

GENDERED MERITOCRACY? WOMEN SENIOR COUNSELS IN AUSTRALIA'S LEGAL PROFESSION

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ABSTRACT

Workplace gender inequality is an ongoing and systemic social problem. Despite women's entry into professional occupations, the 'glass ceiling' effect persists. With Australia's legal profession traditionally exhibiting a masculine workplace culture, championing meritocratic values, Women Senior Counsels (SC) represent an elite social group which has apparently 'smashed the glass ceiling' by achieving career success. Informed by Marxist-feminist theory and Symbolic Interaction theory, this article uses qualitative email interviews and courtroom field observations to explore professional norms about meritocratic ideals and workplace stereotypes regarding success. The findings reveal that female Senior Counsels have, in keeping with broader social trends, rejected masculine 'successful barrister' stereotypes, and are substituting meritocracy for traditional 'masculine' competency measures. This substitution may illustrate semantic reallocation more than genuine social change. However, as our findings reveal, Australia's legal profession upholds standards of meritocratic competency grounded in masculinity, whereby barriers to true workplace gender equality remain largely invisible.

Key words: sociology, law, gender gap, inequality, stereotypes

INTRODUCTION

Workplaces are sites of meaning production that contribute to self-identity and value (Perlman, 1968). They confer income and status, affecting social mobility, prescribing access to networks and shaping individuals' social image (Degenne & Forse, 1999). Work provides our most important social interactions (Goffman, 1973) and is an intrinsic element of our social fabric (Jamrozik, 2009). Yet, while structural theories about work featured eminently in classical sociology (see Karl Marx; Emile Durkheim and Max Weber), discussion of gender as a contributing variable was routinely absent from this analysis until Marxist and other feminists highlighted the global concentration of women in low status and poorly paid jobs. Feminist work (Littlewood, 2004) countered neoclassical economic and human capital theories of labour division and showed that gender-segregated labour forces were shaped by systemic social norms and practices (patriarchy, 'family wage' standards, breadwinner roles, etc.).

The 'gender gap' in income parity in industrialised countries, particularly Britain, Ireland, Japan and the United States, is compounded by geography, weakened unionism and the

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global economy (Payne, 2011). Moreover, whilst women's access to higher education has narrowed the gap, "women's pays still lags behind men's in almost every sector of the economy" (Payne, 2011, p. 212). Contemporary social institutions remain grounded in hegemonic stereotypes of 'masculinity' and 'femininity' (Heywood, 2007) and workplaces, as social institutions, continue to be dominated by masculine attributes so that characteristics labelled 'feminine' are subordinated (Abbott, 2006). Sociologists have identified that gender operates as a 'glass ceiling': an invisible, yet empirically documented, unbreachable socio-cultural barrier that prevents women from achieving career success on par with men (Benokraitis & Feagin, 1995; Gazso, 2004). Indeed, sociologists have long argued that overcoming this barrier must be a primary task (Hochschild, 1983). The historical devaluation of femininity, the feminisation of specific occupations and the gendered division of labour which result when gender stereotypes shape high status occupations (Chafetz, 1984) make analysis of women in 'masculine' professions an understudied social group of particular interest. Although some women 'break through' the glass ceiling (Schoombee, Hafford & Quai, 2001), even introductory sociology textbooks assert that: "in any field, the greater a job's income and prestige, the more likely it is to be held by a man" (Macionis, 2009, p. 283).

As women enter workplace positions previously inhabited only by men, such as Prime Minister of Australia or Chief Executive Officer of the London Stock exchange, it is imperative that our gaze shifts towards examples that demonstrate how (if at all) our historically gendered institutions and workplaces are changing. Despite its masculine heritage the Australian legal profession is one workplace founded on the principle of 'meritocracy', with individual achievement heralded as the cornerstone of promotion (Eagly & Sczesny, 2009). Given the gendered history of Australia's legal profession, women who have risen to high level positions in the profession are a social group worthy of the attention of gender and women's studies.

National and international examinations of gender inequality in the legal profession over the past three decades have focused on gendered barriers to success rather than examining the 'anomalies' of successful women. This research provides a novel theoretical and methodological exploration of successful women in the Australian legal profession by using qualitative interviews and field observations informed by feminist sociological theories of gender inequality and Symbolic Interactionism (SI). By treating Australia's legal profession as a gendered institution, our analysis benefits from SI's insights. Specifically, we examine meritocracy as a manifestation of shared standards in the legal profession (Blumer, 1998) whilst not overlooking the importance of social structure to group formation (Wallace & Wolf, 2006).

Our population is Australian women barristers who have 'succeeded' by virtue of promotion to Senior Counsel (SC), an honour given on the endorsement of peers (New South Wales Bar Association, 2008a). Contextualised in purportedly 'meritocratic' workplaces, we identify contemporary gender stereotypes of 'the successful barrister', as perceived by Australian women SC, via qualitative interviews. Next, through field observations, we observe how 'lawyering' behaviours conform to stereotypically gendered behavioural norms. Finally, we question whether the ideology of meritocracy, as echoed in Australia's legal profession, is a viable mechanism to effect social change, particularly the creation of gender neutrality and equity in historically masculine workplaces.

LITERATURE REVIEW

Changes in global employment patterns are connected to changes in family structure and broader social values (Smart, 1997). The Australian labour market reflects global patterns, including increased socioeconomic gender inequality shaped by parenthood, family structure and the shift from an industrial to a service economy (Jamrozik, 2009). As Australian government policy in the past two decades fostered the emergence of a 'new middle-class' in dual-income households, gender inequality decreased amongst professional and educated employees yet remained stagnant or worsened for the poorest (Jamrozik, 2009). The impact multiple social categories have on experiences of gender foregrounds the need to theorise 'women' and 'gender' as non-monolithic categories (Payne, 2011).

Despite the proclaimed decrease in gender inequality among Australia's professionals, and 1960s equal pay legislation, national statistics confirm continued pay inequality between men and women for comparable employment (Australian Bureau of Statistics, 2002; 2008). Gender inequality in the Australian legal profession is no exception; the profession remains dominated numerically by men (Freeman, 2001; Kirkton, 2006; Goswami, 2008; Richards, 2008). In 2005, the Human Rights and Equal Opportunity Commission argued that workplace equity would result in a greater pool of talent available to employers (HREOC, 2005). However while women constituted over half of law graduates (Richards, 2008) by 2008, only 5 percent were practicing New South Wales Senior Counsels (NSW Bar Association, 2008b). Further, only 4 of the 48 High Court of Australia (HCA) judges have been women in its history (HCA, 2008) despite the present HCA bench boasting an almost equal gender division (3 female and 4 male judges). Women remain significantly underrepresented in the legal profession's upper echelons and gender equity is unlikely to simply emerge (McColl, 2006).

Lack of representation in senior positions is of primary concern to sociologists asserting that organisational decisions and cultural change are generated 'at the top' (Schaafsma, 2001). An absence of senior professional women renders invisible women's perspectives and furthers inequality (Smith, 1990). Senior professionals often are the public face for their institutions which accounts for the 'male' barrister being the public image of lawyers (Bainbridge, 2006). Without women's representation at the top, neither gender-neutral imagery, nor gender-equal organisations are likely.

Advocates of the 'trickle-up' theory (Richards, 2008) contend that, in time, numerical equity will eventuate in the upper echelons as graduates rise through the professional hierarchy. They argue that by creating family-friendly workplaces (Schaafsma, 2001) historical barriers will be overcome. In reality, however, caretaking commitments place pressure on employees by forcing them to choose between work and family, which has led to women being viewed as an employment risk (Connelly, 2005; Pocock, 2005; Freeman, 2001) with potential to put family before career (HREOC, 2005). Furthermore, child-friendly workplaces (Spigelman, 1999), changing peer attitudes and a meritocratic promotion system (McColl, 2006; Eagly & Sczesny, 2009) have all failed to significantly change women's numerical representation at the pinnacle of Australia's legal profession.

Prior sociological research explaining women's numerical under-representation in senior positions and disproportionate pay (Valentova, Smidora & Katrnak, 2007) has cited biological difference (Scott, 1999), the glass ceiling (Gazso, 2004), family pressure (Pocock, 2005; Robertson, 2002) and invisible cultural and social barriers (Connelly, 2005) including masculine workplaces (Eagly, 2004) as key reasons. These explanations build on the

approach taken by a strand of feminism which emphasises women's difference from men, sometimes called 'difference' feminism or cultural feminism. Difference feminists claimed that biological, physiological or social difference contributed to inequality (Gilligan, 1982) and encouraged women to openly express and embrace their difference (Gilligan, 1982; Young, 1990).

International studies found women's increased access to education and employment opportunities in every industry and profession (horizontal equality) failed to create numerical (vertical) equality (Gorman, 2006; Valentova et al., 2007) and gender inequality remained (McMurdo, 2008). Women in the UK received fewer promotions even in typically feminine professions (school teaching, nursing and social work) and earned less pay than men, even for similar roles, such as university lecturers (Abbott, 2006). The United States' long history of women's under-representation as law practitioners (Fralick, 2009) also continues, although demographic analyses identified much change in gender segregation over the past 30 years (Sander & Yorke, 2009). Gender inequality, stratification and the varied constraints facing women in law have been documented in Argentina (Gastiazoro, 2007), Korea (Kim, 2008), the UK (Bolton & Muzio, 2008) and the US (Ortiz & Roscigno, 2009; Epstein, 2004). In China, simply being a woman lawyer resulted in less pay and reduced opportunities for promotion to partner (Michelson, 2009). In brief, the path to success in legal careers is, at every step, a gendered process (Mossman, 2006).

Australian legislation reflects a meritocratic method for social change. Section 2A(a) of the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) provides that the Act exists "to promote the principle that employment for women should be dealt with on the basis of merit". Meritocracy, manifested as promotion based on demonstrated skill, experience and talent, is the preferred solution to gender inequality in law (Eagly & Sczesny, 2009). As Justice McColl (2003) stated, "gender should be an irrelevant issue and all we want to be are lawyers; we want to be seen as lawyers, not women lawyers". A gender-neutral meritocratic promotion system should remove all causes of inequality, beyond women physically leaving the profession for family reasons (Schmitt et al., 2009). An ideology of meritocracy assumes an inaccurately heightened equal opportunity for professional success (Freeman, 2001; Eagly, 2004) as men continue to receive more promotions in the legal profession (Goswami, 2008). Therefore, a merely legalistic solution is insufficient for social change because attitudes, as well as social structure, perpetuate gender inequality.

Social attitudes towards gender in the Australian legal profession stem largely from stereotypes. Stereotypes here refer to role expectations (Eagly, 2004) held by members of the Australian legal profession about required standards and expectations of professional behaviours and skills. Stereotypes are crucial to sustaining gender inequality because they allow individuals to make instant judgements based on preconceived role expectations (Biernat, 2005; Madon et al., 2006; Pittinsky, Shih & Trahan, 2006). Individuals not only use stereotypes to make 'cognitive shortcuts' (Madon et al., 2006), but also to seek validation for assumptions to dismiss contrary evidence (Johnston & Miles, 2003). Gender stereotypes provide the theoretical basis for understanding 'successful' women in law who are treated as 'exceptional cases' (Slater, 2001) or 'men in skirts' (Kirby, 1997). Thus, we argue that stereotypes are crucial to understanding the invisibility of successful women and their ability to overcome the historical male dominance in law.

The notion that meritocracy may circumvent gender inequality in the legal profession requires examination of normative expectations associated with the term. The creation of meaning has been hermeneutically critiqued for overestimating the shared reality words

convey while ignoring the fundamental role tacit knowledge plays in effective communication (Altheide & Johnson, 1992). In other words, individuals perceive social reality differently. How one interprets situations has sociologically been shown to depend upon past experiences, socialisation and cultural norms which can and do vary by time and place. Social meanings, shared concepts and group values result from the pragmatic development of shared interpretations (James, 1977; Stryker, 1955; Athens, 2003). Individuals faced with interaction-situations and new objects (physical and existential) use learned skills and schemas to evaluate, interpret and determine appropriate courses of action (Athens, 1997). Over time, attitudes, customs, words and objects sustain coherent meaning (Blumer, 1998).

Our understanding of workplace gender inequality is informed by the 'equality-versus-difference' debates in feminist theory that shifted studies of employment segregation and discrimination (Scott, 1994) from systemic to individual levels as structuralism gave way to postmodernism (Littlewood, 2004). For example, in contrast with research on gender identity performance which presupposes a normative social order guided by social rules and hegemonic constructions of femininity / masculinity (Butler, 1990; Schwalbe, 2005; Duron, 2009), social interactionism argues that greater attention be paid to factors such as status and authority stemming from the social context and interactions producing inequality, rather than on a universal understanding of social inequality per se (Schippers, 2008).

The reproduction of inequality is a learned behaviour modelled on significant others (Mead, 1934). It is by modelling the behaviour of others, who may be real individuals and/or our imagined understanding of the social order, that the individual comes to see themselves as a social object, an individual within a specific social order, and thus is able to anticipate how others will respond to their behaviour (Mead, 1934; Blumer, 1998). Individuals may also learn, such as from co-workers' expectations, how not to behave (Athens 1997) since those who act contrary to the norm risk being labelled deviant (Becker, 1963; Eagly, 2004).

Beyond simple role expectations (Eagly, 2004), meritocracy exists as a shared cultural norm with shared meanings that become 'moral' standards by which behaviour is judged (Goffman, 1973). Moral standards, as vital to professional legitimacy and integrity (Hughes, 1962), guide perceptions of workplace equity. Images of 'ideal' and 'real' barristers assume critical importance for intra-group acceptance. Yet moral standards can be sites of inequality because groups are inherently homogenous and members often work to maintain the group's integrity at the expense of outsiders (Gorman, 2006; Perry, 2007; Hicks, 2008). If, as Leary (1995) asserted, individuals attempt to present self-images in accordance with group association, self-esteem and self-identity (Rosenberg, 1979), then the historical exclusion of women from the legal profession may perpetuate gender inequality. Thus, we hypothesise that Senior Counsel's perceived perpetuation of gender norms and behaviours, consistent with historical 'successful barrister' stereotypes, is likely guided by moral standards and maintained by real or perceived expectations.

CONTEXT

Gender Stereotypes Guiding Research Framework

Gender stereotypes in Australia's legal profession are static (Brooks, 2006) and based on an assumption that women lack the skills required to be successful barristers (Hunter & McKelvie, 1998). Two views of 'successful barrister' stereotypes are espoused in legal academia: the 'ideal' and the 'reality'. The 'ideal' barrister is a heroic truth finder

(Bainbridge, 2006), the *Perry Mason* character (Gardner, 1957) skilled in oration (volume, aggression) exhibiting legal intelligence (dominance), dogged-determination (arrogance) and focused brilliance (narrow-mindedness). The 'reality' stereotype, whose attributes appear in parentheses, is associated with health concerns and social problems (Richards, 2008).

Despite the perpetuation of gendered stereotypes in Australia's legal profession, some women have overcome the 'glass ceiling' (Schoombee, Hafford & Quai, 2001; Gazso, 2004) by becoming barristers, Senior Counsels and judges. These exceptions implore questions such as: Why did such women succeed? Did they perceive that they conformed to the profession's stereotypes? Gazso (2004) suggested success is based on women appearing to work harder than their 'male' colleagues (see Slater, 2001; Brooks, 2006) and the judicial response expressed concern that successful women in law may be seen as token 'men in skirts' or 'honorary men' (Gaudron, 1997 in Connelly, 2005; Kirby, 1997). In business, the phrase "exiles from their sex" (Wajcman, 1999, p. 11) was applied to successful women who faced prejudice, with achievements dismissed as evidence of deviancy (Becker, 1963) rather than professional ability (Barns & Preston 2002). Others have cautioned that viewing women in masculine terms is immediately problematic (Smith, 1990; Young, 1990; Code, 1991; Krakauer & Chen, 2003) and have argued that such stereotypes may dissolve progress toward gender equity (Zhang, Schmader & Forbes, 2009).

Research Framework and Question

Symbolic Interaction theory requires a qualitative method that allows researchers to examine social issues from the point of view of the individuals involved (Cooley, 1902; Goodrum, 2008; Hicks, 2008). By 'taking the role of the other' (Mead, 1934), researchers can appreciate and, arguably understand, the motivations behind social action (Muijs, 2004). Our research design was grounded in these premises, plus the feminist insight that research participants are the most qualified advocates of their own experiences (Kasper, 1994). Remembering that the separation of men's and women's perceived abilities and strengths is deeply entrenched in historical experiences (Gilligan, 1982; Gorman, 2006), a broad research aim is to question the degree to which meritocracy in Australia's legal profession is a gender-neutral ideal viable for achieving gender equity. Understanding meritocracy as a culturally relative, normative concept, our research question asks: *Do the perceptions of Australian women barristers promoted to Senior Counsel, and the behaviours of 'successful' practitioners, reflect the gender-neutral norm of meritocracy?*

Research Design and Sample

Our research followed a two-part process. First, all women in the Australian legal profession appointed to SC were electronically contacted and asked to complete a 19-item structured email interview. Second, field observations were conducted to explore visible manifestations of meritocracy in the workplace. The design was created in consultation with, and received support from, an 'insider' (Ambrey, 2003), a woman SC and cousin of the principal investigator, and approved by the University's Human Research Ethics Committee.

Email interviews were chosen because of suitability to the population (Sue & Ritter, 2007) and ability to overcome barriers to open and frank disclosure (Egan et al., 2006; Adler & Adler, 2008). Lacking the power dynamics typical of face-to-face interviews, this methodology has gained sociological support when data is contextualised as part of a word-based communicative event (Olivero & Lunt, 2004). Although absence of audio-visual cues is a shortcoming of email research (Murray & Sixsmith, 2003; Maczewski, Storey &

Hoskins, 2004), as a unique, modern communication tool (Weare, Loges & Oztas, 2007) its structure encourages frank responses (Murray & Sixsmith, 2003; Egan et al., 2006). Further, email permitted clarification of participants' answers to ensure accurate interviewer-interpretation of responses.

Every woman SC (N=39) listed by Australian State and Territory Bar Associations in 2008 as a current practitioner was invited to complete an email interview containing demographic and open-ended questions exploring their reasons for pursuing law, specialisation, professional image and perceptions about stereotypical attributes of 'successful' barristers. Seventeen accepted the invite and twelve completed interviews, yielding a 36 percent response rate. However, the notion of 'response rate' is generally of less significance in qualitative research since findings seek to provide thematic or in-depth knowledge rather than generalisations about a population (Monette et al., 2008).

Field observations enable researchers to contextualise participant responses. Field observations were conducted after completion and analysis of interviews. Informed by similar research (Morris, 2007; Sollund, 2007), this permitted comparison of interviewees' perceived stereotypes with workplace observations of 'successful' barristers in practice. Twenty-seven court matters in the NSW Supreme Court, Court of Appeals (CA) and five in the NSW Supreme Court, Common Law Division, were randomly selected, based upon likelihood of SC participation (Senior Counsel must be accompanied by a junior barrister and instructing solicitor so appearance in lower courts is rare), and observed. Twenty days of court viewing (December 2007-March 2008) for up to five hours per day, were conducted. The location met Patton's (1990) criteria of naturalistic inquiry that real world environments and interactions be studied as they occur; barristers performed everyday activities in the presence of an audience with public observers. To preserve anonymity no effort was made to observe interviewees. Leading counsel was observed in each case, with seventeen advocates observed in detail. Advocate appearance, behaviour and reception by judges (typically three judges preside over each CA matter) were recorded in a codebook. Close observation and coding of courtroom interactions also included court staff details.

Data Processing

Kasper's (1994) assertion that data provided by research subjects, mediated by their own self-expressive intentions, is a valid source of information informed the data analysis. As 'experts' in their field (Savin-Baden, 2004), participants' responses were approached as important and valid in their own right in accordance with the premise of Symbolic Interaction theory that, despite doing a 'poor job' of interpreting social situations, individuals always and without exception make interpretations and formulate actions based on their decisions (Blumer, 1998). Being mindful to account for researcher impact on data analysis (Thomas, 1993), we focused on repeated themes across participants' responses following Lupton's (2002) method of reading responses in light of the research. Following Humphries' (1970, p. 15) insight that "answers become clear only when we are aware what questions were asked and how conclusions were reached", close attention was paid to the nature of questions prompting specific answers.

Our data analysis followed an investigator-mediated style (Bourgois, 2003), taking into account Sciarra's (1999) warning that no research is free from the researchers' influence and Blumer's (1979, p. x) caution that "it is inevitable that [the researcher] will cast the area in terms of images of it...derived from the popular stereotypes of [the researcher's] group...". With workplace experience in law, our firsthand familiarity informed analysis of the social

subject, a classical recommendation of Mills (1959) who argued that researchers must be immersed in the subject's society and experience.

Borrowing Goodrum's (2008) approach to thematic analysis, interviews were organised by interviewee perceptions of their attributes (i.e. oratorical skill, hard work and legal knowledge) and legal stereotypes. Next, a list of SC-identified stereotypical attributes was taken to field observation sites to observe if and how these attributes manifested in courtroom interactions. During the 32 court observations, SC behaviour was compared to the listed attributes and communicative events were contextualised using courtroom expectations and norms articulated by current Australian legal education. For example, if a barrister argued with a judge, 'talking over' the judge and ignoring judicial direction to desist from a line of argument, this was categorised as 'aggression'. Similarly, barristers' vocal presentation and ability to be understood by judges was determined by coding judicial response to statements. For example, if a judge asked for clarification or advised that a statement was understood, this was noted under 'skill in legal argument'.

ANALYSIS

Six Senior Counsels from NSW, four from Victoria and one each from Western Australia and Queensland completed email interviews. Ages ranged from 40-60 and all but one were 'European Australian', that is, Australians of European descent. Seventy-five percent supported dependent children and 83 percent were married or partnered. Experience as barristers ranged from 17-29 years and as SC from 12 months to 18 years. Sixty-six percent felt they did not actively pursue a law career, that it was a passive response to multiple factors (i.e. family pressure, desired lifestyle). One participant thought law promised the best available option since, without career guidance, other options were unachievable or insufficiently interesting. Another suggested family influence assisted her choice: *My father was a barrister...he was very keen for one of us to do law. I was the 'lucky' one. Both my siblings had more sense* (SC9).

The majority (58 percent) offered gender-neutral, meritocratic qualities when asked to describe 'successful barrister' stereotypes. Descriptions included *intelligence* (SC11), *toughness and tact* (SC7), *confidence* (SC1) *diligence* (SC9) and *legal skills*, particularly, *the ability to spot a good argument from a morass of material* (SC8). One noted that stereotypes follow prominent and respected High Court judges: *If there is a stereotype, I think it would largely be both intellectual and industrious and typified by the great generalist advocates and financially successful role models provided by the likes of Michael McHugh and Murray Gleeson* (SC12).

Along with evidencing 'ideal' stereotypes, a third of respondents identified negative or 'reality' stereotypes such as *aggressive, arrogant, and out of touch with the rest of the world* (SC2) and someone who *works hard and plays hard, who sacrifices family for work-success* (SC3) as necessary for success. Negative stereotypes often demonstrated critique of more positive, 'ideal' attributes and skills. For example, hard work and assertiveness became an addiction to work at the expense of family and aggression was noted to negatively impact peer relationships. Interviewees who mentioned masculine imagery clearly linked it to negative stereotypes: for example SC2 added that the successful stereotype was *male* and SC6 described the stereotypical successful barrister as *undoubtedly male, non-indigenous, private school educated, [someone] who played rugby or cricket*. Positive stereotypes outlined legal skills and abilities required to become a successful barrister yet the negative stereotype focused on the individuals' character and was characterised as a masculine construct. Further,

when asked what attributes clients expected of ‘successful barristers’, respondents offered negative stereotypes where legal skills are instrumentally used to achieve outcomes at any cost or at least to [achieve] *the client’s most hoped for outcomes* (SC12).

Ninety-two percent of participants mentioned the importance of hard work, persistence and tenacity as key to their success in Australia’s legal profession. For example: *I am able to take responsibility for cases or applications. This means that solicitors feel safe with me – and confident that I know the judges and will put in the hard work on the detail* (SC5). Legal skills, such as *the ability to digest large volumes of information* (SC11) were deemed critical as were sensitivity to courtroom interactions and *an ability to focus on the issues in a case and knowing when to give up* (SC4). Flexibility as a lawyer, for example: *the ability to abandon or re-cast a prepared argument and run with another if the evidence is not what was anticipated or the Court is not receiving a point as anticipated* (SC1) as well as a flexible approach to career, e.g. [taking] *professional opportunities whenever they presented themselves, sometimes at significant personal cost* (SC8) were important.

Participants were asked about their self-image in light of the legal profession’s stereotypes of success. Over half framed their answer as a gender issue. SC8 noted, *I’m female and that takes you out of the mainstream at silk level straight away*. When asked if gender differences existed among SC, SC6 replied, *that is obvious, I would imagine*. SC7 said, *I am more warm and personal than most male barristers*. SC3 construed herself as having better work/life balance, *I think I am seen as having a more balanced [family] outlook than the stereotypical image*. Statements such as *I am [now] comfortable doing it my way* (SC9) and *I now have more confidence that you can retain courtesy and humility and act fairly and still conduct a robust and effective case* (SC1) expressed a sense of breaking away from stereotypical professional images associated with aggression and arrogance.

Analysis of courtroom field observations concentrated on one key theme: ‘argumentative encounters’. Defined as ‘when a barrister engaged in dialogue with a judge about a disagreement of fact or law’, analysis of argumentative encounters permitted examination of stereotypical attributes identified by interviewees: aggression, diligence, competency and legal skill. Findings are presented in two sub-themes: judicial response and legal competency.

Judicial Response

No overt difference was observed in the treatment of women and men barristers. When a barrister ignored a judge’s direction, was rude or refused to answer a direct question concerning the legal or factual basis of an argument, the judicial response was clear: such behaviour was unappreciated, irrespective of gender. In one case, when a barrister repeatedly proved unable to clarify the direction of his appeal argument, the judge informed the opposing barrister that there was no need for him to outline his argument and retired for deliberation, a clear message of dissatisfaction with the advocating barrister’s argument. In another case, when a male barrister’s mobile telephone rang during his speech, the judges exchanged looks of incredulity, leaned their heads back and sighed audibly.

Whether directed toward male or female barristers, judges and other court participants responded similarly by viewing aggression negatively. When an argument was constructed carefully, when respect was accorded to the judges by pausing to hear and reflect on questions and changing argument direction when prompted, judges thanked or complemented the barrister, engaging in friendly and positive dialogue regardless of gender. On one occasion, when a woman barrister stopped and reflected after being directed by a judge to

answer a particular question, her response was greeted with a nod of approval from the court officer and judge and a visible exchange of smiles between the instructing solicitor and client. Conversely, in another case detailed below, when a woman SC repeatedly refused to pause when directed to stop by a judge, another judge stopped her and asked the opposing barrister to explain negligence law and ‘duty to maintain property to a safe standard’ for his colleague.

Legal Competency

Legal competency is a key attribute required of successful barristers and seemingly influenced by gendered interaction norms, as illustrated by the following courtroom observation:

A male and female barrister opposed each other on a negligence appeal matter. One of the three CA judges stopped each barrister during his/her speech to ask questions about their statements. The barristers’ responses were very different. The man stopped, paused for over thirty seconds and calmly answered the question, asking whether the answer had satisfied the judge’s query. He did not raise his voice and maintained his composure. The judge thanked him for his response. The female barrister did not stop to reflect, continued to speak and talked around the issue until she gathered her thoughts and then gave a response. Unsatisfied, the judge asked her to clarify her position. She refused and repeated her statement. As the judge interrupted again, she raised her voice saying, No, I said... and repeated the same statement. The judge grimaced, exchanged a raised eyebrow with his judicial colleague, and the judge’s associates, usually student assistants, smiled to each other. The judge, after allowing the female barrister to finish, asked the male barrister to intervene and assist his colleague to clarify the facts in dispute.

The judges were visibly pleased by the male barrister’s flexibility (a trait identified by SCI’s interview) and angered by the female barrister’s aggressiveness. The male barrister was deemed competent because he gave the impression of being knowledgeable in the specific law; he knew the facts of his case and seemed conscious of the others involved. The judges responded accordingly, thanking him and deferring to his knowledge and opinion. The female barrister appeared incompetent; she gave the impression of not knowing the law, had little understanding of her case, or was unable to articulate the facts, and did not have the interpretive skills to discern the judges’ attitude.

A gendered division in perceived legal competency, as described in the above case, was anticipated across observations in support of Bogoch’s (1999) finding that judges perceived female lawyers as incompetent. However, this was not the case. This case exhibited the only observed interaction whereby a female barrister gave the impression of incompetency. From mobile phones ringing during arguments to blatant insulting of judges (i.e. one male barrister asked if the judge had read the relevant case law) most legal incompetency was displayed by male barristers. Nevertheless, judicial and court-participant responses remained consistent across the observations and confirmed an ideology of meritocracy in legal skills, impressions and attributes.

CONCLUSIONS

Gender inequality is a social problem with far-reaching impact beyond the Australian legal profession, a custodian of human rights (see NSW Bar Association, 2008a). This non-generalisable qualitative research highlighted specific instances where supposedly ‘gender-neutral’ meritocratic standards did and did not manifest as gendered stereotypes and interactions. Despite a supposed cultural shift in gender attitudes, introduction of family-friendly workplaces, and replacement of hegemonic and patriarchal standards for peer-assessment with merit-based guidelines, men still outnumber women in law’s upper echelons (McColl, 2006).

Masculine ‘ideal’ barrister images may be leftover historical remnants (Eagly & Sczesny, 2009), or, such images may appear gender-neutral while still exhibiting masculine values (Code, 1991). As proponents of ‘trickle up theory’ (Richards, 2008) mask reasons for gender inequality, we followed Young’s (1990) assertion that equality is achievable by publicising minorities’ otherwise-invisible experiences or perspectives. Feminist and Symbolic Interaction theories informed our research design, which utilised qualitative interviews to examine whether successful female Senior Counsels perceived ‘successful barrister’ stereotypes in gendered or meritocratic terms, and field observations to observe how gender affected barristers’ courtroom interactions with judges.

The ‘successful barrister’ stereotypes that Senior Counsels reported reflected the ‘ideal’ and ‘realist’ barrister typology (Gibson, 2008), with all but one focusing solely on positive, ‘ideal’ attributes related to skill and competency. This finding underpins the perceived importance of meritocratic peer assessment among interviewees. Women’s explanations for success echoed Goffman’s (1973) self-presentation thesis whereby success results from performance; performance of legal skill was perceived as critical to success.

A random sample of courtroom proceedings was observed, prioritising ‘argumentative encounters’, to examine how SC-articulated stereotypes (aggression, diligence, competency and legal skill) might manifest during interactions. Initially, a gender division between ‘ideal’ and ‘realist’ stereotypes (Gibson, 2008) appeared to confirm historically-masculine imagery (Bainbridge, 2006; Bogoch, 1999). Courtroom observations demonstrated that legal skill depended on conveying competency. The male barrister whose mobile telephone rang tarnished his image (Goffman, 1973) and lost authority’s respect, as did the female Senior Counsel who ignored judicial advice. By prioritising legal skill, the meritocratic ‘ideal’ appeared to remove gender from the courtroom.

Attributes required for meritocratic success, however, are constructed interpretatively in a shared process, becoming a moral standard (Goffman, 1973). If masculinity guides the illusory gender-neutral standard of meritocracy (Barretto et al., 2009), then merit-driven, ostensibly gender-neutral attributes (legal skill, aggression/assertiveness and confidence) may perpetuate discrimination. The majority of female Senior Counsels interviewed distanced themselves from inherently *male* (SC6) ‘successful’ stereotypes and did not pursue law careers to become successful professionals; rather law was the most available, attractive or only option to satisfy desired lifestyles or meet family pressures. Female lawyers are often highly motivated and high-performing (Connelly, 2005), yet like female veterinarians, only ‘super-achievers’ are successful (Slater, 2001). Senior Counsel interviewees echoed these sentiments, with 92 percent mentioning the importance of hard work, persistence and tenacity as keys to success in Australia’s legal profession. This adds to past research (Slater, 2001; Brooks, 2006) which has found that women must work harder than men to live up to ‘ideal’ masculine expectations that may be untenable or unnecessary (Eagly, 2004) to attain endorsement and respect from a social group (Goode, 1978). Theoretically, it advances

notions that when stereotypes guide professional expectations (Eagly, 2004; Hicks, 2008) or standardisation relies on historically-masculine imagery, femininity is viewed through a masculine lens (Code, 1991). Empirically, it offers qualitative Australian examples supporting international findings that women often fulfil 'ideal' stereotype requirements (Gorman, 2006) and often work harder to achieve the same success as men, which may derail true equality (Eagly & Sczesny, 2009).

Female Senior Counsels interviewed did not perceive themselves as Senior Counsels, but rather as *female* Senior Counsels, as different from men (Slater, 2001; Brooks, 2006). Whilst courtroom observations failed to confirm that Australian judges perceived female barristers as incompetent because of gender, as observed in Israel (Bogoch, 1999), some Senior Counsels perceived that clients prefer barristers who display 'masculine' attributes, with ruthlessness necessary for victory. Support is offered for past research which has found that clients choose barristers perceived most likely to win (Hunter & McKelvie, 1998), with one Senior Counsel noting that clients seek counsel who can [*achieve*] *the client's most hoped for outcomes* (SC12). This is problematic, however, to the extent that social attitudes are grounded in masculine ideal images based on 'successful barrister' stereotypes promulgated by mass media (Bainbridge, 2006). Those exhibiting the apparently gender-neutral attributes identified by the interviewees may be overlooked by clients and instructing solicitors, thereby creating circular inequality in briefing practices (McMurdo, 2008).

Stereotypes perpetuate attitudes fostering gender inequality (Zhang et al., 2009) and gender stereotypes and attitudes are integral to the inequality experienced by women lawyers (McMurdo, 2008). Gender-neutral standards based on masculine constructs cannot be truly gender neutral. Successful presentation of a self-image of legal competence is the key criteria for meritocratic approval in the legal profession. For this to be achieved, attributes revealed in this study, such as 'aggression', 'ruthlessness' or other 'negative' stereotypes must be disassociated from gender whilst traditionally feminine attributes, such as 'warm and personable' must also come to be perceived as gender-neutral by clients, legal professionals and society more broadly. Rendering visible social constructs, such as meritocracy, designed to overcome inequality, yet historically steeped in masculine heritage, is a sociological project requiring additional research to change discourses and gender/power relations perpetuating the 'glass ceiling' (Barreto et al., 2009; Eagly & Sczesny, 2009; Schoombee et al., 2001).

The finding that female Senior Counsels upheld meritocratic qualities as their personal key to success supports perceptions that practices promoting numerical equality without reference to merit may leave women's promotion open to severe criticism (Dworkin, 1977; 1986; Brooks, 2006). Women's equality in career success requires professional legitimation, not political tokenism, to be perceived as more than 'exceptional cases' (Slater, 2001), 'men in skirts' or 'honorary men' (Gaudron, 1997 in Connelly, 2005; Kirby, 1997) or 'exiles from their sex' (Wajcman, 1999). By exploring stereotypes and ideals foundational to one specific social institution, the Australian legal profession, it is our hope that the perceptions of a minority group of women, successful Senior Counsels, and the observation of courtroom interactions, will offer novel theoretical and empirical insights prompting social change and gender equality more broadly.

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