

EXPLANATORY MEMORANDUM

Anecdotal information received from judges and legal practitioners around Australia persistently indicates that women are not appearing as advocates in the superior courts in numbers which proportionately reflect their presence in the legal profession. Furthermore anecdotal reports continue to suggest that women are not being briefed to appear in more senior or complex matters, other than perhaps in the Family Court.

With the exception of work by the Victorian Bar, very little research has been performed in Australia to objectively measure the rate that women are appearing as advocates in the superior courts or to investigate the types of matters they are appearing in. No substantive national study has been performed to research the reasons why women are so noticeably absent as advocates in the State and Territory Supreme Courts, the Federal Court and the High Court.

In 1998 Rosemary Hunter and Helen McKelvie published their report 'Equality of Opportunity for Women at the Victorian Bar', which had been commissioned by the Victorian Bar Council. As part of their research Hunter and McKelvie carried out a formal court appearances study, which confirmed that gender briefing patterns existed in Victoria. The Equality Before the Law Committee of the Victorian Bar subsequently undertook informal surveys in 2001 and 2002 of female appearances in some Victorian State Courts, Federal Courts and the Victorian Civil and Administrative Tribunal. These survey results confirmed continued anecdotal reports that women barristers remained significantly under-represented in court appearances. In 2005 the Equality Before the Law Committee undertook a further and more formal survey of the State Courts, the results of which have not as yet been released.

Australian Women Lawyers ('AWL') has long been concerned that significant barriers exist to the advancement of women as advocates in Australian Courts.

In 2004 AWL initiated a national gender appearance survey of State and Territory Supreme Courts and of the Federal Court. AWL is not aware of a comprehensive national survey of gender appearances having ever been conducted previously.

Victoria was not included in the survey due to the continuing work that was being undertaken by the Equality Before the Law Committee and the Victorian Bar Council, in relation to gender appearance studies. The Family Court was also not included in the survey. Anecdotal reports from judges and legal practitioners indicate that women have achieved a significant degree of representation as advocates in the Family Court, although AWL is not aware of any recent national survey where this has been objectively assessed. The decision was made by the Board not to include the Family Court, in order to concentrate on the Courts where the absence of women as advocates was the most obvious.

The object of AWL's national survey was to ascertain the rate at which women were appearing as advocates, the type of matters in which they were appearing and the average length of time of cases in which they did appear. The survey was not designed to monitor the appearances of women as members of an independent bar in any jurisdiction, but rather to simply record the appearances of women as advocates.

The survey was initiated without funding from any source. AWL would like to thank the Chief Justice of the Federal Court, the Chief Justices of New South Wales, Western Australia, South Australia, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory, the President of the Court of Appeal of Queensland and the Chief Judges of the District Courts of Queensland, South Australia and Western Australia for their assistance with the survey. The surveys of each of these courts took place for periods of between two to four months at various times between late 2004 and 2005. The courts were asked to complete a survey form for each matter heard during the survey period. The survey forms

were completed by court staff and then forwarded to AWL at the end of the relevant survey period. Consequently in obtaining the results of the survey, AWL has been dependent upon the information received from each of the courts. AWL would like to also thank all the staff who assisted with the survey in completing the survey forms.

In late 2005 AWL received a small grant of funds from the Law Council of Australia, to assist AWL in compiling the results of the survey. AWL would like to thank the Law Council for this grant, as it assisted in analysing the considerable volume of data received from the courts. In late 2005 AWL engaged a statistician Victoria Smith to commence an analysis of the survey data. Subsequently in 2006 a significant amount of voluntary work has been undertaken by members of the Board of AWL in further analysing the data. Each Board member has been requested to review the results for their jurisdiction. AWL would also like to thank the immediate past President of AWL Noor Blumer for her continued work this year in assisting with the analysis of the survey results.

It is noted that for some of the results it has been decided by the Board of AWL that the results recorded on the survey sheets were not reliable. These results have therefore not been included in the final survey results.

The survey results speak for themselves. The results of the survey indicate that there is substance to the anecdotal reports that gender briefing patterns persist and that women are not being briefed to appear in more senior or complex matters. By way of illustration it is of particular concern that during the survey period:-

- In the New South Wales Supreme Court 27.8% of the appearances before a Master were by women, whereas only 9.9% of the appearances before the Court of Appeal were by women.

- In the New South Wales Supreme Court only 14.2% of the appearances in civil matters were by women.
- In the Federal Court only 5.8% of the appearances by senior counsel in were by women.
- In the Federal Court the average length of hearing for male senior counsel was 119.7 hours, whereas for female senior counsel the average length of hearing was 2.7 hours.
- In the Federal Court the average length of hearing for a male who was junior to senior counsel was 223.6 hours, whereas for a female junior counsel in the same position it was 1.4 hours.
- In the Supreme Court of the Australian Capital Territory no women appeared as senior counsel in civil matters.
- In the Supreme Court of the Australian Capital Territory no women appeared as junior to senior counsel in civil matters.
- In the Supreme Court of the Australian Capital Territory only 5.3% of the appearances in civil matters were by women.
- In the Supreme Court of the Australian Capital Territory only 1.7% of the appearances in civil trials were by women.
- In the Supreme Court of the Northern Territory no women appeared as senior counsel in civil matters.
- In the Supreme Court of the Northern Territory no women appeared as junior to senior counsel in civil matters.
- In the Supreme Court of the Northern Territory no women appeared as senior counsel in criminal matters.
- In the Queensland Court of Appeal only 9.4% of the appearances were by women.
- In the Supreme Court of Queensland only 7.2% of all appearances were by women.
- In the Supreme Court of Queensland no women appeared as senior counsel in civil matters.

- In the Supreme Court of Queensland no women appeared as senior counsel in criminal matters.
- In the Supreme Court of Queensland no women appeared as junior to senior counsel in civil matters.
- In the District Court of Queensland the average length of hearing for a male who was junior to senior counsel for criminal hearings was 115 hours, whereas for a female junior counsel in the same position it was 1 hour.
- In the Supreme Court of South Australia only 6.1% of the appearances by senior counsel in civil matters were by women.
- In the District Court of South Australia the average length of hearing for a male who was junior to senior counsel for criminal hearings was 55 hours, whereas for a female junior counsel in the same position it was 1 hour.
- In the Supreme Court of Western Australia 90% of all appearances before a Master were by women, whereas only 9.3% of all appearances before the Court of Appeal were by women.
- In the Supreme Court of Western Australia only 5.9% of the appearances by senior counsel in civil matters were by women. It is noted that AWL is informed by Women Lawyers of Western Australia Inc that the only reason that the appearance rate was as high as 5.9%, was due to the appearance of female senior counsel from the eastern states during the survey period.

The survey also yielded some interesting results. For example in Tasmania 50.2% of all appearances in criminal matters were by women, a result which is higher than any other State or Territory. Inquiries by AWL of Tasmanian Women Lawyers Inc indicate that the most likely reason for this result is due to the number of women appearing from Legal Aid and government agencies. AWL is informed that during the survey period the head of the criminal section of legal aid was a woman, as was her duty solicitor.

In the opinion of the Board of AWL, comparing the survey results to the percentage of women at the independent bar (in the States and Territories where independent bars exist), is of little value. Many appearances, particularly in criminal matters, are performed by lawyers from the various legal aid and prosecution services and other in-house lawyers. Many other appearances, especially in the civil jurisdiction, are by solicitors from private law firms particularly in interlocutory matters.

The Board of AWL is of the opinion that a fully funded comprehensive national gender appearance study should be undertaken. This study should investigate each of the State Supreme Courts and Courts of Appeal, the Federal Court and the High Court. Such a study should:-

- Record the nature of the advocate's appearance ie. whether it is a civil or criminal matter, an interlocutory application, trial or appeal.
- Record the status of the advocate ie. whether the appearance is by senior counsel, a junior counsel/advocate or junior counsel/advocate appearing with senior counsel.
- Record the duration of the hearing.
- Record the entity that briefed the counsel/advocate ie. private law firm, legal aid or other government agency (specifying which agency).
- Analyse the results.
- Research the reasons why women are under represented as advocates in Australian superior courts.
- Provide constructive proposals as to how gender balance can be achieved.

Women have been graduating from law schools from around Australia in equal if not more numbers than men for many years now. The 'trickle' up theory is not working. Women advocates are not being regularly briefed in more complex and senior matters and are thereby being denied the same opportunity for career

advancement afforded to male advocates. This is a matter which should be of serious concern to the legal profession as well as the Australian community.

Caroline Kirton

President

Australian Women Lawyers

Owen Dixon Chambers West

10 August 2006