Na Mídia

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Exposing the gap

For the past two years, many UK law firms have been compelled to publicly disclose the difference between what they pay male and female lawyers. Gender pay gap reporting can be a blunt instrument, but acknowledging a problem is the first step to solving it. We consider the implications for Latin America's legal market.

Credit: Harry Tennant

"Women, you're now working for free for the rest of the year." This is the kind of headline propagated by the UK media when the country observes Equal Pay Day, usually in early November. It is the day in the year that working women in the UK effectively stop getting paid relative to men, who in just over 10 months earn what their female counterparts earn in a year.

The UK passed legislation requiring companies with 250 plus employees to report their gender pay gap in 2017. Intense public scrutiny followed when businesses began to lay bare big disparities between male and female earnings. The legal industry was not exempt. The average gender pay gap across all UK industries was 8.6% in 2018, but it is much higher in the legal sector, estimated at 20%.

But even that figure is not thought to convey the real gulf between male and female earnings at law firms. This is because many firms excluded partners from their reporting. (As partners are not technically employees, the legis-lation does not bind firms to include law firms' highest earners in their results.)

So far, the UK office of Kirkland & Ellis has reported the highest median pay gap of any law firm – a sizeable 68.2%. Magic circle firms have also admitted to sub--stantial differences in pay between the sexes. They have all reported bigger wage gaps than the industry average, but they have also included partners when doing the maths. The latest data from each shows that Slaughter and May has a 41.6% median pay gap; Linklaters' is 44.2%; Clifford Chance's, 43.6%; Allen & Overy's, 39%; and Freshfields Bruckhaus Deringer's, 34.1%.

Clifford Chance was the first Magic circle firm to include partners in its gender pay gap reporting. Partner and global head of people and talent Laura King observes that the gap is fuelled by an over-concentration of women in the lowest pay categories, which is compounded by the fact that most of the firm's senior partners, many of whom were promoted 20 or even 30 years ago, are men. The same set of circumstances is common to firms across the industry, and not only in the UK.

The gender pay gap – the average difference between remuneration for working men and women – it is a global phenomenon. The UK and Australia might be the only countries in the world that make companies disclose the data, but the disparity between men and women's earnings exists beyond both those countries. In 2018 the World Economic Forum estimated that in Latin America there is, on average, almost 30% difference between the earnings of men and women.

Apples and oranges

Read in isolation, the statistics make for a dispiriting read. That's why it's important to make the distinction between what is meant by the gender pay gap and equal pay for equal work. The two terms are often used interchangeably, but they are not the same.

The gender pay gap is the difference between the average earnings of men in an organisation compared to their female counterparts and does not take into account role or seniority. Conversely, equal pay refers to the legal requirement for men and women to be paid the same for the same work. In many countries (including the UK and – in Latin America – Argentina, Brazil, Chile, Colombia, Mexico and Venezuela) legislation makes unequal pay for equal work illegal.

Critics note the limitations to what can meaningfully be interpreted from the average figures used to calculate the gender wage gap. Because it doesn't take into account the individual and occasionally anomalous circumstances deciding people's pay, the analysis will arguably tell you little about whether a company is actually paying men and women different amounts for the same work. "Statistics can create good soundbites and may bring attention to a very important issue, but actually looking at pay equity is more complicated and requires a much deeper dive into understanding the policies and practices about how pay is set at different companies," says Amy Aukstikalnis, a principal at Los Angeles-based Welch Consulting who commented on the subject when she spoke at Latin Lawyer Live 5th Annual Labour & Employment last year. "There's a multitude of other factors that can reasonably, legitimately and in a non--discriminatory way impact differences in people's pay."

Amy Aukstikalnis, Alexandre Bertoldi, Pauline Caldwell, Virginia Clegg

Economist Ali Saad, managing partner of US consultancy Resolution Economics, who has helped several international law firms carry out pay audits looking at gender in the wake of the #MeToo movement, agrees. He warns that interpretation of averages can lead to a conclusion that isn't always meaningful. "To do a statistical analysis you need to compare apples to apples for similarly situated men and women, and only then can you determine if they are being paid differently."

But gender pay gap reporting is a useful way of illustrating the fact that – by and large – men occupy the highest paid positions at most organisations. While it cannot tell you whether an employer is discriminating along gender lines, it does provide evidence to support the theory that there remain barriers preventing women from reaching the same career level as their male counterparts.

Fewer women reach the top

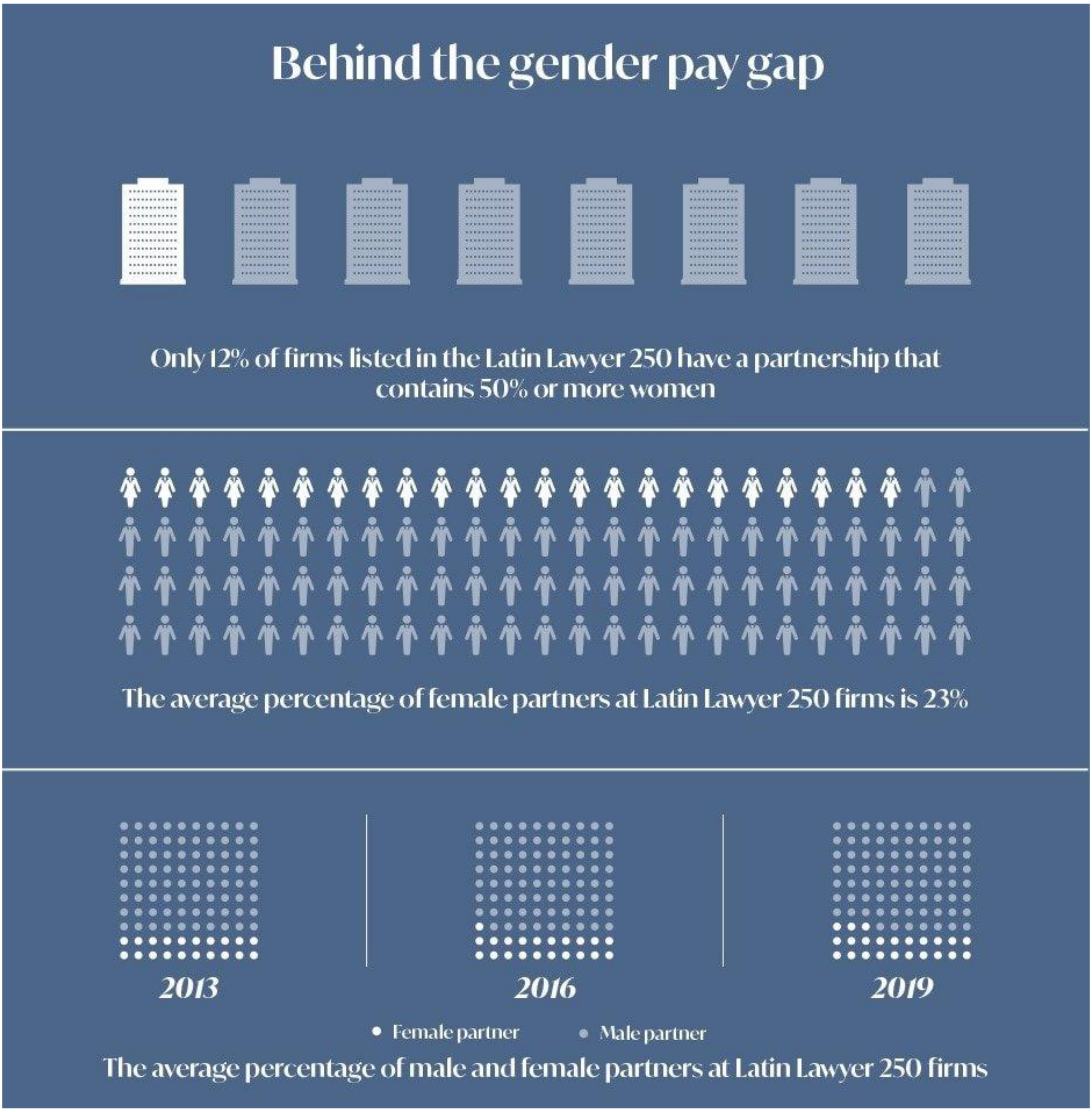
So far, other jurisdictions have yet to follow the UK and Australia's lead. In Latin America, it is not standard practice to publicly disclose information on lawyer salaries and partner compensation. As a result, many firms have not made collecting that information systematic.

However, some have. Latin Lawyer surveyed almost 70 firms recommended in the Latin Lawyer 250 and found that close to half of them had conducted gender pay analysis. Some saw doing so as a logical extension to the data they collect on salaries. "It's an evolution of the analysis we already conducted to determine if our compensation was in the top range of the market," says Pinheiro Neto Advogados managing partner Alexandre Bertoldi. "Plus we thought it would be a useful tool for diversity matters." Another firm that has analysed salaries based on gender is Ferrere, which has offices in Uruguay, Bolivia, Paraguay and Ecuador. It did so after signing up to the UN Global Compact's Women's Empowerment Principles and is using its gender gap analysis tool, an online platform designed to help signatories meet gender equality objectives. "The goal for Ferrere was to assess how we were contributing to advancing gender equality and identify what further action can be taken," says partner Isabel Laventure.

A very small fraction of firms reported finding individual cases of female lawyers earning less than their male counterparts in the same role. But, as it is in the rest of the world, it is largely the case that the larger the firm, the more formulaic remuneration evaluations are, and firms rely on strict, prescribed methods to decide salaries.

Equal pay for equal work is upheld among the firms we surveyed, but the lack of gender diversity at partner level is strong evidence of a prevalent pay gap across Latin America's legal market. "A male lawyer will get similar payment to a female lawyer with comparable skills and performance, but the gap does exist at a more basic level in relation to career development, because that is where you find significant differences between genders," points out Jaime Fernández Madero of Fernández Madero Consulting.

Gender wage gaps generally produce a negative popular backlash when published, but the circumstances they illustrate – such as not enough women making partner – are not shocking to anyone with knowledge of the make-up of traditional law firm partnerships. It is fair to say that publishing the gap does not reveal anything about an organisation that an observer would not already have sussed out: that as you go higher up the ranks, the women become fewer and fewer.



Of the firms listed in the Latin Lawyer 250, only 12.5% have a partnership that contains 50% or more women. Today, the average percentage of women partners among Latin Lawyer 250-listed firms is 23%. The number of women reaching partner level appears to be rising, but painfully slowly: in 2016 that figure was 21% and in 2013 we recorded it as 20%. By comparison, the 2018 Latin Lawyer Elite firms – which we consider to be among the most forward-thinking in their markets – have 19% female partners. This number might reasonably be expected to be higher, since those firms are considered to be particularly engaging with diversity issues.

A law firm that has predominantly men at senior levels and more women at lower levels will almost certainly have a gender pay gap. This is not an indication that men and women are unequally remunerated for the same work, rather, the gap paints a picture of the internal hierarchy within a firm. This pecking order is common in law firms the world over and is the same status quo contributing to the gender pay gaps reported by Magic circle firms in the UK. **"Although I don't see the gender pay gap as the most important issue related to gender equality in the Brazilian legal market, it seems to be the same in every country and in every industry: there are more men than women in leadership positions and, consequently, the reality is that men earn more than**

women," says Luciana Tornovsky, M&A partner and head of diversity and inclusion at Brazil's Demarest Advogados.

"It's not that there is intentionally a default pay gap," says Claudia Prado, who used to be managing partner at Brazil's Trench Rossi Watanabe and then led Baker McKenzie's Latin American group before she left to become an independent consultant. "It's a consequence of the different opportunities that women have to progress in their career compared to men," she says. "They end up getting less, not because there is intentionally discrimination because they are women, but because of the challenges they face," says Prado.

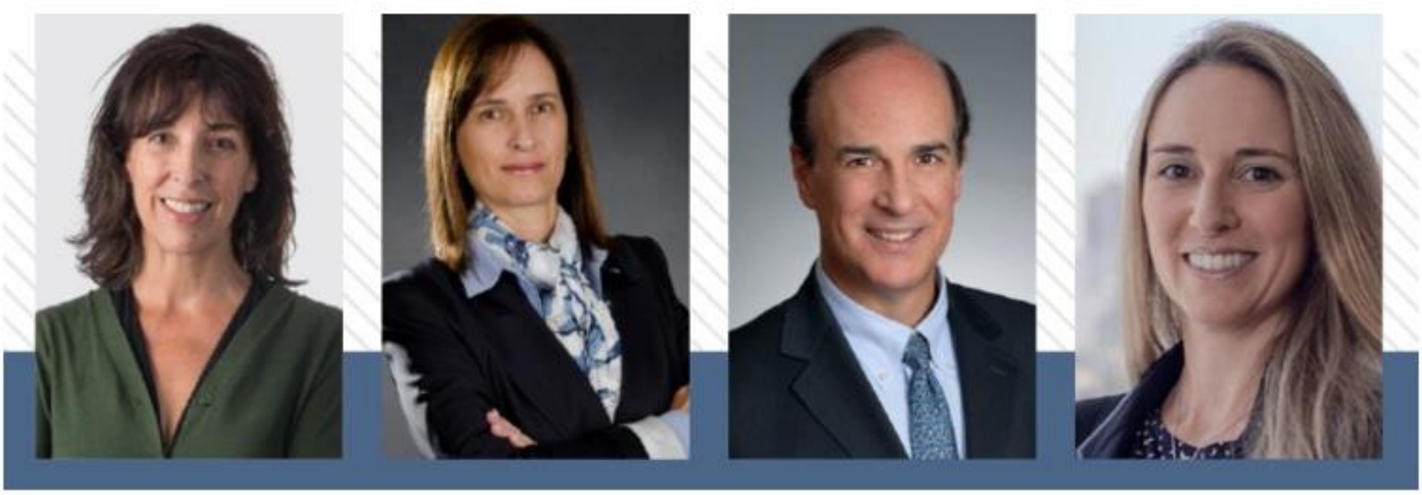
The gender pay gap is far from being common parlance in Latin American legal circles, but the issue it draws attention to – that there remain barriers in the way of women's career progression that require urgent attention – is one many firms are acutely aware of.

Many firms have tried to address some of these barriers and instil more inclusive working environments by launching dedicated focus groups. (Some firms have taken this a step further, launching groups to promote sexual, racial and disability diversity too). There are also cross-firm initiatives, such as The Vance Center's Women in the Profession Program. "Right now, you can't avoid the subject of diversity," says Carolina Zang, managing partner of Zang, Bergel & Viñes Abogados. "I've even heard of completely unexpected firms with super machismo partners talking about the issue." The pace of change is slow, however, and while focus groups addressing diversity are more common across the region, most firms' partnerships are a long way from achieving gender parity.

What gets measured gets managed

In relying on the broad brush of averages, the nuances behind the numbers are often ignored. For example, a lot of women choose to work part time, and flexible working is often a positive step towards reintegrating women into the workforce after they have a family. This is something the data fails to recognise.

For example, UK firm DAC Beachcroft – like many others – pays bonuses pro rata to part time colleagues. "Because a larger proportion of part time workers are women, this can skew the overall picture on the bonus gap," says Virginia Clegg, senior partner at the firm. "That's one of the difficulties of considering the data in isolation and an example of how it isn't always reflective of what is happening on the ground. For both women and men to be able to work part time in a world of greater flexibility is actually a really good thing, but looking at the data out of context might suggest otherwise."



Laura King, Claudia Prado, Ali Saad, Luciana Tornovsky

Any assessment of an employer's position on diversity should take into account more than just the numbers. But where they can add value is in acting as a talking point. "Possibly the best thing that came out of it was the ability to have a full and frank discussion internally," says Clifford Chance's King. "It is a really helpful nudge for organisations in the realm of fairness and diversity."

Presenting the data and the glaring discrepancies between how well male and female lawyers fare might lead firms to think more carefully about the root causes feeding the results. Clyde & Co HR director Pauline Caldwell was initially sceptical, on the grounds that she didn't think collating the data would tell her team anything they didn't already know. "I was definitely one of the HR directors that rolled their eyes and said not another fad that will achieve nothing," she remembers. "But when you have something that is almost institutionalised you need a considered and concerted attempt and commitment to move forwards."

Many of the factors underscoring law firms' gender pay gaps are not likely to change quickly, meaning there is probably little new information to be gleaned year on year. The rate at which partners retire and firms promote is such that the composition of the partnership is not going to look vastly different any time soon. There are other factors that will likely effect measured change on the rate of women reaching the top of the profession, but that won't be evidenced in year-on-year assessments of the numbers. Nowadays it is becoming more common for men as well as women to juggle family commitments with their careers, for instance, meaning these pressures are less likely to hold women back from advancing in the future.

Measuring the gender pay gap

In the UK companies with more than 250 employees must disclose their mean and median pay gap for hourly wages and bonuses. They are also obliged to supply the number of men and women receiving bonus payments and the proportion of men and women in each pay quartile. Collectively this data is used to summarise companies' gender wage gap.

The data is based on figures drawn from a specific date each year – called the 'snapshot date' – and is backward looking, so the data disclosed in 2019 will be for 2018. "The legislation spelled out a framework for how everyone had to report and how to reach calculations in an hourly format, so there's a consistency of approach," says Clifford Chance partner Laura King.

That doesn't mean there isn't room for confusion though. Organisations' mean and median pay gaps can be very different because of the distribution of pay among employees (and due to the gulf between what the highest and lowest paid members of an organisation earn). The mean gender pay gap is often higher than the median because it is more likely to be skewed by outlying results.

UK legislation only makes reporting employees' salaries mandatory – meaning law firms are not obliged to include partners in their data. In November 2018 professional association The Law Society of England and Wales released guidelines on how firms should comply with the legislation. It published best practices that call on firms to go beyond the legal requirement in order to deliver the spirit of the legislation and to build a clearer picture going forward.

The Law Society's guidelines recommend firms include partner remuneration in their reporting. It also called on firms with fewer than 250 employees to voluntarily take part and urged firms to include a robust narrative report alongside the data, as well as a detailed action plan. It suggested firms reveal their disability, ethnicity and sexuality pay gaps too.

But acknowledging there is a gap opens the door to implementing faster methods of closing it. For example, aware that it was hiring more men than women as lateral partners, Clyde & Co now requests that the agencies it works with to fill senior positions supply shortlists that are 50/50 male and female candidates. "We don't always get it, but that's the message we want to send. You're never going to move the dial if you don't set yourself that target," says Caldwell.

By acting as a benchmarking tool, it paves the way for observers to draw distinctions between firms and highlight the good, the bad and the ugly. Importantly, law firms can also measure how well they are doing in relation to their competitors, says King. When thought about in these terms – as a benchmarking tool – it matters less that the data purely looks at averages, because everyone is bound by the same standard. "You can see if an organisation is doing better than you and from there try and work out what the reason for that is."

This can only be a good thing if it inspires those that are performing poorly to do better, points out Demarest's

Tornovsky. In Brazil, where a cluster of firms have heavily publicised upped diversity efforts in recent years, forward thinking initiatives by a select few are encouraging others to effect positive change. “Many law firms in Brazil are worried about diversity and that’s a good thing, because if one starts to then the other does as well, so it’s healthy competition.”

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