Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia

Pam Stewart* and Anita Stuhmcke†

Abstract

This article presents the findings of the first systematic and comprehensive study to probe a substantial tranche of applications for special leave to appeal to the High Court of Australia. Special leave to appeal is discretionary and a case must satisfy the public interest test in s 35A of the *Judiciary Act 1903* (Cth) to be granted leave to appeal. This article presents findings as to the characteristics of the litigants and legal representatives involved in special leave applications. The data reveals high numbers of self-represented applicants and low numbers of legally aided applicants, as well as disproportionate success rates for those litigants who enjoy an advantage because of greater resources and litigation experience. The study also highlights a striking lack of diversity in both applicants and lawyers appearing in special leave applications. These are all matters that are outside the control of the High Court and that have an effect on the nature and flow of the Court's appellate work. The study demonstrates that a High Court appeal is, in many cases, restricted to well-resourced litigants and that there are significant access to justice issues for self-represented litigants due to the limited availability of legal aid.

I Introduction

An application for special leave to appeal is the gateway to final appellate consideration of a case by the High Court of Australia. The resources available to the High Court are finite, limiting the Court's attention to appeals involving questions of particular importance, so that the vast majority of applications for special leave are unsuccessful. Investigation of special leave applications, both successful and unsuccessful, provides insight into the operation and reliability of the

* Senior Lecturer in Law, University of Technology ('UTS') Sydney, New South Wales, Australia.
† Professor of Law, UTS Sydney, New South Wales, Australia.
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special leave to appeal requirement and identifies external factors that may constrain the Court in its work.

In this article, we present the findings from a study of all 783 special-leave-to-appeal applications determined by the High Court between March 2013 and February 2015. It is now more than 30 years since s 35A of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*') introduced the almost universal special leave requirement.[1] However, this is the first study to examine a substantial tranche of High Court special leave applications in a systematic and comprehensive way. Importantly, this study offers insights into the special leave process that are not available in existing literature. The data pre-dates the 2016 changes to special leave procedures that have resulted in significantly more applications being determined 'on the papers' without oral hearings.[2] The substantive law as to the requirements for special leave remains constant, so the findings of this study are particularly topical and relevant in light of the recent procedural changes. It is significant because the 2016 procedural changes have resulted in fewer applications being heard orally, with the capacity for detailed research using publicly available data now considerably reduced because of the lack of detail about cases, parties or lawyers in the published dispositions of applications heard on the papers. The volume of data publicly available to the present researchers, particularly that extracted from the transcripts of the many applications heard orally, will not be available in future without access to individual court files for the increased volume of applications heard on the papers. The increased use of 'paper only' determinations has resulted in a loss of transparency about the specifics of the special leave process, making this study well timed and of considerable interest to lawyers,[3] researchers and administrators.

The study results show that concerns regarding the administration of justice generally are equally relevant to applicants for special leave to appeal to the High Court. Those concerns include:

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1 Under s35A, inserted into the *Judiciary Act* by *Judiciary Amendment Act (No 2) 1984* (Cth) s 4. Appeals to the Full Court from a single Justice exercising original jurisdiction of the High Court do not require leave, though appeals from interlocutory judgments do: *Judiciary Act* s 34. The removal of the appeal as of right occurred gradually and was complete by 1984: *Judiciary Amendment Act (No 2) 1984* (Cth) s 3. In criminal matters, special leave to appeal has always been required: *Judiciary Act* ss 35–35AA. See David F Jackson, 'The Australian Judicial System: Judicial Power of the Commonwealth' (2001) 24(3) *University of New South Wales Law Journal* 737. For a history of the *Judiciary Act* provisions and requirements for appeal, see *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194, 205–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

2 High Court of Australia, *Changes to High Court Procedures for Considering Applications for Special Leave* <http://www.hcourt.gov.au/assets/corporate/policies/Special_Leave_Changes.pdf>. See also Jeremy Gans, 'News: Court Announces Fewer Oral Hearings for Special Leave Applications' on Jeremy Gans, *Opinions on High: High Court Blog* (16 March 2016) <https://blogs.unimelb.edu.au/opinionsonhigh/2016/03/16/news-court-announces-fewer-oral-hearings-for-special-leave-applications/>.

3 Gans, above n 2.

- limited access to justice[4] because of severe restrictions on availability of legal aid;[5]
- the difficulties faced by self-represented litigants;[6]
- limited access to legal advice, representation and remedies for women and children;[7]
- disproportionate success rates for those most 'capable' litigants who are seasoned players with significant resources;[8] and
- lack of diversity in counsel briefed to appear.[9]

Each of these matters is deeply concerning for a final apex court. The availability of legal aid, the diversity of litigants and counsel, and the advantages enjoyed by well-resourced and seasoned litigants are all factors outside the control of the Court, yet they influence the Court's assessment of special leave applications and selection of cases for appellate hearing.

This study demonstrates the very restricted availability of legal aid to special leave applicants, with only 5.11% of applicants represented by a legal aid body at oral hearings during the study years. Related to the limited availability of legal aid

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4 Law Council of Australia, *The Justice Project* (2017) <https://www.lawcouncil.asn.au/justice-project/about-the-project>; Community Law Australia, *Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System* (July 2012) <http://www.communitylawaustralia.org.au/wp-content/uploads/2012/07/CLA_Report_Final.pdf>.

5 Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 208 <https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2002-04/legalaidjustice/report/contents>; Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System* (February 2004) <http://lca.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload079a.pdf>.

6 Productivity Commission, Australian Government, *Access to Justice Arrangements* (Report No 72, September 2014) vol 1, ch 14 ('Self-represented litigants') <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>; Elizabeth Richardson, Tania Sourdin and Nerida Wallace, *Self-Represented Litigants: Gathering Useful Information* (Final Report, Australian Centre For Justice Innovation, June 2012).

7 Pam Stewart and Anita Stuhmcke, 'Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond' (2014) 38(1) *Melbourne University Law Review* 151; Catherine Branson QC, President of the Australian Human Rights Commission, 'Women as Agents of Change: Balancing the Scales' (Speech to Commonwealth Law Ministers' Meeting, NSW Government House, Sydney, 13 July 2011) citing UN Women, *2011–2012 Progress of the World's Women: In Pursuit of Justice* (2011) 52–5 <https://www.humanrights.gov.au/news/speeches/president-speech-women-agents-change-balancing-scales>; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002); Louis Schetzer and Judith Henderson, 'Access to Justice and Legal Needs, Stage 1: Public Consultations' (Law & Justice Foundation of New South Wales, August 2003) 67 [2.105] <http://www.lawfoundation.net.au/ljf/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/$file/public_consultations_report.pdf>; Ustinia Dolgopol, 'Justice for Children: The Obligations of Society, Lawyers and Law Schools' (1997) 1(3) *The Flinders Journal of Law Reform* 297.

8 Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95 (Galanter's theory is known as 'party capability theory').

9 Daniel Reynolds and George Williams, 'Gender Equality among Barristers before the High Court' (2017) 91(6) *Australian Law Journal* 483; Russell Smyth and Vinod Mishra, 'Barrister Gender and Litigant Success in the High Court of Australia' (2014) 49(1) *Australian Journal of Political Science* 1.

is the large number of unrepresented applicants, with 46% of all applicants self-representing during the research period. Not one of those applicants was successful. The study reveals limited access to the High Court for women and children, with very few female applicants (18% of individual applicants) or child applicants (1.71% of individual applicants) during the study years. The data demonstrates a conspicuous lack of gender diversity in counsel appearing, with female counsel accounting for just 7.04% of lead advocates briefed for either party in special leave hearings. The disproportionate success rate for the most capable litigants evidenced by previous research is confirmed with the most frequently successful applicants being government and public authorities who succeeded in 53.57% of their applications.[10] By contrast, the overall success rate for all applicants was 10.22%.

Part II of this article provides the context of our study with an outline of the constitutional and statutory framework and procedure for special leave to appeal to the High Court. The study methodology is detailed in Part III. Part IV presents the findings of the study as to overall success rates in special leave applications by reference to case categories and having regard to the public interest function of the High Court and s 35A of the *Judiciary Act.* In Parts V–VIII we provide data detailing the kinds of applicants seeking special leave to appeal and their success rates, and use this to test party capability theory.[11] Lastly, in Parts IX–X our findings about seniority and gender of counsel appearing in special leave applications reveal the prevalence of senior counsel,[12] the apparent influence of a small number of very senior members of the Bar and the significant under-representation of female counsel in special leave hearings.

II Special Leave to Appeal: The Constitutional and Statutory Framework and Procedure

The High Court of Australia is the final Australian appellate court. Special leave to appeal to the High Court is required for all appeals from Australian state and territory supreme courts, from state courts exercising federal jurisdiction and from the Federal Court of Australia.[13] Leave is also required for appeals from interlocutory decisions of High Court justices exercising original jurisdiction.[14]

The requirement for special leave to appeal makes the High Court's appellate jurisdiction entirely discretionary.[15] The Court selects the cases that it hears and

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10 Galanter, above n 8; Reginald Sheehan and Kirk Randazzo, 'Explaining Litigant Success in the High Court of Australia' (2012) 47(2) *Australian Journal of Political Science* 239; Burton M Atkins, 'Party Capability Theory as an Explanation for Intervention Behaviour in the English Court of Appeals' (1991) 35(4) *American Journal of Political Science* 881; Herbert Kritzer, 'The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?' in Herbert Kritzer and Susan Silbey (eds), *Litigation: Do the "Haves" Still Come Out Ahead?* (Stanford University Press, 2003) 342; Kevin T McGuire, 'Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success' (1995) 57(1) *Journal of Politics* 187.

11 Galanter, above n 8.

12 'Senior counsel' may include 'Senior Counsel' ('SC') and 'Queen's Counsel' ('QC').

13 *Judiciary Act* ss 35, 35AA; *Federal Court of Australia Act 1976* (Cth) s 33.

14 *Judiciary Act* s 34(2).

15 *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194, 218 [36] (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). In *Coulter v The Queen* it

thereby guides development of the law according to its own program and pace. Section 35A of the *Judiciary Act* prescribes matters that must be considered on an application for special leave to appeal:

> In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:
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> (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
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> (i) that is of public importance, whether because of its general application or otherwise; or
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> (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
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> (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

Sir Anthony Mason recognised that these concerns represent a focus on the High Court's public interest function, rather than on the private rights of litigants:

> Section 35A reflects a tension between the Court's law-making and adjudicative function. Requirement for special leave, as a condition of an appeal to the High Court, stems from acceptance of the proposition that litigants are entitled to one appeal from a judgment at first instance, but a second appeal to an ultimate court of appeal can only be justified if it serves the public interest. Public interest may be served by clarifying the law, or by insisting on procedural regularity, though, in the particular case, this might be said to relate more closely to the adjudicative function of the courts. The tension to which I refer arises between the public and the private interests served by an appeal to the High Court.[16]

Criminal special leave applications may focus on miscarriage of justice arguments related to individual circumstances without substantial reliance on questions of legal principle, though the public interest is served in avoiding any miscarriage of justice.[17] Justice Kirby writing extra-judicially in 2002 traced the

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was held to be an 'extremely wide judicial discretion': (1988) 164 CLR 350, 359 (Deane and Gaudron JJ). See also, Sir Anthony Mason, 'The State of the Judicature' (1994) 20(1) *Monash University Law Review* 1, 6.

16 Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1, 4; *Morris v The Queen* (1987) 163 CLR 454, 475 (Dawson J); Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784. O'Brien refers to 'the antimony' created by the juxtaposition of the High Court's public and private functions: David O'Brien, *Special Leave to Appeal* (Supreme Court of Queensland Library, 2nd ed, 2007) 46.

17 The issue of whether the interests of the administration of justice in criminal cases require a grant has been referred to as the 'visitation' jurisdiction: Justice Hayne 'Advocacy and Special Leave Applications in the High Court of Australia' (Speech delivered to the Victorian Bar, Continuing Legal Education, Melbourne, 22 November 2004) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej_22nov04.html>; Ben Wickham, 'The Procedural and Substantive Aspects of Applications for Special Leave to Appeal in the High Court of Australia' (2007) 28(1) *Adelaide Law Review* 153.

significant increase in appeals in criminal matters heard by the High Court from its inception and opined that the Court's criminal work was 'quite possibly the most vital part of the law of our community' having 'considerable social importance'.[18]

The limitations on access to justice, restricted diversity in litigants and legal representatives, and disproportionate advantage for the most capable litigants revealed by the present study may well create some dissonance between the public interest that the Court is compelled to serve under s 35A of the *Judiciary Act* and the interests of individual litigants.

The special leave process is efficient, as is no doubt dictated by the Court's considerable workload, yet that efficiency, coupled with the broad discretion exercised in the selection of cases for appeal, creates some opacity as to the manner in which special leave applications are considered. Procedures are streamlined. Following changes to pt 41 of the *High Court Rules 2004* (Cth) ('*High Court Rules*') in 2016,[19] a large number of applications for special leave are now dealt with 'on the papers'. Rule 41.08.1 permits two Justices to determine *any* application without an oral hearing.[20] Previously only those matters where the applicant was unrepresented were heard on the papers.[21]

All applications are now initially examined by a panel of two or three Justices. If the panel, in its broad discretion, decides that an application can be granted or refused without oral argument, then orders are published in open court. The Court's published 'dispositions' of matters heard on the papers offer brief formal reasons with scant information about the substance of the case, the parties or their lawyers.[22] If the panel decides that an application warrants oral hearing, then it is listed. There is no guidance as to how the justices decide which applications are to be heard orally. On the question of when an application might be listed for hearing, Kirby J (referring to the pre-2016 rules) has stated that

> [i]f there is the slightest possibility that oral argument could change our inclination, or that a point might have been missed in the courts or tribunals below or by the applicant, we will arrange for the application to be removed

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18 Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30(3) *University of New South Wales Law Journal* 731, 744–5; Justice Michael Kirby, 'Why Has the High Court Become More Involved in Criminal Appeals?' (2002) 23(1) *Australian Bar Review* 4. See also *Morris v The Queen* (1987) 163 CLR 454, 475 (Dawson J).

19 Part 41 changes under the *High Court Amendment (2016 Measures No 1) Rules 2016* (Cth) sch 1 item 2 commenced 1 July 2016.

20 Of the applications decided in 2016–17, 75% were finalised without an oral hearing: High Court of Australia, *Annual Report 2016–2017* (30 November 2017) 21 <http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2016-17.pdf> ('*2016–17 Annual Report*').

21 Former *High Court Rules* 2004 pt 41 r 41.10.5, now repealed and replaced: *High Court Amendment (2016 Measures No 1) Rules 2016* sch 2 item 2. The new pt 41 does not include separate rules for self-represented applicants except that a respondent need not file a response where an applicant is self-represented unless directed to do so by two Justices (r 41.05.2). In *Cachia v Hanes*, the High Court recognised the right of a litigant to self-represent, but noted the extra burden on the court administration, consequent delays and inefficiencies in the litigation process: (1994) 179 CLR 403, 415–16 (Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

22 For a statistical analysis of reasons given in 40 special leave applications, see Luke Beck, 'The Constitutional Duty to Give Reasons for Judicial Decisions' (2017) 40(3) *University of New South Wales Law Journal* 923.

> from the list for disposition on the papers. We will direct that it be listed for oral hearing.[23]

If an application is listed for hearing, written submissions and summaries of argument are required.[24] Oral hearings are short, with timing strictly prescribed. Each party is allowed 20 minutes for argument with an applicant's reply of five minutes, unless the Court orders otherwise.[25] A party may not necessarily be called upon to present oral argument. The Court may decide that one side of the case is strong and may hear from the opposing party only,[26] subject to procedural fairness considerations.

III Methodology

This study analyses all 783 special leave decisions of the High Court between March 2013 and February 2015. This period was chosen because the composition of the High Court was static, the personnel being Chief Justice French and Justices Kiefel, Crennan, Bell, Gageler, Keane and Hayne.[27] The decisions were accessed electronically.[28] The large volume of data had to be extracted from the publicly available records without the aid of technology: a system of electronic data retrieval or machine learning was not possible because of the form in which the records are available on the AustLII database and on the High Court website. The special leave applications coded included those considered on the papers under the then applicable *High Court Rules* rr 41.10.5 and 41.11.1 and also those heard orally under *High Court Rules* r 41.11.3.[29] The data set for the study reported here was collated using variables identified and defined by the information available in special leave dispositions and transcripts. The dispositions provide very limited information about parties or their cases though it was possible to extract the data sought in some instances by referring to the lower court judgment from which special leave to appeal was sought. Other information was simply not available from either dispositions or transcripts, for example Legal Aid funding for private lawyers. These gaps in available information made interpretation of some data difficult and there are instances where we acknowledge that specific findings are not possible.

In all, more than 50 variables were coded. The major data-points extracted and analysed in this article are:

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23 Kirby, 'Maximising Special Leave Performance', above n 18, 745.

24 *High Court Rules* r 44.

25 Ibid r 41.08.3.

26 Hayne, above n 17.

27 Justice Keane was sworn in as a Justice of the High Court on 5 March 2013. From that date the Bench remained constant until Justice Nettle was sworn in as a Justice of the Court on 3 February 2015, replacing Justice Crennan who retired on 3 February 2015.

28 Four sources were used to collect and cross-check data: High Court of Australia, *Special Leave Applications Results 2014,* <http://www.hcourt.gov.au/registry/special-leave-applications-results-2014>; AustLII, *High Court of Australia Special Leave Dispositions* <http://www8.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/HCASL/>. Abandoned or discontined applications were not included in the data set.

29 See above nn 19–21 and accompanying text.

(1) General case categories of civil, immigration and criminal.[30] These categories have been used by the High Court, in its annual reports for the years covered by our research, to differentiate areas of its work.[31] At a more granular level, 28 categories of legal practice were also coded.

(2) Hearing type (oral or 'on the papers') and length of oral hearings.

(3) Success rates: grant or refusal of special leave, overall and relative to party type.

(4) Legal representation of parties: self-representation; legal aid bodies appearing; details of solicitors and counsel.

(5) Names and status of all parties: individuals; corporations; government and public authorities; other entities.

(6) Gender and maturity (adult or child) of individual parties.

(7) Counsel seniority and success rates.

(8) Gender of counsel appearing in lead (speaking) roles and in secondary roles.

These data-points were selected in order to determine who is using the High Court, whether there are identifiable barriers to access and, if so, for whom, and whether particular parties enjoyed any discernible advantage. We were also keen to examine diversity of gender and seniority among lawyers in special leave applications.

The data regarding success rates relative to party type confirms existing research recognising that more experienced and better resourced parties enjoy greater success.[32] The data concerning self-represented and legally aided applicants raises concerns regarding opportunity to appeal to the High Court in particular and access to justice more broadly. Similarly, the data relating to the gender and age of applicants speaks to a lack of opportunity for women and children to access the justice system at the highest level. Of equal concern is the data on gender of counsel appearing in special leave applications revealing significant disparities in briefing patterns for male and female barristers.

IV Overall Success Rates

The obvious starting point for analysis of empirical evidence concerning special leave applications is the overall success rates for those applications. It would come

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30 Immigration cases were separately categorised because they accounted for a very significant proportion of the total number of 'civil' cases and because their inclusion (without separate identification) in the civil case category would potentially have distorted the figures as to self-representation, paper hearings and success rates in the remaining civil cases being appeals from state and territory supreme courts and from the Federal Court exercising jurisdiction other than in immigration matters.

31 See, eg, High Court of Australia, *Annual Report 2013–14* (12 November 2014) 20 (Table D) <http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA-Annual-Report-2013-14.pdf> ('*2013–14 Annual Report*'). The Court's most recent Annual Report does not provide any such breakdown: High Court of Australia, *2016–17 Annual Report*, above n 20, 21.

32 Galanter, above n 8.

as no surprise to any Australian lawyer that the success rates are very low, given the numbers of applications filed compared with the finite capacity of the High Court to hear and determine appeals.

From 1 March 2013 until 3 February 2015 there were 783 applications for special leave disposed of by the High Court and, of those, 80 were granted special leave to appeal. That represents a 10.22% overall success rate. This figure is consistent with the High Court's own statistics. The *2013–14 Annual Report* discloses a 10.5% success rate for special leave applications in 2012–2013 (44 granted, 375 refused) and an 11.29% success rate in 2013–14 (54 granted, 418 refused).[33] The temptation in a first response to these low success rates might be to interrogate them in terms of 'access to justice' given that clearly there are very few litigants whose final appeals are heard by the High Court. But here, the essential function of the High Court must be borne in mind. The appellate jurisdiction does not exist to provide yet another appellate opportunity for a disappointed or persistent and often well-resourced litigant who has already failed in an intermediate appellate jurisdiction.[34] Rather, s 35A mandates a focus on the Court's public interest responsibility.[35]

Of considerable interest is the breakdown in Figure 1 (below) of the total number of cases in this study into three main categories; namely civil, criminal and immigration.[36] This profile of the Court's work enables closer scrutiny of issues such as the effects of self-representation, mostly in immigration matters, and the availability of legal aid, which is almost entirely confined to criminal matters. The types of applicant also tend to be aligned with particular categories of case. Obviously, there are no corporate applicants in immigration matters. This has some significance when comparing relative success rates between well-resourced applicants and others.

Immigration cases accounted for 27% of all civil applications. This figure is consistent with the High Court's own statistics. In 2013–14 immigration matters comprised 28% of all civil applications and in 2012–13 the proportion was 24%.[37]

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33 High Court of Australia, *2013–14 Annual Report*, above n 31, 33 (Table I).

34 Kirby, 'Maximising Special Leave Performance', above n 18, 745.

35 David F Jackson, 'The Australian Judicial System: Judicial Power of the Commonwealth' (2001) 24(3) *University of New South Wales Law Journal* 73 and 'The Lawmaking Role of the High Court' (1994) 11 *Australian Bar Review* 197 and 'Practice in the High Court of Australia' (1997) 15 *Australian Bar Review* 187; Kirby, above n 18. Professor Luntz examined the special leave criteria applied by the High Court in 18 tort law cases in 2003 and concluded that few of the criteria for a grant of special leave were apparently satisfied in those cases (though the sample of cases is very small): Harold Luntz 'Round-up of Cases in the High Court of Australia in 2003' (2004) 12 *Torts Law Journal* 1, 10.

36 These categories were used by the High Court in its annual reports for the research years: above n 31. Constitutional cases, that is 'matters arising under the Constitution or involving its interpretation' are within the original jurisdiction of the High Court (*Judiciary Act* s 30) and are not required to seek special leave to appeal. Accordingly, there are no constitutional cases in the data set. For research concerning constitutional cases see, Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2015 Statistics' (2016) 39(3) *University of New South Wales Law Journal* 1161. This article is part of a series, commenced in 2003.

37 High Court of Australia, *2013–14 Annual Report*, above n 31, 17. See also Table D of the High Court of Australia *Annual Report 2012–2013* illustrating the number of immigration matters as a proportion of civil special leave applications filed in the 10 years prior to 2013–14 <http://www.hcourt.gov.au/

During the research period criminal cases made up 20.56% of the total number of applications and civil cases, other than immigration cases, made up 57.98% with immigration cases accounting for 21% of the total number of applications.[38]

Figure 1: Types of applications, success rates and hearings

	Outcome			**Hearing type**		
	Granted (no.)	Refused (no.)	Success rate (%)	On paper (no.)	Oral (no.)	Total cases
Civil law	53	401	11.67	243	211	454
Criminal law	23	138	14.29	54	107	161
Immigration law	4	164	2.38	150	18	168
Total	80	703	10.22	447	336	783

The vast bulk of immigration matters were heard 'on the papers' without oral argument under previous *High Court Rules* r 41.10.5, which applied where the applicant was self-represented. Criminal matters by comparison, were heard orally in 66.46% of cases, no doubt because in most instances the applicant was legally represented with a proportion of applicants legally aided as discussed in Part VI. In civil matters, oral hearings were held in 46.8% of cases. As can be seen from Figure 1 above, the success rate for immigration cases is very low (2.38%), while the success rates for other civil matters and criminal matters are considerably higher at 11.67% and 14.29% respectively. Figure 2 (below) details legal practice areas at a more granular level, allowing immigration cases to be compared to all other categories of case.

The low success rate for immigration cases is arguably reflective of the s 35A 'public interest test'. Immigration cases would have been the subject of both administrative and judicial review prior to any application for special leave and would generally involve individual rather than public interests. By contrast, the higher success rate in criminal cases appears to recognise that there are cases where the dominant consideration in the grant of special leave is to serve the interests of justice in a singular case 'to prevent individual injustices'.[39] Here the private interests of the individual appellant are served,[40] though the avoidance of individual injustices in criminal cases where applicants are imprisoned would certainly be in the public interest.

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assets/corporate/annual-reports/HCA-Annual-Report-2012-13.pdf> 16 (Table D) ('*2012–13 Annual Report*').

38 The High Court's *2013–14 Annual Report*, above n 31, does not reveal the breakdown between criminal and civil special-leave-to-appeal applications.

39 Kirby, 'Maximising Special Leave Performance', above n 18, 744; Kirby, 'Why Has the High Court Become More Involved in Criminal Appeals?', above n 18.

40 In *Liberato v The Queen*, the High Court majority referred to the public interest function of the Court: (1985) 159 CLR 507, 509 (Mason ACJ, Wilson, Dawson JJ). On the other hand, the dissenting Justices were concerned with the private interests concerning miscarriage of justice: at 509 (Deane J); at 517 (Brennan J).

Figure 2: Legal practice areas[41]

		Outcome (no.)		***Success rate (%)***	
Category of case	Total SLAs for category	Granted	Refused	For category	Of all SLAs
Immigration law	168	4	164	2.38	0.51
Criminal law	161	23	138	14.29	2.94
Tort law	71	5	66	7.04	0.64
Civil procedure	69	3	66	4.35	0.38
Administrative law	36	4	32	11.11	0.51
Family law	34		34	0	0
Contract law	33	3	30	9.09	0.38
Industrial law	25	4	21	16	0.51
Taxation law	24	5	19	20.83	0.64
Property law	22		22	0	0
Statutory interpretation	17	6	11	35.29	0.77
Equity	17	6	11	35.29	0.77
Corporations law	16	8	8	50	1.02
Legal practitioners	12	1	11	8.33	0.13
Estate law	10		10	0	0
Discrimination law	7		7	0	0
Competition law	7	1	6	14.29	0.13
Intellectual property	7	2	5	28.57	0.26
Bankruptcy	7		7	0	0
Constitutional law	6	1	5	16.67	0.13
Insurance law	5	1	4	20	0.13
Evidence	4		4	0	0

[41] 'SLA' = special leave applications. The figures in the '% success of all SLAs' column add up to 10.24% rather than 10.22%, the average success rate. This discrepancy is due to rounding to two decimal places of each item in the chart. The categories of practice area coded for the study were based on the catchwords used by the High Court in *High Court Bulletins* (produced by the Legal Research Officer, High Court of Australia Library) augmented by the catchwords used in other databases such as LexisNexis, AustLII and CCH.

(Figure 2 continued)		***Outcome (no.)***		***Success rate (%)***	
Category of case	Total SLAs for category	Granted	Refused	For category	Of all SLAs
Social security	3		3	0	0
Extradition	2		2	0	0
Banking & finance	2		2	0	0
Local government law	2		2	0	0
Workers compensation	2		2	0	0
Native title	2	2		100	0.26
Personal property	2		2	0	0
Admiralty law	1	1		100	0.13
Wills	1		1	0	0
Procedural fairness	1		1	0	0
Succession	1		1	0	0
Land & environment	2		2	0	0
Consumer law	1		1	0	0
Landlord & tenant	1		1	0	0
Judicial process	1		1	0	0
Damages	1		1	0	0
Total	**783**	**80**	**703**		10

V Self-Represented Applicants

There is a very strong correlation between success rates and legal representation. There was a substantial number of self-represented applicants during the research period: in all, 46% of special leave applications (358 out of 783 cases) were filed by self-represented applicants. Not one of the self-represented applicants was granted special leave to appeal.

This concern is not new and has been the subject of comment. The Australian Productivity Commission report on *Access to Justice Arrangements* in 2014 considered that self-represented litigants were particularly disadvantaged in higher courts where ‘complex disputes and questions of law are less suited to self-

representation'.[42] The data in Figure 3 (below) confirms the concerns of the Productivity Commission in a striking manner.

Figure 3: Self-represented applicants

		Civil law		**Criminal law**		**Immigration law**		**Total**	
		Self-represented		Self-represented		Self-represented			
		Yes	No	Yes	No	Yes	No	Yes	No
Outcome: granted	Number of cases		53		23		4		80
	% allowed in practice area	11.70		14.20		2.38			
	% of total allowed applications	66.25		28.75		5.00			
Outcome: refused	Number of cases	176	225	42	97	140	24	358	345
	Total refused	401		138		164		703	
	% refused in practice area	88.33		85.71		97.62			
	% of total refused applications	57.04		19.63		23.33			
	Hearing type (no.) Oral	211		107		18		336	
	Hearing type (no.) On the papers	243		54		150		447	

Of the total self-represented applicants (358), 39% were in immigration cases (140). Civil cases, other than immigration matters, accounted for 49% (176). By comparison, there were relatively few self-represented applicants in criminal matters, with 12% (42) of the total self-represented applicants. The High Court's *2013–14 Annual Report* records that the proportion of special leave applications filed by self-represented litigants during 2013–14 was 40% compared with 44% during 2012–2013,[43] figures broadly consistent with the research data.

To compile the data set for cases where there was no oral hearing, special leave applications filed by self-represented applicants were identified by reference

[42] Productivity Commission, above n 6, 487. For comment on aspects of the report see Justice Steven Rares, 'Is Access to Justice a Right or a Service?' (Speech delivered at the Access to Justice: Taking the Next Steps Symposium, Monash University, 26 June 2015) [2015] *Federal Judicial Scholarship* 11.

[43] High Court of Australia, *Annual Report 2013–14*, above n 31, 31. The proportion of applications filed by self-represented litigants in the previous 10 years is illustrated in the High Court of Australia, *2012–13 Annual Report*: above n 37, 15 (Table C).

to the special leave dispositions.[44] Special leave dispositions in cases of self-represented applicants each contained a direction to the Registrar to draw up, sign and seal orders dismissing the application under r 41.10.5 of the *High Court Rules*, a rule that specifically dealt with applications by self-represented persons. Incidentally, because the new *High Court Rules* that commenced on 1 July 2016[45] do not make separate provision for self-represented applicants,[46] there is no longer any information on the public record indicating whether an applicant was legally represented where a matter is determined on the papers. In matters heard orally, the transcripts reveal whether a party was represented, with the names of counsel and instructing solicitors recorded.

The Productivity Commission's 2014 report recognised that 'while levels of self-representation in [higher] courts are lower, self-representation does, and will continue to, occur'.[47] The Productivity Commission found that data was limited, being patchy and inconsistent,[48] but that 'most people self-represent involuntarily because they cannot afford a lawyer or cannot access legal aid'.[49] The Productivity Commission recognised that there is a group of individuals, whom it called 'the missing middle', that do not qualify for legal aid, but who have no capacity to meet the costs of litigation.[50]

The Productivity Commission's report did not specifically address the issue of self-represented litigants in the High Court. Yet, the proportion of self-represented applicants in special leave applications in the present study is high (46%),[51] with a zero success rate justifying the Commission's disquiet about disadvantage to self-represented litigants.

Applications for special leave by self-represented applicants are almost always dealt with 'on the papers', so that the self-represented party is not required to appear at a hearing. Nevertheless, there is resonance in the Productivity Commission report: 'There are legitimate concerns about self-representation in higher courts. One concern is the possible impact on a just outcome for the self-represented litigant.'[52]

Justice Kirby, writing extra-judicially in 2007, revealed the concern and approach of High Court Justices to self-represented applicants for special leave. His Honour recognised that the rules enabling matters to be dealt with 'on the papers' alleviated some problems faced by the Court in accommodating self-represented

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44 On the AustLII website: *High Court of Australia Special Leave Dispositions* <http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/HCASL/>.

45 *High Court Rules* pt 41, as amended by *High Court Amendment (2016 Measures No 1) Rules 2016* (Cth).

46 All applications are now determined according to *High Court Rules* r 41.08.1.

47 Productivity Commission, above n 6, 487.

48 Ibid 488–9, citing Richardson, Sourdin and Wallace, above n 6.

49 Ibid 492.

50 Ibid 20.

51 High Court of Australia, *Annual Report 2015–2016*, 19–20 <http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2015-16.pdf> ('*2015–16 Annual Report*'). See also applications filed by self-represented litigants in the preceding 10 years: at 21 (Table C).

52 Productivity Commission, above n 6, 487.

applicants.[53] Where a self-represented applicant's matter is listed for oral hearing, Kirby J said that

> [i]f the applicant is not legally represented, the panel might suggest that the Registry explore the availability of pro bono assistance from the relevant Bar Association. This will sometimes also happen in an oral hearing. All Justices regularly do this.[54]

In the present study, all but one of the applications filed by self-represented litigants were dealt with on the papers. The single oral application by a self-represented applicant was refused special leave to appeal.[55] The applicant was one of several respondents to an application and he apparently filed a 'cross-application'. At the hearing, he made oral submissions with considerable guidance from the Court as to time constraints, and direction to confine his submissions to relevant matters.[56] The challenges for the Court and the self-represented litigant alike in oral hearings are well illustrated by the comments of Justice Kiefel, as she then was, at that hearing (omitting the responses of the applicant):

> Mr Marshall, just to assist you, we are familiar with these principles. Given the time restraints that you have it might be best to focus your attention upon the much more specific matters upon which the applications for special leave depend … I think you are straying off into general principles now, with which we are familiar.

And

> I was not sure when you mentioned that what that had to do with the application for special leave.

And

> Mr Marshall, which part of your grounds in your draft notice of appeal are you speaking to at the moment?

And

> Perhaps you could return to more relevant matters than these asides.[57]

There was one self-represented respondent in an oral civil application in *Sidhu v Van Dyke*.[58] The transcript revealed that while the respondent appeared in person, her submissions had been prepared and signed by counsel.[59] She was, naturally, afforded the opportunity to respond to submissions made by the applicant's senior counsel. She answered questions from the Bench in an articulate

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53 Kirby, 'Maximising Special Leave Performance', above n 18, 740.

54 Ibid. In *D'Orta-Ekenaike v Victoria Legal Aid*, Callinan J recognised the increasing need for pro bono assistance for litigants and the reliance by the courts on the availability such assistance: (2005) 223 CLR 1, 119 [377].

55 Transcript of Proceedings, *Tory v Megna* [2013] HCA Trans 246 (11 October 2013).

56 Ibid 365, 505, 515 (Kiefel J).

57 Ibid 505, 520, 568, 597 (Kiefel J).

58 Transcript of Proceedings, *Sidhu v Van Dyke* [2013] HCATrans 312 (13 December 2013) 11.

59 Ibid 7 (French CJ).

and knowledgeable manner.[60] Given her responses, there was obviously no need for the Bench to offer explanation or assistance as to procedure or substantive issues.[61]

The burden of self-representation on court time, recognised in *Cachia v Hanes*,[62] is illustrated by the longer hearing time required for the single case with the self-represented applicant. It took 46 minutes compared to the average of 28 minutes for applicants with legal counsel. By contrast, however, the self-represented respondent's hearing took 23 minutes: slightly less time than the average of 28 minutes for legally represented respondents.

This study shows that a self-represented applicant has virtually no prospect of success. The cases in which applicants are typically self-represented are overwhelmingly civil and immigration appeals where legal aid is generally unavailable. Of the total number of immigration applicants in the study, 85% were self-represented.[63] The High Court *2013–14 Annual Report*[64] reveals that 88% of immigration applications in 2013–14 were filed by self-represented applicants, while in 2012–13, 75% of immigration applicants self-represented.[65] In earlier years, immigration applications had even higher numbers of self-represented litigants, comprising, for example, 93% of applicants in 2009–10.[66]

Some immigration applicants may have had assistance in the preparation of their applications from an immigration advice service or from a lawyer on a pro bono basis.[67] It is impossible to know from the High Court dispositions whether that may have been so in individual cases. Certainly, there is virtually no government-funded legal aid available for merits review or judicial review in immigration cases.[68] So it is unsurprising that the majority of immigration applicants are self-represented. There was one immigration case heard orally during the research period where the respondent asylum seeker was represented by a law firm and senior and junior counsel on a pro bono basis.[69] This information was not available from any of the

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60 Ibid 225.

61 There was a grant of special leave in the case and the appeal was ultimately dismissed: *Sidhu v Van Dyke* (2014) 308 ALR 232 (French CJ, Kiefel, Bell, Gageler, Keane JJ). The respondent was represented by senior counsel at the hearing of the appeal.

62 (1994) 179 CLR 403 at 415–16, [22] (Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

63 In the Federal Court of Australia, the majority of self-represented litigants have also been involved in migration appeals: Tania Sourdin, and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants — The Dark Side' (Working Paper No 32, 2014) 3: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713561>.

64 High Court of Australia, *2013–14 Annual Report*, above n 31, 17.

65 High Court of Australia, *2012–13 Annual Report*, above n 37, 15. For further statistics concerning numbers of self-represented immigration applicants in previous years in the High Court, see Richardson, Sourdin and Wallace, above n 6; Elizabeth Richardson and Tania Sourdin, 'Mind the Gap: Making Evidence-Based Decisions About Self-Represented Litigants' (2013) 22(4) *Journal of Judicial Administration* 191.

66 High Court of Australia, *Annual Report 2009–2010*, 14 <http://www.hcourt.gov.au/assets/corporate/2010-annual-report/2010annual.pdf>.

67 See, eg, Refugee Advice and Casework Service, <http://www.racs.org.au>; Immigration Advice and Rights Centre, <http://www.iarc.asn.au/index.html>.

68 Andrew and Renata Kaldor Centre for International Refugee Law, *Factsheet: Legal Assistance for People Seeking Asylum* (March 2017), University of New South Wales <https://perma.cc/VSF3-2CXF>.

69 Transcript of Proceedings, *Minister for Immigration & Citizenship v SZQRB* [2013] HCA Trans 323 (13 December 2013).

High Court records but was gleaned from the website of the solicitors for the respondent to the application brought by the Minister for Immigration.[70]

It is to be anticipated that most immigration applications for special leave are refused, given that cases would have been assessed in the first instance by the Department of Immigration and Border Protection, followed by merits review by the Administrative Appeals Tribunal or the Immigration Assessment Authority followed by judicial review in the Federal Circuit Court and an appeal to the Federal Court. In view of the public interest considerations mandated by s 35A of the *Judiciary Act* and the fact that the High Court does not function merely as a further 'step' in the appellate process, it is unlikely that many immigration applications would fall within the parameters warranting a grant of special leave.

There were only four immigration applications for special leave heard orally that were successful. Of those, two were cases in which the Minister for Immigration was the applicant[71] and two were cases where the applicant was the visa seeker.[72] In all four cases, all parties were legally represented by counsel, though senior counsel did not appear in all cases.

VI Legally Aided Applicants for Special Leave to Appeal

There is a correlation between numbers of self-represented applicants and the availability of legal aid. In 2004, the Law Council of Australia observed that crippling funding constraints on legal aid budgets had severely restricted legal representation in civil matters since the 1990s, though there is a dearth of available data.[73] The present study verifies that assertion. There were 40 applications heard orally where a legal aid body was recorded as the applicant's solicitor. That is a mere 5.11% of all special leave applications during the research years. Of those applications, all but three were in criminal matters. Figure 4 (below) details the numbers and outcomes for applicants represented by legal aid bodies in oral hearings.

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70 Russell Kennedy Lawyers, *Minister's High Court Application for Special Leave to Appeal in the Case of Afghan Asylum Seeker was Refused* (18 December 2013) <http://rk.com.au/news/ministers-high-court-application-for-special-leave-to-appeal-in-the-case-of-afghan-asylum-seeker-was-refused/>.

71 Transcript of Proceedings, *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2014] HCATrans 54 (14 March 2014); Transcript of Proceedings, *Minister for Immigration and Border Protection v SZSCA* [2014] HCATrans 111 (16 May 2014).

72 Transcript of Proceedings, *Uelese v Minister for Immigration and Citizenship* [2014] HCATrans 239 (17 October 2014); Transcript of Proceedings, *FTZK v Minister for Immigration and Citizenship* [2013] HCATrans 270 (8 November 2013).

73 Law Council of Australia, above n 4; Mary Anne Noone, 'Access to Justice Research in Australia' (2006) 31(1) *Alternative Law Journal* 30.

Figure 4: Legally aided applicants in oral hearings[74]

Practice area	Outcome		Total legal aid applicants	Total SLAs for all applicants	% of legal aid SLAs successful	Legal aid cases as % of total SLAs
	Granted	Refused				
Civil		1	1	454	0	0.22
Criminal	10	27	37	161	27.03	22.98
Immigration	1	1	2	168	50	0.60
Total	11	29	40	783	27.5	5.11

Unavailability of legal aid in the vast bulk of civil cases,[75] especially at appellate level, would be the chief reason for the large number of self-represented applicants for special leave to appeal. The Law Council of Australia has stated that the 'erosion in the level of legal representation … has had a detrimental impact on the legal system and the delivery of justice'.[76] The Law Council indicated that the demand for legal aid in criminal matters, and in family law matters concerning children, was such that it consumed almost all funding, leaving little or no capacity for civil law legal aid.[77] This assertion is starkly confirmed by the data for legally aided special leave applications. There was only one civil application and two immigration matters heard orally where the applicant was represented by a legal aid body.[78]

Legally aided matters heard orally were identified for the data set by the names of legal aid bodies recorded as solicitors for applicants on transcripts. There would likely be an additional number of legally aided applicants in criminal matters where private solicitors acted for the applicants. It is not possible to know from those transcripts whether the applicants were legally aided. It was also not possible to know whether any applicants were legally represented on a pro bono basis. The 2017 *10th Annual Performance Report* of the Australian Pro Bono Centre recorded that Australian lawyer signatories to the *National Pro Bono Aspirational Target*

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74 'SLA' = special leave applications.

75 For example, in NSW there are restrictions on the types of civil law matters for which legal aid is available and there are strict means, merits and availability of funds tests: Legal Aid NSW, *Policies, 6. Civil Law Matters* (6 December 2010) <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.3.-list-of-civil-matters-for-which-legal-aid-is-available-to-all-applicants>.

76 Law Council of Australia, above n 4, Executive Summary.

77 Law Council of Australia, Submission No 62 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice*, 23 September 2003, 17, [9.1] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/submissions/sublist>.

78 The applicant in the civil matter was represented by the Fitzroy Legal Service and the immigration applicants were represented by the Asylum Seeker Resource Centre in one case and the Legal Aid Commission of NSW in the other case.

contribute 35 hours of pro bono legal services, per lawyer, per year.[79] So it is likely that some individual applicants may have received pro bono representation. Such information is simply not available on the public record.

Of the 5.11% of applications where a legal aid body represented the applicant, most were criminal matters: 37 cases or 22.84% of all criminal law special leave applications. There were only three legally aided non-criminal applications heard orally, confirming that legal aid remains very restricted other than in criminal matters.[80] Even in cases where legal aid is available, the inadequacy of funding means there is a loss of experienced legal practitioners in legally aided matters because the cost of providing the legal services is not met by legal aid fees.[81] The reality is that in Australia today, there is inequity of access to legal representation and that is reflected in the numbers of self-represented special leave applicants and their correspondingly low success rates.

Overall, 27.5% of legal aid cases were granted special leave compared with the general success rate of 10.22% and the success rate of 14.2% for criminal matters. This increased success rate for legally aided applicants is at least partly explained by the fact that cases are granted legal aid only where there is a very real prospect not only of a grant of special leave, but also of success on the substantive appeal. By way of illustration, Legal Aid Queensland — which will fund applications for special leave to appeal to the High Court for criminal sentences and/or convictions — imposes a merits test requiring that on the legal and factual merits, the application is 'more likely than not to succeed' and that 'a prudent self-funding litigant would risk his or her own financial resources in funding the … application'.[82]

VII Who Applies for Special Leave to Appeal and Who is Successful?

The data indicates that High Court appeals are, in the main, confined to a particular class of advantaged litigant. Individuals significantly outnumber corporate and government and public authority applicants for special leave. However, the most capable applicants — namely, government and corporate parties who would have litigation experience and significant resources — are overwhelmingly more successful. Figure 5 (below) shows success rates for different types of applicant.

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79 Australian Pro Bono Centre, *10th Annual Performance Report of the National Pro Bono Aspirational Target 2007–2017* (October 2017) <http://www.probonocentre.org.au/wp-content/uploads/2017/09/Aspirational-Target-2017-V11-FINAL.pdf>. See also, National Pro Bono Resource Centre, *National Survey Report on the Pro Bono Legal Work of Individual Australian Barristers* (November 2008) 6 <http://www.probonocentre.org.au/wp-content/uploads/2015/09/Barristers-report-FINAL.pdf>. That survey found that of 355 barristers responding, 311 or 87% had done pro bono legal work in the previous 12-month period.

80 Law Council of Australia, above n 4. For discussion of the effect of legal aid availability in criminal matters in the High Court, see Kirby, above n 18.

81 Law Council of Australia, above n 4, 27, 41.

82 Legal Aid Queensland, *The Merits Test* (2019) Grants Policy Manual <http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Policy-Manual/The-Merits-Test>.

Figure 5: Applicant types[83]

	Civil law			Criminal law			Immigration law			
	Oral		Papers	Oral		Papers	Oral		Papers	
Applicant type	G	R	R	G	R	R	G	R	R	**Total**
Association		1								1
Corporation	21	56	20							97
Crown					3					3
Government & public authorities	15	12	1	1	4		2	3		38
Individual	16	89	221	22	77	54	2	11	150	642
Ship	1									1
Sovereign State			1							1
Total	53	158	243	23	84	54	4	14	150	783

Applicants most likely to obtain special leave are government and public authorities who succeeded in 53.57% of their civil applications and in 47.36% of their applications across all areas of practice.[84] Corporations succeeded in 21.64% of their applications, all in civil cases. By contrast, individual applicants succeeded in only 4.91% of their civil matters (excluding immigration matters) and in 6.23% of their applications across all practice areas: a sizeable disproportion between individuals and others (that is, government and public authorities, and corporations). Moreover, the success rate for individuals is well below the average of 10.22% for all applications.

Individual applicants are by far the most numerous in special leave applications, partly because of the number of immigration and criminal applications. Even excluding those matters, individuals significantly outnumber corporate and government and public authority applicants in civil matters (326 individuals compared with 125 corporate and government and public authorities combined). This disparity does not offer any immediate explanation for the much lower success rates for individual applicants. Government and public authorities and corporations would be better resourced financially than most individuals and have ease of access to timely expert legal advice and representation throughout the litigation process. They are also more likely to be seasoned to the litigation process; that is, repeat players.

In his 1974 seminal work, Galanter hypothesised that 'repeat players' (parties with established litigation experience and significant resources) have more success than 'one shot' litigants with fewer resources and less experience. Galanter's theory and the body of research that followed it are known as 'party capability theory'. Galanter's study concluded that there were differential success rates between 'haves'

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83 G = granted; R = refused.

84 This figure does not include cases where the Crown was the applicant for special leave. During the period from March 2013 to February 2015, the Crown was the applicant in three criminal matters and was unsuccessful in all.

and 'have nots'.[85] Subsequent studies of United States ('US') courts showed that government litigants were more often successful than private businesses or organisations or individuals.[86] Later studies of appellate courts provided less support for Galanter's hypothesis demonstrating that party strength alone does not determine success rates and concluding that other variables such as area of law and counsel appearing influence outcomes.[87]

The Australian High Court was studied using Galanter's theory, initially by Smyth[88] and more recently by Sheehan and Randazzo.[89] Both studies provided only partial support for the Galanter hypothesis. They concluded that while the Australian Government had an advantage over other litigants, individuals (contrary to Galanter's hypothesis) possessed higher net advantages over state and local government and private business. However, these studies were concerned exclusively with substantive appeals in the High Court in the periods both before and after the introduction of the special leave requirement in civil matters. They did not consider litigant success in special leave applications.

While individuals may not be disadvantaged in substantive appeals (except by comparison with the Australian Government), Figure 4 (above) shows that individuals are much less likely to be granted special leave to appeal than are government and public authority and corporate applicants. Since the special leave process screens out many more individual appeals than government, public authority and corporate appeals, the Smyth and Sheehan and Randazzo conclusions must be tempered by the gateway effect of the special leave requirement.

The Sheehan and Randazzo study did consider whether there was any shift in success patterns in High Court appeals after the introduction of the universal special leave requirement in 1984. They found that prior to 1984, individual applicants were significantly less likely to win their appeals (than other types of litigant) and that

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85 Galanter, above n 8.

86 Donald Songer and Reginald Sheehan, 'Who Wins on Appeal: Upperdogs and Underdogs in United States Courts of Appeals' (1992) 36(1*) American Journal of Political Science* 235. Canadian research has supported Galanter's theory: Peter McCormick, 'Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992' (1993) 26(3) *Canadian Journal of Political Science* 523. For English research, see Burton M Atkins, 'Party Capability Theory as an Explanation for Intervention Behaviour in the English Court of Appeal' (1991) 35(4) *American Journal of Political Science* 881.

87 Wheeler Stanton et al, 'Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970' (1987) 21(3) *Law and Society Review* 403; Reginald Sheehan, William Mishler, and Donald Songer, 'Ideology, Status and the Differential Success of Direct Parties Before the Supreme Court' (1992) 86(2) *American Political Science Review* 464–71; Donald J Farole Jr, 'Re-examining Litigant Success in State Supreme Courts' (1999) 33(4) *Law & Society Review* 1043; Herbert Kritzer, 'The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?' in Herbert Kritzer and Susan Silbey (eds) *Litigation: Do the "Haves" Still Come Out Ahead?* (Stanford University Press, 2003); Andrea McAtee and Kevin McGuire, 'Lawyers, Justice and Issue Salience: When and How Do Legal Arguments Affect the US Supreme Court?' (2007) 41(2) *Law & Society Review* 259; Christopher Hanretty, 'Have and Have-Nots before the Law Lords' (2014) 62(3) *Political Studies* 686.

88 Russel Smyth, 'The "Haves" and the "Have-Nots": An Empirical Study of the Rational Actor and Party Capability Hypotheses in the High Court 1948–99' (2000) 35(2) *Australian Journal of Political Science* 255.

89 Sheehan and Randazzo, above n 10.

after 1984 there was a 'substantial shift' with individuals being 'significantly more likely to win'.[90] This shift can be explained by the screening out of a high proportion of individual applications at the special leave hurdle, as demonstrated by the present study. Sheehan and Randazzo did not consider the litigants who were excluded by the special leave process.

Smyth referred to 'Australian exceptionalism'[91] to party capability theory, recognising that the leave to appeal requirement 'siphons off routine cases where one party has a clear advantage'.[92] He posited this as one explanation for the lack of disadvantage for individuals in High Court appeals together with the availability of legal aid and the briefing of senior counsel by individuals in criminal appeals. Ultimately, Smyth concluded that these possible explanations for the difference in the Australian experience did not resolve the issues.

The filtering effect is the very reason for the special leave structure as Kirby J recognised:

> The universal special leave system that has operated in the High Court of Australia since 1976 filters out the appeals that are more routine with outcomes more predictable and with legal or factual contests less likely to produce reasonable differences of opinion.[93]

The present study clearly establishes that individuals' applications for special leave to appeal are refused in considerably greater numbers that those of government, public authorities or corporations. Smyth's suggested explanation for relative individual success in High Court substantive appeals because of 'siphoning off' of cases is therefore strongly supported by our research.

Individual applicants are less likely to enjoy the 'party capability' benefits available to government, public authority and corporate applicants because individuals are more likely to be self-represented, with their applications for leave being heard on the papers in numbers significantly exceeding those of corporate or government and public authorities: in civil matters 221 individuals' applications were heard on the papers, as opposed to 21 applications by corporate and government or public authority bodies. Individuals in civil cases, other than immigration matters, accounted for 49% of all self-represented applicants.

The disproportionate success rates for government, public authority and corporate applicants underscore the inequalities produced by self-representation and the absence of legal aid for individual applicants as well as an inability to access senior legal representation at the appellate level. The data further suggests that the most capable litigants have significant influence on the final appellate work of the High Court.

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90 Ibid 250.
91 Smyth, above n 88, 267.
92 Ibid 270.
93 Kirby, 'Maximising Special Leave Performance', above n 18, 733.

VIII Female and Child Applicants

The study reveals that women and children make very few applications for special leave to appeal compared with adult males. Previous research confirms the under-representation of women and children in High Court negligence appeals,[94] but there has been no investigation as to how often such litigants apply for special leave to appeal and whether they are successful or not.

In the present study, the gender and maturity of individual lead applicants was coded.[95] Women account for only 18% of individual lead applicants with their applications having slightly lower success rates than those of males (see below Figure 6).

Figure 6: Comparison of male and female lead applicants

	Total	**%**	**Granted (no.)**	**% granted**	**Refused (no.)**	**% refused**
Individual	642		40	6	602	94
Male	526	82	34	6	492	94
Female	116	18	6	5	110	95

There are recognised obstacles to women's participation in litigation that do not apply equally to males, including reduced economic capacity.[96] The fairly diverse legal practice categories in which women lead applicants appeared (see below Figure 7) do not offer any specific explanation for the under-representation of women in the cohort of individual applicants.

Figure 7: Women lead applicants by practice area

Administrative law	7	Family law	9
Bankruptcy	1	Immigration law	21
Civil procedure	15	Industrial law	3
Contract law	4	Land & environment	1
Corporations law	1	Legal practitioners	1
Criminal law	14	Property law	8
Discrimination law	2	Taxation	4
Estate law	2	Torts	21
Equity	2	**Total**	**116**

Figure 2 (above Part IV) shows the number and success rates of all applicants by legal practice area across the entire data. A comparison of Figure 2 and Figure 7 (above) underscores the low rates of female applicants in special leave applications.

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94 Stewart and Stuhmcke, above n 7. See also Pam Stewart and Anita Stuhmcke, 'High Court Negligence Cases 2000–10' (2014) 36(4) *Sydney Law Review* 585.

95 Where there was more than one applicant in a single suit, the gender and age of the first applicant was coded. There were few such cases and they were largely confined to immigration matters where a male adult was the applicant and another family member was listed as a second applicant.

96 Branson, above n 7. For barriers facing culturally and linguistically diverse women, see Wayne Martin, 'Embracing Diversity in the Law: Solutions and Outcomes' (2016) 43(8) *Brief* 18–23.

One general explanation for the under-representation of women in the data set may be found in commentary that suggests apparently 'neutral' law may, because of gender inequalities in wider society, be unequal in application.[97] This argument as to the socio-legal construction of gender and the consequent restriction upon public participation similarly applies to other vulnerable populations such as children.[98] Indeed, in this data set child lead applicants during the research years numbered only 11 (1.71% of individual lead applicants), with 5 of the 11 applications being dealt with on the papers. The specific legal practice areas involving child lead applicants were limited as follows: crime (sentencing): 3; immigration: 4; tort: 3; and family law (capacity and parens patriae): 1.

Three child applicants were granted special leave to appeal (a 27.27% success rate), as detailed in Figure 8 (below).

Figure 8: Child lead applicants by practice area, gender, appearance type and outcome

Hearing type	oral 6; heard on papers 5
Gender	male 7; female 4
Practice area	civil 4; criminal 3; immigration 4
Outcome	granted 3; refused 8

As is the case for women, child litigants face significant impediments to participation in the legal process. The Law Council of Australia states:

> Due to limited independence and life experience, children and young people … often rely on their parents or friends to mediate their access to legal services. Children and young people commonly view the legal system as intimidating, overwhelming, stressful and expensive. This view, combined with limited financial resources, deters many young people from engaging with the legal system. Children and young people often experience communication barriers in court as their social communication skills, vocabulary and language skills are underdeveloped compared to adults, and the justice system does not provide the necessary system supports to help young people understand and navigate the legal system.[99]

Barriers facing child litigants include: the lack of specialist legal services for children; few solicitors skilled in dealing with children, particularly in regional areas; inaccessibility of legal services to children; and the intimidating atmosphere of legal services including minimal public visibility.[100]

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97 Carol Smart, 'Law's Truth: Women's Experience' in Reg Greycar (ed) *Dissenting Opinions: Feminist Explorations in Law and Society* (Allen & Unwin, 1991), cited in Reg Graycar and Jenny Morgan (eds), *Hidden Gender of Law* (Federation Press, 1990) 176.

98 Jonathan Herring, *Vulnerability, Children and the Law* (Springers Briefs in Law, 2018) ch 4 ('Are Children More Vulnerable than Adults?').

99 Law Council of Australia, *The Justice Project — Children and Young People*: *Consultation Paper*, (August 2017) 2 <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Children%20and%20Young%20People.pdf>.

100 Schetzer and Henderson, above n 7, 69–70.

The small number of female and child applicants for special leave to appeal mirrors the lack of diversity of litigants in the justice system generally and is reflected in a corresponding absence in substantive High Court appeals.

IX The Lawyers in Special Leave Applications: The Influence of Senior Counsel

Several studies have found that the quality of legal representation influences success in litigation and is a function of party capability.[101] Our data confirms this is the case for High Court special leave applications. Senior Counsel or Queen's Counsel were briefed as lead counsel by the first applicant in 269 of the total of 336 cases heard orally: that is in 80.06% of special leave matters heard orally (see below Figure 9).[102] Senior Counsel or Queen's Counsel also had higher success rates than junior counsel.

Figure 9: Application outcome by reference to lead counsel[103]

		Successful	Unsuccessful	Total cases (no.)	Success as % of all successful cases	Lead counsel type as % of all cases	Success as % of all cases
Applicant	No barrister		1	1	0	0.30	0
	Non-silk	7	59	66	8.75	19.64	2.08
	QC / SC	73	196	269	91.25	80.06	21.73
	Total	**80**	**256**	**336**			
Respondent	No barrister	1	2	3	0.39	0.89	0.30
	Non-silk	53	5	58	20.70	17.26	15.77
	QC / SC	202	73	275	78.91	81.85	60.12
	Total	**256**	**80**	**336**			

Sheehan and Randazzo examined barrister influence in their study of Australian High Court appeals between 1970 and 2003 and found that while barrister general experience was not influential, prior success in the High Court was significantly related to appellant wins.[104] Hanretty studied appellate outcomes in the House of Lords between 1969 and 2003 and concluded that the experience of

[101] Hanretty, above n 87; Stacia Haynie and Kaitlyn Sill, 'Experienced Advocates and Litigation Outcomes' (2007) 60(3) *Political Research Quarterly* 443; John Szmer, Susan Johnson and Tammy Sarver, 'Does the Lawyer Matter? Influencing Outcomes in the Supreme Court of Canada' (2007) 41(2) *Law & Society Review* 279; McGuire, above n 10; Kevin McGuire, 'Explaining Executive Success in the U.S. Supreme Court' (1998) 51(2) *Political Research Quarterly* 505; Paul Wahlbeck, 'The Life of the Law: Judicial Politics and Legal Change' (1997) 59(3) *Journal of Politics* 778.

[102] There was a small number of cases where there was more than one applicant each having separate counsel. Data was extracted only for the principal applicant's counsel. The same approach was taken to data on respondents.

[103] For applicants, success is an application granted. For respondents, success is an application refused.

[104] Sheehan and Randazzo, above n 10, 247.

counsel had a significant effect on litigant success. Hanretty found that the number of counsel appearing for a party and success of counsel in previous cases did not have a significant effect.[105]

Senior Counsel or Queen's Counsel were successful in 27.14% of the applications in which they appeared as leaders for the applicant, whereas junior counsel were successful in only 10.61% of the cases in which they appeared as lead counsel for the applicant. These figures tend to support Hanretty's findings linking counsel experience to success in House of Lords appeals. It is telling too that senior counsel (SC or QC) were briefed in a high percentage (80%) of applicants' cases, signifying that litigants and their advisors recognise the importance of experienced counsel to outcomes.[106]

In the present study, we considered the experience of counsel by reference to whether individual counsel had been appointed as Senior Counsel or Queen's Counsel because those appointments require appellate experience in major cases as well as seniority and eminence.[107] It follows that barristers appointed as Senior Counsel or Queen's Counsel have more extensive experience and success than other counsel, especially at appellate level.

Figure 10 (below) displays the 12 most frequently appearing lead counsel in special leave applications (for either applicants or respondents), together with success rates for each. Counsel are referenced by single letters (unrelated to their names) with gender and seniority specified. The success rate figures are 'raw' and are not weighted to adjust for the underlying probability that a barrister is more likely to succeed if appearing for a respondent because the majority of cases are refused leave and, for a respondent, a refusal is counted as a 'success'.

The most frequently appearing 12 counsel appeared in 142 cases out of the total of 336 cases heard orally, that is in 42.26% of hearings. These counsel, all male, must have a very substantial influence on the final appellate work of the High Court simply because they argue such a significant proportion of special leave applications.

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[105] Hanretty, above n 87, 695. Conversely, Flemming and Krutz studied leave to appeal applications in the Canadian Supreme Court and found no advantage for more experienced barristers: Roy Flemming, and Glen Krutz, 'Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses' (2002) 64(1) *Journal of Politics* 232. A South African study found that the number of previous appearances was not significant, but that prior success of lawyers was an indicator of future success: Haynie and Sill, above n 101.

[106] It has been shown in some US research that the impact of counsel is sometimes related to cultural capital recognised by the courts rather than advocacy and legal skill: Rebecca L Sandefur, 'The Impact of Counsel: An Analysis of Empirical Evidence' (2010) 9 *Seattle Journal of Social Justice* 51. Whether this would be so at the highest level in the court hierarchy is not reported and may be unlikely.

[107] See, eg, NSW Bar Association, *Senior Counsel Protocol* (16 May 2013) <http://archive.nswbar.asn.au/silks/protocol2013.pdf>.

Figure 10: Top 12 most frequently appearing lead counsel (unweighted)

Lead counsel	Total appearances	Successful (%)	Unsuccessful (%)
Mr A, SC	25	24	76
Mr B QC	17	52.94	47.06
Mr C SC	16	43.75	56.25
Mr D SC	14	64.29	35.71
Mr E SC	12	50	50
Mr F QC	9	55.56	44.44
Mr G SC	9	77.78	22.22
Mr H QC	9	22.22	77.78
Mr I	9	11.11	88.89
Mr J QC	8	75	25
Mr K SC	7	74.43	28.57
Mr L QC	7	100	0

It is telling that the 12 most frequently appearing lead barristers were male. The next group of seven barristers each appeared six times and were the equal 13th most frequently appearing barristers. This group included one female, the most frequently appearing female barrister (who is not Senior Counsel or Queen's Counsel). There were only 47 female barristers appearing as lead counsel; that is, in speaking roles for applicants or respondents. The most frequently appearing female counsel in leading roles are detailed in Figure 11 (below) together with their percentage success rates. Again the figures are not weighted for the bias in favour of respondents' counsel.

Figure 11: Top 13 most frequently appearing female lead counsel (unweighted)

Female lead counsel	Total appearances	Successful (%)	Unsuccessful (%)
Ms A	6	100	0
Ms B QC	4	25	75
Ms C SC	2	50	50
Ms D SC	2	100	0
Ms E SC	2	100	0
Ms F SC	2	0	100
Ms G SC	2	100	0
Ms H	2	0	100
Ms I	2	100	0
Ms J SC	2	0	100
Ms K	2	50	50
Ms L SC	2	100	0
Ms M QC	2	50	50

X Counsel Gender

A feature of special leave applications clearly revealed by this study is the low number of briefs for female counsel relative to briefs for male counsel in oral applications. The data confirms the findings of other studies on the gender of counsel appearing in the High Court and accentuates the bias inherent in briefing patterns in Australian High Court practice.[108] This is clearly a matter outside the control of the Court, but the lack of diversity in counsel appearing has implications for the administration of justice generally and for the Australian legal profession. Ideally, the senior ranks of the Bar should mirror the diversity of lawyers and that diversity should subtly inform institutional dynamics, but our study reveals that not to be the case.

Figure 12 (below) details the gender of counsel appearing in leading roles and relative success rates.[109] Sadly, this data reinforces the frequently cited concerns about gender inequality in the Australian legal profession and, in particular, the 'glass ceiling' that apparently restricts women lawyers' attainment of high rank in the profession.[110] In 2015, women accounted for 23% of all Australian barristers.[111] Yet, the number of women appearing in special leave applications during the study years was significantly below that average being 15% of counsel appearing overall.

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[108] Reynolds and Williams, above n 9; Smyth and Mishra, above n 9.

[109] In rare instances, where there was more than one applicant or respondent in the same suit with separate counsel, only counsel for the first applicant and the first respondent were coded. Where there were separate cases with separate suit numbers heard together, counsel for the first applicant and respondent in each separate suit number were coded.

[110] Jen Travers, 'The Glass Ceiling' (2008–2009) 11(1) *Newcastle Law Review* 93; Francesca Bartlett, 'Model Advocates or a Model for Change? The Model Equal Opportunity Briefing Policy as Affirmative Action' (2008) 32(2) *Melbourne University Law Review* 351; Angela T Ragusa and Philip Groves, 'Gendered Meritocracy? Women Senior Counsels in Australia's Legal Profession' (2012) 1 *Australian Journal of Gender and Law* 1; New South Wales Bar Association, *Equitable Briefing Working Group Review of the Application in New South Wales of the Equitable Briefing Policy of the Law Council of Australia* (August 2015); Australian Women Lawyers, 'Only 7.92% of Female Senior Counsel Practising at the Independent Bar are Female, Fifty Years After Australia's First Female Silk Appointed' (Media Release, 4 September 2012) cited in Maree Keating and Natalie Zirngast, 'Fault-Lines in Bar Culture: Women Barristers' Negotiations with Collegiality, Care and Success' (2013) 38(4) *Alternative Law Journal* 265, 266 n 24; Australian Women Lawyers, *Gender Appearance Survey* (August 2006) <https://web.archive.org/web/20090914040404/http://womenlawyers.org.au/documents/Final_Gender_Appearance_Survey-August_2006.pdf>; Law Council of Australia, *Beyond the Statistical Gap: 2009 Court Appearance Survey – Strategy for Advancing Appearances by Female Advocates in Australian Courts* (2009) 7 <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/court-appearance-survey>; Kate Eastman SC, *Visible Targets: The Case for Equitable Briefing* (30 June 2016) <https://www.kateeastman.com/wp-content/uploads/2016/06/Visible-Targets-June-2016-1.pdf>; Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (Urbis Pty Ltd, 2014) <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-report-on-attrition-and-re-engagement>.

[111] Australian Bar Association, *Australian Bar Association Statistics 2015* (30 June 2015) <http://archive.austbar.asn.au/statistics>.

Figure 12: Lead counsel by gender: Applicants and respondents (unweighted)[112]

Lead counsel gender		Outcome: successful	Outcome: unsuccessful	Total cases	Success (% of successful SLAs)	Success (% of SLAs with same gender lead counsel)	Success (% of SLAs with any gender lead counsel)
Applicant	female	4	20	24	5	17	1
	male	76	235	311	95	24	23
	Total	80	255	335	100	–	24
Respondent	female	21	2	23	8	91	6
	male	234	76	310	92	75	70
	Total	255	78	333	100	–	77

Research has focused on the low number of briefs for female counsel relative to briefs for male counsel in the Australian High Court. A study by Mishra and Smyth revealed that in 2009, 14 women appeared in 19 of the 40 High Court hearings representing a proportion of 48% of all cases.[113] But there were only three women in speaking roles: in 8% of all matters. This Mishra and Smyth study excluded special-leave-to-appeal applications.

Research by Kate Eastman SC disclosed that between 1 July 2014 and 30 October 2015,[114] the High Court delivered 62 judgments (excluding special leave applications) in which 402 counsel appeared. Women barristers appeared in 37 of the 62 matters representing appearances in around 60% of cases, but that figure is apt to mislead. The numbers of women appearing overall, were a disappointing proportion of all appearances with a total of 72 women (18%) as against 330 men (82%). Eastman's figures as to senior counsel (SC or QC) appellate appearances are also gloomy, with 15 female senior counsel (3.7% of total appearances) as opposed to 185 male senior counsel (46% of total appearances).

Most recently in 2017, Reynolds and Williams studied all High Court appearances (including special leave applications) by barristers in the 2016 calendar year in matters in which oral argument took place.[115] They found that 22% of counsel appearing were women, but that in more than half the cases (51%) no female barristers appeared at all.[116] Only 42 female barristers had speaking responsibility in oral argument as opposed to 438 males.[117] They concluded that:

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112 Rounded to the nearest whole percentage. 'SLA' = special leave applications. For applicants, success is an application granted. For respondents, success is an application refused.

113 Smyth and Mishra, above n 9, see Table 2.

114 Eastman, above n 110.

115 Reynolds and Williams, above n 9. See also Smyth and Mishra, above n 9.

116 Reynold and Williams, above n 9, 488.

117 Ibid 489.

> [W]hen women were briefed, they were given lesser speaking responsibility than men, with 25% of all appearances by women involving a speaking role, compared with 63% of all appearances by men.[118]

The present study bears out these conclusions with a glaring absence of female counsel appearing as leading advocates for either party, except in a very few cases. Out of the 783 applications in the data set, 336 were heard orally. Of those, there were just 24 matters (7.14% of all oral hearings) in which a female barrister appeared in the leading advocate's role for the applicant and 23 where a female barrister appeared in the leading advocate's role for the respondent (6.85% of all oral hearings). Overall, the number of female barristers appearing in leading roles for either party was 47 representing just 7.04% of the total number of 668 lead advocates.[119]

Female counsel numbers in the current study are improved when the gender of 'secondary' counsel is considered: that is, counsel in non-speaking roles for applicants or respondents. There were an additional 78 female counsel appearing for applicants in secondary non-speaking roles. There were 12 applications for which a female leader was briefed for the applicant with a female junior. There were an additional 67 female counsel appearing in secondary roles for respondents, with female leaders in 5 of those cases.

There were 167 cases or 49.7% of oral hearings in which female counsel appeared for either party in leading or non-speaking roles. This figure confirms the findings in the Reynolds and Williams study where in just under half the cases (49%), female barristers appeared for either party.[120] However, the raw numbers of female counsel in the present study are disappointing, with 192 female counsel briefed altogether as opposed to 1095 male counsel (lead and second counsel for applicants or respondents). So female counsel constituted 15% of counsel appearing overall, significantly fewer than the 22% in the Reynolds and Williams 2016 study.[121]

The success rates for cases in which female counsel appeared in the lead role for the applicant are almost 8% lower than in cases where the applicant's lead counsel was male. At 16.67% (of the cases in which female leaders appeared), the female leaders' success rates as applicants' counsel is well below the overall success rate of 23.81% for all oral applications. The applicants' male leaders' success rate of 24.44% (of cases in which male leaders appeared) was slightly greater than the 23.81% success rate of all oral applications.

The reasons for this disparity in success rates are not obvious, though the much smaller numbers of female counsel appearing overall would indicate that females are less experienced in High Court special leave applications and thereby may suffer a disadvantage, being less likely to be briefed at all and, if briefed, being less likely to succeed. Such a conclusion is reinforced by the studies that support the

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118 Ibid 493.

119 There were four parties that were not represented by counsel at an oral hearing: one self-represented applicant; one self-represented respondent; and two respondents that filed submitting appearances, but did not have counsel appear at the hearing.

120 Reynolds and Williams, above n 9, 488.

121 Ibid.

hypothesis that experience of counsel and previous success are influential elements in litigant success.[122]

Any interpretation of the data showing the lower success rate for female as compared to male lead counsel is complicated by other disclosures in the study data. The data in Figure 1 (Part IV above) demonstrates that the rate of success in criminal law applications is the highest overall, while Figure 13 (below) shows the large relative over-representation of women lead counsel in criminal applications. The combination of these facts should mitigate against a lower success rate for female as compared to male lead counsel. Yet, Figure 12 (above) indicates the lower success rates for female counsel. There is no evidence that male barristers may reject briefs in cases having weaker prospects of success, though that is a possible reason for the disproportionate success rates. Such an approach would be in breach of the cab rank rule: the ethical obligation of a barrister to accept a brief to appear in a case that is within the barrister's expertise where the barrister would be available to appear and where an acceptable fee is offered.[123] There is no Australian research about the effect of the rule, particularly with respect to the specialist bar appearing in the High Court. Some English commentators have observed that there is now ongoing debate as to whether the cab rank rule (which has significant exceptions) is followed in practice,[124] but there is no empirical data about its operation.[125]

There is a marked disparity in the types of cases in which males and females were briefed as lead advocates. Figure 13 (below) details the practice areas in which male and female counsel were briefed as lead counsel for either applicants or respondents. Of the 28 categories of legal practice that were coded for the study, female lead counsel appear in only 10 practice areas. The most frequent practice area in which both male and female counsel were briefed as leaders is criminal law. They then diverge with male counsels' second and third most common areas for leading appearances being tort law (97%) and contract law (100%), respectively. Female counsels' second and third most common areas for leading appearance are immigration law (19%) and administrative law (15%). There is a disproportionately high appearance rate in immigration and administrative law cases for female lead counsel, given that female lead counsel are briefed in only 7% of all special leave

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122 Hanretty, above n 87; Haynie and Sill, above n 101; Szmer, above n 101; McGuire, above n 10.

123 *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 17, made under the *Legal Profession Uniform Law* by the Legal Services Council, 26 May 2015. The *Uniform Law* was adopted by New South Wales and Victoria on 1 July 2015. See also *Legal Profession (Barristers) Rules 2014* (ACT) r 85; *Barristers' Conduct Rules* (NT) r 85; *Barristers' Conduct Rules 2011* (Qld) r 21; *Barristers' Conduct Rules* (SA) r 21; *Legal Profession (Barristers) Rules 2016* (Tas) r 5 (adopting the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 17); *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Vic) r 17; *Western Australian Barristers' Rules 2011* (WA) r 21.

124 Andrew Higgins, 'Rebooting the Cab Rank Rule as a Limited Universal Service Obligation' (2017) 20(2) *Legal Ethics* 201; John Flood and Morten Hviid, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market* (A report for the Legal Services Board, 2013) <https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf>).

125 In *Hall v Simons* [2000] 3 All ER 673, 680 Lord Steyn doubted that the rule often obliged barristers to undertake work they would not otherwise accept. See also *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 221 (Diplock LJ) and *Giannarelli v Wraith* (1988) 165 CLR 543, [15] (Dawson J). The Australian High Court has favoured the retention of the rule (obiter): *Giannarelli v Wraith* (1988) 165 CLR 543 [4] (Brennan J); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 [27] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 119 [377] (Callinan J).

hearings. By contrast, male counsel are briefed in 93% of hearings overall, with a disproportionately high number of appearances in tort law and contract law cases.

Figure 13: Practice areas in which male and female lead counsel were briefed for either party

Practice area	**Male lead counsel (no.)**	**Female lead counsel (no.)**
Administrative law	34	6
Admiralty law	1	0
Banking & finance	4	0
Bankruptcy	5	1
Civil procedure	27	0
Competition law	10	0
Constitutional law	10	0
Contract law	38	0
Corporations law	22	0
Criminal law	191	23
Discrimination law	5	1
Land & environment	2	0
Equity	25	0
Estate law	4	0
Evidence	6	0
Extradition	2	2
Family law	4	0
Immigration law	29	7
Industrial law	26	0
Insurance law	6	0
Intellectual property	13	1
Legal practitioners	4	0
Native title	4	0
Property law	10	0
Statutory interpretation	29	1
Taxation law	35	3
Tort law	71	2
Workers compensation	4	0
Total	**621**	**47**

The cases in which female counsel were briefed as junior or 'secondary' counsel for applicant or respondent, that is with non-speaking roles, are slightly more varied than the types of cases in which female leaders were briefed. Overall, the legal practice areas in which female secondary counsel were briefed are still limited when total numbers of cases in diverse practice areas are considered. Figure 14 (below) lists the practice areas in which female secondary or junior counsel were briefed for either party.[126]

There are some glaring gaps in the practice areas in which female counsel were briefed. No female counsel were briefed in the 11 corporate law cases heard orally. There are other important areas of legal practice where women counsel are seriously under-represented. No female counsel were briefed in the 19 contracts cases heard orally. These included some large commercial law matters. Only two secondary female counsel were briefed in 'non-speaking' roles in the contracts cases. There were 13 equity cases heard orally, but only four secondary female briefs in non-speaking roles. Just one woman was briefed in a competition law matter as secondary counsel for a respondent, where there were five cases heard orally. These are the types of matters in which counsels' fees are likely to be significant. So, there is a noticeable absence of high fee-paying briefs for women barristers in the contract, corporate and equity practice categories.

The over-representation of women counsel in criminal matters may be explained in part by the number of legally aided cases in criminal law applications (see above Figure 4 in Part VI) and the possibility that female counsel are more likely to accept legal aid briefs where low brief fees may discourage male advocates. There were 23 female counsel briefed as lead counsel for either party and 65 women briefed as secondary counsel, out of the total of 107 criminal applications heard orally. The gender pay gap at the Australian bar is well known.[127] In 2016, Fiona McLeod SC, then President of the Law Council of Australia, noted that the Bar 'was among the worst professions for unequal pay, due in part to the lack of opportunities for women to work on more expensive cases, despite their experience'.[128] The brief fees payable by Legal Aid, even for High Court appearances,[129] are low by comparison with fees payable where the applicant is not legally aided.[130] While a

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[126] The count comprises individual counsel, rather than cases. There were cases in which more than one female was briefed.

[127] Samantha Woodhill, 'Barristers Top the Gender Pay Gap List', *Australasian Lawyer* (June 2016) reporting a study by Ben Phillips, principal research fellow at the ANU Centre for Social Research and Methods <https://www.australasianlawyer.com.au/news/barristers-top-the-gender-pay-gap-list-217716.aspx>.

[128] Jane Lee, 'Lawyers Call for Women Barristers to Be Briefed in 30 Per Cent of Cases by 2020', *The Sydney Morning Herald* (online), 24 June 2016 <https://www.smh.com.au/politics/federal/lawyers-call-for-women-barristers-to-be-briefed-in-30-per-cent-of-cases-by-2020-20160624-gpqtk9.html>.

[129] For approvals made on or after 9 December 2013, the Legal Aid Commission of NSW scale fee for High Court special leave application appearances in criminal matters is $1150 for junior counsel and $1860 for senior counsel: Legal Aid NSW, *Commonwealth Criminal Matters — Counsel* <https://www.legalaid.nsw.gov.au/for-lawyers/fee-scales/commonwealth-matters/criminal-matters-counsel>.

[130] The Federal Court of Australia provides a national guide to counsels' fees (issued 28 June 2013): appearance at hearing on applications and appeals (daily rate including conference) of $900–4200 for junior counsel and $2060–6400 for senior counsel. While the guide does not apply to High Court matters it provides some indication of the starting point for appearances in High Court special leave

legal aid body was recorded as the briefing solicitor of female barristers on the transcripts in only four applications, there would be a further proportion of legally aided applications in criminal matters where private solicitors acted for applicants. Where counsel appears in a criminal matter briefed by a private solicitor, it is not possible to know from the transcript whether the applicant is legally aided.

Figure 14: Female secondary counsel practice areas

Practice areas in which female 'secondary' counsel were briefed	**Number of female secondary counsel (either party)**	**Total oral cases in category**
Administrative law (including discrimination law)	13	23
Banking & finance	2	2
Bankruptcy & insolvency (including corporate insolvency)	2	3
Civil procedure	5	14
Competition law	1	5
Constitutional law	5	5
Contract	2	19
Criminal law	65	107
Equity	4	13
Estate law	1	2
Family law	1	1
Extradition	3	2
Immigration law	7	18
Industrial law	1	13
Intellectual property	3	6
Property law (including native title)	4	5
Statutory interpretation	5	15
Taxation	8	19
Tort	13	36
Total	**145**	**308**

Given the gender pay gap at the Bar, female counsel are perhaps prepared to accept a legal aid brief where a male counterpart might not readily do so, notwithstanding the 'cab rank' rule.[131] It has been suggested in the United Kingdom that criminal and family law fees payable on legal aid briefs do not amount to 'proper professional fees' and so barristers are not compelled to accept such work under the

applications: W G Soden, *National Guide to Counsels' Fees* (28 June 2013) Federal Court of Australia <http://www.fedcourt.gov.au/forms-and-fees/legal-costs/national-guide-counsel-fees>.

[131] See above n 123.

rule.[132] The position in Australia is unknown given the absence of any research concerning the operation of the cab rank rule.

Figure 15 (below) demonstrates that female lead counsel for applicants were briefed mostly by private law firms (79% of female counsel briefs for applicants), with 21% briefed by government or a legal aid body. Where female leaders appeared for respondents, they were briefed mostly by government respondents (78%).

Figure 15: Briefing solicitors for female lead counsel

	Appearing as Female Lead Counsel For				**Overall**	
Briefing solicitor	*Applicant*		*Respondent*		*All briefings*	
Government	4%	1	78%	18	40%	19
Legal Aid	17%	4	–	0	9%	4
Private	79%	19	22%	5	51%	24

Brief fees payable by government would generally be lower[133] than fees commanded by senior counsel briefed privately.[134] This may have an influence on the distribution of government briefs, particularly where counsel is briefed to appear for the respondent to resist an application, rather than for the applicant to prosecute it.

The fact that government respondents briefed more female lead barristers than did private law firms representing respondents may reflect a level of commitment by government to the *Law Council of Australia Model Equitable Briefing Policy*.[135] Though apparently, in High Court matters, that level of commitment is not particularly strong. This dissonance between government briefing patterns depending on whether it is the applicant or the respondent is puzzling.

Under the *Model Equitable Briefing Policy*, the Law Council of Australia and its members encourage those briefing or selecting barristers to make all reasonable endeavours to brief women barristers with seniority, expertise and experience in the

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[132] Flood and Hviid, above n 124. See also, Bar Standards Board, *The 'Cab Rank Rule': A Fresh View* (2013) <https://www.barstandardsboard.org.uk/media/1460590/bsb_-_cab_rank_rule_paper_28_2_13_v6__final_.pdf>.

[133] For example, *Legal Services Directions 2017* (Cth) app D, 5 provides for a maximum senior counsel daily rate of $3,500 (inclusive of GST) without the approval of the Attorney-General and a maximum junior counsel daily rate of $2,300 (inclusive of GST) without such approval. Under NSW *Attorney General's Rates for Legal Representation* (as at 1 August 2018) the Junior Counsel rate is $290 per hour with a daily maximum of $2900 plus GST and the Senior Counsel rate is $480 per hour with a daily maximum of $4800 plus GST: <http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/attorney-generals-rates-for-legal-representation.aspx>.

[134] Soden, above n 130.

[135] Law Council of Australia, *Equitable Briefing Policy* (2016) <https://lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy>. See also the observation made that proactive change is required by the legal profession, Justice Melissa Perry, 'There Should be More Women in the Courtroom: Justice Perry' (2015) 37(7) *Bulletin* (Law Society of South Australia) 12–13.

relevant practice area. The policy includes a target that by 1 July 2018, senior women barristers would account for at least 20% of all briefs and/or 20% of the value of all brief fees paid to senior barristers, with briefs to junior women barristers accounting for at least 30% of all briefs and/or 30% of the value of all brief fees paid to junior barristers. The Australian Government Solicitor has adopted the Equitable Briefing Policy as have various governments and statutory agencies around Australia.[136] Many, but not all, of the targets were met over the first reporting period (2016–17 financial year): women barristers received 20% of total briefs and 15% of the total fees charged by barristers; junior barristers received 28% of briefs; and senior barristers received 12% of briefs.[137] Yet, the numbers of female advocates briefed in lead roles in special leave applications by government is relatively insignificant, underlining the lack of diversity in lawyers who influence the flow of appellate work.

XI Conclusion

A final appellate court such as the High Court has no control over the types and numbers of applications seeking special leave to appeal. Ultimately, the Court selects the appeals it will hear having regard to s 35A of the *Judiciary Act* and must be guided by public interest considerations in selecting cases for appellate hearing. Yet, this study demonstrates that access to the apex court in the Australian justice system depends on external factors beyond the control of the Court. They are factors that operate well outside the considerations that s 35A mandates as relevant to the grant of special leave to appeal.

This study demonstrates that a High Court appeal is, in many cases, confined to a particular class of litigants and that differentials exist across types, age and resources of applicants for special leave. Litigants' ability to bring special leave applications at all is fettered by severe restrictions on legal aid, which result in significant numbers of self-represented applicants and consequent challenges for the Court in fairly and efficiently dealing with those applications. The data reveals few female or child applicants, underlining a lack of diversity in applicants that must correlate to a similar absence of diverse litigants in final appeals. The study also exposes disproportionate success rates of the most capable litigants, indicating that government and corporate parties must exert influence on the Court's final appellate work and, accordingly, on the ultimate development of Australian law. In terms of

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[136] Australian Government Solicitor, <http://ags.gov.au/publications/news/equitable-briefing-24August 2017.html>. The NSW Government adopted the previous Equitable Briefing Policy for Female Barristers and Advocates in 2009: Gabrielle Upton, Attorney General, *NSW Government Raising Bar on Equitable Briefing* (Media Release, 8 November 2016): <http://www.justice.nsw.gov.au/ Documents/Media%20Releases/2016/MR16-nsw-raising-bar-on-equitable-briefing.pdf>; Fair Work Australia and Legal Aid NSW have adopted the policy: Law Council of Australia, above n 135. See also, Law Council of Australia, 'Huge Boost for Equality as Large Firms Adopt Law Council's Equitable Briefing Policy En Masse' (Press Release, 4 November 2016) for a list of law firms adopting the policy <https://www.lawcouncil.asn.au/media/media-releases/huge-boost-for-equality-as-large-firms-adopt-law-councils-equitable-briefing-policy-en-masse>. For commentary see Jane Southward and Jason McCormack, 'New Charter for the Advancement of Women' (2016) 28 *Law Society of New South Wales Journal* 34.

[137] Law Council of Australia, *National Model Gender Equitable Briefing Policy: Annual Report (2016-2017 Financial Year)* (2017) 4<https://www.lawcouncil.asn.au/files/web-pdf/EBP%20Annual%20 Report%20(FY%202016-17).pdf?500422d8-2a91-e811-93fc-005056be13b5>

legal representation, the data concerning counsel appearing in special leave applications confirms the continuing lack of gender diversity, particularly of leading counsel. Importantly, the same data accentuates the influence of a small number of very senior lawyers on the cases selected for appellate consideration.

This study is timely. Its findings are particularly significant in light of the 2016 procedural changes for special leave applications. The 2016 changes increase the proportion of 'paper only' determinations and consequently render the special leave process less open to research than ever before. This loss of transparency makes this study of value to justice administrators, lawyers and future researchers as the findings highlight the need for ongoing monitoring of external barriers to the just and effective operation of the special leave to appeal process.