

Further statistics on women at the New South Wales Bar

By Richard Scruby SC and Brenda Tronson

In ‘Some recent statistics on women at the New South Wales Bar’ (Court Appearance Paper),¹ we addressed gender diversity at the NSW Bar through the lens of data we had collected on court appearances. In this follow-up paper, we consider the implications of this data, in light of other statistics that have been collected, on the attraction of qualified women to, and retention of qualified women at, the Bar.

NARS Report – statistics and the importance of quality of work

In February 2014, the Law Council of Australia published the National Attrition and Re-engagement Study (NARS) Report.² Findings of the NARS Report included:

- 7% of women and 15% of men practising law are barristers³
- of lawyers who are not presently barristers, 5% of women and 12% of men, reported they were actively considering a move to the Bar⁴
- of those not actively considering such a move, 33% of women and 44% of men, reported they might consider a move to the Bar⁵

The NARS Report also considered reasons for past career moves and future career intentions. For both men and women, ‘better quality of work elsewhere’ was one of the most important and most frequent reasons for a past career move.⁶ For men generally, and for women barristers, ‘more interesting or varied work’ was an important and frequent reason for a past career move.⁷ For both men and women generally, ‘more interesting or varied work’ was an important and frequent reason for a contemplated future career move.⁸ And for both men and women who reported they might consider working at the Bar in the future, the ‘more interesting and exciting work’ which might be available at the Bar was the second-most



common reasons provided for that possible move.⁹

In relation to people who had left the profession entirely, ‘[t]he enjoyment derived from the interesting, stimulating and challenging nature of legal work’ was a common reason given for considering re-engagement with the profession.¹⁰

From this, two points can be made:

- men are still being attracted to the Bar at greater rates than women; and
- the quality of work (howsoever expressed) is important to both men and women when considering career moves.

Career Intentions Survey – importance of intellectual stimulation

In June 2015, the Women Lawyers Association of NSW published the Final Report of the Career Intentions Survey 2013-2015 (Career Intentions Survey).¹¹ Just as for men and women already in the legal profession, male law students were more likely than female law students to express an interest in the Bar.¹²

Further, students who wanted to be barristers ‘were significantly more likely to have chosen law because they wanted intellectual stimulation ... than respondents who proposed to work in other legal sectors.’¹³ The potential for intellectual stimulation was also important to a majority of students in their proposed practice area, and even more so for those wanting to be barristers.¹⁴

Court appearance data and quality of work

Our data cannot tell us directly about the quality of work men and women at the Bar are receiving. However, we can draw some broad inferences relevant to this point.

Of particular relevance is the data on the briefing of silks and the briefing of unled juniors.

The briefing of women silks in the New South Wales Supreme Court and the Sydney Registry of the Federal Court of Australia during the period May 2017 to April 2018 was disproportionately low when overall figures and private sector briefs are considered. Bearing in mind that, in the relevant period, approximately 10% of silks at the NSW Bar were women:

- In the New South Wales Supreme Court: overall, 9% of briefs to silk went to women, compared to 6% of briefs to silk by the private sector and 22% of briefs to silk by the public sector
- In the Sydney Registry of the Federal Court of Australia: overall, 7% of briefs to silk went to women, compared to 7% of briefs to silk by the private sector and 15% of briefs to silk by the public sector

Turning to unled juniors, and bearing in mind that, in the relevant period, approximately 24% of the junior Bar were women:

- In the New South Wales Supreme Court: overall, 18% of briefs to unled juniors went to women, compared to 14% of briefs to unled juniors by the private sector and 32% of briefs to unled juniors by the public sector
- In the Sydney Registry of the Federal Court of Australia: overall, 18% of briefs to unled juniors went to women, compared to 15% of briefs to unled juniors by the private sector and 27% of briefs to unled juniors by the public sector

Chart 1: Unled appearances by junior counsel

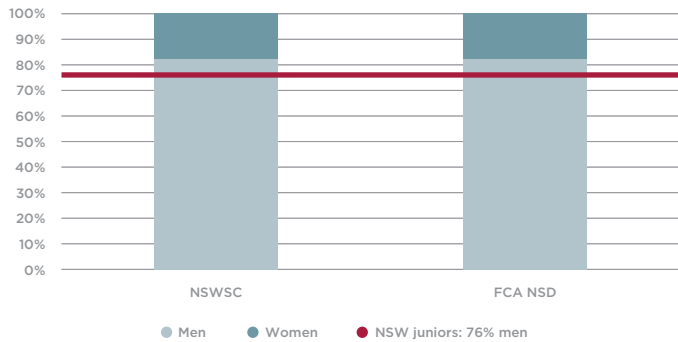


Chart 1: Unled appearances by junior counsel in the NSW Supreme Court and Sydney Registry of the Federal Court of Australia, May 2017 to April 2018

Chart 2: Unled appearances by junior counsel: private sector

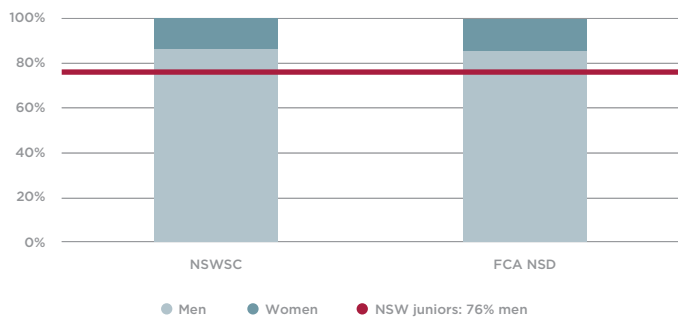


Chart 2: Unled appearances by junior counsel briefed by the private sector in the NSW Supreme Court and Sydney Registry of the Federal Court of Australia, May 2017 to April 2018

Chart 3: Unled appearances by junior counsel: public sector

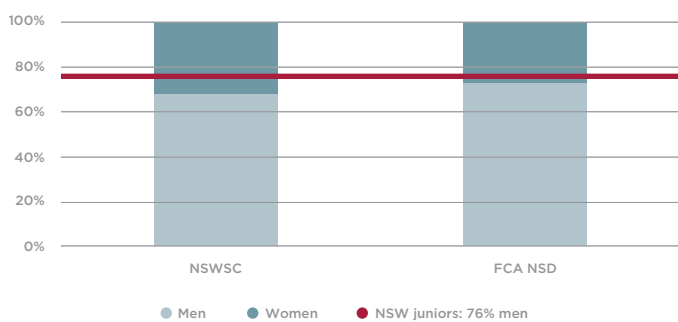


Chart 3: Unled appearances by junior counsel briefed by the public sector in the NSW Supreme Court and Sydney Registry of the Federal Court of Australia, May 2017 to April 2018

The figures on unled juniors are represented in Charts 1, 2 and 3, with a comparison line showing the percentage of male juniors at the Bar.

From these data and charts, we see a familiar picture:

- an under-representation of women overall; and
- an even greater under-representation of women receiving briefs from the private sector; and
- an over-representation of women receiving briefs from the public sector.

Broadly speaking, unled junior work is likely to be higher quality junior work from the point of view of the person doing the work. It is more likely to provide a junior barrister with an opportunity to use and strengthen her or his skills as a barrister and give her or him the chance to work more independently. That unled work is considered to be higher quality is reflected in the fact that junior barristers who do not perform unled work have a much more limited chance of taking silk, and entities which brief barristers are particularly careful to place only those they trust in unled roles.

As a consequence, the fact that women are significantly under-represented as unled juniors, particularly when private sector briefs are considered, leads to an inference that women are receiving a lower share of the higher quality work.

A further inference is available: that women are receiving a disproportionately low amount of the intellectual stimulation for which so many barristers, men and women, come to the Bar, and that they are receiving a disproportionately low amount of varied and interesting work which, as seen above, drives career moves.

Our data also suggested significant disproportion between women practising commercial law and equity (24% of such barristers are women) and women appearing in the commercial and construction lists of the NSWSC (12%) or Equity Division generally (16%).¹⁵ If this reflects the general position, then it is not difficult to infer that it would contribute significantly to dissatisfaction with professional practice.

Income

While money is not necessarily the biggest or most absolute driver behind the career decisions made by lawyers, it is not unimportant.

Better salary or remuneration was reported as one of the most frequent (although not



Photo taken at the High Court in the case *DL v R*, 11 May 2018: a rare all women case. Tanya Smith, Kara Shead SC, Gabby Bashir SC, Georgia Huxley and their instructing solicitors.

most important) factors for future career moves for both men and women,¹⁶ and for women in relation to past career moves.¹⁷ For women at the Bar, stability and reliability of income was the biggest element of dissatisfaction.¹⁸

There is some evidence which supports a conclusion that there is a gender pay gap at the NSW Bar.

The Law Council of Australia's 'Equitable Briefing Policy – Annual Report edition 1, 2016-2017'¹⁹ (EB Report) provides some data on the differences in brief fees paid to men and women barristers: despite 20% of all briefs going to women, only 15% of fees were paid to women.²⁰

While the EB Report concerns the whole of Australia, in the authors' view, it can be assumed that there is a broad similarity with NSW-specific data given the sizes of the NSW Bar and legal market, and the fact that Australia-wide data often reflect NSW-specific data fairly closely.

The EB Report includes only data reported by briefing entities which:

- had adopted the gender equitable briefing policy for the whole of the 2016-2017 year; and
- had complied with their reporting obligations.

In other words, this is a self-selected group of entities who have at least the intention or goal of briefing equitably. For this reason, the picture painted by the EB Report is likely to be rosier than if data were available for all briefing entities.

For these reasons, the EB Report supports an inference that there is a gender pay gap for barristers.

In 'What do women barristers earn',²¹ Ingmar Taylor SC reported on the gender pay gap apparent from the responses to the voluntary survey conducted by the Bar Association in 2014 of its members.²² In that year, the average fees reported by men were \$437,450 and the average fees reported by women were \$269,958. Taylor SC concluded there were two factors contributing to these differences: the fact that most women at the NSW Bar have less than 10 years seniority, and that, on average, women charge lower fees at the same level of seniority.

The existence of a gender pay gap is entirely consistent with our data.

While our data again cannot tell us directly about any differences in remuneration of men and women barristers, we can say the following.

As we have previously observed, it is important to note that the most and best paid legal work emanates from the private sector.²³

The disproportionately low briefing rates of men and women by the private sector in particular, with the disproportion growing as one moves from general figures for junior counsel to unled appearances for junior counsel to the briefing of silks, must have the effect that there is a similar disproportion in the remuneration of men and women from the private sector. That would be so even if it were to be assumed that men and women charged the same rates.

In other words, the disproportionate briefing practices reflected in these data must be causative of a gender pay gap.

This is reinforced when one recalls the disproportionately high briefing rates of men and women by the public sector. While this is positive in some ways, given the lower rates that the public sector tends to pay, if women are doing public sector work instead of private sector work, or because they are not offered private sector work, their levels of remuneration will suffer in comparison to men. Again, these data suggest present briefing practices must be causative of a gender pay gap.

Attrition rates at the Bar

When we turn to the available data on retention, we see that, as at November 2018, the

attrition rate for women barristers is in fact higher than for men:²⁴

- 10 year snapshot: for those who commenced practice between 2009 and 2018 (876 in total, comprised of 569 men and 307 women): as at November 2018, 6% of men had left, and 11% of women had left
- 20 year snapshot: for those who commenced practice between 1999 and 2018 (1706 in total, comprised of 1158 men and 548 women): as at November 2018, 16% of men had left, and 23% of women had left

Very limited information is collected from those who leave the Bar as to their reasons for doing so but, in light of the data outlined above, it is perhaps significant that more women than men give 'leaving to practise as a solicitor' as a reason: 59% of women and 44% of men in the 10 year snapshot, and 38% of women and 30% of men in the 20 year snapshot.

Conclusions: Equitable Briefing

The representation of men and women at

the Bar as an important aspect of diversity. Diversity, as we suggested in the Court Appearance Paper, is important to the future of Bar. In that Paper, we summarised statistics concerning men and women entering the profession generally: the simple position is that women are, by a large margin, under represented at the Bar.²⁵ The NARS Report, the Career Intentions Survey, the gender pay gap and inferences that can be drawn as to the differential quality of work received by men and women suggest a risk that women will leave the Bar at greater rates than men.

It is self-evident that improving equitable briefing practices will go a long way, and perhaps all of the way, to redressing the disproportionately low number of women at the Bar by both attracting more women to the Bar and preventing attrition. The more difficult question is how to improve equitable briefing practices. The implementation of the Law Council's Equitable Briefing Policy is an obvious first step in the right direction.

ENDNOTES

- 1 [2018] (Summer) *Bar News* 50.
- 2 <https://www.lawcouncil.asn.au/policy-agenda/advancing-the->

- profession/equal-opportunities-in-the-law/national-report-on-attrition-and-re-engagement
- 3 NARS Report, 15.
- 4 NARS Report, 45.
- 5 NARS Report, 50.
- 6 NARS Report, 43-44.
- 7 NARS Report, 43-44.
- 8 NARS Report, 46.
- 9 NARS Report, 51.
- 10 NARS Report, 60.
- 11 <https://womenlawyersnsw.org.au/workplace-practices/career-intentions-survey/>
- 12 Career Intentions Survey, Executive Summary at iii, 20.
- 13 Career Intentions Survey, 14.
- 14 Career Intentions Survey, 21.
- 15 Court Appearance Paper, 53-54.
- 16 NARS Report, 46.
- 17 NARS Report, 43.
- 18 NARS Report, 21.
- 19 <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy>
- 20 EB Report, 10.
- 21 [2016] (Spring) *Bar News* 48.
- 22 *Ibid* at 49.
- 23 Court Appearance Paper, 54.
- 24 'Retention of males and females at the Bar who commenced the Bar Practice Course at the private bar in NSW between 1994 and 2018 as at November 2018' (available from the NSW Bar Library).
- 25 Court Appearance Paper, 51.



Photo of Bar Council meeting on 28 March 2019 shortly before it commenced, with past Presidents photos in background. From back to front (right): Gabrielle Bashir SC, Sera Mirzabegian, Talitha Hennessy Vanja Bulut, Mary Walker, Catherine Gleeson, Julia Roy, Ruth Higgins SC. From back to front (left): Liz Welsh, Paresh Khandhar SC, Tim Game SC. Photo: M McHugh.