

Doing diversity in the legal profession in England and Wales: why do disabled people continue to be *unexpected*?

DEBORAH FOSTER | NATASHA HIRST

Cardiff Business School, Cardiff University, Aberconway Building, Colum Drive, Cardiff, CF10 3EU, Wales

Correspondence

Deborah Foster, Cardiff Business School, Cardiff University, Aberconway Building, Colum Drive, Cardiff, CF10 3EU, Wales
Email: FosterD1@cardiff.ac.uk

Funding information

Disability Research on Independent Living and Learning

Abstract

A call for socio-legal scholars to interrogate the relationship between law, disablement, ableism, and justice was recently made in this journal. Using research co-produced with disabled people in the legal profession in England and Wales, this article responds by asking why, in a profession that has made a significant investment in widening access and diversity, do disabled people continue to be *unexpected*? The apparent absence of disabled people in the profession belies a complex reality. Identity concealment is widespread and maintained by genuine fears of career disadvantage. The effect of this is that disabled legal professionals are unable to access their legal rights to reasonable adjustments. Findings suggesting that status, success, and economic power offer little protection from ill treatment exposes the contradictory position that disabled people occupy in a profession that has increasingly favoured ‘business case’ over social justice diversity discourses.

This is an open access article under the terms of the [Creative Commons Attribution](https://creativecommons.org/licenses/by/4.0/) License, which permits use, distribution and reproduction in any medium, provided the original work is properly cited.

© 2022 The Authors. *Journal of Law and Society* published by John Wiley & Sons Ltd on behalf of Cardiff University (CU).

1 | INTRODUCTION

A recent article published in this journal by Lawson called for the strengthening of disability law as an academic discipline.¹ In so doing, it urged socio-legal scholars to interrogate the relationship between ‘law and disablement, to challenge ableism, and to take action to ensure that the law and justice systems are inclusive of disabled people.’² This contribution responds to that call by drawing on data from a unique study of the career experiences of disabled people in the legal profession in England and Wales. Co-produced with disabled legal professionals and their organizations, the research was funded by a consortium of United Kingdom (UK) disabled people’s organizations (DPOs). The findings provide detailed insights into disabled people’s work experiences in the legal profession and highlight barriers that need to be addressed if ableism is to be both understood and challenged to enable disabled people³ to fully participate in systems of justice.

The original aim of this research was to address a significant gap in the academic literature, which says little about the career experiences of disabled people in professional work generally. The legal profession was chosen as the site of investigation for three reasons. First, the number of widening diversity and inclusion initiatives in the UK legal sector has increased in recent years, but disabled people continue to remain (visibly) under-represented. Second, investigations of the legal sector provide an opportunity to evaluate whether employers and organizations charged with upholding the law acknowledge the responsibilities placed upon them by anti-discrimination legislation. Third, it might reasonably be assumed that a disabled person in the legal profession would be more likely to be aware of their rights under the UK Equality Act 2010 than the average disabled person.

Criticisms of enduring elitism in the legal profession offer one explanation for the contemporary proliferation of diversity initiatives in this sector. These criticisms have also fuelled government concerns that such perceptions might undermine public confidence in the fair operation of the law and have prompted initiatives aimed at increasing diverse representation in, for example, the judiciary.⁴ Proponents of social justice arguments for improving diversity argue that the under-representation of some groups has historic and systemic roots that require intervention, including

¹ Lawson argues that the terms ‘Disability Law’ and ‘Disability Legal Studies’ can in many ways be used interchangeably, though the former can denote an academic discipline, with the latter referring to the more fluid pool of scholarship in which it sits: A. Lawson, ‘Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?’ (2020) 47 *J. of Law and Society* 558.

² *Id.*, pp. 558–559.

³ The term ‘disabled people’ is used because it is the preferred terminology of the UK disability rights movement. This recognizes that people have ascribed impairments (whether physical, sensory, cognitive, or neurological) but that the oppression, exclusion, and discrimination that they experience is not an inevitable consequence of their impairment but of barriers in society. For detailed discussion, see *id.*, pp. 559–564.

⁴ An example of this can be found in the work of the group JUSTICE, an all-party law reform and human rights organization. It published a report in 2017, *Increasing Judicial Diversity*, that explored the structural barriers faced by women, those from Black, Asian, and minority ethnic (BAME) communities, and those from lower socio-economic backgrounds in reaching the bench: JUSTICE, *Increasing Judicial Diversity* (2017), at <<https://files.justice.org.uk/wp-content/uploads/2017/04/06170655/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>>. An update published in 2020 assessed progress and identified areas of remaining concern. The latter report, unlike its 2017 predecessor, made some limited reference to the under-representation of disabled people: JUSTICE, *Increasing Judicial Diversity: An Update* (2020) 53–58, at <<https://files.justice.org.uk/wp-content/uploads/2020/01/06170028/Judicial-Diversity-Update-Report.pdf>>.

positive action.⁵ By contrast, advocates of the ‘business case’ for diversity, or what is sometimes referred to as a ‘utilitarian approach’, emphasize the potential contemporary market advantages of widening diversity to encompass an increasingly broad customer base.⁶ While these approaches diverge in terms of *why* improving diversity is important and *how* this should be achieved, there is a consensus between them that diversifying representation in systems of justice and legal practice is a good thing. Another feature that they share is, we argue, their ‘forgetfulness’ when it comes to including disabled people in diversity initiatives aimed at addressing under-represented groups. This leads to the question posed in the title of this article: why do disabled people continue to be *unexpected* in the legal profession in England and Wales?

The neglect of disabled people in practitioner diversity discourses and initiatives is mirrored in academic studies of the legal profession. It is rare to find an interrogation of the effects of systemic ableism on professional careers beyond disability studies, which contrasts sharply with the volume of scholarship presenting longitudinal evidence of the impact of socio-economic background and gender. The legal profession has been comprehensively cited by the sociology of the professions as an example of a traditional occupation whose members have used socio-economic privileges and social closure practices to restrict access.⁷ The role of social capital and connections has been highlighted in such debates as particularly influential in determining career trajectories.⁸ Feminist researchers have exposed the gendered dimension of this privilege,⁹ however, despite growing interest in the impact of intersectional characteristics on careers, very little has been published on the professional careers of disabled people in the UK, and what does exist draws on small samples.¹⁰ Disability has, nonetheless, featured in scholarship on intersectional career disadvantages in the United States (US), which includes a study of female disabled attorneys and recent research into the experiences of disabled and lesbian, gay, bisexual, trans, and queer (LGBTQ+) legal professionals.¹¹ However, the absence of disabled people in UK labour market research on professional work, we suggest, stems from the low aspirational politics of

⁵ The concept of ‘substantive equality’ differs from ‘formal equality’ by recognizing that some groups experience past and ongoing discrimination and disadvantage. Importance is also placed on acknowledging difference. See E. Howard, ‘The European Year of Equal Opportunities for All – 2007: Is the EU Moving Away from a Formal Idea of Equality?’ (2008) 14 *European Law J.* 168; I. Bacik, ‘Combating Discrimination: The Affirmative Action Approach’ in *Developments in Discrimination Law in Ireland and Europe*, eds R. Byrne and W. Duncan (1997) 119.

⁶ H. van Dijk et al., ‘Reframing the Business Case for Diversity: A Values and Virtues Perspective’ (2012) 111 *J. of Business Ethics* 73; F. Tomlinson and C. Schwabenland, ‘Reconciling Competing Discourses of Diversity? The UK Non-Profit Sector between Social Justice and the Business Case’ (2010) 17 *Organization* 101.

⁷ F. Parkin, ‘Strategies of Social Closure in Class Formation’ in *The Social Analysis of Class Structure*, ed. F. Parkin (1974) 1.

⁸ S. Friedman and D. Laurison, *The Class Ceiling: Why It Pays to Be Privileged* (2019).

⁹ F. M. Kay and J. Hagan, ‘The Persistent Glass Ceiling: Gendered Inequalities in the Earnings of Lawyers’ (1995) 46 *Brit. J. of Sociology* 279; S. Bolton and D. Muzio, ‘The Paradoxical Processes of Feminization in the Professions: The Case of Established, Aspiring and Semi-Professions’ (2008) 22 *Work, Employment and Society* 281; E. Skordaki, ‘Glass Slippers and Glass Ceilings: Women in the Legal Profession’ (2010) 3 *International J. of the Legal Profession* 7; H. Sommerlad, ‘“A Pit to Put Women In”: Professionalism, Work Intensification, Sexualisation and Work–Life Balance in the Legal Profession in England and Wales’ (2016) 23 *International J. of the Legal Profession* 61.

¹⁰ For example, research has been conducted on the career experiences of disabled accountants and academics: A. Duff and J. Ferguson, ‘Disability and the Professional Accountant: Insights from Oral Histories’ (2011) 25 *Accounting, Auditing and Accountability J.* 71; J. Williams and S. Mavin, ‘Impairment Effects as a Career Boundary: A Case Study of Disabled Academics’ (2015) 40 *Studies in Higher Education* 123.

¹¹ C. G. Basas, ‘The New Boys: Women with Disabilities in the Legal Profession’ (2009) 25 *Berkeley Gender Law J.* 25; P. Blanck et al., ‘Diversity and Inclusion in the American Legal Profession: Workplace Accommodations for Lawyers

successive UK governments. This poverty of confidence in the potential labour market contributions of disabled people has driven a dominant social policy focus on getting disabled people into *any* form of work, rather than careers. By evidencing the presence of disabled people in professional legal careers, where they are assumed to be absent, this research, therefore, makes an important contribution to academic and policy debate in the UK and seeks to challenge limiting stereotypes.

Research on other marginalized groups in the legal profession originally measured their progress by reference to their increased numerical presence, though recently it has been acknowledged that presence alone is not necessarily a good indicator.¹² A greater number of women entered the profession in the 1970s, but the extent to which this represented progress in terms of equal opportunities has since been questioned. Increased entry coincided with a functional need to meet a higher demand for legal services. However, the impact on gendered horizontal and vertical occupational segregation has been disappointing, leading some to conclude that inequalities have become even more deeply embedded in the profession.¹³ Studies of professional socialization and culture show how professions can operate as ‘crucibles of identity formation’ and that diversity gains are often erased by strong pressures to conform.¹⁴ This suggests that improvements in access and representation alone are ineffective, if the professional practices, cultures, and structures that sustain privilege, segregation, and disadvantage remain.¹⁵ A complaint by ‘non-normative’ solicitors and paralegals that they have become part of a new technical proletariat, confined to increasingly routinized work, is one example of this.¹⁶ Evidence that the most prestigious and lucrative areas of legal practice continue to be dominated by elite groups is another.¹⁷ A full consideration of these debates is not the purpose of this article, and they have been given comprehensive attention elsewhere.¹⁸ A common theme of all such studies, however, is the corrosive effects of an exclusionary professional culture, which has played a significant role in sustaining

with Disabilities and Lawyers Who Identify as LGBTQ+’ (2020) 30 *J. of Occupational Rehabilitation* 537; P. Blanck et al., ‘Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+’ (2020) 20 *University of the District of Columbia Law Rev.* 23.

¹² K. L. Ashcraft et al., ‘Professionalization as a Branding Activity: Occupational Identity and the Dialectic of Inclusivity–Exclusivity’ (2012) 19 *Gender, Work and Organization* 467.

¹³ H. Sommerlad, ‘The New “Professionalism” in England and Wales: Talent, Diversity, and a Legal Precariat’ in *Diversity in Practice: Race, Gender, and Class in Legal and Professional Careers*, eds S. Headworth et al. (2016) 226.

¹⁴ C. Haywood and M. M. An Ghaill, ‘“A Man in the Making”: Sexual Masculinities within Changing Training Cultures’ (1997) *The Sociological Rev.* 576.

¹⁵ H. Sommerlad, ‘Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales’ (2002) 9 *International J. of the Legal Profession* 213; H. Rolfe and T. Anderson, ‘A Firm Choice: Law Firms’ Preferences in the Recruitment of Trainee Solicitors’ (2003) 10 *International J. of the Legal Profession* 315; H. Sommerlad, ‘Researching and Theorizing the Processes of Professional Identity Formation’ (2007) 34 *J. of Law and Society* 190.

¹⁶ C. Derber, ‘Managing Professionals: Ideological Proletarianization and Post-Industrial Labor’ (1983) 12 *Theory and Society* 309; Bolton and Muzio, op. cit., n. 9.

¹⁷ Friedman and Laurison, op. cit., n. 8.

¹⁸ These debates developed from studies that did not consider disabled people in any depth as a disadvantaged group in the profession. This article gives space to the hitherto under-reported experiences of disabled people. For a good discussion of the restructuring of corporate law and private practice and its impact on professionalism and diversity, see H. Sommerlad, ‘Minorities, Merit, and Misrecognition in the Globalized Profession’ (2012) 80 *Fordham Law Rev.* 2481.

what has been described as a ‘disjuncture between the legal profession’s discourse of meritocracy and accessibility’.¹⁹

Accessibility has wider connotations for disabled people, extending beyond professional boundaries. In this research, frequent references were made by participants to everyday barriers to accessibility, such as the built environment of many courtrooms, inadequate hearing loops, inflexible working practices, and ableist assumptions and attitudes. The right to request reasonable adjustments, first introduced into UK law by the Disability Discrimination Act (DDA) in 1995, was an attempt to address some of these. This act was significant in that it differed from previous UK anti-discrimination legislation by acknowledging that different and, if necessary, more favourable treatment was required to address disadvantage.²⁰ The concept of adjustments was, however, predicated on the assumption that employers and service providers would understand and recognize the ‘reasonableness’ of most requests – something that this research calls into question. Only when this is appreciated, it is argued, will the unique and complex disjuncture between the legal profession’s rhetoric of meritocracy, accessibility, and inclusion and the reality, as experienced specifically by disabled people, be understood.²¹

The interface between the intention and the operation of disability law is, according to Lawson, ‘located at the confluence of’ disability studies and socio-legal studies.²² A characteristic of disability studies from which this research project benefitted is its tradition of emancipatory and participatory research that has emphasized the importance of involving disabled people in the design, collection, and analysis of data so that their lived experiences can be captured, and outcomes reflect their priorities. The method of co-production that we use in this research developed out of the historic relationship between the disability rights movement and disability studies scholars in the UK and is reflected in the phrase ‘nothing about us without us’, a principle that shapes disability activism. As disabled researchers, we have also been influenced by a social model of disability, specifically the version developed in the UK by disabled people themselves.²³ This makes an important distinction between a person’s impairment and disability, the latter located in the physical and attitudinal barriers experienced by disabled people in society, rather than in the person.²⁴

Two key questions guide the organization of evidence presented and our analysis. The first shaped our original funding application: what career barriers do disabled people face as legal professionals in England and Wales, and what do these tell us about the profession? The second engages with Lawson’s previous contribution to this journal: what are the implications of findings from this research for disability law and disability legal studies? This article begins by detailing our research methods and the rationale for the parameters placed around data collection. The reasons why academics and groups representing disabled people (in this case, in the legal profession in

¹⁹ H. Sommerlad, ‘“What Are You Doing Here? You Should Be Working in a Hair Salon or Something”: Outsider Status and Professional Socialisation in the Solicitors’ Profession’ (2008) 2 *Web J. of Current Legal Issues*, at <<https://letr.org.uk/references/storage/QT64TQ6C/sommerlad2.html>>. See also Sommerlad, *op. cit.*, n. 13.

²⁰ S. Fredman, *Discrimination Law* (2002); L. Dickens, ‘The Road Is Long: Thirty Years of Equality Legislation in Britain’ (2007) 45 *Brit. J. of Industrial Relations* 463.

²¹ The DDA was the first domestic law to address disability discrimination in employment and the provision of services in the UK. It is also a decade since the UK ratified the UNCRPD; however, the UK is a dualist state and has not yet incorporated it into domestic law.

²² Lawson, *op. cit.*, n. 1, p. 560.

²³ The UK social model of disability was first proposed by Oliver: M. Oliver, *The Politics of Disablement* (1990).

²⁴ See n. 3.

England and Wales) adopted co-productive methods is then explained.²⁵ In Section 3, qualitative data about the experiences of disabled professionals is presented and discussed, and organized around a dominant theme that emerged: disability as a stigmatized identity in the legal profession. How this identity influenced research participants' decisions to disclose, their willingness and ability to access reasonable adjustments at different career stages, and their career trajectories is then explored. Section 4 turns to consider what these findings tell us about the profession. It does this by identifying dominant professional discourses frequently cited by interviewees as disadvantaging disabled people. These are organized around the themes of health and well-being (H&WB), resilience, merit, talent, and the 'business case' for diversity. The role of professional discourses in reinforcing disability as a stigmatized identity and implications for the profession and disability law are then discussed in the conclusion.

2 | METHODS AND DATA

2.1 | Rationale for research and research participants

The research was funded by a consortium of DPOs, which secured a grant from the National Lottery.²⁶ All applicants were asked to demonstrate how they would co-produce research findings and impact from partnerships with disabled people and their organizations and to show how it was envisaged that all participants would potentially benefit. A distinctive feature of co-produced research is close partnerships with users.²⁷ The main partner for this research project was the Lawyers with Disabilities Division (LDD) of the Law Society of England and Wales (the Law Society). The LDD is not a traditional DPO; these are characteristically independent organizations run *by* disabled people *for* disabled people. It has a paper membership of approximately 3,000 and is a 'division' of the Law Society.²⁸ It is one of the few organizations within a professional association dedicated to representing disabled members or those interested in disability issues. We also established a 'Research Reference Group' to facilitate the representation of disabled people from the wider profession, particularly the Bar. In England and Wales, no equivalent organization to the LDD exists for barristers.

The LDD is often approached for advice by its members. It had a sense of the common barriers experienced by disabled legal professionals but lacked any independent evidence or examples that might establish how generalizable these were. The absence of prior data lent itself to an exploratory qualitative inductive approach. Data collection began with a series of focus groups followed by individual interviews. A survey was later undertaken in response to requests for wider participation that would guarantee greater anonymity. Interviews were resource intensive, lasting on average between one and three hours. It should be noted that such was the fear that participants might be identifiable as a minority that some interviewees requested that information about

²⁵ A key principle of co-production in disability studies is that research and actions arising from it must involve the full participation of disabled people and reflect their interests and values.

²⁶ The consortium, called Disability Research on Independent Living and Learning (DRILL), comprised Disability Wales, Disability Rights UK, Inclusion Scotland, and Disability Action Northern Ireland.

²⁷ I. D. Graham et al., 'Exploring the Frontiers of Research Co-Production: The Integrated Knowledge Translation Research Network Concept Papers' (2019) 17 *Health Research Policy and Systems* 88.

²⁸ Other 'divisions' within the Law Society organize to represent women, BAME groups, LGBTQ+ people, and junior lawyers.

other protected characteristics, such as gender, race, or ethnicity, were not detailed in publications. Given this, and the availability of rich and insightful qualitative data, it was felt that an intersectional analysis was not possible.

The legal jurisdiction of England and Wales formed a natural boundary for the research. Disabled people represent a difficult-to-reach group; therefore, research participants were largely self-selecting based on meeting the participant criteria. These specified that they regarded themselves as disabled under the definition of the UK Equality Act; that they were a legal professional (a solicitor, a paralegal, or a barrister) or, to capture people who had left the profession, that they had been in legal work or training within the past five years. The focus was on careers, so disabled students in higher education were not included. We did discuss whether to concentrate on one occupational group and career, but it was thought that this might restrict the number of participants and that career pathways in the profession can change and it was important to capture whether being disabled had shaped these trajectories.

During the data collection phase, the research team (including the LDD) met with several stakeholders, including the diversity and inclusion teams at both regulatory bodies and professional associations (the Solicitors Regulation Authority (SRA), the Legal Services Board (LSB), the Bar Standards Board (BSB), Cilex, the Law Society, and the Bar Council). These personnel were identified as potential change agents by the LDD, and their role was seen as important in disseminating findings and operationalizing recommendations. It was, nonetheless, conveyed to stakeholders that funder requirements clearly specified that findings (rather than impact) were to be co-produced with disabled people.²⁹

2.2 | Research methods

Eight focus group discussions took place across England and Wales. A call for participants was publicized by the LDD, third-sector disability and legal organizations, professional associations, and regulators. Attendees included disabled barristers, solicitors, and paralegals (the majority practising). One London focus group was organized specifically for barristers and was attended by some former and current disabled judges. Debate was stimulated around the barriers and enabling factors that disabled people in the profession had experienced. Some focus groups were chaired by LDD members, and notes rather than recordings were taken to encourage more open conversations. It was impossible to ensure anonymity, and participants were asked to observe Chatham House Rules and made aware of this in advance when asked to sign a consent form.³⁰ Researchers and the LDD reviewed notes taken, from which themes were extracted that shaped the second data collection stage: individual interviews. Researchers provided initial guidance and suggestions to assist in the co-creation of a semi-structured interview schedule with members of the LDD and the Research Reference Group.

In total, 55 individual interviews were conducted using the semi-structured schedule as a guide, though the direction of discussions was often determined by interviewee experiences. The advantage of researchers not coming from a legal background was that it encouraged interviewees to

²⁹ Firms were not consulted during data gathering, though they can be regarded as change agents. They have, nonetheless, engaged with us during the dissemination and impact stages of the research project.

³⁰ Under Chatham House Rules, anyone who comes to a meeting is free to use information from the discussion but is asked not to reveal who made any specific comment. The Rules are designed to increase openness of discussion. Ethical approval was sought and granted by Cardiff University to undertake focus groups using this method.

explain and reflect on processes and behaviours that might be taken for granted by others in the profession. If new themes emerged during interviews, academics sought further clarification through the LDD and the Research Reference Group and discussed their relevance. For ethical reasons, interviews were undertaken by academics. Participants were recruited through adverts and by snowballing methods, as word spread about the research project.³¹ Interviews were conducted by phone, online, or face to face; this facilitated engagement over a wider geographical area while accommodating impairments and fitting around work and family schedules. Interviewees were articulate and the data was rich and detailed. It was common for participants to comment that this was the first time that they had spoken to anyone about being disabled in the context of their career, and some reported that the experience was therapeutic. Interviews were anonymized and professionally transcribed, then thematically analysed. Open-ended interviews are advantageous where limited prior research exists; they are also labour intensive and consequently tend to elicit smaller sample sizes.

Demand to participate in the research increased rather than decreased as the project progressed. A saturation point was reached when researchers found similar themes in terms of experiences continually emerging, though factors such as impairment type and duration, employer, employment type and status, training context, and size of organization provided contextual variations. The utilization of co-productive methods created a valuable feedback loop between academics, the LDD, and legal professionals. The longevity of the project also helped to establish the close relationships essential for genuine co-creation. Once interview data was analysed and findings began to appear in the legal press, further interest was generated. Consequently, a decision was made to design two surveys: one for disabled paralegals and solicitors, the other for barristers. In total, 288 completed survey responses received, of which 241 were from solicitors or paralegals and 47 were from barristers. As this is a foundational article, limitations of space place restrictions on the presentation of all data; as such, reference is made primarily to qualitative evidence because, in our view, this best conveys the lived experiences of disabled people in the profession in what is an under-researched area. Where survey findings substantiate or enhance understanding of qualitative findings or other sources, however, this is noted.³²

The research project began in late 2017 and was intended to last for two years but is still ongoing in 2022 in terms of co-creating dissemination activities, though academics play a substantially reduced role, which was always the original intention. Additional funds were secured from an impact grant that facilitated a continuation of work predominantly with the LDD and the Law Society's Diversity and Inclusion team.³³ Lockdown provided opportunities to address a wider audience through online roundtable debates, joint research-based guidance for the profession, and further research on the experiences of disabled people in the profession during COVID-19.³⁴

³¹ The organizations Lawcare and City Disabilities helped to distribute details of the project.

³² The published report of research findings based on qualitative and quantitative data was launched at a conference held at the British Academy in January 2020: D. Foster and N. Hirst, *Legally Disabled? The Career Experiences of Disabled People Working in the Legal Profession* (2020), at <<http://legallydisabled.com/research-reports/>>.

³³ A UK Economic and Social Research Council (ESRC) impact grant was secured from Cardiff University.

³⁴ Our positive relationship with the Law Society's Diversity and Inclusion team has been particularly important in disseminating research findings. The Law Society, the LDD, and academics have produced jointly published outputs as a consequence of the original research. These include a survey of disabled solicitors conducted during the lockdown period of the pandemic; two 'easy wins' documents, one for smaller and one for larger organizations, which were requested by participants in the roundtable discussions; and guidance on best practice around reasonable adjustments: D. Foster and N. Hirst, *The Impact of COVID-19 on the Employment and Training of Disabled*

3 | EXPERIENCES OF DISABILITY AS A STIGMATIZED IDENTITY IN THE LEGAL PROFESSION

3.1 | Perceptions of disabled people within the legal profession

Historically, the law's concern with the 'welfare' or 'protection' of disabled people has sometimes erroneously arisen from misconceived and ableist assumptions about diminished capabilities or quality of life.³⁵ It has been argued that paternalism 'enables the dominant elements of society to express profound and sincere sympathy for the members of a minority group while, at the same time, keeping them in a position of social and economic subordination'.³⁶ However, the influence of the Independent Living Movement, the social model of disability supported by UK DPOs, and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) has increasingly challenged medical and individualized models of disability in aspects of social and legal policy.³⁷

In the course of investigations in the legal sector, we encountered what disability studies scholars refer to as outdated 'personal tragedy' attitudes towards disabled people.³⁸ We found a manifestation of this in employment relationships, which we conceptualize as a form of 'misplaced paternalism'.³⁹ Such behaviour was evident where (often senior) non-disabled people reacted in ways that they might have 'justified' as 'helpful', but that had the opposite effect, often with detrimental career or personal consequences. Allocating less challenging or less prestigious work to a disabled person with no prior consultation, based on unfounded assumptions about abilities, preferences, or ambitions, is a common example and has the consequence of limiting promotion opportunities.

The different experiences of two interviewees provide further illustrations of misplaced paternalism. The first negotiated what initially appeared to be a positive return-to-work rehabilitation plan following a major spinal cord injury. This consisted of a graded return to work with

Lawyers in England and Wales: Opportunities for Job-Redesign and Best Practice (2020), at <<http://legallydisabled.com/wp-content/uploads/2020/11/Covid-report-TLS-Oct-2020-FINAL.pdf>>; D. Foster et al., *Easy Wins and Action Points for Disability Inclusion in Smaller Organizations* (2021), at <<https://www.lawsociety.org.uk/topics/lawyers-with-disabilities/easy-wins-and-action-points-for-disability-inclusion>>; D. Foster et al., *Easy Wins and Action Points for Disability Inclusion in Larger Organizations* (2021), at <<https://www.lawsociety.org.uk/topics/lawyers-with-disabilities/easy-wins-and-action-points-for-disability-inclusion>>; The Law Society, *Reasonable Adjustments in Organisations: Guidance for Best Practice* (2021), at <<https://www.lawsociety.org.uk/topics/lawyers-with-disabilities/reasonable-adjustments-in-organisations-best-practice-for-disability-inclusion>>.

³⁵ Oliver argues that social care law in England and Wales, particularly the National Assistance Act 1948, which continued in existence until it was supplanted in 2014, reinforced ideas of helplessness and dependency: M. Oliver, 'Disability and Dependency: A Creation of Industrial Societies?' in *Disability and Dependency*, ed. L. Barton (1989) 6. Additionally, Tarrant's analysis of recent failures to reform social care law in Wales demonstrates the endurance of narratives of dependency in the Social Services in Wales Well-Being Act 2014: A. Tarrant, 'When Resistance Meets Law and Policy: Disabled People and the Independent Living Counter-Narrative in Wales' (2019) PhD thesis, Cardiff University.

³⁶ H. Hahn, 'Public Support for Rehabilitation Programmes: The Analysis of US Disability Policy' (1986) 1 *Disability, Handicap & Society* 130.

³⁷ The influence of the disability rights movement and disability studies in academia on disability legal studies is well explained by Lawson: Lawson, op cit., n. 1, pp. 559–564.

³⁸ Oliver argues that a personal tragedy theory of disability is underpinned by medicalized and individualized conceptions of disability and casts disabled people as passive victims of circumstance rather than as active agents: Oliver, op. cit., n. 23.

³⁹ We first used the term 'misplaced paternalism' in the *Legally Disabled?* report: Foster and Hirst, op. cit., n. 32.

reduced responsibilities, which would gradually be increased over time. However, the interviewee described how, despite numerous requests, workload and responsibilities remained static and low, a situation that increasingly led to marginalization and an erosion of confidence. The resulting negative impact on mental health eventually led to a negotiated exit from the firm, accompanied by a generous financial settlement, which had not been sought. While helping to facilitate what became a successful career in self-employment, the long-term psychological impact of this experience has, nonetheless, had an enduring negative impact.

A contrasting example of misplaced paternalism is provided by a second interviewee who had ‘successfully’ concealed a congenital sight impairment during a career in private practice because of fears of discrimination. A move to the public sector was initially viewed as an opportunity to disclose and benefit from reasonable adjustments. However, this interviewee went on to describe unwanted consequences of a different nature:

[S]uddenly you were the go-to disability person, or, you know, ‘Could you just have a look at this massive process?’ ... and I just felt like I was being outed as a disabled person all the time. I found it really difficult ... and, because they were being so nice and friendly about it, I felt like I was drowning in smiles ... and I just ... I couldn’t get on with ... my day job, partly because I was still sorting out reasonable adjustments.

In research conversations with commercial firms, stereotypes of disabled people were frequent. Therefore, despite us introducing ourselves as disabled researchers interested in capturing and understanding disabled people’s work experiences within the legal profession, discussions were frequently reframed to highlight the organization’s involvement in charitable activities with disabled people. Presented as part of a ‘corporate social responsibility’ portfolio, or what Galbraith famously described as attempts by big business to portray an image of a ‘soulful corporation’, the message was a negative one.⁴⁰ Some disabled research participants referenced such behaviour as ‘vulgar public relations exercises’ that served to reinforce stereotypes of disabled people as recipients of charity. Even in a small number of firms where human resources (HR) and senior personnel appeared to value disabled legal professionals, it was common for language to be inherently negative and patronizing. Furthermore, few firms appeared to understand the important distinction between charities (acting on behalf of disabled people) and DPOs run *by* and *for* disabled people.

Findings also highlighted areas of legal practice – personal injury (PI) and medical negligence – where disabled legal professionals were actively used to market services. Some of our most senior interviewees, all with visible impairments, worked in these areas and believed that their identity and lived experiences positively contributed to their professional success. Many also shared a similar ‘backstory’: having been attracted to areas of practice because of personal experiences of litigation in childhood. We asked how they felt when their firms drew attention to them being disabled on their websites, and one interviewee’s response was typical. Her firm had told her that being a wheelchair user gave her a ‘unique selling point’, to which she added: ‘I’m completely fine about it, although I think my employers will probably cringe if I say it like this: “We use it as a marketing tool ...”’

⁴⁰ The term ‘soulful corporation’ was used by Galbraith to describe changes in US capitalism from the 1960s and is employed more cynically as the precursor to corporate social responsibility, which is seen as a more positive descriptor of corporate community activities: J. K. Galbraith, *The New Industrial Estate* (1968); J. K. Galbraith, ‘The Emerging Public Corporation’ (1972) 1 *Business and Society Rev.* 54.

Embodiment in marketing is nothing new, but it is less common in relation to disabled people, and elicited different responses from other disabled research participants in different practice areas. Some saw it as demeaning and exploitative; others raised concerns that disabled people would be stereotypically associated with some areas of law and excluded from others, resulting in occupational segregation or a form of crude objectification undermining professional worth and skills. One interviewee, for example, referred to instances where he believed City law firms exploited young disabled people for their own self-interest:

I've seen the most ... revolting instances of young people just trying to find their feet, just trying to see what they stand for, who they are. They're taken on by an employer and they're encouraged to write articles about how good their employers are about their disabilities ... The subtext is, because they were given a job ... They see themselves as disabled, they are seen as disabled, and no one ever says 'Let this poor sod get on with the job. Stop making a bloody issue of it. Just let him get on with his job. We've all got stuff to do, and we've all got difficulties – stop making such a bloody great thing of his.'

It is of interest to note that participants who reported being used positively in marketing were largely self-confident. They also recounted positive conversations that had taken place in their workplace about their impairment, working arrangements, and promotion opportunities. As a sub-group, their relative seniority was significant; many, having achieved the status of partner, were in positions to influence inclusion practices. However, as we discuss further below, to draw the conclusion from this that there is a positive correlation between seniority and the successful negotiation of reasonable adjustments would be incorrect. One disabled PI partner was keen to stress that to assume disabled people in his field had not worked hard to achieve their position would also be inaccurate:

Once you get into the kind of corporate, er, area ... even, I would suggest, in the PI clinical negligence, those skills are secondary. I think ... all of my employers have looked at me and gone 'Can he do the job? Does he understand law? Can he bill ... If we're going to pay him 50 grand a year, is he going to bill 150 grand a year? Is he going to bill ... treble his salary to justify him being here?'

3.2 | Self-identifying as disabled and negotiating reasonable adjustments at different career stages

The positive experiences found among PI and medical negligence professionals suggest that where disability has a functional role, it can be viewed as a business asset. This, nonetheless, appears to rest in part on the unproven stereotypical assumption that all disabled people possess a natural empathy with other disabled people. It might also imply that in circumstances where no obvious 'business case' exists, disabled people will not occupy senior positions. Since our interviewees included successful senior disabled people practising in other areas of law, where no apparent advantage could be attributed to being disabled, we found this not to be the case. However, it was common in the narratives of these senior participants that they were concerned to minimize attention on their impairment. This ranged from concealment or anger that they felt that it was focused upon in their work environment. This group all referred to 'other people's attitudes' –

those of colleagues, clients, and co-workers – as the biggest barrier that they encountered. Their eventual career outcomes, nonetheless, varied and fell into two distinct categories.⁴¹ The first group of ‘requesters’ knew what reasonable adjustments would help to address their disadvantage but found that their requests were either refused, misunderstood, or only partially implemented. The second, despite their seniority, either feared requesting a reasonable adjustment at all, or if they eventually did, the request was inadequate or long overdue.⁴² This latter group attributed their reluctance to the dominant professional discourse that they perceived saw disability and success as incompatible. When asked in interviews if they could think of an adjustment that would have allowed them to continue in their role, they rarely could, until one was suggested at the end of the interview. Characteristically, they also saw their impairment, rather than the inflexibility of role expectations, to be the ‘problem’, which led to instances of ‘self-exclusion’, demotion, and voluntary exit.

An interviewee with experience as an equity partner in several prestigious City firms fell into the first category. He detailed the frustration and humiliation experienced at having requests for adjustments questioned and obstructed, and explained how attempts to resolve the situation ultimately involved him threatening to personally fund a personal assistant (PA),⁴³ at which point the firm relented, but only to ‘save face’. Reflecting on this ‘watershed’ moment, he said:

[T]o me, that episode, I think, encapsulates many of the difficulties that a disabled lawyer faces. First, because their disability is seen as their salient feature, everything that’s happening is attributed to their disability ... It’s not that you’re a [X] lawyer who needs to do his job, it’s your disability.

Shocking incidences of being undermined and ridiculed by junior staff because he is disabled were also recounted and contributed to his decision to exit the organization. This option was possible because of an excellent reputation and a proven fee-earning capacity, but one that the interviewee felt forced into taking. This example demonstrates that a clear ‘business case’ for making reasonable adjustments is not a reliable indicator of a successful outcome. In addition, it suggests that the usual signifiers of power, such as status and success, do not protect disabled people from ill treatment and discrimination.

‘Other people’s attitudes’ were also problematic for the second group, though their outcomes were even less positive, as illustrated by the experiences of two interviewees. The first, a partner, decided ten years after promotion to officially disclose a hearing impairment after networking in groups became increasingly difficult and following a negative disclosure incident with a client:

[T]hat was a really negative experience and a very low point, where, you know ... I definitely felt ... that client was held against me. And I think from that point on, confidence was lost forever, that I could disclose something like this ... to a major

⁴¹ We have no data on the distribution of disabled clients in different legal sectors. However, the Solicitors Regulation Authority have produced some research on disabled consumers: Solicitors Regulation Authority, ‘Recognising Needs Early Is Key for Firms Helping Disabled Consumers’ *Solicitors Regulation Authority*, 14 October 2019, at <<https://www.sra.org.uk/sra/news/press/2019-press-release-archive/reasonable-adjustments-research/>>.

⁴² Concealment behaviour of this kind is also often referred to as ‘covering’.

⁴³ In this context, a PA is not a secretary but someone who supports a disabled person. This interviewee is Deaf and does not lip read or use sign language.

corporate client and still, you know ... not have that held as a sort of negative ... against me.

Using HR to officially record his impairment, he encountered pressure to step down from the partnership role, which was the eventual outcome. Provided with an opportunity to reflect on this decision, however, he reasoned that there was nothing inevitable about this outcome:

There was always that sense of as soon as I said I'm struggling, that was it. I don't think it was inevitable that we'd end up where we did. And I think in different circumstances, working with different people, and perhaps, you know, with ten years down the line now and there's no doubt about, you know, the workplace is changing ... and diversity and inclusiveness and things like that, they're much more on the agenda than they were.

The second example relates to a recently retired long-standing equity partner in a medium-sized regional law firm. This interviewee admitted that he had successfully adapted his work to accommodate a progressive deterioration in his vision; nonetheless, when his ability to drive became affected, he reasoned that his ability to network was limited, which he described as 'unfair' on his colleagues: 'It would be difficult to justify maintaining my position as a senior equity partner when I wasn't realistically able to make the contributions to the practice that the role would have required really.' Interestingly, he said that he had at no time requested an adjustment to his role or considered employing a driver, rather than take early retirement. However, when at the end of the interview this was suggested, he acknowledged that this easy adjustment would have enabled him to continue and make a significant contribution, and he could have been a valuable role model and mentor to other disabled people. The loss of experienced disabled people from the profession is of concern. The visible presence of disabled people in senior roles was frequently cited as important by interviewees because it helps to challenge perceptions that successful disabled people are 'unusual'. For example, one interviewee, referring to a high-profile disabled person in the profession, said: 'I think people like that they are, sort of, unbelievably driven, much more than the average person is ... I'd say [X], he's ... I just call him exceptional and an exception.'

Disclosure was also a concern of early-career interviewees who participated in this research, many of whom actively hid their identity in their professional capacity.⁴⁴ Some attributed this to past negative experiences of requesting reasonable adjustments. Others were adamant that a strong 'disability penalty' operated in the profession.⁴⁵ One interviewee outlined a common dilemma:

I didn't think they'd hire me if I told them [I was disabled], which was probably right ... I waited until they offered me the job and then I told them because ... I've heard other lawyers say that as well, that you need to get as far down that recruitment

⁴⁴ We highlight disabled people with non-visible impairments because they can 'choose' not to disclose, an option not available to those with visible impairments.

⁴⁵ There is limited literature on flexible working attracting a disability penalty. However, a 'flexibility penalty' is widely recognized in studies of gender and flexible working arrangements; see for example M. Blair-Loy, *Competing Devotions: Career and Family among Women Executives* (2003); E. Cech and M. Blair-Loy, 'Consequences of Flexibility Stigma among Academic Scientists and Engineers' (2014) 41 *Work and Occupations* 86; J. A. Kmec et al., 'Not Ideal: The Association between Working Anything but Full Time and Perceived Unfair Treatment' (2014) 41 *Work and Occupations* 63.

process as possible before telling them because then they're a bit more ... they want you by then.

A pupil barrister with experience of epileptic seizures recounted the fear associated with being 'exposed' or stigmatized as a disabled person in the early stages of a career:

I would be up all night before ... the day before [appearing in court] just petrified that I would have a seizure and that someone would know and see it in me that I wasn't well enough to be a barrister, which was what I was hiding ... I got stuck in the toilets of the court once and couldn't get out and was too scared because the person who was looking after me was the one who told me she'd never been sick in her life.

The competitive professional legal environment and perceptions that legal traditions and culture are inflexible and penalize 'non-normative' candidates were frequently cited as reasons for adopting concealment strategies. Thus, while different treatment to achieve equal treatment may be the intention of the UK Equality Act, interviewees in the legal profession suggested that realizing this objective is the exception rather than the rule:

I definitely feel like ... the liquidity of my personal labour fell 1,000 per cent the day I was diagnosed, so, for instance, it takes international basically off the table. A – because of a lot of the countries where I could potentially work overseas – basically Commonwealth – have very restrictive immigration rules for people who are essentially going to cost the state what I cost the state, and so that's off the table, and it's just internally that's what I'd have to think really hard about moving somewhere else because you just don't know what you'll be facing.

Numerous examples of minor and inexpensive adjustments being refused arose during this research. However, it was taken for granted that disabled legal professionals would be judged by criteria that were not adjusted. It was common, therefore, that disabled interviewees perceived that they had been set up to fail:

Because of the fatigue associated with the MS [multiple sclerosis], [I asked] that where possible my work be given to me within the core working hours. It was kind of common practice within the team for work to be assigned post ... 5 pm and then deadlines to be set for ... the next morning, which ... meant that you had to really work ... late into the evening ... and then very early in the morning to get the work completed. That was difficult for me ... [T]he way that they chose to run their team ... led to a great deal of stress on my part as well because I wasn't able to perform to the level that I was capable of and wanted to be able to perform to, which in turn then made me very frustrated, both with myself and with the situation, which led to, you know, what I consider to have been a fairly steep decline in my physical and my mental health.

The level of concealment by disabled people within an occupational group might be viewed as a good indicator of the level of perceived or anticipated discrimination and, therefore, as a rational response. Our surveys of disabled barristers and solicitors/paralegals, which elicited 288 responses in England and Wales, also found that more than half in each survey group concealed

their identity as a disabled person in *anonymous* workplace equality surveys. Of these, 90 per cent were able to do this because they had non-visible impairments. Leaving aside concerns about the absence of disabled people with visible impairments in the profession that this signifies, interview data also revealed that disabled people with visible impairments often did not declare a non-visible impairment such as fatigue or pain for fear that it was a ‘step too far’.⁴⁶

Current estimates of the number of disabled people in the legal profession in England and Wales are almost certainly underestimates. The most recent statistics collected by the Law Society date to 2019.⁴⁷ They record how 20,826 (16 per cent) of solicitors self-identified as having a ‘long-term health condition or mental illness’ in their survey. When they were asked if they were disabled under the definition used by the UK Equality Act – having an impairment that has a ‘substantial, long-term effect, lasting or expecting to last twelve months or more’ – this fell to 11,393 (9 per cent) of members. Furthermore, of those classified as disabled under the UK Equality Act’s definition, only 14 per cent said that they were currently working.⁴⁸ If we contrast this with data collected by the SRA in 2019,⁴⁹ based on those working in private practice, which is data sourced from employers and does not therefore guarantee the same amount of confidentiality and anonymity, only 3 per cent of solicitors and partners reported being disabled. Accurate data about the number of disabled people in the legal profession is needed. However, as previously argued, just knowing the numerical presence of disabled people in the profession is not enough. This research indicates that data is also needed on the number of disabled people who prematurely retire, accept demotion, sign non-disclosure agreements, leave the profession for other employment, or remain but transfer from salaried to self-employment, and why.

This section has examined the actual and perceived disadvantages of being identified as disabled on the careers of research participants from the legal profession. In the next section, the ways in which dominant professional discourses conflict or interact with disability as an identity, and as a source of disadvantage, are examined in greater depth.

4 | THE INTERACTION OF DISABILITY WITH DOMINANT PROFESSIONAL DISCOURSES IN THE LEGAL SECTOR

4.1 | Professional discourses of health and well-being and the ‘problem’ of disability

Interactions with larger legal firms with a professional HR presence revealed a reluctance to discuss disability, with a preference instead for discussing generic H&WB organizational initiatives. The contemporary development of workplace ‘well-being’ programmes in competitive organizational environments is interesting.⁵⁰ Their adoption in the legal sector might also be viewed as a response to reputational risks associated with media reports of alcohol, drug abuse, and suicide

⁴⁶ This included respondents who indicated they had both a visible and a non-visible impairment.

⁴⁷ Official data obtained from the Law Society’s Diversity and Inclusion team.

⁴⁸ The Law Society, *PC Holder Survey 2019* (2020), at <<https://www.lawsociety.org.uk/en/topics/research/pc-holder-survey-2019>>.

⁴⁹ See the SRA’s toolkit: Solicitors Regulation Authority, ‘Law Firm Diversity Data Tool’ *Solicitors Regulation Authority*, at <<https://www.sra.org.uk/solicitors/resources/diversity-toolkit/law-firm-diversity-tool/>>.

⁵⁰ D. Foster, ‘The Health and Well-Being at Work Agenda: Good News for (Disabled) Workers or Just a Capital Idea?’ (2018) 32 *Work, Employment and Society* 186.

in the profession.⁵¹ To our knowledge, there has been no research into the incidence of self-harm specifically among disabled legal professionals, though a correlation between disability and poor mental health is generally accepted.⁵² Where organizations did specifically refer to disability, they had a tendency to focus on specific non-visible impairments, particularly neurodiversity and mental ill health (where the latter was occupationally related).

In relation to neurodiversity, firms were keen to provide examples of legal professionals demonstrating specific competences in aspects of their work. The subtext was that if an impairment led to someone performing an element of their job *better* than a ‘standard’ or ‘ideal’ employee,⁵³ a ‘business case’ for diversity was possible. Mental ill health was also spoken about in relation to corporate well-being, but presented as distinct from disability and often characterized as a transient occupational ‘hazard’. The effect was to ‘normalize’ poor mental health as the ‘inevitable’ consequence of success that ‘well-being’ programmes could remedy by drawing heavily on notions of individual resilience.⁵⁴

Individualistic well-being discourses are a good ‘fit’ in a sector that values competition and individualized ‘merit’. H&WB initiatives also function as a mechanism to shift responsibility for resolving mental distress onto the employee and away from the employer, by emphasizing techniques that claim to help individuals to triumph over personal adversity. Such individualization (perhaps unintentionally) also serves to camouflage the institutional and legal reasonable adjustment route. As such, disabled research participants, when referring to the increased incidence of H&WB initiatives in the sector, often admitted feeling uncomfortable with them. We suggest that, as well as reinforcing an undefined concept of ‘good health’, this agenda operates in a way that contradicts and undermines what is needed: a universalistic and proactive approach to the implementation of reasonable adjustments to facilitate the inclusion of disabled people in legal workplaces.⁵⁵

4.2 | Disability and the construction of professional merit and talent

While H&WB discourses might suggest that the ‘ideal’ legal professional is non-disabled, the concept of merit is often held up as an objective measure of ability. Well-trodden academic arguments

⁵¹ Bar Council, *Wellbeing at the Bar* (2015), at <<https://www.barcouncil.org.uk/resource/wellbeing-at-the-bar-report.html>>.

⁵² Mental Health Foundation, ‘Physical Health Conditions: Statistics’ *Mental Health Foundation*, at <<https://www.mentalhealth.org.uk/statistics/mental-health-statistics-physical-health-conditions>>; R. A. Cree et al., ‘Frequent Mental Distress among Adults by Disability Status, Disability Type, and Selected Characteristics – United States 2018’ (2020) 69 *Morbidity and Mortality Weekly Report* 1238, at <<https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a2.htm#suggestedcitation>>.

⁵³ J. Ackers, ‘Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations’ (1990) 4 *Gender & Society* 139; D. Foster and V. Wass, ‘Disability in the Labour Market: An Exploration of Concepts of the Ideal Worker and Organisational Fit that Disadvantage Employees with Impairments’ (2013) 47 *Sociology* 705; A. R. Davies and B. Frink, ‘The Origins of the Ideal Worker: The Separation of Work and Home in the United States from the Market Revolution to 1950’ (2014) 15 *Work and Occupations* 18.

⁵⁴ For further discussion of the impact of neoliberalism on the legal profession, see H. Sommerlad, ‘The Commercialisation of Law and the Enterprising Legal Practitioner: Continuity and Change’ (2011) 18 *International J. of the Legal Profession* 1; H. Sommerlad et al. (eds), *The Futures of Legal Education and the Legal Profession* (2015); D. Muzio et al., ‘Professions and Institutional Change’ (2013) 50 *J. of Management Studies* 699.

⁵⁵ Foster, *op. cit.*, n. 50.

have challenged the way in which merit has been used by elites in the legal sector and have increasingly questioned seemingly ‘neutral’ and ‘objective’ criteria.⁵⁶ Some have argued that merit is such a poor indicator of success in the profession that it has become a ‘sham’, its prime function being to justify inequalities.⁵⁷ With evidence suggesting that social background, self-presentation, and cultural fit are much more influential determinants of success, some argue that the more subjective discourse of ‘talent’ has replaced merit.⁵⁸ ‘Talent’, which is difficult to define, can be problematic for all ‘non-normative’ candidates, but for disabled people, when measures draw on the performance of pre-established groups, it is particularly so.⁵⁹ ‘Talent’ is also often conflated with ‘potential’, based on a long-term projection of a candidate’s ability, which, if assumptions are made that an impairment might decline over time, will also serve to disadvantage. If ‘talent’ is determined by reference to behavioural and presentational norms, moreover, it is likely that some disabled candidates will be unable to meet these. There is insufficient evidence from this research to accurately analyse the relative disadvantages attributable to social capital influenced by socio-economic background and disability. Access to financial resources will, however, be beneficial if equipment and personal assistance are required to facilitate independent living and working.

Some have identified recruitment to certain areas of legal practice (most notably, corporate law), the geographical location of a firm (for example, the City of London), and an increased globalization of the legal sector as factors that have sustained social and cultural elites.⁶⁰ Casting doubt on the legal profession’s ability to challenge embedded privilege, moreover, one commentator also refers to a contemporary ‘re-florescence of aristocratic ideas of merit and archaic status signifiers, re-packaged as commodities’.⁶¹ Few participants in this research had built their careers in large international City firms, but among those who had, image, including gendered and ableist bodily and behavioural characteristics, was viewed as important:

[F]rom my experience in it, anyway ... it’s very sort of testosterone and winner-takes-it-all, and very competitive ... and therefore, um, it means that the kind of soft skills and collaboration, and perhaps the quieter voices, and the diversity of just the way people work, you know, the whole introverts/extroverts thing ... isn’t taken into account; it’s bravado ... and I think there’s a lack of recognition that people then recruit in their own image.

The growth of international legal practices has been blamed by some for what has been perceived as a move away from a nationally based ‘civic culture’ in the legal profession towards a

⁵⁶ Sommerlad, op. cit., n. 13; J. J. Mijs and M. Savage, ‘Meritocracy, Elitism and Inequality’ (2020) 91 *The Political Q.* 397; H. Sommerlad, ‘The Social Magic of Merit: Diversity, Equity and Inclusion in the English and Welsh Legal Profession’ (2015) CEPLER Working Paper Series, Birmingham Law School, at <[http://epapers.bham.ac.uk/1962/5/cepler_working_paper_2_2015\(2\).pdf](http://epapers.bham.ac.uk/1962/5/cepler_working_paper_2_2015(2).pdf)>.

⁵⁷ Friedman and Laurison use an analysis of earnings from the Labour Force Survey and the Great British Class Survey and estimate that in the UK a person going to the same university and getting the same degree but from a privileged background will earn £7,000 a year more: Friedman and Laurison, op. cit., n. 8.

⁵⁸ A. P. Carnevale et al., *The Merit Myth: How Our Colleges Favor the Rich and Divide America* (2020).

⁵⁹ Friedman and Laurison argue that parental contacts, schooling, and interpersonal skills learnt from socio-economic opportunities are as important as income: Friedman and Laurison, op. cit., n. 8.

⁶⁰ L. Ashley and L. Empson, ‘Differentiation and Discrimination: Understanding Social Class and Social Exclusion in Leading Law Firms’ (2013) 66 *Human Relations* 219; J. Tomlinson et al., ‘Privileges and Penalties in the Legal Profession: An Intersectional Analysis of Career Progression’ (2019) 70 *Brit. J. of Sociology* 1043.

⁶¹ Sommerlad, op. cit. (2016), n. 13, p. 235.

global ‘business culture’.⁶² Whether this is an accurate portrayal of the UK legal profession is debateable; however, it has been argued that increased internationalization has significantly elevated the importance of the *organization* as opposed to the profession as a site of social exclusion.⁶³ In acknowledgement of this, in the next section we explore the extent to which diversity discourses that draw on notions of social justice are able to resist processes of commodification in an environment where business values increasingly dominate.

4.3 | The commodification of the ‘business case’ for diversity in professional diversity discourses

The commodification of what was once understood as the promotion of equal opportunities in the legal sector is evident in the development of the discourse of a ‘business case’ for diversity. Criticized as ideologically ‘fatally flawed’,⁶⁴ an operation in ‘enlightened self-interest’,⁶⁵ and a means of ‘depoliticising social activism’,⁶⁶ the ‘business case’ is particularly dominant in the commercial sector. However, the idea that principles of social justice have been replaced by utilitarian business-oriented values throughout the profession is too simplistic. During interactions with some large firms, professional associations, and regulators, we often found a commitment to principles of social justice, but not always a developed understanding of the concept of different treatment. The concept of formal equality or equal treatment, which has dominated British equalities law, was well understood and evident in many diversity initiatives. Such a symmetrical approach is, however, incompatible with the asymmetrical justification that underpins reasonable adjustments.⁶⁷

Recent ethnographic research conducted with diversity professionals working in the corporate sector questions whether a ‘business case’ discourse can ever be transformative.⁶⁸ Documenting the ways in which diversity professionals ‘sell’ their training to make it more palatable to existing power holders, it demonstrates how they adopt a worldview common among elites, which emphasizes the negative role of errant individuals (so-called ‘bad eggs’) in perpetuating disadvantage, above systemic inequalities. Interestingly, despite the fact that this contradicted the belief system of diversity professionals themselves, findings revealed that they were willing to adopt the same

⁶² G. Hanlon, ‘The Changing Nature of Professionalism and the Fracturing of the Service Class’ (1999) 9 *International Rev. of Sociology* 87; G. Hanlon, ‘The State–Lawyer Relationship in England and Wales’ (2001) 3 *Sociology of Crime, Law and Deviance* 25.

⁶³ L. Ashley and L. Empson, ‘Understanding Social Exclusion in Elite Professional Service Firms: Field Level Dynamics and the “Professional Project”’ (2017) 31 *Work, Employment and Society* 211.

⁶⁴ M. Noon, ‘The Fatal Flaws of Diversity and the Business Case for Ethnic Minorities’ (2007) 21 *Work, Employment and Society* 773.

⁶⁵ D. Litvin, ‘The Business Case for Diversity and the “Iron Cage”’ in *Casting the Other: The Production and Maintenance of Inequalities in Work Organizations*, eds B. Czarniawska and H. Höpfl (2002) 160.

⁶⁶ L. Dickens, ‘The Business Case for Women’s Equality: Is the Carrot Better than the Stick?’ (1994) 16 *Employee Relations* 5.

⁶⁷ ‘Equality of opportunity’ is a term that is associated with a liberal or formal concept of equality; see the debate in D. Foster with L. Williams, ‘The Past, Present and Future of Workplace Equality Agendas: Problems of Intersectionality in Theory and Practice’ in *Reassessing the Employment Relationship*, eds P. Blyton et al. (2010) 318.

⁶⁸ L. Carrillo Arciniega, ‘Selling Diversity to White Men: How Disentangling Economics from Morality Is a Racial and Gendered Performance’ (2021) 28 *Organization* 228.

self-interested rationality understood by elites. To this extent, it is argued, diversity professionals accept that ‘the performance of economic rationality and amorality is necessary for doing diversity and diversity management’.⁶⁹ This suggests that ‘economic rationality’ should be regarded as a racialized, gendered, and (we would add) ableist performance.

The practice of building diverse teams in response to procurement specifications is one concrete initiative often cited by research participants as evidence of the sector ‘doing diversity’. Using procurement specifications to promote better inclusion can be effective and they are widely used by governments to promote disability design and user accessibility. In the corporate legal sector, for example, they were referred to as a means of bringing about change by increasing the involvement of diverse groups; the Mansfield Rule was cited as one such example.⁷⁰ Interestingly, however, this research project could find no examples of disabled people being asked to take part in such initiatives. Procurement diversity initiatives appeared to focus primarily on improving the representation of women and ethnic minority groups. This led us to question whether disabled people are simply viewed as incompatible with the ‘business case’ diversity discourse.

The presence of a hierarchy of protected characteristics within the legal profession, in terms of the perceived importance of increasing the representation of some groups over others, was frequently referred to during the research. If the volume of research and diversity initiatives commissioned by organizations in the sector that we observed were used as a proxy to establish this, we suggest that women would be located at the top and disabled people at the bottom. The existence of intersecting barriers affecting disabled people and other groups was also rarely acknowledged. For example, traditional legal rituals, inflexible legal training, working practices, career breaks, insufficient mentors, and role models – all widely cited barriers for women – were seldom recognized as problematic for disabled people. Disabled men revealed how they had been excluded from return-to-work events organized exclusively for women following maternity leave. The dominance of women in professional diversity discourses may have originated from a functional need for the profession to expand. However, it is also possible that an informal or unconscious hierarchy of ‘deservedness’ or impairment is also in operation.⁷¹ This concept has been applied in sociological analyses to explain the different treatment of people with different impairments, though could equally operate to ‘justify’ the unequal allocation of resources between groups with different characteristics.

5 | CONCLUSION

This article began with two questions. The first sought to identify the career barriers experienced by disabled legal professionals in England and Wales, why as a group they continue to be *unexpected*, and what findings tell us about the profession itself. Career accounts of interviewees

⁶⁹ Id., p. 242.

⁷⁰ For further information, see *fivehundred*, ‘Diversity Rules: A Closer Look at Mansfield Certification’ *fivehundred*, at <<https://www.legal500.com/fivehundred-magazine/diversity-and-inclusion/diversity-rules-a-closer-look-at-mansfield-certification/>>.

⁷¹ J. Remnant, ‘Getting What You Deserve: How Notions of Deservingness Feature in the Experiences of Employees with Cancer’ (2019) 237 *Social Science & Medicine* 1. The concept of hierarchies of impairment both among non-disabled people and inside the disability rights movement have also been explored: P. B. Harpur, *Ableism at Work: Disablement and Hierarchies of Impairment* (2019); M. Deal, ‘Disabled People’s Attitudes toward Other Impairment Groups: A Hierarchy of Impairments’ (2003) 18 *Disability & Society* 897.

exposed outdated, negative, limiting, and stereotypical assumptions about disabled people in the profession that were further evidenced by academic interactions, particularly with commercial legal firms. It is not surprising, therefore, that concealment was viewed as a rational strategy by most participants in response to expectations based on idealized forms of personal and professional social capital that they found difficult and, in some cases, impossible to meet. In a highly individualistic legal working environment that values and promotes the discourses of 'merit', 'talent', 'health', and 'resilience' defined by reference to ableist norms, hiding an impairment is interpreted as entirely rational. For all but a minority who practised in areas of law where the potential commercial value of employing a disabled person was recognized, this meant that they were unable to bring their true self to work. Frequent references to fears of being 'found out' punctuated interview transcripts. Memorably, a neurodiverse solicitor described how his daily bus journey to work enabled him to get into 'character' to become someone else. Another referred to a 'Darwinian' work environment where they lived in continual fear of being exposed as disabled because it would automatically render all previous achievements professionally worthless. These are descriptions that resonate with Reeve's concept of 'psycho-emotional disablism'⁷² and Campbell's of 'internalized ableism'.⁷³ The former is important because it is seen as a form of internalized oppression. Psycho-emotional disablism, as with the experience of emotional abuse, refers to a negative impact on self-esteem and self-respect. While its causes are located in negative societal attitudes towards disabled people, Reeve highlights their impact on the individual. Meanwhile, internalized ableism was developed by drawing on critical race theory, where a similar 'marking and evaluative ranking of bodies' takes place.⁷⁴ A ranking that uses a 'corporeal standard' as a comparator in essence casts any impairment as 'inherently negative' with the consequence that 'the processes of ableism, like those of racism, induce an internalisation that devalues disablement'.⁷⁵ As interviewees, we also observed how substantial energies were expended by disabled people in managing and hiding their impairment. These energies, if invested elsewhere, might have contributed to their careers and their organization's productivity, signalling a loss of talent to the profession.

The dominance of participants with non-visible impairments in this research goes some way towards explaining the continued status of disabled people as *unexpected* in the legal profession. It does not, however, account for why little has been done to tackle this problem in the past, leaving the profession unable to represent this group effectively or address its under-representation. The widespread adoption of concealment strategies needs to be addressed by challenging a culture that perpetuates fear, disadvantage, and exclusion. Research involving other groups with protected characteristics in the profession has shown that this is not exclusively experienced by disabled people. What is unique to them, however, is that a legal right established with the purpose of addressing disadvantage is effectively rendered inaccessible in this legal setting. This, we argue, should be viewed as a failure of existing law and the legal profession, not of disabled people themselves. Accounts by some senior interviewees best illustrate this. They demonstrate how disabled people 'collaborated' in the destruction of their own careers, because of the internalizing of negative ableist professional norms and values. A common crisis point came when concealment was

⁷² D. Reeve, 'Psycho-Emotional Dimensions of Disability and the Social Model' in *Implementing the Social Model of Disability: Theory and Research*, eds C. Barnes and G. Mercer (2004) 83.

⁷³ F. A. K. Campbell, 'Exploring Internalized Ableism Using Critical Race Theory' (2008) 23 *Disability & Society* 151.

⁷⁴ *Id.*, p. 153.

⁷⁵ *Id.*, pp. 153–154.

no longer viable, which for the interviewees involved in this study resulted not in the implementation of appropriate reasonable adjustments (though they later identified these) but in demotion and early retirement. One could speculate that things might have been different had requests for adjustments been made by these senior professionals, though the experiences of other senior interviewees where a strong ‘business case’ existed cast doubt on this. The recourse in UK law where an adjustment is refused but the claimant believes that it was reasonable is for an employment tribunal to adjudicate the matter. This is a wholly inadequate retrospective remedy that few pursue because of the negative career implications. We suggest, therefore, that the focus needs to shift away from the individual requiring the adjustment and towards the ‘reasonableness’ of pre-existing work environments, including personnel, policies, practices, and culture.

Understanding career experiences helped to reveal how, at an organizational level, ableism can become embedded almost in plain sight in everyday practices and attitudes. Legal organizations are, nevertheless, situated in a wider social, political, and legal environment. The historic as well as contemporary role of social policy and the law in sustaining paternalism and limiting stereotypes of disabled people should not be underestimated. Thus, by adopting the roles of ‘protectors, guides, leaders, role models, and intermediaries’, Hahn argues, non-disabled people have rendered disabled people ‘helpless, dependent, asexual, economically unproductive, physically limited ... and acceptable only when they are unobtrusive.’⁷⁶ Disability is a social construct and, as such, amenable to change through better understandings of health, illness, medicine, and technologies, as well as human rights. However, while the misplaced paternalism and ableism identified in this research may be a legacy from the past, it is unlikely to be seriously challenged if disabled people’s voices cannot be heard because they cannot be identified. Establishing presence may go some way towards addressing Lawson’s plea that the profession and academia address the low profile that disability as a ‘social justice issue’ occupies.

This brings us to our second question: what are the implications of our findings for disability legal studies and law? By focusing on the career experiences of disabled legal professionals, this study questions the operation and effectiveness of current disability employment law. The extent to which disabled people were involved in its drafting and are currently active in its implementation is unknown. However, earlier we suggested that findings indicated that current provisions are predicated on an underestimation of the extent to which ableism is embedded into everyday life and attitudes and an overestimation of the reasonableness of employers. With no lived experience of being disabled in the labour market, these would be easy mistakes to make. As Campbell has argued, ableism often operates at a ‘subliminal’ level.⁷⁷ There is also, we suggest, an inherent naivety in the law as it stands, which fails to properly acknowledge the effects of power differentials in the employment relationship on decisions to make reasonable adjustments. Most disabled participants in this study, as with the wider disabled population in employment, were the less powerful party in the employment relationship; they were not in a strong position to argue the reasonableness of their adjustment request with their employer. Furthermore, examples of senior disabled legal professionals failing to secure adjustments, or securing them only after a struggle, suggest that even where greater parity does exist, the outcome is not necessarily favourable. All of this indicates that greater emphasis on the proactive responsibilities of public bodies, employing

⁷⁶ Hahn, *op. cit.*, n. 36, p. 130.

⁷⁷ Campbell, *op. cit.*, n. 73.

organizations, service providers, and the justice system is needed to counter what appears to be a 'David and Goliath' contest to access rights.⁷⁸

The very concept of adjusted work also needs to be reconsidered. Predicated on the unquestioned presumption that the way in which a job role has been undertaken in the past is the best, this has the immediate effect of casting the disabled person as 'deficient' when making a request.⁷⁹ No proof is required that maintaining the status quo is the most effective route. The UK Equality Act permits an employer to defend itself by pleading that there is a good 'business case' for refusing a requested adjustment; however, it would be unusual to see such a claim being accompanied by evidence of an independent job evaluation, or the claimant being permitted to make a good 'business case' for redesigning their role. The current legal scenario encourages the perception that any alteration to a role is a 'concession' on the part of an employer.⁸⁰ Wider research indicates that employers continue to struggle to understand the concept of different treatment so integral to the concept of reasonable adjustments.⁸¹ Some argue that this is because historically a liberal concept of equality of opportunity and symmetrical treatment has shaped employer approaches.⁸² However, these indicate that even in a sector where it might be reasonably assumed that employers should be more aware of the nuances of discrimination law, disabled professionals are being deterred from exercising their legal rights.⁸³ If the serious aspiration of increasing the representation of disabled people to address the alleged 'legitimation gap' in wider public perceptions of the operation of the law is to be realized, it is apparent, therefore, that more research is needed and that social justice concerns must guide this project.

Co-production and the approach of the disability rights movement in valuing people's lived experiences have been central to the success of this research project, which has stimulated unprecedented discussions and engagement about disabled people in the legal profession in England and Wales. Genuine co-production, however, requires relationships of mutual trust and confidence between academics and research partners, as well as between academics and participants. The ultimate achievement of this research is that it has been 'owned' by both of our partners, the LDD and the Law Society. For this to happen, it is not enough for academics to merely accurately report the experiences of participants; they also need to co-produce potential solutions based on that evidence. Outputs, in terms of benefits to partners and users of the research, are important and, in this instance, the project has stimulated a range of activities now led by the LDD. This research has helped to initiate some foundational conversations, and it is hoped that others will realize the benefits of co-production and further advance our understanding of the contribution that can be made to disability legal studies and law.

⁷⁸ In the UK, public sector equality duties (PSEDs) are viewed as examples of proactive legislation. Similarly, in the US, too are affirmative action programmes.

⁷⁹ Foster and Wass, *op. cit.*, n. 53.

⁸⁰ For a broader debate on reasonable adjustments as an employment relations process, see D. Foster and P. Fosh, 'Negotiating "Difference": Representing Disabled Employees in the British Workplace' (2010) 48 *Brit. J. of Industrial Relations* 560.

⁸¹ D. Foster, 'Legal Obligation or Personal Lottery? Employee Experiences of Disability and the Negotiation of Adjustments in the Public Sector Workplace' (2007) 21 *Work, Employment and Society* 67.

⁸² Foster with Williams, *op. cit.*, n. 67. Our findings in the legal sector can also refer to employer understanding of indirect discrimination.

⁸³ Protection from disability discrimination is not symmetrical, so reverse discrimination claims by non-disabled people are not possible.

ACKNOWLEDGEMENTS

This research was funded by Disability Research on Independent Living and Learning (DRILL) from monies secured from the National Lottery Community Fund. We wish to acknowledge the contribution of all of the disabled legal professionals who participated in this research, many of whom had never spoken of their career experiences before. Thanks also to Alison Tarrant, Emily Kakoullis, and Peter Scott for feedback on earlier versions of this article and to the anonymous reviewers and editor for their insightful and helpful comments.

How to cite this article: Foster D and Hirst N. Doing diversity in the legal profession in England and Wales: why do disabled people continue to be *unexpected*? *J. Law Soc.* 2022;49:447–469. <https://doi.org/10.1111/jols.12382>