

## UNCONSCIOUS BIAS THE ROOT CAUSE OF GENDER DISPARITY



As we approach the centenary in the UK of the Sex Disqualification (Removal) Act 1919, which granted women entry into the professions for the first time, we wanted to reflect on how far the legal profession has come, and how far it still has to go, to achieve gender parity. In this article for the Women Lawyers' Interest Group of the Public and Professional Interest Division of the IBA, we wanted to explore the elephant in the room which continues to be a key barrier for women's career progression: unconscious bias.

### **The business case for gender parity**

Research shows that a more diverse and inclusive workforce helps business by bringing new skills, creativity and innovation, sounder decision-making and higher staff satisfaction and retention. For example, a study of 366 companies across a range of industries in Canada, Latin America, the UK, and the United States published in 2015 by McKinsey & Company showed that companies in the top quartile

for gender diversity are 15% more likely to have financial returns above their respective national industry medians<sup>1</sup>. This number has risen to 21% in McKinsey's expanded 2017 data set<sup>2</sup>.

Like many of the industries they serve, UK law firms have recognised the compelling business case for gender diversity and are increasingly focused on making substantial advancements in diversity and inclusion. For example, numerous City law firms have set specific gender diversity targets, whether independently or by joining campaigns such as the "30% Club", committing to 30% female partnership by 2020.

### **Gender parity in the legal profession**

Female solicitors practising in England and Wales now outnumber men for the first time in history<sup>3</sup>. However, this shift has not been reflected at the more senior levels of the sector, despite efforts to diversify the profession. This is illustrated by the results of the mandatory gender pay gap reporting which came into force in the UK last year.<sup>4</sup> The pay gap results published by the top 25 UK law firms this year revealed an average 20-25% pay gap among their employees (exceeding the aggregate median gap of 18.4% reported in other industries), jumping

to a staggering 60% when partners (who are considered owners of the business rather than employees) are included in the calculations. This means that, in those firms, most of the highest-paid positions are still occupied by men.<sup>5</sup>

Different factors are usually put forward to justify gender pay gap results, the main being the “motherhood penalty” – where mothers miss out on progression opportunities by taking time out of work or working part-time due to childcare issues. While family obligations do account for some of the gender pay gap in the legal industry, arguably the root cause of the problem is unconscious bias.

A recent survey published by the Law Society, *Women in the Law 2018*, supports this view. This survey is the largest ever conducted on the topic of gender equality in the legal profession, collecting responses from 7,781 people across the world (5,758 women, 554 men, 20 other, and 1,449 unknown).<sup>6</sup> While 41% of the respondents perceived the resistance to flexible working policies to be the main barrier to women’s career progression, 89% reported to be working in organisations that have flexible working policies in place (albeit not consistently enforced in all cases). It is therefore clear that law firms have made significant strides in flexible working, which intends to address the “motherhood penalty” issue described above. By contrast, 52% of respondents to the survey (the largest pool) consider unconscious bias to be the main barrier to women’s career progression, and one that is still largely unaddressed (only 11% of respondents reported that some kind of unconscious bias training is carried out in their organisation).

### **Unconscious gender bias in the legal industry**

Biases are “prejudices that we have but are unaware of, mental shortcuts that we make based on social norms and stereotypes”.<sup>7</sup> Although once helpful from an evolutionary

perspective, in the modern working environment bias blinds us to new information and considering valuable options when making important decisions. Types of unconscious bias include affinity bias, the tendency of people to like others similar to ourselves; availability bias, a tendency to make a decision based on information that is readily available rather than objective information; and the “halo effect”, letting someone’s positive qualities, such as attractiveness, influence perceptions in other areas, such as leadership abilities.<sup>8</sup>

Unconscious biases affect key business decisions, such as who to hire, promote and give meaningful work to.<sup>9</sup> An example of how unconscious bias operates as a barrier to higher pay and career progression for women in law is indeed through work allocation, both internally and by clients. Men are generally perceived to be better lawyers and more aggressive advocates, meaning they have better chances of being assigned or instructed on high-profile work, which in turn allows them to win more work, earn higher salaries, and climb the career ladder. In addition, law firms have a legacy culture which is itself biased towards male-orientated networking opportunities (where networking is still the primary source of internal work allocation and promotion). In this regard, one need only think of dinners at golf clubs, football games, and invitations for casual after-work drinks with a male boss.

The existence and impact of these biases is confirmed by hard numbers. A recent piece of research by the global market research firm Acritas shows that male and female clients choose to instruct a female lead partner in just 17% and 25% of cases, respectively.<sup>10</sup> The same firm, when analysing the results of its 2018 Star Lawyer nominations, found that male clients were half as likely as their female counterparts to nominate a female Star Lawyer.<sup>11</sup> Given that four out of five senior in-house counsel are male, and that originations/new business

play an important role in determining the level of partner pay, it is easy to see why female partners find it difficult to reach equity partnership, and, even if they do, can expect to earn 27% less than their male counterparts (according to the latest Acritas survey published in April 2018<sup>12</sup>).

Unconscious gender bias also plays a role in how women's personalities, qualities and needs are perceived (or better misperceived), which has an impact on their career advancement. For example, all sorts of assumptions are made about a woman's ability to work irregular hours on returning from maternity leave, meaning that she will not be allocated complex work for key clients immediately upon re-joining the firm, thereby impacting on her re-integration and progression in the workplace. Equally, if a woman adopts a "tough", assertive approach too often or to too great a degree, she may be judged and disliked.<sup>13</sup>

## Conclusions

Unconscious bias is a key barrier to gender parity in the legal profession. It impacts on law firm profitability in attracting and retaining talented women and offering the most creative and innovative solutions to clients.

Unconscious bias, due to its very nature, is present in all our minds (men's and women's) and as such cannot be eliminated from the legal profession completely. However, its impact can be mitigated as part of a multidisciplinary approach to diversity and inclusion. Many law firms already offer unconscious bias training to their staff, but to make meaningful progress on this issue they also need to re-design their systems and processes to detect and mitigate the impact of bias within their organisations.

For example, the appointment of a work allocation manager and the introduction of "institutional nudges" or "bias interrupters" into recruitment, promotion and compensation processes can help influence

decision makers within law firms to make better and less biased decisions.<sup>14</sup>

## Footnotes

1 Hunt, V., Layton, D. and Prince, S., *Why diversity matters*, McKinsey & Company, 2015.

2 Hunt, V., Prince, S., Dixon-Fyle, S. and Yee, L., *Delivering through diversity*, McKinsey & Company, 2018.

3 Law Society Annual Statistics Report 2017, summary accessible at <http://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2017/>.

4 This requires publication of (i) the median pay gap, calculated by comparing the woman who earns more than half the other women in the company, and less than the other half, with a man earning the same; and (ii) the mean pay gap, calculated by totalling all women's wages and dividing them by the number of women, and then comparing that figure to the same figure for men. This exercise does not therefore measure equal pay for the same role, which has been a legal requirement in the UK since the Equal Pay Act 1970, but instead shows the distribution of men and women across different roles within a company and highlights where there may be concentrations of a particular gender at lower or higher pay levels.

5 See <https://www.bloomberg.com/news/articles/2018-04-16/hidden-gender-london-law-firms-are-divided-over-true-pay-gap> for an overview and analysis of the data.

6 See <http://www.lawsociety.org.uk/news/press-releases/largest-ever-survey-on-gender-equality-in-legal-profession/> for further information on the survey.

7 Clews, E., *Bias Uncovered: Addressing Inequality in the Legal Sector*, Fides Research, 2017.

8 Ibid.

9 Ibid.

10 For more information see <https://www.acritas.com/news/gender-diverse-legal-teams-outperform-single-gender-teams>

11 Spotlight on Acritas Stars 2018: Driving high performance through Star talent and gender diversity, Acritas, January 2018.

12 See

<https://www.acritas.com/Stars2018ExecSummary> for an executive summary of the survey.

13 the so-called “double bind”: judging a woman negatively for behaviour acceptable or even admired in a man. On this see Turner, C. “To fight the slow pace of gender equality in the workplace, attack the root cause”, LSE Blog post, January 2016.

14 Ibid., Fides Research, 2017.

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Legal 500 UK, 2018

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