

SEX DISCRIMINATION IN THE LEGAL PROFESSION

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Law is necessarily the most conservative of the professions and it is not strange that people are slow in accepting such an innovation as the woman lawyer.¹

I INTRODUCTION

Twenty years after the introduction of the *Sex Discrimination Act 1984* (Cth) ('SDA') and nine years after the Keys Young report,² sex discrimination in the legal profession remains a topical issue. The focus is generally on the number of women in the profession rather than the nature of legal work done by women and their contribution to the law. Despite the large numbers of women completing legal training and entering the profession, the numbers of women at senior levels in private practice, at the bar and in the judiciary remain significantly lower than those of their male counterparts. Women represent over 50 per cent of law graduates and newly admitted legal practitioners in most Australian States. The Law Society of New South Wales statistics as of July 2004 show that 39 per cent of practicing solicitors in New South Wales are women.³ The New South Wales Bar Association 2004 statistics note that 14 per cent of practising barristers in New South Wales are women.⁴ Even then, Justice Michael Kirby has commented

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1 Edith Prouty, 'Women in the Law: Their Past, Present and Future' *Woman's Journal*, 22 April 1876.

2 Keys Young Consultants, *Research on Gender Bias and Women Working in the Legal Profession* (1995).

3 Law Society of New South Wales, *Statistics and Profiles of NSW Solicitors* (2004) <http://www.law.society.com.au/uploads/filelibrary/1088743467078_0.24320527710962053.pdf> at 23 October 2004. The Law Society of New South Wales notes that the most significant change in the profile of the legal profession in New South Wales over the last 15 years has been the increase in the numbers of female solicitors from 13.4 per cent to 39 per cent. Since 1988, the number of female solicitors has grown by 125.5 per cent as compared with a rate of 20.2 per cent for male solicitors and a rate of 41.4 per cent for the profession as a whole.

4 New South Wales Bar Association, *Annual Report* (2004) 6, <http://www.nswbar.asn.au/documents/2004AR_000.pdf> at 23 October 2004.

on the lack of women barristers in speaking parts in High Court matters.⁵ The Australian Institute of Judicial Administration notes that, at May 2004, 25 per cent of all judges and magistrates in New South Wales were women, with 20 per cent of all Federal judges and magistrates being women, most being members of the Family Court of Australia.⁶

The question arises whether the disparity between women graduates and women practitioners/judges is related to sex discrimination. Sex discrimination takes many forms and is not confined to the legal concepts of direct or indirect discrimination used in the SDA or comparable legislation. This article examines some of the ways in which sex discrimination, in all its forms, affects the legal profession.⁷

5 Justice Michael Kirby, 'Women Lawyers – Making a Difference' (Address to the Women Lawyers' Association of New South Wales, Sydney, 18 June 1997), <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_womenlaw.htm> at 23 October 2004; Justice Michael Kirby, 'Women in Law – What Next?' (Victorian Women Lawyers Association – Lesbia Harford Oration, Melbourne, 20 August 2001), <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_vicwomen.htm> at 23 October 2004.

6 See Australian Institute of Judicial Administration, *Judges and Magistrates (Women)* (2004) <<http://www.aija.org.au/JudgesMagistrates.htm>> at 23 October 2004.

7 Much has been written about women's participation in the legal profession and discrimination. This paper cannot address all of the issues which have been the subject of detailed study in the following publications and reports: see Rebecca Bailey Harris, 'Gender Bias in the Law and the Legal System' (1993) 66 *Reform* 18; University of Western Australia, *Disadvantaged Lawyers: Women in the Legal Profession* (1994); Nancy Hennessy 'Solicitors' Obligations as Employers under Anti-Discrimination Laws' (1995) 33(4) *Law Society Journal* 40; Mary Rose Liverani, 'Gender Bias: Report Finds Work-Scene Bias Against Women Lawyers Sustained by Fear and Silence' (1995) 33(4) *Law Society Journal* 32; Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996); Susan Israel and Katy McDonald, 'Gender Issues for the Legal Profession – A Report on the Keys Young Survey' (1999) 37(4) *Law Society Journal* 60; Cressida Wall, 'Women: Barristers v Barriers' (2000) 22(9) *Bulletin (Law Society of South Australia)* 22; Marcia Neave, 'How Law Constructs Gender and Vice Versa' (2001) 118 *Victorian Bar News* 45; Susan Israel, 'Disparities Continue between Women and Men in the Legal Profession: Gender Issues in the 1999–2000 Practising Certificate Survey' (2001) 39(1) *Law Society Journal* 66; Rebecca Fahey, 'Go Directory to On-Line Female Barristers', *E Law Practice*, Issue 3, June 2001, 38; Juliet Bourke, 'Feminist Issues: Should Gender Still be on the Agenda?' (2001) 39(1) *Law Society Journal* 13; Sally Moyle and Marissa Sandler, 'Effective Law Effecting Change: The Sex Discrimination Act and Women in the Legal Profession' (2003) 83 *Reform* 10; Jocelyne Scutt, 'Without Precedent: Sex/Gender Discrimination in the High Court' (2003) 28 *Alternative Law Journal* 74; Jason Silverii, 'Renewed Push on Briefing Practices' (2003) 77(9) *Law Institute Journal* 26.

Studies include Victorian Women Lawyers, *Flexible Partnerships – Making it Work* (2002); Victorian Women Lawyers, *A Snapshot of Employment Practices 2001 – A Survey of Victorian Law Firms* (2001); Law Society of New South Wales, *Family Responsibilities Study* (1998); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias in the Judiciary* (1999); Law Society of Western Australia, *Implementing the Gender Bias Task Force Report* (1995); Victoria Law Foundation, *Job Satisfaction Survey Interim Report – Facing the Future: Gender, Employment and Best Practice Issues for Law Firms* (1995); Victoria Law Foundation, *Final Report – Facing the Future: Gender, Employment and Best Practice Issues for Law Firms* (1996); Justice David Kingsley Malcolm, *Report of Chief Justice's Taskforce on Gender Bias* (1994); Commonwealth Department of Industrial Relations, Australian Public Service Division, *Work and Family: Ideas and Options* (1994); Law Society of New South Wales, *Equal Opportunity Policy* (1996); Victorian Bar Council, *Equality of Opportunity for Women at the Victorian Bar* (1998); New South Wales Ministry for the Status and Advancement of Women, *Gender Bias and the Law – Women Working in the Legal Profession in New South Wales* (1995); Victorian Women Lawyers, *Taking up the Challenge: Women in the Legal Profession* (1999).

II MILESTONES FOR WOMEN IN THE LEGAL PROFESSION

The milestones for women's participation in the legal profession in Australia rest with five outstanding women:

- In 1902, Ada Evans⁸ was the first woman to graduate in law from the University of Sydney. She was not permitted to practise law because women did not come within the definition of 'person' for the purpose of demonstrating that she was a 'person of good fame and character', a necessary qualification for admission to practice.⁹ In 1918, the *Women's Legal Status Act 1918* (NSW) was passed which enabled women to be recognised as 'persons' for the purpose of qualifying for legal practice.
- In 1905, Flos Greig was the first woman admitted to practice in Australia, as a barrister in Victoria.¹⁰
- In 1962, Roma Mitchell was the first woman in Australia to be appointed as Queen's Counsel in Adelaide.¹¹ In 1965, she became the first woman judge in Australia, when appointed to the Supreme Court of South Australia.
- In 1975, Elizabeth Evatt was appointed as the first woman Chief Justice of the new Family Court of Australia. She became the first woman President of the Australian Law Reform Commission in 1986, and the first Australian elected to the United Nations Human Rights Committee in 1992.
- In February 1987, Mary Gaudron¹² was the first woman appointed as a justice of the High Court of Australia. By February 2003, there were no women on the High Court.¹³

These all represent 'firsts' by a few women and they are significant achievements. However, the contribution made by women to the legal profession should not rest with these five outstanding women. There are many more stories of women who battled without success and their stories are rarely told or documented. Indeed, it is an onerous burden for women to need to be

8 Born 17 May 1872 at Wanstead, Essex in England. She arrived in Sydney, New South Wales in 1883: see *History* (2003) Ada Evans Chambers <<http://adaevanschambers.com/history.html>> at 23 October 2004.

9 See Law Society of New South Wales, *After Ada: A New Precedent for Women in Law* (2002), <http://www.lawsociety.com.au/uploads/filelibrary/1036022928786_0.9151443275908748.pdf> at 23 October 2004. See also Justice Mary Gaudron, 'Speech for Women Lawyers Association of New South Wales 50th Anniversary Gala Dinner' (Sydney, 13 June 2002), <http://www.hcourt.gov.au/speeches/gaudronj/gaudronj_wlansw.html> at 23 October 2004.

10 Tasmania allowed women to practise law in 1904, followed by Victoria and Queensland in 1905, South Australia in 1911, New South Wales in 1918 and Western Australia in 1923: see *Sisters in Law: Women Pioneers of the Australian Legal Profession*, National Pioneer Women's Hall of Fame <<http://www.pioneerwomen.com.au/sistersinlaw.htm>> at 23 October 2004.

11 See Susanna de Vries, *Great Australian Women from Federation to Freedom* (2001) ch 15.

12 Justice Gaudron was the youngest person appointed as Deputy President of the Conciliation and Arbitration Commission, the first female QC in New South Wales, the youngest person appointed as Solicitor-General for New South Wales and the first woman member of the High Court.

13 See Rachel Davis and George Williams, 'A Century of Appointments but Only One Woman' (2003) 28 *Alternative Law Journal* 54; Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819.

‘outstanding’, a ‘pioneer’, a ‘role model’ and a ‘leader’ in order to be recognised. For many women, a fair go and job security is sufficient. In some senses, equality for women in the legal profession should not be measured by the outstanding successes but by the ability of women to achieve in the same way as their male counterparts, at all levels and in all areas of the law.

III LEGAL PROTECTION FOR EQUALITY

The increase in women’s participation in the legal profession reflects important social changes and perceptions about women’s role in society. The barriers and discrimination that the women pioneers encountered were overt and at times calculated to exclude women from the profession. The 1970s and 1980s saw the introduction of legislative protections against sex discrimination in the workplace. In 1975, South Australia enacted the *Sex Discrimination Act 1975* (SA). It was followed by the *Equal Opportunity Act 1977* (Vic) and the *Anti-Discrimination Act 1977* (NSW). These enactments made it unlawful to treat women less favourably than men in the terms and conditions of employment or by imposing unreasonable conditions or requirements that women could not comply with. Over time, specific laws making sexual harassment in the workplace unlawful were also enacted.

In 1984 the *SDA* was enacted to give effect to Australia’s international human rights obligations and to prohibit discrimination on the ground of sex, marital status and pregnancy throughout Australia. It also created the office of the Sex Discrimination Commissioner. The passage of the *SDA* was controversial and hotly debated.¹⁴

In 1986, the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth), later the *Equal Opportunity for Women in the Workplace Act 1999* (Cth), required organisations with 100 or more employees to establish programs to remove barriers to women entering and progressing in the organisation. Employers, including law firms, must report annually to the Equal Opportunity for Women in the Workplace Agency (‘EOWA’) on the actions taken and the outcomes of workplace programs to remove barriers for women. The reports are available through EOWA and provide an interesting overview of the profile of firms and organisations with 100-plus employees.

In 1999, the *Legal Profession Regulations 1994* (NSW) were amended to introduce reg 69B which prohibited a legal practitioner engaging in discrimination (including sexual harassment) in connection with the practice of law.¹⁵ Regulation 69C required solicitors to undertake mandatory continuing education in the areas of equal opportunity, discrimination and occupational health and safety. Professional conduct rules prohibiting discrimination and

14 For an account of the debate, see Marian Sawyer, ‘The Commonwealth *Sex Discrimination Act*: Aspirations and Apprehensions’ (Speech delivered at the Women, Work and Equity Forum, Sydney, 1 August 2004), <http://www.hreoc.gov.au/sex_discrimination/20thanniversary/women_work_equity/speeches/sawyer.html> at 23 October 2004.

15 Now *Legal Profession Regulations 2002* (NSW) regs 141, 142.

harassment have been adopted in other States and by local professional associations.

Notwithstanding a raft of statutory protections, in 2000, a Keys Young survey found that 37 per cent of female solicitors reported gender discrimination.¹⁶ A New South Wales Law Society survey in 2001 found that 47 per cent of female respondents reported gender-based harassment or discrimination compared with 3 per cent of male respondents. Further, 5 per cent of women reported pregnancy-based discrimination.¹⁷

While the SDA and comparable State and Territory anti-discrimination legislation has been used by women in various professions to challenge discriminatory workplace practices,¹⁸ women lawyers have not generally sought to advocate their rights or to promote change by using statutory protections. As Marcia Neave observes 'ideas about gender can prevail in the face of the clear words of legislation',¹⁹ and this is true to the extent that, whilst there may be legislative measures to ensure equality of women professionals (extending to the legal profession), in reality the barriers to equality continue to exist. The reluctance of women lawyers to use available legal remedies cannot be readily explained. Anecdotal evidence suggests that lack of awareness, fear of retribution, fear of publicity and drawing adverse attention to themselves, and ineffective remedies act as deterrents to making formal complaints.²⁰ An exception is Marea Hickie who, in *Hickie v Hunt and Hunt*²¹ ('Hickie') successfully alleged that the firm Hunt and Hunt discriminated against her on the ground of sex and was awarded \$95 000 in 1998. The case was heard over 10 days in the Human Rights and Equal Opportunity Commission presided over by Commissioner Elizabeth Evatt.

In summary, Ms Hickie commenced employment as a solicitor with Hunt and Hunt in November 1988. She was then 24 and it was her first legal position after completing College of Law. Ms Hickie worked in the firm's insurance group. She progressed rapidly. She was made an associate in December 1991. On 1 July 1995 she became a contract partner for a term of one year. At the time of her appointment as a contract partner Ms Hickie was pregnant. She commenced maternity leave in September 1995 and returned to work on a part-time basis in January 1996. In May 1996, Hunt and Hunt decided not to renew Ms Hickie's contract beyond 30 June 1996. The reasons given were her poor performance appraisal, and her lack of commitment and interest in the firm (for example, she

16 See Israel, above n 7.

17 Ibid 65.

18 See, eg, *Dunn-Dyer v ANZ Banking Group Ltd* (1997) EOC ¶92-897; *Empson v Monash University* (1995) EOC ¶92-694; *Coard v Mobil Pty Ltd* [1997] HREOCA 35 (Unreported, Commissioner Kohl, 3 July 1997); *Bodart-Bailey v Australian National University* (1995) EOC ¶92-744; *Styles v Secretary, Department of Foreign Affairs and Trade* (1988) 84 ALR 408.

19 Neave, above n 7, 46.

20 See, eg, the recent proceedings involving Sydney lawyer Elizabeth Weston who sued her employer Merrill Lynch in London and received extensive publicity. She settled the proceedings for a reported \$1.5 million: see 'Lawyer Gets \$1.5m for Bank's Sex Harassment', *The Age* (Melbourne), 11 July 2004, 3.

21 [1998] HREOCA 8 (Commissioner Evatt, 9 March 1998).

failed to attend the partner's retreat or to explain her absence). She was informed of this decision and on the same day, ceased work and left the firm.

Ms Hickie alleged discrimination and victimisation in relation to the decision not to renew her contract and the way in which she was treated by the firm, particularly in the period from mid-1995 onwards. She further alleged that the firm failed to make proper provision to support her practice during her maternity leave and her later period of part-time work. She complained about narrow male views concerning management styles, marketing and methods of practice-building.

Hunt and Hunt denied any discrimination or victimisation. The firm had policies on equal opportunity, maternity leave and affirmative action. The firm said that it accepted maternity leave and part-time work. The firm contended that the decision not to renew Ms Hickie's contract was a decision that they were entitled to make as a result of her failure to take up effectively the role of a partner and her lack of commitment to the firm.

Many of Ms Hickie's allegations were not substantiated but the Commission found 'indirect sex discrimination' within the meaning of s 5(2) of the SDA.²² The discrimination occurred because Ms Hickie was required to work full-time as a necessary condition to maintaining her position in the firm. This was a condition which disadvantaged or was likely to disadvantage women, and it was not reasonable in the circumstances. However, the Commission noted that the situation was complex and there were a range of factors in play. These included Ms Hickie's management style and her working relationship with other partners. The Commission noted that she

did not relate well with the junior solicitors who worked with her in 1995 or earn their loyalty or respect. Ms Hickie showed a tendency to be over critical and demanding. She needed to gain experience and to have guidance to develop an effective management style; in other circumstances these changes could have happened over time.²³

The Commission observed that 'Ms Hickie did not react well under stress, and her response to what others might have seen as danger signals was to be withdrawn and negative. She failed to act to protect her own interests.'²⁴ The Commission noted that other important factors were the expectations of the other partners.

The decision is an important one. While it demonstrates that the SDA is a vehicle by which discrimination in the profession may be addressed, it also highlights the weakness of the SDA in addressing systemic discrimination and the need for change. *Hickie* resulted in an order for compensation, but did little to require systemic practices to be addressed and remedied.

22 Ibid [10.2].

23 Ibid [10.1.4].

24 Ibid [10.1.7].

There are no other reported cases in Australia involving women lawyers who have successfully complained of discrimination or sexual harassment that have resulted in a public hearing and determination.²⁵

IV LESSONS FROM *HICKIE*

The Commission's observations in *Hickie* provide an insight into the conflicting expectations of firms and women lawyers. The case also demonstrates the systemic and hidden nature of discriminatory practices. Some of these include the expectation that lawyers will work long hours, be available to attend to client and firm demands whenever they arise, and that they will show loyalty and commitment to their firm. Further, success and promotion in large private commercial practices is measured against billable hours, involvement in high profile matters and working with high profile clients. Some of these features of legal practice are not compatible with the demands placed on women, particularly those women who have the primary care of children.

A Evidence of Continuing Structural Discrimination

The 1995 Keys Young report²⁶ found that a comparison of female and male lawyers admitted to private practice in the same year revealed that 3, 5 and 10 years later, women lawyers had attained partnership at a considerably lower rate than men. This finding was highly important in recognising that it was not merely going to be a 'matter of time' before the number of men and women in senior positions levelled out, as more female lawyers attained qualification, but that there were engendered barriers to increasing numbers of senior female lawyers in the profession.²⁷

The Keys Young report also found that women lawyers held the majority (60 per cent) of legal positions in the community sector and a growing number of legal positions in government (41 per cent). The report explored why women chose these practice areas over private practice. The nature of the work undertaken in the government sector and the desire to effect reform were considered major factors, but so too was the greater flexibility of work conditions

25 This is not to say that there is no cause for complaint. Complaints are made which are resolved informally and confidentially. In the course of the author's practice, she has advised and acted for a number of women lawyers who have alleged sex discrimination, pregnancy discrimination, sexual harassment, sex-based bullying and victimisation in the workplace.

26 Keys Young Consultants, above n 2.

27 See Justice Kirby, *Women Lawyers – Making a Difference*, above n 5, where he said:

I am constantly told: Be patient. Things are changing. There is an inevitable time lag. Rome was not built in a day. Now, I have saintly patience. I have waited and continued to wait, quietly confident of change. But the change, at least where I operate, is very slow in coming. There does, after all, seem to be a ceiling. It may be made of something more resistant than glass. ... There should be a greater sense of urgency for change to redress the gender problem of the Australian legal profession. Hope and prayer have their part to play in securing change. The commitment to excellence must remain undiminished. But effective measures to redress imbalance may also be needed.

and practices in the government, academic and community sectors, especially for women with family responsibilities.

The inability to identify practices that may perpetuate discrimination and inequality is perhaps another reason why change is so slow. The Keys Young report examined why women were not progressing to senior roles and considered that the adversarial nature of the law and legal practice, the emphasis on legal precedent and the narrow and conservative client base in certain areas of legal work created, to some extent, a particularly rigid and conservative environment that could be unsympathetic to female professionals. The report further noted that, while gender barriers clearly exist, those consulted felt that the current structure of legal practice was a necessary and inevitable feature of the profession. These views, and the fact that gender barriers are often not 'visible' to some members of the profession, mean that discriminatory practices continue to occur. Often discrimination was not discussed by women due to a fear of jeopardising career prospects. Such a finding is not particularly encouraging to women who want to pursue a career in law, although it has not slowed the number of women enrolling in undergraduate law courses.

Discrimination occurs, not merely because women are actively excluded from senior positions, but because of various social pressures and preconceived notions about women and how the legal profession operates. To date, very little has been done to develop methods to assist the profession to identify and then eliminate practices that may operate as barriers to women's equal participation. It is not clear why the reporting processes under EOWA have not resulted in greater progress where problem areas are identified. It may be that finding the causes of discrimination is akin to peeling the layers of an onion: it is not enough to focus just on the surface issue of the number of women in positions; the deeper issue of how structures and practices should change must also be examined. Until this is done, the evidence of discrimination will remain anecdotal and change may be slow or ineffective.

B Identifying Areas for Change

The following aspects of legal practice illustrate how systemic practices may allow discrimination to continue.²⁸ First, there remain stereotypical attitudes about women, held by both men and women. These attitudes are rarely disclosed or discussed. Some of them concern how women should dress, speak and engage with or manage others. Aggressive or abrasive qualities are not encouraged in women, yet are respected or accepted in some men. Women may be perceived as fragile or weak and their judgment or competency as a legal practitioner may be questioned as a result. Even matters such as height, voice pitch and tone, and age impact upon attitudes to women.

In North America, the courts have held that sex stereotyping is a form of sex discrimination because reliance on a stereotypical assumption or view about women will amount to less favourable treatment when linked to an adverse

28 This is by no means a comprehensive list or review of the measures, but will highlight a few areas to illustrate some of the ways of identifying systemic barriers.

employment decision. Sex stereotyping has been defined as a process whereby decision-makers apply or impute various personality attributes and characteristics about women and measure other women by those standards. If a woman does not measure up to the standards, then she may be perceived negatively.²⁹

In *Hickie*, questions were raised about 'management style' and 'relationships with other staff'. The Commission's decision does not explore whether there were gendered assumptions about appropriate management style for women in this case. In an earlier Commission decision in *Dunn-Dyer v ANZ Banking Group Ltd*,³⁰ the Commission found that describing the complainant as a 'mother hen' and referring to her group as 'the nursery' and 'the mother's club' resulted in the employer being prone to make judgments about staff and co-workers on the basis of quite subjective and impressionistic material. These judgments intruded into assessments of Ms Dunn-Dyer's managerial qualities and caused the assessments of her to be in error. The Commissioner said:

I am satisfied that [the employer] had unreasonably negative views of Ms Dunn-Dyer's managerial and other skills because he characterised her as a woman and based his judgments of her upon characteristics irrelevant to her work but which he identified her as having because she was a woman.³¹

These assumptions about women impact on the type of legal work allocated to women and whether women can meet the criteria for selection as partners or for promotion. A study conducted by the Canadian Bar Association in 1993, *Touchstones for Change: Equity, Diversity and Accountability*, discusses the phenomenon of 'pink files' and 'blue files'. Pink files are those with less profile, less client contact and reduced opportunities to develop legal skills and a client base.³² The pink files involve matters where time-charging may be more difficult because of a greater pressure to reduce costs. Pink files may also involve non-legal work, such as precedents work, training and public relations, particularly in the case of part-time lawyers. In contrast, blue files involve high profile matters, significant contacts with clients and other practitioners, less pressure on costs, and greater opportunities to develop a profile.

Not surprisingly, pink files are allocated more frequently to women and blue files to men. When the allocation of work can be linked to gendered considerations it is not difficult to see that, over time, those working on blue files are more likely to progress rapidly and to have higher billable hours, good client contacts, and the opportunity to develop legal skills and a high profile. One might question whether firms monitor the allocation of work in order to determine whether there are patterns of allocating work on the pink and blue file basis and, if patterns do emerge, whether steps are taken to address the patterns for allocating work.

29 See *Price Waterhouse v Hopkins*, 490 US 228 (1989); *Craik v Minnesota State University Board*, 731 F 2d 465 (8th Cir, 1984); *Jenson v Eveleth Taconite Co*, 824 F Supp 847 (D Minn, 1993); Mary Radford, 'Sex Stereotyping and the Promotion of Women to Positions of Power' (1990) 41 *Hastings Law Journal* 471, 487.

30 (1997) EOC ¶92-897.

31 *Ibid* 77,376.

32 Canadian Bar Association, *Touchstones for Change: Equity, Diversity and Accountability* (1993) 87.

Particular care needs to be taken to ensure that lawyers working part-time are not allocated the significant portion of pink files. While many firms now provide part-time work for women lawyers, this has also resulted in part-time lawyers being allocated work that is more likely to involve lower profile, lower cost and fewer opportunities for career development. Again, one might question whether firms have systems in place to monitor such work allocation.

A second area of concern is the way in which law is practised. Long working hours and weekend work goes hand in hand with pressure to make budgets. The budgets are in turn set by the hours which a solicitor may bill on a given day. Time-charging operates as a barrier to women whose work hours and patterns may require flexibility. Further, there is no clear correlation between the quality of the work done and the hours worked. The more efficient lawyer may be penalised. Working long hours and on weekends is often perceived as commitment to the firm while working shorter hours is perceived as the lawyer having priorities outside or over and above the firm. This is a simplistic impression that again does not take into account the efficiency of the lawyer. It means that the lawyer's commitment is measured by his or her 'visibility' at work. Such a perception is not conducive to working flexible hours, or to working from home or remote locations. In an era of technological change, much of a lawyer's work can be performed at any location and not necessarily from a fixed office. Flexibility in the location of work would assist women lawyers with family responsibilities, yet the perception that valuable work is only performed at the 'office' is an attitude that resists change and the examination of alternatives.

The third troubling issue is a lack of mentoring and role models. Anecdotal evidence suggests that where women hold senior positions in organisations, in private practice, at the bar and in the judiciary, younger or more junior women are more likely to see such a position as attainable for themselves. Where there are no senior women and no formal mentoring systems, more junior women are more likely to see promotion as a challenge rather than a natural progression. They may feel that they have to struggle to attain a higher position because of their gender, or feel that they have to be 'frontier women', paving the way for others. Their gender is more likely to be an issue in promotion. Role models and informal mentoring systems reinforce the fact that more senior positions are achievable. Women who feel or believe that their gender is not an impediment are more likely to be confident and open to promotional opportunities. This may mean that law firms need to encourage women to seek higher office. It may also involve encouraging more junior women to create networks or to discuss their experiences. The hierarchical nature of firms is not open (nor, at times, receptive) to how junior employees view their work environment, or to their ideas about means of changing or improving the workplace. Greater involvement of women in the day-to-day activities or administration of firms removes the 'us' and 'them' mentality which exists between employees and partners. It also allows firms to work with employees to identify barriers to equality.

These three areas are only illustrations of the need to identify the hidden barriers which prevent women progressing in law in step with their brothers.

V CONCLUSION

It is generally accepted that change must occur in the legal profession in Australia for any true level of equality between male and female practitioners to be achieved. Despite the introduction of the *SDA*, studies such as the Keys Young report and the increasing number of women law graduates, systemic change has been slow. The introduction of part-time and flexible working arrangements, mentoring schemes and Model Briefing Policies³³ are all necessary to address systemic barriers to women's equal participation in the profession, but are they enough?

In 1993, the Canadian Bar Association stressed that the objective of achieving equality in the profession was not merely to ensure access and then require women to fit into a profession that has been shaped for men by men.³⁴ The profession itself required a change. The same may be said of the Australian profession and the challenge to make such changes lies ahead of all of men and women in the profession.

33 See Law Council of Australia, *Model Equal Opportunity Briefing Policy for Female Barristers and Advocates* (2004), <<http://www.lawcouncil.asn.au/policy/2393225385>> at 23 October 2004.

34 See *Touchstones for Change*, above n 32.