



Bar Council Equality and Diversity Guides Subconscious Bias

This guide aims:

- To increase understanding of subconscious bias; and
- To suggest steps to reduce its impact on decisions affecting barristers' practices including the management of chambers, the assessment of pupils, recruitment and the allocation of work.

This guide is designed to complement guidance in the Fair Recruitment Guide and various equality and diversity training courses offered by the Bar Council. It may also be of assistance to clerks or other members of staff in chambers.

Language and Terms

Other names for 'subconscious bias' are unconscious bias, implicit association, motivated reasoning, implicit bias, hidden bias and stereotyping.

Implicit Association refers to mental associations that are so well established that they operate without awareness, intention or control.

A stereotype is an inaccurate belief about a person or group, which can reflect a societal or cultural 'shorthand'

Bias can be defined as the stereotypes or biases we all hold, more or less consciously about others. These may be biases 'for' as well as 'against' particular characteristics, behaviours or groups. These biases are rarely explicit or deliberately discriminatory but are hidden and triggered automatically. Implicit association, conscious and unconscious bias about people based on their age, gender, race, sexual orientation, religion or belief, disability and maternity or pregnancy status can influence decision making in chambers and may act as a barrier in securing pupillage, tenancy and work.

Discrimination resulting from such bias is unlawful¹ and barristers are specifically required in professional practice not to discriminate unlawfully².

¹ The Supreme Court and Court of Appeal have recognised that unlawful discrimination may be subconscious (e.g. Court of Appeal - London Borough of Ealing v Rihal [2004] EWCA Civ 623, per Keene LJ at para.38 and Sedley LJ at para.55; House of Lords - Shamoon v RUC [2003] ICR 337, per Lord Hope at para.55).

² Equality Act 2010 and BSB Code of Conduct (para. 305.1).

Subconscious bias may influence decisions in:

- Recruiting pupils, tenants and members of staff;
- Assessing pupils, junior tenants (e.g. giving references or giving feedback for career development purposes), members of staff (e.g. by giving references or staff appraisals);
- Decisions about allocating work, marketing of members, career development, the choice of juniors by seniors or leading counsel;
- Managing chambers and the choice of individuals for roles within chambers or externally;
- Providing legal representation to clients including direct access.

Examples of Sub-conscious Bias

Favouring:

- People who appear to be similar to ourselves. There is a tendency to rate people with similar characteristics to ourselves more highly than those who we believe to be dissimilar.
- More attractive people. There is a tendency to rate people that we regard as attractive more highly than those we find less attractive. We also tend to make less negative assumptions about attractive people.
- Those who we believe will 'fit in' or who we think will be suited to a particular role.

This can influence:

- The recruitment, promotion or decision to dismiss an individual
- Assessment of an individual against an agreed standard; and
- The allocation of particular types of work.

Scenario: Stereotyping

Leading counsel B in XYZ chambers has to recommend to solicitors a suitable junior counsel from XYZ chambers to be the junior on a large case leading to a lengthy trial. Junior barrister A has just returned from maternity leave. However, she is not recommended to the solicitors as a possible junior because it is assumed that she would not wish to or be able to take on such a large commitment so soon after returning to practice. The case would otherwise have been suitable for A and indeed the subject matter of the case was very similar to a case that A did shortly before her maternity leave. The decision not to recommend A was in part the result of good intentions on the part of B, as B did not want A to feel under any pressure to agree to take on the work if she did not want to.

The failure to recommend A is an example of a well-intentioned but unfair decision based on a stereotypical assumption. It might have been avoided, for example, by asking A or by

having in place an agreed plan with A about how such situations would be dealt with during maternity leave and after return to practice.

Scenario: Accents

Pupil J is a white female who is highly educated and whose accent and speech is suggestive of a private school education. Objectively, her intellectual ability as a lawyer is no better than the other pupils at XYZ chambers. However, her pupil master has an unconscious preference for privately educated people based on his own education and background. He also makes unconscious assumptions about the university education of J. Further, the pupil master's bias also includes a stereotypical belief about how good people like J are at conveying an air of confidence. Unwittingly, he rates J more highly than is a true reflection of her ability in terms of her intellectual ability and potential as an advocate.

The difficulty in this situation is that the pupil master's initial impression that he formed of J is very difficult to undo. The pupil master can't help but see her average work output as being of higher quality than it is and to overlook or minimise her errors. This is because of the tendency to pay attention to information that confirms an existing biased perception.

Possible solutions to the unfairness might include having a moderation process so that pupil master assessments are compared by reference to objective evidence that a pupil meets a particular performance standard. Another option might be to rotate the pupils between different pupil masters prior to any assessment.

Bias can be tackled through a range of activities, including training and support on the concept of unconscious bias.

Tip: Sub-conscious Bias Training

Unconscious bias training is growing in popularity, with bias 'testing' and 'overcoming bias' training adding to more traditional equality and diversity training.

Normally, training on unconscious bias should include:

- Information about common biases, stereotypes and myths
- Information about how these can limit and affect decisions
- Helping people to identify their own biases
- How to manage and minimise personal biases and the impact these have in recruitment, work allocation and more general interactions

Tackling Subconscious Bias

Subconscious bias is likely to have the greatest impact on decisions that are subjective or contain a significant subjective element. Tackle subconscious bias by:

1. Being aware of it. The first step to addressing bias is to acknowledge it. Confront prejudiced behaviour and belief, for example say 'I can't believe you just said that...'
2. Attending a diversity training course.
3. Formalising decision-making processes to make them more uniform.
4. Reading and apply the guidance in the Bar Council's Fair Recruitment Guide
5. Involving others in decision making. Moderation processes in interview or assessing staff or pupil candidates are accepted as good practice.
6. Making notes if there is likely to be a delay between gathering information and making a decision. The effect of subconscious bias may be greater in reconstructing events from memory.
7. Reframing questions. For example, with a disabled applicant ask "How will they do the job?" instead of asking "Can they do the job?"
8. Setting yourself goals e.g. "In assessing a female candidate, I am going to ignore the fact that she is a woman."

Tip

Consider taking an Implicit Association Test if you want to understand your own biases. You can do a test online at <https://implicit.harvard.edu/implicit/uk/>

For more information please see Bar Council's Fair Recruitment Guide (Chapter 2) <http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/equality-and-diversity-guidance/fair-recruitment-guide/>

Remember:

Everyone is biased. Bias is a normal part of the way that we process information and make decisions. It is pointless to label bias as being either good or bad. Having a subconscious bias doesn't always make a person racist or sexist.

The equality officers at the Bar Council can offer advice. Please contact:

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