The Legal Sector Is Yet to Deal With the Requirements of the Equality Act 2010

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Abstract

This article will illustrate the extent to which the Equality Act 2010 has been adopted throughout the legal sector. This specifically relates to discrimination against the protected characteristic of sex under s.4 amongst solicitors, barristers, and the judiciary. It will further consider how sex is regarded as one of the most prevalent types of discrimination which lingers throughout the legal sector. Data will be analysed from reports prepared by the various regulatory bodies, in addition to the academic opinion surrounding this area of law. The data will be reflected in self-created bar charts and tables. Case law will also be used throughout to support points made. The article will demonstrate that whilst women have broken through the glass ceiling and emerged into the highest ranks of the judiciary, women are still discriminated against as solicitors and barristers. Furthermore, the apparent preference towards applicants from specific academic institutions will be indicated. Nevertheless, emphasis will be placed on the shift in attitudes towards women, and indeed the increase in female representation across the legal sector.

Keywords

Introduction

Sex is a protected characteristic under s.4 Equality Act 2010. This article will discuss both direct and indirect sex discrimination within the legal sector – focusing on individuals in the roles of solicitors, barristers, and members of the judiciary. This article will outline the rise of women in the legal sector, and indeed consider how some have become the most well-recognised figures in the law throughout England and Wales. This article will identify that there has been a monumental shift in female representation in an environment that was stereotypically occupied by men.

Direct Discrimination

Direct discrimination is where 'a person discriminates against another if, because of a protected characteristic, [he] treats that person less favourably than [he] would treat others'.[1] Scott and Philips state the treatment of a claimant must be compared with that of an actual or hypothetical person – the comparator – who does not share the same protected characteristic as the claimant, and whose circumstances are not materially different from the claimant.[2]

However, the notion of comparators is complex. A claimant may compare their treatment with that of a real comparator or ask the Employment Tribunal to infer that the employer would have treated a hypothetical comparator more favourably.[3] The circumstances relating to the case of a claimant and that of their chosen comparator (real or hypothetical) must not be materially different.[4] Essentially, the tribunal will consider the exact characteristics which have influenced the respondent to treat the claimant in a particular way.[5] It is therefore imperative that the correct comparator is chosen.[6] Furthermore, performing the comparison

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[1] Equality Act 2010 s 13(1).
[2] Gillian Phillips and Karen Scott, *Employment Law 2017* (2017 edn, College of Law Publishing 2017) 354.
[3] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285.
[4] Lexis PSL, 'Direct discrimination' (*Lexis PSL* 2021) <https://www.lexisnexis.com/uk/lexispsl/employment/document/393759/55T3-HSN1-F18B-S4VB-00000-00/Direct_discrimination> accessed 28 March 2021.
[5] Curzon Green Solicitors, 'Direct Discrimination' (*Curzon Green Solicitors* 2021) <https://www.curzongreen.co.uk/direct-discrimination.html> accessed 2 April 2021.
[6] *HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School (Secretary of State for Education intervening) [2018] IRLR 334:* the issue of direct sex discrimination was proven

with an actual comparator will usually be straightforward, whereas it will be more difficult using hypothetical comparators, as it may be necessary to look at factors such as how other workers were treated in situations that were not identical, but instead only similar to the claimant's circumstances.[7]

Direct discrimination was shown in Bullock [1993] ICR 138, where a retirement age of 60 was established for all employees, excusing gardeners, who could retire at 65 (and were all male). A female employee's claim for sex discrimination failed given the difficulty in recruiting gardening staff, which justified an extended retirement age. If a protected characteristic is one of the reasons for the treatment, then that is enough to establish direct discrimination.[8] In James [1990] it was held that in determining whether there has been direct discrimination, the motive, purpose or intention of alleged discrimination is irrelevant.[9] Sex discrimination will be established if persons from one sex are given preferential treatment when being recruited by the employer.[10] Nevertheless, an employer will not be seen to have unlawfully discriminated against a woman if he failed to treat her more favourably than a man, and likewise if the individual was male.[11]

Indirect Discrimination

A person indirectly discriminates another whose protected characteristic is sex if he applies a provision, criterion or practice that is discriminatory of that person, puts him/her at a disadvantage, and that treatment cannot be shown to be a proportionate means of achieving a legitimate aim.[12] The understanding of indirect discrimination was shown in Eweida [2010].[13] The Court of Appeal voiced that claimants may have to show not just that they were adversely affected by the employer's provision, criterion or practice but also that there were

as boys and girls were segregated. The Court of Appeal looked at boys as a collective and recognised they could not interact with girls, and vice versa. Both sexes were seen to have faced the same treatment.

[7] Lexis PSL (n 4)

[8] *Nagarajan v London Regional Transport* [1999] IRLR 572, HL.

[9] ICR 554 and Ian Smith, Aaron Baker and Owen Warnock, *Smith and Wood's Employment Law* (13th edn, Oxford University Press 2017) 262.

[10] Astra Emir, *Selwyn's Law of Employment* (20th edn, Oxford University Press 2018) 145.

[11] *Kenny v Ministry of Defence (Unreported).*

[12] Equality Act 2010, s 19(2).

[13] ICR 890.

others who were similarly adversely affected.[14] The important distinction between direct and indirect discrimination is that for indirect discrimination a defence can be raised if, as stated above, the treatment had a proportionate means of achieving a legitimate aim.[15] It is for the Employment Tribunal to not only determine whether the treatment was appropriate and reasonably necessary, but also that the application of the provision is proportionate, and the aim is legitimate.[16]

As Emir emphasises, an objective balance must be drawn between the reasonable needs of the employer and the discriminatory effect of the provision.[17] The test used by the Employment Tribunal is objective and it does not depend on whether the recipient believes the treatment is less favourable.[18] As Emir concludes, there is a contrast between discrimination amongst the sexes (i.e. how males and females are to dress for work) and discrimination against one or another of the sexes, which is ultimately not permitted.[19]

Harassment

Although not referred to later in this article in more detail, it is important to consider 'harassment' as this forms part of discrimination.[20] Harassment is defined as the 'unwanted conduct of a sexual nature which has the purpose or effect of violating someone's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them'.[21] A single act can amount to harassment under this section.[22] Thornton declares that sexual harassment is not confined to overtly sexualised behaviour and includes sex-based harassment (such as sexist comments).[23]

[14] Spencer Keen, 'The Equality Act 2010: Direct discrimination & harassment' (2010) 160 NLJ 1329.
[15] Emir (n 12) 145-146.
[16] *Briggs v North Eastern Education and Library Board* [1990] IRLR 181.
[17] Emir (n 12) 145-146.
[18] *Burrett v West Birmingham Health Authority* [1994] IRLR 7.
[19] Emir (n 12), 146.
[20] Citizens Advice, 'If you're being harassed or bullied at work' (*Citizens Advice* 2020) <https://www.citizensadvice.org.uk/work/discrimination-at-work/checking-if-its-discrimination/if-youre-being-harassed-or-bullied-at-work/> accessed 16 August 2020.
[21] Equality Act 2010 s 26.
[22] *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3, EAT.
[23] Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 MULR 422.

Middlemiss outlines that there has been a steady increase in reports of sexual harassment within the legal sector throughout England and Wales.[24] Sexual harassment disproportionately, but not exclusively, affects females.[25] Connelly indicates complaints of sexual harassment to the Solicitors Regulation Authority (SRA) have risen 152% in less than five years, with 25 cases in 2014-15 increasing to 63 in 2018-19.[26] Sexual harassment has major effects.[27] It has been linked to reduced job satisfaction, commitment and productivity, as well as deteriorating relationships with colleagues and withdrawal from the workplace.[28] In Stedman [1999] Morison J outlined the key characteristic of sexual harassment is words or conduct of a nature that is unwelcome to the recipient.[29] Furthermore, the recipient must determine what is acceptable to them and what they regard as offensive.[30]

WWI and Universal Suffrage

The role of women during WWI is important for context. Large numbers of women were recruited into jobs vacated by men who had gone to war, particularly in industries such as manufacturing and agriculture.[31] During 1918 munitions factories would become the largest single employer of women.[32] However, as Gosling illustrates, the war halted any further attempts by women to enter the legal sector, though the work of women during the war did much to disprove the archaic view they could not excel in certain professions.[33]

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[24] Sam Middlemiss, 'New developments in the law of sexual harassment' (2019) 3 Juridical Review 269.
[25] Kieran Pender, 'Us Too? Bullying and Sexual Harassment in the Legal Profession' (*International Bar Association*, 2019) <file:///C:/Users/user/Downloads/IBA-Us-Too-Bullying-and-Sexual-Harassment-in-the-Legal-Profession-23.07%20(2).pdf> accessed 20 March 2020.
[26] Thomas Connelly, 'Reports of sexual misconduct at law firms hit all-time high in wake of #MeToo' (*Legal Cheek*, 20 January 2020) <https://www.legalcheek.com/2020/01/reports-of-sexual-misconduct-at-law-firms-hit-all-time-high-in-wake-of-metoo/> accessed 20 March 2020.
[27] Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 Gender & Society 333.
[28] ibid.
[29] *IRLR 299, EAT.*
[30] ibid.
[31] Striking Women, 'World War I: 1914-1918' (*Striking Women*, 2020) <https://www.striking-women.org/module/women-and-work/world-war-i-1914-1918> accessed 19 March 2020.
[32] ibid.
[33] Daniel Gosling, 'Women & the Law: the road to the Sex Disqualification (Removal) Act, 1919' (*Gray's Inn*, 23 June 2017) <https://www.graysinn.org.uk/history/women/women-the-beginnings> accessed 7 June 2020.

Legislation was designed to reflect the value of the role women played during WWI.[34] On 6 February 1918 it became law that women would be entitled to vote in parliamentary elections.[35] This was possible because of the Representation of the People Act 1918.[36] Regarding the legal sector, the Law Society made the decision to admit women in 1918.[37] Even so, as Rackley tells, the Bar 'stood firm' and refused to open its doors to women until it was forced to under the Sex Disqualification (Removal) Act 1919.[38] Even then, they did so 'grudgingly'.[39]

Lord Desai reflects that Parliament recognised the need for some degree of equality:

> "Had women not worked as a vital part of the wartime economy, men would not have realised that women could do more than just sit at home and cook. The suffragettes, the suffragists and the First World War—together were very helpful in building the case for women's suffrage."[40]

In 1919 the Sex Disqualification (Removal) Act had the potential to revolutionise the legal sector as it opened doors for women to enter the roles within.[41] However, getting to the door proved to be difficult.[42] The Act signified the government were starting to take the point seriously, and it was no longer only men who could become solicitors and barristers.[43]

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[34] Birgitta Bader-Zaar, 'Controversy: War-related Changes in Gender Relations: The Issue of Women's Citizenship' (*International Encyclopaedia of the First World War* 8 October 2014) <https://encyclopedia.1914-1918-online.net/article/controversy_war-related_changes_in_gender_relations_the_issue_of_womens_citizenship> accessed 8 June 2020.

[35] Gosling (n 36).

[36] ibid.

[37] Erika Rackley and Rosemary Auchmuty, *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (1st edn, Hart Publishing 2018) 150.

[38] ibid.

[39] ibid.

[40] HL Deb 5 February 2018, vol 788, col 1870.

[41] Elena Rossi, '100 years of women in the professions: The Sex Disqualification (Removal) Act 1919' (*The National Archives* 23 December 2019) <https://blog.nationalarchives.gov.uk/the-sex-disqualification-removal-act-1919/> accessed 17 August 2020.

[42] ibid.

[43] Carrie-Ann Randall, '100 years of women in law: a timeline of sexism and equality' (*The Law Society Gazette*, 8 November 2019) <https://www.lawgazette.co.uk/women-in-the-law/100-years-of-women-in-law-a-timeline-of-sexism-and-equality/5102081.article> accessed 20 February 2020.

Originally, as per Bebb [1914], women were unable to enter the law due to their sex. [44] The Act enabled women to take the necessary examinations and qualify to become solicitors.[45]

Heilbron and Butler-Sloss

The lack of diversity within the judiciary has made it difficult for women.[46] Nonetheless, Heilbron became one of the first women to receive a first class honours law degree and is known as the first woman to be awarded a scholarship to Gray's Inn in 1936.[47] The timing of Heilbron's early career coincided with WWII, with a shortage of men to serve as barristers given much of the male population were serving overseas.[48] Furthermore, Heilbron is recognised as being the first female barrister as leading counsel in a murder trial in England and Wales.[49]

Heilbron would further become the first woman to hold regular judicial office – being appointed the Recorder of Burnley on 6 November 1956.[50] The reason for this is the selection process of the judiciary, with appointments based solely on who 'merited' the position, in addition to the fact they were a white male with 30 years of practising as a barrister.[51] When determining what 'merit' is, McNally implied 'it is often deployed by people who, when you scratch the surface, are really talking about 'chaps like us''.[52] Bingham voices that whilst

[44] 1 Ch 286.
[45] Christina Blacklaws, '100 Years since women became people' (*The Law Society*, 1 November 2017) <https://www.lawsociety.org.uk/news/blog/one-hundred-years-since-women-became-people/> accessed 27 February 2020.
[46] Erika Rackley, 'In conversation with Lord Justice Etherton: revisiting the case for a more diverse judiciary' (2010) 4 PLJ 656.
[47] First Hundred Years, 'Rose Heilbron' (*First Hundred Years*, 7 July 2014) <https://first100years.org.uk/rose-heilbron/> accessed 21 March 2020.
[48] Ibid.
[49] Natalie Smith, 'Rose Heilbron and the Cameo Cinema murders' (*The Justice Gap*, 26 January 2018) <https://www.thejusticegap.com/rose-heilbron-cameo-cinema-murders/> accessed 21 March 2020.
[50] Sarah Asplin, '100 years of women in the Law' (*University of Oxford*, 2019) <https://www.law.ox.ac.uk/sites/files/oxlaw/sarah_asplin_mm_2019_talk.pdf> accessed 1 March 2020.
[51] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 292.
[52] Geoffrey Bindman, 'White male judges: The Supreme Court and judicial diversity' (*Open Democracy*, 6 July 2012) <https://www.opendemocracy.net/en/opendemocracyuk/white-male-judges-supreme-court-and-judicial-diversity/> accessed 21 March 2020.

proven professional achievement is a key ingredient to justify appointment to the judiciary, sex should also be considered.[53]

In 1956, of the 68 women at the Bar, only 45 were practising barristers, with Heilbron the only registered QC.[54] In the 1960s rights regarding sex took a huge turn.[55] Aside from the Dagenham walk out in 1968, it was clear there was an overriding groundswell in a desire for a change in attitude towards women, and this was evidenced by campaigns for women's equal rights.[56] Lunn stipulates, a statute was needed to 'eliminate discrimination as regards terms and conditions of employment between men and women…and to ensure women were given the same right to equal pay as men.'[57] The impact of policies and practices from the government and the legal profession saw minimal input until the early 1970s.[58] Despite many years of reform, the growth of female solicitors from 1918-1970 was minimal – with the most significant period of change being from 1963, where the total number of female solicitors admitted grew from 37 to 222 by 1970.[59]

In 1974 Heilbron became only the second female after Lane in 1962 to be appointed a High Court judge.[60] It is worth noting that whilst the Equal Pay Act 1970 allowed for equal pay and rights to women, it did not give equal pay and rights to women in what was deemed to be a 'female' job.[61] Rackley and Auchmuty state that Heilbron revolutionised the legal profession and unintentionally became a pioneer for women, ultimately impacting on women's legal rights.[62] This included presiding over cases such as C v S [1988], where she denied a man the

[53] Lord Bingham, *'The Law Lords: Who has Served'* in Louis Blom-Cooper, Brice Dickson and Gavin Drewry, *The Judicial House of Lords 1976-2009* (1st edn, Oxford University Press 2009) 126.
[54] Asplin (n 53).
[55] Nadine Muller, 'Gender in the 1960s' (*NadineMuller.org*, 12 March 2013) <http://nadinemuller.org/wp-content/uploads/2013/03/Gender-in-the-1960s-Lecture-Handout.pdf> accessed 28 February 2020.
[56] British Library, 'The campaign for women's suffrage: an introduction' (*British Library*, 6 February 2018) <https://www.bl.uk/votes-for-women/articles/the-campaign-for-womens-suffrage-an-introduction> accessed 26 August 2020.
[57] J Lunn, 'Equal pay legislation—time for reform?' (2001) 151 NLJ 806.
[58] Ulrike Schultz and Gisela Shaw, *Women in the World's Legal Professions* (1st edn, Hart Publishing 2003) 142.
[59] ibid.
[60] Asplin (n 53)
[61] *Fildes v Gwent County Council (Unreported)*: A housemother in a children's home was denied equal pay as the court regarded her circumstances as 'ordinary life', in which mothers take care of children.
[62] Rackley and Auchmuty (n 40), 260.

right to prevent his wife from having an abortion.[63] They add that Heilbron's influence in the Advisory Committee on rape shaped the way in which evidence is now used in criminal trials.[64]

The European Commission introduced several directives during the 1970s to address equality and discrimination, meaning the UK had to follow suit.[65] Grazia Rossilli describes the 1970s as the 'best period for advancing social policies.'[66] The directives included the principle of equal pay for 'work of equal value' in 1975, equal treatment at work in 1976, and the promotion of equal opportunity for men and women.[67] The introduction of the Sex Discrimination Act 1975 made it unlawful for women (or men) to be treated less favourably because of their sex.[68] Originally, the purpose of the Act was to prevent banks requiring women to provide male guarantors when applying for a credit card or loan, regardless of her income.[69] However, the Act also permitted women to take maternity leave and prevented them from being discriminated against due to pregnancy.[70] The Employment Protection Act 1975 later meant women could not be dismissed for being pregnant or be discriminated against for taking time off for childcare.[71]

The late 1980s saw women finally break into the highest-level posts within law and the state.[72] Butler-Sloss became the first female Court of Appeal judge in England and Wales in 1988 and to date is the only female to have been President of the Family Division.[73] In 1990 the legal sector was criticised for 'not ensuring that a successful legal career is equally open to all'.[74] Ames highlights that upon qualification, a solicitor would almost certainly be a man as 'the position of women in the legal profession rarely extended beyond that of tea lady'.[75] Notwithstanding, it would now appear that there has been a momentum towards

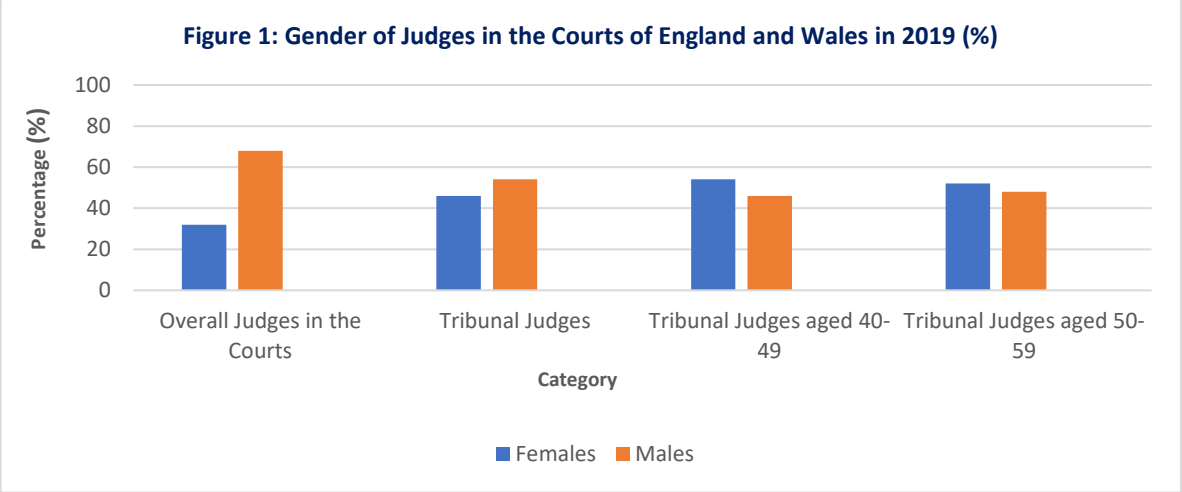
[63] QB 135.
[64] Rackley and Auchmuty (n 40) 260.
[65] European Commission, 'Tackling discrimination at work' (*European Commission*, 2020) <https://ec.europa.eu/social/main.jsp?catId=158&langId=en> accessed 17 August 2020.
[66] Maria Grazia Rossilli, 'The European Union's Policy on the Equality of Women' (1999) 25 Feminist Studies 173.
[67] Ibid 173-174.
[68] Randall (n 46).
[69] ibid.
[70] ibid.
[71] s 34(1)
[72] Rebecca Probert, 'Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland' (2019) 1 CFLQ 169.
[73] ibid.
[74] Donald Nicolson, 'Affirmative Action in the Legal Profession' (2006) 33 JLS 112.
[75] Jonathan Ames, 'The joys of youth' (2011) 108 EL 12.

empowerment of women in the workplace, with increased numbers of women in the legal sector.[76]

Women 'Not Taken Seriously'

Asplin illustrates the first perspective of women was that they could only practice in works that women 'knew about', such as Family.[77] Lindsay comments how female solicitors were often led to 'an involuntary specialism in family law'.[78] This is further supported by Lammasniemi, who affirms in her biography of Heilbron, 'it was symptomatic of gender bias at the time that, despite being one of the leading criminal lawyers in the country, Heilbron was appointed to the Family Division'.[79] Women faced further obstacles in practice given men were uncertain about taking advice from a female in predominantly 'male-dominated' commercial and business cases.[80] In reality, it was recognised that good quality academics or female solicitors being trained could practice in all areas men could.[81] The data below indicates diversity within the judiciary today and women breaking through the glass ceiling. The judicial diversity figures for 2019 identify that there has been a shift in attitudes towards women in judicial roles, with women now occupying a third of the overall profession and having almost an equal holding to men in tribunals.[82] Furthermore, women now outnumber men as tribunal judges aged 40-59.[83]

[76] The Law Society, 'Women in Leadership in Law' (*The Law Society*, 2020) <https://www.lawsociety.org.uk/campaigns/women-in-leadership-in-law> accessed 19 July 2020.
[77] Asplin (n 53).
[78] Probert (n 75).
[79] ibid.
[80] Asplin (n 53).
[81] ibid.
[82] Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2019' (*Courts and Tribunals Judiciary*, 21 February 2020) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2019/> accessed 23 February 2020.
[83] ibid.



[84]

Although not reflected in the data, it should be noted that, of the 143 judges appointed to a senior judicial role in 2018-19, 64 were women.[85] Attitudes towards women can be evidenced in the case of Popal. Popal was informed by the acting solicitor that his client had asked for a change of barrister after discovering Popal was not only of Afghan origin, but also a female.[86] The reason given by the solicitor was that the client believed 'an English judge was far more likely to believe and respect a white male barrister.'[87]

The increased numbers of women within the Supreme Court demonstrates there has been a transition.[88] In 2009 Lady Hale became the first female Justice of the Supreme Court, and is now joined by Lady Arden who also holds the same position.[89] Although now retired, Hale did not go through the traditional route expected of extended practice, and is the first academic to become Justice and President of the Supreme Court.[90] This rise to President of the Supreme

[84] ibid.
[85] ibid.
[86] Rehana Popal, 'Discriminatory instructions' (*Counsel Magazine*, April 2019) <https://www.counselmagazine.co.uk/articles/discriminatory-instructions> accessed 22 March 2020.
[87] Jonathan Ames and Frances Gibb, 'Ditched Asian lawyer Rehana Popal had been stripped of six cases' *The Sunday Times* (London, 10 November 2018) <https://www.thetimes.co.uk/article/ditched-asian-lawyer-rehana-popal-had-been-stripped-of-six-cases-3mh95267z> accessed 22 March 2020.
[88] Cambridge Law Faculty, 'Cambridge Women in Law Launch: In discussion with Lady Hale and Lady Arden' (3 October 2019) <https://www.youtube.com/watch?v=fEBAMyjvtRM> accessed 10 June 2020.
[89] The Supreme Court, 'Biographies of the Justices' (*The Supreme Court*, 2020) < https://www.supremecourt.uk/about/biographies-of-the-justices.html> accessed 9 June 2020.
[90] Durham University, 'Lady Brenda Hale' (*Durham University*, 23 October 2019) < https://www.dur.ac.uk/international/global-lectures/ladyhale/> accessed 15 June 2020.

Court would have been unheard of years ago, as the position was always filled by men, prior to Hale's appointment.[91]

Female Solicitors

Historically, women struggled to progress within firms.[92] Nicolson illustrates it was thought at the time that women were unsuitable to the 'rigours and intellectual demands of legal practice', with male solicitors having a desire to retain their 'gentleman's club' and privileged market position.[93] As such, the door to entry was opened 'only a crack' for women intent on pursuing a career in law.[94] From 1920, it took 50 years before women made up 10% of new Law Society entrants.[95] More recently, Cownie relays that female solicitors described the solicitors profession as 'male-shaped' or 'masculine'.[96] Braithwate postulates that male solicitors have always been, and still are, far more likely than females to be promoted to the most senior ranks within a firm.[97] Cownie reveals that according to the years of admission, a much larger percentage of male solicitors became partners compared to females.[98] Of the annual admissions of solicitors in England and Wales in the 1920s, women made up 1.7%.[99] This rose periodically to 11.6% in 1972.[100] However, more recent data shows females have begun to significantly outnumber male solicitors admitted to the roll.[101] Nicolson adds those who did become solicitors were consistently paid less than men, and 'relegated to female specialisms, and generally made to feel unwelcome'.[102]

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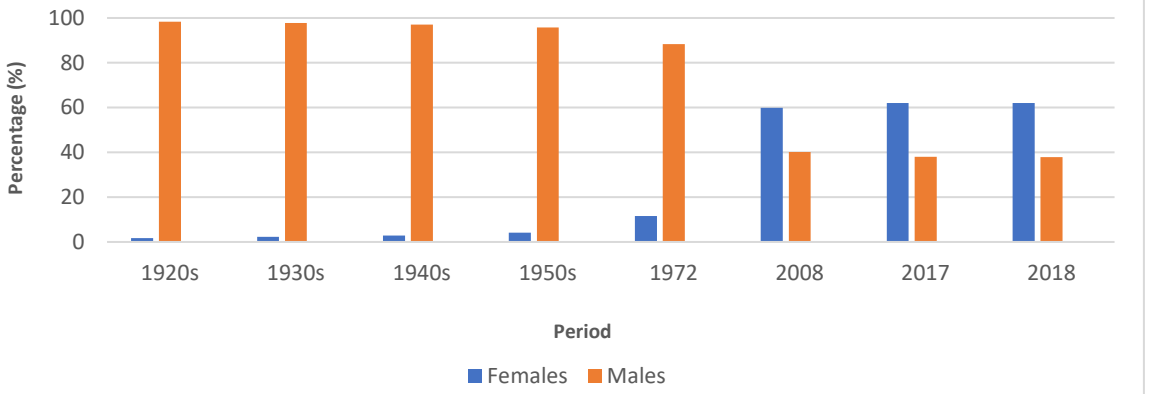
[91] Jane Croft, 'UK Supreme Court names first female president' *Financial Times* (London, 21 July 2017) <https://www.ft.com/content/bc91cb9c-6df7-11e7-b9c7-15af748b60d0> accessed 11 August 2020.
[92] Donald Nicolson, 'Demography, discrimination and diversity: a new dawn for the British legal profession?' (2005) 12 IJLP 203.
[93] ibid.
[94] ibid.
[95] ibid.
[96] Fiona Cownie, Anthony Bradney and Mandy Burton, *English Legal System in Context* (6th edn, Oxford University Press 2013) 144.
[97] Joanne P. Braithwaite, 'The Strategic Use of Demand-side Diversity Pressure in the Solicitors' Profession' (2010) 37 Journal of Law and Society 444.
[98] Cownie, Bradney and Burton (n 99) 143.
[99] Richard Abel, 'The Legal Profession in England and Wales' (1988) 14 University of New South Wales Law Journal 173.
[100] ibid.
[101] The Law Society, 'Trends in the solicitors' profession Annual Statistics Report 2018' (*The Law Society*, August 2019) <file:///C:/Users/user/Downloads/annual-statistics-report-2018%20(12).pdf> accessed 11 June 2020.
[102] Nicolson (n 95).

Figure 2: Annual admissions of Solicitors in England and Wales 1920-2018 (%)



[103]

However, whilst women have exceeded 50% of 'on the roll' solicitors since 1995, a gender pay gap has been underlined .[104] McNabb and Wass reveal that in 2001, in England and Wales, the gap in median salaries was £1,250 for assistant solicitors, £12,000 for salaried partners and £21,000 for equity partners.[105] The Law Society's 2019 Gender Pay Gap Report identified that the hourly pay is 10% more for men compared to women.[106] This demonstrates a failure to address sex discrimination. McNabb and Wass add the reason for this difference cannot be put down solely to experience and the differences in size and locality of firms.[107] Whilst Nicolson and Cownie state seniority in firms is male-dominated, gradual reform has taken place.[108] In 2001 males made up 52.4% of solicitors in England and Wales, whilst females made up 23.9%.[109] Conversely, it is now revealed that although 34% of women constitute partners of firms, this sex gap of seniority has been closing ever so gradually over the past five years – up 1% since 2017 and 3% since 2014.[110]

Nevertheless, despite progress regarding the rise of females to partners within law firms, the treatment of females is still a concern. In 2017 the Lawyer conducted a survey of 1,000

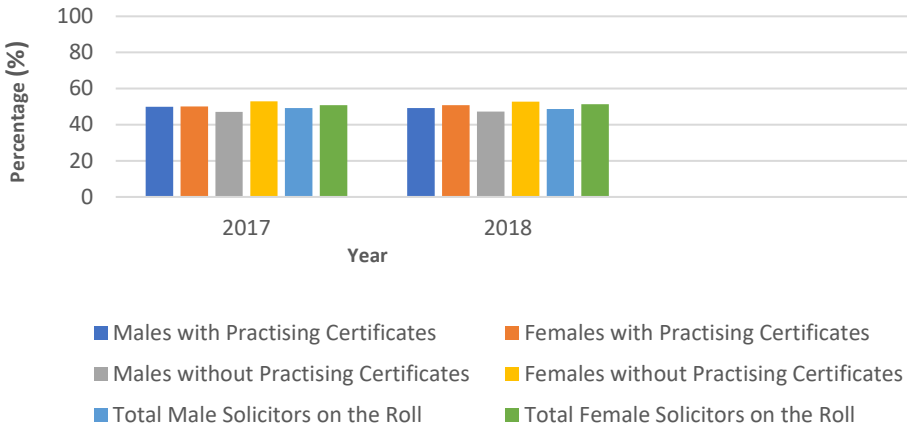
[103] Data collected from n.102 and n.104.
[104] The Law Society (n 101).
[105] Robert McNabb and Victoria Wass, 'Male-female earnings differentials among lawyers in Britain: A legacy of the law or a current practice?' (2006) 13 LE 78.
[106] The Law Society, 'The Law Society Group 2019 Gender Pay Gap Report' (*The Law Society*, February 2020) <file:///C:/Users/user/Downloads/law-society-gender-pay-gap-report-2019-february-2020%20(4).pdf> accessed 9 June 2020.
[107] McNabb and Wass (n 105).
[108] The Law Society, 'How diverse is the legal profession?' (*The Law Society*, 20 March 2020) <https://www.sra.org.uk/sra/equality-diversity/key-findings/diverse-legal-profession/> accessed 9 June 2020
[109] Nicolson (n 95).
[110] The Law Society (n 101).

solicitors.[111] It transpired that 42% of female solicitors had experienced sexual harassment.[112] This ranged from inappropriate comments to unwanted contact and propositions.[113] In a more recent survey, one in every seven female solicitors affirmed they had suffered some form of discrimination.[114] It was also revealed that 4% of male solicitors had fallen victim to the same treatment.[115]

Practising and Non-Practising Solicitors

A gap regarding the sex of practising and non-practising solicitors appears to exist. Below demonstrates the number of male and female solicitors who were entitled (and were) practising in England and Wales, in addition to those who did not hold a practising certificate.[116] The overall statistics indicate that females outnumber males whether it be in practice, former practioners, or indeed those on the roll.[117]

Figure 3: Gender of Practising / Non-Practising Solicitors 2017-2018 (%)



[118]

[111] Richard Simmons, 'Revealed: The scale of sexual harassment in law' (*The Lawyer*, 1 March 2018) <https://www.thelawyer.com/metoo-lawyers-sexual-harassment-survey-2018-2/> accessed 23 March 2020.
[112] ibid.
[113] ibid.
[114] Neil Rose, 'One in seven female solicitors suffer bullying or discrimination' (*Legal Futures*, 16 April 2020) <https://www.legalfutures.co.uk/latest-news/one-in-seven-female-solicitors-suffer-bullying-or-discrimination> accessed 10 June 2020.
[115] ibid.
[116] The Law Society (n 101).
[117] ibid.
[118] ibid.

Reasons Women are 'Disadvantaged'

Women also regard themselves to be 'disadvantaged' compared to men.[119] In 2001 the Law Society identified one of the reasons women felt this way, was due to the fact women are more likely to take extended periods of leave and work part-time due to childcare commitments.[120] Furthermore, women are seen to want to enter practice areas which large firms do not specialise in.[121] Sommerlad and Sanderson argue that:

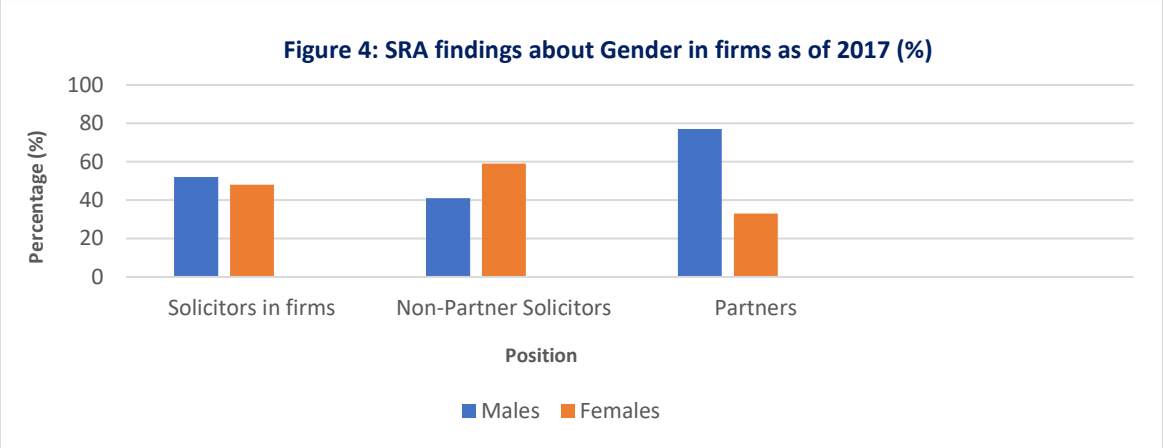
> 'The core form of a lawyer's cultural capital [understanding as a result of where you work] has always been those attributes socially constructed as male and considered to be absent in women: rationality, aggression, unemotional technical skill, etc. Having the correct cultural capital is particularly important because of the extent to which 'personalist' or 'clientist' relationships "underpin power hierarchies and key decision-making" in legal practice.'[122]

The Law Society maintained their earlier observations and recognised women will continue to be disadvantaged by 'a career structure modelled on the working life of someone unencumbered by domestic responsibilities.'[123] Joly identifies that it is an expectation women are committed to family life, and take substantially more career breaks than men, and usually at a time most crucial for promotional prospects and are less available to work extensive hours.[124] Socialising after hours and experience is regarded as important for progression, something which women are unable to execute as frequently due to family commitments.[125] Nicolson further stipulates that women who have children before their legal career commences, struggle in obtaining training contracts.[126] Moreover, those women with

[119] Nicolson (n 95) 204.
[120] ibid.
[121] ibid.
[122] Pete Sanderson and Hilary Sommerlad 'Professionalism, discrimination, difference and choice in women's experience in law jobs' in Phil Thomas, *Discriminating Lawyers* (1st edn, Routledge-Cavendish Publishing 2000) 7.
[123] Nicolson, 'Demography, discrimination and diversity: a new dawn for the British legal profession?' (n 95), 205.
[124] Camille Joly, 'The overrepresentation of Men at the Top of City Law Firms: Power, culture, structure and the paradox of time' (DPhil thesis, Queen Mary University of London 2019) 101.
[125] Jennifer White, 'Gendered Practice in the Provincial Law Firm: Pay, Progression and Parenthood' (DPhil thesis, University of Southampton 2016) 37.
[126] Nicolson (n 77).

children who do secure a training contract, struggle to complete it and ultimately become a fully qualified solicitor.[127]

Glazebrook writes in 2016, whilst females made up 60% of employees within multi-law firms, only 24% were partners.[128] In 2017 the Solicitors Regulation Authority (SRA) collected data from 92% of firms across England and Wales.[129] Whilst females equated for almost half of all solicitors, males still outnumbered females at partner level (although increasing from 2014).[130]



[131]

Overall, Nicholson affirms that despite feminism entering the law a considerable time ago, women are still consistently subjected to discrimination and hostility.[132] Whilst women should have been accepted, in response to an increased female presence, it is believed that male solicitors have 'protectively intensified the masculinist culture.'[133]

Women at the Bar

[127] ibid.
[128] Suzan Glazebrook, 'Gender myths and the Legal profession' (2016) 22 Canterbury Law Review 171.
[129] Solicitors Regulation Authority, 'How diverse are law firms?' (*Solicitors Regulation Authority*, 2017) <https://www.sra.org.uk/sra/equality-diversity/archive/law-firms-2017/#:~:text=There%20has%20been%20an%20increase,the%20UK%20workforce%20were%20BAME.> accessed 23 February 2020.
[130] ibid.
[131] ibid.
[132] Nicolson (n 95) 206.
[133] ibid.

Pinto indicates that women have struggled at the Bar.[134] Only 20 women were called to the Bar in 1921.[135] By 1929 this number had risen to 67, and in 1970 stood at 147.[136] Consequently, Pinto emphasises 'it is little wonder that, for women graduating with law degrees in the 1980s, the Bar did not seem to be a realistic career option.'[137] Fast forward to current times, and she adds much more needs to be done to promote equality of sex progression.[138] A 1992 study revealed almost twice as many female barristers earned below £25,000 and almost twice as many men as women earned more than £100,000.[139] Despite equal numbers of women and men now being offered pupillages, more males are given tenancies, and not through any lesser ability than female pupils.[140] Nonetheless, 2013 was a monumental year for women in law. A v A [2013] would be the first case where all four counsel were female: Scotland QC appearing alongside Kirby, Chisholm and O'Rourke.[141] This case coincided with further key landmarks for women. This included Turnquest becoming the youngest individual to qualify as a barrister in 600 years.[142] However, more notably, Lady Hale was appointed Deputy President of the Supreme Court.[143]

Despite this apparent success, there have been inconsistencies in pay and opportunity between male and female pupillages. Between 2004-2008 Zimdars and Sauboorah found that women, and those older than 25, earned significantly less during their pupillage.[144] It was also revealed that the same groups are more likely to join the employed Bar.[145] The employed Bar allows barristers to train in specialist areas of law, as well as allow them to benefit from financial security and a broader range of employee benefits (including paid leave) and

[134] Amanda Pinto, Kerry Hudson, Justice McGowan, '100 years of women in the legal profession - some personal reflections from three perspectives' (2019) 12 CLR 1002.
[135] ibid.
[136] ibid.
[137] ibid.
[138] ibid.
[139] Lesley Holland and Lynne Spencer, *Without Prejudice? Sex Equality at the Bar and in the Judiciary* (1st edn, TMS Management Consultants 1992) 11.
[140] Pinto, Hudson and McGowan (n 137).
[141] UKSC 60 and Chris Hanretty and Steven Vaughan, 'Patronising Lawyers? Homophily and Same-Sex Litigation Teams before the UK Supreme Court' (2017) 3 Public Law 426.
[142] First 100 Years, 'Timeline' (*First 100 Years*, 2020) <https://first100years.org.uk/digital-museum/timeline/> accessed 9 June 2020.
[143] ibid.
[144] Anna Zimdars and Jennifer Sauboorah, 'The profile of pupil barristers at the Bar of England and Wales 2004–2008' (2010) 17 IJLP 131.
[145] ibid.

protections as an 'employee'.[146] This is unlike the majority of barristers, who are self-employed, either working solely or on a self-employed basis with other barristers in chambers.[147]

Recent reports published by the Bar Standards Board (BSB) go against Pinto's original observations. The chart below depicts great strides have been made, with increased female pupils at the Bar across 2017[148], 2018[149] and 2019[150] respectively. As stated earlier, Pinto indicated that only 147 females were at the Bar in 1970 and more strides were needed to promote equality.[151] However, recent analysis shows that as of 2017 there were 6,240 females at the Bar[152], 6,368 in 2018[153], and 6,600 in 2019.[154] Whilst a consistent trait of greater numbers of male QC's compared to female QC's can be identified, there is no doubt a shift in attitude towards women, as specified earlier, can be seen. Pinto proposes that in 2020 'there will be more women barristers in practice than ever, and, as well as having a female chair of the Bar Council, there will be more women chairing committees and Specialist Bar Associations.'[155]

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[146] The Bar Council, 'Who are the employed Bar?' (*The Bar Council*, 2020) <https://www.barcouncil.org.uk/support-for-barristers/employed-bar.html> accessed 12 June 2020.

[147] Bar Standards Board, 'Information about barristers' (*Bar Standards Board*, 2020) <https://www.barstandardsboard.org.uk/for-the-public/about-barristers.html> accessed 12 June 2020.

[148] Bar Standards Board, 'Report on Diversity at the Bar 2017' (*Bar Standards Board*, January 2018) <https://www.barstandardsboard.org.uk/uploads/assets/93b6a398-49eb-4664-afb9361b148d9ad2/diversityreport2017.pdf> accessed 10 June 2020.

[149] Bar Standards Board, 'Diversity at the Bar 2018' (*Bar Standards Board*, February 2019) <https://www.barstandardsboard.org.uk/uploads/assets/1fda3d4b-c7e3-4aa8-a063024155c7341d/diversityatthebar2018.pdf> accessed 10 June 2020.

[150] Bar Standards Board, 'Diversity at the Bar 2019' (*Bar Standards Board*, January 2020) <https://www.barstandardsboard.org.uk/uploads/assets/912f7278-48fc-46df-893503eb729598b8/Diversity-at-the-Bar-2019.pdf> accessed 10 June 2020.

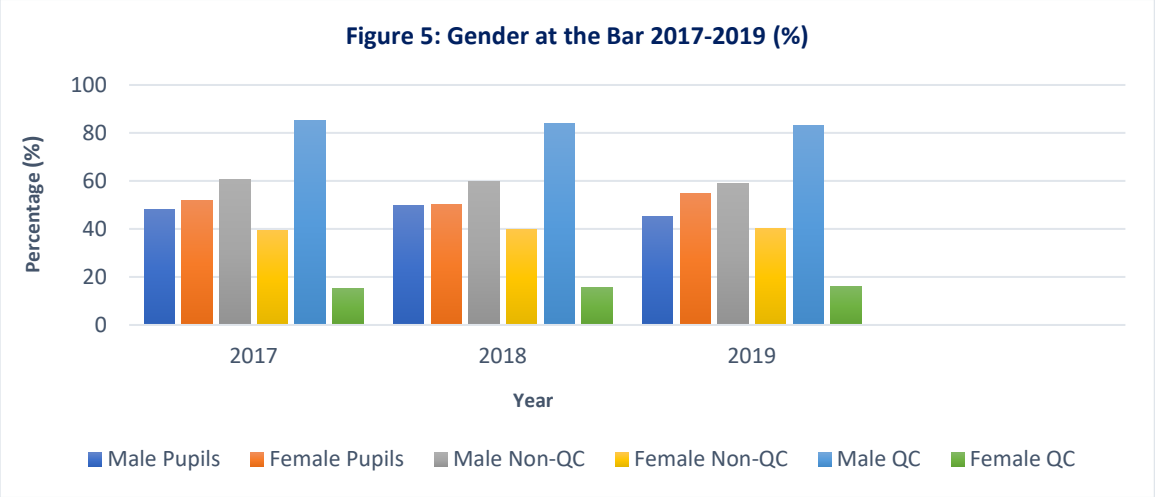
[151] Pinto, Hudson, and McGowan (n 137).

[152] Bar Standards Board (n 149).

[153] Ibid.

[154] Bar Standards Board (n 150).

[155] Pinto, Hudson and McGowan (n 137).



[156]

Blackwell conveys that despite the changes regarding the appointment process of QC's, females remain less likely than males to be appointed.[157] However, this has been blamed on the fact females 'under-apply' for QC positions as they believe, stereotypically, male candidates will have preference.[158] Blackwell writes that the reformation of the selection process was designed to eradicate this attitude of females, yet this does not appear to be the case.[159] Notwithstanding, Blackwell identifies that there has also been a trend with regards to education.[160] This particularly relates to those with an Oxbridge background - with a large proportion of applicants being awarded pupillages due to these institutions appearing on their CV.[161]

Rogers notes the Bar promotes itself to prospective entrants and how a 'discrimination session' was timetabled at a recruitment event she had attended.[162] Would-be female and minority ethnic student entrants to the Bar were warned by panellists that they would face pressure to work in the 'caring, less financially secure areas', such as Family or Crime.[163] The fact this session was scheduled appears to suggest the Bar is aware sex discrimination does exist within its corridors.

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[156] Data collected from n 146 – n 150.
[157] Michael Blackwell, 'Taking Silk: An Empirical Study of the Award of Queen's Counsel Status 1981–2015' (2015) 78(6) MLR 971.
[158] ibid.
[159] ibid.
[160] ibid.
[161] ibid.
[162] Justine Rogers, 'Representing the Bar: how the barristers' profession sells itself to prospective members' (2012) 32(2) LS 202.
[163] ibid.

There is further evidence to indicate the Bar has failed. In 2014 the Equality, Diversity and Social Mobility Committee of the Bar Council came to two strong conclusions regarding sex.[164] Firstly, their report determined that an overall balance between males and females at the Bar is 'unlikely to ever be achieved' (because of high rates of attrition of female barristers); and secondly, a balance of sexes amongst QCs and those barristers with over 15 years of experience is unlikely 'in the foreseeable future.'[165] Current Chair of the Criminal Bar Association (CBA), Goodwin, asserts she will have failed in her duty to the Criminal Bar, and ultimately to tomorrow's judiciary and the wider society if, over the next 25 years, there are only one or two more females who become chairs of the CBA.[166]

Further reports and surveys indicate not enough has been done to prevent sex discrimination. In 2016 the Bar Standards Board (BSB) published a report regarding women at the Bar. One major concern of women was the impact of having children.[167] Many considered maternity leave had a negative influence upon their practice, with impacts on work allocation, progression and income underlined.[168] Responses also indicated negative attitudes from employers of those returning from maternity leave as hindering a successful return to practice.[169] Hanretty and Vaughan also support this, outlining 'a hostile environment, inappropriate behaviours and discrimination in the allocation of work when they started their working lives.'[170]

The report also stated that women at the Bar were subjected to harassment.[171] In Howd [2017] a barrister was brought before a tribunal on eight charges of inappropriate conduct towards female colleagues at his former chambers. [172] The report indicated that two in every

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[164] Martin Chalkley, 'Momentum Measures: Creating a Diverse Profession — Summary Findings' (*Report for the Bar Council of England & Wales*, July 2015), < https://www.barcouncil.org.uk/uploads/assets/bd3cbc4c-674d-4ca5-b0c27bd1585177e9/barcouncilmomentummeasurescreatingadiverseprofessionsummaryreportjuly2015.pdf> accessed 27 February 2020.

[165] ibid.

[166] The Bar Council, 'Roll on the next century for equality of opportunity at the Bar' (*Twitter*, 6 March 2020) <https://twitter.com/thebarcouncil/status/1235892893023379457> accessed 8 March 2020.

[167] Bar Standards Board, 'Women at the Bar' (*Bar Standards Board*, July 2016) < https://www.barstandardsboard.org.uk/uploads/assets/14d46f77-a7cb-4880-8230f7a763649d2c/womenatthebar-fullreport-final120716.pdf> accessed 1 March 2020.

[168] ibid.

[169] ibid.

[170] Hanretty and Vaughan (n 145) 429.

[171] Bar Standards Board (n 167).

[172] 4 WLR 54.

five respondents had suffered harassment at the Bar, with only one in five reporting it.[173] The most common reason cited for not reporting harassment was the fact that victims were conscious about the potential effects upon their career, in addition to the prevailing attitudes at the Bar towards harassment and the reporting of it.[174] A further concern was that half of those who reported harassment were not satisfied with the response of the Bar to their allegations.[175]

Women Take Time Off For Children

A further reason why women are discriminated in the legal sector is due to the fact they leave to start a family, which arguably means putting their parental role before their career.[176] Webley and Duff pay close attention to the human capital theory – the dominant theory that seeks to explain why women are responsible for their own lack of progression, indicating that if women invest more heavily in their career, they will 'reach the higher echelons of the profession.'[177] Case law illustrates that sex discrimination lingers within firms due to the prospect of solicitors having time off to start a family. In Sinclair Roche & Temperley two female solicitors were awarded £400,000 and £500,000 respectively in damages after making a discrimination claim against their employer, due to their lack of progression within the firm and limited opportunities compared to male solicitors. [178] Guyard-Nedelec regards maternity, motherhood and general family responsibilities as the most frequent reasons why women do not renew their practising certificate, whereas for men it is generally due to anticipated retirement.[179] However, flexible working policies are increasingly being offered amongst firms where appropriate.[180] For example, Allen & Overy LLP introduced part-time working policies for full equity partners in a deliberate bid to retain more women.[181]

[173] Bar Standards Board (n 167).
[174] ibid.
[175] ibid.
[176] Liz Duff and Lisa Webley, 'Women Solicitors as a Barometer for Problems within the Legal Profession - Time to Put Values before Profits' (2007) 34 JLS 377.
[177] ibid.
[178] UKEAT/0168/05.
[179] Alexandrine Guyard-Nedelec, 'A Legal Maternal Wall? No Revolution in Motherhood for Women Lawyers in England' (2018) 23 FJBS 8.
[180] Jan Miller, 'Female solicitors fear for promotion prospects' (2010) 160 NLJ 434.
[181] ibid.

Former chairwoman of the Association of Women's Solicitors, McConnell, indicated that it was a target to have more firms examine the benefits that flexible working hours can bring.[182] Nevertheless, Guyard-Nedelec outlines there are increased difficulties associated with part-time work for women.[183] He argues juggling family and work often leads to career changes – from a mere change of specialism to the decision to work in a completely different sector or sometimes, to stop working altogether.[184] Conversely, flexible working at the Bar is dissimilar.[185] As Sommerlad illustrates, 'the long working hours and workaholism of solicitors places women on the side of deviance due to parenting responsibilities.'[186] However, barristers are at the timetable of the court, which makes part-time working difficult.[187] Guyard-Nedelec voices barristers cannot juggle their responsibilities due to the unpredictability– namely the unknown of how long the case will be, whether it will come in early, late, or be rescheduled.[188] With regards to discrimination, the Bar Standards Board (BSB) revealed that 48.6% of female barristers who had childcare responsibilities had experienced discrimination at the Bar.[189]

Numbers Attending University and Further Study

A gap appears to exist between male and female numbers studying Law. In 2017 the Law Society illustrated that 18,850 students were accepted to study LLB Law in the UK.[190] Of this number, 68.8% were female and 31.2% were male.[191] In 2018 the trend of more females continued, with 17,565 successful applicants compared to 8,510 male applicants.[192] The data below reflects the number of male and female students undertaking the LPC (Legal Practice

[182] ibid.
[183] Guyard-Nedelec (n 183)
[184] ibid.
[185] Hilary Sommerlad, "Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales" (2002) 9 IJLP 217.
[186] ibid, pp.217-218.
[187] Guyard-Nedelec (n 183) 7.
[188] ibid.
[189] Bar Standards Board (n 167)
[190] The Law Society, 'Undergraduates and graduates in Law' (*The Law Society*, 2018) <https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/entry-trends/> accessed 1 March 2020.
[191] ibid.
[192] Katie King, 'New female law students outnumber males two to one for first time ever' (*Legal Cheek*, 12 January 2018) <https://www.legalcheek.com/2018/01/new-female-law-students-outnumber-males-two-to-one-for-first-time-ever/> accessed 1 March 2020.

Course) and BPTC (Bar Professional Training Course). A consistent theme at BPTC level is that female students have continued to outnumber male students.[193] This trend was further observed across the LPC.[194]

Figure 6: Number of male and female students undertaking the LPC and BPTC 2015-2017

[195]

Course	Year	Male numbers	Female numbers	% Difference
BPTC	2015	363	445	22.58
BPTC	2016	346	460	32.94
BPTC	2017	368	485	31.79
LPC	2015	3952	6729	70.26
LPC	2016	4490	8579	91.06
LPC	2017	4490	8579	91.06

Conclusion

Research indicates that sex discrimination appears to be ubiquitous within the legal sector. Whilst Heilbron, Butler-Sloss and Hale appear to have broken the glass ceiling in relation to judges, there is evidence to indicate the same cannot be said with the Bar and solicitors.[196] Unconscious bias is regarded as a fundamental reason why women do not achieve senior partnership.[197] Notwithstanding, there appears to have been a shift in the overall number of

[193] Bar Standards Board, 'BPTC Key Statistics 2019' (*Bar Standards Board*, 2019) <https://www.barstandardsboard.org.uk/uploads/assets/b3a1297e-30c2-4798-bd6c68d3305358df/bptckeystatisticsreport2019-appendices.pdf> accessed 20 March 2020.

[194] Solicitors Regulation Authority, 'Regulation and Education Authorisation and Monitoring Activity September 2017—August 2018' (*Solicitors Regulation Authority*, 2018) <https://www.sra.org.uk/globalassets/documents/sra/research/monitoring-activity-2017-2018.pdf?version=48e48c> accessed 11 June 2020.

[195] Data collected from (n 193)

[196] LawCareers.Net, 'Feminist lawyers: the fight for gender equality in the legal profession' (*LawCareers.Net*, 6 June 2017) <https://www.lawcareers.net/Explore/Features/06062017-Feminist-lawyers-the-fight-for-gender-equality-in-the-legal-profession> accessed 16 September 2020.

[197] The Law Society, 'Influencing for Impact: The need for Gender Equality in the Legal Profession' (*The Law Society*, March 2019) <https://www.law.ox.ac.uk/sites/files/oxlaw/influencing_for_impact_-_the_need_for_gender_equaluty_in_the_legal_profession_-_women_in_leadership_in_law_report.pdf> accessed 10 September 2020.

women becoming solicitors, barristers, judges and indeed law students at both undergraduate and postgraduate level. Nevertheless, this does not detract from the fact discrimination still exists.[198] This is particularly the case regarding sexual harassment, with cases rising by 152% in less than five years.[199] The desire to start a family is a further reason for discrimination against women, with a suggestion that women put children before their career, which ultimately results in reduced numbers excelling within their specialist field.[200] However, in an attempt to combat sex discrimination, firms have offered part-time working practices to retain women.[201] Overall, it is evident that discrimination against the protected characteristic of sex still exists across the legal sector. Whilst increased diversity can be seen throughout the legal sector, even greater strides are still required.

[198] Thomas Connelly, 'Over half of female lawyers have experienced or witnessed sexism at work' (*Legal Cheek*, 18 February 2020) <https://www.legalcheek.com/2020/02/over-half-of-female-lawyers-have-experienced-or-witnessed-sexism-at-work/> accessed 16 September 2020.
[199] Connelly (n 28).
[200] Duff and Webley (n 180).
[201] Miller (n 184).