

Adopting a Care Ethics approach to fill the void between formal and substantive equality for women solicitors: An analysis of policies of the Law Societies of Scotland, and England & Wales.

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Declaration

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Abstract

This research explores workplace policy at the sectoral level which is intended to provide gender equality in a professional setting. More women have been entering the legal profession than men for decades, and more than half of solicitors in the UK are now women. However, there is a leaky pipeline as many women leave the profession, or move in-house, or to other legal roles outside of private practice when they become parents and/or require flexibility. Those women that remain, are not making it to partnership in the same proportion as men, as only 28% of partners are female.

This study is based on the premise that employment laws in the UK provide formal but not substantive equality, so specific workplace policies are required to deliver substantive equality. This study provides a critical analysis of the relevant policies of the Law Societies of Scotland, and England and Wales. It seeks to uncover whether and, to what extent, the regulators are committed to improving substantive equality by way of equal outcomes for women solicitors compared with their male counterparts, seeking promotion to partner. The findings will be of use to the national regulators and to law firms in determining their strategic approaches to gender equality and to those in other jurisdictions and professional sectors.

Firstly, this study sets out a theoretical framework using care ethics based on a cross-disciplinary analysis of relevant literature. Secondly, it uses this framework to provide a content and critical discourse analysis of the relevant policies of the two Law Societies. These are compared and contrasted to identify examples of 'good practice' and areas requiring development according to the theoretical framework. This analysis determines whether the approaches adopted by the regulators are likely to lead to substantive equality for women solicitors and whether lessons can be learned from adopting a care ethics approach to policy-making.

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Abbreviations

AML Additional Maternity Leave

CE Care Ethics, also known as Ethics of Care

CML Compulsory Maternity Leave

EU European Union

EA 2010 Equality Act 2010

ERA 1996 Employment Rights Act 1996

FFR Family friendly rights

LSB Legal Services Board

LS of E&W Law Society of England and Wales

LS of S Law Society of Scotland

LLP Limited Liability Partnership

MPLR Maternity and Parental Leave etc. Regulations 1999

MP Member of Parliament

OML Ordinary Maternity Leave

SMP Statutory Maternity Pay

SPL Shared Parental Leave

SRA Solicitors Regulation Authority

UK United Kingdom of Great Britain and Northern Ireland,

USA United States of America

Dedication

To AKG and GDG; and to my parents.

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I owe huge thanks to my supervisors: Professor Nicole Busby for her patience, support and endless feedback over the years; and to my second supervisor Professor Claire McDiarmid for her understanding, support and detailed feedback over a much longer period than was ever anticipated. I am incredibly grateful to you both.

My children have been patient with me at weekends when I have been busy working on this project. They have shown strength and resilience through hard times and are inspirational individuals, who I hope will benefit from the work that is being done in this field to make working life better for women in the future.

My parents are eternally supportive, and I am forever grateful to them. They have helped me through the most difficult times of my life and words cannot express my gratitude and love.

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Chapter 1 – Introduction

The central claim of this thesis is that gender inequality in private practice law firms can be more effectively addressed if the principles encapsulated by care ethics (CE) are explicitly embedded in the policies of the Law Society of Scotland (LS of S); the Law Society of England and Wales (LS of E&W); and the Solicitors Regulation Authority (SRA) (together the Regulators) for the purposes of achieving substantive equality.

Employment laws provide formal equality, but not substantive equality. In order to fill this lacuna, strategies from the Regulators can be used to encourage law firms to alter their own workplace policies, for example to assist in changing workplace culture, and to promote solicitors to partnership level on the grounds of criteria based on CE. This thesis uses a theoretical framework based on CE to analyse the current strategies and policies of the Regulators. It concludes by setting out recommendations for the Regulators about what more should be done to work towards achieving substantive equality for women solicitors in private practice in Scotland, and in England and Wales.

The social and political context in which this is thesis is written is fascinating. We are living through turbulent times, and the threats that we face as a society, seem to be magnified for women. Brexit appears likely to happen in October 2019, unless there is an agreement to delay it further, or Article 50 is revoked. The new prime minister of the UK is Boris Johnson and it looks likely that the UK will leave the European Union (EU) without a deal causing further uncertainty for the economy and for the population generally. The people of Scotland did not vote to leave the EU, and only the Conservative Party membership voted for Johnson to be prime minister. Further referenda on Scottish independence and any Brexit deal or a general election are all possibilities. Across the Atlantic, the inauguration of Donald Trump as President of the USA in January 2017 prompted unprecedented numbers of people to demonstrate

¹ Boffey, 'Brussels to Offer Boris Johnson Extension on No-Deal Brexit.'

² Maddox, 'Four Brexit Challenges the next Prime Minister Must Meet in Week One.'

 $^{^3\} https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum$

in the Women's Marches that were organised across the world the day after his inauguration and in subsequent years to mark the anniversary of that date.⁴

The Women's Marches are part of a broader social movement taking place across the Western world.⁵ Women have spoken out about sexual harassment in ways they have never felt able to do before, thanks to the #metoo and other social media campaigns.⁶ There appears to be a cultural shift taking place whereby women are gaining confidence and finding their voices like never before. Cultural changes tend to happen slowly so the subject-matter of this thesis is still of great importance, and is of even more interest than usual in the current climate.

Research in this area is also timely because 2018 marked 100 years since some women in the UK were first allowed to vote,⁷ and 2019 marks 100 years since women were first allowed to qualify as solicitors in the UK;⁸ the first woman being Madge Easton Anderson in Scotland.⁹ The focus of this thesis is women working as solicitors in private practice law firms in Scotland and England and Wales. Reference is made throughout to the UK, but solicitors in Northern Ireland¹⁰ are not dealt with, and neither are barristers,¹¹ legal executives, in-house lawyers or other legal professionals, as they all face different issues. Law firms are not all the same, and solicitors in high street firms will face different issues to those in large commercial firms. This thesis focusses mainly on women solicitors in medium to large firms, and the issues they face. It is acknowledged that there are still problems within the legal profession regarding *inter alia* race and class, which can result in women facing multiple discrimination, but the focus of this thesis is on gender. Although I have attempted to remove any bias of my own, it is also acknowledged that this is written from the point of view of a white, middle class, female, heterosexual former solicitor.

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⁴ Durkin, 'Women's March 2019: Thousands to Protest across US.'

⁵ Chen, 'The Women's March Movement on Facebook: Social Connections, Visbility and Digitally Enabled Collective Action.'

⁶ Bogen et al., '#MeToo: Disclosure and Response to Sexual Victimization on Twitter.'

⁷ 'Parliament (Qualification of Women) Act 1918'

^{8 &#}x27;Sex Disqualification (Removal) Act 1919'

⁹ Atack, 'International Women's Day 2019 President of Law Society of Scotland Speech.'

¹⁰ Solicitors in Northern Ireland are represented and regulated by the Law Society of Northern Ireland. https://www.lawsoc-ni.org/

¹¹ Barristers are usually self-employed and face a different set of issues.

More women than men have been entering the profession for several decades, ¹² and women have outnumbered men as practising solicitors in Scotland since 2015¹³ and in England and Wales since 2017. ¹⁴ However, the gender balance at the highest levels is not keeping pace, and 72% of partners in private practice law firms are still men. ¹⁵ Like many professional women around the world, they face issues which hinder their career progression more acutely than men, leading to a leaky pipeline from qualification to partnership. Those who do choose to continue to practice often face slower career progression than comparable men. ¹⁶ The problems are well documented and include unconscious bias; difficulties in working flexibly; law firm culture; greater domestic burden; discrimination and unequal pay. Each of these problems will now be outlined.

Unconscious bias is now recognised as a problem in many workplaces, and law firms have a traditionally faced issues with stereotyping and stratification. Women solicitors are often encouraged into practice areas which are lower paid and less prestigious. ¹⁷ Bolton and Muzio write about the gendered segmentation within the legal profession and how women solicitors are more likely to work part-time, outside of the top commercial firms, and 'be relegated to the less prestigious and lucrative areas of practice, such as family, employment and benefits.'. ¹⁸ Men are more likely to continue climbing the career ladder in transactional corporate fields where time-sensitive high value deals are held up as the epitome of success, ¹⁹ whereas women are more likely to work in less time-critical fields, or as Professional Support Lawyers working on knowledge management, legal research and giving training seminars which are seen as more suitable for those who wish to work flexibly. ²⁰ Elsewhere in the literature on women lawyers, they are referred to as 'fulfilling a (frequently transient) proletarian

¹² The Law Society of England and Wales, 'Diversity Profile of the Solicitors' Profession 2015.'

¹³ Carrell, 'Number of Female Solicitors in Scotland Overtakes Male for First Time.'

¹⁴ The Law Society, 'The Law Society Annual Statistics Report 2017.'

¹⁵ The Law Society of England and Wales, 'Women in Leadership in Law: Toolkit,' 2018, 1–24.

¹⁶ The Law Society of Scotland, 'Perceptions and Impacts of Working Patterns within the Legal Profession in Scotland.' The Law Society of Scotland.

¹⁷ Ward, Winterfeldt, and Moran, 'Career Progression in the Legal Sector.'

¹⁸ Bolton and Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession.' p.48

¹⁹ Thornton, 'Work/Life or Work/Work? Corporate Legal Practice in the Twenty-First Century.'

²⁰ Sommerlad et al., 'Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices.'p.63

role within the profession' by Sommerlad ²¹ referring to the UK; the 'working class of the profession' in Canada by Hagan et al;²² and 'fringe dwellers' in Australia by Thornton.²³ Clearly women are more likely to fill the lower ranks of the legal profession, which are also less well-paid contributing to the gender pay gap which is discussed further below. For many women, the cost of leaving practice to be able to work more flexibly cannot be measured in monetary terms alone. These women also lose professional status and may suffer from a feeling of injustice at having to trade in their profession for a related but less well-paid and less prestigious job.²⁴

The gender pay gap is recognised as a general problem in the UK.²⁵ Since 2017, employers with more than 250 employees in the UK are required to report data relating to salaries and benefits. Some law firms were initially reluctant to co-operate and avoided giving information on equity partners claiming that they were not employees.²⁶ However, after high profile pressure from the media, many larger law firms took the lead in providing this information.²⁷ For law firms in England and Wales, the latest available figures show that the gender pay gap stands at 19.2%²⁸ and the latest Scottish figure for law firms is quoted as 42%.²⁹ However, the Scottish figure has been calculated on the basis of hourly earnings, and the comparable hourly rate calculation for England and Wales shows a gap of 20.6% for 2014 and 28.9% for 2018.³⁰ This shows that there is a significant gender pay gap in existence in both jurisdictions. The latest available figure for the gender pay gap in the UK workforce generally (not limited

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²¹ Hilary Sommerlad, 'Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales,' International Journal of the Legal Profession 9, no. 3 (November 2002): 213–34. p.217.

²² Hagan, Huxter, and Parker, 'Class Structure and Legal Practice: Inequality and Mobility among Toronto Lawyers.'

²³ Thornton, Dissonance and Distrust: Women in the Legal Profession.

²⁴ Sommerlad and Sanderson, *Gender, Choice and Commitment. Women Solicitors in England and Wales and the Struggle for Equal Status.*; Judith K. Pringle et al., 'Women's Career Progression in Law Firms: Views from the Top, Views From Below,' *Gender, Work & Organization* 24, no. 4 (2017), doi:10.1111/gwao.12180.; Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice,' *Osgoode Hall Law Journal* 45, no. 4 (2007): 743–811.

²⁵ The Law Society of Scotland, 'Ensuring Fairness, Closing the Pay Gap.' The Law Society of England and Wales, 'Equal Pay: Guidance, Toolkit and Templates.'

²⁶ Thompson, 'Law Firms Resist Pressure on Gender Pay Gap Reporting.'

²⁷ Thompson, 'Latest Allen & Overy Figures Show 39% Gender Pay Gap.'

²⁸ The Law Society of England and Wales, 'Law Society of England and Wales Practice Note on Equal Pay' (London, 2015). The Law Society of England and Wales, 'Private Practice Solicitors' Salaries PC Holder Survey 2015,' 2016. p.3, based on average (median) annual earnings across private practice solicitors.

²⁹ The Law Society of Scotland, 'Equality and Diversity Strategy 2014-2017,' 2014. p.34, based on hourly earnings.

³⁰ Calculation received via email from LS of E&W on 21/08/19

to the legal profession) from the Office for National Statistics is 9.4% using median hourly earnings (excluding overtime)³¹ so it would appear that the gender pay gap in the legal profession is wider than the average occupation in the UK despite the equal pay legislation that has been in force for over 40 years.

It is suggested that the lack of women reaching partnership, and the lack of women remaining in the profession for many years beyond qualification may account in large part for the pay gap and according to the LS E&W 'differences in the proportions of women and men at equity level and differences in PQE [post qualification experience] appeared to account for 82% of the earnings gap.'32 This means that the fact that women are not reaching partnership in the same proportion as men and that women are more likely to take career breaks for maternity and/or caring responsibilities is severely affecting their pay compared to men. Even after controlling for these differences in the working lives of solicitors, 'there remains a gendered difference in pay that disadvantages women'33 of around 6% in 2007-8.34 This means that even women whose lives are not affected by these circumstances are still being paid less than their male counterparts.

Solicitors' salaries have not usually been open and transparent, so research results depend on people reporting their salaries accurately, often on an anonymous basis when asked by the Regulators as part of their surveys of members.³⁵ Rather than having a published scale for pay for solicitors with a certain number of years of post-qualification experience, salaries are more usually discretionary, which is not uncommon in the private sector generally. Although law firms may have their own salary scales to which they may refer, and there are market norms for particular experience in particular practice areas, it may be difficult for women to know whether or not they are being paid the same as their male counterparts for the same job. It is

³¹ Office for National Statistics, 'Annual Survey of Hours and Earnings, 2015 Provisional Results,' Annual Survey of Hours and Earnings: 2016 Provisional Results, 2016, p.8

³² The Law Society of England and Wales, 'Gender and Earnings in Private Practice: Findings from the 2008 Salary Survey,' 2009. p.4

³³ ibid. p.3

³⁴ These are the most recent statistics found calculated in the same way.

³⁵ The Law Society of England and Wales, 'Private Practice Solicitors' Salaries PC Holder Survey 2015.'The Law Society of Scotland, 'Call for Written Evidence on the Gender Pay Gap in Scotland Response by The Law Society of Scotland.'

hoped that s.77 Equality Act (EA 2010) might help to alleviate this problem, as women solicitors should be able to find out how much their male counterparts are being paid for doing the same job. However, in reality unless a claimant is on good terms with a comparable colleague who is willing to disclose this information, it could be difficult in practice to obtain this information.³⁶ This is one of the weaknesses of equal pay legislation, although it is hoped that the culture of secrecy around salaries may be altered over time due to the mandatory gender pay gap reporting requirements. Even though this does not apply to partners in partnerships, a change in culture will place an expectation on law firms to disclose this information and law firms that fail to do so will become unappealing to clients and to staff. In particular the gender pay gap still exists and although it has been identified and is being addressed to a certain extent, there is still significant progress required for the problem to be rectified. Whatley MP states that: 'Closing the gender employment gap could add an extra £150 billion to our GDP by 2025. Although female employment is at a record high, 42% of women are working part-time, compared with 13% of men. Women working fewer hours over their careers is a major contributor to the gender pay gap.'37

Flexible working is another area which is now widely recognised as a problem which is being addressed in the workplace generally. Chapter 2 sets out the legal position but even with the right to request flexible working, people who use this right still face discrimination within law firms.³⁸ A Private Member's Bill by Helen Whately MP is currently before Parliament awaiting its second reading after summer recess.³⁹ It proposes to make flexible working the norm so that employers would need to opt out of flexibility, rather than employees having to make an application justifying why they should be able to work flexibly. If passed, this would make a huge difference to women in the workplace, but it remains to be seen if it is passed, whether law firms would generally ask all new employees to opt out of this right, in a similar way to the working time regulations.

³⁶ Public sector lawyers may be able to find out how much their colleagues are being paid by application under the Freedom of Information Act 2000, but this does not apply to solicitors in private practice.

³⁷ Flexible Working Bill 2017-19.

³⁸ The Law Society of England and Wales, 'Law Society of England and Wales: Career Barriers Research Studies: Findings.'

³⁹ Helen Whately MP, 'Flexible Working Bill 2017-19' (2019).

Traditionally, law firm culture is male-dominated and involves long hours, presenteeism and client entertainment at times and in places that are not family-friendly. Although there are many people who do not appreciate the macho culture of law firms, it tends to disadvantage women more than men. Although the Working Time Regulations 1998 provide formal equality in the sense that they do not discriminate on the grounds of sex, the expectation of long working hours in law firms prevails due to the macho working culture, and the possibility of opting out of the 48 hour limit. This affects women disproportionately since they remain primarily responsible for childcare, which makes long working hours problematic. Therefore, this legislation does not contribute to the substantive equality of women in law firms, and in fact it is likely to be disproportionately affecting women and making the situation worse since it reinforces the long hours working culture by making an opt out acceptable.

When attempting to pinpoint the criteria used to decide whether to promote a solicitor to partner it is very difficult to find a definitive list.⁴⁴ Furthermore, explanatory models of promotion to partnership within private sector firms and work on the impact of sex bias within that process are rare.⁴⁵ In the private sector, traditionally firms have not been keen to publish this information,⁴⁶ which often appears to be more discretionary rather than absolute. Firms have been criticised for having opaque promotion procedures and criteria⁴⁷ which means that it is difficult for a solicitor in private practice

⁴⁰ The Law Society of Scotland, 'Perceptions and Impacts of Working Patterns within the Legal Profession in Scotland.'

⁴¹ The Law Society of Scotland, 'Profile of the Profession 2013 Demographics and Work Patterns of Scotlish Solicitors.' The Law Society of Scotland, 'Ensuring Fairness', Creating Opportunities: A Practical Guide to Equality and Diversity for Scotlish Solicitors.'

⁴² The Law Society of Scotland, 'Profile of the Profession 2013 Demographics and Work Patterns of Scotlish Solicitors,' 2013 p.125.; The Law Society of Scotland, 'Ensuring Fairness', Creating Opportunities: A Practical Guide to Equality and Diversity for Scotlish Solicitors,' 2009 p.18.;The Law Society of England and Wales, 'Equality and Diversity: Women Solicitors.,' 2004 p.37 & p.49.

⁴³ Bacik and Drew, 'Struggling with Juggling: Gender and Work/life Balance in the Legal Professions.' p.137 ⁴⁴ Although these may exist for public sector organisations.

⁴⁵ Savita Kumra and Susan Vinnicombe, 'A Study of the Promotion to Partner Process in a Professional Services Firm: How Women Are Disadvantaged,' *British Journal of Management* 19, no. s1 (March 2008): S65–S74, p.65 ⁴⁶ The Law Society of England and Wales, 'Obstacles and Barriers to the Short and Long Term Career Development of Female Lawyers.' p.14

⁴⁷ Sommerlad et al., 'Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices.' (2010) p.7; Sommerlad, 'The 'Social Magic' of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession.'Pringle et al., 'Women's Career Progression in Law Firms: Views from the Top, Views From Below.'

who believes that they meet the criteria but who has not been promoted to partner to make a claim of discrimination against their employer.⁴⁸

Despite the discretion around promotion criteria, it is thought that these usually include billable hours; new clients; length of service with a firm; 'commitment' shown through extra hours; extracurricular client contact; age of the solicitor. Garvie states: 'Considering these factors, it is not difficult to see how sex discrimination in the indirect form does exist in the legal profession in Britain in general. This thesis agrees that these factors contribute to the continued indirect discrimination against women in partnership promotion decisions, which add to the difficulty in achieving substantive equality for women solicitors.

The domestic burden of a family psychologically, emotionally and practically, is still carried more so by women than men.⁵¹ This is unpaid work which is necessary to nurture the next generation, care for the elderly, disabled and infirm, and also allow family members to go to work, therefore allowing the society and the economy to continue to function.⁵² The 'standard' worker model follows a male working pattern, and although it is assumed that this worker is autonomous, in fact care work is likely to be done for that worker at home and in the workplace⁵³.

Since the late 1980s/early 1990s there appears to have been more debate about the role of men and women in the home⁵⁴ which has come about as a result of changing patterns of employment for women, and subsequent attitude changes towards parenting by both men and women.⁵⁵ Overall, men now appear to be dealing with an increasing share of the domestic burden but women still deal with the vast majority of this work,⁵⁶ in addition to their paid employment. This has been termed the 'second

99–103. p.101.

⁴⁸ June Garvie, 'Indirect Discrimination in Managing a Legal Practice,' International Legal Practioner 20 (1995):

⁴⁹ Ibid. p.100

⁵⁰ Ibid. p.100

⁵¹ Lyonette and Crompton, 'Sharing the Load? Partners' Relative Earnings and the Division of Domestic Labour.'

⁵² Gates, 'Putting Women and Girls at the Center of Development.'

⁵³ Sara Hayden, 'Lessons from The Baby Boon: 'Family-Friendly' Policies and the Ethics of Justice and Care,' *Women's Studies in Communication* 33, no. 2 (2010): 119–37, doi:10.1080/07491409.2010.507574 p.130.

⁵⁴ Richard Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices),' *Journal of Law and Society* 28, no. 4 (December 2001): 520–545, p.521; Gershuny and Robinson, 'Historical Changes in the Household Division of Labor.'; Crompton and Lyonette, 'The New Gender Essentialism--Domestic and Family 'choices' and Their Relation to Attitudes.'

⁵⁵ ibid. p.521

 $^{^{56}}$ Rhode, 'From Platitudes to Priorities: Diversity and Gender Equity in Law Firms.' p.1057

shift'⁵⁷ because mothers in particular, often spend the day at work in paid employment in the same way as fathers, but then go home to deal with their second 'job' of care giving to children and/or elderly relatives in the evenings and at weekends. Women often have heavy care commitments throughout their lives, at first when their children are young, and later when their parents or other relatives are elderly, and these periods frequently overlap.⁵⁸ Many women in the Western world who are involved in paid work of some sort, still retain responsibility for the household chores or management of them⁵⁹ so by comparison the average woman works longer hours and receives substantially less income than the average man. In research commissioned by the LS of E&W one respondent summarised the position well by saying 'In the last 50 years women have been brought into the public sphere. Men have not been brought into the private sphere. This has created true inequality.'.⁶⁰

The concept of caring at home and in the workplace is central to the theoretical framework use by this thesis and is discussed in more detail in Chapter 3. Family Friendly Rights (FFRs) (discussed in Chapter 2) are beginning to make it easier to work towards gender-free parenting, but acceptance of this as the norm by employers and society is likely to take many more decades. For example, where parents take time off as maternity, paternity or parental leave, they may return to the workplace as part-time workers facing a new set of challenges. The skills they may have gained or improved whilst absent from the workplace such as prioritising, coping strategies, time management, and empathy are rarely recognised and rewarded on their return to work. This is addressed further in the theoretical framework set out in Chapter 3 of this thesis.

Direct and indirect discrimination suffered by women is set out in Chapter 2. Although discrimination laws have been around in the UK since the 1970s this is still a problem for women solicitors in private practice. The LS of S highlights the fact that pregnancy

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⁵⁷ Evans, 'Non-Equity Partnership: A Flawed Solution to the Disproportionate Advancement of Women in Private Law Firms.' p. 99; Reichman and Sterling, 'Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers.' p.66;

⁵⁸ Burke and Lisa M. Calvano, *The Sandwich Generation: Caring for Oneself and Others at Home and at Work;* Steiner and Fletcher, 'Sandwich Generation Caregiving: A Complex and Dynamic Role.'

⁵⁹ Daniela Petrassi, "For Me, the Children Come First': A Discursive Psychological Analysis of How Mothers Construct Fathers' Roles in Childrearing and Childcare,' *Feminism & Psychology*, (May 9, 2012): 1–10, doi:10.1177/0959353512442928. p.1

 $^{^{60}}$ The Law Society of England and Wales, 'Obstacles and Barriers to the Short and Long Term Career Development of Female Lawyers.' p.16

discrimination is still a significant problem across the UK as 54% of pregnant women in Scotland, 50% in England and 38% in Wales have experienced some form of pregnancy discrimination.⁶¹ It is difficult to uncover unequivocal evidence of widespread discrimination on the grounds of maternity or pregnancy regularly taking place in law firms as such cases are often settled in private to avoid the details being reported publicly.⁶² However, there is evidence that women often suffer from direct discrimination on the grounds of pregnancy or maternity.⁶³

Less obvious discrimination faced by women solicitors includes for example, on the transfer of clients to other colleagues during maternity leave who are not returned following the return to work, especially if the return is to part-time work. Additionally, it is difficult to clearly evidence whether promotion decisions are influenced by the fact that a woman in her thirties is likely to have a child and require an extended period of leave and possible reduction in hours, whereas a new father may only require a couple of weeks of paternity leave. This is known as statistical discrimination, by which employers make assumptions based on averages, which may have a detrimental impact on a woman's career even if she has no intention of ever having children. Working flexibly has also been identified as problematic for women solicitors as it may be 'tantamount to stepping off the career ladder.'

The issue of gender equality on company boards has been highlighted within Europe over the past decade, with some Members States introducing legislative targets to

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⁶¹ The Law Society of Scotland, 'Ensuring Fairness, Creating Opportunity: A Practical Guide to Equality and Diversity for Scottish Solicitors,' 2013 p.10.;

⁶² Legal Week, 'Pinsent Masons Escapes as Former Lawyers Drop Unfair Dismissal Claims,' 2015, https://www.nexis.com/results/enhdocview.do?docLinkInd=true&ersKey=23_T26563429578&f ormat=GNBFI&startDocNo=1&resultsUrlKey=0_T26563558348&backKey=20_T26563558349 &csi=252592&docNo=3 .; Legal Week, 'McDermott Faces Pregnancy Discrimination Claims from Former Associate.'; Legal Week, 'Travers Settles with Former Trainee in Pregnancy Discrimination Case.'

⁶³ Davis et al., 'Pregnancy Discrimination at Work : A Qualitative Study.'

⁶⁴ The Law Society of England and Wales, 'Equality and Diversity: Women Solicitors.' (2004) p.22

⁶⁵ Although for babies born on or after 3rd April 2011, fathers now have the right to share maternity leave (i.e. they can take APL) with the mother if she decides to return to work before the end of her OML, this right has not yet been widely taken up.

⁶⁶ The Law Society of England and Wales, 'Gender and Earnings in Private Practice: Findings from the 2008 Salary Survey.' p.15

⁶⁷ The Law Society et al., 'Obstacles and Barriers to the Career Development of Woman Solicitors The Law Society Supported by the AWS Prepared for the Law Society by Insight Oxford Ltd' March (2010). p.7

promote progress towards gender equality at board level.⁶⁸ Progress has been made from an average of 11.9% of board members of the largest publicly listed companies in the EU being women in 2010 to 26.7% in October 2018.⁶⁹ Progress in law firms in the UK is not happening so quickly. Gender imbalance at partnership level in law firms is a problem, not only for the women who seek to reach it and cannot share the power and financial rewards, but also for the law firms, their clients, and other stakeholders. A group of leaders with diverse gender, experience and knowledge will make better decisions and ultimately a balanced partnership will perform better.⁷⁰ The fact that law firms are traditionally structured as a partnership, rather than as a company for example, contributes to the problem because discretion is used and pathway of progression from trainee solicitor to partner is not always clearly set out. Compared to companies, law firm partnerships are opaque as there are no shareholders holding the directors to account. More law firms are converting to LLP status, but similar problems persist.

Chapter 1 has set out the context of this thesis and the problems of progression and retention facing women solicitors in private practice. Chapter 2 will outline the legal position which affords formal equality to women solicitors, and the remainder of the thesis suggests how the lacuna between formal and substantive equality can be filled. The methodology used for this study is desk top based research. First a theoretical framework is set out using CE as an interdisciplinary field of enquiry as suggested by Leget, van Nisterooij and Visse.⁷¹ Then a sociolegal analysis of cross-disciplinary literature the framework is given in Chapter 3. This framework is used to provide a content and critical discourse analysis of the relevant policies of the LS of S, and LS of E&W. The policies are set out in Chapter 4 and the analysis in Chapter 5. Chapter 6 sets out the conclusions of the study and the recommendations suggested by this thesis, along with ideas for further work stemming from this study.

⁶⁸ In Scotland, legislation has been adopted for public boards, and a voluntary systems for private boards through 50:50 by 2020 Partnership for Change UK Parliament, Gender Representation on Public Boards (Scotland) Act 2018.

⁶⁹ European Commission, '2019 Report on Equality between Women and Men in the European Union,' European Parliament, 2019, https://doi.org/10.2838/776419. European Comission, 'Source: European Commission, Database on Women and Men in Decision-Making,' 2016, https://doi.org/10.9.

⁷⁰ Traub, 'Bias in Performance Management Review Process: Creating an Inclusive Talent Pipeline By Understanding Our Filters.'

⁷¹ Carlo Leget, Inge van Nistelrooij, and Merel Visse, 'Beyond Demarcation: Care Ethics as an Interdisciplinary Field of Inquiry,' Nursing Ethics 26, no. 1 (2019): 17–25, https://doi.org/10.1177/0969733017707008.

Chapter 2 – Legal Position

The central claim of this thesis is that gender inequality in private practice law firms can be more effectively addressed if the principles encapsulated by CE are explicitly embedded in the policies of the Regulators for the purposes of achieving substantive equality. This chapter sets out the distinction between formal and substantive equality and provides an overview of the employment law framework which provides formal equality. It explains how formal equality is not sufficient to ensure equity generally, and more specifically gender equality at partnership level.

2.1 Meaning of Equality

The term 'equality' can have different meanings, including formal equality or equality of treatment; and substantive equality, which encompasses equality of opportunity and equality of results.⁷² The principles of formal and substantive equality are key to this thesis and will be explained below.

2.1.1 Formal Equality

The term 'formal equality' is used to describe equal treatment of people in the same situations, for example giving equal pay to all people doing the same job in the same circumstances. This principle of treating likes alike and, where there is a normative difference, providing different treatment was espoused by Aristotle.⁷³ Formal equality is a logical starting point which many believe is the most equitable way to deal with issues of equality, because it is consistent and appeals to feelings of fairness and justice⁷⁴.

⁷² Erica Howard, 'The European Year of Equal Opportunities for All - 2007: Is the EU Moving Away From a Formal Idea of Equality?,' European Law Journal 14, no. 2 (2008): 168–85, p.169

⁷³ Aristotle, *Nicomachean Ethics*, https://doi.org/10.4324/9781912281848.Sandra Fredman, 'Chapter 1 Myths and Messages: Theoretical Perspectives,' in *Women and the Law*, Oxford Sch (Oxford: Oxford University Press, 1998), 1–38, www.oxfordscholarship.com, p.15.

⁷⁴ Howard, 'The European Year of Equal Opportunities for All - 2007: Is the EU Moving Away From a Formal Idea of Equality?' p.170

However, the principle of equal treatment, does not consider existing inequalities or social disadvantages⁷⁵ that have been affecting people, or groups of people for generations on the basis of personal characteristics or life experiences. Women, for example, were historically prevented from qualifying as solicitors,⁷⁶ and even 100 years after being allowed into the profession, they still face discrimination⁷⁷ and carry greater domestic burdens⁷⁸ than men. Despite these disadvantages women now represent 51% of Scottish solicitors, and 65% of all Scottish solicitors under the age of 45, but equity partners in law firms in Scotland are still three times more likely to be male than female.⁷⁹ In England and Wales, there are also now more women than men practising as solicitors, but they still represent only 28.8% of partners.⁸⁰ These statistics show that the principle of equal treatment is providing incredibly slow progress in terms of reaching real or substantive equality in the form of gender parity at partnership level in private practice law firms in the UK. The principle of equal treatment also fails to value differences between people.⁸¹

Formal equality entrenches differences because where there are antecedent differences, between people who are now treated alike, it does not assist the person who has historically suffered a disadvantage.⁸² The illusion of equality via formal equality therefore does not improve the position of disadvantaged individuals, and in

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⁷⁵ Ibid p.170.

⁷⁶ The first female solicitor was admitted in Scotland in 1917, and in England and Wales in 1922 whereas men have never been prevented from being admitted as solicitors in the UK since the legal profession began.

⁷⁷ Hilary Sommerlad, "A Pit to Put Women in': Professionalism, Work Intensification, Sexualisation and Work-Life Balance in the Legal Profession in England and Wales.," *International Journal of the Legal Profession* 23, no. 1 (2016): 61–82, https://doi.org/10.1080/09695958.2016.1140945.; The Law Society of Scotland, 'Call for Written Evidence on the Gender Pay Gap in Scotland Response by The Law Society of Scotland,' 2017.; Sharon C. Bolton and Daniel Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession,' *Sociology* 41, no. 1 (February 1, 2007): 47–64, https://doi.org/10.1177/0038038507072283.

⁷⁸ Clare Lyonette and Rosemary Crompton, 'Sharing the Load? Partners' Relative Earnings and the Division of Domestic Labour,' *Work, Employment and Society* 29, no. 1 (2015): 23–40,

https://doi.org/10.1177/0950017014523661.; McKinsey & Company, 'The Power of Parity: Advancing Women's Equality in the United Kingdom.,' 2016.; Man Yee Kan, Oriel Sullivan, and Jonathan Gershuny, 'Gender Convergence in Domestic Work: Discerning the Effects of Interactional and Institutional Barriers from Large-Scale Data,' *Sociology* 45, no. 2 (2011): 234–51, https://doi.org/10.1177/0038038510394014.

⁷⁹ The Law Society of Scotland, 'Law Society of Scotland Progression in the Profession,' www.lawscot.org.uk, 2017, http://www.lawscot.org.uk/about-us/equality-and-diversity/progression-in-the-profession/.

⁸⁰ The Law Society of England and Wales, 'International Women's Day: Women-Owned Law Firms Flourishing,' www.lawsociety.org.uk, 2017, http://www.lawsociety.org.uk/news/press-releases/international-womens-day-women-owned-law-firms-flourishing/. The Law Society of England and Wales, 'Women in the Law 2018: The Largest International Survey Conducted on the Topic of Women in the Law,' 2018.

⁸¹ Ibid p.170.

⁸² Sandra Fredman, Discrimination Law, 2nd ed. (Oxford: Oxford University Press, 2011)p.13.

fact it embeds the differences further by reinforcing disadvantage and making it harder for true equality to be achieved.

2.1.2 Substantive Equality

In contrast to formal equality the principle of substantive equality attempts to deal with historical and ongoing discrimination and aims to compensate for this, may involve different treatment.83 Equality of results is the cornerstone of substantive equality.

Lustgarten explains the difference between equality of opportunity and equality of results in the context of race by stating that equality of opportunity 'accepts that discrimination has been abolished when all formal and deliberate barriers against blacks have been dismantled. Its concern stops with determining whether the factor of race has caused an individual to suffer adverse treatment.'. Whereas 'at the other end of the spectrum the unalloyed fair-share approach is concerned only with equality of result, measured in terms of proportionality. Its inherent logic leads to the adoption of quotas as a remedy once a finding of discrimination is made'.84 In the context of women solicitors, equality of opportunity appears to have been achieved as there are no 'formal and deliberate barriers' against women becoming partners in law firms. Equality of opportunity does not therefore take women solicitors further forward in their quest for substantive equality, so more will be required to achieve this.

Equality of results in the context of women solicitors would require the adoption of quotas in order to achieve gender parity at partnership level, which would be the ultimate evidence of substantive equality. The use of gender quotas on company boards has been debated at length in recent years⁸⁵ and although law firms are usually

⁸³ Ibid p.170.

⁸⁴ Laurence Lustgarten, Legal Control of Racial Discrimination (London: Macmillan Press, 1980) p.6-7.

⁸⁵ Nuria Elena Ramos Martin, 'Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision-Making Positions,' Spanish Labour Law and Employment Relations Journal 3, no. 1 (2014): 20-33.; Victor E. Sojo et al., 'Reporting Requirements, Targets, and Quotas for Women in Leadership,' Leadership Quarterly 27, no. 3 (2016): 519–36, https://doi.org/10.1016/j.leaqua.2015.12.003.; Siri Terjesen and Ruth Sealy, 'Board Gender Quotas: Exploring Ethical Tensions From A Multi-Theoretical Perspective,' Business Ethics Quarterly 26, no. 01 (2016): 23-65, https://doi.org/10.1017/beq.2016.7.

made up of partnerships or LLPs rather than limited companies, the arguments for the use of gender quotas are the same.

Gender quotas are a fixed percentage or proportion that an organisation must meet, whereas a target is an aspiration that an organisation sets itself and there is no obligation for this to be met. Larger law firms in the UK have started to set themselves gender targets, and some progress is being made in these firms to tackle the issue of gender balance at partnership level. Quotas however, are a form of positive action, which is generally prohibited under UK law. Some women of colour already feel resentment towards them if they reach senior positions as there is an assumption that they have been promoted because of quotas. The adoption of gender targets by more law firms in the UK is now necessary in order to move towards gender balance at partnership level in larger law firms, as progress is so slow.

However, Sandra Fredman argues that substantive equality is more complex than this, and can be best explained using her four dimensional approach. She states that the four dimensions are: redressing disadvantage; addressing stigma, stereotyping, humiliation and violence; the participative dimension of social inclusion and political voice; and accommodating difference and structural change. This is intended not as a definition, but as 'an analytical framework to assess and assist in modifying laws, polices and practices to better achieve substantive equality.' ⁹¹

Fredman's definition is very relevant to this thesis' argument for substantive equality and can be applied to women solicitors as follows. The *redressing disadvantage dimension* would require targeting the disadvantage that women as a group have and

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⁸⁶ The Law Society of England and Wales, 'International Women in Law Summit 2012: Setting the Agenda for Change,' 2012.

⁸⁷ Steven Vaughan, 'Going Public: Diversity Disclosures by Large U.K. Law Firms,' *Fordham Law Review* 83, no. 5 (2015): 2301–24, https://doi.org/10.3868/s050-004-015-0003-8.; Harriet Minter, 'Hitting Targets: How Linklaters Plan to Increase Their Number of Female Partners,' *The Guardian Professional*, 2014, http://www.theguardian.com/women-in-leadership/2014/aug/21/hitting-targets-how-linklaters-plan-to-increase-their-number-of-female-

partners?utm_source=emailhosts&utm_medium=email&utm_campaign=WLD+-+September+2014.; Lucy Scott-Moncrieff, 'Breaking Through,' *New Law Journal* 162, no. 7536 (2012): 1361–63.

⁸⁸ Except in the limited circumstances where an employer can choose a candidate from an under-represented group where the candidates are equally qualified for the position s.159 *Equality Act 2010*.

⁸⁹ Hilary Sommerlad, 'The 'Social Magic' of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession,' Fordham Law Review 83, no. 5 (2015): 2325–47 p.2342.

⁹⁰ Pinsent Masons, Clifford Chance, Herbert Smith Freehills, Ashurst, Linklaters, Allen & Overy, Addleshaw Goddard and BLP, are all law firms with gender targets for partnership.

⁹¹ Fredman, "Substantive Equality Revisited."

still do experience. This might require affirmative action to reach the goal of equality, which in the case of seeking gender parity at partnership level, could mean applying different criteria for promotion to partner for men and women for example different billing targets, or the use of quotas.

The addressing stigma dimension promotes respect and dignity, which in relation to women solicitors is relevant to the removal of stereotyping which is discussed further in section 2.2.3 (b)(ii) below.

The *participative dimension* of Fredman's definition relates to involvement, which in the context of women solicitors is relevant to ensuring their participation at the decision-making level of partnership in law firms. As has been seen by the statistics given in above, there is no doubt that women are able to enter the legal profession, but their progression to partnership level is the problem. The recommendations made at the end of this thesis seek to assist law firms in taking steps to achieve this, many of which are relevant to Fredman's next dimension.

Fredman's fourth *dimension on accommodating difference and structural change* is very relevant to ensuring the participation of women solicitors at the most senior levels. The points in this thesis around altering promotion criteria, valuing difference, eliminating stereotyping/discrimination and possibly the use of quotas, should all be considered as solutions to filling the void between formal and substantive equality for women solicitors. This element is the most relevant to this thesis because (as will be seen in more detail in Chapters 5 and 6), it is argued that valuing the basic principles of Care Ethics and including these as promotion criteria can assist in achieving substantive equality for women solicitors, so difference needs to be accommodated and structural changes made in this regard. Overall Fredman's definition sits well with the view of this thesis and the recommendations it suggests.

Having set out the definitions of formal equality which women solicitors already have, and substantive equality which still alludes them, this chapter will now turn to specific employment rights. First those right available to all women will be discussed followed by those available to parents, known as family-friendly rights.

2.2. Employment rights

2.2.1 General employment rights

This section sets out the main general employment rights which are available to employees regardless of whether they provide care for children or others.

2.2.1.1 - Salary and benefits

As far back as 1970, the Equal Pay Act required 'that employers give equal treatment as regards equal terms and conditions of employment to men and to women'92. This has been repealed and replaced by the EA 201093 which provides the same principle by prohibiting 'sex discrimination in relation to contractual pay'.94 And which goes further as s.77 EA 2010 makes secrecy clauses unenforceable if they prevent people from talking about their pay in order to conceal unequal pay for discriminatory reasons. When it comes to bringing an equal pay claim, the Equality of Terms provisions in ss.64-83 of EA 2010 mean that women who do equal work to a man in the same employment are entitled to equality of pay and other terms and conditions of employment.95 S.66 EA 2010 implies a sex equality clause into the contract of employment which ensures that a woman's contractual terms are not less favourable than a man's doing work of equal value in the same employment.

Women solicitors will undoubtedly be aware of these provisions, but they may be reluctant to bring a claim for unequal pay, since they may prefer to remain on good terms with their employer, in order to not lose their job, ⁹⁶ or not receive a poor reference

⁹² UK Parliament, Equal Pay Act 1970.

⁹³ UK Parliament, Equality Act 2010, Schedule 27, Part 1.

⁹⁴ Ibid s.71.

⁹⁵ Also Article 141 Treaty of Rome; Equal Pay Directive 75/117; Defrenne v Sabena (No 2) [1976] ICR 547; Mcarthy's Ltd v Smith [1980] IRLR 210

⁹⁶ Although this would be Victimisation under s.27 *Equality Act 2010* there may still be the same reluctance to bring a claim against a current employer for fear of damage to the solicitor's personal reputation, or career progression in the same firm or elsewhere.

if they move firms, ⁹⁷ or adding an additional barrier to their career progression ⁹⁸ by being 'perceived as a trouble maker and you'd be finished'. ⁹⁹ This means that some women solicitors continue to earn lower salaries than their male colleagues with women moving to more flexible jobs related to the law (for example moving to in-house roles, ¹⁰⁰ teaching law, legal publishing or research) or a totally different field, ¹⁰¹ but which inevitably are less well paid than full-time practice as a solicitor. Even if women solicitors continue in the same job on a part-time basis after returning from maternity leave, they may suffer from 'downward occupational mobility, i.e. a move down the occupational hierarchy to a lower paid job'. ¹⁰²

The formal equality represented by equal pay legislation has not succeeded in achieving its goal therefore more rigorous enforcement of equal pay laws in the legal profession is necessary. The policies of the LS of S and LS of E&W on this point are discussed in more detail in Chapters 4 and 5.

2.2.2. Working Hours

An employed solicitor's contract of employment is likely to set out the usual working hours, along with her usual place of work, annual leave entitlement and other details.

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⁹⁷ For example in the case of *Bullimore v Pothecary Witham Weld Solicitors and Another UKEAT/0189/10/JOJ* a solicitor who had brought a claim for sex discrimination was subsequently given a poor reference for a new job when she changed firms, and EAT found that the conduct of both the previous firm and the new firm amounted to unlawful victimisation when the new employer withdrew their job offer as a result of the poor reference.

⁹⁸ The Law Society of England and Wales, 'Obstacles and Barriers to the Career Development of Woman Solicitors The Law Society Supported by the AWS Prepared for the Law Society by Insight Oxford Ltd,' no. March (2010).

⁹⁹ Hilary Sommerlad et al., 'Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices' (Funded by the Legal Services Board, 2010) p.48.

¹⁰⁰ The Law Society of England and Wales, 'Obstacles and Barriers to the Career Development of Woman Solicitors The Law Society Supported by the AWS Prepared for the Law Society by Insight Oxford Ltd.' (2010) p.7(

¹⁰¹ Hilary Sommerlad et al., op. cit. p.41.

¹⁰² J. L. Atkinson, 'Does the Sex Discrimination Act Provide a Right to Work Part-Time for Mothers?,' *Journal of Social Welfare and Family Law* 32, no. 1 (2010): 47–57, doi:10.1080/09649061003675865.; Dex, S., 1987. Women's occupational mobility: a lifetime perspective. Basingstoke: Macmillan.; Lane, N., 2000. The Low Status of Female Part-Time NHS Nurses: A Bed-Pan Ceiling? Gender, work and organization, 7 (4), 269–281.; Blackwell, L., 2001. Occupational Sex Segregation and Part-Time Work in Modern Britain. Gender, work and organization, 8 (2), 146–163

The Working Time Regulations 1998 implement the European Working Time Directive¹⁰³ into UK law, covering average weekly working hours, night time working hours and other related health and safety rules. They limit the average number of working hours per week to 48,¹⁰⁴ but it is possible for an employer to ask an employee to opt out of this requirement in writing,¹⁰⁵ and with the typical long hours culture in law firms,¹⁰⁶ it is not unlikely for an opt-out to be included in an employed solicitor's contract of employment.

2.2.3. Prohibition of Discrimination

Discrimination on the grounds of sex has been prohibited since the Sex Discrimination Act 1975, 107 which has been repealed and replaced by the EA 2010 which prohibits discrimination on the grounds of a 'protected characteristic': age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. In addition to the statutory protection, it is common to include a clause restating this prohibition in contracts of employment. Despite the double statement of this prohibition in common law and in statute, research shows that discrimination on the grounds of sex in various forms, is still an issue for women solicitors and can be by way of direct discrimination (prohibited by s.13(1) EA 2010); and indirect discrimination (including systemic disadvantage, unconscious bias and stereotyping, most of which is prohibited by s.19 EA 2010). Each of these will now be outlined.

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¹⁰³ They were later amended by the Working Time (Amendment) Regulations 2003

¹⁰⁴ UK Parliament, The Working Time Regulations 1998, s.4(1).

¹⁰⁵ Ibid s.5(1).

¹⁰⁶ Sharon C. Bolton and Daniel Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession,' Sociology 41, no. 1 (February 1, 2007): pp.47–64, p.56.

¹⁰⁷ UK Parliament, Sex Discrimination Act 1975, s.1.

¹⁰⁸ UK Parliament, Equality Act 2010, Schedule 27, Part 1.

¹⁰⁹ Ibid s.4.

¹¹⁰ It is acknowledged that discrimination occurs within the legal profession for reasons other than sex (such as those set out in the definition of 'protected characteristics' plus others such as class) and some women may face dual discrimination (or more) e.g. women of colour, referred to as intersectionality, but this thesis focuses on women in general, as a group, since although there are differences between them, what they do have in common, is the fact that they are all women.

2.2.3 (a) Direct Discrimination

Direct discrimination is prohibited conduct and is defined in s.13(1) EA 2010. An example might be if an employer treats a woman less favourably than a man on the grounds of her sex, by arbitrarily choosing a man over a woman for recruitment or promotion (where they were both equally qualified with the same experience) simply because she was a woman. Direct discrimination on the grounds of pregnancy or maternity is prohibited by s.18 EA 2010.

2.2.3 (b) Indirect Discrimination

Indirect discrimination can be in the form of (i) systemic disadvantage; and (ii) stereotyping and unconscious bias. It is still known to be a problem in law firms in the UK (and elsewhere) but is difficult to prove because of its concealed operation. Since the number of women entering the legal profession has been at least equal to the number of men for decades, it appears that law firms do not discriminate against women at the point of initial trainee recruitment, but indirect discrimination is still thought to be a contributing factor to the lack of gender parity at partnership level.

Indirect discrimination is defined in s.19(1) EA 2010 and arises where *A person (A)* discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. For example, if that employer used criteria for promotion which purported to be neutral but in fact worked in favour of men and against women, (see further section 2.2.3 (b) (i) below) then this would be indirect sex discrimination.

There is also the more complex issue of a provision, criterion or practice (PCP) in the workplace indirectly discriminating against parents. Although not limited to women, as the main providers of childcare, this kind of indirect discrimination affects women more acutely than men.¹¹¹ Being expected to be available to your clients anytime of the day and night, working long-hours,¹¹² the expectation of presenteeism, and regular evening

¹¹¹ Clymo v Wandsworth Borough Council [1989] IRLR 241.; Sykes v JP Morgan (EAT/279/00).; Sinclair Roche & Temperley v Heard and another [2004] IRLR 763.

¹¹² See more on the long hours culture in section 2.2.2 above

entertainment of clients could all be seen as PCPs which are indirectly discriminatory against parents if they lead to a particular disadvantage (s.19(2)(b) EA 2010) such as lack of promotion or the opportunity to take part in performance related training. PCPs do not need to be written down or officially agreed as policies of the workplace as long as they relate to practices that occur which are indirectly discriminatory and which cannot be justified under s.19(2)(d) EA 2010 then they could be found to be contrary to s.19.

Having set out the statutory provisions of indirect discrimination, this section will now look at the issues of (i) systemic disadvantage; and (ii) stereotyping and unconscious bias.

2.2.3 (b) (i) Systemic Disadvantage

This type of indirect discrimination would occur if a law firm used promotion criteria which purported to be gender neutral, but in fact worked more to the advantage of men and to the disadvantage of women (for example, bringing in new clients, or billable hours), which would systematically disadvantage women. In other words, if promotion to partner (even partly) depends on bringing in new clients, and this is mainly done 'on the golf course'¹¹³ or 'going out with clients in the evening'¹¹⁴ this is more likely to disproportionately exclude women who deal with the bulk of childcare.¹¹⁵

2.2.3 (b) (ii) Stereotyping and Unconscious Bias

Section 19(2)(b) EA 2010 deals with stereotyping and unconscious bias. Although similar, they are distinct principles as stereotyping tends to be intentional, whereas

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¹¹³ The Law Society of England and Wales, 'Obstacles and Barriers to the Career Development of Woman Solicitors The Law Society Supported by the AWS Prepared for the Law Society by Insight Oxford Ltd,' no. March (2010) p.11.

¹¹⁴ Ibid p.11.

¹¹⁵ Ivana Bacik and Eileen Drew, 'Struggling with Juggling: Gender and Work/life Balance in the Legal Professions,' Women's Studies International Forum 29 (2006): 136–46, p.137.

unconscious bias takes place when people consider themselves to be acting entirely objectively and can be overcome, for example, through training.¹¹⁶

Unfortunately, stereotypes persist for both men and women in the workplace generally,¹¹⁷ and in particular in the legal profession.¹¹⁸ The term 'glass ceiling' is well known as a metaphor for the limits that women face in their career progression,¹¹⁹ and more recent literature refers to the 'maternal wall'¹²⁰ or 'sticky floor'¹²¹ in addition to the glass ceiling in terms of limiting women's career progression.

Researchers have demonstrated that individuals tend to process incoming information by relying on cognitive shortcuts; in essence stereotypes. ¹²² Unconscious bias is now accepted as a problem, and there is guidance from the Regulators specifically for law firms in relation to reducing and eliminating unconscious bias which is discussed in more details in Chapters 4 and 5. This chapter will now turn to employment rights aimed specifically at parents and those with caring responsibilities.

2.3 Family Friendly Rights

This section sets out the FFRs which are specifically aimed at parents or those with dependents. It sets out each right then gives a critique of the UK's framework.

¹¹⁶ Pollard-Sacks, 'Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege.'

¹¹⁷ Savita Kumra and Susan Vinnicombe, 'Impressing for Success : A Gendered Analysis of a Key Social Capital,' Gender, Work and Organization 17, no. 5 (2010): 521–46. p.538.

¹¹⁸ Sommerlad et al., 'Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices.' p.25; Donald Nicolson, 'Demography, Discrimination and Diversity: a New Dawn for the British Legal Profession?,' *International Journal of the Legal Profession* 12, no. 2 (July 1, 2005): 201–228, p.205; Atkinson, 'Gendered Organizations and Women's Career Progression in the UK Financial Services Sector.' p.245; Andrew Francis and Hilary Sommerlad, 'Access to Legal Work Experience and Its Role in the (re)production of Legal Professional Identity,' *International Journal of the Legal Profession* 16, no. 1 (March 2009): 63–86, p.79; Moira Macmillan, Angus Mcfadyen, and Nick McKerrel, *Women in the Legal Profession in Scotland, Society*, 2005 p.22.

¹¹⁹ Williams, 'Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality.' Kende, 'Shattering the Glass Ceiling: A Legal Theory for Attacking Disrimination Against Women Partners.' Gorman, 'Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms.'

¹²⁰ Joan C. Williams, 'Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality,' Thomas Jefferson Law Review 26, no. 1 (2003): 1–14.

¹²¹ Reichman and Sterling, 'Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers.'

¹²² Lee, 'Unconscious Bias Theory in Employment Discrimination Litigation.' p.482

There are minimum periods of employment required before these FFRs accrue to the employee. This can be problematic for women solicitors because for example, if they already have children before they start a new job, they will be unable to request flexible working until they have been employed there for 26 weeks. This chapter will now outline the main FFRs and consider whether there is any evidence that this rights framework is contributing to substantive equality for women solicitors.

2.3.2 Maternity Rights

All employees with at least 26 weeks service have the right to maternity leave which begins with a period of two weeks' Compulsory Maternity Leave (CML) which commences the day on which childbirth occurs, under s.72 Employment Rights Act 1996 (ERA 1996) and Regulation 8 of the Maternity and Parental Leave etc. Regulations 1999 (MPLR 1999). In addition to CML, ss. 71 and 73 ERA 1996, and Regulations 4 and 7 MPLR 1999 provide the right to 26 weeks' Ordinary Maternity Leave (OML) and 26 weeks' Additional Maternity Leave (AML). Section 2.3.4 below discusses the option of transferring unused leave to one's partner using the Shared Parental Leave (SPL) provisions.

Statutory rights can be extended in writing via the employment contract. The LS of S recommends to its members that if a law firm wishes to retain female talent, that it should provide them with additional benefits at the time that they need it the most i.e. when becoming a parent,¹²⁴ in order to encourage loyalty from the employee and stem the outward flow of female solicitors at this stage of their careers.

Any employee who suffers detriment from their employer for reasons connected with her maternity leave can make a claim under ss.47C and 48(1) ERA 1996. Despite decided cases, 125 it can still be difficult for a solicitor to prove that taking maternity leave had reduced her chances of being promoted to partner, even though there is research showing that women who take maternity leave and/or work part-time are seen as

¹²⁴ The Law Society of Scotland, 'Ensuring Fairness, Creating Opportunity: A Practical Guide to Equality and Diversity for Scottish Solicitors,' 2013 p.58.

¹²³ UK Parliament, Flexible Working Regulations 2014, 2014.

¹²⁵ Lyons v DWP Jobcentre Plus UKEAT/0348/13/JOJ; Smith-Twigger v Abbey Protection Group Ltd UKEAT/0391/13/MC; Hulley & Kirkwood Consulting Engineers Ltd v Marston UKEAT/0078/13/RN

stepping off the 'partner track' (the route to partnership), and onto the 'mummy track' (the non-partnership route). 126

The right to maternity pay is separate to the right to maternity leave. During the periods of CML, OML and AML set out above, employees continue to enjoy benefits such as a company car, gym memberships, private healthcare, holidays and other contractual benefits, other than pay.

Statutory Maternity Pay (SMP) is governed by Regulation 2(2) Statutory Maternity Pay (General) Regulations 1986, and ss. 164-167 Social Security Contributions and Benefits Act 1992. Employees are entitled to 90% of their average weekly earnings for the first 6 weeks of leave, and a further 33 weeks of leave paid at a set flat rate of SMP or continuing at 90% of their average weekly earnings; whichever is lower. Employers can agree to pay employees more than the statutory minimum if they wish, but it may be set out in the contact of employment that the additional payment beyond SMP must be repaid if the employee does not return to work, or does not remain with that employer for a specified period of time.

The uptake of maternity leave and pay by women solicitors clearly depends on when they choose to have children. There is no argument that the formal equality set out by law is available to them, but the existence of pregnancy and maternity related discrimination, along with indirect discrimination and systemic disadvantage (discussed above) due to the discretionary and opaque promotion criteria and procedures, mean that women solicitors are still unable to achieve substantive equality.

Having set out the main maternity rights available to employed solicitors as mothers, this chapter will now turn to the paternity rights available to employed solicitors who become fathers.

Employers Network for Equality and Inclusion, 'Managing Inclusive Workplaces: An Employer's Guide.'

¹²⁶ Although the phrase 'mommy track' was originally used in US literature, the problem has also been proven to exist in the UK so the British version 'mummy track' is now widely used in UK literature, for example: The Law Society of Scotland, 'Perceptions and Impacts of Working Patterns within the Legal Profession in Scotland.' p.1; Thornton, 'Work/life or Work/work? Corporate Legal Practice in the Twenty-First Century.' p.26.;

2.3.3 Paternity Rights

An employed solicitor who becomes a father,¹²⁷ is entitled to certain rights, but these are significantly limited in comparison to maternity rights and came into force decades after maternity rights.¹²⁸ Fathers are entitled to take one or two weeks paternity leave and after the birth of the child, and are entitled to statutory paternity pay. In a similar way to SMP discussed above at section 2.3.2, it is paid at a flat rate of either £148.68 a week or 90 % of average weekly earnings if that is less. More recently the right to share any unused maternity leave by way of transfer has been introduced, discussed further below.

A major problem with paternity leave is that first of all it simply too short to be able to make a significant difference to co-parenting, and although the option to share parental leave is supposed to alleviate this somewhat, it appears not to be being taken up by fathers.¹²⁹ In order for women solicitors to achieve substantive equality, it will be necessary for men to take up their paternity and parental rights too, so that parenting by in law firms workers becomes normalised and accepted.

2.3.4 Other Parental Rights

As mentioned, in addition to the rights to maternity and paternity leave and pay set out above, parents also have the option of SPL which is a transfer between them of any AML which the mother will not be taking, so that the father can use it instead. There is also the option to take unpaid Parental Leave (in blocks of one week) which is limited to 4 weeks per year, up to a maximum of 18 weeks during the first 5 years of a child's life. For shorter periods of a day or two at a time, employees have the right to take time off for dependents. Where parents adopt a child rather than give birth

 $^{^{\}rm 127}$ Or whose partner/civil partner/spouse becomes a mother through birth or adoption.

¹²⁸ UK Parliament, *The Paternity and Adoption Leave Regulations 2002 Reg 4(2)*. Before this came into force for births on or after 6th April 2003, fathers in the UK did not have the right to take any time off when their child was born.

¹²⁹ Weldon-Johns, 'EU Work – Family Policies — Challenging Parental Roles or Reinforcing Gendered Stereotypes?' p.668'

¹³⁰ UK Parliament, Share Parental Leave Regulations 2014.

¹³¹ Regs 13 and 15, Schedule 2, UK Parliament, *Maternity and Parental Leave Etc. Regulations 1999*, vol. 3312.

¹³² ss.57A and 57B UK Parliament, Employment Rights Act 1996.

biologically, similar rights are available as those set out above for parents at each stage.¹³³

2.3.5 Flexible Working

Although the right to request flexible working is no longer limited to parents, it is placed under this section of this chapter since it is primarily parents who wish to take up this right, and the issues discussed here are most relevant to parents. Flexible, or agile working, can take many forms including: working part-time; compressed hours; working from home; amended start/finish times; and many other possibilities. s.80F ERA 1996 provided the right to request flexible working to anyone who had minor children. This right was extended in June 2014 by the Flexible Working Regulations 2014 to anyone who has been employed continuously for 26 weeks¹³⁴ and there is no longer a requirement for the applicant to be a carer, which could have a negative impact on the rights of parents as they could be seen as competing with colleagues who are not parents in making similar requests. Also men may be concerned about their career progression if they take leave.

2.3.1 Critique of FFR framework and law firms

The last two decades have seen the introduction and extension of a range of FFRs in the UK,¹³⁶ to help parents and carers continue their working lives whilst balancing their family responsibilities, emphasising the need for flexibility around working arrangements.¹³⁷ Although at first glance the FFRs available in the UK may appear to be substantial,¹³⁸ there are problems associated with them such as the traditional view

¹³³ UK Parliament, The Paternity and Adoption Leave Regulations 2002.

¹³⁴ UK Parliament, Flexible Working Regulations 2014, vol. 1398, 2014, s.3.

¹³⁵ s. 131 s.UK Parliament, *Children and Families Act 2014*.

¹³⁶ Much of which is as a result of the incorporation of EU law into UK law.

¹³⁷ Oxana Golynker, 'Family-Friendly Reform of Employment Law in the UK: An Overstretched Flexibility,' *Journal of Social Welfare and Family Law* 37, no. 3 (2015): 378–92, p.378 doi:10.1080/09649069.2015.1081222.

¹³⁸ Grace James, 'Family-Friendly Employment Laws (Re)assessed: The Potential of Care Ethics,' *Industrial Law Journal* 45, no. 4 (December 10, 2016): 477–502, doi:10.1093/indlaw/dww029 p.477.

of families;¹³⁹ the imbalance between the FFRs available to mothers and fathers,¹⁴⁰ the low uptake of them by fathers,¹⁴¹ and the inefficacy of the dispute resolution procedure in allowing parents to enforce the rights that are purported to be available to them.¹⁴²

In addition to the FFR themselves being problematic for the achievement of substantive equality for women solicitors, there is also an issue with the uptake of FFRs within the hypercompetitive culture of law firms in particular.¹⁴³ This chapter has touched upon the culture of law firms at various points referring to the long hours working culture in section 2.2.2 above, the aspect of the gendered pay gap culture in section 2.2.1 above, and the culture of indirect discrimination through systemic disadvantage in terms of promotion criteria, and stereotyping and unconscious bias in sections 2.2.3 (b)(i) and (ii) above. The male dominated culture of law firms¹⁴⁴ may not only prejudice women, but also men who would like to take extended paternity leave or parental leave, but feel prevented from doing so by the culture of law firms. This maintains the status quo and does not work towards reaching gender parity at partnership level in private practice law firms.

Collier has written extensively on the culture of law firms¹⁴⁵ and in particular on how it is not helpful to the well-being of men or women.¹⁴⁶ Collier explains that in law firms there is a 'need for frequent long hours and the phenomena of 'workaholism',

¹³⁹ Weldon-Johns, 'From Modern Workplaces to Modern Families – Re-Envisioning the Work–Family Conflict.'

¹⁴⁰ Weldon-Johns, 'EU Work – Family Policies — Challenging Parental Roles or Reinforcing Gendered Stereotypes ?'; James, 'Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities.': Atkinson. 'Shared Parental Leave in the UK: Can It Advance Gender Equality by

an Era of Shifting Identities.'; Atkinson, 'Shared Parental Leave in the UK: Can It Advance Gender Equality by Changing Fathers into Co- Parents?'

Weldon-Johns, 'From Modern Workplaces to Modern Families – Re-Envisioning the Work–Family Conflict.'
 James, 'Family-Friendly Employment Laws (Re)assessed: The Potential of Care Ethics.' p.478-493; Dickens, Making Employment Rights Effective: Issues of Enforcement and Compliance.

¹⁴³ Kumra, 'Busy Doing Nothing: An Exploration of the Disconnect between Gender Equity Issues Faced by Large Law Firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them.'; Collier, 'Naming Men as Men in Corporate Legal Practice: Gender and the Idea of Virtually 24/7 Commitment in Law.'

¹⁴⁴ The Law Society of England and Wales, 'The Law Society's Framework for Equality, Diversity and Inclusion 2016-2019.'Sommerlad, 'Researching and Theorizing the Processes of Professional Identity Formation.'; Ashdown, 'Shaping Diversity and Inclusion Policy with Research.'

¹⁴⁵ Collier, 'Naming Men as Men in Corporate Legal Practice: Gender and the Idea of Virtually 24/7 Commitment in Law.'; Collier, 'Rethinking Men and Masculinities in the Contemporary Legal Profession: The Example of Fatherhood, Transnational Business Masculinities, and Work-Life Balance in Large Law Firms.'; Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices).'

¹⁴⁶ Richard Collier, 'Wellbeing in the Legal Profession: Relections on Recent Developments (or, What Do We Talk about, When We Talk about Wellbeing?),' International Journal of the Legal Profession 5958, no. December (2015): 1–20, https://doi.org/10.1080/09695958.2015.1113970.

especially in certain areas of work and in the large commercial 'City' firms in particular' which clearly, is not the most welcoming environment for an employee to request the FFR available to him or her. This means that men working in law firms who become fathers are probably reluctant to take up options such as SPL as it is likely to have an adverse effect on their career, spreading this problem to male solicitors as well as women.

Until recently, this was not as much of a problem for men as it has been for women, but Atkinsons' criticism of the SPL provisions shows that men who would like to be equal co-parents to their children are not being given equitable rights to do so. Long agrees that even though society appears to be moving on in terms of its attitudes to parental responsibilities, the statutory scheme of maternity and paternity rights in the UK promotes outdated stereotypes which inhibit parents from 'partaking in the work and home life on equal terms. Collier emphasises the importance of engaging with fathers on 'legal and policy developments around the promotion of gender equality, flexible working, and shared parenting. This thesis agrees with Collier's view that it is vital to engage fathers in the debate surrounding work-life balance in law firms, and that men should be included in the promotion of gender-free parenting plans and FFRs in order to improve the situation for both men and women, in the workplace and at home.

Connell states that: 'The whole economic sphere is culturally defined as men's world (regardless of the presence of women in it), while domestic life is defined as women's world (regardless of the presence of men in it). This thesis talks further about this division of 'spheres' in relation to the 'private' sphere of home and family and the 'public' sphere of paid work 152 in Chapters 3, 4 and 5 and the problems with this division.

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¹⁴⁷ Ibid p.44.

¹⁴⁸ Atkinson, 'Shared Parental Leave in the UK: Can It Advance Gender Equality by Changing Fathers into Co-Parents?'

¹⁴⁹ Vanessa Long, 'Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination,' The Equal Rights Review 9, no. 156 (2012): pp.52–65 p.63.

¹⁵⁰ Richard Collier, 'Rethinking Men and Masculinities in the Contemporary Legal Profession: The Example of Fatherhood, Transnational Business Masculinities, and Work-Life Balance in Large Law Firms,' Nevada Law Journal 13 (2013): pp. 410–37, p.424.

¹⁵¹ R.W. Connell, *Gender* (Cambridge: Polity Press, 2002). p.61

¹⁵² Cary L. Cooper and Suzan Lewis, 'Gender and the Changing Nature of Work,' in *Handbook of Gender and Work*, ed. Gary N. Powell (London: Sage Publications Ltd, 1999), 37–46.p.45

2.4 Conclusions

This chapter began in section 2.1 by discussing the meanings of the term 'equality' and distinguished between formal and substantive equality. It found that Fredman's definition of substantive equality sits well with the views of this thesis. Section 2.2 looked at the most relevant general employment rights available to solicitors who are employed in private practice law firms in the UK, and then set out more specifically the most relevant FFRs aimed at parents. It ended with a critique of the FFRs as currently provided for by UK law, and the issues facing solicitors of both sexes who may wish to use them.

At each stage, the chapter considered whether there was evidence of the rights contributing towards substantive equality for women solicitors in private practice. Unfortunately, as has been seen, despite having a raft of employment rights which on the surface appear to allow women solicitors to continue their careers at the same time as having a family, the reality is quite different. Formal equality for women has been achieved, but in order to attain substantive equality (as defined by Fredman), the gaps will need to be filled, and this thesis argues that this can be done via the Regulators' workplace policies. In terms of legal rights for fathers, legislation needs to be equalised so that both parents have equal rights if there is any hope of achieving gender free parenting, and to encourage true co-parenting.

The next chapter in this thesis will set out a theoretical framework based on CE, which will be used in Chapter 5 to analyse the policies and strategies of the Regulators in order to draw conclusions as to how to improve the retention and progression of women solicitors in private practice law firms, in order to strive for substantive equality.

Chapter 3 - Theoretical Framework

The central claim of this thesis is that gender inequality in private practice law firms can be more effectively addressed if the principles encapsulated by CE are explicitly embedded in the policies of the Regulators for the purposes of achieving substantive equality. In Chapters 1 and 2, this thesis set out the problems facing women solicitors in private practice, and the legal framework which provides formal equality, but not substantive equality. Chapter 3, sets out a theoretical framework which can be used to fill this void by employing it to analyse the policies of the Regulators regarding the retention and progression of women solicitors. The results of this analysis and my specific recommendations are set out in Chapter 5.

Since this theoretical framework is derived from CE, in this chapter I critically evaluate the work of some of the leading theorists in this field; namely Nel Noddings, Sara Ruddick, and Eva Feder Kittay. Their work is mainly within the social sciences and humanities in the fields of education, philosophy and politics. CE is wider than these three theorists, but this discussion is mainly focussed on their work as it is most relevant to this framework, as I have identified in Chapter 1 the need for law firms cultures to be less macho and more caring, and for the criteria for promotion to include CE attributes. Although there has been some mention of the use of CE in the workplace 154 academic literature has not yet addressed the importance of CE's themes in law firms, and this thesis seeks to fill this gap in existing knowledge. After defining CE theory and critiquing it, I will set out the elements of this framework on relationships and interdependency in family life and work life.

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¹⁵³ Other leading Care Ethics theorists include Carol Gilligan, Joan Tronto and Virginia Held.

¹⁵⁴ Arthur, "Share Price Reactions to Work-Family Initiatives: An Institutional Perspective." Michelle M Arthur, 'Share Price Reactions to Work-Family Initiatives: An Institutional Perspective', <i>Academy of Management Journal</i>, 46.4 (2003), 497–505. Thomas I White, 'Business, Ethics, and Carol Gilligan's 'Two Voices," *Business Ethics Quarterly* 2, no. 1 (1992): 51–61.

3.1 Defining Care Ethics

This section contextualises CE by situating it within difference feminism on the broader feminist spectrum. The various definitions of CE as proposed by the relevant theorists will then be discussed.

CE can be seen as a kind of difference feminism.¹⁵⁵ Historically, society has constructed different gender roles for men and women¹⁵⁶ which has led to men and women having different lived experiences. The sameness/difference debate is a fundamental to understanding difference feminism and this will now be considered.

Supporters of the sameness argument advocate that women and men are the same and should be treated as such.¹⁵⁷ They take the view that to suggest that women are different from men inevitably leads to women being seen as weaker or inferior.¹⁵⁸ This is based on the view that if women claim to be different, but suggest that their differences should be valued, this argument is unlikely to succeed easily because it will always take place within the patriarchal framework.¹⁵⁹ This thesis rejects this point of view as defeatist, because differences should be celebrated and not denied on the basis that their value will not be sufficiently calculated according to current rules of the game. Instead difference feminists should insist the differences are valued correctly, and this thesis argues that this can be done by including new promotion criteria in law firms, which values elements of CE.

Fredman¹⁶⁰ takes the view that 'the assumption that equality and difference are the only two alternatives is misleading and counterproductive...The dualism needs to be abandoned, and instead the underlying power structures need to be challenged and reformed.'¹⁶¹ The position adopted in this thesis supports the view that the underlying

¹⁵⁵ Most Care Ethics theorists are difference feminists, with the exception of Joan Tronto.

¹⁵⁶ Where 'women are charged with care-giving' Judy Auerbach et al., 'On Gilligan's 'In a Different Voice,'' *Feminist Studies* 11, no. 1 (1985): 149–61.

¹⁵⁷ Tong, 'Feminist Thought in Transition: Never a Dull Moment.' Pearse and Connell, 'Gender Norms and the Economy: Insights from Social Research.'

¹⁵⁸ Carrie Menkel-Meadow, 'Portia in a Different Voice : Speculations on a Women's Lawyering Process,' *Berkeley Women's Law Journal* 1, no. 39–63 (1985). p.41

¹⁵⁹ ibid. p.95

¹⁶⁰ Fredman's work on substantive equality is set out in Chapter 2 above

¹⁶¹ Sommerlad and Sanderson, *Gender, Choice and Commitment*. Women Solicitors in England and Wales and the Struggle for Equal Status. p.16

power structures should be reformed, and suggests that this theory and recommendations can be used to work towards filling the void between formal and substantive equality.

Instead of the equal treatment that formal equality provides, this thesis suggests that what is required is a revaluation of attributes of everyone, regardless of gender or sex in order to allow the true worth of everybody to be appreciated. Writing specifically about the legal profession, Sommerland and Sanderson point out that when women were allowed to join the profession, centuries after men, they were not stepping into 'neutral jobs' but rather 'They were assigned work roles which were gendered, which the law itself designated as 'natural' for someone with particular gender characteristics to occupy.' 162 It is for this reason that a revaluation of people's attributes needs to be made, and this thesis suggests that in law firms, this should be done by adopting this theory into workplace culture, and using my recommendations about the criteria used for promotion to partner, which are set out in Chapter 5. CE theory can assist in doing this.

CE theory first began in the early 1980s with the primary works of Carol Gilligan¹⁶³ closely followed by Nel Noddings.¹⁶⁴ In the years following their initial work, both Gilligan and Noddings have revised and improved their theories following criticism¹⁶⁵ and further research of their own.¹⁶⁶ Later CE theorists¹⁶⁷ have built on their work in a number of fields, and the most relevant parts of these later works will be discussed in detail at various points in this chapter.

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¹⁶² Sommerlad and Sanderson, *Gender, Choice and Commitment*. Women Solicitors in England and Wales and the Struggle for Equal Status. p.16

¹⁶³ Gilligan, In a Different Voice: Psychological Theory and Women's Development.

¹⁶⁴ Noddings, Caring, a Feminine Approach to Ethics & Moral Education.

¹⁶⁵ A critique of the Ethics of Care is set out in section 3.2 below.

¹⁶⁶ Carol Gilligan, 'Reply by Carol Gilligan,' Signs 11, no. No. 2 (Winter, 1986) (1986): 324–33,

https://doi.org/10.2307/3174055; Carol Gilligan and David A.J. Richards, *The Deepening Darkness: Patriarchy, Resistance and Democracy's Future* (New York: Cambridge University Press, 2009); Carol Gilligan, 'Moral Injury and the Ethic of Care: Reframing the Conversation about Differences,' *Journal of Social Philosophy* 45, no. 1 (2014): 89–106, https://doi.org/10.1111/josp.12050.;Carol Gilligan, 'Hearing the Difference: Theorizing Connection,' *Hypatia* 10, no. 2 (1995): 120–27; Carol Gilligan, *Joining the Resistance* (Cambridge: Polity Press, 2011). Nel Noddings, 'Social Studies and Feminism,' *Theory and Research in Social Education* 20, no. 3 (1992): 230–41.Noddings, 'The Care Tradition: Beyond 'Add Women and Stir.' Nel Noddings, 'Teaching Themes of Care,' *Character by the Center for the Advancement of Ethics and Character* (Boston Massachusetts, 2007). Nel Noddings, 'The Language of Care Ethics,' *Knowledge Quest* 40, no. 4 (2012): 52–56.

 $^{^{167}}$ Sara Ruddick, Eva Feder Kittay, Virginia Held and Joan Tronto.

Noddings defines CE as 'a *relational* approach to modern life'¹⁶⁸ which is fundamental to the themes of 'relationships and interdependency' both in family life (section 3.4) and in work life (section 3.5). Gilligan also talks about the CE being grounded in relationships.¹⁶⁹

This chapter will now discuss this theoretical framework which is derived from it, made up of relationships and interdependency in (1) family life; and (2) work life.

3.3 Relationships and Interdependency in Family Life

This section will address the first part of the theoretical framework which is relationships and interdependency in family life. Although relationships and interdependency in family life are important to most CE theorists, there are two major theorists for whom it is central, and these are Sara Ruddick and Eva Feder Kittay, whose work will now be discussed.

Sara Ruddick's work *Maternal Thinking: Towards a Politics of Peace*¹⁷⁰ was ground-breaking because although there had been much writing on motherhood before, no previous work suggested that this experience provided a new way of thinking related to the institution of motherhood rather than the experience of mothering.

Ruddick states that 'mothering is potentially work for men and women'¹⁷¹. Maternal thinking does not depend on having been pregnant or giving birth to a child so whoever this is done by is irrelevant, it is the practice of parenting and the thinking behind it that is important. The way that mothers think can be learnt by men, so the social practice of mothering should be separate from the biological function of birthing, not entwined in the lived experiences and in relevant institutions as is currently the case. If such gender free parenting can be encouraged both in family life and in work life, this would assist in achieving substantive equality for women solicitors in private practice.

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¹⁶⁸ Nel Noddings, 'Care Ethics and Education,' in Beyond Bystanders: Educational Leadership for a Humane Culture in a Globalizing Reality, ed. Nimrod Alioni and Lori Weintrob (Rotterdam: Sense Publishers, 2017), 183–90, http://www.riss.kr/link?id=T12333667 p.183.

¹⁶⁹ Gilligan, Joining the Resistance. p.175

¹⁷⁰ Ruddick, Maternal Thinking: Towards a Politics of Peace.

¹⁷¹ ibid.p.40

Cooley and Stone take the view that Ruddick's definition 'opens the field for exploration'. However, bell hooks warned Ruddick against attempting to include men in the definition of 'mother'. Although, Ruddick's later work still talks about maternal thinking, not parental thinking, Huddick herself does acknowledge that her definition of 'mother' is problematic: 'But there were several problems with my proclamation. Among the 'problems' were the men who were and meant to be primary parents yet rejected entirely the status of mother.' This is not entirely surprising and supports the argument that broader parenting terms should be used.

It is argued in this thesis that in order for gender-free parenting to be facilitated, the terms 'parental' and 'parent' should be used in place of 'maternal' and 'mother' where possible, since the language used can help change cultural norms. ¹⁷⁷ If law firms always used the language of gender-free parenting, this would assist in encouraging more fathers to take paternity or parental leave, provided that employment rights were equalised as suggested in Chapter 2, and for male solicitors who already have children to feel more comfortable in taking on a greater share of childcare. ¹⁷⁸ Having children and dealing with child care is not a women's issue, and this should be emphasised in order for the problems of the retention and progression of women solicitors in private practice law firms to be tackled, and for substantive equality to be achieved.

Another CE theorist that holds similar views to Ruddick is Eva Feder Kittay.¹⁷⁹ A major feature of Kittay's work within the theme of relationships and interdependency in family life relates to her own experience of caring for her severely disabled adult daughter Sesha, and she talks about the need for recipients of care to accept it graciously for a

¹⁷² Nicole Cooley and Pamela Stone, 'Introduction,' WSQ: Women's Studies Quarterly 37, no. 3&4 (2009): 13–21, p.15.

¹⁷³ Andrea O'Reilly, 'A Conversation About Maternal Thinking,' in Maternal Thinking: Philosophy, Politics, Practice (Toronto: Demeter Press, 2009), 14–38, p.27.

¹⁷⁴ Sara Ruddick, 'On Maternal Thinking,' WSQ: Women's Studies Quarterly 37, no. 3&4 (2009): 305–8

¹⁷⁵ Sara Ruddick, 'Pacifying the Forces: Drafting Women in the Interests of Peace,' *Signs* 8, no. 3 (1983): 471–89. p.27

¹⁷⁶ Alison Bailey, 'Review Essay: Mothering, Diversity, and Peace Politics,' Hypatia 9, no. 2 (1994): 188–98, p.188.

¹⁷⁷ Nigel Parton, 'Rethinking Professional Practice: The Contributions of Social Constructionism and the Feminist 'Ethics of Care,' British Journal of Social Work 33, no. 1 (2003): 1–16, p.6.

¹⁷⁸ Chapter 2 discusses why SPL is not being used by fathers

¹⁷⁹ O'Reilly, op.cit.

true caring relationship to take place.¹⁸⁰ Although Kittay's own circumstances are very specific, her work is more generally about care. This thesis argues that in fact, this element of relationships in family life is important to any consideration of substantive equality for solicitors in a wider context. This is because there will be an impact on the hours that anyone will be available to work in a law firm if they are also dealing with such responsibilities in their family life.

Kittay looks at liberal and feminist ideas of equality¹⁸¹ taking into consideration dependent people and those around them. Kittay points out that no theory can claim to be egalitarian if it does not take into consideration dependency and dependency workers, and that 'dependency must be faced from the beginning of any egalitarian project that hopes to include all persons within its scope.'182 She points out that a social responsibility for care needs to be included in any principle of justice because care will inevitably be required in society. This is not only the obvious care that every person requires at the start of their lives as a newborn, but throughout the life cycle, as people move from the person being taken care of (as a child), to the person caring for someone (as an adult), and then back to the person being taken care of again (as an elderly, or ill/disabled adult).¹⁸³

Therefore, people remain interdependent throughout their lifetimes on those they live with, or those on whom they depend or who depend upon them.¹⁸⁴ In addition to the actual caring that takes place in the home, there is also the issue of household management which is necessary for daily life to run smoothly for these interdependent people. Tasks such as cooking, cleaning, driving children to and from school, childcare and other activities, still tend to fall to women more often than men.¹⁸⁵ Even where these jobs are outsourced to others (who are usually women) it is the women

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¹⁸⁰ Eva Feder Kittay, 'The Completion of Care - With Implications for a Duty to Recieve Care Graciously,' in Care Professions and Globalization: Theoretical and Practical Perspectives, ed. Craig Iffland and Ana Marta Gonzalez (New York: Palgrave MacMillan, 2014), pp33–42

¹⁸¹ Sara Ruddick, 'An Appreciation of Love's Labor,' Hypatia 17, no. 3 (2002): 214–24. p.215

¹⁸² Kittay, Love's Labor: Essays on Women, Equality and Dependency. p.77

¹⁸³ Eva Feder Kittay, 'Dependency, Equality, and Welfare,' Feminist Studies 24, no. 1 (1998): 32–43 p.36.

¹⁸⁴ Fiona Robinson, 'Beyond Labour Rights,' International Feminist Journal of Politics 8, no. 3 (2006): 321–42, p.321.

¹⁸⁵ Lyonette and Crompton, 'Sharing the Load? Partners' Relative Earnings and the Division of Domestic Labour.'

of the household who often shoulder the burden of finding and managing these 'helpers' which is a burden in itself.¹⁸⁶

As the task of caring usually falls to the female members of the household, 187 this contributes to the problem of inequality, as the burden that they think they have extinguished once their own children have grown up is reignited as their parents reach the age where they require care to be taken of them. Increasingly women find themselves caring for their own children and for their elderly parents simultaneously, as women delay childbirth until later in life, and older people are living longer, often with chronic illnesses or disabilities resulting in the 'sandwich generation'. 188

This theoretical framework emphasises relationships and interdependency in family life as a vital issue in tackling the retention and progression of women solicitors in private practice and achieving substantive equality, and it is clear that law firms need to take more account of the other responsibilities that people have outside of their work life.

As seen in Chapter 2, FFRs are available to all employed solicitors, but often those who choose to take these options are not promoted in the same way as those that do not. Also Chapter 2 explained that some fathers want to be more involved in the early years of their children's lives, but the hypercompetitive culture of law firms is not conducive to them doing this and progressing their careers unhampered. It is for these reasons that it has been included as a theme in this framework which will be used to analyse the policies of the Regulators in Chapter 5.

¹⁸⁶ Joan C. Tronto, 'The 'Nanny' Question in Feminism,' Hypatia 17, no. 2 (2002): 34–51, https://doi.org/10.1111/j.1527-2001.2002.tb00764.x.

¹⁸⁷ Women's Business Council, 'Maximising Women's Contribution to Future Economic Growth,' 2013 p.24. ¹⁸⁸ Allison M. Steiner and Paula C. Fletcher, 'Sandwich Generation Caregiving: A Complex and Dynamic Role,' *Journal of Adult Development* 24, no. 2 (2017): 133–43, https://doi.org/10.1007/s10804-016-9252-7.; Jade E. Gillett and Dimity A. Crisp, 'Examining Coping Style and the Relationship between Stress and Subjective Well-Being in Australia's 'Sandwich Generation,' Australasian Journal on Ageing 36, no. 3 (2017): 222–27, https://doi.org/10.1111/ajag.12439. *The Sandwich Generation: Caring for Oneself and Others at Home and at Work*, ed. Ronald J. Burke and Lisa M. Calvano (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing. 2017).

¹⁸⁹ Collier, 'Naming Men as Men in Corporate Legal Practice: Gender and the Idea of Virtually 24/7 Commitment in Law.'Richard Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices),' *Journal of Law and Society* 28, no. 4 (December 2001): 520–45, https://doi.org/10.1111/1467-6478.00201.Richard Collier, 'Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender,' *Harvard Journal of Law and Gender* 33 (2010): 431–75.

In addition to relationships and interdependency in family life, it is vital to consider the relationships and interdependency that exist in work life, which will now be discussed.

3.4 Relationships and Interdependency in Work Life

Section 3.3 above set out the first element of this theoretical framework which is the importance of relationships and interdependency in family life. This section will now set out the second part by continuing the theme of relationships and interdependency, but with emphasis on work life, rather than family life.

Relationships and interdependency in work life can be considered in relation to people working in law firms as follows. Trainee solicitors joining a law firm at the beginning of their careers will have relationships with more senior solicitors who will have responsibility for supervising their work during the period of their training contracts, traditionally via four 'seats' of learning in separate areas of law. This relationship is interdependent because the trainee needs the supervising solicitor to guide them in their work, and the supervisor needs the trainee to assist them on parts of larger files or projects for which they are ultimately responsible. All fee earners will also have interdependent relationships with administrative and support staff who help them with secretarial, accountancy, personnel and other issues which they cannot deal with themselves.

In addition to internal relationships of interdependency within law firms, there are external relationships which exist with clients and other parties. These are also interdependent because for example property lawyers rely on financial institutions, estate agents, Land Registry staff, and other lawyers for their work to be completed. In contentious practice areas, solicitors rely on Court staff, expert witnesses and other stakeholders for their work to be completed, and of course clients are a vital third party that are required by solicitors for the profession to continue. This solicitor-client relationship is also interdependent because clients depend on solicitors for their legal needs to be met in commercial, private or other fields, and solicitors need clients to pay their bills so that salaries and other costs can be discharged.

Noddings' work has been criticised for being domain specific, in other words, she talks mainly about special personal relationships, such as parent and child, or teacher and pupil, but critics suggest that perhaps this theory might not be relevant to the arenas of business, world politics or the military for example.¹⁹⁰ However, Noddings disagrees with this point and instead suggests that CE should be used as a 'critical tool for rethinking and restructuring these arrangements.'¹⁹¹.

This thesis agrees with Noddings and suggests that solicitors who spend more time training trainees and who are good at it, should be specifically rewarded, and this can be achieved by including it in the criteria for promotion to partner. This can be ascertained by checking their time recorded supervising trainees, and feedback collected from trainees after each seat of their training contract, asking about the supervision they received and from whom, and used as evidence for promotion. Time spent training others within the firm for example giving seminars, should also be valued and rewarded, not simply recorded on a time-recording system designed for billing clients. If providing good supervision and training were to be one of the criteria for promotion to partner, this would make the situation fairer for all. It is the responsibility of all solicitors to pass on their skills and knowledge to more junior staff and their efforts and performance in this area should form part of the decision making process for promotion.

3.5 Conclusions

In conclusion, this thesis emphasises the importance of relationships and interdependency in private practice in the legal profession. This should be appreciated both in family life (by encouraging the use of FFRs without career progression being forfeited as discussed in Chapter 1), and in work life (by valuing time spent training trainees and collecting feedback on relationships with colleagues and other stakeholders also discussed in Chapter 5). These elements should be valued in the process of promotion to partner alongside the existing criteria, as this would go some way to alleviating the problem of the retention and progression of women solicitors, and work towards achieving substantive equality for all.

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¹⁹⁰ Ann Diller, 'Review: The Ethics of Care and Education: A New Paradigm, Its Critics, and Its Educational Significance,' *Curriculum Enquiry* 18, no. 3 (1988): 325–42.p.331

¹⁹¹ ibid.p.332

The next chapter will set out the relevant policies and strategies of the LS of S and the LS of E&W, in so far as they relate to relationships and interdependency and the retention and progression of women solicitors in private practice. These will then be analysed in Chapter 5, using the theoretical framework which has been set out in this Chapter, and specific recommendations will be made suggesting how to fill the void between formal and substantive equality for women solicitors.

Chapter 4: Policies and Strategies of the Regulators

The central claim of this thesis is that gender inequality in private practice law firms can be more effectively addressed if the principles encapsulated by CE are explicitly embedded in the policies of the Regulators for the purposes of achieving substantive equality. This thesis has set out the problems relating to women solicitors caused by the lacuna between formal equality in law and substantive equality in lived experience, the legal position affording formal equality, and the theoretical framework which will be used. This chapter will set out the policies and strategies including workplace guidance and regulation provided by (1) LS of E&W; (2) SRA; and (3) LS of S, as far as they relate to women solicitors. This chapter will conclude with a brief comparison, and the full detailed content analysis of these policies will take place in Chapter 5, using the theoretical framework which has been developed using the theory of CE as set out in Chapter 3.

It is of note that the roles of the Law Societies in each jurisdiction differ somewhat, and England and Wales has an additional regulatory body. In England and Wales, the Law Society continues the representative role it has had since it was founded in 1825, 192 but is no longer the sole regulator of solicitors. It was a recommendation of the Clementi Review in 2004 193 that the regulation and representation of solicitors in England and Wales should be dealt with by separate bodies, so the Legal Services Act 2007 created the LSB 194 which oversees the regulation of all lawyers in the jurisdiction. Under the LSB there are separate 'approved regulators' for the separate branches of the legal profession in England and Wales i.e. solicitors, barristers, legal executives, licensed conveyancers, patent agents, trademark attorneys, costs lawyers and notaries. 195

This thesis focuses on women solicitors rather than other types of lawyers, so it will analyse the regulation of this branch of the legal profession only, which is dealt with

¹⁹² The Law Society of England and Wales, 'The Law Society's Framework for Equality, Diversity and Inclusion 2016-2019' (London, 2015).

¹⁹³ Sir David Clementi, 'Review of the Regulatory Framework for Legal Services in England and Wales Final Report,' 2004.

¹⁹⁴ S.2(1).

¹⁹⁵ S.12 and Schedule 2 Ibid.

by the SRA as an approved regulator under the oversight of the LSB. ¹⁹⁶ The SRA is officially a part of the LS of E&W but has full operational independence, and its regulatory decisions are made independently of the LS of E&W and in the public interest. ¹⁹⁷ In addition to the regulation of solicitors by the SRA, the LS of E&W is listed as an 'approved regulator' as a regulatory body and it continues to deal with the representation of solicitors in England and Wales and its work in relation to women solicitors is of great relevance to this thesis. The LS of E&W sees itself has having a key role as an agent for change in the legal profession, ¹⁹⁸ and it is clear from the volume of research and guidance it has produced that it takes this role seriously. In its 2016-2019 Framework, the LS of E&W refers to 'the importance that the profession places on the Society's role in working with private practice to enhance their ability to create inclusive working environments' ¹⁹⁹ and 'using our unique position to help exert global influence in the legal profession'. ²⁰⁰

In Scotland, the LS of S has been dealing with both the regulation and representation of all solicitors in Scotland since 1949. Its work around women solicitors specifically, is therefore very significant to this thesis. The position of women advocates, members of the judiciary or other lawyers within Scotland will not be examined directly.

The statutory duties relating to the employment rights of solicitors in law firms were set out in Chapter 3. In addition to these, there are some regulatory requirements relating specifically to law firms which are mandatory. In England and Wales, the most relevant such requirement is Principle 9 of the SRA handbook, which is discussed further in section 4.2.1. In Scotland, Rule B1.15 of the Standards of Conduct is the most relevant rule and is discussed in section 4.3.3.

Beyond statutory obligations and regulatory requirements, the policies and strategies of the Regulators are largely non-binding on the legal profession. However, they are an indication of the best practice that is expected of its members, and if law firms do

¹⁹⁶ S.20 UK Parliament.

¹⁹⁷ UK Parliament. p.1

¹⁹⁸ Solicitors Regulation Authority, 'Equality , Diversity and Inclusion Strategy 2014/15 to 2016/17,' 2014.

¹⁹⁹ The Law Society of England and Wales, 'The Law Society's Framework for Equality, Diversity and Inclusion 2016-2019.' p.8

²⁰⁰ The Law Society of England and Wales, 'Law Society of England and Wales Practice Note on Equality Act 2010' (London, 2012).p.7

not meet the standards set out by the Regulators they may need to explain why they did not do so, in the event that a complaint is made against them.

This chapter will now outline the relevant policies and strategies of these Regulators, starting with England and Wales, and then Scotland.

4.1 England and Wales

The retention and progression of women solicitors has been of interest in the last decade or so and this is represented by various documents and initiatives which are summarised and discussed below.

4.1.1 Equality and Diversity Framework 2016-2019²⁰¹

This framework is a three year plan setting out the LS of E&W's objectives relating to equality and diversity both as an employer and as the representative body for solicitors. Although it is expiring this year, the new plan has not yet been published. The objectives are aligned with the overall goals of the LS of E&W and the issues of equality, diversity and inclusion appear to have increased in importance as compared to the previous version. It states: The Law Society of England and Wales will take necessary action to eliminate individual and institutional discrimination;... and to make equality and equal treatment a core issue in the development, delivery and refinement of its policies, initiatives and services and the way it manages its staff. 205

²⁰³ As at August 2019.

²⁰¹ The Law Society of England and Wales, 'The Law Society's Framework for Equality, Diversity and Inclusion 2016-2019.'

²⁰²Ibid p.7

²⁰⁴ The Law Society of England and Wales, 'The Law Society Equality and Diversity Framework 2012-2015,' 2012.

 $^{^{205}}$ The Law Society of England and Wales, 'The Law Society's Framework for Equality , Diversity and Inclusion 2016-2019' (London, 2015) p.3.

4.1.2 Diversity and Inclusion Charter²⁰⁶

The flagship initiative of the LS of E&W's strategy in relation to women solicitors is the Charter to which law firms and other employers (Signatories) are invited to sign up. It was first established in 2009 and the latest figures show that the number of Signatories stands at 467 law firms²⁰⁷ which represents over one third of all employed solicitors in England and Wales, and more firms are continuing to commit to the Charter on an ongoing basis. The LS of E&W plans to update the Charter soon, but has not given a timeline for doing so.²⁰⁸

The Charter statement comprises six public commitments which the Signatories agree to achieve. These include such striving to achieve best practice in the recruitment, retention and career progression of their employees; naming a senior individual within each Signatory to be responsible for that establishment meeting the Charter commitments; sharing examples of good practice with other Signatories and working together to achieve the implementation of the Charter aims; and publishing an annual report on the diversity profile of each Signatory's UK employees and details of their work on equality, diversity and inclusion.²⁰⁹

Once they have committed to the Charter and become Signatories, firms have access to the Charter protocols, checklists, toolkits, case studies and best practice guidance which sit behind a firewall on the LS of E&W's website. There is also a large selection of guidance on diversity and inclusion available to the general public via the website which does not require any log-in details to be accessed. The Practice Notes of most

²⁰⁶ The Law Society of England and Wales, 'Law Society of England and Wales Diversity and Inclusion Charter,' www.lawsociety.org.uk, 2016, https://www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion/diversity-inclusion-charter/.

²⁰⁷ The Law Society of England and Wales, 'The Law Society's Diversity and Inclusion Charter,' 2017, https://www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion/articles/lawsociety-diversity-and-inclusion-charter/.

²⁰⁸ https://www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion/diversity-inclusion-charter/diversity-charter-annual-report/

²⁰⁹ ibid.

interest in this area are on flexible working;²¹⁰ positive action;²¹¹ equal pay;²¹² collecting, reporting and publishing diversity data;²¹³ mentoring;²¹⁴ and procurement.²¹⁵ There are three protocols which are on flexible working;²¹⁶ legal procurement;²¹⁷ and monitoring and reporting.²¹⁸

The Signatories produce a joint biennial report to inform the LS of E&W of their progress towards achieving the goals of the Charter. Although the Charter still includes the commitment to annual reporting, since 2015 this has become a biennial activity.²¹⁹ The 2017 Biennial report indicates encouraging progress as over 90% of large firms have a partner-level diversity champion and 62% of all solicitors working in signatory firms are women.²²⁰

4.1.3 Lexcel Accreditation

This is an award made by the LS of E&W to legal practices which meet the standards set out for 'excellence in legal practice management and client care.'221 In version 6.1222 of the Lexcel Legal Practice Quality Mark the fourth standard for legal practices is headed 'People Management' which states at 4.2 that 'Practices must have an equality and diversity policy, which must include: (a) recruitment, selection and

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²¹⁰ The Law Society of England and Wales, 'Law Society of England and Wales Practice Note on Flexible Working' (London, 2015).

²¹¹ The Law Society of England and Wales, 'Law Society of England and Wales Practice Note on Positive Action,' 2011.

²¹² The Law Society of England and Wales, 'Equal Pay: Guidance, Toolkit and Templates' (London, 2015).

²¹³ The Law Society of England and Wales, 'Law Society of England and Wales Practice Note on Collecting, Reporting and Publishing Diversity Data' (London, 2016).

²¹⁴ The Law Society of England and Wales, 'Law Society of England and Wales Mentoring Programme,' www.lawsociety.org.uk, 2016, https://www.lawsociety.org.uk/support-services/practice-management/Diversity-inclusion/mentoring-programme/.

²¹⁵ The Law Society of England and Wales, 'Law Society of England and Wales Procurement Protocol,' www.lawsociety.org.uk, 2016, https://www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion/procurement-protocol/.

²¹⁶ The Law Society of England and Wales, 'Law Society Statement on Flexible Working Protocol,' 2011, http://www.lawsociety.org.uk/practicesupport/equalitydiversity/inclusioncharter/flexible-working-protocol.page.

²¹⁷ The Law Society of England and Wales, 'Law Society of England and Wales Procurement Protocol.'

²¹⁸ The Law Society of England and Wales, 'Law Society of England and Wales Practice Note on Collecting , Reporting and Publishing Diversity Data.'

²¹⁹ The Law Society of England and Wales, 'Diversity and Inclusion Charter Biennial Review 2015' (London, 2015).

²²⁰ The Law Society of England and Wales, 'Diversity & Inclusion Charter 2017 Review - Summary,' 2017.

²²¹ The Law Society of England and Wales, 'Lexcel England and Wales v6 Standard for Legal Practices Excellence in Legal Practice,' 2014.

²²² Updated March 2018.

progression...'223 but it does not deal specifically with promotion to partner level which is a missed opportunity.

Law firms in England and Wales are not obliged to become Charter Signatories, nor are they obliged to apply for Lexcel accreditation.

4.1.4 International Women in Law Summit 2012 Legacy Report

In recent years, the LS of E&W has marked International Women's Day on 8th March by hosting networking events or training on the topic of women solicitors, and in 2012, the International Women in Law Summit took place in London.²²⁴ It 'assessed the outcomes of three decades of diversity initiatives across the legal profession worldwide'²²⁵ and looked at what must be done in the future.

A legacy report document was produced setting out the key recommendations reached at the event and from the research commissioned in advance of the summit. The recommendations are separated into those which are aimed at professional bodies and organisations; and those which are aimed at law firms. However, no swift progress was made regardless of the Summit and Legal Report, and the recommendations were not obviously implemented, leading to more money and time being spent on similar events in 2019.

4.1.5 Career Barriers Action Plan 2013

In 2008, the LS of E&W salary survey identified pay disparities between particular groups of solicitors.²²⁶ This prompted further research to be commissioned by the LS

²²⁴ The Law Society of England and Wales, 'Law Society of England and Wales: Top Lawyers Set Agenda for Change at International Women's Day Summit,' www.lawsociety.org.uk, 2012,

https://www.lawsociety.org.uk/news/press-releases/top-lawyers-set-agenda-for-change-at-international-womens-day-summit/.

²²³ The Law Society of England and Wales, 'Lexcel England and Wales v6 Standard for Legal Practices Excellence in Legal Practice.' p.8

 $^{^{225}}$ The Law Society of England and Wales, 'International Women in Law Summit 2012: Setting the Agenda for Change.' p.4

²²⁶ The Law Society of England and Wales, 'Gender and Earnings in Private Practice: Findings from the 2008 Salary Survey,' 2009.

of E&W and in late 2010 three reports were issued into the experiences of women,²²⁷ black and ethnic minority, and lesbian, gay, bisexual and transsexual solicitors.²²⁸ The problems being faced by these particular groups of people were analysed and the Career Barrier Action Plan 2012 was drawn up to identify ways in which the barriers they faced in their careers as solicitors could be tackled. It was updated in 2013, and makes reference to the three-year period 2012-2015, but has not been updated since then. The over-arching aim of the plan is 'to provide practical support and guidance for solicitors and firms to address the career barriers facing women...'²²⁹ and the other groups identified in earlier research. The points relating to women solicitors are of most relevance to this thesis.

4.1.6 Career Satisfaction Report 2015

This Career Satisfaction Report is entitled 'Rethinking legal career development: How to enhance returns on talent'²³⁰ and is based on a survey conducted by the LS of E&W in October 2014. The introduction of the report points out to law firms that:

'These findings therefore serve as an important wake-up call for employers in the sector to revise their understanding of what constitutes an effective career development strategy in today's environment. If they want to avoid losing valuable talent prematurely, employers of legal professionals will need to learn these lessons and react to these findings.'231

This report highlights that millennials expect and demand flexible working from the start of their careers, and this will need to continue throughout their careers.²³² According to this report, 'it is evident that employers are already accommodating this to some extent: 68% of under-35s are striking the right work/life balance and 79% are getting time off when they need it.'.²³³ However, when it comes to the question of work-life balance, the results based on gender (as opposed to age) were different as 34%

²²⁷ The Law Society of England and Wales, 'Obstacles and Barriers to the Short and Long Term Career Development of Female Lawyers.'

²²⁸ The Law Society of England and Wales, 'Career Barriers Action Plan 2012,' 2012.p.2

²²⁹ The Law Society of England and Wales, 'Career Barriers Action Plan 2013' (London, 2013). p.3

²³⁰ The Law Society of England and Wales, 'Rethinking Legal Career Development: How to Enhance Returns on Talent. Career Satisfaction Report,' 2015.

²³¹ ibid. p.2

²³² ibid. p.9

²³³ ibid. p.9

of women respondents were struggling to achieve a work-life balance compared to 24% of men.²³⁴ Although the question of flexible working and work-life balance may not be solved due to the problems faced by women in particular, the demands of millennials of both sexes before they become parents may lead to an improvement in the working conditions of all solicitors.

4.1.7 International Women in Law Survey 2017-18

It was recognised that not much progress had been made since the 2012 Summit and so the LS of E&W conducted another survey between November 2017 and January 2018. Internationally, there were 7,781 respondents of the global survey which makes it the largest international survey conducted on the topic of women in the law.²³⁵

Unconscious bias (52%) was perceived to be the main barrier to career progression in 2018, closely followed by unacceptable work/life balance demanded to reach senior levels (49%), and traditional networks/routes to promotion are male orientated (46%). Compared to the 2012 results, respondents to the survey were more aware of the role unconscious bias plays in preventing many women from reaching senior positions within the legal profession, as this was up from the third reason cited in 2012. This was also reflected in the scoring of the least consistently enforced policies in the workplace where only 11% reported unconscious bias training being consistently carried out in their organisation.²³⁶

In relation to flexible working, 91% % of respondents said that a flexible working culture is critical to improving diversity in the legal profession, whereas this was 86% in 2012. This research shows that 52% of respondents work in organisations where a flexible working policy is consistently enforced; 37% work in organisations where there's provision, but not consistently enforced and 11% work in organisations with no provision for flexible working which shows that slow progress is being made.

Following on from the survey the LS of E&W prepared two further projects, namely the roundtables and the pledge.

²³⁴ The Law Society of England and Wales. p.12

²³⁵ The Law Society of England and Wales, 'Women in the Law 2018 Infographic,' 2018.

²³⁶ ibid.

4.1.8 - International Women in Law Roundtables 2019

After the survey was conducted a series of roundtable events were organised across the world earlier this year. 100 roundtable events were held in England and Wales with international events held in countries as far afield as Kenya and Australia.²³⁷ A toolkit was produced to assist people running the events, including one aimed specifically at engaging men in the events as Champions for Change.²³⁸

4.1.9 Women in Law Pledge 2019

The survey and roundtable discussions resulted in the Women in Law Pledge being launched this year, ²³⁹ along with guidance. ²⁴⁰ It is a collaboration between the LS of E&W, The Bar Council, CILEx and other organisations with an interest in the legal profession and advises signatories to sign up to the Charter and contains some suggestions which reflect some of the aspects contained within the Charter itself.

4.2 Solicitors Regulation Authority requirements

Although the LS of E&W and the SRA are separate bodies, there is an overlap between some of their areas of work in relation to law firms. The main policy of the SRA which affects the retention and progression of women solicitors is an element of Principle 9.²⁴¹

4.2.1 SRA Principle 9

As a matter of compliance, all regulated law firms within England and Wales are required by the SRA to comply with the principles set out within the SRA Handbook.

²³⁷ The Law Society of England and Wales, 'Women in Leadership in Law: Toolkit.'

²³⁸ The Law Society of England and Wales, 'Male Champions for Change: Toolkit.'

²³⁹ The Law Society of England and Wales, CILEX, and Council, 'Women in Law Pledge.'

²⁴⁰ The Law Society of England and Wales, CILEX, and Council, 'Women in Law Pledge - Guidance.'

²⁴¹ The SRA guidance is being updated and new versions will come into effect on 25 November 2019. Equality, diversity and inclusion will be dealt with under the new Principle 6.

Principle 9 requires the regulated population to 'run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity.'242 There are also six mandatory equality and diversity outcomes set out in chapter 2 of the Code of Conduct in the SRA Handbook²⁴³ which are intended to support firms to meet the requirements of Principle 9. The outcomes are supplemented by non-mandatory indicative behaviours which provide a nonexhaustive list of ways to achieve the outcomes.²⁴⁴

All law firms in England and Wales are required to collect diversity data on their firm's workforce and report the aggregated data to the SRA online, and they are also required to publish a summary of the data each year. This requirement to collect, report and publish diversity data was in place for the first time in January 2014, and sample questionnaire for law firms to use was provided by the SRA. The intention was for law firms to ask their workforce to complete the questionnaire which asked for details such as the position each individual held within the firm, their age bracket, gender, disability, ethnic group, religion, sexual orientation, socio-economic background (education), and whether they had caring responsibilities in addition to their paid employment.

However, for each question participants are given the option to tick 'prefer not to say' which may make people more likely to complete the questionnaire, but will not necessary provide useful data. For example, sexual orientation is a sensitive issue which many employees may consider is nothing to do with their work, and not something that they want their employer to know about. In a large law firm, completing this anonymous questionnaire may not be an issue for one person in an organisation of thousands, but for a small law firm, by process of elimination people may be able to work out who answered in a particular way to certain questions and the privacy and anonymity of the participants could be compromised.

Of particular relevance to women solicitors, the sample questionnaire asks whether the participant is the primary carer for any children under 18,245 and whether they are responsible for other family members, friends, neighbours or others because of 'long-

²⁴² Solicitors Regulation Authority, 'SRA Handb. Version 21.' p.7

²⁴³ ibid.p.16

²⁴⁴ ibid. p.17

²⁴⁵ Solicitors Regulation Authority, 'Example Diversity Questionnaire,' 2013. Question 13

term physical or mental ill-health/disability, or problems related to old age.²⁴⁶ The fact that an attempt is being made at collecting this data is a step in the right direction in terms of understanding the issues that the workforce faces, but there is no option in this sample questionnaire to mention any other forms of care giving such as care given over weekends/holidays to elderly relatives who do not live close by and therefore caring on a weekly basis is not possible.

Initially, the requirement under Principle 9 for all law firms to collect, report and publish diversity data on its workforce has faced criticism and apathy from law firms.²⁴⁷ Although this was a requirement of every law firm in England and Wales, one fifth of law firms failed to meet the initial deadline of January 2014.248 The deadline was therefore extended to allow more firms to comply with the requirement, and 85% of firms²⁴⁹ completed this exercise by the extended deadline. Approximately 1,100 firms were referred to the SRA supervision enforcement team because they still failed to give their diversity reports to the SRA by the extended deadline, and only 4 firms had disciplinary action taken against them for that year.²⁵⁰

As a result of these problems, the SRA simplified the procedure making it easier for firms to report their workforce diversity statistics online through their Compliance Officers. However, there is a risk that data collected in a simplified manner may not be as valuable as it might have been under the original plans. One way in which law firms might be encouraged to take the issue of equality and diversity monitoring and reporting more seriously might be for the SRA to consider publishing league tables to show which firms have complied with Principle 9 and which have not. This is likely to foster competition between law firms to perform better in this area, and it would be very bad for the image of a law firm if its clients were to find out that they had not complied with their Principle 9 requirements.

²⁴⁶ Solicitors Regulation Authority. Question 14

²⁴⁷ Solicitors Regulation Authority, 'SRA Diversity in the Profession Enewsletter,' 2014. p.4

²⁴⁸ John Hyde, 'One in Five Firms Missed Diversity Data Deadline,' Law Society Gazette Online, 2014, http://www.lawgazette.co.uk/practice/one-in-five-firms-missed-diversity-datadeadline/1/5039706.article?PageNo=2&SortOrder=dateadded&PageSize=50#comments.

²⁴⁹ Solicitors Regulation Authority, 'SRA Diversity in the Profession Enewsletter.' p.5

²⁵⁰ ibid.p.5

4.3 Scotland

Within Scotland there are many initiatives taking place to tackle the issue of the retention and progression of women solicitors. As has been mentioned above, there is no separate regulation body in Scotland, so the LS of S deals with both the regulation and representation of solicitors in Scotland. Like the SRA, the LS of S is a public authority for the purposes of the EA 2010 and is required to comply with the public sector equality duties.

4.3.1 Equality and Diversity Strategy for 2014-2017

This was published in January 2015, and an updated version has not yet been produced as at August 2019. It highlights the importance of equality and diversity issues to its membership by stating that there has been more engagement and more responses from members on equality research and consultations than in any other area dealt with by the LS of S.²⁵¹ As a result of the this the main areas identified as requiring support are 'all career stages, including entry to the profession, pay and progression, workplace behaviours, and the provision of services to clients.'²⁵² This thesis is most concerned with pay and progression and workplace behaviours so will focus on the sections of the strategy which are most relevant to these two areas.

At the end of the Foreword, it is intimated that a more firm approach will be taken in future if the current voluntary method does not achieve the desired outcomes²⁵³ and this is set out more clearly later in this document.²⁵⁴ During the period 2014-2017 the LS of S was looking for law firms to comply voluntarily with their obligations in the area of equality and diversity and in particular the areas of 'equal pay, patterns of work in the profession, and contributing to work to improvement diversity in the judiciary.'²⁵⁵ The 2014-2017 strategy builds on the previous strategies and addresses the LS of S's

²⁵¹ The Law Society of Scotland, 'Equality and Diversity Strategy 2014-2017,' 2014.p.3

²⁵² ibid.p.3

²⁵³ The Law Society of Scotland, 'New Equality Strategy Aims to Help Solicitors Achieve Career Goals,' The Law Society of Scotland Website, 2015, http://www.lawscot.org.uk/news/2015/01/new-equality-strategy-aims-to-help-solicitors-meet-career-goals/.

²⁵⁴ The Law Society of Scotland, 'Equality and Diversity Strategy 2014-2017.' p.34

²⁵⁵ ibid.p.3

obligations under the EA 2010 and the General Equality Duty arising from the Public Sector Equality Duty.

As was the case for the previous three year strategy, the LS of S confirms that it 'remains committed to mainstreaming equality and diversity across all of our work. We believe this strategy demonstrates both our level of commitment and the tangible progress we are making in this field.'256 This is an important point because if issues of equality and diversity are not prioritised across all areas of work, an effective result will be far less likely. This is explicitly dealt with in this document and informs all of the aims of the LS of S.

Although the LS of S is not a public authority, it carries out public functions and those activities need to comply with the public sector equality duty under s.149 (2) EA 2010. There were previously statutory duties in relation to sex, race and disability,²⁵⁷ but these are now wider under s.149 EA 2010, which sets out the public sector equality duty.²⁵⁸

4.3.2 Ensuring fairness, creating opportunity: Practical Guide to Equality and Diversity for Scottish solicitors 2013

This guidance was commissioned by the LS of S to assist solicitors in to be 'top class performers' in the area of equality and diversity.²⁵⁹ The guide covers all of the protected characteristics and is divided into sections dealing with: issues, patterns and experiences; employment and training for solicitors and other staff working in law firms; and delivering an equal and accessible service to clients all over Scotland. This thesis is most interested in the gender, maternity and pregnancy issues set out in the first and second sections of the guide.

²⁵⁷ Under the Equal Pay Act 1970, Sex Discrimination Act 1975; Race Relations Act 1976 and Disability Discrimination Act 1995.

²⁵⁶ The Law Society of Scotland.p.5

²⁵⁸ UK Parliament, Equality Act 2010, s.149.

²⁵⁹ The Law Society of Scotland, 'Ensuring Fairness, Creating Opportunity: A Practical Guide to Equality and Diversity for Scottish Solicitors,' 2013.p.5

Within the section on employment and training there is a section headed 'Progression and promotion'²⁶⁰ which is of particular relevance to the central issue of this thesis. There is a section providing the business case for ensuring that progression and promotion is open to all employees within a law firm. The LS of E&W has a similar publication but the wording of the Scottish document here seems to be wider and looking at more than the business case, although this is the heading the section has been given. For example it states: 'Employers have a legal, moral and ethical duty to ensure that they uphold the principles of equal opportunities and anti-discriminatory practice. Ensuring that opportunities for progression and promotion are fair and objective reduces the risk of being subject to accusations of discrimination and also helps to ensure that expectations are clear and decisions are well informed.'²⁶¹

Using discretion instead of formal criteria to make decisions about promotion to partner and emphasising the importance of bringing in new clients rather than developing work with existing clients are both issues which have been identified in Chapter [3] as significant problems for women solicitors. The LS of S acknowledges this in the guide and sets out action that law firms could take to rectify the situation and also sets out additional business reasons to motivate law firms to do this.

Also, the issues identified here are that part-timers may not have time to deal with learning and development, the problems with a long-hours culture, and ill-considered work allocation. These all affect both men and women, but as women are more likely to work part time after having children these will be more acute and may contribute to them deciding not to remain working as a solicitor.

Additional advice set out in this guidance includes 'Do not use 'continuous service' as a criterion for progression, as it may disadvantage employees who take maternity leave or career breaks for health or caring reasons. Make sure part-time employees and employees on maternity leave are included when inviting applications for progression/ promotion.'262 This is of course good practice to law firms and beneficial to women solicitors.

²⁶⁰ The Law Society of Scotland.p.38

²⁶¹ ibid.p.38

²⁶² ibid.p.41

The guide talks about being sensitive to the changing needs of its employees and the benefits of flexible working. It sets out examples of good practice and talks about a specific law firm in Glasgow which offers job sharing as flexible working solution.²⁶³ It also sets out seven top tips for flexible working²⁶⁴ which include sensible reminders such as the fact that flexible working may be vital when an employee's children are very young, but that the older they children become the more likely the parent may be to work full time again, so what may seem like a major change for the law firm may only last for a few years.

Overall this guide is very well written, easy to read and set out in a user-friendly format. Although much of the content is also available from the LS of E&W, the fact that the LS of S has it contained in one well-presented guide does appear to make it more accessible and perhaps more likely to be read and taken on board by law firms.

4.3.3 Equality Standards

In July 2014, the LS of S published a consultation document on a new framework of equality and diversity standards.²⁶⁵ It invited responses which were considered, along with data from interviews and other responses²⁶⁶ during the revision of the standards prior to publishing the final framework in February 2015.

The 10 Equality Standards are similar those in the LS of E&W's Charter set out in section 4.1.2 above in that it invites law firms and in-house law departments to sign up to the voluntary framework. It sets out ten guidance objectives 'based on the biggest issues of concern in the Law Society's research over the last ten years and draw on evidence from other Schemes as to the most effective ways of tackling these issues. They are designed to assist solicitors in meeting the requirements of Practice Rule

²⁶³ The Law Society of Scotland.p.52

²⁶⁵ The Law Society of Scotland, 'Framework for Success: Ensuring Fairness, Creating Opportunity A Consultation on a New Framework of Equality and Diversity Standards,' 2014.

²⁶⁶ The Law Society of Scotland, 'A New Framework of Equality and Diversity Standards: Advice and Information from the Equality and Diversity Committee of the Law Society of Scotland,' 2015. p.3

B1.15 – Diversity. These are set out under the headings: leadership; strategy; staff development; reporting and publication; equal pay; and accessible services. 468

At present the equality standards are published as 'Advice and Information' which means that they are voluntary at this stage²⁶⁹. It is suggested that they may become formal guidance which means that it would still be 'non-mandatory but you may be required to justify any departure from Guidance in the event of any complaint being made'²⁷⁰. Feedback is requested via the website on this point, but no action has yet been taken despite the suggested that it may happen in 2016.²⁷¹ Since the issue of equal pay still exists in Scotland (as well as elsewhere in the UK) the opportunity of making a formal Rule making these standards obligatory for all law firms may have been wasted here.

4.3.4 Ensuring Fairness, Closing the Pay Gap

In February 2015, the LS of S published guidance for law firms specifically to assist them in ensuring that there is no pay gap on the grounds of sex in their law firms. This includes an Equal Pay Audit Toolkit based on the Equality and Human Rights Commission but tailored to the legal profession²⁷². In particular it was designed with small and medium sized law firms in mind, since they are most common in Scotland, but it is also a useful starting point for larger law firms²⁷³.

This document explains step by step, how to carry out an equal pay audit and starts by explaining the importance of doing so²⁷⁴. It reminds law firms that conducting an equal pay review includes a commitment to put right any issues found and that it is not simply a data collection exercise²⁷⁵. By conducting this kind of audit law firms are likely

²⁶⁷ The Law Society of Scotland, 'Framework for Success: Ensuring Fairness, Creating Opportunity A Consultation on a New Framework of Equality and Diversity Standards.'p.9

²⁶⁸ The Law Society of Scotland, 'A New Framework of Equality and Diversity Standards: Advice and Information from the Equality and Diversity Committee of the Law Society of Scotland.' Appendix 1, p.5.

²⁶⁹ ibid.p.4

²⁷⁰ ibid. p.4

²⁷¹ i.e. January/February 2018

²⁷² The Law Society of Scotland, 'Ensuring Fairness, Closing the Pay Gap,' 2015. p.3

²⁷³ ibid. p.3

²⁷⁴ ibid.p.4

²⁷⁵ ibid.p.5

to find discrepancies in pay which they were unaware of since most employers consider that they are rewarding their employees equally for equal pay, but there is up to a 42% difference in pay between male and female solicitors in Scotland.²⁷⁶

4.3.5 Parents in the Profession Guides

On the LS of S website there are 12 practical guides in a series called 'Parents in the Profession'.²⁷⁷ These guides were commissioned by the LS of S and cover a wide range of topics. These are considered in chronological order from 'How to ensure a smooth handover to and from your cover'²⁷⁸ for women about to go on maternity leave to 'How to signal the desire for, and get on, the partner track'²⁷⁹ for those who have successfully returned from maternity leave and wish to progress their careers further. Ten of the twelve guides are aimed at women having babies, but there is also one entitled 'How to make a positive start to combining fatherhood and career'²⁸⁰ for men about to become father, and also one called 'Best practice for managing maternity leave for line managers' for the managers of those taking maternity leave.²⁸¹

These guides offer detailed advice and examples and quotes from women who have been through each stage covered. The fact that the series also includes guidance for fathers and managers is important, and a well considered inclusion.

²⁷⁷ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession,' www.lawscot.org.uk, 2017, http://www.lawscot.org.uk/members/parents-in-the-profession/.

http://www.lawscot.org.uk/members/parents-in-the-profession/best-practice-for-managing-maternity-leave-for-line-managers/when-your-colleague-has-returned/.

²⁷⁶ ibid.p.3

²⁷⁸ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 1 of 12 : How to Ensure a Smooth Handover to and from Your Cover,' www.lawscot.org.uk, 2017,

http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-ensure-a-smooth-handover-to-and-from-your-cover/.

 $^{^{279}}$ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 10 of 12: How to Signal the Desire for, and Get on, the Partner Track,' www.lawscot.org.uk, 2017,

http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-signal-the-desire-for-and-get-on-the-partner-track/home-life/.

²⁸⁰ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 11 of 12 : How to Make a Positive Start to Combining Fatherhood and Career,' www.lawscot.org.uk, 2017,

http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-make-a-positive-start-to-combining-fatherhood-and-career/your-onward-journey-as-a-working-farther/.

²⁸¹ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 12 of 12: Best Practice for Managing Maternity Leave for Line Managers,' www.lawscot.org.uk, 2017,

Further research by the LS of S has been published entitled 'Perceptions and Impacts of Working Patterns within the Legal Profession in Scotland'²⁸² as a result of the strategies set out in this chapter, but thus far no new policies have been published in line with this research.

4.4 Conclusion

This chapter has set out the wide range of initiatives, strategies and policies of the LS of E&W, the SRA and the LS of S aiming to achieve equality and diversity within the legal profession. The LS of E&W does appear to have been addressing this issue in more detail for a little longer than the LS of S, which is probably due to its larger size and its greater resources, but the LS of S is certainly making many recent efforts to ensure that it is leading the profession in the area of equality and diversity within Scotland.

As a result of the larger size of the jurisdiction, the longer period of time that the LS of E&W has been addressing this issue, and the fact that regulation is now dealt with by the SRA, the policies and strategies dealing with women solicitors in England and Wales have become very complex. There are a variety of different initiatives which produce an intricate web of policies which are not easy to navigate.

By contrast, the LS of S has started working on the issue of equality and diversity somewhat later and is dealing with a smaller jurisdiction with fewer law firms to represent and regulate. The policies and strategies of the LS of S are simpler and clearer and are therefore likely to be easier for law firms to understand which may mean that they are more likely to comply with the suggestions for best practice. The LS of S appears to take a more practical approach, and the online series 'Parents in the Profession' is a particularly outstanding difference between the way the LS of E&W and the LS of S are approaching this issue.

A positive point is that both LS of E&W and the LS of S are taking the issue of equality and diversity seriously and have identified the problem that both jurisdictions face with the retention and progression of women solicitors. However, achieving substantive

²⁸² The Law Society of Scotland, 'Perceptions and Impacts of Working Patterns within the Legal Profession in Scotland,' 2015.; The Law Society of Scotland, 'Experiences of Established Professionals within the Legal Profession in Scotland,' 2015.

equality beyond the formal equality provided by the law requires more to be done. The next chapter gives a detailed analysis of these policies and strategies and assesses each one using the theoretical framework which was set out earlier in Chapter 3.

Chapter 5 – Analysis

The central claim of this thesis is that gender inequality in private practice law firms can be more effectively addressed if the principles encapsulated by CE are explicitly embedded in the policies of the Regulators for the purposes of achieving substantive equality. In this chapter I will present the results of a content analysis I have conducted of the policies and strategies discussed in Chapter 4, using the framework set out in detail in Chapter 3. Under each heading of the framework, I will set out the results of my systematic analysis of the content of each relevant policy item first from the LS of E&W (including the SRA), and then the LS of S, (together 'the Regulators'), as far as it relates to women solicitors. In the next chapter I will make recommendations to the Regulators which if implemented will contribute to the achievement of substantive equality for women solicitors.

The results of this content analysis will be presented under the framework of relationships and interdependency as follows: (1) in Family Life: which is subdivided into: (i) Maternity/Paternity/Parental Leave; and (ii) Flexible Working; and (2) in Work Life: which is subdivided into: (i) Supervision and training; (ii) Collegiality; and (iii) External stakeholders. Recommendations for action to be taken will relate to each heading and will be set out in the next chapter.

5.1 Relationships and Interdependency in Family Life

The first theme under the framework is relationships and interdependency in family life. A discussion of the reasons for using this divide was set out in Chapter 3. This section sets out the results of the content analysis of the areas of the policy and strategy of the Regulators which relate to relationships of care which are primarily located in family life (such as caring for children, partners, elderly or disabled relatives or friends), but which inevitably affect a person's working life.

This theme emphasises the fact that nobody is entirely self-sufficient,²⁸³ and all people rely on others to a greater or lesser degree in their lifetimes. The extent to which this affects people's working lives differs between people, and those with caring responsibilities for children, elderly or disabled relatives or others will have their working lives affected more at certain times. This section will now set out the results of the analysis.

5.1 (i) Maternity/Paternity/Parental Leave

This section addresses the areas of the Regulators' policies that deal with issues surrounding maternity, paternity or parental leave. As was seen in Chapter 2, these rights are set out in statute, but this section looks at supplemental policies that the Regulators have issued to assist law firms in dealing with these issues.

The LS of E&W's policy does not include any significant focus on maternity, paternity or parental leave. This may be because the LS of E&W considers that law firms are dealing with these issues well and do not require further guidance. However, as was seen in Chapters 1 and 2 of this thesis, discrimination still takes place when women take maternity leave, for example, clients being handed over to colleagues supposedly only for the duration of the maternity leave, but then not returned to the solicitors after they rejoin the workplace after maternity leave.²⁸⁴

Also, research by the LS of E&W itself has shown that there is a 'tendency for men not to take the paternity leave to which they are entitled. It was suggested that this would put their dedication and 'macho' career standing into question.'.285 It is the view of this thesis therefore, that policy is necessary from the LS of E&W in this area to assist law firms in changing their culture to encourage the uptake of leave by fathers, and using the principles of this framework in drafting such policy would make it more effective.

 ²⁸³ Kittay, Love's Labor: Essays on Women, Equality and Dependency. Tronto, Moral Boundaries: A Political Argument for an Ethic of Care. Virginia Held, The Ethics of Care: Personal, Political, and Global, 2005, 29–45.
 ²⁸⁴ Stephen Ward, Daniel Winterfeldt, and Leslie Moran, 'Career Progression in the Legal Sector,' 2012. p.23
 ²⁸⁵ The Law Society of England and Wales, 'Obstacles and Barriers to the Short and Long Term Career Development of Female Lawyers.' p.9

In stark contrast to the LS of E&W's lack of guidance or policy in this area, the LS of S has commissioned a series of 12 guides in a series entitled 'Parents in the Profession'.²⁸⁶ These are aimed at solicitors about to embark or return from a period on maternity, paternity or parental leave, and their managers.²⁸⁷ The guides give very practical advice and include case studies of people from a variety of law firms and inhouse legal positions in Scotland. They cover topics such as: 'How to ensure a smooth handover to and from your cover';²⁸⁸ 'How to ask for, and make the most of, KIT days';²⁸⁹ 'How to set yourself up for a great return';²⁹⁰ 'How to reignite your confidence';²⁹¹ 'How to ensure a strong first 90 days back in the saddle';²⁹² and 'How to draw boundaries between work and home'.²⁹³ Additionally, 'How to make a positive start to combining fatherhood and career'²⁹⁴ is aimed at solicitors who are new fathers planning to take paternity leave and 'Best practice for managing maternity leave for line managers'²⁹⁵ is written for those managing all solicitors in these circumstances.

The guides were drafted by consultants who routinely advise companies and organisations on how to retain talent, in particular women after maternity leave, ²⁹⁶ and it is evident that the principle of relationships and interdependency in family life is

²⁸⁶ Produced by http://talentkeepers.co.uk/

²⁸⁷ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession.'

²⁸⁸ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 1 of 12: How to Ensure a Smooth Handover to and from Your Cover.'

²⁸⁹ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 2 of 12: How to Ask for and Make the Most of Keep in Touch (KIT) Days,' www.lawscot.org.uk, 2017,

http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-ask-for-and-make-the-most-of-keep-in-touch-days/during-leave/.

²⁹⁰ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 5 of 12: How to Set Yourself up for a Great Return,' www.lawscot.org.uk, 2017, http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-set-yourself-up-for-a-great-return/when-youre-back-at-work/.

²⁹¹ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 6 of 12: How to Reignite Your Confidence,' www.lawscot.org.uk, 2017, http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-reignite-your-confidence/when-youre-back/.

²⁹² The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 7 of 12: How to Ensure a Strong First 90 Days Back in the Saddle,' www.lawscot.org.uk, 2017,

http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-ensure-a-strong-first-90-days-back-in-the-saddle/when-youre-back-at-work/.

²⁹³ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 8 of 12: How to Draw Boundaries between Work and Home,' www.lawscot.org.uk, 2017,

http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-draw-boundaries-between-work-and-home/returning-to-work/.

²⁹⁴ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 11 of 12: How to Make a Positive Start to Combining Fatherhood and Career.'

²⁹⁵ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 12 of 12: Best Practice for Managing Maternity Leave for Line Managers.'

²⁹⁶ http://talentkeepers.co.uk/hr-ld-edi-practitioner/

pervasive to the advice they give. Since this series of guides written for the LS of S is entitled 'Parents in the Profession', by definition relationships and interdependency are central, since this is obviously most relevant to people when children come into their lives.

In other guidance, the LS of S make a very valuable point to law firms when suggesting that they consider 'the potential benefits in terms of loyalty and reputation of offering a maternity/paternity package that goes beyond the minimum required by law.'.²⁹⁷This thesis considers this to be good advice to law firms, which would assist in improving the issue of the retention and progression of women solicitors in private practice law firms.

In conclusion, this analysis has found that the LS of S performs well on this point regarding maternity and paternity leave. However, despite their own research uncovering issues with both maternity and paternity leave in private practice law firms, the LS of E&W fails to provide guidance to law firms on how to improve their performance in these areas. My recommendation regarding protected rights beyond the statutory minimum is set out in Chapter 6.

5.1 (ii) Flexible Working

The second subdivision under the theme of relationships and interdependency in family life is the issue of flexible working, which is also referred to as 'agile' working, and can take many forms including: working part-time; compressed hours; working from home; amended start/finish times; and many other possibilities. Once solicitors become parents it is often inevitable that their working lives will be impacted, and having the option to work flexibly may be the only way to manage having a family and continuing to work as a solicitor, at least during the early years of parenthood. This appears to be the case in particular for women who still tend to deal with the bulk of the childcare and family management tasks.²⁹⁸

²⁹⁷ The Law Society of Scotland, 'Ensuring Fairness, Creating Opportunity: A Practical Guide to Equality and Diversity for Scottish Solicitors.' p.58

²⁹⁸ Verloo, Multiple Meanings of Gender Equality: A Critical Frame Analysis of Gender Policies in Europe. p.112

Flexible working may also be necessary for those caring for others such as disabled or seriously or terminally ill relatives, neighbours or friends, and as was seen in Chapter 2, the right to request flexible working is now open to all employees who have worked continuously for the same employer for 26 weeks.²⁹⁹ This chapter will now present the results of the content analysis of the policies of the Regulators in relation to all kinds of flexible working options. It will first discuss the findings in relation to the LS of E&W and then the LS of S.

The LS of E&W's Framework for Equality, Diversity and Inclusion 2016-2019 highlights the issue of flexible working and states 'The importance of flexible working has emerged as a priority area for solicitors. Flexible working enables members to support their own work/life balance without penalties to career progression. It also enables employers to deliver equality of opportunity, attract and retain diverse talent and enhance business performance.'.300 This thesis takes the view that this description of flexible working may be true in an ideal world, but the lived experience of many women indicates that there is a penalty to their career progression if they work flexibly, in terms of not being promoted at all, or being promoted at a much slower rate than colleagues who do not need to request flexible working options.³⁰¹ Research commissioned by the LS of E&W itself found that 'Women in large city firms all viewed asking to work flexibly as tantamount to stepping off the career ladder.'.302 Law firms with flexible working policies seem to be unduly congratulated with headlines such as 'Law Firms Lead the Way as Family Friendly Employers'303 when the lived experience of many solicitors who chose to work flexibly is actually that their career progression is affected, or they fear that it will be so they change jobs or leave private practice, 304 so there is

²⁹⁹ Under section 80F Employment Rights Act 1996.

³⁰⁰ The Law Society of England and Wales, 'The Law Society's Framework for Equality, Diversity and Inclusion 2016-2019.' p.8

Margaret Thornton, 'Work/life or Work/work? Corporate Legal Practice in the Twenty-First Century,' *International Journal of the Legal Profession* 23, no. 1 (2016): 13–39, doi:10.1080/09695958.2015.1093939 p.29.; Ariane Hegewisch, 'Flexible Working Policies: A Comparative Review,' 2009 p.v.

³⁰² The Law Society of England and Wales, 'Obstacles and Barriers to the Short and Long Term Career Development of Female Lawyers.'p.6

³⁰³ Monidipa Fouzder, 'Law Firms Lead the Way as Family-Friendly Employers,' Law Society Gazette Online October (2017), https://www.lawgazette.co.uk/practice/law-firms-lead-the-way-as-family-friendly-employers/5063085.article?utm_source=dispatch&utm_medium=email&utm_cam paign= GAZ141016#commentsJump.

³⁰⁴ Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice,' Osgoode Hall Law Journal 45, no. 4 (2007): 743–811.; Thornton, 'Work/Life or Work/Work? Corporate Legal Practice in the Twenty-First Century.'; Deborah L. Rhode, 'Diversity in the Legal Profession: A Comparative Perspective,' Fordham Law Review 83, no. 1 (2015): 2241–48, https://doi.org/10.3868/s050-004-015-0003-8.;

clearly an implementation gap between the policies that law firms have and what happens in practice.

The importance of flexible working to members of the profession was highlighted by the Career Satisfaction Report 2015, sets out statistics as evidence that Millennials and younger generations expect flexibility throughout their careers.³⁰⁵ Newer solicitors entering the profession expect flexible working which may assist in a cultural shift making flexible working more acceptable. If it becomes the norm in law firms, this will in turn contribute to the improvement in substantively equality at partnership level.

Also relevant to this principle of flexible working, are the training needs of all staff including partners who are responsible for managing staff in law firms. This is dealt with by the LS of E&W's Diversity Standards which form part of the Charter, and also the 2019 Pledge. Included as minimum requirements for all signatories to the Charter are that the firms '[have] assessed equality and diversity training needs for all staff including partners'; 306 'delivers equality and diversity training to all staff'307 and 'delivers a range of equality and diversity training and information which is adapted to roles and levels within the practice.' 308 Once managers of law firms are aware of their duties and the issues facing these members of staff at this time in their lives, they will know of their duty to consider requests for flexible working in a reasonable manner. The Charter Standards include as a minimum requirement that each signatory: 'has a mechanism for reviewing the effectiveness of the process'; 310 and 'can demonstrate the usage of flexible working practices at various levels within its workforce'. 311

It is clearly of vital importance that managing partners are aware of the issues they need to consider when members of their staff have changes taking place in their lives such as having babies, taking maternity/paternity/parental leave, and/or requesting flexible working patterns, since the relationships and interdependency that take place

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Savita Kumra, 'Busy Doing Nothing: An Exploration of the Disconnect between Gender Equity Issues Faced by Large Law Firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them,' Fordham Law Review 83, no. 5 (2015): 2277–2399, https://doi.org/10.3868/s050-004-015-0003-8.

³⁰⁵ The Law Society of England and Wales, 'Rethinking Legal Career Development: How to Enhance Returns on Talent. Career Satisfaction Report.' p.5

³⁰⁶ The Law Society of England and Wales, 'Equality and Diversity Standards Full Version,' 2012. Standard 2.1.4

³⁰⁷ The Law Society of England and Wales. Standard 2.2.4

³⁰⁸ The Law Society of England and Wales. Standard 2.3.4

³⁰⁹ s.80G(1)(a) Employment Rights Act 1996 UK Parliament.

³¹⁰ The Law Society of England and Wales, 'Equality and Diversity Standards Full Version.'

³¹¹ ibid.

in family life directly impact the working lives of the people involved on a daily basis. Provided law firms are actually implementing this pledge, this is a positive move and one which the LS of E&W should be monitoring via the biennial reporting which Charter signatories are required to carry out. However, this does not appear to have been reported on to date.

In addition to this requirement which is within the Charter Standards, all Signatories to the Charter are also expected to commit to the LS of E&W Flexible Working Protocol which states 'To ensure the long term retention of both male and female lawyers, legal practices need to understand and incorporate flexible working into the fabric and culture of the business.'312 This protocol attempts to tackle some of the problems faced by solicitors discussed in Chapters 1 and 2 such as solicitors being considered less committed than full time colleagues if they request part time or flexible working. The protocol includes the following statements: 'Flexible working does not mean lower performance or productivity, rather efficient lawyers who maximise their working hours to benefit both employer and client';313 'We want flexible working to become a genuinely acceptable option for top lawyers that does not diminish their career development progress in the medium and long term'314 and 'We want lawyers to maximise their professional potential regardless of personal constraints, including caring responsibilities or disabilities'.315

The protocol then sets out some practical advice for law firms which sign up with a section headed 'Equipping partners to manage flexible working'316 in which useful proposals are made such as 'Encouraging reflection and greater awareness of those managing flexible working of their own views and perceptions, particularly past experience and own domestic arrangements'317 and 'Ensure that a positive culture is fostered with give and take on both sides.'.318 This is important to this principle of the framework as it incorporates the theme of relationships and interdependency by

³¹² The Law Society of England and Wales, 'Law Society Statement on Flexible Working Protocol,' 2011, http://www.lawsociety.org.uk/practicesupport/equalitydiversity/inclusioncharter/flexible-workingprotocol.page.

³¹³ ibid.

³¹⁴ ibid.

³¹⁵ ibid.

³¹⁶ ibid.

³¹⁷ ibid.

³¹⁸ ibid.

reminding decision-makers in the workplace that any parent is inevitably involved in caring relationships at home to a greater or lesser extent, and that this will have an impact on their working lives in some way.

Suggesting that these decision-makers also reflect on their own views and perceptions as mentioned above, also hints at dealing with the unconscious bias that can be a stumbling block³¹⁹ when people whose own lives and experiences differ from the lives of the people about whom they are making decisions. For example, an older male partner in a law firm who had a stay-at-home wife taking care of him and his children at the relevant times, may not fully appreciate the issues facing women who are working with them as solicitors, as well as being mothers and partners at home too. These sections of the LS of E&W Flexible Working Protocol should prompt them into thinking more broadly about their own experiences compared to others, and make reasonable decisions accordingly.

Law firms that have not signed up to the Pledge, Charter or the Protocol, are still advised to put into place the best practice guidance set out in the LS of E&W's Practice Note on Flexible Working.³²⁰ Clearly law firms are obliged to comply with the provisions of legislation in this area, but there is no obligation for them to implement the best practice suggested. Unfortunately, this is a disadvantage of the policies of the Regulators, as was discussed in Chapter 4. If law firms are not complying with the legislation, the workplace policy provided by the Regulators could play a role in encouraging them to do so.

This Practice Note on Flexible Working by the LS of E&W points out that all statutory requests to work flexibly must be considered carefully and 'As carers will often be women with caring responsibilities, any practice restricting opportunities for part-time or flexible working may be indirectly discriminatory on grounds of gender.'.³²¹

It goes on to set out examples of requests for flexible working and the grounds on which refusal is likely to lead to claims against the law firm. It also points out that

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³¹⁹ The Law Society of England and Wales, 'International Women in Law Summit 2012: Setting the Agenda for Change.' p.8

³²⁰ The Law Society of England and Wales, 'Law Society of England and Wales Practice Note on Flexible Working.'

³²¹ ibid. p.5.

'flexible working requests are often made by: women, who still traditionally assume most responsibility for child caring; women returning from maternity leave, and those caring for elderly and/or disabled adults.'.322 These are examples of the relationships in family life to which this part of the framework refers, but the Practice Notes from the LS of E&W simply set out what is required of law firms to comply with their legal obligations. There are no additional suggestions made here to encourage law firms to adopt flexible working as a standard practice within the workplace. If this was achieved, and law firms that are not Signatories to the Charter or the Flexible Working Protocol were all doing this as a basic standard, it would assist in working towards substantive equality for all at partnership level.

It was suggested in International Women in Law Summit Legacy Report,³²³ that the uptake of flexible working in law firms should be included in the diversity data that is collected by the SRA and the LS of E&W³²⁴ in order to identify which practice areas and firms require further assistance in achieving flexible working for solicitors. However, the latest questionnaires for this data collection do not yet include questions on flexible working uptake. This is vital, because although the policies appear to be in place, law firms are not implementing them sufficiently or quickly enough to make a difference in terms of substantive equality in private practice. This needs to be done as a matter of priority if any significant change is to happen.

The legacy report refers specifically to the effect of flexible working on career progression when it recommends that law firms should 'Achieve lasting change and close the gap between policy and culture: make flexible working a choice that does not impede long term career progression.'.³²⁵ This is an important point which is supported by the following three suggestions:

(1) 'Ensure men and women can harness flexible working throughout their career, can clearly signal differing career development speeds at different

³²² The Law Society of England and Wales. p.8

³²³ The Law Society of England and Wales, 'International Women in Law Summit 2012: Setting the Agenda for Change.'

³²⁴ ibid. p.19.

³²⁵ ibid, p.20

- points in their professional and personal lives to engage and ensure long term career paths';
- (2) 'Review and improve the measurement of performance and career development criteria, including flexible working contributions: to develop a fairer appraisal of performance, to include measurement of broader contributions to profitability, including recruitment, retention and business development'; and
- (3) 'Commit to provide alternate roles and later entry points to partnership, track and communicate viable alternate careers.'.326

Unfortunately, these suggestions have never been implemented by the LS of E&W and there does not appear to be any incorporation of these principles into LS of E&W policy since the Summit. Instead of implementing these suggestions, the LS of E&W have conducted further research and made more suggestions for improvement through the survey, roundtables and pledge this year. This is an opportunity missed, as they would assist with tackling the problems of the retention and progression of women solicitors in private practice. Significant resources must have been used by the LS of E&W and all delegates in attending and participating in the events in 2012 and 2019, and the results capture many important points. It is very disappointing to see that the suggestions have not made their way into the LS of E&W's policies and strategies for women solicitors even after 7 years. Instead of focussing on doing this, more time and resources were spent updating the research and suggestions.

This section will now set out the results of the analysis of the LS of S's policy in relation to flexible working. Due to the fact that some women on maternity leave may not want to return, may return then leave the firm, or prefer to return on a part-time basis,³²⁷ the LS of S suggests that law firms should 'Publish criteria, and agree requests for part-time or flexible working at all levels wherever possible. Consider job share, part-time working, annualised hours, compressed hours, etc.'.³²⁸ The LS of S does not yet have detailed guidance for Scottish law firms, in the same way that the LS of E&W has

³²⁶ The Law Society of England and Wales. p.20

³²⁷ The Law Society of Scotland, 'Ensuring Fairness, Creating Opportunity: A Practical Guide to Equality and Diversity for Scottish Solicitors.' p.58

³²⁸ ibid. p.58

already. However, following the publication of research including working patterns³²⁹ there is an indication in their Strategy that this may be issued in the near future.³³⁰

The Strategy also includes the following objective: 'To positively promote the business and staff productivity/ retention benefits of new thinking on patterns of work and address issues concerning career progression'331 and sets itself the specific objective to 'Issue Guidance on working patterns, technology and career progression: 'Ensuring fairness, supporting diverse patterns of work' including guidance on best practice to be adopted in promotion exercises and highlighting the potential for discrimination'332 which is likely to deal with similar issues to the equivalent guidance from the LS of E&W whenever it is published.

Practical advice for women solicitors in relation to flexible working also exists within the Parents in the Profession series from the LS of S in the form of two guides entitled 'How to pitch for flexible working (and make it work for you and your team)'³³³ and 'How to renegotiate your role'.³³⁴ These provide assistance for individual solicitors but without more detailed guidance aimed at their employers, it may be difficult for solicitors and their employers to negotiate the best possible flexible working options for everyone involved, in private practice law firms.

This second part of the theme of relationships and interdependency in family life has looked at flexible working. As has been seen, the LS of E&W provides detailed guidance in relation to flexible working both through the Charter, and for those who are not Signatories through the Protocol and Practice Note on this topic. However, what is lacking on the part of the LS of E&W is regular monitoring of the uptake of flexible working options in law firms. At present, it appears from the outside that law firms offer various options and that anybody that wishes to work flexibly will be able to

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³²⁹ The Law Society of Scotland, 'Perceptions and Impacts of Working Patterns within the Legal Profession in Scotland.' 2015

³³⁰ The Law Society of Scotland, 'Equality and Diversity Strategy 2014-2017.' p.38

³³¹ ibid. p.66

³³² ibid. p.66

 $^{^{333}}$ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 3 of 12: How to Pitch for Flexible Working (and Make It Work for You and Your Team),' www.lawscot.org.uk, 2017,

http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-pitch-for-flexible-working-and-make-it-work-for-you-and-your-team/before-you-leave/.

³³⁴ The Law Society of Scotland, 'Law Society of Scotland Parents in the Profession Guide 4 of 12: How to Renegotiate Your Role,' www.lawscot.org.uk, 2017, http://www.lawscot.org.uk/members/parents-in-the-profession/how-to-renegotiate-your-role/when-youre-back/.

do so without any issues. However, the lived experience of these solicitors is that it can be difficult to negotiate flexible working,³³⁵ and if it is taken up, the career progression of the flexible worker will suffer.³³⁶ My recommendation regarding flexible working is set out in Chapter 6.

5.2 Relationships and Interdependency in Work Life

This section focuses on relationships and interdependency in work life and is subdivided into three topics: (i) supervision and training; (ii) collegiality; and (iii) external stakeholders.

5.2 (i) Supervision and training

Whilst undertaking the content analysis of the policies and strategies of the Regulators relating to the retention and progression of women solicitors, an attempt was made to find references to the supervision of trainees or the ongoing training of solicitors in private practice. Unfortunately, no such references were found either from the LS of E&W or from the LS of S.

The supervision of trainee solicitors is vital to the legal profession, since without new trainees progressing through training contracts to become newly qualified solicitors, there would be no new supply of solicitors to continue practising law. For these trainees to learn the practical and legal aspects of the profession, they are required to work under the supervision of fully qualified solicitors in the field in which they are currently training. Therefore, the time spent supervising and training trainee solicitors is fundamental to the legal profession and the qualified solicitors who do this, and do it well, should be rewarded appropriately. This information can be easily ascertained by collecting feedback from all trainee solicitors on their experiences in each 'seat' of their training contract. This should be private and confidential information which

³³⁶ The Law Society of England and Wales, 'Obstacles and Barriers to the Short and Long Term Career Development of Female Lawyers.' p.21

³³⁵ The Law Society of England and Wales, 'Equality and Diversity: Women Solicitors.,' 2004 p.18.; The Law Society of Scotland, 'Ensuring Fairness, Creating Opportunities: A Practical Guide to Equality and Diversity for Scottish Solicitors,' 2009.; Bacik and Drew, 'Struggling with Juggling: Gender and Work/Life Balance in the Legal Professions.'

should be collected anonymously so that trainees feel comfortable to give honest feedback.

It is disappointing to see that the Regulators have not considered this aspect of the legal profession in relation the retention and progression of women solicitors. Via this framework, I am suggesting that this is an important aspect of working life in private practice law firms, and people who spend time building relationships with trainees and assisting them with learning how to give legal advice in their particular field should be recognised and rewarded through the promotion process.

At present, it is expected that solicitors will supervise and train more junior members of their team within their field, as an ordinary part of their workload. However, I am suggesting that criteria for promotion to partner should be made broader to include the contribution that people make to the supervision and training of their more junior colleagues. This would be assessed by collecting feedback from trainees throughout the year, and collated to show how the supervising solicitors are performing in the opinions of their trainees, and also by reference to their own recording of time spent on training and supervision. I make a recommendation regarding the inclusion of an additional selection criterion in Chapter 6.

5.2 (ii) Collegiality

The second subdivision deals with collegiality. In a similar way to the topic of training and supervision in section 5.2(i) above, this subdivision is interested in the relationships between solicitors and others in the workplace. Rather than the relationship between trainees and supervising solicitor, this heading is more generally about the way solicitors interact with colleagues at all levels.

It was hoped that in conducting this analysis of the policies and strategies of the Regulators, that some content would be found relating to this, but unfortunately none was found. I am suggesting that 360 degree feedback should be collected amongst all law firm staff so that solicitors give feedback on each other as colleagues, and also support staff should give feedback on the relationships they have with the fee-earners and vice versa. This should happen at all levels of the organisations from trainees

and support staff up to managing partners, and I make a recommendation to this effect in Chapter 6.

5.2 (iii) External Stakeholders

The third subdivision relates to external stakeholders. Whereas the previous two subdivisions looked at relationships within law firms between trainees and supervisors, and colleagues more generally, this subdivision relates specifically to the relationships that solicitors have with external parties. These may be clients, or other law firms, and depending on the practice area also e.g. banks, estate agents, HM Court Service staff, HM Land Registry staff, HM Revenue and Customs staff and others with whom solicitors have regular contact through their work.

As was the case for the previous two subdivisions, it was hoped that in conducting this analysis of the policies and strategies of the Regulators, that some content would be found relating to this, but unfortunately none was found. I am suggesting that 360 degree feedback should be collected from all of the external stakeholders relevant to the practice area so that the performance of solicitors can be measured in terms of the relationships they have with those external parties with whom they have regular contact. These external contacts would be asked about the manner in which they were dealt with, whether the solicitor successfully built up a rapport with them, if they felt that they had been dealt with politely and efficiently. I make a recommendation in Chapter 6 regarding the inclusion of this in the promotion criteria.

To conclude this section of the content analysis it can be said that there a major similarity between these three subdivisions of supervision and training; collegiality; and external stakeholders. This is that none has been addressed by the Regulators in their policies and strategies relating to the retention and progression of women solicitors and despite the fact that they are all vital to the existence of the legal profession, they are presently ignored.

As was seen in the second theme in section 5.2 above, the relationships and interdependency relating to family life are dealt with by policies that contain them in home life as far as possible so that they do not affect the workplace any more than

necessary. However, the relationships and interdependency which inevitably exist in the workplace are treated as invisible and the performance of solicitors in nurturing and building relationships between trainees, colleagues, clients and others are not recognised or valued. This thesis has suggested in this section that the Regulators should require all law firms to review and overall their promotion processes to include these elements in their promotion criteria. This will contribute towards achieving substantive equality in the workplace for women solicitors and others who practice these principles of the framework.

5.5 Conclusions

This intention of this chapter was to present the results of the content analysis of the policies of the Regulators in relation to women solicitors, which was conducted using an original framework. The results were presented under two themes, which were further subdivided. The main conclusions will now be summarised in this final section of the chapter, and specific recommendations will be made in the next chapter.

It has been seen in this chapter that there are areas in which the LS of E&W has very detailed policies and guidance for its members, whereas the LS of S has none at all, such flexible working. This is likely to be because England and Wales is a larger jurisdiction, and its Law Society is significantly older than that of Scotland.

The first theme to be discussed was 'relationships and interdependency in family life', and the results of the analysis were set out under two subdivisions. The first was maternity, paternity and parental leave and looked at the areas of policy dealing with these areas. There is no focus within the LS of E&W policy on these areas, although as mentioned in section 5.1 (i) above, there is research published by the LS of E&W pointing out that men tend not to take the paternity leave to which they are entitled. This thesis therefore suggests that policy is necessary covering all three kinds of leave set out in the title of the subdivision, and that the importance of relationships and interdependency should be pervasive within the policy. In contrast, the LS of S has issued 12 guides in a series entitled 'Parents in the Profession' which cover the practical issues facing parents and their line managers when dealing with maternity, and paternity leave. These are useful guides and show the LS of S's attempts to assist with the retention and progression of women solicitors, since it is often at this stage in

a woman's career that she leaves the profession, as discussed in Chapters 1 and 2. Under this heading I made Recommendation 1 that the LS of E&W should issue guidance to law firms specifically relating to maternity, paternity and parental leave, suggesting protected rights beyond the statutory minimum.

The second subdivision under this theme was on the topic of flexible working. The LS of E&W has very detailed guidance on this point, but much of this is aimed at signatories to their Charter, rather than all law firms. Also, there were a number of important suggestions made in the International Women in Law Summit Legacy Report (set out in section 5.1 (ii) above) which have not been taken on board by the LS of E&W. This thesis suggests that these suggestions are implemented in order to close the gap between policy and culture in law firms, and to help with the move from formal to substantive equality in the legal profession. The LS of S does not have detailed guidance of law firms in relation to flexible working, which ought to be remedied in order for solicitors to be able to successfully implement the advice given to them in the 'Parents in the Profession' guides. Recommendation 2 made under this heading is that the Regulators should monitor and report on the uptake of flexible working in all law firms in the UK, and the position of the employee working flexibly, so that employees who do so, do not have their career progression unfairly stunted, and to fill the gap between the policies of law firms and their implementation.

The second theme was 'relationships and interdependency in work life' with three subdivisions: supervision and training; collegiality; and external stakeholders. Unfortunately, there was no mention of any of these topics within the policies and strategies of the Regulators at all. This appears to reflect the fact that the LS of E&W and the LS of S accept the legal profession's underlying view that relationships are relevant to the home and not the workplace, which this thesis refutes. It is impossible to exclude relationships and interdependency from work life because wherever there are humans together there will inevitably be interdependency between them and relationships of some description. This section concluded that feedback should be collected from all parties involved in order to assess which solicitors perform well in this area, and they should be rewarded within the promotion process. This would encourage solicitors to nurture and develop their relationships in the workplace and this would contribute towards achieving substantive equality within the legal profession. There were three recommendations made under the three subdivisions

and these were that the Regulators should require all law firms in the UK to review their promotion processes and adopt as new criteria for promotion, a solicitor's performance (3) in training and supervision (4) with collegiality; and (5) with external stakeholders. Adopting these additional promotion criteria will contribute towards the achievement of substantive equality.

It might be thought that suggestions by the Regulators which are not backed by sanctions will no achieve substantive equality in law firms. This thesis takes the view that ideally, there should be a change in the law in England and Wales to match legislation in Scotland for public companies, and with a 50:50 campaign for private companies, and partnerships such as law firms. However, in the absence of these, additional requirements from the Regulators will need to be made, and if clients are made aware that law firms are not meeting their regulatory requirements in relation to gender balance, they will choose to take their business to law firms that do prioritise this.

The next chapter in this thesis will bring together the conclusions from the preceding chapters to provide a conclusive answer to the research question of this thesis. It will present recommendations for future legal and policy developments and reform within the legal profession, in order to tackle the shift from formal to substantive equality, and the retention and progression of women solicitors in private practice in the UK.

Chapter 6 -Conclusions and Recommendations for Future Action

The central claim of this thesis is that gender inequality in private practice law firms can be more effectively addressed if the principles encapsulated by CE are explicitly embedded in the policies of the Regulators for the purposes of achieving substantive equality.

Chapter 1 showed that there is a significant problem for women solicitors in Scotland, and England and Wales around their retention and progression in private practice law firms. These problems include direct and indirect discrimination; the model of working in law firms and their macho culture; the criteria used for promotion to partner; the domestic burden; and the gender pay gap.

Chapter 2 set out the legal position and the details of employment laws that provide formal but not substantive equality, and it looked at the definitions concluding that Fredman's definition sits well with this thesis. It explained that the provision and implementation of specific workplace policies are required if substantive equality at partnership level is to be achieved in private practice law firms.

Chapter 3 set out a theoretical framework based on CE theory which focuses on relationships and interdependency in family life, and in work life. Chapter 4 set out the workplace policies and strategies of the Regulators and Chapter 5 analysed the extent to which CE theory informs their approaches to gender equality. It can be concluded that it is not informed by CE theory at all, but this thesis suggests this approach should be adopted by the Regulators in order to assist with the retention and career progression of women solicitors in both jurisdictions. This could be achieved through implementing the recommendations made by this thesis as follows:

In relation to maternity, paternity and parental leave, the Regulators should suggest to law firms that they go beyond the statutory minimum rights available to all employees and give protected terms and conditions to parents returning from leave, and conditions such as the return of their clients and files that they were working on before they took leave. Therefore I suggest:

RECOMMENDATION 1: The LS of E&W should issue guidance to law firms specifically relating to maternity, paternity and parental leave, suggesting protected rights beyond the statutory minimum.

Although the problems surrounding flexible working are not limited to the legal profession,³³⁷ I suggest that the Regulators of the legal profession need to embed the framework into their policies and strategies in order to achieve substantive equality for women solicitors in private practice. Therefore, this thesis makes the following recommendation:

RECOMMENDATION 2: The Regulators should monitor and report on the uptake of flexible working in all law firms in the UK, and the position of the employee working flexibly annually, so that employees who do so, do not have their career progression unfairly stunted. This would go some way to filling the implementation gap between the flexible working policies of law firms and their employees successfully taking up these patterns of working.

Additionally, I am suggesting that the time spent and the skills used on supervision and training should be assessed alongside time spent billing clients when promoting solicitors to partner. This would assist in achieving substantive equality for women solicitors and those who practice the elements set out in the framework. The LS of E&W and LS of S should include this in their guidance to law firms in order for it to be introduced into the promotion criteria and therefore, I am making the following recommendation:

RECOMMENDATION 3: The Regulators should require all law firms in the UK to review their promotion process and adopt a solicitor's performance in 'training and supervision' as a new criterion for promotion to partner.

Another suggestion to be taken into consideration alongside other criteria in promoting solicitors to partner is collegiality. This would contribute towards achieving substantive equality for women solicitors and other who practice the principles set out in this framework, and so the LS of E&W and LS of S should include this in their guidance to

United Kingdom.'

³³⁷ The Institute for Public Policy Research found that although 94% of British organisations have flexible working arrangements, only 19% of UK working women are actually able to vary the hours they work. There are negative perceptions about these choices threatening career progression and one-third of UK managers have heard colleagues make derogatory remarks about agile workers, and almost half say that flexible schedules for workers cause resentment in teams. McKinsey & Company, 'The Power of Parity: Advancing Women's Equality in the

law firms in order for it to be introduced into the promotion criteria, and therefore, I am making the following recommendation:

RECOMMENDATION 4: The Regulators should require all law firms in the UK to review their promotion process and adopt a solicitor's 'collegiality' as a new criterion for promotion to partner.

Another criterion for promotion which would contribute towards achieving substantive equality for women solicitors and other who practice the principles set out in this framework relates to a solicitor's performance with external stakeholders. The LS of E&W and LS of S should include this in their guidance to law firms in order for it to be introduced into the promotion criteria, and therefore, I am making the following recommendation:

RECOMMENDATION 5: The Regulators should require all law firms in the UK to review their promotion processes and adopt a solicitor's performance with 'external stakeholders' as a new criterion for promotion to partner.

In addition to the previous five recommendations, it is necessary for an overall recommendation which will make a difference to the achievement of substantive equality as follows:

RECOMMENDATION 6: The Regulators should require all law firms in the UK to adopt gender targets to achieve a 50:50 balance by 2020.

Further research following on from this thesis could include ways in which these recommendations could be incorporated into statutory obligations ensuring that law firms are obliged to implement them, for example via Principle 9 and other reporting obligations such as those which currently exist for the gender pay gap.

It is acknowledged that these recommendations will not solve all of the problems surrounding the retention and progression of women solicitors in private practice, and, whilst not capable of achieving substantive equality for all, they would help towards making incremental progress in achieving the goal of gender equality at partnership level

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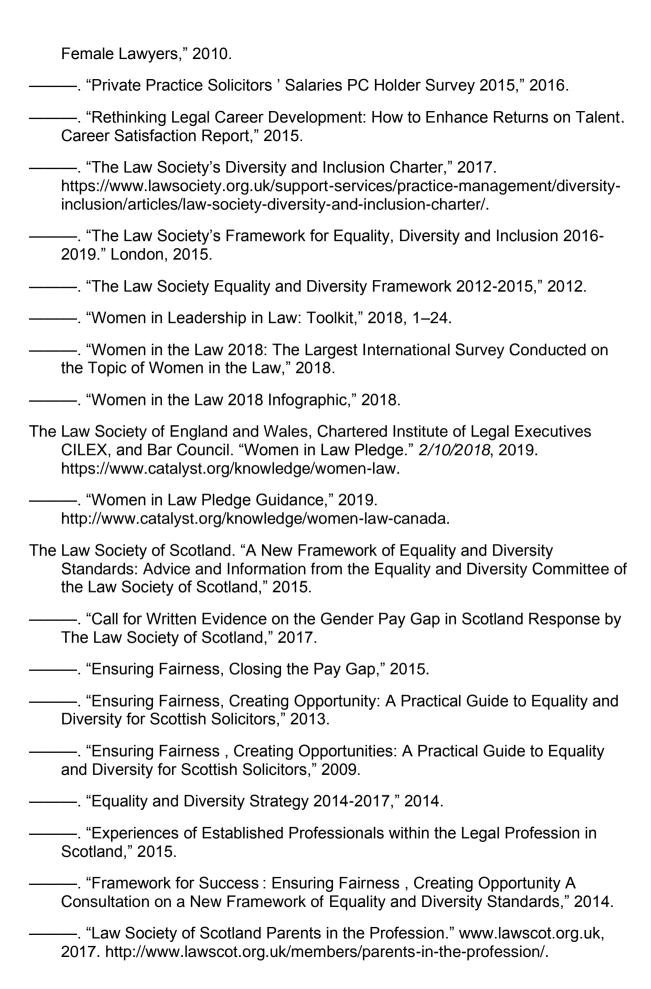
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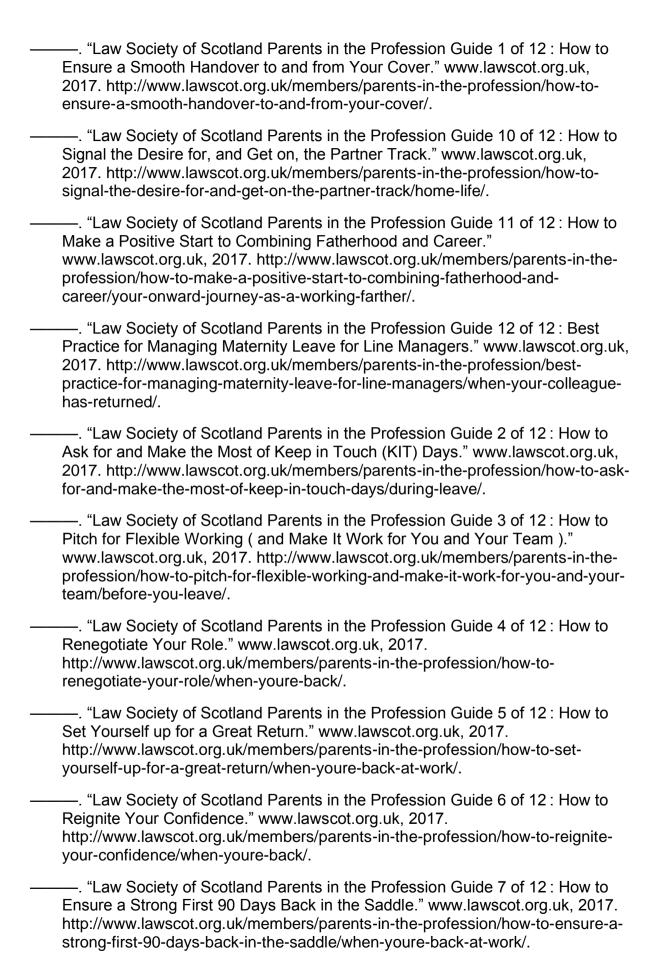
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International

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