



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

**HOUSE OF  
REPRESENTATIVES**

STANDING COMMITTEE ON EMPLOYMENT AND  
WORKPLACE RELATIONS

**Reference: Pay equity and increasing female participation in the workforce**

THURSDAY, 18 JUNE 2009

CANBERRA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES



## **INTERNET**

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

**<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to:

**<http://parlinfoweb.aph.gov.au>**

**HOUSE OF REPRESENTATIVES**  
**STANDING COMMITTEE ON EMPLOYMENT AND WORKPLACE RELATIONS**

**Thursday, 18 June 2009**

**Members:** Ms Jackson (*Chair*), Mr Haase (*Deputy Chair*), Ms Bird, Ms Hall, Mr Hayes, Mr Keenan, Mr Neumann, Mr Ramsey, Dr Southcott and Mr Symon

**Members in attendance:** Mr Haase, Ms Jackson, Mr Neumann, Mr Ramsey, Mr Symon

**Terms of reference for the inquiry:**

To inquire into and report on:

The causes of any potential disadvantages in relation to women's participation in the workforce including, but not limited to:

- The adequacy of current data to reliably monitor employment changes that may impact on pay equity issues;
- The need for education and information among employers, employees and trade unions in relation to pay equity issues;
- Current structural arrangements in the negotiation of wages that may impact disproportionately on women;
- The adequacy of recent and current equal remuneration provisions in state and federal workplace relations legislation;
- The adequacy of current arrangements to ensure fair access to training and promotion for women who have taken maternity leave and/or returned to work part time and/or sought flexible work hours; and
- The need for further legislative reform to address pay equity in Australia.

**WITNESSES**

**BLUMER, Ms Noor, Chair, Equalising Opportunities in the Law Committee, Law Council of Australia..... 1**

**CAPLE, Ms Carole, Policy Lawyer, Law Council of Australia ..... 1**

**McLEOD, Ms Fiona Margaret, SC, Chair, Equal Opportunity Committee, Victorian Bar; and Immediate Past President, Australian Women Lawyers ..... 15**

**SCHILLING, Ms Meredith Anne, Member, Victorian Bar ..... 15**



**Committee met at 11.19 am****BLUMER, Ms Noor, Chair, Equalising Opportunities in the Law Committee, Law Council of Australia****CAPLE, Ms Carole, Policy Lawyer, Law Council of Australia**

**CHAIR (Ms Jackson)**—Welcome. This is the 24th public hearing for the committee's inquiry into pay equity and associated issues relating to increasing female participation in the workforce. I welcome today representatives from the Law Council of Australia. I would just like to advise you that, although the committee does not require you to give evidence under oath, this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. I advise you that these proceedings are being broadcast on the internet. I would like to thank the Law Council for your attendance here today. We have received your submission, but I wonder if you would like to present any additional submissions or make an opening statement before we open it up for questions from the committee.

**Ms Blumer**—We have no additional submissions, but I would like to make an opening statement.

**CHAIR**—Please do.

**Ms Blumer**—For the record, the Law Council of Australia is the peak organisation representing the Australian legal profession on issues of national and international concern—so we are very national. I have chaired the EOL Committee—that is, the Equalising Opportunities in the Law Committee—since 2007, and Carole Caple has been the policy lawyer with responsibility for that committee until recently. I will tell you a little bit about us. I am a litigation lawyer. I am based in Canberra and I have practised law for about 17 years. Prior to becoming a lawyer I was involved in the implementation of sexual harassment and antidiscrimination policies and laws—arising out of the Sex Discrimination Act 1984—in what was then known as the Department of Employment, Education and Training. In the last 10 years I have been heavily involved in gender issues in the law and in particular I have served as a board member, and then as president, of Australian Women Lawyers. That was in about 2005.

Ms Caple also has a background as a practising lawyer and has worked for the Law Council since about 2006 as a policy lawyer. She has recently completed her Master of Laws in commercial law and is the author of the submission which is before the committee today. I think it is a very fine submission, and she should take the credit for that.

You may well wonder why this committee should be interested in the plight of women lawyers. As a group our image is certainly not one generally to attract public sympathy. We are regarded by some—

**CHAIR**—You should try being a politician!

**Ms Blumer**—True. I think we got higher on the list than you did!

**CHAIR**—You did.

**Ms Blumer**—We are regarded by some—indeed, perhaps by many—as overeducated, overpaid and overdressed. Indeed, some of us fit that stereotype admirably. But scratch the surface of that image and you will find a very different story. This story, as far as can be documented, illustrates how a combination of circumstances and prejudices has treated many of our women lawyer graduates very badly. It is well known that nowadays only the academic cream gets to go to law school, and for many years young Australian womanhood has been doing this in droves, outnumbering the men and entering the legal workplace as equals. But after about five years many of them leave the private profession. Of those that manage to remain, only a few rise to seniority in the profession. Rather than being cocooned from the gender pay equity gaps by education and status, women lawyers are equally subject to those same gaps as are women in the broad spectrum of industries—in some cases, more so. It seems that, when it comes to pay equity, education and professional status do not protect anyone. And we do not really know why.

The problems of equity for women in the workforce know no economic or professional bounds. Having said that, many women in the legal profession have and do excel, notwithstanding the general situation. However, it is very important that in celebrating the success stories we do not fail to acknowledge those who suffer detriment and fail to flourish to the extent of their full potential.

The statistics provided in this submission—and I will mention here that the statistics that Carole was able to obtain were very limited—show clearly that on the whole women in the legal profession are not faring as well as their male colleagues. For many years the number of women graduates has exceeded the number of male graduates. Yet, still, even in the first few years of private practice, men are earning \$7,000 to \$8,000 per annum more than their female colleagues. This is before marriage or any other excuses have set in. Right in those very early days when we are graduating with the prizes and everything else that is what is happening. This is reflected by a fallout of women lawyers as they get older. For example, in Victoria, 50 per cent of young practising lawyers are women, but this has fallen to 25 per cent by the time they reach the age of 40 years. Conversely, in the general workforce for the same period women's participation generally had risen to 58 per cent.

Given that women represent about 25 per cent of the private profession after the age of 40, it is significant that only about 18 per cent of partners in law firms are women. For women who choose to go to the private bar as barristers, the situation is even worse. That situation will be outlined in more detail by Fiona McLeod SC, who is presenting the submission from the Victorian Bar Association, so I will not go into a lot of that.

Were it the case that the combination of Australian workplace practices legislation, affirmative action initiatives and cultural change had significantly improved the status of women in the legal profession, we would probably have no need to be here today. But the figures that we are able to access often show a worsening rather than an improvement in the average remuneration of women in the legal profession, notwithstanding their increased participation rate.

The 14 recommendations in this submission attempt to achieve the following. Firstly, better collection of information on the briefing of barristers—who gets what and how much they are paid. The government has gone a long way towards this with its legal services directions, but more work needs to be done in other sectors, particularly the private sector, because if you

cannot count it, you cannot fix it. Secondly, the improvement of the collection of data on pay equity issues generally, so that accurate industry based statistics can be obtained and used to establish benchmarking and generate research into mechanisms for improvement. Thirdly, increasing the power to investigate and monitor gender equity issues in the legal profession, some of which we hope will be improved through the equal remuneration provisions in the new Fair Work Act.

Implementation of such recommendations would allow industry-specific information to be available and would benefit all industries, not just the legal profession. For this reason, the Law Council itself has undertaken and financed projects to assist this process. As we speak, statistics are being collected from superior courts all over Australia that will show over a period of about two months who is appearing in what courts and in what types of matters by gender. Gender appearance data, which is basically people appearing as barristers or as advocates in court, was originally collected by Australian Women Lawyers in 2006. While the collection process was somewhat jerry-built, the results provide an important insight into who was appearing as counsel in which courts and showed clearly that the longer the trial, the more superior the court and the more lucrative the type of matter, the less women were appearing.

The current survey will provide professionally collected information using a sophisticated survey method to provide a picture of the appearance of the courts in 2009. That is all over Australia. To accompany those results, the Law Council has in place a model equality of opportunity briefing policy that provides guidelines and resources for legal firms and agencies to monitor and consider who they are briefing and which encourages them to inquire about and consider suitable women counsel whenever possible. However, the Law Council of Australia cannot achieve the level of change needed on its own. The government, through the ABS, the Office for Women and its industrial relations powers has an enormous ability and role to play in the legal profession. We thank you for being able to be here today.

**CHAIR**—Thank you very much. I found your submission incredibly interesting and very helpful. I would like to know a little bit more about a few things. If I am clear from what you are saying, this \$7,000 or \$8,000 a year gap is institutionalised, for want of a better description—it is normal practice for women lawyers to be paid less than men.

**Ms Blumer**—I did not know it until I read that statistic. As an employer, I find it somewhat shocking. The benchmarking surveys are usually not gender separated. I was always under the impression that people were being paid the same. Carole can help me on this. Is it that they are more in the lower paid areas, like community legal centres, or is it for the same job?

**Ms Caple**—It would appear to be people performing the same job being paid differently. That is straight out of law school in their first year of practice. We are talking about the practising profession rather than in government or in other roles.

**CHAIR**—Is there a clear sex segregation? My sister is a lawyer of some 25 years, and I recall when she first graduated there was an expectation that women would be more in family law, for example, then you would find them in criminal law. Is that sort of segregation still commonplace?

**Ms Caple**—There are traditionally certain practice areas where women tend to cluster more. That is true. But, to be fair, in Victoria the Chief Justice of the Court of Appeal is a woman with a commercial background, so more and more we are seeing women coming into commercial roles.

**Ms Blumer**—I think essentially, though, they are still clustering in the lower paid end of the profession.

**CHAIR**—And whether that is their preference or that is where the vacancy is is something you do not necessarily have the information on?

**Ms Caple**—We just reflect on the fact that, because we have so many more senior women vacating the profession after the first five to 10 years, by definition the women who are there are more junior and are taking on roles that are more junior. If you come into a firm, whether your expectation is to be a general practitioner or to be in any particular area, as a junior practitioner you will often be taking on the role that you are given.

**Ms Blumer**—I think we are all aware of the system that operates at the moment, whereby the most academically successful are offered cadetships or internships with the major law firms. Those law firms fight very hard to get the very best graduates and in fact look after them very, very well. It was always my understanding that there was a difference between what particular firms would pay and what sorts of packages they would offer. A lot of the firms now do try and attract women in particular with good maternity leave packages and other benefits. That is why I find this particularly shocking, because I think it does reflect that there is still a preference—in some firms more than others. There is a big difference. If you look at the figures for individual private law firms, some will have only 10 per cent women partners; others will have a much higher percentage—20 per cent or something like that. So there is a big difference in culture. I know that even up to a few years ago—and they will still be out there—that there were smaller firms, not the larger firms, not the top tier firms, that would not, as a matter of principle, employ women. You will still find quite a lot of the smaller and medium sized law firms do not have very many women in their ranks. I think they are just being selectively not selected. So those issues are still there. I just did not know it was that bad until I looked that statistic. I was quite horrified.

**CHAIR**—In other industries, some of this is being put down to women perhaps not being as good at—I do not like to put it that way—or not seeking the same things in individual pay negotiations as their male counterparts. Or perhaps they value certain things more highly which may be non-monetary benefits. I am curious because, in the private practice area, I assume that people are quite secretive about the actual pay scales that apply or any bonuses or commissions that may apply. Is that still the case?

**Ms Blumer**—It is my understanding that it is still very secretive. It is not like the Public Service, where we know that you are at that level and you are going to earn between x and y. There is benchmarking carried out by private organisations within the legal profession who collect from firms—who pay for the service—very specific data from on what they are paying, what people are earning, how many hours they are billing and all of this sort of information. That information is not gender based. What would be really interesting would be if they had to collect that on a gender basis. They are a private organisation but a lot of the good law firms

subscribe to this, and that might be very interesting. It might be something we could look at to find more information. They only provide a firm's information to that firm in particular but then they do a general survey where they show you where you compare to other firms of a similar type and size—that is, what they are paying people. So the information is out there.

**CHAIR**—Would a graduating lawyer be aware of that? Would they be going into their applications with a bit of an idea of what the going rate of pay should be?

**Ms Blumer**—They do not have access to that confidential data. However, they would have a pretty good idea from talking to their fellow students and colleagues about what an entry-level solicitor, for instance, would expect to earn at various places and what kind of a package would be involved. But it would be anecdotal. I do not know that they could find that out elsewhere—although some websites would be fairly straightforward.

**Mr NEUMANN**—I was a senior partner of a small- to medium-sized law firm in the Brisbane CBD. We subscribed to that information. The information was on a one- to five-year basis, was geographic and was about whether fees were up to \$300,000 or \$1 million or \$2 million.

**Ms Blumer**—Exactly.

**Mr NEUMANN**—It was never gender based at any stage.

**Ms Blumer**—But it would just be an extra box to tick.

**Mr NEUMANN**—The Financial Management and Research Centre at the University of New England had that information. We subscribed to a number of ways to do it, but it was never gender based.

**Ms Blumer**—That is what I am talking about. In fact, it might be worth our while, as the Law Council, talking to them and seeing if they could perhaps start.

**Mr NEUMANN**—Go to the University of New England and ask them.

**Mr HAASE**—I would be interested to know your view on whether or not a graduating student is very concerned about the starting salary. I suspect that, increasingly into the immediate future, they will be less concerned with that starting salary and very keen to have a start. I would suspect that attitude would destroy one's motivation for bargaining. What would your comments be in that regard?

**Ms Blumer**—There have been a lot of layoffs in the legal industry, particularly from large firms. Is that your understanding, Carole?

**Ms Caple**—Yes.

**Ms Blumer**—That is in the last 12 months. You will find that people are less fussy because the young lawyers are worried about getting jobs. For the last 10 or probably 20 years, there have been good times. But the situation is changing now; the capacity to bargain is changing. Usually the entry level is a set amount; there is usually not a lot of negotiation at the entry level.

They do the right thing. They want to get you in there, they want to see what you are like and they want to see if they want to keep you. A lot of firms are prepared to pay fairly well for that. The issue is what happens after that, though. I suspect it is not at the entry level but two or three years down the track that certain people are encouraged to stay and certain people are not. It is very difficult to measure whether somebody is doing a better job than another in the legal profession. For instance, it is such a subtle thing as to whether one is a good litigation person. Do they collect their evidence well? How do you measure? I am hoping that maybe, with the tightened equal remuneration principles, there will be enough there for lawyers to be able to bring a case on that basis.

**Mr HAASE**—Would you care to comment further on the other aspect: as to whether, once individuals are engaged and are found to be good, bad or indifferent, it is possibly that employers are encouraging the best to stay. It is very difficult for me not to be making a gender biased comment here, but is it possible that those that are selected and are perhaps paid more to maintain their employ are moving away—to that \$7,000 or \$8,000 per annum figure—from the remainder that are staying on that initial salary? Your statistics show the males predominantly are moving away. Are they being kept on with the dangling of the remuneration, as opposed to women simply being deliberately paid less?

**Ms Blumer**—I would not want to say that they are being deliberately paid less. It is the market imperative, yes, and it makes sense. It is business; it is how you do things. When we are talking about the private legal profession we are talking about business, as you will certainly know. It is a business.

**CHAIR**—It is billable units, six-minute units, and some people are better at billing than others.

**Ms Blumer**—Yes, that is right.

**CHAIR**—Some people are ruthless at billing.

**Ms Blumer**—Some people are ruthlessly good at it. Some people are too good at it. Some people are not good enough.

**Mr HAASE**—Some women are ruthless, too, Chair.

**Ms Blumer**—I did say ‘people’! So, yes, all of those things that go into it. It may be that, as you say, they are looking at the long term. I do not know why this is happening, but it is happening. And that is a problem—that we do not have enough information on what is happening inside the private law firms. We would like to find out, whether it is through somewhere like FMRC or some other means. A couple of the law societies do collect data on income by gender, but there is very little of it available. As Carole will say, it is voluntarily provided by the law firms, but quite happily provided.

**Mr HAASE**—Would you care to comment further—I am looking for a stop sign from the chair but she has not given me one yet—

**CHAIR**—Does rolling my eyes count?

**Mr HAASE**—Only if you are looking at me—so would you care to comment further on whether or not partners would offer that higher remuneration to men on the basis that there is the perception that perhaps ladies are going to be absent for maternity leave? Is that something that is an issue in the industry?

**Ms Blumer**—I do not think that is a big mystery. I am sure that is going on in heads. Once again, it is a business, and that is the reason. Certainly maternity leave provisions can assist. It is interesting to note that a lot of the law firms are now saying, ‘We will offer good maternity leave,’ because they have to try and keep women there. It is almost like twins who are the opposite of each other: one side of the firm is encouraging women and the other side is doing something else. There are two cultures at work. It has been said that law firms are in two markets: one to get clients and one to get lawyers. If you lose a lawyer it costs an enormous amount of money to replace them.

**Mr NEUMANN**—\$100,000.

**Ms Blumer**—At least, because when they come in they cannot bill for some time, they do not know the clients and they have to learn the files. So they are looking at retention rates and trying to keep people steady, and of course the maternity leave does not help. That is why we need added incentives.

**Mr HAASE**—But that issue makes our task very difficult because it is not something we can solve.

**CHAIR**—Maybe.

**Ms Blumer**—We can have a look at it.

**CHAIR**—Exactly.

**Mr RAMSEY**—I would say that, of all the submissions we have seen, this would have some of the most blatant examples of women not being paid the same. I picked out a figure from, I think, Victorian, that a woman briefed in litigation on a matter by a government department is likely to receive only 38 per cent of the fee paid to a male barrister. That is an incredible figure. I want to go even further than Barry, but before I dig my hole and you shoot me I want to try and construct a ladder to get out of it. I expect you to respond and shoot me down but I need to ask the question: do you ever rate women lawyers as opposed to men lawyers and is there an industry perception that they are not as good for some reason?

**Ms Blumer**—I do not think there is any rating system, and certainly not in my head. But I think that there was a perception many years ago—and I think it is very much past, and as a litigation lawyer I can say this quite frankly—that men were more aggressive. We are going into the realms of—

**Mr RAMSEY**—I notice—

**Ms Blumer**—So, more aggressive—you want a bloke if you are in court; you want that bulldog approach. And yet, as Fiona will tell you, the statistics show that that approach is often

not the most successful. Also, I regret to say, many women are in fact quite aggressive. It is not necessarily a bad thing, and I think the kinds of women who are attracted, for instance, to the bar or to litigation law—they are usually the last bastions of the ‘we need a bloke’ attitude—are going to be fairly assertive people. In my experience over the years, very rarely have I had a client say, ‘I do not want that person because they are a woman.’ We have equally got the situation where they do not want someone because they are a man. So clients these days are of both persuasions. So there is that thought, and it is more amongst the legal profession itself that it is amongst the clients. When it comes to briefing practices, often when we think of a barrister we see a bloke; or in the medical profession—

**CHAIR**—We have watched too many episodes of *Rumpole* or something.

**Ms Blumer**—Yes. We did have some nice women in that as well.

**Mr RAMSEY**—The reason I ask that question—and I noticed some incredulous faces being pulled on the back benches—is that I wanted to hear you say that. I wanted you to say whether it was an industry perception, that they do not value women’s services as highly, and you are saying it is not even that.

**Ms Blumer**—Well, I am saying—

**Mr RAMSEY**—Initially I asked: does the industry have a reason to think that women do not perform as well as men?

**Ms Blumer**—No, they do not have any reason to think that.

**Mr RAMSEY**—And you said no, clearly, to that.

**Ms Blumer**—Definitely not.

**Mr RAMSEY**—My next question is: does the industry have a perception that—

**Ms Blumer**—I can only imagine that they do, because otherwise they would be briefing more women counsel and they would be making more women solicitors partners. And let me just say that a lot of the statistics we have got have been skewed over the last few years, because what the private law firms started to do to make their statistics on women look better was appoint women as salaried partners. Now, a salaried partner is just a fancy name for an employee with more responsibility—a bit more money, all the responsibility but no care. Basically—

**Mr NEUMANN**—No equity.

**Ms Blumer**—No equity—thank you very much. So you have got no equity in the business; you are not part of the business. They were filling out their figures by appointing women as salaried partners, and it really is meaningless. It is my understanding now that in the kinds of statistics, for instance, that the major newspapers are gathering they seek now to differentiate between salaried partners and equity partners—because really, with a salaried partner, you can sack them tomorrow. It means very, very little. It is appealing to one’s desire for status and title rather than for real involvement and power. There is no power as a salaried partner. It is in the

equity principle. It is going to be more and more disguised too, as more firms are incorporating, so it becomes even harder, and that is why we need to get inside the firms and see what they are doing.

**Ms Caple**—Just in answer to your question, Mr Ramsey, we are about to run a survey to discover what perceptions may have remained as far as the legal profession is concerned as to whether women are performing in the same way that men are.

**Mr RAMSEY**—I think it would be really interesting. It is difficult to believe when you see these figures put in front of you that the industry is valuing women is highly as men. Even taking into account those issues that Barry raised about them looking at a woman and saying, ‘She is going to be away for three of the next seven years,’ you would think that highly educated, switched-on people would be able to see past those blockages, and yet the figures would suggest they cannot.

**CHAIR**—Rowan, I am in the parliament. I can assure you that they do not.

**Ms Blumer**—I have four children and I have worked solidly as a lawyer for the last 17 years. Fiona McLeod has two or three children.

**Ms Caple**—Two.

**Ms Blumer**—Two, I am sorry—I am exaggerating. There are many of us that have a lot of children—our husbands and partners have them as well!

**Mr SYMON**—Just on salaried partners, thinking about that reminded me of the position of trolley bay manager in a supermarket—an inflated title but nowhere up the ladder with it. I do not think you can actually have the two words in the same sentence for it to have meaning.

**Ms Blumer**—No, it does not mean anything. It is the most meaningless affectation.

**Mr SYMON**—I wanted to ask you about statistics and that leads into where what I wanted to go with this. I notice you have referred to a lot of privately collected statistics in here and then pointed out the deficiency in the ABS statistics, which we have examined at some length in this inquiry so far. I was particularly interested in your submission where, in leading up to the recommendation, you are asking for specific data which sets out to track performance over time data of employee earnings and hours, which would then show up these sorts of things that are intangible at the moment. In the past I suppose it has not been dealt with because it has not been measured. My question to you is: have you got a particular focus for that? If you are going to do performance over time I imagine it would be a much bigger job than the current collection statistics by the ABS.

**Ms Caple**—I imagine it would. But the issue of pay equity is not a new one. I take what you are saying to the effect that the issue does surface from time to time but it is a longstanding issue. It dates back to when we started making any sort of collection of any data whatsoever. Just judging from what happens within the states themselves to address these matters, it would not be fair to say that this is a new development—that pay inequity has not existed for a very long time.

**Mr SYMON**—Just to go on with that, we have had the Australian Public Service in and there were similar sorts of issues in that, because women had not necessarily stayed in the job as long, when you looked at women as a whole, there was a lower outcome.

**Ms Caple**—Of course.

**Mr SYMON**—What you said about statistics collection would tend to reinforce—it certainly does for me—that a better dataset from the ABS done more regularly would allow it to be identified down to that one. Performance over time is not something that I have seen a dataset on from anyone.

**Ms Caple**—With respect, it would also be particularly useful to see those sorts of data in light of the changes to industrial relations law and the impact that those laws might have, because they are reputed to have quite an impact and of course you will only know if you look.

**Mr SYMON**—Yes, exactly. Certainly I think that is a very good recommendation. Without collection it makes it easy for it to be ignored by some people, but it is there, it is real and part of what we are doing is to identify these things. Thank you.

**Mr NEUMANN**—I have just been appointed to the committee, so I do not have any papers. I would like to pose a couple of questions and ask you to comment on them. There has always been a war for talent with respect to the employment of lawyers. It has always been difficult and there are financial inducements you have to give to get them to come and work for you. I noticed your comments to Barry Haase in relation to that. I just want to talk about a couple of things. I think we need to do some investigation, and I would like to hear what you have to say about it, into the culture of some of the small, medium and even large firms in Brisbane's CBD, as well as Sydney and Melbourne, particularly in so far as their machismo culture and the lack of family friendly work hours they require—the billable hours requirements and other quite onerous requirements—and also the idea that you have got to join the right clubs, join the right groups and drink with the right blokes and the like. That has been quite a disincentive to a lot of the female lawyers that I know. Can you comment on that? That is one.

The next thing I would like to comment on is simply the attitude taken by the judiciary in court. I was a litigation lawyer for 24 years before I got elected to this place. I argued criminal cases and personal injuries and in the end specialised in family law. In the attitude taken by judges and the way they comment on women barristers and solicitors who appear before them—what they wear, how they look, how they talk to them and the way they address them—there is a lack of respect that I have personally witnessed on numerous occasions and that the many female lawyers who worked for me over the years have actually commented on. I wonder whether you should look into that aspect as well.

**Ms Blumer**—Thank you very much for asking that question because it allows me to go into anecdotal situations. With respect to the judiciary, I would first of all say that most of them are absolutely marvellous. However, when I first became a lawyer and sat at the bar table, the magistrate addressed us as 'Good morning, gentlemen.' I have watched women—

**Mr NEUMANN**—I have seen that, too, by the way.

**Ms Blumer**—One has to take it on the chin. I saw a strange memo that came out from the Family Court, I think in Parramatta, some years ago that said, ‘Women that appear in trousers will be heard’—or seen, whatever. Obviously they had had a problem up until that point. I have seen solicitors in my own employ being told, ‘Miss So-and-so, you’re in the First Eleven now’—cricketing terms. The stories I have heard go on and on. It happens much less these days but one cannot help but see it still occur from time to time. It is very shocking to a lot of our young women lawyers who just did not grow up expecting that. It is not so bad for the older lawyers who have kind of experienced that in daily life from time to time.

Going back to firm culture, and this is anecdotal, they might work for an industry—I do not want to say a particular industry—where it is part of the culture, and we have had complaints about this, to take the person from that particular company or organisation out to strip joints or to lunch in restaurants with lap dancers. Those sorts of situations are very difficult for women to be involved in and to get on in that situation. What are you going to do? There has been a little bit of an improvement in that women are now networking themselves a bit more and a bit better, and it is a very important thing to do. But, anecdotally, those situations continue to occur.

The problem you have as a lawyer is whether to complain about a member of the bench who says or does something like that or complains about how you appear. I know a young pregnant woman got severely berated in court about her outfit. It was the best she could do, she was very ill, but there was concern that it was not appropriate. These are humiliating situations. The problem with complaining about the bench is that it might be all fine and well and you might be right, but what happens next time you appear before that person? It is very much to the disadvantage of your next client if you complain on this occasion. People are afraid, and we do not have good judicial complaints mechanisms in most jurisdictions so those situations often continue.

**CHAIR**—What about training? I have read that the judiciary are increasingly being exposed to cross-cultural training.

**Ms Caple**—That is correct, and on gender.

**CHAIR**—Gender included in that?

**Ms Caple**—Yes.

**CHAIR**—Is that common in most states?

**Ms Caple**—It is ad hoc.

**Ms Blumer**—It is ad hoc amongst the different jurisdictions. New South Wales has a very active college, I believe, but other places have nothing or very, very little at all. Once again anecdotally, people going to the bench often express their concern as to the lack of training they do receive in many jurisdictions.

**Mr NEUMANN**—It would be interesting to see the response. When the Howard government inserted the new part VII into the Family Law Act, which concerns the shared parenting arrangements—equal time or substantive time—I noticed the difference in the way the judges

and federal magistrates dealt with women litigants in person, as well as women lawyers. There was a lot more of an aggressive approach taken to women lawyers in those circumstances, when women would argue for women in residential, custodial and contact cases. I would be very interested to see what data we could get in relation to the attitude taken by the courts since that time.

**Ms Blumer**—Yes.

**Mr NEUMANN**—It is a very controversial issue; it has been in the newspapers. The *Australian* newspaper has run it a lot. I am interested because, increasingly, female lawyers complain to me about the way that judges and federal magistrates talk to them when they are arguing those types of cases, particularly for women.

**Ms Blumer**—No, I am not aware of that.

**Mr NEUMANN**—No, but I think it is something you should be looking at, shouldn't you—or perhaps the Law Society?

**CHAIR**—I would like to ask a couple of questions in closing. First, I will just make the comment that, from the evidence that the committee has received, it always seems that, where there are individual negotiations for employment arrangements, women appear to do worse than where there is well-known information available or there are collective arrangements, in terms of minimums and benchmarks and all the rest. So I can imagine that private practice is problematic.

In the area of actually addressing pay equity, in the jurisdictions that have included pay-equity principles, there have been cases, many of them very successful—even though there have not been as many as some of us might have liked. They have been incredibly lengthy. They have involved huge amounts of evidence gathering. They have often required the involvement of your profession—and at a senior level and at great cost to the applicant. The system still seems incredibly adversarial. I notice you have made some comments about this. I am interested that you can see a system working where pay equity becomes something that is promoted, where there might be a government agency whose job it is to actually make the inquiries and get access to the secretive wages information themselves. In your opinion, is it possible to avoid that kind of cost and those adversarial legal proceedings, if we have some sort of alternative mechanism?

**Ms Caple**—We would like to believe that is the case. To be fair, it is difficult to say that there is a lot of information out there for people to work with, for a starter. When we say that there is a pay equity issue in the legal profession, I do not know that—other than the data that we were able to obtain to prepare this submission—there is a great deal of awareness of the issue within the legal profession itself. I think a lot of people are quite surprised when they read that it is. A dedicated unit that would address issues of research, raising awareness and making it easier for cases to be brought forward or, indeed, cases to be heard in some sort of—I will not say 'another way'—less adversarial and less resource-intensive way would probably be an entirely appropriate approach.

This is a broad-scale issue. If it goes through in the way that it is presently being dealt with, in a case-by-case way, we are going to see little nibblings at the margins, but isn't this a matter that

really should be trotted out as front and centre, longstanding, across the board, with every profession? Financial services seem to be the worst off, but lawyers are not that much better.

**CHAIR**—We certainly have not come across a profession where women have not been in this situation.

**Ms Blumer**—Legal cases are quite good for lawyers. I know that when big cases have come out—and they cost an enormous amount to run—everybody in the profession has exclaimed, ‘Oh my goodness; we’ll have to clean up our act,’ and things happen. Lawyers listen to the results of cases because they understand them and it interests them.

**Mr NEUMANN**—Precedent.

**Ms Blumer**—Yes, precedent. Also, women lawyers will have trouble complaining about legal costs, but the fact is that it costs them a lot of money too. While they have some understanding and access to legal services that might be better, it is still a cost problem. Not only that, it is a reputational problem. In this particular industry, as in any industry, once you have a reputation as a troublemaker it is very hard to get around that. So I think confidentiality is a very important thing. But I do think there should be a remedy. There should be benchmarks and there should be information. The problem is that a lot of the women we are talking about do not know they are being paid less. They do not know.

**CHAIR**—Yes. One of our submissions was from Diversity Council Australia. They actually undertook some research and discovered that most of the people interviewed did not know there was a pay equity gap and were surprised to find there was one. They generally thought it should be addressed once it had been identified.

**Ms Caple**—I also draw your attention to that case in Victoria last year—and no doubt Ms McLeod will mention it—of the Victorian Women Lawyers and the judicial notice that was taken of the fact that women lawyers were at a disadvantage. There is no need to prove it. It is a given.

**CHAIR**—True. I am very interested in your equal opportunity briefing policy. Can I ask who designed it, where it comes from and where it is currently applied?

**Ms Blumer**—It comes from the Law Council of Australia. The Law Council, as a peak body, has a role in setting standards and assisting practitioners in meeting those standards. It was designed by a working group of the Law Council. It has been reviewed recently. It is for individual firms, briefing agencies and government departments to adopt. If they adopt it then these are the kinds of things that will follow through—and a few have. What we really wanted and what the policy has in it at the moment—and which we think we might have to change—is a reporting provision. You have got to report who you briefed, how much and various provisions like that. That is where it came unstuck. Once again the private profession did not want to say and they did not want to go that far. We have actually had a consultant speaking to the firms and seeing what sort of a survey instrument they would be happy with, and they were not happy with quantitative research at all. But they were prepared to give very good overviews and opinions as to what was happening in their firms.

From our point of view any improvement is good. If the firm is at least sitting down on a regular basis and asking, 'What are we doing?' and looking at their own practices—and are at least considering them and thinking about it—then that is a step up from doing absolutely nothing. We want to get to the point where they will actually be prepared to give us their statistics so we can say: 'This is what you did this year. You improved that year and fell back a bit there. I wonder why. Is it so and so who does not like briefing women? They have never briefed a woman in their life.' That is the process that we want to get happening within the individual firms. But our policy is only as good as those who adopt it and how actively they take it in board. There is no compulsion.

**Mr HAASE**—In recommendation 14 you talk about the initiatives taken by some states. I am just wondering if you had Queensland specifically in mind.

**Ms Caple**—I am a Queensland solicitor.

**Mr HAASE**—Thank you. It has been mentioned to us in evidence previously that Queensland have just delivered a report that looks like a good system and a good model.

**CHAIR**—On behalf of the committee, I thank you very much for your attendance here today and for your submission. Do not be surprised if we need to come back to you and ask further questions. No doubt, if that happens you will hear from our secretariat. It has been very interesting. You will be sent a copy of the transcript of this morning's hearing, to which you are able to make corrections of grammar and fact. On behalf of the committee, I have really appreciated your attendance today. Thank you very much.

**Ms Blumer**—Thank you for having us.

**Ms Caple**—Can I just say one last little thing to Mr Haase. The system in Quebec in Canada is also a very good one but I have not had a chance to give it proper analysis. But I understand it is very good.

**Mr HAASE**—Thank you.

[12.10 pm]

**McLEOD, Ms Fiona Margaret, SC, Chair, Equal Opportunity Committee, Victorian Bar; and Immediate Past President, Australian Women Lawyers**

**SCHILLING, Ms Meredith Anne, Member, Victorian Bar**

**CHAIR**—I would like to welcome representatives of the Victorian Bar to today's hearing. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. I would also like to advise you that these proceedings are being broadcast on the internet.

We have received your written submission and had an opportunity to look at that. Would you like to present any additional submissions or make an opening statement before we start to quiz you?

**Ms McLeod**—I will introduce us. I am the Chair of the Equal Opportunity Committee of the Victorian Bar, a role I have held for the last two years. I am a former president of Australian Women Lawyers, as was the previous witness Noor Blumer, so also I have the authority to speak on behalf of Australian Women Lawyers today. I have practised as a barrister at the Victorian Bar for 18 years and as a silk for the last five years. Meredith Schilling has been at the Victorian Bar for three years. She came to the bar late in the piece; before that she was a judge's associate and did her articles with a large city firm. She is a co-author of this report.

Firstly, I will give you some background to the role of the Victorian Bar Equal Opportunity Committee in the promotion of equality of opportunity for women barristers at the Victorian Bar. The Victorian Bar has demonstrated leadership and commitment to addressing the issue of gender inequity for women barristers since at least 1994. It has been a leader amongst states in doing so. It commissioned a landmark report into discrimination against women at the bar and barriers to retention and advancement and has worked over the last decade to address ongoing cultural and systemic issues in the profession, in particular in the bars, through practical measures and the drafting and implementation of state and federal government policy to address inequity in the delivery of work and payment of fees to women barristers. The bar consults and participates with the judiciary and with the profession in membership of the Law Council of Australia's Equalising Opportunities in the Law Committee, from whom you have just heard. It also advises on issues of law reform as appropriate.

I am here in another capacity this morning as an immediate past president of the Australian Women Lawyers. That is an umbrella organisation representing women lawyers' state and territory bodies at the national level. Australian Women Lawyers has been and is working independently in cooperation with the Law Council to promote the interests of women lawyers and to address entrenched discrimination. Carole just mentioned to you that the Law Council is undertaking a survey of members this year. It is doing that jointly with Australian Women Lawyers.

As a profession, we recognise that we are fortunate to be able to draw on our own members' skills and our voluntary capacity to contribute to these important issues. I want to acknowledge the contribution of individuals on various bar and solicitor professional bodies, including AWL, where we have been so successful in progressing these issues with government and the private profession so far.

We are also very pleased that the committee is undertaking this inquiry. We think that the financial security of women in society and the issue of pay equity is very important. It is a crucial indicator of the financial wellbeing of all women and thus of society, including the professional women represented by our bars. We believe it is very important to draw attention to the underrepresentation of women in senior levels of governance and decision-making roles.

The strength of the legal profession impacts on our ability to perform an important role in the administration of justice. It is from our bars, for the most part, that our judicial officers are drawn, and where pay inequities exist they have, in our observation, a negative impact on the strength and depth of our bars and inevitably on our courts and the administration of justice. We hope that there will be a range of recommendations on how to take steps to end the pay inequality that exists and that you can put forward some strategies to overcome this.

Just turning to our submission briefly, the submission analyses the published data regarding government briefing of women barristers by the state of Victoria and the Commonwealth. It does not go to private briefing, of course. Our report concludes that there are inequities revealed by the data in the number of briefs in some areas going to women, in the nature of work that is briefed to women and in the actual fees paid to women. It is important to state a number of things. The state of Victoria and Commonwealth attorneys-general have each demonstrated a real commitment to addressing the issue of inequity over a number of years. The very collection and publication of the data that forms the basis of government reports was motivated by this commitment, and we recognise that, to the adherence to equal opportunity briefing policies and to measuring the success of implementation measures.

Noor just mentioned to you briefly that the Law Council developed the equal opportunity briefing policy through a working party—the original policy was developed at the Victorian bar, known as the model briefing policy—and we were successful in negotiating with the state government to have that implemented for the production of all government work. It was a requirement of tendering for government work that firms adopt that model briefing policy. The policy was then promoted through the Law Council, and it was changed and adopted to suit the various state positions. Now we have the national equality of opportunity briefing policy.

The data in our report represents government spending, and it is obviously not spending by private firms on known government work. The income of any individual barrister depends on direct negotiation with them briefing them. So, unlike the law firms, where there is a negotiation with a partnership and, in some cases, scales of pay, our fees depend entirely on our direct negotiation. It is our expectation, based on anecdotal evidence and past research that we have undertaken—and we expect to see this confirmed in the survey that is being undertaken this year—that government briefing represents the high water mark in terms of briefing of the profession. In other words, the inequity expected in briefing by private firms we expect to be much worse both in terms of the number of briefs and the fees that are paid. The last point to make is that the data relates to briefing in Victoria and briefing by the Commonwealth, and we

expect the position in other states and territories to probably be worse than in Victoria because we have had the benefit of government briefing policies in place for a number of years now.

Our research on the retention of women shows that women leave the bars at a significantly earlier stage than men. The last demographic study we did showed that women left the bar on average at seven years seniority and men leave at 15 years seniority. I do not know if we mentioned that specifically in the report. Clearly, if you are looking at women progressing to levels of seniority—to take silk, to be available for appointments to court—seven years is usually too junior to be considered for that. More work is required to establish why this is so, but work in the past has suggested financial security is a primary reason. We do not know what proportion of our members are undertaking work part time, nor what motivates the choice to work part time. Responsibility as carers, we assume, is one reason but there may be other reasons, including financial imperatives to supplement income with other work. As we note in our report, the bar has implemented a range of measures to support members taking time off for child-care responsibilities. Australian Women Lawyers is supportive of recently announced measures to introduce paid parental leave and the potential extension of the scheme to include superannuation entitlements.

We make a number of recommendations regarding measuring and reporting of briefing which we say should be relatively easy to implement and manage, and we would like to make the following points. Without financial security, the position of women barristers will not improve. Governments have the unique position as significant purchasers of legal services and are thus uniquely placed through well-crafted policy to address inequities that persist and provide leadership for the private profession.

What is needed in terms of briefing is both breadth and depth at all levels of experience in all jurisdictions and with equity in terms of remuneration. In the past, governments have pointed to briefing of a small number of senior women as evidence of addressing pay inequity or at least briefing inequity. But that has not succeeded on its own in addressing the situation for the majority over the long term. For these measures to be meaningful, we believe we need to introduce briefing targets as to the number of briefs and the proportion of briefs paid—aspirational targets to begin with. It might also usefully include measures to achieve the breadth and depth of briefing. My colleague and co-author of this submission, Ms Schilling, will speak about the adequacy of the data in the report.

**Ms Schilling**—As my colleague Ms McLeod has said, the submission of the Victorian Bar provided to the inquiry is based to a large extent on an analysis of the *Barristers briefing report 2006-2007*, which was prepared by the Victorian Department of Justice. As Fiona has said, the report meets the terms of the Victorian Bar Equal Opportunity Briefing Policy, which recommends that organisations adopting the policy ‘develop the capacity to collect data’ and report on the comparative allocation of work between male and female barristers, showing specifically the number, practice area, type and gross value of those services.

The Victorian Bar welcomes the publication of the report. However, that report is currently the sole source of reliable data on pay equity issues as they affect male and female barristers. The data collated in the *Barristers briefing report 2006-2007*, as analysed in the Victorian Bar’s submission, establishes unequivocally the existence of a gender pay gap between male and female barristers. It also shows that, whilst the percentage of briefs to women have increased and

in some areas now exceed women's representation at the bar itself, women are being briefed predominantly in child and welfare protection matters, which attract the lowest brief fees, on average. So, as Fiona has said, whilst the Victorian Bar welcomes the increased allocation of work to women overall, there is no evidence at present that barristers briefed in such child and welfare protection matters will, in time, graduate to those jurisdictions attracting higher average brief fees.

Let us now return to the issue of data collection. Although the Victorian Bar is aware that many private firms collect and report internally on their briefing arrangements, the results of these studies are unpublished. A very small number of these firms have provided data to the Equal Opportunity Committee of the Victorian Bar on a strictly confidential basis. Although a considerable amount of work has been done over the past 10 years by the Victorian Bar and Australian women lawyers to collate and analyse data on the appearances of female barristers, this data captures only the frequency, duration and nature of female barristers' appearances. It does not enable any direct comparison to be drawn between the fees paid to equally skilled and experienced male and female barristers.

The Victorian Bar therefore considers that it is critical that a more rigorous approach is adopted to the collection and analysis of data relating the briefing of female barristers. This recommendation, in our opinion, has wider application to the collection of data on remuneration in any of those industries in which women are not engaged as employees but work—as in the case of barristers—in an independent manner. In this respect, the Victorian Bar endorses recommendations 4 to 7 of the Law Council of Australia's submission. In particular, it supports the establishment of a research unit, with a particular focus on the collection and analysis of empirical data throughout all industries. Such an initiative would assist, in particular, those industries—of which the Victorian Bar is one—that face unique challenges in addressing the collection and analysis of data. As Ms Blumer states in her submissions from the Law Council: 'If you can't count it, you can't fix it.' I would add to that, 'If you can't identify it, then you can't even commence fixing it.'

**CHAIR**—Absolutely. Thank you very much for that. I am fascinated by these statistics from the Victorian government and the Commonwealth government. As I understand your submission, the Commonwealth government has only relatively recently agreed to apply the briefing policy. Is that correct?

**Ms McLeod**—The Commonwealth purchases government legal services through the Legal Services Directions, which are given the force of legislation. There have been recent amendments to the Legal Services Directions—I think it is appendix D—and the specific provisions which encourage the collection of data. Those have been recently amended so that it is mandatory now to report, in year end reporting on Commonwealth spending, a breakdown of male/female number of briefs and fees spent. I hope you have the attachment where we have analysed the Commonwealth briefing, because I spent hours going to different published websites to pull this data together. There is no point at which this data is easily obtained in one place, and we would certainly be encouraging the Office of Legal Services Coordination or somebody to collect this data on behalf of Commonwealth firms and agencies.

**CHAIR**—I was assuming that the data on government departments on page 7 of the submission was the general Commonwealth one but maybe it is not.

**Ms McLeod**—No, this is all Victorian. The Commonwealth is represented in a separate attachment. Page 12 is a summary of the Australian Women Lawyers survey.

**CHAIR**—That is representation of women.

**Ms McLeod**—Yes. There is a separate attachment.

**Ms Schilling**—Perhaps it has not been provided.

**CHAIR**—I may not have it my copy of the papers.

**Ms McLeod**—It should be appendix H.

**CHAIR**—‘Analysis of briefing’—I have got it listed here but not appendix H.

**Ms McLeod**—We will make sure we get that to you. We refer to it at paragraph 33.

**CHAIR**—I must admit I just assumed that somehow I had read it wrong and that those were the figures. The Commonwealth one is the one that we have the easiest ability to influence—for want of a better description—and I was just very curious. One would assume it is not remarkably different from the statistics from Victoria.

**Ms McLeod**—Some agencies have a very low level of briefing overall. We do not have information from Australian Government Solicitor, which is very important because they would provide the main briefs for litigation matters.

**CHAIR**—You do not?

**Ms McLeod**—We do not. We asked Australian Government Solicitor to provide that information and we have come to a bit of a dead end with that. I would think it was critical that the AGS provide it.

**CHAIR**—‘Dead end’ as in no answer or as in: ‘We are not going to give it to you’?

**Ms McLeod**—No, an answer. I do not want to speak for the CEO but we did not get the data we were after. I know she is very supportive of equal opportunity briefing issues. To be fair to the AGS, I know they are on board. We just do not have their data readily available. We need it because they are the biggest spender on government work. Appendix H sets out things like the fact that HREOC are wonderful at briefing women, which will not surprise you. There are some surprising issues too. For example, the Department of Veterans’ Affairs had a good year but it was not a very big spend. The insolvency trustees were good as well, but again it was not a very big spend.

**CHAIR**—I am almost wondering whether you ask who is responsible for determining the briefing of a government agency. Do we collect the gender information on that?

**Ms McLeod**—Who makes those decisions internally?

**CHAIR**—In other words, are women lawyers in government more likely to brief women barristers on matters or—

**Ms McLeod**—I can make a general observation about that. It does not appear to us that women are particularly supportive in their briefing patterns of women; otherwise you would expect to see, with the demographics in the profession of younger women in particular, that there would be a higher rate of briefing.

**CHAIR**—Regarding the information about the briefs and the fees, on the Victorian data it has been pointed out to me that there has been a 10 per cent increase in the briefing of women; yet when you actually look at the increase percentage for the fees it is seven per cent.

**Ms McLeod**—So we are going backwards.

**CHAIR**—That was my interpretation. Presumably in your broader work you make this information available about barristers' general levels of fees and charges. Is it that women are not putting themselves out there at the appropriate fee level or—

**Ms McLeod**—I think that may be right to some degree. As I said, it is an individual negotiation. All barristers in Victoria—or most—retain a clerk who provides administrative services, collection of fees and things of that nature. And the clerk is often the liaison point with the solicitor and may often negotiate fees directly with the solicitor. The clerk will know what your standard rates are and the clerks may often advise women to set their rates lower than men.

**Ms Schilling**—I think another issue is that, if you are doing work for government, you will obtain a government rate. You will have to provide information about your commercial rate and your years of standing at the bar, and then you will be informed what your rate will be set at and, from that point on, if you do further Commonwealth work, for instance, that will be the rate that is set on your briefs, that is marked on your briefs, until it is revised again. And that does throw up the question: how, in that type of work, does this inequity still arise? I suppose the questions that are raised are: are male barristers setting their commercial rates generally higher; are they seeking to renegotiate their rates more frequently and higher? These are questions that are—

**CHAIR**—And the answers to those are unknown to you.

**Ms Schilling**—Yes. As I said in my submission, the data in the briefing report is the sole data, and the analysis of that data that we have undertaken in our submission is really the first time—and I have not been involved at the bar for many, many years, but it seems to be the first time—those types of figures have been analysed in this way, and they are, as you put it, very blatant. They demonstrate blatant inequality.

**CHAIR**—Massive inequality—three times the pay gap that exists in hospitality and retail amongst incredibly low-paid workers.

**Ms Schilling**—Yes. And I think one of the more glaring aspects of the pay gap which surprised me in working through the figures was that, even in respect of the welfare and child protection matters, where women are briefed in 61 per cent of matters, their percentage average fee remains significantly lower—

**CHAIR**—It was. It was about—

**Ms Schilling**—at 68 per cent.

**CHAIR**—Yes.

**Ms Schilling**—I think one of the common responses that are given in relation to pay inequity is that, because that are so many variables, such as seniority and expertise, it is very hard to compare like with like in this area. Then there is the other issue, which is that the predominance of male barristers in silks is extreme—the percentage of women who are silks is very low—and they are going to be the barristers receiving the higher fees. So that may account to a certain extent for the inequity. But in the Children’s Court, where these welfare and child protection matters occur, you are going to have fewer numbers of silks appearing in that jurisdiction, so one would expect to have greater homogeneity of experience and expertise and yet one still finds a significant pay inequity in that jurisdiction.

**CHAIR**—Did you have a question, Mr Haase, before you have to go?

**Mr HAASE**—Yes, I do. Just to further clarify that situation, are you saying quite specifically that, in working for the Commonwealth, when you submit your experience and seniority, and I think you mentioned a third criterion—

**Ms McLeod**—Commercial fees.

**Mr HAASE**—and your commercial fees, the Commonwealth would discriminate?

**Ms Schilling**—No, absolutely not.

**Mr HAASE**—No. So the commercial fee will be different, as we have been discussing, but if the seniority and the experience are the same, does the Commonwealth offer a lower rate for female representation?

**Ms McLeod**—We do not know, but we would not expect so.

**Ms Schilling**—No.

**Mr HAASE**—Okay. They certainly would not put it in writing, I would not think. Can I go back to the model briefing policy. At point 8 of your submission you say:

That report confirmed anecdotal reports by members of the Bar and judiciary that women barristers were significantly under-represented in court appearances.

Is that about the total numbers? Is it simply that there are more barristers capable of doing the job than are required to do the job and, therefore, in a currently male dominated environment, they simply say, ‘Well, we’ll give the work to the blokes’? Is that from an anecdotal perspective perhaps?

**Ms McLeod**—We do not know the reasons, but we do know the judges ask us and have been asking us for more than a decade: where are the women? They are not appearing in the long trials. They are not appearing in the appeals. That may be a factor of the fact that there is a small pool at the top end—we have less than 10 per cent silks in Victoria and it would be similar in other states. But you would expect to see some of those women bobbing up in the long trials. I think it reflects the fact that women are not being selected for briefing in the first place.

**Ms Schilling**—I agree.

**Ms McLeod**—That is why we say you need breadth and depth. You need senior women and you need junior women. You need them in building cases, in industrial cases, in commercial cases and in appeals—all over; not just in child and welfare protection matters.

**Mr SYMON**—I cannot really ask a question without talking about stats. I am amazed by some of these tables and I am really glad you have provided them to us. It is probably the most extreme example I can remember that has been presented to this inquiry. In particular, I am interested on the table on page 10 of your submission which compares across jurisdictions. From my reading, the only one there where a woman would get paid more for a brief is before the Federal Court, which was only a small number of cases anyway. So, as you were saying before, even if it is a case of experience in that particular field, it cannot just be that when it goes across all of the fields.

**Ms McLeod**—On that, can I just make the point that of course we have a number of senior women—silks—at the bar who do practise largely in the Federal Court and a female Solicitor-General. I do not know if the Solicitor-General's fees are included in this, but of our 17 or 18 women silks at least half would practise in the Federal Court. Maybe it is female friendly down there.

**Mr SYMON**—That may well be a reason. There is not a big disparity there either; it is not far off equal. The next question I am going to ask is much harder, though. Anecdotally, what have you picked up from other state jurisdictions along those lines?

**Ms McLeod**—We would expect that other states are not better than Victoria at the very highest levels.

**Mr SYMON**—Because they are unpublished?

**Ms McLeod**—Because the Australian Women Lawyers survey, which was done a number of years ago, showed some astonishing anomalies. For example, the average length of brief of a junior woman in the Federal Court was something like one or two hours compared to 100-plus for a man, so there is an instant fee anomaly there. It was 223 hours for a man, whereas for a female it was 1.4.

**Mr SYMON**—That is amazing. This profession is salary based. A lot of the submissions and witnesses we have had have come from a wage based environment, where there might be an award that sits behind them that provides some sort of a floor, even though there are plenty of problems identified with that. We have had other salary based professions come in and explain their problems. Does the fact that there is no floor in any of the levels that we have looked at

here present a problem, or is it just an issue that comes down to an expectation that individual negotiation will provide a reasonable outcome?

**Ms McLeod**—If individual negotiation would lead to equity we would have seen it in the last 10 years, because this work has been underway for at least 10 years in Victoria, with the Victorian bar and—for at least the last five years—the Victorian government right behind it, and it has not led to that result. Some of the private firms have picked up model briefing and equal opportunity briefing policies across the board, but their confidential reporting has not led to any change in the figures. So they are very willing, but it has not led to a different outcome.

As to what will provide the trigger for any change, my personal view is that governments have to lead the way. Individual briefing choices are made based on relationships and observation. You asked Noor and Carole before about what prompts briefing decisions and if there is a cultural aspect to it. When people see other people perform well in court they may say, ‘They did a good job, I might use them next time,’ or ‘We’ll give them a try.’ Of course they will not take what they perceive to be a risk with a briefing just to brief a woman if they think there is a component of risk or if a client does not want a woman briefed or if there is some perception that machismo is required in the circumstances. So it is circular: for women to get the work, they have got to be on their feet so they can be seen performing the work well.

Judges can help because chief justices, particularly in Victoria and on the Federal Court, have for a long time spoken about the merit of briefing women: they are well prepared and they have got gender based qualities to their skills. They have basically said, ‘We’re the consumers. We like having women before us, so send them up.’ That has been wonderfully reassuring but has not led to any change in practice that we have observed.

**CHAIR**—We have your appendix H now, which is really good.

**Ms McLeod**—Yes.

**CHAIR**—I am just laughing about the fact that the National Competition and Consumer Council is 100 per cent blokes.

**Ms McLeod**—Yes. It would be very useful, as you can see, for us to have access to this data and for it to be in place annually so that there can be some ongoing analysis of it.

**Mr RAMSEY**—I would just like to come back to the model briefing policy. How many firms are picking this up? How many are you actually getting to say, ‘These are the protocols we’re going to follow’? Is there resistance out there?

**Ms McLeod**—All firms tendering for government work must adopt it, so that covers quite a breadth of large- and middle-sized firms. Some large firms have taken it up and taken it across all work, not just government work.

**Mr RAMSEY**—Yes, that was the next question. Okay.

**Ms McLeod**—We have spent a lot of time talking directly, particularly to large firms, in order to encourage them to adopt it. Some have versions of it. They have tailored it to have a national

model. In some cases, that even differs from the national equality of opportunity briefing policies. So they have tinkered with it to suit themselves and their own data collection processes.

**Mr RAMSEY**—I do not know a lot about the way law is practised—it is not my field. Can you assume that most of the major companies are involved in government work somewhere along the line and that they would be adopting this?

**Ms McLeod**—Yes.

**Mr RAMSEY**—Okay, so you are getting in at the big end of town. It would be the next tier down where you would need to get that take-up.

**Ms McLeod**—We recognise that we need to do that, because often those middle-tier firms have a significant volume of litigation work.

**Mr RAMSEY**—Yes.

**Ms Schilling**—I think the other difficulty arises because the reporting that is being provided by the firm relates exclusively to the government work, and we do not have the figures in relation to briefing across the board, so we do not have sufficient data there to know how the adoption of the policy is affecting the briefing practices across the board.

**Mr RAMSEY**—Okay.

**Ms McLeod**—We have considered collecting data through the bars, which collect income data each year for the purposes of professional indemnity insurance. There are confidentiality issues about people's estimates of income and reporting of income from previous years, but that is certainly an avenue that we are exploring with the bar.

**Mr RAMSEY**—That brings me to recommendation 38, where, if I understand this right, you are asking parliament to legislate for:

... mandatory reporting of legal service expenditures reporting on the briefing of women and men by numbers of briefs ...

**Ms McLeod**—Yes.

**Mr RAMSEY**—That would be very industry specific legislation, which, while not impossible, is not a place that parliaments tend to want to run to—picking out this one industry and saying, 'We're legislating specifically for that.' Would you like to comment on that?

**Ms McLeod**—That would only require tinkering with the Legal Services Directions. It would not require a change to the head legislation.

**Mr RAMSEY**—Okay. So that is not a regulation?

**Ms McLeod**—It has the force of law by reason of its adoption, if you like, into—I think—the Judiciary Act 1903.

**Mr RAMSEY**—I just thought I would ask a lawyer.

**CHAIR**—Equally, I imagine, it would have any opposition to the idea that government procurement policy might include some minimum requirement for pay equity. It is just that you are saying that your particular circumstances could be addressed quite simply through further tinkering with those Legal Services Directions.

**Ms McLeod**—Yes.

**Mr RAMSEY**—Okay. Thank you.

**Ms McLeod**—We recognise that we have got the job with the private sector. But the recommendations of this committee that could be of real value to us would be on that government spending and reporting data collection—things of that nature.

**CHAIR**—To that extent, if government changed its procurement policy—for example, for legal services—so that the adoption of the model policy was a requirement for any firm considering government work, that would have a substantial impact.

**Ms McLeod**—If you look at page 15, footnote 29, that is the current Commonwealth requirement—Legal Service Directions appendix D, at clauses 4C and 4D, 4C says:

... barristers are to be selected for ... skills and competency independently of ... gender ... arbitrary and prejudicial factors do not operate to exclude the engagement of female barristers ...

And 4D says that, in selecting counsel, you have to ‘identify all counsel’, ‘genuinely consider engaging such counsel’ and ‘monitor and review engagement’. The note is the encouragement to publish annually. We say it should be more than an encouragement; it should be mandatory. It should also record the number and gender of fees engaged and the comparative fees paid.

The next step that our committee and our bar have endorsed is that there should be some target in place. So if 30 per cent of your bar are women or 20 to 30 per cent of your bar are women, you should look at a figure of between 20 and 30 per cent of your spend. As we see it, that will be the only way to provide a critical mass in our profession for some improvement.

**Mr RAMSEY**—What do you think that would mean at the operation front? How does the workplace actually deal with that, do you think?

**Ms McLeod**—It means that the individuals making briefing decisions or briefing recommendations actually have to think: ‘I’ve got this job coming up. Who are suitable women who could do it too?’ And then they would do a comparison of skills.

**CHAIR**—Can I just interrupt for a minute. Rowan, you would like to move that the committee go into a subcommittee for the remainder of this hearing?

**Mr RAMSEY**—Yes, quite happily.

**CHAIR**—There being no objection, I declare it carried. I am sorry to interrupt.

---

**Ms McLeod**—I hope that appendix is of use.

**CHAIR**—Very much so.

**Ms McLeod**—I am not a statistician, so I do not pretend that it represents a comparison of like with like, but those are just the raw data that we have taken from the website.

**CHAIR**—It would be interesting to discover whether the Attorney-General is actually given a copy of the summary of the data at any point.

**Ms McLeod**—The Attorney-General has a copy of our submission and our attachment.

**CHAIR**—Never let a chance go by!

**Ms McLeod**—He has also expressed an interest in talking to us about it.

**Mr RAMSEY**—At least in those departments where there are no females there seems to be no discrimination!

**Ms McLeod**—For Commonwealth briefing, you can look to a case that is going to run in South Australia and say: ‘Well, the depth of the bar here is not deep enough. We can look to Sydney, Victoria, Brisbane or wherever for appropriately qualified people, because we are a mobile population.’ As much as Western Australia does not like the fact we all tend to go over there to run cases too, it is the truth. And in Commonwealth briefings—

**CHAIR**—It is nice to see a group of people prepared to fly over to WA. My experience from a parliamentary point of view is that it is me that has to keep coming back over here. I found that particularly interesting. From my own point of view I am still curious as to what is happening—I get the impression that more women barristers are coming on board, despite what we heard earlier about there being a drop-off of lawyers after about five to 10 years. Your numbers are still slowly increasing?

**Ms McLeod**—This is anecdotal as well. We have 20 to 30 years of women in equal or slightly greater numbers graduating through law schools, and many of them in the top number of students as well. By the time you get to the bar and the various readers programs, it drops down to about 30 per cent. By the time you get to senior level silk it is less than 10 per cent. So we do have attrition. We have a real problem with retention.

**Mr RAMSEY**—Do we know where they typically go?

**Ms McLeod**—Back to private practice or in house as corporate counsel.

**Mr RAMSEY**—So they are not dropping out of the law profession? They are just going back to the non-promotional areas of it?

**Ms McLeod**—We think so.

**CHAIR**—Which is compounding the problem of not having women appearing in more complex and lengthy proceedings.

**Ms McLeod**—Because they are just not there.

**Ms Schilling**—Or the women that are there are too junior to brief in those more complex matters.

**Ms McLeod**—And governments have been proactive in looking for women to appoint, so there has been something of a take off the top too. We would never complain about that, but it has created a tension at that top end.

**Mr RAMSEY**—It probably suggests that some women—not surprisingly—are finding the work-family balance difficult, and making decisions to say, ‘I can’t handle this’ or ‘I don’t want to do this.’

**Ms McLeod**—That is why we make the point that we do not know what proportion of our members are in part-time work or have carer’s responsibilities—and that is not just for children; it is also family members. We do not know an exact answer to that. We would expect there would be a portion who found it easier to look for certainty of work after childcare responsibilities are largely managed. But I come back to this point: if you have certainty of pay, then you can make a choice. If you do not know if you have work, the only choice is not to go back—whether you have children or you do not.

**CHAIR**—Is there anything that the bar itself is looking at doing to promote the numbers or to find out why your attrition is like it is?

**Ms McLeod**—The bar has asked our committee—the Equal Opportunity Committee—to look at the broad question of retention and what can be done to assist women staying at the bar. We do not have any parameters around that at the moment; it is basically up to our committee to formulate what that looks like. But the bar is concerned. We have also looked at the question of entrenching women on our Bar Council, which is our governing body. I have been a member of that governing body for 14 years, and there are currently no senior women on our governing body. This is something of a disappointment to our Bar Council.

**Mr RAMSEY**—What do you mean entrenching?

**Ms McLeod**—Creating two positions that must go to women. The bar has not received that well or adopted it, so that is unlikely to happen. But the bar is continuing to look at ways to encourage women, especially at the senior levels, to be part of the governing body.

**CHAIR**—And is your organisation, the Equal Opportunity Committee, replicated in each state bar association?

**Ms McLeod**—Certainly in New South Wales. Noor might know the answer to that.

**Ms Blumer**—There are various bar associations but nowhere near as organised as you at the Victorian Bar.

**Ms McLeod**—That is very nice. I know there is an Equal Opportunity Committee in New South Wales that works closely with their bar. I understand there are issues in Queensland, as well, but they have perhaps less organisation to that structure. There is an equal opportunity committee that deals not just with gender issues—of course that is not our only issue; we look at diversity of the bar, as well. I am not sure about Darwin, Adelaide and Western Australia, although I believe Western Australia has an equal opportunity committee.

**CHAIR**—I have only ever heard of the Women Lawyers Association; I have not heard any other equal opportunity committee.

**Ms McLeod**—So they would just be issues that would be on the general governing bar agenda from time to time.

**CHAIR**—Thank you very much for that, and thank you for your attendance here today. We have had a fairly lengthy inquiry and sometimes we find ourselves coming back and asking for more information or clarification of things. So do not be surprised if that happens; the contact will be through the secretariat. You will also be sent a transcript of your evidence today to which you are entitled to make corrections of grammar and fact. On behalf of the committee and those of us who are left on the subcommittee, thank you very much for coming here today. That was very interesting and I thank you for your appearance.

**Ms McLeod**—Thank you for your work.

Resolved (on motion by **Mr Ramsey**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

**Committee adjourned at 12.54 pm**