

Data on diversity: The 2018 survey

By Ingmar Taylor SC and Chris Winslow

The New South Wales Bar is perceived as an island in a sea of demographic change. Society views barristers as ‘old white men wearing wigs’.¹ Michael Kirby said he was ‘shocked and surprised’ by the under-representation of Asian Australians in the legal profession, comprising just 1.6 per cent of barristers nation-wide.² At the time the NSW Bar Council was in no position to demur – it did not have the data to do so.

To be sure, the New South Wales Bar Association has long kept and published basic data regarding local practising barristers. The purpose was partly regulatory, but also as a means to determine the ‘retention’ and career progression of barristers, from pupillage to appointment as senior counsel and beyond. Such data also served as a useful indicator of the resilience of an independent referral bar, buffeted by the collapse of HIH, challenged by competition from solicitors, and under threat from government policies designed to curtail common law rights to compensation in motor accident cases. That information included gender, but until recently the bar did not study the cultural composition of the bar. That changed recently when it became an object of the association’s strategic planning.

In the context of the bar, diversity is a function of two factors: commencement and retention over a given time – put simply, who is admitted, who stays and for how long? Nowhere has this equation been more apparent than in the obvious gender imbalance at the bar. This was the first facet of diversity to be scrutinised. In 2004 *Bar News* published a special edition on women barristers, which examined the statistics and the perception that women completing the Bar Practice Course were leaving the bar not long after and were not ‘retained’.³

In the ensuing years, Bar Association committees, along with several academics, have examined the issue, including studies on equitable briefing and court appearances by women. The most recent of these was an excellent article by Richard Scruby SC and Brenda Tronson in the Summer 2018 edition of *Bar News*.⁴ At the same time, the focus on the composition of the bar was widened to include the severe under-representation of Indigenous Australians. Bar Council commissioned ad hoc surveys – such as the one by Urbis Consulting in 2014 – but the surveys were not aimed at understanding cultural diversity and the findings were not widely published. During this time the Bar Association was falling behind other peak legal organisations in the collection, analysis and publication of member data, most



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notably the Victorian Bar, the Bar of England and Wales, the Bar Standards Board and the Judicial Appointments Commission in the UK. Over this period there has been a growing understanding of the need to build, what marketers would call, a ‘360-degree view’: an end-to-end picture of barristers’ career pathways to the bar, their practices – and their diversity.

In 2018 the Bar Council, under the leadership of Arthur Moses SC, recognised that to deal with the challenges of a changing society, economy and market for legal services, as well as to provide better targeted services and benefits to its members, the Bar Association needed to collect data systematically and regularly on the intellectual capital and diversity of the New South Wales Bar and trends in the changing nature of local barristers’ practices. As part of the 2018-19 practising certificate renewal documentation, the Bar Association included ‘Appendix A’, an optional survey containing 12 questions, which covered issues relating to their practice, cultural and linguistic diversity and parental responsibilities. LGBTIQ orientation was not one of facets of diversity targeted in 2018-19, but will be in the 2019-20 practising year. Appendix A was sent to all holders of a 2016-17 PC. Respondents were asked about their experience within a 12-month period commencing on 1 April 2017 and concluding on 31 March 2018 (inclusive). The exceptionally high response rate (64.97 per cent), lends confidence to the results.⁵ It is only by examining this data, and how it changes over time, that the Bar Association can understand the extent of the issue and the effectiveness of steps being taken to address it.

THE REPORT CARD

There is nascent cultural diversity at the New South Wales Bar. It is comparable in most respects to its interstate and overseas counterparts, although a quick walk down most suburban streets in Sydney will tell that it remains a long way from being representative of the state’s population as a whole.

The Bar Association followed the Australian Bureau of Statistics’ practice of identifying two ancestries as a guide to ethnic diversity. Members were asked: ‘What is your ancestry?’⁶ Members could respond by nominating *up to two cultures* – picking from the list provided (which included ‘Australian’) plus the option of a free answer. A total of 1526 barristers (63 per cent of those surveyed) gave at least one response. More than half of the barrister-respondents (790; 51.77 per cent) identified with a *single ancestry* (see Graph 1). Of those, 413 (52.3 per cent) identified themselves as ‘Australian’. In other words, 27.2 per cent of the bar.⁷

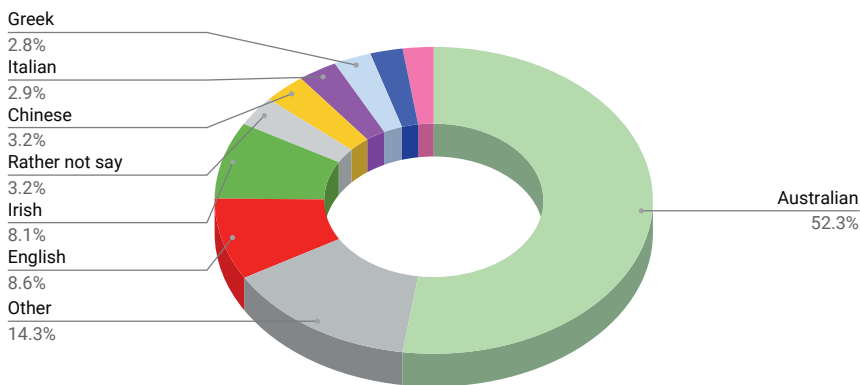
Whether the diversity of the bar continues to grow will depend, to some extent, on whether these barristers remain in practice, or at least do not leave the bar at a rate exceeding those who do not have identify as having a diverse background.

As Graph 2 indicates, ‘Other’ was the second most frequent response – 113 respondents who identified 44 distinct cultures.

What of ‘mixed ancestries’ or ‘hyphenated’ identities? According to the data collected, 337 barristers (22 per cent of respondents) nominated Australian and *one other ancestry*. As expected, 80.2 per cent identified English, Irish or Scottish. However, 55 barristers (16.3 per cent) responded ‘Other’ and nominated 31 unique cultures – eight of which were Eastern European, part of the former Soviet Union or the former Yugoslavia.

It is worth noting the significantly increased cultural diversity among 305 *young* barristers, which for the purposes of this analysis is anyone born in 1978 or later.

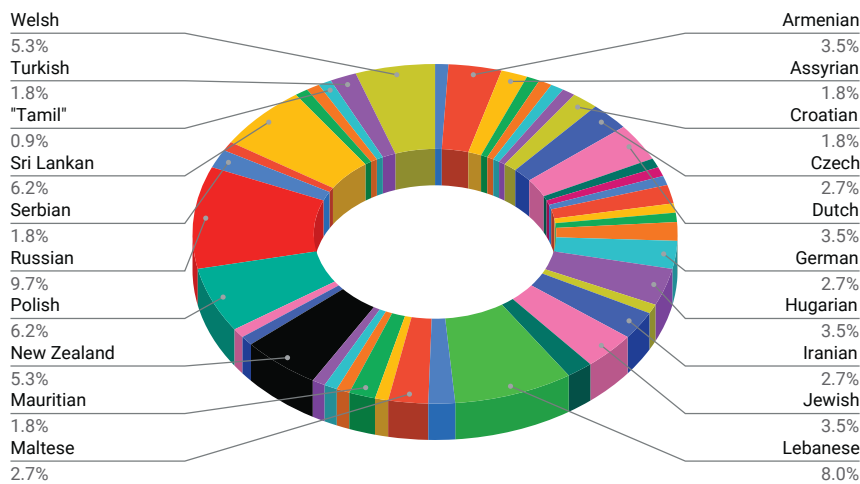
Graph 1: Ancestry, single response



Although it is, admittedly, a small cohort, approximately 17 per cent of those born after 1978, who identify as having a single ancestry, nominated either Chinese or Indian as their cultural heritage. Together with those who nominated 'other' as a single ancestry, nearly 40 per cent of barristers aged under 40 have a diverse cultural background. The number who nominated Chinese ancestry (11.3 per cent) is nearly twice the proportion of the NSW population as a whole. Whether the diversity of the bar continues to grow will depend, to some extent, on whether these barristers remain in practice, or at least do not leave the bar at a rate exceeding those who do not identify as having a diverse background.

Regrettably, less than one per cent of respondents identified as being of Aboriginal or Torres Strait Islander descent. This compares unfavourably with the Victorian Bar, where 1.2 per cent claim Aboriginal and Torres Strait Islander ancestry and with the NSW population as a whole (2.9 per cent).

Graph 2: Composition of single 'other' ancestry

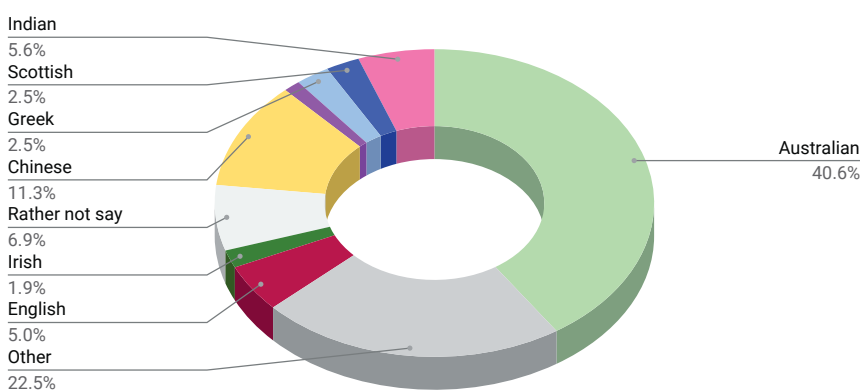


The Bar Association also asked barristers to nominate their country of birth. There were 1547 responses – a response rate of 65 per cent. 14.3 of respondents were born overseas in 49 countries (or 48, depending on the interpretation of East Timor's status at the relevant point in time).⁸ This is significantly short of the national or state figure: 34.5 per cent of the population in NSW were born overseas.

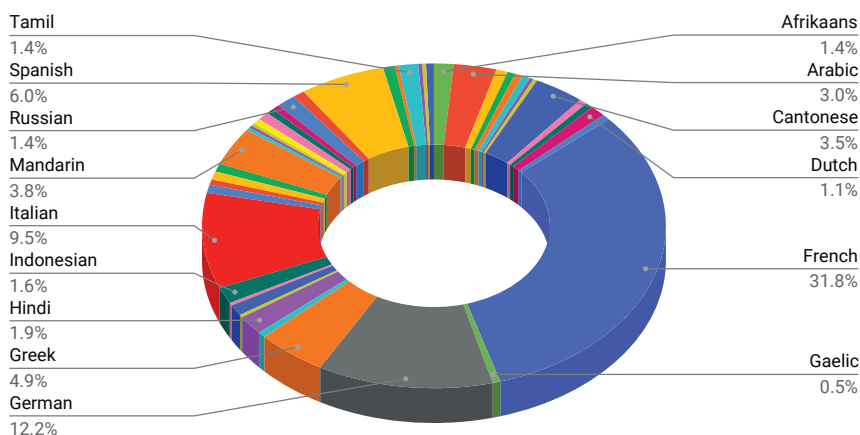
Again, there is emergent diversity among young barristers. Of the 304 respondents aged 39 or less, 22.7 per cent were born overseas in 25 countries. The diversity of this cohort is more proximate with the NSW community as a whole. For example: there are five barristers born in India (1.65 per cent of that cohort). 1.9 per cent of the NSW population was born in India. Seven barristers aged 39 or less were born in China (2.31 per cent of that cohort) versus 3.0 per cent for the whole population of NSW.

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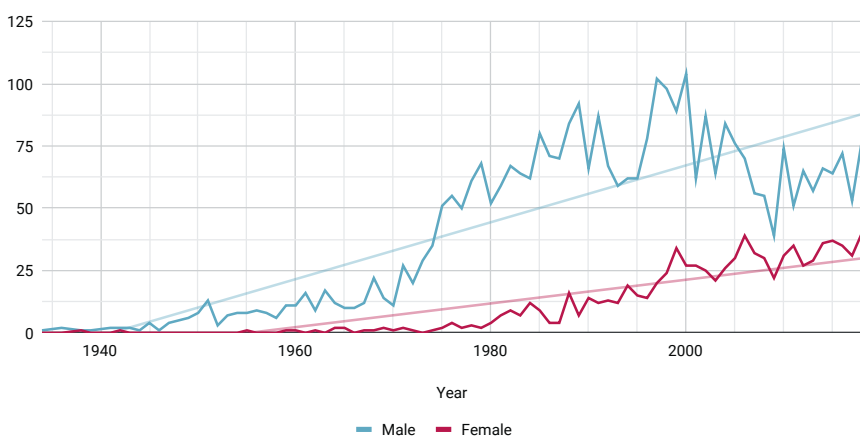
Graph 3: Single ancestry, born 1978 and after



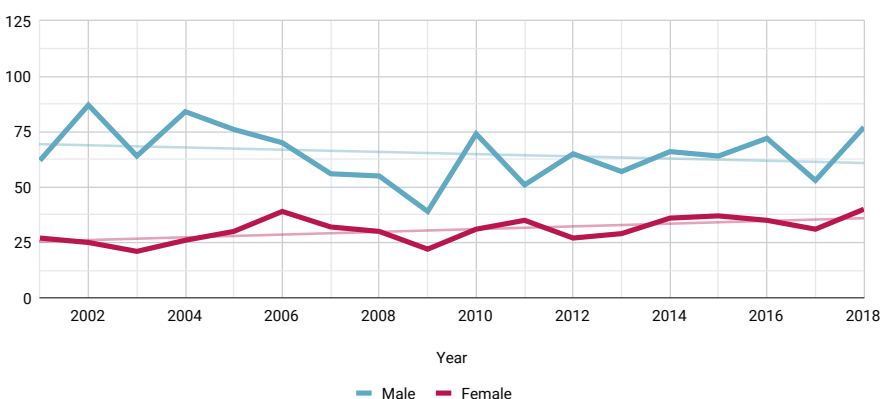
Graph 4: Language proficiency - intermediate and high



Graph 5: Practice commencement by calendar year



Graph 6: Trend commencement, 2000



Torres Strait Islander descent. This compares unfavourably with the Victorian Bar, where 1.2 per cent claim Aboriginal and Torres Strait Islander ancestry and with the NSW population as a whole (2.9 per cent).

LANGUAGES OTHER THAN ENGLISH

The Bar Association has long collected data on languages spoken by practising certificate holders, but this did not extend to self-reporting on language proficiency. During PC renewals, Question A10 asked respondents to assess their proficiency in other languages according to a scale of 'Basic', 'Intermediate' and 'High'. Respondents could identify proficiency in more than one language.⁹

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In order to make the findings more relevant, those who reported only a rudimentary knowledge of another language (e.g., for travel) were eliminated from the data set. The result, represented by Graph 4, is that 368 barristers report having either an intermediate or advanced proficiency in a foreign language (15.2 per cent of the NSW Bar). Women barristers in New South Wales are more likely than their male counterparts to report an ability to speak a language other than English. However, only 58 barristers (less than 3 per cent) reported an intermediate or high proficiency in an East Asian or South Asian language.

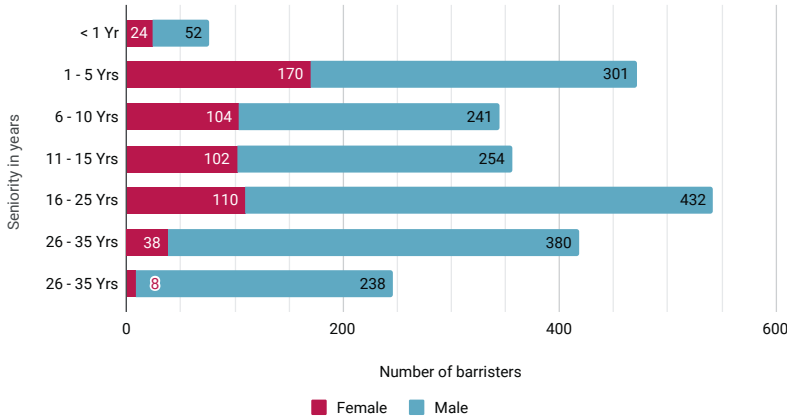
SOCIOECONOMIC DIVERSITY

As reported elsewhere in this edition, the survey provided limited evidence suggesting that socio-economic factors affect who comes to the bar. Secondary education, often used as a proxy for social mobility and socio-economic status, indicates an over-representation of graduates from non-government high schools.

WOMEN AT THE BAR

The ratio of men to women at the bar has been the focus of attention since the first women were admitted, but more so since the number of women graduating in law exceeded the number of males and women became a majority of the solicitor branch of

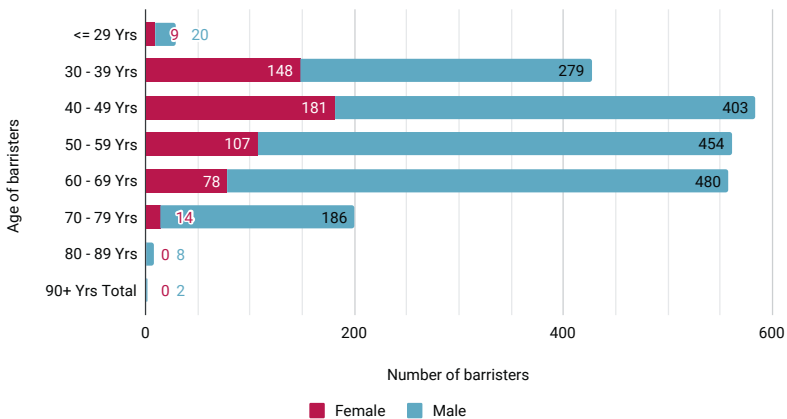
Graph 7: Practising barristers, by seniority and gender



the profession. Currently, women comprise only 23.17 per cent of practising barristers in NSW, and only 11.26 per cent of silks. Data collected by the Bar Association indicates a consistent, upward trend in the number of women commencing and practising at the bar (Graph 5). Men increased in number at a higher rate until 2000, but since then the commencement numbers have been more stable, while varying from year to year.

A serious concern for diversity at the bar is that, while the ratio of men to women is reducing, it is doing so at a declining rate.

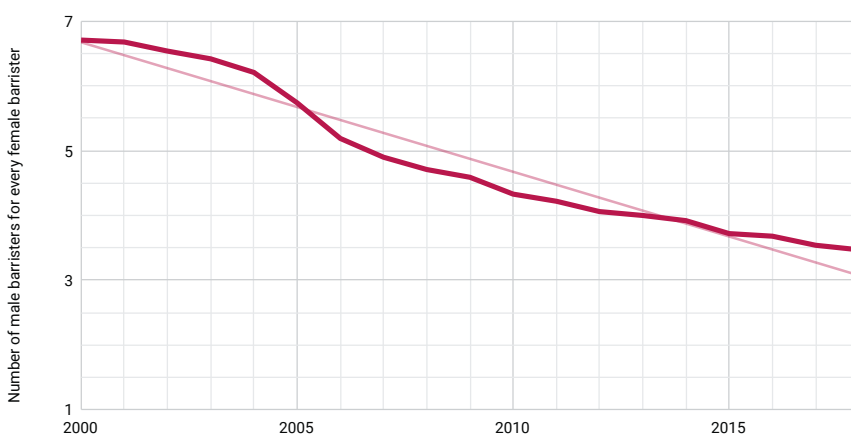
Graph 8: Practising barristers, by age and gender



A serious concern for diversity at the bar is that, while the ratio of men to women is reducing, it is doing so at a declining rate. The 2004 *Bar News* article, 'A statistical analysis of gender at the NSW Bar', concluded that 'the overall percentage of barristers who are women will not be anywhere near 50 per cent in the foreseeable future'. That prediction has proven accurate.

Data on women commencing at the bar is one thing, but what about court work?

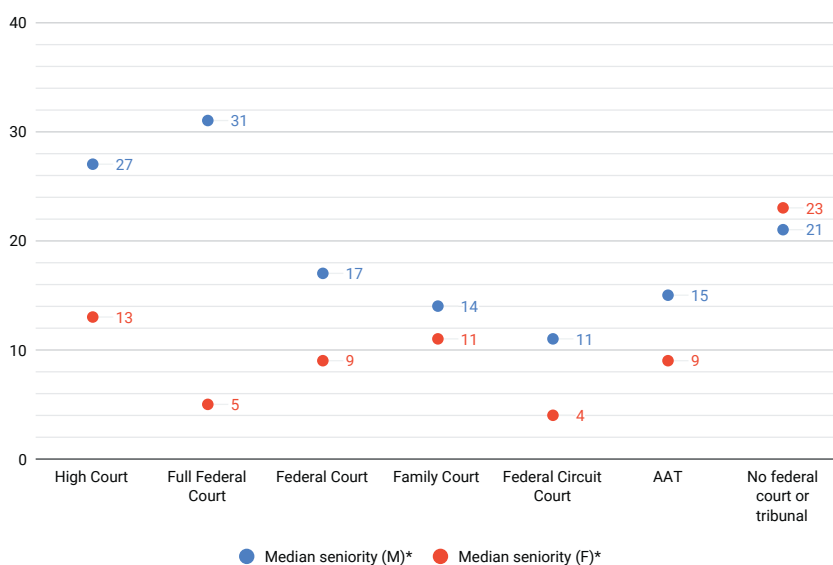
Graph 9: Ratio of male to female barristers



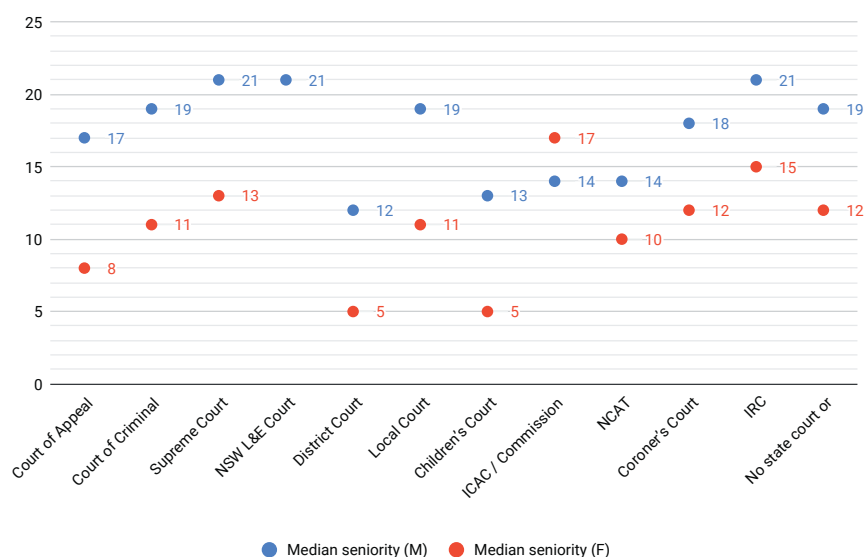
Graph 7 and Graph 8 show the number of practising barristers broken down by gender, seniority and age, while Graph 9 represents the ratio of male to female barristers. The gradient of the line has lessened since around 2012. Had the ratio sustained its rate of change between 2004 and 2006, there would be parity between the number of men and women barristers by 2018. That hasn't happened. The gradient of the line since 2016 is a cause for concern and suggests that the ratio of men to women will approach 3:1, but will take many years to intersect and go below that point.

Data on women commencing at the bar is one thing, but what about court work? There have been several reports on in-court appearances by women barristers. Data collected by the Bar Association indicates that women are more likely to accept direct

Graph 10: Appearances in federal courts, seniority and gender



Graph 11: Appearances in state courts, seniority and gender



briefing by in-house counsel than men (54.44 per cent / 49.22 per cent), but not significantly more likely to accept a direct access brief. Women are appearing in mediations and arbitrations (both representing and as an approved mediator) in approximate proportion to their numbers at the bar. In a number of federal and state courts and tribunals, the median seniority of women barristers is nine years, considerably less than their male colleagues' 17 years.¹⁰

To retain its position as the home of the best lawyers in Australia it must be permeable to the 'best and brightest' legal minds, whatever their origin.

Matching data collected on court appearances and gender produces the hierarchy represented in Graph 12. It shows significant disparities between the ratio of men to women barristers and their court appearances during the practising year in the various jurisdictions. As at 30 June 2018 the ratio of male to female barristers in NSW was 3.46. The ratio of male to female silks is 8.19. The ratio of male to female respondents to the survey was 3.17. As can be seen, the ratio of men to women appearing in ICAC, commissions of inquiry, the Local Court and the Court of Criminal Appeal, is much closer than in other jurisdictions, including the NSW Court of Appeal and High Court. To some extent this might be said to reflect the lower median seniority of women at the Bar, although that explanation is harder to adopt in respect of the District Court.

CONCLUSION

The Bar Association's Strategic Plan posits that in order for the bar to represent clients from a cross-section of society, it must reflect that society. Many at the New South Wales Bar consider it to be purely meritocratic, although that is not something necessarily known to those who view it from outside (nor necessarily accepted by all within it).

To retain its position as the home of the best lawyers in Australia it must be permeable to the 'best and brightest' legal minds, whatever their origin. Furthermore, once admitted to practise, barristers who are not old

white men in the making need to remain in practice. The need to increase the number of women at the bar remains acute, particularly in respect of the number of women silks.

The same is true of those from non-Anglo backgrounds. Diversity needs to be encouraged so that over time the leaders of the bar become visibly representative of our society. This will in turn send a message to those from diverse backgrounds: if you are bright, articulate and hard working you will succeed at the bar regardless of your gender, ethnic or cultural background.

Positive steps need to be taken. The first of which is to understand who we are. The 2018 survey was that first step.

ENDNOTE

- 1 Katie Walsh, 'Barristers insist they are not just old white men wearing wigs', *Australian Financial Review*, 5 April 2018. The solicitors branch of the profession was not immune to criticism either.
 - 2 In 2015 the Hon Michael Kirby AC CMG, acceptance speech as patron of the Australian Asian Lawyers Association, reported in Rowan Callick, 'Michael Kirby shocked by death of Asian Australian lawyers', *The Australian*, 4 December 2015.
 - 3 Ingmar Taylor and Chris Winslow, 'A statistical analysis of gender at the NSW Bar', [2004] (Winter) *Bar News* 20.
 - 4 Richard Scruby SC and Brenda Tronson, 'Some recent statistics on women at the New South Wales Bar', [2018] (Summer) *Bar News* 50-54.
- | | Male | Female | Total | M:F ratio | Response rate |
|------------------------------------|------|--------|-------|-----------|---------------|
| Respondents | 1193 | 376 | 1569 | 3.17 | 64.97% |
| PC holders
30 June 2018 | 1862 | 536 | 2415 | 3.46 | - |
- 6 Australian Bureau of Statistics, *Data Quality Statement, Ancestry (ANCP, ANCI, ANCI2P)*, <http://www.abs.gov.au/websitedbs/censushome.nsf/home/statementspersonanpc?opendocument&navpos=430> (Accessed 14 March 2019). *The Australian Standard Classification of Cultural and Ethnic Groups (ASCCEG)*, 2011, Table 1.3 was used as a guide for recording responses.
 - 7 The top five ancestries nominated by respondents to the 2016 Australian Census were: English (23.3 per cent); Australian (22.9 per cent); Irish (7.5 per cent); Scottish (5.9 per cent) and Chinese (5.2 per cent).
 - 8 **According to the Victorian Bar survey**, 15 per cent of Victorian barristers were born overseas, while 37 per cent had at least one parent born overseas. Survey respondents listed 33 countries of birth, the most common being UK, New Zealand and Canada.
 - 9 The Victorian Bar took a different approach. According to their survey, nine per cent of their local practising barristers speak a language other than English *at home*. Respondents listed 18 languages. The most common of these were Greek, Italian, French, German and Hebrew. *The State of the Victorian Bar: Performance, challenges, and opportunities* (Nous, March 2018) <https://www.vicbar.com.au/sites/default/files/The%20State%20of%20the%20Victorian%20Bar%20report.pdf>
 - 10 The median seniority for all Appendix A respondents was 18 years for males and 10 years for females.

Graph 12: Ratio M:F all courts

