

REVIEW OF THE APPLICATION IN NEW  
SOUTH WALES OF THE EQUITABLE  
BRIEFING POLICY OF THE LAW  
COUNCIL OF AUSTRALIA

Equitable Briefing Working Group

Report to the President of the  
New South Wales Bar Association

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*August 2015*

## Equitable Briefing Working Group Report

Diversity and equality are increasingly recognised as critical to the profession.<sup>1</sup> In August 2014, in response to the National Attrition and Re-engagement Study (**NARS Report**) the President of the New South Wales Bar Association Jane Needham SC established an Equitable Briefing Working Group (**Working Group**).

The purpose for convening the Working Group was to review the application of the 2004 Law Council Equitable Briefing Policy (**Policy**) in New South Wales.<sup>2</sup> The NARS Report confirmed that problems persist with the retention and promotion of women at the New South Wales Bar notwithstanding the adoption of the Policy in 2004. The available evidence suggests that the Policy has made little or no difference to the briefing practices nor has it provided greater opportunity for women barristers.

In reviewing the Policy, the Working Group drew on the experience and expertise of the profession who regularly engage with the New South Wales Bar in litigation and advice work (**Annexure A**). This experience and expertise has been very helpful in the preparation of this Report. The Working Group notes the important role played by the profession in addressing equitable briefing. Each member of the Working Group participated in a personal capacity and nothing in this Report should be read as representing the views of any firm, government agency or the Law Society of New South Wales.

The Working Group considered how to develop sustainable strategies for implementing the Policy or a reframed version of the Policy and taking steps to see these strategies implemented.

### Terms of reference

The Working Group's terms of reference are to:

- review existing measures and strategies adopted by the Bar, Law Society, firms and in-house counsel for implementing the Policy;
- identify possible barriers for the implementation of the Policy;
- identify benefits of the Policy;
- identify strategies for implementation of the Policy in the short term and long term; and
- identify and make recommendations in relation to any necessary amendments of the Policy.

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<sup>1</sup> "Diversity, equality critical to our wellbeing" *The Australian*, Friday, 15 May 2015 at p. 27 Opinion piece by President of the Australian Bar Association, Fiona McLeod SC, in which she noted:

"... diversity and equality are critical to our wellbeing as a profession and this is not just a 'women's issue'.

<sup>2</sup> <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Equitablebriefingpolicy.pdf>

## Background

### *Participation of women at the New South Wales Bar*

Women account for more than one-half of graduates from law schools in New South Wales and have tended to outperform male students academically.<sup>3</sup>

The number of women practising at the New South Wales Bar does not reflect the proportion of women law graduates. The New South Wales Bar is not attracting women in numbers that reflect the number of women graduates. The following table compares the number of women counsel in practice over the past 15 years. While there has been a significant increase in the total number of women at the New South Wales Bar during that period, women still only comprise 20.95% of all counsel at the present time.

	June 2000	March 2015
<b>Total barristers</b>	1919	2267
Male	1680 (87.6%)	1792 (79.05%)
Female	239 (12.4%)	475 (20.95%)
<b>Senior Counsel</b>	256	373
Male	250 (97.5%)	336 (90.08%)
Female	6 (2.5%)	37 (9.92%)
<b>Junior Counsel</b>	1663	1894
Male	1430 (86%)	1456 (76.8%)
Female	233 (14%)	438 (23.1%)

We have also assumed that the statistics from The Australian Women Lawyers Gender Appearance Survey in 2009 and the Law Council's 2009 *Beyond the Statistical Gap: 2009 Court Appearance Survey*<sup>4</sup> continue to reflect women counsels' experience in court, but even with the rise in the number of women coming to the Bar, those women are not appearing in court as regularly as their male counterparts:

- In the New South Wales Supreme Court only 9.9% of appearances before the Court of Appeal were by women, but 27.8% of appearances before a Master were by women.
- In the Federal Court only 5.8% of appearances by Senior Counsel were by women. The average length of hearing for men Senior Counsel was 119.7 hours, compared to 2.7 hours for women Senior Counsel.
- In the Federal Court the average length of hearing for male counsel appearing as Junior to Senior Counsel was 223.6 hours, whereas for women Junior Counsel in the same role it was 1.4 hours. (Data was not collected for hearing length in the New South Wales Supreme Court).<sup>5</sup>

<sup>3</sup> <http://www.graduatecareers.com.au/Research/GradJobsDollars/BachelorU25/Law/index.htm> recording women are 66.7% of graduates. See also Professor Ross Buckley's article below.

<sup>4</sup> [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Beyond%20the%20statistic%20gap%20-ItemB\\_3-AttachmentA.PDF](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Beyond%20the%20statistic%20gap%20-ItemB_3-AttachmentA.PDF)

<sup>5</sup> [http://www.womenlawyers.org.au/documents/Final\\_Gender\\_Appearance\\_Survey-August\\_2006.pdf](http://www.womenlawyers.org.au/documents/Final_Gender_Appearance_Survey-August_2006.pdf)

### **Findings of the NARS Report on equitable briefing**

The NARS Report recorded that some participants experienced sex discrimination. Women reported being denied work or opportunities purely on the basis of gender.<sup>6</sup>

At page 73, the NARS Report records:

*“Several participants commented that there is a growing, if not sufficient, industry knowledge of best practice management and ethical work practices. What is lacking in their view is the monitoring of behaviour and enforcement of policies and expectations required to move equitable practices beyond ‘lip service’ and a promotional opportunity, to authentic change. Without the threat of consequences, several felt that it was unlikely that employers would genuinely change their behaviour. It was considered particularly challenging to effect behavioural change in decision makers in private practice or at the Bar who were largely self-regulating.”*

The NARS Report recommended:

- a review of briefing practices to identify any unintended bias, and monitor the impact of any changes;
- the importance of clear and transparent data and guidance on:
  - briefing practices;
  - pay rates; and
- managing expectations with respect to career progression and on leadership levels of women across the profession.<sup>7</sup>

### **Measures and strategies adopted by the Bar, Law Society, Firms and In-house counsel for implementing the Policy**

This time line sets out the key stages of the development of the Policy and identifies certain of the measures and strategies undertaken to implement the Policy:

5 April 2000	Chief Justice Michael Black, Keynote Address, Seminar on Equality of Opportunity for Women at the Victorian Bar (Melbourne)
6 November 2002	Slattery QC memorandum to New South Wales Bar Council <i>Client Promotion of Equal Opportunity at the Bar</i>
28 October 2003	New South Wales Bar Council adopts New South Wales Equitable Briefing Policy
November 2003	Standing Committee of Attorneys-General asked the Law Council of Australia to develop a national model equitable briefing policy for adoption by the governments and private legal profession
March 2004	Law Council adopted the Policy (known as the Model Equal Opportunity Briefing Policy for Female Barristers and Advocates)
June 2004	New South Wales Bar Council adopted the Equitable Briefing Policy

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<sup>6</sup> NARS Report pages 6 and 94.

<sup>7</sup> NARS Report page 8.

26 May 2004	New South Wales Law Society Council endorsed the Policy <sup>8</sup>
1 April 2005	Bowne SC and Ors – Draft Proposal for Implementing the Policy
29 July 2005	Freehills advise Mr Ian Harrison SC, President of the New South Wales Bar Association re adoption of Policy
2006	Australian Women Lawyers National Gender Appearance Survey
July 2008	The Policy was approved for adoption of all New South Wales government agencies
June 2009	Amendments and rebranding of the <i>Equitable Briefing Policy for Female Barristers and Advocates</i>
2009	Premier's Memorandum on Briefing Senior Counsel including identification of women senior counsel
December 2009	Law Council launched the 2009 Court Appearance Survey
2011	New South Wales Law Society undertakes <i>The Advancement of Women in the Legal Profession Project</i> <sup>9</sup>
February 2013	First Freehills Equitable Briefing Function (now held annually)
March 2014	Law Council's NARS Report
October 2014	Allens, Westpac, KPMG Equitable Briefing function
March 2014	Minter Ellison, Women in Commercial Law function
Mid 2014	New South Wales Bar Council approves Best Practice Guidelines in response to the NARS Report
March/ May 2015	NARS Workshops convened by the Law Council of Australia to address a range of issues arising in the NARS Report, including equitable briefing
8 May 2015	Law Council <i>Equity and Diversity Charter</i> <sup>10</sup>
4 June 2015	<i>A Spotlight on Equitable Briefing</i> - Panel Discussion hosted by Ashurst

### Reflections on the current Policy

The Policy, adopted in 2004 and amended in 2009, does not establish tangible obligations as to outcomes. There is no comprehensive register of individuals, firms, agencies or corporations that have adopted the Policy. The Policy does not impose an obligation to implement, monitor or report on adherence to the Policy.

<sup>8</sup> <http://www.findlaw.com.au/news/4773/nsw-law-soc-adopts-equitable-briefing-policy.aspx>

<sup>9</sup> <http://www.lawsociety.com.au/ForSolicitors/advocacy/thoughtleadership/Advancementofwomen/index.htm>;  
<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/579007.pdf>

<sup>10</sup> [http://www.lawcouncil.asn.au/lawcouncil/images/Diversity\\_and\\_Equality\\_Charter.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/Diversity_and_Equality_Charter.pdf)

Equally the Policy does not seek to establish obligations tailored to the qualitative and quantitative aspects of the briefs the subject of the obligations created under the Policy. Accordingly, there was no reporting requirement in relation to qualitative and quantitative outcomes.

The Policy assumes that creating an obligation to consider would overtime translate to a change in briefing practices. It has not eventuated.

### ***Current awareness of the Policy***

When compared to the private sector, in the New South Wales public sector, there is greater level of awareness of the Policy and the requirement to implement the Policy.<sup>11</sup> The 2009 Premier's Memorandum<sup>12</sup> requires women Senior Counsel to be specifically identified for any brief to Senior Counsel and if a woman is not available an explanation as to why there are no qualified women Senior Counsel.

In the Commonwealth public sector, the *Legal Services Direction 2005*<sup>13</sup> concerning the engagement of counsel includes Rule 4C, which provides:

#### ***Rules about selection of counsel***

*4C. All barristers are to be selected for their skills and competency independently of their gender. An agency is to ensure that arbitrary and prejudicial factors do not operate to exclude the engagement of female barristers or to limit the range of barristers being considered for the brief.*

Some Commonwealth agencies have gone further than the *Legal Services Direction 2005*. For example, the Fair Work Ombudsman has publically discussed its approach to equitable briefing and the benefits to its agency.<sup>14</sup>

In the private sector, there appears to be limited awareness of the Policy. Further, there is a limited understanding of how the Policy operates and a dearth of implementation strategies.

Anecdotally, the implementation of Policy is being driven by clients who specifically request their panel firms to identify suitable women counsel to brief.

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<sup>11</sup> SICorp TMF Legal Services Panel: Briefing Pack for Member Agencies and Legal Services Blueprint: Legal Service Delivery Reforms for the NSW Government, Department of Attorney General & Justice.

<sup>12</sup> Also <http://arp.nsw.gov.au/m2009-17-briefing-senior-counsel>

<sup>13</sup> <https://www.comlaw.gov.au/Details/F2006L00320>

<sup>14</sup> See public statements by the Fair Work Ombudsman and General Counsel for the FWO, Janine Webster <http://www.theaustralian.com.au/business/legal-affairs/bar-helps-agency-slash-its-costs-by-half/story-e6frg97x-1226099331979>

## Reasons for reviewing the Policy

Generally, all persons consulted considered the Policy was 'a good idea' and support the Policy.

The benefits of the Policy include:

- expanding the existing and prospective pool of talent for counsel available for court appearance and advice work;
- providing the numbers within the New South Wales Bar who can continue to provide legal services at an economical value due to the lower costs basis in using the New South Wales Bar<sup>15</sup>;
- meeting client expectations with respect to genuine participation and inclusion of women;
- giving effect to gender equity in supply chains for the provision of legal services;
- giving effect to other wider diversity and equity policies;
- redressing the underrepresentation of women at the New South Wales Bar and acknowledging that the trickle-down effect has not increased opportunities for women counsel;
- acknowledging that diverse groups bring a greater variety of experience and enhance decision making;
- providing role models for women in the legal profession generally;
- better reflecting the community and its confidence in the profession that the law is not only fair but seen to be fair;
- enhancing the profession's credibility by being representative of the composition of the community.

The challenge is moving beyond the "in principle" commitment to the Policy and implementing a revised form of the Policy that:

- delivers improved results; and
- is monitored and measured.

The Working Group identified a number of compelling reasons for reviewing the Policy. The key issues were pay equity and the need for more effective implementation strategies to overcome the present barriers.

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<sup>15</sup> See public statements by the Fair Work Ombudsman and General Counsel for the FWO, Janine Webster <http://www.theaustralian.com.au/business/legal-affairs/bar-helps-agency-slash-its-costs-by-half/story-e6frg97x-1226099331979>

## **Pay Equity**

The NARS Report noted that women counsel reported bias in briefing practices, based on both client and colleague perceptions which in turn impacted on their income.<sup>16</sup>

Pay equity is a universally recognised right. The disparity in the average gross annual fees is a clear indicator that women are not receiving access to either the number or the kind of briefs that their male counterparts are receiving. As the following data reveals, the disparity in pay is in the order of 38%. This disparity would be unacceptable in any other industry.

In 2014, the New South Wales Bar Association conducted a survey of its members as part of the membership renewal process. The results reveal stark differences between the average annual fees charged by men and women counsel. The average gross annual fees for men were \$437,450 while the average gross annual fees for women were \$269,958. On average, gross annual fees for men were \$226,213 higher than that of women across the whole of the New South Wales Bar. The data also revealed that 41% of women earned gross fees under \$200,000 compared to 24% of men. It is not clear whether this reflects a greater number of women in part-time practice (where the annual earnings represent a proportion of what would otherwise be full-time earnings).

While these differences are stark, they must be read in context. Men were generally older, and had been established at the New South Wales Bar for longer compared to women barristers.

The gap between annual fees charged by men and women counsel may also be due to differences in the level of seniority of the counsel. We note that the gap is lower for counsel who joined the New South Wales Bar after 2009 – the gap is \$29,377. There are far fewer women represented at the most senior levels of the New South Wales Bar compared to men. Women Senior Counsel represent 10% of Senior Counsel.

An overview of gross annual fees charged by men and women respondents to the survey was examined by reference to the counsel's year of commencement. Tracking disparity over time revealed that the gap in average gross annual fees by reference to gender was relatively consistent for all respondents who commenced at the Bar since 1985.

## **Barriers to implementation of the Policy**

During the course of roundtable discussions, a number of issues arose with respect to the implementation of the Policy by the Working Group. These issues include:

- (1) Limited awareness and understanding of the Policy in private firms of all sizes and amongst key clients;
- (2) Limited awareness as to how and where to 'find' suitable women counsel;
- (3) Limited relevant information available about women counsel published by women counsel and their chambers;
- (4) The need for women counsel to promote their business and to create and promote their 'brand';
- (5) Unconscious bias in selecting counsel;

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<sup>16</sup> NARS Report page 93.

- (6) The role of clients in selecting counsel if the client specifically requests a male counsel. It was not clear whether this is actually occurring or whether the firms perceive the client's reaction to be adverse if a woman counsel is recommended;
- (7) For large commercial law firms which may conduct large scale litigation, the limited number of women Senior Counsel to take on large complex commercial cases is a barrier. Notwithstanding the significant increase in the number of women Senior Counsel over the past 3 years, most women Senior Counsel are relatively junior in the ranks of commercial Senior Counsel generally;
- (8) The importance of Senior Counsel in recommending women counsel to clients/solicitors. There appears to be a limited awareness of Senior Counsel about the Policy or their role in implementing the Policy. There is no record of whether any Senior Counsel in New South Wales has personally adopted the Policy.

Other barriers to implementation include the absence of clear guidance as to how the Policy should be implemented. They include, but are not limited to, the following:

- (1) There is no record kept of firms/organisations that have adopted the Policy;
- (2) There does not appear to be a comprehensive communications strategy within organisations with respect to the Policy, and how it is to be implemented;
- (3) Few organisations that have adopted the Policy report on its implementation;
- (4) No organisations appear to have set targets with respect to the briefing of women counsel.

There is no consistency in information available in relation to adoption and implementation of the Policy. The imposition of a reporting requirement would create some transparency around the adoption and implementation of the Policy that has been lacking to date.

There is a need to identify how to overcome the barriers and also identify the 'drivers' for effective implementation of the Policy. The key drivers appear to be:

- articulating and promoting the business case for implementation;
- client preference – real or perceived;
- Senior Counsel practices for recommending women counsel;
- finding an answer to “we'd like to brief women but don't know any” statement; and
- encouraging women counsel to provide the information solicitors and clients *need* to know when selecting counsel to brief.

## Recommendations for review of the Policy and enhanced implementation strategies

The Working Group makes the following recommendations:

### **Recommendation 1: Revised Policy**

The current Policy be reviewed and redrafted in the manner suggested in [Annexure B](#).

The Working Group is of the view that the Policy requires updating in order to ensure that there is a transparent and accountable system in place to monitor equitable briefing practices. The reporting requirements will be for:

- law firms which have 25 or more lawyers;
- government departments, corporations or entities ('enterprises') which have 25 or more lawyers; and
- Senior Counsel/Queen's Counsel.

A copy of this report and the proposed recommended amendments should be submitted to the Law Council for its consideration and adoption.

The New South Wales Bar Association's Junior Vice President, who is a director Law Council, should be delegated the task of promoting and explaining the recommended amendments to the constituent bodies of Law Council.

### **Recommendation 2: Targets**

The Working Group is also of the view that targets should be set for the briefing of women counsel in two year stages for 2017 and 2019.

By 1 July 2017, the following targets for equitable briefing should be met:

1. Law firms or enterprises with 25 or more lawyers and all government agencies to be briefing women counsel in matters such that at least:
  - a. 10% of all briefs to Senior Counsel should be to women Senior Counsel;
  - b. 20% of all briefs to counsel over 5 years' seniority should be to women counsel; and
  - c. 35% of all briefs to counsel under 5 years' seniority should be to women counsel.
2. Senior Counsel will endeavour to ensure:
  - a. all recommendations of counsel include at least one woman, whenever that is reasonably feasible; and
  - b. when briefed in matters which require a court appearance, as far as is reasonably feasible, women appear as junior in 23% of all matters over the course of the reporting period.

In July 2019 these targets will be updated to reflect the reporting provided by Policy adoptees:

These targets have been included in the revised Equitable Briefing Policy set out in Annexure B. Where a firm, enterprise or Senior Counsel does not meet the targets set out in the revised

Equitable Briefing Policy, consideration should be given by that firm, enterprise or Senior Counsel as to how the targets could be met.

**Recommendation 3: Reporting**

1. Where the firm or enterprise has 25 or more lawyers it should collect and report on the data as follows. The reporting should address separately the figures for male counsel and women counsel in respect of each of the following data topics:
  - the number of counsel briefed during the year;
  - the number of those counsel who are Senior Counsel;
  - the number of those counsel who were briefed as an advocate (i.e. not led);
2. The Independent Bars should conduct a trial for Senior Counsel and Queen's Counsel to report the following information, by reference to gender:
  - the number of counsel briefed as their junior counsel during the year;
  - the number of counsel who were briefed as their junior counsel as a result of a recommendation by Senior Counsel/Queen's Counsel;
  - the number of counsel who were recommended by the Senior Counsel/Queen's Counsel to law firms who were seeking junior counsel to be retained in new matters where the Senior Counsel/Queen's Counsel were not retained.

Firms or enterprises adopting the revised Equitable Briefing Policy should be granted a 'grace period' of one year, where necessary, to adapt their internal framework for reporting as required.

This reporting framework is included in the revised Equitable Briefing Policy in Annexure B. Consideration should be given at a national level to the creation of an online reporting portal to allow smaller firms to report on compliance with the Policy throughout the year.

**Recommendation 4: Enhanced implementation strategies**

Regardless of whether the proposed amendments are adopted, the current Policy and/or any revised policy must have effective implementation strategies in the manner suggested in [Annexure C](#).

## **ANNEXURE A: Participants**

### **BAR**

New South Wales Bar Association: Arthur Moses SC & Kate Eastman SC – co chairs  
Equal Opportunity Committee: Anthony McGrath SC  
Practice Development Committee: Liz Cheeseman SC  
Women Barristers Forum: Kate Morgan

### **CLERKS**

Michele Kearns

### **SOLICITORS**

Law Society of New South Wales: Gary Ulman

Large commercial firms: Brigitte Markovic (Clayton Utz)  
Jenny Campbell (Allens)

Medium to small firms: Scott Chapman (Tress Cox)  
Mark Sullivan (Lander & Rogers)  
Michelle Harpur (Swaab)  
Luke Geary (Salvos Legal)

New South Wales Government: Katherine McFarlane, Chief of Staff to the Hon. Brad Hazzard MP, Attorney-General NSW, September 2014-March 2015

Shannon Thompson, Senior Policy Adviser to the Hon. Gabrielle Upton MP, Attorney General NSW, from June 2015

In house Government: Clair Hodge (New South Wales Police/Transport NSW) and New South Wales In-house Government Lawyers Forum

In house commercial/clients: Susan Price (PwC)

## **ANNEXURE B: Revised Equitable Briefing Policy**

In selecting counsel for all matters, all reasonable endeavours should be made to:

- (1) identify women counsel with relevant seniority, expertise, experience or interest in the relevant practice area; and
- (2) genuinely consider engaging qualified women counsel;

thereafter and where appropriate:

- (3) notify and publish the [insert name] adoption of the Equitable Briefing Policy;
- (4) regularly review the practices for engagement of women counsel; and
- (5) in consultation with [LOCAL BAR] [LAW COUNCIL insert name] periodically report on the nature and rate of engagement of women counsel.

### **Objectives of the Policy**

Equitable briefing practices maximise choices for legal practitioners and their clients, promote the full use of the Independent Bar, and optimise opportunities for practice development of all counsel or solicitor advocates.

The adoption of equitable briefing practices can play an important role in the progression of women in the law, the judiciary and the wider community.

The Policy has been updated in order to ensure there is transparency and accountability in the implementation of the Policy.

### **Application of the Policy**

This Policy is formulated for adoption by both clients and legal practitioners (including in-house counsel) throughout Australia.

The selection of counsel or solicitor advocates is ultimately the decision of the client, and in-house counsel are encouraged to adopt and apply this Policy when instructing firms and making their selection.

Referring legal practitioners exercise significant influence in their client's selection of counsel.

This Policy is also formulated to take into account the role relevantly played by barristers' clerks and counsel in its effective operation. When they are consulted by clients, briefing firms and briefing agencies with a view to engaging counsel, all barristers' clerks and counsel adopting this Policy will include women counsel among the names of counsel they identify in the relevant practice area under inquiry.

## **Targets**

By 1 July 2017, the following targets for equitable briefing should be met:

1. Law firms or enterprises with 25 or more lawyers and all government agencies to be briefing women counsel in matters such that at least:
  - a. 10% of all briefs to Senior Counsel should be to women Senior Counsel;
  - b. 20% of all briefs to counsel over 5 years' seniority should be to women counsel; and
  - c. 35% of all briefs to counsel under 5 years' seniority should be to women counsel.
2. Senior Counsel will endeavour to ensure:
  - a. all recommendations of counsel include at least one woman, whenever that is reasonably feasible; and
  - b. when briefed in matters which require a court appearance, as far as is reasonably feasible, women appear as junior in 23% of all matters over the course of the reporting period.

In July 2019 these targets will be updated to reflect the reporting provided by Policy adoptees:

These targets have been included in the revised Equitable Briefing Policy set out in Annexure B. Where a firm, enterprise or Senior Counsel does not meet the targets set out in the revised Equitable Briefing Policy, consideration should be given by that firm, enterprise or Senior Counsel as to how the targets could be met.

## **Implementing the Policy**

The implementation of the Policy requires active engagement by the Independent Bars, firms, government agencies, in-house counsel and their clients.

Adoption of the Policy should be accompanied by notification or publication of its adoption internally and externally and to [LOCAL LAW SOCIETY/BAR ASSOCIATION –insert name].

The Policy should be distributed widely with guidance on how the Policy is intended to operate and practical measures for its implementation.

Periodically there should be publication of reminders and refreshers about the relevant organisation's adoption of the policy and its requirements.

### ***Identifying women counsel***

Identifying appropriate women counsel should be no different from identifying counsel of any gender. This Policy encourages firms to identify women counsel in a variety of ways.

The Independent Bar accepts its role in assisting legal practitioners to identify women counsel. The [LOCAL BAR ASSOC/CHAMBERS – insert name] should maintain up to date contact details, qualifications, seniority, practice areas and experience for counsel.

Women counsel are encouraged to maintain appropriate and relevant resumes, in a readily accessible form.



### ***Maintaining data base***

On adoption of the Policy, firms, agencies and individuals are encouraged to prepare and maintain an internal referral list/data base of women counsel, which is regularly updated.

### ***Selection of women counsel***

The Policy encourages genuine consideration of women counsel based on skill, experience, expertise and interest. This Policy encourages all practitioners (counsel, solicitors, in-house etc) to seek out women counsel appropriate for the relevant matter. For example:

- by consulting an internal list or data base;
- if a recommendation is sought from counsel, he or she should be asked whether there are appropriate women counsel to be considered (both Senior and Junior Counsel as the case may be); and
- if the client requests the names of a number of potential counsel, then consideration should be given to ensuring that women counsel are included in such a list.

### ***Review and reporting***

Briefing firms, government agencies, Senior Counsel and, where applicable, barristers' clerks should develop the capacity to collect data and regularly report upon that data so as to identify the nature and rate of engagement of women counsel.

The extent and nature of reporting will depend on the firm or enterprise.

1. Where the firm or enterprise has 25 or more lawyers it should collect and report on the data as follows. The reporting should address separately the figures for male counsel and women counsel in respect of each of the following data topics:
  - a. the number of counsel briefed during the year;
  - b. the number of those counsel who are Senior Counsel;
  - c. the number of those counsel who were briefed as an advocate (ie. not led); and
2. The Independent Bars should conduct a trial for Senior Counsel and Queen's Counsel to report the following information, by reference to gender:
  - The number of counsel briefed as their junior counsel during the year;
  - The number of counsel who were briefed as their junior counsel as a result of a recommendation by Senior Counsel/Queen's Counsel; and
  - The number of counsel who were recommended by the Senior Counsel/Queen's Counsel to law firms who were seeking junior counsel to be retained in new matters where the Senior Counsel/Queen's Counsel were not retained.

The reporting should be directly to the local Bar Association and Law Societies by 30 March each year and for those bodies to report to Law Council by 30 April each year, with the Law Council publishing the figures on a State by State basis and National basis by 30 May each year.

Firms or enterprises adopting the revised Equitable Briefing Policy should be granted a 'grace period' of one year, where necessary, to adapt their internal framework for reporting as required.

This reporting framework is included in the revised Equitable Briefing Policy in Annexure B. Consideration should be given at a national level to the creation of an online reporting portal to allow smaller firms to report on compliance with the Policy throughout the year.

Where they do not already do so, in-house counsel may wish to consider:

- requiring that the firms they engage confirm their adoption of the Policy; and
- requesting regular reporting from firms as to their performance against these criteria overall, and on matters for that client.

## ANNEXURE C: Implementation Strategies

The following strategies are intended to identify a wide range of implementation strategies that takes account of the profession as a whole. The Working Party considers that effective implementation requires proactive measures being taken by the Bar and the Law Society, as well as firms, agencies and individuals.

### *Bar Association, its members and clerks*

- Commit to a survey of members through the practising certificate renewal process bi-annually to collect data relevant to the composition of the Bar, the recruitment, retention and attrition of women counsel, as well as issues concerning barriers to practice and pay equity.
- Education and awareness:
  - hold specific seminars for chambers, clerks and women counsel on marketing and providing information to other barristers, solicitors and prospective clients. This should involve the preparation of appropriate CVs and other ways to publish the counsel's practice and experience;
  - hold specific seminars directed to Senior Counsel/Heads of Chambers on the Policy, its application and strategies to increase the profile of junior women counsel who appear with Senior Counsel – for example specific speaking roles;
  - work with clerks and counsel to encourage counsel to adopt the Policy within chambers and personally;
  - hold specific seminars on issues relevant to the barriers to implementation such as unconscious bias.
- Work with Heads of Chambers/clerks to propose that sets of chambers as a whole sign up to the revised Policy (a counsel specific version) and as for the Best Practice Guidelines publish on New South Wales Bar Association's website a list of those chambers who have adopted.
- Work with Heads of Chambers/clerks to set up pro-forma text for an Equitable Briefing webpage that can be used as a template to be added to Chamber's own webpages.
- Develop and encourage the Advocates for Change among all Senior Counsel.
- Address in Bar Practice Course, awareness of the Policy.
- Consider whether a commitment to the Policy is a relevant consideration to be taken into consideration when assessing an application for appointment as Senior Counsel.<sup>17</sup> In particular, whether the applicant has:
  - recommended or been led by women Senior Counsel;
  - recommended or led women Junior Counsel;
  - mentored or acted as a tutor to women Junior Counsel.

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<sup>17</sup> [http://www.nswbar.asn.au/docs/webdocs/silk\\_protocol\\_052014.pdf](http://www.nswbar.asn.au/docs/webdocs/silk_protocol_052014.pdf) paragraphs 6(g) and 7(a).

- Improve information and resources via the Bar Association's website relevant to solicitors seeking to brief women counsel providing appropriate information and also promoting the revised Policy.
- Improve the processes for collection and publication of relevant data and statistics to assess and determine whether the Policy is effective.
- Ensure that all relevant Bar Association Committees are aware of the Policy and its application (if relevant) to the work of the Committee.
- Consult with other Australian and foreign bar associations on the issues and strategies for promoting equitable briefing.
- The President or members of the Executive meet with their counterparts in the Law Council of Australia and New South Wales Law Society on an annual basis to discuss and review the implementation of the Policy.
- The Equal Opportunity Committee to liaise with its counterpart committee in the New South Wales Law Society on strengthening implementation strategies and promoting greater awareness of the Policy.
- Consult with Commonwealth and the New South Wales Attorneys-Generals and Solicitors-General on briefing women barristers.
- Establish a pilot project to test implementation strategies.

#### ***Law Society, its members and solicitors***

- Education and awareness:
  - hold specific seminars for solicitors about the Policy, its application and strategies to increase the profile of women Junior Counsel;
  - hold specific seminars on issues relevant to the barriers to implementation such as unconscious bias;
  - publish relevant information about the Policy in the *NSW Law Society Journal* and/or the Society's website, including profiles of firms and chambers which have adopted the Policy.
- Encourage firms/in-house counsel to adopt the Policy.
- Encourage firms/in-house counsel to develop means of recording when and how the Policy is implemented and prepare annual reports.
- Encourage government agencies, firms/ in-house counsel to hold seminars or other functions as an opportunity to identify women counsel.
- Identify other key groups and other forum for in-house counsel.

### ***Key clients***

- Education and awareness of the Policy.
- Encourage those institutions that regularly use barristers' services to implement the Policy in their legal services purchasing protocols or tendering processes.

### ***Develop records/register/collection of data***

- Develop the means of collecting data about firms, clients and government agencies who have adopted the Policy and their measures for reporting.
- Consultation with Law Council concerning registers for firms/persons adopting equitable briefing.

### ***Specific issues for implementation strategies***

- Work with Media – Legal Affairs reporters/Lawyers Weekly/etc.

## Annexure D: Resources and information

Bar Council (UK)	'Snapshot: The Experience of Self-Employed Women at the Bar', United Kingdom, 2015 <sup>18</sup>
Buckley R Bartlett, F	Momentum Measures: Creating a diverse profession, 2015 <i>Women at the Bar - Bar News</i> (2007-2008) Summer 10 <sup>19</sup> "Model Advocates or a Model for Change? The Model Equal Opportunity Briefing Policy as Affirmative Action" (2008) 32(2) <i>Melbourne University Law Review</i> 351
Justice Branson	"Running on the Edge", <i>Women Lawyers Association of New South Wales</i> 15 October 1997
Justice Gaudron	Launch of the Australian Women Lawyers, 19 September 1997 Speech for Women Lawyers Association for NSW, 13 June 2002
Liveris C Justice Kirby	<i>Women in Legal Leadership – A Handful at Best</i> <i>Women Lawyers - Making A Difference</i> <sup>20</sup> <i>Women in the Law – What's next</i> <sup>21</sup>
Chief Justice Murrell	<i>Why should we advocate for equal representation of women in the legal profession?</i> <i>Law Week</i> May 2014 <sup>22</sup>
McColl SC RS	"Ally McBeal – A Reflection of the Paradigm Lawyer and the Law Firm?", speech at the Women Lawyers Association NSW, 17 May 2000
Justice McColl	" <i>Lawyers Weekly – Women in Law Awards</i> " <sup>23</sup> <i>Celebrating Women in the Judiciary</i> <sup>24</sup> <i>Women Lawyers in 2003 - A View from the Top</i> <sup>25</sup>
Justice McMurdo	'A Report Card on Gender Equality at the Queensland Bar and Bench and the Invisible Women' (Speech delivered to Queensland Women Judicial Officers and Barristers, Brisbane, 21 March 2014) <sup>26</sup>
Melbourne Business School Monash University	<i>Gender Equality Project</i> (November 2012) <i>Barrister Gender and Litigant Success on the High Court of Australia</i> <sup>27</sup>
Pike, Robinson	<i>Barristers' Working Lives: A Biennial Survey of the Bar 2011</i> (UK Bar Standards Council)

<sup>18</sup> [http://www.barcouncil.org.uk/media/379529/snapshot\\_the\\_experience\\_of\\_self\\_employed\\_women\\_at\\_the\\_bar.pdf](http://www.barcouncil.org.uk/media/379529/snapshot_the_experience_of_self_employed_women_at_the_bar.pdf)

<sup>19</sup> [http://www.nswbar.asn.au/docs/resources/publications/bn/bn\\_summer0708/summer0708.pdf](http://www.nswbar.asn.au/docs/resources/publications/bn/bn_summer0708/summer0708.pdf)

<sup>20</sup> [http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_womenlaw.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_womenlaw.htm)

<sup>21</sup> [http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_vicwomen.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_vicwomen.htm)

<sup>22</sup>

<http://static1.1.sqspcdn.com/static/f/1172269/24980496/1401770687647/Law+Week+Dinner.pdf?token=b1D0esDx9x9u05Y03d8GFYgS4kE%3D>

<sup>23</sup>

[http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/assets/supremecourt/m6700011771022/mccoll\\_2014\\_1017.pdf](http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/assets/supremecourt/m6700011771022/mccoll_2014_1017.pdf)

<sup>24</sup> [www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mccoll\\_2006.05.03.pdf](http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mccoll_2006.05.03.pdf)

<sup>25</sup>

[http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mccoll\\_2003.09.19.pdf](http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mccoll_2003.09.19.pdf)

<sup>26</sup> <http://archive.sclqld.org.au/judgepub/2014/mamcmurdo210314.pdf>

<sup>27</sup> <http://www.buseco.monash.edu.au/eco/research/papers/2013/1513barristermishrasmyth.pdf>

Ragusa & Groves	<i>Gendered Meritocracy? Women Senior Counsels in Australia's Legal Profession</i>
Richards A	"Women in the legal profession: An overview" (2003) 83 Australian Law Reform Commission Reform Journal 14 <sup>28</sup>
Scharf, S & Liedenber, R	'First Chairs at Trial: more women need seats at the table', American Bar Foundation and Commission on Women in the Profession, 2015 <sup>29</sup>
Chief Justice Warren	<i>Promoting Difference</i> <sup>30</sup>

#### Other articles:

- "Where are the Women in the Courtroom asks Federal Court judge Melissa Perry", *The Australian Financial Review*, 16 April 2015: [www.afr.com/business/legal/where-are-the-women-in-the-court-room-asks-federal-court-judge-melissa-perry-20150416-1m0o01](http://www.afr.com/business/legal/where-are-the-women-in-the-court-room-asks-federal-court-judge-melissa-perry-20150416-1m0o01)
- "Deliberate changes to briefing practices", *Australian Legal Sector Alliance*, 11 March 2015: <http://www.legalsectoralliance.com.au/blog/3246802>
- "Private practice joins the Bar in promoting equitable briefing", *Lawyers Weekly*, 2 February 2015: <http://www.lawyersweekly.com.au/news/16111-private-practice-joins-the-bar-in-promoting-equitable-briefing>
- "Fair Work Ombudsman Raises the Bar in terms of Gender Equality" *The Australian*, 11 July 2014: <http://www.theaustralian.com.au/business/legal-affairs/fair-work-ombudsman-raises-the-bar-in-terms-of-gender-equality/story-e6frg97x-1226984772655>
- "Justice Ruth McColl calls for New South Wales Bar to alter culture", *The Australian*, 27 June 2014: <http://www.theaustralian.com.au/business/legal-affairs/judge-ruth-mccoll-calls-for-nsw-bar-to-alter-culture-brief-female-juniors/story-e6frg97x-1226968110172>
- "Justice Ruth McColl warns gains on gender threatened by about-face on diversity", *Sydney Morning Herald*, 28 February 2014: <http://www.smh.com.au/federal-politics/political-news/judge-ruth-mccoll-warns-gains-on-gender-threatened-by-aboutface-on-diversity-20140227-33mfv.html>
- "Judge claims women barristers treated unfairly", *The Australian*, 26 September 2008: <http://www.theaustralian.com.au/business/legal-affairs/women-barristers-badly-treated/story-e6frg97x-1111117586624?nk=cc49fcd5b32920deba5e8129bd1309db>

See also:

<http://www.australianwomenlawyers.com.au/publications>  
[http://www.vwl.asn.au/images/portia/issue\\_30.pdf](http://www.vwl.asn.au/images/portia/issue_30.pdf)

<sup>28</sup> <http://www.austlii.edu.au/au/journals/ALRCRefJl/2003/15.html>

<sup>29</sup> [http://www.americanbar.org/content/dam/aba/marketing/women/first\\_chairs2015.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf)

<sup>30</sup> <http://www.austlii.edu.au/au/journals/VicJSchol/2003/1.pdf>