PAY GAP AND GENDER DISCRIMINATION
No more euphemisms

The Hon Mary Gaudron famously said, “We got pay equity once, then we got it again, and then we got it again, and now we still don’t have it.” But we don’t need to wait 217 more years to achieve equity, as the World Economic Forum predicts. The legal profession can follow the lead of organisations that have reduced or eliminated the gap in a very short period of time by using effective and deliberate strategies for change.

A n abundance of statistics and studies demonstrate that there is a gender pay gap in the legal profession, and that it is one of the biggest in any industry. This article highlights a few of these figures but, more importantly, it examines a key root cause – discrimination – and provides some strategies to address and overcome this.

MIND THE GAP
Women make up more than half of the legal profession. The latest National Solicitor’s Report showed that in 2016, there was an even gender distribution with 50.1 per cent female and 49.9 per cent male solicitors. In the mid-1990s in Australia, women began graduating from law in equal numbers to men. That trend has only increased in the past 20 years, with women now making up 60 per cent of lawyers entering the profession.

Despite these figures, a ‘trickle-up’ effect has not occurred over the past 30 years. Indeed, if that were the case, given the average span of a career, we should be close to equity by now. Instead, we have a large gap. The size of that gap fluctuates depending on the data collected, but no matter what the data set, there is always a gap, and a gap that is one of the largest in any industry.

Data from the Workplace Gender Equity Agency (WGEA)
shows that the legal services industry has 28,154 employees within 68 organisations, and 69.7 per cent of these employees are female. There is a 29.7 per cent total-remuneration gender pay gap. Women who identified as employee barristers to the Australian Tax Office (ATO) (such as in-house government counsel) reported a 141 per cent gender pay gap compared with their employee barrister male counterparts in data collated by the ATO in the 2013-2014 financial year. The New South Wales Bar Association survey data of 2014, which included responses from about half of its members, identified a gender pay gap of about 62 per cent, despite very similar hours worked.7

This pay gap reflects, in part, the poor representation of women in senior positions in our profession. The WGEA data also shows that women account for just 9.5 per cent of legal CEOs and only 33 per cent of key management personnel.8 In 2015, the Law Society of South Australia Practising Certificate Survey found that in private practice, on average only 14 per cent of equity partners and legal practitioner directors were women.9 The 2015 Australian Bar Association statistics show that 23.13 per cent of barristers were women. They also show that, nationally, only 91 of the 842 senior barristers were women.10

This state of affairs will not simply get better with the passage of time. Western Australian Chief Justice Martin recently described the numbers of women appointed to his court as tragically low, with only one of 18 Supreme Court justices appointed in the past decade being female.11

'PRICED-LESS'
The subtitle of this article 'No more euphemisms' comes from observations made by the Hon Mary Gaudron at the International Bar Association (IBA) Conference held in Sydney in October 2017. She said that 'gender pay gap' and similar terms were euphemisms which should be relinquished, given that the number of women entering the law over decades has not levelled the playing field, stating: 'I think it's time we call it for what it is. It is discrimination pure and simple...and it is discrimination which seems to be intractable and incapable of resolution by the application of the anti-discrimination laws'.12

These concerns of the Hon Mary Gaudron are supported by the statistics in the Law Council of Australia's National Attraction and Re-Engagement Study Report (NARS), published in 2014. NARS identified key areas of concern; in particular, that half of all women lawyers reported experiencing discrimination due to their gender and that one in four women reported experiencing sexual harassment at their workplace.13

Also supporting these concerns is a 2016 report by KPMG, based on 2014 data, into the causes of the gender pay gap. The She's Price(less): The economics of the gender pay gap report found that sex discrimination factors of both direct discrimination and unconscious bias were the largest contributors to the gender pay gap in Australia, and accounted for 38 per cent of the difference. This was a rise from the 35 per cent, which it had found in its 2007 Household Labour Dynamics in Australia (HILDA) survey. Importantly, part-time work, often thought to be a large reason for the pay gap, was found to contribute only 4 per cent of the reason for the gap.14

WE'RE NOT BROKEN – NO NEED TO FIX WOMEN
Acknowledging that discrimination is the single largest cause of the pay gap is the first step in working out how to address it. Up until now, so much of the energy and effort in this area has gone into mentoring and networking, and leadership programs designed to make women more 'confident'. In fact, these issues constitute such a small piece of the puzzle – in our profession, more than most, confidence is hardly the issue, and does not explain why we still lag behind other industries.

Rather than trying to fix the women so that they fit the system (and the preconceived biases) we need strategies to disrupt the system and challenge the biases if we are to meaningfully confront the gender pay divide. Law Council of Australia (LCA) President Fiona McLeod SC, speaking at the IBA Conference said: "You've got to have equality down through all levels – and that's why it's so important that we address things like the pay inequity, that we look at how we employ, how we promote, how we allocate work to people, how we brief people... We have to look at all of those issues right through all our systems because we won't get there just by having super women at the top."

HOW TO CHANGE SOMETHING THAT IS NOT NECESSARILY YOUR FAULT
Highlighting discrimination is not about a blame game, nor is it all about fault. A large part of this dilemma is about recognising the role that our preconceived or unconscious
biases play in defining our relationships with each other. Once we recognise these biases, we can develop strategies to disrupt them and, over time, create cultural change.

In response to the NARS findings, the LCA introduced unconscious bias training in March 2017 and made it available to all lawyers.¹⁶ Unconscious biases are small pieces of information accumulated over time, processed in our unconscious minds, and which are responsible for around 80 per cent of our everyday decision-making.¹⁷

I urge everyone to consider either the LCA-supported (or other) training in this area. You will find that, like any refresher in critical thinking, it can also sharpen your legal skills and judgement in other areas.

Confirmation bias is one common manifestation of unconscious bias. That is, we pay more attention to information which confirms and conforms to our own existing belief system, are less likely to question that information and are more likely to ignore information that contradicts our worldview. Another type of unconscious bias is attribution bias, where we give more weight to those in our 'in' groups, by giving second chances to them and the benefit of the doubt; while for people outside of this we often fall into judging by stereotype. Closely related to this is affinity bias: our tendency to develop relationships with those who are like us.

These biases are particular problems for those applying for jobs, particularly new graduates. Any advertised position is flooded with graduates of high merit and sometimes all that distinguishes them in the interview is sensing how someone will 'fit' in an organisation. We are naturally attracted to people who share our attitudes, qualities and experiences, but unless we actively apply strategies to challenge our biases, we will end up employing people because they are like us. This is a problem not only for fundamental principles of equity and fairness, but also because we know that diversity is good for business.¹⁸

American lawyer, Kathleen Nalty, provides training in unconscious bias and suggests many strategies for dealing with and interrupting these biases. She encourages us to ask ourselves questions about who makes us uncomfortable and why, and who we get advice from and why. She encourages us to mindfully notice things that surprise us, ask why, and then to reflect on how that bias could affect other areas of our decision-making. Nalty also suggests that these personal behavioural changes, while important, are not enough to combat unconscious bias. Structural changes, such as affirmative action, are needed to create change in the short term.¹⁹

The LCA is also on the front foot in this area. It has adopted and promoted its Diversity and Equity Charter and Equitable Briefing Policy, and successfully lobbied organisations to take up equitable briefing practices. The Equitable Briefing Policy is target-based and aims to brief women in at least 30 per cent of matters, and pay women at least 30 per cent of the value of all briefs by the year 2020. While this is a low target, and far from equal, it is a step in the right direction. Eighty organisations and over 100 barristers have adopted this policy, and the push is also coming from major corporations such as Telstra, AMP, Westpac, and others.²⁰

Equitable briefing is the particular structural policy currently targeted by the LCA as NARS found that:

Female barristers most often reported experiencing almost every form of discrimination or type of harassment at work than their counterparts in private practice or in-house legal roles. Female barristers were twice as likely as those in private practice or in-house roles to believe they have ever experienced sexual harassment at their workplace. Female barristers were also more likely than other females to report experiencing discrimination due to gender, bullying or intimidation, and discrimination due to family/carer responsibilities.

Female barristers in this study referred to both conscious and unconscious bias at the Bar. Conscious bias included female barristers being denied briefs because clients preferred male counsel. Unconscious bias includes courts and tribunals extending hearings well into the evenings without consulting counsel who have family commitments after-hours.²¹

Equitable briefing is a commendable strategy for challenging unconscious and conscious gender bias. Other strategies that firms can consider include: conducting a pay audit; changing hiring practices (blind or targeted recruiting and ensuring gender balance on selection panels); running bystander training (encouraging people to speak out and call out sexist jokes and the like); promoting flexible working arrangements for all staff, looking at billing practices to favour output over time spent at desks; paid maternity and parental leave; paying superannuation while on unpaid maternity leave; promoting people while they are on maternity leave; and running networking or CPD events at varied times to accommodate those with caring responsibilities.

A combination of personal behavioural awareness training with operational adjustments can bring about long-term change and a reduction in the discrimination faced by women in the profession on account of their gender alone. These changes could also benefit women and others who face layers of discrimination caused by their race, religion, sexuality, or a combination of these things.

IT CAN HAPPEN (ALMOST) OVERNIGHT
Finally, it is worth considering how organisations can eliminate the gender pay gap quickly by implementing strategies including those discussed above.

One example is the South Australian Department of Treasury and Finance, whose very active Chief Executive (CE), David Reynolds, has stated that: 'unequal gender pay rates can be fixed today by any willing business manager.'²² Under his leadership, the Department has implemented the action-based Gender Equality in Leadership Strategy. In 2015, there were no women in the top levels of its executive. Now 5 of 11 members of the executive leadership group are women. With a co-ordinated approach to reforming recruitment, performance, flexibility and training, it has almost achieved its 50/50 target. It has conducted a simple review of executive contracts to ensure that women and men doing equal work were paid equally, delivered unconscious bias training to all interview panel members, and ensured that at least 50 per cent of interviewees for each position are women. Importantly, flexible work practices have been adopted by senior management, with the CE himself adopting a practice of
'leaving loudly' to pick up children, etc., to counter stereotypes and encourage others to feel comfortable in adopting flexible work practices. In this way, the CE is leading by example. I am hopeful that his example leads to the widespread adoption of such practices both within his Department and more widely across the public service.

Others are following this trend, and showing how quickly gaps can be reduced. Australia Post and SA Water have both recently announced an elimination of pay gaps in their respective businesses. The WGEA publishes a list of employers of choice, based on the strategies those companies are adopting for more equitable workplaces. A few law firms currently feature on this list, and it would be great to see more follow. Former Sex Discrimination Commissioner, Elizabeth Broderick, said that "Gender Equality is the unfinished business of the 21st century." We now have the knowledge and tools to achieve it in the workplace. Let's get it done.


Leah Marrone is the President of the Women Lawyers Association of South Australia Inc.; she is also a board member of the national body, Australian Women Lawyers Ltd., a member of the Equal Opportunity Committee of the LCA, a member of the Premier's Council for Women in South Australia, and Deputy Chairperson of the not-for-profit charity, Welcome to Australia Ltd. she works as a lawyer at the Legal Services Commission of South Australia.

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