

OPINION

The Glass Ceiling for Women in the Law

2017 was a year to celebrate women in the law in the United Kingdom. Our own Master Hale was appointed President of the Supreme Court, a wonderful achievement and an inspiring role model for female lawyers not just here but across the world. The question I want to ask is whether this is a genuine smashing of the glass ceiling for women in the law, or an example of an extraordinary woman who is in truth an outlier from the general picture for female lawyers. I have tried to draw on my own experiences and therefore will say more about the Bar than the solicitors' profession.

Across the Bar and the Judiciary female representation is improving, but for many, particularly in the more senior echelons, that improvement remains glacial.

The recent Justice report on 'Diversity in the Judiciary' recorded that England and Wales remains languishing at the foot of any international league table on judicial gender diversity. A major difficulty for diversity at Circuit Bench and above is that the traditional pool is that of senior barristers and that pool continues to be stubbornly male dominated. At the last count 13.7% of QCs appointed were women. The outlook for women at the Bar is decidedly mixed. The split at Call has been 50/50 since 2000, but there is a massive drop-out rate round about 7–10 years' Call, leading to the continued disparity at the senior levels.

The reasons for women leaving are not that hard to see. Being a barrister is a struggle with young children at the best of times – travel, urgent deadlines and the general unpredictability of practice are hard to manage. Those challenges lessen significantly with top quality flexible childcare. But if you have young children and are dependent on nurseries and child minders with strict timetables, and have no back up when the urgent injunction comes into sight, the juggling can quickly become impossible. Women are still disproportionately represented in publicly funded work and that work has seen dramatic cuts in funding in recent years.

I often hear people say that women ‘choose’ to work fewer hours at the Bar and are less ambitious than men. If that is a genuine ‘choice’, fantastic – staying at home with children or taking a less intensive job can be great choices. However, too often there is no genuine choice involved. The combination of societal and financial pressure means the female barrister gives up her hard won, and often much cherished, career at the Bar. She then, however ‘able’ and well suited to the role, is not in a position to apply to be a senior judge. This means a real talent is lost to the profession and ultimately the public.

So is this a necessary outcome about which we can do no more than feel a bit sad but assume that little can be done? Absolutely not. First, why are women still disproportionately going into less well paid areas of law and then almost certainly earning less when they get into them? My own view is that this is where subconscious bias rears its head (and it has to be admitted in some cases rather more conscious bias). In considering this issue I want to express my gratitude to Daniel Kahneman’s amazing book *Thinking Fast and Slow*, a book that genuinely changes how you think. One of the many great passages describes the change in practice in auditioning for musicians in major orchestras in the 1980s. The moment the auditions changed to having the musician play behind a curtain the proportion of women shot up, although the sole criteria, i.e. musical ability was precisely the same.

There are so many subconscious biases that we – men and women – are guilty of: women don’t think quite as analytically as men; women bring emotions into analysis, so women are better at more ‘human’ areas of law; when women have children they don’t want to work as hard so they ‘choose’ to do less well paid/high status work. I have heard each one of these thoughts expressed by very senior members of the Bar/Judiciary. My personal experiences include being introduced by one very senior barrister to another even more senior barrister in a case we were all in as my clients’ ‘care package’. I have heard frequent disparaging comments about female judges as being too emotional and inclined to take into account irrelevant matters, such as the real life implications of their judgments, but equally of women barristers being ‘too pushy’ or ‘too aggressive’.

Then there is the Everyday Sexism and the tolerance of discrimination that would be much harder to maintain in a solicitors’ firm with a human resources department. There are I suspect a number of chambers that steadfastly fail to implement the BSB rules on fair allocation of work,

and simply turn a blind eye to the way women are channelled away from certain types of work. Senior men are allowed by chambers never to work with female juniors on the ground it is a personal choice for the QC. The Bar Council report ‘Snapshot’ records numerous comments about female criminal barristers being channelled into sexual crime and away from the more career enhancing work. Equally, it is striking how relatively few women there are in the senior echelons of the chancery/commercial Bar. I recently had to look at a large number of terrorism cases in the High Court and above. It was striking how few were allocated to female judges, again with the notable exception of Master Hale.

Women get to the critical 5–10 years’ Call already at a disadvantage. Then the problems really start if they have children. Whereas a male barrister who takes time out for the Christmas play is praiseworthy as a ‘hands-on’ dad; very quickly the female barrister is judged as not being serious about her career and is not promoted to the same degree. If the children are sick then the default position is the mother either stays at home or frantically tries to sort the situation. Gradually the struggle to keep one’s practice going becomes simply too much and sometimes not financially worth it.

But there are ways round these problems. I kept my practice going with three small children thanks to Treasury Panel work and the many female solicitors at the Treasury Solicitor’s who understood why cons after 5pm were a no go area and were probably grateful for my insistence of going home at 5pm. A supportive partner who is genuinely committed to equal childcare is a boon to be treasured, but should not have to be a prerequisite to a successful career.

Clerks can be a make or break. If chambers want advice on how to retain women, get a female clerk who has had children. There are many fantastic clerks who are both supportive and creative. Many clerks appreciate that it is a complete waste to support a woman in her first years and then make it so difficult for her to keep going that she either leaves the Bar or moves chambers. So, instead of expecting the recently-returned mother to spend six weeks in Birmingham and then blaming her for refusing to accept the brief, the enlightened clerk instead realises that cases in London are a much better idea.

Senior members of chambers are critical too. There is a tendency to blame clerks for the crisis in female retention, without barristers examining their own behaviour. Clerks will almost invariably set the

tenor of their behaviour from that of the senior members. I would never have had a successful planning practice if it had not been for the support of Robert Carnwath (as he then was), who was determined that I and the other junior female planner should have fair opportunities. My clerks were great but I think much of that was down to Robert setting the tone.

There are still male QCs who are unwilling to lead women, with a range of feeble excuses. A lack of understanding that expecting the female junior to stay up all night to do the pleading because the QC has been too disorganised to do his bit on time does not help. It's so much easier to have a male junior because they don't worry (or at least are much less likely to say they are worrying) about collecting the kids from nursery. The old macho attitudes – from both men and women – that you have to work all hours to be a barrister are trotted out to justify the poor diversity figures.

I think these issues are not just about women but about the future of the Bar as a healthy and thriving profession. Childcare and professional roles are changing, and clients are becoming more concerned about diversity. If the Bar wants to attract the best candidates then it has to come to terms with millennials who want a decent work life balance. Chambers that recognise this are more likely to thrive. Master Hale's achievements are awe inspiring, but it is possible that moving from the Bar to academia was a good career move.

So what are the ways forward? There are some relatively easy steps that can be taken. Implement the work allocation rules, and monitor what is happening. Encourage women to develop practices that will stand them in good stead across their careers. Have some empathy and understanding for women with young children and don't set them up to fail. Have a mentoring scheme from junior tenant through to silk, which isn't focused on helping those who are struggling but instead on enabling all members of chambers to succeed. Senior women barristers (and judges), it's our duty not to pretend that there is no discrimination at the Bar or Bench, but to talk about our own experiences openly. Finally, let's all examine our subconscious biases and try to struggle against them.

Master Natalie Lieven