news/female-supreme-court-justices-interrupted-more-male-colleagues-study/>>; Maggie Mallon, 'Here's How Frequently Women Supreme Court Justices Are Interrupted by Men', *Glamour* (online, 6 April 2017) <<https://www.glamour.com/story/how-frequently-women-supreme-court-justices-are-interrupted-by-men>>.

<sup>29</sup> See also Daniel Reynolds and George Williams, 'Gender Equality Among Barristers before the High Court' (2017) 91(6) *Australian Law Journal* 483; Hall and Williams (n 12).