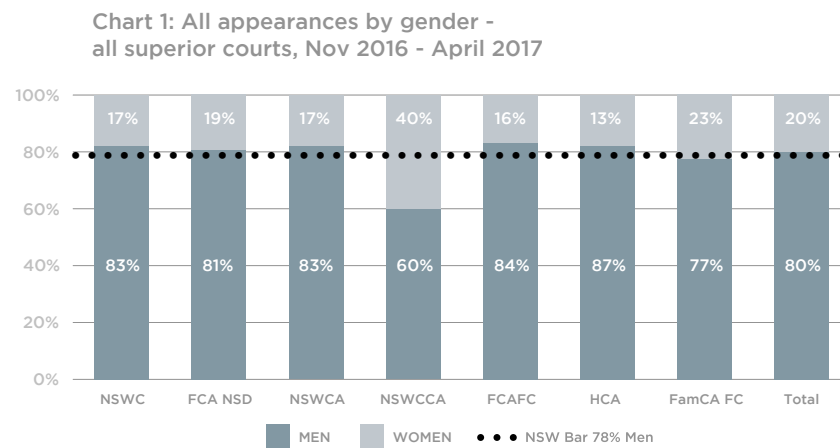


Some recent statistics on women at the New South Wales Bar

By Richard Scruby SC and Brenda Tronson

It is often said that one does not see many women appearing in court. Is this due merely to the fact that only 22 per cent of barristers in New South Wales are women? Do women barristers obtain proportionately the same amount of work as men? Is there a difference in the type of work they receive? This article takes a statistical approach to examining these questions by analysing data collected by the Equity and Diversity Committee and the Women Barristers Forum.



For the administration of justice to be most effective, its participants have to be representative of the community they serve. The members of the independent bar of New South Wales are important participants in the system of justice in this state and the New South Wales Bar, to be as effective as it can, has to be representative of the community it serves. A diverse bar is more representative of the community than one that is not.

Is the New South Wales Bar diverse? There does not seem to be any satisfactory way to measure diversity and there has not so far been any attempt to measure the diversity of the New South Wales Bar. It would be necessary first to identify the groups whose representation is in question and then find a way to measure the extent to which they are represented at the Bar. It is not clear how one could do either of these things in a comprehensive or accurate way.

A diverse Bar is not the same as one in which men and women are equal participants. But that is an important part of a diverse Bar. In other words, one aspect of diversity is the representation of women at the Bar. There are different ways in which that can be examined. One simple and obvious way is to look at the percentage of women that have a practising certificate in New South Wales. The percentage as at 30 June 2017 was 22 per cent and as at 30 June 2018 it was 23 per cent.¹ On any number of bases, these figures are low. To take only a few:

The percentage of barristers who were women as at 30 June 2017 is the same as the percentage of solicitors who were women in 1990.

- About 50 per cent of the adult population in New South Wales are women.
- Since October 2016, at least 50 per cent of all practising solicitors in Australia have been women.²
- As at June 2018, 51 per cent of all practising solicitors in New South Wales were women.³
- The percentage of barristers who were women as at 30 June 2017 is the same as the percentage of solicitors who were women in 1990.⁴
- In 2015, 59 per cent of solicitors entering the profession for the first time were women.⁵ In 2015/2016, 34 per cent of people taking the bar course were women.⁶
- Since 1993, 50 per cent or more of Australian law graduates have been women.⁷

As part of its attempts to increase diversity, one of the aims of the New South Wales Bar Association is to increase the number of women barristers. Why are only 22 per cent of all barristers women? Is it because, when they come to the Bar, women barristers get less work or less opportunities to appear in court? There is a widespread perception that one does not see many women appearing in court. Is the perception correct? If it is correct, is it due merely to the fact that only 22 per cent of barristers are women? Is the position different in different jurisdictions?

In the last 18 months the Equity and Diversity Committee and the Women Barristers Forum attempted to obtain more data that might shed light on these questions,⁸ replicating in concept a study undertaken by Kate Eastman in 2015. They used AustLii to look at the number of appearances of women barristers over particular periods from 2016 to 2018 in the following courts: the Supreme Court of New South Wales, the New South Wales registry of the Federal Court at first instance, the New South Wales Court of Appeal, the Court of Criminal Appeal, the Full Court of the Federal Court, the Full Family Court and the High Court. A total of 1383 judgments were analysed across all courts for the period November 2016 to April 2017, and a further 2530 judgments were analysed across the Supreme Court of New South Wales, the New South Wales registry of the Federal Court (first instance) for the period from May 2017 to April 2018. Because the survey considered only judgments that appear on AustLii, no data were collected for jury trials. No data were collected for special leave applications in the High Court. Appearances by solicitors were not considered. Appearances by interstate counsel were included.

For each case, the following data were collected: senior and junior counsel, the judge (in the case of first instance decisions), whether the briefing entity was a public or a private entity. Public entities were treated as all government agencies or statutory authorities, whether State or Commonwealth. A briefing entity was, with one exception, regarded as the ultimate client (for example, a local council that instructs a private firm of solicitors counted as a public entity). The exception was that where Legal Aid acted as solicitor this also was counted as a public entity. The purpose of the distinction was to capture decision making which was governed, on the one hand, by governmental policy and, on the other, by private interests. With the considerable assistance of

Chart 2 - 3: All appearances by gender - All superior courts, Nov 2016 - April 2017

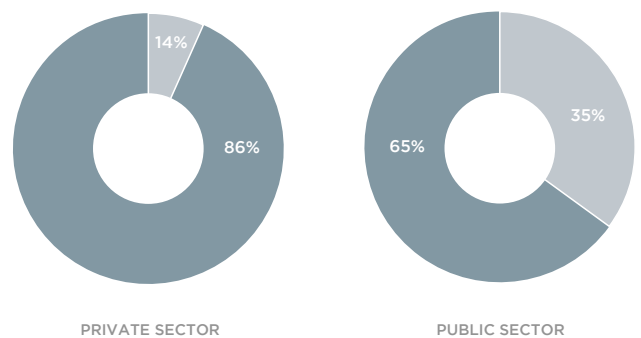


Chart 4 - 5: All appearances by gender - Supreme Court and FCA Sydney Registry, Nov 2016 - April 2017

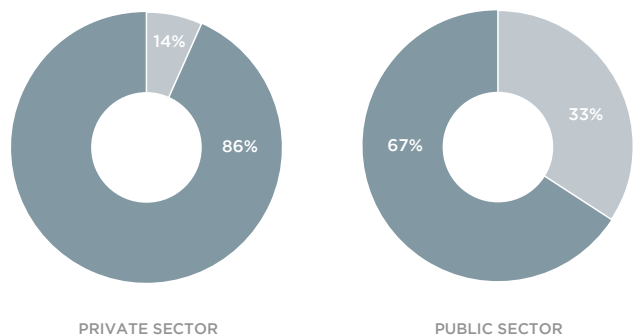
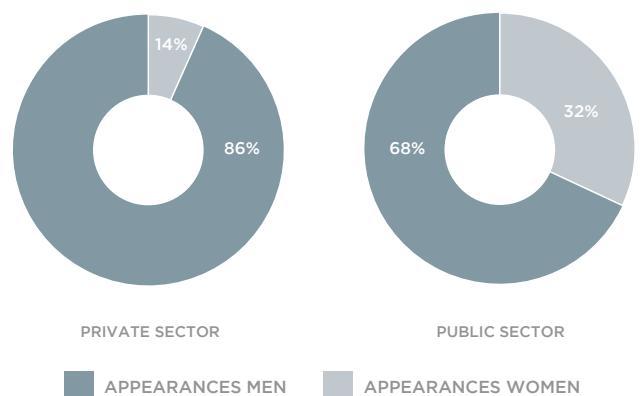


Chart 6 - 7: All appearances by gender - Supreme Court, Nov 2016 - April 2017



For the Supreme Court of New South Wales and the New South Wales registry of the Federal Court (first instance) for the period from May 2017 to April 2018, the data were very similar, with women constituting 18 per cent of the overall percentage of barristers appearing in each court and overall.

Ting Lim from the New South Wales Bar Association, the data were collected and entered into Excel spreadsheets. Filters can be applied to those spreadsheets to examine particular aspects of the results.

The results of part of this analysis were discussed at a CPD presentation in March this year. Some further data have been gathered since the time of that presentation. Charts additional to those presented here, some of which are updated versions of the information presented in March, are available on the Bar Association website.

An overview of the results of the analysis for all courts in the period from November 2016 to April 2017 appears in Chart 1 below. It breaks down appearances in each of the courts by men and women. The dotted line is drawn to indicate the level of representation that one would expect if it matched precisely the percentage of men and women barristers with practising certificates over this period.

For the Supreme Court of New South Wales and the New South Wales registry of the Federal Court (first instance) for the period from May 2017 to April 2018, the data were very similar, with women constituting 18 per cent of the overall percentage of barristers appearing in each court and overall.

These results largely replicate the results of the Eastman paper. That paper looked at the same courts over the period July 2014 to October 2015. The overall percentages of women appearing in the Eastman paper were slightly lower across all courts except the Full Court of the Family Court: they were, respectively, 16 per cent, 15 per cent, 14 per cent, 38.5 per cent, 15.6 per cent, 17.5 per cent, 28.3 per cent.⁹

One result reported in the Eastman paper was an apparent difference between public and private sector briefing. That paper found that women obtain more public sector briefs and fewer private sector briefs than one would expect if briefs matched the percentage of practising men and women barristers.¹⁰ This result was also been noted in a study conducted by Reynolds and Williams on High Court appearances (including special leave applications).¹¹

Data collected in the present study show the same result. That is the focus of this article: the difference between the extent to which women and men are briefed by public and private entities. This aspect of the analysis is depicted in Charts 2 and 3, which present this difference for the period November 2016 to April 2017.

The significance of the difference between public and private sector briefing can be seen in more detail by an examination of data for appearances in the Supreme Court of New South Wales and the New South Wales Registry of the Federal Court. During the period November 2016 to April 2017, women accounted for 18 per cent of all appearances in both courts, taken overall. If these appearances are broken down into public and private sector briefs, a different picture emerges.

Charts 4 and 5 provide a pictorial representation of the distribution of private sector and public sector briefs for both courts during this time.

Charts 6 and 7 provide a pictorial representation of the distribution of private sector and public sector briefs in the Supreme Court for the same period.

In the Sydney registry of the Federal Court for this period the figures were similar: women accounted for 14 per cent of all private sector appearances and 33 per cent of all public sector appearances.

Chart 8 - 9: All appearances by senior counsel - Supreme Court, Nov 2016 - April 2018

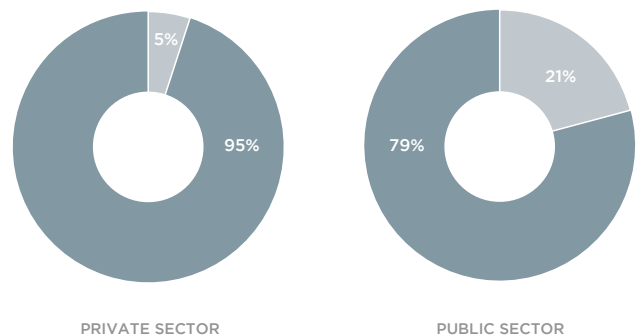


Chart 10 - 11: All appearances by junior counsel - Supreme Court, Nov 2016 - April 2018

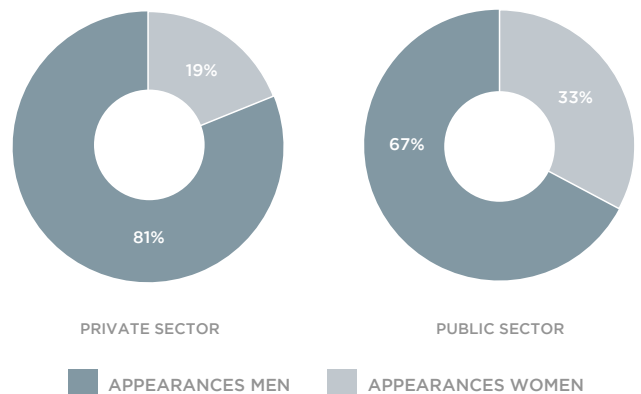
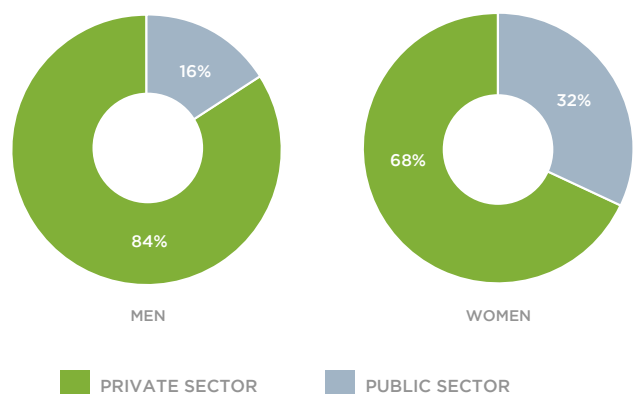


Chart 12 - 13: Appearances for public sector vs private sector - Supreme Court, Nov 2016 - April 2018



One would expect that, if women receive a disproportionately low number of briefs from the private sector, then that would translate into a disproportionately low number of briefs in equity and commercial cases. This is borne out by the data.

Undertaking the same exercise for the period May 2017 to April 2018:

- Women accounted for 16 per cent of all private sector appearances and 29 per cent of all public sector appearances in the Supreme Court.
- Women accounted for 16 per cent of all private sector appearances and 26 per cent of all public sector appearances in the Sydney registry of the Federal Court (first instance).
- Women accounted for 16 per cent of all private sector appearances and 28 per cent of all public sector appearances in both courts overall.

For the entire period, November 2016 to April 2018:

- Women accounted for 15 per cent of all private sector appearances and 30 per cent of all public sector appearances in the Supreme Court.
- Women accounted for 16 per cent of all private sector appearances and 28 per cent of all public sector appearances in the Sydney Registry of the Federal Court (first instance).
- Women accounted for 15 per cent of all private sector appearances and 29 per cent of all public sector appearances in both courts overall.

The difference between public sector and private sector briefing can be examined by looking at the matter from the perspective of senior and junior counsel. During the period in question, about 10 per cent of all senior counsel and about 24 per cent of all junior counsel with practising certificates in New South Wales were women.¹² The distribution of public and private sector briefs for each of junior and senior in the Supreme Court for the entire period is depicted in Charts 8 to 11.

The figures in the Sydney registry of the Federal Court over the same period were similar: 5 per cent of private sector senior counsel appearances and 16 per cent of all public sector senior counsel appearances were women. For junior counsel the percentages were 20 per cent and 31 per cent respectively.

Another way to look at the effect of what seem to be different public and private sector briefing practices is to see what percentage of total appearances by women and men are accounted for by public and private sector briefs. For the Supreme Court of New South Wales, this is depicted in Charts 12 and 13.

In the Sydney registry of the Federal Court for the same period, public sector briefs constituted 19 per cent of briefs for men and 33 per cent for women.

Public sector briefs made up only 19 per cent of all appearances in the Supreme Court and 22 per cent in the Sydney registry of the Federal Court in the period under consideration. The higher percentages of appearances for women in the public sector thus have only a small impact on overall percentage rates of appearance.

One would expect that, if women receive a disproportionately low number of briefs from the private sector, then that would translate into

a disproportionately low number of briefs in equity and commercial cases. This is borne out by the data. The appearances in the Supreme Court can be filtered to examine appearances before judges who typically sit in the commercial and technology and construction lists of that Court.¹³ When those filters are applied, the following statistics emerge for the period November 2016 – April 2018:

- Women accounted for 84 out of 699 total appearances, or 12 per cent.
- Women silks accounted for 8 out of 226 appearances by silk, or 3.5 per cent.
- Women juniors accounted for 76 out of 481 appearances or 16 per cent.

The proportion of appearances by women, and by women junior counsel, improves slightly if one looks at the results for appearances across all of the Equity Division over the same period. The proportion of appearances by women silks drops. Those figures are:

- Women accounted for 356 out of 2189 total appearances, or 16 per cent.
- Women silks accounted for 14 out of 591 appearances by silk, or 2.5 per cent.
- Women juniors accounted for 342 out of 1598 appearances or 21 per cent.

There does not seem to be anything about the practice areas of men and women barristers that might explain these differences. Practice areas are self-identified by practitioners to the New South Wales Bar Association. As at 30 June 2017 the percentages of women to men in the main practice areas in the courts the subject of the present survey was as follows:

- Commercial Law: 24.2 per cent / 75.8 per cent (total 698)
- Equity: 24.3 per cent / 75.7 per cent (total 588)
- Common law: 20 per cent / 80 per cent (total 332)
- Crime: 27.9 per cent / 72.1 per cent (total 405)
- Public and Administrative: 29.7 per cent / 70.3 per cent (total 508)
- Tax: 22 per cent / 78 per cent (total 118)
- Family Law: 40 per cent / 60 per cent (total 172)
- Appellate: 24.8 per cent / 75.2 per cent (total 549)

It is difficult to see how this distribution of practice areas could account entirely for the differences between public and private sector briefs. They help explain why women receive more than 22 per cent of public sector work in that they indicate higher participation rates in public and administrative law and crime. They put the 23 per cent of all appearances by women in the Full Court of Family Court into context. But they do not help explain why women receive less than 22 per cent of private sector work. They also raise other obvious and

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important questions: why, if 24 per cent of barristers practising in the commercial and equity sphere are women, were only 12 per cent of appearances in commercial and construction list matters or 16 per cent of Equity Division matters appearances by women barristers?

The court in which women had the highest percentage of total appearances was the Court of Criminal Appeal, where 42 per cent of all appearances were women. These are, in one sense, very positive figures. However, the public-private divide is apparent also in this jurisdiction. On the basis of our definitions of public and private briefing entities, public sector briefs account for 62 per cent of appearances in this court. If briefing practices were gender neutral, one would expect that about 62 per cent of appearances for both men and women would be accounted for by public entities and about 38 per cent by private entities. However, this is not reflected in the data. The data collected show that 49 per cent of all appearances by men were for public entities and 51 per cent for private briefing entities. In contrast, 81 per cent of appearances by women were for public briefing entities and 19 per cent were for private briefing entities.

A similar conclusion can be drawn from the figures referred to above in the Supreme Court and Federal Court from data collected over a longer period. It will be recalled that in Supreme Court, 19 per cent of all appearances were public sector briefs and 81 per cent private but these percentages are not reflected in the distribution of appearances as amongst men or as amongst women. In that court 32 per cent of all appearances by women were on public briefs and only 68 per cent private, whilst the figures for men were 16 per cent and 84 per cent respectively (see Charts 12 and 13, above). In the Federal Court, 22 per cent of all appearances were public sector briefs and 78 per cent private. In that court, 33 per cent of all appearances by women were on public sector briefs and 67 per cent on private sector briefs; the respective figures for men were 19 per cent and 81 per cent.

Conclusions

Statistics do not often find favour as a mode of persuasion in litigation; they tend to be, as Windeyer J once said, interesting but not useful.¹⁴ Although the statistics considered in this article are not offered in that context, the data that produced them has some obvious limitations. They do not measure the length of cases, and treat appearances on a six-week trial as the same as appearances on a two-hour motion. They do not include cases that settle before judgment. They do not take into account or measure the extent to which men and women have speaking roles in court. They do not include all courts and tribunals in the state.

However, we would suggest that there is no particular reason to think that the results would have shown increased levels of participation by women had these matters been taken into account. We also suggest that the data we have discussed are useful for at least two reasons.

First, both alone and in conjunction with the data obtained in the Eastman paper, they suggest that women appear in court at a level beneath what one might expect even having regard to their low numbers at the Bar. To return to one of the questions posed at the beginning of this article, they suggest that the perception that one does not see

many women in court is not due merely to the fact that there are not many women at the Bar.

Secondly, the data support the need for the Equitable Briefing Policy. The rates of appearances by women on public sector briefs (35 per cent across all courts for the period from November 2016 to April 2017, and 28 per cent for the Supreme Court and the Sydney registry of the Federal Court (first instance) for the period from May 2017 to April 2018) need to be evaluated by reference to the target set under that policy for all women counsel (30 per cent). The rates of appearances on private sector briefs are well below that target. In general, public sector agencies have been applying equitable briefing initiatives for over a decade and the data are consistent with such initiatives driving a more equitable distribution of work.

To return to another of the questions posed at the beginning of this article, one obvious way to encourage more women to come to the Bar and to remain in practice is to seek to ensure that women barristers are briefed by the sector from which both the most and best paid legal work emanates: the private sector.

ENDNOTES

- 1 NSW Bar Association Annual Reports.
- 2 Urbis, 'National Profile of Solicitors 2016: Report', 24 August 2017: https://www.lawsociety.com.au/sites/default/files/2018-04/NATIONAL_per_cent20PROFILE_per_cent20OF_per_cent20SOLICITORS_per_cent202016.compressed.pdf. More information about statistics in the solicitors' branch are available from the Law Society of NSW website at <https://www.lawsociety.com.au/advocacy-and-resources/gender-statistics/profiles-surveys-and-statistics>.
- 3 Law Society of New South Wales, Practising Solicitor Statistics as at 30 June 2018: https://www.lawsociety.com.au/sites/default/files/2018-07/201806_per_cent20Practising_per_cent20Solicitor_per_cent20Statistics_per_cent20per_cent20Jun_per_cent202018.pdf.
- 4 Taylor and Winslow, 'A statistical analysis of gender at the NSW Bar', *Bar News*, Winter 2004, p20.
- 5 Law Society of NSW 2015 profile, summarised at: <https://www.lawsociety.com.au/advocacy-and-resources/advancement-of-women/gender-statistics>.
- 6 NSW Bar Association Annual Report, p12.
- 7 'Beyond the Statistical Gap', Law Council of Australia (2009), p10.
- 8 We wish also to thank the following people who worked on collecting data: Thomas Arnold, Madeleine Bridgett, Bronwyn Byrnes, Matthew Cobb-Clark, Jeh Coutinho, Ermelinda Kovacs, Natasha Laing, Sarah McCarthy, Douglas McDonald-Norman, Jennifer Mee, Meg O'Brien, Jayne Treherne and Marea Wilson.
- 9 A copy of the Eastman paper can be downloaded from the following site: <https://www.kateeastman.com/wp-content/uploads/2017/02/Visible-Targets-June-2016-Kate-Eastman-SC.pdf>
- 10 The definition of 'public briefing entity' in the Eastman paper is the same as ours, save that the Eastman paper takes Legal Aid briefs to be private briefs.
- 11 (2017) 91 ALJ 483.
- 12 The New South Wales Bar Association Annual Report for 2016/2017 gives percentages as 10.2 per cent and 24.4 per cent respectively. The percentages for 2017/2018 were 10.9 per cent and 24.6 per cent respectively. In this article we have generally rounded percentages to the nearest 1 per cent.
- 13 We think it is plain that nothing in this article suggests that there is any connection between any judge, judges or court and the extent to which women appear. We do not think there is any connection. However, this footnote has been included for the avoidance of any doubt.
- 14 Parker v The Commonwealth (1965) 112 CLR 295 at 311. His Honour was referring to statistics about the rate of remarriage for widowed women tendered in evidence on an assessment of damages under Lord Campbell's Act. See also De Sales v Inglis (2002) 212 CLR 338 at [71].