



Launch of King and Wood Mallesons' Equitable Briefing Policy

Remarks by the Honourable Justice Chris Maxwell AC, President of the Victorian Court of Appeal at the launch of King and Wood Mallesons' Equitable Briefing Policy, Melbourne.

30 March 2017

It is a special pleasure for me to be invited back to Mallesons. One of the most memorable, and most enjoyable, periods of my career as a barrister was the period 1990-93 when I worked, virtually full-time, with the late lamented Tony Border. Tony was then the head of litigation. We were acting for Tricontinental, the merchant banking arm of the State Bank of Victoria. He was the finest litigator I ever had the privilege to work with. Tony would, I know, be proud of the leadership which the firm is showing, in 2017.

And I am especially delighted to have been asked to speak about the firm's new equitable briefing policy. The challenge of gender equality in the legal profession is so important, and we still have so far to go, that it is of great significance to have a leading national, and international, firm showing strong leadership of this kind.

But I want to begin with a story from this morning's appeal. It was a civil appeal, following a trial in the County Court over a contract for the supply of goods. The judge had found that the supplier had misrepresented the suitability of the goods for the particular purpose and that the purchaser had suffered loss because of its reliance on the misleading representation. The award of damages was in the hundreds of thousands, so it was a common or garden commercial dispute.

When I read the written submissions yesterday, I noticed that in each case they were signed by a male senior counsel and a male junior. And, as expected, they were the counsel who duly appeared this morning. Their instructing solicitors were also male. It so happens that the bench was also all male. (As you may know, of the 13 judges of appeal, only three – the Chief Justice and Justices Tate and Ferguson – are female.)

So the gender scoreline was 9-nil! Pretty appalling ...

Now improving diversity on the bench is a separate, though equally important, topic. As you may recall, the Victorian Government has committed to 50% female judicial appointments. The Chief Justice and I are advancing the case that judicial appointment processes will need to change if that target is to be achieved.

Anecdotal evidence, of course, cannot prove a case. But this was, I thought, a powerful snapshot of the face of civil appeals on a particular day in March 2017. A law student who watched the appeal asked me afterwards, "What does this say about the legal culture?" What indeed.

As you may know, the Court of Appeal has begun recording the gender of counsel who appear in appeals, both civil and criminal. This was an initiative of Justice Tate, one of the founders of the Women Barristers' Association and a tireless campaigner for gender equality.

The figures to the end of February show that, in civil appeals, there were 277 appearances by counsel. Of that total, some 42 (or 15%) were female. That is slightly more than 1 in 7. In criminal appeals, the proportion is a little better. Of a total of 280 appearances, 65 (or 23%) were female.

Some of the individual months for civil appeals are quite shocking: August 2016: 42 men and 5 women; September: 22 and 3; October: 45 and 7.

More shockingly still, the figure of 15% is only slightly better than it was 20 years ago when the Victorian Bar Council commissioned a report on Equality of Opportunity for Women at the Victorian Bar. A three month study of six jurisdictions and 782 cases revealed that female barristers made 13.6% of the total appearances.

This is not the occasion for an exploration of why the progress has been so slow. It has not been for want of effort by many courageous women, and a few men, over the decades. But there is an inertia which we must overcome. We should be ashamed as a profession that we have achieved so little progress on this fundamental human rights issue.

That is why the equitable briefing policy is so important. As you would be aware, the policy commits this firm to achieve a 30% target in the briefing of junior barristers and a 20% target in the briefing of senior barristers. The target is expressed as a percentage of the number of briefs given and of the value of brief fees paid.

Then, by 30 September in each year, the firm will report confidentially to the local law society in each State, or directly to the Law Council, with respect to the measures undertaken and – most significantly – the progress towards the target.

One thing, I think, is clear. Without measurement of what is actually occurring, and accountability for what the figures show, we will never achieve real change. I hope that the adoption of this policy by this firm, and other leading firms, may lead us to the point where firms are reporting publicly on the proportion of briefs given, and fees paid, to women. (Just as companies are required to report to the Workplace Gender Equality Agency against six indicators, including gender representation and remuneration.) If that produces healthy competition between firms to show who is achieving the most progress towards gender equality, that must surely be a good thing.

The Law Council recommends that, in order to achieve the targets, each firm should review its current briefing practices, having regard to the following questions:

- Do your briefing practices reflect the objectives of the Policy?
- How do you maintain a record of your briefing practices?

- Do you regularly review the panel of barristers whom you brief (if any)?
- How do your partners/staff receive ongoing training in “best briefing” practices, including practices that will promote achievement of the targets?
- How do you foster and encourage women barristers?

I am aware, from my consultations with younger female lawyers, that the obstacles to equality in the law extend well beyond decisions about which barrister gets briefed. There are all sorts of serious issues about how legal workplaces operate: how women are deliberately or thoughtlessly excluded from client events or social occasions; how the pay gap between men and women remains outrageously large, preserved by the cloak of secrecy which still hangs over what people are paid; difficulties about flexible work and re-entering the workplace after time off for children; and dealing with casual sexism.

The public statement which this firm is making on this particular topic will encourage – and challenge – us to think hard about how those other issues are to be dealt with. In the end, of course, we are all individually accountable.