

## Equitable briefing: a conversation with Phillip Boulten SC

As a response to the Law Council's National Attrition and Re-engagement Study Report (NARS), the Equal Opportunity Committee will identify senior practitioners as Advocates for Change. Phillip Boulten SC has been selected as an Advocate for Change in the area of criminal law for defence barristers. Talitha Fishburn spoke to him about his views on female defence barristers and the extent to which equitable briefing impacts them.

Phillip Boulten SC has tutored and mentored many junior barristers over his long career as a barrister in criminal law. 'More than half of my readers were female', he reflected, 'and they were outstanding advocates. They worked hard and they delivered well.' Of his female readers, Boulten observed that one is now a senior counsel, one is a magistrate, and others have a very substantial criminal law practice. He added, 'They were good. Very good. But I can see the same qualities in many female barristers around me, even the absolute newcomers to the bar. They have a lot of talent.'

Boulten noted that barristers at the criminal law bar tend to be very experienced advocates in criminal law prior to coming to the bar. They mostly hark from Legal Aid, the Aboriginal Legal Service or private criminal law defence firms. Their weapon is their very real experience of standing up and running a case. Accordingly, the 'bar' is a high one at the criminal law bar. In particular, the standard of oral advocacy and familiarity with evidence law at the criminal law bar tends to be high even among very new barristers. He stated of criminal law barristers, 'Most of them hit the ground running from day one.' When it comes to females, there is no exception to this. 'Most of the female barristers, even the very junior ones, have a wealth of excellent experience in criminal law and in oral advocacy.'

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Boulten is committed to advancing equitable briefing at the bar. However, he admits that from a pure numbers point of view, female barristers at the criminal law bar have a 'fairly good rating' compared with other areas of law, such as commercial litigation. He is aware of the statistics recording extremely low numbers of females with speaking roles in commercial litigation. However, in criminal law, the statistics are far less



skewed and there tends to be more gender parity in briefs and in speaking roles in court.

As for speaking roles in criminal law, that is its 'bread and butter'. Seldom is there a criminal law brief that does not require a speaking role. The reasons for this are twofold. First, criminal advocacy (especially at the trial level) is overwhelmingly oral, compared to the written submissions that dominate other areas of the law. Similarly, in a criminal trial, the mode of adducing evidence tends to be oral compared to civil trials that rely on affidavits for evidence in chief. Secondly, 'junior' briefs, in the sense of being 'led' are few and far between in criminal law compared to other areas where a team of barristers may be briefed for the one client, and junior barristers in such cases might not even go to court, let alone have a speaking role. Particularly in Legal Aid funded cases, due to funding caps, there is virtually never the opportunity for two or more persons to be briefed as might routinely happen in commercial cases.

Despite this gossamer of a 'fairly good rating', for female barristers in criminal law compared to their male colleagues, Boulten is adamant that 'serious work is still to be done' to level the playing field for female barristers in criminal law. 'We all really need to turn our mind to this,' he implores.

Talitha Fishburn, 'Equitable briefing: a conversation with Phil Boulten SC'

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While the bald numbers of briefs to females are somewhat better, a more than superficial analysis of these numbers shows some alarmingly wide gaps in terms of the quality and types of practice which are divided along gender lines.

First, the 'really good cases' tend to be briefed to males. That is, the more complex, longer, significant or substantial criminal law trials, possibly with a high profile dimension, tend to be briefed to males rather than females. In contrast, female barristers receive fewer of these sorts of cases and are disproportionately briefed in local court matters and summary matters more so than their male colleagues. In Boulten's view, if a barrister is not getting experience in significant and more complex matters, and tends to be working on the more routine lower court trials, it is harder for them to eventually step up. Accordingly, the quality and type of brief is a matter for attention in bridging the gender gap at the criminal law bar.

Second, in criminal law, briefs are either privately funded or Legal Aid funded. The former tend to be substantially more remunerative than the latter, although there are fewer of them. Female barristers tend to be briefed in fewer privately funded briefs than male barristers. This in turn may contribute in a very material way to the statistic of pay disparity between males and females at the criminal law bar. The pay disparity between males and females at the bar is another gap that needs to be addressed.

Boulten speculated that a reason why female barristers tend to receive briefs for criminal law trials of *shorter* duration, is the perception in the market that women with family commitments are unable to commit to a longer trial. Sometimes, he noted, the inability to commit to a long trial for family reasons is a complete misconception, in other circumstances, it may have some basis. Despite this, Boulten said that a woman's choice to have a family should be no anathema to a successful practice at the bar. He believes that such misconceptions and stereotypes need to be addressed front on.

Boulten recounted examples of some women who needed flexible working arrangements to accommodate family commitments who took off longer blocks of time in between

longer trials, rather than work on a reduced workload from week to week. This meant that the barrister was able to take on longer cases and get experience in more complex cases rather than only accept shorter cases.

This is obviously a big sacrifice that a woman makes. In an ideal world, the market would not require this, but we have courts that sit for five days a week. But if this is a tangible solution that allows a woman with family commitments to accept longer cases, it needs to be facilitated from all sides.

Boulten disagrees that criminal law briefs where gender is in issue (for example, sexual assault trials) do not, despite the stereotype, lend themselves more to a female or a male barrister. Rather, he emphasised, 'A serious female barrister can win the confidence of the hardest jury and the most exacting trial judge just as quickly and just as effectively as a man. I have seen it countless times.' It is a myth that particular briefs are gender critical.

A criminal law practice is built on one's professional connections as well as referrals from other barristers. When Boulten identifies a talented junior barrister, he plainly states to his solicitors, '*You really need to try [X]*'. He admits that he tends to make such recommendations based on talent, regardless of gender. But he added that he is particularly committed to telling his private clients about talented female barristers.

In the opinion of Boulten, there is work to be done to improve gender disparities at the criminal law bar. In summary, he concluded as follows. First, immediate short term solutions are available. These include banishing misconceptions and baseless stereotypes. It also involves conscious recommendations and referrals of talented female barristers. Second, longer term solutions need to start. This includes engagement by the Bar Association, courts, chambers, Legal Aid and private firms thinking of ways to brief female barristers on longer trials despite family commitments.