

Law Council of Australia updates Equitable Briefing Policy



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In November 2022, the Law Council of Australia (LCA) updated its Equitable Briefing Policy¹ following a review of the policy in June 2022. The review identified that while the target for women to receive 30% of all briefs had been met in the 2019–2020 reporting year, women were still receiving less than 30% of the value of all brief fees. The updated Equitable Briefing Policy has maintained the target for women barristers to receive at least 30% of all briefs and at least 30% of the value of all brief fees, with a review on progress to be conducted after the 2023–2024 reporting year. On 23 March 2023, Bar Council noted the updates to the Equitable Briefing Policy having adopted the original policy in September 2016.

The Bar Association is a briefing entity under the policy and encourages all barristers, regardless of seniority, to adopt the policy. Policy adoptees are required to provide a confidential annual report on their briefing practices and the measures taken to implement the policy to the LCA by 30 September of each year. The LCA has recently developed additional resources to assist policy adoptees with reporting requirements. On 27 March 2023, the Diversity and Equality Committee and Women Barristers Forum held an online CPD which launched the updated Equitable Briefing Policy. The CPD can be viewed on the NSW Bar Association's website.

Aims and objectives of the policy

The policy is designed to achieve 'a nationally consistent approach towards

bringing about cultural and attitudinal change within the legal profession with respect to gender briefing practices'.² The policy's objectives include, among other things, assisting in the progression of women in the law, the judiciary and the wider community, redressing the underrepresentation of women as barristers in Australia, promoting the provision of role models for women in the legal profession generally, reflecting community expectations of fairness in all aspects of the administration of the law and enhancing the profession's credibility by making it more representative of the composition of the community which it serves.³

In 2014, the LCA published its *National Attrition and Re-engagement Study (NARS Report)* which identified persistent problems with retention and promotion of women at the NSW Bar due to issues such as preferential briefing of men barristers to women barristers, experiences of discrimination and harassment at work, difficulties associated with heavy workloads that place demands on other responsibilities including family responsibilities, and having to shoulder the financial burden associated with taking maternity leave.⁴

In response to the *NARS Report*, the NSW Bar Association's Equitable Briefing working group produced a report in August 2015 which identified, among other things, that the pay gap between men barristers and women barristers was in the order of 38% and that women barristers were not appearing in court as regularly as men barristers.⁵

In 2016, the LCA published the Equitable Briefing Policy which set targets that by July 2020, women barristers be briefed in at least 30% of all briefs and receive at least 30% of the value of all brief fees.⁶ The policy could be adopted by any briefing entity broadly defined to include any person, corporation, entity, firm, partnership, government or body who recommends or briefs Australian barristers to advise or to appear in Australia or overseas. Adoptees of the policy were required to provide a report to the LCA by September of each year.

Review of the Equitable Briefing Policy

On 1 June 2022, the LCA published its *Review of the Equitable Briefing Policy*. The review was based on data collected over the first four years of the policy and considered matters including whether the reporting targets should be revised, whether the policy should address additional areas of diversity, and whether the terminology used in the policy is up-to-date.⁷ The review observed that according to the Australian Bar Association's membership statistics from January 2021, of the 6,379 practising counsel, 27% were women (1,701) and 73% were men (4,676).⁸ The figures suggest a moderate improvement in women's representation at the Bar since 2010, at which point in NSW 81.2% of barristers were men and 18.8% were women.⁹ By contrast to these figures, the 2020 National Profile of Solicitors recorded that of the 7,342 solicitors admitted for one year or less, 38% (2,825) were men and 61% (4,513) were women.¹⁰ Consistently over the past decade, on average 61% of new admissions as solicitors were women.¹¹

The review observed that notwithstanding the moderate improvement in the number of women called to the Bar, the improvement appears disproportionately low when compared with the number of women entering the profession overall in that same period.¹²

In respect of the target set that 30% of briefs be given to women barristers, the review reported that the target had been exceeded in 2019–2020, with 31% of briefs being given to women.¹³ However, in the same period, women barristers were receiving 23% of briefing fees which is still proportionately lower than both the proportion of briefs received by women barristers and the proportion of fees received by men barristers.¹⁴

In light of these findings, the LCA recommended that the targets be maintained with a view to reviewing them as part of the report process for the 2023–2024 reporting year. In large part, the targets

were maintained on the basis that the policy was only partially successful with women barristers still receiving less than 30% of the fee value of all brief fees by 2020.¹⁵

The LCA also considered expanding the ambit of the policy to include additional areas of diversity so that the policy might track the number of briefs and associated fee values provided and received on the basis of a barrister's cultural or ethnic background, linguistic background, experience with disability and/or membership of the LGBTIQ+ community.¹⁶ The review ultimately recommended against expanding the ambit of the policy to include additional areas of diversity at this time primarily for the reason that such data would have to be voluntarily disclosed by barristers and that certain practical difficulties attend to the policy adoptees being able to collect and report on that data.¹⁷ However, the review recommended that the issue be reconsidered periodically in future reviews and that the policy include a general statement supporting the extension of equitable briefing practices to broader areas of diversity.¹⁸

Updated Equitable Briefing Policy

The LCA published the updated Equitable Briefing Policy in November 2022. The policy encourages all persons or reporting entities:¹⁹

1. to make all reasonable endeavours to brief or select women barristers with relevant seniority and expertise, experience or interest in the relevant practice area;
2. to brief or select women barristers for at least 30% of all briefs and at least 30% of the value of all brief fees, in accordance



with international benchmarks concerning the retention and promotion of women;

3. to provide a confidential report to the LCA by 30 September each year with respect to the measures taken to implement these targets; and
4. to ensure that the Law Council is notified within a reasonable time of any changes to the status or contact details provided to the Law Council.

A policy adoptee would not be expected to meet the targets if local conditions (such as local variation in access to women barristers) preclude them from doing so. In such cases, policy adoptees are encouraged to include in the 'Comments' section of their annual confidential report the nature of the local conditions affecting the data.

Resources for barristers who adopt the policy

The Bar Association is a briefing entity under the policy and, in that capacity, has adopted

the policy and Bar Council has formally noted the recent updates. Barristers, regardless of seniority, are encouraged to adopt the policy.

To assist policy adoptees with reporting requirements, the LCA has developed a reporting template and guidelines.²⁰ The guidelines provide clarification around issues including who is a 'senior barrister', which briefs are captured by the policy reporting requirements, how the value of briefs is to be recorded, the reporting requirements for late adoptees of the policy, how policy adoptees should report when their status has changed during a reporting period and how to report when a barrister was briefed as a mediator.

The requirement to provide a confidential annual report on briefing practices and measures taken to implement the policy annually enables the LCA to collate the data provided and to produce a final report of figures for publication. Data will be aggregated and published information will not disclose identifying information. The LCA has developed an online portal to assist policy adoptees in submitting their annual reports.²¹

On 27 March 2023, the NSW Bar Association's Diversity and Equality Committee and Women Barristers Forum jointly hosted a CPD launching the updated Equitable Briefing Policy. The CPD was presented by Kate Eastman AM SC, chaired by Anthony McGrath SC (the Bar Association's Advocate for Change for gender diversity) with concluding remarks from Naomi Sharp SC (Chair of the Women Barristers Forum). The CPD has been recorded and can be viewed through the Bar Association website. **BN**

ENDNOTES

- 1 Law Council of Australia, Equitable Briefing Policy (Updated November 2022) <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Equitable%20Briefing%20Policy%20%20Updated%20Nov%202022.pdf>
- 2 Law Council of Australia, Equitable Briefing Policy (Updated November 2022), p 3 <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Equitable%20Briefing%20Policy%20%20Updated%20Nov%202022.pdf>
- 3 Ibid.
- 4 Law Council of Australia, National Attrition and Re-engagement Study (NARS) Report, p 80 <https://www.lawcouncil.asn.au/docs/a8bae9a1-9830-e711-80d2-005056be66b1/NARS%20Report.pdf>
- 5 NSW 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: Equitable Briefing Working Group' (August 2015), pp 2 and 7.
- 6 Law Council of Australia, Review of the Equitable Briefing Policy (1 June 2022), p 9 <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Review%20of%20the%20Equitable%20Briefing%20Policy.pdf>
- 7 Law Council of Australia, Review of the Equitable Briefing Policy (1 June 2022) <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Review%20of%20the%20Equitable%20Briefing%20Policy.pdf>
- 8 Law Council of Australia, Review of the Equitable Briefing Policy (1 June 2022), p 6 <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Review%20of%20the%20Equitable%20Briefing%20Policy.pdf>; Australian Bar Association, Membership Statistics (January 2021) <https://austbar.asn.au/formembers/member-information>.
- 9 Law Society of New South Wales, Thought Leadership 2011: Advancement of Women in the Profession – Report and Recommendations (2011) p 33 <https://womenlawyersnsw.org.au/wp-content/uploads/579007.pdf>
- 10 Law Society of New South Wales on behalf of the Conference of Law Societies, 2020 National Profile of Solicitors (URBIS, July 2021) pp 20-2 <https://www.lawsociety.com.au/sites/default/files/2021-07/2020%20National%20Profile%20of%20Solicitors%20-%20Final%20-%201%20July%202021.pdf>
- 11 Law Council of Australia, Review of the Equitable Briefing Policy (1 June 2022), p 7 <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Review%20of%20the%20Equitable%20Briefing%20Policy.pdf>
- 12 Ibid.
- 13 Law Council of Australia, Review of the Equitable Briefing Policy (1 June 2022), p 10 <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Review%20of%20the%20Equitable%20Briefing%20Policy.pdf>
- 14 Ibid.
- 15 Ibid, p 20.
- 16 Ibid, pp 17-19.
- 17 Ibid.
- 18 Ibid p 18.
- 19 Law Council of Australia, Equitable Briefing Policy (Updated November 2022), p 3 <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Equitable%20Briefing%20Policy%20%20Updated%20Nov%202022.pdf>
- 20 Law Council of Australia, Equitable Briefing Policy – Reporting Template and Guidelines (updated 1 July 2022) <https://www.lawcouncil.asn.au/files/pdf/policy-guideline/Equitable%20Briefing%20Policy%20Reporting%20Template%20and%20Guidelines%20Updated%20Version%202022.pdf>
- 21 Law Council of Australia, Equitable Briefing Policy <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy>