

What is the economic cost of discrimination?

By Penny Thew and Brenda Tronson¹

The cost to economies and workplaces of discriminatory² practices and frameworks is well researched, traversed and documented.³

Estimates of the cost of discrimination in workplaces and economies in Australia, the United States and the United Kingdom for instance have varied from A\$45bn per annum in Australia between 2001 and 2011 in respect of racial discrimination alone;⁴ £127.6bn per annum in the United Kingdom in 2018 in respect of total output lost resulting from discriminatory pay practices on the basis of sex, ethnicity and sexual orientation (meaning ‘pay gaps’ between women and men, different ethnicities and sexual orientations, resulting in lost output of £123bn, £2.6bn and £2bn respectively);⁵ to up to USD\$12 trillion for the global economy, or 16% of global income, in respect of gender-based discrimination in social institutions (namely formal and informal laws, social norms and practices restricting rights and opportunities).⁶

The cost of workplace bullying in various forms is estimated to be A\$36 billion annually in Australia (as at 2010) and £13.75 billion per annum in the UK.⁷

In November 2018, the International Monetary Fund (IMF) found that the productivity and growth gains from adding women to the labour force for instance (by reducing barriers to participation) ‘are larger than previously thought ...[and that] for the bottom half of the countries in our sample in terms of gender inequality, closing the gender gap could increase GDP by an average of 35%.’⁸ The IMF found that higher productivity generally and higher incomes for men would result from a greater inclusion of women in the labour force, the latter because of the overall productivity increase.

In 2012, Crosby Burns said ‘there’s a price to be paid for workplace discrimination [in the United States] – US\$64 billion’ (ibid, p1). This was an annual amount said to constitute the ‘estimated cost of losing and replacing more than 2 million American workers who leave their jobs each year due to unfairness and discrimination.’ The research found that businesses that discriminate ‘put themselves at a competitive disadvantage compared to businesses that evaluate individuals based solely on their qualifications and capacity to



contribute,’ even setting aside the exposure to ‘potentially costly lawsuits’ (p3).

In its 2018 report, the Centre for Economics and Business Research Limited (Cebr) in the United Kingdom applied the methodology adopted by the World Bank and found that wage discrimination (or ‘pay gaps’) led directly to a loss of labour income for the group discriminated against plus a reduction of labour as an input for production for the economy as a whole, resulting in an estimated total of £249bn of total output lost from the gender pay gap alone (ibid, pp28, 30). The conclusion was that a ‘double-dividend’ existed to increasing workplace diversity and decreasing discriminatory practices, namely because more diverse organisations are more likely to be financially successful, while a decrease in discriminatory practices increased incomes of many groups which in turn benefits the whole economy.

In 2014 it was estimated that the global economy would be ‘billions if not trillions of dollars richer if opportunities were offered more equitably’, with discrimination described as a ‘very expensive habit’ (Voyles, ibid, p1-2).

Are these analyses relevant to the New South Wales Bar?

The reports described above arise largely from studies of the costs of discrimination, harassment and bullying in workplaces in Australia, the United Kingdom, the United States, Europe and Asia. The workplaces analysed typically consist primarily of common law employment relationships, or at least relationships whereby a principal bears some responsibility for, and control over, a (casual, independent contractor or employed) worker. By contrast, barristers

practising in New South Wales are of course largely self employed and are required to operate as ‘sole practitioners’.⁹

In that context, do the economic analyses above have any applicability to the New South Wales Bar and the working environment of chambers and, if so, how? Is there a cost to the New South Wales Bar, or even to individual chambers or barristers (aside from the costs of potential litigation) of discrimination, harassment and/or bullying? Is that cost borne personally by the perpetrators, the victims or does it impact on the profession as a whole and does this have implications for the ongoing success and relevance of the profession?

In December 2017, Fiona McLeod SC, then President of the Law Council of Australia (the LCA), observed that:

‘The strength of the legal profession depends upon nurturing a professional environment that fosters and rewards individual ability, application and integrity, shielded from the impact of discriminatory, extraneous and arbitrary practices. The overarching objective is to provide a productive, inclusive and sustainable legal profession that is well placed to serve the needs of the community.’¹⁰

At the same time, the LCA launched a series of tools to assist in addressing discrimination, harassment and bullying in the profession, including a summary of relevant laws and their potential impact on the legal profession, and links to resources available across the Australian bars including the NSW Bar Association’s Model Best Practice Guidelines and VicBar’s online complaint and reporting portal as well as its bullying, discrimination and harassment policies.¹¹

The impact on the profession in Australia of discriminatory practices was considered in 2014 in the report flowing from the LCA’s National Attrition and Re-engagement Study (the NARS report), in the context of which the LCA expressed ‘particular concern’ at the ‘wide gap between the number of women who enter the profession and those that remain in it’, and the ‘evaporating workforce’ (NARS report Q&A). The NARS report found that 1 in 2 women respondents, of the 4000 women and men legal practitioners surveyed, reported being discriminated against on the basis

of sex, one in four women reported being sexually harassed, while one in two women and more than one in three men also reported being bullied at work (at [7.2.2]). A key issue for the profession was said to be the impact on its reputation of such findings (p87, table 21).

Systemic disparities within the profession, such as the 'gender pay gap', have been the subject of numerous reports in the mainstream media. While the 'gender pay gap' at the New South Wales Bar is said to be approximately 38.3% (in that, of those responding to a NSW Bar 2014 survey, women at the Bar reported a gross income of about 61.7% of that of men before expenses),¹² that gap has been widely reported in the media as being substantially higher.¹³ The gender pay gap of 38.3% at the New South Wales Bar can be sharply contrasted with the far lower (yet still significant) national gender pay gap of 21.3% for full time total remuneration.¹⁴

Setting aside the accuracy of the figures reported in the mainstream media of the gender pay gap at the Bar,¹⁵ arguably reports of pay disparities of even the more accurate 38.3% have the potential to influence the decisions of those considering entering or

of 'losing and replacing workers' where at least some of the attrition may be attributed to systemic and/or direct discrimination, including harassment, as well as bullying. If consideration is had to the expenditure in attracting entrants to the Bar (in the form of seminars and events directed at universities), as well as the cost of facilitating entry to the Bar (in the form of the Bar exams, Bar Practice Course and CPDs), plus the less measurable but substantial voluntary contribution of time and endeavour by the senior Bar to fostering the junior Bar, the ongoing financial and other losses to the profession of 'losing and replacing workers' are quantifiable and significant.

What are some of the other common law bars doing?

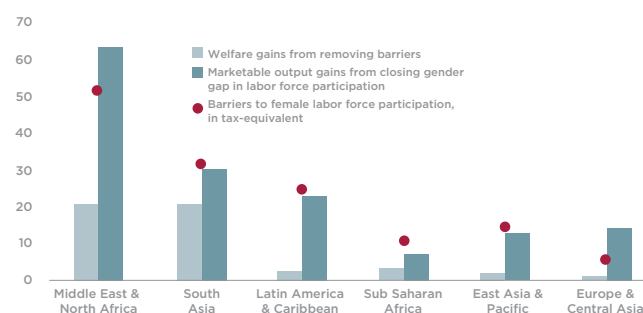
By way of specific example, the New York Bar has implemented a number of strategies addressing in particular harassment in the profession, including links to seminars entitled 'How to navigate sexual harassment in the workplace',¹⁸ 'Moving the Culture Forward: Metoo and sexual harassment in the workplace'¹⁹ and a link directly to the 'metoo' webpage. The New York Bar has also produced a webinar in relation to the relevant sexual harassment bar rules.²⁰ The United Kingdom Bar has implemented various initiatives dealing with bullying and harassment in the profession, including a website dedicated to well-being at the Bar,²¹

or 'pay gaps', at the Bar could produce the 'double dividend' of the overall increased financial success of a more diverse profession combined with incomes in discrete groups increasing as a result of a decrease in discriminatory practices (Cebr, *ibid*). Overall, a distinct competitive advantage combined with increased financial success is reported to result from a more diverse workforce and decreased discriminatory practices (Crosby Burns, *ibid*).

ENDNOTES

- 1 The authors would like to thank the New South Wales Bar Association Library for its invaluable assistance in the conduct of research for this article.
- 2 This article considers in addition the economic cost of harassment, considered a form of discrimination, as well as bullying.
- 3 E.g., Crosby Burns, *The Costly Business of Discrimination*, Center for American Progress, March 2012; Green et al, *Diversity and inclusion at work: facing up to the business case*, CIPD, June 2018; Hersch and Bullock, *The Law and Economics of Employment Discrimination Law*, Vanderbilt University Law School, Legal Studies Research Paper Series Working Paper Number 18-41, 2018; Voyles, *The High Cost of Discrimination*, CKGSB Knowledge, 2014; Cebr, *The Value of Diversity*, INvolve, 2018; Ferrant and Kolev, *The economic cost of gender-based discrimination in social institutions*, OECD Development Centre, June 2016; Becker, *The Economics of Discrimination*, University of Chicago Press, 1957.
- 4 Elias, *Measuring the economic consequences of racial discrimination in Australia*, Deakin University, 2015.
- 5 Cebr, *ibid*, p. 30; <https://www.personneltoday.com/hr/cost-of-discrimination-uk-economy/>
- 6 Ferrant and Kolev, *ibid*, pp 1, 2.
- 7 Potter et al, *Bullying and harassment in Australian workplaces: results from the Australian workplace barometer project 2014/2015*, 2016, p5.
- 8 L'garde and Ostrey, *Economic Gains from Gender Inclusion: Even Greater Than You Thought*, IMFblog, Insights and Analysis on Economics and Finance, 2018.
- 9 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, Rule 12.
- 10 <https://www.lawcouncil.asn.au/media/media-releases/building-a-more-diverse-and-inclusive-legal-profession>
- 11 <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/bullying-and-harassment-in-the-workplace>
- 12 *NSW Bar Association 2014 Member Profile Report* (Urbis Pty Ltd, March 2015), Section 6.1 Gross annual fees, p.13.
- 13 Irvine, 'Rough justice: the job with 140% gender pay gap', *SMH*, 10 June 2016; Inga Ting, 'The gender income gap in more than 1000 occupations', *SMH*, 20 April 2017; Butt et al, 'The jobs that don't earn what you would expect', *SMH*, 17 May 2017; Woodhill, 'Barristers top the gender pay gap list', *Australasian Lawyer*, 14 June 2016.
- 14 <https://www.wgea.gov.au/topics/gender-pay-gap>.
- 15 Ingmar Taylor SC, 'What do women barristers earn?' [2016] (Spring) *Bar News*, 2016, p. 48.
- 16 Scruby SC and Tronson, 'Some recent statistics on women at the New South Wales Bar' [2018] (Summer) *Bar News*, 2018, p50; 'Further statistics on women at the New South Wales Bar' [2019] (Autumn) *Bar News* 50; Kate Eastman SC 'Visible Targets' (June 2016): <https://www.kateeastman.com/wp-content/uploads/2017/02/Visible-Targets-2016-Kate-Eastman-SC.pdf>
- 17 'Retention of males and females at the Bar who commenced the Bar Practice Course at the private bar in NSW between 1994 and 2018 as at November 2018' (NSW Bar Library).
- 18 <http://www.nysba.org/store/events/registration.aspx?event=0FK64>
- 19 <http://www.nysba.org/store/events/registration.aspx?event=0FR81>
- 20 <https://clearlawinstitute.com/shop/webinars/free-webinar-new-york-state-and-nycs-new-sexual-harassment-laws-082818/>
- 21 <https://www.wellbeingatthebar.org.uk/problems/bullying/>
- 22 https://www.barcouncil.org.uk/media/664669/barristers_working_lives_2017_harassment_and_bullying.pdf

Chart 1: Economic Gains – Reducing barriers to women in the workplace significantly boosts welfare and growth.



Source: IMF staff calculations.
Note: See 'Economic Gains from Gender Inclusion: New Mechanisms, New Evidence,' IMF Staff Discussion Note No 18/06 for explanations of the calculations.

staying in the profession, and may impact more broadly on the public perception of the profession.

In addition, the rates at which women appear unled in Court is far lower than for men.¹⁶ It is likely that these disparities are at least partly causative of the gender pay gap and may contribute to decisions (particularly by women) to come to and remain at the Bar, and to the public perception of the profession more generally.

Commensurate with this observation, a consideration of NSW Bar Association statistics¹⁷ demonstrates that women leave the Bar at significantly higher rates than men, with attrition rates of 11% for women and 6% for men over a ten year period to November 2018 and 23% for women and 16% for men over a twenty year period.

An analogy can be drawn in this respect to the analyses described above of the cost

which deals with bullying and harassment in particular, and the publication of a report entitled *Barristers' Working Lives 2017*, which deals with bullying and harassment.²²

Conclusion

If one applies the economic analyses of, say, the IMF as described above, it could be said that adding greater numbers of women, and people of diverse ethnicities, cultures, racial backgrounds and sexual orientations to the Bar (reflecting the broader community) has the potential to increase productivity and growth, thereby resulting in higher incomes globally at the Bar (cf L'garde and Ostrey, *ibid*). At the least, it appears that reducing the attrition rate of both women and men at the Bar can minimise the cost of losing and replacing the workforce (Crosby Burns, *ibid*). Steps assisting to reduce wage discrimination,