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Dwyer, Joan

(1940 - 2019)

Born	16 May, 1940, Melbourne Victoria Australia
Died	11 September, 2019, Melbourne Victoria Australia
Occupation	Barrister, Chairperson, Lawyer, Solicitor, Tribunal Member

Summary

Joan Dwyer OAM graduated from the University of Melbourne in 1961, signed the solicitor's roll in 1963 and came to the bar in 1978. She had a diverse and successful career that included working as a research assistant for Sir Zelman Cowen and, when in London, for solicitors to Queen Elizabeth II.

She was a Senior Member of the AAT (Clth) for 21 years and Chair of the Equal Opportunity Board (Vic).

Joan Dwyer passed away peacefully in September 2019 at the age of 79, after a five-year battle with cancer.

Go to 'Details' below to read a reflective essay written by Joan Dwyer for the Trailblazing Women and the Law Project.

Details

The following additional information was provided by Joan Dwyer and is reproduced with permission in its entirety.

I attended PLC (the Presbyterian Ladies' College, Melbourne) for almost all my schooling. I finished school, aged 16, at the end of 1956. PLC, which was founded in 1875, had been a pioneer in the field of educating women, but by the time I started there in 1946, it had changed somewhat. While it still believed women could and should excel academically, it seemed to me to emphasise conformity and lady-like behaviour rather more than any rebellious pioneering spirit.

My parents were Jewish refugees from Hitler. My father was a businessman. He had studied a commercial course and was always interested in acquiring knowledge. Not only my mother, but also my grandmother had attended the University of Vienna. My mother had done medicine there, and my grandmother had studied mathematics and physics as one of the very early female university students. After my birth, my mother sat an exam on 6 weeks notice, the equivalent of final year medicine, to have her Viennese medical qualification recognised in Australia. She was one of the few "foreign doctors" who was successful at the first attempt.

It had always been accepted, by both my parents and school, that the next stage for me after school would be University, which I must say I saw more as a continuation of school, rather than as a step towards a career.

During our last year at school there was some discussion of suitable careers, by a teacher who had responsibility for giving advice as to careers, as well as her prime responsibility as Head of Geography. My impression of her advice is that we could do teaching or nursing, both suitable careers for a girl and also a form of community service. I did not really see myself as a teacher or a nurse and, although my mother was a doctor, I did not have a scientific bent, and therefore did not have the necessary prerequisites for medicine.

I needed special permission to enrol at University before I turned 17, but assuming that I passed that hurdle, I thought I would simply enrol for Arts and then think further about a career when I had finished that course. When my father heard what I was planning, he said that in his opinion I was being stupid. He said that I should use my time at University to obtain a career qualification, and he suggested that I do law. My mother had a patient, Lynette Barry, who was a lawyer, as well as a wife and mother to quite a large family, and it was arranged that I meet her and talk about working as a woman lawyer. Ever the obedient daughter, I applied to do Law/Arts at University in 1957.

I couldn't have attended very well to whatever Lynette told me. After obtaining the necessary permission to start my course, I had to apply to Arthur Turner, the sub-Dean of the Law School, to actually enrol in law. I can clearly remember him asking me why I wanted to do law. I replied, "because my father told me to." He then asked me what I thought a lawyer did, and I replied that I did not know. He asked me to think about it and I thought really hard and answered that I thought if you wanted to buy or sell a house, you would use a lawyer. He said words to the effect, "Oh well, I suppose you can drop out at the end of first year" and let me in. I am conscious that it was a very different world then.

To my surprise I found I was really interested in the law subjects of my combined course, especially Introduction to Legal Method and Torts and Contracts. All went well till the end of my third year when I began to wonder what I would do when I finished the course and whether I would enjoy working in a legal office. I went to see the Dean, Professor Zelman Cowen (later The Right Honourable Sir Zelman Cowen Governor- General of Australia) and told him I was thinking of dropping out, because I did not think I would enjoy being a solicitor. He talked me into going on to complete the course and said that if I got an Honours degree I could become a tutor in the Law School. I lacked the confidence to select the Honours questions, where one had to make a selection, but did well enough for Professor Cowen to offer me a position as his research assistant with some tutoring as well.

After graduation, I did my articles at Lander and Rogers, a city firm with a large insurance company client base. I worked very closely with the senior partner Hartwell George ("Chick ") Lander. He had high standards of efficiency and was a hard taskmaster, and a difficult opponent to lawyers on the other side, but appreciated a job well done. I learnt a lot from him and have always been grateful for the basic training I received. I found I really enjoyed the litigation side of the practice, and learnt how important it was to have a carefully prepared case.

After completing one year of Articles I was admitted in 1962 and shortly afterwards left for a year overseas. This had been previously arranged, with the understanding that I would then return to Lander and Rogers. In England, due to a chance meeting my parents had had in Spain with a partner in the firm, I spent some time working for Farrer and Co, Solicitors. The firm acted for the Queen and other members of the Royal Family, as well as for many of the aristocracy and landed gentry of England, and also for famous people such as Ian Fleming.

The contrast with practice in Australia seemed to me quite great. All was done with the appearance of a casual gentlemanly attitude towards the work. For instance when I arrived there sharp at 9am on my first morning, to show my keenness, I was told that solicitors, as distinct from staff, did not arrive until around 9.30am. Social distinctions were to be observed. One country client, to whom I had to travel by train and taxi, in order to obtain her signature on a document, was shocked when I repeated to her some comment the taxi driver had made to me. She asked in a disapproving tone, "you spoke with the taxi driver?" I spent a lot of time at Farrers poring over huge old parchment title documents the size of a desk, trying to determine what lands our clients owned and what parts of their estates were common land. I prepared a document indexing all the property owned by one family and all the members of that family in order to facilitate decisions as to estate planning and bequests to the National Trust.

On my return to Melbourne, I resumed working for Lander and Rogers as a first year litigation solicitor, but after a while I decided that I should see what it was like working in a different sort of firm, mainly for private clients rather than insurers. I moved to Oakley Thompson for about a year and then decided to try crime at Galbally and O'Bryan. I found I was mainly doing divorce and personal injury work there, but, on one occasion, I appeared robed, as "Mr Frank's" Junior, on the last day of the hearing of the case of Christine Aitkin, who was charged with harbouring the escaped prisoners Robert Ryan (sadly the last man hung in Victoria) and Peter Walker. I soon realised that, although I was glad I had had the experience, a life of crime, or even work in a mainly criminal law firm, was not for me, and so moved to a very different atmosphere at Whiting and Byrne.

I enjoyed my time at Whiting and Byrne. There were about 6 partners all with different clients and specialties, and the junior solicitors could be asked by any partner to take on a particular matter or piece of research. The firm aimed to give a high standard of service and so took care not to overload new solicitors with too much work, to the extent that at first I felt quite underutilised. In some ways, especially its costing method, it was still rather old-fashioned, but the work was interesting and the partners and solicitors were helpful and approachable. I had agreed to stay two years at interview, but became pregnant and, although I stayed working part-time until 2 weeks before my daughter Bridget was born, I could not quite honour that commitment.

After Bridget was born, in August 1968, I had things other than a return to work on my mind, but towards the end of that year my husband John, a barrister, saw an advertisement for tutors at Monash Law School to start in March 1969. Somewhat reluctantly I prepared an application and sent it off. I was offered part-time tutoring and by March 1969, I was glad to have the opportunity to work again. I enjoyed tutoring in Contracts and stayed at Monash until we left to go to England in mid-1970, as John had obtained a lectureship at Durham University.

We loved Durham. It is a beautiful university town dominated by its Norman Cathedral and old castle. The Dean of the Law School had John lecturing in many different subjects and was also happy to provide me with some part-time lecturing in Family Law to "keep my hand in." He did not believe in slacking. I accepted this opportunity even though our second daughter, Tessa, was born just a couple of months after our arrival in Durham. John was able to work at home to look after the girls while I was lecturing.

On our return to Australia, John became a part-time lecturer at Monash, as well as continuing his practice at the Bar, and I looked for and found part-time work. This was not easy as there was, at that time, no practice of women working part-time to combine work and family responsibilities. Further, I wanted to work as a litigation solicitor and that was considered impossible because of the demands of litigation. At one stage I offered my services to a solicitor who was known to be hopelessly inefficient at managing his busy sole practice. I suggested that he needed help and I could provide it. He turned out to be too inefficient even to get back to me.

Eventually I found part-time work with AW (Junior) Foster at a small suburban practice close to home. He was concerned as to how I would cope working in litigation, if cases came on for hearing or negotiations on days I was not scheduled to work. I assured him I would be flexible and there were no problems of that nature in the 5 years or so I worked at that practice. I left temporarily because John had a sabbatical coming up as a result of his Monash position, and he had arranged to spend the time at the University of Warwick working with Professor Patrick Atiyah in the field of common law.

It was interesting that once other solicitors saw that my part-time work arrangement was satisfactory, they also offered me part-time work. I did not want more work myself, but did manage to place two other friends in similar work. One remained with the firm for more than 40 years until she retired from practice.

On our return to Melbourne, I continued to work at AW Foster and also applied for and obtained a fractional appointment as a Senior Teaching Fellow at Melbourne Law School. But, shortly after we got back, John was invited by the University of Warwick to return and take up a 12 months appointment teaching Professor Atiyah's classes, while he took time off to write The Rise and Fall of Freedom of Contract.

I decided to look for part-time work as a solicitor while we were in England that time and, after writing many letters to local solicitors, found a position with NJL Brockbank, an idiosyncratic Dickensian solicitor who ran a one man practice from a 4 storey Victorian townhouse in Royal Leamington Spa. I had said, in my letter seeking work, that I was more interested in the varied experience than in the money, so he offered me work at one pound an hour and I accepted those terms. However, on the first morning, after I had completed all he had asked me to do, and had asked for more work once or twice, he came in and announced that he was doubling my remuneration.

While in England that time, I also decided to sit the exams for an overseas solicitor to be admitted to practice as a solicitor of the High Court of Judicature. A law clerk at Mr Brockbank's office said there was no way I could pass at a first attempt, which was all I would have time for in the year we were going to spend in England. He said he himself had sat 5 or 6 times and not passed yet. This both aroused my competitive spirit and warned me that I might need to put quite a bit of effort into preparation. I found an advertisement for a crammers' course and went to London for about 3 days of intensive, first class instruction. I did pass on my first attempt, but I was very grateful to my colleague for the warning that caused me to do the London intensive course. I was pleased to see that my English admission certificate was signed by Lord Denning, the Master of the Rolls.

We returned to Melbourne in late 1977 and I found part-time work at Flood and Permezel in the city. I found I lost too much

time travelling into the city and back for school pick ups, and decided that local work was much more flexible for a part-time solicitor. I changed to work for our friend Pat Clancy at Patricia Clancy and Associates in Camberwell.

By 1978 our daughters were almost 10 and 8 and established back at school. I thought I could take on a new challenge and try the Bar. I arranged to read with Ron Meldrum who had a very busy general common law practice. I was his first reader and he turned out to be a brilliant master. He has an excellent knowledge of the law, but his particular skill in my opinion is in understanding the psychology of the court, of his client and of any witnesses he would be examining or cross-examining. He too demonstrated the importance of careful preparation of any case. He is also very good company and we had a lot of fun, sometimes arriving at his client's work premises for a "view" with me on the back of a motorbike, at other times being taken up in a small plane by our solicitor on a country circuit. I must say on that occasion it did not seem like fun to me until we had safely landed after our joyride.

One day, shortly after joining the Bar, I saw a notice in a lift at Owen Dixon seeking applications from lawyers willing to be a Chairman of the Social Security Appeals Tribunal ("the SSAT"). I did not know much about the social security legislation, but I was interested in people and in social welfare and I decided to apply. My application was successful and I found the work very interesting. We sat as a 3 member Tribunal with a public servant, a social worker and the lawyer, as the Chairman. I sat once a fortnight on a Friday afternoon. I enjoyed the mix of disciplines and learnt a lot, especially from the very experienced social worker with whom I sat. At that time our decisions were only recommendations, but so far as I know they were accepted.

Friday afternoons were often a quiet time in Court , and the SSAT did not really interfere with my practice at the Bar. I took Chambers and developed a general practice doing some Magistrates Court "crash and bash", which was my least favourite type of work as I considered the results were often very random. I found it difficult to predict which driver the Magistrate would accept. I was surprised by some of my wins, as well as by some of my losses. After a time I seemed to develop specialties. I was often sent to the Childrens' Court to oppose applications that children be removed from their families, and also fought some such matters on appeal in the County Court. I did a number of Practice Court applications for an extension of time, in which to commence personal injury litigation. I did some Family Court work and some building and contract cases.

I was pleased that I had come to the Bar as it had always had a mystique or allure, but in some ways I missed the ongoing contact that a suburban solicitor has with clients. Also there is a great deal of tension and strain in running a hotly contested matter, which may go on for several weeks. While it was great to have such work it was also stressful for me and for John and sometimes for the girls.

Then one day in late 1980, out of the blue, I received a telephone call from Yolande Klempfner, who was, at the time, the Premier's Adviser on Womens' Affairs. She asked whether I would be interested in applying for the position of Chairman of the Equal Opportunity Board. The Equal Opportunity Act had been passed in 1977 and the term of appointment of the first Chairman was almost up. I understood that Yola was making similar calls to a number of possible applicants.

At first I was uncertain as to whether I wanted to leave the Bar so soon, but both John and my father thought I should definitely apply and so I went ahead. When I was told I had an interview, I bought a new dress for the occasion ("the interview dress", which I still have) and rather nervously entered the Department of Premier and Cabinet for the first time. The main thing I remember being asked was whether I would feel overawed if I had QC's appearing before me. I replied that as I lived with one and did his washing etc, (John having taken silk by that time) I was not likely to be overawed. I had the feeling that it was that answer which clinched the interview for me.

I was appointed on 2 March 1981. I found my position had varied responsibilities. An important one was educating the community about the concept of equal opportunity. Rather to my surprise I found I had speaking engagements even during my first week in the job. I remember feeling it was rather like jumping into a swimming pool, to give my first lunch time talk about equal opportunity when I had had practically no time to get accustomed to the new position. But jump in I did, and I seemed to swim alright, so from that time on I enjoyed my speaking engagements. I liked meeting all the different school, country and city groups who invited me as speaker and dealing with the varied questions.

I also had an office and staff to manage, which was another new experience for me, in which I was very much assisted by the Registrar, Karen Maynard. In my new role, I became exposed for the first time to the workings of government and endless meetings of highly paid public servants about compliance with United Nations Conventions. The aim seemed to be to do as little as possible, and say as little as possible about what we were actually doing, but to clothe that little in very precise language. Having some input into the drafting of new legislation, for instance amendments to the Equal Opportunity Act to make discrimination on the ground of disability unlawful, was more rewarding.

I found that I very much enjoyed conducting the hearings of the Equal Opportunity Board. In some cases we had to decide whether there had been unlawful discrimination, and in others whether there was a valid reason to grant an exemption from the provisions of the Act. We always sat as a three member Board and I valued the experience my fellow members, Ian Sharp, a former Judge of the Australian and Conciliation and Arbitration Commission, and Don Ross, a former Commissioner of the State Bank and of the Housing Commission of Victoria, brought to our work. In those days there was a great deal of supportive media interest in the work of the Equal Opportunity Board, and the media was present whenever we delivered a reserved decision. Usually our decision would be reported on the news that evening.

When it was coming close to the end of my three year term, there was no indication given to me as to whether or not I should

expect to be reappointed. I was perhaps rather old-fashioned and felt that it was for the government to advise me of its intentions rather than for me to seek an indication. During that period I saw an advertisement for Senior Members of the Commonwealth Administrative Appeals Tribunal (the “AAT”). I decided to apply. There were some delays for various reasons, but eventually I was offered and accepted a tenured appointment to age 65 as a Senior Member of the AAT. The Victorian government appeared to be surprised that I had applied for another position, and, by arrangement between the two governments, I held both positions for part of 1984, although I did not actually do any hearings for the EOB, and the Registrar and other staff ran things there and only rarely asked me for input.

At the AAT I had found my perfect position and I stayed there for the full 21 years remaining till I turned 65. In 1984 it was very rewarding to be a Senior Member of the AAT. The work was exciting. The idea of having external merits review of the decisions of public servants was innovative, not only in Australia but internationally. After a period of some resistance among the higher echelons of the public service, the AAT, under its wise and learned first President, The Honourable Justice Gerard Brennan, had gained general acceptance, and recognition of the high standard of its decision-making.

When I started, The Honourable Justice Daryl Davies had recently become the second President of the AAT. He was assisted by Deputy Presidents Alan Hall and Robert Todd. The Act required that reasons for decision be delivered and it was impressed upon the Senior Members that our work was to be of a very high standard. We were expected to take great care with, and pride in, our decision writing and to clearly set out the relevant legislative provisions as well as our reasoning leading to our findings of fact; and to explain how the legislative provisions applied to the facts as we had found them. Where we were setting aside the decision under review, it was important that we explain clearly to the decision-maker why the decision had not been the correct or preferable decision, but it was also always appropriate to write our decisions so that a lay party could understand and follow the reasoning. In order to assist us in producing work of a high standard, all full-time Senior members were entitled to a legally qualified Associate as well as a personal assistant.

As I had done before on the SSAT and the EOB, we usually sat as a three member tribunal and there was much to be gained from the combined experience of the many part-time members with very different specialist expertise ranging from medicine, social work, business, the armed services, aviation and other qualifications.

I am very much a “people sort of person” and I felt privileged to share the life stories of the many applicants who appeared before us, either in person or with legal representation. When the legislation allowed us to right what appeared to be a wrong, that was satisfying. Where it did not, it sometimes seemed to me to be worth pointing out to the legislature in the reasons for decision, that, in the particular circumstances before us, the legislation might not serve the purpose desired, or might be able to be finely tuned to provide a more just result .

In the early days of my appointment, there were not very many Senior Members of the AAT, and so the Sydney and Melbourne full-time members were expected to travel quite a bit, especially to the states which had few members. It was great fun to visit and sit in Perth, Brisbane, Canberra and Adelaide, often for two weeks at a time, with a weekend free for sightseeing in the middle. Each state seemed to have slightly different customs or styles of advocacy and that added interest. Also meeting and sitting with, and sometimes visiting the homes of, the interstate members added to a friendly collegiate atmosphere. In later years there were more members in each state, and less interstate interchange, and I certainly travelled less.

Another aspect of the role of the AAT which particularly suited me, was our flexibility as to the procedures we adopted. As I have explained in a number of published articles, The AAT Act 1975, in s 33(1)(b), provided that the Tribunal should conduct its proceedings with as little formality and technicality as a proper consideration of the matters before it permitted; and, in s33(1)©, that the Tribunal was not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks appropriate, always of course complying with the rules of natural justice.

Perhaps because of my parents’ continental background, and in particular my father’s discussion of these matters, I have never been convinced that an adversarial system of justice is clearly preferable to an inquisitorial or investigative system of justice. The AAT Act allowed me to consider the application of some flexibility in hearings. Although some learned Presidential Members had declared that the AAT was not an inquisitorial body, there were some instances where the opposite view had been expressed. I became very interested in this issue. I sometimes suggested to the parties that certain evidence be called in order to inform the Tribunal as to a certain issue. I also started to publish papers on the powers of the AAT and its use of those powers to achieve a fair result. In that connection I also wrote about the use of expert witnesses in hearings.

I presented papers at a number of conferences and my interests extended to cover papers on disability issues, such as one on Access to Justice for people with Severe Communication Impairment. I enjoyed the intellectual exercise of writing and presenting papers on somewhat controversial areas.

As I have already said, I remained a Senior Member of the AAT until my statutory retirement age of 65 in 2005. There were some changes over those 21 years, which to me did not seem to improve the independence or standing or high standards of the Tribunal, but I adopt the view of Justice Brennan in his opening address at the 1996 conference to mark the Twentieth Anniversary of the AAT:
Having been away from the coalface of the AAT for seventeen years, I do not presume to pontificate on what, or more significantly, who the AAT should be to-day.

As I came close to my statutory retirement age, I realised that although I did not mind the idea of semi-retirement, especially

as John was retired by then, I did not want to give up all professional legal work. I first applied to become a member of the Aboriginal Housing Board of Victoria. It was an honorary position and after I was appointed, I learnt that I was the only applicant for the position which required legal qualifications. There were interesting aspects of the work, new people to meet and work with, and some travel to hold Board meetings in country areas and meet the local aboriginal communities. But there were also some conflicts and tensions as to management and governance issues and, after about eighteen months, I tendered my resignation.

During my working career, I had realised that I was particularly interested in medico-legal issues. I had been a member of the Committee of DEAL Communication Centre (now the Ann McDonald Centre) for many years and as already mentioned had worked to have discrimination on the ground of disability made unlawful under the Equal Opportunity Act 1978 (Vic), and had written on disability issues. I decided to apply for positions on hearing panels under various health professional regulatory Acts, and to apply for appointment to the Mental Health Review Board.

I was successful in being appointed to the list from which hearing panels were selected under the Medical Practice Act 1994 and under legislation for the regulation of Chinese Medicine Practitioners and Nurses. I was not appointed to sit on many hearings but, when I did sit, it was always interesting and challenging in many different respects. Although still eligible to sit, I have not been asked to do so since many of the Boards were brought together under the Australian Health Practitioner Regulation Agency ("AHPRA") in 2009.

I found that I had a philosophical difference of opinion on the issue of the current significance attached to sexual relations between health professionals and former patients, where both were adults and there was no evidence of coercion or demonstrable undue influence. As research by others has shown, the odds of removal from practice (ie suspension or cancellation) were 22 times higher [81%] in cases in which doctors were found to have had a sexual relationship with a patient compared with all other cases, such as errors in care delivery, poor clinical judgement or lack of knowledge. (Removal of doctors from practice for professional misconduct in Australia and New Zealand Elkin, Spittal, Elkin and Studdert BMJ Qual Saf published online July 21 2012).

It seemed to me that the argument that there must always be undue influence due to an imbalance of power in such relationships was more an article of faith than a matter that could be proven in each case. Eventually, I wrote and delivered a paper on the issue (Is there as much need for Protection as Health Professional Boards and Tribunals seem to believe? Delivered to the 14th Greek/Australian Legal and Medical Conference in Greece in 2013).

Luckily my application to become a member of the Mental Health Review Board was successful. I have now been sitting as a part-time member of the Board and, since July 2014 of its replacement, the Mental Health Tribunal, for almost ten years. I have found the work both interesting and informative as well as very rewarding. I have learnt a lot about mental illness, its causes, its treatment and the distressing consequences for those who suffer with it. Once again, the interactions with colleagues from different backgrounds have been enjoyable and it is good to still be using my legal skills in an informal hearing situation.

The law has provided me with very many challenges, many worries and sleepless nights, but continuing interest and intellectual stimulation and many rewarding friendships and other relationships. I am ever grateful to my parents for giving me the encouragement and advice to study law, and to Arthur Turner for letting me enrol in the Law School, in spite of my unimpressive performance at that first interview. I am also grateful to Professor Zelman Cowen for persuading and encouraging me to continue and complete my course and to all the employers and colleagues and staff who have helped me along the way.

Published resources

Resource
A golden reunion, Walsh, Andy, 2015,
http://law.unimelb.edu.au/news/MLS/a-golden-reunion

Site Exhibition
Australian Women Lawyers as Active Citizens, Trailblazing Women Lawyers Project Team, 2016,
http://www.womenaustralia.info/lawyers

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