

DEPARTMENT OF TRADE AND INDUSTRY

NOTICE 394 OF 2018



DISCUSSION DOCUMENT ON GENDER TRANSFORMATION IN THE JUDICIARY AND THE LEGAL SECTOR

Table of Contents

1. Purpose of the discussion document	
2. Contextual background	
2.1 Historical legacy	
2.2 Lodged complaint	
2.3 Visual illustration of the current <i>status quo</i>	
3. Comparison with other jurisdictions	
4. Barriers which hamper women in the legal profession and corresponding recommendations	
4.1 Practising as a female attorney	
4.2 Gender inequality in legal professional structures	
4.3 Lack of mentorship opportunities	
4.4 Practicing as a female advocate	
4.5 Judiciary	
4.6 Lack of financial resources to fund further training for women	
4.7 Failure to consider women in academia and in the private sector	
5. Conclusion	

Acknowledgement

The discussion document was borne out of the complaint lodged with the Commission for Gender Equality (CGE) by Democratic Governance and Rights Unit (DGRU) and Sonke Gender Justice (Sonke) regarding the slow pace of gender transformation in the judiciary. The common overall objective of gender equality and the resultant working relationship culminated into the complainants, whom are experts in the sector, providing significant input into the format and content of the discussion document.

Acronyms and Abbreviations list

CLS	Cape Law Society
CC	Constitutional Court
CGE	Commission for Gender Equality
CGE Act	Commission for Gender Equality Act 39 of 1996, as amended
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
Constitution	Constitution of the Republic of South Africa, 1996
DGRU	Democratic Governance and Rights Unit
DOJ	Department of Justice and Constitutional Development
FSLC	The Law Society of the Free State
GCB	General Council of the Bar
JSC	Judicial Service Commission
LSNP	Law Society of the Northern Provinces
LSSA	Law Society of South Africa
KZNLS	Kwa-Zulu Natal Law Society
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PWD	People with disabilities
RSA	Republic of South Africa
SCA	Supreme Court of Appeal
Sonke	Sonke Gender Justice

1. Purpose of the Discussion Document

This discussion document intends to fulfil recommendations A and B of the CGE's investigative report¹:-

CGE in consultation with the DGRU and SONKE must prepare a discussion document on the various factors that may hamper the progression of women lawyers within the legal profession. The discussion paper will be published for comment to facilitate an open discussion on the subject matter. The final content of the discussion document shall inform the proposed National Summit where key stakeholders will discuss gender transformation in the legal sector and propose with practical resolutions and implementation plan on the matter.

Accordingly, the discussion document aims to: -

- stimulate meaningful dialogue and commitment to gender transformation in the legal sector and the judiciary amongst key stakeholders.
- sensitise the legal sector and the judiciary on gender inequality and to raise awareness of the need and importance of gender transformation in the legal sector, the judiciary and amongst members of the public
- provide practical, specific and feasible recommendations for solutions to the barriers that impede women's progress in the legal sector and their appointment to the bench – which will serve as the foundations for further discussion, development and adoption at an envisaged national summit to forge a way forward to a more inclusive and representative legal sector from a gender and race perspective.

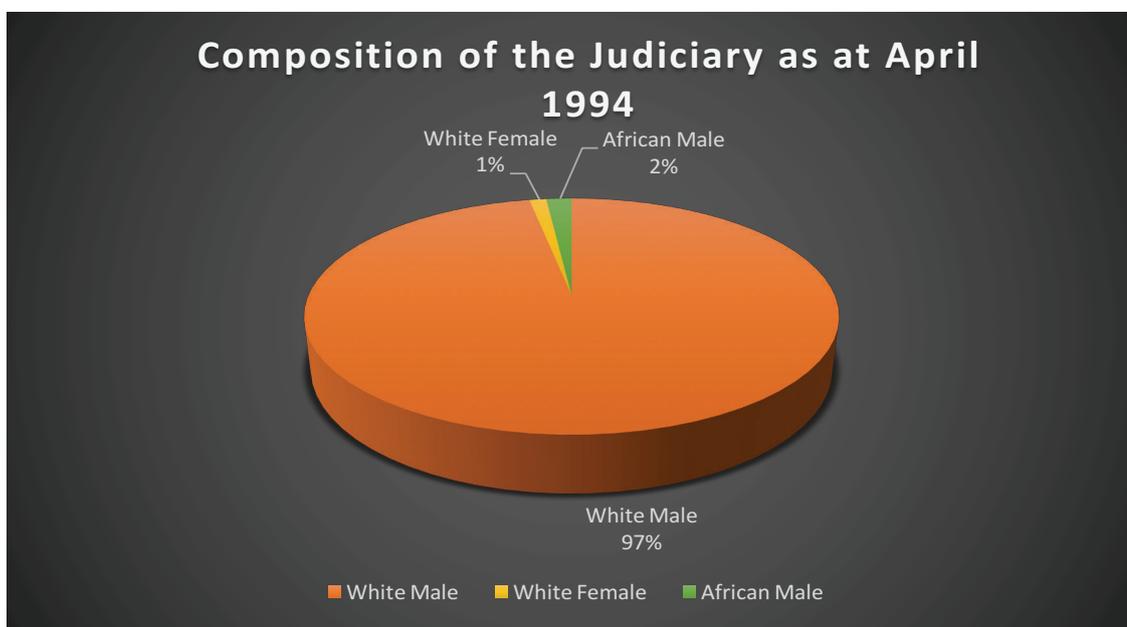
¹ The CGE's investigative report can be accessed online at <http://www.cge.org.za/wp-content/uploads/2016/12/CGE-Lack-of-Gender-Transformation-in-the-Judiciary-Investigative-Report.pdf>

2. Contextual Background

2.1 Historical Legacy

The Apartheid era, fraught with a patriarchal and racist ideology, left a marred society rife with gender and racial inequalities. It is well documented that at the commencement of the new constitutional democracy in 1994, the bench comprised of 165 judges of which 160 were white men, 3 black men, 2 white women and no black women².

The graph hereunder starkly reflects the disproportionate *status quo*.



With the dawn of democracy, various constitutional mechanisms were put in place to facilitate the attainment of racial and gender transformation.

Firstly, all persons were vested with the right to equality and prohibition against unfair discrimination on the basis of race and gender: -

² As per the Judicial Service Commission's completed questionnaire. See also CGE's CEDAW report, 2010.

9. Equality

1. *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
2. *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
3. *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
4. *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
5. *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

Secondly, in ventilation of the right to equality and need for an independent judiciary, a key constitutional mechanism was established in terms of chapter 8 of the Constitution titled "Courts and Administrative Justice". Chapter 8 set out the procedure for the appointment of permanent and acting Judges.

Moreover, it provides for the establishment and composition of the Judicial Services Commission (JSC).³

The role of the JSC and its constitutional imperative to appoint a gender balanced bench is set out in terms of section 174(2) of the Constitution,

“...the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”.

This provision commits the JSC to appointing judicial officers in accordance with the constitutional imperatives of equality and transformation in terms of gender and race.

Thirdly, the CGE an independent statutory body created under Chapter 9 of the Constitution, has a mandate to promote and protect gender equality in government, civil society and the private sector. It is the CGE's role to monitor and evaluate policies and practices of organs of state at any level, statutory bodies and functionaries, public bodies and authorities and private businesses, enterprises and institutions to promote gender equality and make any recommendations that the CGE deems necessary.

2.2 Lodged Complaint

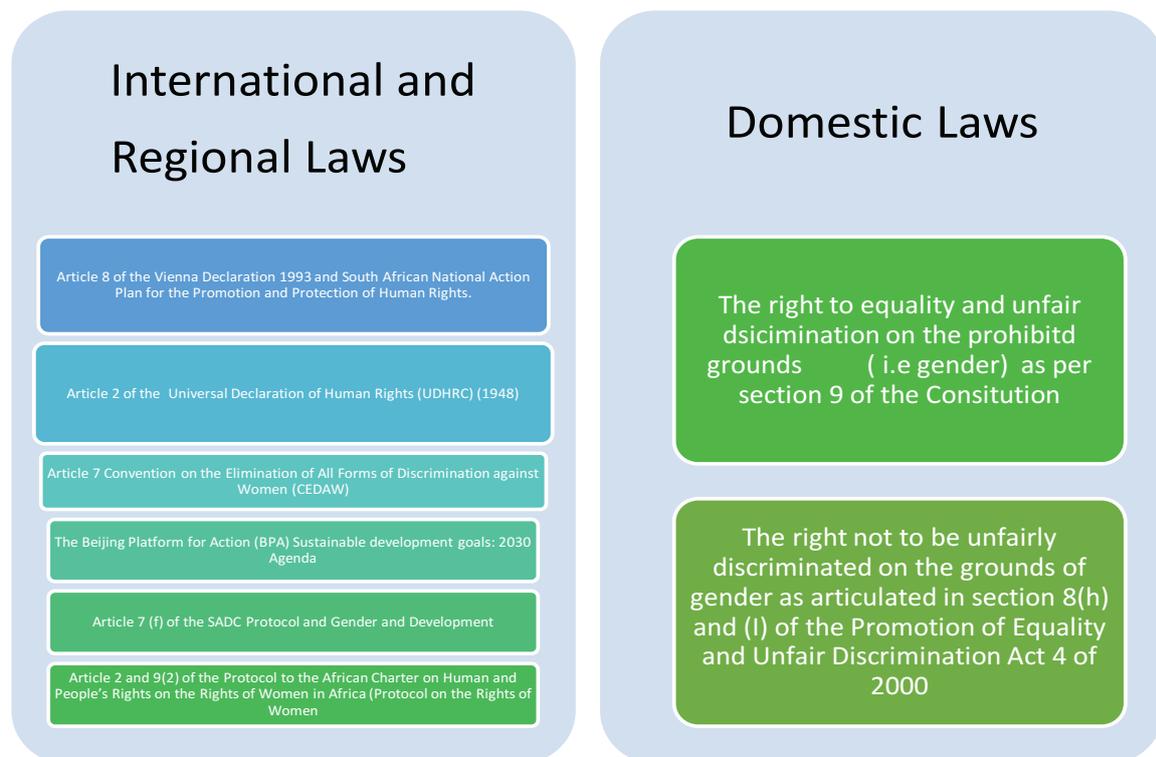
It is on this basis that, on 19 October 2012, the DGRU and Sonke lodged a complaint with the CGE⁴ regarding the slow pace of gender transformation in the judiciary (i.e. a violation of section 174 of the Constitution). It was submitted that during the period of 2009-2012, the JSC had interviewed a total of 211 candidates for 110 positions and only 24 women were appointed. According

³ JSC is entitled to advise the national government on any matters relating to the Judiciary or administration of justice. Additionally, it performs the following functions: (a) interviewing candidates for judicial posts and making recommendations for appointment to the bench; and (b) dealing with complaints brought against Judges. Available at: <http://judiciary.org.za/about-the-jsc.html> (accessed on the 16 March 2017).

⁴ As per the formal complaint form.

to information received from the Law Society of South Africa there were more females graduating or practising as attorneys at the time.

This was in stark comparison to the statistics of the General Bar Council where the picture changed, with only 561 female practising advocates out of 2 384. Furthermore, the complaint strongly averred that the gross paucity of gender equality on the bench was a direct violation of domestic laws and a host of international and regional instruments signed and ratified by the South African government.



Flowing from the complaint and the impact of the CGE's investigation into the complaint⁵, substantial gains have been made towards improving gender transformation in the judiciary since 2012: -

- a) Increase in the number of women appointed to judicial leadership positions, namely:

⁵ See CGE's Investigative report, available at: <http://www.cge.org.za/wp-content/uploads/2016/12/CGE-Lack-of-Gender-Transformation-in-the-Judiciary-Investigative-Report.pdf>

- Judge President M Molemela – Free State Division of the High Court
 - Deputy Judge President PL Goliath – Western Cape Division of the High Court
 - Deputy Judge President F Mokgohloa – Limpopo Division of the High Court
 - President MM Maya – Supreme Court of Appeal
 - Justices N Mhlantla and L Theron were appointed to the Constitutional Court.
- b) The adoption of criteria for the appointment of Acting Judges by the Heads of Court at a meeting held on 3 April 2016. The criteria commit Heads of Court to consider key aspects when recommending candidates for appointment as Acting Judges in terms of section 175 of the Constitution⁶:-
- *Candidates to be considered for appointments as Acting Judges should be appropriately qualified persons.*
 - *They must be fit and proper persons, i.e people of integrity and competent.*
 - *They should have been in practice for at least 10 years. In specialized courts, a degree of some knowledge and expertise in that field is required.*
 - *A candidate's potential to become a Judge should also be considered when making recommendations for Acting Judges.*
 - *Superior Courts should have Committees in their respective Divisions to decide on recommendation of candidates for Acting appointments.*
 - *Heads of Court should send out invitations to the Law bodies seeking recommendations of candidates to be considered for appointment as Acting Judges.*

⁶ The CGE is still awaiting formal advice from the JSC as to when the required deliberation between the Legal Profession and Heads of Court regarding the criteria will take place. However, the JSC has confirmed that the criteria are in operation until such deliberation occurs.

- *When making recommendations to the Minister for appointment of Acting Judges, all Heads of Court should consider the need for the Judiciary to broadly reflect the racial and gender composition of the South African society*
- c) Increased nomination and formal support of women applicants for judicial vacancies by the CGE.
- d) CGE's commencement of observing and monitoring of the JSC's interview processes for judicial officers.
- e) Finalisation of CGE's investigative report and resultant recommendations which have prompted:
- Engagement with integral stakeholders such as the Department of Justice, Office of the Chief Justice, Law Society of South Africa, Professional Bodies for attorneys and advocates which are key to the advancement of women's equality and representation in the legal sector and judiciary. This has further aired issues which are often not spoken about directly or addressed, leaving the *status quo* intact.
 - Identification of the need for a holistic multi-stakeholder approach and "team" involvement to address the slow pace of gender transformation and the under-representation of women in the judiciary.
 - Greater accountability for the cited Respondents⁷ in relation to ensuring gender transformation in the legal profession and the judiciary.
 - Commitments made by the CGE to address the slow pace of gender transformation in the judiciary and legal profession.
 - Media coverage on the outcomes of the investigation ⁸.

⁷ As cited in the complaint

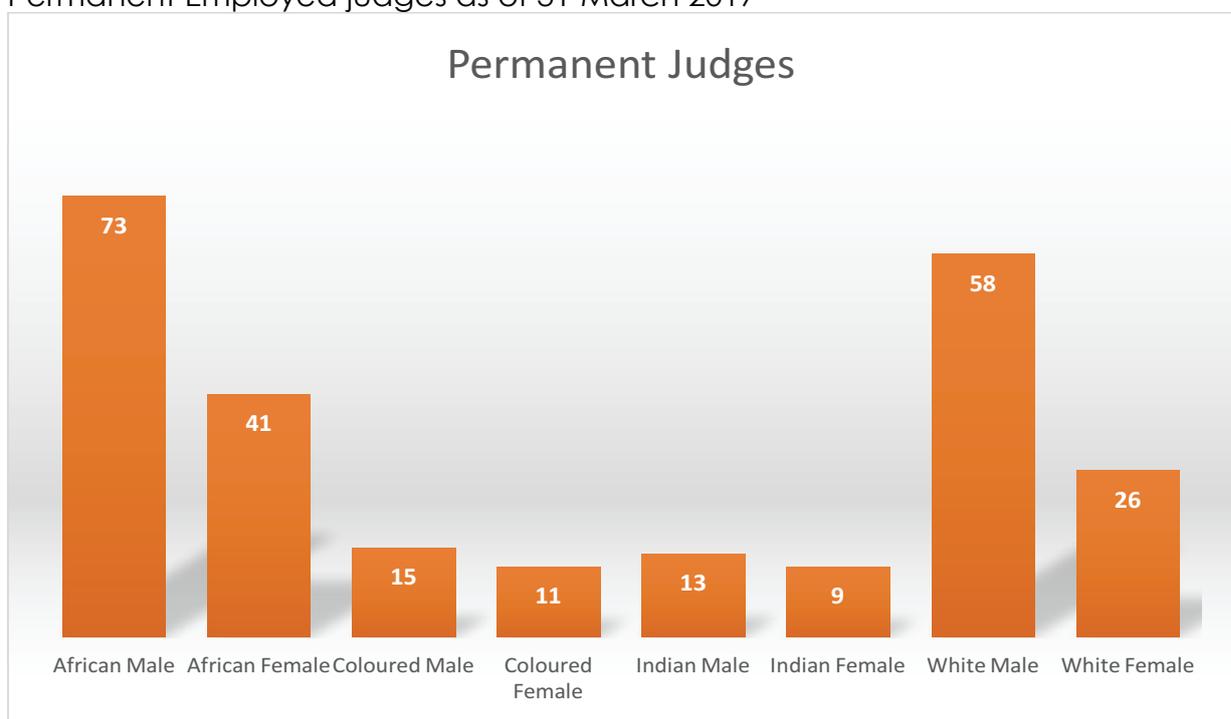
⁸ Emanating from the formal launch of the CGE's investigative report on the 7th of December 2016. For example, <https://www.pressreader.com/south-africa/sowetan/20161208/281509340812270>; <http://www.timeslive.co.za/local/2016/12/07/'Gender-transformation-in-the-judiciary-being-addressed-in-silos'-CGE> ; <http://www.polity.org.za/article/summit-on-transformation-of-the-judiciary-needed-gender-commission-2016-12-07>; <http://www.dailyvoice.co.za/news/calls-for-judiciary-gender-equality/>

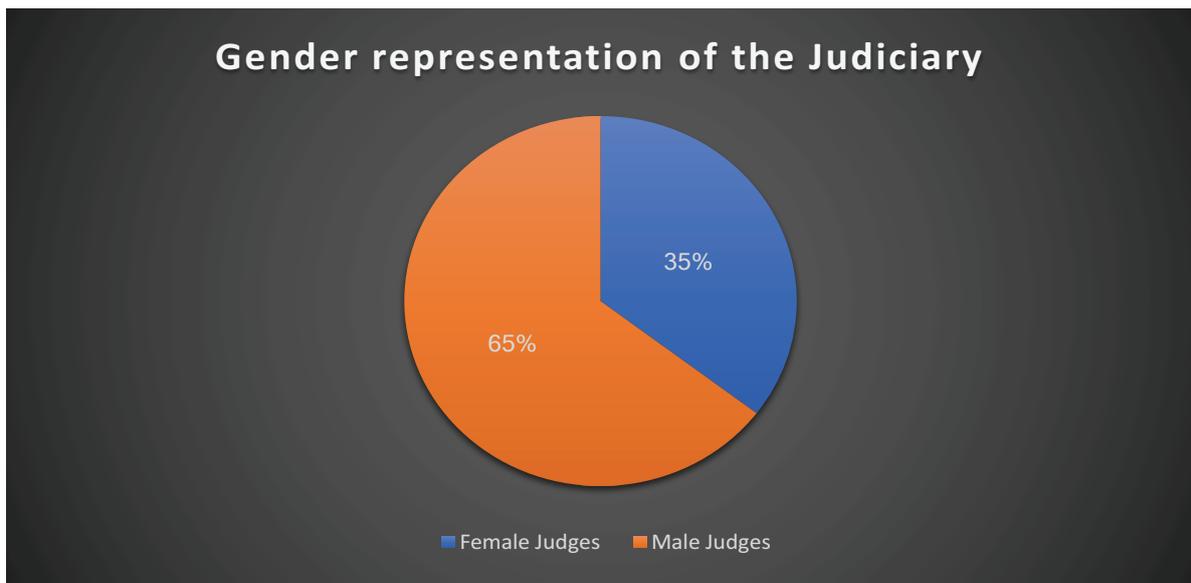
2.3 Visual Illustration of the status quo

Despite the achievements and gains stemming from the lodged complaint, the gender representation of the legal sector remains skewed. The graphs hereunder provide visual illustration of the current gender disproportionality of the legal sector, grossly apparent at leadership positions: -

2.3.1 Gender representation in the judiciary

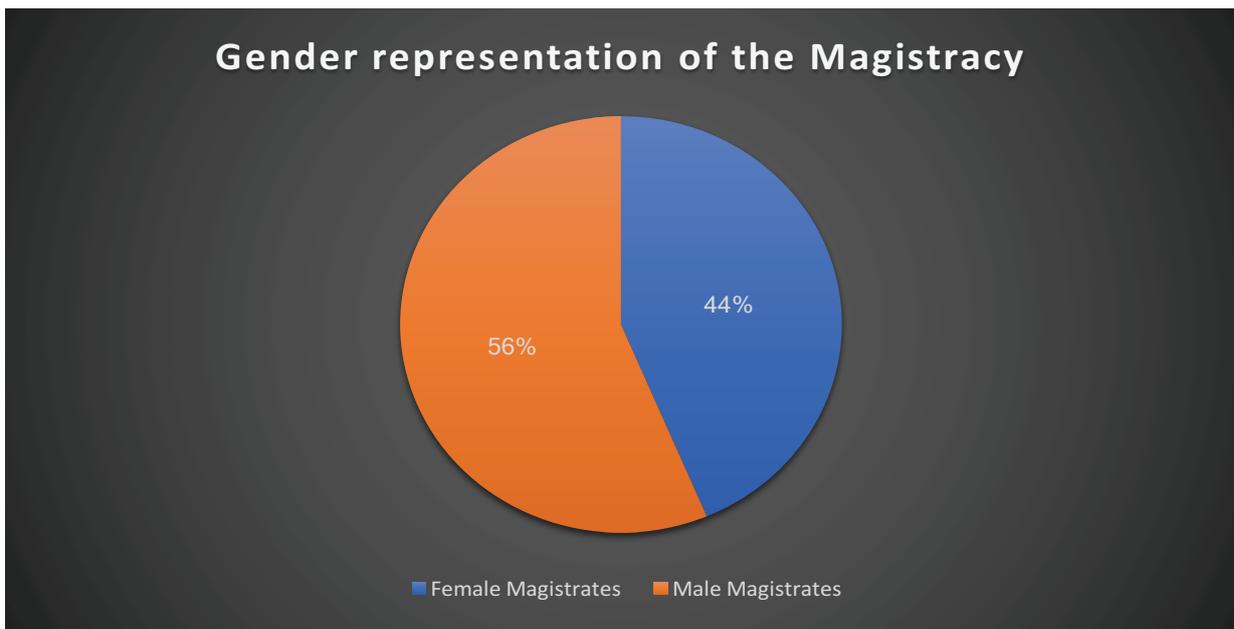
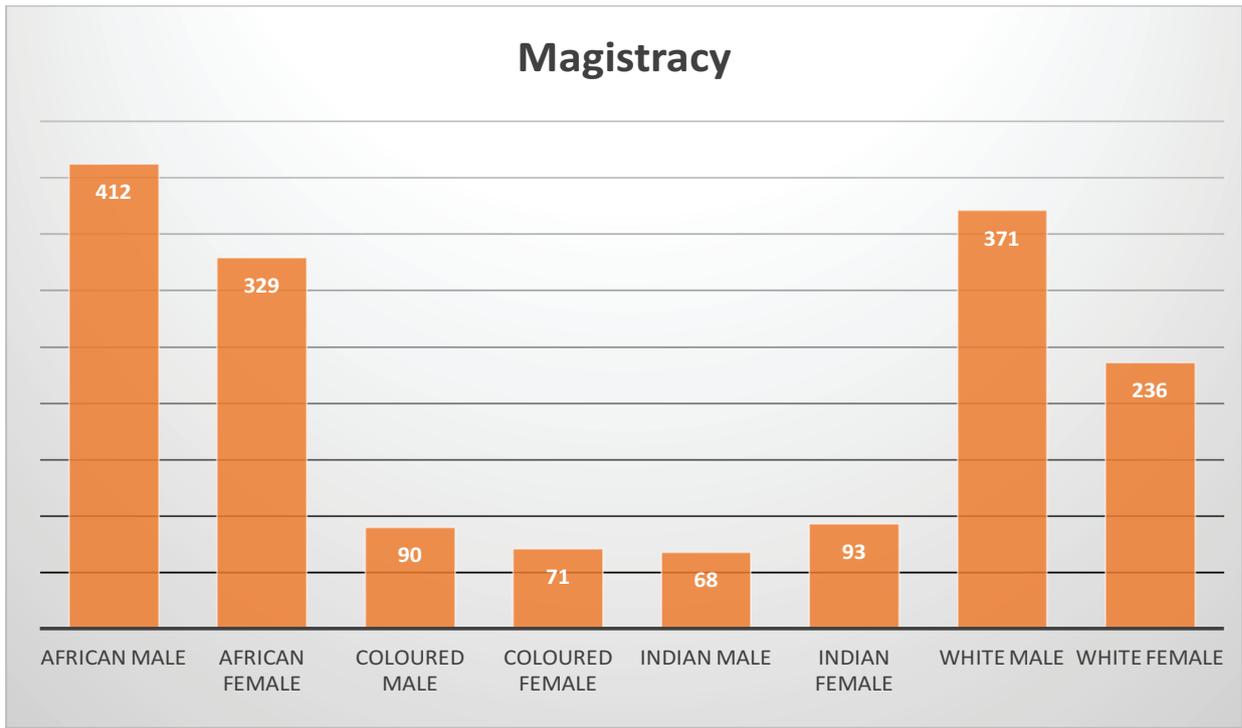
Permanent Employed judges as of 31 March 2017





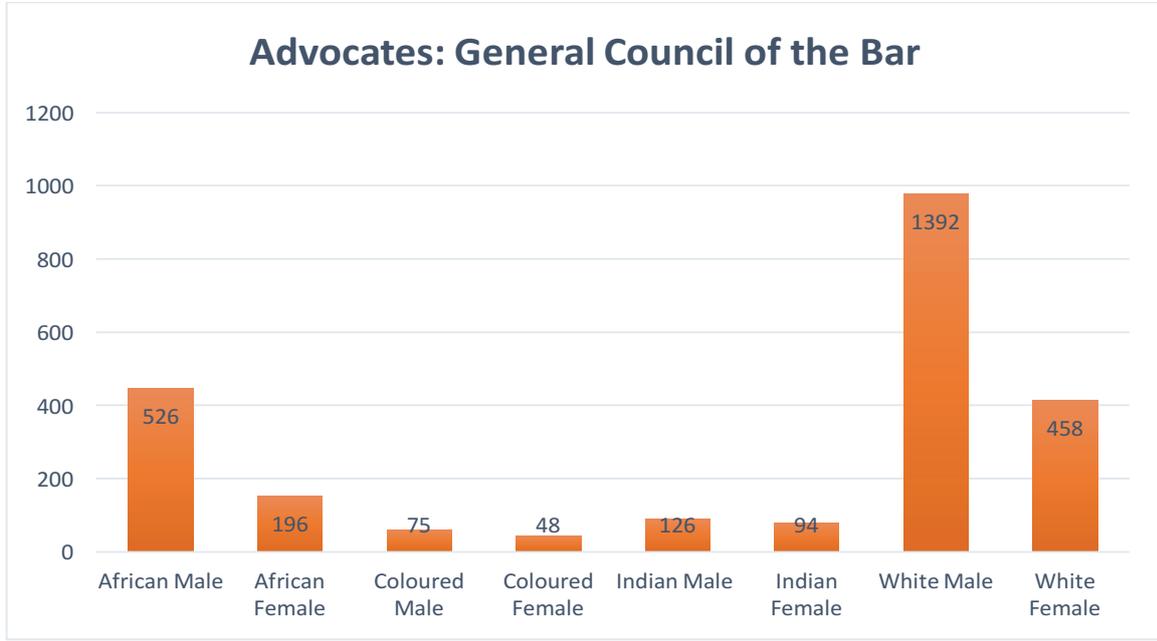
2.3.2 Gender representation in the magistracy

Permanent employed Magistrates as of December 2016.

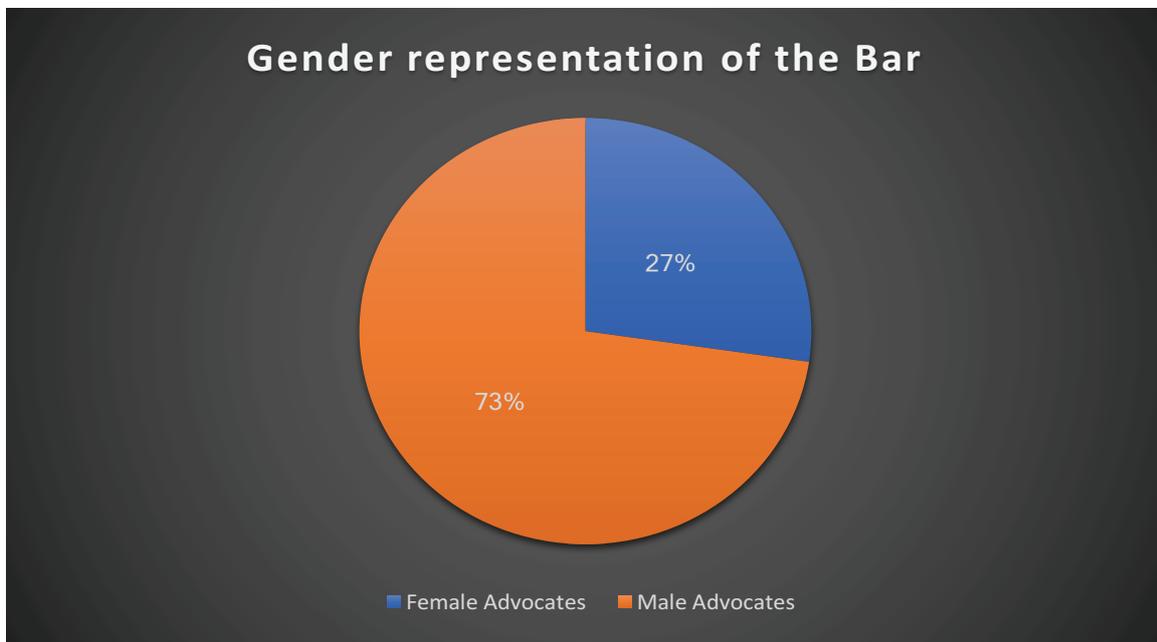


2.3.3 Gender representation at the Bar

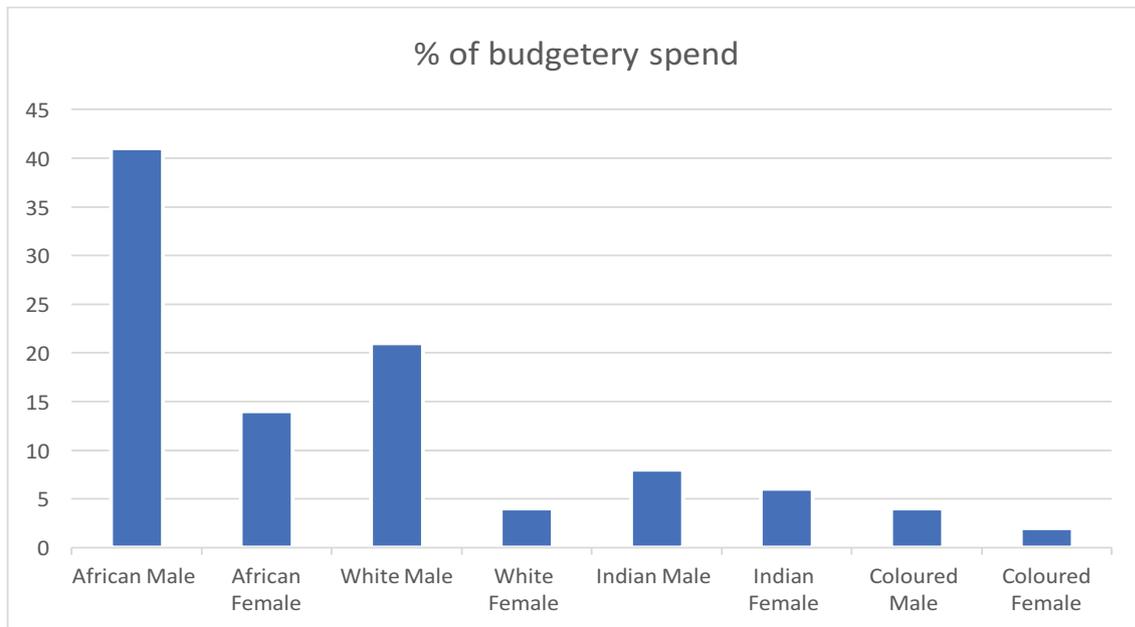
Advocates registered with the General Council of the Bar as of 30 April 2017.



Gender Representation of the Bar



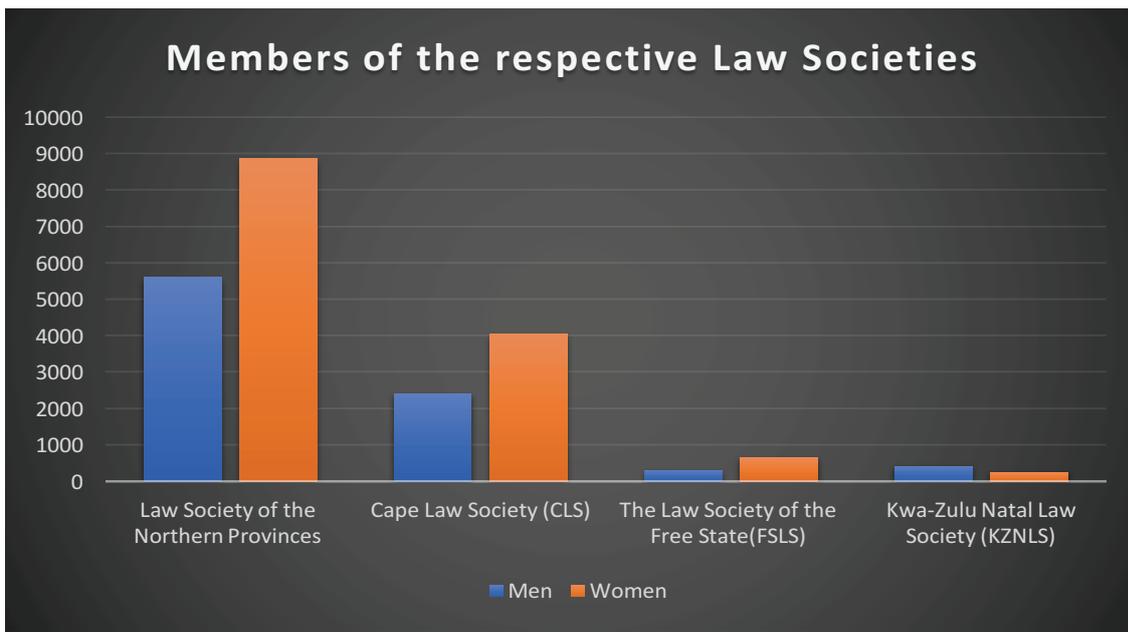
It is important to highlight that despite the DOJ Services directives to increase allocation to women advocates, in 2016/2017, R 781 101 699 was spent on briefing advocates as follows⁹: -



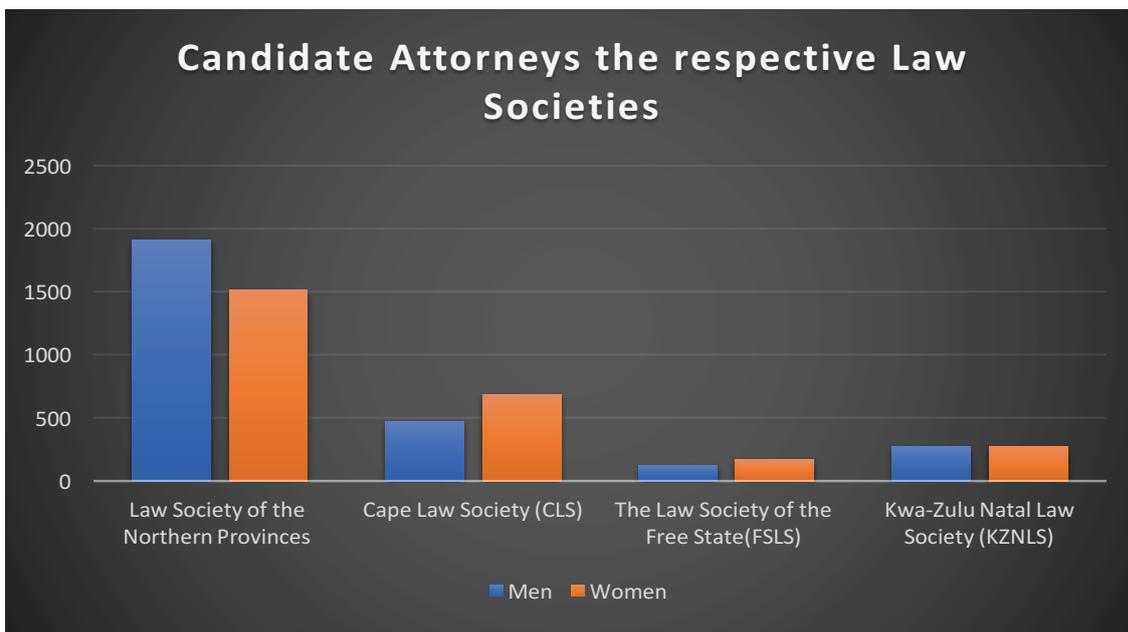
2.3.4 Gender representation at the respective law societies

Gender Disaggregated statistics provided as of the 6 April 2017.

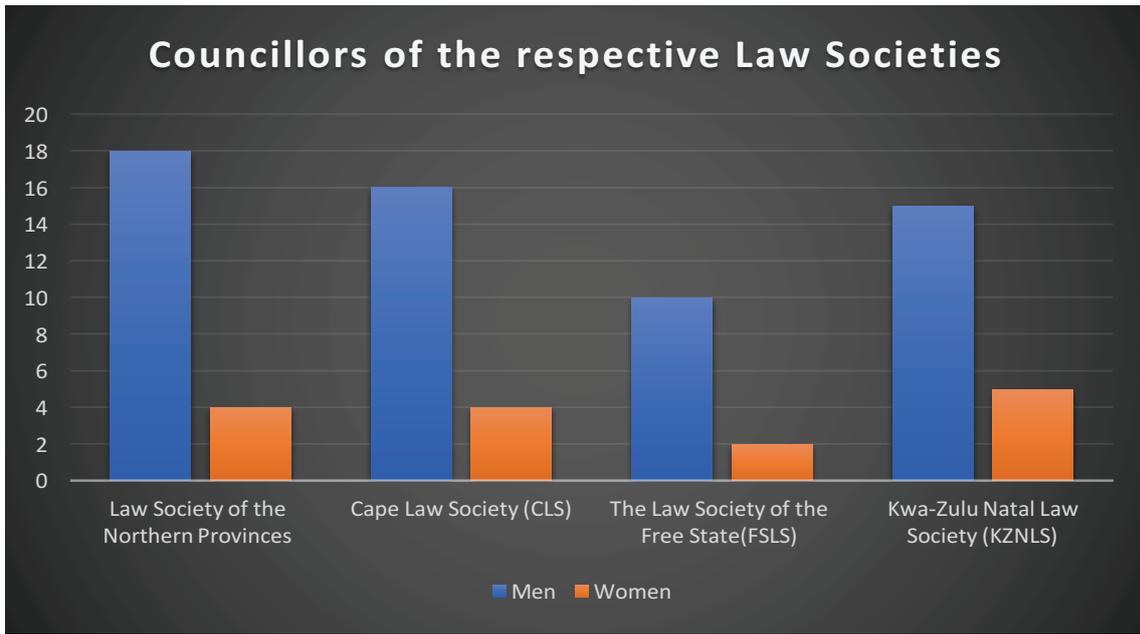
⁹ Information provided to the CGE by the Department of Justice per email.



Candidate attorneys of the respective Law Societies.



Councillors of the respective Law Societies.



3. Comparison with other Jurisdictions

In an article by Michelle Toxopeus¹⁰ of the Helen Suzman Foundation she stated that the statistics show a very slow increase of women into the judiciary. Of the judges appointed to the judiciary between 1994 to 2013 only 20% were women. By 2016 only 86 of the 242 judges were women a percentage of 36%. Of the 24 leadership positions that are currently occupied in Superior Court's 75% are held by men. It bears mention that gender representation in the magistrate's courts has been slightly better in that under the leadership of Judge President Legodi head of the

¹⁰ Women in the Judiciary 12 June 2017

Magistrates Commission, 51% of the most recent appointments were women.

Ms Toxopeus analysed the appointments in other jurisdictions and found that in 2014 the average proportion of women among judges across European states was 51%; in the US Federal courts 36% of the judges were women and in Canada 50%. In the African Court of Human Rights and People's Rights only 46% were women. On the African Commission on Human Rights there are seven female and four male commissioners. There is therefore a global concern about the lack of women serving in higher courts. This is so for Africa, Canada Europe, Latin America and the USA.

Ms Toxopeus argues that the global trend should not affect South Africa as gender representation should be normative for South Africa based on our Constitution where gender transformation is foundational. SAC-IAWJ also regards this aim as foundational.

It is therefore perplexing that it has taken so long for what should have been a path of effective transformation driven by the constitutional imperatives for women to be appointed to the bench and promoted to leadership positions within the judiciary. After all these years of democracy there has been insufficient momentum to ensure equal gender parity in the judiciary and in the entire legal profession. It is important to examine the more recent historical context to understand that this entrenched thinking continues to hamper the progress of women into and within the Judiciary.

4. Barriers which hinder women's progress in the legal profession

The slow pace of gender transformation of the judiciary cannot be examined and in turn rectified in isolation. The discussion with view to find practical solutions to accelerate the lag must be placed within the larger pool of key stakeholders which participate in the legal arena. Considering the causes of the slow pace of gender transformation of the bench and reflecting on possible ways to speed up such transformation requires a holistic approach.

It is important to take cognisance of the fact that the vast majority of judicial officers are appointed from among the members of the practicing legal profession. Hence, the attitude of its members about gender issues, the status of women within the profession, and the practices both within the profession and within the judiciary (including practices surrounding the appointment of acting and permanent judges) will affect the pace and the quality of gender transformation in the judiciary¹¹.

Information obtained from the LSSA indicates that the number females graduating and being admitted as attorneys is slightly higher than that of males¹². The deepening disparity starts to become increasingly visible when examining the gender disaggregated statistics of practising attorneys or advocates. It can be concluded that there are no substantial barriers¹³ in university admission and qualifying as an attorney or advocate. Focus should therefore be at legal practise level within the legal landscape.

The obstacles listed hereunder emanate from numerous research studies, observations and legal opinion. For brevity and to ensure the discussion document remains a springboard for the formulation of practical and feasible solutions, rationale for the listed obstacles will not be delineated but barriers

¹¹ De Vos, P "Gender Transformation, what needs to be done"- brief prepared for the CGE on its instruction.

¹² Law Society of South Africa, Statistics for the Legal Profession 2015/2016.

¹³ This does not mean that there are no challenges faced by female LLB students.

merely cited. The relevant research and rationale for the cited obstacles and barriers may be located within the following pool of base documents.¹⁴

- The CGE's investigative report on "the lack of gender transformation in the judiciary" findings and recommendations, 2016.
- Centre for Applied Legal Studies, "Transformation of the Legal Profession".
- Outcomes of the DGRU and Sonke "Gender Justice's Gender Transformation of the Judiciary Project 2013-2015"
- International Journal of the Legal Profession, "It's a man's world: barriers to gender transformation in the South African judiciary. Perspectives from women advocates and attorneys".
- De Vos, P "Gender Transformation, what needs to be done"- brief prepared for the CGE on its instruction, 2015.

4.1 Practising as a female attorney

4.1.1

Underlying and widespread discriminatory perceptions of women's competencies as legal practitioners being as substantially weaker than their male counterparts.¹⁵ There is general perception from other practitioners that women lawyers are only good in certain areas of law and are not good in complex litigation matters. This general perception leads to Women lawyers not getting the experience and exposure in lucrative areas of law, both from the private and the public sectors.

Further, this is compounded by the rigidity of the profession wherein excessive work hours are expected. Socially accepted gender roles within society equate to social and family responsibilities falling largely upon women

¹⁴ including but not limited to: -

¹⁵ Comments of the Department of Justice and Constitutional Development, provided 23 April 2018, page 5.

practitioners. The legal landscape is very patriarchal in its formation and does not cater for the different roles that women lawyers should fulfil at various stages in their lives. For example, motherhood is perceived as career limiting.

Issues of sexual harassment in the workplace of junior women legal practitioners and candidate attorneys are not being dealt with openly and transparently and there is a fear of victimization for those who report incidents of sexual harassment. Such incidents discourage young women from remaining in the legal profession.

In 2017 at a Women Leading in Law (WOLELA) Conference, participants expressed similar concerns as voiced by Madam Justice Siwendu, that young women were still experiencing sexual harassment, entrenched racism, patriarchy, misogynist behaviour and thinking and sometimes outright insults and instances of sexual harassment ranging from references to physicality, to things that are profoundly painful for women and that this happened behind closed doors.

4.1.2 Recommendations

- Legislated flexible working hours, including gender sensitive policies such as paternity leave.
- Notwithstanding the “Gender and Law” module offered at the school for Legal practice, there is a need for mandatory admission examinations which seek to test understanding of gender, equality, patriarchy and sexism.
- The inclusion of a compulsory sexual harassment education and awareness workshop/program during the induction or training of candidate/junior practitioners.

4.2 Gender inequality leadership in various legal structures such as the LSSA

4.2.1 Leadership positions in the legal profession are occupied by males and succession planning seems to exclude women in these structures.

4.2.2 Recommendation

- Specified quotas that the structures reflect gender parity.

4.3 Lack of mentorship opportunities for women ¹⁶.

4.3.1 Mentorship of women lawyers is taken up by other women in the legal profession and most males demonstrate a reluctance in mentoring young black women practitioners.¹⁷

4.3.2 Recommendations

- Mandated mentoring programmes for all women attorneys and advocates by experts/seniors in all legal fields. Such mentoring programmes should be spearheaded by the relevant Law Societies and overarching Commissions (i.e. Magistrates Commission), the Judicial Services Commission¹⁸ and National Prosecuting Authority.
- The aspirant women judge's courses should be re-introduced as soon as possible. The Training Programme for Aspirant Women Judges resulted in the appointment of about 20 women on the bench. That programme was subsequently cancelled. It is important that such a programme be resuscitated with immediate effect and implemented to ensure that when women are brought to the bench, they can navigate with ease. Female magistrates should also be recruited to this programme.

¹⁶ Ibid, at page 57.

¹⁷ Op. cit, Comments of the LSSA.

¹⁸ Comments of a Regional Court Magistrate, provided on the 11th of February 2018

4.4 Practising as a female advocate

4.4.1

Unequal distribution of work between women and men. The skewed provision of work occurs at both State and private institutions. Such skewed and systematic provision of work is linked to the discriminatory perceptions of women's abilities.

In response to the unequal distribution of briefs, the DOJ, through the offices of the State Attorney, has put in place measures aimed at accelerating the achievement of equitable representation of women and other historically excluded groups in the legal profession, as required by the Constitution.¹⁹ The strategic objective, indicators and targets of the DOJ set for the offices of the State Attorney for the financial year 2018/19 is that 80% value of briefs must be allocated to the previously disadvantaged practitioners; with 27% value of briefs and 40% number of briefs which must be allocated to female counsel. The DOJ is consulting with the relevant stakeholders on the draft briefing policy as targeted above.

4.4.2 Recommendations

- Legislated quotas for legal briefs to be provided to women advocates. Similarly, senior counsel to be legally mandated to accept and guide female pupils.
- Mandatory gender sensitisation workshops/course or training with the law firms' senior attorneys/directors to encourage gender sensitivity and

¹⁹ Comments of the Department of Justice and Constitutional Development, provided 23 April 2018, page 4.

the equal distribution of work.

4.5 Judiciary

4.5.1

Despite South Africa's 20 years of democracy, the bench remains male dominated. Certain obstacles include lack of female nominations by legal structures, a veiled JSC shortlisting process and the availability of women and/or their willingness to be available for the appointment of certain judicial positions.

4.5.2 Recommendations

- The criteria for the appointment of Acting Judges to be deliberated upon in conjunction with the legal profession to obtain the “necessary buy in” and knowledge of the cited criteria by the legal pool.
- Formulation of guidelines for the role of Judges Presidents in encouraging women to apply for acting appointments.
- Adoption of a transparent shortlisting process by the JSC for judicial vacancies.
- Mentorship and/or peer collaboration mandatory programmes requiring permanent Judges to be paired with a senior female attorney, advocate, academic or magistrate²⁰.
- Revision of the JSC's criteria for appointment of judicial officers.
- Revision of the JSC's publishing channels for judicial vacancies to aim for an increased audience.
- Mandatory allocation of work in all areas of law, as woman are mainly considered suitable for Family Law. This is extremely prominent in Magistracy.

²⁰ Comments of a Regional Court Magistrate, provided on the 11th of February 2018

4.6 Lack of financial resources in support of further training of women²¹

4.6.1

Despite the challenges that women practitioners are facing as identified above, there are no focused plans or strategies to assist women to overcome these challenges.²² Capacitating women in terms of the necessary financial resources to ply their chosen profession and upskilling them through training is a challenge. Whatever activities exist within the profession to upskill and resource female practitioners are conducted on an ad hoc basis.²³

Lack of access to opportunities to get judicial skills training. SAJEI, which is the recognized body for imparting the training for judicial skills training only offers training to judicial officers already employed, and for those in private practice, it is only on recommendation of the relevant JP, that a legal practitioner can access the Judicial skills training offered by SAJEI.²⁴ This obviously limits the access to judicial skills training for many women legal practitioners. Professional Organisations such as LEAD and NADEL are trying to close this gap, but only a limited number of practitioners can get training in judicial skills, and there is no definite policy of giving preference to women legal practitioners for intake in the training.²⁵

The private sector and the bodies such as the BLA, NADEL and the South African Women Lawyers' Association have a crucial role to play in enhancing efforts made by the DOJ. The challenges faced by women in the legal profession demand close collaboration between the two sectors for all to fulfil their mandates.²⁶

²¹ Op. cit, Comments of the LSSA.

²² Ibid,

²³ Ibid,

²⁴ Ibid,

²⁵ Ibid,

²⁶ Comments of the Department of Justice and Constitutional Development, provided 23 April 2018, page 6.

4.6.2 Recommendations

- Formulation of a policy to give preference to women practitioner on the enrolment of Judicial Skills Training, to also empower women in the private practice.
- Remodelling of the upskill, capacitating and training resources policy/programs to empower female practitioners on permanent basis as opposed to ad hoc programs.

4.7 Failing to consider women in academia or private sector in judicial appointments

4.7.1

There has been a singular lack of recruiting from academia. Given the widespread and systemic barriers faced by women within all aspects of the legal profession. Clearly, that the traditional way of recruiting judges from the Bar will not achieve the kind of goals of equitable representation that we might want to see. Over the past decades, both race and gender representation on the bench have been enhanced in many ways, including broadening the pool of judicial candidates to the attorneys' profession, and, to a lesser extent, to the magistracy and academia; providing education and training for aspirant and new judges; extending acting opportunities to potential candidates, and applying section 174(2) to the selection process. All these initiatives should continue.

In the 1990s, several women academics made it onto the Bench and served with great distinction. These include Justices Mokgoro and O'Regan in the Constitutional Court and Judges Van Heerden and Lewis (who were promoted from the High Court to the SCA). In 2018, there is a significant pool of potential women judges in academia, in private and public law that can greatly help

to increase numbers. Academics are well trained in the content of the law, but might lack some practical experience. This is easily rectified by seeking out women academics to serve as acting judges.

4.7.2 Recommendation

- That this group be particularly targeted for acting appointments and mentored where appropriate.

5. Conclusion

The discussion document aims to identify the barriers, challenges and the recommendations affecting transformation of the gender equality in the legal profession. It is evident that the said challenges do not emanate from the same source and cannot be addressed and pinned to a specific stakeholder (entity, body or organisation).

For gender transformation in the legal profession to be an attainable reality, a solution driven movement is required by all stakeholders. In turn, the envisaged National Summit is an appropriate forum to further interrogate the recommendations and to agree on a tangible action plan towards attainment of parity within the legal arena.