

Have Australian legal professional regulators missed the diversity boat or are law societies sailing away with the glory?

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Introduction

In March 2014 the Law Council of Australia released a report: *National Attrition and Re-engagement Study (NARS)*.ⁱ That report identified many of the challenges faced by women in the legal sector in Australia, particularly triggers that prompt women to leave the sector and barriers to returning. NARS made recommendations about avenues for change which focused on professional bodies and law firms, or chambers. In light of NARS the discussion of the diversity challenge facing the Australian legal profession has centred on what professional organisations or firms and chambers are doing to address diversity. Little has been said about what is being done by legal profession regulators and the essential role these regulators must play.

The 2014 Law Society National Profile revealed that of the 66,211 practising solicitors in Australia the split between male and female was 51.5% male to 48.5% female. The report also shows a trend of increasing female representation and acknowledges that female solicitors comprised 60% of solicitors admitted in the prior year and 59.1% of all solicitors admitted in the past 10 years.ⁱⁱ

A gender or equality issue is identified

The evidence is in that diversity is good for business, and the question has arisen as to whether the legal profession is lagging behind other industries.

The diversity 'problem' in the legal profession as summarised by NARS is that despite women outnumbering men at the time of admission they are not filling out the senior years. In other words, women are not remaining in the legal profession for the long haulⁱⁱⁱ. This is a loss to the profession. This also poses another more visible challenge to the attainment of gender balance in judicial appointments, with the numbers of senior females in short supply. NARS explores some of the reasons that women do not remain in the profession:

- Lack of flexibility
- Lack of transparency about pay and promotion
- Bullying and harassment

NARS does not look at whether there is a particular role for legal professional regulators in addressing diversity issues generally. What opportunities do exist for regulators to set the tone?

Australian legal profession regulation

Importantly throughout Australia the regulators of the legal profession are many and varied. In the Northern Territory the Law Society Northern Territory whilst retaining the historic membership and advocacy functions regulates the legal profession pursuant to the *Legal*

Profession Act (2006) (NT). Across Australia the legal profession experiences regulation from a number of sources including legal services commissioners and law societies. In the NT as elsewhere there is also an independent admissions board. Elements such as issuing practising certificates or oversight of trust accounts may be undertaken by the professional association or an independent statutory regulator, with varying degrees of collaboration. As regulators in many respects hold the key to virtuous legal practice why aren't we looking to the legal professional regulators to play their part to regulate this problem out of existence?

Diversity and the administration of justice

Importantly in the Northern Territory the regulation of the legal profession is for the purpose of protecting consumers of legal services, promoting the administration of justice and facilitating legal practice on a national basis. These objectives are mirrored across the country. Thus it is essential that regulators ensure that the public interest is being served by the regulations they administer. When promoting the administration of justice, regulators must ensure that consumers are getting what they need from the legal sector. A tidal wave of research is telling us that consumers want diversity from service providers is legal professional regulation delivering? As the gatekeepers of the legal profession should regulators embrace diversity in the legal profession as an issue of priority? A diverse legal profession serves the public and the administration of justice in many ways. Is it not in the public interest that the judiciary reflects the diversity of the community it serves?

What can regulators do?

In creating a diversity agenda regulators can look at other examples such as the formulae of Male Champions for Change:

- Step up as leader.
- Create accountability
- Disrupt the status quo. At times we assume that the obstacles to women's advancement are inevitable or insurmountable. Eg We over emphasise seniority as against diversity for Board of Committee appointments which acts to entrench the status quo.
- Dismantle barriers for carers.

NARS also identified critical enablers for an effective gender diversity program:

- Visible commitment by senior management;
- Know the numbers;
- Tackle mindsets and bring about cultural change.

Importantly regulators need to address unconscious bias and systemic bias in legal professional regulation and ensure they strike the right balance between protecting the public and the administration of justice.

Unconscious bias

Once we can accept that individually we float on a deep sea of unconscious bias we then need to create conscious islands that give us pause for thought.

Addressing unconscious bias at an operational level is challenging but is as important as addressing more systemic issues for regulators. Let's not be afraid of admitting we all have unconscious bias. Malcolm Gladwell's book *Blink* brings together a body of research about how decisions are made, ultimately in the blink of an eye. We know that we have bias ingrained within us that have positive and negative impacts on our daily decisions. There have been papers about the impact of unconscious bias amongst the judiciary. To assess your unconscious bias go to: <https://implicit.harvard.edu/implicit/takeatest.html>

Addressing unconscious bias is a key challenge in recruitment and retention of women in the legal profession. Those considering admissions, examining conduct or determining exemptions must consider the role unconscious bias plays in outcomes. The key to dealing with these biases is pro-actively putting in place measures to mitigate the impact of that bias.

It is not enough to say "I don't have unconscious bias, I just employed a female!"

The challenge for regulators where boards are elected or appointed by others is that gender balance of decision makers appear to be taken out of our hands. Putting in place measures such as:

- Promoting, recommending and seeking out diverse candidates;
- Talking explicitly about unconscious bias;
- Workshopping ways to minimise the impact in the recruitment process, and
- Mandating diversity in selection panels.

Whilst none of these will eradicate our programmed thought patterns they provide an opportunity to re-consider and re-examine the role these patterns play in outcomes.

Systemic bias

In addition to the daily challenge of swimming against the tide of our unconscious bias there are existing structures that may operate as barriers to diversity and retention and engagement of women in the legal profession, importantly bullying and harassment and access to flexible work.

The Diversity Council of Australia launched its report in August 2012 *Men Get Flexible! Mainstreaming Flexible Work in Australian Business*. The report found that access to flexible work practices was not a women's issue and that Australian men want and need access to flexible work to support their important roles as fathers, carers and engaged volunteers in their communities. The report looked at how men achieve flexible work arrangements. In line with the Diversity Council recommendations regulators must support the call for the legal profession to have increasing access to flexible work.

Many of the regulatory mechanisms expressly or implicitly require full time work and regulators should consider if such requirements remain in the public interest where they act as barriers to diversity in the legal profession.

Specific regulatory elements that impact on encouraging (or discouraging) diversity for consideration include:

- Admission
- Professional Indemnity Insurance
- Continuing professional development

- Supervision
- Rules of Professional Conduct

Admissions

There has recently in the Northern Territory been consideration by the Legal Practitioners Admissions Board of 'stale qualifications.' Typically the applicants had taken an extended period of time between completion of their studies and their application for admission. During this hiatus applicants had been either out of the work-force all together or in part time employment that was not of a legal nature. Parallels were drawn between individuals who, having obtained admission, then proceed to undertake aid work in a foreign country. Whilst for the former the extended break was a barrier to practice, suggesting the applicant no longer holds suitable qualifications, the latter did not face such a barrier.

Prompted by these applications consideration has been given to whether academic requirements can go stale and can (should) the admissions authority impose some specified limit on the years that can transpire between the completion of a legal degree and seeking admission. Alternatively is there a policy consideration to ensure that applicants for admission ought not be prejudiced on the basis that a period of time has elapsed between completion of the academic qualifications where that time is attributable to parenting or caring commitments?

Professional Indemnity Insurance

All Australian jurisdictions require professional indemnity insurance (PII) in order to engage in legal practise. It is clear that consideration of the cost of engaging an employee seeking flexible work will include the cost of PII. The scheme of PII operated by the Law Society Northern Territory pursuant to the *Legal Profession Act (NT)* (LPA) has two levels of insurance – full-time and part-time which is defined to mean up to 15 hours per week.

Is this PII expense a barrier for an employer if a practitioner wants to work more than 15 hrs but not full time? Is there a policy consideration to consider encouraging flexible work through flexible pricing of PII?

Supervision

One area which has attracted significant interest amongst regulators is the supervision requirements for legal practitioners seeking an unrestricted practising certificate. Importantly approaches vary around Australia. Regulation 12 of the *Legal Profession Regulations (NT)* ("the Regulations") detail the methodology by which the period of supervised practice is calculated, particularly for part-time employment. Importantly the regulations require 18 months or two years 'full time' where 'full time' means 35 hours per week. Whilst this in effect places a cap on full time work which does not reflect the reality of 40-50 work week, it similarly penalises part-time work.

In Western Australia and Victoria policy statements have been issued detailing what constitutes supervision (for example daily contact between the supervising practitioner and supervisee, supervising practitioner scrutinises and signs off on correspondence and documents, any legal assistance provided by the supervisee is approved by the supervisor before it is given).

Do descriptors of this nature pose barriers to part-time or flexible work practices and what would reform of this area look like? Are there more appropriate considerations rather than merely hours engaged in paid employment that would recognise the entirety of applicants' experience. Could a competency based assessment replace hours based supervision? What

impact would such changes have, would they make unrestricted practice more attainable for those with caring responsibilities leading to more flexible working arrangements?

Continuing professional development

Most Australian jurisdictions require a minimum of 10 hours of professional development every twelve months. This requirement is not reduced for a person working part time, though may be reduced for working part of a year. Are there sufficient opportunities to undertake this development in times and manners suitable for those with caring responsibilities? Is there a policy consideration that those working flexibly ought have reduced obligations?

Conduct Rules

The uniform law that operates in Victoria and New South Wales has adopted conduct rules for barristers and also conduct rules for solicitors. These rules have also been adopted in a number of other Australian jurisdictions. Importantly for consumers of legal services and employees in the sector being both legal and non-legal the rules contain provisions that reflect a zero tolerance to discrimination, sexual harassment and workplace bullying.^{iv} Whilst these provisions existed previously in some jurisdiction their adoption in two of Australia's largest jurisdictions has created a new standard. The passage of these rules makes what is unacceptable behaviour in the broader community and subject to sanction in other fora, also subject to disciplinary sanction. Legal profession conduct rules that do not include these provisions are under significant pressure to come aboard.

Other regulatory responses

United Kingdom

Important leadership for Australian legal profession regulators can come from the Legal Services Board of England and Wales who funded a study by the University of Westminster.^v Interestingly the study identifies similar problems of high rates of women entering the profession but lower female representation in the late years. 'despite important advances toward greater openness and diversity the profession is never the less perceived as inherently masculine in character in the sense of its working patterns and general culture, and , further characterised by (possibly unwitting) biases against non white professionals and those from the lower socioeconomic groups.'^{vi}

Compared to NARS the UK report has an increased focus on interventions of a regulatory nature. Similar to the NARS the report captures important data and identifies main themes:

- The fragmentation of the profession and consequent nuanced nature of respondents' experiences;
- The legacy of the profession's white, male elitist origins and the significance of cultural stereotypes;
- The importance for career success of personal relations/ bonding and socialising;
- The long hours' culture and emphasis on commitment (rarely defined);
- The lack of transparency of some key procedures and practices in some organisations.

The proposals for addressing these issues:

- Outreach Programs: Legal profession pre-employment designed to overcome barriers for aspiring lawyers. Are there equivalents in Australia? Could regulators implement such programs?
- Reform of the qualification pathway: seeking reform to the training contract and pupillage system. Could Australia explore competence based training, training grants or bursaries?
- Disclosure and monitoring of diversity data: The report recommends placing obligations on front line regulators to publish aggregated diversity data for each branch of the legal profession. In Australia the only comprehensive national study of the legal profession was published by the Conference of Law Societies^{vii}.
- Formal Mentoring Role models and Networks. The report recommends regulation of formal mentoring schemes to address the inequality of privilege experienced by some members of the profession over others. Is there a role for Australian regulators to implement mentoring schemes?
- Flexible working/ structural reforms.
- Diversity training at multiple levels including undergraduate, post graduate levels, professional development.

Importantly there are many ideas presented by this study that should inform the evolution of legal professional regulation in Australia. The central role of legal professional regulators sits in stark contrast to solutions posed by NARS.

Law Society of Upper Canada

The Law Society of Upper Canada regulates more than 49,000 lawyers and 7,400 paralegals in Ontario in the public interest. In 2015 LSUC was awarded Top Employer status for the 10th year in a row.^{viii} This award reflects the LSUC commitment “to play a leadership role in helping make the legal community more diverse and representative of the changing population of the province of Ontario.”

Could Australian legal professional regulators aspire to this leadership role? What message would this send to firms and chambers?

Other Australian regulators

Australian Stock Exchange

The debate has been long ranging about what action, if any, can be taken to increase female representation on boards and in senior executive roles of Australian publicly traded companies. Australian markets have not been immune to the discussion about whether setting targets or quotas are necessary to see increased diversity on the boards. That discussion included concern that there were not enough women in the pipeline to fill imposed requirements. The Australian Stock Exchange (ASX) acknowledges the role it plays to model best practice in its ‘Diversity and inclusion Policy’^{ix}. The ASX policy demonstrates the important role a regulator can play as thought leader. It is not enough to simply require specific conduct of the regulated, but when the regulator steps up to demonstrate best practice it sends a powerful message.

State and Federal Governments

There are many examples of efforts to regulate diversity. Importantly the States and Territories often prescribe diversity reporting amongst independent statutory authorities^x and

many times it is a requirement of government tenders. We know that as significant consumers of legal services this government requirement has driven the push for diversity strategies in the larger law firms, in response to customer demand. Should Australian regulators be reporting internal diversity and also the diversity of contractors?

Law Society Northern Territory

In 2007 women overtook men in the Northern Territory legal profession. (Not a headline in the NT news- and why not!) But the diversity challenge for the Northern Territory remains expansive. The NT is approximately 30% Indigenous however over 80% of the people in NT prisons are Indigenous. In that context how many Indigenous judges sit in NT courts? Presently none. Pleasingly the NT has the highest proportion of Indigenous legal practitioners in Australia at 1.9% but against the background population much more needs to be done, as New South Wales comes a very close second at 1.6%. It is interesting to compare the inflow of Indigenous Australians into legal studies and the legal profession with the numbers of members of the Legislative Assembly in the Northern Territory. In 2016 the Legislative Assembly boasts six out of 25 members, and has 17 Indigenous MLAs in its brief history. It is clear that there are talented and motivated people that are well placed to assume leadership positions and more needs to be done to attract them to the legal profession.

In August 2014 the Law Society Northern Territory adopted a Reconciliation Action Plan (RAP) and followed this up with '*Celebrating Diversity*' a strategy focused on diversity. In common across these strategies is a desire to co-ordinate initiatives to address under-representation of women and minority groups within the legal profession. One of the loftier aims of these strategies is to one day see a bench that reflects not just a diverse legal community but the diversity of the community which it serves.

The Law Society Northern Territory sees its role as an example to the profession. There are many challenges to achieving a diverse workforce. The Law Society Northern Territory as the regulator and membership organisation has accepted the challenge in the interest of the consumers of legal services and the administration of justice. Importantly this commitment is in line with the objects enshrined in the LPA, to promote the administration of justice and efficient and effective Australian legal profession. The strategy includes a visible commitment by senior management, publishing the data and being prepared to tackle mindsets in order to bring about cultural change.

LSNT steps up as leader

In adopting a diversity strategy the Law Society Northern Territory has embraced its leadership role. There have also been opportunities to embrace national commitments and make public statements on this topic and the Law Society Northern Territory is a signatory to the Law Council of Australia Diversity Charter.^{xi} The Law Society Northern Territory is exploring what tools local firms and agencies can share about the practical aspect of flexible work, how challenges have been overcome and the rewards that have been generated.

There is also a commitment to championing the female and Indigenous role models of the legal profession.

LSNT creates accountability

The Law Society Northern Territory conducted an audit of its Council and Committees to determine if there was a need for reform of recruitment policies. Pleasingly it was established that the Committees and the Council are well balanced with over 55% women. Indigenous legal practitioners were also represented on the Committees and Council.

Providing data to the national profile of solicitors (in collaboration with the Law Society of New South Wales and others)^{xii} and the Australian Bar Association statistics^{xiii} has been an ongoing commitment as well as publishing Northern Territory data on an annual basis.

LSNT disrupt the status quo

The Law Society Northern Territory has also made representations about equitable briefing policies, judicial appointments and certainty of sitting hours to name a few. Importantly members of the Council take seriously the opportunity to propose diverse appointments to judicial and quasi-judicial office. Councillors do not shy away from difficult conversations with male Attorney General, Office of the Department of Public Prosecutions and the Chief Justice of the Supreme Court.

Through multiple communication channels the Law Society Northern Territory promotes diversity in the legal profession. Images and stories of successful Indigenous lawyers are important for changing perceptions about their place in the profession and encouraging them to pursue legal careers.

LSNT dismantles barriers for carers

There are many other regulatory challenges that act as disincentives to flexible work. When policies and practices are reviewed consideration is given to their impact on flexible work. The Law Society Northern Territory has committed to the adoption of the Australian Solicitors Conduct Rules and the Australian Bar Association conduct rules.

Conclusion

From this fleeting analysis it is clear that there is an imperative for regulation of the legal profession in Australia to embrace a commitment to diversity. The commencement of the 'Uniform Legal Profession Regulation' in Victoria and New South Wales is an ideal opportunity to disrupt the status quo. Legal professional regulators must work alongside law societies and bar associations to:

- demonstrate best practice
- contribute to meaningful data collection on a national basis.
- Audit and report findings of diversity amongst decision makers, boards and committees.
- Commit to taking steps to address unconscious bias. If it is the Attorney General that appoints the Board then don't shy away from a discussion with her about mechanisms to address unconscious bias.
- If you find that you are doing well then share it.
- Accept that we cannot get it right all the time, don't criticise just do it.

Some ideas about how this may translate to legal professional regulators include:

- Take active steps to recruit a diverse workforce, and consider ensuring that senior managers reflect a diversity commitment.
- Insisting that decision making committees such as Admissions Boards and Professional Ethics Committees have a diverse makeup.
- Commit to measuring diversity and reporting on it, set targets.

- Take active steps to recruit women to boards and committees and examine if there are any barriers to diversity such as meeting time that can be addressed?
- Considered use of de-identification in applications and reports (removing age gender and other identifying information eg name)
- Set targets and report against them

None of these actions will be a cure-all but as the arbiters of professional standards it is for regulators to show leadership and there is a need and a clear public interest in doing so.

Acknowledgements:

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ⁱ http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/NARS%20Report_WEB.pdf

ⁱⁱ <http://www.lawsociety.com.au/resources/surveysandstatistics/1005660>

ⁱⁱⁱ LCA Gender Balance in Private Practice

^{iv} See rule 42 of *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* REG 42 (NSW)

^v Sommerland H; Webley L et al 'Diversity in the Legal Profession in England and Wales: A qualitative study of barriers and individual choices

^{vi} Sommerland H; Webley L et al 'Diversity in the Legal Profession in England and Wales: A qualitative study of barriers and individual choices

^{vii} Law Society National Profile accessed 25 Jan 2016

<https://www.lawsociety.com.au/resources/surveysandstatistics/1005660>

^{viii} Media Release 8 Dec 2015 accessed 25 January 2016

http://www.lsuc.on.ca/uploadedFiles/For_the_Public/News/News_Archive/2015/release-top-employers-2016.pdf

^{ix} ASX Diversity Policy and Inclusion Policy August 2015 accessed 25 Jan 2016

<http://www.asx.com.au/documents/about/diversity-and-inclusion-policy.PDF>

^x See the Legal Service Commissioner (Vic)/ Board annual report 2015.

^{xi} http://www.lawcouncil.asn.au/lawcouncil/images/Diversity_and_Equality_Charter.pdf

^{xii} <https://www.lawsociety.com.au/resources/surveysandstatistics/1005660>

^{xiii} <http://www.austbar.asn.au/wp-content/uploads/2015/11/ABA-PC-hldr-and-Mbr-stats-2015.pdf>

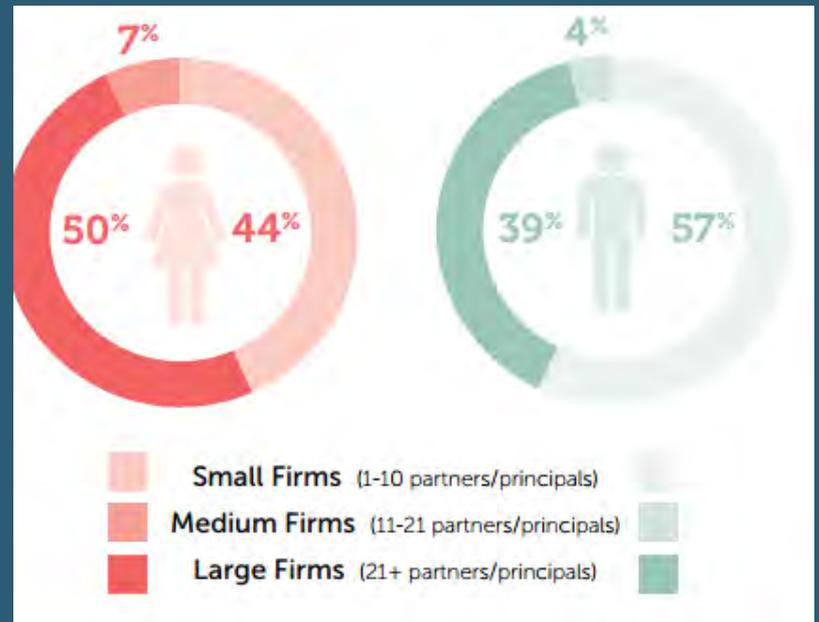
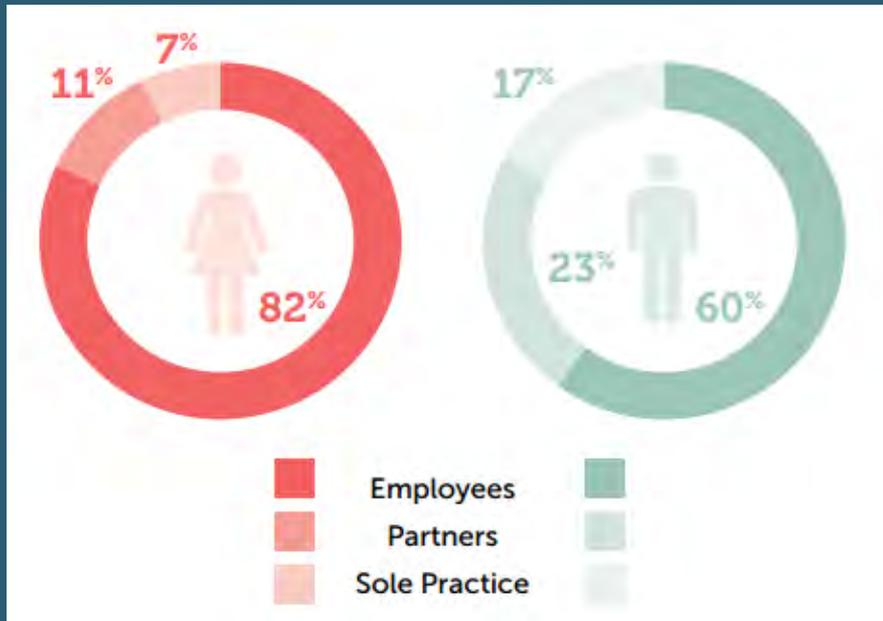


Regulators missing in action or leading the charge in the diversity fight?

Megan Lawton - CEO
Law Society Northern Territory

Law Council of Australia

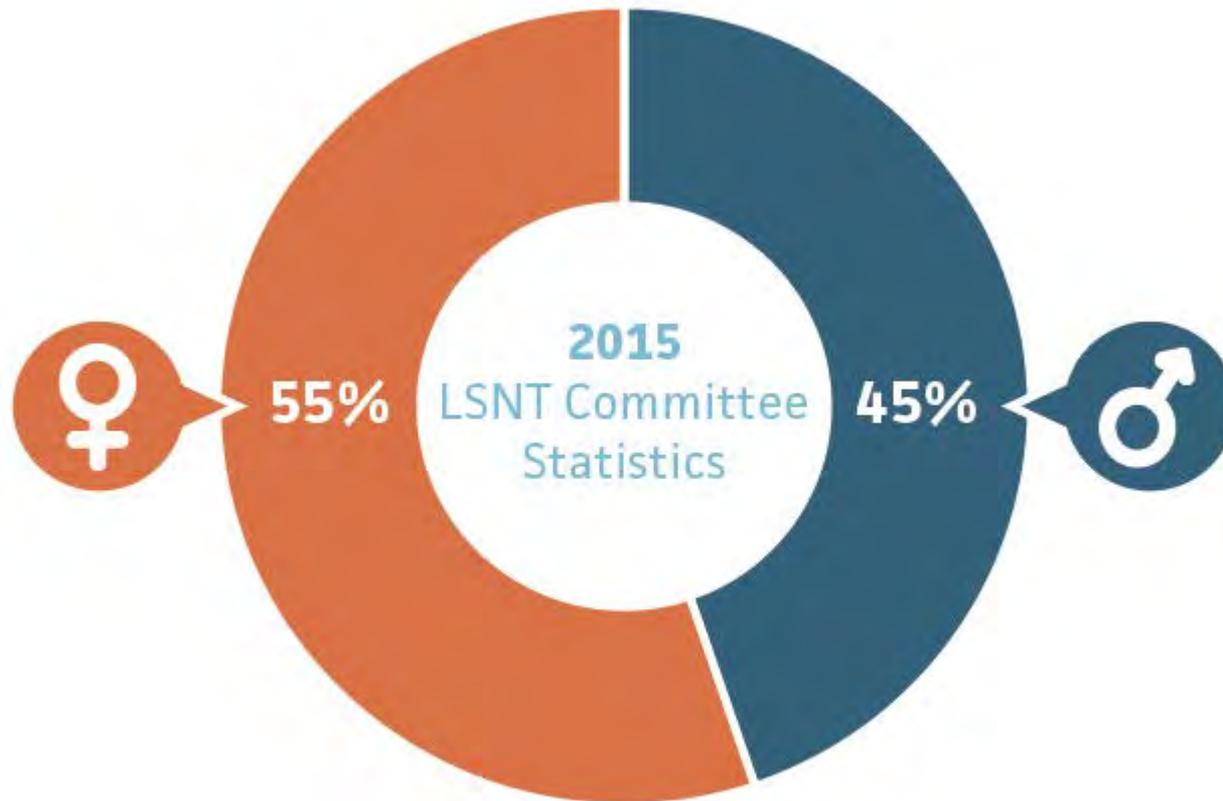
GENDER BALANCE IN PRIVATE PRACTICE



NT Female v Male Demographics 1982 - 2015



Law Society NT Committees



Law Society Council 2014-2015



Victorian Legal Services Board and Commission



Table 16: Number of executive officers classified as 'ongoing'

| Classification | 2013-14 | | 2014-15 | |
|----------------|---------|--------|---------|--------|
| | Male | Female | Male | Female |
| E0-1 | 0 | 0 | 0 | 0 |
| E0-2 | 1* | 0 | 1* | 0 |
| E0-3 | 2 | 0 | 2 | 0 |

*This position is the Commissioner, Michael McGarvie, who is a statutory office holder.

PUBLIC ADMINISTRATION VALUES AND EMPLOYMENT AND CONDUCT PRINCIPLES

The Board and Commissioner continue to uphold the public sector conduct principles of managing and valuing diversity, managing underperformance, reviewing personal grievances and selecting on merit.

The Commissioner, as employer of all staff, is committed to applying merit and equity principles when appointing staff. The selection processes ensure that applicants are assessed and evaluated fairly and equitably on the basis of the key selection criteria and other accountabilities without discrimination.

Victorian Legal Services Board and Commission



Table 15: Employees of the Commissioner

| | 30 June 2014 | | | 30 June 2015 | | |
|-----------------------|-----------------------|------------------|---------------------|-----------------------|------------------|---------------------|
| | Ongoing | | Fixed term & Casual | Ongoing | | Fixed term & Casual |
| | Number (headcount) | FTE (rounded) | FTE (rounded) | Number (headcount) | FTE (rounded) | FTE (rounded) |
| Gender | | | | | | |
| Male | 28 | 27 | 2 | 25 | 24 | 4 |
| Female | 43 | 39 | 6 | 49 | 46 | 7 |
| Total | 71 | 66 | 8 | 74 | 70 | 11 |
| Classification | | | | | | |
| VPS 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| VPS 2 | 0 | 1 | 1 | 1 | 1 | 0 |
| VPS 3 | 10 | 10 | 2 | 13 | 12 | 4 |
| VPS 4 | 13 | 11 | 2 | 13 | 13 | 5 |
| VPS 5 | 26 | 23 | 2 | 26 | 24 | 1 |
| VPS 6 | 18 | 17 | 1 | 17 | 16 | 1 |
| STS | 1 | 1 | 0 | 1 | 1 | 0 |
| Executives | 2 | 2 | 0 | 2 | 2 | 0 |
| Other [#] | 1 | 1 | 0 | 1 | 1 | 0 |
| Total | 71 | 66 | 8 | 74 | 70 | 11 |

[#]Employee reported as 'Other' is the Commissioner, Michael McGarvie, who is a statutory office holder.

Family Court of Australia

Table 8.9 Total number of judges, 30 June 2015

| Location | Judges |
|------------------------------|-----------------------------|
| New South Wales | 14 |
| Victoria | 1 Chief Justice 6 |
| Queensland | 6 |
| South Australia | 3 |
| Tasmania | 1 |
| Australian Capital Territory | 1 Deputy Chief Justice 1 |
| Total | 33 |

At 30 June 2015, there were 33 judges, including the Chief Justice; 16 female and 17 male.

Leadership Lessons from Dancing Man

- <https://www.youtube.com/watch?v=fW8amMCVAJQ>



**LAW
SOCIETY
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