

# Equitable Briefing Initiative – Public Statement

## Achieving equitable representation of Victorian women barristers in commercial litigation

A joint initiative of CommBar, members of the Judiciary and the Victorian Equal Opportunity and Human Rights Commission.

### 1. Background

In 2014, the **Commercial Bar Association of Victoria (CommBar)** considered what action it might take in relation to the equity issues facing women barristers in commercial litigation, with particular focus on concerns about:

- the lower rates of briefing women barristers; and
- the lower value of briefs for women at the Commercial Bar.

Members of the CommBar executive and Judges joined forces to support action on these 2 areas of underrepresentation of women barristers. An organising committee comprising of Justice Debbie Mortimer, Justice Elizabeth Hollingworth, Commissioner Kate Jenkins, Philip Crutchfield QC, Kathleen Foley and Anna Robertson formed to progress the initiative.

In addition, the initiative has greatly benefitted from ongoing involvement and support from the judiciary, including from:

#### **The High Court of Australia**

The Hon. Susan Crennan AC (formerly Justice Crennan)  
Justice Michelle Gordon

#### **The Federal Court of Australia**

Justice Bernard Murphy  
Justice Jennifer Davies  
Justice Debbie Mortimer

#### **Supreme Court of Victoria**

Chief Justice Marilyn Warren  
President Chris Maxwell  
Justice Anne Ferguson  
Justice Elizabeth Hollingworth  
Justice Peter Almond  
Justice James Elliott

## County Court of Victoria

Judge Maree Kennedy

Chief Justice James Allsop of the Federal Court of Australia has been very supportive of the initiative. Although his Honour's commitments have not allowed him to travel to Melbourne for either of the workshops, the Federal Court has hosted both workshops.

This initiative engages with the lawyers who brief the Commercial Bar.

### CommBar Workshop 1:

On 7 November 2014 CommBar, members of the Judiciary and the Victorian Equal Opportunity and Human Rights Commission convened a private workshop: *Increasing the representation of women barristers in commercial litigation*.

This workshop was attended by 11 Judges, 27 law firm commercial litigation partners and 8 in-house corporate counsel who regular brief the Commercial Bar.

The objectives of this first workshop were:

- To express the observation by, and the experiences of, members of the judiciary about the underrepresentation of women in commercial matters before them in both state and federal courts;
- To identify current efforts to improve equitable briefing practices within firms with a view to remedying that underrepresentation;
- To explore barriers to briefing women; and
- To explore what firms could do to lead change.

The workshop identified four areas where action could be taken to support real change:

1. **Awareness:** While those at the Bar may be aware of the slow progress and systemic challenges of rectifying the underrepresentation of women at the Bar, wider stakeholders were mostly unaware of this issue.
2. **Briefing Practices:** Individual discretion was the primary means of choosing a barrister, with little reference to equitable briefing policies. The unscientific methods by which new barristers are identified and briefed create a situation where gender bias (individual, systemic and unconscious) can impact decisions at all levels of the process.
3. **Firm and organisational accountability:** generally participants were supportive of monitoring and reporting systems on equitable briefing for firms as a way to motivate real action.
4. **Commitment, leadership and recognition:** Participants were keen to show leadership and take action to increase equitable briefing of commercial barristers.

Following this workshop it was agreed that a second workshop would be organised to harness this current momentum and to continue to progress this work. A number of participants also initiated action in the interim period to

learn more about the issues and take immediate steps to improve equitable briefing.

## **CommBar workshop 2**

On 20 May 2015, the second workshop was convened. The objectives of this workshop were:

- To review a baseline of current practices as well as a consolidated list of ideas to develop more equitable briefing practices;
- To explore the issue of leadership and accountability for driving change; and
- To identify high impact actions that could produce significant change over a period of 3- 5 years.

This paper outlines the commitments made by participating firms and organisations following those sessions.

## **2. The challenge**

- At 30 June 2015, 28% of CommBar members are women.
- It is a universal observation of those members of the judiciary consulted that women barristers are significantly underrepresented in commercial law matters.
- This fact has been reinforced by some of the judges involved in the initiative who have maintained their own data on this issue. For example, Justice Elliott recorded 9.6% appearances before him were female counsel as compared to male counsel in the 2 year period from 2013-2015. Justice Hollingworth observed no female counsel leaders in commercial matters before her in the Supreme Court in a 10 year period.
- While there have been some efforts to improve this situation, progress has been too slow and often focused on what action women barristers might take to change the situation, rather than addressing briefing practices.
- It is primarily law firms and in-house counsel who determine who is briefed and for which tasks, so those instructors have a significant role to play to achieve equitable briefing at the commercial Bar.
- While some clients require firms to report on their equitable briefing practices, for most matters this requirement does not apply.
- Current briefing practices are largely 'word of mouth', inconsistent and unsystematic. This contrasts with the rigorous selection processes used in many large firms to select employees.
- There is currently a knowledge gap in data collection, monitoring and public accountability on briefing practices.

## **3. The rationale**

- The focus of this initiative is to increase briefing of women at all seniority levels of the Commercial Bar.
- Introducing more transparent briefing practices will eliminate some of the invisible barriers impeding the advancement of women.

- This initiative asks instructors to make conscious decisions supporting equitable briefing, with the aim of briefing approximately proportionate to the number of women barristers at the Commercial Bar.
- Changing briefing practices will improve the quality and diversity of those briefed, and in time will have an impact on the demographics of the Bar itself. Importantly, it will improve the service offered by law firms and the outcomes for clients.
- This initiative asks instructors to do more than just become aware of the problem.
- It is about identifying high impact actions that could produce a significant change over a period of 3 years, monitored on an annual basis.
- Putting in place systematic, reliable briefing practices is not only positive for gender equality but also serves an important business imperative.

#### **4. The Charter**

This initiative will monitor progress over a three year period (2016 – 2019). The signatories to this initiative commit to implement the following actions over the next three 12-month periods in Victoria:

- 1. We are committed to Gender Equitable Briefing. We commit to one of the following aspirational targets:**
  - a. Our target is to brief in approximately equal proportion to the number of CommBar members who are women (which at 30 June 2015 is 28%), in both the number of briefs and value of briefs; or**
  - b. Our target is to brief in approximately equal proportion to the number of Commbar Junior Counsel members that are women (which at 15 September 2015 is 30%) and the number of CommBar Senior Counsel that are women (which at 15 September 2015 is 16%), in both the number of briefs and value of briefs.**

The objective of this initiative is to achieve equitable briefing of women barristers based on the current proportion of women practicing at the Victorian Commercial Bar.

We recognise that exact briefing will be difficult but signatories will individually aim for approximate equitable briefing in numbers of commercial barristers briefed as well as value of work. As a collective group we aim for equitable briefing, as this measure will demonstrate sustainable leadership by lawyers briefing the Victorian Commercial Bar.

It is a target, and as such, we recognise that change will not happen overnight. However, unlike other initiatives that aim for gender equity in the legal profession, briefing practices are discretionary, immediate and are the consequence of a deliberate choice. It provides a unique opportunity for rectification at a much quicker rate than what can be expected in other organisational change type initiatives.

We acknowledge that many of the instructing lawyers involved in this initiative work for national and global organisations. This initiative focuses on actions to be taken in Victoria.

Effective from 1 January 2016, signatories will aim for a Gender Equitable Briefing Target (measured by number of briefs as well as value of work) of 25-30%. Signatories will report every 6 months against their briefing targets and compliance with charter commitments 2 to 4.

**2. We commit to developing, updating and promoting an Equitable Briefing Policy and circulating this annually to all lawyers at our organisation. This will include supporting staff to attend relevant training sessions to improve briefing practices.**

Links to recognised equitable briefing policies will be provided on the initiative webpage, including the VicBar, police, and LCA policy.

**3. We undertake to ensure that, in preparing commercial briefing shortlists for clients and in seeking recommendations for commercial shortlists, suitably qualified and experienced women barristers are included. If we are provided with a list without a woman barrister nominated, we will ask, "if not, why not", to determine the justification.**

All signatories commit to both requesting and nominating women commercial barristers on any briefing shortlists. This includes at least one woman for teams of 4 barristers or less, at least 2 women for teams of barristers of 5-8.

**4. We will take proactive steps to identify new women commercial barristers with skills and expertise in the areas in which we regularly brief work. This may be women who are new to the bar, or women barristers practising in a particular area who have not previously been on the firm's radar.**

This is about widening the list that each instructor has of women, especially to identify new women.

For example: signatories will ideally ask their preferred Senior Counsel and Queen's Counsel to provide a range of women commercial barristers for their consideration.

**5. We commit to collect relevant data that captures the gender and experience level of the person briefed, and the monetary value of briefing. The data captured may be expanded in the future to collect other relevant information.**

Prospective data collection to commence **1 January 2016**.

Signatories to develop in-house mechanisms to commence capturing the following data:

- Gender (male/ female/ other)
- Value of briefing (monetary value)
- Barrister range: Junior Counsel, Senior Counsel (if possible).

Additional measures may be discussed at further workshops.

**6. We undertake to confidentially report our briefing data to the Victorian Equal Opportunity and Human Rights Commission every 6 months, with the expectation that the Commission will report back to us individually and publically in a de-identified manner. The first report will be provided to the Commission by 1 September 2016 and will capture data from [1 January 2016 – 30 June 2016].**

All signatories agree to confidentially report the data to the Victorian Equal Opportunity and Human Rights Commission every 6 months.

The Commission will report back to each individual signatory how they are progressing compared with other signatories. This will be represented by a de-identified ranked graph indicating where each individual signatory is ranked in comparison to other signatories and in overall improvements.

The Commission will publically report (in a de-identified manner) how many signatories have achieved gender equitable briefing practices. This will include an aggregated percentage of how the signatories are collectively performing.

Ongoing workshops will also be convened. The intention of future workshops is to bring signatories together to discuss the progress of the initiative, any issues arising and to flag possible solutions.

With consent of the signatories, the CommBar will acknowledge publically all firms who each year achieve equitable briefing of commercial matters by number of briefs and/or value of briefs.

## **5. Possible actions for wider stakeholders**

Workshop participants highlighted a range of additional actions that involved wider stakeholder involvement that could also have a direct impact on this

issue. In the interest of capturing the breadth of this information these actions are detailed below.

### **Widening the impact of this initiative**

Participants to this initiative recognise that gender equity is more likely to be achieved at CommBar and across the wider Victorian Bar through wide commitment by many instructors and organisations. Therefore CommBar will take action to make a range of stakeholders aware of the initiative through a webpage (see below) and through various communication activities in partnership with others. These may include:

- information sessions for VicBar barristers to explain the initiative;
- working with ACLA to convene sessions to engage more in-house counsel in the initiative;
- working with LIV to engage more law firm signatories;
- information sessions for clerks.

### **Improving Barrister profiles**

Based on feedback received in the course of the workshops, CommBar will convene a range of participants to support the VicBar in their review of online profiles of barristers with the aim of creating better standards of profiles to support firms to identify suitable barristers, particularly to identify new counsel. This group will include diverse perspectives and expertise, for example from law firms, in-house counsel, barristers, recruitment, unconscious bias experts.

### **Webpage**

VicBar/VEOHRC will host a webpage that is to include all the relevant information for this initiative. With the support of the Commission, the information may include: background resources, action plans, facilitators guides, ongoing (de-identified) reporting, opportunities for additional signatories to sign up. The intention is that this will be a central place to obtain resources which can be promoted to new Victorian signatories as well as other bar groups within VicBar and other Barristers associations across Australia.

### **Role of Judges**

Given the value of the information provided by Judges through the course of this process, Judges may offer to voluntarily collect gender appearance statistics to share with signatories or more broadly. This contribution by Judges and their associates is much appreciated by the participants of this initiative. Models of how to collect this data will be provided on the initiative website or on request to Strategic Projects and Policy Unit at the Victorian Equal Opportunity and Human Rights Commission. Judicial supporters of the initiative may wish to be acknowledged as a supporter on the initiative website.

## **6. The signatories**

The following firms and organisations have committed to participate in this initiative as founding members of the *Equitable Briefing Initiative*:

- Arnold Bloch Leibler

- Australian Securities & Investments Commission
- Corrs Chambers Westgarth
- Gilbert & Tobin
- K & L Gates
- Lander and Rogers
- Maddocks
- Norton Rose Fulbright
- Slater and Gordon
- Telstra
- Victorian Government Solicitors Office

CommBar encourages other firms and organisation who brief the Commercial Bar to sign up to this initiative by contacting the Strategic Projects and Policy Unit at the Victorian Equal Opportunity and Human Rights Commission on 9032 3431 for further information.