

**Stereotyping and unconscious racial bias: stumbling blocks for parties, witnesses and aspirant lawyers alike. How should the law and the profession respond?**

Discussion of unconscious racial bias – the risk that individuals possess and act upon racial prejudices that they might not be aware of – is becoming increasingly mainstream. The Lammy Review published in 2017 concluded that racial bias, both implicit and explicit, remains prevalent in the criminal justice system. Moreover this year Lord Reed, in his first interview as President of the Supreme Court, identified unconscious bias as the reason behind barrister Alexandra Wilson’s “totally unacceptable” treatment at the hands of Her Majesty’s Courts and Tribunals Service.

The problem, however, is that unconscious bias is by its very nature difficult to solve. The fact that individuals may not be aware of their own prejudices makes the drive for change a laborious process; the efficacy of unconscious bias training, a favourite of corporate employers and recommended in the 2020 Update: Tackling Racial Disparity in the Criminal Justice System report, is questionable.<sup>1</sup> At the same time the risk that unconscious bias poses to the integrity of the legal system should not be underestimated. The Lammy Review found that over 50% of BAME people believe that the criminal justice system discriminates against particular individuals and ethnic groups.

This essay will provide a broad framework for the legal sector beyond the educational initiatives that constitute the standard institutional response to implicit bias, to be achieved in two parts. First, proper processes must be implemented to raise individual awareness of unconscious bias. In addition to unconscious bias training the focus should be on improving transparency in the criminal and civil justice systems to ensure that decisions are properly scrutinised. Second, confidence in the judicial system and legal profession as a whole must be improved by ensuring the judiciary remains representative of the wider population.

Education alone is not enough to bring about the scale of change required. Instead, increasing the transparency of decision-making will motivate self-awareness by exposing judges and legal professionals alike to outside scrutiny. For instance in criminal litigation publicly available written

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<sup>1</sup> For instance see Equality and Human Rights Commission, *Unconscious Bias Training: An assessment of the evidence and effectiveness*, March 2018.

records of sentencing remarks could be provided, and parties to the litigation including the defendant, witnesses and jurors, could provide feedback on how they think each case has been handled by the legal professionals involved. This would provide multiple benefits. First, justices and lawyers would be encouraged to choose their words wisely with the knowledge that what they say can be reviewed after each hearing. Second, all parties involved would have a chance to comment directly on how the judges, and advocates if necessary, have dealt with others, offering an opportunity to improve communication. Third, this would provide greater confidence and trust in the criminal justice system by making the details of court proceedings publicly accessible, and help to break down the potential for “them and us” division between the legal professionals and lay clients. The added benefit to such an approach is that providing an opportunity to give feedback is equally applicable in both criminal and civil cases.

Transparency could also be improved by extending the recommendations put forward in the Lammy Review into the civil justice system. Most notably it was suggested that the CPS should take race-blind decisions whenever practicable, with identifying information redacted from case information passed by the police. In addition to enforcing this as a matter of policy for the CPS, a similar system could be set up in the civil system. When the identity of the parties is irrelevant, such as for interim applications with no oral evidence, litigants could be referred to simply as “individual X”. This would remove the opportunity for unconscious bias in some hearings entirely.

While the proposals set out above would mitigate against unconscious bias by provoking self-awareness, more diverse representation among the judiciary must be the first step towards permanently removing that bias altogether. The 2018 Race Disparity Audit found that only 6% of judges who declared their ethnicity were from non-white ethnic groups. Removing the “pale, male and stale” image will instil greater trust and confidence in the judicial system and encourage progressive decision making within the judiciary as a whole.

It is on this basis that an equivalent of the Rooney Rule – an American football policy that requires teams to interview ethnic-minority candidates for senior coaching roles – could be introduced into the Judicial Appointments Commission (JAC) selection process. This is a relatively easy step to apply; the JAC would have to ensure that at least one BAME candidate attends the “selection day” stage of the

existing process for each role. This would apply to both criminal and civil justices alike, and has potential application in law firms to ensure greater diversity among legal professionals. This simple change would have far-reaching consequences. Most importantly, mandating this selection approach would encourage BAME practitioners to apply for judicial roles. This will fast-track existing BAME talent into senior positions. For aspiring BAME lawyers, seeing broader ethnic representation in the higher echelons of the legal sector will encourage a greater number of applications at the junior end, having the positive effect of increasing diversity in the legal profession for the next generation. Finally, greater BAME representation on the judiciary will provide confidence that the law is being applied equitably. It is hoped that the issue of BAME not guilty pleas, which are disproportionately high, would thereby be disincentivised.

Working to remove unconscious bias from the legal system is not a panacea. Published reviews consistently note that there are a range of socio-economic factors that contribute to over-representation of BAME individuals in the criminal justice system. These necessarily fall beyond the scope of actions to be taken by the law and legal profession. However, identifying and acting upon unconscious bias is an important first step in restoring trust and confidence in the justice system. Publishing more reports can only go so far in achieving this. Identification of a problem is undoubtedly the prerequisite to solving that problem, but paperwork cannot instil real change. As such, the positive actions in relation to awareness and restoration of trust outlined in this essay must be followed.

Word Count: 999