

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

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<http://tinyurl.com/zj9r8oc>

Introduction In March 2014 the Law Council of Australia (LCA) released a report: *National attrition and re engagement study* (NARS).¹

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 ten years.²

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 haul.³

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 Throughout Australia the regulators of the legal profession are many and varied. In the NT, the Law Society Northern Territory (the Society) whilst retaining the historic membership and advocacy functions, regulates the legal profession pursuant to the *Legal Profession Act (2006)* (NT). As regulators in many respects hold the key to virtuous legal practice why aren't we looking to the legal profession regulators to play their part to regulate this problem out of existence?

Importantly in the NT, 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. 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?



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

- step up as leader;
- create accountability;
- dismantle barriers for carers; and
- disrupt the status-quo—at times we assume that the obstacles to women’s advancement are inevitable or insurmountable. For example, we over emphasise seniority as against diversity for board of committee appointments which acts to entrench the status-quo.

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

- visible commitment by senior management;
- know the numbers; and
- 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. 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, retention and engagement of women in the legal profession—importantly bullying and harassment and 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.

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

- admission;
- professional indemnity insurance (PII);
- continuing professional development;
- supervision; and
- rules of professional conduct.

Admissions In the NT, there has recently 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 workforce 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?

PII All Australian jurisdictions require 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 Society pursuant to the LPA has two levels of insurance: full-time and part-time, which is defined to mean up to fifteen hours per week.

Is this PII expense a barrier for an employer if a practitioner wants to work more than fifteen hours 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. The Regulations require eighteen months or two years 'full-time' where 'full-time' means thirty-five hours per week. Whilst this in effect places a cap on full-time work which does not reflect the reality of forty to fifty-hour work week, it similarly penalises part-time work.

In Western Australia and Victoria policy statements have been issued detailing what constitutes supervision (e.g. 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 ten 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 to 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 most 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.⁴ Whilst these provisions existed previously in some jurisdictions, 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.⁵ Interestingly the study identifies similar problems of high rates of women entering the profession but lower female representation in the later 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."⁶

Compared to NARS the UK report has an increased focus on interventions of a regulatory nature. The proposals for addressing diversity issues:

- Outreach programs: Legal profession pre-employment designed to overcome barriers for aspiring lawyers.
 - Reform of the qualification pathway: Seeking reform to the training contract and pupillage system.
 - 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.⁷
- 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.
 - 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 (LSUC) The LSUC regulates more than 49 000 lawyers and 7400 paralegals in Ontario in the public interest. In 2015, LSUC was awarded 'top employer' status for the tenth year in a row.⁸ 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 (ASX) 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. That discussion included concern that there were not enough women in the pipeline to fill imposed requirements. The ASX acknowledges the role it plays to model best practice in its *Diversity and inclusion policy*.⁹ 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.

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The Society In 2007 women overtook men in the NT legal profession (not a headline in the NT News—and why not!). But the diversity challenge for the NT remains expansive.

The Society sees its role as an example to the profession. 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.

Providing data to the national profile of solicitors (in collaboration with other law societies)¹⁰ and the Australian Bar Association statistics¹¹ has been an ongoing commitment as well as publishing NT data on an annual basis.

The Society disrupts the status-quo The Society 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 the Attorney-General, Office of the Department of Public Prosecutions and the Chief Justice of the Supreme Court.

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 in 2015 is an ideal opportunity to disrupt the status-quo. Legal professional regulators must work alongside law societies and bar associations to:

- Demonstrate best practice and 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.

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.

¹ http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/NARS%20Report_WEB.pdf

² <http://www.lawsociety.com.au/resources/surveysandstatistics/1005660>

³ LCA Gender Balance in Private Practice

⁴ See rule 42 of Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 REG 42 (NSW)

⁵ Sommerland H; Webley L et al 'Diversity in the Legal Profession in England and Wales: A qualitative study of barriers and individual choices

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⁷ Law Society National Profile accessed 25 Jan 2016 <https://www.lawsociety.com.au/resources/surveysandstatistics/1005660>

⁸ 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

⁹ ASX Diversity Policy and Inclusion Policy August 2015 accessed 25 Jan 2016 <http://www.asx.com.au/documents/about/diversity-and-inclusion-policy.PDF>

¹⁰ <https://www.lawsociety.com.au/resources/surveysandstatistics/1005660>

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

