



THE
VICTORIAN
BAR

EQUALITY OF OPPORTUNITY FOR WOMEN AT THE VICTORIAN BAR

**A Report commissioned and published by
the Victorian Bar Council**



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**FOREWORD FROM THE CHAIRMAN OF THE
BAR COUNCIL**

The Bar Council commissioned this Report out of a commitment to the equality of opportunity for all its members, and to the elimination of practices and attitudes which discriminate against women. The aim of the Report, therefore, was to gather systematic and reliable quantitative and qualitative data to assess the current status of women at the Victorian Bar, and to identify any barriers to women's advancement, including any discriminatory practices.

The Bar Council welcomes the Report. It is well-researched, extensive, and challenging. It is the first report in any jurisdiction to focus specifically on the position of women barristers, and on the extent of gender bias in an independent Bar. The Bar Council owes the researchers, Associate Professor Rosemary Hunter and Ms Helen McKelvie, a debt of gratitude. The Bar Council also acknowledges the efforts of the Steering Committee for the project.

The Report makes numerous findings and recommendations which will have implications for all parts of the legal system in Victoria. It is expected to be of great significance to the profession nation-wide, and internationally. The Report confirms that the position of women barristers at the Victorian Bar has improved significantly over recent years. The majority of the male and female barristers who were interviewed expressed satisfaction with their current position and progress at the Bar; over a third of both women and men saw no barriers to the achievement of their aspirations; and none of the women barristers interviewed listed any aspect of the structure and environment of the Bar itself as barriers to their success.

In no small measure, this position is due to initiatives taken by the Bar Council over recent years. In recent years the Bar Council had taken steps to minimise barriers to women's careers at the Bar. The Council has been conscious of the need to appoint women to its committees, and has done so. It has supported the activities of the Women's Barristers' Association, the Bar's Equality Before the Law Committee, the Bar's Child Care Facilities Committee, and Australian Women Lawyers. The Bar has, for many years, had a panel of conciliators to deal with cases of sexual harassment and vilification. It is the only Bar in Australia to have instituted a system of parental leave, under which subsidies are made available to women barristers to assist them in paying annual Bar subscriptions and in maintaining their chambers for periods of up to six months. Recently the Bar Council made funds available for the completion of a parents' room in Owen Dixon Chambers.

Larger numbers of women are now coming to the Bar. The Victorian Bar's open-door policy and its policy of providing affordable rental accommodation for new barristers makes it

relatively easy for women to come to the Bar. In a speech at a recent New South Wales Bar dinner, Justice Mary Gaudron pointed out that women barristers seemed to be more successful in Victoria than elsewhere. Nearly one third of the last intake of Bar readers were women.

However, the research findings indicate that women generally find it more difficult to gain entry to, and support from, the mainstream of the Bar. This difficulty may have significant effects for individuals in terms of peer recognition, work satisfaction, and success. Women at the Bar are less likely to be briefed as regularly as men, and have a lower representation in longer cases. The interview data emphasises that the roles and attitudes of judges, solicitors, clerks and clients are crucial in determining the experience of women at the Bar.

The recommendations set out in the Report are directed at the Bar Council, Bar committees, the general membership of the Bar, solicitors and the judiciary. The Victorian Bar Council believes that this Report is significant to everyone working in the law today. There may be some barristers, male and female, and other people who are involved with the justice system, who will disagree with some of the findings. However, the findings cannot be ignored. The research clearly shows that barriers to women's advancement at the Bar do exist, and that further steps can be taken to achieve equality of opportunity for all women barristers.

This is a matter of concern to the Bar Council. The life of a successful barrister will always be characterised by pressure, hard work, intellectual rigour, and reliance on the collegiate atmosphere of the Bar. But it should never be incompatible with parenthood, and it should never be characterised by gender discrimination. In response, the Bar Council is reviewing the recommendations contained in the Report, and has appointed a working party to develop a plan of action on gender bias. The Bar Council will use this research to do all it can to eliminate any discriminatory practice at the Victorian Bar.

The Bar Council cannot control the way in which barristers are briefed. Also, there are many aspects of the Bar's culture which are not within the direct control of the Bar Council and which may take some time to change. Nevertheless, we accept the challenge issued by the Report to the Bar Council to 'lead from the front'. The Bar Council has always been of the view that sexual discrimination at the Bar is intolerable. Gender bias runs counter to all the best ideals of an independent Bar, which include justice, fairness, and the unbiased recognition of merit. Indeed, the Report suggests that many women are coming to the Bar because they expect it to provide an environment of freedom and tolerance in which ability is recognised. We are proud of the many successful women currently practising at the Bar, and we are proud of the women judges, magistrates, tribunal members and judicial registrars who were at our Bar. But we want to see more women achieve this level of success.

With the completion of this Report, we now have some objective evidence of women's experiences at the Bar and a solid basis from which to proceed. Until now, evidence of gender bias at the Bar has been isolated or anecdotal. With this Report in hand, we will be looking to our members, to clerks, to solicitors, to judges and to the public at large to help us in our goal of eliminating bias at the Bar.

NEIL J YOUNG
Chairman

27 July, 1998



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A Report to the Victorian Bar Council

**Rosemary Hunter
Helen McKelvie**

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FOREWORD

There have been barristers practising in the courts of Victoria since before 1840. But the first woman to practise as a Victorian barrister, Joan Rosanove, did not sign the Roll until 1923, becoming Victoria's first woman QC in 1965. In 1959, well within the practising life of senior judges and members of the Bar, she remained the only woman member. By 1970 there were only three women barristers, and 25 years ago, still less than 10 in active practice. The first Victorian woman judge, Justice Margaret Lusink, Joan Rosanove's daughter, was not appointed to the Family Court of Australia until 1976.

In these circumstances it is not surprising that until quite recently, many judges, barristers and barristers' clerks, and many solicitors and their clients, the litigants, thought that the practice of a barrister was a male preserve, not least because of the adversarial nature of the work itself. Senior legal figures of the 1970s and even 1980s often went to some lengths not to hide their view that women were not suited to courtroom advocacy, notwithstanding that by 1980 at least, there were women barristers in substantial numbers. Nor is it surprising that now, with some 230 women in active practice at the Bar, a number of them share (with plenty of others) the suspicion that many of the participants, from judges through to lay clients, still hold to the same outmoded views, and that work is distributed accordingly.

One of the main purposes of this report was to discover whether this suspicion was justified. If it could be shown not to be, the record could be set straight. For, of course, women barristers are practising, competently and successfully, in every area of the law. But if there was a factual basis for the suspicion, then simple justice demanded a remedy, and that the women of the Bar be given true equality of opportunity. The Victorian Bar Council is to be congratulated on making the farsighted and sensible decision that the question should be independently researched, and made the subject of this report.

The results of this research are important for a variety of reasons. In particular the Bar has always claimed to stand for a series of ideals, amongst the most important of which is a willingness to defend and support fairness and justice to all — which surely must include its own members. And it would be quite wrong for those who contemplate coming to the Bar to be dissuaded from doing so by the fear that the Bar itself maintains gender bias, or that bodies such as the Bar Council might not do everything possible to eradicate discriminatory practices. The commissioning of this report is evidence that the Bar Council will not condone the perpetuation of practices or attitudes which discriminate against a group of its own members.

The researchers have, I know, been greatly assisted by the generous and enthusiastic co-operation of the judges and court staff in the various courts surveyed, and by the many persons who agreed to be interviewed, all of whom gave freely of their time. The results should be evident in the quality of the report itself.

I congratulate the authors of the report, and commend their work to the Victorian legal community.

Stephen Charles
Judges' Chambers
Melbourne.

14 July 1998

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THE STEERING COMMITTEE

Members of the Steering Committee for the project were:

- The Honourable Mr. Justice Charles, of the Supreme Court of Victoria, Court of Appeal (Chair)
- The Honourable Justice Sally Brown, of the Family Court of Australia
- Professor Marcia Neave, Law Faculty, Monash University
- Bernard Bongiorno, QC
- Anthony Howard, QC
- Rachelle Lewitan, QC
- Mr. Ian Dunn, Chief Executive, Law Institute of Victoria
- Kim Pettigrew, barrister (Secretary)
- Fiona Phillips, barrister (Acting Secretary, June-August 1997).

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Helen McKelvie, LLB, BA (Melb) is a freelance legal researcher. After graduating she worked for a short time as a solicitor, and then as a research officer for the Victorian Law Reform Commission, National Road Transport Commission and Victorian Department of Justice, during which time she gained significant experience in legal and social research design and methods, community consultation and policy development. She has also worked in the field of plain language drafting for lawyers. She has been a columnist for the *Alternative Law Journal* and, with Melanie Heenan, is the author of the *Rape Law Reform Evaluation Report* (Victorian Department of Justice, 1997). She currently holds the position of Manager, Program Development, at the Victorian Institute of Forensic Medicine.

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Rosemary Hunter and Helen McKelvie

July 1998.

EXECUTIVE SUMMARY

I. Introduction

1.1 In 1997 women comprised around 50% of law graduates, 28% of solicitors, 15.8% of barristers and 6% of QCs in Victoria. This research project arose out of concerns expressed to the Equality Before the Law Committee of the Victorian Bar Council about the under-representation of women in the senior ranks of the Bar, and the perceived high attrition rate of women coming to the Bar. While many have argued that the proportion of senior female barristers will increase naturally with time, the Equality Before the Law Committee wished to determine whether there were any barriers impeding the advancement of women at the Bar. The aim of the project was therefore to gather systematic and reliable quantitative and qualitative data to assess the current status of women at the Victorian Bar, and to identify any barriers to women's advancement, including any discriminatory practices. Questions of fairness and equality are important in an institution which plays a central role in the administration of justice. They are also important for graduates planning career paths in the legal profession.

1.2 The report examines the motivations and aspirations of female and male barristers, the impact on women barristers of the culture and environment of the Bar, the roles and attitudes of solicitors, clients and clerks in briefing processes, issues involved in combining practice at the Bar with family responsibilities, and the ways in which women operate and are regarded in the courtroom, as advocates or as judges.

1.3 Three main research methods were used to capture different kinds of data:

- a literature review, which entailed a review of recent studies, reports and articles dealing with the status of women in professional occupations in general, and in the legal profession in particular, both in Australia and overseas;
- confidential face-to-face interviews with a range of legal personnel, designed to identify and compare any differences in the values, opportunities and experiences of female and male barristers at the Bar, in briefing processes and in the courtroom;
- a study of court and tribunal appearances over a three-month period, to provide an objective measure of whether equality between female and male barristers exists in an important area of practice — courtroom advocacy.

These sources yielded a complex and multifaceted picture of women's status and opportunities at the Bar.

2. Barristers' motivations and aspirations

2.1 The research findings in relation to barristers' stated motivations and aspirations clearly indicate that women are serious about their careers at the Bar. While there are minor gendered patterns in relation to reasons for coming to the Bar and measures of a successful barrister, there is also a considerable variety of views among both women and men on these points.

2.2 The majority of both women and men are satisfied with their current position or progress at the Bar, although there is limited evidence of a higher degree of dissatisfaction amongst women. A striking gender difference arises, however, in relation to perceived barriers to success. Women and men mentioned quite different barriers and women perceived more barriers standing in their way. Some of these barriers, such as those identified in briefing processes and in combining work and family responsibilities, are overtly related to gender difference.

3. Bar culture and organisation

3.1 The culture and organisation of any workplace play a significant role in determining the experiences of those operating within it. Analysis of the findings reinforces conclusions reached in other studies of workplaces with a low proportion of women — that culture represents a pervasive source of gender biased attitudes and behaviour, that are very difficult to challenge.

3.2 The research findings indicate that women generally find it more difficult to gain entry to, and support from the “mainstream” of the Bar, which may have significant effects for individuals in terms of peer recognition, work satisfaction, and “success” as a barrister. Cultural factors contributing to this situation included a high level of criticism of female barristers around the Bar; exclusion or alienation of women from social networks, lunching rituals and other social events; and issues of sexuality being used to undermine women’s professional credibility. Different experiences of mentoring at the Bar for female and male barristers were also highlighted in the interviews.

3.3 In terms of the formal organisational structures at the Bar, the interviews revealed a significant amount of dissatisfaction with the level of representation of women, and recognition of their needs, by those controlling the power structures. At the same time, some interviewees expressed opposition to the formation and operation of the Women Barristers Association. Lack of institutional support and a strong tradition of “no dobbing” inhibit women barristers from making formal complaints about gender biased or other inappropriate treatment.

3.4 Overall, the values of the Victorian Bar and the way it is run have not changed significantly to accommodate women who do not share the background, attitudes and assumptions of the traditional membership. Even if, as individuals, women do not experience this directly as discrimination, at a systemic level, the culture and organisational arrangements of the Bar can be seen to play a large part in creating an environment in which women are not supported and may choose not to join the Bar, or make the decision to leave.

4. Briefing practices and prejudices

4.1 The interview data emphasised that the roles and attitudes of solicitors, clerks and clients are crucial in determining how and whether barristers receive work. The interviews show that in the abstract, solicitors did not hold gender biased views about the qualities of a good barrister. In practice, however, personal contacts and rapport between barristers and solicitors are all-important in the briefing process. To the extent that senior male solicitors have control over briefing, this tends to advantage male barristers through the operation of homosocial networks, although women’s networks are beginning to have some impact. More generally, many solicitors lack knowledge of women barristers practising in their areas, and some employ directly or indirectly discriminatory criteria in selecting barristers for particular cases. Solicitors are generally unaware of the gendered impact of their decisions. Client preferences, either express or assumed, also have some impact on briefing opportunities, although some solicitors’ assumptions about what kind of barrister their male client would prefer are connected with their own gendered preferences and beliefs.

4.2 The interview material suggests that while clerks may not have the ability to influence the growth of barristers’ practices through the allocation of floating work as might have been the case in the past, the atmosphere of the list and the clerk’s and other list members’ attitudes can still have an impact on women’s experiences at Bar.

4.3 The court appearances study provides evidence of the outcomes of briefing processes. Data from the study suggests gendered patterns in the briefing opportunities afforded to women and men in the courts and tribunal studied, with individual women and women overall enjoying a narrower range of briefing opportunities than their male colleagues. Specific findings include:

- a higher proportion of men than of women on the Bar Roll appeared in the higher courts in Victoria during the study, and this disparity was not simply attributable to the relative seniority of female and male barristers at the Bar;
- male barristers appeared to have greater opportunities for junior work than did female barristers;
- female barristers were less likely to receive multiple briefs;
- women made a higher proportion of appearances in cases of shorter duration and in Family Court cases, and a lower proportion of appearances in the trial division of the Supreme Court and generally in commercial and personal injuries cases, yet the case sample indicated a significantly higher volume of work available in the commercial and personal injuries areas than in family law;
- female barristers were significantly under-represented in jury trials, both criminal and civil, with criminal prosecution work providing virtually the only means for women to gain trial experience;
- there was a difference between private and public sector briefing patterns, but apart from the Victorian OPP, neither sector was noticeably supportive of women barristers.

5. Family responsibilities

5.1 In relation to the relative family responsibilities of barristers, the research findings show that, like many women in the workforce, many women at the Victorian Bar play multiple roles: as spouses, primary parents and barristers. Currently, most of their male counterparts are not attempting the same degree of commitment to these different roles. Despite the notion that the Bar offers a degree of flexibility conducive to combining practice with an active parenting role, particular characteristics of the Bar appear to exacerbate the problems of taking time off for childbirth and of ongoing multiple role-playing, including the need to maintain solicitor contacts, the importance placed on experience and continuous practice, the requirement of fitting around court timetables, and the fact that optimal years for childbearing and being involved with parenting small children coincide with the time when barristers “should” be putting in maximum effort to establish their practices. In addition, the prevailing attitude around mothering and part-time work amongst members of the profession associates these with lack of commitment or even incompetence, creating an environment that is particularly unsupportive of pregnant women and mothers attempting to maintain their careers at the Bar. Despite the fact that some women have made the best of it, competing family responsibilities, and attitudes at the Bar towards them, appear to be possibly the largest contributing factors to women leaving the Bar.

5.2 Interviewees also described the entrenched work ethos at the Bar — working weekends and long hours on a continuous basis — which makes it difficult for women with parenting responsibilities to compete effectively and for all barristers to participate in family life. Not only do women at the Bar generally lack the domestic support systems upon which male barristers have traditionally relied, but it is increasingly difficult for male barristers to find (and keep) partners prepared to be barrister’s wives. Thus, social changes are challenging the ongoing

viability of the traditional model and producing a need for the role of barrister to be redefined for a single actor with a life outside the Bar.

5.3 Recent changes to the Bar Rules to accommodate barristers with nontraditional work arrangements have benefited women with parenting responsibilities, although according to interviewees, further adjustments are needed.

6. In the courtroom

6.1 The findings in relation to the operation of the courtroom show that women barristers are required to overcome the preconceived notion that barristers are male. This is manifested in heightened visibility of women amongst their male peers, treatment highlighting their status as women first before being acknowledged as barristers, attitudes to their competence, and their own confidence as advocates. The traditional courtroom as a physical setting also has some “inherent disadvantages” for women in terms of projecting voices of a higher pitch and, for those of smaller stature, making their presence felt. Nevertheless, it appears that female barristers have been largely successful in finding effective ways of being advocates.

6.2 In addition, the findings suggest that male barristers are more likely to initiate and be comfortable with gameplaying tactics, and that while some women learn how to play them, they are more likely, at least initially, to find them alienating and confusing. Interviewees stressed the role of judges in censuring inappropriate courtroom behaviour, and also considered that the senior Bar has a role to play in setting standards. With regard to rude or hostile treatment from the bench, most female and male barristers reported only isolated incidents of this type of behaviour, and that they approached them as “part of being a barrister”. Only a couple of women contended that treatment they had received from judges or magistrates was motivated by gender bias.

6.3 The interview findings also suggest that the increased number of female barristers practising in Victoria has generally had a positive impact on the way in which proceedings are conducted. The majority of interviewees also responded positively to questions about increasing the number of women on the bench. Suggestions regarding how a more gender-balanced bench may be achieved reinforced the need for greater acceptance and support for women at the Bar, to enable more women to gain the experience and maturity required for judicial appointment.

7. Conclusion

7.1 The research shows that barriers to women’s advancement at the Victorian Bar do exist, and that the situation will not simply be remedied by “natural increase” over time. Positive intervention is required in order to achieve equality of opportunity for women barristers, and the report contains a number of recommendations for ways in which identified barriers may be addressed. The Bar also has an important, ongoing role to play in discussing the research findings, and devising, adopting and implementing strategies for change.

LIST OF RECOMMENDATIONS

Introduction

Recommendation 1 (p.12):

That the Bar Council gather, maintain and publish consistent information regarding entry to and attrition from the Bar, by gender. Attrition records should also include age, years at the Bar and reasons for leaving, obtained via exit interviews, a standard self-completion questionnaire, or other reliable method.

Bar Culture and Environment

Recommendation 2 (p.39):

- that the Bar Council consider ways of enforcing Rule 11.1, to prevent sexist criticism of female members from undermining their professional credentials and thereby damaging the image of the Bar;
- that the Bar Council and senior members of the Bar take a leadership role in actively discouraging sexist criticism of female members, when it occurs within their earshot, and generally by their words and actions.

Recommendation 3 (p.42)

- that senior barristers make an appropriate effort to create a welcoming environment for new female and male members of their chambers;
- that consideration be given to any requests that the seniority rules relating to the allocation of chambers be relaxed in order to enable an appropriate gender mix within various floors of chambers.

Recommendation 4 (p.44):

- that judges and senior barristers attempt to make social occasions inclusive of junior female and male barristers;
- that List dinners and other Bar social events be held in a welcoming atmosphere for women members, and never at male-only clubs.

Recommendation 5 (p.45):

That male barristers regard female barristers as professional colleagues, and recognise their capacity to obtain work based on their professional skills.

Recommendation 6 (p.46):

- that the Bar Council organise for barristers to receive relevant information about the definition of sexual harassment and the reasons for its prohibition;
- that barristers be encouraged to document incidents of sexual harassment for those charged with dealing with it, even if they do not wish to make a formal complaint, in order that the nature and extent of sexual harassment may be known and relevant education arranged for members of the Bar;
- that the sexual harassment panel at the Bar keep a record of complaints and queries about incidents of sexual harassment, and any advice given or action taken.

Recommendation 7 (p.49):

That the Bar Council consider short and long term strategies for ensuring greater representation of women on the Council and its sub-committees, not only in terms of numbers but in the conduct of meetings and actual decision-making, such as:

- revision of the Bar Council membership rules so they are not so heavily weighted towards the senior echelons of the Bar, where men enjoy an overwhelming majority;
- a requirement that the Bar Council categories and every committee include at least two women members;
- a policy that Bar Council appointments to outside bodies alternate between men and women, and that when two or more appointments are made, there be as far as possible a gender balance of appointees.

Recommendation 8 (p.49):

That Barristers Chambers Ltd take steps to ensure that it always includes at least two women members.

Recommendation 9 (p.50):

- that judges and senior members of the Bar continue to give active support to the Women Barristers Association (WBA);
- that the diversity of women barristers be recognised by acknowledging that WBA has a valuable role to play for its members, and does not threaten the status of other women or of men at the Bar.

Recommendation 10 (p.52):

That administrators of the Bar Readers' course:

- attempt to educate all speakers about the importance of using gender inclusive language and examples;
- consider potentially different learning styles in the design of course materials and practical exercises;
- seek expert advice and assistance if necessary on the design of gender inclusive curricula;
- incorporate acknowledgment of additional cultural barriers likely to be faced by female barristers into the courses and include sessions related to these issues;
- include course content about unacceptable forms of behaviour for barristers, including sexual harassment and exclusionary cultural practices.

Recommendation 11 (p.54):

- that the Bar Council provide more structured assistance in the process of matching potential readers with appropriate Mentors;
- that the Bar Council establish a training and accreditation program for Mentors, which should incorporate attention to cross-gender mentoring;
- that the WBA or the Bar Council maintain a list of senior women who are prepared to act as informal mentors for younger women, to be made available initially to all junior women barristers, and thereafter to women entering the readers course.

Recommendation 12 (p.57):

- that the systemically adverse impact of the culture of the Bar on its female members be acknowledged;
- that members of the Bar work to ensure that the institution does in fact offer equal opportunities to all members.

Recommendation 13 (p.58):

- that the Ethics Committee adopt a pro-active role in combating sexist behaviour at the Bar;
- that confidentiality of complaints to the Ethics Committee be strictly adhered to, so that complainants are not subject to retaliatory gossip.

Briefing Practices and Prejudices

Recommendation 14 (p.73):

That WBA and other relevant groups at the Bar continue to develop forms of networking that may be appropriate and useful to women barristers.

Recommendation 15 (p.74):

That individual women, and WBA collectively, pursue suggestions for providing women barristers with opportunities to display their skills as orators or advocates otherwise than in court.

Recommendation 16 (p.75):

That the issue of pay equity for women barristers be the subject of further study.

Recommendation 17 (p.77):

- that QCs actively turn their minds to the existence of suitably qualified women barristers when considering who to recommend as junior counsel;
- that the Bar Council request the Law Institute to encourage solicitors to do the same when considering who to brief as junior counsel.

Recommendation 18 (p.78):

- that the Bar produce a (regularly updated) catalogue of women barristers, listing their experience and areas of practise;
- that the Bar Council request the Law Institute to encourage solicitors to make a greater effort to identify women barristers working in their fields (by reference to such a catalogue, or to list directories, the Law Institute diary, Internet resources, active inquiries, etc.), to investigate their performance, and consider adding them to their personal pool of barristers.

Recommendation 19 (p.78):

That the Bar Council request the Law Institute to promote measures to eliminate double standards and other sexually discriminatory practices in briefing processes.

Recommendation 20 (p.80):

That the Bar Council request the Law Institute to encourage solicitors to make themselves aware of the actual numbers of women on their firm or agency's list and in their own stable, and to aim to keep those numbers proportionate to the numbers of women barristers practising in the relevant areas.

Recommendation 21 (p.83):

That the Bar Council promote the view that:

- government agencies should accept responsibility for the achievement of fair gender representation in briefing, and closely monitor and adjust their briefing practices to ensure this outcome is achieved;
- government agencies contracting out work to private firms should include the achievement of fair gender representation in briefing as one of the key performance indicators in the contract;
- private lawfirms should consider their briefing practices and processes within the context of their equal employment opportunity policies.

Recommendation 22 (p.89):

- that lists strive for proportionate representation of women at the various levels of the Bar;
- that lists adopt affirmative measures other than quotas to recruit and retain women members, in order to achieve proportionate representation, and to encourage women to come to the Bar;
- that all list committees adopt equal opportunity interviewing policies for applicants;

- that clerks and list committees facilitate supportive interactions between more senior and new list members;
- that clerks remain conscious of the potential impact of gender in the process of matching barristers with solicitors and clients, and attempt to overcome solicitors' ignorance of women barristers working in 'non-traditional' areas;
- that list committees consider requesting clerks to maintain records of the volume and distribution of floating work by gender and area of law, and to provide this information annually to list members;
- that clerks attempt to maintain gender balance among their employees.

Recommendation 23 (p.93):

That the Bar Council request the Law Institute to promote the view that solicitors serve the best interests of clients by ensuring that barristers are chosen on the basis of their skills rather than their sex.

Recommendation 24 (p.102):

- that the Bar Council request the Law Institute to promote the principle that briefing solicitors should ensure that they offer equal opportunities to female and male barristers in the allocation of jury work, without discrimination on the basis of stereotypical assumptions and unsubstantiated beliefs about women's abilities in this area.
- that the Criminal and Common Law Bar Associations take steps to promote women barristers as jury advocates;
- that women barristers appearing as junior counsel in jury trials be given speaking parts and the opportunity to take witnesses to enable them to develop their skills as jury advocates.

Family Responsibilities

Recommendation 25 (p.112):

- that the Bar Council initiate a change in attitudes towards motherhood at the Bar, so that barristers who become pregnant can expect to be accepted and offered assistance in maintaining their practices, rather than experiencing pregnancy related discrimination;
- that the Bar Council request each court to adopt a policy that requests from barristers to accommodate child care arrangements will be treated with sympathy and understanding.

Recommendation 26 (p.116):

That clerks should provide the support and assistance requested by women on their lists who have children, rather than making assumptions about their capacities or commitment, which may thereby undermine their practices.

Recommendation 27 (p.121):

- that the Bar Council and Committees hold meetings at times that encourage participation by barristers with family responsibilities (e.g. lunchtimes);
- that the Bar Council encourage debate within the Bar and the wider legal profession about current work practices, including consideration of family responsibilities, health and professional development;
- that the Bar Council engage in dialogue with the Courts about more family friendly work practices.

Recommendation 28 (p.123):

- that the recommendations of the Work and Childcare Advisory Service, particularly for the establishment of an Advice and Referral Service, be implemented by the end of 1998;

- that the Bar Council and Barristers Chambers Limited actively support the efforts of the Childcare Sub-Committee in meeting the needs of parents at the Bar on an ongoing basis;
- that members of the Bar Council and Barristers Chambers Limited take such further steps as are necessary to inform themselves as to the issues faced by women with young children at the Bar, and actions necessary to ensure equality of opportunity for those women.

In the Courtroom

Recommendation 29 (p.131):

That male barristers ensure that interactions with female colleagues and other women in the courtroom are conducted on a professional footing.

Recommendation 30 (p.133):

- that the Bar Council sponsor workshops on using body and voice in the courtroom, which pay special attention to the variety of physical attributes of female and male barristers, and how they may be exploited for greatest effect;
- that workshops of this nature also form part of the Bar Readers Course;
- that the Women Barristers Association consider running such a workshop presented by and for women barristers.

Recommendation 31 (p.138):

That the Bar Readers Course specifically address the issue of gratuitous gameplaying and ways of combating it.

Recommendation 32 (p.139):

- that the Bar Council promote the use of gender inclusive forms of address such as “counsel”, “ladies and gentlemen”, or “members of the Bar”;
- that women’s own choices of address (Miss, Mrs or Ms) be respected.

Recommendation 33 (p.141):

That in order to provide an environment in which all barristers feel comfortable and enjoy equal opportunities to practise, the Bar Council promote uniform standards of courtesy and politeness towards advocates.

Recommendation 34 (p.142):

- that judges make clear that they consider rude, hostile or sexist behaviour in their courtrooms to be inappropriate, and that the targets rather than the perpetrators of such behaviour will be supported;
- that gender awareness issues continue to be included in the professional education courses run for the judiciary;
- that senior members of the Bar lead by example in this area.

Recommendation 35 (p.149):

- that WBA and the Bar Council promote discussion of a broader, more inclusive range of qualities that may be considered to equip barristers for judicial appointment;
- that all judicial appointments be evaluated by reference to the same standards, rather than women appointees being subject to additional scrutiny due to their gender;
- that recommendations in this report designed to ensure that women barristers are encouraged to remain at the Bar and enjoy equal opportunities to progress, be understood as also contributing to the establishment of a pool of senior women barristers from whom appropriate judicial appointments may be drawn.

Conclusion

Recommendation 36 (p.152):

- that the Bar Council, WBA, and/or other relevant bodies hold workshops to discuss this report, and to devise further practical suggestions in response to its findings;
- that the Bar Council make funding available for the employment of appropriate consultants to advise it in the process of adopting and implementing strategies to overcome the barriers to women's advancement at the Bar identified in this report;
- that strategies arising from the research findings be adopted and implemented within a two year period from the publication of this report;
- that those responsible for implementing various strategies report regularly to their constituencies on actions taken in that respect;
- that the results of the implementation process be monitored and evaluated after two years has elapsed.

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Chapter I

INTRODUCTION

1.1 Genesis, Aims and Significance of the Project

1.1.1 This research project arose out of concerns expressed to the Equality Before the Law Committee of the Victorian Bar Council about the under-representation of women in the senior ranks of the Bar, and the perceived high attrition rate of women coming to the Bar. The Equality Before the Law Committee wished to determine whether there were any barriers impeding the advancement of women coming to the Bar. The research was commissioned and principally funded by the Victorian Bar Council. Supplementary funding for the project was also received from the Victoria Law Foundation. An additional contribution to the project was made by The International Commission of Jurists.

1.1.2 The aim of the project was to gather systematic and reliable quantitative and qualitative data to assess the current status of women at the Victorian Bar, and to identify any barriers to women's advancement at the Bar, including any discriminatory practices. The project was designed to move beyond anecdotal reports of equal or unequal treatment encountered by individual women barristers, to determine as accurately as possible the current general experience of women at the Bar. This report sets out the results of the research, including suggestions for overcoming identified barriers, for consideration by the Bar Council and other members of the Bar. The Equality Before the Law Committee planned that the second part of the project would involve the adoption and implementation of positive strategies to ensure that women barristers enjoy substantive equality with their male counterparts.

1.1.3 The project is significant for a number of reasons. First, the legal profession is charged with upholding notions of fairness and justice, and administering the complex system of laws that apply to all members of society. Some of those laws are aimed at eradicating gender bias and other forms of unlawful discrimination. It is important that those responsible for maintaining the legal system do not themselves condone or perpetuate biased or discriminatory practices within their own organisations. A high standard of fairness is expected of an institution which plays such an important role in the justice system. In the words of a Law Council of Australia Discussion Paper:

Lawyers stand in a special relationship to the law . . . We are the people who make it work and we have a moral responsibility to ensure that our standards are, and are seen to be, equal to the highest standards in the community.¹

1.1.4 Second, this research into the operation of the Victorian Bar complements earlier work looking at the position of women practising law in solicitors firms in Victoria.² It also adds to a large body of work undertaken elsewhere in Australia,³ and in many State jurisdictions in North

1. Equalising Opportunities in the Law Committee, Law Council of Australia, 'Discussion Paper: Draft Conduct Rule for the Law Council of Australia on Discrimination and Sexual Harassment' (n.d.), 19.
2. Mark Herron, Annie Woodger and George Beaton, *Facing the Future: Gender, Employment and Best Practice Issues for Law Firms* (Victoria Law Foundation, 1996).
3. Australian Law Reform Commission, *Report No. 69, Part II — Equality Before the Law: Women's Equality* (1994), ch. 9; Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (1994); Chief Justice of Western Australia, *Report of the Chief Justice's Task Force on Gender Bias* (1994); Law Society of NSW, *Survey: Getting Through the Door is Not Enough: An Examination of the Equal Employment Opportunity Response of the Legal Profession in the 1990s* (1993); Jennifer Neilsen, *Gender Bias in the Civil Litigation System and its Impact on Women as*

America,⁴ which examines the extent of gender bias in the legal profession and court systems. At the same time, it is the first report in any jurisdiction to focus specifically on barristers and the operation of an independent Bar.

1.1.5 Third, seniority at the Bar and appointment to the bench have traditionally been closely linked. Removing barriers which may exist to women's advancement at the Bar will ensure the availability of experienced female barristers as suitable appointees to the bench. The on-going appointment of women to both State and Federal judicial positions is vital to the creation of a gender-balanced judicial system one which has the public's confidence in its ability to be responsive to all who come before it.

1.1.6 Finally, the project report will assist female graduates and law students to make informed decisions regarding their future career paths in the law. It is important for women seeking admission to the Bar to be able to be confident that their reasonable expectations of success, in an open, transparent and equal workplace, will be met. The research results will provide them with valuable and relevant information.

I.2 Women at the Victorian Bar

1.2.1 The year 1997 marked one hundred years of women in the law in Victoria. The first female law student, Grata Flos Matilda Greig, entered the University of Melbourne Law School in 1897. After she graduated, the Victorian Parliament was compelled to pass the Women's Disabilities Removal Act 1903 (colloquially known as the "Flos Greig Enabling Act") to enable her admission to practice law. Her achievements and those of her successors were enthusiastically celebrated during the centenary year.

1.2.2 Flos Greig did not, however, lead a steadily increasing stream of women into the Victorian legal profession. At the end of 1997, women remain under-represented in the profession as a whole, and most particularly in the senior echelons of the Bar and on the bench. Women currently comprise 28% of solicitors,⁵ 15.8% of barristers, and only 6% of QCs in Victoria.⁶ There is one woman out of 10 on the Court of Appeal, and one woman out of 20 in the trial division of the Supreme Court. There are three women on the Family Court but no women on the Federal Court bench in this State. Women comprise 10% of County Court judges and 17% of Magistrates in Victoria. Nevertheless, these figures represent a significant advance on the position twenty years ago, when a total of only 32 women had ever signed the Victorian Bar Roll,⁷ and female judicial

Civil Litigants in NSW: Northern Rivers Region of NSW (Report prepared for the NSW Department for Women, 1995); *Research on Gender Bias and Women Working in the Legal Profession: Report* (Prepared by Keys Young for the NSW Department for Women, March 1995); and *Gender Bias and the Law: Women Working in the Legal Profession: Report of the Implementation Committee* (NSW Department for Women and NSW Attorney-General's Department, 1996).

4. See e.g. New Jersey Supreme Court Task Force on Women in the Courts (1986) 9 *Women's Rights Law Reporter* 129; Michigan Supreme Court Task Force on Gender Issues in the Courts, *Final Report* (1989); Judicial Council Advisory Commission on Gender Bias in the Courts, *Achieving Equal Justice for Women and Men in the Courts: Draft Report* (1990); Illinois Task Force on Gender Bias in the Courts, *The 1990 Report of the Illinois Task Force on Gender Bias in the Courts* (1980); Ninth Circuit Gender Bias Task Force, 'The Effects of Gender in the Federal Courts: Final Report' (1994) 67 *Southern California Law Review* 745.

5. Statistics supplied by the Law Institute of Victoria, October 1997.

6. Victorian Bar Roll, Division A, Part I — Victorian Practising Counsel, 2 December 1997. The total figures were: QCs — 9 women, 143 men; Junior Counsel — 189 women, 912 men. The proportion of women barristers in Victoria is higher than in other states. Recent studies show that women make up 10% of the Bar in NSW and only 6% in Queensland and Western Australia: Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, Melbourne, 1996), Appendix B, 295; Chief Justice of Western Australia, *Report of the Chief Justice's Task Force on Gender Bias*, 75.

7. Linda Dessau, 'A Necessarily Short History of Women at the Bar' [Winter 1981] *Victorian Bar News* 12.

appointments could be counted on the fingers of one hand, although even then women were more than 30% of law graduates.⁸

1.2.3 Such figures on women's representation in senior roles in the profession have generated two competing responses. One is the so-called "trickle up" theory. This theory contends that the present low proportion of senior female barristers and women on the bench is an historical artefact that will be corrected naturally with time. There are now more women graduating from law schools (50% of law graduates since the early 1990s⁹), more women entering the legal profession, and more women coming to the Bar (for example, in the March 1998 Bar Readers course — the initial training program for new barristers — 18 of the 56 participants (32%) were women). Hence, after an appropriate lapse of time, there will be more women occupying senior positions at the Bar who may be considered for judicial appointment. The opposing view (which might be labelled the "entrenched masculinity" theory) argues that the shortage of senior women at the Bar is a result of discrimination against and discouragement of female barristers, which have deterred women from signing the Roll and caused a disproportionately high rate of attrition amongst women coming to the Bar. This will continue to occur, and the numbers of women reaching the senior ranks of the Bar and becoming available for judicial appointment will not increase significantly, unless and until these barriers to women's advancement are dismantled and women enjoy equality of opportunity at the Bar.

1.2.4 The debate between these opposing views is not unique to the Victorian Bar. The American legal scholar Carrie Menkel-Meadow has pointed out:

Some have argued that the very recent entry of women into the legal profession explains much occupational segregation, which will soon fade away. That has not happened elsewhere, however; gender configurations in the workplace are remarkably durable. As a profession such as teaching or clerical work begins to change gender composition it often "tips" and becomes the work of the other sex; or subfields within a profession remain sharply segregated, even when the "profession" broadly defined seems to become integrated (as in banks and the computer industry).¹⁰

1.2.5 Several of the legal professionals interviewed for the research suggested that while discrimination against women at the Bar may have existed in the past, there has been a real change in attitudes in recent years, and that women are now treated equally (if not even more favourably as recipients of 'positive discrimination'). One clerking list chair noted, for example, that there has been a dramatic change in the general acceptance of women at the Bar in the last three to four years. Before that, women were considered unusual, out of place; now they are simply accepted as part of the general pattern of life at the Bar. The research was not concerned to detail whether, and if so, what changes have occurred over time, but it was designed to discover whether there remain any present barriers preventing women from joining the Bar, retarding their progress at the Bar, discouraging them from staying at the Bar, and/or resulting in their capacities being overlooked or undervalued. Along with other reports and commentators,¹¹ its findings cast doubt upon the "trickle up" thesis regarding women's future prospects at the Bar. While there have undoubtedly been improvements in attitudes to, and treatment of, women barristers, the research suggests

8. The Hon. Justice Mary Gaudron, 'Speech to Launch Australian Women Lawyers' (1998) 72 *Australian Law Journal* 199, at 121.

9. ALRC, *Equality Before the Law: Women's Equality*, 176.

10. Carrie Menkel-Meadow, 'Feminization of the Legal Profession: the Comparative Sociology of Women Lawyers', in R. Abel and P. Lewis (eds.), *Lawyers in Society: An Overview* (University of California Press, 1995), 221 at 244.

11. *Research on Gender Bias and Women Working in the Legal Profession: Report* (Prepared by Keys Young for the NSW Department for Women, March 1995); Justice Sally Brown, quoted in 'Call for action on harassment' (1996) 31 *Australian Lawyer*, 44; former lawyer and Queensland Governor Leneen Forde, quoted in Desley Bartlett, 'Doing it Tough: Gender Issues at the Bar' (1997) 32:7 *Australian Lawyer*, 16 at 17; Justice Mary Gaudron, 'Speech to Launch Australian Women Lawyers', 121-122.

that there is still some distance to go in order to achieve equality of opportunity for women at the Victorian Bar.

1.3 Scope of the Study

1.3.1 In determining where any obstacles to women's advancement at the Bar might be identified, Sir Owen Dixon's statement, quoted in the introduction to the Bar Rules, provided a useful starting point:

The Bar is no ordinary profession or occupation. The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the Bar and of judges.¹²

This quotation identifies three broad sites, and suggests a range of questions, for investigation. First, do solicitors and their clients hold any prejudiced beliefs or assumptions about the suitability or otherwise of male or female barristers for particular kinds of work? Do they evaluate the performance of female and male barristers differently? Alternatively, do solicitors' briefing practices indirectly exclude women from consideration? The role of the clerks must also be considered in any analysis of briefing practices. Second, do the culture and environment of the Bar, and generally held views about what makes a good barrister or judge, make it more difficult for women than for men to succeed? Third, what attitudes towards women barristers, including their styles of advocacy, are held by the Victorian judiciary, and what impact do these attitudes have on the experiences of male and female barristers in the courtroom?

1.3.2 A fourth group that may have a significant impact on barristers' activities is their families. Do childbearing and family responsibilities have differential consequences for the careers of female and male barristers? A fundamental question preceding all of these is whether women and men at the Bar have the same kinds of goals and aspirations for their careers, to enable meaningful comparisons to be made of relative progress and success.

1.3.3 The report examines each of these issues. The picture that emerges of women's status and opportunities at the Bar is therefore complex and multifaceted. The report also explores the "different voice" argument - the contention made by some theorists that the presence of women in the courtroom, as barristers or judges, is a positive good;¹³ that women bring to the Bar and the bench a set of qualities and attributes that are different from men's, and that can be of great benefit to clients of the legal system, and to the administration of justice in general.

1.4 Research Methods and Management

1.4.1 At the commencement of the project, the Equality Before the Law Committee invited the researchers to submit a proposal as to how they might investigate the status of women at the Victorian Bar and whether any barriers existed to women's advancement at the Bar. The Committee and the researchers discussed a range of possible approaches to these questions, and ultimately determined that three main research methods would be pursued: a literature review, a study of court and tribunal appearances over a three-month period, and interviews with a range of

12. *In re Davis* (1949) 75 CLR 409 at 420.

13. See Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39; Madame Justice Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507; Sharyn Roach Anleu, 'Women in the Legal Profession' (1992) 66 *Law Institute Journal* 162.

legal personnel. The combination of these three methods was designed to capture different kinds of data (existing literature, quantitative data on appearances, and qualitative material on the views of barristers and other relevant players in the system), and also to enable cross-checks between the different data sources (for example, to see whether views about briefing were borne out in practice, or whether assertions in the literature, often derived from other jurisdictions, held true in Victoria). Where different research methods produce consistent results, those results can command a high degree of confidence.

1.4.2 Once the project design was settled, a Steering Committee was constituted to oversee the conduct of the research and the preparation of the report, and to provide advice and assistance to the researchers in the course of those processes. The Steering Committee met on a monthly basis to receive reports on the progress of the research and to respond to any queries raised by the researchers. It reviewed and approved data collection documents, as set out below, and was also responsible for reviewing successive drafts of the report. The following paragraphs explain in detail the process of the research.

1.5 Literature review

1.5.1 The project commenced with a review of recent studies, reports and articles dealing with the status of women in professional occupations in general, and in the legal profession in particular, both in Australia and overseas. The review was designed to help identify key issues for the interview process, to provide a wider context for the findings of the study, and to assist in formulating suggestions that might arise from those findings. The bibliography provides a complete list of references consulted.

1.5.2 One non-legal study that provided useful insights for the project was Rosabeth Moss Kanter's *Men and Women of the Corporation*.¹⁴ Kanter, a sociologist, investigated the effects of the highly disproportionate representation of women and men in the professional and managerial ranks of a large US corporation. She developed a typology of workplace groups, ranging from those that are "uniform" (consisting exclusively of members of one sex, or other type), through "skewed" and "tilted" groups to "balanced" groups (with a 60:40 to 50:50 sex or other type ratio).¹⁵ She described skewed groups as those "in which there is a large preponderance of one type over another, up to a ratio of perhaps 85:15".¹⁶ On this analysis, both the Bar and bench in Victoria would be categorised as skewed groups, with some areas (such as the ranks of QCs or Supreme Court judges) being highly skewed. Kanter observed that within skewed groups, "[t]he numerically dominant types also control the group and its culture in enough ways to be labelled "dominants", while the few of another type in the skewed group tended to be treated as tokens "as representatives of their category, as symbols rather than individuals".¹⁷ Kanter's work gave rise to the notion of a "critical mass": the proportion of the minority type needed to change a group from "skewed" to merely "tilted", in which "dominants are just a 'majority' and tokens become a 'minority'. Minority members have potential allies among each other, can form coalitions, and can affect the culture of the group."¹⁸ Kanter's analysis provides a framework for interpreting some of the interview data gathered for this project, and also suggests that increasing the proportion of women at the Bar may be an important goal in itself.

14. Rosabeth Moss Kanter, *Men and Women of the Corporation* (Basic Books, New York, 1977).

15. *Ibid.*, 208–209.

16. *Ibid.*, 208.

17. *Ibid.*

18. *Ibid.*, 209.

1.5.3 Another important theoretical article on the progress of gender equality in employment is Deborah Rhode's 'The "No Problem" Problem: Feminist Challenges and Cultural Change'.¹⁹ Rhode, a Professor of Law at Stanford University, draws together a range of historical and contemporary material on women workers and sex discrimination. Her central insight is that the promotion of women's equality is often impeded indirectly by what she labels the "no problem" problem, that is, the belief among male colleagues that there is no problem of gender inequality to which they might need to respond. She identifies three facets of the "no problem" problem: denial that significant gender inequalities exist; acknowledgment that disparities exist, but denial of their injustice (they are explained by reference to biology or culture); and acknowledgment that disparities exist but denial of responsibility for causing or remedying them. Rhode's analysis provided useful guidance in structuring the research so as to be able to address possible "no problem" responses.

1.5.4 Turning to the specific literature on women in the legal profession, academic and theoretical work has expounded the "entrenched masculinity" and "different voice" theories referred to earlier (paras 1.2.3 and 1.3.3). There has also been a substantial amount of empirical information generated by so-called "gender bias reports" in North American jurisdictions.²⁰ These have focused on inappropriate, demeaning or discriminatory treatment of women in court - be they litigants, witnesses, lawyers or judges — by male judges and other men involved in the litigation process. The reports suggested some areas of questioning for the interviews undertaken for this study. However, due to the different organisation of legal practice in the US (the existence of a fused profession with no separately constituted group of advocates), and the fact that the reports were often directed towards judicial behaviour, they are of limited direct relevance to the Victorian situation or to this project in particular. In the UK, where there is a similarly divided profession, there has been no systematic study of women at the Bar, although the book by distinguished British barrister Helena Kennedy, *Eve Was Framed*,²¹ provides a rich source of anecdotal material.

1.5.5 Australian reports that have considered the position of women barristers include the Keys Young Report commissioned by the NSW Department for Women,²² and the Australian Law Reform Commission's Report No 69 on *Equality Before the Law*.²³ Both of these reports range more broadly over women in the legal profession, and devote little specific attention to women barristers as a separate group. Professor Margaret Thornton's *Dissonance and Distrust: Women in the Legal Profession*, published by Oxford University Press in 1996, does include a particular focus on women at the Bar. Professor Thornton's work provides critical insights on the status of women barristers in Australia, and was a valuable source of hypotheses that could be tested in the interviewing process for this project.

1.6 Interviews

Aims and Procedures

1.6.1 In order to identify and compare any differences in the opportunities and experiences of female and male barristers, in briefing processes, at the Bar and in the courtroom, a substantial program of confidential face-to-face interviews was undertaken with Victorian barristers, solici-

19. Deborah L. Rhode, 'The "No Problem" Problem: Feminist Challenges and Cultural Change' (1991) 100 *Yale Law Journal* 1731.

20. Above note 4.

21. Helena Kennedy, *Eve Was Framed: Women and British Justice* (Vintage, 1992).

22. Above note 3.

23. *Ibid.*

tors, barristers' clerks, judges, and people who had left the Bar within the last five years. The interviews with barristers, judicial officials, clerks, and former barristers were all conducted by a single researcher, a qualified lawyer, experienced in socio-legal research. Another interviewer, a PhD candidate in the area of criminology, and therefore familiar with the organisational structures of the legal profession, was also employed to conduct some of the interviews with solicitors.

1.6.2 In order to ensure consistent coverage of issues in the interviews, the researchers developed a schedule of standard questions for each category of interviewee (see Appendix A). These interview schedules were then approved by the Steering Committee. In addition, as this aspect of the project involved research on human subjects, the research protocol and the interview schedules were submitted to and approved by the University of Melbourne's Human Research Ethics Committee.

1.6.3 Subjects selected for interview (as explained below) were each sent a letter from the Chair of the Steering Committee, Mr. Justice Charles (or, in the case of solicitors, from the Chief Executive of the Law Institute, Mr. Ian Dunn) setting out details of the study and inviting them to participate. They were then contacted by the researchers to see if they would agree to be interviewed, and if so, to arrange a time to do so. This procedure resulted in the identity of interviewees being known only to the researchers (letters of invitation were signed 'blind'). Interviewees were also guaranteed that their identity would remain confidential in reporting the results of the research. Virtually all those invited agreed to be interviewed.

1.6.4 The interview schedules allowed for a semi-structured approach to be taken to the interviews. Some questions called for responses within a range, while others were more open ended, providing an opportunity for interviewees to raise matters of particular concern or interest to them. The interviewers did not strictly dictate the form of the interviews. In many cases the interview followed the order of questions in the schedule fairly rigorously, however the structure of others was determined more by the interviewees, with the schedule functioning as a checklist to ensure that all the identified relevant topics had been covered in the discussion. This method allowed the researchers to both compare responses and attitudes on a standard list of topics, and to elicit other qualitative material.

1.6.5 The majority of interviews were conducted in the offices or chambers of the interviewees. In the case of two practising barristers and one former barrister (all female) the interviews were conducted at their homes. The interviews varied in length, from 20 minutes for some judicial officials to 2.5 hours with some barristers and solicitors, reflecting the length of the different interview schedules, and the amount of detail provided by the interviewees. All but one of the interviews were tape-recorded with the permission of the interviewees, to ensure that an accurate account of their responses could be reported. Notes and tape recordings were used to produce a written account of the matters discussed in each of the interviews. Material from, and analysis of, those written accounts are used in following chapters of the report.

Sampling

1.6.6 There are a number of methods available for obtaining the views of members of a given group of people. One familiar method is to hold an election or plebiscite, wherein all members of the population are asked to express their opinion on a certain matter. In most cases, however, a total population survey will be impractical. Such surveys are highly resource-intensive and costly, both in terms of collecting and analysing the data. For example, to conduct and transcribe a one-hour interview with every member of the Victorian Bar would take approximately three and a half person years, and would yield a quantity of data that would take further years to analyse. Conse-

quently, it is usually necessary to confine research to some smaller proportion of the total population. This might be done, for example, by selecting identified members of the population who are known to have an interest in the topic to be researched, or by advertising the research and interviewing the self-selecting group who respond to the advertisement. While these methods are appropriate in some circumstances, they were not considered appropriate for this study, since they tend to yield skewed rather than representative samples of interviewees.

1.6.7 The method chosen for selecting interviewees for this research is known as ‘stratified random sampling’. Each broad category of interviewees (barristers, solicitors, barristers clerks, judicial officers and former barristers) was divided into sub-groups (strata), as set out below. The target number of interviewees within each sub-group was then determined, and potential interviewees were selected randomly from each sub-group,²⁴ by drawing names out of an envelope up to the target number. If any person selected was unavailable or declined to be interviewed, a replacement name was drawn from the relevant sub-group by the same method. The purpose of random selection was to ensure that the interviews captured the potential range of views that might exist among the groups interviewed regarding the status of women barristers, and that the pool of interviewees was not skewed towards holders of any particular view. Random selection is the accepted social science method for choosing a sample from which reliable inferences can be drawn as to the general situation. Stratification is designed to ensure that important sub-groups within the larger group are adequately represented in the data.²⁵

Barristers

1.6.8 A total of 50 barristers were interviewed: 25 female and 25 male. Using the Roll of Victorian Practising Counsel, a sample of QCs and junior barristers who had been at the Bar for varying periods of time was selected as follows:

<i>Sub-group</i>	<i>Female</i>	<i>Male</i>
QCs	4	5
Juniors at the Bar for more than 10 years	9	8
Juniors at the Bar for 5–10 years	8	8
Juniors at the Bar for less than 5 years	4	4

It was initially intended to include a separate sub-group of junior barristers of more than 20 years’ standing, but there were insufficient numbers of women in this subgroup to enable a random sample to be taken from it.

1.6.9 The relative numbers of each sub-group at the Bar as a whole, and of women and men within each sub-group, are shown in Figure 1.²⁶ Clearly, the various subgroups differ in size, and there are (sometimes vastly) unequal numbers of women and men in each sub-group. Thus, the proportions of each sub-group in the sample do not entirely reflect their relative proportions at the

24. A partial exception was the category of former barristers — see below.

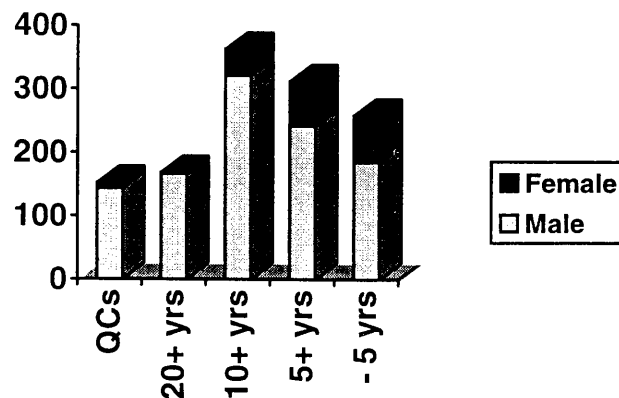
25. See for example Earl R. Babbie, *Survey Research Methods* (Wadsworth Publishing Co, Belmont, California, 1973), 83, 94–95; Donald P. Warwick and Charles A. Lininger, *The Sample Survey: Theory and Practice* (McGraw Hill, New York, 1975), 69–70, 98.

26. The numerical figures are:

<i>Sub-group</i>	<i>Female</i>	<i>Male</i>	<i>Total</i>	<i>Female %</i>
QCs	9	143	152	6
Juniors at Bar more than 20 years	2	166	168	1
Juniors at Bar 10–20 years	42	321	363	12
Juniors at Bar 5–10 years	71	241	312	23
Juniors at Bar less than 5 years	74	184	258	29
<i>Total</i>	198	1055	1253	16

Bar, and neither do the proportions of women and men in the sample reflect their relative proportions in each sub-group.

Figure 1: Distribution of Women and Men at the Victorian Bar



For the purposes of this study, it was considered more important to include adequate representation of QCs and more experienced members of the Bar, and adequate representation of women and men in each sub-group in the sample, than to reflect accurately their respective overall proportions. Otherwise, for example, women would have been excluded altogether from some of the sub-groups in the sample, and would have been so minimally represented in others as to make it impossible to gain any diversity of women's views. In a study concerned with opportunities for and experiences of women at the Bar, this would have been an unacceptable result.

1.6.10 The ages of the male barristers in the interview sample ranged from early 30s to late 50s (average age 45), while the ages of the female barristers ranged from late 20s to mid 50s (average age 42). This difference in ages between the two groups is not significant.

1.6.11 Women and men in the sample had largely followed similar paths to the Bar. Similar numbers had gone straight to the Bar after articles (three women: two men), practised as a solicitor (17 women: 18 men) or worked in another sector (three women: five men). Three of the women and two of the men had been judges' associates. Both female and male barristers practised in a wide range of courts and areas of law, although more men than women practised in the Supreme Court (14:9) and twice as many men practised in the Supreme Court than in the Magistrates Court (14:7). As noted earlier, there was no significant age difference between the interviewees that might explain this pattern.

Solicitors

1.6.12 A total of 40 solicitors responsible for briefing within their firms or organisations were interviewed. A sample of law firms (derived from a list of law firms provided by the Law Institute of Victoria), government/public sector agencies and community legal centres was chosen as follows:

<i>Size/Nature of Firm</i>	<i>No.</i>
Large private firm	11
Medium-sized private firm	9
Small private firm	10
Government/public sector agencies	8
Community legal centres	2

The categorisation of private firms as small, medium or large was in accordance with the categories used by research staff at the Law Institute.²⁷ Again, the sample does not reflect the relative overall proportions of the different types of firms and organisations. The great majority of private law firms are small firms. On the other hand, large firms are likely to be disproportionately involved in briefing counsel. Indeed, several of the small firms selected in our initial sample were unable to assist with the research, as they had no experience of briefing barristers. This necessitated a further process of sampling until a sufficient number of small firms with briefing experience was included. Since the purpose of interviewing solicitors was to gain information about briefing practices, a sample was constructed that enabled this focus to be maintained, while at the same time ensuring an adequate representation of all major groups of firms/organisations.

1.6.13 Private firms selected in the sampling process received a letter inviting the firm's participation in the study and requesting the firm to nominate a solicitor with briefing responsibilities to take part in an interview. The firms' choices resulted in interviews being conducted with 18 partners, three senior associates, five junior solicitors and four sole practitioners from the private profession. Fifteen of these interviewees were female and 25 were male.²⁸ The status of these practitioners was as follows:

<i>Status</i>	<i>Female</i>	<i>Male</i>
Partners in private law firms	4	14
Senior Associates in private law firms	3	0
Junior solicitors in private law firms	4	1
Sole practitioners	1	3
Government/agency lawyers	1	7 ²⁹
Community lawyers	2	0

1.6.14 The areas of law covered by the various firms, legal centres and agencies varied widely, and collectively included virtually all fields of practice.

Barristers' Clerks

1.6.15 Barristers' clerks were interviewed in order to gain a further perspective on briefing practices and the process by which barristers become established at the Bar.³⁰ Five of the twelve barristers' clerks currently operating at the Victorian Bar were randomly selected for interview from sub-groups categorised by list size, age and whether they were general or specialist in nature. The researchers relied on the Steering Committee and other members of the Bar to assist in determining these categories. Three of the clerks interviewed had general lists and two ran more specialist lists. One small list, one large list and three medium-sized lists were represented in the sample. The individual clerking experience of the interviewees ranged from less than five to more than 15 years, with an average period of nine years as a clerk.

Judicial Officers

1.6.16 The observations of judicial officers were sought for the study in relation to the performance of female and male barristers and in-court behaviour. A total of 20 judicial officers were interviewed, stratified as follows:

27. Large firms are those with nine or more partners, medium-sized firms are those with between four and eight partners, and small firms are those having one to three partners.

28. As noted in paragraph 1.2.2 above, 28% of practising solicitors in Victoria are female. Thus, female solicitors were over-represented in the sample (38%).

29. Two of the interviews at government departments or agencies were with a panel of lawyers. In each case, however, while other male and/or female staff were present, the main interviewee who answered most of the questions was male.

30. The role of barristers' clerks is described in Chapter 4.

<i>Court/tribunal</i>	<i>No.</i>
Court of Appeal	2
Supreme Court Trial Division	2
Federal Court	2
Family Court	3
County Court	4
Victorian AAT	2
Magistrates Court	5

1.6.17 The individual judicial experience of interviewees ranged from 18 months to 27 years, with an average of 11 years on the bench. Four of the interviewees were female: one each from the Family Court, County Court, AAT and Magistrates' Court.

1.6.18 As noted below, the study of court appearances undertaken in addition to the interviews did not incorporate appearances in the Magistrates Court. Nevertheless, Magistrates were included in the interview program for several reasons. First, the Magistrates Court has a relatively high proportion of women on the bench, compared to the other courts and tribunals in Victoria (paragraph 1.2.2, above). Second, significant numbers of women barristers practise in the Magistrates Court, and anecdotal evidence suggested that demeaning behaviour towards women barristers was more likely to be encountered in that Court than, say, in the Federal Court, Supreme Court or Court of Appeal. Thus it was considered appropriate to seek the views of Magistrates as part of the overall project.

Former Barristers

1.6.19 Ten former barristers who had left the Bar in the past five years were interviewed — five women and five men - in order to gain an understanding of the reasons why people leave the Bar, and whether these reasons are related to gender. A list of names of people who had left the Bar in the relevant period was provided by the Bar Council. A random selection of potential interviewees was made, and where possible their current contact details were also obtained from the Bar Council. In some cases, however, contact details were unavailable or were out of date. Further information was then sought from the clerks of the former barristers. This process enabled the researchers to contact and arrange interviews with five male and three female former barristers. The names of the remaining two female former barristers were provided to the researchers by current members of the Bar. Thus, the group of former barristers interviewed was largely but not wholly a product of random selection.

1.6.20 Since the number of barristers who have left the Bar in the past 30-odd years is unavailable, it is not possible to determine whether the total number of former barristers interviewed was disproportionate to the total number of current barristers interviewed (a ratio of 1 :5). It must be acknowledged, however, that former barristers as a group may hold less favourable views of the Bar than current barristers. Care has thus been taken in the report to give appropriate weight to the respective reviews of current and former barristers.

1.6.21 Two of the former barristers interviewed had left the Bar in 1993, three in 1994, three in 1996 and two in 1997. Their length of time at the Bar ranged from four to 13 years, although the women had stayed at the Bar for a shorter period of time on average (four and a half years) than had the men (eight years). Their ages ranged from early 30s to early 50s, although the women were also on average younger (36) than the men (42). Like the current barristers, the majority (eight of the ten) had gone to the Bar within three years of admission to practice. The other two (one female/one male) had practised for a considerable period before joining the Bar. Prior to

going to the Bar, again like the current barristers, they had been judges' associates, government legal or policy officers, or solicitors in private practice. The interviewee who stayed at the Bar longest had joined directly from the Leo Cussen course. The areas of law in which they had practised at the Bar included commercial, crime, civil, common law, town planning and family law. They had worked in the Magistrates, Children's and County Courts, and undertaken Practice Court work and chambers applications, but had not otherwise "progressed" to the higher courts.

1.6.22 Four of the five women interviewees were now employee solicitors or solicitor-advocates, with one employed in a government department. By contrast, only one of the male interviewees was now an employee solicitor; one was a partner in a large law firm, one a sole practitioner, one a government policy adviser and one had left the law altogether. The different destinations of men and women appear related to the differentials in age and years at the Bar between the two groups, although the courts in which they worked indicate that the men had not been more "successful" at the Bar than the women. Interestingly, and contrary to popular perceptions, the women Bar leavers did not withdraw from the workforce (to care for children) but took up alternative employment. This point is explored further in the chapter on family responsibilities.

1.6.23 The large gender imbalance at the senior levels of the Bar, together with anecdotal evidence, suggest that there has been a higher attrition rate for women barristers over the years than for their male counterparts. In this respect, the 1979 British Royal Commission on Legal Services found that of those who were called to the Bar, 47% of the women had left within ten years compared to 13% of the men.³¹ While the fact that the women in this study's sample of former barristers had stayed at the Bar for a shorter period than the men lends support to the existence of a higher attrition rate for women, the researchers were unable further to statistically verify its existence or otherwise with the resources available to them. The matter could be definitively determined, however, if information on attrition rates and reasons for departure was routinely maintained by the Bar Council. Apart from enabling it to identify and combat any gendered patterns of departure on an ongoing basis, this information would also assist the Bar Council for the purposes of forward planning and internal review.

Recommendation 1: That the Bar Council gather, maintain and publish consistent information regarding entry to and attrition from the Bar, by gender. Attrition records should also include age, years at the Bar and reasons for leaving, obtained via exit interviews, a standard self-completion questionnaire, or other reliable method.

List Committees

1.6.24 In addition to the individual interviews, the researchers undertook two focus group interviews with Chairs of List Committees or their nominees, in order to gain an insight into the process of selection for lists, the meaning of being on a particular list, and attitudes to transfers between lists. Again, the interviews were semi-structured. The questions asked are also set out in Appendix A. In all, ten of the 12 lists were represented in the focus groups.

Use of Interview Data

1.6.25 Material from the interviews is used in two ways in the report. First, generalisations are made and inferences drawn based upon response patterns from the sample of interviewees. Thus,

31. Royal Commission on Legal Services, *Final Report* (Cmnd 7648, HMSO, 1979), cited in Menkel-Meadow, 'Feminization of the Legal Profession', 235. The Royal Commission also found that women barristers attributed the difference to the difficulty of obtaining a tenancy, while men thought that women left because they wanted to have children. This kind of difference in perception is discussed further in the chapter on family responsibilities.

for example, if a majority of barrister or solicitor interviewees said X in response to a particular question, it can be inferred that X represents the majority position or experience of barristers or solicitors as a whole. If there was a marked divergence between the responses of female and male interviewees to a particular question, it can be inferred that the question raises a 'gender issue' (i.e. that experience or perceptions on this issue are related to gender).

1.6.26 Secondly, quotations from interviews are used to illustrate particular points or to represent particular views that emerged in response to interview questions. As the discussion will make clear, such quotations do not always represent the majority position. In some cases, it is significant that a particular view has been expressed, even if it belongs to a minority or just one interviewee. For example, some accounts of gender biased treatment or discrimination may be isolated or infrequent incidents, but as has been pointed out elsewhere, "[t]he same might be said of trust account defalcations. It is not a question of how often it occurs; it is a serious occurrence every time it happens."³² The interviews inevitably elicited differences in personal experience, and accordingly, material reproduced will not always reflect the experience of the individual reader. Nevertheless, it is important for the report to describe matters that are relevant to the investigation of whether barriers exist to women's advancement at the Bar, and for members of the Bar to acknowledge the legitimate concerns of others.

1.7 Quantitative Study of Court/Tribunal Appearances

Aims

1.7.1 In addition to the interviews, the project included a comparative study of appearances by female and male counsel over a selected three-month period in six courts/tribunals. The aims of this study were twofold: to provide an objective measure of whether equality between female and male barristers exists in an important area of practice — courtroom advocacy — and to provide systematic data to test and supplement the views on briefing practices expressed in interviews by judges, solicitors, clerks and barristers themselves.

1.7.2 The six jurisdictions chosen for the study were:

- the Supreme Court — Court of Appeal;
- the Supreme Court — Trial Division;
- the Federal Court;
- the Family Court;
- the County Court
- the Victorian Administrative Appeals Tribunal.

The choice of the five courts listed was consistent with the aim of the study to gauge the success of women barristers in progressing to the level of substantive actions in the higher courts as opposed to making short applications and Magistrates Court appearances.

1.7.3 The High Court was not included in the study due to the small number of sittings in Melbourne during the study period, and the likelihood of a significant number of interstate barristers appearing at those sittings. Nevertheless, various High Court judges have produced statistics on the proportion of women barristers appearing before the Court. Justice Kirby, for example, has noted that:

32. Equalising Opportunities in the Law Committee, Law Council of Australia, 'Discussion Paper: Draft Conduct Rule for the Law Council of Australia on Discrimination and Sexual Harassment', 13.

In a year and a half of cases before the Court I have seen, I suppose, hundreds of barristers and heard from at least 200 of them, exercising a “speaking part” before the Court. Yet in that time I have only seen and heard from six women advocates. There have been a few more juniors — but six have risen to the podium. So in terms of numbers . . . the proportion of women appearing as counsel before the High Court of Australia and speaking to the Court is . . . probably as low as two or three percent.³³

Similarly, Justice Gaudron has pointed to the figures for the year 1996–97, in which:

Seventy-three matters came before the Full Court, with women presenting argument only on two occasions. On the assumption that there were two parties to each of the Full Court matters an assumption which errs considerably on the side of caution — the percentage of women to total advocates was 1.4 per cent. They were slightly more visible and more audible in special leave applications, with women appearing in the role of advocate on 14 occasions out of 276, giving an overall percentage of 2.5.³⁴

1.7.4 While the gender imbalance noted by Justices Gaudron and Kirby is striking, it must also be acknowledged that High Court practise in itself is unusual — very rare for women, but atypical for men as well. Only one woman and two men of the 50 barristers interviewed for this study listed the High Court as one of the courts in which they practised (the woman as a junior, and one of the men formerly rather than currently). The courts included in the study provide a better basis for comparison among the majority of female and male barristers.

1.7.5 The Magistrates Court was excluded from the study for reasons of both status and logistics. The Magistrates Court is an undeniably important venue for barristers to learn and develop their advocacy skills, but, as noted above, the study was concerned with the question of whether women barristers enjoy equality of opportunity in moving beyond the Magistrates Court. In addition, while gathering the required data from the other five courts was a feasible exercise, obtaining similar data from Magistrates Courts would have consumed far more time and resources, and was considered impractical. By contrast, it was possible to include the Victorian AAT in the study, since it is a relatively small jurisdiction operating from a single and easily accessible location. The AAT is also unique in having a comparatively high proportion of women — 40% — among its full-time members.

1.7.6 In each court and tribunal, a three month sample of appearances was taken, which can be assumed to be reasonably representative of the overall picture of appearances in those jurisdictions during 1997. In the Supreme, Federal and Family Courts and the AAT, the three month period ran from August to October 1997 inclusive. In the County Court, due to an unavoidable delay in commencing data collection, the sample period ran from September to November 1997 inclusive. The slightly different sampling period makes no difference to the validity of the sample from each court or of comparisons between them. More importantly, neither period was affected by any distortions such as vacation times or pre-vacation rushes.

1.7.7 It should be noted that the focus of the data gathering was on *court appearances* rather than just *briefs*. It was not intended to investigate the relative proportions of women and men briefed in all cases coming before the relevant courts and tribunal during the study period. Rather, the project was more specifically concerned with advocacy experience — the instances in which female and male barristers were afforded the opportunity to be seen on their feet and to exercise their advocacy skills. This focus was chosen because of the centrality of advocacy to the definition of a barrister, and to her or his reputation and prospects of advancement. The question, then, was whether women barristers enjoy equal access to this quintessential barristerial activity.

33. The Hon. Justice Michael Kirby AC CMG, ‘Women Lawyers — Making a Difference’ (1998) 10 *Australian Feminist Law Journal* 125, at 130.

34. The Hon. Justice Mary Gaudron, ‘Speech to Launch Australian Women Lawyers’, 122.

1.7.8 Moreover, it would have been both impractical and misleading to gather data on all cases in the relevant court and tribunal lists during the period of the study. Details of counsel, briefing solicitors and so forth may have been unavailable in many cases which settled just prior to hearing; recording the necessary details for every case would have imposed an intolerable burden on the researchers and/or court staff; and the data set would have been heavily weighted with interlocutory and practice matters of short duration, many of which may have involved appearances by solicitors rather than barristers. For example, directions hearings were included during piloting of the data collection sheets in the Federal Court. It became clear from this exercise that the volume of records generated would be too great for the resources of the project, and would not reflect its main aim of determining whether advocacy opportunities were linked to gender.

Data Collection Procedure

1.7.9 Permission was gained from each court and tribunal for court staff to be involved in the data collection process. In the Court of Appeal, Supreme Court trial division, Federal Court and County Court, data was recorded by judges' associates. Court officers undertook the data recording task in the Family Court, while AAT members themselves recorded data in that tribunal. In each case, meetings were held with the relevant staff to brief them on the project, explain the aims of the quantitative study, and receive their input on the best method of data recording in their court or tribunal. This was necessary to take account of differences in the kinds of matters heard, terminology employed, and the way the Registry was organised, in each court or tribunal. Data collection forms for each jurisdiction are set out in Appendix B.

1.7.10 In each case, staff responsible for data collection were asked to record only "matters of substance", and to exclude cases they felt did not meet that criterion. Directions hearings were given as a specific example of what not to include, unless such a hearing was quite substantial. Practice court and duty list matters were also generally excluded. In the Family Court, court officers were requested to record information about defended matters only. One potential disadvantage of the procedure adopted was that it left some room for court staff to exercise discretion as to which cases they would record, resulting in possible inconsistency between different staff members and different courts. Another was that some staff might not fill out data forms as diligently as others. The researchers attempted to address these issues by requesting further information when data forms were returned incomplete,³⁵ checking with the relevant court or tribunal when the number of data forms returned appeared low, and carefully checking the database to identify and remove obvious inconsistencies and anomalies. On the other hand, the great advantage of reposing the data recording function in court staff was that they were in the best possible position to accurately identify the sex of the barristers appearing before the relevant court or tribunal. Attempting to gain this information simply from appearance lists would probably have resulted in much less reliable, and much more missing data. Since the primary aim of the study was to compare appearance rates of female and male barristers, the advantages of the procedure adopted were considered to outweigh its disadvantages.

1.7.11 In all courts other than the Family Court, appearances in substantial cases before all judges (including cases heard on circuit) were recorded. In the Family Court, agreement was reached to record appearances before only two of the judges sitting during the study period (including cases heard on circuit). This resulted in a smaller relative sample being taken from the Family Court, and Family Court cases comprising only a very small proportion of the overall

35. In a small proportion of cases complete data could not be collected, as two judges of the County Court directed their Associates not to fill in certain information on the data form.

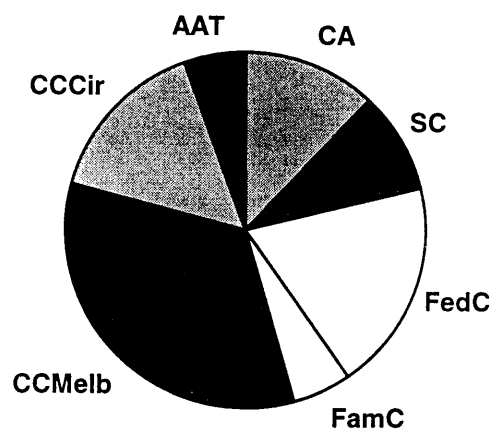
sample. However, since direct and standard defended matters are allocated randomly to different judges,³⁶ it can be said that the “two judge” sample is fairly representative and gives a reliable picture of the overall pattern of appearances in Family Court defended cases. In terms of the relative status of Family Court cases within the total data set, the Family Court data has, where appropriate, been weighted to reflect the fact that it constituted only a proportion of the total number of cases that would have been recorded within the study period, had all judges sitting been included in the study.³⁷

1.7.12 It might finally be noted that quantitative studies of this nature, and on this scale, are rarely attempted. The researchers are aware of only one similar survey, undertaken in the United States in the early 1980s, which investigated appearances by male/female and white/minority counsel over a 16 week period. That study was much more limited in scope, focusing on appearances before one federal court judge in the Northern District of California, and gathered less information in relation to each appearance.³⁸ For the present study, information was gathered on each case concerning the court, presiding official(s), month hearing commenced, area of law, numbers of female and male counsel appearing, identity and seniority of counsel appearing, briefing firm or organisation, duration of hearing and type of hearing (see Appendix B). This information was converted into numerical codes, which were then entered into a database, and analysed using SPSS statistical software.

General Profile of Cases in the Sample

1.7.13 In total, 782 cases were recorded in the sample. Weighting up the Family Court data brings the total to 805. The distribution of cases by court is shown in Figure 2. In all, approximately half of the sample consisted of cases in the County Court.

Figure 2: Distribution of Cases in sample by Court/Tribunal



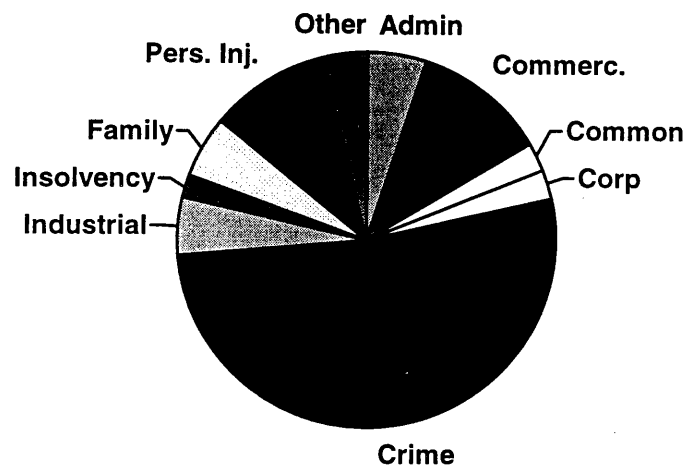
36. Family Court cases classified as “complex” are generally allocated to a specific judge, but this judge was not included in the sample.

37. The two judges included in the sample sat for a total of 18 weeks during the study period, while the total sitting time for all Family Court judges during that period was 39 weeks. The two judges in the sample therefore represented 46.2% of total sitting time. To render the Family Court data comparable to the data from the other courts, a weighting factor of 2.17 has been applied.

38. Barbara Bryant, ‘Sex and Race in the Federal Court: A Courtroom Survey’ (1983) 13 *Golden Gate University Law Review* 717. The findings of that survey indicated that women were more likely to appear for the government than for private firms, and in civil rather than criminal matters. The different structure of the profession in Australia and the US, and the age of the US statistics, renders them of limited relevance to the present study, although the government/private distinction does seem to be borne out in the present study: see Chapter 4.

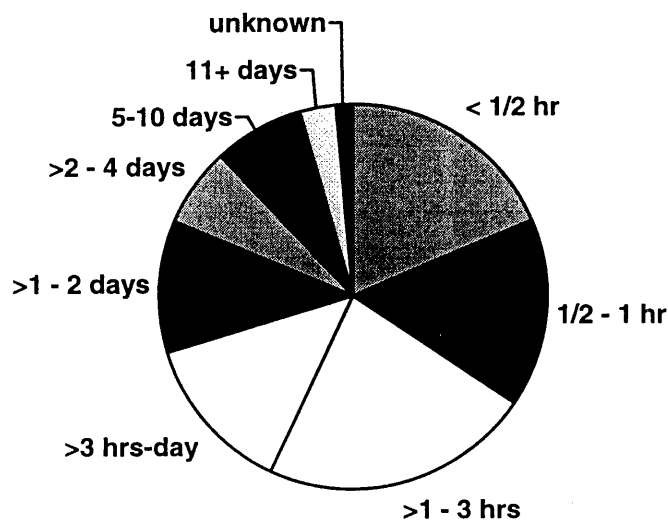
1.7.14 The distribution of cases in each area of law is shown in Figure 3. The “Administrative” area includes FOI, guardianship and migration; the “Commercial” area includes intellectual property, planning/building and trade practices; the “Personal Injury” area includes transport accident and WorkCover cases; the “Other” category includes admiralty, probate, tax and practice matters. By far the largest single category, with 52% of cases in the sample, was crime. This result is not surprising given the predominance of County Court cases in the overall data set. The only other areas with any significant numbers of “substantial” cases were commercial law (12%) and personal injuries (10%). These cases were not concentrated in any particular court but were spread across both state and federal courts and (in the case of commercial matters) the AAT. Administrative, industrial and family law made up 5% each of the sample. The administrative and industrial cases were largely concentrated in the federal arena.

Figure 3: Distribution of Cases in sample by Area of Law



1.7.15 The duration of cases in the sample ranged from less than half an hour to 11 days or more, with the majority of cases clustered at the lower end of the spectrum. 71% of cases ran for a day or less, and more than half (57%) ran for three hours or less.

Figure 4: Distribution of Cases in sample by Duration



1.7.16 The distribution of duration of cases did vary significantly between the different courts and tribunal, as shown in Figure 5. The County Court had the highest proportion of short cases, followed by the Court of Appeal and the Family Court. The Supreme Court Trial Division had the highest proportion of long cases, followed by the Family Court and the County Court. The Federal Court had the highest proportion of cases lasting between one and three hours.

1.7.17 The distribution of types of hearing in the sample is shown in Figure 6. The different categories (e.g. “notice of motion”, “final hearing”, “trial”) are in accordance with the terminology employed in the relevant court or tribunal. Overall, approximately one third of the cases in the sample were trials or final hearings, one third were appeals, and one third were other types of hearings. The high proportion of appeals is due to the fact that in addition to cases in the Court of Appeal, a large number of County Court cases were appeals from the Magistrates Court. Figure 7 shows the distribution of types of hearing for each court.

Figure 5: Duration of Cases in sample by Court/Tribunal

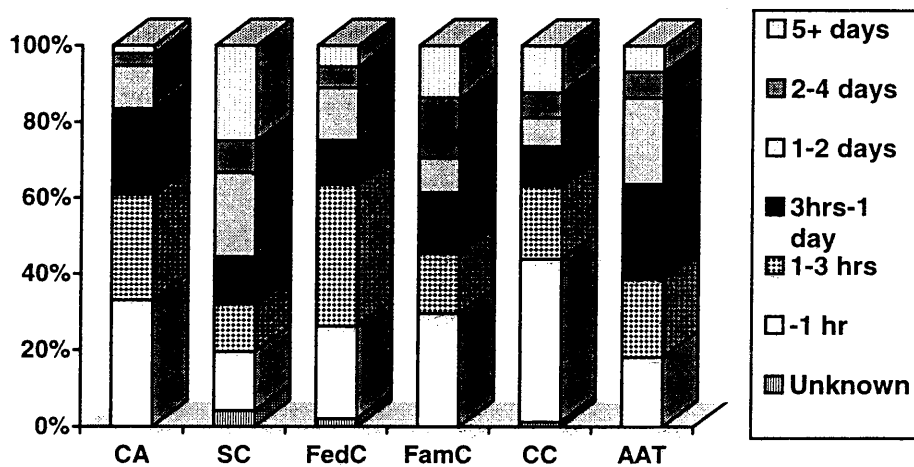


Figure 6: Distribution of Cases in sample by Hearing Type

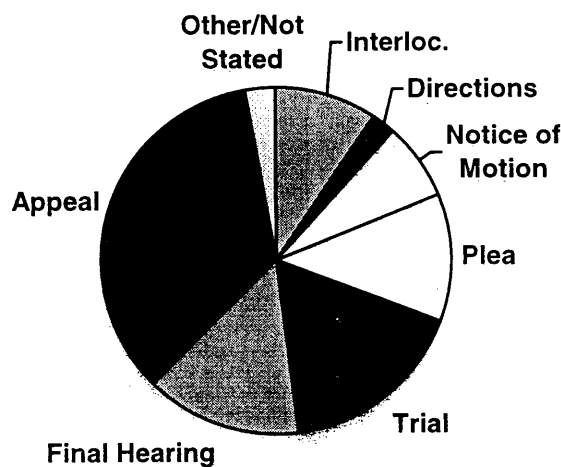
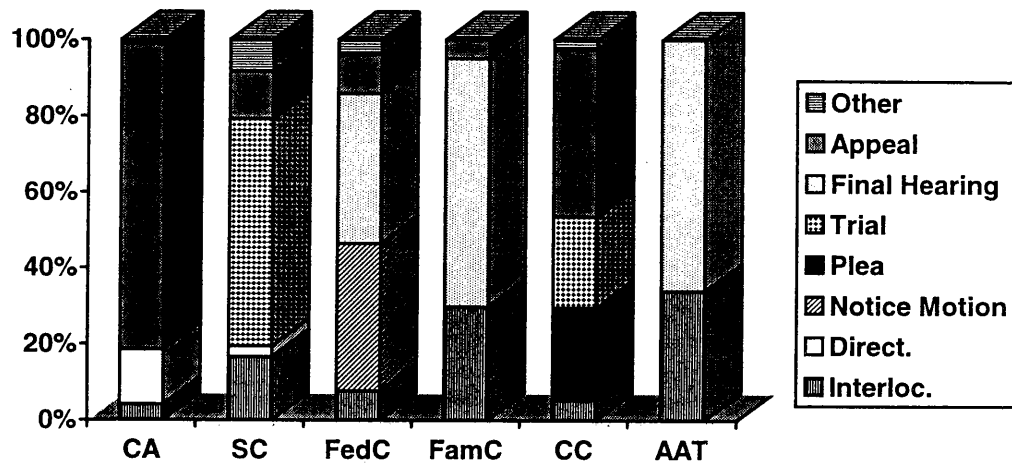


Figure 7: Hearing Type in sample by Court/Tribunal



1.7.18 The breakdown of courts, area of law, duration of cases and hearing type by gender is discussed in chapter 4.



Chapter 2

BARRISTERS' MOTIVATIONS AND ASPIRATIONS

2.1 Introduction

2.1.1 As noted in the previous chapter, this research was motivated by concerns about the paucity of senior women at the Bar, and the slow rate of female appointments to the bench. One possible reason for these phenomena is that women and men come to the Bar with different goals and personal aspirations. Women and men may value different achievements at the Bar and in life generally, and hence traditional "male" measures of success (achieving seniority, prominence, judicial appointment) may not be relevant for women. Looking at this issue from the opposite angle, Deborah Rhode has pointed out that observed gender inequalities have often been explained as being due to cultural differences and/or individual choices.¹

2.1.2 In light of these possibilities, the research set out to determine through the interviews with barristers whether there are any gender differences in women's and men's reasons for coming to the Bar, aspirations, expectations, or measures of success at the Bar. It also sought to determine whether interviewees perceived any gender-related barriers to success.

2.2 Reasons for Coming to the Bar

2.2.1 Interviewees were asked their reasons for coming to the Bar. They were not asked to specify a major reason, thus individual interviewees may have given more than one reason, and reasons summarised here are not mutually exclusive.

2.2.2 Six women and nine men said they had "always wanted to be" or had been interested in being a barrister:

I'd wanted to be a barrister since I was a little boy . . . didn't feel like a real lawyer in solicitor's office . . . it's freer and more interesting at the Bar (male barrister).

It really was like a calling . . . (female barrister).

A further four women and two men said they had come to the Bar because they liked advocacy.

2.2.3 The other two major reasons given by both female and male barristers for coming to the Bar represented two sides of the same coin: they were attracted by the independence and autonomy offered by the Bar, and/or did not wish to (continue) practice as solicitors.² The former reason was cited by seven women and eight men, while the latter reason was given by nine women and ten men.

I was attracted to working with the law rather than organising things as a solicitor, as a barrister you go straight to the issues (male barrister).

1. Rhode, 'The "No Problem" Problem', 1765. The most notorious example of this reasoning occurred in the US sex discrimination case of *EEOC v Sears, Roebuck & Co*, 839 F.2d 302 (7th Cir., 1987), where the judge accepted the company's argument that the distribution of male and female sales employees into higher paying (commission) and lower paying (salaried) jobs respectively was the result of women's own choices rather than discriminatory recruitment practices. See also Vicki Schultz, 'Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument' (1990) 103 *Harvard Law Review* 1749.

2. On this point, see further the Victoria Law Foundation study on career (dis)satisfaction of solicitors: Herron, Woodger and Beaton, *Facing the Future: Gender, Employment and Best Practice Issues for Law Firms* (1996).

I disliked being a solicitor, not well paid and didn't like time sheets . . . (female barrister).

I prefer to be my own boss; as a solicitor you're always accountable . . . was offered a partnership but didn't respect some of them (male barrister).

I enjoyed advocacy as a solicitor. I'd rather do it full time than do all the paperwork as well . . . (female barrister).

2.2.4 The only gender difference that arose in this respect was that women seemed to have stronger reasons for desiring to escape from a law firm. Five of the women but none of the men said that they had hated articles, or had been treated badly in their firm.

I was disgruntled with my treatment at the law firm. The partners were very, very sexist, unfair and unprofessional.

These comments indicate that sexism in some law firms may operate as a strong "push factor" encouraging women to join the Bar.

2.2.5 Minor gender differences emerged among the other reasons given by barristers for coming to the Bar. More men than women (4: 1) mentioned that they had followed in the footsteps of a family member at the Bar:

I always wanted to be an advocate. My grandfather had been a barrister, I come from a long line of legal family and I prefer to be on the front line, rather than in the trenches (male barrister).

On the other hand, several more women than men (7: 2) said they had been advised, supported or influenced in their decision to come to the Bar by a mentor or friend:

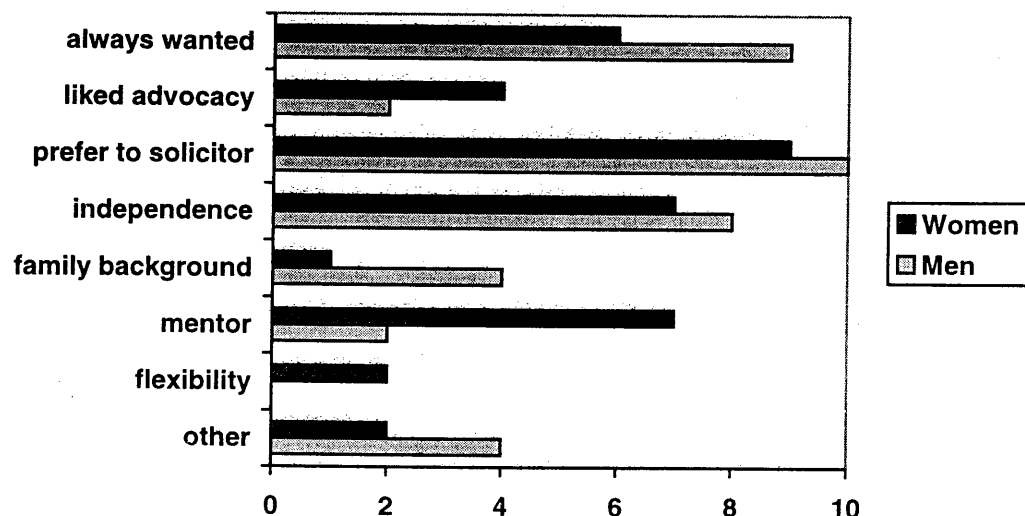
I was persuaded by another woman at the Bar . . . she was influential in my decision . . . (female barrister).

After being an Associate there was no going back to being a solicitor, the judges assume that you are going to the Bar, which inspires you with a bit of confidence (female barrister).

Two women but none of the men raised the need for flexibility in caring for children as a reason they had chosen the Bar. The extent to which they had found such flexibility to exist is discussed in Chapter 5.

2.2.6 Overall, women and men interviewed had joined the Bar for substantially similar reasons, although mentoring, enjoyment of advocacy and childcare considerations played a somewhat greater role for women, while long-held ambitions and family background played a somewhat greater role for men. The pattern of reasons given by women and men is shown in Figure 8.

Figure 8: Reasons for Coming to the Bar



2.3 Confidence of Success

2.3.1 The question as to whether interviewees had been confident of succeeding when they came to the Bar was answered by more men than women. Ten women said they had been confident while four said they had not been confident. Fourteen men said they had been confident, with six saying they had not been confident. These figures show a similar “confidence rate” (around 70%) between women and men who addressed the question.

2.3.2 Reasons for having confidence varied widely:

I was confident, that’s the sort of person I am. [I was] more mature than others [when I came to the Bar] . . . (female barrister).

I had the confidence of youth, I was physically fit and had no worries (male barrister).

I was confident because I knew family law and I had a very good clerk (female barrister).

It was an age of great confidence, virtually everyone who came to the Bar and wanted to, succeeded (male barrister).

I was confident and that came from my naive attitude . . . I thought that like other things in my life I would take to it easily (female barrister).

Three women and three men said they felt confident because they had had experience with doing appearance work as solicitors, and three women and four men said they felt confident because they had good contacts with solicitors and therefore expected to receive briefs:

I was confident because I was in court during articles . . . I had had some experience, I was with a good clerk and had a stable of mates who I expected to brief me, which they did . . . (male barrister).

I was known by labour law firms and there was a need for people in this area, so I thought I would be OK (female barrister).

2.3.3 On the other hand, seven women but no men admitted to having had no contacts or connections when they came to the Bar:

I didn’t want to be a solicitor; I found court work exciting . . . I didn’t have experience or contacts, didn’t go to the right school, no relatives in the law . . .

I was confident but prepared for lean times because I was from interstate and didn’t have any contacts.

For these women, however, lack of contacts appeared to operate more as a challenge than as a deterrent. They were either determined to pursue a career at the Bar despite their initially limited connections, or confident of success for other reasons.

2.4 Measures of Success

2.4.1 As with reasons for coming to the Bar, women’s and men’s notions of what makes a successful barrister were largely similar, with some minor gender variations. Again, individual interviewees sometimes gave multiple responses, rather than being asked to name a single most important criterion. It should be noted that definitions of what constitutes a successful barrister may differ from a barrister’s own aspirations. Definitions of success may be applied to others but not to oneself, and tend to include a conventional or cultural element rather than reflecting purely personal views. While this section deals with measures of success, interviewees’ personal aspirations are discussed in the following section.

2.4.2 The single largest response from both women and men to the question of what makes a successful barrister was “being busy”, although more men (14) than women (9) subscribed to this measure. The next largest categories of response were attaining peer recognition/respect (7 women: 6 men), and being a skilful lawyer (5 women: 8 men):

Being busy, peer recognition, getting to work in the areas that you want to (female barrister).

Reputation matters most . . . how you are regarded by your peers and the bench, must maintain your integrity . . . skill as an advocate and how often you appear in court (male barrister).

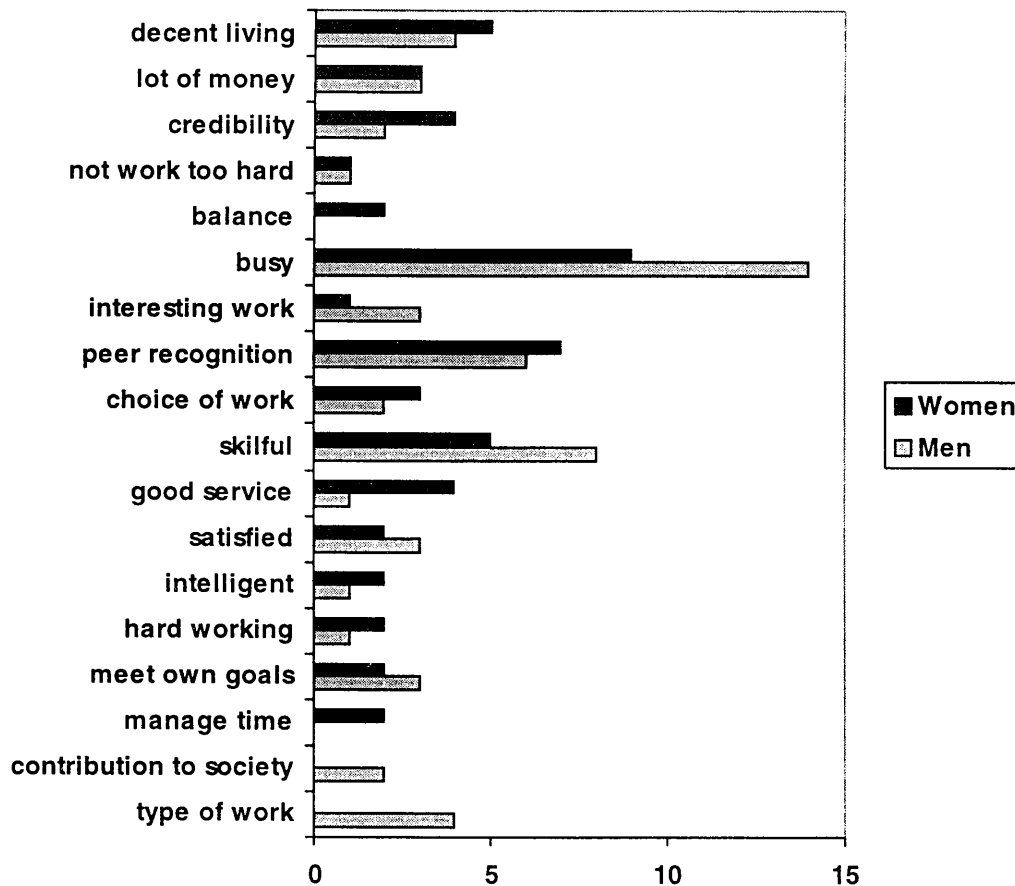
Someone who gets a lot of work (female barrister).

One that has plenty of work, a good reputation amongst peers, good on their feet, in court, advising clients properly . . . (male barrister).

2.4.3 A few definitions of success were mentioned only by women: providing good service to solicitors and/or clients (4); coping with pressure, managing time effectively (2); and attaining a balance between work and the rest of life (2). The measures that were mentioned only by men related to doing a particular type of work (e.g. appearing in important cases) (4); and making a contribution to society (2).

2.4.4 While a number of interviewees mentioned economic measures of success, they were divided as to the nature or value of such a measure. Three women and three men said that a successful barrister was one who made a lot of money, while a further five women and four men preferred to define success in terms of making a good, reasonable, or adequate living. Two women and one man specifically rejected financial measures of success at the Bar. The full range of definitions of success elicited in the interviews is set out in Figure 9.

Figure 9: Measures of a Success



2.4.5 As noted earlier, measures of success put forward by interviewees may reflect their understanding of generally-held views rather than the standards that are most meaningful to them. Thus, when testing for gender difference in this area, one might expect to find more convergence between the views of female and male barristers on the question of measures of success than on the question of personal aspirations. In this context, one of the most interesting things about the measures of success suggested by interviewees was their great number and diversity.

2.5 Aspirations

2.5.1 The women barristers interviewed were quite noticeably more conventionally ambitious than their male counterparts. More women aspired to take silk (5 women: 3 men), to attain judicial appointment (8 women: 3 men), and to make (more) money (4 women: 1 man). The other notable aim mentioned by women was to have credibility and/or recognition for their skills at the Bar (5 women, no men).

2.5.2 On the other hand, there were also more women who specifically did not wish to become a QC (3 women: 2 men) or a judge (5 women: 2 men). The following comments from women explain these choices:

The whole nature of QC has changed . . . not required to hold silk the way you used to, it means ever so much less . . . I always thought that it would be a greater honour than being a judge because being a judge can be so political . . .

I have no real desire to be a judge; I consider it a very unfortunate life, very lonely, isolated . . . cut off from your friends . . . I consider myself far too young to even think about it . . . between 55 and 60 you might consider it . . . It's . . . boring.

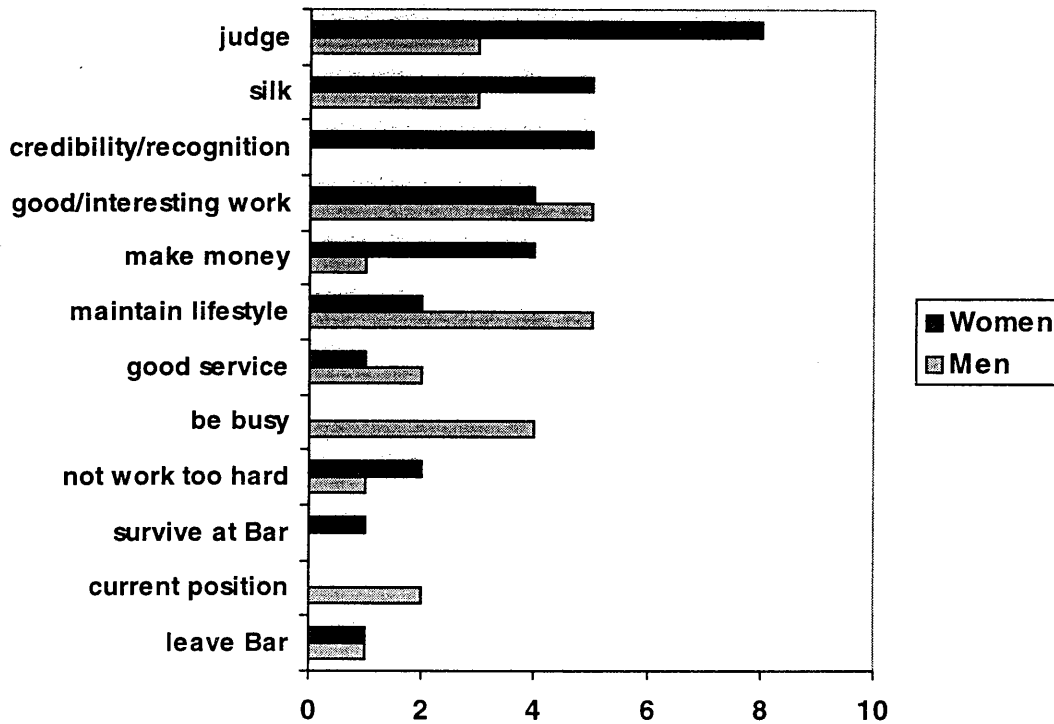
I used to aspire to the bench, but I don't accept that the latest ones have been based on merit, so I'm less keen.

The perceived tokenism of recent female judicial appointments received some comment, and is discussed further in Chapter 6. One woman, however, reported that her ambitions had changed because "I thought by now women would be more accepted into the ranks of the judiciary . . . It used to be an attractive potential . . ."

2.5.3 The major areas of aspiration mentioned by men were to maintain their current lifestyle (5 men: 2 women); do good or interesting work (5 men: 4 women); and be busy (4 men: no women). Thus, the men's goals were ones that related to individual satisfaction and that could be measured personally, while the women tended to articulate goals involving external recognition, achievement of which would be observable to others in the legal community.

2.5.4 The overall range of aspirations listed by interviewees was narrower than the range of measures of success, as shown in Figure 10. It is also clear from the Figure that while there is a gender difference in barristers' aspirations, the nature of the difference is not such as to explain women's relative lack of seniority at the Bar and promotion to the bench. Rather, it raises further questions as to why women's ambitions may not be achieved.

Figure 10: Aspirations



2.6 Satisfaction with Position/Progress

2.6.1 One possible reason for the disjunction between women's aspirations and their current position at the Bar (see paragraph 1.2.2) is that achievement of those aspirations (particularly to take silk and receive judicial appointment) is located some considerable time in the future. This hypothesis is partly borne out by the fact that the women who said they wanted to become QCs or judges had an average age younger than the average for all interviewees. Moreover, the majority of both female and male barristers interviewed indicated that they were satisfied with their current position or with current progress towards their goals.

2.6.2 There were, however, fewer women than men who expressed satisfaction with their current progress (14 women: 17 men), and more women who were either equivocal or unsatisfied (7 women: 4 men). It is difficult to draw conclusions from these small numbers, particularly as other lawyer satisfaction studies have yielded contradictory results on the question of gender difference.³ It is, however, important to listen to the voices of those who expressed dissatisfaction.

2.6.3 In the case of one male and one female barrister, dissatisfaction sprang from their own tendencies to be overly self-critical, so they were "never good enough". One of the other men admitted that his practice had been badly affected by the recession, which had undermined his confidence. A third said he would like to be busier more consistently, and would like to get more experience in criminal trials. The latter desire was more of a theme of the interviews with women

3. For example, American Bar Association and American Bar Foundation studies found that American women lawyers were more dissatisfied than men, but the Victoria Law Foundation's study of Victorian solicitors found men and women to be equally dissatisfied with their careers. See American Bar Association, in [Winter 1983] *ABA Journal* 1388; Ronald L. Hirsh, 'Are You on Target?' (1985) 12 *Barrister* 17; Robert Nelson, 'Preliminary Results from A National Survey on Lawyer Job Satisfaction', presented at Conference on Women in the Legal Profession, Madison, Wisconsin, August 1987 — all cited in Menkel-Meadow, 'Feminization of the Legal Profession', 251; Herron, Woodger and Beaton, *Facing the Future*. It should also be noted that the subject populations of these studies (focusing, respectively, on lawyers in a fused profession and solicitors, were not precisely comparable to that of the present study, which focused on barristers.

barristers. Two said they would like to have more experience in big cases or running cases on their own to develop their court skills; three specifically wanted more trial experience:

I would like to be doing more work on my feet. I've got a good paper work practice for now; I want to get some practice in front of a jury.

This point assumes significance in light of the court appearances study which found that women appear to be systematically excluded from jury work (see Chapter 4).

2.6.4 Two of the women interviewed expressed a level of bitterness not encountered in any of the interviews with male barristers:

If I could get out I would, I don't think it is particularly glamorous or great . . . But it is difficult to get out and do something completely new. I could use a bit more work.

I'm not satisfied with the way women have not been accepted in the profession . . . and disillusioned with the way access to justice is effectively denied to most people . . .

While these were isolated views within the interview sample, given the random sampling method for choosing interviewees, it is reasonable to assume that such views are reflected among at least some other women at the Bar.

2.7 Barriers to Success

2.7.1 Another possible reason why women's ambitions at the Bar might not be realised is that there are obstacles in the way of their success. In addition to being asked about current satisfaction, interviewees were asked whether they perceived any barriers to the achievement of their aspirations. While the majority of both women and men were satisfied with their progress to date, they had the opportunity, in response to this question, to identify barriers that they had encountered and overcome in the past, or that they expected to encounter at some stage in the future. Once more, interviewees were not confined to nominating one major barrier, and some gave multiple responses.

2.7.2 Over a third of both women and men saw no barriers to the achievement of their aspirations. Some barristers (both male and female) saw the need to network in order to get work as a barrier:

My barriers? . . . this place works on networking to a large extent; networking with solicitors and networking with other barristers and that's something that — I prefer to get work on the merits of the achievement in the brief rather than who I had lunch with (male barrister).

2.7.3 Beyond that, women and men diverged remarkably in the kind and number of barriers they perceived. Women were more likely to list more than one potential barrier, and several of the barriers they listed were gender-related, such as solicitors' reluctance to brief women, and family responsibilities:

women in my area don't get as good a go as they should . . . there are some solicitors and some clients who get very nervous when a woman is representing them . . . not when you are part of a team with silk, but when you are responsible for the whole brief.

Having children is a barrier — in terms of time commitment and psychological commitment, you wear a lot of guilt about working long hours and not seeing the kids as much and not doing the kind of things with them that their friends' mothers do . . . and you can't compensate for that by thinking that I am providing for the family as I imagine a lot of men do, because I have a husband who is working as well.

Moreover, such barriers were listed only by women, while other barriers were noted only by men. Overall, the barriers to success identified by interviewees were as follows

<i>Perceived Barrier</i>	<i>Women</i>	<i>Men</i>
No barriers	✓✓✓✓✓✓ ✓✓✓	✓✓✓✓✓✓ ✓✓✓✓
Networking requirements	✓✓✓✓	✓✓✓
Not “in” at the Bar/lacking right connections		✓✓
Solicitors’ reluctance to brief women	✓✓✓✓	
Lack of support from women solicitors	✓✓	
Clerk not promoting women	✓	
Lack credibility due to youth/non-English speaking background	✓✓	
Being young and unproven/getting established	✓	✓✓
Family demands/having children	✓✓✓	
Not prepared to work very long hours	✓✓	
Need to support family/financial responsibilities		✓✓
Not receiving junior briefs	✓	
Too much junior work	✓	
Not able to get work in desired area	✓	
Too specialised		✓✓
Downturn in work		✓
Legislative interference with area of work		✓✓
Silk appointment process		✓

2.7.4 The kinds of barriers mentioned by women in relation to briefing, networking and family responsibilities, are examined in more detail in Chapters 4 and 5. It is interesting that none of the women listed any features of the structure and environment of the Bar itself as barriers, whereas the interviews elicited a significant amount of discomfort and/or criticism in that area. This material is discussed in Chapter 3.

2.8 Conclusion

2.8.1 The research findings clearly indicate that women are serious and committed about their careers at the Bar. While there are minor gendered patterns in relation to reasons for coming to the Bar and measures of a successful barrister, the wide spectrum of views on these issues is also noteworthy. Women and men tend to differ amongst themselves at least as much as the two groups differ from each other on these points.

2.8.2 The majority of both women and men are satisfied with their current position or progress at the Bar, although there is limited evidence of a higher degree of dissatisfaction amongst women. A striking gender difference arises, however, in relation to perceived barriers to success. Equal numbers of women and men saw no barriers to the achievement of their aspirations. But of the 60-odd percent who did identify barriers, women and men mentioned quite different barriers and women perceived more barriers standing in their way. Some of these barriers were overtly related to gender difference. Thus, if women are to be encouraged and supported in the achievement of their high aspirations at the Bar, these gendered barriers need to be removed.

2.8.3 The rest of this report should be read in light of the findings set out in this chapter. They are fundamental to the consideration of women's status, opportunities and prospects of success at the Bar.

Chapter 3

BAR CULTURE AND ORGANISATION

3.1 Introduction

3.1.1 The culture and organisation of any workplace play a significant role in determining the experiences of those operating within it. For that reason, the research for this project included some exploration of these phenomena, both explicitly in the interviews with barristers and other legal personnel, and informally through the general research process. Analysis of the findings reinforces conclusions reached in other studies of workplaces in which low numbers of women render them “tokens” compared with larger numbers of “dominant” men,¹ and where women have generally been expected to accommodate the demands of a male-dominated institution rather than the converse — “that cultures . . . represent the most pervasive source of on-going discriminatory attitudes and behaviour . . . and are perhaps the hardest aspect of gendered organisational life to challenge”.²

3.1.2 A potential difficulty in investigating Bar culture is its indeterminate nature. As the interviews demonstrated, each individual’s experience of the Bar is different, making ‘culture’ difficult to define or accurately describe. An infinite number of factors, including gender, are relevant to how each person will perceive and describe the Bar. Consequently, the opinions of Bar culture from those operating outside the Bar environment will not necessarily reflect the views of those within it, and nor can the accounts of the individual barristers interviewed be taken as defining the collective experience. Kanter observed in her study of a corporate environment, that the workplace is “often equally mysterious to the people inside, whose views can be limited and parochial because they rarely get a sense of the whole”.³ Other research has also found that individuals may be reluctant or unable to identify themselves as being the subject of discrimination or gendered treatment.⁴

3.1.3 In addition, part of the difficulty in challenging workplace culture as a site of barriers to the career advancement of a particular group (in this case women), is that it arises from the attitudes and behaviours of the membership, which are unregulated by easily enforceable rules or guidelines.⁵ Similarly, many of the hierarchical structures of the Bar are informal, and the few formal ones are based on long-standing traditional arrangements that are not readily departed from.

3.1.4 Bearing these cautions in mind, the aim of this chapter is first, to examine issues that emerged from the interviews as a whole, regarding relevant aspects of Bar culture and organisation — informal and formal structures, common values and priorities of members, assumptions, habits and beliefs shared about ‘the way things are done’ — and how they may influence individual female and male experience of being a barrister and decisions about practice. Secondly, it

1. Kanter, *Men and Women of the Corporation*, 207.

2. Catherine Cassell and Sue Walsh, ‘Organisational Cultures, Gender Management Strategies and Women’s Experience of Work’ (1997) 7 *Feminism and Psychology*, 224.

3. Kanter, *Men and Women of the Corporation*, 212.

4. See generally Faye Crosby, *Relative Deprivation and Working Women* (Oxford University Press, 1982). This point is developed in more detail in section 3.6, below.

5. The Bar Rules do not directly deal with these matters, and arguably, are generally difficult to enforce in relation to barristers’ attitudes

considers ways in which aspects of Bar culture and organisation that may have an adverse impact on female barristers can be addressed.

3.2 Prevailing Masculine Culture at the Victorian Bar

3.2.1 In recent years, in the context of increasing numbers of women joining the Bar, observations made of its culture have often focused on conservative traditions of hierarchy and status and a prevalence of masculine values and behaviours derived from elite private boys' schools. These observations are not surprising given that the Bar is an institution established around practices that are in some cases centuries old, and the majority of the Bar's members are white middle class males, many of whom attended private boys' schools. In the present research, several interviewees, both female and male, reinforced this image of the Victorian Bar, describing it as "deeply conservative", "a big boys' club", and having "a 'boysie' atmosphere". They spoke about the competitive and often aggressive nature of barristerial practice, the "hero" status accorded to certain prominent male barristers around whom cliques informally arise, the frequent use of sporting analogies in the language of the Bar, and how many members call each other by their surnames, a practice common to private boys' schools. Another characteristic which featured prominently in descriptions of the Bar was the strong sense of camaraderie and willingness to assist others, the "open door policy" between barristers of all levels of seniority.⁶

3.2.2 Despite the increase in women practising at the Victorian Bar,⁷ a noticeable "feminisation"⁸ does not appear to have occurred. This lack of impact on the dominant masculine culture at the Bar is consistent with Kanter's findings that the token status of women prevents them from expressing their own values or culture until they reach a critical mass in the workforce. As noted in Chapter One, women currently comprise only 15.8% of the Bar Roll. It is a matter for speculation what effects a critical mass of women may have on the Bar and the way law is practised. Certainly from the point of view of creating a balanced workplace, a few of the younger male barristers interviewed spoke regretfully of their female contemporaries leaving the Bar, because they found it more enjoyable and "normal" to have a gender mix at work, as it had been at university. A few male judicial officials also spoke of valuing the input of their few female colleagues and their presence making a more pleasant workplace.

3.2.3 A speech by Justice Kirby of the High Court acknowledges (with considerable understatement) both the historical reason for the masculine nature of Bar culture and its potential to alienate the uninitiated:

Any professional group which for 700 years has comprised solely men is bound to have inherited attitudes which may sometimes seem unwelcoming to some new entrants.⁹

Justice Kirby puts women at the top of the list of new entrants who may not "share precisely the same background, attitudes and assumptions" as the traditional membership of the Bar. Justice Gaudron, also of the High Court, has similarly remarked on the "collegiate spirit and . . . ethos" of Australian Bars as being "not conducive to an atmosphere to which women easily adapt".¹⁰

6. Most barristers adhere to the informal practice of giving advice or assistance to others who walk through their door. There is also a tradition of allowing others to borrow books from Chambers, so long as a note is left on the shelf.

7. Noted in Chapter 1, paragraph 1.2.2.

8. Menkel-Meadow discusses this term in 'Feminization of the Legal Profession: the Comparative Sociology of Women Lawyers', at 222. At the simplest level it is about the profession containing more women. Others consider 'feminisation' to have occurred when "feminine qualities" such as empathy and nurturance are recognised, valued and expressed in the practice of law, or when "feminist" values have influenced both the practice and the substance of the law. See also Sharyn Roach Anleu, 'Women in the Legal Profession', 162.

9. The Hon. Justice Michael Kirby, 'Women Lawyers — Making a Difference', 132.

10. The Hon. Justice Mary Gaudron, from a speech at the Women Barristers' Association dinner, 9 June 1994, 13.

Justice Branson of the Federal Court, in pondering the reasons for the paucity of women at the top of the Australian legal profession, has spoken of “a significant problem” arising because “as women in our profession, we are made to feel that we are outsiders — not of the mainstream.”¹¹

Adapting to, or existing outside, the prevailing culture

3.2.4 The research findings indicate that feeling part of the “mainstream” at the Bar, or having a sense of belonging, is a complex matter which is largely indeterminate at a group level, but has significant effects for individuals in terms of peer recognition, work satisfaction, and “success” at the Bar. When asked if they felt comfortable in the environment of the Bar, more male than female barristers unhesitatingly said they did, and always had (10 women: 17 men). Many of these interviewees did not elaborate on their answers, other than to say, “yes, I love it”, “it really suits me”. The existence of a conservative/masculine mainstream culture was acknowledged by others who said they felt comfortable, and some whose answers indicated that it had taken time or effort to become comfortable, or at least tolerant of the Bar environment. Some described this mainstream as being maintained by people (mainly men) “whose whole lives are the Bar” in terms of practice and social life, some of whom were considered “egocentric” and “self-important”. However, several interviewees maintained they were largely unaffected by mainstream Bar culture because, as individual practitioners, they could choose to ignore it or could effectively create their own work environment amongst a small group of colleagues:

It’s a fairly stuffy, conservative environment, but because you are self employed, it doesn’t really matter, as long as you don’t offend anybody . . . it doesn’t matter if I find someone else pompous or slightly distasteful (male barrister).

I’ve always been busy, so not one to feel thrown onto the social contacts at the Bar . . . you practise on your own as a barrister so it is easy to feel comfortable if you are busy and have a few good friends around you . . . I’ve always been in chambers with congenial people (female barrister).

I find them a very serious lot, not terribly creative as a profession, and apart from my mates in family law, not terribly friendly . . . the serious ones are a bit hard to take (female barrister).

3.2.5 Small groups were described by some female (but no male) interviewees, as providing support and a sense of place for their members. They appear to operate as ‘sub-cultures’, with various bases: the close association that arises during the readers’ course; common areas of practice; proximity of chambers; sexuality (“there’s the gay group”); and some clerking lists that tend to “be a bit like family” and promote a sense of “a base and a source of information and assistance”. The recently formed Women Barristers Association (WBA) has also provided support and ended “a feeling of isolation” for some women for whom the low numbers of women at the Bar had made it difficult to find or gain entry to a sub-culture grouping of common interest.¹² Indeed, a few senior female barristers spoke about having relied on the friendship of just one other woman who had joined the Bar at the same or similar time, without whom they “would have been lost”:

One woman who went through the readers course with me, we provided support for each other emotionally until she left about four years ago . . . She would come to my room or I to hers, shut the door and have a bitch about everyone, burst into tears and everything, stuff you wouldn’t do in front of anyone else . . . I cried when she left, I was devastated and felt really isolated until WBA started up.

11. The Hon. Justice Catherine Branson, ‘Running on the Edge’, address to the Women Lawyers Association, Sydney Town Hall, October 15, 1997, 8.

12. But see also the comments made in opposition to the formation of a “special group” for women in para 3.5.15 below.

3.2.6 A few interviewees also spoke about the Bar accommodating eccentric individuals who operate way outside any sub-culture and the mainstream. One female barrister said “there are some who are completely mad”.

3.2.7 A male ex-barrister made the point that

no one individual can get to know over a thousand-plus barristers on the roll, so ‘the bar’ is effectively the small number of colleagues you encounter regularly.

In this context the interviews demonstrated the existence of strong collegiate ties at the Bar, exemplified by the words of a former barrister who spoke fondly of the colleagues he had shared a floor of chambers with:

That’s one of the things I miss. It’s a bit like being in the trenches. You have had a hard day in court and . . . it’s often only another barrister who will understand why you feel how you do, you swap war stories.

Similarly Helena Kennedy, a senior barrister at the English Bar, has written:

The Bar . . . can be wonderful . . . the camaraderie is one of the most pleasurable parts of the job. The fight in court can be tough and the locking of horns can be serious stuff, but only rarely does the wrangle live beyond the case.¹³

3.2.8 So far, the findings can be seen to create a picture of an environment in which conservative tradition and masculine values coexist with sub-cultural variation and eccentricity, with individuals able to choose the degree to which they participate in the mainstream. However, as the comments of the judges quoted earlier imply, in terms of achieving aspirations of a “busy practice”, silk, judicial appointment, or even the confidence to continue at the Bar, acceptance within the mainstream is important, and a sense of belonging within a small group of friends and colleagues may not be enough. This is a phenomenon that affects ‘non-mainstream’ men as well as women, as one male barrister with aspirations for judicial appointment attested:

It will be more difficult for me, I don’t have a big practice, I am not part of the mainstream at the Bar . . . and the informal structure of the Bar is such that you have to toe the line if you want to receive acknowledgment and support for a move onto the bench.

3.2.9 The interview findings also indicate that women find it more difficult to gain entry to, and support from the mainstream of the Bar. Although several interviewees identified successful women at the Bar as evidence that whatever your gender, “if you are good enough you will get ahead”, the fact that there are some female QCs, judges and juniors with busy practices does not of itself prove the existence of a level playing field in terms of the cultural aspects of the Bar. As the findings in Chapter 6 indicate, successful women at the Bar are likely to have worked harder than their male peers for the same degree of acknowledgment. In terms of Bar culture, they are likely to be those who have most easily adapted to mainstream norms, or to have shared the values of the mainstream to begin with. This is an occurrence common to other workplaces. For example in corporations, women in senior management have been observed to be “as conventional in their view of hierarchy, bureaucracy, management, as most of the men they join”.¹⁴ In relation to the Bar, one senior male barrister spoke about characteristics of successful women:

It’s true you can point to successful women, but generally their physical shape, size and demeanour . . . fit within the acceptable range . . . It’s a male benchmark that these women are able to fit into.

13. Kennedy, *Eve was Framed*. 41.

14. Cynthia Cockburn, *In the Way of Women: Men’s Resistance to Sex Equality in Organisations* (Macmillan. London. 1991). 71.

3.2.10 Other comments from interviewees indicate that some women are aware of being required to adapt to a benchmark male norm in order to be accepted. They spoke about: “having to have broad shoulders”; “just get[ing] on with your job and [being] accepted”; knowing “I have become hardened to the blokey atmosphere”; and being “so keen to be one of them that you sublimate your own needs”. There were also several women whose comments demonstrate that they have had difficulty adapting — they said they like the work of a barrister, but had problems with cultural aspects of the workplace. Some younger women spoke about the competitive nature of the work arrangements being “tough”, the informal hierarchies being “intimidating” and the number of men at the Bar making them feel like “interlopers”. Others mentioned sexism, “some of it deeply ingrained”, as being a factor. One woman said that it was more overt when she first came to the Bar 11 years ago, and “it wasn’t across the board, but I suppose that’s what it is like now, there are pockets of it”, often taking the form of “bitchy criticism” that undermines the achievements of women at the Bar (see paragraph 3.3.2 below).

3.2.11 Two of the five women who had left the Bar, had consciously resisted being acculturated and cited the “boys’ club” atmosphere as contributing to their decision to leave. One had experienced the Bar as “in some ways hostile to women”. She recalled a survey conducted amongst barristers in which a high proportion of questionnaires were returned with comments to the effect that women shouldn’t be at the Bar. She also mentioned that “you couldn’t put up a notice in the lifts about a WBA meeting without it being defaced”. She said of her decision to leave:

I just didn’t want to be around people like that, or in an institution where a substantial minority, who are quite vocal about it, felt like that.

3.2.12 Some solicitors had also observed female barristers undergoing an acculturation process. A few comments focused on the Bar having a “culture of arrogance” that meant that barristers “behave badly” in terms of the way they charge fees and service solicitors. For example one male solicitor said:

The female members adopt that norm very quickly . . . it’s a very egotistical club. Instead of breaking that down. [women] tend to join in.

Others commented more generally:

[Women] join the club very quickly, whether it’s because that’s their views or because they don’t want to rock the boat.

A lot of the female barristers who have survived have got used to the deprecating humour and they are skilled at it themselves.. some of them are now as bad as the males.

3.2.13 By contrast, five of the female barristers but only two of the male barristers interviewed said they did not feel comfortable in the Bar environment, and a couple more men said “it took some time to get used to”, pointing to a much smaller proportion of men who are affected by a process of adapting to Bar culture. Other responses to interview questions from male barristers, solicitors and judges acknowledged that women coming to the Bar face much greater difficulties in operating within the heavily male dominated environment of the Bar:

I am a member of the sex that has the predominance of numbers, so I am comfortable being in the majority . . . As the numbers of women at the Bar swell, they will feel more comfortable.

I’ve got no doubt at all that women barristers justifiably feel less comfortable in the Bar environment at times than male barristers . . . we are far too slow to empathise with others and to see things as they see them . . . It’s not always easy to be aware of the problems that others encounter.

3.2.14 However, overall, male interviewees did not demonstrate an active awareness of the cultural dynamics of the Bar and the difficulties that may be faced by women in this context. Their comments appeared to be based on an assumption of a level playing field, which is consistent with the findings of sociologists Atkinson and Delamont, in their research into barriers facing women in science, that cultural traits of members of the dominant male population were

treated by the initiates as a matter of natural talent, of personality, of the 'virtuality' of practitioners. That is, a central part of the essential performance skills of the occupation is never explicitly taught, but is believed to be innate, natural, inborn and personal.¹⁵

3.2.15 Atkinson and Delamont draw upon earlier work which distinguished two dimensions of any occupation: "indeterminacy" and "technicity". "Technicity is the explicit, rule-governed, codified part of the job", in the case of lawyers, legal skills and knowledge. "Indeterminacy" is:

the 'hidden curriculum' of job performance: all the tacit, implicit, unexamined ways of being a member of any occupational group: for rules of thumb, genius, flair and other unspecifiable aspects.¹⁶

In terms of defining potential barriers to women's advancement at the Bar, the findings of the present study are compatible with the conclusions drawn by Atkinson and Delamont that to be successful, women need to be "visible to core set members and/or members of core sets themselves":¹⁷

It is plausible to look for the marginal status women have held . . . as being due *not* to their lack of technical skills necessary for the jobs, but to their perceived failure to behave in ways which reveal their mastery of the indeterminate.¹⁸

Being part of the mainstream — family and educational background

3.2.16 Comments made in the interviews indicate that family connections in the law and "the right" educational background can make a difference to whether a person has or easily develops a 'sense of place' in the mainstream culture of the Bar (whereas opinions differed widely as to how influential these factors actually are in terms of procuring work: see Chapter 4).

3.2.17 In terms of family connections, both female and male barristers interviewed whose fathers or other family members were or had been barristers or judges did speak about feeling "at home" at the Bar.

I was acculturated early because my father and all his mates were on the bench or at the Bar. I'd heard all their war stories for years. (Male barrister)

It was probably easier for me because of my name and who my father was. (Female barrister)

3.2.18 Many interviewees played down the influence of having been privately educated at one of the "right schools" on getting ahead at the Bar.¹⁹ A number of solicitors, however, viewed the private school backgrounds of many male barristers as being heavily influential on Bar culture. One male solicitor said:

They all went to school together and nothing has moved on for them . . . they are still trapped in fourth or fifth form, and they move *en masse* from fifth form to grey [hair].

15. Paul Atkinson and Sara Delamont, 'Professions and Powerlessness: Female Marginality in the Learned Occupations' (1990) 30(1) *Sociological Review*, 90, at 106.

16. *Ibid.*, 95.

17. *Ibid.*, 104.

18. *Ibid.*, 107

19. See paragraph 4.4.19 below for educational details of interviewees from the Bar.

One male barrister readily admitted how his private school education had helped him “fit in”

If you have been to a school, at least they know of you and have some expectations . . . you’ve had the same teachers and you are part of a society . . .

3.2.19 Some of those who had not been to private schools spoke about feeling it had been more difficult for them to make connections and feel comfortable at the Bar. One woman who had left the Bar described her experience:

I still managed to make friends but I felt like an outsider. I was very young, there weren’t many women . . . and being [from an ethnic background] didn’t make it any easier. It would have been easier if I had been to a private school and lived in Canterbury or South Yarra . . . there are no nuts and bolts that I can show you as forensic proof . . . nor do I lack self esteem, I’m not insecure, but I was acutely aware that everyone seemed to be speaking an unspoken language that had to do with where they came from.

3.2.20 The differential significance of family and educational background for male and female barristers in developing a sense of belonging at the Bar is obviously difficult to quantify. However, it appears that women generally have a harder time, simply because they are obliged to adapt to the dominant values and behaviours at the Bar, which are set by the majority of members, who are male.

3.3 Exclusionary Cultural Practices and Events

3.3.1 Justice Branson’s remark that women “are made to feel not of the mainstream” (quoted earlier) carries the implication that there is some active force applied. A British researcher examining male-dominated workplaces has also detected that:

Men are often observed to generate a masculine culture in and around their work . . . that can make women feel, without being told in so many words, ‘you are out of place here’.²⁰

Pinpointing the ways in which men “actively create a cultural environment in which ‘women don’t flourish’”²¹ can be difficult, as many exclusionary practices are oblique and unconscious. Many also seem to be a consequence of habit and homosociability, having the appearance of normality within the male-dominated setting of the Bar. The interviews with barristers and other members of the profession revealed a number of incidents and practices which fall within this description, and some which are more blatant.

Criticising female barristers

3.3.2 One aspect of Bar culture highlighted in the interviews and generally in the research process, was the degree to which barristers share information, or gossip. Much of the information shared seems to be related to cases and legal issues, although the competitive nature of barristerial practice also appears to promote a notable measure of self-promotion and critical analysis of opponents’ performances.

3.3.3 In her study of “dominants” and “tokens” within a corporate environment, Kanter observed that tokens, highly visible because of their low numbers, were persecuted for “flaunting success”, and that there was an active backlash against those who were seen to advance too fast within the organisation.²² Similarly, in her investigation of various male dominated workplaces,

20. Cockburn, *In the Way of Women*, 65.

21. *Ibid.*

22. Kanter, *Men and Women of the Corporation*, 216–7.

Cynthia Cockburn, a sociologist, observed an undercurrent of resentment towards women, with some men feeling “damaged by the equality movement and the influx of women”²³ In the present study interviewees’ descriptions of the type of criticisms levelled at female barristers, especially successful ones, also accords with these observations. Female barristers reported:

If you get good work, they say it’s because someone owes you a favour or you are doing favours for someone else . . . in the end that kind of thing gets you down.

The Bar can be very hostile. There is still that stuff about if a woman asserts herself and does a good job, she is a hard nosed bitch. If she doesn’t perform well she shouldn’t be there because she is not committed to the job.

People are bitchy about others’ objective success . . . Some male barristers are particularly critical of women taking silk . . . I am very conscious that they are more critical of the women who are successful than the men . . .

3.3.4 As discussed further in the next chapter, a few female barristers also said they had been falsely accused of sleeping with influential senior barristers to get junior briefs or preferential treatment (see paragraph 4.4.52).

3.3.5 One young female solicitor was appalled at “the way that male barristers treat female barristers and the things they say behind their backs”. She described conversations she had heard while in court instructing male barristers:

They always pick on things like a woman’s appearance, her weight . . . “she’s such a girl, she can’t concentrate on the law for more than two seconds” . . . stereotypical things, her age . . . If it’s a young guy, it’s “Oh good, he’s trying”, if it’s a young female barrister it’s “She should have stayed as a solicitor for a few more years” . . . They always pick on gender . . . when they are backstabbing other blokes they never pick on gender [issues].

3.3.6 A few male interviewees admitted to hearing male colleagues engaging in conversations criticising female barristers. One ex-barrister said some of his peers were “very scathing” about women at the Bar. Another said:

At Friday night drinks there were a lot of sexist comments made about women, often in the context of talking about opponents, they were the subjects of the remarks.

3.3.7 The comment of a female barrister practising in family law implied that women at the Bar are also prone to “bitch about each other”, but the “bitchy” conversations between men appear to take place primarily when there are few women in attendance, for example at the pub after work and in other predominantly male settings. While it seems that much of the sexist criticism of women takes place outside their presence, the fact that some of it is said to their faces, and that it happens at all, creates an atmosphere that is unwelcoming to female barristers.

3.3.8 During the interviews, several male interviewees and a few females made critical comments about female appointments to the bench.²⁴ Some of their remarks, which were primarily focused on whether these appointments had been based on “merit”, again indicated a significant level of resentment against successful women.²⁵ Some demonstrated a belief that the appointments process had reached an unacceptable level of reverse discrimination in favour of women, despite the numbers of women on the bench still being objectively very low (see paragraph 1.2.2).

23. Cockburn, *In the Way of Women*, 67.

24. See also paragraphs 6.7.8–10 below.

25. This response has been noted in other studies of male-dominated workplaces. See for example, Cockburn, *In the Way of Women*, 67.

3.3.9 As noted earlier, attitudes and behaviours of barristers are unregulated by easily enforceable rules or guidelines. The Bar Rules do contain a provision that arguably applies to sexist criticism of female barristers and judges:

A barrister shall not publish, orally or in writing or otherwise, an opinion of the professional characteristics of fellow barristers or any of them in a way or in such circumstances as to impugn the dignity and high standing of the profession.²⁶

The sexist criticism described in the interviews clearly denigrates the professional credentials of those it is directed at, and as the Rule suggests, is damaging to the general image of the Bar. However, this form of criticism is obviously viewed as acceptable by at least a proportion of the members. The comments of the young female solicitor (mentioned earlier) who was appalled by the criticisms she had heard reinforce their potential to damage the Bar's image:

Apart from anything else, it's a lack of professionalism. I mean we might have a whinge about solicitors from other firms, but it's behind closed doors, not in front of clients and other professionals.

Recommendation 2:

- *that the Bar Council consider ways of enforcing Rule 11.1, to prevent sexist criticism of female members from undermining their professional credentials and thereby damaging the image of the Bar;*
- *that the Bar Council and senior members of the Bar take a leadership role in actively discouraging sexist criticism of female members, when it occurs within their earshot, and generally by their words and actions.*

Casual conversation around the Bar

3.3.10 The interviews also revealed that other casual conversation around the Bar may not be intended to exclude or directly belittle female barristers, but cumulatively may have these effects.

Sporting conversations

3.3.11 One example of this form of exclusion is conversation about the football and other sporting events which appear to be common in and around court and chambers. While some of the women interviewed said they follow the football and other sports and participate in these conversations, more said they had no interest in them and often felt excluded in these contexts. Obviously the same could be said of the converse situation — women having conversations on topics in which many men have little interest — although not surprisingly because of the far smaller proportion of women at the Bar, none of the male barristers interviewed complained of feeling excluded in such circumstances. Conversation about sport between judges and male barristers before the commencement of proceedings in court was identified by some female barristers as being especially alienating (see Chapter 6).

3.3.12 The remarks of a few male barristers identified underlying assumptions of neutrality and a denial of the cumulative discriminatory effects of these kinds of interactions. One said:

True it is that the clerk won't want to talk to some female barrister . . . so fervently about what the ballet was like last Friday night as much as he might want to talk to some male member of the Bar about what St Kilda did in the finals last Saturday. But that's more a matter of relationships . . . skill in communication, rather than a gender issue.

26. Rule 11.1.

Sexist jokes

3.3.13 When asked about whether sexist jokes or remarks are made around the Bar, many of the solicitors and barristers interviewed indicated that they thought the Bar was no different to other work and social environments, that this type of interaction happens “just like life generally” and that it is “not a big problem”. Two male solicitors gave examples of different contexts in which these interactions take place

It is still pretty prevalent within the environs of the court . . . that comes from all the stakeholders . . . police, court staff, lawyers.

If you get six barristers milling around outside courts and they are all men, there may be some sexist remarks made then, but you would expect that at the football or anywhere else. But you probably wouldn't get the converse, a group of women barristers milling around making sexist remarks.

3.3.14 A number of male interviewees said that many of these jokes and remarks were made when women were not present, indicating an awareness that they may offend. Other comments pointed to the belief that they “don't seem to bother anyone”. While there were many women who said they were comfortable with these interactions, and some who participated in them themselves, overall the comments indicated different levels of tolerance for this type of ‘humour’. A number of interviewees drew distinctions between the telling of jokes/remarks that are intended to belittle or not. Notably, young women barristers and solicitors were the least willing to dismiss sexist jokes and remarks as an inevitable component of professional and social interaction at the Bar. Some spoke about strategies for dealing with situations where they felt sexist humour was being used generally as a “put-down” or specifically to put them off their case. One young woman said she had a stock of “anti-male jokes to fire back” where necessary. Others spoke about having to “have a sense of humour” or a “thick skin”. A few said “it's important to stand up for yourself” in situations where the “humour” is inappropriate, but not to be “nit-picking about it”. One female barrister said:

If you're relevant to that conversation, then you just respond as appropriate at the time . . . if something is said that is inappropriate, I've always said something, I don't let it run. There is a difference between being really hardline about these things and knowing how to not go overboard .

3.3.15 Kanter made the observation that in these circumstances, “no one wants to be a wet blanket” and

an individual rarely feels comfortable preventing a larger number of peers from engaging in an activity they consider normal.²⁷

In this context, she also observed that there were “ways token women could demonstrate loyalty and qualify for a closer relationship with dominants”, with one of them being to “allow . . . themselves and their category to provide a source of humour for the group”.²⁸ The comments of some female interviewees indicate that this dynamic may be part of what is happening at the Bar. One senior female barrister said:

Some women laugh at these jokes . . . comments about legs . . . that are really put-downs . . . to ingratiate themselves with the men, and I find that distressing.

3.3.16 Making judgments about humour and especially sexist humour is extremely difficult. As many of the interviewees identified, the intention behind jokes and witticisms, whether conscious

27. Kanter, *Men and Women of the Corporation*, 228.

28. *Ibid.*, 229.

or unconscious, is important. Each instance has its own interplay of relevant circumstances and personalities. There is also a level at which, as one female solicitor said, “a good joke is a good joke” and even the most sensitive people will laugh. Another point raised by a few interviewees was that the courts can often be very tense environments in which many barristers and other participants sustain a high level of stress, which (non-offensive) well-timed jokes or remarks, often away from the proceedings, can assist in relieving. However, there is an argument that the cumulative effect of sexist jokes and remarks contributes to a masculine culture that is not welcoming and supportive of women. Certainly the interviews revealed that some women, but no men, had difficulty dealing with this type of interaction at the Bar.

Comments on appearance

3.3.17 Another gendered social dynamic mentioned during the interviews, which is common to many workplaces and “life generally” was men remarking on women’s appearance. A small number of female barristers and solicitors reported that some male barristers regularly make comments or mentioned isolated comments made about their hair/makeup/clothes/general appearance. They said that equivalent comments are not made about male lawyers, which emphasises women’s “difference” and detracts from the professionalism of the relationship between opposing counsel and barristers generally. For example, one female barrister described the large amount of unwelcome attention she received from male colleagues when she had her hair dyed blonde. She felt compelled to dye it brown to avoid what she experienced as negative stereotyping.

3.3.18 Some women acknowledged that some comments about a woman’s appearance are intended as compliments only, which makes responding negatively to them very difficult. Nevertheless, the women generally said that they would prefer to be considered barristers and maintain a professionalism that is shared with their male colleagues .

3.3.19 A few female interviewees also identified part of the “boys’ club atmosphere” of the Bar as manifesting in conversations punctuated by sexual references, for example about certain female witnesses’ body parts. A young female solicitor in a ‘without prejudice’ conference with a room full of male barristers and solicitors said:

They used the ‘f word’ less because there was ‘a lady’ in the room but they still made really inappropriate sexual comments.

On circuit

3.3.20 Going ‘on circuit’ (appearing in court sittings away from Melbourne) provides an intense work experience and an important training ground. Interviewees were not specifically asked to comment on their experiences of being ‘on circuit’, but some female barristers and solicitors volunteered information on this topic. One barrister said she had appreciated the freedom, also enjoyed by her male colleagues, of being removed from family responsibilities and able to focus solely on work (and socialising) for a period of time. Other women, however, reported feeling alienated from the routines of their male colleagues:

If you go on circuit, as a woman, no one will bother talking to you, you don’t get invited to the golf, and you don’t share sexist jokes and you don’t go to the pub after court and have a beer . . .

They all go on circuit together and have big nights out. I went once . . . I was the only woman and I felt like a fish out of water.

Around chambers

3.3.21 While many barristers, both female and male mentioned being grateful for the support of floor members and the “reality of the open door policy”, social links between barristers sharing a floor of chambers were highlighted as a potential source of unconscious exclusion of women. One female barrister related an anecdote about a group of male barristers who regularly lunch together and meet on the floor before leaving, without realising that habitually congregating outside a female barrister’s door without ever inviting her to join them might make her feel excluded. Others spoke more generally about men being

more comfortable around other men, and on the floor they will introduce themselves more readily and offer assistance and chat more easily.

3.3.22 A senior male barrister admitted to being aware of his lack of effort to include “the girls in the room at the end of the hall” in the society of the floor. He said he felt guilty about it after they left and made the comment that “perhaps girls shouldn’t share a room, to get away from the concept of ‘the girls together’”. On the other hand, as noted above (para 3.2.5), women barristers have sometimes found the close friendship of another woman crucial to their survival. Another female barrister spoke about being the only woman on the floor and having made an effort to fit in: “if I had got offended at everything they said, I would have been shut out of it”. When she left the floor, she said her male colleagues genuinely lamented her departure saying “who is going to pick us up when we say politically incorrect things?”, unaware of the extent to which she had actually been biting her tongue.

3.3.23 This image of male barristers’ appreciation of their female colleagues’ contribution to the atmosphere and dynamics of the workplace is reinforced by the reports of new floors of chambers being established with a predominance of women. One woman said that the (young) men on her floor, who were in the minority, were comfortable “and proud” to share chambers with so many female colleagues.

3.3.24 A few barristers had suggestions about how cultural problems stemming from exclusively male chambers could be remedied. One female barrister said the Bar should

get more women in and mix them into chambers and make the men see how good they are . . . although it would be hard going being dumped in Owen Dixon 14 and being left to teach the old bastards how to behave.

Recommendation 3:

- *that senior barristers make an appropriate effort to create a welcoming environment for new female and male members of their chambers;*
- *that consideration be given to any requests that the seniority rules relating to the allocation of chambers be relaxed in order to enable an appropriate gender mix within particular floors of chambers.*

Socialising at the Bar — The Essoign Club

3.3.25 During the interviews, the Victorian Bar’s social club, The Essoign Club was mentioned several times as a setting in which some female barristers were aware of having a ‘different’ status and feeling unwelcome. Membership of the Essoign Club is open to all barristers on the roll, with 68 women and 574 men currently listed as members. The club room is located within one of the main buildings of chambers and is open for lunch, and evening drinks and other functions.

Traditionally, the club has been an informal meeting place where barristers and other members of the profession meet and exchange information, with members often taking the closest available seat at lunch, regardless of who was seated next to them. In this way members of the Bar from all different levels and areas of practice have an opportunity to meet and socialise within the Bar setting.²⁹

3.3.26 A few of the female barristers interviewed said they felt “perfectly comfortable” going to the Essoign Club (although this appeared to be primarily in the context of having arranged to meet others for lunch rather than participating in the ritual of taking pot luck on lunching companions). One senior female barrister said she used to go there when she first came to the bar twenty years ago:

Generally it was very pleasant, you talk, hear about cases and you learn . . . it’s a terrific learning tool.

But she acknowledged that, “some [male] judges couldn’t cope with women being there”. In that vein, several female barristers said they felt the current atmosphere in the club was intimidating and unreceptive to young barristers, especially women, and that they avoided going there. One said of the older male members of the profession who frequent the club:

the conversations are all about themselves and how great they are and I don’t find it comfortable to be around, or very interesting.

3.3.27 One female barrister said that she and some of her colleagues had made an effort to use and feel more comfortable in the club, although this had been in the face of some resistance in the form of derogatory comments:

Nobody bats an eye in the Essoign Club if you see a table of all males, but we still get comments if a group of women go up there and sit as a group at a table . . . There are always audible comments: “What’s the girlie club doing today, discussing cooking or knitting or gossiping?” . . . They just can’t accept that a group of women might like to have lunch together, just like a group of men does.

3.3.28 One young woman had observed that many of her junior male colleagues did not need to make the same sort of effort to fit in at the Bar, using the Essoign Club as an example: “the males are already initiated . . . there are boys who come to the Bar and just slip into the mould, they go to the Essoign Club, no problem”. Another acknowledged that mingling in the “establishment atmosphere” could be intimidating for anyone:

You have to have more front than Myers to go to the Essoign Club and sit next to some judge and start talking about yourself.

Socialising at the Bar — other events

3.3.29 Many barristers said they enjoy and feel comfortable at the various social events organised by the Bar Council and other organisations within the Bar. However, others said that for various reasons, they are not interested in spending their spare time with other barristers. Comments made by some women were indicative of Kanter’s point that “The situations in which . . . peers are supposedly ‘relaxing’ (afterwork drinks, celebratory dinners, sports events) are often the most stressful for tokens, for on such occasions the protection of defined positions and struc-

29. Two female barristers also mentioned the barristers’ coffee lounge, which was formerly located in Owen Dixon Chambers East. They lamented the Bar Council decision which led to its demise a number of years ago. They saw it as an even more informal setting in which barristers could socialise and exchange information about cases. The cafes in the ground floors of Owen Dixon West and Marland House are also frequented by barristers, but these were seen to be poor substitutes for the coffee lounge.

tured interaction disappears”.³⁰ Social occasions provide opportunities for women’s ‘differences’ to be highlighted:

There are social events where, after a few reds, a small number of men are quite happy to say that women shouldn’t be at the Bar at all.

Going to Bar functions . . . I’ve decided that I can’t be bothered with the boys’ club nature of it.

You notice at formal and informal “social” events at the Bar . . . there is a lot of “sniffing around” that goes on . . . Women are brushed aside, perhaps not so much because they are women, as they are mainly in the lower ranks and therefore have no status . . . and there is no need to suck up to them. At those events you find that women end up talking to each other . . . In a room where most people are concerned to be talking to the “right people” it can be very intimidating, not very welcoming, and most women will provide a haven for each other in that space, although there are some who don’t.

3.3.30 Clerking list annual dinners were mentioned by a number of both female and male interviewees as enjoyable social events at the Bar. By contrast there were a few women who had not enjoyed them. One described how the dinner was held at the Australia Club which does not allow women members, “which as a starting point is pretty alienating and offensive to the women on the list”. She went on to say:

The whole thing was like a male tribal bonding experience . . . it was as if there were no women present, or that’s the way most of the men behaved . . . some of the things spoken about were fairly crude, like “all men know that when you get an adjournment, you go for a piss” . . . You feel terrible as a woman in that atmosphere and there is nothing you can do about it. If you complain you are seen as a wowsler . . . it’s alienating and pitiful at the same time . . . It really makes being a woman at the Bar feel really strange, like you are not amongst your own kind.

3.3.31 Several barristers mentioned the “tradition of lunching” at the Bar and alluded to the homosociability of older male barristers and the negative impact this can have on the ability of female barristers to gain access to the valuable knowledge and advice their male contemporaries are exposed to on these occasions. One young male barrister said:

Some elements of the Bar are incredibly conservative. There are a lot of older male barristers who feel more comfortable working with men . . . and when they invite you out to lunch, there are no women invited . . .

3.3.32 One female barrister was keen to see “more mixing between junior and senior ranks of the Bar” to make “the young barristers feel at home in a professional and social sense”. She thought these links needed to be consciously fostered, especially in relation to young women, with whom older male barristers “may not have so much in common”, and who may not be “confident to approach older members of the Bar”.

Recommendation 4:

- *that judges and senior barristers attempt to make social occasions inclusive of junior female and male barristers;*
- *that List dinners and other Bar social events be held in a welcoming atmosphere for women members, and never at male-only clubs.*

30. Kanter, *Men and Women of the Corporation*, 239.

3.4 Additional Difficulties for Women — Sexuality and Harassment Issues

Sexual relationships at the Bar — real or rumoured

3.4.1 In addition to the behaviours and attitudes discussed above, the interview findings identified a further category of interaction that can be seen to add to an uncomfortable undercurrent for women and creates a focus for women's (not men's) achievements to be called into question.

3.4.2 A number of female interviewees mentioned "there is a problem with assumptions being made about what you are doing out to lunch with an older male barrister". A senior female barrister said that when she first came to the Bar in the 1970s:

If I went out to lunch with a male barrister, I used to take a brief and put it on the table so that anyone who walked into the restaurant knew it was a professional lunch . . . hopefully young women do not have to do that sort of thing these days.

Comments from a few younger women, however, indicate that such considerations still apply. They spoke about rumours flying around after innocent lunches with older male barristers, or after being perceived to be working "too closely" with a particular silk. On the basis of interviewees' comments, the focus of these rumours has remained consistent over time. The senior female barrister who always took a brief to lunch said that from when she started at the Bar "there were always stories about women sleeping around and getting junior briefs". This picture was mirrored by the comment of a young female solicitor about the sexual favours her contemporaries were rumoured to be imparting for junior work. This issue is also noted in the next chapter concerning briefing practices.

3.4.3 Whether or not rumours about sexual intimacy between members of the Bar have any basis in truth, it should be noted that it is the motives of the women involved that are the focus — the professionalism of the men does not appear to be questioned. This double standard is discriminatory and creates a situation where the professional development of female barristers may be compromised by concern to preserve their professional and personal reputations.

Recommendation 5: That male barristers regard female barristers as professional colleagues, and recognise their capacity to obtain work based on their professional skills

Sexual harassment

3.4.4 The interview schedules did not include a specific question about the incidence of sexual harassment at the Bar. A few female barristers did, however, describe being sexually harassed since they had signed the Roll. One young woman said that "sleazy remarks" were directed at her "relatively often". On one occasion her male opponent asked her to sit on his lap while they finalised consent orders. She said she was especially surprised because this man was around her age and she usually expects that that kind of treatment would come from older men. Other women said they had received unwelcome requests for dates and had had suggestive comments made in their presence. One barrister also said she had heard of an incident when a young female barrister had one evening delivered some papers to the chambers of a silk with whom she was not acquainted. When she walked in, he said to her "How about a f . . . ?" One senior woman talked about judges in the "old days" being "very sleazy" and at social events having to say "Don't do that sir, I might have to hit you sir", which was very difficult because "you had to appear before

them". The behaviour of judges was not mentioned in relation to any recent incidents of sexual harassment.

3.4.5 The image of the Bar as an environment in which some male members feel free to sexually harass their female colleagues was reinforced by one of the clerks, who talked about it being a general problem with "some fellows having a reputation for preying on young women". He saw this as a barrier to women feeling comfortable at the Bar — "people just shouldn't have to put up with these things". Similarly, the remarks of Tony Pagone QC, in a paper written for an International Bar Association conference, imply that sexual harassment is not uncommon at the Bar. He wrote: "Many examples were given to me in the course of discussing the preparation of my paper".³¹

3.4.6 The Bar has recently included in its Rules a prohibition on any conduct constituting sexual harassment, with internal procedures set up for dealing with complaints.³² A small panel of (female and male) barristers, one with experience of managing a sexual harassment complaint system, have been designated for barristers to approach with complaints. One of the barristers from the panel reported that the panel had received complaints about a few "very serious" matters, but that they had not been approached about many incidents of "trivial harassment", "which is not to say they don't occur . . . I imagine they do not think they are worth complaining about". This view is consistent with the attitudes of the women who related incidents of sexual harassment during the interviews, none of whom had considered reporting their experiences. They said they would prefer to deal with these matters themselves at the time or "couldn't be bothered", or did not think it was worthwhile becoming involved in a complaint procedure. Tony Pagone's paper also speculated about these responses. He wrote:

Complaint about unwanted sexual advances by a senior male in the profession may well be suppressed by a more junior female so as not to ruin her career prospects.³³

3.4.7 Determining the extent of sexual harassment occurring at the Bar was not a specific focus of the research. However, to the extent that it does occur, its deleterious effects on individuals who are subject to it and the workplaces in which it occurs should be acknowledged.³⁴ Unchecked incidents of sexual harassment, whether "serious" or "trivial", contribute to an environment that can be experienced as threatening or unwelcoming.

Recommendation 6:

- *that the Bar Council organise for barristers to receive relevant information about the definition of sexual harassment and the reasons for its prohibition;*
- *that barristers be encouraged to document incidents of sexual harassment for those charged with dealing with it, even if they do not wish to make a formal complaint, in order that the nature and extent of sexual harassment may be known and relevant education arranged for members of the Bar;*
- *that the sexual harassment panel at the Bar keep a record of complaints and queries about incidents of sexual harassment, and any advice given or action taken.*

31. C.T. Pagone, 'Employment Practices and Awareness of Diversity', Paper for the IBA Committee 11 (Discrimination and Gender Equality) at the Berlin Conference, 23 October 1996, 15.

32. Bar Rules 16.1. It should also be noted that sexual harassment of a person working in a 'common workplace' with the perpetrator is unlawful under the *Equal Opportunity Act 1995* (Vic.), s.87.

33. Pagone, 'Employment Practices and Awareness of Diversity', 14.

34. These effects are well documented. See for example, CCH Industrial Law Editors, *Countering Sexual Harassment: A Manual for Managers and Supervisors* (CCH Australia, 1992); Equal Employment Opportunity Bureau, *Eliminating Sexual Harassment: Guidelines for Sexual Harassment Officers and Personnel Officers* (Australian Government Printing Service, 1986); Clare Brant and Yun Lee Too (eds), *Rethinking Sexual Harassment* (Pluto Press, 1994).

3.5 Formal Organisational Structures at the Bar

Bar Council

3.5.1 The Bar Council is the most formalised of the organisational structures at the Bar. It is comprised of an elected body which manages and administers the business and affairs of the Victorian Bar, which, in the Statement of Purpose of the Bar's Constitution, include:

- to promote, maintain and improve the quality of the Victorian Bar; and
- to seek to promote the welfare of members of the Victorian Bar.

3.5.2 The rules for election of barristers to the Council include seniority requirements for different categories: in Category A, 11 positions must be filled by barristers who are QCs or are of not less than 15 years' standing; in Category B, six Council members must not be QCs but have between six and 15 years' experience; and in Category C, four juniors of not more than six years' standing may be elected. Of the current membership of the Bar Council there are no women in Category A, one in Category B and two in Category C.

3.5.3 During the interviews several female barristers lamented the lack of representation of women in this peak power structure at the Bar. None of the men interviewed specifically mentioned the Bar Council in these terms. The women's general view was that those in control of the Council and therefore making decisions about the future direction of the Bar were "out of touch" with the majority of the membership, and especially the needs of female barristers:

The Bar Council is far too top heavy with silks who don't know what is going on for everyone else . . . they are not representing the majority of the Bar.

The people running the Bar need to talk to women more . . . Women don't hang around chambers so the men need to actually make an effort to talk to them . . . Younger women need to have some input to the decisions of the Bar Council so they understand what their needs are . . . and the Council needs to create opportunities to talk that are not intimidating and are not at times that make it difficult for women to attend . . .

3.5.4 Some also saw the election rules as biased in favour of senior males, as there are so few women eligible for election in Category A and the process is controlled by unspoken allegiances, so that "only those in the club" should expect to be elected anyway. One woman said "you can't complain about it, because if you do they will never let you into the club".

3.5.5 A female QC spoke about there being "good historical reasons" for many of the rules and traditions of the Bar, and was therefore wary of "fiddling with" them. However, in relation to the Bar Council election rules, she conceded that their current operation "could well discriminate against women" so that a temporary change could be justified.

3.5.6 The Bar Council also has power to create subcommittees to deal with various issues, for example, ethics and equality before the law. Membership of these committees is not gained via election, but through more informal invitation and nomination, usually via patronage of senior members. A few women barristers reported that this method of filling committee positions makes it more difficult for them to gain representation, for reasons similar to those mentioned earlier about male members knowing and being more comfortable working with other males. Another relevant factor is the time commitment of committee work and the timing of meetings being difficult to coordinate with parenting responsibilities, which affects more women than men (see Chapter 5). One female barrister, however, discounted these as major problems:

I know a number of women who are clamouring to be on committees and can't get on . . . There is an idea that because of your family commitments you can't put in long hours therefore you can't be on committees, it's so wrong . . . women are incredibly organised because they have to be.

3.5.7 Barristers were asked about participation on the Bar Council and/or committees during the interviews. Eight women and ten men said they had been involved in Council or committee work. Of those who had not been involved, there were more women who said they would like to be involved but could not afford the time because of family commitments. Equal numbers of women and men said they were not interested in being on Bar committees.

3.5.8 Interviewees and other members of the Bar consulted during the project indicated that in recent years the Bar Council had become aware of the need for greater participation by female members within the committee structure, with the result that efforts have been made to invite more women to participate. A few women reported positive experiences of the Bar Council and various committees. However, the comments of some women who had experience on the Council or on subcommittees pointed to there being further difficulties for women's representation, once elected or invited to participate. They described how meetings have very strict structures and are dominated by more senior participants by whom they felt intimidated and effectively silenced, and that they felt they were only there so the committee could avoid criticism for lacking female representation. One woman described her term on a Bar committee:

They were looking for a token woman, I was chosen as someone who wouldn't make waves . . . it was very frustrating and humiliating, disappointing . . . It made me disappointed in the Bar as a whole . . . I've talked to women who have sat on the Bar Council and they say the same thing . . . One said she would not stand for re-election because she felt there was no point . . . she achieved nothing because she wasn't given the opportunity and it was not through lack of trying . . . she would speak out and was ignored.

Another young female barrister said of her experience:

I sit on a couple of committees and it is hard work . . . it's very subtle . . . They don't make eye contact . . . it took me a couple of meetings to get the courage up to have my say and there are a few people who just don't look at me . . . it's not very welcoming . . . It puts a lot of pressure on you . . . as a young women you are on the decision-making body with all these experienced men . . . so all of a sudden, as well as being a good lawyer and a hard worker, you have to have all this judgment . . . you are supposed to be subtle and understand the political nuances . . . it's very demanding . . .

3.5.9 These findings indicate a need for greater consideration of the ways in which women's views can be heard and decision-making power shared within the formal structures of the Bar. This theme emerged strongly in female barristers' responses to the question of whether they would suggest any changes to the operation of the Bar. Five women called for more equal representation of women from all levels on the Bar Council and on committees:

More female representation of women on committees so men realise they have to be careful about the way they treat women.

Greater representation of women on bodies and committees . . . its been so male dominated for so long they just look down on us.

There needs to be some power sharing at the Bar, active recruitment of women onto the power wielding bodies of the Bar . . . women to be approached to represent the Bar when asked for appointments to outside committees and other bodies . . . we need to be involved in the administration of the Bar structures.

3.5.10 One female magistrate also spoke about this issue, making the point that it is not just about women asserting themselves within the established hierarchy, it is also a matter of men "moving over . . . and making room . . . or being forced to accept that there should be more room" for women to be heard and have an influence on the workings of the Bar. In this context, several women spoke about greater female representation benefiting not only them but the Bar as a whole, as it would ensure a better public image of an institution that is supportive of the diverse needs of its membership.

Recommendation 7: That the Bar Council consider short and long term strategies for ensuring greater representation of women on the Council and its subcommittees, not only in terms of numbers but in the conduct of meetings and actual decision-making, such as:

- ***revision of the Bar Council membership rules so they are not so heavily weighted towards the senior echelons of the Bar, where men enjoy an overwhelming majority;***
- ***a requirement that the Bar Council categories and every committee include at least two women members;***
- ***a policy that Bar Council appointments to outside bodies alternate between men and women, and that when two or more appointments are made, there be as far as possible a gender balance of appointees.***

Barristers Chambers Ltd (BCL)

3.5.11 BCL is the company which owns and operates the city chambers, clustered around the corner of William and Lonsdale Streets, where virtually all members of the Victorian Bar are tenanted. Barristers were not asked any specific questions concerning BCL in the interviews, and no gender-related comments on BCL were volunteered in the course of the interviews. Nevertheless, the membership of BCL is very much like that of the Bar Council: dominated by senior male (commercial) barristers. Though women have served on the board of BCL, there were no female members at the time of the study, and as discussed in Chapter 5, BCL has at times appeared unresponsive to women's accommodation issues.

Recommendation 8: that Barristers Chambers Ltd take steps to ensure that it always includes at least two women Board members.

Women Barristers Association (WBA)

3.5.12 The WBA was formed by female members of the Bar in 1993 with the aims of promoting awareness, discussion and resolution of issues which particularly affect women; identifying, highlighting and eradicating discrimination against women in law and the legal system; and advancing equality for women at the Bar and the legal profession generally, and providing a professional and social network for women barristers. The group meets regularly and plays different roles for its members and within the informal structures of the Bar. It has an advocacy function in the context of publicly representing the views of female barristers on legal and other issues. In terms of a support role for its members, as mentioned earlier, WBA has provided some women with a sense of place at the Bar, which had previously been lacking. For example, one woman had felt as if she was the only single mother at the Bar, but has now made links with other women coping in similar situations. WBA also provides a forum for women to network and exchange relevant information about cases and practice-related issues.

3.5.13 During the interviews, women involved in the WBA acknowledged that "a lot of people felt very threatened by it", to the point that "it was almost a joke amongst a lot of people". WBA meetings and events have, however, received the conspicuous attendance and support of some male judges, QCs and other senior barristers, which some members are pleased about. One said she recognises that there is

no point in the women just talking amongst themselves about how they want to change the Bar, you have to have some of the influential blokes listening.

3.5.14 One of the judges interviewed explained that he had been a very public supporter of the WBA when it was forming, and described the kind of situation in which senior members of the profession could be influential in raising the awareness of their peers around issues affecting women at the Bar:

I was coming out of one of those early WBA lunchtime meetings with a County Court judge . . . and on the pavement we ran into a somewhat archaic silk who said to us, "I see you have been to the Women Barristers Association, what would you say if we had a men barristers association", and the County Court judge said "We have had one of them for many years, it's called the Bar".

3.5.15 The WBA does not however, enjoy the universal approval of women at the Bar, either. Although no particular questions were asked concerning WBA, four of the female barristers interviewed volunteered the view that it is "not necessary to have a formal organisation" and that WBA is "divisive" and "polarises the Bar". They see that it has the potential to

encourage recalcitrant men, of which there are a majority at the Bar, in their view that women at the Bar are different . . . we are all just barristers . . . It creates the perception that women need some sort of organisation to support them because they can't stand up for themselves . . .

Similar debates regarding the formation of separate women's groups within the larger framework of a legal institution are noted by Carrie Menkel-Meadow in her comments on the recent formation of women's bar associations in a number of countries:

There is some evidence that [they] improve women's status in the profession by serving as both a source of female candidates for public office and a powerful lobbying agent . . . [but] some feel that separate bar associations only exacerbate occupational segregation and distract women from becoming active in the male-dominated bar associations.³⁵

3.5.16 Women barristers' conflicting attitudes to the WBA reflect the classic feminist 'sameness/difference' dilemma — the question of whether it is strategically preferable for women to argue that they are just the same as men, and therefore should be treated (and should behave) in the same way, or that they are essentially different from men, and therefore need to seek accommodation of that difference. Justice Gaudron's recent speech to launch Australian Women Lawyers was largely concerned to demonstrate the limitations and failures of the 'sameness' approach and to advocate for a new approach based on 'difference'.³⁶ However, the positions of 'sameness' or 'difference' are not the only alternatives available. Women barristers are a diverse group, and joining the WBA might be seen as an individual's response to her particular situation rather than an existential statement about the needs of women barristers as a whole. Likewise, the fact that someone does not see any personal need for the WBA does not mean it should not exist for others.

Recommendation 9:

- *that judges and senior members of the Bar continue to give active support to the WBA;*
- *that the diversity of women barristers be recognised by acknowledging that WBA has a valuable role to play for its members, and does not threaten the status of other women or of men at the Bar.*

35. Menkel-Meadow 'Feminization of the Legal profession, 240.

36. Justice Gaudron, 'Speech to Launch Australian Women Lawyers'.

Readers and mentoring

The Bar Readers Course

3.5.17 The Victorian Bar provides a three month, full-time training course for new entrants to the Bar, who are known as “readers”. The course includes instruction and practice in advocacy skills and legal drafting, court attendance, and explanation of various aspects of running a practice as a barrister and the culture of the Bar. The course is primarily taught by practising members of the Bar and the bench who give of their time and expertise as a contribution to ensuring a high standard of practice and behaviour for the future of the profession.

3.5.18 The barristers’ interview schedule did not include a question relating to the readers’ course, nevertheless, various comments and anecdotes were volunteered during the interviews. Most barristers who spoke about the readers’ course said they had “thoroughly enjoyed it”, and thought it was a “great introduction to the Bar”. However, a few of their comments indicate that an ‘indoctrination’ to various gendered aspects of Bar culture may be unconsciously incorporated in the teaching methods and materials.

3.5.19 A few female barristers who had come to the Bar in the early-mid 1990s spoke about the use of gender exclusive language by “the majority of speakers in the course” and consistent use of hypothetical case examples involving only men, which made them and other women in the course feel “excluded and invisible”. As mentioned in paragraph 3.6.6 below, younger women recently graduated from university are likely to have a greater sensitivity to these issues and have higher expectations, having come from an environment where teaching in that style is now considered unacceptable. These women also mentioned the “matey links” between the male members of the Bar and bench that became evident in the context of their addresses during the course. One woman explained that these manifestations of the “boys’ club” culture of the Bar were not acknowledged and were thus inadvertently reinforced, making her feel excluded and daunted by the prospect of encountering it on a daily basis in the courts.

3.5.20 One female barrister said she had started out at the Bar (in 1991) reasonably confident, but had “had the confidence knocked out of me by the readers course”. Similarly, a female former barrister who came to the Bar the following year considered that the teaching methodology in the course “destroyed what little confidence I had”. She referred to some of the practical exercises set during the course as

tasks that you couldn’t perform well, because you haven’t got the information or the time to do it well. Conscientious people crack under that. I don’t think there was a woman who wasn’t in tears . . . whereas blustering kinds of people cope with that much better, so if you had wanted to set up something to make not very bright men feel better about themselves and bright women feel terrible, then you couldn’t have done better.

This description of different learning and work preparation styles for women is consistent with the picture drawn of different attitudes to case preparation by women and men in Chapter 6.

3.5.21 During the interviews a female magistrate also suggested that young women coming to the Bar may benefit from some instruction on ways to deal with male aggression, as she had observed the difficulties experienced before her in court. She said women need to be aware of what they are likely to come up against and how they can employ “other weapons” to deal with male “aggression and histrionics”.

Recommendation 10: That administrators of the Bar Readers' course:

- *attempt to educate all speakers about the importance of using gender inclusive language and examples;*
- *consider potentially different learning styles in the design of course materials and practical exercises;*
- *seek expert advice and assistance if necessary on the design of gender inclusive curricula;*³⁷
- *incorporate acknowledgment of additional cultural barriers likely to be faced by female barristers into the courses and include sessions related to these issues;*
- *include course content about unacceptable forms of behaviour for barristers, including sexual harassment and exclusionary cultural practices.*

Mentoring

3.5.22 The Bar has traditionally operated with a system of pupillage for readers, in recognition of the idea that encouragement, guidance and support from those who are already established in the profession can greatly assist in ensuring the success of new entrants. When making arrangements to join the Bar, readers are obliged to approach a barrister of at least 10 years standing who is not a silk to be their Mentor (previously known as “Master”). The Mentor’s role is to provide the reader with rent-free accommodation in their chambers for the period of the readers course and for a further six months (or more by agreement), and to be a source of “encouragement, guidance and support” for the reader at the beginning of their career at the Bar and, ideally, if the two develop a close relationship, beyond. The choice of Mentor is traditionally regarded as quite important to the future prospects of a reader, as it will determine the nature and quality of practice to which they are initially exposed and the clients and solicitors they are likely to meet in the course of their time in the Mentor’s chambers. Mentors are sometimes able to provide their readers with some work and are often the means of introduction to particular networks and sub-cultures of the Bar.

3.5.23 There is no formalised process for matching readers with Mentors. It is up to the readers to use their own contacts or do their own research, which, as some of the interviewees indicated, can be an alienating experience for those who are unfamiliar with the system and do not know anyone at the Bar. In his IBA conference paper, Tony Pagone writes that:

the process is entirely haphazard and unstructured . . . One can only wonder at the processes of screening and unconscious selection which take place before the approach is made by whoever it is that makes the approach. How a reader selects a mentor to approach and how a mentor agrees to accept a person as a reader are each highly personal processes, at times bordering upon the mysterious.³⁸

He also noted that:

despite the importance to the profession and the public of this point of entry into the ranks of barristers, there is a great lack of research on how it works and the consequences of how it works³⁹

37. Several senior academics have expertise in this area, including Professor Regina Graycar (Sydney), Associate Professor Jenny Morgan (Melbourne), and Professor Sandra Berns (Griffith), who were engaged as consultants by the Department of Employment, Education and Training to prepare gender inclusive curriculum materials for use in Australian law schools.

38. Pagone, ‘Employment Practices and Awareness of Diversity’, 4.

39. Ibid

3.5.24 The findings from this research indicate that there is a considerable degree of variation in the way the formal mentoring system works. A number of barristers said their experience of being mentored lasted only for the period of their readership — their relationships with their Master did not develop into ones of on-going support and friendship. Some attributed this to incompatible personalities or interests, how busy their Masters were (“he had a big practice and a new reader every year”), that there did not seem to be a need for on-going contact, or “it just didn’t happen”. There were other barristers who specifically said their Masters had not been effective in passing on knowledge and skills (“I was my master’s first pupil and I don’t think he knew what to do with me”). A minority of barristers reported very successful mentoring experiences arising from their time as readers. One barrister said of his Master “she has been a great help in every respect . . . it has been a great relationship for both of us”; another felt his “was very good to me, and the relationship continues today”.

3.5.25 Barristers were asked generally whether they had had a mentor (in the broader sense) at the Bar — a relationship which may have developed through the pupillage system or in the course of their work with senior barristers. More men than women (13: 10) said they had had a mentor. This difference might be attributed to there being a greater likelihood that young men will share mutual interests with older men. For example, one young male barrister said an effective mentoring relationship had developed out of a shared interest in riding motorbikes. A female barrister, by contrast, spoke about junior barristers requiring the patronage of older barristers but said that she and other women had found it harder to foster these relationships:

You often don’t share the same interests as older male barristers and therefore it is less likely that those relationships will arise spontaneously . . . they like drinking, you have to go home to the kids . . . there is not as much conflict for men in this way.

Twice as many women as men (14: 7) said they had not had a mentor. One female barrister specifically regretted this situation, considering “It’s the one weakness of my career, that I haven’t had a mentor”. A few women said they would have preferred to read with another woman, because they thought they would have had a better chance of developing a close relationship, but that there did not seem to be enough senior women available to play these roles.

3.5.26 In terms of what was gained from the formal mentoring relationship, most barristers of both sexes referred to advice and teaching, and a few also talked about friendship. Notably, more men than women (5: 1) said their Master had been a source of work for them. One woman said that although her Master had been “very good”, he had had “some screwy ideas about the position of women in society” and that this had an influence on his ability to support her in getting work:

It was like he didn’t want to push me forward because I was a woman, and he didn’t want to have to wear the flak if something went wrong.

3.5.27 The interview findings about mentoring and the other evidence about the prevailing masculine culture at the Bar suggest that there is a greater need for mentoring support for women. Results of research undertaken amongst women lawyers in the USA indicated that those who had “true” mentors perceived themselves as being more successful and satisfied with their careers than those without mentors.⁴⁰

3.5.28 A number of interviewees suggested that there should be more active mentoring of younger women by older women at the Bar (“big sister-type mentoring”). Others were also keen

40. Sandra Riley and David Wrench, ‘Mentoring Among Women Lawyers’ (1985) 15 *Journal of Applied Social Psychology* 374, at 384.

to see further education about gender issues for male barristers who are taking on female readers. One barrister said: "I'm sure there are men who want to be good Mentors to their female readers, but have some difficulties". Another barrister suggested that when barristers have been at the Bar for 10 years and become eligible to take readers, they could undergo some form of accreditation that gives them some "tips on how to be a good Mentor" and reinforces relevant ethical issues for them to be aware of in the mentoring relationship. Another young female barrister suggested that new readers could be provided with a list of potential Mentors working in particular areas of practice, complete with details of others who may have read with them, so they can "check their references".

3.5.29 It will always be the case that some individuals have personalities and communication skills that will equip them better than others to take on mentoring roles, and the vagaries of compatibility in human relations make them impossible to dictate. However it does appear that more structuring of the system of Mentoring at the Bar may assist all new readers, and especially women who are disadvantaged by the prevailing culture of the Bar.

Recommendation 11:

- *that the Bar Council provide more structured assistance in the process of matching potential readers with appropriate Mentors;*
- *that the Bar Council establish a training and accreditation program for Mentors, which should incorporate attention to cross-gender mentoring;*
- *that the WBA or the Bar Council maintain a list of senior women who are prepared to act as informal mentors for younger women, to be made available initially to all junior women barristers, and thereafter to women entering the readers course.*

3.6 Barriers to the Recognition of Discrimination

Denial

3.6.1 As Professor Rhode's "no problem" problem" thesis makes clear, one of the main barriers to dealing with gender discrimination in the legal profession is convincing those who may be contributing to discriminatory practices that there is in fact a problem to address. She also makes the point that those who are subject to discrimination are unlikely to be conscious of it, and will therefore also require similar persuasion:

A wide gap remains between many individuals' objective experience and their subjective perception of gender inequalities . . . In studies in which a majority of women acknowledge gender discrimination in employment to be a problem, or where objective evidence points to that conclusion, most individuals do not believe they have personally been victims.⁴¹

Female Barristers

3.6.2 Analysis of comments made by female barristers in this study are consistent with Rhode's description. As noted earlier, there were several women who said they feel very comfortable at the Bar, and many who said they are satisfied with their progress and consider themselves successful, but at the same time were able to relate experiences that would, from an "objective" viewpoint, identify them as having been the targets of sex discrimination. For example, a senior

41. Rhode, 'The No-problem Problem', 1773.

barrister said of the Bar: "I love it, I always have. For me it is a very happy, supportive environment . . . I feel I can go to anyone and discuss anything". During the interview she also spoke of having been sexually harassed early in her career a number of times by male judges, not receiving the prestigious work of her male contemporaries because she was unable to attend the men-only social clubs where the relevant contacts were made, and of the unjustified criticism she came in for from men in the profession when she was made a QC.

3.6.3 None of the female barristers interviewed directly identified the conservative/masculine culture of the Bar as a barrier to their advancement. At most their comments implied that cultural aspects of the Bar were at times frustrating or distressing, but they did not reveal a consciousness of systemic discrimination. Alternative explanations were considered before gender discrimination in inquiring why there are so few female QCs and female barristers of long standing at the Bar. Women interviewed from those categories tended to question the abilities of their female colleagues, rather than looking to underlying factors embedded in the culture of the Bar that may be influencing the prospects of their colleagues. In this context, Kanter notes that the price of sharing the measures of objective success in the workplace and being "one of the boys" was a willingness to "occasionally turn against the girls":⁴²

I haven't experienced any difficulties. If other people are experiencing difficulties, I don't know whether its because they are less able or if it's for other reasons.

It's an individual profession . . . you make your own opportunities or else you may be in the wrong job.

Another way in which token women typically responded to their situation, according to Kanter, was to "demonstrate their gratitude for being included by not criticising their situation or pressing for any more advantage".⁴³

3.6.4 Other points made by Rhode in this context are also represented in the interview data. For example Rhode writes:

For women to see themselves as victims imposes costs . . . Faced with a potential loss of efficacy and self esteem, together with the unpleasantness of identifying a perpetrator of injustice, many individuals prefer to revise their sense of merit or blame.⁴⁴

One QC said:

I think I would have done better if I was a man. Why, is not because of the judges or other barristers, but because of society.

This QC appreciated the lack of barriers to entry to the Bar, as she had not been able to find employment as a solicitor because of the attitudes of legal firms to professional women. She therefore considered the Bar to be a place of relative freedom and tolerance. She also elaborated on her experience that "the problem" exists outside the Bar, describing the difficulties she had being taken seriously in social settings as a professional woman — at dinner parties, questions about the area of law in which she practised being directed to her husband who knew nothing about it — so for her the Bar, where she was recognised as having expertise, was "safe territory".

3.6.5 This barrister's viewpoint suggests that the theory of relative deprivation is also useful in explaining why individuals may not identify themselves as victims of discrimination and therefore be unconvinced of its existence. This theory is based on the premise that "individuals are most

42. Kanter, *Men and Women of the Corporation*, 228.

43. *Ibid.*

44. Rhode, 'The No-problem Problem', 1775.

likely to feel aggrieved when they believe that a desired object or status was available in the past and will not be in the future".⁴⁵ Where a desired object or status has never been available, individuals are more likely to feel complacent about their situation, despite the existence of factors which may be contributing to their being unable to achieve their goals or having difficulty doing so. Within this theoretical framework it is likely that the more senior women at the Bar are the least likely to feel aggrieved by factors which may be perceived as obstacles to women's advancement, having arrived with fewer expectations. This is borne out by the comments of senior women in the interviews. For example some said:

I come from a generation that just looks at the lay of the land and works with it.

I don't want to belittle other people's problems and it doesn't mean that some judges were not rude to women . . . but I just didn't notice.

[Early on] I had some sensational support from some male barristers . . . flicking me work, getting me junior briefs, without there being a price attached to it, and we are still friends.

Similarly, senior women recounting their experiences in the "old days" expressed a firm belief that such problems would not be encountered by young women today or in the future.

3.6.6 By contrast, many younger women at the Bar have come through universities with a largely gender balanced student population and have higher expectations of equal treatment. They have experienced the "desired object or status", and in joining the legal profession are more likely to be aggrieved to find that the dominant culture deprives them of it. The comments of the younger women interviewed reflect this perspective. One young female solicitor said:

I went to an all girls school, I went to university where it was 50% male, 50% female and there wasn't an issue, if someone gave you a hard time, you'd tell them where to go and have no hesitation in doing so. You get out into the work force and you are confronted with it. I honestly thought that sexism was not an issue, until I got out into the workforce . . . I can't believe this goes on, especially in a profession that is meant to be so enlightened, intellectually superior, leading the charge for legal rights . . . but it's just so male dominated and this stuff happens.

Male Barristers

3.6.7 Almost a third of the male barristers interviewed expressed the view either that equality of opportunity exists for women at the Bar, or that any problems experienced by women are not structural but a matter of personal shortcomings:

I don't see that there is a problem in terms of gender; there are apparently plenty of successful female barristers around chambers these days.

I no doubt blindly suppose that there is equality of opportunity at the Bar . . . If you have considerable ability at the right time, you'll be recognised and prosper . . .

I think the Bar is a fantastic institution, because if you are good at what you do, I genuinely believe that you will be pretty quickly recognised as such. That's one of the great beauties at the Bar . . . I think in the end people who are good, no matter what their external appearance or their gender or their background, will do well, if that's what they want. So in that sense the Bar is a great leveller . . . I think it's not the Bar that would stop people achieving what they want to achieve, but themselves or their lifestyles or the circumstances that they're in.

45. Ibid.

Similarly, a male magistrate asserted that:

The Bar is the last bastion of free enterprise. It shouldn't be interfered with or undermined. It is a system based on ability and people get on if they are good . . . I was staggered to [be invited to participate in the research]. I couldn't believe that this perception of bias still exists . . .

3.6.8 While these statements can all be seen as manifestations of the “no problem’ problem”, the sentiment behind them must also be acknowledged — a commitment to the Bar as an institution, and a fear that any change will be detrimental. Nevertheless if, as the interview material suggests, the culture of the Bar has a systemically adverse impact on its female members, the price of maintaining the status quo is a high one. In arguing for a constructive outcome for the research findings — ensuring that the Bar actually does live up to its egalitarian and meritocratic promises — an analogy may be drawn with the institution of law itself. One may have respect for ‘the law’ in general, while seeing that particular aspects of it work unfairly or unjustly and are in need of reform.

Recommendation 12:

- *that the systemically adverse impact of the culture of the Bar on its female members be acknowledged;*
- *that members of the Bar work to ensure that the institution does in fact offer equal opportunities to all members.*

The no dobbing rule

3.6.9 The interview findings identified another obstacle, associated with the Bar’s strong tradition of self regulation, to defining and dealing with problems arising from discriminatory attitudes and behaviours. In his book *Australian Lawyers*, Professor David Weisbrot writes of the Bar:

One of the greatest forces of maintaining discipline is self-discipline, motivated by acceptance of the rules of conduct and enforced by peer pressure and scrutiny.⁴⁶

3.6.10 Clearly members of the profession take pride in maintaining their own standards, which appears to have contributed to the development of a generalised reluctance to formally complain about the conduct of fellow barristers. Helena Kennedy has observed that “for many within the profession it is an unforgivable betrayal to criticise ones brothers in law”.⁴⁷ During the interviews, both barristers and solicitors generally displayed a negative attitude to becoming involved in a formalised complaint system. For example, some barristers indicated that they would go to great lengths to avoid having to report a colleague to the Ethics Committee — “I wouldn’t wish that process on anybody”. In general, they said they would and had preferred to deal with the unacceptable behaviour of other barristers themselves. They spoke about a number of different approaches including: confronting the person directly at the time; relaying their concerns in strong terms at some later time; involving their own or the other person’s master in “having a quiet word”; and ignoring the behaviour. Some barristers, particularly younger ones, admitted that some of these approaches required a strength of character that they were not always sure they had, and in some cases said they were actively trying to acquire as an important part of their professional skills as a barrister.

46. David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990), 199.

47. Kennedy, *Eve Was Framed*, 41.

3.6.11 Interviewees also described the strong incentives to play the game of avoiding having to accuse a fellow member of the profession in anything other than a spontaneous and informal setting. They spoke of real and perceived consequences of complaining in terms of being negatively assessed and talked about for your actions. A barrister said she would be reluctant to complain about another barrister, because of the potential damage to her reputation, something she and others emphasised was a barrister's greatest asset:

You become worried about people commenting about you — by putting a complaint in to the Ethics Committee, you're the subject of an enormous degree of chat in the lifts.

3.6.12 In reference to sexist treatment by male colleagues one female solicitor spoke about the escalation of negative effects that result from complaining:

You whinge about it amongst yourselves and other female colleagues but that is about as far as you get . . . If you complain, you are even more alienated and ostracised, but if you don't complain, you're acquiescing.

3.6.13 In keeping with other behaviours discussed in this Chapter, there appears to be additional gender-related judgment made of women in these situations. Not only are women who complain betraying their colleagues but, as one interviewee remarked, they "get labelled as a sensitive female or hysterical and unable to cope". This was highlighted by an anecdote related by one of the male judges during the interviews. He described a situation where a male barrister had referred to a female barrister as "it" during court proceedings. The judge said he did not censure the male barrister, considering that the female barrister had "brought it on herself" by her own behaviour in making some subjective criticism of a witness. The female barrister reported her opponent to the ethics committee, "which she was entitled to do" but "a bloke wouldn't have done it . . . there are rules by which the game is played". (By contrast, one female barrister interviewed spoke about being taken to the ethics committee for actions which would never have been complained of in a man.)

3.6.14 The 'no dobbing' tradition may have been justified in an all-male context where there was no opportunity for gender-biased treatment of colleagues. Now, however, it operates as an unconscious method of condoning and entrenching behaviours that may undermine, distress or alienate women at the Bar

Recommendation 13:

- *that the Ethics Committee adopt a pro-active role in combating sexist behaviour at the Bar;*
- *that confidentiality of complaints to the Ethics Committee be strictly adhered to, so that complainants are not subject to retaliatory gossip.*

3.7 Conclusions

3.7.1. Justice Catherine Branson argues that

There is no genuine equality of opportunity in allowing women to enter traditionally male institutions - but only on the basis that the values of such establishments and the way they are run are to remain unchanged. The freedom to be an honorary man, or alternatively, an outsider, is a freedom few women aspire to.⁴⁸

48. Justice Branson, 'Running on the Edge', 4.

As the findings in this Chapter show, the values of the Victorian Bar and the way it is run have not changed significantly to accommodate women who do not share the background, attitudes and assumptions of its traditional membership. Even if, as individuals, women do not experience this directly as discrimination, at a systemic level, the culture and organisational arrangements of the Bar can be seen to play a large part in creating an environment in which women are not supported and may choose not to sign the Roll, or make the decision to leave.

3.7.2 The popular view, expressed repeatedly during the interviews (especially by men) is that things *have* changed and will change as more women come to the Bar. Another theme was that an increase in the numbers of male barristers who have grown up with equal numbers of female peers will make a difference. Kanter's theory of a critical mass of minority members being able to influence workplace culture also reinforces this perspective that "time will heal".

3.7.3 However, passively waiting and simply relying on the number of women as the source of change does not address the situation for women currently at the Bar, and those who may be considering entry. It allows the Bar as a whole, and in particular those who control or who *are* 'the mainstream', to deny responsibility for contributing to discriminatory practices and events, and for taking steps to remedy them. In the meantime, the combined effects of attrition and the masculinist image of the Bar may prevent the proportion of women at the Bar ever reaching a critical mass.

3.7.4 While at an organisational level, certain measures may be taken relatively easily to remedy the lack of representation of women and their views, there are obvious problems associated with attempting to "impose reform" on the way people think and behave. During the interviews members of the profession (both female and male) referred to this:

I don't think you can force it . . . I don't think you can set up an artificial environment (male ex-barrister).

You can't expect them not to be blokes . . . it is only going to be helped by more women being there and the men being more accustomed to them being there and their behaviour adjusting appropriately (female solicitor).

It comes back to their own insecurities . . . until they recognise the obvious, that women are going to have as great, if not greater abilities than men in most areas, they are not dealing with reality . . . I don't know how you get people at the Bar to deal with reality, if they don't come to that view themselves (male barrister).

3.7.5 A few interviewees spoke about the potential for efforts aimed at remedying cultural barriers to escalate the problem, "just create resentment, giving the excuse to those who are already hostile towards females". Clearly these considerations should be taken into account in implementing any recommendations arising from this report. However, there were a minority of interviewees who were positive about improving the culture and organisation of the Bar for women and therefore for all members. The words of one young male barrister represent them well:

The Bar does have a role to play in changing the dominant culture, but not if it detracts from the reason why the Bar exists in the first place . . . it should be about enhancing the function of the Bar and not detracting from it. We are here to provide a service to the public.

3.7.6 In this respect, a female barrister called for "more leading from the front". Such leadership was displayed, for example, at the time when new clerking lists were established, and members of the Bar Council changed to the new lists to help get them started. The recommendations in this Chapter represent one set of suggestions, but the leadership of the Bar could also engage in the kind of creative thinking in which lawyers are skilled, to design strategies that would "enhance the function of the Bar" by making its culture more tolerant and inclusive of difference.

Chapter 4

BRIEFING PRACTICES AND PREJUDICES

4.1 Introduction

4.5.5 This chapter turns its attention to briefing — the process by which barristers obtain work. It examines the practices and attitudes of the major players involved in the briefing process: solicitors, barristers' clerks and clients. The primary source for these practices and attitudes is the interviews conducted with solicitors and barristers' clerks. The interviews with barristers, judicial officers and list committee members are also drawn upon for their experiences and impressions of briefing processes.

4.1.2 The court appearances study provides evidence of the outcomes of briefing processes. This chapter provides the major venue for reporting the results of that study. Data from the study shows the numbers and proportions of female and male barristers briefed to appear in the various jurisdictions, and various kinds of cases, included in the study. These results in themselves suggest certain gendered patterns in the briefing opportunities enjoyed by women and men in the courts and tribunal studied, most notably:

- a higher proportion of men than of women on the Bar Roll appeared in the courts and tribunal studied during the data collection period, and this disparity was not simply attributable to the relative seniority of female and male barristers;
- male barristers appeared to have greater opportunities for junior work than did female barristers;
- female barristers made 13.6% of total recorded appearances, but this proportion varied considerably according to length of hearing, court, area of law and type of hearing;
- female barristers made a higher proportion of appearances in cases of shorter duration and in the Family Court, and a lower proportion of appearances in the trial division of the Supreme Court and in commercial and personal injuries cases, yet the case sample indicated a significantly higher volume of work available in the commercial and personal injuries areas than in family law;
- a limited amount of prosecution work offered virtually the only opportunity for women barristers to gain criminal trial experience, and they were also largely excluded from civil jury trials;
- women barristers were less likely to receive multiple briefs;
- there was a difference between private and public sector briefing patterns, but also a difference between public sector agencies in their preparedness to brief women barristers.

4.1.3 The court appearances data is also used to confirm or refute the beliefs of interviewees concerning the operation of the briefing system. Where interviewees' assertions are not borne out by the appearances data, the accuracy of those assertions is brought into question. Where, conversely, the different sources of information point to the same conclusion, that conclusion is rendered more reliable. The conjunction of court appearances data and interview material in the chapter provides a rich and extensive account of the impacts of briefing processes on female and male barristers, pointing to some direct but mostly indirect and systemic forms of discrimination against women barristers, which would need to be addressed on several different levels.

4.2 The Players

4.2.1 The legal profession in Victoria is formally ‘fused’ but in practice divided. Lawyers are admitted to practise as “barristers and solicitors”, but there is an effective division of functions between the two branches of the profession. Broadly speaking, barristers are in-court advocates, particularly in the higher courts, while solicitors deal with transactions and preparations for litigation. Barristers might also represent clients in alternative dispute resolution processes or give advice on specific legal matters.

4.2.2 Each barrister conducts an independent business, operating in competition with other barristers. Traditionally, however, barristers were prohibited from ‘touting’ for business and from having a direct relationship with clients.¹ Thus, barristers usually receive their work via solicitors, who brief the barristers on behalf of their clients. At the Victorian Bar, each barrister is associated with a clerk, who performs booking functions and administrative work, collects fees, and may also be a source of work, when solicitors call requesting the services of an available barrister for a particular appearance. The roles and attitudes of solicitors, clerks and clients, and the relationships between these players and the ultimate service providers, the barristers, are crucial in determining which barristers receive which work, or any work at all.

4.2.3 The quantity and quality of work received by barristers determines their ability to survive financially at the Bar. The level of responsibility and prestige attached to different briefs also affects personal standing at the Bar, which in turn determines a barrister’s prospects of judicial appointment.

4.2.4 Barristers talk about getting “the good work”. Some areas of law are considered more prestigious than others, for example work in the higher courts and in commercial areas, as opposed to Magistrates Court work and family law. Margaret Thornton asserts that “sexual divisions of labour” operate at the Bar, with women barristers occupying the less prestigious and lucrative roles.² The court appearances study and interview questions regarding the briefing process were designed to test this issue, to determine whether, and if so why, a sexual divide results from the briefing process.

4.3 Court Appearances: Comparative Data

Individual Appearances

4.3.1 Eighty-one individual female barristers and 555 individual male barristers were represented in the court appearances study.³ These numbers make up 41% of the women and 53% of the men on the Bar Roll. Thus, a significantly higher proportion of male barristers than of female barristers appeared during the study period in the courts and tribunal that were the subject of analysis.⁴ The difference is even greater when consideration is confined to appearances only in the Supreme Court and Court of Appeal. Eighteen individual female barristers and 225 individual male barristers appeared in those courts, representing 9% and 21% respectively of their numbers on the Bar Roll.

1. Recent amendments to the Victorian Bar Rules enable barristers to have direct relationships with clients in certain circumstances.

2. Thornton. *Dissonance and Distrust*, 191.

3. When discussing individual appearances, it is not possible to weight the Family Court data. From the available data we can estimate the total number of cases heard in the Family Court during the study period and the total number of appearances, but we cannot estimate the identity of the barristers appearing. See further paragraph 1.7.11 and footnote 37.

4. If individual appearances in the Family Court are excluded, the relative numbers and proportions of barristers appearing in the remaining jurisdictions were 72 (36%) women and 535 (51%) men. Eleven individual women (6% of women on the Bar Roll) appeared in the Family Court during the study, and 24 men (2% of men on the Bar Roll).

4.3.2 It might be expected that the relatively more junior/less experienced status of women at the Bar may account for the difference in the proportions of individual female and male barristers appearing in the study. This appears not to be the case, however. The seniority hypothesis can be tested by looking at the relative seniority of women and men appearing in the study. This is shown in Figure 11. The first two bars of the Figure show the seniority distributions of female and male barristers appearing in the Supreme Court and Court of Appeal, while the second two bars show the seniority distributions of female and male barristers appearing in all jurisdictions.

4.3.3 The seniority distributions for male barristers were almost identical between the Supreme Court and Court of Appeal, and all jurisdictions. The distributions for female barristers show a lower proportion of more junior women and a higher proportion of more senior women appearing in the Supreme Court and Court of Appeal than in other jurisdictions. This suggests that women but not men require greater seniority to appear in the Supreme Court and Court of Appeal than in the other jurisdictions studied.

4.3.4 However, it can also be seen that the seniority distributions of female and male barristers appearing, both in the entire sample and in the Supreme Court and Court of Appeal, are quite different. In each case, a lower proportion of senior women than of senior men, and a higher proportion of junior women than of junior men appeared. If appearance in the jurisdictions studied was dependent upon seniority, one would expect to see much more similar seniority distributions for female and male barristers appearing there. Figure 11 does not present a picture of higher court work being uniformly reserved for the most senior barristers. The women who were briefed tended to be more junior, on average, than were the men briefed in the jurisdictions studied. Hence the lower proportion of female barristers than of male barristers briefed in those jurisdictions must be explained by reference to some factor or factors other than relative seniority.

Figure 11: Seniority Distributions of Female and Male Barristers in Court Appearances Study



Multiple Appearances

4.3.5 Fourteen female barristers appeared in the sample more than three times, i.e. an average of more than one appearance per month. This figure represents 7.1% of all women on the Bar Roll. Eighty-eight male barristers appeared in the sample more than three times, representing 8.3% of men on the Bar Roll.⁵ Thus, a marginally higher proportion of male barristers than of female barristers received ‘regular’ briefs in the jurisdictions studied.

5. One of the women and nine of the men were Crown prosecutors (out of a total two female and 16 male Crown prosecutors at the time of the study).

4.3.6 For both women and men, the proportion of QCs receiving regular briefs was higher than the proportion of junior barristers, although the small number of women involved results in misleadingly divergent percentage figures (33% of female QCs and 5% of female juniors received regular briefs, compared to 13% of male QCs and 8% of male juniors). The average seniority of male barristers receiving regular briefs was higher than the average seniority for women. However, eight of the male barristers briefed regularly were more junior than the most junior female barrister briefed regularly. This suggests that at least some male barristers obtain regular work in the jurisdictions studied sooner than their female peers. Those who did so practised mainly in crime, but also in industrial law, migration and personal injuries.

4.3.7 Women were less likely to be briefed as often as men. The relative numbers of appearances by female and male barristers in the 'regular briefing' group are shown in the following table:

<i>No. Briefs</i>	<i>Women</i>	<i>Men</i>
4-5	11	55
6-10	1	25
11-20	1	5
>20	1	3

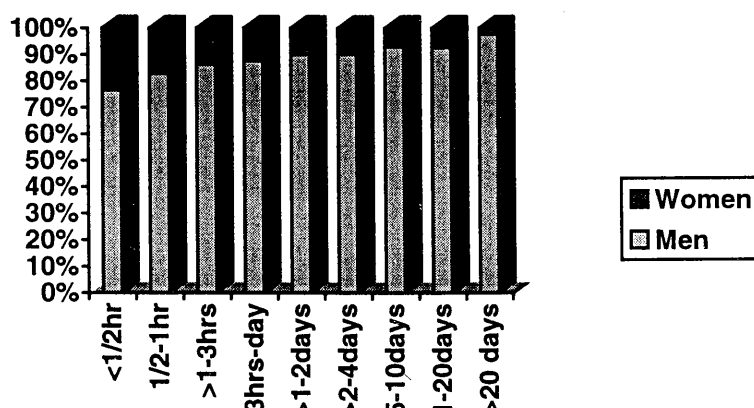
Receiving more than five briefs was extremely rare for women, but considerably less so for men

Aggregate Appearances

4.3.8 There was a total of 1830 appearances by barristers in the sample: 238 appearances by female counsel and 1592 appearances by male counsel. Adjusting the Family Court data results in figures of 258 appearances by women and 1629 appearances by men. Women thus accounted for 13.7% of total appearances.

4.3.9 These appearances by women were not evenly distributed across different kinds of cases, however. The proportion of appearances by female and male counsel in cases of varying duration is shown in Figure 12:

Figure 12: Appearances by Duration of Hearing



4.3.10 Figure 12 shows a very clear pattern: rather than women being proportionately represented across cases of different duration, female participation was inversely related to duration of hearing. As duration of hearing went up, female participation went down. Women made up 13.7% of appearances overall, but equalled or exceeded that level of representation only in cases up to a day's duration. They were represented more than the average in cases shorter than an hour, but represented less than the average in all cases longer than a day. As noted in Chapter 1 (para.1.7.15), cases running for a day or less made up 70% of the total sample, however a large proportion of these (those running for three hours or less — 57% of the sample) are also the more minor, less complex cases that give barristers less opportunity to gain advocacy skills and/or to display their abilities to their colleagues, solicitors and the bench. Explanations for women's lower representation in longer cases, and in the sample overall, may be sought from the interview data obtained from solicitors, clerks, and former and current barristers.

4.4 Role and Attitudes of Solicitors in the Briefing Process

4.4.1 Solicitors were asked about the qualities, from their perspective, of a good barrister, and how they and those in their firm or organisation go about selecting barristers for different cases.

4.4.2 The question "what do you think makes a good barrister?" elicited a long and varied list of qualities and skills — from "hard working and well prepared with excellent interpersonal abilities" to "they must be able to appreciate the commercial realities of the case", "be prepared to fight", and "they have to actually read the file and not bad mouth me to the client". The varied responses reinforced other statements made by solicitors about the briefing process to the effect that the selection of counsel depends on a multitude of factors specific to the file and to the client, and that it is a matter of professional pride to most solicitors to be able to select the appropriate barrister for the job. Solicitors emphasised that they take into account whether the barrister has knowledge of the relevant area of law and the required technical skills for the specific task, "because some are good at the paperwork, others are hopeless at the paperwork but brilliant on their feet . . . it depends on what strengths you think you need for each case". Other factors may become relevant such as which court and judge the matter will be heard before, who opposing counsel is and what sort of approach will get the required result. For example:

Recently we used a well-known table thumping silk for an interlocutory matter where it was poorly pleaded against our client. We entered a summons to have the matter struck out, sent in the silk, he thumped the table . . . and it got struck out . . . we wanted a table thumper.

There are occasions where . . . you are going to have what I would call a no-holds barred fight . . . and my experience has been, over the years, that . . . probably some of the male barristers are more prepared to . . . be less gentle. In that situation, you might say perhaps I need someone who is, to use the old expression, going to "kick heads". In that situation, my experience has been that female barristers will be more intellectual in their approach and perhaps a little less willing to give them a lesson.

4.4.3 The ability to thump tables and "kick heads" are qualities generally associated with a particular style of masculinity - relatively senior, authoritative, physically imposing. One older male solicitor went even further in arguing that:

You want to be able to refer the client to a barrister who is strong enough to handle the client's problem and the difficulty, or the perceived difficulty with female barristers, is that they may not have the intestinal fortitude to handle it.

Such gross generalisations about the abilities of women barristers were rare, however. In general, the qualities of a good barrister listed by solicitors did not reveal any obviously gendered patterns.

4.4.4 Yet while considerations regarding knowledge and technical skill may dominate in specific instances, the interviews strongly suggested that in relation to repeat work, which most barristers rely on to maintain and build their practices, personal rapport between solicitors and barristers is all important.

Personal contacts

4.4.5 Barristers were asked about the current sources of their work. In general they confirmed that personal contacts and relationships they had built up over years with particular solicitors provided them with the mainstay of their practices.

4.4.6 The majority of both women and men said they were briefed more by male solicitors than females, which is not surprising given that there are more male than female solicitors.⁶ Many of the senior male barristers commented that they tended to receive their work from partners in law firms who are predominantly males. "It's a generational thing" — many of the senior male solicitors who brief them are also their contemporaries from school or university or they have come to know them socially over the years. Consistent with this observation was the comment of one barrister who had been at the Bar for over 30 years, who said he had experienced a decline in the number of briefs he received as his contacts in law firms retired or moved out of active participation in litigation.

4.4.7 Solicitors' comments indicated that: "Who you brief is a very personal thing". As one solicitor remarked, "It is kind of sacrosanct in terms of any investigation or inquiry into the basis or criteria on which barristers are selected".

There are some people that we like to brief again and again, in part because we have established a good relationship with them. I think that they understand us and we understand them.

Firm lists

4.4.8 The personal nature of the briefing process seemed to be generally consistent across large, medium and small firms, as well as government and other agencies, whether or not general briefing policies were in place. For example, almost all the solicitors interviewed from the large firms said that they maintain lists of "preferred counsel" for solicitors to refer to when briefing counsel. However, many of them also said that at a practical level, lists are not strictly adhered to:

We have a list, but no one uses it, so for practical purposes, it is irrelevant.

I pulled it out the other day . . . I noticed that most of the junior counsel we had on it were now silks or on the bench or gone . . . it's all out of date.

We are supposed to use someone on the list or else get partner approval, which is generally pretty easy to get.

It is adhered to in the sense that it is your first reference point, but the reality is that we each have a stable of barristers that we work with and we only go outside that stable when they are not available

4.4.9 Solicitors from medium sized and small firms said that they do not have formal briefing policies or maintain strict lists of counsel. They indicated that they and each of the solicitors in their firms had their own preferred barristers whom they had come to know and trust. One medium sized firm had discussed the possibility of drawing up a list, but had finally rejected the idea,

6. In October 1997, 28% of solicitors were women, though women were only 9% of partners and 20% of sole practitioners. Figures provided by the Law Institute of Victoria.

concluding that “the reality is that each solicitor will use barristers that they have some familiarity with”.

4.4.10 A similar approach is followed in most of the government and other agencies whose representatives were interviewed. Two government offices said they had lists but, like the large firms, they are “not hard and fast”. “Basically the list identifies a large number of barristers who are prepared to work for the government rate . . . but who gets briefed is really up to the individual solicitors within the office”. Some overriding policies may also be operating at various times — set by the current Minister, or in one agency, the governing council — aiming to “widen the pool of barristers used”, “contain costs”, or “consider using more female barristers”. But the interviewees indicated that implementation of these policies is affected by the dominant selection formula, that is, the personal preferences of the individual briefing solicitors who will be the ones working closely with the barristers.

4.4.11 The Committee concerned with the implementation of the Keys Young report on women in the legal profession in NSW recommended that one way of ensuring that women are not overlooked in briefing is to encourage adherence to lists of barristers, formed by advertising selection criteria, inviting expressions of interest, and a selection process informed by principles of equal employment opportunity, although it made the recommendation only in the context of government agencies’ briefing practices.⁷ The responses of solicitors in this study indicate, however, that such a proposal, even if adopted by government agencies and/or large firms, is unlikely to be implemented in the way intended. Solicitors insist on the value of personal knowledge of and confidence in particular barristers, in preference to a more bureaucratic selection process. Further, while seven female and six male barristers thought that more rigorous construction of and adherence to firm lists would be a good idea, four women and five men were actively opposed to the idea, and the largest group of barristers (11 women and 12 men) thought the idea was pointless or would not work. Their reasons for this assessment included solicitors’ ultimate need for discretion in choosing whom to brief, the countervailing operation of market forces, and the difficulty of specifying criteria for inclusion on a list. Two other women thought that the list concept would not be relevant to their areas of practice (family law and plaintiff work).

4.4.12 If personal contacts play such an important role, it is relevant to investigate how they are formed, and whether there is a gender dimension to that process.

“Word of mouth” information

4.4.13 The solicitors’ comments reveal that they are heavily influenced by those around them in developing their own stable of regularly briefed barristers, and in moving outside that stable when the need arises. “Word of mouth” was by far the most frequent response to the question “what methods do you use for getting information about barristers?”, with most saying if they have to go outside their regular stable, they consult with colleagues within the firm and other lawyers outside the firm. As one of the clerks observed:

Wherever they meet, eventually they talk about business, it’s the worst thing lawyers are guilty of. So you can guarantee that if your name is out there as someone who does a good job, sooner or later it will spread.

4.4.14 Solicitors were asked about the internal decision making processes in their firms. Partners in large law firms generally said that they would only consult others in the firm about briefing counsel if they were outside their area of expertise, although a few senior male partners said that

7. *Gender Bias and the Law*. 21–22.

they often talk to the younger people in the firm to find out about new barristers, "because we are always looking for the up and coming bright young things". A few firms hold regular meetings to discuss cases, and choice of counsel is included on the agenda. Employee solicitors in larger firms reported having a "fair amount" of control over who they briefed, except in large matters where a partner would always be consulted about the choice of counsel. In medium and smaller firms there seems to be an emphasis on individual solicitors developing their own views and skills in selecting counsel, with advice and suggestions available on an ad hoc and informal basis. Some barristers working in criminal law, however, noted that although their instructing solicitors were now often female, authorisation for briefing came from a male partner in the firm. In some government organisations solicitors are officially required to obtain authority to brief counsel from branch heads. However, it seems that a lot of trust is placed in the solicitors and that official procedures are not often adhered to, especially where the solicitors are briefing people who are used regularly.

4.4.15 As one of the authors of this report has written elsewhere:

Word of mouth recruitment is a notorious means of replicating an organisation's existing characteristics. Within a predominantly male workforce, the sexual characteristics of that workforce will be perpetuated.⁸

In the briefing context, older male solicitors are likely to have more familiarity and rapport with male barristers who are similar to them. If those male solicitors are also law firm partners, they will pass on the names of the men they prefer to brief, and their feelings of confidence, to their employees, thereby extending the influence of this self replication process. Some solicitors identified this process occurring:

I brief males more than I brief females . . . they're human and not entirely perfect . . . and I suspect that it is easier to brief a male than it is to brief a female, as a male, because you expect a male to be acceptable to your client and capable of standing up to a tough judge.

My partners don't know the women as well . . . they know the men, they associate with them, they don't associate with the girls much.

[In response to suggestions about briefing more women, the male partners say] we want to brief who we like and that's who we can rely on and they are good blokes.

Comments made by clerks bear out these observations, though they also considered that the situation is changing:

With younger solicitors, their peer group contains both men and women. Some older solicitors tend to go more for the blokes. As time goes by, I think . . . that stuff will change and has changed.

4.4.16 The predominance of male solicitors, particularly in senior positions in law firms, together with the reliance on personal choice in briefing, gives male barristers a clear advantage over their female colleagues when it comes to briefing opportunities. As the last quotation suggests, however, the source of contacts on which a barrister relies may enhance or mitigate this pattern of masculine advantage.

Pre-established networks

4.4.17 Being part of a school, university, community or legal network before coming to Bar is a definite advantage. As noted in Chapter 2, some barristers had been confident of success at the

8. Rosemary Hunter, *Indirect Discrimination in the Workplace* (Federation Press, 1992) 166.

Bar because they came equipped with contacts and therefore expected to be briefed. Clerks emphasised that coming to the Bar with a network of contacts established at university or while working as a solicitor makes a big difference, as can family and 'old school tie' connections. Similarly, list committee members talked about assessing applicants in terms of the contacts they could contribute to the list, and their ability to "hold their own" on the list rather than being reliant on the clerk for work. Some networks, however, appear to be more effective than others at directing work to members.

4.4.18 One male former barrister commented: "I went to Melbourne Grammar and that gave me an immediate introduction . . . I knew a number of people and they knew of me". In general, though, interviewees tended to assert a lack of old school tie or club connections or to deny their utility. For example one male barrister said:

I went to a private school, Melbourne Uni, had friends who were solicitors, but as my uncle said, "don't expect your friends to brief you", which proved true . . . I don't feel that my school or class connections have made a difference.

4.4.19 Contrary to the popular image of the class and institutional background of most barristers, approximately one third each of the female and male barristers interviewed had attended a private school (nine women: nine men), a state high school (nine women: seven men) or a Catholic school (five women: nine men). In the case of four women and six men, these schools had not been in Melbourne. Nevertheless, even those women who might have been expected to be able to exploit their school connections did not talk about the 'old school tie' in the same way as men did. Former private school women did not refer or appear to have access to an 'old girls' network. Thus, the interviews do not bear out the expectation that women's school connections would work for them in the same way as men's do (or, indeed, that men's school connections are such a pervasive influence).

4.4.20 Networks brought by women to the Bar tended to have been formed at university rather than at school. For example a solicitor in a government office explained:

I went through Monash with a group of women and at least seven of them have gone to the Bar. I am in Women Lawyers and I see them regularly. We brief at least four of them regularly and they are excellent.

4.4.21 Male interviewees comprehensively outnumbered female interviewees in club memberships, although few admitted to belonging to all-male clubs. One woman was a member of the Kelvin Club and one a member of the Alexandra Club, while four men belonged to either the Gentlemen's Club, the Naval and Military Club or the Savage Club. One woman and three men were members of the RACV, while one woman and seven men were members of the MCC, and three men were members of the VRC. Three women and eight men belonged to sporting clubs (golf, football, tennis, etc.), while four women but no men listed other organisational memberships. Interviewees made few comments regarding the impact of club memberships on briefing opportunities. However, to the extent that they provide the occasion for networking, particularly in an exclusively or predominantly male environment, they do have at least an indirect effect of enhancing men's advantages in the briefing stakes.

4.4.22 More of the male barristers interviewed also had a family background in the law. Six women and 11 men said that they came from a legal family and that this had either generally increased their confidence and comfort at the Bar, or had positively increased their briefing prospects.

4.4.23 In general, however, the clerks had not observed a big difference between men and women at the Bar in relation to networking. One clerk thought that "men might have slightly better

networks when they come, but it may be that I am more aware of it because they make more noise about it” and “if there is a difference when they first come, it is quickly overtaken by the network they set up by their ability”.

Developing and maintaining networks at the Bar

4.4.24 Most of clerks interviewed identified networking, “the ability to establish and cultivate relationships” as “the most important thing in people being able to develop a career at the Bar”. One observed that:

If a person fails at the Bar, generally it’s got nothing to do with their intellectual ability, but with their personality . . . they just don’t have the ability to get on with other people, explain what happened to the client.

For those barristers who choose to take advantage of recent legal reforms allowing them to establish independent chambers and to operate without a clerk, networking will assume even greater importance in maintaining their practices.⁹

4.4.25 One clerk thought that women might have better networking skills, in terms of the actual creation of relationships, because “men are conditioned to be strong and silent, you can’t show weakness and you can’t reach out to others”. On the other hand, women might be less inclined to want to go “drinking with the boys”. In Thornton’s words:

Fraternal bonds are reinforced through time-honoured drinking and lunching rituals that are also marked by gendered practices of exclusion. Women may enjoy neither the drinking nor the masculinist atmosphere accompanying it . . . Even though women may find the atmosphere at the ‘after-hours bar’ to be uncongenial, their absence can deleteriously affect them in . . . access to work¹⁰

This point was reinforced by a female barrister

People who cultivate contacts with instructors, that kind of networking serves them well. I think it’s important, especially in commercial work. You are incredibly dependent on your networks. As a junior barrister. . . patronage from senior people is really important. And I think that is harder for women, because often you don’t share the same interests, and you just can’t network in the way blokes can, going for drinks at 5:00 for a couple of hours with a whole group of barristers, because you have to go home to kids, or even if you don’t actually have to go home to kids, there’s a sense that you ought to be going home to your kids . . . It’s quite extraordinary what importance is placed on those sessions and what goes on, how much information is exchanged about who has been performing in what cases and just professional information . . . You become more aware of what opportunities there are and people are more aware of you.

And a female solicitor:

Men seem to be better networkers . . . I rarely go to a function where men aren’t around shaking hands and swapping business cards . . . and I don’t find women do that as much . . . Men are much better at saying “I did this great job. Remember that trial of . . .” . . . They’re always able to drag up their last success, even if this is a failure, and that’s probably something that we’ve grown up with and something that we just have to learn to get better at . . . you almost have a bragging competition.

Likewise, a male barrister talked about his ability to maintain camaraderie with the solicitors he knows

I can be blokey with the male solicitors . . . drop the “f” word and stuff like that and make the odd joke and they love it . . . that can be some advantage . . . it’s a character thing. Some of the solicitors who brief me have a different background . . . one who is a Toorak Geelong Grammar girl to a couple of Greek fellows and a few

9. Pagone, ‘Employment Practices and Awareness of Diversity’, 6.

10. Thornton, *Dissonance and Distrust*, 174.

Scotch blokey types, and it becomes a matter of how you fit in with those people . . . understanding them and knowing when to be blokey and when not to be.

4.4.26 “Playing the game” may, however, also be uncongenial to some male barristers. Both male and female ex-barristers identified a lack of willingness to actively engage in the social aspects of networking as being part of the reason for their practices not developing as they could have:

They brief you if they like you and I wasn’t prepared to do all that social, kiss-butt sort of stuff that went on. Maybe I should have . . . it’s not enough to get good results . . . I should have been asking [the solicitors] about their families and their practices and schmoozed them . . . it really worked for a friend of mine, she wasn’t a better advocate, but her phone rang a lot more (female former barrister).

I didn’t actively foster relationships with solicitors . . . there are a lot of very ambitious people at the Bar who know exactly what to do to get ahead . . . I know barristers who take solicitors out to lunch three days a week (female former barrister).

I am not one for networking. I should have networked a lot more than I did . . . My policy was “do a job and do it well” and . . . that was working for a while . . . (female former barrister).

I was not one to be hanging around the Essoign Club or going down to the Met on a Friday night (male former barrister).

4.4.27 Yet women do face a difficulty with networking not encountered by men, since there are sexual tensions involved in socialising between women and men which are not present when men socialise together. Women barristers spoke of being subjected to juvenile and demeaning remarks and innuendo when they were seen lunching with a male solicitor. The assumption that such a meeting must have a sexual dimension denies women’s professional standing and hampers their ability to pursue their careers on an equal footing with men.

Women’s networks

4.4.28 As noted earlier, women barristers’ contacts with women solicitors tend to be established at university or after coming to the Bar rather than at school. The evidence concerning the utility of women’s networks, however, appears to be equivocal.

4.4.29 It was not possible for any relationship between female solicitors and female barristers to be tested in the court appearances study, since only the briefing firms were recorded in each case rather than the identity or sex of the instructing solicitors. But the interviews yielded a considerable amount of material on the subject. As mentioned earlier, the greatest source of work for both female and male barristers was male solicitors from private law firms (11 women: 17 men). Five women and three men said that their work mostly came from female solicitors in private law firms. This work was almost exclusively in family law. Some of the women said they were conscious of being briefed by women who “feel more comfortable working with another woman” or who are keen to support women at the Bar.

4.4.30 More women than men said that government agencies were their major source of work (7: 1). Women solicitors within those agencies provided most of the work for three of the women interviewees and one man. The areas in which women were briefed included administrative law, tax and anti-discrimination law. The one man in this position does almost all of his work for the OPP or other government agencies, noting that “you find a lot more women working in those [places]”. Two women, however, received most of their work from male solicitors in government agencies, and two thought that briefing from government agencies came about 50/50 from female and male solicitors.

4.4.31 These briefing patterns reflect the general distribution of women solicitors: more likely to be located in the public sector, community legal centres and family law than in large corporate firms.¹¹ Thus, even if women barristers are briefed by women solicitors, this may not bring them the high-powered, prestigious work to which male barristers may have access through their networks. This point is evident in the comments of a female community legal centre solicitor who consistently briefed three or four women, but was very disappointed when two of them recently left the Bar to go back to work as solicitors:

They said they had been at the Bar for a long time and were not getting the higher court work which they thought they should be doing by this stage of their careers, so they have taken jobs which offer them some more challenges and a steadier income.

4.4.32 A further illustration of the uncertain value of women's networks emerges from the contrast between the views expressed by two women judges. One commented that:

There is now a good women's network in business. There are a lot of women in business who would prefer to direct their legal work to a women. You can work the networks very well now, where you couldn't 10 or 15 years ago. There are women's breakfasts . . . So although you may have the disadvantage of not having gone to the school that the guys went to and not belonging to their golf club, and not being invited to lunch or drinks after work. .it's still a major issue in Melbourne . . . but you have the new women's networks which really are much more close and effective, if you want to get work.

The other, however, poured scorn on the idea of women's networks:

Women think they should be getting together with other women and they have these women's breakfasts, but there is no point in mixing with all these women. What they should be doing if you want to get on is go where "the power" is, in the male domain. Why mix with women? You are just going to grizzle with each other. Get in there and network where it is important.

4.4.33 Six female solicitors said they felt more comfortable working with women barristers because they could be "more casual with them" and it was more likely that a friendship would develop than with a male barrister. There were a few female solicitors who said they regularly brief women and would like to brief more women barristers but they had trouble finding them:

There just aren't enough women at the Bar, which is really annoying . . . Sometimes I specifically ask for women and the clerk says "I don't have any women in that area"

I keep an ear out for women who practise in estate work . . . I've become aware of one who is writing articles who I would like to try.

4.4.34 A more commonly-cited problem, however, which further militates against women's networks proving to be a fruitful source of briefs for women barristers, was the fact that some female solicitors were, for a variety of reasons, very hesitant to brief other women. Their rationales ranged from enjoyment of the sexual friction generated in dealing with male barristers, to concerns about "balance", to fear of being seen to be making a statement:

I am a woman and I think if you have an end that is heavily laden with females during hearings, it doesn't work, you need to strike a balance . . . I also gear it around which judge I am appearing before . . . If I am acting for a female, I prefer to balance that with a man.

If you have high powered commercial clients, there would be pressure on you not to brief a female, and the female barristers complained about that, they said it was because the female solicitors were more comfortable with male barristers. But it's not that so much as, you're really happy having this terrific case, as a woman,

11. See Roach Anleu, 'Women in the Legal Profession', 162.

that you would be hesitant to impose on the situation another woman . . . the last thing most lawyers want to be seen as is out there flying the flag for other purposes.

4.4.35 The irrationality of these attitudes can be demonstrated by reversing their premises. Nobody would ever say that an all-male Bar table, with a male client and male judge, was “unbalanced”. Indeed, this configuration remains the norm. Likewise, nobody would consider that a male solicitor was “imposing another man on the situation” or “flying the flag for other purposes” if he briefed a male barrister to represent his client. Nobody regards male gender as any kind of a liability, whereas female barristers are treated less favourably because of their gender. This is a clear instance of sex discrimination.

4.4.36 Three of the more senior women barristers specifically noted feeling unsupported by women solicitors. One reported that she had “never been briefed by a woman. . . In the last 10 years there have been women in the field but they just haven’t briefed me.” According to another:

The biggest problems in some ways were women . . . I can count on one hand the number of briefs I have had from women . . . partly because there are less women working in crime . . . but there were a number at Legal Aid, and one briefed me once . . . I think it’s changing . . .

However, one woman had noted

a dramatic change with women solicitors briefing women barristers since the Women Barristers’ Association started networking . . . There seemed to be intense competition . . . but that has altered . . . there is really good rapport . . .

4.4.37 When asked for suggestions as to how any barriers to women’s advancement at the Bar could be overcome, a female solicitor in a large firm thought that “there has to be a strong network of women at the Bar, and a network of female solicitors who brief them. That’s the way women are going to progress on a merit basis”. Male solicitors and barristers have no hesitation in exploiting their masculine networks, and this is part of men’s advantage at the Bar. Women’s networks do not stand on an equal footing with men’s, since they are less entrenched, there are fewer women solicitors and they are often located in less prestigious and remunerative parts of the legal profession. Nevertheless, as the positive efforts of the WBA indicate, there is further unrealised potential for women’s networks to provide briefing opportunities for women barristers.

Recommendation 14: That WBA and other relevant groups at the Bar continue to develop forms of networking that may be appropriate and useful to women barristers.

Other factors in choosing a barrister

Observations of performance

4.4.38 A further way in which solicitors may come to know of barristers for potential briefs is by observing their performances in court. Many said they would try out barristers whose performance impressed them in a matter in which they were opposed.

4.4.39 The reliance on court observations may set up a negative cycle for female barristers: if they do not receive briefs they will not be seen~ and are therefore less likely to receive further briefs. This may well occur in particular areas (e.g. jury trials: see below paragraphs 4.7.27ff), if not across the spectrum of briefing as a whole. The gender profile of the area is thereby perpetu-

ated, giving rise to solicitors' comments such as "I haven't seen any women appearing in [that area]".

4.4.40 Perceptions of court performance may also be gender biased, to the detriment of women barristers. For example, a solicitor from a large firm explained what had occurred when the firm's list was being updated:

I asked the group "is that person someone you'd like to see down the other end of the Bar table when you walk into court?" If you got a majority who said yes, well, that's someone who shouldn't be on your list. We didn't go through a list of female barristers with any such purpose, but my recall is that no woman survived that rather tasteless test . . . mind you a lot of male barristers didn't either.

The implication here is that none of the women on the list were seen as being "tough" enough to be formidable opponents. This point is explored further in paragraphs 4.7.19–22 below, and in Chapter 6.

4.4.41 In addition to being seen in court, solicitors suggested that female barristers could make themselves known by taking other opportunities for public speaking. For example:

One way that I have seen female barristers in action and then given them work subsequently is at seminars, seeing them present lectures, writing articles and all the usual things . . . Seminars are particularly good because you see them on their feet.

Barristers could, for instance, "approach the suburban associations and provide speakers for meetings". Another solicitor reinforced the point that "something like that is very impressive . . . they're the sort of things that make one feel very confident about briefing someone".

Recommendation 15: That individual women, and WBA collectively, pursue these suggestions for providing women barristers with opportunities to display their skills as orators or advocates otherwise than in court.

Fees

4.4.42 A number of solicitors indicated that the level of barristers fees is often part of the equation in determining which member of counsel is briefed: "I am always interested in hearing about competitive fees, or that they are willing to negotiate".

4.4.43 Some American studies have shown that women lawyers earn less than men in comparable jobs.¹² The researchers were unable to investigate this question directly in the present study, since asking barristers to allow their fee books to be examined was considered by the Steering Committee to be too sensitive an issue. Barristers were, however, asked whether they had set fees, and if so at what level, and solicitors were asked if they had observed any differences in the way female and male barristers set or negotiated their fees.

4.4.44 The majority of male barristers (17) and around half of the female barristers (14) did charge a set fee for their services. Of those who specified the level of those fees, the rates between women and men were broadly comparable for their areas of practice and seniority, although two women but none of the men mentioned a rate of less than \$100/hour. Similar num-

12. Menkel-Meadow, 'Feminization of the Legal Profession', 244.

bers of women and men (9: 7) said the amount they would charge would vary according to the client and/or the brief. The most notable gender difference with regard to fees was that women were more likely to refer to being paid legal aid or government rates, or scale fees, or to doing pro bono work, than were men (8:4). One woman said she felt solicitors tried to take advantage of her in this regard, knowing that she was more likely to accept pro bono work than her male colleagues with similar knowledge and seniority. She also said

I know they try and get a lower fee out of me and that they think "Oh [she] has a partner who earns a good income, so it doesn't really matter what we pay her".

A solicitor working in the family law area commented that male barristers were far less likely to take on legal aid matters and "the women generally are community conscious to the extent that they will take legal aid matters". "Community consciousness" may, however, translate into lower remuneration for female barristers.

4.4.45 Just over half the solicitors said they had observed no difference in the way female and male barristers set or negotiated their fees, with one commenting that "[women] certainly aren't discriminated against in terms of fees". The remaining solicitors had observed differences. Some solicitors said that female barristers were easier to negotiate with about fees, especially in situations where clients are concerned about costs. Again, however, in some instances it seemed from the solicitors' descriptions that ease of negotiation merely equated with women being prepared to accept less:

Some male barristers will say "well I can't do it for \$1500, I'd want \$1800", whereas I haven't come across any female barristers who make that an issue. They say "\$1500? Fine".

4.4.46 Similarly some solicitors said that female barristers are "better value for money" than their male counterparts and that "men charge a lot more, sometimes unrealistically". One solicitor said she thought that "women are less greedy than men" Another described

some blokes [trying] to get more out of you, especially when you know they have just bought a new car or been on an expensive holiday. I find it very wearing, knowing they are trying to screw you and the client . . . women don't tend to do that kind of thing.

4.4.47 The fee issue therefore appears to be a double-edged sword for some women barristers. On the one hand, their attitudes to fees and to poorer clients are more conducive to them being briefed, but at the same time they may gain less financial reward for their skills.

Recommendation 16: That the issue of pay equity for women barristers be the subject of further study.

Junior work

4.4.48 Solicitors were asked about the process of choosing junior or senior counsel in cases that required a silk. The majority (18) said that the QC would normally be chosen first, followed by the junior, though 10 said that the more usual process in their firm or organisation would be for the junior to be briefed first, followed by silk if the case required it. Most interviewees described a selection process for QC or junior that was conducted either entirely by the firm, or by the firm in consultation with the silk or junior (whoever had been briefed first). Only three solicitors said that the barrister would have primary responsibility for the choice of a junior or leader.

4.4.49 Several solicitors stressed the need for silk and junior to work well together:

The reality is the two of them will have to work together . . .

If they're not going to work well together, well, you'd be crazy to throw them together.

We would certainly be aware of the fact that we wanted a junior who would work well with the silk

In this context, solicitors referred to well-established silk-junior teams, or knowing which silks and which juniors get on from within the firm's or organisation's pool. By contrast, one solicitor said:

The trouble with going to a silk is that they have their own mates . . . I try to break up the mateship . . . One of the advantages of the two counsel system is to mix people . . . If you have an equity case, most equity barristers are shocking cross-examiners so you get a good cross-examiner silk and you give him a good academic junior, or vice versa.

4.4.50 The fact that only 6% of QCs are women partly justifies the assumption in the previous quotation that a silk will be male. This leaves junior women in a difficult position, however. They may miss out on junior briefs in the matching process, on the basis that male QCs know and prefer to work with male juniors. One female solicitor in a large firm, for example, described the process of choosing a junior as a combination of what the silk thinks and what the partner thinks. She had never heard any women's names mentioned in this context. Similarly, one female barrister noted:

People often use QCs in my field . . . they then choose the juniors and I have never received a junior brief from them . . . I have worked with them with me getting the brief first and me bringing them in . . . but it hasn't gone the other way.

And the point was reinforced by a male barrister:

There is no doubt in my mind that one of the barriers to women's practice at the Bar is the boys' club thing . . . there are networks . . . silks recommend juniors and work with them regularly . . . it's much harder for women to be part of those networks . . . it's groups of mates who lunch regularly and tend to pass work to each other, they are known as a good team.

4.4.51 Alternatively, if women do receive junior briefs, they risk being stereotyped into the role, being perpetually consigned to the task of handmaiden to a male authority figure. A male sole practitioner described how he would usually brief a female junior for preliminary work, "and when it gets a bit hot, we bring in a silk" (male). In the words of a female barrister

Too much junior work can be a trap . . . you should be careful of not getting the experience of running the show . . . you get the feeling that you are not a "real barrister" because you don't open your mouth in court . . . There's a danger in becoming a permanent junior . . . it makes you reliant on male patronage and you then shadow the practice of more senior males and you are not identified for your own strengths.

4.4.52 At the same time, women juniors are faced with denigrating comments from their male colleagues about how they managed to secure the brief - on the basis of their looks, or in return for sexual favours. One woman interviewee was involved as a junior in a case in the Supreme Court, but when it went to the High Court on appeal she was not briefed. She discovered this was because the solicitors at the briefing agency were attempting to "save her reputation", since rumours had been circulating as to why she was getting so much junior work from that agency. Such comments and rumours clearly undermine women's professional legitimacy and 'chill' the climate of junior work for women.

4.4.53 In the court appearances study, 28 appearances by women and 179 appearances by men were as junior counsel. Thus, women made 13.5% of junior appearances, the same as their proportion of appearances in the overall sample (13.7%). Appearances by women in junior roles made up 11.7% of all appearances by women, with appearances by men in junior roles making up the same percentage (11.2%) of all appearances by men.

4.4.54 In terms of individual appearances as juniors, a smaller proportion of women (11.6%) than of men (14.5%) on the Roll of junior counsel appeared in the sample as junior counsel. At the same time, a higher proportion of women in the sample (27.5%) than of men in the sample (23.4%) appeared as junior counsel. Only one woman was briefed more than once as a junior, while 23 men were briefed two, three or four times as a junior. On balance, these figures suggest that women barristers are more likely to be excluded from junior work than typecast into it. There was no particular area of law in which junior briefs for women were concerned.

4.4.55 One woman barrister called for

a fairer distribution of junior work . . . I value clients' right to brief who they want . . . but a rotational system would give everyone a go and a proper apprenticeship is critical for barristers.

Another suggested that senior members of the Bar should take more responsibility in this respect:

They have enormous power to influence who gets to be junior to them . . . they often suggest three to four names . . . There are a lot of silks who work consistently with the one junior . . . that is favouritism . . . You do work closely and you have to get on but this is an area where they can positively do something. I know some silks who positively encourage female juniors. It can be a quantum leap for your practice.

Recommendation 17:

- ***that QCs actively turn their minds to the existence of suitably qualified women barristers when considering who to recommend as junior counsel;***
- ***that the Bar Council request the Law Institute to encourage solicitors to do the same when considering who to brief as junior counsel.***

Proportion of women used

4.4.56 Solicitors were asked what proportion of their firm/agency list or their own personal stable of barristers are female. Very few solicitors said they do not brief any women at all. However, of the 352 solicitors firms, legal centres and government agencies represented in the court appearances study, only 79 (22%) briefed one or more women barristers during the study period.

Lack of awareness of women in the area

4.4.57 Solicitors who had no women in their "personal pool" of barristers said they did not know of any women who practise in the areas in which they brief. One young female partner in a large firm said:

I think that you will find that there are a lot of female barristers who do family law . . . You don't find a lot that do high profile commercial litigation, and I think that is the essence of the problem, they are not there . . .

A female associate in another large firm said:

You realise that there aren't that many senior women barristers compared to men . . . In my experience of commercial matters, I think I can say that I have never been involved in a case where we've briefed a woman barrister.

Similarly, male solicitors working in commercial law, personal injuries and town planning said they could not name any women barristers who work in their areas. One senior male solicitor said he had to make an effort to do more research about who "the good ones are that are filtering up the system . . . we are all lazy, and if you are happy with what you have, there is little incentive to do the research".

4.4.58 In one government agency a list of preferred counsel had been compiled by a panel of solicitors firms retained to run the litigation for the agency. Of 20 QCs, 51 juniors, nine 'newcomers' and 17 mediators, there is one junior woman who is recommended for use in costs matters. The list was described as "not hard and fast", but when asked, the operators at the agency said that their "impressions about barristers come from the panel and if you asked me to name one woman barrister, I couldn't tell you".

Recommendation 18:

- *that the Bar produce a (regularly updated) catalogue of women barristers, listing their experience and areas of practice;*
- *that the Bar Council request the Law Institute to encourage solicitors to make a greater effort to identify women barristers working in their fields (by reference to such a catalogue, or to list directories, the Law Institute diary, Internet resources, active inquiries, etc.), to investigate their performance, and consider adding them to their personal pool of barristers.*

Double standards of assessment

4.4.59 One government solicitor interviewed said that she knew of women who worked in the relevant area, but that they were known to act for opponents of the agency and were therefore unlikely to be briefed. A similar issue was raised by a male partner in a criminal law firm. He had observed that female criminal barristers who make it to the County Court doing trials tend to "get their break from the DPP" which means they are prosecuting and are therefore unlikely to be used by defence firms. He admitted that "we are a bit sexist from that point of view, because we don't take a hard line with the males as opposed to the females". In other words, males might be forgiven for undertaking some prosecution work, but women may not be.

4.4.60 Judging women barristers by reference to their presumed allegiance to one 'side' or the other is antithetical to normally assumed standards of professional impartiality. The double standard of assessing men on the basis of their ability but women on some other or additional basis is another example of sex discrimination.

Recommendation 19: That the Bar Council request the Law Institute to promote measures to eliminate double standards and other sexually discriminatorily practices in briefing processes.

Overestimates of the proportion of women used

4.4.61 Solicitors' estimates of women in the firm's/organisation's stable of barristers generally ranged from less than 10% to 20–30%. Given that women make up only 16% of the Bar, a stable of 20–30% women would be surprising in many areas.

4.4.62 It is notable that solicitors were asked for impressions rather than to check their records for accurate information. This introduces the possibility of 'visibility bias' — the tendency to overestimate the proportion of a minority group present in a given situation. As explained by Rosabeth Moss Kanter:

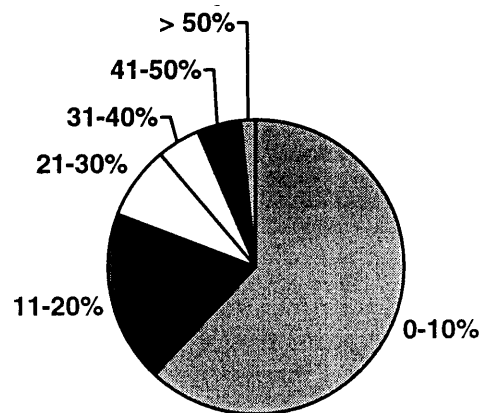
[T]okens get attention. One by one, they have higher visibility than dominants looked at alone; they capture a larger awareness share. A group member's awareness share, averaged over other individuals of the same social type, declines as the proportion of total membership occupied by the category increases, because each individual becomes less and less surprising, unique, or noteworthy.¹³

This point was borne out with one solicitor who estimated that 20–30% of barristers he used were female, then rang the accounting department and was told that the figure was more like 10%. Kanter also notes that "Visibility tends to create performance pressures on the token",¹⁴ an observation that might help to account for the double standards of assessment noted above.

4.4.63 The figures on the proportion of briefs given by law firms to women and men in the court appearances study must be treated with caution, since many firms briefed only once or twice during the study period. Of those firms/organisations briefing more than three times (63 in all), almost half (30) briefed no women. The overall gender-briefing pattern for this groups of firms and agencies is shown in Figure 13.

4.4.64 The one firm that briefed more than 50% women in fact briefed women more than men (4: 1 briefs). This was a firm headed by a female sole practitioner, specialising in crime. Only one other firm in the entire sample briefed women more than men, briefing women twice and a man once during the study period.

Figure 13: Proportion of Briefs Given to Women by Frequently Briefing Firms/Agencies (n=63)



13. Kanter, *Men and Women of the Corporation*, 210.

14. *Ibid.*, 212.

4.4.65 Some solicitors who estimated their personal stable of barristers to include 20–30% women said they used women mainly for family law matters or in “female sensitive areas”. One family law firm said they use up to 65% women because “we have the attitude that if a female is available, and a male is available, and the female is just as good, we go for the female, so we do have our own affirmative action going on.” Again, it is difficult to test such assertions against the court appearances data, since only three firms briefed more than twice in the Family Court during the study period (of these, one gave four briefs to men, one gave five briefs to men and one to a woman, and one gave two briefs to men and two to women). Victoria Legal Aid gave three Family Court briefs to women and none to men, but it also gave 39 briefs to men and three to women in other areas.

Recommendation 20: That the Bar Council request the Law Institute to encourage solicitors to make themselves aware of the actual numbers of women on their firm or agency’s list and in their own stable, and to aim to keep those numbers proportionate to the numbers of women barristers practising in the relevant areas.

Public versus private sectors

4.4.66 As noted earlier, of the barristers interviewed, there were a larger number of women who reported being briefed and “feeling supported by” solicitors in government agencies. One woman spoke about receiving government briefs in the tax area, but not from the large private firms that do that sort of work: “women do not get tax briefs from private firms . . . even women who have come from those firms”.

Another senior female barrister said that she had received “a lot of [her] work from the government and a lot of women seem to”. She also indicated that she and other women tended not to be briefed by the larger firms, and as it was difficult to get sufficient work to maintain a practice from smaller firms who do a limited amount of court work, repeat work from government sources made it possible for women to build up experience in interesting areas of law. The down side is that “they pay you less and it is not so highly esteemed by the private sector”.

4.4.67 The court appearances data suggests that women barristers’ relationships with government agencies is by no means secure. There was variability between agencies as to the extent women were briefed, and the agencies also tended to be an equally good, if not better, source of support for male barristers.

4.4.68 By far the most frequently briefing agency in the sample was the Victorian Office of Public Prosecutions, with 417 briefs. Other public agencies appearing in the sample included the Australian Government Solicitor (59 briefs), Victoria Legal Aid (45 direct briefs), the Commonwealth DPP (15 briefs), and Victorian Government Solicitor (14 briefs). The proportion of these briefs directed to women is shown in the following table:

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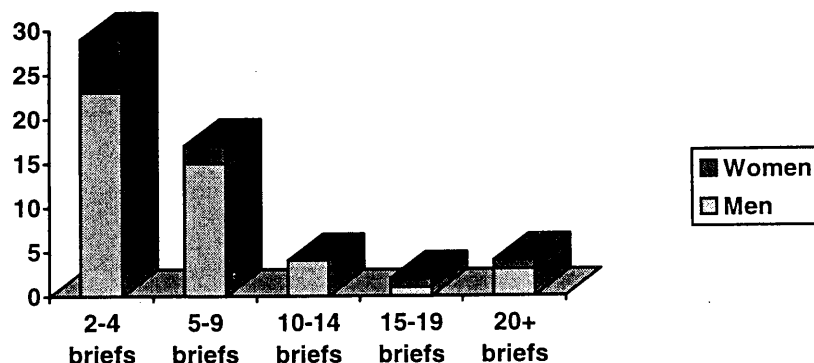
<i>Agency</i>	<i>Total Briefs</i>	<i>No. Briefs to Women</i>	<i>% Briefs to Women</i>
Victorian OPP	417	81	19.4%
Australian Government Solicitor	59	7	11.9%
Victoria Legal Aid	45	6	14.3%
Commonwealth DPP	19	4	21.1%
Victorian Government Solicitor	14	4	28.6%
<i>Average</i>			<i>18.4%</i>

4.4.69 It can be seen that while the Victorian OPP offers a high number of briefs to women barristers, it is also a very good source of work for male barristers. The number of briefs going to women from the other three agencies is very low. AGS and Victoria Legal Aid brief often, but only a small number of those briefs go to women.¹⁵ The agency with the highest proportion of briefs going to women was the VGS, although the high proportion is related to the small overall number of briefs given by that agency.

4.4.70 The total number of briefs from government agencies tends to translate into numerous briefs for a small number of individual barristers, especially in the case of women. The 81 briefs given to women by the Victorian OPP went to 21 women. Eleven women were briefed once while 10 women were briefed more than once. By contrast, the 336 briefs given to men by the OPP went to 167 men: 121 briefed once and 46 briefed more than once.

4.4.71 One woman (who was not a Crown prosecutor) received all of her 26 briefs during the study period from the OPP. This was the highest number of briefs received by any woman. Six of the top seven female recipients of multiple briefs (including one Crown prosecutor) received all or most of their briefs from the OPP. The other woman in the top seven received half of her six briefs from the AGS. The highest number of briefs given to an individual man was 30; again, this individual received all his work during the study period from the OPP, but was not a Crown prosecutor. Seven of the top eight male recipients of multiple briefs (also including one Crown prosecutor) received all or most of their briefs from the OPP. The other received five of his 13 briefs from Victoria Legal Aid. The OPP's repeat briefing pattern is shown in Figure 14:

Figure 14: OPP Multiple Briefs



4.4.72 The other agencies appearing in the study were not such a reliable source of regular briefs for individual barristers, particularly for women. Only two women received more than one brief from AGS (two and three briefs respectively) and only one woman received two briefs from VGS. Seven men received multiple briefs from AGS (between two and seven briefs), four men received multiple briefs from Victoria Legal Aid (between two and five briefs), and one man received three briefs from the Commonwealth DPP.

4.4.73 Ten private law firms briefed as or more frequently than two of the government agencies discussed above. These were a mixture of large corporate and labour law/plaintiff firms.

15. Further information about AGS briefing patterns is contained in the AGS *Annual Report*.

The proportion of their briefs directed to women is shown in the next table.

<i>Firm</i>	<i>Total Briefs</i>	<i>No. Briefs to Women</i>	<i>% Briefs to Women</i>
Corporate Firm #1	34	3	8.8
Labour Firm #1	33	3	9.1
Labour Firm #2	28	4	14.3
Corporate Firm #2	27	1	4.7
Corporate Firm #3	26	2	7.7
Corporate Firm #4	24	4	16.7
Labour Firm #3	21	5	23.8
Corporate Firm #5	17	0	0.0
Corporate Firm #6	17	0	0.0
Corporate Firm #7	15	0	0.0
<i>Average</i>			9.1

4.4.74 The average proportion of briefs going to women barristers from government agencies was much higher than the average proportion of briefs going to women barristers from private law firms. However, three of the private firms performed better in this respect than some of the agencies. In particular, Labour Firm #3 gave more briefs to women during the study period than did two of the agencies, and gave a higher proportion of briefs to women than did four of the five agencies.

4.4.75 Private firms also tended to spread work among more barristers and to give fewer briefs to individual barristers than the government agencies:

<i>Firm</i>	<i>Individual Briefs: Women</i>	<i>Individual Briefs: Men</i>	<i>Multiple Briefs: Women</i>	<i>Multiple Briefs: Men</i>
Corporate #1	3	21	0	4 (2-4 briefs)
Labour #1	3	26	0	1 (4 briefs)
Labour #2	2	10	2 (2 briefs)	6 (2-4 briefs)
Corporate #2	1	11	0	5 (2-4 briefs)
Corporate #3	2	17	0	3 (2-3 briefs)
Corporate #4	4	17	0	1 (3 briefs)
Labour #3	3	11	1 (2 briefs)	2 (2-3 briefs)
Corporate #5	0	17	0	0
Corporate #6	0	14	0	1 (3 briefs)
Corporate #7	0	15	0	0

The above table also demonstrates starkly that women barristers have virtually no access to whatever multiple briefing does occur in these ten frequently briefing private firms. As one female barrister commented in relation to the labour law firms:

With union work . . . quite complex, specialised stuff . . . there has not been a big preparedness to brief the younger women . . . We don't get the continuous stream of work that the men do . . . So much of the union work is male identified, for example the meatworkers union, or the transport workers union, and the officials are all blokes, real blokes, and they respond to fellas a lot better . . . There is a closeness that develops between the officials and the barrister because a lot of the legal work happens at very tense times. . . cements the relationships and it is hard to break into that.

The issue of client choice is discussed further in section 4.6 below.

4.4.76 In summary, government agencies appear to have strong relationships with selected barristers, while private law firms tend to be more diversified in their briefing. Unfortunately, not many women — and far fewer women than men — benefit from either of these briefing patterns. Since government agencies are engaged in the expenditure of public funds, and are not subject to the wishes of private clients, a greater degree of accountability for proportionate representation in briefing might be expected of them than of private law firms, particularly since State and Commonwealth public policy includes adherence to principles of equal opportunity and non-discrimination.

Recommendation 21: That the Bar Council promote the view that:

- ***government agencies should accept responsibility for the achievement of fair gender representation in briefing, and closely monitor and adjust their briefing practices to ensure this outcome is achieved;***
- ***government agencies contracting out work to private firms should include the achievement of fair gender representation in briefing as one of the key performance indicators in the contract;***
- ***private law firms should consider their briefing practices and processes within the context of their equal employment opportunity policies.***

4.4.77 The interviews and court appearances data show that solicitors' briefing practices present a variety of barriers to women's advancement at the Bar, ranging from overt sex discrimination, to indirect forms of discrimination (such as reliance on homosocial networks) and the operation of gender-biased criteria. In addition, solicitors are generally unaware of the gendered impact of their decisions, and unwilling to take responsibility for the issue in a context where their primary concern is to provide the best possible service for their client. Yet it is questionable whether that service is provided when the talents of a proportion of available barristers are left out of consideration. Exercising a greater awareness of gender in the briefing process can translate into better client service.

4.5 Barristers' Clerks at the Victorian Bar

4.5.1 Different systems of clerking exist within different independent Bars. In Victoria, 12 clerks (one of whom is a woman) operate "lists" of barristers of varying sizes, with some primarily specialising in particular areas of law, and others housing a more general stable of barristers. Barristers' clerks play both administrative and "clearing house" or booking agent roles for the barristers on their lists. Their administrative services generally include answering telephones and taking messages, handling mail, delivering briefs, playing a role in accounting, negotiating and collecting fees and other associated tasks to facilitate the smooth running of their barristers' practices. As an adjunct to their booking agent function, the clerks also promote the barristers on their lists to solicitors who may want to use their services.

Floating Work

4.5.2 As booking agents, the clerks play a critical role as "the interface between the resources at the Bar and the community". They exercise varying degrees of discretion as to which barrister on their list may be retained for a particular brief, largely depending on the request from the solicitor. As the foregoing section would suggest, in the majority of cases a solicitor calls to inquire as to the availability of a particular barrister or short-list of barristers, in which case the clerk's function is fairly limited (although the request for particular barristers may reflect past efforts of

the clerk in promoting those barristers or introducing them to the solicitor making the request). Alternatively a solicitor may request a list of names of available barristers of certain seniority and experience for a particular brief. In these instances the clerks have a more significant role - they choose whom to include on the list and what information they provide about the barristers included on the list. In other circumstances a solicitor may say "who have you got to do this?", "who's new and who's good?", or "who needs a brief?". Generally these briefs are short matters at the Magistrates Court or applications or uncontested matters in the higher courts. This category of unallocated briefs is known as "floating work" and has traditionally been used to support new or "baby" barristers in their first years at the Bar. A floating brief represents an introduction to a solicitor or firm and is important for establishing relationships which may lead to "repeat work" and the building up of a practice.

4.5.3 Each of the five barristers' clerks interviewed reported that "floating work" represents only a small percentage of the briefs handled by their offices. The view was that "there is very little floating work at the Bar generally these days", compared to the "old days" when clerks were responsible for assigning a significant amount of floating work to junior barristers.

4.5.4 This scenario was confirmed by the comments of both practising barristers and those who had left the Bar. Of the eight barristers interviewed who had been at the Bar for five years or less, seven said they had received "some support" from their clerks in the way of floating work. One female barrister, who had been at the Bar for 18 months, said she had received virtually no floating work. Most have received the majority of their work via other contacts ("everybody said don't rely on the clerk and they were right").

4.5.5 In assisting a solicitor to make a choice regarding counsel when the situation arises, clerks undertake what a few of them described as a "matching process". In talking to the solicitor they find out when the matter is listed (and therefore who is available) what the case is about, how senior a person they require, what the solicitor is like, some details about the client and their personality, and then try to match a barrister:

It's not just a person with legal ability, it's also a matter of getting the right mix between the barrister and the client, the style of client.

The solicitor might start talking to you and say 'I don't like such and such because . . . and then you get a bit of an idea about what they are looking for.

Two of the clerks emphasised barristers' availability as the primary determinative factor in whether they could direct work their way.

4.5.6 Not surprisingly, the clerks generally indicated that "everyone on the list gets a go" and that "gender does not come into it". Yet given that the majority of solicitors and clients are male, gender may enter the matching process at a subconscious level, in the same way as it may come into the choice of a junior to work with a male silk, or a 'mate' to work with a male partner, as discussed in the previous section.

4.5.7 In relation to the distribution of floating work, one male former barrister spoke about

just about everyone who was not earning a whole lot of money [having] some degree of paranoia about whether the floating briefs were being distributed fairly, but there was no way of knowing.

A woman who had left the Bar after five years, however, was very clear that she had received "quite blatant sex discrimination" from her clerk in respect of floating work, and general support in collecting fees and developing her practice.

I think the only women who did get support were, to be quite truthful, the ones who were young and pretty. The married ones and the older ones got zilch.

Four other women still at the Bar also expressed reservations about whether clerks gave women a 'fair go':

I don't know about how it works in the clerks office . . . I had a friend who had a feeling she was being discriminated against and she got a solicitor friend to ring up the list and they didn't put her name forward.

You hear stories about what some of the clerks say on the phone to solicitors . . . "There's John such and such, Christopher blah blah", and the list goes on, and then at the end, "and some of the ladies are available that day as well".

Clerks . . . not liking you wearing trousers shouldn't influence whether they recommend you to be a junior to a QC.

Sometimes when I have been in the office, I haven't heard my name mentioned by his staff and I wonder about that . . . It used to be a very male-dominated list and maybe the staff are the same and there is some of that left over

The last speaker also described a female friend having a brief taken away from her by her clerk and given to a male barrister who supposedly had more experience than her, but she discovered he had just commenced at the Bar.

4.5.8 In a similar vein, two solicitors (one male, one female) said that clerks very rarely recommended female barristers when they rang for advice, although a third solicitor said she "always get[s] a mixed list when I ask". A female solicitor in a government agency suggested that

they could get more women in the clerk's offices. When you ring you almost always talk to a man. There is one woman in one of the clerk's offices and she is really good because she knows I like to brief women and she will put their names forward first.

Four women barristers said that they thought their clerk did distribute briefs and promote people on the list fairly. Nevertheless, it is interesting to note that more women than men (8: 4) mentioned the role of the clerk when asked whether they thought that the briefing process overall was fair.

4.5.9 Almost all the barristers of more than five years standing said they did not rely on their clerks as a source of work and did not expect to receive work from them. Those who reported that they receive more than the occasional brief from their clerk worked in family law or "petty crime", areas where it appears solicitors more regularly use referrals from clerks.

Is which list important?

4.5.10 Being on a particular list may influence a barrister's prospects of success in a variety of ways. The clerk or the list may have the reputation of attracting 'good' work, or may have access to more floating work than other lists. The clerk may be better or worse at promoting the barristers on his or her list, and the list may provide a more or less supportive environment for new barristers. For women barristers, there is also the issue of whether the clerk and the list generally are supportive of women.

Joining a list

4.5.11 Female and male barristers interviewed gave similar, varying reasons for how they came to be on a particular list when they first joined the Bar. Common explanations included: a family member was or had been on the list (4 women: 2 men); the list was recommended to them

(4 men); they knew the clerk from their briefing experience as solicitors (3 women: 3 men); they were allocated to that list (3 women: 2 men); or their master/mentor was on that list (2 women: 2 men).

4.5.12 The application and selection process for joining a list varies between lists and is sometimes ad hoc. Few lists provide any information about the list to prospective applicants. Rather, it is assumed that readers will already have some knowledge of the lists, or will gain the information from their mentor or the Readers Course. Written applications are entertained by each list committee, and are often supplemented by an interview. Six of the 10 lists represented in the focus groups said they tried to interview all applicants, one (large) list said 50–60% of applicants would be interviewed, while three did not conduct interviews as a matter of course. If held, the interview might be with the whole list committee, a sub-committee, a single person and/or the clerk. Interviewing processes for most lists do not follow common equal opportunity principles (e.g. ensuring at least one woman on the interview panel and asking each candidate the same questions).

4.5.13 The qualities for which list committee members said they looked in applicants included an ability to contribute to the list, find their own work and bring new contacts to the list, a good academic record, aptitude, and preparedness to work hard. Two committee members mentioned the importance of being able to get on with others on a small list, although two committee members from larger lists said personality was not really an issue in their selection processes. Sometimes there might be a preference for applicants wanting to work in a particular area if the clerk thought the list needed boosting in that area. Other factors emphasised by some list committee members included professional recommendations, character references from people known to the committee, and a range of outside interests.

4.5.14 Some of the lists expressed an interest in having more women members, but in all but two cases, had not adopted and did not propose to adopt any form of affirmative action to achieve this aim.¹⁶ This attitude appeared to be based on a combination of the general passivity of list committees in the application process, and opposition to the idea of quotas. However, quotas are by no means the only possible form of affirmative action available.¹⁷ List committees and/or clerks could, for example, make a public commitment to equality of opportunity (“We are an equal opportunity list”), specifically invite applications from suitable women, and consider the possible impact of their interviewing procedures on women. None of these suggestions involve making gender into a selection criterion. One of the lists that had adopted a policy of positive action in order to build the number of women on the list from a very small base had found that it was quite possible to recruit women without sacrificing quality. According to the committee chair, the list was concerned to achieve a gender balance in the same way that it aimed for a balance of areas of expertise, and wanted to be seen to be actively promoting a greater mix of people at the Bar. In one sense, there is little incentive for lists to take active steps to recruit women members, since all women coming to the Bar will be placed on one list or another. However, such steps can help to encourage more women to come to the Bar, and would certainly contribute to a positive atmosphere for those who join the list.

Promotion of barristers on the list

4.5.15 The days when clerks had considerable control over the careers of members of their lists, through their power to dispose of a lot of floating work, are apparently gone. There remain various

16. In the case of one list, a female barrister interviewed said she had been involved in developing a policy about getting more women on the list, which had resulted in a higher proportion of women taken onto the list. This was not confirmed, however, by the list committee member who attended the focus group.

17. See e.g. Benjamin David Oppenheimer, ‘Distinguishing Five Models of Affirmative Action’ (1988–89) 4 *Berkeley Women’s Law Journal* 42.

ways, however, in which clerks can promote the barristers on their lists, and some clerks engage in these activities to a greater extent or more successfully than others. Some clerks might take solicitors out to lunch, or organise seminars to display their barristers' talents to solicitors. Others send out 2000 letters to solicitors advertising each new intake of barristers. Three lists have home pages on the internet with details about each barrister's seniority and areas of practice, some complete with photographs. Others provide glossy, hard copy list directories with the same kind of information. Two solicitors, however, complained that list directories do not give sufficient information, "we don't have any idea about the ability behind the names". Their ideas included having barristers' CVs on the internet, or videos or CD Roms showing "who they are and what they do, their likes and dislikes . . . then you can check on the person that the clerk is recommending".

4.5.16 The comments of other solicitors about the role of clerks suggest that their overall influence on briefing should not be over-emphasised. When asked what method they use to gather information about barristers for briefing purposes, consulting a clerk was, in all but a few cases, well down the list. Many interviewees had to be prompted with a follow up "do you ever use a clerk?". Approximately one third of the 40 solicitors interviewed said they consult a clerk, but often only to ascertain availability, or when they are "stuck at short notice when the barristers [they] know are unavailable", or "as a last resort".

4.5.17 A few solicitors reported positively about having trust in particular clerks, those who "develop a knowledge of the people on their lists", so that they "tend to use the barristers on those lists, which becomes quite critical". By contrast, over a quarter of the solicitors reported "bad experiences" with clerks, with the consequence that they "avoid relying on them if at all possible". They spoke about the clerks having insufficient knowledge of the barristers on their lists to be able to give reliable information, and pushing their "own agendas":

You ring them and spend 10 minutes telling them about the case and the type of person you need . . . and they seem to understand your requirements and then they give you a list of people you wouldn't brief in a pink fit, who haven't got anywhere near the kind of skills you require.

I think the clerks are more interested in spreading the work than in giving you the best person for the job. They have an extremely obvious conflict of interest in terms of recommending people.

Nevertheless, some solicitors said they do "pay attention" when clerks are promoting the new barristers on their lists, because they are "always on the look out for young barristers to take care of our lower end work".

4.5.18 On most lists, clerks' promotional activities are directed primarily towards solicitors, and do not extend to creating links between new and more experienced members of the list. One list committee member said that the clerk prepares short resumes of new readers which are circulated to the list, so that if there are any little jobs that list members know of, they might try to look out for junior members. The list committee chair of a large list noted the importance of circulating photographs of list members, since young members have difficulty seeking advice from senior members if the senior members do not know who they are. The same speaker argued, however, that "the list isn't a nursemaid . . . you don't want them to expect that". Yet introducing young barristers to existing members of the list can be a way of expanding networks and creating opportunities that might otherwise not be available, particularly to women.

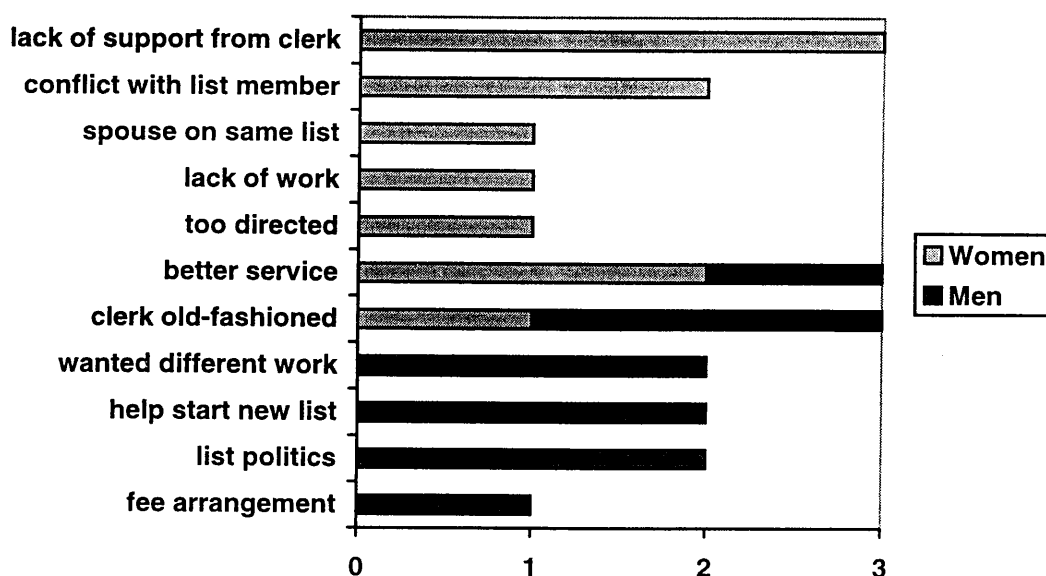
Movement between lists

4.5.19 Under previous Bar rules moving from one list to another was prohibited without the permission of the Chairman of the Bar Council. In more recent times "swapping lists" has become

more acceptable, although according to list committee members, transfer applications would always be treated with some suspicion.

4.5.20 Practising and former members of the Bar were asked if they had ever changed their clerk and if so, their reasons. Eighteen of the 50 practising barristers (10 female: 8 male) and two of the 10 former barristers (1 female: 1 male) had changed clerks. Among the currently practising barristers, women and men had moved lists for quite different sets of reasons, as shown in Figure 15:

Figure 15: Reasons for Changing Lists



Most of the reasons cited by women for changing lists were in some way related to gender. For example:

The guys that were getting ahead on the list were those who found out which church the clerk . . . went to and would attend on Sundays . . . I had a situation where the clerk backed the solicitor over me in relation to fees . . . Now . . . I don't have to deal with those old man types of attitudes.

I used to fight with another man on the list who took the attitude that women were only at the Bar to marry a silk . . . so I left . . . [My current clerk] recognises that women are discriminated against and tries to do something about it . . . Some of the older men think we should be at home with the kids. . . [but my clerk] is very professional. . .

I changed from my first clerk because I felt like an employee, that I couldn't make my own choices, I was being told where to go and what I would be paid . . . I get a lot less floating work, but I am much happier . . . I don't want to be directed by the clerk. I was encouraged to do a lot of family law . . .

None of the men offered these kinds of reasons for changing lists, although some also expressed concern about their former clerk's "bad attitude to women".

4.5.21 The interview and focus group material suggests that while clerks may not have the ability to influence the growth of barristers' practices through the allocation of floating work as might have been the case in the past, the atmosphere of the list and the clerk's and other list members' attitudes can still present barriers to some women's advancement at the Bar. Lists could do considerably more to attract and promote talented women. "No problem" and "not our responsibility"-type views need to be overcome in order for this to occur.

Recommendation 22:

- *that lists strive for proportionate representation of women at the various levels of the Bar;*
- *that lists adopt affirmative measures other than quotas to recruit and retain women members, in order to achieve proportionate representation, and to encourage women to come to the Bar;*
- *that all list committees adopt equal opportunity interviewing policies for applicants;*
- *that clerks and list committees facilitate supportive interactions between more senior and new list members;*
- *that clerks remain conscious of the potential impact of gender in the process of matching barristers with solicitors and clients, and attempt to overcome 'solicitors' ignorance of women barristers working in 'non-traditional' areas;*
- *that list committees consider requesting clerks to maintain records of the volume and distribution of floating work by gender and area of law, and to provide this information annually to list members;*
- *that clerks attempt to maintain gender balance among their employees.*

4.6 Clients

4.6.1 Solicitors reported that, in general, individual clients do not have a great deal of influence over who is briefed to appear for them. Most are dependent on their solicitor when it comes to making choices of counsel. Only occasionally will an individual client know of and want to brief a particular barrister:

It depends on the client . . . [some] like to have a lot of control over how the case is run . . . others are quite happy to defer to your expertise . . . in reality they mightn't have that much to do with actually choosing counsel.

By contrast, institutional and corporate clients (who are more likely to be 'repeat players' in the system) usually have more of an idea about who they want to brief and some have their own preferred lists.

4.6.2 Solicitors consistently said that clients' wishes are accommodated as far as possible and that the matter is carefully negotiated where the solicitor believes the client's choice is unsuitable for the particular case at hand. Many solicitors spoke about the "practical commercial reality" that the client is paying the bill.

It's a service industry; you don't try and talk people out of a service that they've said they want.

At the end of the day, we have to do the best for our client and that, on occasions, means accepting the client's instructions, even if you don't necessarily agree with them.

If the client tells me that they have a preference for a particular person, then that person will get a guernsey unless I am vehemently opposed.

Expressed gender preferences

4.6.3 More than half the solicitors interviewed said that they had had clients who specified a preference for either a male or female barrister to represent them in certain matters. This seemed to occur most frequently in family law and criminal matters, or cases considered to be

“female-sensitive” (e.g. crimes compensation, or medical negligence cases involving “loss of a foetus or scarring”, presumably relying on a stereotype of women as more sympathetic, caring etc.).

4.6.4 In family law, solicitors reported that many female clients requested female counsel because they were able to relate more easily to them regarding sensitive issues arising from their marriage breakdowns and were more likely to “see the situation from [their] point of view”. While a few solicitors said that male family law clients specifically requested male counsel (“just make sure you don’t get me a woman”; “no woman in this world can do the job that a man can do”) it seemed they were less likely than women to specify the gender of counsel. One solicitor attributed this to male clients “tak[ing] advice more readily than female clients because I think they are used to how the business world works, relying on professionals, paying professionals, whereas women, especially older women are not so used to it”. A female barrister, on the other hand, thought many women feel more comfortable “having to describe being sexually assaulted or abused in some way or a medical condition” to a lawyer of their own sex.

4.6.5 Another solicitor spoke about general client perceptions about the role of female barristers in matrimonial cases:

There is a perception that females are for wives and males are for husbands, which is just a perception . . . [in our firm] we consistently brief females [for both wives and husbands].

By contrast, a female barrister described a potential woman client who

took one look at me and said “you won’t do, my husband is a very strong man and he’ll need someone very strong to stand up to him . . .” That’s her prerogative. If she wanted someone else she is entitled to feel comfortable about who is representing her.

The same barrister, however, said she had more often been briefed because the female client felt more comfortable talking about their case with another woman, or “because I’m a mother, I have more empathy for mothers”.

4.6.6 Client requests for female barristers in family law may help to explain female barristers’ experiences of being “pushed” into practising in that area, as discussed in the following section. Nevertheless, there remains a perceived shortage of women at the senior end of the family law Bar. A solicitor noted that “[if] the matters are difficult or highly contested . . . we go for senior counsel, who happen to be male”. At the time this comment was made there was one woman QC specialising in family law, and there are now two. The notion that ‘senior = male’ may still, however, operate to negate client preferences for a woman.

4.6.7 Solicitors who work in criminal law reported that some male clients charged with sexual offences request female counsel because they believe it will “look better” for them in front of a jury. This view seems to be reinforced by a few solicitors who said they raised the matter of the gender of counsel as part of tactical discussions. One male solicitor with a long history of working with criminal clients described how client sexism has “swung around”. Previously criminal clients expressed a strong bias against using female counsel because they were not considered competent or tough enough to handle the criminal jurisdiction. However, this solicitor has observed a shift in this perception so that now, some of the clients express bias towards female barristers. On the other hand, another male barrister practising in criminal law noted that:

there are a lot of clients in the criminal system who are pretty basic in their outlook and belief and they would prefer to have a man representing them . . . it’s just that they are old fashioned in the way that they think, so I suppose that is an advantage [for male barristers].

A senior woman barrister also commented upon

the discrimination that exists in terms of the fact that the chairman of [X Co.], if they are charged in relation to criminal matters, and needs a silk, will not think of me or [another female silk] . . . We are not real criminal silks to them . . . because that's got to be . . . a guy . . . We don't get the share of corporate crime that we should get in terms of our ability, knowledge and experience.

4.6.8 The attitude of solicitors from government agencies responsible for prosecuting offences involving sexual assault or misconduct varied in relation to accommodating specific requests by complainants for female counsel. Since complainants are not clients and are not paying the bill, there is less concern to keep them happy. In one agency, a general assumption is made that the female complainants would prefer a female prosecutor. In another agency, however, the solicitor reported that complainants have no influence over who is briefed. "There might be the odd victim who puts to us that they want either a male or female barrister, but that's usually pretty irrational stuff".

4.6.9 One female barrister who practises in the property and probate areas reported that she was told by a male solicitor friend who briefed her regularly that although she had done all the interlocutory steps for a case, he could not brief her for the trial because the client wanted a male. A male solicitor also noted that "a lot of businessmen, especially the smaller businessmen I have to say, prefer to deal with blokes; they're a bit distrustful". Often though, in areas other than family and crime, it seems that client preferences work in a more subtle way.

Solicitors' assumptions

4.6.10 In addition to the operation of express client preferences, over a quarter of the solicitors said they make assumptions about their clients' preferences in relation to the gender of counsel, without the matter necessarily being discussed.

4.6.11 In choosing counsel many solicitors appear to consider the client's needs in terms of whether the barrister will be able to relate well to them. "We would get barristers on the 'good bloke' theory: he's a good bloke and will get on with the client". Clients who are older males from European or Asian backgrounds are often assumed not to want a female to represent them "because of their ethnic background, they don't take any notice of women". Most solicitors with these clients said they accommodated their assumed preference by briefing males to appear for them. One female barrister described having a brief taken from her by a Greek solicitor "whose client was very traditional". However, a young female solicitor demonstrated that such concern may be unnecessary:

I had one client who was a Greek 60 year old, very set in his ways. Initially he made a comment about the barrister when he saw her. I ignored him because I knew that when he saw her performance, he wouldn't have anything to query.

4.6.12 A few solicitors also reported making gendered choices of counsel in instances where a male client's general aggression or attitude towards women was either articulated or assumed. They tended to try and "protect" female barristers from these clients, although in one instance a reverse psychology was adopted:

My employee solicitor told me she was worried about briefing a woman because the client was a pretty obnoxious male . . . we discussed it and decided that . . . [he] would probably tone down his behaviour [with a female barrister], which he did. We think that if we had got him a male barrister, he would have continued to be obnoxious.

It is interesting to note in this example that the female employee solicitor was not protected from the obnoxious male client, and her gender was apparently regarded as irrelevant.

4.6.13 Solicitors also spoke about the operation of client assumptions about the ability of female counsel. The solicitors' descriptions indicate that these matters are not actually articulated: some clients show a "real reluctance or reservation about the recommendation of a female barrister"; "often when you tell your [male] clients that you are going to brief a female barrister, they sort of say 'Oh'"; "there are certain clients who you know will not want a woman fighting their cause . . . some of them won't work with me [a female partner in a large firm] because I am female, so we won't get a female barrister for them". Again, however, there were solicitors who did not necessarily act to accommodate the client's assumed preference, prioritising other considerations about how the case should be run:

I have briefed women when I thought the client would want a man, only to find that he was more than happy with the person I briefed, mainly because the outcome was excellent.

I had a commercial matter recently where the client had definite views about these things and I briefed a female barrister . . . nothing was said.

As these responses show, a client's expressed or assumed gender preferences may be overcome simply by choosing the best person for the job.

4.6.14 Other answers given by older male solicitors revealed that their own attitudes and stereotypical views are reflected in their assumptions about what the client would prefer:

I do assume that male clients would be expecting a male barrister . . . I think more so for adversarial matters, advice matters would not concern a client quite so much.

4.6.15 Solicitors from government agencies, whose clients are mostly other government departments or agencies, generally took the view that "gender is irrelevant . . . we're interested in ably qualified people who perform the job".

Clerks' responses

4.6.16 Barristers clerks reported that occasionally gender preferences are expressed by solicitors calling to book a barrister. Consistent with the solicitors' comments, older "ethnic" male clients and family law clients were cited as those most likely to prompt a gender preference.

4.6.17 With commercial clients, one clerk said that "there is sometimes a perception that we have got to get someone tough", i.e. a man, although solicitors actually saying they or their clients do not want a woman is "rare" — those comments are "happening less and less as it is becoming less acceptable to exercise gender bias". While some of the clerks said they felt obliged to respect the solicitor's or client's views in these instances, one clerk says he tries to broaden their perspective:

I tell them that if their client is saying they don't want a female, then they are cutting off a large part of the very competent market . . . regularly I can change their mind . . . I tell them to go back to the client and check what their attitude is, because often they will have just assumed.

4.6.18 It appears, then, that client preferences, either express or assumed, do have some impact on briefing opportunities. While women barristers may be specifically requested in some family and criminal cases, in other areas they are likely to be excluded by the operation of actual or presumed client choice. Some solicitors' assumptions about what kind of barrister their male client

would prefer are connected with their own gendered preferences and beliefs. Other solicitors and clerks take the view that the way to best serve the client is to select the best barrister for the job, regardless of gender.

Recommendation 23: That the Bar Council request the Law Institute to promote the view that solicitors serve the best interests of clients by ensuring that barristers are chosen on the basis of their skills rather than their sex.

4.7 Channelling Women Into Particular Areas or Types of Work

4.7.1 Carrie Menkel-Meadow points out that

women everywhere are concentrated in the lowest echelons of the [legal] profession, although these differ from country to country. There appears to be a push-pull effect: women are “pulled” into work for which they are thought to possess special talent (such as domestic relations) and “pushed” (or more likely kept) out of high-status work (such as private commercial matters in capitalist regimes).¹⁸

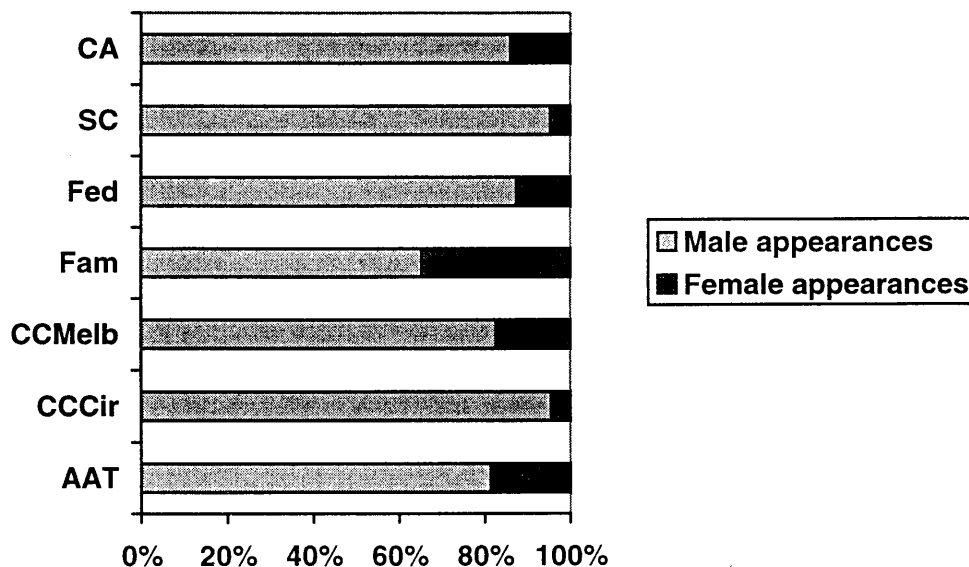
Similarly, Justice Branson argues that:

men are generally perceived as naturally possessing the competency cluster of traits — strength, toughness, assertion, responsibility, authoritativeness, credibility, whilst women are seen as naturally possessing the nurturing cluster — caring, vulnerability, passivity, indecisiveness . . . Thus . . . there is a tendency for [women lawyers] to be easily siphoned off into supportive, backroom roles whilst their male colleagues are encouraged into more prominent roles.¹⁹

The application of these observations to the Bar is not unproblematic, since barristers constitute an elite within the legal profession as a whole, and advocacy is by definition a prominent role. Nevertheless, as pointed out already, there is more or less prestige attached to different areas and kinds of work in which barristers may engage.

4.7.2 Certainly women barristers made varying proportions of appearances in the courts and tribunal that were the subject of the court appearances study, as shown in Figure 16:

Figure 16: Appearances by Female and Male Counsel by Court



18. Menkel-Meadow, 'Feminization of the Legal Profession', 237.

19. Branson, 'Running on the Edge', 8-9.

The Figure shows the highest proportion of appearances by female counsel in the Family Court (17/49 appearances: 35%), and the lowest proportion in the Trial Division of the Supreme Court (11/241 appearances: 5%) and on circuit in the County Court (11/248 appearances: 4%). These patterns are explored further below. The proportion of appearances by female counsel in the Court of Appeal during the study period was 14% (34/245 appearances). This contrasts with 6% of appearances by female counsel in the life of the Court of Appeal prior to the study (June 1995–July 1997), suggesting that the three months of the study may have involved an unusually high number of appearances by female barristers in the Court of Appeal.²⁰ In both periods, however, a similar pattern was evident in that court of multiple appearances by a small number of individual women barristers.

4.7.3 Anecdotal impressions of the work done by women at the Victorian Bar are that they practise predominantly in “people law areas”. This is consistent with the finding of the Keys Young report on the NSW legal profession, that women tend to be clustered in family law and crime and find it harder to get briefs in other areas such as insurance, industrial, equity and commercial law.²¹ Thornton writes about a history of “cases perceived to relate to ‘feminine issues’ . . . [being] referred to women.” In relation to the Bar in England, Kennedy writes of:

already established tracks which divide the profession into elite and non-elite areas . . . [Women] find themselves . . . more readily functioning in areas that are undeservedly less prestigious, such as family law, child-care and low level crime.²²

4.7.4 Within the sample of barristers interviewed for the research, the areas of law practised by both women and men varied widely. The only noticeable area of difference was the number of women practising in the family law and related child welfare area (10), compared with the number of men (3). Similar numbers practised in crime (7 women: 6 men) and commercial law (8 women: 10 men).

4.7.5 Interviewees were asked how they came to work in their current areas of practice. Most of the very junior barristers did not define themselves as having a particular speciality, but some did speak about having areas of interest that they intended to pursue at the Bar. In general they said they were “doing whatever comes my way at this stage”.

4.7.6 The barristers who had been at the Bar for more than a few years reported that their current practice had developed in one of, or a combination of, three ways: actively pursuing an area of specific interest, either defined before coming to the Bar or whilst there; developing an area of experience gained while working as a solicitor (or in another related position) before coming to the Bar; or “falling into” an area of practice by chance (“getting a lucky break”). More women than men talked about following an area of interest (12: 9) and more men than women referred to experience gained as a solicitor (10: 6), but these differences are not significant. Women were more likely to find themselves being “encouraged” by their clerks to do family law, and to have to resist this ‘pull factor’ in order to pursue a different interest:

I knew I wanted to do crime but I kept getting told I should go into family law, but I refused.

20. The figure of 6% appearances by women barristers is derived from records of all cases before the Court of Appeal, supplied by Mr. John Wood, Associate to Mr. Justice Charles. It breaks down into 6.7% of appearances in criminal appeals, 5.2% of appearances in civil appeals, and 7.4% of appearances in bail applications. Criminal appeals comprised 64% of the court’s business (with 33% civil appeals and 4% bail applications). It should be noted that the data supplied and the court appearances study are not entirely comparable, since the former counted *all* cases before the Court, while the latter counted only *substantial* cases. This difference would not appear to account for the disparate results regarding appearances by female barristers, however.

21. Keys Young (for the NSW Department for Women), *Research on Gender Bias and Women Working in the Legal Profession*, 65.

22. Kennedy, *Eve Was Framed*, 44–45.

4.7.7 More generally, some women (particularly older women) talked about lack of support from their clerks for their chosen direction

[The clerk] laughed at me when I said I wanted to do crime, but he did get me a trial after I badgered him . . . It was very unfair in those days, very difficult to work in the areas you wanted to. You only got family law briefs . . . they just didn't want to brief women. It's different these days . . .

I came to the Bar with the intention of practising in tax and corporate law . . . I advised my clerk that I would not take briefs in other areas and he told me that he would not be able to be a source of work in that case . . . Only if I was doing family law, crime or personal injuries . . . not because I was a woman but because it was a very small section of the Bar doing commercial law.

I started getting a lot of work in workers' comp and I didn't like it and wanted to get out of them and do more common law stuff. I told my clerk about it and he just wouldn't help, he just kept booking me for the workers' comp matters.

A few male barristers, by contrast, spoke about enlisting the support of their clerks to change the direction of their practices:

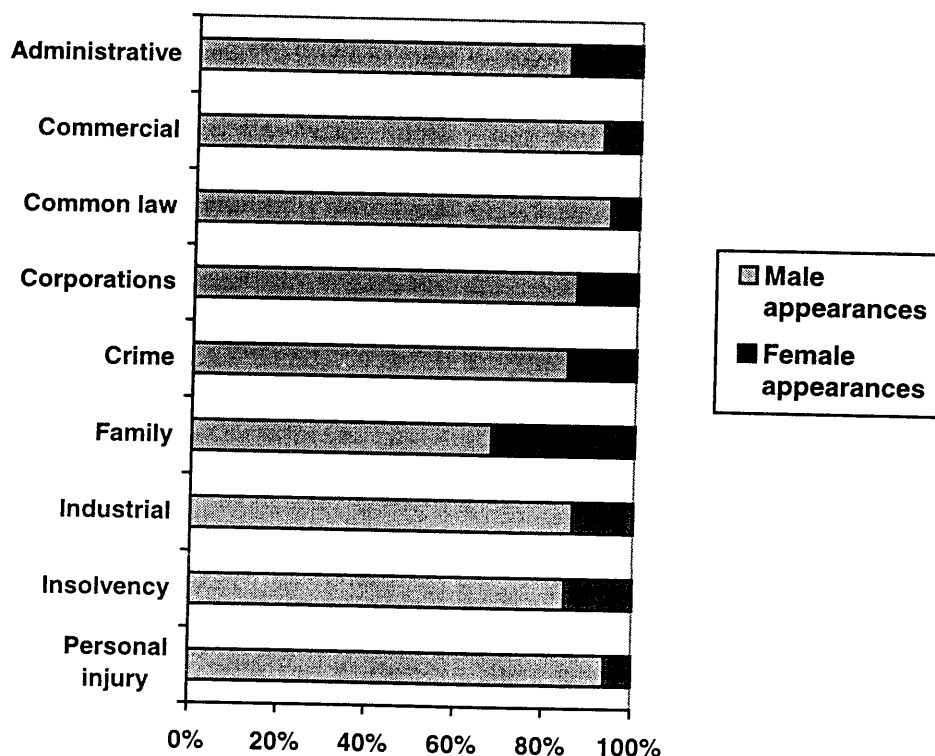
I got the assistance of the clerk who helped me build up a practice [in personal injuries] . . . it wasn't a difficult transition, he pushed my name forward.

I will be looking to [my clerk] to get me some work in the commercial areas that I am looking to break into.

4.7.8 Interviewees were also asked if they thought women or men are better suited to particular matters or areas of law. Most of the solicitors and clerks and almost all judicial officers responded in the negative. Their comments were to the effect that suitability for certain matters or areas of law could "not be divided on gender grounds". They spoke of "individual ability and aptitude", and "the qualities and the personality" rather than gender determining whether barristers, women or men, are suited to particular matters or areas of law. There were however, comments made by a significant minority of interviewees about different qualities of male and female barristers (real or perceived), that may equip them to handle certain types of cases better than others, or better than colleagues of the opposite gender.

4.7.9 In the court appearances study, women barristers made a high proportion of appearances in family law, and a low proportion in commercial law, common law and personal injuries. Figure 17 shows the relative proportions of appearances by women in areas of law that occurred often enough in the sample to enable meaningful comparisons. For the purposes of this comparison, 'personal injury' cases include Transport Accident and WorkCover disputes, the 'commercial' area includes planning/building, trade practices, intellectual property, contracts, property and superannuation, and 'administrative law' includes migration, guardianship and FOI.

Figure 17: Appearances by Female and Male Counsel by Area of Law



Since commercial law and personal injuries (including workers' compensation and transport accident matters) were two areas that figured substantially in the overall sample of cases (10–12% of cases each), women's under-representation in these areas represents a significant gap for female counsel. As noted in paragraph 1.1.41, criminal cases made up over 50% of the sample, while family law cases (with appropriate weighting) made up only 5% of the sample. The highest number of appearances by women (135) was in crime, followed by family (28) and commercial cases (23). The highest number of male appearances was also in crime (748), followed by commercial (257) and personal injuries cases (205).

Family law

4.7.10 Family law has been a rapid growth area, particularly since the advent of the Family Court in 1975. As noted previously, women are sometimes thought, by clients, solicitors, clerks and male colleagues, to have an inherent empathetic quality which makes them suited to this area of law. A solicitor who was currently dealing with family maintenance matters, for example, said "the female barrister that we've briefed is very understanding of the family issues involved and I don't think that a male barrister would be in tune with the matter in the same way". Another thought "there's merit to women being more sensitive [to the client's needs] and not as ready to just judge what they think is the appropriate outcome. I think women are sort of better at it". Most of the female barristers who were interviewed and who practise in family law appeared also to subscribe to this view, suggesting there was some advantage to being a woman in that area.

4.7.11 Other solicitors talked about the strategic advantages of briefing women in family law matters — in some cases because the case would run more smoothly if the client's perception that she will get a better hearing from a female barrister is met; or the impression of an unappealing male client may be "softened" by representation by a female. In the context of the Family Court being one focused on settlement rather than contested hearings, a judge of that court observed

that female barristers were generally “slightly better suited to family law” because they are “less strident, less aggressive and more oriented to the atmosphere of the court”. A solicitor also suggested that “women are better negotiators and settlers . . . and that women tend to be able to settle them as final orders more so than men, which is great for the client because it takes it out of the court system”.

4.7.12 One clerk commented that women are better at family law because they “remain detached”, whereas men “tend to want to get involved”. This contrasts with the more usual stereotype of women as lacking objectivity and getting emotionally involved. Clerks’ apparent practice of steering women into family law may result from such attitudes about gender difference, or may be economically driven, in that they know they can easily obtain work for women in family law. Although, as noted earlier, several women had resisted pressure from their clerks in this respect, some others were happy to go along with it:

It was my best subject at Uni, an area of interest. I found it quite easy. I was always quite happy to pursue family. When I came to the Bar my clerk put me forward as a family law practitioner — certainly the clerk did direct me into family law . . . I was very young so I was guided by him — the clerk was able to “sell me” in that area . . . I read with a family law specialist, so the die was cast . . .

A male barrister had also experienced a push towards family law:

I did crime and commercial when I came to the Bar. I didn’t come to the Bar with the desire to do family law . . . but I just received briefs in that area and I enjoy it, no regrets . . .

4.7.13 Three solicitors rejected the notion that women are inherently better suited to family law. One said he thought generally males and females are “equally good at it” and speculated that the ‘typecasting’ of women as being more sympathetic had led them to receive more briefs in that area, “whether they like it or not”. Another thought “it is a complete fallacy to say that women are better at family law just because they work in it a lot”.

4.7.14 Anecdotal evidence suggests that male barristers are more likely to get the big property cases in the Family Court, while female barristers are more likely to be briefed in children’s matters. In this context, according to a female family law practitioner:

I find that a lot of males have had more experience in commercial related matters than females . . . in their own lives. If they’re middle aged and they are married, even though they are barristers . . . somehow it’s the husband who has control of the finances and knows about all these things more than the females . . . If I have a commercially oriented matter which is complicated . . . I have a tendency to brief a male . . . There is a shortage of female barristers who are very experienced in that area.

Another solicitor said that “women seem to be better at child custody and protection matters . . . they are far more practical and can tell a male client that he is being unrealistic”. The number of cases included in the court appearances study from the Family Court is too small to allow any clear conclusion to be drawn on this issue, but the breakdown of Family Court cases does give some support to the anecdotal material. Women barristers made just under half the appearances in parenting cases (6: 8) and in cases involving both children’s and financial issues (2: 4), but only one third of appearances in cases concerning only property (5: 15).

4.7.15 One barrister noted a dilemma for junior barristers (particularly women) in being given work in the Children’s Court: it offers great experience, but carries no prestige. Similarly, a family law practice can be well paid, provide a regular supply of work, and involve important opportunities for women to conduct trials (a significant advantage given the dearth of such opportunities in other areas, as discussed below). Yet family law remains a low status area, a classic fate of

activities perceived as 'women's work'. One option in response is for women barristers to avoid being typecast into family law; another is to raise the status of family law so that opportunities in that area are considered as desirable as any others.

The contradictions of crime

4.7.16 Contradictory views appear to be held about women barristers' suitability or unsuitability for criminal cases. Some said that women are better at prosecuting in sexual assault cases, others said that women are better at defending alleged sex offenders, while still others thought women not strong enough to handle criminal trials. These views do not appear to be reconcilable.

4.7.17 A few judges mentioned that female barristers seemed to be able to appropriately handle witnesses in cases involving allegations of sexual assault. One female judge noted that having a female prosecutor in an incest case made her [the judge] feel more comfortable because she felt that the witness was more at ease talking about intimate body parts with a female barrister asking the questions. A solicitor had similarly observed "women [to be] better and have a much more sensitive touch when dealing with women who have been abused or taken advantage of . . . They have the ability to ask the hard questions, but be soft and understanding to the complainants". Similarly, a solicitor said he was more likely to brief a woman for a domestic violence intervention order, because "she would be more able to understand the predicament of the client", and a female barrister felt it was an advantage being a female in the context of sexual harassment cases, because "the female clients feel more comfortable, therefore they make a better witness and have a better experience of the justice system because it has been less confrontational, more sensible and measured".

4.7.18 As Helena Kennedy has pointed out: "Women are also sought to act for men in rape and other sexual assault cases, because of the involuntary endorsement they give to the male defendant".²³ Two older male solicitors who have worked in criminal law for a number of years spoke about "taking advantage" of using women in criminal matters for "the sympathy vote". One commented that while female barristers "were once viewed as a liability", they are now increasingly briefed in rape cases, "especially nasty ones", because the perception is that this will "even the scales a bit" in the eyes of the jury. A female barrister thought it would be "less troubling for the jury and the judge if it is a woman cross-examining a rape complainant and she breaks down". Another described being given a brief because she was a woman: "it was an indecent exposure case and they wanted a woman to cross-examine the male copper".

4.7.19 One solicitor, however, said he "doesn't subscribe to the view that you brief women to do the sex cases and men to do the armed robberies", "we are just after someone competent". Another said that he found women to be more judgmental about the behaviour of his criminal clients and was therefore more likely to brief men for those matters ("men tend to take less of a moral view").

4.7.20 The more common views, however, would lead one to believe that sex cases would be well supplied with female counsel on both sides. This was not borne out in the court appearances study. The study included 16 rape or indecent assault trials. In these trials, women barristers made only three appearances (in three separate cases), while male barristers appeared 29 times. The notion that women might be preferred for sexual assault cases seems to be outweighed by the countervailing concern that women are "not tough enough" to handle criminal trials.

23. Kennedy, *Eve Was Framed*, 34.

4.7.21 For example, one female solicitor (who does not handle “heavy crime”) said she would hesitate to brief a woman for something that was quite vile, because she would not want to put her through the experience (although she, as a solicitor, was obviously expected to cope). Two male barristers thought similarly that “if you’ve got some . . . overbearing, large offender or murderer type person, you probably wouldn’t send along a young female barrister to represent him”, and “when dealing with bad criminals I think it was probably an advantage to be a male . . . just keeping them under control”. Two others noted that men tend to be given the heavy work, the violent crimes.

4.7.22 A few solicitors working in the criminal law area spoke about a perception that “women might not be as good as men at attacking the integrity of police on assault matters or things like that”:

It’s easier for male barristers in cases that require a very aggressive stance to roll a copper. When you have to get really heavy with someone, I tend to think of the very strong male barristers, although I know there are some very good women barristers who could hold their own with anyone . . .

4.7.23 One of the clerks spoke more generally about the perception which “circulates” that “in tough cases you need a bit of a bastard, a mongrel, and women aren’t that”. In the same vein, a female solicitor commented that “there is an aggressive edge that we expect men to be able to call upon and we don’t have the same expectation of women”. Other solicitors likewise observed:

There are some men who handle cases in an obnoxious way and in those instances, to have a strong man against them is sometimes better than having a woman.

It goes back to the old aggression thing, probably in an absolute knock-out, head to head brawl, I would probably have a slight preference for a number of male barristers.

The clerk quoted above said, however, that he challenged both the perception that you need a “mongrel”, and the perception that there isn’t as much mongrel in women as there is in men.

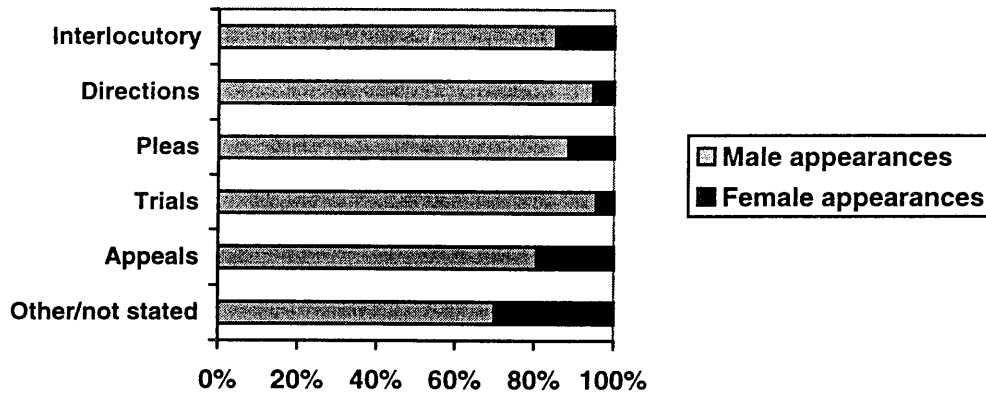
4.7.24 Two male barristers commented on the situation in a recent criminal trial, where there had been three women instructing, but eight men and no women briefed. One observed:

There wasn’t a woman at the Bar table . . . Now, that’s neither here nor there . . . experienced females abound, but by the same token, I hadn’t been five years at the Bar and I was there.

4.7.25 Overall, women made 15% of the appearances in criminal cases in the court appearances study. The majority, but not large majority of these appearances (63%) were for the Crown. This suggests that women barristers can get a ‘break’ in criminal law other than in prosecution or Crown appeal work.

4.7.26 Women’s appearance rate in criminal cases was not consistent across courts, however. Women made 18% of appearances in the Court of Appeal (26: 119), 7% of appearances in the Supreme Court (3: 38), 20% of appearances in the County Court in Melbourne (96: 384), and only 5% of appearances in the County Court on circuit (10: 207). Seventeen of the 26 appearances by women in the Court of Appeal and one of the three appearances by a woman in the Supreme Court were by Crown prosecutors. These results are consistent with the notion gathered from interviews that Supreme Court trials and County Court circuits have proved difficult for women to break into — circuits because of the travelling and boozy socialising involved (see Chapter 3), and trial work/jury actions in general. The point regarding trial work may be explored further by examining the gender representation in different types of criminal hearings, shown in Figure 18. It should be noted that the highest number of appearances were in appeals (475), followed by pleas (209), trials (126), interlocutory matters (34), directions (19) and other/not stated (20).

Figure 18: Female and Male Appearances in Criminal Cases by Hearing Type



4.7.27 Thus it appears that while women barristers are well represented in criminal appeals (although most of these were from the Magistrates Court), their access to trial work is severely limited. Women made only six appearances in criminal trials during the study period, all of them in the County Court in Melbourne, and five of them on behalf of the Crown. When it comes to criminal trials, therefore, private firms are highly unlikely to brief women, and the only way (a handful of) women are able to gain trial experience is in prosecuting on behalf of the Crown.

Jury Matters

4.7.28 The gendered nature of appearances in criminal trials is replicated in civil trials as well, although civil trials comprised only a tiny proportion of the court appearances study. Women made a total of seven appearances before a judge and jury during the study period, compared with 138 appearances by men. The breakdown of these figures by court, and in comparison with non-jury cases, was as follows:

<i>Court</i> — <i>presiding</i>	<i>No.</i> <i>appearances</i> <i>by female</i> <i>counsel</i>	<i>No.</i> <i>appearances</i> <i>by male</i> <i>counsel</i>	<i>Total</i> <i>appearances</i>	<i>%</i> <i>appearances</i> <i>by female</i> <i>counsel</i>
Supreme Court Trial Division				
— judge and jury (n = 6)	0	19	19	0.0
— judge alone (n = 66)	11	211	222	5.0
County Court Melbourne				
— judge and jury (n = 39)	6	84	90	6.7
— judge alone (n = 231)	97	406	503	19.3
County Court Circuit				
— judge and jury (n = 16)	1	35	36	2.8
— judge alone (n = 107)	10	202	212	4.7

One appearance by a woman and 11 appearances by men before a judge and jury were in non-criminal trials. In either civil or criminal law, jury actions remain very much a male preserve.

4.7.29 One male barrister speculated as to the reasons why:

not many females want to get into the personal injuries line of work. I can only think of a handful of women who appear regularly . . . I think it would be a good area for them, but they don't seem to be interested or they don't feel that there is enough security in it . . . Particularly for plaintiffs who need understanding and care and

communication, I think women have those skills perhaps more than men . . . it would be good to have them coming through . . . I've asked why they don't and one of the reasons put forward is that they would not want to do jury work . . . but there are a lot of women in the criminal law where it is jury work in the higher jurisdictions.

As demonstrated above, women barristers receive only a minute amount of jury work in criminal law, or in personal injuries. In this context, it is quite rational for women not to "feel there is enough security" in that area and not to want to practise in it. The prejudices against women doing jury work exposed by the interviews are a more likely explanation for the situation than women's unconstrained choices.

4.7.30 One female barrister noted the difficulty experienced by women in getting briefed for trials in the County Court, "whereas there are men I went to Uni with who are not that talented who are in the County and Supreme Court all the time". A male barrister located the blame with the clerking system: "clerks tend to slot women into particular areas of practice . . . you notice in criminal law that women have greater difficulties getting into trial work . . . maybe women are perceived as being not tough enough". Solicitors too operate on stereotyped assumptions about women's ability

to sway a jury and cross-examine incisively and leave someone hung out. It's something that you don't know if they've got, and you're not prepared to make the commitment to see if they've got it . . . You've got a greater expectation that a male is more capable of taking strong positions.

4.7.31 The particular kind of toughness perceived as necessary for jury trials was described several times by male interviewees by reference to quintessentially masculine activities. For example, a County Court judge said he thought women are not as good as men at conducting "witness actions activities" — using the evidence of witnesses to persuade a jury about the existence of a state of facts, rather than persuading a judge on a question of law — because:

that side of the profession . . . is . . . hand to hand combat of a personal kind. Women make very good soldiers in a modern army, because they are required to pull a trigger on a weapon that kills someone 500 or 1000 yards away . . . they are not very good at bayonet fighting. [In the courtroom] it is very much the hand to hand, or mind to mind combat.

A senior male barrister described jury trials as:

a structured form of gladiatorial combat . . . a rule based form of beating your opponent round the head . . . You're in there to destroy the opposing client's case . . . kick them in the guts with a nicely measured presentation which wins over a judge . . . it's combat. Some people are not good at combat, even carefully rule based combat. I think it is particularly difficult for women to engage in that . . . For many women it is not the way they have been brought up, they have been brought up to be nice to people . . . to be nurturing . . . Many men don't come to the Bar for the same reason, they don't want to be involved . . . For women who do want to be involved, for many of them it is hard . . .

And in the words of another male barrister:

If I was a solicitor . . . if you're going to brief a woman for a trial, a real nasty sort of fight, you'd kind of be inclined not to. You'd say, "This bloke is going to shout and this, that and the other". Perhaps like trying to put her in a football team.

4.7.32 Jury trials, then, is an area in which a major change of attitudes is necessary before women are likely to enjoy equal opportunities. So long as trials are thought of in terms of military combat or a game of football, women will inevitably continue to be excluded. One of the best ways to change attitudes is to see women performing successfully in the area, but some kind of circuit breaker is needed to enable this to occur. A male magistrate and a male solicitor considered that

the OPP and Legal Aid should take more responsibility for ensuring that women “get real forensic experience”; “more faith should be put in women so that they receive the challenging work”. More generally, at some point inexperienced male barristers are “given a go” by someone before a jury, while inexperienced female barristers are not.

Recommendation 24:

- *that the Bar Council request the Law Institute to promote the principle that briefing solicitors should ensure that they offer equal opportunities to female and male barristers in the allocation of jury work, without discrimination on the basis of stereotypical assumptions and unsubstantiated beliefs about women’s abilities in this area;*
- *that the Criminal and Common Law Bar Associations take steps to promote women barristers as jury advocates;*
- *that women barristers appearing as junior counsel in jury trials be given speaking parts and the opportunity to take witnesses to enable them to develop their skills as jury advocates.*

Different work?

4.7.33 At the beginning of the chapter, the question of whether there is a “sexual division of labour” at the Bar was raised. A senior male barrister, reflecting on the fairness of the briefing system, observed:

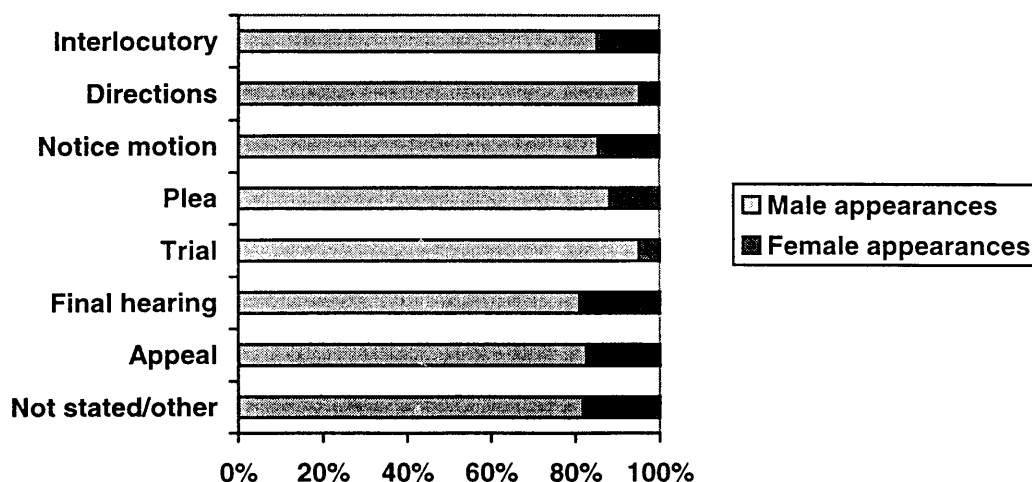
I do think it’s fair to say, on my own experience, that [the work women get] may well differ from the sort of work that men of the same ability might get, or be offered. That’s a very, very generalised notion that I’m stating. I think it’s fair to say women tend to be offered different work . . . I suspect women are seen by solicitors in a certain light. They’re often seen as being good lateral thinkers, being good at research, being willing to do research, willing and capable juniors, but not so much as leaders - not great advocates, not great plea makers, perhaps not aggressive enough to be at the forefront of cut and thrust advocacy. If that is the perception, it does lead to women getting slightly different work — shorter cases, Practice Court type stuff, lots of research work, advice work. You tend to see less of them in court.

In this context, most solicitors spoke about briefing women for Magistrates Court matters, or interlocutory work in the higher courts. The exceptions to this were government agencies who said they consistently use women for “sensitive and important cases” in “interesting areas”, such as administrative and constitutional law, “the plum briefs”. One County Court judge thought that female barristers are suited to intellectual expression of the law, “writing advisory opinions dealing with matters of pure commercial law”. A senior male solicitor had also observed that women were better suited than men to more intellectually challenging tasks, but this did not mean, he stressed, that they should be “kept away from” any activities within the practice of law.

4.7.34 The design of the court appearances study does not enable comment on whether women barristers do tend to do more research and advice work than men, or whether they are more likely to practise in the Magistrates Court and/or Practice Court, although the lower proportion of female than of male barristers briefed in the courts and tribunal studied suggests this may be the case (see paragraph 4.3.1). The study does clearly show that women are proportionately over-represented in Family Court appearances, and seriously under-represented in other areas, particularly criminal trials, personal injuries in general, and, to a lesser extent, commercial law. As noted at the beginning of the chapter, it also demonstrates that women get the work of shorter duration in the courts studied.

4.7.35 The breakdown of female and male appearances in different types of hearings is shown in Figure 19 (for explanation of the typology of hearing types referred to, see paragraph 1.7.17 of the Introduction).

Figure 19: Female and Male Appearances by Hearing



The Figure shows that women barristers did not make a disproportionately high number of appearances in interlocutory matters or notices of motion, and were barely seen at all in directions hearings, although the fact that directions hearings were concentrated in the Supreme Court and Court of Appeal may help to explain women's absence. The notion that women are suited to more intellectual work may be reflected in the great disparity between their appearances in trials and appeals. However, it should also be noted that a large majority of women's appeal appearances were in criminal cases, mostly in the County Court. Criminal cases also comprised the majority of appeal appearances for male barristers, but the proportion of criminal appeals to other appeals was higher for women (87%: 76%).

4.8 Conclusion

4.8.1 In response to the question whether she perceived any barriers to the achievement of her aspirations, one female barrister gave a pithy summary of gender bias in the briefing system, with particular reference to criminal practice:

The older solicitors in crime are very matey and they only brief men . . . it's very difficult to break into the circle. You have to drink with the Legal Aid solicitors and that's not my scene . . . The clerks don't put up women's names for the heavier crimes . . . Some firms don't brief women because they will be laughed at by their clients . . . male barristers can't flick you the work . . . female solicitors are really hard on female barristers, they often prefer to work with men, there is a certain sex appeal about some of them.

As this quotation points out, the networking required to establish and maintain relationships with solicitors, clerks' practices, client preferences, and stereotypical assumptions about women all contribute to comparative advantages for men and disadvantages for women in briefing processes. The results of these advantages/disadvantages are demonstrated in the data obtained from the court appearances study.

4.8.2 Several interviewees made interesting suggestions as to how briefing could be made fairer. In response to the problem of how female barristers in particular may become known to

solicitors in their fields; both a Supreme Court judge and a former barrister suggested that specialist accreditation processes could be established for different jurisdictions, in the same way that solicitors may gain specialist accreditation through the Law Institute. This could be taken further in the case of jury trials to include specific training in dealing with a jury, by means of trial simulations, so that the initial barrier of lack of experience, and solicitors' unpreparedness to give women barristers this initial experience, could be overcome.

4.8.3 On the subject of clerks, two solicitors (one female, one male) made the tentative suggestion that an all-women's list or clerking service could be established.

4.8.4 Essentialised notions about the suitability of women for certain areas of law reflect the continuing token status of women at the Bar, whereby individual women are taken to represent their whole sex. In fact, women barristers, like male barristers, are a very varied group. Thus, they should be regarded as individuals, on the basis of their individual skills and merits, in the same way as men are. A male solicitor considered that preconceptions about what girls are good at (such as family law) need to be actively countered from law schools through to the senior levels of the Bar. But senior barristers "have to go back to law schools and inject that kind of perspective there. It can't come from academics, it has to come from students seeing practitioners".

4.8.5 Finally, a female solicitor noted proposals for in-house barristers, and the growing number of solicitor-advocates, and considered that many women might find such arrangements more attractive than joining the Bar. This highlights the importance of the issues raised by this report. If the Bar does not find ways to ensure that women barristers enjoy equality of opportunity, then it will be by-passed as women find other ways to pursue their advocacy aspirations.

Chapter 5

FAMILY RESPONSIBILITIES

5.1 Introduction

5.1.1 Contemporary social research investigating the division of family responsibilities between men and women continues to observe that women bear a heavier burden than men when it comes to caring for children and maintaining domestic arrangements.¹ This observation has remained consistent, despite the increased numbers of women who have joined the paid workforce in the last 20 years.² The findings of this study do not challenge these observations.

5.1.2 Research has also observed the negative outcomes for women who take on multiple role responsibilities in striving for professional success whilst maintaining households, participating in relationships and rearing children. In this context, studies of lawyers in the United States have found that women lawyers are more likely than men to experience “role conflict” and/or “role overload” resulting from the stresses of juggling daily childcare/domestic arrangements with the demands of a professional environment.³ It has also been noted that women’s multiple roles make it “difficult for women to maintain the appearance of total dedication to their careers that is necessary to compete in [professional legal] settings”.⁴ Again, findings from the present study are consistent with these observations, including reasons given by some women for leaving the Bar being associated with family responsibility issues, and others at the Bar citing them as the greatest impediment to women’s career advancement.

5.1.3 However, other studies in the US have linked lawyers’ marital and family status with job satisfaction, finding that “women lawyers with children are significantly more satisfied with their legal careers and with the balance of work and family lives than are men and childless women”.⁵ One reason posited for this finding is that women “may have achieved a healthier balance between work and career and the rest of life by accepting and resolving the work-family tension and adjusting personal standards accordingly”.⁶ It seems that giving birth and taking primary responsibility for child rearing — the “biological problem” referred to by a number of male interviewees — may compel women to reconcile work and home issues in a way that many men do not. Consequently, depending on individual perceptions and experience, playing multiple roles may be seen to facilitate women’s ability to achieve a healthier balance, rather than only causing negative effects on career development and professional standing. While the present study did not aim to investigate the possible nexus between parenting and job satisfaction, this reasoning resonates with some of the comments made by both female and male barristers during the research. The interviews did reveal some examples of barristers aspiring to and perhaps achieving their own versions of a “healthy balance” (see Chapter 2). However, it also showed that they are doing so in an environment that does little to actively support their efforts.

1. See for example, Ken Dempsey, ‘Women’s Perceptions of Fairness and the Persistence of an Unequal Division of Housework’ (1997) 47 *Family Matters*; J. Baxter and M. Western, ‘Women’s Satisfaction with the Domestic Division of Labour’ (1997) 46 *Family Matters*; Michael Bittman, *Recent Changes in Unpaid Work* (Australian Bureau of Statistics, 1995).

2. Ibid.

3. John Hagan and Fiona Kay, *Gender in Practice: A study of Lawyers’ Lives* (Oxford University Press, Oxford/New York, 1985), 98.

4. Ibid.

5. Susan E. Martin and Nancy C. Jurik, *Doing Justice, Doing Gender* (Sage Publications, 1996), 153.

6. Ibid.

5.1.4 In contrast to the situation of mothers at the Bar, the vast majority of barrister fathers interviewed do not attempt the same degree of juggling performed by many of their female colleagues. This situation has various repercussions, aside from the obvious one of allowing the men to concentrate more of their efforts on building their legal careers. Focus on their own professional goals and a lack of experience of combining a primary parenting role with a professional one, may mean that many male barristers are not prompted to question the structural underpinnings of their work, and are unable to fully appreciate the difficulties faced by their female colleagues attempting to play multiple roles. They are therefore less likely to support changes to their professional environment that may accommodate parenting needs and at the same time allow them to avoid some of the adverse lifestyle outcomes that are seemingly inherent in the current organisation of work at the Bar. The issue of combining work and family responsibilities may thus be seen as a manifestation of the “no problem” problem identified by Professor Rhode (see chapter 1). Male barristers tend not to see the issue as one of gender inequality or, if they do, are unlikely to accept responsibility for rectifying it.

5.2 Different Experiences of Family Responsibility

5.2.1 As noted above, members of the Victorian Bar do not appear to vary from the rule when it comes to the division of family responsibilities between men and women. The majority of fathers interviewed (14 out of 19), had wives or partners who had primarily cared for the children on a full-time basis; the others had partners who worked and had combination paid childcare/shared parenting arrangements. By contrast, none of 15 mothers had husbands or partners who had taken primary responsibility for care of the household and children: 10 use or had used paid childcare, mainly nannies, three had their mothers or other family members helping, and two had taken responsibility for home duties and childcare, before coming to the Bar. These women and other mothers are therefore currently playing, or have in the past played, the multiple roles in which their male colleagues lack experience.

5.2.2 The relative situations of these male and female barristers are consistent with findings regarding samples of the legal profession in the US,⁷ about which it has been observed:

Men are able to father children with little regard to work demands, which might help explain why they are more satisfied with current work structures. Women who continue to express traditional ‘women’s values’ of connection and caring for children will find the currently constructed workplace less satisfactory.⁸

In the present study this contrast is reflected in the comment of one female solicitor:

I think women are still very much guilt-stricken because they’ve neglected their children or haven’t been to their play or reading or helped at the tuck shop, whereas men have no feeling of that at all. It’s not expected of them and they don’t do it.

It is also reflected in the responses of male and female practising and former barristers, when asked whether having children had affected their career ambitions or prospects or the way they organised their work. Many men said that having children had not had an impact on the way their careers had developed or were developing. Of those that said having children had made a difference, almost all referred to the motivation to work hard to provide for their families, pay the school fees, specialise for a more secure income, or stay fit and healthy to continue breadwinning. Only a few male barristers described having made different arrangements to accommodate children:

7. In the US, the workplace structures are different from those of the Victorian Bar, but the professional demands are arguably analogous.

8. Menkel-Meadow, ‘Feminization of the Legal Profession’, 252.

they had refrained from going on circuit at times of family stress, taken less work, or taken time off after particularly long trials to counterbalance the time spent away from their families.

5.2.3 By contrast, almost all of the women with children spoke about the “enormous impact” parenthood had had on the way they were able to practise and consequently their experience of competing at the Bar. They gave details of the daily arrangements and compromises made to accommodate their parenting responsibilities: leaving work hours earlier than prior to having children, limiting the type of work they could take on -- one day matters only, no long trials, or paper-work rather than court work; working part-time despite the desire to work more; no conferences outside office hours; no long hours at night because they were busy with children or exhausted; having to breastfeed at court or rushing home to do so; taking no work outside the metropolitan area to be accessible for children; taking more expensive parking space to be able to get to the children at short notice. Two of the five women interviewed who had left the Bar — but none of the men — did so for reasons directly related to the impact of family responsibilities on their practices at the Bar. In short, these barristers described how pregnancy and childrearing, playing multiple roles, had “fundamentally changed [their] work capacity” and, in some cases, their perceived prospects of success at the Bar.

5.3 The Bar as a Flexible Workplace for Parents

5.3.1 Making changes to accommodate children is something all working parents face to varying degrees. Some jobs and workplaces make these changes easier than others. On one level of analysis, practice at the Bar appears to have the independence and flexibility to make working there an attractive prospect for someone wanting to combine a professional career with pregnancy and active parenting. Indeed, when barristers were asked why they chose to go to the Bar, a significant number of them spoke about “the lifestyle” and the “ability to be your own boss” and “organise your own time”. This reasoning seemed to inform the perception of some interviewees that the Bar is a better option than working as a solicitor for women lawyers who also want to have families. Interestingly this perception appeared to exist amongst men, and some women *before* having children:

I think the work of a barrister is much better for women, than being a solicitor, if you want to have children . . . the potential to be flexible, the potential to select the jobs you want to do, if you are well regarded. As a lifestyle for a female barrister, it would be almost ideal, because you have that flexibility (male ex-barrister).

Initially I thought I could have kids and be a barrister and that was one of the main reasons I went to the Bar because I thought being a solicitor, I would have to take time off work, whereas you could do it more easily at the Bar. But I just found it very difficult juggling the two, extremely difficult (female ex-barrister).

5.3.2 A few of the male barristers interviewed spoke about being able to choose to work at home or be at home on days when there is no work and therefore be more available to look after sick children, or just spend more time with them. One man whose wife was also employed had found the lifestyle at the Bar easier to accommodate a shared parenting role than when he was a solicitor. Generally, however, the male barristers’ comments did not emphasise flexible work practice at the Bar as an advantage to their role as parents.

5.3.3 The responses of female interviewees who had had children while at the Bar indicate that a number of factors are relevant in determining whether the independence and flexibility of the Bar as a parenting advantage are experienced as myth or reality. One factor appears to be the time perspective from which the issue is viewed. One of the senior women interviewed specifically mentioned that the “flexibility of the Bar [had been] attractive as a mother” and that she had

chosen to do a lot of work at home and a lot of paperwork, because “court work would have made me unavailable to my children”. Another said that it was just a matter of “getting the childcare issue under control”. This group of women appeared to be generally satisfied with the way their careers had progressed in terms of balancing work and home life. Interestingly, one (a QC) whose main comment about the Bar was that it had “worked for” her, added:

I wouldn't say I worked it out in any perfect way, I don't think I have. And if you speak to my children they will tell you “she is far too busy” . . . None of them have shown any interest in law and their stated reason is that I work too hard.

5.3.4 Another major factor appears to be timing, both in terms of the actual birth and return to work, and the onset of family responsibilities within the wider context of a career at the Bar. One clerk mentioned a “very well-organised” member of the list who managed to time her pregnancies so that she could give birth over the summer and come back to work without there being a noticeable break in her availability to take briefs. A few of the women interviewed had made the choice to return to work soon after giving birth, generally with the awareness that “unbroken” availability was crucial to building a practice. There were a couple of women whose choices were limited as they were the primary breadwinners for their families. While some of these women were able to maintain contacts with solicitors and continue to receive briefs, they described other difficulties, such as coordinating lactating with work at the Bar:

I had a nanny, but I was breastfeeding, the nanny was bringing him in for feeds, I was expressing. I just couldn't coordinate it around court times. I would just be bursting . . . It was just impossible to try and be an advocate when all you can think about is whether you're going to start leaking milk out of your breasts.

I was trying to breastfeed my kids and do court work . . . I had them at home, 15 minutes away by train, so I would go home and feed and come back.. I told my clerk I would only accept briefs in the City.

5.3.5 Coordinating children with Bar work or re-establishing a practice after returning from full-time parenting appear to be more problematic for women who have only been at the Bar for a short time when they start families (a scenario that is not unusual, given that many barristers begin practice in their mid-twenties to thirties). Availability at short notice and versatility over a number of areas of law can be more important at the beginning of a career at the Bar than for those who have become established in an area of expertise, are well-known and sought after by solicitors. They are also characteristics that are difficult to combine with the demands of a young family. For some, the uncertainty of work and income in early years at the Bar also make paying for childcare difficult. A number of women said they could “not afford a nanny” or explained that the cost of childcare made it “hardly worth working”. The different experiences of younger barristers, and those having children after establishing themselves at the Bar is illustrated by the comments of two interviewees:

You can decide to be in court or not on a given day, by accepting, or not accepting a brief . . . because you are self employed you have choices . . . but [as a ‘baby barrister’] you have to be able to do something at five minutes notice, and you can't do that when you have small children . . . you can't always organise child care a day ahead. And you can't say to your clerk, I'd like briefs on Tuesdays and Thursdays, thanks. And you can't say to solicitors, give me four days notice so that I can organise childcare. It's an unreasonable expectation. If you do only paperwork, then a lot of those problems may disappear, but in setting restrictions you may lose a lot of work.

I had a year off for each of my children . . . I didn't find it too difficult to come back and re-establish practice because I was already well established [10 years at the Bar], compared with other women who had children in their second or third year at the Bar and went away and were never seen again.

5.3.6 In this context it is worth reflecting on the very small numbers of senior women at the Bar (see Chapter 1). It is a matter for speculation that those women who might have become senior had they stayed, left because combining Bar work and home duties was too onerous. Certainly some barristers have chosen other options. The women with children who had left the Bar are now working as employee solicitors or legal officers where they say they are experiencing security of income, and report being able to arrange their time more effectively than if they had stayed at the Bar. These women said they had enjoyed their time at the Bar and one said she would like to go back when her family responsibilities allow. Their comments are consistent with the reports of other female barristers who said a number of their colleagues had similarly “defected” to law firms after having children:

I have watched girlfriends leave and go off to full-time jobs in offices where they feel they have more structure to their day and they can arrange things.

5.3.7 By contrast, there were a few women who emphasised their commitment to, and love of, their work at the Bar despite the difficulties:

Being at the Bar and being a mother is very difficult, but I have been determined to make it work . . . and I don't see why I can't do it all . . .

Yet one of the women judges interviewed was frank about the personal cost of success in the law and expressed doubt about the possibility of being a success in both spheres of home and work:

I think that we are telling the young female lawyers that it is possible to do both and you've got to have rocks in your head really, to try and do both. The only way that I have been able to do it is that my husband does not have a high-powered career and he has really put his career on hold while we had the kids, and it's still been impossible . . . it's such a grinding profession.

5.3.8 A female partner at a large law firm took issue with the idea that successful women at the Bar “or in any real pressure job” actually do any combining:

It's all about having enough money to pay for the childcare, the cleaner, the gardener, the secretary who does your dry-cleaning and your banking. That's what it is really about. Where is the ‘combination’? They pay everyone else to do the things they don't have time to do.

She said she did not intend to have children because trying to maintain a relationship with a spouse and put energy into her work would be “quite enough”.

5.3.9 The interviews conducted with barristers and former barristers suggest that the merits of independent and flexible work at the Bar over other forms of employment for parents are much overrated. All women barristers with childcare responsibilities struggle in one way or another with their dual roles. Some ultimately reach an accommodation that is satisfactory for them, but others are unable to do so and leave the Bar. Either way, the struggle is conducted by each individual woman with minimal support from the formal structures of the Bar.

5.3.10 A series of precepts for young women barristers could be drawn from the points made by interviewees: wait until your practice is well established before having children, so that you won't lose work and can afford to pay for a nanny; take as little time off as possible and preferably give birth during court vacations; choose a partner who both earns a good income and is prepared to subordinate their career to yours. Such precepts need only be articulated to demonstrate their unreality and absurdity. Rather than expecting female barristers with children to either adapt themselves to existing work practices or depart, the Bar could provide practical assistance to

combine work and family responsibilities, and/or consider how it can offer more meaningful flexibility for those who need it (see recommendations below). Such actions would help to ensure equal opportunities for men and women at the Bar, and to retain women members who would otherwise find the task of juggling career and parenthood impossible.

5.4 Attitudes Towards Parenthood

5.4.1 The interview findings clearly indicate that women and men at the Bar have markedly different experiences when it comes to maintaining their professional credibility in light of their status as parents. As Justice Branson of the Federal Court has observed:

In the case of men, commitment to the profession is assumed, in the case of women, it must be demonstrated. For men, marrying and having a family is interpreted as a sign of responsibility . . . for women it demonstrates divided loyalty.⁹

5.4.2 A number of female barristers reported assumptions made on the basis of them becoming mothers, the perception being that mothers “are not interested in [their] careers and in pursuing [them]”. None of the male barristers interviewed reported similar assumptions operating in relation to them becoming fathers. In this context male barristers talked about self-imposed pressures to “take every brief [they] can get [their] hands on” and “work as hard as possible” in order to provide for their new family. One male barrister spoke about the opposite assumption being made about men, which he saw as a professional advantage he had over his female contemporaries:

I think I’ve always felt somewhere deep down in my psyche that by being a man you’re taken more seriously; people think you’re there for the longer term. They think therefore that you’re more reliable.

5.4.3 Women who had been pregnant while at the Bar reported an unwelcome reduction in the amount of work directed to them by clerks and solicitors and described an environment whose culture is generally not supportive of women working while pregnant or as mothers. One woman said she was surprised and upset when she was six months pregnant when a judge, jokingly, made the comment that he was glad the case was over because he had been worried that she would go into labour in his courtroom, unaware that this could cause her offence or undermine her credibility as a barrister. Another interviewee spoke about a pregnant barrister who was visited in her chambers by an older male barrister who abused her, saying she was taking work away from men who had to support their families.

5.4.4 Interviewees described how the negative responses to pregnancy at the Bar have resulted in an atmosphere of fear, with women concealing their impending motherhood for as long as possible. One woman who had left the Bar spoke about her friends’ behaviours arising from their concerns about the effect of pregnancy on their perceived work capacity:

Females at the bar who became pregnant played games with smoke and mirrors. They never announced publicly that they were pregnant. They invested in swing coats to conceal their pregnancies until the last moment. I was frequently sworn to secrecy when they told me they were pregnant. They would keep it from their clerks because they felt it would have some briefing impact. That was common . . . it was all clandestine. It wasn’t talked about with men because they wouldn’t understand and they would be judgmental. [They] didn’t want to be dismissed as “a mum”

5.4.5 Similarly, it appears that following the birth of their children, rather than celebrating new motherhood, some women at the Bar are still reluctant to advertise their circumstances, adding to their stress levels:

9. The Hon. Justice Catherine Branson, ‘Running on the Edge’, paper delivered at the NSW Women Lawyers’ Association Breakfast Series, Sydney Town Hall, October 15, 1997, 10

I was away for three months to have the baby. I came back to an unfinished brief. I was getting phone calls at home from male solicitors. I was so careful to mask my situation . . . it was a real bind to be in.

5.4.6 The comments of one female judicial officer who had worked for many years as a solicitor highlight the importance of avoiding mention of family responsibilities in order to maintain credibility:

I have never ever, if I've not been available for something said, "I'm sorry I've got to go to a kindergarten party, or do something with the kids", I'd always say "sorry I'm not available". It's not a problem that you are not available, but if you are not available because of something connected with the kids, it's seen to be an issue . . . in practice you could say "I'm going to a conference and I won't be in for three days", which sends a different message to "I won't be in for three days, my child has got the flu" . . .

She was also pessimistic about this situation changing in the near future:

For years to come women are going to have to not say things, or learn to say them in a way that is acceptable in the legal community. It's a sad thing, but I don't know that it is going to change because it is getting more competitive rather than less.

5.4.7 A few female barristers also talked about their reluctance to be open about their parenting responsibilities in the court setting:

I have real trouble getting to court at 10.00 because of commitments at home and I wish I had the guts to stand up and say "look your Honour, I know this is a personal matter, but I would be very grateful if we could start at 10.30 . . . because I am a mother" . . . but I am too gutless . . . I don't know what the response would be . . . I don't want to get knocked back. "Now we have to make court times fit in with female counsel, to appease them" . . . You are so keen to be one of them that you sublimate your own real needs . . . I don't have a wife getting my kid off to school and me off to work and doing the dishes as I am walking out the door . . . I don't have the funds to have a nanny, and I don't want my peers to know that it is difficult for me.

Justice Branson has noted a double standard in this context:

Women lawyers fear being seen to lack commitment to their profession and that explains why although I have had a number of male barristers suggest to me that they would find it inconvenient for the court to sit late because they have child care responsibilities, I have never experienced a woman making a similar statement.¹⁰

5.4.8 This observation is supported by those of a few solicitors who said in the interviews that they had been in court when men rather than women have requested an early adjournment because they "have to go and pick up the kids". By contrast, one female barrister said she knew about the fears of many of her colleagues but had made a decision on returning to the Bar to be very "up front" about her family commitments, including speaking up in court where necessary. In her opinion, "If we don't, then the problem will never go away".

5.4.9 In support of that view, the interviews also provided some examples of support shown to women who had been open about their needs. One woman who had left the Bar said that she was treated sympathetically by judges' associates in the County Court who knew that she had a young child at home to breastfeed and would allow her to go on first in chambers applications, disregarding the rule about seniority: "I said I was a mum and that my case would only take 10 minutes". Another senior woman reported receiving the same treatment in similar circumstances, 20 years ago. Nevertheless, before more women will speak up, they need to be confident that such requests will elicit a helpful rather than a scornful reaction.

10. Ibid

Recommendation 25:

- *that the Bar Council initiate a change in attitudes towards motherhood at the Bar, so that barristers who become pregnant can expect to be accepted and offered assistance in maintaining their practices, rather than experiencing pregnancy-related discrimination;*
- *that the Bar Council request each court to adopt a policy that requests from barristers to accommodate child care arrangements will be treated with sympathy and understanding.*

5.5 Interruptions to Practice at the Bar

5.5.1 Interruption to practice as a barrister was identified by many interviewees (especially men) as the most significant factor hampering women's advancement at the Bar. Notably, it is interruptions to practice for family reasons that are reported to be most disruptive. Clearly there may be practical and psychological reasons for this associated with playing very different roles as mother and barrister. One clerk commented:

If they stay away for an extended period, it is very good for their children, but with a few of them, they become almost 'gun-shy', they've lost confidence in going to court and they make the decision to do advice work.

5.5.2 However, in keeping with the assumptions noted above, the disruption is also arguably an effect of the attitudes of participants in the legal system to the place of parenting in the context of professional practice. As one judge pointed out, assumptions about commitment and credibility seem to work in favour of men and against women, even if a man's absence is as long or longer than one for family reasons:

You might get a bloke who says I'm doing a PhD for six months, or taking a study tour to Tibet, but [he is] not seen as less competent or committed.

In keeping with comments reported earlier about the general quality of female barristers' work, none of the interviewees said that when women come back from having babies their standard of work drops, or that they are unreliable. The interview comments centred around the reduction in time flexibility and the ways in which women self-regulate, in terms of taking on an amount of work they can cope with.

5.5.3 In the interviews, barristers were asked about their experiences of taking extended time off from the Bar, and of re-entering practice. Their responses generally supported this picture — men are far less likely to be affected by the notion that family commitments detract from professional ability and commitment. None of the male barristers had taken extended time off from the Bar for reasons associated with family responsibilities, other than one barrister who took his family on an extended holiday at a time when he felt he needed to spend time with them and re-assess the direction of his practice at the Bar. Six male barristers had taken long holidays, or appointments to governments bodies (from 3–12 months). None had returned to the Bar on a part-time basis. Each reported that there had been no major adverse effect on their practices as a consequence of their absences.

5.5.4 The seven female barristers who had taken some extended time away from the Bar for reasons of leisure or other legal work reported that their practices "picked up again when [they] got back" without too much difficulty. Eight of the 15 barrister mothers interviewed described

taking time off from their careers at the Bar to have one or more children. A few took a short time off (4–12 weeks per child), others were away for up to 4 years. One spent a number of years (up to 10) parenting and taking the occasional brief. A few of them had chosen to work part-time on their return to the Bar. They reported more problems with maintaining their practices during pregnancy and/or re-establishing them after their return, although their experiences seemed to vary according to several factors, including the timing of their absence (as noted above); the reliability of their childcare arrangements; the degree of support from their spouses, clerks, and solicitors; and what their career aspirations were in the scheme of their lives.

5.5.6 Some of the clerks spoke about the effect of being in a long running case (“out of circulation”) as similar to taking time off to have a baby, and that they know some barristers say “no” to that kind of work for that reason. They indicated that there is a lot of variation in how barristers’ practices fare after an extended absence:

There are some who have extended time off and have come back and a week after they’re back its like they’ve never been away . . . they pick up exactly where they left off. Others have a real struggle — it depends on the type of practice they had before.

Nevertheless, in the experience of all interviewees, taking time off to have a baby had very different consequences from taking time off for other reasons.

The part-time option

5.5.7 Several interviewees, both male and female, spoke about the “double-edged sword” of part-time work at the Bar. The prevailing view seemed to be that working part-time keeps you on the Bar Roll, gives you an income, but you “will never be taken seriously” or make it to the top of the profession — a view seemingly based on assumptions about what kind of commitment to professional development is possible working on a part-time basis. The female barristers interviewed described a range of experiences with part-time work. One barrister had been working in commercial law and, having experienced difficulties coping on returning full-time after her first child, consulted her clerk

I thought I would go part time and his advice to me was: “Don’t do that because you will be ‘slotted’ like all the other women barristers. The impression it conveys is that you are not serious and you can only do small cases, Magistrates Court and chambers stuff and when your kids are grown up it will be harder to put that reputation behind you”. He said that in his experience that is what happened to a lot of women . . . that their practices never really developed.

She chose to leave the Bar rather than work part-time, and later returned full-time, determined to build a “serious” practice, after “losing all [her] contacts” and it being “as if I had never been at the Bar”. Another barrister had been forced to leave because it was not economically viable for her to maintain chamber¹¹ while she had two small children. She worked part-time as a solicitor for a few years and later returned to the Bar with experience in a new area of law in which she now practises. In contrast, one family law barrister found working part-time at the Bar after she had children suited her very well, but qualified her position saying:

It’s been easier for me because I [love my time with the] children, and I have a husband and fall back position. My income is very secondary . . . if my practice fell in a hole it wouldn’t be big disaster financially . . . but it hasn’t happened.

11. The Bar rule about compulsory chambers while maintaining a position on the Bar Roll was changed in 1995, as discussed below. Also, BCL now permits chambers to be shared between barristers.

Solicitors' attitudes

5.5.8 The attitude of briefing solicitors and the relationship established with those solicitors is clearly relevant to how disruptive a family related absence (and on-going family responsibilities) will be for a barrister. As noted above, a number of female barristers reported experiencing a drop-off in work from solicitors who had been regularly directing briefs to them until they became obviously pregnant or had a child:

As soon as I got pregnant, I never got another brief from him.

With the last pregnancy I noticed that a few people had stepped into my shoes a bit with a couple of my significant supporters . . . women solicitors have been more loyal in that regard.

5.5.9 A few of the clerks made similar remarks, one saying "if they come back straight away, then everything is fine", however, one pointed out that "their practices do take a backward step, people just forget that they are around, forget what they are about, they get used to someone else".

5.5.10 Some of the women expressed frustration at the assumptions made about their work capacities, especially, as one barrister pointed out, "mothers work really efficiently in the time available, because they have to. You learn new skills in time management":

It pissed me off because I had worked really hard to make arrangements so that I was available to do the work . . . and when I was doing the work they would be asking "how is she doing this?"

I lost an enormous amount of work when I came back after having kids because of the restricted hours I could work . . . and I shouldn't have had to, because it wasn't necessary.

One female barrister with children said that she had established good relationships with solicitors who also had children:

So I lost a number of solicitors, but also secured some, particularly males, because they say "thank goodness you don't want a conference at six in the evening" because they want to go home as well . . . If they are sympathetic to the family commitments, then they stick to you because they know you are going to work their sort of hours.

5.5.11 In the interviews, solicitors' attitudes to briefing barristers with family responsibilities were investigated. They were asked if they take a barrister's family responsibilities into account when making a decision about briefing, especially in long matters and those which may involve being away from Melbourne overnight. Their responses are interesting for the range of awareness of work/family responsibility issues they demonstrate.

5.5.12 Many of the solicitors were nonplussed by the question, the topic of family commitments seeming out of place in the context of professional interaction. In line with this, more than half said that "family responsibilities never come into it", they "assume that a barrister is available if they say they are" and that "they will have made their own arrangements about their children". A number said that "people don't ordinarily raise family issues" and that reasons for not being available are not necessarily discussed — "family matters may be a problem, but unless they tell us about them, we don't make those assumptions". These responses can be interpreted in a number of ways. It could be that for the purposes of briefing, these solicitors approach barristers as non-gendered professionals, or that family responsibilities are not an issue for the barristers that these solicitors deal with, or the responses could reflect the fear-enforced silence (described earlier) around mentioning matters that may detract from an impression of professional competence and reliability.

5.5.13 The responses of other solicitors indicate that an awareness of barristers' realities outside of their professional commitments is integrated into their approach to briefing and working with counsel. They said they do take parenting responsibilities into account and attempt to accommodate them, by consulting about the scheduling of conferences and other timetabling arrangements. One male solicitor said:

You have to have a good working relationship and most of the counsel that I work with, I know their family situation and they know mine . . . we have those kinds of personal discussion . . . "No, I can't do it Saturday because of [a child's football match]" . . . that kind of thing.

One senior male solicitor spoke about wanting to brief a female barrister for a longrunning matter and treating the issue of her family commitments with sensitivity:

I knew she had a young child . . . I didn't raise it specifically, but warned her about the time and effort we anticipated and gave her the opening to mention her family commitments.

5.5.14 Solicitors working in the public sector especially displayed an awareness of accommodating family responsibilities as an equity issue, and an understanding of the benefits of making that effort. In some cases, a policy driven practice could readily be articulated in relation to these situations:

Yes, for example, someone we use regularly had a child in the last 12 months and when she came back part time, we would schedule conferences around her availability, we would talk to her at home when the baby was screaming in the background, those sorts of things, we would be conscious of it . . . we have a history of that as a workplace . . . very supportive . . . we are quite prepared to be flexible around people's time constraints . . . They have the skills and experience we want, so we are prepared to do that . . . we as an organisation have a responsibility to do that, as a Government department . . . we offer that flexibility to our staff so we should extend that to the people we brief.

We had one case where the case went for a long time and one of our counsel was going to have a child and we had to plan out how we were going to run it, given that she was going to be at home for about three months . . . we planned the process . . . Then she worked from home . . . and the case went on long enough for her to get pregnant again, so we faced it again . . . It can be a big problem . . . if the matter runs for two to three years, you can often lose counsel, both men and women . . . so family matters are considered with the women more than the men, because they get pregnant . . . But it is just a management problem and I would say [having been a private practitioner] that the public sector have a much better approach to this issue than they do in the private sector . . . We just have to handle it with good planning . . . A lot of people don't think that way and luckily I don't have to answer to a dozen partners.

5.5.15 As this solicitor suggests, counsel can become unavailable for a large variety of reasons, and pregnancy and childbirth have the advantage of being events that can be planned around, unlike, for example, a sudden illness. Once the stigma attached to family responsibilities for women professionals is removed, women's family-related absences can be treated by all firms (not just government agencies) as simple matters of planning and management.

Clerks' attitudes

5.5.16 The attitude of the barrister's clerk is also important in determining how easily family related absences from the Bar and on-going family responsibilities can be managed and integrated into work practices. As noted in chapter 4 the clerks may not currently be especially effective as "suppliers" of regular work, but their role as managers and supporters of their barristers' practices may be more influential in the context of making family oriented arrangements workable.

5.5.17 Two of the five clerks interviewed made a point of emphasising their active support of barrister/mothers on their lists. One said "we take the view that we are here to assist", facilitating

their ability to work from home by linking telephones and messages, and delivering briefs to home. Another said he tries to direct paperwork to women at home and doesn't "usually mention to solicitors that they have had a baby".

5.5.18 Female barristers reported contrasting experiences with regards to clerks' attitudes and behaviours around pregnancy and child rearing. Some found their clerks to be very supportive:

[He is] always very accommodating of my family commitments and my need to earn living . . . Sometimes he throws a wobbly and I tell him to stick his head in. When I came back to the Bar he gave me a start in [a new area] . . . which got me going again. He has been very supportive of a number of women at the Bar.

In relation to the same clerk, another woman commented that her relationship with him:

. . . actually improved after I had children . . . when I first said to him I'm not doing commercial work, he kind of looked askance, but because I was at home with children I couldn't continue a broad based practice, it required too much work . . . [I] feel like he is very supportive of me.

One woman with young children, one of whom is regularly sick, said she had told her clerk that she "won't be extending [her]self during this rough period" and that he has been "very understanding" and attempts to accommodate her.

5.5.19 Others reported negatively about clerks' responses to their circumstances:

After I gave birth the briefs dropped off even though I was available for work and I hadn't communicated to anyone other than my clerk that I was breastfeeding, that I would be rushing home to feed my baby . . . I just found that after having a baby, people were not sending me any work

I knew people who got to six months and were obviously pregnant, the clerks automatically think that you are "off the boil" and your work winds down. I saw it happen to a friend of mine who was told by a solicitor that the clerk had said she was pregnant and not available, within 24 hours of her having informed the clerk of the pregnancy and her intention of working right up to the birth. I don't think they mean to be malicious . . . but they make assumptions about you being tired or not wanting the work.

Solicitors who had been briefing me told me that my clerk was telling them that I had gone on holidays or was on leave, whereas I was just sick [related to childbirth] and needed a few weeks off. It was funny, work started slowing down after that . . . One solicitor, two years later, said "oh you're back" and I said "where did I go?" and he said "I kept phoning up trying to brief you and your clerk was saying you were on sabbatical or something".

5.5.20 All barrister mothers should receive the degree of support from their clerks described in para 5.5. 18.

Recommendation 26: That clerks should provide the support and assistance requested by women on their lists who have children, rather than making assumptions about their capacities or commitment, which may thereby undermine their practices.

5.6 Long Hours and Continuous Practice — The Bar's In/compatibility with Family Life

5.6.1 The perceived "dangers" of taking time away from practice to be an active parent are not only the loss of solicitor contacts and the short term consequences for a barrister's practice. Comments made by interviewees across the profession highlighted the significance placed on

continuous practice, and the ability to devote long hours, as necessary (or at least highly desirable) qualifications for being considered for “serious matters” or judicial office. Senior male members of the Bar and the judiciary spoke about their practices having been based on consistent availability in order to maintain relationships with solicitors and build up experience in their areas of expertise. They emphasised the competitive nature of practice at the Bar, “the nature of the work is that you have to work full-time and very hard . . . if you do piecemeal work, you’re not going to make much progress through the profession” and that “if you drop out of the competition [to have a child] then you are leaving your place open”; “the law is very unsympathetic, if you’re not there, you’re not there and somebody else will do the brief for you”.

[Having time out] takes you away from the market and the exposure you need. If you have someone who has done 40 armed robbery trials, they are going to know every trick of the trade, as opposed to someone who has been in and out of it, broken up by family commitments.

Most women see their commitment to their children as being stronger than their commitment to their career and that being the case, their careers are going to go in stops and starts and they will be less likely to be promoted to positions where long hours of work are required.¹²

Women face setbacks by the fact that they take time off to have children and it becomes very difficult after a couple of years to come back in and achieve that same sort of respect and notoriety that men can.

5.6.2 While there is an element of truth in these comments, it is noteworthy that they also tend to exaggerate the impacts of childrearing on women’s working lives. The first quotation overstates the amount of time that women might need to take off for reasons associated with family commitments. Few women would be “in and out of it” more than twice. US research has found that women work different numbers of hours at different stages of their life cycle,¹³ suggesting that over a reasonable time at the Bar, it is quite possible for a woman to have children *and* do 40 armed robbery trials. The second quotation does not reflect the views expressed by women barristers interviewed about their career commitments (see Chapter 2). Nevertheless, as Justice Mary Gaudron has observed, the work practices of barristers are “inimical to anything like a reasonable family life”.¹⁴

5.6.3 The picture of long hours at work for practising barristers is supported by the responses of barristers when they were asked to estimate the number of hours a week they would be working on average (taking into account that barristers hours tend to vary according to the briefs they take on). Ten said they regularly work a 50+ hour week (4 women: 6 men); 14 said they work between 50–60 hours per week (7 women: 7 men); 10 work 45–50 hours per week (3 women: 7 men); 16 work 45 hours a week or less (11 women: 5 men). Even accounting for some degree of error in these estimates, the majority of barristers interviewed, who are arguably typical of the Bar’s population, appear to be working far in excess of an average 40 hour week. At the same time, in describing their aspirations at the Bar, more men than women remarked on the hard work, stress and personal cost involved in pursuing their career, or articulated a desire to “slow down” later in their careers (2 women: 8 men). This suggests that men are perhaps more likely than women to attempt consistently to follow the traditional script for career advancement.

5.6.4 In addition to long hours of work, contribution to other aspects of life at the Bar, including membership of the Bar Council or other committees which tend to enhance professional standing, entail attendance at meetings outside court hours, mostly in the evenings, also difficult to reconcile

12. Compare the level of career commitment expressed by women interviewees, set out in Chapter 2.

13. Menkel-Meadow, ‘Feminization of the Legal Profession’, 239.

14. Justice Mary Gaudron, from a speech at the Women Barristers’ Association dinner, 9 June 1994.

with an active parenting role. The inflexibility of court timetables was also cited as a contributor by a female solicitor:

In a dire emergency the courts will be sympathetic, but by and large they are there to process people's disputes and it's an imposition on the clients if you're going to say "Oh, well, I'm sorry, I have a sick child" and ask to adjourn the trial until tomorrow. It's going to cost people money and why should they pay for that, really?¹⁵

5.6.5 Overall, the interview data demonstrates that the understanding of how a barrister's practice must be conducted in order to be regarded as "serious" or "successful" prevails to the extent that long hours on a continuous basis is considered intrinsic to the nature of "real" practice at the Bar, leaving little room for imagining an alternative way of working that may better accommodate "real" parenting (or a balanced lifestyle, even without children).

If you have to work all night, you have to work all night. I don't see how you can change the nature of the profession to accommodate a woman who can't do that because she has other obligations, it seems to be structurally impossible (male judge).

Some of it is the expectation of the courts that people are available to work through the night, which makes it hard for anyone with family responsibilities . . . if judges had to pick up their kids from creche, it would be different (female barrister).

5.6.6 The intensive work formula for success relies on assumptions about the relative value of different activities and how they contribute in the longer term to the performance of barristers (and judges) and to their lives outside the Bar. Knowledge of the law and procedure and their application in the courts is valued over skills and experience gained in running a household, negotiating within a family setting and coping with other stresses of parenting. Hours spent in the library researching is considered more useful to the practice of law than cooking dinner every night for the kids. These weightings might seem obvious, but they do not necessarily take account of the "human" skills required of the "good barrister"¹⁶ (e.g. clear communication, compassion, ability to place the legal problem within a wider context) and the way in which other life experience can be translatable and enhance skills applied in a legal setting.¹⁷

5.6.7 Similarly, the premium placed on continuous practice of the law ignores the problems of "burn-out", ill-health and relationship breakdown associated with sustained focus on one area of endeavour. A number of comments made during the interviews illustrate that these are real consequences for many barristers (and solicitors):

I was working with a male QC who said "on Saturday we will get on with this issue and on Sunday, this other issue." I said, "I won't be working on Saturday because when I started at the Bar I promised I would spend at least one full day a week with my family". The QC looked at me and said, "I wish I had done that" (male barrister).

I have watched many of my colleagues' marriages fall apart . . . one destroyed his family . . . The personal cost is absolutely insane and no amount of success could warrant it (male QC).

[There are] far more disruptions caused in firms by men's mid-life crises than women leaving to have babies (female solicitor).

15. By contrast, a Federal Court judge interviewed mentioned the new docket system for listing now used in the Federal Court, which creates more certainty for practitioners regarding scheduling their work. He also felt that there is a greater readiness to take into account the needs of counsel when fixing the timetable.

16. See, for example, solicitors' accounts of what they look for in a barrister in various contexts, set out in Chapter 4.

17. This point was raised by the interviewer and acknowledged by interviewees on a few occasions.

5.6.8 One judge interviewed said he took the job because “I was never seeing the children”, and that on the bench “there’s more control over the hours you work”. Male judges at their welcomes almost routinely thank their wives for “bringing up the children without me”

5.6.9 A female barrister with ambitions for silk and eventually judicial office described how her commitment to practice had affected her marriage:

I’m now separated . . . as a fairly direct result of me coming back to the Bar full time. Even though I had an arrangement with my husband that he would work from home, a role reverse, when push came to shove, he wasn’t happy being “a barrister’s wife”, basically . . . It’s just what barristers’ partners put up with . . . Usually it’s the wives . . . They give an extraordinary amount of support in order that the men can function in this job . . . [From my husband’s point of view] I wasn’t a good mother if I wasn’t home at a certain time . . . I shouldn’t put my work before my children and in his eyes I was doing that . . . [My dedication to practice] has created enormous conflict.

5.6.10 A number of interviewees mentioned a high rate of divorce amongst barristers. One said his secretary had formerly worked on a floor of chambers where only one of 25 male barristers was not divorced.

5.6.11 The perceived need to sacrifice home and family involvement for a career at the Bar was cited by a number of male solicitors as the reason why they would not consider leaving practice as a solicitor.

I’m not attracted to the Bar because I have a young family and wouldn’t want to compromise family routine for late briefs and other work outside court time.

5.6.12 In other professional disciplines, especially in the business world, consideration of the costs of devoting long hours and mental and emotional energy exclusively to work are gaining more attention, with personal and professional crisis being recognised as the consequence of ignoring the “shadow side” of success.¹⁸ The interviews with current and former members of the Bar indicated that there may be a growing awareness of these issues. Both men and women who had left the Bar spoke about not being willing to compromise their lifestyles for success as barristers:

The top rank would have involved sacrifices above and beyond what I was prepared to do . . . in terms of time . . . the lifestyle and the approach to work required of the top commercial barristers, it’s pretty full on . . . Most of the ones I know are working six days a week . . . There is not a lot of time for family and other interests. The law is their entire life . . . I wasn’t that committed that I wanted to make it my life (male ex-barrister).

5.6.13 The comments of several young practising barristers also demonstrated an awareness of the pitfalls of adherence to the success formula and a determination not to be overtaken by it:

I know the people around here who are successful start at six in the morning and finish late at night . . . and they do the same on the weekends . . . it would drive me mad . . . too much stamina and concentration (female barrister).

The ethos of the Bar is to work long and hard and to be available all the time, so because I don’t want to do that I may lose solicitors . . . but at the moment at a junior level, it’s working OK (female barrister).

5.6.14 Notably, a number of younger male barristers spoke about experiencing a conflict between their work and their desires to be more actively involved in their relationships with their spouses and with their small children. One said:

18. See for example, John R. O’Neil, *The Paradox of Success: When Winning at Work Means Losing at Life* (Putnam, New York, 1993).

Life as a parent demands time. Relationships with children demand time . . . I try to balance things out. If I've got to work all one weekend, I try to make up on it, because particularly at the moment, where I'm finding that the more time I spend with [my two year old son], the better our relationship is — he loves it. If I don't spend any time with him for five days he wonders who I am; you can really feel the change in the relationship.

The way one young male barrister spoke about the place of his family in his life reflected the sentiments of some female interviewees

Having children puts everything in context . . . it helps me to cope. When I am having a bad day in court, I think of my family and it helps me to do the best I can. Work is not at the same level as having a family, it means I do not have any great aspirations for my work, because ultimately [my family] are more important. I find work rewarding but not all-important.

5.6.15 One male QC was able to describe how, throughout his career, the importance of his family had been given status by the care he took to arrange his practice so he could “spend a lot more time at home than many of [his] peers, and be a lot more involved with [his] children”. He said “being a father was more important”. His efforts included taking his teenage children when he was appearing interstate, to watch him in court, so they would understand where he went and what he was doing. He did however, acknowledge that these efforts were made in the context of a “very traditional arrangement” where his wife had not been in paid employment and had been primarily responsible for maintaining the household and caring for the children. A number of other senior male barristers also talked about the importance of their families, mostly in terms of them being the reason for working so hard.

5.6.16 An American commentator on contemporary work practices has observed:

The workplace is not going to change . . . until a critical mass of men demands that it change. And for that to happen, what a man considers valuable about himself and his life has to undergo a reevaluation. The women's movement was able to happen quickly because it didn't change the values of the success culture; it strove to make them equally available. But what we define as valuable must be broadened. No real change is going to happen until it is estimable for men to do the traditional work of women as it is for women to do the work previously reserved for men.¹⁹

5.6.17 Comments made in the interviews indicate that there is a growing awareness of these issues, especially amongst younger practitioners.

The Bar wants to find out how female barristers can be more like male barristers . . . whereas I think that is a fairly unhappy model (female ex-barrister).

Until you get further changes in society that tell the bloke that it's alright to stay at home and look after the kids, you don't have to be the breadwinner and you're not a wimp if your wife's out working and supporting you, it's inevitable that more females will drop out . . . I think those sort of attitudes are changing . . . my generation, we have accepted women working and accepted that as an everyday part of life, it may need another generation to accept that women can work, but men don't have to . . . that will ultimately level the playing field more than it is at the moment. (Male solicitor)

As a generalisation, I think that women have a more holistic approach . . . they are interested in succeeding in other things at the same time [but] . . . I think there are a lot of men out there who are also interested in spending their weekends bushwalking and kyaking and what have you, and they give up those things to advance their careers . . . There are more males than females who are willing to put their lives on hold to pursue their careers. It is more socially acceptable for a female to take career options that are not so high-flying, than it is for a male. (Female solicitor)

19. Elizabeth Perle McKenna, *When Work Doesn't Work Anymore: Women Work and Identity* (Hodder Headline Australia, 1997).

5.6.18 The findings from this study do indicate that the prevailing work culture of the Bar and the attitude to parenting as a distraction from the main game of law imposes enormous costs on women with families attempting to compete on an equal footing at the Bar *and* against the efforts of male barristers to integrate home and work, to be more involved in parenting their children and to maintain their relationships with their spouses. It does seem that, at this stage, men and women at the Bar remain constrained by expectations attached to their traditional gender roles. At work, men currently have an advantage, in that those trying to devote more effort to their families and lives outside the Bar are not experiencing an erosion of their credibility due to perceived divided loyalties, and neither do they generally bear the physical demands of performing both roles. One young male barrister commented on his wife's efforts in this respect:

I help out at home. I try and do as much as I can, but she is fantastic . . . I have vast regard for her. I don't think I could do it quite frankly. I don't think I'm physically capable of doing it. I don't think I could cope with having to be looking after children one minute and running to the Full Court the next, like [my wife] does. She's got that uncanny ability to be able to switch on, switch off — that's a skill. I don't think a lot of guys have that. Guys just aren't built like that. They just don't have that ability.

5.6.19 For many interviewees, reconciling the nature of work at the Bar and the biological and social reality of women's childbearing and parenting presented an intractable problem. However, some younger participants in the research, for whom success seems to be in the process of redefinition to include goals outside of work, appear to be questioning the seemingly neutral work structures, creating an opening for debate about changing the culture of the workplace rather than labelling it a women's problem, and searching for ways to accommodate the work/family struggle. In this respect, the Bar Council should be seen to be pro-active in anticipating the needs of its members.

Recommendation 27:

- *that the Bar Council and Committees hold meetings at times that encourage participation by barristers with family responsibilities (e.g. lunchtimes);*
- *that the Bar Council encourage debate within the Bar and the wider legal profession about current work practices, including consideration of family responsibilities, health and professional development;*
- *that the Bar Council engage in dialogue with the Courts about more family friendly work practices.*

5.7 Accommodating Family Responsibilities at the Bar

Changes to Bar Rules

5.7.1 Traditionally the rules governing conduct of practice at the Bar have not accommodated the needs of members who may have wished to practise in other than a traditional way. This has adversely affected some barristers, especially those with parenting responsibilities, and especially women. There were a few examples cited in the interviews of women who were forced to leave the Bar because the rules did not allow them to practise in a way that suited their changed circumstances.

5.7.2 In recent years the rules have been relaxed to allow barristers to share chambers or work from home. They may also take leave of absence and pay a reduced membership fee while their practices are in abeyance for reasons that now include family commitments. Both male and

female barristers commended these changes during the interviews. A few of them had taken advantage of the new rules and thought that they facilitated their ability to stay at the Bar.

5.7.3 According to barristers involved, these changes took place only after concerted lobbying by those concerned about the negative effects the old rules had on women's attempts to combine a career at the Bar with pregnancy and parenting. The prolonged process involved in changing the Bar Rules and the strong opposition to the changes are an example of how the Bar Council as a representative governing body has had to have pressure applied to it to accommodate the needs of female members, rather than it being pro-active in assessing and meeting those needs. A few female barristers in the interviews spoke about the Bar Council being "out of touch" with the needs and concerns of the general population at the Bar. One woman described a series of interactions with members of the Bar Council regarding her leave of absence to have a child, which demonstrated to her their lack of understanding of her situation — "they are the people making decisions about how I can practise", they are "dinosaurs". Indeed, a number of women barristers recommended that there be greater provision for women's views to be aired within the power structures of the Bar, as they felt their needs and life circumstances are not understood by the majority of senior male barristers involved in running the Bar (see also Chapter 3).

Creche facilities at the Bar

5.7.4 As part of the interviews for this research, barristers with (or soon to have) children were asked whether creche facilities at the Bar would make a difference to their work capacity, and if they would use a creche if one was provided. Only one of the men interviewed (who had a shared parenting arrangement) said he would maybe have used a creche when his children were young. Four of the women interviewed said yes, they would use a creche. Another thought she might use one if it was appropriate for her child; another thought she might use one for conferences. Other barristers were opposed to the idea of a creche. One woman thought that having a whole group of barristers' children together would be dreadful.

5.7.5 In terms of suggestions on how the operation of the Bar could be improved generally, and in relation to the position of women, several interviewees (barristers and others) mentioned childcare facilities and proposed that they be established at or near the William Street chambers. Some felt that these facilities should be subsidised by the Bar, others were opposed to this idea. One senior male barrister felt very strongly about this issue:

That arrangement would discriminate against me. Why should I subsidise men bringing in their babies while their wives go overseas? I don't bring my dog in to be kennelled while my wife plays golf. You have to draw a demarcation line between being a professional practitioner and private demands.

This is a very clear illustration of an older man being out of touch with the issue ("men bringing in their babies while their wives go overseas"), and resistant to change — the "no problem" problem starkly expressed. Contrary to his view, this research has shown that the traditional demarcation line between professional practice and private demands operates as a barrier to equal opportunity for women at the Bar.

5.7.6 An independent inquiry into the childcare needs of members of the Bar undertaken by the Work and Childcare Advisory Service in 1994 involved a more comprehensive survey of barristers and their childcare needs. The report included a number of recommendations. One of them was "that the Victorian Bar Council consider possibilities of establishing a child care centre as a joint venture arrangement with other organisations within the CBD".²⁰ The Childcare

20. Work and Childcare Advisory Service, *Victorian Bar Council Child Care Feasibility Study, Final Report*, Executive Summary, 2.

Sub-Committee of the Bar Council advises that it has considered and rejected a few proposals for such a joint venture and that negotiations in relation to other proposals are continuing. Given the report's findings of an unmet need which presumably still exists, this issue ought to be pursued as a matter of priority.

Other initiatives

5.7.7 Other recommendations made in the Work and Childcare Advisory Service report were:

- That the Victorian Bar Council assess and implement flexible working practices and additional assistance measures that would best suit barristers, their employees and other staff and their specific work situations in balancing work and family responsibilities.
- That the Victorian Bar Council establish an Advice and Referral Service for use by barristers, their employees and other staff. This service can be provided either as an in-house service or by an outside agency. That the Service include information about child care near work and near home. Further, that the Service provide regular feedback on the extent to which existing services for pre-school aged and school aged children are able to meet the need.
- That through the Advice and Referral Service, the Victorian Bar Council monitor the extent to which the need for holiday care can be met on a place by place basis.
- That the Victorian Bar Council investigate the provision of education programs to assist key people in making them more aware of the issues facing barristers, their employees and other staff with family responsibilities and to assist in more effectively managing flexible working arrangements.

None of these recommendations appears yet to have been implemented.

5.7.8 Another proposal of the Child Care Sub-Committee was to establish a parents' room with feeding and changing facilities in Owen Dixon Chambers. Again, the Subcommittee reported extreme difficulty in implementing this proposal. However, in May 1998, the Executive Officer of the Bar Council advised that a parents room with the desired features was nearing completion, and will be available for use by members and staff within a few weeks.

Recommendation 28:

- *that the recommendations of the Work and Childcare Advisory Service, particularly for the establishment of an Advice and Referral Service, be implemented by the end of 1998;*
- *that the Bar Council and Barristers Chambers Limited actively support the efforts of the Childcare Sub-Committee in meeting the needs of parents at the Bar on an ongoing basis;*
- *that members of the Bar Council and Barristers Chambers Limited take such further steps as are necessary to inform themselves as to the issues faced by women with young children at the Bar, and actions necessary to ensure equality of opportunity for those women.*

5.8 Conclusions

5.8.1 The research findings show that, like many women in the workforce, women at the Victorian Bar play multiple roles: as spouses, primary parents and barristers. Currently, their male

counterparts are not attempting the same degree of commitment to these different roles. Particular characteristics of the Bar appear to exacerbate the problems of taking time off for childbirth and of on-going multiple role-playing, including the need to maintain solicitor contacts, the importance placed on experience and continuous practice, the requirement of fitting around court timetables, and the fact that optimal years for childbearing and being involved with parenting small children coincide with the time when barristers "should" be putting in maximum effort to establish their practices. In addition, the prevailing attitude around mothering and part-time work amongst members of the profession associates these with lack of commitment or even incompetence, creating an environment that is particularly unsupportive of pregnant women and mothers attempting to maintain their careers at the Bar. Despite the fact that some women have made the best of it, competing family responsibilities, and attitudes at the Bar towards them, appear to be possibly the largest contributing factors to women leaving the Bar.

5.8.2 Interviewees described the entrenched work ethos at the Bar - working weekends and long hours on a continuous basis - which makes it difficult for women with parenting responsibilities to compete effectively and for all barristers to participate in family life. Their comments also pointed to the creation of significant pressures for barristers who may be seen to succeed at the level of their legal practices, but may also experience negative consequences in terms of relating to their families and being able to lead balanced lives. Interviewees indicated that being a successful barrister has traditionally been a two-person job: one person focusing on work and the other providing the domestic support system on which he relies. Not only do women at the Bar generally lack such domestic support systems, but it is increasingly difficult for male barristers to find (and keep) partners prepared to be barrister's wives. Thus, social changes are challenging the ongoing viability of the traditional model and producing a need for the role of barrister to be redefined for a single actor with a life outside the Bar.

5.8.3 Recent changes to the Bar Rules to accommodate barristers with nontraditional work arrangements have benefited women with parenting responsibilities. However, the hard-fought manner of their passage demonstrates the lack of understanding and support for the needs of many women at the Bar, and does not augur well for further reforms. The Bar Council must move beyond the "no problem" response it has taken to the issue to date and take responsibility for promoting and supporting initiatives to assist barristers to balance work and family responsibilities.

Chapter 6

IN THE COURTROOM

6.1 Introduction

6.1.1 The courtroom is the traditional setting for the popular image of the barrister, wigged and gowned, in an oratory stance behind the bar table. This is powerful imagery, which the findings of Chapter 4 suggest may affect the perceptions of clients and solicitors, and therefore briefing practices. The image also reflects highly valued barristerial skills — being good on your feet, being in court, confident and in command — making the courtroom an important site for the research's examination of possible barriers to women's advancement at the Bar. To do this, the interviews explored questions of how women are able to inhabit the courtroom setting and the role of barrister, compared with the experiences of their male counterparts. They also looked at how the courtroom and its traditional inhabitants, their attitudes and behaviours, have accommodated increasing numbers of female advocates, and whether women are perceived to have made a difference in the way the courtroom operates.

6.1.2 Another measure of how women are regarded in terms of their abilities in the courtroom is their representation on the bench — appointment from the senior ranks of the Bar having traditionally been regarded as an acknowledgment of mastery over courtroom skills and respect within the profession. The interviews therefore posed questions relating to whether and how more women should or could be appointed to the bench in Victoria.

6.2 Displacing the Masculine Image of the Barrister

6.2.1 Because membership of the Bar was for so long exclusively male, and continues to be dominated by men, it could be contended that, on entering the courtroom, female members of the Bar start from the position of having to displace the notion that "barrister = male". Lynn Hecht Schafran writes about this as a "culturally ingrained expectation".¹ Professor Margaret Thornton's analysis of the Australian legal profession also contends that

Women who enter the legal profession are still represented as non-men, as 'others' to the benchmark man, the paradigmatic incarnation of legality who represents the standard against whom others are measured.²

6.2.2 This notion, and its consequences in terms of briefing practices, have been explored in the Chapter 4. In relation to the courtroom, the views of a senior male QC reinforce the idea that, although things are changing slowly, women at the Bar continue to contend with attitudinal barriers to their acceptance as legal professionals:

Most men [at the Bar and on the bench] . . . are sexist . . . They don't expect women to be there in the first place . . . [They think] it's men's business, what are they [women] doing there? . . . And that is either explicit or unexpressed . . . As time goes by, some are being reconstructed and try to accept the changes . . . Most of them do it very poorly. They say all the right things, but just don't get it.

6.2.3 One marker of the entrenchment of the expectation that barrister = male was raised by a number of women and one male interviewee. They said that judges and magistrates often refer to

1. Lynn Hecht Schafran, 'Women as Judges, Lawyers and Jurors', in Laura Crites and Winifred Hepperle (eds), *Women the Courts and Equality* (Sage Publications, Newbury Park, 1987), 195.

2. Thornton, *Dissonance and Distrust*, 2.

the members of the bar table collectively as “gentlemen”, even when there are female barristers present. Most of those who drew attention to these occurrences also said they considered them a “minor irritation” and played down their significance. One said:

You feel like saying “Hey, what about me?” but you know it’s just petty because it is an established turn of phrase rather than a deliberate slight.

A female judge also reported being regularly referred to as “His Honour” and that she often doesn’t “pick them up on it” because she doesn’t “think it is all that sinister . . . it just comes from what they are used to”. While this may be so, these forms of address hold some symbolic value, and fail to reflect a workplace in which women have been present for many years now.

Competence and confidence

6.2.4 One area in which attitudes and conditioned expectations about barristers manifest is in the perceptions of women’s competence and in their own confidence in themselves. The same conditioning to gender stereotypes that creates the expectation of barrister = male is responsible for how women and men are viewed when performing certain tasks. Extensive social science research has found that in many professional contexts, both women and men tend to rate a man’s performance more favourably despite their performance being identical in form and content (whereas women are seen as more competent than men in what are viewed as women’s areas of expertise, such as domestic tasks and child-rearing).³ These findings support observations made of the legal profession. For example, during a gender bias taskforce study in the US, a male judge observed that “men lawyers are assumed to be capable until they prove otherwise, but women lawyers must prove themselves from the beginning”.⁴

6.2.5 They also support the views expressed by some of the female barristers interviewed for this research. One said she had noticed “a tendency to accept males at face value”. Another spoke about the “congratulatory surprise” expressed by colleagues “when you have done well” that suggested a “lurking doubt or lack of faith” that reinforced a feeling of “having to prove yourself”. An experienced female barrister related an anecdote about attending a Bar dinner after having practised as a barrister for 10 years:

I was told by a more senior male barrister [in relation to a recent case] “Well done, a great result. ‘Course you’re accepted now.” He would never have made that comment to a man . . . it shows you have to prove yourself before you are regarded as alright.

6.2.6 The comments of a female barrister with a busy junior practice reveal that gendered perceptions about competence can also operate from within:

I have a sense of being prejudged, that I have to demonstrate my mastery over my case, the law, whereas for men it seems to be assumed. I do it myself, when I appear opposed to a male junior who I don’t know, I attribute to him a mastery that I don’t allow for myself or other women . . . He will look as though he belongs and you think that in his eyes you don’t belong and that you are no good . . . so you have to assert yourself and show dominance over the matter, so that he takes you seriously . . . This may be my own internal commentary, but it is real enough to make working at the Bar fairly challenging in terms of maintaining a confident self-image.

Another young female barrister spoke about having appeared in the Court of Appeal and having assessed her own performance negatively. She also assumed that the judges thought

3. See for example Kay Deaux, *The Behaviour of Men and Women* (Brookes Cole, 1976).

4. Schafran, ‘Women as Judges, Lawyers and Jurors’, 197.

poorly of her performance, that she was an “upstart”, whereas she was later informed that they had been impressed by her.

6.2.7 A lack of self-confidence in one’s ability as an advocate is not something experienced exclusively by female barristers. However, against the background of the social science research in this area, these interview findings do suggest that women are more likely to have to overcome societal and personal preconceptions about their own competence in a professional setting. This notion is reinforced by the observations made by judges in the interviews. One, who teaches in the readers course, thought that the female readers are generally less confident than the men: “women ask whether I think they are capable of becoming barristers, whereas men seem to assume this”. Another judge said: “I suspect that to get on at the Bar women have to be more able than men”.

6.2.8 One manifestation of being “more able” is the tendency to work harder in case preparation. Five of the 20 members of the bench interviewed made the observation that female barristers seem to put greater effort into preparing their cases for court appearances. One attributed this to them being less self confident than men, who “often think they can pick it up as they go along”. Similar comments were made by five solicitors, for example:

Women are generally quite fastidious in their preparation . . . some male barristers are prepared to rush in without being fully prepared, without a full knowledge of the facts . . . winging it.

I’ve seen male barristers who read the material at the hearing; women tend to be more thoroughly prepared than the male barristers.

I suppose one of the things that people might say is that perhaps because of the competition and the need to prove themselves, [women] really bend over backwards, but I think that’s really a bit unfair. I guess it’s probably a biological thing. It’s probably conditioning and training as well though, because women have to do a whole range of roles in life don’t they? So they have to be really organised. I think men have giant egos, so they think they’ll be right.

I’ve never seen a female with whom I haven’t been impressed. I can’t think of a female who hasn’t been on top of her subject and conducted herself with dignity and decorum and efficiency generally, whereas I can think of many men whose performance falls below standard in every way.

6.2.9 A few male barristers also made complimentary remarks about the abilities of women they had been opposed to. One said “women are the most dangerous opponents . . . because they tend to take their role seriously, research things more thoroughly . . . they’re more diligent”.

6.2.10 This sense of needing to work harder, be better, is obviously something that stands women in good stead in their personal performance as barristers. However, it does perpetuate an expectation of a higher standard for women, and provide an additional pressure that does not appear to be the general experience of the male population at the Bar. Several male barristers spoke about the Bar being a highly competitive workplace, but none mentioned having to work harder to overcome assumptions about their professional credentials because they were men. Again, because of the competitive nature of the Bar, pressure of this kind experienced by women is apt to remain largely unarticulated, but the prospect may inhibit some women from making the move to join the Bar. Unfortunately, in the short term, relieving women of this pressure does not appear to be a practical option. It may be that larger numbers of women coming to the Bar in the future will have a positive influence in this regard. As some theorists have asserted, a future measure of change towards “real equality” may be “when mediocre women achieve at the same level as mediocre men”.⁵

5. John Hagan and Fiona Kay, *Gender in Practice: A Study of Lawyers’ Lives*, 34.

The double-edged sword of visibility

6.2.11 A further indicator of female barristers' status as "different" from the norm, is their increased visibility amongst the male dominated population of the Bar. In Kanter's observations of a work environment inhabited by "dominants" and "tokens", she noted the double-edged quality of an increased level of visibility for the "tokens" — women had an "attention-getting edge" for their work activities, but there was a consequent diminution in freedom from the lack of anonymity.⁶ She reported that many of the women would have preferred to be less noticeable, as this typical comment indicated:

If it seems good to be noticed, wait until you make your first major mistake.⁷

6.2.12 In the present study, female barristers were not asked specifically about their experience of heightened visibility amongst their male peers. Nevertheless, a number of them made comments that supported Kanter's observations. They reported feeling it had been an advantage to be a woman and therefore a little bit "different" in that solicitors might "remember you more easily", and sometimes it could be easier to get a judge's attention. Three female barristers added that being "different" also meant "you have to work harder not to stuff up", and "there is pressure on you to perform really well".

6.2.13 This phenomenon of female visibility was also mentioned by several male interviewees. One ex-barrister who had had difficulty attracting work acknowledged his general advantage in being a white middle-class male, but also regretted not being a woman or from some other minority in order to be noticed by briefing solicitors. A senior male judge said of the women who appear before him:

They stand out because they are women, and there are not many of them, so from that point of view, you do tend to look at them more.

6.2.14 Another judge felt that the pressures of closer observation of women compelling them to make extra effort with their work, have been alleviated by recent increases in the number of women practising at the Bar. He spoke about the situation he felt existed in the past:

The expectation of them was different . . . two male barristers were part of the scenery, but a female barrister was something to comment about and watch intently. It was very unfair . . . The younger women do not have to worry about impressing anyone because they are female, they are impressive because they are barristers.

6.2.15 It should be noted that this judge sits on the Family Court, and this statement may be more true in that jurisdiction, where there is a much greater representation of women than in other courts. The court appearances study revealed the following information about the degree of female visibility in each court and tribunal:

6. Kanter, *Men and Women of the Corporation*, 213.

7. *Ibid.*

<i>Court/Tribunal</i>	<i>% cases with no women appearing</i>	<i>% cases with one woman appearing</i>	<i>% cases with two + women appearing</i>
Court of Appeal (n=72) ⁸	65	35	0
Supreme Court Trial Division (n=97)	85	15	0
Federal Court (n=155)	76	19	5
Family Court (n=20)	40	40	20
County Court: Melbourne (n=271)	67	28	5
County Court: Circuit (n= 123)	91	9	0
AAT (n=44)	64	36	0
Total (n=805) ⁹	72	24	4

The Family Court was the only court in which more than half the cases included women barristers, while at the opposite extreme, less than 10% of the County Court circuit cases included a woman. Only the Family Court, Federal Court and County Court in Melbourne experienced more than one woman appearing in a case. These figures suggest that appearing as a woman in most instances in the courts and tribunal studied can be an isolating experience. During the interviews, some female barristers mentioned that they enjoyed court work and felt very comfortable in the court environment. However, female barristers in the jurisdictions studied are highly likely to find themselves to be the only woman in court, which inevitably renders the environment less comfortable than it would be for male barristers surrounded by people “like” them.

6.2.16 A senior male barrister thought that ‘extra’ judicial scrutiny accorded to women had a negative effect for them, based on double standards about male and female appearance and credibility:

Women have a disadvantage in that the judge will be observing them, sizing them up by reference to criteria that are different [from those applied to men] . . . The first observation of a woman is how she looks today . . . tired, or not as attractive, or she has put on a bit of weight . . . not dressed very well . . . Men are also evaluated that way but the parameters are much broader . . . [in terms of] the range of what is acceptable . . . there are some very fat, slobby male barristers . . . [but] for women the range of permissible variation is much smaller . . . It’s a disadvantage . . .

Another more junior male barrister had also noted a negative consequence for his female colleagues arising from their heightened ‘noticeability’:

I know a lot of women feel a lot of pressure about dressing, that they have to look great . . . there is competition to look good.

6.2.17 The comments of a female judicial officer also highlight how a negative appraisal of female barristers is made easier by reason of their visibility. She initially noted:

There are a number of women who appear here regularly, who are more senior [and] who are fairly hopeless, but who are consistently briefed because their names are known . . . That’s a problem.

The interviewer then asked: “Are there also hopeless male barristers who appear in this jurisdiction?” The response was:

8. By contrast, the record of the Court of Appeal over the period June 1995–July 1997 more closely resembled that of the trial division of the Supreme Court during the study period, with no women appearing in 85% of cases, one woman appearing in 14% of cases, and more than one woman appearing in 1% of cases — data supplied by Mr. John Wood, Associate to Charles JA.

9. This total includes weighted rather than raw Family Court figures.

There is [also] a big group of male barristers who get a lot of briefs who are basically incompetent . . . but there has been a lot of promotion of women in the law over the last 10 or so years, some of them have been promoted beyond their ability in terms of the briefs they get and the work they do . . . If they were male I don't think they would have done as well, but because female, they got work.

6.2.18 On the other hand, two male judges of the Supreme and Federal Courts considered female barristers to be outstanding in a more positive sense:

The [women] that have appeared before me have been very good . . . there are a number of particularly good female advocates and I've had several of them, several times . . . There is such a range amongst male barristers . . .

Generally speaking, I'd say that the [women] appearing in the Federal Court are very good . . . [With male barristers] the quality is much more uneven. The samples are not comparable in terms of numbers but the quality is much more uneven among the men than among the women.

However, three other judicial officers in jurisdictions where appearances by women are more frequent (the County Court, Family Court and Magistrates Court) found female barristers to range from very good to not so good in the same way as male barristers, reinforcing Kanter's point that the size of a minority group in a given situation determines whether its members are seen as representatives of the group or simply as individuals.¹⁰

Sexualised interaction in the courtroom

6.2.19 Analysis of some of the courtroom interactions described in the interviews suggests that a barrister's status as a woman may sometimes be considered ahead of her professional standing as an officer of the court — another way in which the notion that male barristers are “normal” and female barristers are “different” is reinforced.

6.2.20 Interviewees had noticed some members of the bench and male opponents being deferential towards female barristers in a way that is different to their interactions with male barristers. Other situations described by interviewees overtly sexualise female barristers in a way that can be seen to undermine their confidence and credibility as advocates.

6.2.21 One barrister described an experience where her opponent commented on her bare neck, and then asked her out for dinner while she was on her feet (he then withdrew the invitation when she won the point). An ex-barrister spoke about being one of only three women in a Supreme Court chambers full of male barristers. She made a mistake and flustered, but the master granted the order she wanted. A silk applied for an order after her, was refused and said to the master “Perhaps I should get Miss XX to be my junior and then I could have any order I wanted”, which caused her ears to burn as she bolted from the court. Another young solicitor described a conversation she had with a male colleague: “I told him that I got a really good result in front of (a particular judge) . . . and his response was “He must have wanted to sleep with you”.

6.2.22 Other comments made in the interviews similarly referred to the courtroom being ‘sexualised’ by reference to female participants. One solicitor spoke about notes being passed around the bar table making “outrageous” comments about the appearance of women in the courtroom. A male barrister had observed some of his older colleagues making “inappropriate and ambiguously flirtatious” remarks to young female instructing solicitors, in circumstances where it

10. Kanter, *Men and Women of the Corporation*, 208.

would be very difficult for the young women to respond in a way that would communicate that they were not enjoying that type of attention.

6.2.23 The interview material did not indicate that these sorts of interactions were necessarily prevalent in and around the courtroom. Several female barristers mentioned that the personnel in the jurisdictions they appear in maintain a “very professional” approach. There was also some interview material indicating that some female barristers respond by turning the sexualised situation to their advantage, or in some cases initiate it themselves. For example, a magistrate described a situation where a female barrister’s name was shortened and used familiarly,

but she had ‘assisted’ in that by engaging in an exchange that was more like it was around a barbecue, jokey, with a consciousness of the difference in gender by both of them . . . from him to her, a bit condescending, and her to him, not quite flirtatious . . . It could have got out of hand and it was certainly distracting for the parties.

6.2.24 Whatever their extent, remarks and behaviours that sexualise courtroom interactions do not appear to be directed towards men in the way they are towards women. At least, this was not raised as an issue during the interviews. It appears that courtroom interaction that is directed at male barristers as men, rather than as lawyers, is more likely to refer to their interests in football and other sporting events interaction that complements the competitive nature of the legal process and serves to enhance their sense of belonging in the court environment instead of placing them in an ambiguous territory outside it.

Recommendation 29: That male barristers ensure that interactions with female colleagues and other women in the courtroom are conducted on a professional footing.

6.3 The Courtroom as Physical Setting

6.3.1 Courtrooms have traditionally been designed to accommodate the serious and adversarial nature of proceedings. Many older courtrooms have high ceilings, hard surfaces and poor acoustics — a demanding setting to which most new practitioners need some time to adjust and feel comfortable. However, in terms of identifying features of the workplace which may disadvantage women, it is worth noting that courtrooms, as a physical setting, tend to favour those of larger physical stature and voice, a group which is likely to contain more men than women.

6.3.2 During the interviews a number of male judges and barristers mentioned that they had observed women experiencing difficulties in projecting their voices in court (in one case this was expressed as the judge having trouble hearing female voices as compared with male voices). One senior male barrister spoke about women having “an inherent disadvantage” because the lower tone of the male voice “carries more authority than a high pitched voice . . . people respond to the power of the tone and pitch rather than volume”. A male judge suggested that women benefit from “developing techniques that are appropriate to their voice levels and physical size . . . tak[ing their] own features and personality . . . and maximis[ing] their value”. He mentioned that some male advocates are also required to adopt different styles according to their physicality. He compared “big men like John Starke with booming voices” with “whippety” men who had to be aggressive and persistent, but emphasised that awareness of the need for effective voice projection in the courtroom setting would almost always be relevant for women.

6.3.3 Voice projection was not identified by any of the female barristers interviewed as a “problem”, although a few mentioned their smaller stature making it more difficult to “make [their]

presence felt” in the courtroom. One barrister saw her large size and direct manner as an advantage in the courtroom and had observed the disadvantages for other women whose stature and demeanour might make them more appealing in other (social) settings. A few women specifically mentioned voice in the context of a question about developing an advocacy style. These women had clearly analysed how they could best use their voices. One said:

I never raise my voice, because if you do, as a female, you sound like a nagging wife . . . so I lower my voice and get very soft and intense.

6.3.4 In addition to the issue of voice projection, the physical setting of the courtroom was also raised in the interviews in relation to how barristers inhabit the space of the courtroom. One senior judge had analysed the courtroom and its procedures, in terms of their design being a “male construct” based around masculine ideas of adversarialism and gamesmanship. He observed that the masculine nature of the court setting and the fact of it having historically been a male preserve, would inevitably render it more difficult for women to operate in comfortably and effectively. He asserted “it [is] naturally a place where males felt more comfortable”. These observations were supported by the comments of a male barrister who said:

I have a physical assurance and sense of my own space in the court room and in the environs of the Bar that I think it would be more difficult for a woman to have . . . it is a sense of belonging that you need to feel effective . . . some men question it and don’t necessarily feel it, but the issue would be much bigger for women.

6.3.5 A female solicitor and a female magistrate also made comments about having observed more men to have an expansive and confident physicality in the courtroom setting, compared to women:

Men tend to put their hands on their hips a lot more and play with the back of the chair, sort of a gunslinging stance, strutting . . . especially male criminal lawyers . . . [They have] quite a macho style . . .

As a general proposition, women at the bar table don’t “expand” in the same way as a lot of the male barristers - I’m talking about deportment, actions and spreading of papers, and then in volume of voice and attitude of asking questions. [There is a difference in] how they ask questions, not what they ask. For example, some male barristers will move a lot, some even cover the length of the bar table in walking up and down and talking. Women are more inclined to stay still in the one spot, but they move their hands a lot, close to the body, whereas men are more likely to make broad arm gestures . . . Men will often put their foot on the chair or move at least one or two paces either side of their position at the bar table

6.3.6 It does not necessarily follow that a more physically expansive or flamboyant style in the courtroom translates to more effective advocacy, although it does suggest a level of confidence that a more restricted physicality does not. And as a number of interviewees mentioned, confidence plays a large part in the success of many barristers. This depiction of the courtroom as a place in which men are more likely to feel confident and “at home” and to which women have more difficulty adapting, is not one that necessarily reflects the experience of all practitioners at the Bar. To a large extent, these matters are not articulated, and are unlikely to feature in the conscious concerns of most barristers. However, the interview findings indicate that these observations are worth bearing in mind when considering the wider question of why women as a group have not advanced in large numbers through the ranks of the Bar. They indicate that an awareness of gender differences in the use of voice and space may be helpful in the context of teaching advocacy skills and in mentoring young barristers.

6.3.7 The design and use of more modern courtrooms, which have better acoustics or voice amplification, and which are less inclined to advantage those of larger stature, will make a difference. So will the cumulative effect of increasing numbers of female advocates who appear in

them, making them places that are familiar and comfortable for both women and men practitioners. In the meantime, gender differences should be acknowledged in terms of the physical setting of the traditional courtroom presenting particular challenges for female advocates.

Recommendations 30:

- *that the Bar Council sponsor workshops on using body and voice in the courtroom, which pay special attention to the variety of physical attributes of female and male barristers, and how they may be exploited for greater effect;*
- *that the Women Barristers Association consider running such a workshop presented by and for women barristers.*

6.4 Styles of Advocacy

6.4.1 Use of body and voice in the physical setting of the courtroom is part of a larger concept which the interviews attempted to explore with barristers by asking them about their “advocacy style” and how it had developed. Leading American judicial educator and commentator on gender bias issues, Lynne Hecht Schafran, has asserted that:

A significant problem for women trial lawyers is finding a litigating style that is both comfortable and effective for the attorney *and* acceptable to her audience. Sociologists call this the professional women’s double bind. The woman who acts in a stereotypically “feminine” manner — soft-spoken, passive, compassionate — is dismissed as lacking the equipment to do the job. The woman who is forceful, aggressive and cross-examines like a tiger is put down as a bitch.¹¹

A similar observation has been made by British barrister, Helena Kennedy:

Passivity is still the expected role; aggression is considered phallic and certainly unattractive in a woman.¹²

6.4.2 There was some evidence that this “double bind” is operating for women at the Victorian Bar. Within the sample of female barristers and former barristers interviewed, some were conscious of experiencing these sorts of difficulties. In relation to the existence of a double standard around use of an aggressive (masculine) style in the courtroom, one said:

I used to get very cross when blokes were engaged in vigorous cross-examination where there is a lot of anger for show, harumphing and banging of the bar table and raised voices. If you do that as a woman, you are cast as being shrill, and I know lots of women who have been caught up very short if you are thought of as being shrill in your cross-examination . . . Another tool used by women, as they can’t be aggressive, is to be sarcastic, and you get short shrift if you do that . . . it’s classed as being insulting . . . It is hard finding the style or the manner that is effective. Blokes can be full of bluster and blokey indignation and throw paper around the bar table, but if you try and do that as a woman, in my experience, you get pulled up by the magistrate or judge . . . told to get that tone out of your voice, which can put you off your stride.

6.4.3 The interview comments generally revealed some ambiguity around women adopting an aggressive style. A male QC observed that:

A lot of women find it very hard to be aggressive, in whatever subtle way that aggression is expressed . . . doesn’t have to be table thumping . . .

11. Schafran, ‘Women as Judges, Lawyers and Jurors’, 202.

12. Kennedy, *Eve Was Framed*, 48.

The comments of one young female barrister support the suggestion that women must venture outside their “normal” range of behaviours to find ways of feeling effective within an adversarial setting:

I am much more aggressive than I would otherwise be . . . in my dealings with male barristers, particularly because with some of them they think they can walk all over you and you have to set them straight from the beginning . . . you feel you have to be aggressive because if you’re not they will railroad you.

6.4.4 The idea that there may be some pressure to conform to the dominant style in the jurisdictions where new practitioners “cut their teeth” is supported by the observations of some solicitors and judicial officers about younger female barristers being “determined to show that they are as good as other people and they will dig their heels in on things unnecessarily”. A female magistrate said:

Because it’s an adversarial system, a lot of men and women feel the only way to deal with the system is to be aggressive . . . [They are] more invasive in the way they handle themselves at the bar table and in the way that they ask the questions.

6.4.5 Again, the question arises as to whether a more masculine, highly adversarial approach is necessarily the most effective way of achieving the desired result in the courtroom. No doubt in some circumstances this may be the case. However, several experienced barristers, both female and male, expressed the view that “aggressive”, “overbearing” and “theatrical” styles of advocacy that have been favoured in certain jurisdictions as the “way to get results”, are “on the way out”. One said: “It only impresses some clients and solicitors and doesn’t necessarily advance the case”. Other barristers believed that members of the bench are unimpressed by these tactics and that being able to present the substance of a case is more important. One male barrister said

Judges are, by and large, intelligent men [*sic*] and they have to be intellectually persuaded. It’s rare to find a judge that will be persuaded by sloping mirrors, flash words. They need substance, and it’s the content and the way you structure your arguments . . .

This point was reinforced by several judicial officers during the interviews. For example one female magistrate said:

[Being aggressive] doesn’t make the asking of the questions necessarily more effective at all . . .

6.4.6 In general, the interview findings revealed a trend towards other modes being favoured in the courtroom — being “assertive”, “forthright” or “forceful” without being aggressive, or being “natural”, “direct and honest” and “conciliatory rather than highly adversarial”.¹³ In this context, some comments made in the interviews highlight how some supposedly “feminine” attributes are given value as effective tools for barristers. Solicitors and barristers spoke about women not having so much “ego investment” in the process, being more easily able to be “non-adversarial”, and that “a softer approach” is sometimes more effective in negotiations and mediations one male barrister said:

In certain cases, when you have to cross-examine female witnesses sometimes you can come across as harsh if you are aggressive, whereas a female cross-examiner I don’t think would be judged in those terms, as being harsh.

6.4.7 An anecdote told by a female barrister suggests there is strength in having a flexible approach to advocacy, being able to call on whatever attributes are appropriate to the case and the forum. She described appearing in the AAT with two male silks who

13. Although as noted in Chapter 4, there are still several solicitors who value “headkicking”; see paragraph 4.4.2–3.

... couldn't handle the non-confrontational atmosphere and were told off by [the female tribunal member] for being too adversarial in their cross-examination ... they could not gear down to an appropriate style.

6.4.8 Some other comments made by a few female barristers point to there being some (largely unspoken) pressure to shape their professional/personal presentation to avoid criticism of a type that is not directed at male barristers. They spoke about not doing "anything that males consider stereotypical" and not "calling on womanly wiles ... when I don't get my way". Also, during the interviews a few strongly worded criticisms of female barristers who had shed tears at the bar table demonstrated that the "emotional woman stereotype" must be assiduously avoided in order to gain or maintain professional respect. None of the responses made by male barristers included reference to avoiding criticism based on their masculine behaviour being unprofessional or improper for a barrister.

6.4.9 An additional pressure for women to slot themselves within courtroom behaviours defined by reference to a male benchmark might arise from the relative lack of a feminine 'ancestry' at the Bar and on the bench. Some theorists have asserted that the paucity of senior women to act as role models in the profession contributes to younger women's styles developing in a way that perpetuates the (male) norm, rather than new models evolving, to which women can more easily relate.¹⁴

6.4.10 The issue of role models (or lack of them) arose during the interviews with a few of the female barristers. One female QC said:

When I came to the Bar 20 years ago there were few women and there were styles of being a barrister that were very masculine ... I suppose it took a while for the women to work out whether they would ape the men or just be themselves and see how it came out in the wash ... I think you have to invent your own way of running the case ... whether it is effective or not, you will find out from the judges.

The same emphasis on self-reliance was reflected in the remarks of younger female barristers who said:

You don't need female role models ... it's better not to imitate ... you have to do it your own way.

It's no problem that there are no female role models, you just have to learn what is right for you.

6.4.11 Many of the female barristers interviewed said that they had not been conscious of relying on male or female role models. Arguably, the influence of role models is not necessarily the product of a conscious process. Just witnessing other women operating in the courtroom could be influential, without having an intention of finding features of their method to imitate. In this context, Helena Kennedy writes:

I try to encourage female pupils to watch other women in court, just to reassure them that they do not have to behave like men or function in any way that feels unnatural.¹⁵

6.4.12 In general, the findings relating to advocacy styles at the Bar are indicative of a movement within the profession towards acceptance of different approaches to legal practice that can better reflect the diversity of barristers, and accommodate the diverse needs of community members accessing the justice system. Another pointer in this direction was the fact that a significant number of both the female and male barristers interviewed said that, in effect, their advocacy "style" was primarily a reflection of the strengths of their own personalities.

14. See for example Cynthia Fuchs Epstein *Women in the Law* (Basic Books, New York, 1981), 31, 108; Mona Harrington, *Women Lawyers: Rewriting the Rules* (Alfred A. Knopf, New York, 1993), 175.

15. Kennedy, *Eve Was Framed*, 46.

6.5 Dealing with Courtroom Dynamics

Gameplaying at the Bar table

6.5.1 A feature of the courtroom relevant to an examination of courtroom dynamics is “game playing” or “argy bargy” at the bar table. In the interview questions this was described as “a barrister making comments or acting in a way that is intended to undermine the credibility of their opponent”. It was perhaps more colourfully spoken of by some of the interviewees:

Snorts, audible sighs and the rolling of the eyes and the throwing down of the pen, throwing themselves back into the chair, making objections that are not directed to the bench but at pouring scorn on their opponent.

... plenty of game playing ... plenty of jibes going back and forth, people pretending to be very affronted, threatening to go to the Ethics Committee ...

Smartarsy one upmanship ...

It's an ego based thing usually ... some people have a way of operating that is deliberately irritating, it's gamesmanship.

6.5.2 To a large extent, interviewees appeared to accept this type of interaction at the bar table as “part of what goes on”, although many made it clear that it is more likely to happen in some courts than in others, depending on the level of experience of the practitioners and the nature of the cases being heard. Many of the solicitors interviewed saw it as “friendly jibing”, “just a bit of chesting”, or, if the hectoring is “well-placed” it was seen as “tactical”, and part of the barrister’s armoury to be able to pick which opponents will be “easily ruffled” ... “if they lose their calm, it’s better for my client”, “that is part of the process, knowing how to deal with the opposition, so you get the result you want”.

6.5.3 In general, barristers characterised these kinds of behaviours as “part of the game”, and thought that “if you haven’t experienced [it] it means you are going around the edges a bit too much”. The prevalent attitude was that “you have to be fairly robust to survive as an advocate” and most said they didn’t and couldn’t let it worry them, although some did describe incidents where they were put off their arguments to the detriment of their clients’ cases.

6.5.4 Some members of the bench said that this type of behaviour does not occur in their courts. However, others acknowledged that it “goes on” and that they have a role in seeing that it “doesn’t get out of hand”. One judge said:

There have been some pretty nasty pieces of behaviour over the years and it is inevitable in the context of an adversary system — people operate under stress and they will behave badly from time to time.

6.5.5 As noted earlier, some interviewees observed that this type of gameplaying behaviour was mainly the preserve of male barristers, although a few thought that it was a practice that “comes with the territory”. One judge said:

I can think of a number of men who play those games, and a number of women, and there are some people who are particularly subject to them, vulnerable to them and there are some who are not. Barristers become aware of who will bite and who won’t.

Certainly there were a number of female barristers who said this kind of behaviour was something that men were more inclined to “carry on with” - more than there were male barristers who said they “preferred not to conduct [themselves] in that way”. Some of the female barristers said:

I’m not into it ... never engaged in any of that ... I tend to distance myself from the case.

Blokes tend to play games in court and I can choose to play along and be tough, some women do not have that capacity . . . you can always refuse to play the game.

They really think they can put one over on you, bully you into a better settlement for their client. It usually happens outside court when you are negotiating. It makes it really hard. They say things like, "I've been a barrister for 20 years and . . ." They try to psyche you out as a tactic. But I have never had that happen with another woman, even experienced ones. It happens with young men too actually, they try to ambush you, try to make you doubt your case, instead of dealing with the issues in the case. This sort of stuff really puts me off doing court work. When you come home and feel like crying, you feel discriminated against when what you are there to do is represent your client and they try all this bullying stuff.

6.5.6 This last quote raises the issue of whether there are differences in the way male and female barristers respond to gameplaying tactics. While most of the male interviewees thought that a barrister targeted for this kind of treatment should simply deal with it on the spot, only half of the women interviewees took the same attitude (including one woman who said she had developed a stock of male jokes to fire back at men "playing the game"). A female magistrate saw gameplaying as a type of "bastardisation process" which most men are more likely to be familiar with from school and the football club, whereas for women, "it is not part of their make-up, they don't know how to handle it, and it hurts them more, or they are nonplussed by it, they don't understand the game . . . even if a young man is inexperienced, they will often know how to jostle back or put up a better front".

6.5.7 The same magistrate said she had also observed an "extra element" to the intimidation meted out by more experienced male practitioners to an inexperienced woman — she is patronised on the basis that "she needs special treatment because she is female". A young female barrister recounted her experience of such treatment:

Sometimes people look at you as if . . . "little girl, what are you doing here?" . . . particularly from male barristers . . . You can just see their chests puff out when you walk into the courtroom, and you have a male opponent who has a sexist approach . . . and that is not everyone, but it's not a minority.

One member of the bench observed that the "games"

happen on the basis of inexperience, psyching out, intimidating people . . . there are a lot of younger women at the Bar so this does happen to them . . . they can be intimidated . . . this game is based on experience.

6.5.8 One senior male barrister expressed strong opposition to this kind of behaviour:

It's unforgivable . . . and unjustifiable . . . [It's] only fair enough when the power relationship is equal . . . There is a really gruesome aspect to the Bar in that people will try anything, exert power over each other, especially in negotiations . . . and it's more difficult to deal with as a junior barrister and even more so to junior females . . . I give junior women the advice - don't try and settle cases, chat with opponents, because they will just try and intimidate you and bully, they will play all the tricks they can . . . male standover tricks . . . avoid it by not engaging in it, just turn up at court . . . Boys are trained to fight, or have it instinctively . . . they come at it easier than women.

6.5.9 It may be more accurate to look to the personalities of individual barristers, rather than their gender, to determine how they will create or respond to the dynamics of the courtroom, and their ability to operate effectively within it. However, on the basis of these findings it does appear that women may face additional hurdles in avoiding or alternatively attempting to participate in the general gameplaying ethos of their male colleagues — most women not having grown up with or been conditioned to understand this as the primary mode of behaving. The general acceptance of gameplaying as an inherent feature of the interaction in many courts renders it difficult to counter, although there were a few interviewees who felt strongly that the games played by many barris-

ters were counterproductive to the main objectives of the legal process. For example one solicitor said:

I think that you can conduct a professional interaction without resorting to those sorts of tactics, which I have a strong feeling are unprofessional . . . I don't think people should be interacting like that and I find it insulting when people do.

6.5.10 Until there are more participants in the legal process who feel similarly, it may be that female participants in the Bar Readers course would benefit from some practical advice on dealing with behaviour which they may find more off-putting and alienating than do their male peers.

Recommendation 31: That the Bar Readers Course specifically address the issue of gratuitous gameplaying and ways of combating it.

Forms of address

6.5.11 During the interviews, solicitors and barristers were asked whether they had observed or experienced inappropriate forms of address based on gender in court. None of the male barristers reported being inappropriately addressed in court. By contrast, 13 of the 25 female barristers interviewed said that during their careers at the Bar they had been addressed inappropriately in court in ways that drew attention to their female status and undermined their professional credibility. One said that she had been referred to as "girlie" by a witness. A few said that older male barristers had referred to them as "young lass", "young lady" or "love". Others had experienced questionable forms of address from magistrates or judges: "girlie", "love", "young lady", "having a cat fight are we ladies?". Most said that it had happened only once or "rarely".

6.5.12 One female QC emphasised her opinion that although some terms may be considered inappropriate, not much is meant by them and there is no point being offended:

I've been called 'love' and 'darl' and 'sweetie' and I just don't take offence.

Other, younger women had a different attitude:

A barrister in negotiation called me "girlie" and I think he rather regretted saying that after I had finished with him.

It really irritates me . . . being referred to as "the young lady", which doesn't sound derogatory, but if I am in court, I am not a young lady, I'm a barrister.

6.5.13 A few women also spoke about use of the title "Ms" as a source of concern for some judicial officers. One female barrister had been called "Ms" in "a derogatory way". Another said "some judges can't handle 'Ms'". A further barrister said she had become involved in a "discussion about the use of 'Ms' that went on for 10 minutes of wasted court time with the judge taking the attitude that it is either 'Miss' or 'Mrs' . . .".

6.5.14 Few solicitors had observed barristers being inappropriately addressed on the basis of their gender (5 women, 2 men). One female solicitor said she had "heard stories but never seen it herself".

6.5.15 Comments made by several interviewees indicated that in recent years awareness of the potential for professional credibility to be undermined by inappropriate forms of address in the

courtroom has grown amongst judicial officers. And the efforts of some had been noted. In one case a Supreme Court judge, described by the interviewee as “old style”, “kept getting quite flustered” about how he should address the bar table, which comprised four men and a female QC. Throughout the trial he used the expression “Gentlemen and Miss X”, which despite the judge’s obvious concern to be inclusive of female counsel, the interviewee, Miss X’s junior, found quite inappropriate.

6.5.16 Overall, the findings indicate that there is not a high incidence of inappropriate address in the courtroom, and that most practitioners do not consider it a big problem. However, to the extent that it does still occur, it symbolises the inability of the Bar and the bench to adapt to the changes in the composition of the Bar Roll, and efforts should be made to ensure that all members of the Bar are addressed appropriately, respecting their choice of title.

Recommendation 32:

- *that the Bar Council promote the use of gender inclusive forms of address such as “counsel” “ladies and gentlemen” or “members of the Bar”;*
- *that women’s own choices of address (Miss, Mrs or Ms) be respected.*

Gender bias from the bench

6.5.17 A central focus of gender bias task force studies conducted during the 1980s and early 1990s in the state and federal courts of the United States was on gender-biased treatment of female attorneys by male judges. Lynn Hecht Schafran writes that the “stories of overt hostility coming from judges are legion”, and that the task force reports document “many ways in which women attorneys are overtly denigrated in courtrooms and chambers”.¹⁶ Other recent anecdotal material from the United States, authored by female litigators, carries the strong implication that women continue to face additional hurdles when appearing as advocates on behalf of their clients, because of the gendered stereotypes of female and male behaviour adhered to by some male judges.¹⁷

6.5.18 The findings from the present study suggest that problems experienced by female barristers in terms of gender biased treatment from male judges have diminished over recent years — either because those judicial officers who were less tolerant and less able to adjust to the increased numbers of women appearing in their courts have now retired, or they have changed their attitudes, responded to gender awareness seminars, or, as one interviewee asserted, “the misogynists now know to shut up”. Some of the more senior female barristers interviewed indicated that “things have changed”.

6.5.19 In relation to ways in which members of the bench may exhibit gender biased behaviour other than in forms of address, one older male solicitor contrasted the current situation with his previous experience as a barrister in the late 1970s:

I saw such intolerance that I saw women barristers weep, and I believe that it was almost deliberate. I always looked up to those women who were brave enough to give it a go.

16. Schafran, ‘Women as Judges, Lawyers and Jurors’, 195.

17. See Jean Maclean Snyder and Andra Barmarsh Greene (eds), *The Female Advocate* (Litigation section of the American Bar Association, 1996).

He also said that in recent times any disrespectful treatment was not overt, but infrequently he had observed judicial behaviour that he thought was “dismissive” of a female barrister and that he had the sense that it was because argument was being presented by a woman. In this context, Schafran has observed, “body language and tone of voice that reveal discomfort, disinterest or hostility to a woman lawyer speak volumes to juries and clients”, and are a less obvious manifestation of gender bias.¹⁸ Another example of this was described by a female ex-barrister during the interviews:

On days when I wasn't in court I would go and observe other cases . . . where women barristers were being given a hard time by some older male judges. [On one occasion] Ms X was on one side, and Mr Y on the other side and he was obviously a really good mate of the judge. When Mr Y talked, the judge would listen and his posture would be different to when Ms X was talking. He wouldn't be paying attention . . . it's a subtle thing, but you pick it up.

6.5.20 Overall, the extent of less obvious forms of bias is difficult to gauge from the interview data. There were no direct questions posed, and obviously not all interviewees are attuned to this level of observation of the courtroom environment. The interviews did, however, attempt to measure whether barristers perceived themselves as being subject to rude or hostile treatment from the bench during their careers at the Bar. More men than women (17 men: 9 women) said they had experienced what they saw as inappropriate treatment. They were not asked specifically if they thought the relevant members of the bench exhibited a gender bias in this regard. Several volunteered the opinion that “the odd” or “occasional” judge or magistrate is rude to practitioners because they are “just grumpy” or “a bully” and not because they have a gender bias. There were only two female barristers who asserted that the rude treatment they had received was directed at them because they were women. One said:

There is one magistrate who doesn't like women, he's rude to us and he often invites the boys back for a cup of tea in his chambers after court.

6.5.21 A few female barristers said they felt that some male judges and magistrates exhibited a gender bias in their favour, in that they were “probably more polite” towards them because they were women:

They are nicer to you and you can take advantage of that by getting further up the list.

With some judges being charming works . . . it doesn't affect the result but it might appear to make the case run better and you might get a reputation as an appealing advocate.

This is supported by a few solicitors who had observed magistrates and judges behaving differently towards female barristers, describing them as having been overly deferential, more formal, better behaved or protective of women. A few had also observed male magistrates to respond better to female advocates so that matters “run more smoothly” although a couple of solicitors implied this was more likely if the women were young and attractive.

6.5.22 Some solicitors (3 male and 3 female) had also observed incidents that involved female advocates being “given a hard time”, or “being patronised” by older male judicial officers in a way that they identified as gender biased. One solicitor who had done a lot of appearance work felt that because she was young and a woman, she was an easy target for hostility from the bench. She felt that the treatment she received from one magistrate, before whom she was obliged to appear regularly, seriously compromised her clients' cases. She raised the issue of the difficulty faced by

18. Schafran, 'Women as Judges, Lawyers and Jurors', 196.

young advocates in complaining about rude or biased treatment from the bench. Her complaint (made through her employers) was met with the response that she should “not take things so personally”. The same solicitor described a situation where inappropriate behaviour from the bench was, in her view, more effectively dealt with:

I also saw it happen to two young women barristers who were abused by a certain magistrate and I saw a very senior male barrister go in afterwards and tell the magistrate off for his treatment of the women. He wasn't afraid of saying what he thought . . . he was more senior than the magistrate and could match him and know that there wasn't much the magistrate could do.

6.5.23 Analysis of comments made by barristers about how they respond to general “non-gendered” rudeness or hostility from the bench suggest that there may be differences in the way this “work hazard” is tolerated by male and female barristers. Many (both male and female) commented that dealing with difficult judges and magistrates was just “part of the job”, (“there are some very rude members of the bench, but that doesn't worry me, its all part of life's rich tapestry”). A few women were less tolerant. One female ex-barrister said:

That was the final straw really . . . from a judge who was notoriously inappropriate to everybody . . . It didn't have anything to do with gender but I decided I didn't want to do a job where I was going to get treated like that.

None of the other former barristers indicated that judicial behaviour had been instrumental in their decision to leave the Bar, however two other women barristers said that they had made decisions about the area of law and the jurisdictions in which they were prepared to practise on the basis of their experiences with, and the reputations of, members of the bench in certain courts.

6.5.24 Overall, the interview findings about gender-biased treatment from the bench indicate that its incidence is most likely isolated, rather than widespread. However, it may be that more women than men are unable, or unwilling to accept occasional rudeness or hostility from the bench as part of “normal” work conditions.

Recommendation 33: That in order to provide an environment in which all barristers feel comfortable and enjoy equal opportunities to practise, the Bar Council promote uniform standards of courtesy and politeness towards advocates.

Complaining about unacceptable behaviour in court

6.5.25 When asked about whether they had or would consider making a complaint about behaviour they found unacceptable in court, the responses from barristers demonstrated how effectively the “no dobbing rule” (described in Chapter 3) operates in this context. This was especially so in relation to complaints about treatment from the bench. A few female and male barristers and solicitors spoke about the disincentives to attempting to address these matters, other than via normal avenues of legal appeal.

6.5.26 In relation to behaviour of other participants in the court, a general theme arising from the responses related to a belief or expectation that the bench does, or should deal with any unacceptable behaviour in court, as it arises. In relation to some of the “boys games” played at the bar table, a number of interviewees thought that there could be more intervention from the bench. One female barrister said:

Judges are removed from it, they don't say "cut it out boys" or anything like that. They don't get involved.

6.5.27 All of the judicial officers interviewed considered that they had a role in controlling any inappropriate behaviour from barristers in their courtrooms, whether or not there appeared to be a gendered quality to it. There were a few whose comments demonstrated a sensitivity to the issues faced by women in maintaining professional credibility in the courtroom and that from the bench, there is a balance to be struck:

Generally a tactful response from the bench is required because there would be occasions where being too open about one's reaction might be as embarrassing to the female barrister as the initial inappropriate remark or approach. But it would be appropriate to indicate that [you were] aware that inappropriate behaviour had occurred and did not want it repeated.

I recall one occasion when a male barrister was patronising to his female opponent — he belittled her— it was flippant and rude. She responded, but I would have, had it struck me that she was embarrassed or hurt by it, I would have responded myself, but she was fairly sharp and he got what he gave.

6.5.28 The comments of another judge highlight a contrast in awareness amongst members of the bench in relation to gender issues:

I can remember one incident . . . a very senior member of the Bar, driven to a state of exasperation by a female member of the Bar playing a very technical rule about the admission of documents . . . making it enormously difficult for this [senior male] barrister . . . After about the 20th objection, he said through his teeth "If she does it again, I'll take her outside and spank her". [At this point the interviewee laughs.] I saw it as justified, I ignored it.

The same judge said:

If counsel were illustrating a point to the jury by a joke that was to the point, I wouldn't object to it because it was sexist. If it wasn't to the point I would object to it because it wasn't to the point, or if it were in bad taste.

6.5.29 A male solicitor who agreed that "it really is the role of the bench, if anything occurs in court, to be setting the tone", also added:

I think that the role the senior Bar play in setting those mores can't be underestimated, and if they were to take a role, then I'm sure that that would have an impact on the junior ranks of the Bar . . . Looking at how they have taken the lead in pro bono work, they are really setting an example.

Recommendation 34:

- *that judges make clear that they consider rude, hostile or sexist behaviour in their courtrooms to be inappropriate, and that the targets rather than the perpetrators of such behaviour will be supported;*
- *that gender awareness issues continue to be included in the professional education courses run for the judiciary;*
- *that senior members of the Bar lead by example in this area.*

6.6 Impact of Women on the Court

6.6.1 The interview and statistical findings clearly indicate that the proportion of women at the Bar has not grown sufficiently for them to effectively blend in amongst the larger male population in the courtroom. Given that level of visibility, it is relevant to ask whether courtroom participants

perceive any differences in the way the courtroom operates when there are women at the bar table, whether the presence of women has affected the way in which proceedings are conducted. This question is relevant in the light of theoretical arguments, noted in Chapter 1, that women might bring a “different voice” and approach to legal practice.¹⁹

6.6.2 More than half the solicitors interviewed had observed differences about the operation of the courtroom when there were women at the bar table. A significant number of them spoke about the impact of women by reference to situations when they are absent. They said that “male egos being a problem”, and with an all male bar table, there is a lot more “puffery” and “strutting” and that “things could be said in half the time”. Male barristers were described as “little boys in the schoolyard”. Women were seen to be “less ego driven” than men, less inclined to be rude and aggressive, women tend to “tone things down”. In this context a number of interviewees qualified their responses as “generalisations only” — that the observations were “not true of all men and all women”, “some women are worse than the men” although some solicitors were happy to make more sweeping statements. For example:

One thing that female barristers don't do, is this power struggle stuff . . . between the two roosters, and that is a refreshing change because quite often, to the complete detriment of your client, this nonsense is taking place and I have often . . . had to have a word to the other solicitor and get on with the negotiations because the two roosters are incapable of doing it . . . I have to take on the negotiating myself because their egos are too much for it.

6.6.3 One male solicitor spoke about perceiving a negative consequence of having women in the courtroom in that he sees men “playing up to the fact that women are there” — “they try to impress them . . . their insecurities come out . . . then there's a need to get ahead of the pack and wag their peacock's tail.”

6.6.4 Female solicitors saw advantages for the operation of the courtroom with women at the bar table. Two young female solicitors said they felt more comfortable instructing women because they didn't attempt to undermine them. They said they had regularly been treated with disrespect by male barristers, but never by females. A more senior female solicitor related an anecdote about having been involved in proceedings in the Family Court where all the barristers and the instructing solicitors were women.

It was a very pleasant experience. It was a difficult case but we got the work done in an extremely co-operative way, and the male judge commented on the process and how easy it was to come to a sensible resolution.

6.6.5 Fewer members of the bench had noted differences with women at the bar table. Of the 20 judicial officers interviewed, 15 said that despite an increase in the numbers of women appearing before them (for those who had been on the bench for more than a few years), they had not observed any impact on the way the courtroom operates. One judge said he was “not conscious of [any difference]. I think it would concern me if I were . . . women are in the courtroom, men are in the courtroom, people present their arguments”. Of the five who said having female advocates did make a difference, one could not make generalisations about the impact, two said the atmosphere was “less combative” and they were “less bloody-minded”, one said it was better to have women in cases involving sexual or family issues because they are more understanding and there is less tension in the courtroom, and one commented on different use of space and advocacy style.

6.6.6 In order to gauge the perception of barristers about their own behaviour in relation to working with women in the courtroom, interviewees were asked whether they approach a female

19. See paragraph 1.3.3, and in particular Menkel-Meadow, ‘Portia in a Different Voice’.

opponent differently from a male one. Almost all the male barristers said ‘no’ without any other elaboration. A few said that their approach to an opponent is dependent on their individual personalities, rather than gender. One said that in court it would not make a difference, but outside, he would be less “blokey” with a woman.

6.6.7 About half the female barristers responded similarly to the majority of the men — their approach is no different or is based on their opponent’s individual personality or reputation. The other half said they generally find a female opponent “easier to deal with”, “more sensible”, “more pleasant”, “better prepared”, “more civilised” or “less gameplaying” than many of their male opponents. By contrast, one senior woman in family law said she prefers dealing with male opponents because “they get less emotionally involved in the cases”. Another senior woman in crime said she finds it more difficult being opposed to women because some of her best tactics don’t work against them: “I try to get men annoyed with me so they get loud and aggressive which makes me look calm and rational”.

6.6.8 These findings about how the participants perceive female barristers operating in the courtroom indicate that, on balance, the presence of women has had a positive impact on the conduct of proceedings. They also suggest that women’s contribution to the legal profession and the Bar in particular should be highly valued, and provide incentive for those concerned with the future of the Bar to ensure that measures encouraging women to join and stay at the Bar, such as those recommended in this report, are acted upon.

6.7 Women on the Bench

6.7.1 Legal theorists, practitioners and institutions have spent considerable time in recent years debating questions related to the appointment of women to the bench.²⁰ These debates have on occasion been sparked by critical media coverage of judicial decisions claiming that the reasoning of male judges has been influenced by gender bias. Announcements of new judicial appointments also attract attention to the small proportion of women currently occupying seats on the bench in Victoria (see paragraph 1.2.2). Much of the debate has focused on whether more women would make a difference to our courts. A number of arguments have been posited, relating to reasons of public perception about the impartiality and independence of the judiciary, the need for judicial diversity to fairly reflect gender differences in society and the legal profession, and the positive effects arising from the different perspectives women may bring to the court and to legal reasoning.²¹ For the present research, questions about women being appointed to the bench were canvassed in the interviews with legal personnel with the aim of determining how female barristers are viewed in terms of their suitability for judicial appointment. This was seen as an important area of enquiry for the interviews, given that perceptions within the profession are an influential factor in the formula for career advancement, and as noted in Chapter 2, judicial office is considered a desirable goal by a number of women at the Bar.

20. See for example Suzanna Sherry, ‘Civic Virtue and the Feminine Voice in Constitutional Adjudication’ (1986) 72 *Virginia Law Review* 543 (though cf Robert W. Van Sickel, *Not a Particularly Different Voice: The Jurisprudence of Sandra Day O’Connor* (Peter Lang, New York, 1998); Madam Justice Bertha Wilson, ‘Will Women Judges Really Make a Difference?’ (1990) 28 *Osgoode Hall Law Journal* 507; Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (1991); Commonwealth Attorney-General’s Department, *Judicial Appointments: Procedure and Criteria* (AGPS, 1993); Sean Cooney, ‘Gender and Judicial Selection: Should There Be More Women on the Courts?’ (1993) 19 *Melbourne University Law Review* 20; Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*; ALRC, *Equality Before the Law: Women’s Equality*, 201–203; Roger Douglas and Kathy Laster, ‘Feminised Justice: The Impact of Women Decision Makers in the Lower Courts in Australia’ (1995) 12 *Justice Quarterly* 701; Regina Graycar, ‘The Gender of Judgments: An Introduction’, in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995), 262; Margaret Thornton, *Dissonance and Distrust*, 201–209.

21. See in particular Wilson, ‘Will Women Judges Really Make a Difference?’; Cooney, ‘Gender and Judicial Selection’.

More women on the bench — theoretical support

6.7.2 The question, “Do you think there should be more women on the bench in Victoria?” was put to interviewees. There were a few respondents who thought that the gender composition of the bench was not an issue of concern. For example, one female solicitor thought that female judges would not “make a difference to the outcome of cases, why is it important?”.

6.7.3 The overwhelming majority response from female and male barristers, former barristers, solicitors and members of the bench, however, was “theoretically, yes”. Several gave reasons that reflect the theorists’ arguments as to why women should be appointed to the bench in Victoria. They spoke about there being a need to “properly reflect the make-up of the community” and it being “essential for the community to see its composition reflected in the institution that is dispensing justice”. The value of a female perspective on the bench was also emphasised. Female members of the bench were described as being “more sensitive”, “adding a different dimension” and having “a very ordered sense of what is right and wrong in the world”. One female solicitor also said:

Female judges are so much better to appear before, they are much better at listening and asking questions, they are not as rude or dismissive.

A Federal Court judge said:

The presence of women on the Federal Court bench in Victoria would have a very powerful positive effect of inspiring other women and encouraging people to be represented by women barristers . . . And having women as colleagues would be an improvement for the workplace.

Another male judge thought that:

A court will do its job better if it is able to reflect the experience of the community as a whole, and that’s impossible when the court is comprised of almost entirely of members of one sex.

6.7.4 Of the interviewees who thought there should be more women on the bench, a small minority were of the view that there are also well-qualified female candidates who are currently available to take up judicial appointments. Some of this minority thought that an effort should be made to seek out these women and they should be actively encouraged to take up judicial office. One male judge thought that:

unless we take a positive step forward, quite a vigorous one, then [a more gender balanced bench] will be wishful thinking.

6.7.5 These views contrasted with those of the majority, many of whom expressed reservations both about the current availability of women eligible for judicial appointment, and about “affirmative action” being applied to the process of making future appointments. The lack of a sufficiently large “pool” of female barristers with the required seniority and standing for judicial appointment featured in many responses. Many also held the view that “it is just an issue of time” before more women are appointed as they reach the senior ranks in larger numbers.

6.7.6 The perceived shortage of senior, competent women may be based on the comparative areas of practice of female and male barristers. As noted earlier in this chapter and in Chapter 4, women’s level of visibility in different courts and tribunals is quite variable. One male barrister, for example, noted that

many women get channelled into particular types of practices, especially family and minor crime, that are really not going to get them noticed for the purposes of advancing at the Bar and judicial appointment.

Another male barrister, after expressing the view that there are not “women barristers with sufficient experience and quality to warrant their appointment”, admitted in response to a follow-up question, that:

I was really thinking of appointment to the Supreme Court/Federal Court, and insofar as there are women who practise regularly at the County Court . . . and other tribunals, such as the Family Law Court, I’m really not qualified to say.

6.7.7 There also appeared to be differences in the way the concept of affirmative action was understood, with some interviewees, while generally opposed to the idea of affirmative action, saying that, in the short term, certain measures may be appropriate - for example, if there were a female and a male candidate who were equally qualified, they would “not be opposed” to the female being offered the appointment, to improve the gender balance on the bench. Most responses, however, were qualified by statements about the necessity for appointments to be made on the basis of ability or “merit” rather than “just for the sake of having more women”. Several mentioned that promoting women to the bench as “tokens”, rather than on the basis of merit, did harm to “the cause”, with some past appointments being pointed to as examples of this phenomenon.

6.7.8 Generally, the comments directly demonstrated or implied that female appointments to the bench are subject to a high degree of scrutiny. One female barrister described it as:

When women hit the bench, they are in a fishbowl.

For many women this is unlikely to be viewed as an encouragement to accept an appointment. A female barrister thought there was a need to “encourage [women] to take the positions when they are offered . . . I can understand why they don’t want to take them”. A few barristers and solicitors spoke positively about their experiences and impressions of recent female appointments, but there was an equal if not greater amount of negative comment.

6.7.9 In particular, there was some resentment expressed about perceived “queue jumping” in recent female appointments. This was almost exclusively from a few more senior male barristers who made statements about the courts as an institution having been “devalued” by appointments they saw as “overtly political” in nature. One said:

. . . in the last 12 months or so, if my gender had been otherwise, I could have rocketed to judicial stardom . . . Female preference at the moment is rampant, it’s almost absurd . . . I could be severely disadvantaged . . . although I am not personally interested in becoming a member of the judiciary.

Rosabeth Kanter noted a similar phenomenon in her study of professional women in a large corporation:

[A] number of men were concerned that women would jump ahead of them. They made their resentments known. One unwittingly revealed a central principle for the success of tokens in competition with dominants: to always stay one step behind, never exceed or excel. “It’s okay for women to have these jobs,” he said, “as long as they don’t go zooming by me.”²²

6.7.10 The implication carried by much of the comment about the basis on which women may be appointed to the bench is that it is different from that on which males are appointed, although this proposition was not adhered to by some other interviewees:

22. Kanter, *Men and Women of the Corporation*, 218.

Basically the traditions of the Bar have been that people will be appointed on merit. I might say that it doesn't entirely happen that way. People get appointed because they were Chairman of the Bar Council, or because of people they know, because of the people they worked for — they did a lot of government work, they were a good bloke, they were popular. I know a lot of people who, strictly speaking, are not brilliant lawyers and they've been appointed, probably above their standing (male barrister).

We are appointed by governments, who, like God, create judges in their own image and likeness . . . They may appoint for all sorts of curious reasons, and sometimes on the basis of misunderstandings . . . When they get it wrong, there's not much you can do about it (male judge).

A female barrister also commented that the appointment of a woman considered unsuitable “sets us back, whereas bad appointments of men aren't noticeable, they blend in”. Thus, it may be that criticisms of female judicial appointments are related at least as much to gender as to qualifications or performance.

6.7.11 Overall, despite the degree to which practical impediments to the goal of appointing more women were emphasised in the comments, there was a high level of theoretical support for the concept of increasing the numbers of women on the bench, subject to an increasing number of women moving into the senior ranks of the Bar. However, as the research findings demonstrate, the “trickle-up”, “time will tell” method, the suitability of which many of the interviewees were convinced of, has so far not proved effective, and cannot alone be relied upon to ensure that sufficient numbers of women stay at the Bar to become qualified for judicial appointment.

Achieving a more gender balanced bench

6.7.12 There were some interviewees who supported the concept of taking some action towards ensuring the best conditions for more women to be appointed to the bench in Victoria, rather than simply waiting for that outcome to materialise. While a few advocated the establishment of a judicial committee to make appointments, or the advertising of and application for judicial positions, these were minority views. The main methods suggested for achieving more of a gender balance, related directly to themes arising from the research and to some of the conclusions reached in other parts of this report.

Review of selection criteria and methods: redefining 'merit'

6.7.13 A female judge thought that “[t]he selection criteria for judicial appointment should be closely looked at to ensure that they do not embody values of the male elite”. In this context, the concept of long and continuous practice as a primary factor in the selection equation was covered by a male judge who spoke about the need for a reassessment of the way in which time out from legal practice is viewed, as it “creates a vastly more capable person [in terms of] judicial decision-making . . . the life of a mother running a household, is very much a judicial role”. The comments of a female barrister supported this: “The experience clock does not stop running when you are away from the Bar with children, it probably gives you more skills that are relevant for the job”.

6.7.14 One female barrister spoke about the appointment method relying on prospective appointees being well-known to the mainstream of the profession, and implied that being comfortable with a certain amount of self-promotion was also of assistance. She felt this reflected a mode of behaviour that men are more familiar and at ease with:

Women are loathe to put themselves forward, but they will if they are supported — the selectors should be cognisant of the way in which women are motivated, and gear the process appropriately.

6.7.15 One female magistrate saw appointing women as an opportunity for them to show their potential, which may not be as obvious as men's because of career breaks and having less of a profile amongst the mainstream, for family or other reasons. She said:

Women learn very quickly when they are put in those positions. Sometimes the speed with which women learn indicates how much them not being at a comparative level of development to a man [in terms of a practice at the Bar] is a matter of relativity of opportunity, rather than of ability and qualifications.

But she did qualify this with the view that:

It depends very much on the selection process, because some women have been given opportunities that they can't meet and some men have too, but it is more noticeable for the women. The people selecting have got to do it well, to see what is there . . . the selectors have really got to know a lot about what they are selecting for, about the jurisdiction . . . looking at what skills and nous are required, rather than simply the years of experience. Maturity is not measured in years.

Support for women at the Bar and on the bench

6.7.16 The theme of many of the suggestions is consistent with the conclusions reached in Chapter 3 regarding the culture at the Bar, and elsewhere in the report that the male dominated nature of the institution creates an environment in which women may not feel supported:

Women must be encouraged to stay at the Bar so they can become senior.

Women have to be supported more in the junior positions in law, so they can consolidate their experience and then genuinely earn their appointments to the bench.

The affirmative action has to happen further down.

Women should be supported earlier in their careers, before they get disillusioned.

6.7.17 Some interviewees spoke about this notion being relevant, even where a woman has "made it" to judicial appointment. One Supreme Court judge's comment demonstrates an awareness of the need to support those who are entering a workplace in which they have no, or few, peers of the same gender:

A female appointment should be made to feel welcome on the bench . . . judges should ensure that women would not feel uncomfortable about taking up an appointment.

This perspective is supported by a magistrate who said "when appointing women to a male enclave, they should do it in twos or threes, if not fours", and a senior male QC who thought "there should be support for women on the bench, one woman alone can be swamped". These views in turn illustrate the relevance of Kanter's insights about the importance of a "critical mass" of women, to the bench as well as to the Bar.

6.7.18 The idea of women needing support to advance in a competitive environment for which they have been professionally trained, may be incongruous or even offensive to some, especially those women who have succeeded without such a need being recognised or accommodated. However, these interview findings, and the low numbers of women who have historically chosen a career and then succeeded at the Bar, are themselves good reasons for trying to introduce some measures aimed at creating an environment that acknowledges the benefits of having women working within it and supports them in being there.

Recommendation 35:

- *that WBA and the Bar Council promote discussion of a broader, more inclusive range of qualities that may be considered to equip barristers for judicial appointment;*
- *that all judicial appointments be evaluated by reference to the same standards, rather than women appointees being subject to additional scrutiny due to their gender;*
- *that recommendations in this report designed to ensure that women barristers are encouraged to remain at the Bar and enjoy equal opportunities to progress, be understood as also contributing to the establishment of a pool of senior women barristers from whom appropriate judicial appointments may be drawn.*

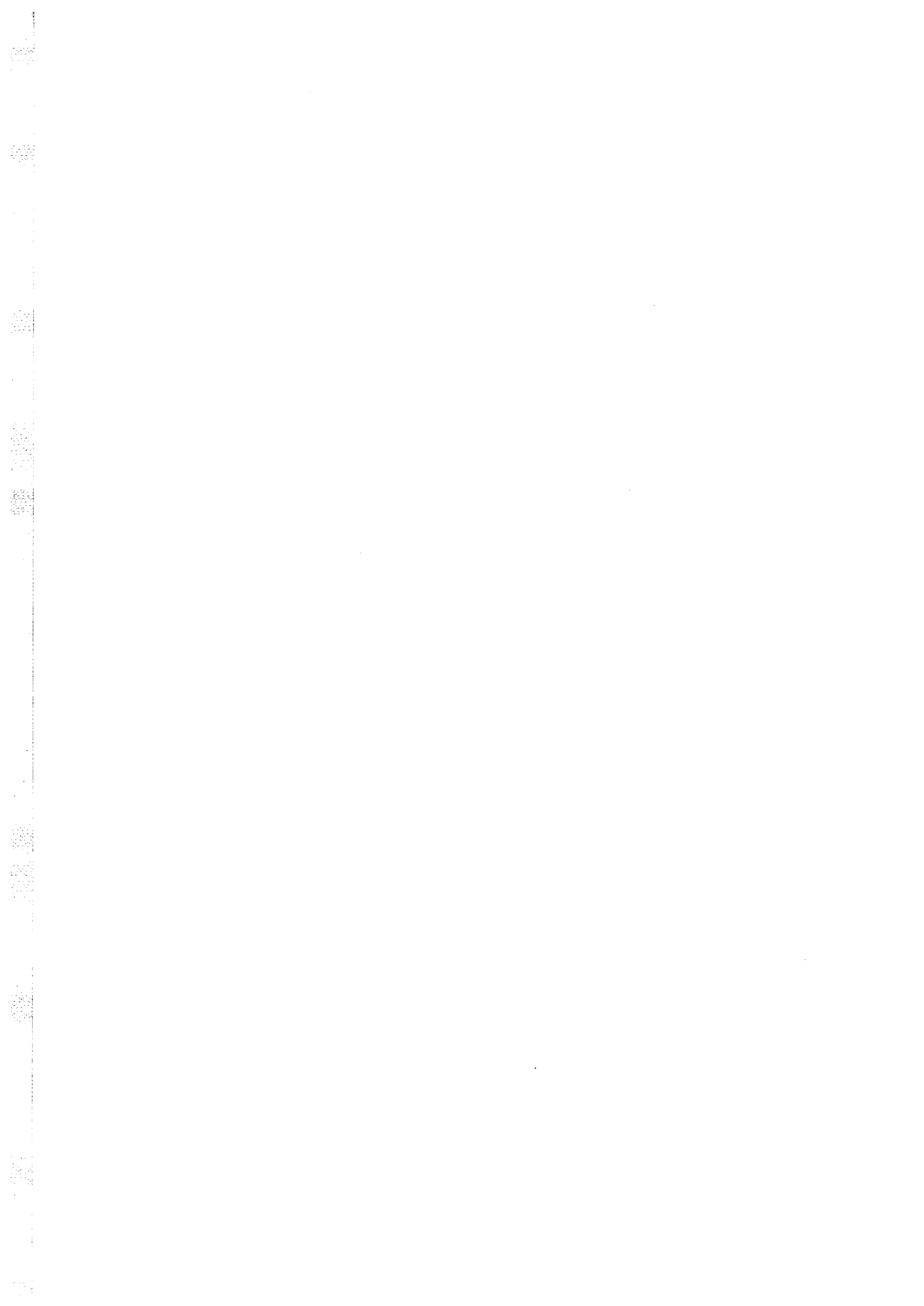
6.8 Conclusion

6.8.1 The findings in this chapter reinforce those reported in earlier ones regarding the requirement for women to overcome impediments created by the male-dominated history of the Bar. In this instance, in the courtroom, the findings show that women have been dealing with the preconceived notion that barristers are male. This is manifested in the advantages and disadvantages of having a heightened visibility amongst their male peers, treatment highlighting their status as women first before being acknowledged as barristers, attitudes to their competence, and their own confidence as advocates. The courtroom as a physical setting can also be seen as having some “inherent disadvantages” for women in terms of projecting voices of a higher pitch and for those of smaller stature making their presence felt.

6.8.2 In addition, the findings suggest that male barristers are more likely to initiate and be comfortable with gameplaying tactics, and that while some women learn how to play them, they are more likely, at least initially, to find them alienating and confusing. With regard to rude or hostile treatment from the bench, it appears that, in general, female and male barristers have similar experiences and attitudes. Most reported only isolated incidents of this type of behaviour, and that they approached them as “part of being a barrister”. Only a couple of women contended that treatment they had received from judges or magistrates was motivated by gender bias. In contrast with the US gender bias task force reports, then, this research found judicial gender bias to be a minor issue for women advocates, particularly in comparison with the more significant hurdles noted in previous chapters.

6.8.3 In terms of styles of advocacy in the courtroom, despite some difficulties contending with attitudes about how women should behave as advocates, it appears that female barristers have been largely successful in finding effective ways of being an advocate.

6.8.4 The interview findings also suggest that in terms of their contribution from the bar table, the increased number of female barristers practising in Victoria has generally had a positive impact on the way in which proceedings are conducted. Their value to the court and the legal system was also acknowledged by the majority of responses to questions about increasing the number of women on the bench. Suggestions regarding how a more gender-balanced bench may be achieved reinforced conclusions reached in other parts of this report — those concerning the way in which the values of the (masculine) mainstream of the Bar inform the criteria on which prospective appointments are assessed, and the need for greater acceptance and support for women at the Bar, to enable more women to gain the experience and maturity required for judicial appointment.



Chapter 7

CONCLUSION

7.1 Barriers to Women's Advancement at the Victorian Bar

7.1.1 The research shows that there are barriers impeding women's advancement at the Victorian Bar. While there is now widespread (if not universal) acceptance of women barristers, they do not yet enjoy equal opportunities with their male colleagues at the Bar. Consequently, women barristers are compelled to work harder and to overcome additional hurdles in order to succeed.

7.1.2 Interviews with barristers indicate that women are serious and committed about their careers at the Bar. Their aspirations for success may even be higher than those of their male counterparts. A significant proportion of women saw no barriers to the achievement of their goals or to their progress to date, however more than half did identify barriers, which were different from and more numerous than those identified by men.

7.1.3 The interviews and court appearances data demonstrate the existence of gender bias against women barristers, and show that it is a complex phenomenon, ranging from sexist attitudes, to directly and indirectly discriminatory treatment, to systemic factors. Within the dominant culture of the Bar, women can be marginalised and subjected to inappropriate behaviour. The structure of work at the Bar and attitudes towards parenthood also create difficulties for women attempting to combine work and family responsibilities. The beliefs and practices of solicitors, and some clerks and clients, result in women not having access to the same range of briefs as their male colleagues. And in court and on the bench, while the research did not replicate the findings of US gender bias studies, it did show that women barristers and judges are subject to more intense scrutiny than their male counterparts (by both themselves and others), and are often regarded as representatives of their sex rather than as individuals. This is a typical outcome where members of one group constitute a small minority of a population, but one which adds to other disadvantages experienced by minority members.

7.1.4 Another typical response in situations where one group and its culture dominates is for members of the dominant group to have difficulty recognising the barriers facing the minority group, since they have no personal experience of those barriers. Moreover, it is understandable that some members of the minority group, particularly those who have succeeded under adverse conditions, will also deny the existence of barriers, rather than recognise their own success as a product of exceptional personal effort. Such denials (which Professor Rhode has labelled the "no problem" problem) themselves present barriers to the achievement of equality.

7.2 Achieving Equal Opportunity

7.2.1 Contrary to popular belief, it is not "just a matter of time" before women will achieve more than minority status at the Victorian Bar. At least 30% of law graduates were women by the late 1970s, but 20 years later, women still only constitute 16% of barristers in Victoria, and 6% of QCs. The barriers identified by the research operate to discourage women from joining the Bar, and to discourage those who do join from staying to achieve positions of seniority. Thus, a "critical mass" of women at all levels of the Bar, which is a necessary concomitant of equality, will not be achieved without positive action. Moreover, the research revealed other pressures for change

such as some men's dissatisfaction with the notion that being a barrister requires total commitment to work at the expense of family life, and moves for advocacy to be conducted and judicial officers selected from sites outside the Bar - which also demand positive responses.

7.2.2 Much of the gender bias discovered by the research was perpetrated unthinkingly or unconsciously. One positive step, then, would be for individual players to recognise the results of their views and actions, and to resolve to make their own contribution to equality of opportunity.

7.2.4 Systemic problems require more than individual responses, however. The report recommends various measures that could be taken to overcome barriers to women's advancement at the Bar, and to enhance the standing of the Bar as an institution concerned to practice and promote fairness and equality. Responsibility for such measures must necessarily lie with the leadership of the Bar, or with Bar structures that have the power to adopt policies and revise practices.

7.2.5 The recommendations made here are not intended to be exhaustive. It may be the case that those within the Bar, and/or experts in the field of organisational change, are able to devise further constructive solutions to the issues identified in the report. As noted in Chapter 1, the Equality Before the Law Committee of the Bar Council envisaged that following the publication of this report, there would be a second stage of consultation, adoption and implementation of strategies to ensure that women barristers enjoy equal opportunities with their male counterparts.

Recommendation 36:

- *that the Bar Council, WBA, and/or other relevant bodies hold workshops to discuss this report, and to devise further practical suggestions in response to its findings;*
- *that the Bar Council make funding available for the employment of appropriate consultants to advise it in the process of adopting and implementing strategies to overcome the barriers to women's advancement at the Bar identified in this report;*
- *that strategies arising from the research findings be adopted and implemented within a two year period from the publication of this report;*
- *that those responsible for implementing various strategies report regularly to their constituencies on actions taken in that respect;*
- *that the results of the implementation process be monitored and evaluated after two years has elapsed.*

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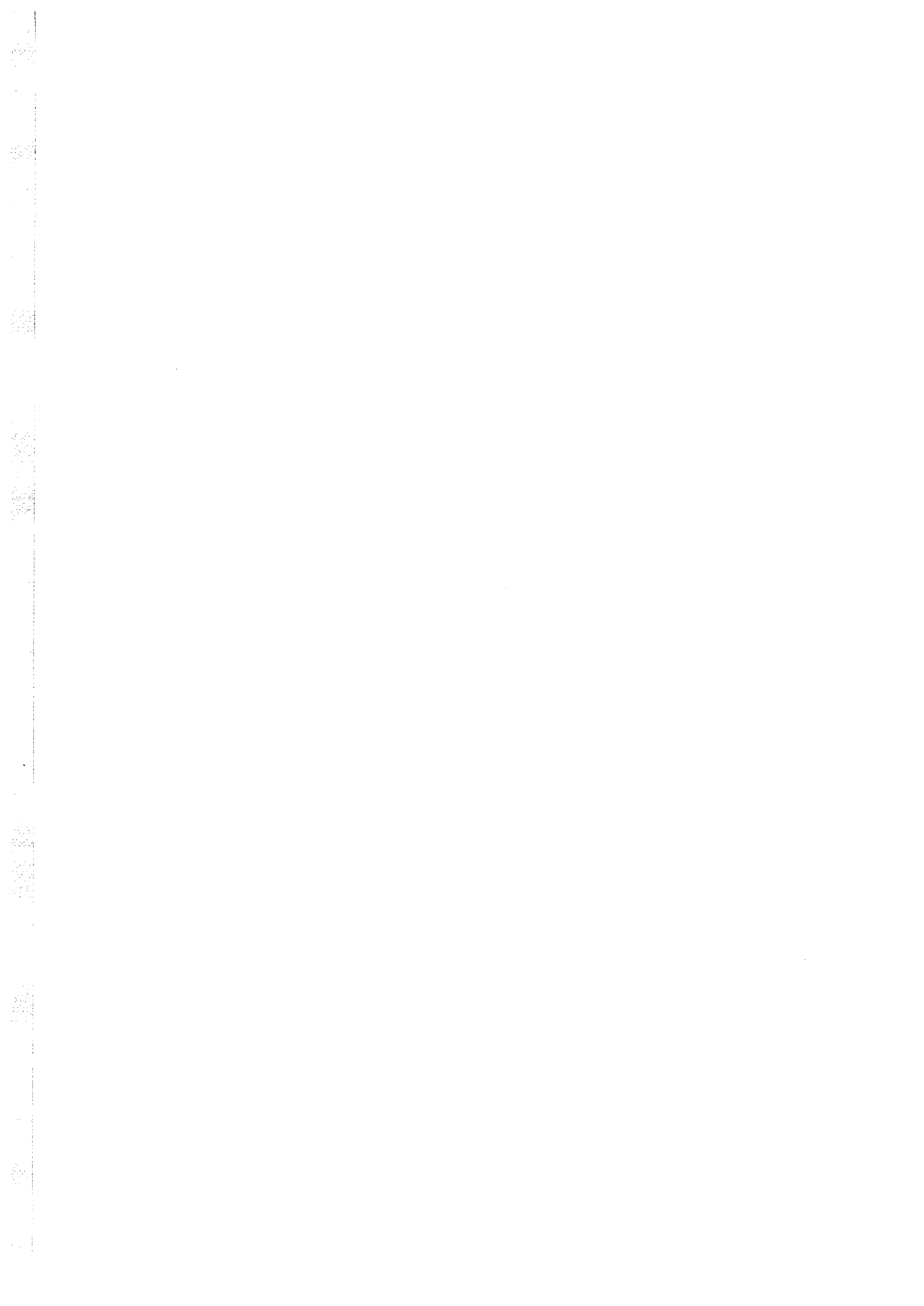
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APPENDIX A: INTERVIEW SCHEDULES

Interview schedule for barristers

Demographics and background
Interviewee ID
Year of admission Year of coming to bar Year of taking silk (if applicable)
Current age
Are you working full or part time at the bar?
What would that translate as, in hours per week, on average?
Since you came to the Bar, have you had any extended periods away from the bar? (6 months or more)
What areas of law do you work in?
Were you a solicitor before coming to the Bar?
Do you work in the same areas of law that you are working in at the Bar?
How did you come to specialise in the areas that you now practise in?
Which courts/tribunals do you regularly appear in?
Do you have a set hourly or daily rate?
Aspirations/success measures
Why did you come to the bar?
When you started, were you confident of succeeding at the bar?
Why?
How would you describe a successful barrister?
What aspirations do you have for your career in the law?
Are you satisfied with your progress towards those aspirations, to date?
Can you identify any barriers to you achieving your career aspirations? personal or structural

Do you feel comfortable in the environment of the Bar?
Can you suggest any changes to the operation of the bar that would enhance your ability to achieve your aspirations'?
[prompt with suggestions if necessary, e.g. partnership arrangements, working from home, work sharing]
If you were making the choice again, would you choose the Bar?
Clerks
Which list are you on?
How did you come to be on that list?
Have you ever changed lists? Why?
Can you describe the current relationship you have with your clerk?
What do you see as the function of a clerk?
Briefing
Could you identify the current source(s) of your briefs?
Has that changed over time? How?
Are you briefed more by men or women?
Do you socialise much with other lawyers?
Do you belong to any clubs?
Do you feel a part of any formal or informal networks at the bar?
Can you describe them?
What about friendship groups?

<p>What kind of secondary school did you attend?</p> <p>Do you have family in the law?</p> <p>Are there any other cultural factors that may be relevant to your status at the Bar?</p>
<p>Do you think these cultural factors make a difference to the number or type of briefs you receive?</p>
<p>Do you think the briefing system operates fairly?</p> <p>Have you ever experienced it working unfairly?</p>
<p>Do you think it would be preferable if (government agencies and private firms) adopted a system where they set performance criteria and interview barristers as applicants to be included on a list that will receive briefs regularly from that firm or agency?</p>
<p>Courtroom behaviour</p>
<p>In your working life as a barrister, are there times when you feel it has been a disadvantage being a man/woman? Describe</p>
<p>Can you describe your advocacy style? Describe development</p>
<p>Have you ever experienced</p> <ul style="list-style-type: none"> — being addressed inappropriately on the basis of your gender? — what you consider to be rude or hostile treatment? — comments or actions of others that undermined your credibility in front of clients? — sexist jokes told in the court environment? — any other unacceptable behaviour? <p>Can you briefly describe the circumstances/your response etc.?</p> <p>What do you think of having formal procedures to deal with these matters?</p>

Family

Relationship status

Do you have children?

What child care arrangements did/do you have?

Has the lack of creche facilities at the Bar affected your work capacity?

Any other dependants, e.g. elderly or sick parents?

Does having children/dependants influence your career aspirations/prospects?

Have you experienced a conflict of roles between work and family?

If yes, what strategies have you adopted to cope with this conflict?

Mentoring

[senior barristers only]

Have you taken on readers? How many? Women or men?

When you have to return a brief, do you generally recommend another barrister to the clerk/solicitor?

Have you had a mentor at the bar?

[prompt with definition]

Is your mentor also the person you read with?

If no, how did that person become your mentor?

Has your mentor helped you receive the type of briefs you are after?

(If no mentor)

Have you had a variety of support from different quarters?

Bar committees

Are you/have you been involved in any committees associated with the bar?

How did you come to be on it?

Would you like to be?

Why not involved?

General comments

How often do you appear opposed to a woman?

Do you approach a female opponent differently from a male one?

Do you think there should be more women on the bench in Victoria?

(If yes,) How do you think that should be achieved?

Do you have any suggestions on how to improve the operation of the Victorian Bar from the point of view of creating equality of opportunity for everyone at the Bar?

Interview schedule for solicitors

Demographics and background
Solicitor ID
Organisation type
Number of solicitors involved in litigation in firm
Area(s) of law practised/briefed
Briefing policy
What do you think makes a good barrister?
Does your firm/dept. have a formal/informal policy [or list] dealing with briefing barristers?
If yes, what is it, how does it work? determine if list has different sections etc.
[In developing list /or generally] what method do you use for obtaining information about barristers?
If there is a list, is it strictly adhered to? What factors affect the composition of the list? Is there an appraisal process? (Formal /informal, periodic/ad hoc)
[If firm has list of barristers], what proportion are women? Are there women silks? senior juniors? Juniors?
If an employee solicitor: How much control do you have over who is briefed? If a partner: Do you have control over who is briefed? Do you consult with employee solicitors/other partners?
If you are briefing silk, and a junior, who chooses the junior?

<p>When you are choosing a barrister for a particular matter [from your list or otherwise], what factors do you consider?</p> <p>Are barristers' family responsibilities considered in this process? [E.g. would a barrister with responsibility for children be considered for long trials or interstate matters]</p> <p>Are limitations attributed to family responsibilities actual or perceived?</p>
<p>Describe any experience with these issues</p>
<p>How much influence do clients have over who is briefed?</p>
<p>Have you ever had a client who has specified that they want either a male or a female barrister? [Do you ever assume that a client would not want a female/male barrister?]</p>
<p>What is your/the firm's/the organisation's attitude in this type of situation?</p> <p>[prompt: would you ask the client directly about the gender issue/defer to the clients' wishes /attempt to persuade the client of the merits of your choice for counsel, regardless of gender?]</p>
<p>Have you personally briefed female barristers?</p> <p>Do you approach working with a female barrister differently from a male one?</p>
<p>[If haven't briefed women] do you know of women who specialise in [the relevant area of law]?</p>
<p>[If yes] Do you consider that she/they have the qualities of a good barrister you described earlier?</p>
<p>Is there any reason why this woman/these women are not briefed?</p>
<p>Are there any matters that you think female barristers are better suited to than males?</p> <p>Do you brief them for these matter?</p>
<p>Are there any matters that you think male barristers are better suited to than females?</p> <p>Do you brief them for these matters?</p>

How are brief fees decided on for different barristers?

Have you observed any differences between male and female barristers in the way fees are set or negotiated?

Observation of barristers

Do you regularly attend court [and have the opportunity to observe barristers appearing?]

If not, who instructs? What dictates whether you attend at court?

Have you observed female barristers appearing in the court when you are attending?

Can you make any generalisations about the performance of female barristers?

Can you make any generalisations about the performance of male barristers?

Do you think the courtroom operates differently when there are women at the bar table?
How?

Behaviour in court

Have you ever seen or heard

- a barrister being addressed inappropriately on the basis of their gender?
- what you consider to be rude or hostile treatment of a barrister?
- comments or actions of others that undermined a barrister's credibility in front of clients?
- sexist jokes told in the court environment?

Can you briefly describe the circumstances/your response etc.?

What do you think of having formal procedures to deal with these matters?

General comments

Do you think there should be more women on the Victorian bench?

Why?

How do you think that should be achieved?

Do you have any suggestions on how to improve the operation of the Victorian Bar?

Interview schedule for ex-barristers

Demographics and background
Interviewee ID
Year of admission Year of coming to bar Year of leaving Bar
Current age
Current employment
Were you working full or part time at the bar?
Can you estimate how many hours you were working per week, on average?
What areas of law did you practice in?
Were you a solicitor before going to the Bar?
Did you work in the same areas of law that you practised in at the Bar?
How did you come to specialise in the areas that you practised in?
Can you briefly describe the development of your practice at the Bar — sources of work — courts or tribunals appeared in — fees charged — interruptions to practice
From your point of view, did the briefing system operates fairly?
Did you ever experienced it working unfairly?

Reasons for coming/leaving

What factors contributed to your decision to leave the Bar?

Why did you go to the bar?

When you started, were you confident of succeeding at the Bar?

Why?

Did you have particular aspirations for your career at the Bar?

Were you satisfied with your progress towards those aspirations, when you left the Bar?

Can you identify any barriers to you achieving your career aspirations? Personal or structural

Can you suggest any changes to the operation of the Bar that would have enhanced your ability to achieve your aspirations?

Environment/networks

Did you feel comfortable in the environment of the Bar?

Did you have a mentor at the Bar?
[prompt with definition]

Was your mentor also the person you read with?
If no, how did that person become your mentor?
Did your mentor help you receive briefs?

(If no mentor)

Have you had a variety of support from different quarters?

Did you socialise much with other lawyers?

Do you belong to any clubs?

Did you feel a part of any formal or informal networks at the bar?

Can you describe them?

What about friendship groups?

What kind of secondary school did you attend?

Do you have family in the law?

Do you think these “cultural” factors made a difference to the development of your practice?

Clerks

Which list were you on?

How did you come to be on that list?

Did you ever changed lists?
Why?

What kind of relationship did you have with your clerk?

Were you satisfied with the service provided by the clerk?

Do you think it would be preferable if (government agencies and private firms) adopted a system where they set performance criteria and interview barristers as applicants to be included on a list that will receive briefs regularly from that firm or agency?

Courtroom environment

As a barrister, were there times when you felt it was a disadvantage being a man/woman?
Describe

Advantage?

Did you ever experience

- being addressed inappropriately on the basis of your gender?
- what you consider to be rude or hostile treatment?
- comments or actions of others that undermined your credibility in front of clients?
- sexist jokes told in the court environment?
- any other unacceptable behaviour?

Can you briefly describe the circumstances/your response etc.?

Did you ever make a formal complaint about any of these matters?

Did this type of inappropriate behaviour contribute to your decision to leave the Bar?

Family

Relationship status

Do you have children?

What child care arrangements did you have while at the Bar?

Have they changed since you left the Bar?
How?

Would creche facilities at the Bar have made a difference to your work capacity as a barrister?

Did having children/dependants influence your career aspirations/prospects/decision to leave the Bar?

Did you experience a conflict of roles between work and family while at the Bar?

What strategies have you adopted to cope with this conflict?

Has this changed since you left the Bar

Bar committees

Were you involved in any committees associated with the bar?

How did you come to be on them?

Would you have liked to be?

Why not involved?

General comments

Do you think there should be more women on the bench in Victoria?

(If yes,) How do you think that should be achieved?

Do you have any suggestions on how to improve the operation of the Victorian Bar from the point of view of creating equality of opportunity for everyone at the Bar?

Interview schedule for barristers' clerks

Demographics/background
Clerk ID
Years practising as a barristers clerk?
What did you do before becoming a barristers' clerk?
Does your clerking practice specialise in particular areas of law?
What arrangement do you have with the barristers on your list for payment for your services? Is the arrangement the same for everyone on the list?
Assigning briefs
Could you estimate the % of briefs received by barristers on your list that you have control over? i.e. how many briefs do you assign?
How do you go about assigning these floating briefs? What criteria do you use? [Are there any family/lifestyle factors that would rule out a barrister who was otherwise qualified to handle a certain brief?]
With floating briefs, how often do solicitors specify the gender of the barrister? Have you ever suggested a barrister and been told by the solicitor that a barrister of the opposite gender would be preferred?
What is your attitude to this type of situation? [Do you defer to the customer's wishes or argue for the merits of the individual, regardless of gender?]

The way barristers' practices develop seems to vary widely — some start out reliant on their clerk for briefs, and remain that way, others develop a network of contacts and a supply of briefs, or have already established contacts when they come to the Bar.

Would this be true for barristers on your list?

What factors do you think are most influential in determining how this development process happens?

Do you think the influence of these factors differ markedly for men and women?

Are there any briefs that you think women are better suited to than men?

Are there any briefs that you think men are better suited to than women?

Do you get much feedback on the performance of the barristers on your list?

Does this affect the way you assign briefs?

When a barrister is obliged to return a brief to you, how often is it accompanied by a recommendation for another barrister for the job, (directed either to you or to the instructing solicitor)?

In those circumstances, do you feel obliged to follow the recommendation, if that barrister is available?

How are fees set for different briefs/barristers?

What do you think about organisations (government agencies and private firms) adopting a system where they set performance criteria and interview barristers as applicants to be included on a list that will receive briefs regularly from that firm or agency?

Gender balance/recruiting to list

How many women do you have on your list?

Do you have a quota or policy about having women on your list?

Do you have a selection committee?

Are there women on the selection committee?

What are the criteria for selecting new barristers for the list?

In your experience, is there a lot of movement between lists?

Are you aware of reasons why barristers move between lists?

Does this involve both women and men?

What kind of arrangements do you make with barristers who want to have time off for different reasons?

- to undertake different work
- holidays
- study
- family commitments

How many men on your list have made such arrangements?

How many women?

Have you observed differences in the experiences of men and women who return to the Bar after a long absence?

General comments

Do you think there should be more women on the Victorian bench?

How do you think that should be achieved?

Do you have any suggestions on how to improve the operation of the Victorian Bar?

Interview schedule for judges and tribunal members

Demographics/Background
Judge/tribunal member ID
Years on the bench
Court or tribunal
Were you a barrister before your appointment to the bench?
Observations of barristers
What do you think makes a good barrister?
In your time on the bench, has there been an increase in the number of women appearing before you?
Has this had an impact on the courtroom?
Can you make any generalisations about the performance of female barristers?
What about any particular women or groups of women?
What about male barristers? particular men or groups of men?
Do you think the courtroom operates differently when there are women at the bar table? How?
Do you think there are matters or areas of law that female barristers are better suited to than males?
Are there any matters that you think male barristers are better suited to than females?

Behaviour in court

Have you ever seen or heard in your courtroom

- members of the bar being inappropriately addressed on the basis of gender?

- what you consider to be rude or hostile treatment towards members of the bar?

- comments or actions that undermined the credibility of members of the bar in front of clients?

- sexist jokes told in the court environment?

How do you see your role in these situations?

General

Do you think there should be more women on the Victorian bench?

Why? What benefits are there?

How do you think that should be achieved?

Do you have any suggestions on how to improve the operation of the Victorian Bar?

FOCUS GROUP QUESTIONS: CLERKING LISTS

How are the list committees formed?

Are there any rules about representation of different sections of the list, for example do the junior members specifically have a representative on the committee?

Is there any requirement to have women on the committee?

Two sorts of applications: new readers and transfers. How do the readers find out about the list, do you provide information about the list for that purpose? (or all word of mouth?)

Can you describe how new readers' applications are dealt with? Is there some standard methodology?

What criteria are used for assessing applications? Is there a process of short listing and interviews, or does everyone get interviewed? Who conducts the interviews? Are there standard questions? How much influence does a family connection have on whether someone is considered for the list?

What are you looking for in a new member of the list?

Do the same things apply when assessing an application for transfer?

How are transfers from other lists dealt with?

Is there a specific policy dealing with gender? Any formal or informal affirmative action programs happening?

What kind of information and support are provided to new barristers on the list?

Is there a policy regarding the allocation of any floating work to new barristers?

APPENDIX B: DATA COLLECTION FORMS

Victorian Bar Council Study Court appearance coding sheet

Supreme Court - Appeals

1. Court/tribunal (please enter code)

- 01 County Court
- 02 Supreme Court - Trial Division
- 03 Supreme Court - Court of Appeal
- 04 Family Court
- 05 Federal Court
- 06 Administrative Appeals Tribunal

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2. Presiding official(s) (please enter code)

- 01 Judge alone
- 02 Full bench
- 03 Judge and jury
- 04 Other (Specify) _____

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3. Month of hearing commencing (please circle one)

Aug Sept Oct

4. Area of law (choose most applicable, and enter code)

- 01 Common law
- 02 Corporations law
- 03 Personal injury (transport accident/industrial)
- 04 Probate
- 05 Planning/building
- 06 Administrative
- 07 Commercial
- 08 Crime (Specify most serious offence) _____
- 09 Other (Specify) _____

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5. Names of parties (please fill in identifying details)
(plaintiff/applicant/crown)

.....
.....
.....

(defendant/respondent)

.....
.....
.....

6. Number of female counsel appearing (please enter number)

--	--

7. Number of male counsel appearing (please enter number)

--	--

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

8. Name(s) of female counsel (enter names)

(pl/app/crown) _____ Tick if

appearing
as junior

Briefing solicitors
(enter firm name)

(def/resp)

Tick if
appearing
as junior

9. Name(s) of male counsel (enter names)

(pl/app/crown) _____ Tick if

appearing
as junior

Briefing solicitors
(enter firm name)

(def/resp)

Tick if
appearing
as junior

10. Duration of hearing (Please enter approximate length of hearing when completed)

minutes

--	--

hours

--	--

days

--	--

11. Type of hearing (please enter code)

01 Interlocutory matter (prior to final hearing)

02 Trial

03 Appeal

04 Obtaining orders in settlement

05 Other (Specify) _____

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12. Coding sheet completed by (please initial clearly) _____

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

**Victorian Bar Council Study
Court appearance coding sheet**

Supreme Court - Trial Division

1. Court/tribunal (please enter code)

- 01 County Court
- 02 Supreme Court - Trial Division
- 03 Supreme Court - Court of Appeal
- 04 Family Court
- 05 Federal Court
- 06 Administrative Appeals Tribunal

--	--

2. Presiding official(s) (please enter code)

- 01 Judge alone
- 02 Full bench
- 03 Judge and jury
- 04 Other (Specify) _____

--	--

3. Month of hearing commencing (please circle one)

Aug Sept Oct

4. Area of law (choose most applicable, and enter code)

- 01 Common law
- 02 Corporations law
- 03 Personal injury (transport accident/industrial)
- 04 Probate
- 05 Planning/building
- 06 Administrative
- 07 Commercial
- 08 Crime (Specify most serious offence) _____
- 09 Other (Specify) _____

--	--

5. Names of parties (please fill in identifying details)

(plaintiff/applicant/crown)

.....

.....

.....

(defendant/respondent)

.....

.....

.....

6. Number of female counsel appearing (please enter number)

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7. Number of male counsel appearing (please enter number)

--	--

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

8. Name(s) of female counsel (enter names)

(pl/app/crown) _____ Tick if
 _____ appearing
 _____ as junior

Briefing solicitors
 (enter firm name)

(def/resp) _____ Tick if
 _____ appearing
 _____ as junior

9. Name(s) of male counsel (enter names)

(pl/app/crown) _____ Tick if
 _____ appearing
 _____ as junior

Briefing solicitors
 (enter firm name)

(def/resp) _____ Tick if
 _____ appearing
 _____ as junior

10. Duration of hearing (Please enter approximate length of hearing when completed)

minutes

--	--

 hours

--	--

 days

--	--

11. Type of hearing (please enter code)

- 01 Interlocutory matter (prior to final hearing)
- 02 Trial
- 03 Appeal
- 04 Obtaining orders in settlement
- 05 Other (Specify) _____

12. Coding sheet completed by (please initial clearly) _____

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

**Victorian Bar Council Study
Court appearance coding sheet**

Federal Court

1. Court/tribunal (please enter code)

- 01 County Court
- 02 Supreme Court - Trial Division
- 03 Supreme Court - Court of Appeal
- 04 Family Court
- 05 Federal Court
- 06 Administrative Appeals Tribunal

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2. Presiding official(s) (please enter code)

- 01 Judge alone
- 02 Full bench

--	--

04 Other (Specify) _____

3. Month of hearing commencing (please circle one)

Aug Sept Oct

4. Area of law (choose most applicable, and enter code)

- 01 Insolvency
- 02 Industrial
- 03 Migration
- 04 Trade practices
- 05 Intellectual property
- 06 Tax
- 07 Corporations law
- 08 Admiralty
- 09 Other Commercial (Specify) _____

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10 Other Administrative appeals (AAT, ADJR)

11 Other (Specify) _____

5. Names of parties (please fill in identifying details)

(plaintiff/applicant)

.....

.....

.....

(defendant/respondent)

.....

.....

.....

6. Number of female counsel appearing (please enter number)

--	--

7. Number of male counsel appearing (please enter number)

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If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

8. Name(s) of female counsel (enter names - add if a solicitor)

Briefing solicitors
(enter firm name)

(pl/app)

Tick if
appearing
as junior

(def/resp)

Tick if
appearing
as junior

9. Name(s) of male counsel (enter names - add if a solicitor)

Briefing solicitors
(enter firm name)

(pl/app)

Tick if
appearing
as junior

(def/resp)

Tick if
appearing
as junior

10. Duration of hearing (Please enter approximate length of hearing when completed)

minutes

hours

days

11. Type of hearing (please enter code)

- 01 Notice of motion
- 02 Final hearing
- ~~03 Directions~~
- 04 Obtaining orders in settlement
- 05 Other (Specify) _____

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12. Coding sheet completed by (please initial)

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

**Victorian Bar Council Study
Court appearance coding sheet**

Family Court

1. Court/tribunal (please enter code)

- 01 County Court
- 02 Supreme Court - Trial Division
- 03 Supreme Court - Court of Appeal
- 04 Family Court
- 05 Federal Court
- 06 Administrative Appeals Tribunal

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2. Presiding official(s) (please enter code)

- 01 Judge alone
- 02 Full bench

--	--

04 Other (Specify) _____

3. Month of hearing commencing (please circle one)

Aug Sept Oct

4. Area of law (choose most applicable, and enter code)

- 01 Family - financial only
- 02 Family - parenting only
- 03 Family - financial and parenting
- 04 Other (Specify) _____

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5. Names of parties (please fill in identifying details)

(plaintiff/applicant)

.....

.....

.....

(defendant/respondent)

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.....

.....

6. Number of female counsel appearing (please enter number)

--	--

7. Number of male counsel appearing (please enter number)

--	--

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

8. Name(s) of female counsel (enter names-add if counsel is a solicitor) **Briefing solicitors** (enter firm name)

(pl/app) _____ Tick if appearing as junior _____
 _____ _____
 _____ _____

(def/resp) _____ Tick if appearing as junior _____
 _____ _____
 _____ _____

9. Name(s) of male counsel (enter names - add if counsel is a solicitor) **Briefing solicitors** (enter firm name)

(pl/app) _____ Tick if appearing as junior _____
 _____ _____
 _____ _____

(def/resp) _____ Tick if appearing as junior _____
 _____ _____
 _____ _____

10. Duration of hearing (Please enter approximate length of hearing when completed)

minutes

hours

days

11. Type of hearing (please enter code for how matter is listed)

01 Interlocutory matter (prior to final hearing)

02 Final hearing

03 Appeal

04 Other (Specify) _____

12. Coding sheet completed by (please initial)

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

**Victorian Bar Council Study
Court appearance coding sheet**

County Court

1. Court/tribunal (please enter code)

- 02 Supreme Court - Trial Division
- 03 Supreme Court - Court of Appeal
- 04 Family Court
- 05 Federal Court
- 06 Administrative Appeals Tribunal
- 07 County Court - Melbourne
- 08 County Court - Circuit (Specify) _____

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2. Presiding official(s) (please enter code)

- 01 Judge alone
- 02 Full bench
- 03 Judge and jury
- 04 Other (Specify) _____

--	--

3. Month of hearing commencing (please circle one)

Sept Oct Nov

4. Area of law (choose most applicable, and enter code)

- 01 Common law
- 02 Corporations law
- 03 Personal injury (transport accident/industrial)
- 04 Probate
- 05 Planning/building
- 06 Administrative
- 07 Commercial
- 08 Crime (Specify most serious offence) _____
- 09 Other (Specify) _____

--	--

5. Names of parties (please fill in identifying details)
(plaintiff/applicant/crown)

.....

.....

.....

(defendant/respondent)

.....

.....

.....

6. Number of female counsel appearing (please enter number)

--	--

7. Number of male counsel appearing (please enter number)

--	--

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

8. Name(s) of female counsel (enter names) **Briefing solicitors**
(enter firm name)

(pl/app/crown) _____ Tick if
 appearing
 as junior

(def/resp) _____ Tick if
 appearing
 as junior

9. Name(s) of male counsel (enter names) **Briefing solicitors**
(enter firm name)

(pl/app/crown) _____ Tick if
 appearing
 as junior

(def/resp) _____ Tick if
 appearing
 as junior

10. Duration of hearing (Please enter approximate length of hearing when completed)

minutes	<input type="text"/>	<input type="text"/>
hours	<input type="text"/>	<input type="text"/>
days	<input type="text"/>	<input type="text"/>

11. Type of hearing (please enter code for how matter is listed)

01 Interlocutory matter (contested)

02 Trial

03 Appeal

04 Obtaining orders in settlement

05 Other (Specify) _____

06 Plea

12. Coding sheet completed by (please write name clearly) _____

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

**Victorian Bar Council Study
Court appearance coding sheet**

AAT

1. **Court/tribunal** (please enter code)
01 County Court
02 Supreme Court - Trial Division
03 Supreme Court -Court of Appeal
04 Family Court
05 Federal Court
06 Administrative Appeals Tribunal

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2. **Month of hearing commencing** (please circle one)
Aug Sept Oct

3. **Area of law** (choose most applicable, and enter code)
01 Mental health
02 Guardianship
03 Crimes Compensation
04 FOI
05 Childrens' and Young Persons' Act
06 Licensing
07 Transport accident
08 WorkCover
09 Other (Specify) _____

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4. **Names of parties** (please fill in identifying details)

(plaintiff/applicant)

.....
.....
.....

(defendant/respondent)

.....
.....
.....

5. **Number of female counsel appearing** (please enter number)

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6. **Number of male counsel appearing** (please enter number)

--	--

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

7. Name(s) of female counsel (enter names-add if counsel is a solicitor)

(pl/app) _____ Tick if
 _____ appearing
 _____ as junior

(def/resp) _____ Tick if
 _____ appearing
 _____ as junior

Briefing solicitors
(enter firm name)

8. Name(s) of male counsel (enter names-add if counsel is a solicitor)

(pl/app) _____ Tick if
 _____ appearing
 _____ as junior

(def/resp) _____ Tick if
 _____ appearing
 _____ as junior

Briefing solicitors
(enter firm name)

9. Duration of hearing (Please enter approximate length of hearing when completed)

minutes

hours

days

10. Type of hearing (please enter code for how matter is listed)

01 Interlocutory matter (prior to final hearing)

02 Final hearing

03 Other (Specify) _____

11. Coding sheet completed by (please initial) _____

If you have any queries about filling in the coding sheet, please call Helen McKelvie at the University of Melbourne on 9344 8923

