

benefit the barrister in excess of the barrister's fair remuneration for the legal services provided to the client.'

The Australian Consumer Law Part 2-2 (ss 20 to 22A) contains prohibitions on unconscionable conduct in trade or commerce. Other provisions might also conceivably be relevant, such as the avoidance of unfair terms in consumer and small business contracts under Part 2-3 (ss 23 to 28).

### What is to be done?

Cancellation fees are not for everybody, and they are not for every case. Many barristers never charge a cancellation fee, at least in the narrower sense of that term. Whether it is called a cancellation fee or a fee-on-brief, the least contentious is probably a claim for a single day's fee when a case settles shortly before hearing. The other situation where a cancellation fee might be justified is the long, all-consuming case. The current state of New South Wales law is reflected in *Wilkie* and in *Levy v Bergseng*. The most important parts of those judgments are the monitory words, which remind practitioners of their fundamental professional obligations now expressed in the Uniform Law s 172.

In the present regulatory environment, a barrister should not claim a cancellation fee in any sense of that term unless it is covered by fee disclosure and is within the terms of any applicable costs agreement. Members can find advice about this on the costs and billing page of the Bar Association website. Cancellation fees can be particularly contentious. A barrister should never charge a cancellation fee without consciously considering whether it is fair to the client to do so and whether the amount charged is fair. If one is minded to do so, it is good practice to discuss the matter with the instructing solicitor first. If there is any doubt about fairness or amount or if the claim is for more than the first day, it is also good practice to talk to an experienced and objective colleague who understands the relevant area of practice.

### ENDNOTES

- 1 The statutory criteria in a practitioner/client context are now set out in the *Legal Profession Uniform Law* s 200.
- 2 1 July 1994 was the commencement date of most of the provisions of the *Legal Profession Reform Act 1993*, including substitution of Part 11 of the *Legal Profession Act 1987*.
- 3 See (1997) 35 (6) *Law Society Journal* 28.
- 4 The writer has not yet succeeded in locating primary records of these. They are referred to in correspondence held by the Bar Association.
- 5 [2005] NSWSC 873 [13].
- 6 The terms of the costs agreement would have entitled him to charge the full eight weeks.
- 7 72 NSWLR 178, 209 [138], [139].
- 8 72 NSWLR 178, 199 [95].
- 9 At 200 [99], [100].
- 10 The barrister's costs agreement provided a daily rate for hearings and an hourly rate for chamber work, but did not separately refer to pre-trial preparation as a separately billable item; this may have played a role in the particular case by reference to the old fee-on-brief concept.

## Equitable briefing

By Brenda Tronson

Since the Bar Association adopted the Law Council of Australia's National Model Gender Equitable Briefing Policy (the policy), the Diversity and Equality Committee of the Bar Association and the Women Barristers Forum have been working together to promote awareness of the policy and to take steps for its implementation by the Bar Association.

The aims of the policy include driving cultural change within the legal profession, supporting the progression and retention of women barristers and addressing the significant pay gap and underrepresentation of women in the superior courts. Read more broadly, the policy is a vessel by which unconscious bias may be consciously addressed by those responsible for selecting counsel. The policy is available for adoption by any briefing entity, including organisations and counsel, in addition to clients. Based on the New South Wales Bar Association website as at August 2017, women constituted just over 20 per cent of all barristers, and approximately 10 per cent of silks. Further, approximately 33 per cent of barristers of 10 years standing or under are women, and approximately 15 per cent of barristers with over 10 years' seniority are women.

The policy itself, together with more information and the Law Council of Australia's online register of adoptees, are online.<sup>1</sup> The Bar Association adopted the policy in 2016. At the time of writing, 75 NSW barristers had adopted the policy, together with five NSW chambers and a large number of important briefing entities, including law firms of all sizes, government agencies and corporations.

### What steps has the Bar Association taken?

During 2017, the Diversity and Equality Committee of the Bar Association and the Women Barristers Forum, through a joint working group, have taken steps towards the implementation of the policy by the Bar Association.

1. We have presented a number of seminars to build awareness of the policy among barristers and to assist barristers in understanding their (not onerous) obligations once they adopt the policy.

On 9 March 2017, we held a CPD seminar entitled 'Gender Equitable Briefing – Making it Happen: The Solicitor's View'. A panel of solicitors from a range of firms and agencies provided their perspective on gender equitable briefing and what barristers can do to help firms fulfil their own obligations. This CPD was well-attended and received positive feedback.

During the February-March 2017 CPD season, members of the Diversity and Equality Committee attended regional

CPD conferences and presented seminars informing members about the policy.

On 16 August 2017, we made history by running the first NSW Bar Association live-streamed CPD seminar: 'Reporting under the National Model Gender Equitable Briefing Policy: A practical guidance seminar'. The in-person audience was highly engaged; another 200 viewed via the live stream.

We presented a session on 19 September 2017 to provide information and support for those wishing to present a seminar on equitable briefing to their own floors.

Many of the seminars we run are available to barristers to view on the Bar Association CPD Online website.<sup>2</sup>

2. We have developed resources to support barristers who have adopted the policy, or who wish to learn more, including FAQs, a Guide to Reporting and a worksheet and report template.<sup>3</sup> We welcome any feedback.
3. We have produced a three year Strategic Implementation Plan for the Bar Association,<sup>4</sup> which was adopted by Bar Council on 11 May 2017.

The Bar Association's strategic goals are divided into two phases, Phase 1 ('Awareness, Adoption and Facilitation') and Phase 2 ('Reporting, Monitoring and Evaluation'). The two phases are not completely temporally distinct. Once we have analysed the information presented to us through barristers' reports, you will see more Phase 2 activities, and we will continue to work on the Phase 1 objectives throughout the life of the Strategic Plan.

### Bar Association's report

In September 2017, the Bar Association released its report as a briefing entity. From 1 September 2016 to 30 June 2017, the Bar Association briefed 10 barristers (seven men and three women) in 11 matters. The Bar Association is pleased to report that the figures show women were selected for 25 per cent of the briefs and account for 55 per cent of the value of all brief fees paid. Of the senior barristers, women account for 30 per cent of all briefs to senior barristers, which meets the 1 July 2018 target of 20 per cent. Neither of the two junior barristers briefed were women.

### More information?

If you require more information about the policy and its implementation at the NSW Bar, please contact Ms Ting Lim, policy lawyer, at the Bar Association.

### ENDNOTES

- 1 <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy>
- 2 <https://www.nswbar.asn.au/for-members/cpd>
- 3 <https://www.nswbar.asn.au/coming-to-the-bar/equitable-briefing>
- 4 <https://www.nswbar.asn.au/coming-to-the-bar/equitable-briefing>