



WOMEN IN THE LAW - AN AUSTRALIAN PERSPECTIVE

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The quest for gender equality in the workplace has always been an uphill battle: in the public and private sectors, in Australia, and all over the world. Women have faced particular challenges in the legal profession, which has traditionally exuded a male-dominated culture and which only started to accept significant numbers of female lawyers into practice in the second half of last century. There have been dramatic improvements in the situation for women in the law in Australia. Women now comprise over 62.5% of law graduates¹ and as of 2016, there are equal numbers of men and women in the profession.² However, despite equal representation, female lawyers continue to face discrimination and sexual harassment in the workplace and hold less than one quarter of the positions of power.³ There is still a great distance to travel to achieve gender parity in the profession.

Statistics – past and present

The history of female legal practitioners spans only one century. During the two thousand years of Western history before this, lawyers qualified not through their formal legal training but based on their gender, civil status and economic position.⁴ In Australia, a restriction known as the ‘marriage bar’ excluded married women from employment in the public service and some private companies.⁵ The prohibition was abolished in 1966, before which women represented only 11% of the law school cohort.⁶

Academic and employment opportunities have improved dramatically for Australian women lawyers. In 1994, women comprised 50% of law school graduates and 25% of the legal profession.⁷ Now, these numbers are approximately 62.5%⁸ and 50%⁹ respectively and rising every year. In 1994, men held over 90% of all federal judicial offices and Justice Mary Gaudron was the only woman ever to be

¹ Victorian Women Lawyers (2016) *Addressing the Gender Pay Gap in the Legal Sector* <<https://vwl.asn.au/wp-content/uploads/2015/07/VWLO20-Fact-sheet-DP4-FS3.pdf>>.

² Law Society of New South Wales (2017) *National Profile of Solicitors 2016 Report* <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1378059.pdf>>.

³ Marianna Papadakis, ‘Women now 24pc of law firm partners’ *Australian Financial Review*, 21 January 2016 <<http://www.afr.com/leadership/women-now-24pc-of-big-law-firm-partners-20151216-glp6ly>>.

⁴ Hanne Peterson (2012) ‘Gender and the Legal Profession – Changing Legal Cultures? Introductory Reflections’ *Journal of Law and Social Research* Vol 1, no. 8.

⁵ Dianne Gibbins, ‘Equity in the Australian Public Service – a Change in Focus’ *Public Service and Merit Protection Commission* 12 August 2010

<http://www.aic.gov.au/media_library/conferences/policewomen/gibbins.pdf>.

⁶ Victorian Equal Opportunity & Human Rights Commission (2014) *Changing the rules – The experiences of female lawyers in Victoria*

<http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Changing_the_Rules_Web.pdf_Final_1.pdf>.

⁷ Australian Law Reform Commission (1994) *Equality before the law* <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt2.pdf>.

⁸ Victorian Women Lawyers (2016) *Addressing the Gender Pay Gap in the Legal Sector* <<https://vwl.asn.au/wp-content/uploads/2015/07/VWLO20-Fact-sheet-DP4-FS3.pdf>>.

⁹ Law Society of New South Wales (2017) *National Profile of Solicitors 2016 Report* <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1378059.pdf>>.

appointed to the High Court.¹⁰ Now, there have been four additional female appointees to the High Court, including the current Chief Justice, Susan Kiefel, appointed to the High Court in January 2017. Former Chief Justice Marilyn Warren became the first female Chief Justice in any Australian state or territory when she was appointed Chief Justice to the Victorian Supreme Court in 2003. Happily, she has been succeeded by a second woman Chief Justice, Anne Ferguson. In politics, the nation's two most senior leaders were for a time and each for the first time, women – Julia Gillard as Prime Minister and Quentin Bryce as Governor General.

These numbers signal an important improvement for women in the legal profession. However, the fact that several women hold or have held prominent positions of power in the law does not signify gender equity, nor that women are free from discrimination and sexism. Although there are equal numbers of male and female lawyers in Australia, there is still significant gender disparity at partnership level in private practice. As recently as 2000, women made up less than 15% of law firm partners.¹¹ This rate rose to 21% in 2014 and 24% in 2016¹² but the growth is slow and the continuing small proportions of women partners demonstrate ongoing barriers to attaining seniority.

Gender problems

Many commentators have considered the barriers to women's progress within the legal profession. Dishearteningly, studies over decades have highlighted the same types and prevalence of these barriers. In the 2014 National Attrition and Re-engagement Study (NARS) Report conducted by the Law Council of Australia, almost half of the 4000 women surveyed said they experienced discrimination due to their gender, compared to 10% of men.¹³ One in four women reported that they were discriminated against because of family and carer responsibilities.¹⁴ Direct, indirect and systemic forms of discrimination were described by study participants.

Direct discrimination

Instances of direct, overt discrimination have been reported by women and men in the legal profession but the literature suggests that women are significantly more likely than men to have experienced a range of discriminatory behaviour.¹⁵ Of the female participants in the NARS Report, 50% reported experiences of bullying and intimidation, 47% experienced discrimination due to gender and 24% experienced sexual harassment.¹⁶

Sexual harassment is likely to occur in the early stages of employment. According to a report commissioned by the Victorian Equal Opportunity & Human Rights Commission, 63% of reported

¹⁰ Australian Law Reform Commission (1994) *Equality before the law*

<https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt2.pdf>.

¹¹ Victorian Women Lawyers (2016) *Addressing the Gender Pay Gap in the Legal Sector*

<<https://vwl.asn.au/wp-content/uploads/2015/07/VWL020-Fact-sheet-DP4-FS3.pdf>>.

¹² Marianna Papadakis, 'Women now 24pc of law firm partners' *Australian Financial Review*, 21 January 2016

<<http://www.afr.com/leadership/women-now-24pc-of-big-law-firm-partners-20151216-glp6ly>>.

¹³ Law Council of Australia (2014) *National Attrition and Re-engagement Study (NARS) Report*

<<https://www.lawcouncil.asn.au/docs/a8bae9a1-9830-e711-80d2.../NARS%20Report.pdf>>.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

incidents of sexual harassment occurred within the first 12 months of being in the workplace.¹⁷ Common examples of sexual harassment include sexually suggestive jokes or comments, intrusive questions about private life or physical appearance, inappropriate physical contact, and unwelcome staring.¹⁸ Women often refrain from reporting the harassment because they anticipate negative consequences for their career; fear they will not be believed; or do not want to navigate bureaucratic, ineffective complaints processes.¹⁹

Because the nature of legal work is often inherently confrontational and adversarial, women and men also often experience instances of bullying, aggression and intimidation in law firms and at the Bar.²⁰

Indirect discrimination

While direct sex discrimination may not always be apparent in the workplace, cultural and structural barriers often impede women's progression in the legal profession and contribute to high rates of attrition. Historically, legal private practice was designed for a full-time working male breadwinner, whose partner would stay at home to raise a family and keep house.²¹ Employers often measure their employees' commitment to the law firm based on their visibility and the number of billable hours they work, factors that have created a culture of 'presenteeism'.²² Consequently, many women were, and often still are, unable to sustain a private legal practice, particularly at a senior level, because of family responsibilities that preclude them working long hours and being constantly available.

It is expensive for law firms to recruit, train, and provide continued professional development for lawyers and the high rates of attrition among women causes concern. Firms are increasingly focusing on the financial cost of gender inequality.²³ Many firms now offer flexible working arrangements and part time contracts – indications that the traditional model is eroding and law firms are prioritising the retention and promotion of their valuable female lawyers. Nevertheless, the introduction of flexible work policies and strategies has not erased the entrenched culture of 'presenteeism' in the workplace. Part time workers are often made to feel unwelcome and are less likely to be promoted.²⁴ Many women experience difficulties with meetings that are scheduled during their days off or during times when their family responsibilities prevent them from attending.²⁵

¹⁷ Victorian Equal Opportunity & Human Rights Commission (2014) *Changing the rules – The experiences of female lawyers in Victoria*

<http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Changing_the_Rules_Web.pdf_Final_1.pdf>.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Law Council of Australia (2014) *National Report on Attrition and Re-engagement Survey*

<<https://www.lawcouncil.asn.au/docs/a8bae9a1-9830-e711-80d2.../NARS%20Report.pdf>>.

²¹ Australian Law Reform Commission (1994) *Equality before the law*

<https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt2.pdf>.

²² Victorian Equal Opportunity & Human Rights Commission (2014) *Changing the rules – The experiences of female lawyers in Victoria*

<http://www.humanrightscommission.vic.gov.au/media/k2/attachments/Changing_the_Rules_Web.pdf_Final_1.pdf>.

²³ Ibid.

²⁴ Australian Law Reform Commission (1994) *Equality before the law*

<https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt2.pdf>.

²⁵ Law Society of New South Wales (2012) *Flexible Working*

<<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/671890.pdf>>.

Helen Conway, former director of the Workplace Gender Equality Agency, underscores that partners and managers must undergo training on how to manage employees working flexibly in order to remove the stigma of flexible working.²⁶ It is insufficient to implement flexible working policies if the lawyers' roles are designed purely for full time employees and if there is a lack of awareness of the benefits of working flexibly. Rather, 'firms need to cut deeply into their cultures...gender equality...needs to be part of a firm's DNA'.²⁷

Systemic discrimination

A third and interconnected form of discrimination is systemic discrimination against women, which refers to the 'practices that are absorbed into the institutions of the legal profession and have a disparate impact upon women.'²⁸ It is widely reported that the legal profession has been and continues to be a male-dominated environment.²⁹ Many women report feeling as though they work in an 'exclusive boys club', which propounds sexism.³⁰ This entrenched 'male' culture arguably encourages and expects aggression and competitiveness from lawyers, but not too much aggression from females because this would be inconsistent with traditional female stereotypes.³¹ Women also report being pressured to conform to masculine-defined codes of conduct, including unofficial 'feminine' dress codes.³²

This imbalance of power in the legal profession has affected women's willingness to continue practising and their ability to attain positions of seniority. This reinforces the urgent need for a cultural shift in the legal profession. In addition to the importance of informing lawyers about the benefits of flexible working, the profession must focus on changing the inherent, systemic male-dominated culture and eliminating the 'boys club' mentality. Although there are equal numbers of men and women in the legal profession, these numbers do not yet correlate with the feeling of equality for women in the law.

The good news

While it is evident that the gender gap is still a problem in the legal profession, many law firms have made vast improvements in reducing these disparities.

Pay gap

²⁶ Marianna Papadakis, 'Bias, inflexibility drive women from law' *Australian Financial Review*, 14 March 2014 <<http://www.afr.com/news/policy/industrial-relations/bias-inflexibility-drive-women-from-law-20140313-ixl1j>>.

²⁷ Ibid.

²⁸ Australian Law Reform Commission (1994) *Equality before the law* <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt2.pdf>.

²⁹ Ibid.

³⁰ Ibid.

³¹ Victorian Women Lawyers (2016) *Addressing the Gender Pay Gap in the Legal Sector* <<https://vwl.asn.au/wp-content/uploads/2015/07/VWL020-Fact-sheet-DP4-FS3.pdf>>.

³² Australian Law Reform Commission (1994) *Equality before the law* <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt2.pdf>.

Women make up more than 62.5% of professionals working in law but the gender pay gap is 15.5% for professional full timers and 22.8% for professional part timers.³³ These figures increase for all legal sector workers: the gap is 35.6% for full timers and 31.9% for part timers.³⁴ Awareness of the pay gap is widespread and many firms are endeavouring to facilitate gender and pay equality in their workplaces. The efficacy of their actions is measured by the Workplace Gender Equality Agency (WGEA) and the number of firms that receive the WGEA Employer of Choice for Gender Equality award is increasing each year.

In 2014, Maddocks, an independent Australian law firm, conducted a pay gap analysis to ensure that male and female lawyers were paid the same amount for work of equal value. This analysis is ongoing and where the identified gender pay gaps cannot be justified, the firm makes appropriate adjustments to enable equality.³⁵ Global law firm Herbert Smith Freehills scrutinises remuneration at every echelon of the firm through its rigorous checks and balances system. The firm has introduced various strategies to narrow the pay gap, including a formal remuneration policy with specific gender pay equity objectives and management sign off.³⁶

NewLaw

Perhaps the most successful gender equality strategies are manifest in the law firms that have adopted the 'NewLaw' model; that is, firms that focus on dismantling the traditional structures of law firms and creating contemporary and innovative practices. These firms commonly have successful flexible working arrangements in place, gender equity in the partnerships, and a healthy culture that rewards its lawyers on merit rather than gender.

Hive Legal

Hive Legal was established in 2014 by a group of experienced partners from large law firms, who sought to redesign the legal landscape and implement a model that prioritised flexible working, value pricing, and innovation. The Melbourne commercial law firm has grown dramatically since its inception and currently has approximately 30 employees, including five male and four female partners.

Founded on collaboration, like 'bees in a hive', the firm is structured to enable its employees to work closely as a team to deliver outcomes to clients, rather than to work independently in a silo model. Although Hive has an office, where many of its staff members choose to work, the firm also places a heavy emphasis on flexible working because of the continuous demands on the time of all of its employees.³⁷ The ability to work during the times and in the locations most suitable to Hive employees generates a positive and productive environment and the firm enjoys low rates of attrition.

³³ Victorian Women Lawyers (2016) *Addressing the Gender Pay Gap in the Legal Sector* <<https://vwl.asn.au/wp-content/uploads/2015/07/VWL020-Fact-sheet-DP4-FS3.pdf>>. These figures are based on Workplace Gender Equality Agency data of 66 Australian law firms.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ ALPMA (2014) *Q and A with Jodie Baker, Managing Director, Hive Legal* <<http://www.alpma.com.au/a-survival-guide-for-legal-practice-managers/q-a-with-jodie-baker-managing-director-hive-legal>>.

A key component of Hive is its adoption of value pricing and dismissal of billable hours. The fees and billing mechanisms are agreed upon with the clients upfront and the lawyers are rewarded for their efficiency and the outputs they produce, rather than the hours they put in. The contemporary model at Hive is particularly advantageous for female lawyers because they are able to work during unusual times or in remote locations without feeling pressured to be permanently present in the office or to compromise family responsibilities. The model also benefits the men at Hive and encourages them to take advantage of the flexibility and partake in familial obligations.³⁸

Marque Lawyers

Sydney commercial law firm Marque Lawyers employs a very similar model to that of Hive Legal. Founded in 2008, the vision of Marque was for lawyers to work collectively, in an 'elastic' business, and feel happy practising law. The firm does not have billable hours but rather charges fixed periodic fees under various retainers, which it believes rewards efficiencies.³⁹

Within a year of opening, four of Marque's senior female lawyers were pregnant and took parental leave at the same time. This was an unforeseen challenge but the Marque employees embraced it, knowing that the women were very happy at Marque and would all return after their leave, which they did. The firm adopted a flexible model, which encourages its employees to determine their own working arrangements and has created a culture of trust and equality. Currently, 70% of all employees and 55% of Marque partners are female.⁴⁰

Future

These positive examples of the strategies of both large, traditional firms, and smaller, contemporary firms demonstrate that the legal profession is moving toward gender equity. Firms are taking action to remove the cultural and systemic problems in their workplaces, which have prevented women from reaching positions of power and influenced them to leave the profession. These gender disparities are problematic universally, not only in the Australian legal profession. Indeed, several statistics suggest that Australia is actually closer than other countries to achieving various elements of equality by virtue of its recognition and implementation of flexible working arrangements. A global survey conducted by the International Bar Association identified that the highest rate of part time work for females is in Oceania (predominantly Australia).⁴¹

Despite this progress, the pervasive evidence of unwavering gender discrimination signifies that there is still much more to do before gender equality in the law is attained. Lawyers must break down the structural barriers of their firms that impede women's ability to work flexibly and attain seniority. They must be educated about the benefits of the gender equality policies and strategies in place – not in a way that merely suggests that the firm must reach certain quotas to be perceived as 'gender friendly' but because of the profound benefits that equality will bring to the productivity, culture and philosophy of the firm.

³⁸ For more information about Hive Legal, see their website at <http://hivelegal.com.au/>.

³⁹ Marque Lawyers (2016) *A Culture of Flexibility Built on Trust* <<http://www.marquelawyers.com.au/assets/a-culture-of-flexibility.pdf>>.

⁴⁰ Ibid. For more information about Marque Lawyers, see their website at <http://www.marquelawyers.com.au/>.

⁴¹ International Bar Association (2017) *Women in Commercial Legal Practice* <<https://www.ibanet.org/LPRU/Women-business-Lawyers-Initiative-Front-page.aspx>>.