



## Women at the Bar

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In Michael Slattery's president's column (*Bar News*, Winter 2007) he noted that 17 per cent of the New South Wales Bar are women, up from 13 per cent in 2000, and took some comfort from this increase.

In the photo of the readers of 01/2007 in the same issue, almost half of the new readers (19 of 44) were women.

Yet of the 29 counsel engaged in the recent high-profile C7 litigation in Sydney, only two were female. (*Seven Network Limited v News Limited* [2007] FCA 1062 (27 July 2007)). Both were on the team for Channel Seven.

If the gender of barristers on C7 had reflected the representation in the profession, there would have been five female counsel involved, not two.

I mentioned this to a female barrister on Phillip Street the other day, and was met with the rejoinder, 'But where are the excellent female commercial juniors?'

Why is this usually the response, even from women? Why is the test for women and men so often different? Why do women need to be excellent to warrant a guernsey in such litigation, when male juniors often just need to be competent, working on the same floor as one of the senior counsel, and available? And how are women to gain the experience to be excellent if they are not routinely involved in the most complex matters?

Involvement in complex trials led by eminent senior counsel is some of the best training possible for younger barristers. Large teams of barristers need counsel of a range of experience levels. A conscious effort on the part of senior counsel and law firms would result in the involvement of more female counsel.

For many years now women have accounted for more than one-half of our graduates from law schools. At UNSW Law School, where I teach, females have accounted for on average 56.3 per cent of our students for the past five years and have tended to do slightly better than the male students over that period. For some time now two of the four principal law schools in Sydney have had female deans.

Yet the Australian Women Lawyers Gender Appearance Survey of Australian courts for periods in late 2004 and 2005 revealed the following:<sup>1</sup>

- ◆ In the Federal Court only 5.8 per cent of appearances by senior counsel were by women, and, of greater concern, the average length of hearing for male senior counsel was 119.7 hours, compared to merely 2.7 hours for female senior counsel.
- ◆ In the Federal Court the average length of hearing for male counsel appearing as junior to senior counsel was 223.6, whereas for female junior counsel in the same role it was only 1.4 hours.
- ◆ Similarly, only 9.9 per cent of appearances before the New South Wales Court of Appeal were by women, but 27.8 per cent of appearances before a master were by women. (Data wasn't collected for hearing length in the NSW Supreme Court).

In short, the data collected in the survey confirmed the anecdotal evidence that, except before the Family Court, women do not appear



Photo: Newspix

as advocates in the superior courts in numbers that reflect their presence in the profession.

This conclusion is reinforced by figures cited by Kirby J in delivering the Dame Ann Ebsworth Memorial Lecture in London in February 2006: of the 161 counsel who appeared before the High Court in 2004 in appeal hearings, seven were women, less than five per cent. On special leave applications, the figure was a little better, but still lamentable: eight per cent of counsel were female.

As Kirby J said:

One hundred years after the first women was admitted to legal practice in Australia it is difficult to understand why there is still such a gap between the numbers of men and women appearing as advocates before the highest court. The reasons would seem to lie deep in legal cultural and professional attitudes and practice.

Michael McHugh, at the High Court Dinner in Perth, 24 October 2004, put it more bluntly: 'discrimination against female lawyers has been rife throughout the 43 years I have been a member of the legal profession.'

McHugh J proceeded to ask and answer the question why women have so few speaking parts before the High Court:

The inescapable conclusion is that it is the product of the discriminatory, systemic and structural practices in the legal profession that have been well-documented in recent years and which prevent female advocates from getting the same opportunities as male advocates.

In other words, the Bar is a blokey place that prefers blokes. No doubt its members rarely notice this. To any outsider looking in, such as myself, it is obvious. As a male law professor recently put to me, 'I went to the recent Bench and Bar Dinner – it was appalling, the testosterone and BS was so thick it was difficult to breathe'. I appreciate to many eminent counsel this will sound like nonsense – but then fish rarely notice the water in which they swim, especially when the temperature is comfortable.

It is now more than three years since the Bar Council adopted the Law Council of Australia's Model Equal Opportunity Briefing Policy for Female Barristers and Advocates. This policy calls for those briefing

counsel to genuinely consider engaging female counsel and to periodically report on the nature and rate of engagement of female counsel.

My searches of large law firms' web sites uncovered no such periodic reports. Three years is more than long enough for law firms to have started to regularly report on their engagement of female counsel and one would expect that the first to do so may well enjoy an edge in seeking to hire female associates. At the least they would mark themselves out as progressive and concerned.

Having children does typically disrupt women's careers more than men's. There is a strong case for affirmative action for female barristers' to compensate for the disruptions of child bearing and rearing. But here I am not discussing affirmative action, merely equal treatment. Why is it still so clearly absent in our profession?

Why are we, a profession committed to the administration of justice, not ashamed of the deep hypocrisy of denying equal treatment to so many of our own members?

Until female advocates gain a fair share of experience in complex litigation and appeals before the higher courts, they will be under-represented among the ranks of senior counsel because they will not have received the training that best prepares people for to assume the role of senior counsel. They will therefore also be under-represented in judicial appointments and our judiciary will remain unrepresentative of the people it judges.

As a profession, if we are serious about providing reasonable opportunities for female advocates, with the goal, in time, of having a representative judiciary, a number of steps need to be taken:

- ◆ The Australian Bar Association, or some other national organisation, needs to commission a comprehensive survey of the appearances of female advocates in all our courts – the type and duration of cases they appear in, and in which courts. The survey considered earlier was, on its own admission, very limited and partial. The starting point must be to know nationally the type of experience female advocates are gaining in the courts.
- ◆ Each state and federal department that regularly engages lawyers needs to decide whether it is going to have an equal opportunity or affirmative briefing policy and implement it.
- ◆ Each law firm needs to decide whether it is going to have an equal opportunity or affirmative briefing policy, and implement it.
- ◆ Having implemented these policies, these government departments and law firms need to report annually on the outcomes of their chosen briefing policies, ie. the proportion of female barristers briefed, and the types, and durations, of matters in which they were briefed.

Perhaps it is even time, when judges look out upon a sea of counsel as in the C7 litigation, for mention to be made if the composition of counsel is unrepresentative of the profession?

**Endnote**

1. See: *Gender Appearance Survey Results and Explanatory Memorandum*, August 2006 at [www.womenslawyers.org.au](http://www.womenslawyers.org.au)

Bar Practice Course 02/07



Back row to front:

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Absent: Sarah Huggett