

**CAREER PATHS FOR WOMEN
IN THE LEGAL PROFESSION IN WESTERN AUSTRALIA**

RECOMMENDATIONS

The Committee recommends that:

1. Courses on law and gender should be studied as core subjects by all students undertaking law courses at universities;
2. Continuing legal education courses on gender and discrimination issues be held by the Law Society to educate current practitioners and that the ethics course required for admission as a practitioner includes a component on discrimination and gender bias;
3. Law firms be encouraged to include flexible working hours, permanent part-time work, job sharing, flexible work location, career break scheme and child care leave;
4. The Law Society of Western Australia and the Western Australian Bar Association take the lead in promoting women's participation in the profession by ensuring women's full and equal participation in their councils and committees;
5. The Law Society of Western Australia should closely monitor and encourage women's participation in the profession publishing guidelines on Equal Opportunity, assisting new practitioners, training and equal opportunity for key groups and mentoring schemes for women;
6. The Law Society adopt a code of conduct addressing gender bias and establishing procedures for its elimination. Maintaining stereotypes or permitting hostile working environments could be considered professional misconduct, because it violates the rights of each person to equal opportunity;
7. The Western Australian Law Society should include in its Professional Conduct Rules a provision that sexual harassment is unprofessional conduct.
8. The Western Australian Law Society should develop a gender neutral format for questioning applicants for positions as Articled Clerks and encourage all firms to use it.
9. The Women Lawyers Association of Western Australia establish a mentoring scheme whereby experienced female lawyers offer their assistance to younger women.

10. The Law Society undertake an annual review of the degree to which all employers of lawyers and the Independent Bar and all Government bodies and agencies conform to a set of published criteria concerning gender bias, and publish the results.

INTRODUCTION

11. Although close to 50% of law graduates are now women, experience has shown us that we cannot assume that their influx into the system will translate into gender equality. Despite their large numbers and demonstrated ability, a significant number of women will not rise to corresponding positions of power. If there is no equal participation by women in the legal profession, then women seeking legal services are discriminated against.

12. In a legal system which ensures equal participation women and men should be equally involved in the application, administration and enforcement of laws in courts and tribunals. Career opportunities for women should be as diverse as the profession where justice is administered equally by women and men, as magistrates, judges, solicitors, barristers and court staff. All those administering justice would take account of women's needs. Women's perspectives would be included in shaping legal concepts and doctrines. Court perspectives would not militate against women's interests but respect and dignity would be accorded to all, irrespective of gender or professional status.¹ One could only agree with this vision's statement, however the reality of the situation is that in Western Australia the legal profession has been and still is, dominated by men.

13. Although women have been graduating from the law schools in Western Australia over the last 10 years in equal numbers to men, this is not reflected in their participation in the profession. As at 30 June 1993, 26% of the profession holding practice certificates were women. The number of women who were partners in legal practices was 10.2% and the number of women who were employees in legal practices was 67.5% (Appendix A). The number of women who are partners in large commercial law firms in Perth is considerably less than the average. Taking the five largest law firms in Perth, only 5.4% of the partners were women.

14. As at December 1993 women made up 6.4% of the barristers practicing in Western Australia.

15. It is obvious from these statistics that women are grossly unrepresented at senior levels of the profession. This is not a uniquely Western Australian position. In the United States, for example, the number of female lawyers who are moving into senior positions and who are married with children is almost nil, while the number of senior male lawyers married with children is about 90%.² It is important to look at what obstacles are put in the path of women pursuing their legal careers and what is the extent of gender bias against women among lawyers.

Women in Law Schools

¹ Law Reform Commission Discussion Paper 54, *Equality Before the Law*.

² *Australian & New Zealand: Equal Opportunity Law and Practice*, page 73.

16. The two law schools in the State offer illustrations of quite different circumstances relating to women in legal academia, although there are commonalities between them as well. This is true particularly in the area of vertical segregation of men and women in academic staff. The trend here is for women to be over-represented in the more junior, part-time and temporary teaching appointments and to be under-represented in areas of seniority, tenure and management.

17. At UWA Law School the 1994 Handbook lists 44 members of the academic staff. Among these are:

- 4 professors (all male)
- 6 associate professors (all male)
- 14 senior lecturers (one female)
- 14 lecturers (six female)
- 4 assistant lecturers (three female)
- 2 visiting fellows (one male, one female)

18. At Murdoch, there is a similar distribution:

- 1 professor (male)
- 3 associate professors (all male)
- 5 senior lecturers (all male)
- 7 lecturers (six female)
- 1 fractional associate lecturer (female)

19. However, the two law schools are quite differently placed by virtue of the length of their establishment, so their particularities need to be addressed.

20. Twelve of the UWA appointments are fractional. Four of these are females with young children; the other eight are all men in full-time or near full-time employment elsewhere (eg the Independent Bar, the Ministry of Justice, or the DPP's office).

21. The perception of senior management in that university is that women "choose" to work at the University on a fractional basis as some men do. This is of course true in a sense. However the "choice" is in most cases a response to the work-family conflict and is not a desire to opt out of a career in academia. It is seen by the women themselves mostly as a temporary arrangement necessary while children are young and is often dictated by a husband's inflexible work commitments.

22. One should note two interesting facts about the system of fractional appointments:

- (1) although fractional appointments were initially devised to accommodate women's needs and in a sense therefore could loosely be described as a mild form of affirmative action to benefit women, they are now used in the UWA Law School to benefit more men than women (see above); and

- (2) where men are fractional appointees, they are almost without exception employed elsewhere on a permanent full or part-time basis, whereas this is rarely if ever the case among the women.
23. The effect of this tends to be that fractional appointments have come to be seen as a satisfactory way of supplying the Law School's demands for staff rather than as a low-key form of affirmative action for women.
24. Another common difficulty for women in the lower ranks of academia is the frequency with which their teaching portfolios may be altered or added to, and the difficulty this presents of developing an area of specialisation in which to write or do research (which activities are, despite the lip service paid to teaching, the main criteria of promotion).
25. The present Dean of UWA's School of Law has recently indicated his intention to ask the University's Equity Officer to conduct an investigation into the concerns of female academic staff.
26. There has been no opportunity for any such pattern to be established at Murdoch, and of course it cannot be assumed that such a pattern would or will be established. However, the clear vertical gender imbalance does need to be examined.
27. The School of Law was established at Murdoch University in 1990, and has made a large number of appointments in a short period. Because of this heavy demand for highly qualified people, it has been necessary to recruit outside the State. Of the 16 appointments made, only 5 did not come from either interstate or overseas to take up the position. Of these, two are men and three are women.
28. Because of the tendency of heterosexual couples to place more importance on the male partner's career than on that of the female partner, it has been difficult to recruit senior women, who are likely to be more settled in their relationships, whose partners are likely to be established in their careers, and who are likely to have children, thus ruling out the possibility of coming alone. Of the three women who moved to Perth to take up jobs at Murdoch, two were joining partners who had already moved here. None had children. Of the 8 men who moved to Perth, five brought their families with them.
29. Thus the vertical gender imbalance at Murdoch is most properly seen as a result of the relative immobility of senior women and the resulting low demand among women for senior positions there. As such it is a symptom or illustration of the difficulties women face in their careers as a result of the demands of their personal circumstances. It need not be seen as an indication of any kind of gender bias on the part of the University or the Law School.
30. Indeed, there are other aspects of the institutional culture at Murdoch which tell against the implication that there is any gender bias operating. The fifth appointment the School made, in the foundation year, was of a person who would teach Feminist Legal Theory. Thus feminism and a recognition of the importance of women's issues have been built in to the curriculum from the outset. This must in large part account for the establishment in the School's third year of the Enid Russell Society, a student society dedicated to women's issues. UWA, by contrast, has only this year offered its first course on feminist legal theory, Feminist Analysis of Law, and then only in response to student demand rather than any interest among

the staff. No permanent full-time appointment has been made to teach the course; rather, it is being taught by a consortium of lecturers from within and outside the university.

31. It is also worth noting that five of the six female lecturers at Murdoch are committed feminists, active in the field of feminist research or research on women's issues, and that many compulsory and elective courses include a consideration of feminist theory and women's issues. This sends a very important message to the students, especially female students, about the centrality of women's concerns to legal discourse and the importance and validity of work on women and the law.

32. At the same time however, and unfortunately, it must be recognised that these messages would be even stronger if the women involved were distributed throughout the seniority hierarchy. For this reason the vertical imbalance, even if not the result of any bias, is to be regretted. The low status of women academics in law schools is of concern not merely to the women themselves: it is also of concern to the wider profession because of the false message it gives law students about women's competence and "proper place", and because of the absence of female role models for the women law students.

33. In the Committee's view, these issues need examination, and consideration needs to be given to ways of assisting women academics (both full-and part-time) to gain promotion. In particular, the Committee awaits with interest the outcome of the proposed investigation by the Equity Officer at UWA.

34. It is also thought by the Committee that feminist jurisprudence and gender studies should become part of the core curriculum in law schools. It is hoped by this education of future lawyers at an early level in their legal careers that a more sympathetic approach to women's issues will be exhibited by them.

GENDER BIAS IN THE PRIVATE PROFESSION

Articled Clerkship

35. At the present time a person cannot be admitted as a practitioner in Western Australia pursuant to the Legal Practitioner's Act without having complied with such term of articles of clerkship as prescribed by the Board. At the present time the period of articles prescribed by the Board is one year. Articles can in fact be taken over a period of longer than a year with the approval of the Legal Practice Board. This fact does not seem to be well known by either employers or applicants for articles. Significantly to date only men have applied for and been given approval to extend their articles over the one year period.

36. Anecdotal evidence indicates that older women graduates with children felt that they were discriminated against when attending interviews for articles by the form of questioning by interviewers. Those interviewing found it difficult to accept that because the applicants had children they would be able to give to the firm the commitment that was necessary during their articles year.

37. Other women articled clerks were offended at the form of questioning by the interviewers. Questions relating to whether they intended to leave the profession to have children were regularly asked of female applicants. While it could be a valid question for an interviewer to ask a question as to the number of years it is anticipated that the applicant could give to the firm, this question could be asked in a gender neutral way to all applicants rather than making it gender specific to women. It must be noted that men leave law practices for a number of reasons including holidays, sporting commitments, overseas travel and the furthering of their academic qualifications. They are not at interviews for articles subjected to the same type of questioning as to their future as women are.

38. It is submitted that the Law Society should prepare a recommended format for the questioning of articled clerks to include questioning of applicants in a manner which is gender neutral. For example, instead of asking a female applicant whether she intends to leave employment and have children, a more neutral approach could be applied and the question asked, "How long can you offer us in terms of employment?"

Women's Areas of the Law

39. Women are less likely to practice in the commercial area of law and are most likely to be channelled into family or welfare areas. These areas are likely to be grouped at the lower earning end of the profession, hence lowering the status of women in the legal profession. For solicitors in particular, this can be of significance as their ability to earn fees can be significantly less than the male solicitors who are involved in commercial litigation work which can command a higher level of fees. As the ability to earn fees is one of the main criterion for the acceptance of partners into legal practices, then this channelling of women into these areas of the profession has meant that they have not been able to compete in the partnership "stakes" to the same extent as men.

40. This channelling of women into family and welfare areas is reflected not only in the number of women practicing as solicitors in the profession, but also as barristers. There is one woman at the Independent Bar practicing at a senior level in commercial law, civil litigation and property law. Those practicing at the Bar mainly work in the areas of administrative law, family law, criminal law and welfare areas.

Maternity Leave

41. A basic requirement for women's continued involvement in legal practice is a woman lawyer's ability to take appropriate time off to have a child. But it is also critical that she should be able to do so without suffering serious disadvantage (such as the loss of her client-base or the need as a result of her absence to move into a new area of practice). A recent legislative development that needs to be taken into account is the now statutory right of all employees (including men) to take unpaid parental leave for up to twelve months. Since this presumable does not affect partners, it does not remove the necessity for firms to develop policies for the granting of maternity leave or parental leave.

42. The impact of children on the careers of female lawyers is generally regarded in the profession as the individual woman's problem rather than as a firm concern. One effect of regarding the matter as one important to a firm generally would be that, even in a firm where there are no pregnant women, there should be a policy on maternity leave to cater for the

future, so that women entering the firm would know where they stood and be able to plan appropriately and confidently.

Large Commercial Law Firms

43. These firms are characterised by gruelling performance expectations and intolerance of family responsibilities. In fact, successful lawyers are typically devoted to evening meetings, professional gatherings and corporate recreational activities. Because most women have children and continue to bear most of the responsibility for their care, this work model presents a major barrier to women's achievement of gender equality in the large commercial law firms. The fact that there are only 7 women out of 129 partners in the "big five firms" confirms this barrier. Only 3 of those women have children.

44. Anecdotal evidence suggests that women are leaving the large law firms before partnership decisions are made. They may be leaving because of family responsibilities, or more often than not, because they can anticipate that they simply are not going to be able to compete with the men because of present or future family commitments and because in many instances they do not feel accepted in the male dominated large firms. These women tend in some instances to leave the profession altogether after having a family, or to choose to work in smaller firms which are likely to offer more flexibility, or to open small firms of their own.

45. While there is nothing wrong with women working in a flexible environment which suits them, such as the smaller firms or opening their own firms, they are being deprived of the opportunity to succeed at what is traditionally thought of as the accepted career path, that is, through a career in the large commercial firms. The men of course suffer no such obstacle in their careers. This may be the reason why women are so under represented at judicial level when the appointments usually come from the bar or the large commercial firms.

46. The large commercial law firms have in mind a model, both of whom the young lawyer will be and also the partner. What constitutes a successful lawyer may be a person who is young, competitive and "one of the boys". Women who take parental leave may be considered less committed as lawyers because they do not have the single-minded purpose of the male lawyers. The partnership model is one who is male, married to a woman who assumes the major responsibility for running the household and for personally caring for children or organising their care, even if she is a practicing lawyer herself, thereby freeing the man to spend most of his waking hours at work (see Dixon and Davies, *Career Patters in the Legal Profession and Career Expectation of Law Students in WA*, a comparative study, pp.81-83, 85-86, 88-93). This stereotyping of men in this position severely disadvantages women, not only those with families, but the evidence indicates that this may be a type of systemic discrimination working against women becoming partners in law firms.³

47. What is required is a major change of attitude by all firms to their attitude to women employees. This may be brought about by the publishing by the Law Society of an annual index rating the performance of firms and agencies in relation to a number of criteria relevant to gender bias, such as:

- the percentage of female solicitors and their seniority;

³ *Halfway to Equal*, 1992, para 4.1.8.

- the existence of parental leave policies (and their content);
- attempts to educate staff about the nature of sexual harassment and its inappropriateness (including, for instance, in mentoring relationships);
- the existence of flexible work arrangements to accommodate lawyers with children or other family obligations;
- in-house mentoring arrangements or other formal programmes to assist less experienced practitioners in finding their feet and developing their potential.

A major criticism has been made by women that there is either no part-time work, or if there is part-time work there is a lack of recognition given to it. The lack of worth is indicated by a situation which arose in a firm where a part-time women's lawyer's office was given to somebody else on the basis that she was "only part-time". The perception seems to be that, part-time work almost does not count towards your maternity leave as a senior associate was not allowed to return to work at that level part-time until such time as she had worked part-time for some months and was then subsequently reinstated to the position of senior associate.

48. By not making provision for women to work part-time in law firms and by not giving adequate status to the type of work women do when it is of a part-time nature, the legal profession is contributing to the number of women who are leaving the practice of law, and for those who return an under-utilisation of their talents. The profession needs to realise that almost all women who are employed in the legal profession will at some time during their career work part-time. This may for some women only be a matter of weeks, for other it may be years.

49. Women who leave practices to have children find that this is interpreted by the other partners and employers as a lack of serious interest in the work commitments by the women involved. This is obviously not the case; however, the fact that many firms are not prepared to be flexible with work arrangements after women have had children, would indicate that they do not believe that women who have had children are worth sticking with in the long term. Again this results in an under-utilisation of women practitioners.

Sexual Harassment

50. Sexual harassment, which is a form of discrimination can be a barrier to women's full participation and integration into the areas of employment. Studies in the USA involving more than 3500 lawyers practicing in federal courts found that 60% of female lawyers claim they had been the target of unwanted sexual advances or other forms of sexual harassment during the previous five years. Nearly 40% said they had been sexually harassed by a client and one-third reported being harassed by another lawyer.

51. The Women Lawyer's Association of Western Australia has documented a number of serious instances of sexual harassment. In all but one of these cases (six in all) the women concerned left their jobs because of the sexual harassment to which they were subjected. The cases involved women of mature years as well as very young women. The firms involved included large well known firms as well as smaller places of employment. The Association requested that the Professional conduct Rules be amended to include a provision that sexual harassment is unprofessional conduct. Although the Law Society rejected this proposal, the Association is maintaining links with the Equal Opportunity Committee with a view to formalising procedures to assist women who have a complaint of sexual harassment.

Women at the Bar

52. The fact is that there are a very small number of women practising at the Independent Bar, and very many of those who have practised there have left after a short time. This is of concern not only because it is the most frequent route to a senior judicial appointment, but also because it apparently excludes women from participation in an important area of practice and can prevent clients from having a choice about the gender of their counsel.

53. A common complaint is that it is almost impossible for a woman to establish herself at the Independent Bar in the commercial area because male solicitors will not brief women in commercial matters.

54. In fact, very recently a judge was heard to ask a female barrister whether in fact any men briefed her! This attitude is commonplace in the legal profession and contributes to women barristers not receiving the briefs in complex matters of any kind.

55. In discussions with one past female member (1975-1977) and (1987-1989) the following points were noted:-

1. There was a certain amount of subtle prejudice arising out of family responsibilities. The barrister was informed (by another female barrister) of negative comments from other members of the bar about being only "a part-time housewife barrister because of family commitments". At the same time the female barrister was aware that many male barristers took time off for long lunches, golf days etc and at that time one male barrister was running a part-time business as an airline pilot.
2. Female barristers who satisfy certain accepted criteria are tolerated. However there is some evidence of intolerance to any marks of eccentricity or non-conformity. Given that at the time the bar comprised a number of individuals who could be described as having unusual personalities this did indicate that there was a different standard expected from female members of the bar.
3. The emphasis on running a "professional/commercial practice" makes it difficult for women to practice part-time at the bar or to practice with a degree of flexibility required by family commitments.

GENDER BIAS IN DIRECTOR OF PUBLIC PROSECUTIONS AND CROWN SOLICITOR'S OFFICES

56. This paper focuses on professional staff only.

57. There is anecdotal evidence that gender bias is an issue for non-professional staff also (eg in the DPP it appears that they are even less likely than professional staff to have access to part-time work). This topic is not dealt with here, partly because of inadequacy of information, and partly because such issues, for non-professional staff, are capable of being

dealt with by formal structures implemented across the public service. The small and specialised nature of the DPP and CSO professional workforce has meant that terms of employment, promotion, and the like are dealt with informally (compared with the public service as a whole) and based on patronage and accommodation of individuals. By and large, such informal networks are still "boy's" networks, and such a structure does not assist women.

Recruitment

58. Recruitment in both offices is not gender biased. It is not unusual for a larger number of female than male professional assistants or articled clerks to be employed. Recruitment at higher levels although, until recently, infrequent, seems also not to be gender based.

Training

59. Training had until perhaps a decade ago attempted in part to shield young women from areas for which it was assumed they were unsuitable or would not be permitted to practice (particularly in relation to sexual assault trials), but there is now no such discrimination. Articled clerks rotate through a number of areas of work, some compulsory, and all appear to be offered a similar range of experience.

Type of Work, and Promotion

60. In both offices, assessment of the aptitude and performance of legal practitioners is based upon purely subjective assessments.

61. In the Crown Solicitor's Office it is the Crown Solicitor alone who decides who will be consulted about whether a particular sort of work should be given to a person, and whether the person is suitable for promotion or reclassification. There is no system for ensuring all those who may have knowledge of a person's abilities will be consulted. There is a reluctance to disclose the actual seniority - the "level" of each officer, which makes appropriate comparisons difficult. There is no procedure by which these informal assessments will be placed before the person who is the subject of them for comment. Usually, there is no indication to legal officers as a whole that promotions or reclassification's are even under consideration, or that a particular type of work may be available.

62. Allocation of a particular matter may be done by the Crown Counsel, who operates in the same way as the Crown solicitor.

63. It is of course always possible for an officer concerned about his or her progress to initiate a discussion with the Crown Solicitor, but it is rare for an officer to receive any feedback from such discussion.

64. In the DPP, there is a group of 4 people who make decisions as to promotion. The fact that such matters are under consideration is published. There is more of an opportunity for legal officer to answer any criticisms which may have been made. The actual process of evaluation and selection is not an open one, however.

65. In particular, like the Crown Solicitor's Office, there is no system for ensuring full consultation and there is a degree of secrecy surrounding the actual classification levels of

officers. Allocation surrounding the actual classification levels of officers. Allocation of counsel work within the DPP's office is done according to the "level" of the Counsel, the solicitor having indicated the level of difficulty of the trial. The decision as to what level of trial an individual can cope with is made on the same informal basis as are work allocation decision in the Crown Solicitor's Office.

66. In both offices, complaints of gender bias in the allocation of work and of promotion and reclassification exist. It is rare for specific complaints to be made in any formal way, because the structure of both offices allows ample scope for retaliation and victimisation. It is not clear how far gender bias in these areas does exist in each office.

67. Having regard to the community wide tendency to value work performed by a man over work performed by a woman, it would be surprising if it did not exist. The office structure in each case provides scope for giving effect to any bias which may exist.

68. One possible indication of bias within each office is that there have on a number of occasions been informal complaints within the Crown Solicitor's Office and the then Crown Prosecutor's Office of discrimination in favour of women. In each case, when the allegedly favoured women's careers were examined, it was found that they had progressed either as quickly as, or marginally more slowly than, men in the office with whom they had graduated, or with whom they had been admitted.

69. These sorts of complaints support the subjective impression of a number of women that women in each office are perceived as younger or less experienced than they really are. In a structure based on informality and patronage, such perceptions are damaging.

Conditions of work

70. Maternity leave in each case is the public service standard of one year's unpaid leave. There has been no attempt to whittle this down or dissuade any officer from taking it.

71. Part-time work. The Director of Public Prosecutions has a clear policy of not hiring legal officers on a part time basis. This is irrational and discriminatory, as officers who return from maternity leave do return part-time, and do work efficiently (generally as solicitors, with some court time in some cases). There is a policy that senior solicitor's positions are not available to part-time employees. The Crown Solicitor's Office policy, if any, is not known.

72. Both offices have allowed women returning from maternity leave to return to work part-time. The Crown Solicitor's Office attitude to part-time return is seen as more welcoming and cooperative than the Director of Public Prosecution's.

73. In each office, there is a clear impression on the part of the women employed that working part-time means that they are most unlikely to be considered for promotion or reclassification, and that they are generally considered to be "difficult", or less valuable as employees.

74. Flexible working hours. In both offices, there is some informal flexibility in working hours. For those who work largely as solicitors, there is, rationally, substantial room for

greater flexibility, but in each office there is a clear impression that anything other than "normal" hours is seen as a lack of commitment to the job.

75. Sexual harassment. As the proportion of women legal officers has increased, with the consequent decline in novelty there has been a substantial decline in inappropriate innuendo, "jokes" and touching. It appears that, compared with any large firms, the incidence of such harassment in the CSO/DPP is very low.

Equal Opportunity Committee

76. The Director of Public Prosecutions' office has established a committee to look at issues of equal opportunity. It has identified part-time work, and work allocation, as issues of general concern. It at present appears, however, that the role of the committee is only to ensure that officers feel they have a stake in the "process" of office organisation; there is no commitment to implement any recommendations which may be made.

APPENDIX A

COMPOSITION OF THE PRACTISING PROFESSION IN WESTERN AUSTRALIA AS AT 30 JUNE 1993

	<u>Females</u>		<u>Males</u>		Total
	Resident	Non-Resident	Resident	Non-Resident	
Partners	48	24	467	282	821
Employers	345	5	511	27	888
Sole Practitioners	37	1	268	3	309
Barristers	8	4	100	132	244
Consultants	1	-	27	2	30
Others	5	2	12	20	39
WA Government					
Ministry of Justice	21	-	39	-	60
DPP	12	-	22	-	34
Other Departments	15	-	19	-	34
Practice Certificate Holders	7	-	14	-	21
Commonwealth Government	16	-	31	1	48
Miscellaneous	45	8	54	15	122
	560	44	1564	482	2650