**BACFI/SEAL EVENT IWD EVENT 2026**

**DIVERSITY IS NOT A DIRTY WORD**

Here we are celebrating International Women's Day. And women have been the first beneficiaries of diversity initiatives in the legal profession and in the judiciary. But diversity seems to have become a dirty word. The current government in the United States of America is waging war on what are called there DEI policies and practices – by DEI they mean 'diversity, *equity* and inclusion'. Law firms, for example, have been told to give up such practices on pain of being denied access to federal buildings, which of course include the federal court buildings to which they need access in order to litigate. Some of them, including at least one US branch of a UK law firm, have felt that they had to succumb to this bullying.

And we are not immune to such pressures in this country. The Reform party's manifesto for the 2024 election promised to replace the Equality Act – with what was not made clear - and to 'scrap diversity, equality and inclusion roles that have lowered standards and reduced economic productivity'. Reform has now taken control of ten county councils. The first target of their mission to drive out waste in local government expenditure was EDI officers – scarcely a large saving, if indeed they exist at all. The 2024 Conservative party manifesto also promised

to ‘introduce controls on all equality, diversity and inclusion initiatives and spending’.

It’s not only some political parties. The Bar Standards Board has recently dropped a proposed core duty upon barristers to promote equality and diversity, after strong opposition from the Bar Council and other members of the profession. Yet the solicitors’ profession has had a duty to act in a way that encourages equality, diversity and inclusion for the past six years.

But what is all the fuss about? Note that in this country we talk of EDI, by which we mean *equality*, diversity and inclusion, and not DEI, by which the Americans mean diversity, *equity* and inclusion.

So what’s the difference? Equality and equity are words which are frequently used interchangeably. Both have the same Latin root – aequus or aequa, meaning level, fair or equal. But they can certainly be interpreted differently.

In 2023, International Women’s Day adopted the campaign theme #EmbraceEquity. The aim was to get people talking about the difference between equality and equity and what it might mean in policy terms. For them, ‘equality’ meant treating people the same – each individual or group of people is given the same resources or opportunities as others. ‘Equity’ recognises that each person has different circumstances and allocates the resources and

opportunities needed to reach an equal outcome. Note the difference between equality of *opportunity* and equality of *outcome*. Equity acknowledges that people don't begin life in the same place and that circumstances can make it more difficult for people to achieve the same goals. Equity based solutions take into account the diverse lived experiences of individuals and communities, adapting services and policies according to those differences. The aim of equity is to change systemic and structural barriers that get in the way of people's abilities to thrive.

They illustrated this in several ways – most vividly by four pictures of three people of very different heights – one tall, one small, one in between – looking over a tall fence into a baseball match. The first picture, labelled 'reality' showed the tall person standing on several crates, easily able to look over the fence, the middling-sized person on one crate just able to see over, and the short person in a hole unable to get anywhere near the top of the fence. The second picture, labelled 'equality', showed them all on the same size crate, the tall and middling person being able to see over, but the short one still not able to do so. The third picture, labelled 'equity', showed the tall person without a crate, the middling person with one crate and the short person with two crates – all able to look over the fence. The final picture, labelled 'liberation' removed the fence – again

they were all able to see the game. The concluding slogan is 'Equality is giving everyone a show. Equity is giving everyone a show that fits.'

Now we might quarrel with the use of different terms to describe these different concepts – but we are used in the UK to differentiating between *equality of opportunity* and *equality of outcome*. However, it is not always easy to tell which is an opportunity and which is an outcome – did the different sized boxes give all three of them an equal *opportunity* to see the game? Or did they produce the *outcome* that they were all the same height?

For the most part, in this country we mean equality of opportunity, not equitable outcomes. I think that we can be clear that promoting diversity is not about preferring people who are less well qualified to do the job. There is no reason why it should lead to a lowering of standards. Quite the reverse. It is about recognising that people other than those who have traditionally done the job are equally or even better qualified to do it. I well remember how demeaning it was when the moment promoting diversity was mentioned people started to talk about merit – as if diverse candidates were not as meritorious as the traditional ones.

But why do we have EDI policies at all? The answer, I think, is because we have (and have had since the 1970s) laws against discrimination. The providers of employment, education, training, accommodation, goods and services must not

discriminate against people with what we now call protected characteristics. They must not discriminate directly – that is, by treating such people less favourably because they have a protected characteristic. But they also must not discriminate against such people indirectly, that is by having a requirement – a provision, criterion or practice (PCP) - which applies to everyone and looks neutral on its face but which is in fact harder for people with a protected characteristic to meet. A minimum height requirement for a police officer is an obvious example. If an individual can show that the PCP like this has disadvantaged him or her, then the provider has to show that the PCP is objectively justified.

Indirect discrimination is designed to eliminate unjustified barriers to equality of opportunity. But both direct and indirect discrimination aim for equal treatment – not to give anyone a leg-up – an extra crate. This hasn't always been easy.

The first protected characteristics were sex and race or ethnicity. Women were to be treated in the same way as men in the same circumstances. People from an ethnic minority were to be treated in the same way as people from the ethnic majority. This had all sorts of immediately beneficial results. Women could no longer be denied mortgages unless they had a male guarantor, just because they were women. Women could no longer be paid two-thirds of the salary paid to a man for doing exactly the same job. Women could no longer be denied access

to a public bar at lunchtime. Landlords were no longer allowed to put up signs saying ‘no blacks; no Irish’. These things were all commonplace when I started out in the law in the 1960s and getting rid of them was undoubtedly a change for the better.

But it meant that you have to find a person of the opposite sex (or racial/ethnic group) to compare yourself with and this caused problems with pregnancy. Men could not become pregnant. So at first it was held that it was not sex discrimination to dismiss a woman because she was pregnant, as there was no male equivalent with whom she could be compared. Then it was held that she could be compared with a man who was absent for an equivalent amount of time because of illness. So there was no discrimination when a sick man would have been dismissed for that reason. But the European Court of Justice rejected the comparison argument and held that it was sex discrimination to dismiss a woman because she was pregnant. It sounds so obvious, doesn’t it: only a woman can become pregnant so dismissing a woman because she is pregnant must be dismissing her because she is a woman.

The recognition that pregnancy required a different approach was perhaps the first dent in the assumption that everyone should be treated the same – the first hint of a need for a difference in treatment to level the playing field. Full recognition of this came with the Disability Discrimination Act 1996. Among

other things, this introduced a duty on employers and other providers to make reasonable adjustments to cater for people with disabilities. Once again, this did prove easy. Mr Paulley is a wheelchair user who planned to travel by bus from Wetherby to Leeds and then to catch a train to Stalybridge to have lunch with his parents. But he was unable to board the bus in Wetherby because the wheelchair space was occupied by a sleeping baby in a buggie which the mother refused to move. The bus driver did not insist so Mr Paulley could not board the bus and had to wait for the next one. He missed his train and was an hour late for lunch in Stalybridge. The Supreme Court held that the bus company should have done more to insist that the mother move the buggie and make the space available for Mr Paulley.

These may seem like examples of a sort of equity because they require pregnant women and people with disabilities to be treated differently – and perhaps more favourably – than others because they start from a position of disadvantage. But the aim is to give them the same opportunities as others – so equality of opportunity - rather than to produce an equality of outcome.

We now have a much longer list of protected characteristics - including gender reassignment, religion or belief, and sexual orientation. The law has been brought together in the Equality Act 2010. There are a few provisions in that Act which make tentative moves towards greater equality of outcome. There is the

'tie-breaker' provision which allows a recruiter to choose, as between equally qualified candidates, the one who comes from a relatively disadvantaged group. The Act also permits, not positive discrimination, but what I would call affirmative action – action to enable or encourage people who share a protected characteristic to overcome their disadvantage, or to meet their particular needs, or to encourage them to participate in an activity where their participation is disproportionately low. So there is nothing wrong with equality, diversity and inclusion initiatives which aim to do just that. And there is the public sector equality duty which requires public authorities to 'have due regard to' the need to eliminate discrimination and other conduct prohibited by the Act, to advance equality of opportunity between people who share a protected characteristic and those who don't, and to foster good relations between those who share a protected characteristic and those who don't. Note that once again the reference is to equality of opportunity and not to equality of outcome. Even so, there are politicians who want to scrap it.

And once discrimination is prohibited, so that you can no longer keep women, people from ethnic minorities, gays, etc out of the workplace, you have to begin to think about how you will treat then when there are there. That is where inclusion comes in. Women who enter a man's world should not be expected to leave their femininity behind and behave like a man. Gone, one hopes, are the

days when a woman judge appointed to sit full time at the Old Bailey could be told by the senior judge that she must 'fit in', or when a woman judge sitting in another large criminal court in the provinces could be told by the resident judge that he didn't think that any of the women who sat there could complain that they had not been treated like 'one of the boys'. If you want to get the best out of people you have to respect them for who they are.

There has been considerable progress in recruiting more women to the judiciary during this century. By 2025, we had risen to 44% of all judges, 39% of court judges, and 54% of tribunal judges, though only 30% of High Court judges and 23% of Court of Appeal Judges. And sadly only two of the twelve Supreme Court Justices are women. But this was up from 32% of courts judges and 47% of tribunal judges in 2020. Much less progress has been made in recruiting judges from ethnic minorities. In 2025, they were only 12% of all judges, 11% of court judges and 14% of tribunal judges. But more worryingly, while the proportion of judges of Asian and mixed race heritage has been going up over the last ten years, the proportion of judges of African or African-Caribbean heritage has not gone up at all – they remain just over one per cent of court judges and just under two per cent of tribunal judges. In 2025, 10% of judges had a disability, 8% of court judges and 15% of tribunal judges; but we can't compare this with five or

ten years ago because the figures for judges in post were ‘not collected in a sufficiently robust way’.

But whatever their fate elsewhere in the world, diversity and inclusion policies are alive and well in the judiciary of England and Wales. In 2020 it launched its first five-year Judicial Diversity and Inclusion Strategy. The aim of the strategy was ‘to increase the personal and professional diversity of the judiciary at all levels . . . by increasing the number of well qualified applicants for judicial appointment from diverse backgrounds and by supporting their inclusion, retention and progress in the judiciary’. By ‘personal and professional diversity’ they meant, not only the protected characteristics within the Equality Act 2010 but also ‘other differences such as socio-economic background, caring responsibilities and gender identity; and also professional diversity, such as individual career paths and jurisdictional backgrounds’. This last was a welcome recognition that employed and in-house lawyers are just as well – if not sometimes more – qualified to become judges as are those in self-employed practice as a barrister or solicitor. But perhaps the greatest concern is about socio-economic inequality. There has long been a far greater proportion of people from comparatively advantaged backgrounds, independent schools and elite universities, in the legal profession than in the general population and this looks set to get worse rather than get better. Qualifying as any sort of lawyer has

become more and more expensive in recent decades – and legal apprenticeships are disproportionately taken up by middle class candidates.

The 2020 strategy had four core objectives. The first was 'creating an environment in which there is greater responsibility for and reporting on progress in achieving diversity and inclusion' – in other words counting; the second was 'supporting and building a more inclusive and respectful culture and working environment' – we are now taking judicial well-being much more seriously than we used to do; the third was 'supporting and developing the career potential of existing judges', that is promoting movement between the different branches and ranks of the judiciary - this used not to happen and the tribunal judges still feel that their work is not sufficiently understood and valued by what they call the uniform branch; the fourth was 'supporting greater understanding of judicial roles and achieving greater diversity in the pool of applicants for judicial roles'.

In January this year, the Judiciary of England and Wales launched its Diversity and Inclusion Strategy for 2026 to 2030. They have kept the same definition of 'personal and professional diversity', so BACFI members can still feel included. This time there are three high level objectives: first, 'Every judicial office holder fosters an inclusive working environment where everyone is treated with dignity and respect'; second, 'The judiciary will promote greater diversity within the

applicant pool for judicial office including by engaging with under-represented groups'; third, 'The judiciary will support diversity through the development of the career potential of all salaried and fee-paid judges'. But within these are two focus areas of acute need requiring urgent attention: an increase in the percentage of black judges; and the provision of reasonable adjustments if required by disabled judges.

But why should we care about diversity and inclusion in the judiciary? If justice is blind, why should it matter who the judges are? Beverley McLachlin, for many years Chief Justice of Canada, gave four reasons why there should be more women in the judiciary, but the same applies to other dimensions of diversity too. Forgive me if you've heard all this before.

The first reason is democratic legitimacy. Our constitution is founded on the rule of law: the idea that society is governed by laws and not by the diktat of individual men and that everyone, the governors as well as the governed, is subject to the law. This means that the law must be there to serve every member of society, not just one section of it: the women as well as the men, the ethnic minorities as well as the majority, the gay as well as the straight, the poor as well as the rich, and so on and so on. Everyone must be able to feel confident that the law is there for them if they need it. Everyone must feel confident that they will get a fair hearing if they come before the courts. This means that our courts,

and the lawyers who serve their clients in and out of court, must be as reflective as possible of the society they serve.

The second reason is closely linked to that. The guiding principles of our law are justice, fairness and equality. Justice means getting the right result. Fairness means getting to it in the right way. And equality means treating everyone as equal before the law. Every human being is entitled to equal respect and to be treated as an end and not a means. Only the other day, I heard the former Archbishop of Canterbury, Rowan Williams, make an eloquent plea for what he called the ambitious claim that there are certain rights which everyone should have simply by virtue of being human. In one way or another, that notion of equality is reflected in all the modern human rights instruments and in many written Constitutions. It is also reflected in our domestic law. Sadly, there now appear to be politicians who don't accept that. But those values of justice, fairness and equality ought to be visibly embodied, not only in our laws, but also in the judges who administer them. The visible absence of people from under-represented groups means that they are not.

Third, and leading on from that, is equality of opportunity. This benefits, not only the individuals concerned, but also society, so that we don't waste the talents that are available to us. We are still wasting them. Women are noticeably falling out of (or with) self-employed practice as a barrister or a solicitor after between

15 and 20 years. They are noticeably less well-represented among the KCs and equity partners of law firms. Such attrition is found in other professions, but it is particularly noticeable in the law. People should feel free to put their family responsibilities before their own professional advancement if they want. But many want to do both and find this increasingly hard because of the way so much private practice is organised. Career expectations and trajectory are structured around the life of a person without demanding responsibilities outside work. All those able young people who go into the law should be enabled to stay in it, and not be forced out by the long hours culture in some parts of the profession. But if they do take a break from self-employed practice or, more commonly, step sideways into some other area of legal practice, such as the government legal service, local authorities, regulatory bodies or in-house counsel in commerce, finance or industry, they should not for that reason alone be regarded as less worthy of judicial appointment.

Those are all good reasons to fight for a more diverse judiciary. But might there be another one? Might not judicial decision-making be enhanced by greater diversity amongst its practitioners? The early senior women judges were sceptical about this. We are all servants of the law and true to our judicial oath 'to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will'. In most cases, as Mary Jean Coyne, of

the Supreme Court of Minnesota put it many years ago, 'A wise old woman and her wise old man reach the same conclusions.' But of course the law is not, or at least not always, neutral or clear-cut. Choices have to be made. As Beverley McLachlin has argued:

> ' . . . jurists are human beings, and, as such, are informed and influenced by their backgrounds, communities, and experiences. For cultural, biological, social and historic reasons, women do have different experiences than men.'

In short: 'We lead women's lives: we have no choice.' And the experience of leading those lives should be just as important in shaping and applying the law as is the experience of leading men's lives. The same is true of the other dimensions of diversity.

I can point to some decisions where my experience of leading a woman's life made a difference to my decisions: the recognition that violence is a wider concept than hitting or threatening to hit and covers many other forms of intimidation and coercion; the recognition that the interests of British children born and brought up here should be given great weight in decisions to deport their parents; the recognition that 'every male has a choice about where he puts his penis'. In all of these I managed to persuade my fellow judges to my point of view. There are others in which I failed.

I believe that these reasons – democratic legitimacy, visible diversity, equality of opportunity, and better decision-making - apply also to other areas of public life – to Parliament, to government, to the civil service, to public bodies of all sorts. And I believe that you cannot have diversity without inclusion. Rubbishing such policies is not only inconsistent with our laws against discrimination, it also looks suspiciously like returning us to a world run exclusively by straight white men. I have nothing against straight white men (indeed I married two of them) but they should not be the only ones in charge.