

# MODEL ADVOCATES OR A MODEL FOR CHANGE? THE MODEL EQUAL OPPORTUNITY BRIEFING POLICY AS AFFIRMATIVE ACTION

FRANCESCA BARTLETT\*

[This article considers a recent regulatory approach to addressing disadvantage experienced by women at the Australian Bar. The Model Equal Opportunity Briefing Policy for Female Barristers and Advocates ('MBP') developed by the Law Council of Australia in 2004 was a popular initiative which received widespread support. This article examines the origins and assumptions underpinning the policy. It is contended that while the policy is a genuine attempt to ameliorate the dismal plight of women at the Bar, it is narrow in application and effect. It is argued that this policy is a product of the prevalent Australian approach to policymaking which avoids any mention of 'affirmative action'. The article traces how this aversion is justified less by principle than rhetorical use of the idea of merit. Finally, it is contended that when we consider the case of briefing practices in Australia, merit is a contestable concept which does not provide a sufficient reason to reject out of hand other policy approaches.]

## CONTENTS

I	Introduction.....	351
II	Describing Disadvantage through Briefing Practices.....	354
III	The Law Council of Australia's Model Equal Opportunity Briefing Policy.....	361
IV	Defining the MBP — Constructions of Merit and Affirmative Action.....	364
V	What Is Meant by Selection on 'Merit'? .....	367
VI	Defining Affirmative Action .....	373
VII	Some Arguments for and against Affirmative Action.....	378
VIII	Conclusion .....	381

## I INTRODUCTION

In most Western countries today, women graduate from law school in roughly the same proportion as men.<sup>1</sup> However, there remains a large disparity between men and women in the rates of retention and seniority within most legal professions. For instance, a report by the Victorian Women Lawyers in 1999 noted that there is a much higher rate of women than men not going on to practise law or leaving legal practice within the first few years.<sup>2</sup> In the United States, Canada,

\* BA (Hons), PhD (La Trobe), JD (Melb); Lecturer, TC Beirne School of Law, The University of Queensland. I am very grateful to Professor Charles Rickett, Dr Heather Douglas and Dr Jonathan Crowe for taking the time to read a draft of this article and for their insightful comments. I also thank the anonymous referees for their useful comments on earlier drafts of this article as well as the invaluable proofreading and substantive comments made by the Editorial Board of the *Melbourne University Law Review*.

<sup>1</sup> See Caroline Kirton, *Explanatory Memorandum to Gender Appearance Survey Information August 2006* (2006) 6 <<http://www.wlact.org.au/Documents/Explanatory%20Memorandum%2010%20August%202006.pdf>>; Christopher Roper, The Centre for Legal Education, Department of Employment, Education and Training, *Career Intentions of Australian Law Students* (1995) 15.

<sup>2</sup> Victorian Women Lawyers, *Taking up the Challenge — Women in the Legal Profession* (1999) 1. A report on a survey of practitioners in Queensland has also indicated that while 38 per cent of the solicitors' branch were women, they represented 62 per cent of solicitors under the age of 29: Terry Hutchinson, *Equalising Opportunities in the Law Committee, Queensland Law Society, 2003 Membership Survey: The Report* (2006) 13–14.

England and Wales, the trend is the same.<sup>3</sup> This disparity between ‘success’ achieved by men and women in Australian legal practice has been noted by law societies, Bar associations and law reform committees across the country for some time.<sup>4</sup> While it is conceded that success is necessarily a subjective and relative concept, this article proceeds on the basis that women’s position in the legal profession and experience in their working lives cannot be solely attributed to a free ‘choice’.<sup>5</sup>

This article considers an initiative to address women’s disadvantage in one branch<sup>6</sup> of legal practice in Australia — the Bar. Like their solicitor counterparts, numerous studies in Australia and overseas have reported that women barristers face persistent disadvantage.<sup>7</sup> Gender inequalities have been documented in

<sup>3</sup> There is a plethora of literature documenting women’s entry and progression in the US: see, eg, Cynthia Fuchs Epstein, ‘Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors’ (2001) 49 *University of Kansas Law Review* 733; Paula A Patton, ‘Women Lawyers, Their Status, Influence, and Retention in the Legal Profession’ (2005) 11 *William and Mary Journal of Women and the Law* 173. In the United Kingdom and Canada, studies have revealed similar statistical differences between men and women in retention and progression within the legal profession and have drawn similar conclusions as to the factors influencing this trend: see, eg, Hilary Sommerlad and Peter Sanderson, *Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status* (1998); Hilary Sommerlad, ‘Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales’ (2002) 9 *International Journal of the Legal Profession* 213; Jane Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (2001); Jean McKenzie Leiper, *Bar Codes: Women in the Legal Profession* (2007).

<sup>4</sup> See, eg, Keys Young, Ministry for the Status and Advancement of Women, New South Wales, *Gender Bias and the Law: Women Working in the Legal Profession* (1995); Jane Goodluck, *Women Working in the Legal Profession in Tasmania: Final Report for Women Lawyers Association of Tasmania* (1996); Chief Justice’s Taskforce on Gender Bias, *Report of Chief Justice’s Taskforce on Gender Bias* (1994); Rosemary Hunter and Helen McKelvie, Victorian Bar Council, *Equality of Opportunity for Women at the Victorian Bar — A Report to the Victorian Bar Council* (1998).

<sup>5</sup> See, eg, Deborah Rhode’s discussion of the ‘myth of choice’ as a common explanation for persistent gender inequalities in the legal profession. She contends that ‘women lawyers face lingering double standards and double binds’ as they juggle competing work and family responsibilities as well as competing narratives about the ideal lawyer and the ideal mother: Deborah L Rhode, ‘Gender and the Profession: An American Perspective’ in Ulrike Schultz and Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003) 3, 13–15.

<sup>6</sup> The structure of the legal profession in Australia varies between states and territories. Each jurisdiction has separate statutory frameworks for admission and certification, and separate professional bodies governing admission and discipline. Since April 2004, however, all states and territories have agreed to enact most aspects of the Law Council of Australia’s *Legal Profession — Model Laws Project: Model Bill (Model Provisions)* (2<sup>nd</sup> ed, 2006) <<http://www.lawcouncil.asn.au/natpractice/currentstatus.html>>. The amended *Legal Profession Acts* in each jurisdiction provide for a divided profession at least in practice — joint admission and separate certification as a barrister or solicitor and/or differing practical training post-admission (attendance at a Bar Readers’ course and at least six months under ‘pupillage’ or mentoring by a more senior barrister). Most states and territories also have separate professional bodies for barristers and solicitors (as in Victoria, NSW, Queensland, Tasmania and the Australian Capital Territory). These professional bodies generally have delegated power to make rules governing the practice of barristers and solicitors, which typically allow barristers to act only as sole practitioners and limit the type of work they may perform to advocacy and advice work.

<sup>7</sup> See above n 4. There has been less work conducted in the US concerning female advocates as the legal profession is not divided. However, several gender bias taskforces have considered the position and treatment of women litigators: see, eg, John C Coughenour et al, ‘The Effects of Gender in the Federal Court: The Final Report of the Ninth Circuit Gender Bias Taskforce’ (1993) 67 *Southern California Law Review* 745; Judge Marilyn Loftus, ‘First Year Report of the New Jersey Supreme Court Taskforce on Women in the Courts — June 1984’ (1986) 9 *Women’s Rights Law Reporter* 129. There have been more studies conducted in the UK, from which Australia has inherited its professional model, which refer to women as specialist advocates: see, eg, Lesley Holland and Lynne Spencer, The General Council of the Bar, *Without Prejudice? Sex Equality at the Bar and in the Judiciary* (1992).

statistical terms (such as lower representation in higher ranks, lower earnings and fewer appearances in superior courts) and in qualitative analyses (such as perceptions about a lack of ‘commitment’ inherent in women’s potential to have children, gendered assumptions about aptitudes to perform the advocacy role and homosocial behaviour at the Bar). The next Part of the article discusses in detail the findings of two empirical studies undertaken in relation to women’s experiences of working at the Bar. These studies are significant not only for providing evidence of disadvantage experienced by women at the Bar, but also because they formed the basis for a regulatory response considered by this article.

This response was the Model Equal Opportunity Briefing Policy for Female Barristers and Advocates (‘MBP’) developed by the Law Council of Australia in 2004.<sup>8</sup> It is contended that while this initiative has the potential to institute change leading to real advances for women at the Bar, it has been detached from the genesis of the policy and its specific objectives. To a large extent this is a result of compromises that are inevitable in the process of developing a national policy. However, it is argued that it can also be attributed to a strong antipathy to developing any regulatory initiative (law or policy) which could be described as a form of affirmative action.<sup>9</sup>

‘Affirmative action’ has been a dirty phrase in the Australian political–legal context for at least the last 10 years. The chief criticism of such policies is that it is incompatible with merit-based selection and promotion. This concern is particularly pronounced in the legal profession, which retains a strong liberal ideology, valuing rationality and supposedly neutral and objective judgements of merit.<sup>10</sup> This article examines the basis for this rejection of affirmative action policies. It considers how the two concepts of merit and affirmative action have been constructed in the context of the development of the MBP so as to allow for a limited set of policy options.

Yet, it is contended that the MBP in its current form can be understood as a form of affirmative action, albeit a weak form. This article is concerned with renaming the policy and goes on to examine the formulation of the MBP as a policy-based on the assumption of an oppositional relationship between merit and affirmative action. It is submitted that this dichotomy in principle is not as firm as has been suggested, particularly in the case of awarding briefs to counsel. Rather, it functions as a discursive sleight of hand not based in firm argument as to competing principles or rationales.

On the basis of this argument, this article ultimately calls for two outcomes: first, the MBP should be amended to include more targeted objectives to be

<sup>8</sup> Equalising Opportunities in Law Committee, Law Council of Australia, *Model Equal Opportunity Briefing Policy for Female Barristers and Advocates* (2004) <<http://www.lawcouncil.asn.au/get/policies/2443254835/0.pdf>> (‘MBP’).

<sup>9</sup> At this stage, ‘affirmative action’ is used in a generic sense to describe all forms of regulation addressing perceived disadvantages of a group. The term will be further described in Part VI of this article.

<sup>10</sup> Liberalism has been criticised from many angles. Feminist legal scholars have criticised liberal individualism and its understanding of equality on the basis that equality is defined against men. Feminists have pointed out that an assumption that men and women were similarly situated in society strengthens existing power relations rather than disturbs them. It is not within the scope of this article to fully engage with feminist debate in this area. For a discussion of this, see Maria Drakopoulou, ‘The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship’ (2000) 8 *Feminist Legal Studies* 199. For a discussion of the jurisprudence of liberal individualism, see Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990).

achieved by ‘harder’ measures; secondly, a range of measures should be considered in formulating any regulatory response to disadvantaged groups.

## II DESCRIBING DISADVANTAGE THROUGH BRIEFING PRACTICES

Over the last 15 years, there has been a large amount of academic attention directed towards addressing the continuing gender imbalance in the legal profession in Australia and throughout the Western world.<sup>11</sup> Although many causes have been identified, there is no consensus as to a single area of concern or any one solution.<sup>12</sup> While women have historically been excluded from the profession, there are now few formal barriers to their entry and success within the profession.<sup>13</sup> For this reason, there are some within the profession who have argued that it is simply a matter of time before the problem will resolve itself, or that a time lag exists as a result of the historical predominance of men in the legal profession. However, as Justice Mary Gaudron has observed: ‘[t]he trouble with women of my generation is that we thought if we knocked the doors down, success would be inevitable’.<sup>14</sup> A decade later this has not occurred. Not surprisingly, as the Chief Justice of the Victorian Supreme Court, Marilyn Warren, has commented, ‘there is impatience that change is not occurring more rapidly’ and ‘[t]here is irritation at ongoing discrimination against women.’<sup>15</sup>

In Australia, two large empirical studies of the Australian Bar have been undertaken to test long held anecdotal wisdom that the gender plays a significant role in the Bar’s culture and practices. The first study, commissioned by the Victorian Bar Council and undertaken by Rosemary Hunter and Helen McKelvie in 1997–98, was a wide-ranging review of the culture of the Victorian Bar as recorded by court appearances and interviews with barristers, judges, clerks and

<sup>11</sup> See, eg, Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996); Patton, above n 3; Deborah L Rhode, ‘The “No-Problem” Problem: Feminist Challenges and Cultural Change’ (1991) 100 *Yale Law Journal* 1731; Carrie Menkel-Meadow, ‘Portia Redux: Another Look at Gender, Feminism and Legal Ethics’ (1994) 2 *Virginia Journal of Social Policy & the Law* 75; Nancy J Reichman and Joyce S Sterling, ‘Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers’ (2004) 14 *Texas Journal of Women and the Law* 27; Christine Alice Corcos, ‘Portia Goes to Parliament: Women and Their Admission to Membership in the English Legal Profession’ (1998) 75 *Denver University Law Review* 307; Cynthia Fuchs Epstein, *Women in Law* (1<sup>st</sup> ed, 1981).

<sup>12</sup> Of course, there are factors which are generally agreed to pose obstacles for many women related to family responsibilities, continued discriminatory practices within the profession and so on: see above n 11.

<sup>13</sup> For a thorough discussion of the history of women’s exclusion from the Australian legal profession, see Thornton, *Dissonance and Distrust*, above n 11. While the legal profession has undoubtedly changed, Hunter points out that there remain some formal (if indirect) barriers to entry in NSW which require a large initial outlay to purchase chambers: Rosemary Hunter, ‘Discrimination against Women Barristers: Evidence from a Study of Court Appearances and Briefing Practices’ (2005) 12 *International Journal of the Legal Profession* 3, 4. Most jurisdictions require that junior barristers undertake a period of mentoring or pupillage. While generally appointment of a senior barrister to undertake this role is a formality, Bar rules leave this appointment process to the barristers. Further discussion of this practice is not within the scope of this article. However, this is an area that requires further research given the difficulty junior women barristers often experience in developing networks at the Bar.

<sup>14</sup> Justice Mary Gaudron, ‘Speech to Launch Australian Women Lawyers’ (Speech delivered at the Australian Women Lawyers Launch, Melbourne, 19 September 1997).

<sup>15</sup> Justice Marilyn Warren, ‘Promoting Difference’ (Speech delivered at the Victorian Women Lawyer Achievement Awards, Melbourne, 15 May 2003).

briefing solicitors.<sup>16</sup> This study produced reliable empirical data that documented significantly lower levels of seniority, rates of advancement and court appearances for female as opposed to male barristers.<sup>17</sup> It also provided a detailed qualitative analysis of the data gathered and recommendations for change within the profession. Hunter, writing in 2003, concluded that the study appeared to show that the ‘greatest barrier to change is the culture of the Bar itself’.<sup>18</sup> Hunter and McKelvie reported that there were a number of aspects of the ‘hegemonic masculinity’<sup>19</sup> of Bar culture which impacted directly on female barristers.<sup>20</sup> These included an image of the model barrister as working long hours and showing complete commitment<sup>21</sup> to the profession which many women could not or were presumed not to demonstrate; a prevailing belief that women were unsuitable or lacking aptitude for many core practices of an advocate which were predefined as requiring masculine qualities; and the much celebrated collegiality or ‘fraternity’ of the Bar which, far from supporting women, often formed internal barriers excluding women.<sup>22</sup>

The Hunter and McKelvie report, therefore, provided strong evidence that female barristers at all levels of seniority experienced disadvantage and often direct discrimination, contesting the notion that inequality of opportunities at the Bar would be wholly remedied by a ‘natural increase’ in numbers over time.<sup>23</sup> Their report concluded that the dreary statistics are influenced by what Cynthia Fuchs Epstein describes as ‘gendered constraints’ — that career choices are imposed on women rather than chosen by them.<sup>24</sup> This may be in the form of direct discrimination,<sup>25</sup> or subtle forms of indirect discrimination such as the imposition of ostensibly neutral environments that favour men. In particular, their report pointed to inequitable briefing practices as discriminating against female barristers both directly and indirectly. The MBP, which this article discusses, is a response to the findings of the Hunter and McKelvie report.

Nearly 10 years later, the Australian Women Lawyers’ *Gender Appearance Survey Information: August 2006* (‘*Gender Appearance Survey*’) indicates that there continues to be a vast disparity in the gender balance of senior barristers in

<sup>16</sup> Hunter and McKelvie, above n 4. The project consisted of a literature review, 125 interviews with legal personnel, two focus groups with members of list committees and a study of court and tribunal appearances over a three-month period. A more detailed discussion of the methodology adopted is provided in the report: at 4.

<sup>17</sup> Ibid xi.

<sup>18</sup> Rosemary Hunter, ‘Women Barristers and Gender Difference’ in Ulrike Shultz and Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003) 103, 104.

<sup>19</sup> The authors refer to the work of Margaret Thornton, who points to the overlap of constructions of masculinity and of law as rational, authoritative and objective: Thornton, *Dissonance and Distrust*, above n 11, 8. Thus, this ‘discursive correlation results in an empirical correlation’ so that men are constructed as suited to law: Hunter, ‘Women Barristers and Gender Difference’, above n 18, 106. Hunter also notes here the emergence of the notion of ‘hegemonic masculinity’.

<sup>20</sup> Hunter and McKelvie, above n 4, 31.

<sup>21</sup> For a discussion of the legal profession in England and Wales which documents the importance of ‘commitment’ as a core value of professionalism, see Sommerlad and Sanderson, above n 3.

<sup>22</sup> See Sharon C Bolton and Daniel Muzio, ‘Can’t Live with ‘Em; Can’t Live without ‘Em: Gendered Segmentation in the Legal Profession’ (2007) 41 *Sociology* 47; Celia Davies, ‘The Sociology of Professions and the Profession of Gender’ (1996) 30 *Sociology* 661.

<sup>23</sup> Hunter and McKelvie, above n 4, xii.

<sup>24</sup> Epstein, *Women in Law*, above n 11, 79–81.

<sup>25</sup> For an account of women’s exclusion from the legal profession in Australia, see Thornton, above n 11.

Australia.<sup>26</sup> There are far fewer female than male senior counsel in each jurisdiction.<sup>27</sup> In addition, women on average receive fewer complex, important or long running briefs than men, and are paid proportionally less.<sup>28</sup> These figures bear out Justice Michael Kirby's lament that, during his more than 10 years on the High Court of Australia, he has observed 'few female advocates with "speaking parts"'.<sup>29</sup> While these empirical results were not accompanied by the detailed analyses of the Hunter and McKelvie report,<sup>30</sup> this data indicates that similar factors relating to gender disadvantage continue to prevail. As Hunter found, while court appearances were a function of seniority at the Bar, particularly in superior courts,<sup>31</sup> 'sex emerged as the only significant factor' when their results were adjusted to take account of lower rates of senior women.<sup>32</sup> In other words, even proportionally, senior women receive fewer briefs to appear in superior courts than their male counterparts.

In addition, the *Gender Appearance Survey* also reported that no female junior counsel to senior counsel appeared during the survey periods<sup>33</sup> in any civil matter in the Northern Territory<sup>34</sup> and only one appeared in Queensland,<sup>35</sup> while the highest appearance rate, in the Federal Court of Australia, was of just 18.8 per cent of civil matters.<sup>36</sup> Therefore, not only do women appear to be hitting glass ceilings, but they also appear to be less likely to receive opportunities at a junior level at the Bar. This affects women's promotion prospects as well as their enjoyment in their career at its early stages.<sup>37</sup>

<sup>26</sup> Australian Women Lawyers, *Gender Appearance Survey Information: August 2006* (2006). The *Gender Appearance Survey* collected data from surveys completed by court staff. These surveys requested that the sex and seniority of the barrister appearing be recorded in each matter as well as the type and duration of the matter. Surveys were completed in courts of all levels in state, territory and federal courts with the exception of Victorian courts and the Family Court of Australia.

<sup>27</sup> There are 15 female silks out of 219 silks in Victoria (Victorian Bar Directory); 3 female silks out of 130 silks in Queensland (Queensland Barristers Directory); 16 female silks out of 350 silks in NSW (NSW Barristers Directory); 1 female silk out of 183 silks in Western Australia (WA Barristers Directory); 5 female silks out of 26 silks in South Australia (South Australian Barristers Directory); no female silks out of 30 silks in the ACT (ACT Barristers Directory); no female silks out of 6 silks in Tasmania (Tasmanian Independent Bar Directory); 1 female silk out of 7 silks in the Northern Territory (Northern Territory Barristers Directory).

<sup>28</sup> Hunter, 'Discrimination against Women Barristers', above n 13.

<sup>29</sup> Justice Michael Kirby, 'Appellate Advocacy — New Challenges' (Speech delivered at the Dame Ann Ebsworth Memorial Lecture, London, 21 February 2006) 41 <[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_21feb06.pdf](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_21feb06.pdf)>.

<sup>30</sup> The type of matter, gender of senior and junior counsel appearing and length of court appearance were recorded. While this study covered most of Australia, it was more modest than the Hunter and McKelvie study because it did not consider how briefs were awarded.

<sup>31</sup> That is, it is more likely that those appearing in superior courts are senior counsel or senior junior counsel. As women represent a small percentage of senior counsel, their appearances in superior courts are likely to be proportionally lower.

<sup>32</sup> Hunter, 'Discrimination against Women Barristers', above n 13, 9.

<sup>33</sup> *Gender Appearance Survey*, above n 26, 3 lists the survey periods by court. The surveys were not conducted concurrently but rather the survey periods generally ran for two to four months through 2004 and 2005.

<sup>34</sup> *Ibid* 17.

<sup>35</sup> *Ibid* 20.

<sup>36</sup> *Ibid* 44. See also Caroline Kirton, 'Has the System Failed Women?' (Speech to the Judicial Appointments Forum, Australian Bar Association, Sydney, 27 October 2006) 7.

<sup>37</sup> Justice Marcia Neave, 'Women Barristers Talk — Hearts and Minds, the Next Step' (Speech delivered at the Women Barristers' Association Anniversary Dinner, Melbourne, 23 November 2006) 2 <<http://www.vicbar.com.au/GetFile.ashx?file=BarAssocWomenFiles%2fWomen+Barristers+-+Final+1.pdf>>. The Bar has a far worse ratio of women to men than in the solicitors'

The *Gender Appearance Survey* also significantly documented a nationwide trend of women being briefed in certain areas of law, or, viewed another way, not being briefed in certain areas of law.<sup>38</sup> In most states, women received far fewer (or no) briefs for civil matters at any level of seniority.<sup>39</sup> There was also a much lower reported rate of senior female counsel appearing in criminal matters in superior courts.<sup>40</sup> While the survey does not provide detailed data as to specific areas of law or the nature of briefs received by those appearing in court, it indicates that women barristers are receiving fewer briefs in civil or commercial areas or, where they receive briefs in these areas, the briefs are of a minor nature or in a lower court. In this sense, the *Gender Appearance Survey* replicates longstanding empirical and qualitative findings in Australia and internationally. For instance, Margaret Thornton's important commentary on the Australian legal profession in *Dissonance and Distrust* documented the enduring stereotypes as to the archetypal advocate and the resulting relegation of women into 'feminine' areas of law. She states that women 'are significantly overrepresented in the least prestigious and least remunerative areas of practice and significantly underrepresented among the most elite positions',<sup>41</sup> which is also argued by Deborah Rhode with respect to the US profession.<sup>42</sup> Hunter and McKelvie's report also found that women barristers were 'significantly over-represented in family law, and significantly under-represented in commercial law, common law and personal injuries'.<sup>43</sup> Many of their interviewees indicated that this was largely due to the 'push' factor, where clerks steered junior female barristers into 'feminine' areas due to stereotypical assumptions about women's abilities and interests.<sup>44</sup> Solicitors were also reported to adopt similar reasoning when appointing counsel, often referring to client preference or strategy in Family Court matters.<sup>45</sup> While due regard to the individual concerns of a client or finding a barrister best suited to the case are beyond reproach, this does not explain the empirical research outlined above which indicates that women are being briefed

branch. For instance, in Queensland, while the reports vary, women comprise approximately 40 per cent of the solicitors in that state: Queensland Law Society, *79<sup>th</sup> Annual Report (2007)* 10 <<http://www.qls.com.au/content/lwp/wcm/resources/file/ebb7974c5a8caf2/06-07-qls-annual-report-WEB.pdf>>.

<sup>38</sup> For a summary of significant disparities, see Kirton, above n 1, 3. The *Gender Appearance Survey* results do not provide empirical data in relation to appearances in the Family Court. In light of the qualitative research discussed in the text and the results of the *Gender Appearance Survey*, this data may therefore indicate only a small snapshot of where women practise at the Bar.

<sup>39</sup> *Gender Appearance Survey*, above n 26, 6.

<sup>40</sup> Ibid. Hunter has documented some of the complexities and 'contradictions' of criminal law that are significantly influenced by gendered stereotypes: Hunter, 'Discrimination against Women Barristers', above n 13, 24–8.

<sup>41</sup> Thornton, *Dissonance and Distrust*, above n 11, 191.

<sup>42</sup> Deborah L Rhode, 'Gender and Professional Roles' (1994) 63 *Fordham Law Review* 39, 59. In the US, there is a wealth of scholarship which has provided empirical support for and examined the reasons behind this trend: see, eg, Carrie Menkel-Meadow, 'The Comparative Sociology of Women Lawyers: The "Feminisation" of the Legal Profession' (1986) 24 *Osgoode Hall Law Journal* 897; Epstein, 'Women in the Legal Profession at the Turn of the Twenty-First Century', above n 3; Patton, above n 3. In the UK, Helena Kennedy has made similar observations of the English Bar: Helena Kennedy, *Eve Was Framed: Women and British Justice* (1992) 44–5.

<sup>43</sup> Hunter, 'Discrimination against Women Barristers', above n 13, 19.

<sup>44</sup> Hunter and McKelvie, above n 4, 93.

<sup>45</sup> Ibid 90.

in these areas (although often in the lower courts)<sup>46</sup> at the *expense* of receiving briefs in other areas.

In all states in Australia, barristers practise as sole practitioners. They are therefore vulnerable to the same financial imperatives as any small business person. In particular, they are reliant on receiving briefs which sustain their practice, and developing a reputation which ensures repeat business and a progression in the level of work offered. This not only requires their clerk<sup>47</sup> or solicitors to provide them with regular briefs but also requires the establishment of a profile by accessing more senior barristers and attracting more 'prestigious briefs'.<sup>48</sup> This is an important practical reality for all barristers, particularly those beginning their careers. Hunter and McKelvie's report noted that it was often more difficult for female barristers to establish themselves because many senior male barristers in Victoria were inclined to recommend a junior from the 'boys club'.<sup>49</sup> In addition, they found that in some cases when junior women received briefs to work with senior counsel they were 'faced with denigrating comments from their male colleagues about how they managed to secure the brief — with the implication or direct assertion that it was on the basis of their looks, or in return for sexual favours, rather than on merit'.<sup>50</sup> Such incidents, Hunter maintains, 'undermine women's professional legitimacy and "chill" the climate of junior work for women'.<sup>51</sup>

Hunter and McKelvie's study also consisted of interviews with solicitors about their briefing practices, which revealed similar inclinations to brief both senior and junior counsel according to established networks. They found that the overwhelming factor influencing briefing was 'personal rapport between solicitors and barristers'.<sup>52</sup> Word of mouth also played a significant role.<sup>53</sup> While

<sup>46</sup> Hunter notes that there is still substantial anecdotal evidence, as well as some evidence from her research, that women are not receiving briefs to appear in family law matters which concern untested areas of law or significant monetary disputes. Indeed, Hunter comments that in such instances, '[t]he notion that "senior" is synonymous with "male" may still ... operate to negate client preferences for a woman': Hunter, 'Discrimination against Women Barristers', above n 13, 23.

<sup>47</sup> The constitution of the barristers' branch varies considerably across different Australian jurisdictions. In Victoria, barristers typically practise from chambers and are placed on a 'list' administered by a clerk (which is decided by the list committee on application by the barrister to the list). Sections 3.2.4 and 3.2.5 of the *Legal Profession Act 2004 (Vic)* prohibit '[c]ompulsory clerking' and '[c]ompulsory chambers'. Thus barristers in Victoria are not compelled to be on a clerk's list or obtain chambers. However, the Bar Association strongly encourages this practice: see The Victorian Bar, *About the Bar: Coming to the Bar — Other Information: Financial Commitments* <<http://www.vicbar.com.au/e.3.4.asp>>. In contrast, there are no clerks in Queensland and chambers largely serve as convenient accommodation and financial economies of sharing secretarial staff.

<sup>48</sup> Frances Millane, 'Equal Opportunity and the Briefing Dollar/Pound' (Speech delivered at the International Bar Association's Second World Women Lawyers' Conference, London, 30 June 2003) 3.

<sup>49</sup> Hunter and McKelvie, above n 4, 68–9. See also Hunter, 'Discrimination against Women Barristers', above n 13, 10. While there are female senior counsel in most states, they comprise a small part of the senior Bar. Therefore, they exert little influence on such statistics, and possibly in shaping the culture of the senior Bar. Rhode, for instance, argues for an expansion in the number of women in senior legal positions if only to increase their potential influence. However, not all senior women will choose to promote or assist junior female barristers: see, eg, Deborah L Rhode, 'Gender and the Profession: The No-Problem Problem' (2002) 30 *Hofstra Law Review* 1001, 1007.

<sup>50</sup> Hunter, 'Discrimination against Women Barristers', above n 13, 11.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* 12.

these informal factors appear to be gender-neutral, women are less likely to benefit from such collegiality in a predominantly male workforce. It has long been argued that there is a level of ‘homosociality’ prevailing at the Bar, which ensures that gendered characteristics of the workplace are perpetuated.<sup>54</sup> The ‘workplace culture’ affecting women at the Bar is exerted by the broader profession (solicitors’ branch). A plethora of literature concerning gender and the broader legal profession has noted similar cultures of exclusion through informal processes. For instance, Paula Patton described discrimination against women in US law firms as not only a result of applying negative stereotypes, but of *favouring* various attributes that are classically associated with or only achievable by men. She noted that ‘legal careers ... [are] shaped by and for the man with a family who is “family free”’,<sup>55</sup> while the classical attribute of law as adversarial is male.<sup>56</sup> The matrix of socially enforced responsibility, differing life experience and perceptions about women’s attributes and abilities often mean that women are not or cannot be considered the ‘best candidate’ for the job. It is not surprising then that there is a significant interconnection between sex discrimination across the two branches of the legal profession.<sup>57</sup>

Rosabeth Kanter observed that there is a ‘visibility bias’ operating in many workplaces where minorities ‘get attention’ by virtue of being different.<sup>58</sup> In the context of the Bar, a visibility bias operates so that where there is one female senior counsel out of 10 on a list of candidates for a brief, this represents a sufficient amount to claim that there is no discrimination in briefing practices.

<sup>53</sup> Hunter and McKelvie, above n 4, 67–8.

<sup>54</sup> See, eg, Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) 165, where Hunter argues that this is the case in most male-dominated workplaces. The history of the legal profession in Australia is characterised by these informal exclusion cultures where women, even when formally ‘let in’ to the profession, are relegated to ‘fringe dweller’ status: Thornton, *Dissonance and Distrust*, above n 11, 47. For a study of the experiences of the first women lawyers in several jurisdictions internationally, see Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (2006).

<sup>55</sup> Patton, above n 3, 181. Patton cites Holly English, who argues that many male lawyers do not experience the pressures of assuming caring duties for their families (such as child care): see Holly English, *Gender on Trial: Sexual Stereotypes and Work/Life Balance in the Legal Workplace* (2003) 249–50.

<sup>56</sup> For a discussion of this argument, see Eleni Skordaki, ‘Glass Slippers and Glass Ceilings: Women in the Legal Profession’ (1996) 3 *International Journal of the Legal Profession* 7. Carrie Menkel-Meadow postulates that women may have a ‘different voice’ in legal practice: Carrie Menkel-Meadow, ‘Portia in a Different Voice: Speculations on a Women’s [sic] Lawyering Process’ (1985) 1 *Berkeley Women’s Law Journal* 39, drawing on Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (1982). This essay has sparked a large amount of debate within feminist scholarship. While there is considerable debate as to the idea of ‘women’s voice’ (see, eg, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2<sup>nd</sup> ed, 2002) 1–3), this analysis does highlight the fact that the entrenched traditions in the legal profession reflect male interests. For instance, Patton’s article indicates that emotions such as yelling and abuse are more acceptable than other feelings such as camaraderie: Patton, above n 3, 183. A few recent critiques of the ‘different voice’ theory include Deborah L Rhode, ‘Feminist Critical Theories’ (1990) 42 *Stanford Law Review* 617, 624–5, where it is argued that difference theory is not only empirically untrue but limiting women to prevailing gender stereotypes. See also Joan C Williams, ‘Deconstructing Gender’ (1989) 87 *Michigan Law Review* 797; Jeanne L Schroeder, ‘Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination’ (1991) 70 *Texas Law Review* 109; Ellen C Dubois et al, ‘Feminist Discourse, Moral Values, and the Law — A Conversation’ (1985) 34 *Buffalo Law Review* 11.

<sup>57</sup> It is also worth noting that there may be a significant connection in respect of briefing practices due to similarly lower numbers of senior female solicitors. A preponderance of senior male solicitors is likely to have a profound impact on the briefing cultures of any firm.

<sup>58</sup> Rosabeth Moss Kanter, *Men and Women of the Corporation* (1<sup>st</sup> ed, 1977) 210.

Sharon Bolton and Daniel Muzio comment that such perceptions arise when there are well publicised successes.<sup>59</sup> However, academics and legal professionals have described women's experience in the practice of law as often marked by a 'double bind' required by a culture of conformity: female lawyers are either understood as 'token successes' or 'honorary men', or they are derided for being unfeminine in adopting 'masculine' characteristics of ambition and aggression.<sup>60</sup> The 'othering' of women is achieved by distancing them from the supposedly neutral attributes of an ideal advocate. As Thornton claims, '[o]therness has been effectively constructed as though it were a personal peccadillo that compromises the claimed universality and neutrality of the public sphere'.<sup>61</sup> In other words, the 'cultural capital'<sup>62</sup> in the legal profession is male.

Finally, Hunter and McKelvie's report noted that client preference played a part in briefing practices. They contended that, in most cases, the will of the client was observed by the solicitor even when this amounted to sheer prejudice on the basis of gender.<sup>63</sup> In the UK, Lesley Holland and Lynne Spencer note a similar influence in unequal briefing practices and point out that, while the most blatant instances would be unlawful, they are seldom challenged.<sup>64</sup>

Hunter and McKelvie's report, therefore, identified a broad range of factors affecting the Bar. The culture of the Bar, practices inside law firms and their relationship with the Bar, and client choice were all identified as having a substantial impact on the working lives of female barristers. The challenge in responding to these findings was to devise strategies that addressed these different influences. The MBP is the primary regulatory response to the Hunter

<sup>59</sup> For instance, Bolton and Muzio report that the rate of women receiving practising certificates in the UK has increased by 850 per cent in the last 25 years (while in the same period men being granted practising certificates increased by only 15 per cent). Women now account for approximately 40 per cent of the 'professional headcount' in the UK: Bolton and Muzio, above n 22, 48.

<sup>60</sup> The prevalence of these stereotypes in legal professions across the world is described in essays contained in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003): see, eg, Rhode, 'Gender and the Profession', above n 5, 11; Hunter, 'Women Barristers and Gender Difference', above n 18, 105; Hilary Sommerlad, 'Can Women Lawyer Differently? A Perspective from the UK' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) 191, 199; Ulrike Schultz, 'Women Lawyers in Germany — Perception and Construction of Femininity' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) 295, 308. See also Ann Bartow, 'Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys' (2005) 11 *William and Mary Journal of Women and the Law* 221.

<sup>61</sup> Thornton, *Dissonance and Distrust*, above n 11, 25.

<sup>62</sup> Pierre Bourdieu, *The Logic of Practice* (Richard Nice trans, first published 1980, 1990 ed) 69–70 [trans of: *Le sens pratique*]. Bourdieu's concept of 'cultural capital' is defined as 'a permanent disposition, a durable way of standing, speaking, walking, and thereby of feeling and thinking': at 70.

<sup>63</sup> Hunter and McKelvie, above n 4, 89–93. This report also noted the role of clerks in suggesting barristers for 'floating work' as a factor: at 83–5. See also Hunter, 'Discrimination against Women Barristers', above n 13, 15–17. Note also that there have been several studies of the relationship between clients and lawyers with regard to testing gendered preferences: see, eg, Bryna Bogoch, 'Gendered Lawyering: Difference and Dominance in Lawyer–Client Interaction' (1997) 31 *Law and Society Review* 677.

<sup>64</sup> Holland and Spencer, above n 7, 10. In Australia, s 22(1) of the *Sex Discrimination Act 1984* (Cth) prescribes that it is unlawful for those providing 'services' (defined in s 4 as including 'the kind provided by members of any profession or trade') to discriminate against another person on the grounds of that other person's sex. Thus, lawyers must not unlawfully discriminate against their clients. However, this Act does not contain reciprocal provisions which apply to those receiving such services (clients).

and McKelvie report.<sup>65</sup> However, Hunter notes that while the policy response was appropriately focused to ‘tackle the shortcomings of the [solicitors’] branch of the profession’, it did not deal with other aspects of the report, which identified discriminatory cultures and practices of the Bar itself.<sup>66</sup> To this criticism, it is added that the MBP neither adequately addresses the effect of the lawyer–client relationship on briefing practices nor contains clear and specific objectives.

### III THE LAW COUNCIL OF AUSTRALIA’S MODEL EQUAL OPPORTUNITY BRIEFING POLICY

Hunter and McKelvie made a number of recommendations devoted to ‘Briefing Practices and Prejudices’ because their analysis made it clear that briefing practices were a major contributor to disadvantage experienced by women at the Bar. Many of the recommendations were educationally focused, including: that Queen’s Counsels and Senior Counsels look for appropriate junior counsel and that the Law Institute of Victoria encourage solicitors to do the same;<sup>67</sup> that the Bar produce a catalogue of women barristers and encourage solicitors to identify women working in relevant areas of law;<sup>68</sup> that solicitors be encouraged to review who they brief and evaluate what proportion of those regularly briefed are women;<sup>69</sup> and that clerks’ lists strive for proportionate representation of women at various levels and maintain records of briefs received by the barristers on their lists according to gender.<sup>70</sup> The report also offered more aspirational recommendations which underpin the MBP, such as urging efforts to remove double standards and other sexually discriminatory practices in briefing,<sup>71</sup> and observing that the best interests of clients are served by choosing the best barrister without prejudice as to gender.<sup>72</sup>

In 2000, the Victorian Bar Council drafted and adopted a model briefing policy which set out nine principles for equality in briefing based closely on the Hunter and McKelvie recommendations.<sup>73</sup> This produced an immediate response in Victoria and across the country.<sup>74</sup> For instance, shortly afterwards, the Western Australian Bar Association and Law Society adopted a similar policy, and the New South Wales Bar Council adopted a version of the policy in 2003. The

<sup>65</sup> The report also recommended that the state and territory Bar associations establish female barristers’ lists to assist in the identification of appropriate female counsel: Hunter and McKelvie, above n 4, 78. These lists are available in many states.

<sup>66</sup> Hunter, ‘Discrimination against Women Barristers’, above n 13, 36.

<sup>67</sup> Hunter and McKelvie, above n 4, 77.

<sup>68</sup> *Ibid* 78.

<sup>69</sup> *Ibid* 80.

<sup>70</sup> *Ibid* 89.

<sup>71</sup> *Ibid* 78.

<sup>72</sup> *Ibid* 93.

<sup>73</sup> Victorian Bar Council, *Equality of Opportunity Model Briefing Policy* (2000).

<sup>74</sup> The Women Barristers’ Directory was also established as a subcategory of the listings of barristers in Victoria (on the Victorian Bar’s website <<http://www.vicbar.com.au>>). This initiative was recommended to increase the visibility of female barristers. It has been copied by most Bar associations across the country. The Victorian Bar Council also formed a committee to continually review this area, conduct a number of workshops and engage in discussions with the private sector: Chris Merritt, ‘More Briefs for Female Lawyers’, *The Australian Financial Review* (Melbourne), 29 August 2003, 3.

report and the Victorian policy encouraged Australian Women Lawyers to establish a Taskforce on Briefing Practices in May 2003, which ultimately led to the production of the *Gender Appearance Survey*. The Law Council of Australia adopted the Victorian policy in 2003, despite noting that the widespread endorsement and adoption of the policy by the profession had not yet generated any fundamental change in basic norms prevailing within the legal profession.<sup>75</sup> The results of the *Gender Appearance Survey* in 2006 support these comments.

The issue was considered at the November 2003 Standing Committee of Attorneys-General meeting, which resulted in the Law Council of Australia being charged with developing a national model policy suitable for adoption by the government and private legal profession. The MBP, which was adopted on 20 March 2004, is described as ‘a common set of aspirational principles’,<sup>76</sup> possibly because it is proposed for voluntary adoption by clients and legal practitioners. The MBP provides:

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

- (a) identify female counsel in the relevant practice area; ... and
- (b) genuinely consider engaging such counsel; ... and
- (c) regularly monitor and review the engagement of female counsel; ... and
- (d) periodically report on the nature and rate of engagement of female counsel ...<sup>77</sup>

The MBP broadly retains the primary focus of the original policy to educate those briefing and to avoid direct discrimination against female counsel, contained in the requirement to ‘genuinely consider engaging’ female counsel.<sup>78</sup> However, it can also be understood as the first step away from the detailed findings of the Hunter and McKelvie report. It removed several specifically targeted responses to areas of functional discrimination in briefing practices, such as promoting opportunities for junior female barristers.<sup>79</sup> Furthermore, it placed the requirement for counsel to identify female counsel when asked for recommendations as a note to the policy. There are no measures ostensibly aimed at curbing the predominance of selection by fraternal networks. The third level of influence on briefing practices — the client — has also been omitted from the MBP. A section entitled ‘Application of the Policy’, while ‘acknowledging’ that

<sup>75</sup> Law Council of Australia, 2010: *A Discussion Paper — Challenges for the Legal Profession* (2001) 134.

<sup>76</sup> MBP, above n 8.

<sup>77</sup> *Ibid* 2. The MBP (at 2–3) contains guidance notes to assist in implementing the policy such as:  
A genuine consideration would have regard to the skills and competency of counsel, regardless of gender and should avoid inappropriate assumptions about the capacities and aptitude of female and male counsel. Where there are equally capable male and female counsel available, arbitrary and prejudicial factors should not operate to exclude the engagement of female counsel. ...  
The objective of reviewing, monitoring and then reporting to clients and to Bar Associations or Law Societies on the nature and rate of engagement is that female counsel be briefed at no less than the prevailing percentage of female counsel in the relevant practice area. ... The review and periodic report should have regard to the success or otherwise of the implementation of an equitable briefing policy, and should initiate steps to redress inequity where it is identified.

<sup>78</sup> *Ibid* 2.

<sup>79</sup> The analysis here is comparing the MBP to the earlier model briefing policy adopted by the Victorian Bar Council.

‘legal practitioners exercise significant influence’ in selecting counsel,<sup>80</sup> provides no requirement that efforts be made to remove client prejudice within the MBP.<sup>81</sup>

Finally, and of more concern, specific objectives have been replaced by the broader ideal of ‘progression of women in the law’ (in ‘Objectives of the Policy’).<sup>82</sup> While this is certainly the overarching goal, the Hunter and McKelvie report was significant for its identification of specific objectives for achieving this broader goal. Indeed, the ‘Objectives of the Policy’ section prioritises the maximisation of ‘choices for legal practitioners and their clients’ and optimisation of ‘opportunities for practice development of all counsel’.<sup>83</sup> The MBP, therefore, appears to be less focused on its initial objective of promoting women at the Bar. There is a reference in the ‘Notes to Assist in Implementing the Policy’ which explains the requirement of reporting on the rate and nature of briefs as intended to ensure that ‘female counsel be briefed at no less than the prevailing percentage of female counsel in the relevant practice area’.<sup>84</sup> It is unfortunate that this is left to a note rather than forming part of the body of the policy, as it is the only part of the MBP which refers to a defined and practical objective.

The previous Part of this article discussed in detail the findings and recommendations of the Hunter and McKelvie report in order to explain the basis of the MBP. The report traced the various ways in which women experience discrimination in briefing practices. It is acknowledged that the MBP takes a first step by educating ‘briefers’ of the availability of female counsel, by prohibiting direct discrimination and by establishing a process to evaluate whether the policy has resulted in any change (that is, whether more women are being briefed). This is a valuable beginning. However, it is contended that the MBP in its current form is unlikely to create any substantive change within cultures of briefing at the Bar or by solicitors because it does not question the basis by which counsel are selected. It is argued that the MBP needs to be more than recommendatory. It should be attended by ‘harder’ requirements which demand more transparency in the process of briefing barristers, and mandate certain outcomes, at least, in the short-term.

In order to make this point, this article addresses the preliminary question of whether this weaker version was the product of prevailing assumptions about appropriate policymaking. The reduction of the goals of the MBP to statistical equality and removing direct discrimination applies a formal rather than substantive idea of equality of opportunity. It is argued that the MBP is focused on achieving procedural fairness and hence is in line with the prevailing regulatory approach of achieving equality of opportunity — prohibiting individual instances of discrimination rather than ensuring equality of result.

<sup>80</sup> MBP, above n 8, 2.

<sup>81</sup> Interestingly, the ‘Application of the Policy’ section requires that barristers and clerks put forward names of female barristers when consulted: *ibid*. This aspect of the MBP, while it appears not to be part of the provisions to be implemented, seems to take a tougher approach by requiring that female counsel be considered in every case.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid* 3.

Nevertheless, it is also contended that if we retain even the limited goal of statistical equality (women should be briefed equally in proportion to their numbers at the Bar), this provides a strong justification for implementing more radical forms of policy to achieve this result. While the prevailing attitude to appropriate equality policy will be difficult to displace, this is a rare opportunity to put forward strong arguments for ‘hard’ affirmative action policy which institutes real institutional change.<sup>85</sup> In this case, there is general consensus that women at the Bar are a disadvantaged group and that there is a legitimate need to take action to remedy this situation. We have identified a specific area (briefing practices) causing widespread disadvantage to women at the Bar. The difficult question then is: ‘how far should society go in trying to redress any imbalances that have occurred?’<sup>86</sup> It is argued that appropriately designed and implemented affirmative action policy is more likely to remove specified aspects of discrimination.

As an underlying basis for any amendment to the MBP, this article contends that the MBP in its current form can be characterised as affirmative action. However, there remains strident opposition to such a description. As Aileen McHarg and Donald Nicolson argue, there is a ‘gap between perception and reality’ in designing such policy, and certain misconceptions ‘have a real hold and rhetorical power.’<sup>87</sup> The next Part, therefore, examines the formulation and discursive framing of the MBP.

#### IV DEFINING THE MBP — CONSTRUCTIONS OF MERIT AND AFFIRMATIVE ACTION

The MBP has been widely adopted by most Bar associations, law societies and the Victorian and federal governments.<sup>88</sup> Professional and governmental bodies, when adopting and promoting the MBP, presented a united description of the policy. For instance, when adopting the MBP the Victorian Bar Council stated that it was

not an affirmative action or quota policy. It advocates, as part of the briefing process, that reasonable endeavours be made to identify and genuinely consider appropriate women barristers as suitable for briefing in a particular case and for a particular client.<sup>89</sup>

<sup>85</sup> Ibid. Indeed, the notes in the MBP contemplate that those implementing the policy may assess its effectiveness and determine what further initiatives are needed.

<sup>86</sup> Noor Bloomer, ‘Outgoing President’s Report’ [July 2006] *Themis* 8. This question applies beyond reforms by the legal profession alone. While this article is concerned with discussion of the MBP as a regulatory initiative of the profession, it is suggested that this analysis has broader application. However, while the Victorian and federal governments have adopted versions of the MBP, neither institution has approached regulation this way.

<sup>87</sup> Aileen McHarg and Donald Nicolson, ‘Justifying Affirmative Action: Perception and Reality’ (2006) 33 *Journal of Law and Society* 1, 3.

<sup>88</sup> While it is not within the scope of this article to discuss the implementation of the policy by these governments, it is noted that adoption has taken very different forms. For instance, while the Victorian adoption of the policy appears interested, and invested, in ensuring that it creates change and in measuring its success, the federal government’s implementation of the MBP does not appear to be attended by the same interests. Implementation of the MBP is the subject of a companion article that also refers to qualitative research in the area currently being undertaken.

<sup>89</sup> Anthony Howard, *Report of Meeting of the Victorian Bar Council Held on 1 April 2004* (2004) 2–3.

The Law Council of Australia has explained that '[t]his means that where there is equally capable male and female counsel available, prejudice should not be a factor in excluding a female barrister or advocate'.<sup>90</sup> The federal government's *Review of the Legal Services Directions Issues Paper* ('*Issues Paper*')<sup>91</sup> clearly indicated that the only appropriate regulatory principle for fair briefing was on 'merit'. The *Issues Paper* contrasted this 'principle' with the dangers of any form of affirmative action policy.<sup>92</sup>

The introduction of quotas is not supported. Quotas are regarded as an ineffective tool for achieving progress in this area, mainly because they generate opposition to the policy they are supposed to promote, rather than building support for that policy. Merit should remain the essential criterion for allocating the Commonwealth's legal work and quotas are in conflict with this principle.<sup>93</sup>

Thus the predominance of 'merit' is underscored as the only legitimate political, philosophical and moral principle for regulation. It is contrasted with affirmative action as an extreme example of radical action — the imposition of quotas. The tension is contained in how the two concepts are defined. Merit is understood as a 'value neutral' selection process. It fulfils the liberal ideals of individualism and rationality which are embedded in our legal discourse by postulating an objective criterion for finding the best (and therefore the most worthy) candidate. Therefore, as Thornton's work has long argued, merit has continued to hold significant power:

Devoid of any social context, [merit] is perceived as an apolitical criterion of personal worth. A mystique of neutrality has nevertheless endowed the concept with considerable political significance and moral persuasiveness when it is invoked to justify, to criticise, or to constrain, any policy proposals. Merit, so defined, has political form that is clearly unrelated to the reality of its application as an 'apolitical' selection criterion.<sup>94</sup>

<sup>90</sup> Law Council of Australia, 'Law Council Sets Standards for Equal Opportunity in the Legal Profession' (Press Release, 20 March 2004) <<http://www.lawcouncil.asn.au/read/2004/2393172803.html>>.

<sup>91</sup> Legal Services and Native Title Division, Attorney-General's Department, *Review of the Legal Services Directions Issues Paper* (2004) <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)-1+Review+of+issues+paper.pdf/\\$file/1+Review+of+issues+paper.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-1+Review+of+issues+paper.pdf/$file/1+Review+of+issues+paper.pdf)>.

<sup>92</sup> However, it also canvassed various methods for adoption of and compliance with the MBP by considering equal opportunity briefing policies in other jurisdictions. For instance, the *Issues Paper* cited ministerial approval for 'the principle that government entities should engage legal services with regard to equality of opportunity' and that government agencies and external legal service providers demonstrate compliance with the policy by completing an annual checklist: *ibid* 21. This checklist was annexed to the *Issues Paper*: at 25. As the Law Council of Australia noted in its submission, this reference is actually incorrect: Law Council of Australia, *Office of Legal Services Coordination Review of Legal Services Directions: Law Council of Australia Comments — Response to the Issues Paper Published by the Legal Services and Native Title Division of the Commonwealth Attorney-General's Department* (2004) 2. Nevertheless, the Victorian government does require reporting on all briefing with reference to gender (using the Briefing Barristers Survey), and it publishes the results: see Office of Government Legal Services, Department of Justice, Victorian Government, *Barristers Briefing Report 2006–2007* (2007) <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb10c508bcae7b/VictorianGovernmentBarristersBriefingReport200607.pdf>>.

<sup>93</sup> *Issues Paper*, above n 91, 22.

<sup>94</sup> Margaret Thornton, 'Affirmative Action, Merit and the Liberal State' (1985) 2 *Australian Journal of Law and Society* 28, 29.

In contrast, affirmative action is 'understood as describing a range of policies which contemplate the possibility of the selection of a less qualified over a more qualified candidate on the basis of their membership of an under-represented target group'.<sup>95</sup> Australian legislation in the area is characterised by the same approach. For instance, Thornton describes the amendment to the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) to rename it the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ('*EOWW Act*') as carefully deleting all reference to 'forward estimates' or 'objectives' because of the fear of quotas, which is code for appointing 'unqualified' women without regard to the merit principle.<sup>96</sup>

This Part questions whether either concept should necessarily be understood in this way. The above characterisation of affirmative action ignores all alternative objectives and principles that may underpin such policies, such as diversity and distributive justice. It is entirely defined in relation to its contravention of principles of merit and even equality. Indeed, it suggests that it operates as a form of discrimination. This explanation of affirmative action is why it is often also termed 'preferential treatment' or 'reverse discrimination'. The ideal of merit is located as a subset of the dominant ideology of liberalism with the core value of individual autonomy. John Stuart Mill reasoned that there was a utilitarian good in removing regulatory intervention and allowing individuals to compete on their merits, thereby creating a more equal and just society.<sup>97</sup> While neo-liberal philosophy has more recently accepted that not all members of society can attain equality in an unregulated, market-driven society, there remains a 'general liberal suspicion of prioritising equality over freedom'.<sup>98</sup> A regulatory approach that impinges on freedom to compete on merit is therefore suspect, obscuring the range of other rationales for such an approach.

In Australia, all legislative mention of affirmative action has been erased and largely replaced by phrases such as 'equal opportunity' or 'merit'. The renamed *EOWW Act*<sup>99</sup> includes the 'object' to 'promote the principle that employment for women should be dealt with on the basis of merit'.<sup>100</sup> Thus, affirmative action is chiefly rejected because of its positioning in a dichotomous relationship with merit. However, as the next Part argues, merit as a neutral, objective and isolated concept is highly questionable. There is now a chorus of commentators pointing

<sup>95</sup> Kate Malleon, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 *Journal of Law and Society* 126, 127. While Malleon is concerned in her article with judicial selection, her useful definition of affirmative action is applicable more broadly.

<sup>96</sup> Margaret Thornton, 'EEO in a Neo-Liberal Climate' (2001) 6 *Journal of Interdisciplinary Gender Studies* 77, 92. See also Barbara Pocock's discussion in Barbara Pocock, 'Equal Pay Thirty Years On: The Policy and the Practice' (1999) 32 *Australian Economic Review* 279, 281.

<sup>97</sup> John Stuart Mill, 'The Subjection of Women' in Alice S Rossi (ed), *Essays on Sex Equality: John Stuart Mill and Harriet Taylor Mill* (1970) 123.

<sup>98</sup> Marion Maddox, 'Affirmative Action: Liberal Accommodation or Radical Trojan Horse' (1998–99) 14 *Australian Journal of Law and Society* 1, 8.

<sup>99</sup> Section 8(1) of the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cth) imposed an eight step plan for the implementation of an affirmative action programme which included: issuing a policy statement in accordance with affirmative action objectives; data collection to assess the level of women employed in the organisation; setting clear objectives for the future; and monitoring achievements. No quotas were required to be imposed and the only sanction for failing to comply with its provisions was naming in Parliament.

<sup>100</sup> *EOWW Act* s 2A.

to ‘merit’ as an inherently subjective concept.<sup>101</sup> They also point to the use of merit as a camouflage for discriminatory practices. Carol Bacchi argues that the idea of ‘merit’ is used to reinforce ‘informal cultural values’, mask ‘contradictory interests and preserve existing unequal power relations’.<sup>102</sup> Thornton similarly criticises the looseness of the conceptual basis of merit that ‘permits and legitimates discriminatory practices’.<sup>103</sup> Merit is not a neutral and objective factor in selecting counsel. As a result, the MBP, as a reflection of the merit principle, should be understood as an add-on to existing practices rather than a mechanism of institutional change. While the MBP has been lauded as a regulatory instrument to institute cultural change, the preservation of institutional status quo, in word and deed, may in fact mask informal discriminatory practices.

Further, it is argued that once the dichotomous relationship between merit and affirmative action is rejected, the social or moral justificatory power of merit-based selection is weakened and we are left searching for an underlying rationale.

#### V WHAT IS MEANT BY SELECTION ON ‘MERIT’?

Kate Malleon describes what she calls the common ‘maximalist’ approach of selection on merit, which assumes that in any situation the best candidate for the job can be easily identified based on a set of objective criteria.<sup>104</sup> However, as she says of judicial selection, briefing counsel is rarely so easy. The qualitative work described earlier<sup>105</sup> identified a wide range of informal and value-laden criteria which are often employed to identify the ‘best candidate’. The criteria are rarely articulated and often unconscious, and may vary depending on the area of law, the type of brief (in adversarial cases, for instance, a natural inclination for a ‘desk-thumping’ man may prevail; in other circumstances, ‘senior’ may be synonymous with ‘male’) and the client (assumptions about the sex, race or other background of the client may inform selection). While it is not suggested that there should be any criterion which is inappropriate (except those based on prejudice or malice), the merit principle is often invoked to shroud in mystery the selection process and thus the criteria used to select counsel. In many cases, there may not only be several barristers who could perform the brief equally well, but may do so in very diverse ways. However, far from weighing different talents, briefs are most commonly awarded on the basis of predetermined qualities of a ‘good advocate’ or simply a like person (a man). Those who possess dominant cultural capital — male barristers and those briefing them —

<sup>101</sup> For instance, Christopher McCrudden suggests that the meaning of merit is so contested that it is hardly worth using the term at all: Christopher McCrudden, ‘Merit Principles’ (1998) 18 *Oxford Journal of Legal Studies* 543, 543–4.

<sup>102</sup> Carol Bacchi, ‘The Brick Wall: Why So Few Women Become Senior Academics’ (1993) 36 *Australian Universities’ Review* 36, 39, citing Albertine Veldman, ‘“The Rule of Power”: The Implementation of Equal Employment Opportunity Law in a Corporate Setting’ (1991) 12 *Dutch and Belgian Law and Society Journal* 69, 76.

<sup>103</sup> Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 19.

<sup>104</sup> Malleon, above n 95, 128.

<sup>105</sup> Young, above n 4; Hunter and McKelvie, above n 4.

wield what Pierre Bourdieu describes as ‘symbolic mastery’<sup>106</sup> by which they can recreate and manipulate briefing culture.

A key aspect of the merit principle is not only that a clear, neutral and objective set of selection criteria can and should be applied in each instance, but also that this must be derived solely on the basis of the function to be performed rather than broader concerns such as promoting a disadvantaged group. The MBP makes a first, uncontroversial step in providing that extrinsic considerations of background and other prejudicial concerns must be excised from selection processes. It is not contested that this aspect of selection on ‘merit’ should be observed. In this sense, the MBP extends the reach of anti-discrimination statutes to briefing barristers. While this is a laudable addition to the regulatory regime, this aspect of the MBP tells a briefer little about how to undertake the briefing process or, more specifically, what selecting on merit means. Indeed, it appears to imply that selection of counsel has *not* been on merit. However, this Part argues that a better understanding of the MBP is that it is intended to correct individual instances of prejudice rather than to address an institutionalised problem of determining what selection on merit entails.<sup>107</sup>

It is suggested that not only will there rarely be one best candidate, but that merit cannot be ascertained as a clear set of criteria for performance of a brief. There are few jobs, particularly in the case of an individual brief, which have a definite and finite set of functions to be fulfilled by a person who possesses the ability to perform them to a specified degree. Indeed, in many cases, when looking at the talents of counsel, the briefer may change their conception of how to conduct the case or favour one or other criteria specified for fulfilling the brief. While briefers may look for certain broad minimum qualifications such as experience, how much experience is attainable will often depend more on the available pool of candidates and balancing this against other factors such as the hourly rate. Thus, as Malleon observes of judicial appointment, which involves a similarly flexible array of qualities in a candidate, ‘there is no possibility of disengaging the construction of merit from the question of who might be appointed’.<sup>108</sup> It follows that in each case, the question of merit is intimately connected with the pool of candidates. This is not necessarily objectionable, but raises grave doubts as to any neutral and objective understanding of merit. What then becomes crucial is how we construct merit in each case, and understanding that it is a process of preference for one candidate over another. The MBP begins this process by prohibiting certain types of preference formation based on lack of awareness of any female candidates and direct prejudice. The next step is not to set out a prescriptive (or proscriptive) method for selecting counsel, but rather to make transparent how merit is determined in each case. For instance, this could be done by listing the candidates considered and providing an explanation of why one person from the list was or was not selected. The ‘visibility bias’ described by Kanter may thereby become apparent. Simply short-listing a female

<sup>106</sup> See also Sommerlad’s useful discussion of Bourdieu’s ‘habitus’ as an internalised cultural practice: Hilary Sommerlad, ‘Researching and Theorizing the Processes of Professional Identity Formation’ (2007) 34 *Journal of Law and Society* 190.

<sup>107</sup> It is conceded here that the MBP does address the process of finding candidates for a brief. Rather the argument concerns the second step of ‘genuinely considering’ female counsel when making a decision as to whom to award the brief.

<sup>108</sup> Malleon, above n 95, 137.

barrister may not be sufficient where the briefing process is weighed against her. Similarly, where there are several female barristers who are eligible for the brief, consideration of only one (to make up the numbers) will be insufficient.

One preliminary observation which follows from a more subjective notion of selection of counsel is that it is unlikely the MBP in its current form will achieve even the limited objectives it sets out (equality for women in the number and nature of briefs they receive proportional to their professional representation). While the MBP requires review and reporting on the nature and rate of appointment of female counsel, the undefined process of selection in each case provides an excuse for a lack of progress in achieving formal equality. In short, it is hard to see how it is enforceable even where the policy takes a mandatory form.<sup>109</sup> The implication when the MBP fails to achieve results is that it is the fault of women at the Bar — they are simply not meritorious enough to receive briefs.<sup>110</sup> If we understand the MBP to be concerned with achieving equality of process rather than result (women should be equally able to compete for briefs rather than actually ensuring that they receive them), the form of the MBP may be insufficient. The *process* of briefing does not merely consist of being placed on a list and ‘genuinely considered’ — it also encompasses how this consideration is undertaken.

The larger point here is not to postulate a perfect solution, but rather to problematise the contention that merit is neutral and objective. In the context of current discriminatory selection processes, it is contended that the terminology of merit should be dispensed with, or at least what is meant by it should be described.<sup>111</sup> More significantly, when merit loses its power to elevate a process beyond question and thus its social or moral weight, it is no longer a *prima facie* basis on which to reject affirmative action policies. In order to explain this, this Part examines several arguments based on the ‘merit principle’ put forward by Donald Nicolson in the context of briefing.<sup>112</sup> These arguments have long been employed to argue against affirmative action policies.

First, Nicolson considers the argument that ‘candidates adjudged to be the best have a moral right or claim to the relevant position’.<sup>113</sup> He rejects this argument on the ground that the ‘best’ candidate is rarely selected on past performance and that even if this were true, few would say that someone with more aptitude is morally superior. In the case of awarding briefs, this process may differ from selection for academic places, recruitment or promotion. Past performance is

<sup>109</sup> An example of such a mandatory form is the adoption of the MBP by the Victorian government. This early adoption provides some indications of the ‘success’ achieved in implementing the MBP, where there was an increase in briefs awarded to female barristers by the government: see Office of Government Legal Services, above n 92.

<sup>110</sup> For a similar argument against anti-discrimination policies, see Anne Game, ‘Affirmative Action: Liberal Rationality or Challenge to Patriarchy?’ (1984) *Legal Service Bulletin* 253. Admittedly, women at the Bar may also be unavailable or unwilling to take on many cases. The argument here is that where we leave undisturbed the rationale that (unexamined) merit is the only valid method of selection of counsel, then such initiatives may attract this argument.

<sup>111</sup> For instance, Nicolson is scathing of ‘merit’ as a term used to reject affirmative action as he notes the ‘irony, if not the hypocrisy, of lawyers trumpeting a principle which so many continue to disregard, not to mention the bigotry of the assumption that those from previously excluded groups are inherently inferior’: Donald Nicolson, ‘Affirmative Action in the Legal Profession’ (2006) 33 *Journal of Law and Society* 109, 115.

<sup>112</sup> These arguments are not new, but rather Nicolson’s article usefully summarises them: *ibid.*

<sup>113</sup> *Ibid* 116.

often crucial and the brief may require almost identical application of skills, intellect and other talents as demonstrated in previous cases. Nevertheless, a moral argument is weak when one frames this in distributive justice or even substantive equality terms. In many cases, the talent may not be natural ability, but rather experience (being able to obtain briefs), types of education (such as pupillage at the Bar) and learned skills (such as style of arguing). A woman, subject to a complex array of discriminatory factors within the culture of the Bar, may find such skills, experience and education difficult to establish, as has already been discussed. If the stated goal is equality of opportunity, promoting women is arguably a moral good that has some claim to be weighed alongside individual natural talent. This form of merit-based argument seeks to accrue benefit only to individual barristers.

Nicolson also postulates a slightly different claim that the best candidate has a 'legitimate expectation, rather than a moral claim, to the position'.<sup>114</sup> This is a common contention of those opposed to affirmative action, who often use this claim as a basis to characterise affirmative action as discriminating against those outside the target group. Again, Nicolson claims that this is a suspect assertion. If an affirmative action program is well publicised and pre-advised, then the reduction of opportunities in certain cases is hardly a strong cause for complaint. In the case of receiving briefs, it is spurious that any one barrister has a legitimate expectation to receive any brief. Rather, this argument shifts without any basis the free right of a barrister to compete for briefs to a formal right to obtain that brief.

The strongest argument in support of merit is that professional standards are best served by recruiting the 'best' candidates. In the case of briefing, it has already been argued that the best candidate is generally a subjective choice and that there is rarely a single person best suited for the case. While it is conceded that merit has some role to play in defining a minimum level of qualification, in many cases there will be a female barrister able to perform the minimum requirements, which ought to produce something approaching equality of opportunity at the Bar. This, as has been described in detail in this Part, is not the case. Therefore, an argument that selection on an undefined value of merit is required to ensure professional standards is not convincing.

However, if we understand professional standards to mean the interests of the client, then this is a more complex consideration. As a matter of contract (the retainer between solicitor and client), in equity (such as fiduciary duties of loyalty and trust),<sup>115</sup> and under statute,<sup>116</sup> acting against the interests of the client will be a breach of a lawyer's duties. Any consideration of interests other than the client's, such as those of female barristers, may contravene these strict duties

<sup>114</sup> Ibid 117.

<sup>115</sup> See generally *Carter v Palmer* (1842) 8 Cl & F 657; 8 ER 256; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

<sup>116</sup> Each state and territory except South Australia has enacted a legal profession Act, the provisions of which are largely uniform in this area: see *Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2008* (WA). The Legal Profession Bill 2007 (SA) has lapsed. Furthermore, barristers' rules and solicitors' rules promulgated by professional bodies also require the observance of strict duties of client confidentiality, care and loyalty. A breach of such duties attracts severe professional sanction: see, eg, *Mellifont v Queensland Law Society Inc* [1981] Qd R 17.

of loyalty and care.<sup>117</sup> It follows that a solicitor must in every case brief a barrister on the basis of the interests of the client alone. This requires selecting the most meritorious counsel for the case. However, again, this cannot be reduced to a predetermined formula. While each client desires the best barrister in town, the client's case or budget may not allow for briefing a high priced senior counsel. Duties to the client are not breached when lesser counsel, who reaches minimum qualifications to perform the case, is briefed. Equally, while the client may prefer a type of counsel (such as a man), it does not follow that this will be the best counsel. There is some discretion, indeed obligation, under rules governing solicitors and barristers in most states to exercise independent forensic judgement.<sup>118</sup> Where a client displays a prejudice, there is no legal prohibition on the solicitor pointing out that this is a poor method for selection of counsel. While there is no clear professional ethical regulation which mandates appointment of appropriate counsel, allowing the client to choose poorly may constitute a substandard level of care. In any case, recourse to client prejudice is unwarranted in most cases because clients will be entirely guided by their solicitors in selection of counsel. Therefore, there appears to be nothing prohibiting either the solicitor seeking out available and eligible female counsel for all briefs, nor suggesting them to their clients.

The concern of private practice that their clients expect appointment of the most effective counsel is not inconsistent with a more directed, and even coercive, MBP. Only where we can point to objective and efficient methods of evaluating merit can we make a real claim as to the appropriateness of existing briefing practices. An alternative to the MBP, which was present in the early Victorian version of the policy, is to require counsel or solicitors to recommend female barristers and to make real efforts to persuade clients not to bring any prejudices to bear. A directed or dynamic understanding of merit might apply such that the legal practitioner is required to assess the available counsel not on presupposed abilities of a generic best advocate but on one best suited to the

<sup>117</sup> It is conceded that this duty may be stated too strongly. Consideration of other interests than that of the client's may be permissible or demanded. For instance, professional ethical regulation and common law in each jurisdiction elevates duties to the court (and the lawyer's role as officer of the court) above their duties to the client when a conflict in duties arises. Furthermore, professional ethical regulation encompasses equitable principles, which strictly prohibit the lawyer from preferring or even promoting their own interests when undertaking legal work: see, eg, Law Institute of Victoria Ltd, *Professional Conduct and Practice Rules* (2005) rr 9–13. However, there are no express prohibitions on the consideration of other interests while undertaking legal work, except where this will clearly constitute substandard work for the client. Unlike directors' duties, lawyers' duties are typically provided as proscriptive rather than prescriptive. Thus, there is considerable discussion in the field of legal ethics which debates the role of a lawyer in this area: see, eg, the arguments of moral activist theorist, David Luban: David Luban, 'The Adversary System Excuse' in David Luban (ed), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1983) 83.

<sup>118</sup> See, eg, The Victorian Bar Inc, *Practice Rules: Rules of Conduct and Compulsory Continuing Legal Education Rules* (2005) r 16, which provides:

A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and the instructing solicitor's desires where practicable.

Similarly, r 17 provides that there is no breach of duty to the client should the barrister exercise such 'forensic judgment' and conduct the case contrary to client instructions in certain circumstances. These rules are replicated in rr 13.1 and 13.2 of the Law Institute of Victoria Ltd, *Professional Conduct and Practice Rules* (2005). This is also imposed in contract and tort by a minimum standard of care to be exercised in undertaking legal work.

client and their needs with reference to the available pool of candidates. This form of 'care'<sup>119</sup> shown to the client may not only assist women to obtain a range of briefs, but it may also be entirely consistent with duties to the client. For instance, r 12 of the Law Institute of Victoria's *Professional Conduct and Practice Rules* provides that solicitors must advise clients on a range of matters which will assist them to make informed decisions.<sup>120</sup> Arguably, advice on choice of counsel with reference to the interests of the client's case would fall within these duties. In some cases the client may have interests in supporting female counsel.<sup>121</sup>

It is conceded that the interests of the client provide a strong argument for merit to be paramount in selection of counsel. The imposition of 'hard' affirmative action policies that require a quota of female barristers to be appointed may be inconsistent with duties to the individual client. Where a client clearly expresses a preference for counsel which is based in prejudice, there is no exception to the solicitor's duties to follow client instructions as client preference, in this instance, falls outside the scope of anti-discrimination laws. Thus, there is no prima facie unlawfulness or prejudice to the administration of justice. Similarly, it is conceded that there are strong incentives for lawyers to cater to clients' preferences in order to maintain good relationships. On the other hand, where lawyers predicatively suggest a certain type of counsel on this basis, this displays a paternalism that may not be in the best interests of the client. The argument that all other policy options should be rejected in favour of retaining total discretion in the selection of counsel on the basis of an undefined idea of merit is questionable. An amended version of the MBP, which includes the specific requirement that female counsel be considered in all or most cases or that the client be advised on a differing range of talents and how these might be useful for the case, does not breach duties to the client and accords with a subjective understanding of merit. Additionally, requiring an explanation of why apparently eligible women were overlooked in the award of a brief represents another strategy to render transparent the selection process.

In formulating the MBP, merit has not only been defined as objective and intrinsically fair, but it has also been discursively located in opposition to all other considerations. The implication is that it is unacceptably violated when considerations other than those strictly required for the job are also valued. This article argues that a value of promoting substantive equality for women at the Bar does not necessarily result in selection without regard to any form of qualification or ability to perform the job. As discussed above, in many cases there will be several barristers able to perform the brief despite possessing different qualities. It does not follow that if we favour one barrister on the basis of being female that she was not selected on merit. This 'tie-breaker' approach is

<sup>119</sup> 'Care' is used here to link to a larger debate in legal ethics regarding the appropriate relationship between lawyer and client. It is one that not only values loyalty and zealousness to the client's cause, but also takes into account a range of other considerations that may affect the client or others involved in the case: see, eg, Rhode, 'Gender and Professional Roles', above n 42; Nel Noddings, *Caring: A Feminine Approach to Ethics & Moral Education* (1<sup>st</sup> ed, 1984); Menkel-Meadow, 'Portia in a Different Voice', above n 56.

<sup>120</sup> Law Institute of Victoria Ltd, *Professional Conduct and Practice Rules* (2005) r 12.

<sup>121</sup> Certain clients may have an interest in promoting diversity or equality as a personal or organisational goal. If the client is not made aware of the availability of female counsel, they may be unaware that there were suitable female counsel for their matter.

also unlikely to breach duties to the client.<sup>122</sup> However, the MBP was formed on the basis that no such extrinsic consideration is valid. This was not put forward as a matter of principle but rather as a discursive tactic of contrasting merit with an extreme form of affirmative action (quotas). There was no consideration of the spectrum of possibilities between the two. The next Part examines a few of the many definitions of affirmative action that have been offered to illustrate this point.

## VI DEFINING AFFIRMATIVE ACTION

The MBP was generally viewed as different to any system of quotas for female barristers. It was on this basis that a range of policy options for achieving the objective of equality for women at the Bar was rejected. However, in contrast, affirmative action as policy and law is generally defined in a far more expansive way, particularly in the US, which has a long history of implementing such policies.<sup>123</sup> Affirmative action is properly understood as based in certain rationales and objectives rather than one form of implementation. Reference to quotas obscures the intent of such policies, and thus leaves no space for such initiatives to be seriously considered as appropriate responses to an identified area of disadvantage.

Since affirmative action has no one definition, it can be understood as any policy that recognises and addresses past or present disadvantage of an identified group (based on a range of rationales from retributive to distributive justice and arguments favouring diversity or social utility). In more practical terms, it 'is a novel mechanism that is designed to change the profile and culture of a workplace in the interests of women and/or designated groups through the initiation of

<sup>122</sup> Nicolson points to two difficulties with this approach. First, this could lead to an over-representation of women in briefing which would not be the case for a specified quota or target: Nicolson, 'Affirmative Action in the Legal Profession', above n 111, 123. However, this seems a small concern in the context of the long history of women's discrimination at the Bar. This strategy also seems appropriate in relation to selection of senior counsel where there are two equally qualified counsel. Here, the low numbers of senior women at the Bar suggest that, at least in the short-term, this would be unlikely to lead to over-representation. Secondly, given that subjective and informal methods of selecting counsel are often used, such a policy would simply lead to more weight being placed on those very fraternal qualities which we are seeking to reduce in order to avoid the policy (arguing that the woman is not an equal): at 123. Without an accompanying requirement to identify how candidates are selected and evaluated, this form of policy seems doomed to failure as it does not displace the merit principle.

<sup>123</sup> There is a great deal of literature discussing affirmative action laws in the US context where such policies have been found to be constitutional under the 'equal protection' clause (*United States Constitution* amend XIV): see, eg, *Regents of the University of California v Bakke*, 438 US 265 (1978), affirmed in *Grutter v Bollinger*, 539 US 306 (2003); Philip C Aka, 'The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases' [2006] *Brigham Young University Education and Law Journal* 1. In Canada, affirmative action programmes have also been upheld as constitutional: *Andrews v Law Society of British Columbia* [1989] 1 SCR 143. However, while the US Supreme Court has upheld affirmative action laws, many commentators note that the increasing restrictions placed on such policies indicate that there is a danger that a more conservative Court may in the future find that affirmative action is unconstitutional: see, eg, Norma M Riccucci, 'The Immortality of Affirmative Action' in Carolyn Ban and Norma M Riccucci (eds), *Public Personnel Management: Current Concerns, Future Challenges* (3<sup>rd</sup> ed, 2002) 73; Hanes Walton Jr and Robert C Smith, *American Politics and the African American Quest for Universal Freedom* (2000) 227–31; Taunya Lovell Banks, 'Contested Terrains of Compensation: Equality, Affirmative Action and Diversity in the United States' (1997) 15(2) *Law in Context* 110, 119–20.

measures at the institutional level.<sup>124</sup> While Wojciech Sadurski also conceives of affirmative action as an institutional process, he defines what he calls ‘preferential treatment’ in terms of awarding benefits based on discrimination suffered. His description is therefore intimately connected to the moral and political rationale for instituting the program:

in the processes involving selection, admission or distribution of important opportunities, preference should be given to persons singled out on the basis of those very characteristics which have been used in the past to deny them equal treatment.<sup>125</sup>

Affirmative action has generally been defined in contrast to anti-discrimination regulation on the basis of divergent underlying assumptions about achieving equality. While both broadly claim to promote equality, one is premised on achieving equality of result and the other on achieving equality of procedure (that is, equal opportunity). Affirmative action, as Sadurski’s definition illustrates, is often understood as more relational, concerned with identifying difference and how this has created unfair results. As many feminist commentators have noted, equality of opportunity is premised on removing discrimination, but discrimination is understood broadly as making distinctions between people on the basis of their difference.<sup>126</sup> Australian courts have applied this ‘sameness’ approach in most contexts based on the notion that men and women are ‘equal’ and therefore different presumptions are inappropriate.<sup>127</sup> Federal legislation such as the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth)<sup>128</sup> has tended to follow the international treaty model for

<sup>124</sup> Margaret Thornton, ‘Affirmative Action, Merit and Police Recruitment’ (2003) 28 *Alternative Law Journal* 235, 235. See also Thornton, ‘Affirmative Action, Merit and the Liberal State’, above n 94.

<sup>125</sup> Wojciech Sadurski, ‘The Morality of Preferential Treatment (The Competing Jurisprudential and Moral Arguments)’ (1984) 14 *Melbourne University Law Review* 572, 574.

<sup>126</sup> Similarly, in the US the majority of laws are focused on individual rights and formal equality, despite the constitutional protection for certain affirmative action policies. Ariane Hegewisch argues that the US ‘arguably has the highest levels of formal equality for women who are able to work full-time “like a man” but provides the least public support’ for alleviating social and legal disadvantages (such as a greater share of domestic labour) imposed on them: Ariane Hegewisch, ‘Introduction’ in Ariane Hegewisch et al (eds), *Working Time for Working Families: Europe and the United States* (2005) 1. See also Martha Minow’s discussion of ‘sameness’ and ‘difference’ in legal discourse: Martha Minow, ‘Justice Engendered’ in Patricia Smith (ed), *Feminist Jurisprudence* (1993) 217.

<sup>127</sup> For example, the sameness approach is now adopted to displace the equitable presumption of advancement. For a discussion of the ‘neutrality’ principle, see Lisa Sarmas, ‘A Step in the Wrong Direction: The Emergence of Gender ‘Neutrality’ in the Equitable Presumption of Advancement’ (1994) 19 *Melbourne University Law Review* 758. Different presumptions have been applied in Australian cases, though not without criticism: see, eg, *Brown v Brown* (1993) 31 NSWLR 582. For decisions as to the legality of ‘special measures’ laws, see, eg, *Gerhardy v Brown* (1985) 159 CLR 70; *Proudfoot v ACT Board of Health* (1992) EOC 92-417.

<sup>128</sup> These federal laws are made primarily under the expansive external affairs power (*Commonwealth Constitution* s 51(xxix)) by enacting parts of international treaties that Australia has ratified. These treaties include the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). These treaties also include two International Labour Organization conventions: the *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951,

addressing discrimination against identified groups by providing that 'special measures' which advance a certain group are legally sanctioned only as an *exception* to the general prohibition on discrimination.<sup>129</sup> In this sense, affirmative action is legally understood as a form of discrimination.<sup>130</sup> Indeed, as Beth Gaze notes, the provisions of the federal anti-discrimination Acts discourage any form of 'active measures' to prevent discrimination.<sup>131</sup> Thus, anti-discrimination laws in Australia are based on a principle of equality which does not include sanctioning any action 'to make the anti-discrimination principle fully effective ... to prevent [discrimination] occurring instead of merely relying on subsequent complaints to eliminate it'.<sup>132</sup>

Faye Crosby and Stacy Blake-Beard provide a useful practical description of the differences in perspective:

affirmative action differs from simple equal opportunity policies in several ways. First, affirmative action entails the expenditure of effort and resources; equal opportunity is more passive. Second, affirmative action is planful and forward looking, requiring organizations to monitor their existing actions and outcomes and to anticipate future problems, whereas equal opportunity is reactive, requiring corrective actions only after a problem has been alleged or discovered. Finally affirmative action requires that organizations be cognizant of the ethnic and gender characteristics of people, whereas equal opportunity does not. Indeed, equal opportunity seeks to encourage a 'color blind' and 'gender blind' approach.<sup>133</sup>

The MBP falls within both definitions. It can be considered to be affirmative action because it is designed to influence briefing practices for the benefit of women at the Bar. It is proactive rather than responsive to one particular instance

165 UNTS 303 (entered into force 23 May 1953); *Convention Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

<sup>129</sup> While there are no constitutional restraints on state power, state laws have necessarily followed the federal laws so as not to be inconsistent and therefore inoperative under s 109 of the *Constitution*.

<sup>130</sup> Anne Bayefsky discusses the approach adopted by international treaties and traces how the treaties allow for 'special measures' to institute equality as exceptions to the general presumption that anti-discrimination is best achieved by a formal equality approach: Anne F Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1, 24-33. See also s 8(4) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which states that '[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.'

<sup>131</sup> For a discussion of the specific provisions, see Beth Gaze, 'The Ambiguity of Affirmative Action in Australia' (1997) 15(2) *Law in Context* 136, 145-6.

<sup>132</sup> *Ibid* 145.

<sup>133</sup> Faye J Crosby and Stacy Blake-Beard, 'Affirmative Action: Diversity, Merit, and the Benefit of White People' in Michelle Fine et al (eds), *Off White: Readings on Power, Privilege and Resistance* (2004) 145, 146 (citations omitted). Similarly, Chris Ronalds describes the difference in anti-discrimination and affirmative action as the former being 'an indirect and ad hoc method of achieving the necessary structural changes required for equal employment opportunity': Chris Ronalds, *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* (2<sup>nd</sup> ed, 1991) 13. By contrast, as Ronalds states (at 13), affirmative action can be understood as not placing the emphasis on individual solutions

but on analysis of, and remedies for, structural discrimination which is reflected in an individual employer's patterns of employment. An overall review of employment policies and practices addresses the underlying policies that are being pursued by an employer and promotes their reform insofar as they have the effect of unjustifiably disadvantaging women. The intervention is proactive in nature and does not rely on an individual complaint from an aggrieved person.

of discrimination, with enforcement intended to be by those briefing rather than by individual women at the Bar. On the other hand, it is primarily prohibitive in focus and appears to adopt a sameness approach to achieving equality — it is based on the presumption that female barristers should be permitted to compete in a fair competition for briefs. It does not attempt to question the process of selecting counsel nor to encourage those briefing to take account of differences between counsel. The MBP is designed to change workplace cultures at an institutional level yet it does not seek to address the core aspect of disadvantage experienced by women in receiving briefs: how counsel is selected and the context within which such choices are made.

The point here is not to redefine the MBP but to demonstrate that definitions, without consideration of the rationale for adopting a particular strategy, are meaningless. The MBP falls somewhere in the middle because it is attempting to promote institutional change without being criticised for instituting radical, and therefore possibly objectionable, policy. This article does not suggest that those formulating the policy held anything but high hopes for achieving real change for women at the Bar. Rather, the article suggests that those hopes were hampered in the range of regulatory options and in the way that the policy was promoted. However, as Bacchi warns, this article argues that

those who advocate substantive structural change need to ensure that they do not buy into conceptual frameworks which undermine their articulated goals. ... A close study of the concepts employed in reform programmes is a necessary part of this project.<sup>134</sup>

This burden should not be placed on the shoulders of individual women at the Bar; rather, it should be a core element of development, promotion and implementation of policy by authoritative institutions.<sup>135</sup>

Further, the MBP presents an opportunity to institute ‘harder’ affirmative action measures which, cognisant of the arguments of ‘reverse’ discrimination, rest on the primary goal of eliminating a recognised disadvantage. In this case, there is ample evidence of women’s disadvantage at the Bar, which is widely accepted by the legal profession and government. Although certain measures may advantage women, without criticisms on social or moral grounds, these appear to be nothing more than rhetorical objections. While the ‘merit principle’ is presented as an argument from principle, this article has argued that ‘merit’ should simply be one of many considerations for proper briefing.

It is submitted, therefore, that the MBP should include a range of ‘harder’ measures to ensure the success of the initiative. This article has raised several compelling arguments against the imposition of mandatory quotas in private sector briefing which may breach duties to clients (although it is noted that such

<sup>134</sup> Carol Bacchi, ‘Policy and Discourse: Challenging the Construction of Affirmative Action as Preferential Treatment’ (2004) 11 *Journal of European Public Policy* 128, 144.

<sup>135</sup> McHarg and Nicolson, above n 87, 13, note that it is often the potential beneficiaries who shoulder the burden of demonstrating that an initiative is appropriate and justified. This has been called the ‘principle of proportionality’ or ‘strict scrutiny’. Hugh Collins contends that this often requires that the woman show that she is more deserving than her male counterpart so as not to attract an accusation that the appointment is unmeritorious: Hugh Collins, ‘Discrimination, Equality and Social Inclusion’ (2003) 66 *Modern Law Review* 16, 18. For a similar argument with regard to judicial selection, see Barbara Hamilton, ‘Criteria for Judicial Appointment and “Merit”’ (1999) 15 *Queensland University of Technology Law Journal* 10.

considerations do not arise in the case of government and should therefore be considered in these cases). However, other strategies may be lawfully adopted.<sup>136</sup> The thrust of this article suggests that where we can institute more transparent briefing practices a fairer result will ensue. Thus, it is argued that the MBP should mandate identification and consideration of female counsel by requiring a list of candidates to be drawn and discussed with the client. It is also suggested that some accountability for selection should be required such as providing reasons for decision as to counsel in each case. While there may be an objection that this is an added burden to commercial practice, reporting could be in the form of a brief file note which is in most cases standard practice in recording client instructions. Such documentation could then form the basis of the other requirements of the MBP to monitor, review and report on briefing. This information would be a substantive addition to any review, rather than simply relying on raw numbers of female counsel briefed. More explicit requirements in the MBP which mandate intra-firm policies (such as education and directives from senior partners) and reviews each year would also ensure practical, rather than symbolic, compliance.

It is further contended that we should consider other measures to assist a clearly identified group in need of assistance. Implementation of affirmative action ideals does not rest solely on the imposition of quotas. A less stringent form could entail setting targets. These would allow for briefing on merit, but provide some guidance as to appropriate levels for briefing female counsel. Another alternative is what Nicolson calls 'operating decision-making preferences'.<sup>137</sup> These can be applied in a range of ways: most commonly, where there are equally qualified candidates, extra 'points' are awarded for relevant areas of disadvantage. While this may result in equally qualified male barristers missing out on certain briefs, there is little evidence that this would result in a reduction of standards within the profession.<sup>138</sup> If there are further objections in principle to such an approach, these must be articulated within the process of formulating policy.

A related example illustrates the advantages of such a targeted strategy. In 2007, a Victorian Bar Council subcommittee, the Equal Opportunity Committee,

<sup>136</sup> Those receiving legal services do not fall within the scope of the *Sex Discrimination Act 1984* (Cth): see above n 64. Therefore, while such policies may constitute 'discrimination' for the purposes of the relevant federal or state Act, there are unlikely to be any contraventions of its provisions. Wider implementation of affirmative action policies such as quotas within individual firms may require a clearance under the relevant sex discrimination Act. Similarly, implementation of such initiatives by the federal government or its agencies may constitute a contravention of *Sex Discrimination Act 1984* (Cth) s 26. However, other initiatives are unlikely to contravene these provisions, such as requiring appropriately qualified female counsel to be listed for consideration, explaining to a client the merits of each counsel with reference to a range of relevant skills and providing a brief explanation for reasons for selection of counsel in each matter.

<sup>137</sup> Nicolson, 'Affirmative Action in the Legal Profession', above n 111, 122.

<sup>138</sup> Much US literature points to little reduction in standards for such hard affirmative action programmes: see, eg, Michael Selmi, 'Testing for Equality: Merit, Efficiency and the Affirmative Action Debate' (1995) 42 *University of California Los Angeles Law Review* 1251; Alan Freeman, 'Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay' (1988) 23 *Harvard Civil Rights — Civil Liberties Law Review* 295; Randall Kennedy, 'Persuasion and Distrust: A Comment on the Affirmative Action Debate' (1986) 99 *Harvard Law Review* 1327.

recommended that two places be reserved on the Council for senior women.<sup>139</sup> The Council has refused to endorse the proposal.<sup>140</sup> The rationale of those proposing the quota was a general recognition that women were not well represented in the higher ranks of the Bar and barristers are far more likely to be appointed to senior counsel when serving on a Bar Council.<sup>141</sup> In this context, it is difficult to dispute that women should be assisted, at least until their numbers in the senior ranks of the Bar rise. This initiative is grounded in objectives of substantive equality where institutional practices, rather than the deficiencies of those disadvantaged, are brought into focus. As Alexandra Richards argued in her submission supporting amendment to the Victorian Bar Council Constitution: 'The proposal is not about victimisation. It is about representation'.<sup>142</sup>

#### VII SOME ARGUMENTS FOR AND AGAINST AFFIRMATIVE ACTION

While the previous Part has proposed the implementation of 'harder' forms of affirmative action, it is conceded that this article has not provided a fulsome argument for implementation of such measures. That is, I have not examined the rationales for affirmative action, but rather the principal argument against it — that it contravenes the merit principle.<sup>143</sup> It has been contended that the merit principle does not provide a strong rationale to reject affirmative action, and that we must therefore engage in a proper debate about the underlying rationale of any policy. This article has not provided a further discussion of this debate as it has not been held in relation to this policy. In this Part, I provide a brief overview of the nature of such a debate with reference to the very few arguments raised in formulating the policy.

As McHarg and Nicolson argue, there is no one 'legitimizing principle' for affirmative action or any other regulatory strategy.<sup>144</sup> A great range of justifications have been made by scholars and regulators, and thus only the most prominent ones are mentioned here. One rationale is policy as a form of compensatory

<sup>139</sup> The quota system proposed requires that if more than two women are nominated in the senior category of council members, the two with the most votes automatically have a place; if there is only one woman nominated, then she automatically receives a place: Equal Opportunity Committee, The Victorian Bar Inc, *Bar Council Proposal to Alter Constitution to Provide for Minimum Number of Entrenched Positions for Female Members of Counsel in Senior Category* (2007); Alexandra Richards, *A Case in Favour of the Special Resolution to Amend Clause 10 of the Constitution* (2007). This system is similar to the requirements for the Queensland Bar Council as set out in the constitution of the Queensland Bar Association: *Constitution of the Bar of Association of Queensland* cl 10.1 <[http://www.qldbar.asn.au/index.php?option=com\\_content&task=view&id=29&Itemid=33](http://www.qldbar.asn.au/index.php?option=com_content&task=view&id=29&Itemid=33)>.

<sup>140</sup> The Victorian Bar Inc, *Proposed Amendments to the Constitution: Explanatory Memorandum* (2007) 4 (recommendation 14); Susannah Moran, 'Bar Opportunity Not Knocking for Women', *The Australian* (Sydney), 31 August 2007, 38.

<sup>141</sup> Michael Pelly, 'NSW Bar Tightens Selection of Silks', *The Australian* (Sydney), 14 September 2007, 29.

<sup>142</sup> Richards, above n 139, 8. The special resolution was considered by the members of the Victorian Bar at an annual general meeting on 17 September 2007. I am not aware of any publicly available minutes of the meeting. However, no amendment was made to the Victorian Bar constitution as proposed in the special resolution.

<sup>143</sup> For other arguments against affirmative action, see Thomas Nagel, 'Equal Treatment and Compensatory Discrimination' (1973) 2 *Philosophy and Public Affairs* 348, 357–8.

<sup>144</sup> McHarg and Nicolson, above n 87, 3.

justice.<sup>145</sup> However, as Bacchi argues, this is probably an inadequate practical justification for policies assisting women in the workforce.<sup>146</sup> Another rationale is based on distributive justice. There has long been an argument for implementing affirmative action based on ‘distributive justice’.<sup>147</sup> For example, a similar, though less individual-focused, version is proposed by McHarg and Nicolson which they described as an argument from a social utility perspective.<sup>148</sup> This approach embraces an understanding of the policy as preferential, yet casts this as simply a new member of uncontroversial measures which are understood as ‘contributing to some overarching social or organizational goal.’<sup>149</sup> As they point out, social goals such as inclusion and social harmony are generally acceptable as rationales for ‘maternity leave, subsidised childcare or even the minimum wage’, because they are seen as benefiting society rather than the disadvantaged individual.<sup>150</sup>

Another social utility rationale is that a policy promotes diversity. Nicolson provides compelling arguments for promoting diversity such as the inherent value of alternative styles of lawyering which may be appropriate in certain matters. Lawyers from previously excluded groups may act as role models and may exhibit less of a tendency to perpetuate discriminatory thinking and practices.<sup>151</sup> The consultation draft of the *Implementation Kit* for the MBP states that ‘the promotion of such equal opportunity accords with Australian society’s expectations and [is] in furtherance of a legal profession which more truly reflects the diversity of that society and its responsiveness to it.’<sup>152</sup> This justification postulated in support of the MBP is broader than formal equality (which the MBP proposes) and articulates a plausible social good for adoption of the policy. It is a pity then that such sentiments did not translate into a stronger rationale for considering a range of policy options. As has been discussed in this article, when we consider the range of skills and talents that may be employed at the Bar which may be the result of a process of transparent and accountable

<sup>145</sup> See, eg, Gertrude Ezorsky, *Racism and Justice: The Case for Affirmative Action* (1991); Bikhu Parekh, ‘A Case for Positive Discrimination’ in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: The Limits of the Law* (1992) 261.

<sup>146</sup> Carol Lee Bacchi, *The Politics of Affirmative Action: ‘Women’, Equality and Category Politics* (1996).

<sup>147</sup> See, eg, Ronald J Fiscus, *The Constitutional Logic of Affirmative Action* (1992); Gwyneth Pitt, ‘Can Reverse Discrimination Be Justified?’ in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: The Limits of the Law* (1992) 281.

<sup>148</sup> McHarg and Nicolson, above n 87, 15–19. See also Collins, above n 135.

<sup>149</sup> McHarg and Nicolson, above n 87, 15.

<sup>150</sup> *Ibid.*

<sup>151</sup> Donald Nicolson, ‘Demography, Discrimination and Diversity: A New Dawn for the British Legal Profession?’ (2005) 12 *International Journal of the Legal Profession* 201, 217–20. See also Barbara Hamilton’s discussion of the advantages of a diverse judiciary which refer to a large scholarship supporting this idea: Hamilton, above n 135, 17–20.

<sup>152</sup> Law Council of Australia, *Model Equal Opportunity Briefing Policy for Female Barristers and Advocates — Implementation Kit: Consultation Draft* (2007) 4 (on file with author). This statement comes from the opening message of Tim Bugg, the Law Council President. A consultation draft of an *Implementation Kit* for the MBP was produced by the Law Council of Australia on 23 June 2007. The stated aims are to ‘raise awareness’ of the MBP and to ‘promote broad adoption of the Model Briefing Policy by the private legal profession’: Letter from Peter Webb, Secretary-General, Law Council of Australia to Constituent Bodies of the Law Council of Australia, 23 June 2007 (on file with author). This letter was attached to the front of the consultation draft. Without any legislative power to enforce the MBP, the Law Council of Australia is sensibly focusing on encouraging private legal practitioners to adopt the policy.

briefing practices, diversity becomes an attractive feature for the profession and individual clients. Moreover, diversity at the Bar contributes to shared social goals.

Hunter supports a similar diversity argument formulated as a business case for private practice.<sup>153</sup> She refers to government implementation as a means of providing financial incentives to those working for government to implement the policy. This taps into a clearly major factor in the professional motivations for private lawyers. However, as she notes, this is only a partial solution that covers a small part of the private legal profession. Indeed, as this article has argued, there are deeper concerns for a rationale focused on women's conformity to an unchanged profession.<sup>154</sup> Clare McGlynn, Lisa Webley and Liz Duff criticise the 'business case' put forward for promoting women within the English and Welsh legal professions.<sup>155</sup> McGlynn describes the use of human capital theory, which contends that losing women from the legal profession through discrimination results from a lack of recognition of the worth of individual workers and is bad for business. However, she argues that the focus on profit maximisation, therefore, implies that there is no other rationale (such as equality for women) on which to base encouragement of women in the legal profession. Consequently, where an employer does not perceive a business case for promoting women within their organisation, there is no further reason (professionally or ethically) to provide equality for women.<sup>156</sup> A similar argument can be made in respect of the MBP where individual solicitors may cite overriding concerns of client duties and financial or efficiency considerations. Where we can articulate an alternative and attractive approach, this may better engender a change in practices. For instance, it could be contended that providing advice on a range of available talent may advance client interests which fulfils an important professional duty, and will encourage a diverse workplace which may raise the standards of the Bar.<sup>157</sup>

There is one further rationale against implementing an affirmative action policy that was hinted at in the *Issues Paper* of the federal Attorney-General's Department — the Department expressed a concern that such strategies would 'generate opposition'.<sup>158</sup> Is policy that agitates opposition so objectionable? Is a policy which is entirely uncontroversial, yet ineffectual, a better one? While no other comment was made in the *Issues Paper* (suggesting that this was a point that had been decided and required no further debate), I infer that it is a reference

<sup>153</sup> Hunter, 'Discrimination against Women Barristers', above n 13, 38.

<sup>154</sup> In recent times, the focus has again changed from equal opportunity to 'managing diversity', which reduces the focus on the disadvantage of groups in favour of a managerial task of dealing with a diverse workforce: see Bacchi, *The Politics of Affirmative Action*, above n 146, 51–4.

<sup>155</sup> Clare M S McGlynn, 'Strategies for Reforming the English Solicitors' Profession: An Analysis of the Business Case for Sex Equality' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) 159. Similarly, Duff and Webley describe the 'business case' but conclude that it is not only 'actively undermining the position of women in the profession, [but] now also perhaps its more traditional constituency — men': Liz Duff and Lisa Webley, 'Women Solicitors as a Barometer for Problems within the Legal Profession — Time to Put Values before Profits?' (2007) 34 *Journal of Law and Society* 374, 382.

<sup>156</sup> McGlynn, above n 155, 166–72.

<sup>157</sup> See, eg, Justice Mary Gaudron's discussion of the question as to why the Bar did not appreciate 'that male lawyers would have been improved by the competition with the consequential improvement in the availability and quality of legal services': Gaudron, above n 14.

<sup>158</sup> *Issues Paper*, above n 91, 22.

to a long held concern that affirmative action policies may exacerbate discrimination against a group (being provided with assistance).<sup>159</sup> This may be because it is understood pejoratively as ‘preferential treatment’ connoting a *lack* of equality and discrimination against a dominant group (such as male barristers). Alternatively, such policy may entrench those very prejudices to be remedied and stigmatise all members of the group as unworthy to occupy positions provided. In the context of women in the legal profession, there is some evidence that a perception of ‘unworthy’ appointment to senior positions (such as elevation to the bench) increases publicly articulated prejudices.<sup>160</sup> However, this argument appears to doom groups subject to discrimination to their fate by the very fact of this prejudice. This is surely not a sufficient argument by which to dismiss the consideration of such a policy.

#### VIII CONCLUSION

This article does not attempt to prefer any one justification for affirmative action in this case. It also does not seek to prescribe one form of affirmative action measure (although certain suggestions have been made). Rather, this article argues for a step before this debate. It is contended that as part of the regulatory response to women’s disadvantage at the Bar, a range of options should be considered. In the current climate, we have dispensed with this policy approach due to an excessive obedience to an undefined idea of merit. The article has examined the meaning of both merit and affirmative action in order to refute the assumption of a dichotomous relationship between them. It is concomitantly argued that the privileging of merit as the supreme consideration is questionable. It is only when proper attention is paid to principle rather than rhetorical strategy that we can engage in a more rigorous debate. Careful consideration of the context of briefing practices indicates that a regulatory approach must adopt more mandatory and specific measures in order to effect change. This article has attempted to conceive of alternatives which are based in making practices more transparent and accountable. Further discussion and analysis must now occur.

<sup>159</sup> See, eg, Nagel, above n 143.

<sup>160</sup> See, eg, Hamilton’s discussion of the appointment of Roslyn Atkinson to the Supreme Court of Queensland: Hamilton, above n 135.