

Why are there so few women at the Bar?

By Justin Gleeson SC and Rena Sofroniou

Introduction

What is the explanation for the low number of females at the New South Wales Bar?

The above statistical analysis has shown that up until 1976, no more than two women commenced at the NSW Bar in any year. During the 1980s, on average, about 10 women commenced at the New South Wales Bar each year, at a time when the male intake was between 70 and 90 per year. During the 1990s the female intake in most years had risen to between 15 and 20, although the male intake remained about five - six times that number.

The late 1990s were a boom period for intakes generally with over 100 males coming to the New South Wales Bar each year and the female intake rising to an all time high of 34 in 1998. Since 2000 there has been a general decrease in the number of barristers commencing practice, affecting males and females alike.

The fact that women today comprise only 14.7 per cent of the NSW Bar is largely a function of historical forces at work prior to the 1990s. Similarly, the low number of women as silk is at least partly explained by these historical trends: for barristers 15 years or more at the Bar, there are approximately 800 males and only 50 females. If one looks at barristers 10 years or more at the Bar there are about 1100 males and only 90 females.

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Another perspective is to focus more closely on the intake to the Bar over the last seven or eight years. That reveals a somewhat different picture where, on average, women comprise about 25 per cent of the Bar Practice Course and 25 per cent of the admissions and where the attrition rate, to use that unpleasant term, is roughly the same between men and women (between six per cent and seven per cent). For these reasons, women comprise 32 per cent of all barristers between 0 - 4 years at the Bar, and a further 19 per cent of all barristers between five and nine years at the Bar. Assuming these trends continue, it might be expected that in a number of years women would come to comprise one-quarter to one-third of the entire Bar, perhaps more, and their representation as senior counsel would dramatically improve. These latter statistics do suggest, however, that to the extent that the Bar as an institution can take measures to nourish the careers of its members, it is very important to ensure that the 32 per cent of barristers in the 0-4 year range who are women receive equality of opportunity and treatment so as to ensure that they do come through to perform a leadership role in the profession in the years ahead.



Women at the Bar: More are needed.
Photo: Murray Harris

To inquire further about the causes of the low female intake at the Bar involves recognising that things are changing for the better at the entry point. It also means recognising that for those women who came to the Bar 10 or more years ago they did so when the imbalance was far greater, which may have impacted upon their career. Also relevant to consider is the fact that even a current entry rate of 25 per cent - 30 per cent of women, against a background of 60 per cent of law graduates being women, suggests that the Bar is less attractive to women than men. There must be reasons for this.

Nature of the investigation

Our attempts to investigate possible causes for the low female intake to the Bar have resulted in some thought-provoking findings. We commence with a couple of preliminary observations.

First, there does not appear to have been any formal study conducted into this precise question. We are unaware of any expenditure by the Bar, the universities or other bodies on research into the issue.¹

Accordingly, although necessarily impressionist in analysis, we have asked women who have chosen to come to the Bar, the more recently the better, to speculate as to why their female colleagues have not chosen to join them. Further, we have asked women of long standing at the Bar to give us their impressions of their life as women at the Bar and the extent to which they think there is room for improvement.

We acknowledge that we have not asked many men to comment on the issue and perhaps this is worth following up at some later stage.

As one of us (the authors) is female and the other is not, we have also swapped our own war stories and subjective experiences. Perhaps not surprisingly, we identified a number of

overlaps, common to male and female sensibilities, as well as some contrasting experiences.

This investigation is not meant to gainsay the hard work of some members of the Bar Council or EOC over the last 10 years. Virginia Lydiard's article in this issue outlines a number of Bar Association initiatives over that period. However, an entry rate of 25-30 per cent for women, as against a female law graduate rate of 60 per cent, suggests even today there are forces at work that need to be investigated.

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Results of investigation

We offer the results of our investigations in the form of the following propositions:

- The issue of women's choices in coming to the Bar and their experiences once at the Bar, is in fact much more subtle and multi-faceted than usually portrayed. The generalised nature of 'women' and of the 'Bar', like most such broad subjects, invites a variety of responses. There are as many views on the subject as there are variations in the spectrum of opinions from ultra-conservative to ultra-radical.
- In fact, whereas a number of women were gracious and thoughtful enough to provide very moving and clear depictions of their experiences at the Bar as women, very few such speakers were willing for us to record their observations in this journal. We are very grateful to those who have participated. Time and again we were concerned to find that almost every woman we spoke to who, whilst enjoying her own experiences at the Bar, had anything other than an optimistic and uncritical view of the institution and could understand why women were discouraged from joining in, nevertheless expressed the reservation that her view was probably not in keeping with a general attitude, or was in some way not valid. Whilst not by any means reaching the extent of secrecy or persecution, there was an unmistakable sense received from such women that, in each case, she was effectively alone in discussing her concerns, or at least isolated from her colleagues (male and female). To make too many criticisms was to be a complainer or, perhaps, an accurate but unduly strident critic of a work environment that was, on the whole, enjoyed and its bad points tolerated.
- Following on from the previous point, there does not yet appear to be any established forum for the swapping of

women's experiences, views and stories, although some embryonic steps have been taken in this regard.

- Further, the issue of a woman's choice to come to the Bar is tied up with a consideration of a woman's viability once at the Bar, since it has been speculated that it is female law graduates' perceptions of what life at the Bar as a woman would be like that could reasonably be expected to play an important part in rejecting the Bar as a desirable work environment.
 - As one woman succinctly expressed it, 'it boils down to the two 'F factors': Fear and Family. Whereas, she suggested, men might be encouraged to follow through with their risky professional dreams and vocations (including the setting up of practice as a self-employed barrister), women were, whether innately or by social conditioning, more risk-averse.
 - As a correlation, the argument continues, whereas men are often pressured to display, in their judgements and actions, more self-confidence than they necessarily feel, women on the whole down-play their strengths, avoid what might be termed 'arrogant' behaviour (more unseemly in the female than the male) and are valued more when they displayed more temperate, commonsense, supportive and conciliatory qualities.
- It is perhaps then not surprising that historically men at the Bar, as well as solicitors briefing young barristers, have developed support networks that bolster the 'young bucks' who show promise and interest during their fledgling years at the Bar. We emphasise that such networks are not open to all men, nor to all types of men and that individual men might certainly be isolated or 'out of the Club', as a matter of subjective experience. However, at a more general level, the hierarchies, networks and supports are intrinsically male in their culture, their metaphors and their codes. This is not in itself a bad thing and 'male' is not a dirty word. Some women (the female author included) revel in such an environment, and this may have more to do with early parental and other role models and life experiences than it does with anything specific to the Bar. The question, for our purposes, is whether the 'male-ness' we have identified is necessarily supportive of women? Is it construed by women who might have otherwise come to the Bar to be so unwelcoming that she is deterred from doing so?
- We take the view that it might not be a sufficient response to this argument to point merely to the undoubted number of happy and successful women currently practising at the Bar. The occasional, prodigious, appropriately-pedigreed or otherwise well-placed woman may interact to some extent with these networks on particular floors, but her designation as a genuinely welcomed and supported 'mate' does not make the hierarchy she visits any less male in its

characteristics, and if that 'maleness' is perceived to be unwelcoming to other women, they will still be deterred from joining.

- What do we mean by 'maleness' in this context? We have used general language in this regard, but the actualities are obvious to those wishing to observe them. Rather than just consisting of a majority of male barristers, we mean that the Bar from time to time consists of, involves, or rubs shoulders with, male activities and traditions that exclude women, whether explicitly or implicitly. Lunches in the exclusively male Australia Club are an example, the rugby union connections (not merely as current fans but frequently as former team mates or adversaries), current tennis buddies (rarely featuring mixed doubles, as we understand it). Further we can point to the apparent floor 'dynasties' (designated by lines of 'readership' more frequently than by blood), which at least in practice often do not include women.
- We do not suggest that the existence of the more blatant of these networks are particularly comfortable for excluded individual males (there were after all only five men included in the purported 'A' list recently published in a glossy mag, but one might fairly speculate about the characteristics of any putative 'B' or 'C' list).
- The subject raises in a very direct way issues that potentially threaten one's sense of security as a barrister. In this regard the relatively small number of women at the Bar appears to perpetuate the problem. To what extent does each woman feel herself to be a single (perhaps happy, perhaps barely-tolerated) exception to the over-arching proposition that the archetypal image of a barrister remains that of a tall, not too young, preferably baritone man?
- As to the other 'F factor', family, it is trite to observe the extent to which we are reminded that working women nonetheless generally perform, in terms of hours spent, the majority of work in keeping house and raising children, particularly when those children are very young. We do not understand the question of women at the Bar to be synonymous with child-care and family-friendly Bar policies: men are, after all, often parents and women are not necessarily mothers. But it would be naïve to suppose that for women of child-bearing age the heavy demands of the job, and the need to run a small business, would not play a major role in the decision whether to enter such a career.
- We do not propose that the 'maleness' endemic to the Bar be obliterated or demonised. We suggest that a consciousness of its existence and a recognition of the dubious connection between such embedded structures and the ability to do effective work as a barrister will assist in relaxing such arbitrary barriers to women actually 'belonging', whether 'prodigies' or not, 'exceptional' or not.

What is to be done?

It is not the intent of the authors to be prescriptive. We would rather invite open discussion than seek to presume to comprehend fully the problem or the answers to it. Indeed, the above discussion has sought to suggest that at many points the question of women's experiences at the Bar intersects with more fundamental questions about survival at the Bar which are faced by all of its members.

A first question that should be faced is whether the Bar should support or even mandate steps designed deliberately to bring female barristers better to the attention of solicitors and clients. This notion was given prominence in March of this year, with Malleson Stephen Jaques being the first solicitors' firm to announce that it would allocate all work to barristers using the national equal opportunity briefing policy drawn up by Australian Women Lawyers. That policy requires the firm to take all reasonable steps to identify female counsel in relevant practice areas and to genuinely consider engaging them. The position of the New South Wales Bar Council is that on 23 October 2003 it adopted its own Equitable Briefing Policy (Bar Brief, November 2003). Since then the Law Council of Australia has drawn up its own policy which draws on the NSW Bar, Victorian Bar and Australian Women Lawyers policies. The Standing Committee of Attorneys General (SCAG) is considering the LCA policy. The New South Wales Bar Association has said (through its Executive Director, Philip Selth) that it is currently meeting with major institutions to persuade them to adopt the LCA policy, and that the New South Wales Bar Association considers it has been a real leader in the drive for an equitable briefing policy across Australia.

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As will be seen elsewhere in this issue, some female barristers regard this as an important step forward; others regard it as offensive. The tentative view of the authors is that it should be trialled fully. To the extent that discrimination occurs in subtle ways, a feminist critique might hold that the former Bar rule prohibiting any form of self-promotion was gender biased. If most barristers are male, and they already have established networks and modes of obtaining briefs from solicitors, then it would be in their interest not to have solicitors and clients fundamentally rethinking how they go about briefing barristers.

We also think that if the briefing policy is adopted widely, it can be exploited by young female barristers (and young male barristers for that matter) in ways that are not only good for the individuals but also highly competitive overall. For example,

floors of barristers could take this opportunity to present a marketing profile to major firms, indicating something about their various members, including female members, and their various specialties, talents and skills.

Secondly, and at a minimum, it is a fundamental challenge for the Bar to ensure that the one-quarter to one-third of each intake who are female progress through to the leadership roles in the profession. This is not only the proper reward for these persons but also because more, and more varied, successful female role models itself will be a highly transforming force. We suspect that part of the inertia which may cause solicitors firms not to fully embrace the briefing of female barristers, particularly in cases in the commercial area, is a perception influenced by what we have referred to earlier as the 'archetypal' or classic male role model barrister. No one these days may be able to emulate the Hon TEF Hughes QC in his cross-examination skills, but some strive to, and many solicitors and clients still appear to expect only this from a cross-examination. Powerful male role models reinforce notions that a cross-examination is there to 'destroy' a witness's credibility or to leave 'blood on the floor'. Even apart from cross-examination, there are many aspects of the presentation of any case where young barristers coming through model themselves upon those whom they perceive to be the successful leaders of the profession. When most of those leaders are by historical necessity male, stereotypes are perpetuated and are in turn fed through to solicitor and client perceptions.

Thus, whatever view one may care to take about the principle of affirmative action, we think that steps by the Bar Association to nurture and encourage female barristers, especially between five and ten years at the Bar, to ensure that they do become successful leaders and successful role models, are very important for the health and flourishing of the institution as a whole.

Thirdly, it is worth noting that courts have played a role in accepting and encouraging a wider diversity of advocacy styles and manner than hitherto. In April 2000, Chief Justice Black AC of the Federal Court said as follows:

high levels of overt aggression and theatricality are not persuasive. Judges do not like them. They regard them as a diversion and a nuisance. They do not impress and they do not persuade. One wonders why it is thought that juries - representative of the community as a whole - would be any more impressed by such conduct than judges. This is not to say that our court is a dull place, or that an advocate's flourish is discouraged. Far from it. But the qualities by which judges are assisted in the conduct and decision of a case include, predominantly, intelligence, perception, knowledge and scholarship, as well as excellence in the skills of communication and independence of thought and spirit. Remember too, that the adversarial system, while still adversarial in essence, is changing.²

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Women - and male - barristers should be encouraged to know that this is what is expected of them by all courts.

Fourthly, where the Bar Association, or floors of barristers, are considering reform that may improve the quality of life or practice for their members, those reforms should be considered on their merits and not classified merely as women's issues. We have already mentioned that we believe child-care to be such an issue. On 22 April 2004, the Bar Council approved a permanent in-house child care scheme for members of the Bar. It stated that: 'It did so to spread some new and practical ideas to members which would give support to all barristers with family responsibilities. It is hoped too that this programme will encourage more women lawyers to consider a career at the Bar.' The scheme will work in the same way as did the pilot programme, featured in the 2003 Winter edition of this journal. The essence of the scheme is that the barrister calls the service provider, McArthur Management Services, to obtain backup childcare in emergencies or when regular childcare arrangements breakdown.

We would conclude this article with another plea for members, and prospective members, to communicate their views on the issue. Ultimately, the issues at stake are not only the career aspirations and experiences of the 2000 plus barristers at the New South Wales Bar, but the health of our institution as a whole.

¹ We should acknowledge the pioneering study by Virginia Lydiard and Geri Ettinger, 'Law lawyers and society' (1981) and their update paper 'Women in law in NSW' (2003) which addressed issues in this area.

² Keynote address by the Hon MEJ Black AC at a seminar on 'Equality of Opportunity for women at the Victoria Bar', 5 April 2000.
