

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

**Sexual orientation and religion or belief monitoring
within chambers and BSB entities**

**Consultation on a possible change to
diversity monitoring rules**

April 2018

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Executive Summary

Should the current restrictions on the publication by chambers and BSB entities¹ of sexual orientation and religion or belief (SO and RB) monitoring data be removed to promote disclosure and transparency? Should the rules relating to both of these monitoring categories apply in the same way as they currently do to the other diversity characteristics? Please give us your views.

We have been approached by the Bar Council to consider a potential rule change, which would involve the removal of the rule requiring each member of chambers' or entities' workforce to give their consent before aggregated and anonymised SO and RB monitoring data can be published. The removal of this rule would bring the regulation of SO and RB monitoring in line with the regulation relating to the other diversity characteristics: gender, race, disability, age, socio-economic background and caring responsibilities.

The potential benefits of a change include increased levels of data publication by chambers and entities, which might contribute to improvements in transparency and disclosure rates. It could also help chambers and entities to attract and retain a diverse workforce, thereby improving diversity within the barrister profession as a whole. However, we recognise that there may also be perceived disadvantages from such a change. Although we would hope that this would be unlikely, some people may feel that being identified as a chambers with a high percentage of people who are LGBT+ or from a particular religious group may have security implications for example. In addition it may not be appropriate to treat SO and RB data in the same way. The consultation aims to strike a balance with increasing openness and transparency about diversity at the Bar without compromising the need for anonymity.

The proposed change is to the rules within the BSB Handbook. The scope of this consultation is relatively narrow and proposes extending and streamlining data monitoring practices with which chambers and entities are already familiar. If, following consultation, the rules are changed, chambers and entities would be required to amend their diversity data policies to remove the restriction on the publication of SO and/or RB data. Data in these categories would only be published if there was no risk that individuals could be identified or if those who might be identified gave their consent.

But before we decide whether to do this, we would like your views.

¹ Excluding BSB single-person entities.

About this consultation paper

We invite responses to this consultation paper from anybody wishing to share their views. However, we anticipate that it is going to be of greatest interest to self-employed barristers and those managing multi-tenant barristers' chambers.

Within this consultation paper, we consider:

- an amendment to the rules in the BSB Handbook to change the way in which chambers and entities approach the publication of SO and/or RB data (we identify different possible options);
- the potential benefits of the proposed change for individual barristers and for the Bar as a whole; and
- the potential challenges of implementing this rule change.

We encourage you to share your views, either formally or informally. Your thoughts will be very valuable to us when we consider whether or not to change the rule.

The closing date for this consultation is **5 July 2018**.

You can respond to this consultation by contacting us as follows:

[Online survey](#)

Email: equality@barstandardsboard.org.uk

Tel: 0207 611 1305

Equality and Access to Justice Team

The Bar Standards Board

289-293 High Holborn

London WC1V 7HZ

If you would like this consultation in an alternative format, such as larger print or audio, please let us know. Please let us know if there is anything else we can do to facilitate feedback other than via written responses.

We look forward to hearing from you.

Part I: Introduction

The Handbook equality rules

1. The BSB Handbook sets out the standards that the Bar Standards Board requires from the barristers and specialised legal services businesses which it regulates. The BSB has a regulatory objective and commitments within its Equality Strategy 2017-19 to promote a diverse profession. Lack of diversity and discriminatory working practices within the profession are key themes identified in the BSB's 2016 Risk Outlook².
2. In September 2012, the BSB introduced a number of mandatory equality rules into the Handbook that apply to all self-employed barristers in multi-tenant chambers. Some of the rules were subsequently applied to BSB multi-person entities, following the introduction of entity regulation. The rules aim to promote and embed the principles of equality and diversity within chambers and entities. They cover a number of different areas previously untouched by regulation for the Bar such as equality monitoring, fair recruitment training and parental leave.
3. The workforce diversity monitoring rules were introduced to ensure that chambers have a valid evidence base upon which to develop and implement anti-discriminatory practice, policies and procedures. The data can be used by chambers and entities to inform their equality action plans and to evaluate initiatives aimed at promoting equality and diversity. The publication of diversity data is required to promote disclosure, improve transparency and contribute to the recruitment and retention of a diverse workforce.
4. The current rules to which this consultation relates are found at rC110.3(q-s) of the BSB Handbook:

q. The Diversity Data Officer shall invite members of the workforce to provide diversity data in respect of themselves³ to the Diversity Data Officer using the model questionnaire in Section 7 of the BSB's Supporting Information on the BSB Handbook Equality Rules (https://www.barstandardsboard.org.uk/media/1596730/bsb_equality_rules_handbook_june_2014.pdf);

.r The Diversity Data Officer shall ensure that such data is anonymised and that an accurate and updated summary of it is published on chambers' or BSB

² https://www.barstandardsboard.org.uk/media/1751659/bsb_risk_outlook.pdf

³ The members of chambers' workforce are offered the opportunity to provide diversity data covering age, gender, disability, ethnic group, religion or belief, sexual orientation, socio-economic background and caring responsibilities.

entity's website every three years. If chambers or the BSB entity does not have a website, the Diversity Data Officer shall make such data available to the public on request;

.s The published summary of anonymised data shall:

.i exclude diversity data relating to the characteristics of sexual orientation and religion or belief, unless there is consent from each of the members of the workforce; and

.ii exclude diversity data in relation to any characteristic where there is a real risk that individuals could be identified, unless all affected individuals consent; and

.iii subject to the foregoing, include anonymised data in relation to each characteristic, categorised by reference to the job title and seniority of the workforce.

5. Guidance on the rules is provided in the BSB Handbook Equality Rules Supporting Information document. The guidance indicates that where there are fewer than ten members of chambers, or fewer than ten individuals with a particular characteristic, rule .s(ii) comes into force and prevents publication of the relevant data unless there is consent from all those to whom the data in question relate.
6. During the development in 2011/12 of the equality rules, and in line with 2011 Legal Services Board (LSB) statutory monitoring guidance and diversity best practice, a cautious approach was taken to the publication of SO and RB data. This was due to the sensitivities associated with the disclosure of these protected characteristics and the Bar's lack of familiarity with the process of diversity monitoring. There were also concerns that without this rule, no SO or RB data would be disclosed at all by members of chambers' workforces. The BSB's 2011 consultation on the equality rules showed broad support for the approach, including from Stonewall and the Equality and Human Rights Commission.

Background to the suggested rule change

7. In March 2016, the Bar Council requested that the BSB review the diversity data monitoring rules and associated guidance. The Bar Council had proposed amendments to the publication rule in support of promoting a culture of openness and transparency at the Bar.

8. We are aware of some of the limitations of the current rules. Recent BSB supervision exercises have shown fairly high levels of awareness of, and compliance with, the diversity monitoring rules. A majority of chambers have published summarised diversity data on their websites, but almost none of these summaries contains data relating to SO or RB because consent has not been given by all members of the workforce. One consequence of the current drafting of the rules, for example, is that straight/heterosexual members of chambers (who are not at significant risk of having their identity revealed) might veto the publication of all SO data. Similar situations can also arise for RB data publication.
9. We are reflecting on the current rules in the light of updated guidance from the LSB. The updated guidance issued in February 2017 by the LSB under section 162 of the Legal Services Act “Guidance for legal services regulators on encouraging a diverse workforce⁴” removes prescription around the way that Approved Regulators should approach the collection and publication of SO and RB data. The updated guidance encourages Approved Regulators to adopt approaches to monitoring that are most appropriate for their regulated communities and that best meet the LSB’s diversity outcomes.
10. We have considered carefully the Bar Council’s request for a rule change. Throughout 2017 and in early 2018, the BSB engaged a number of specialist organisations and members of the profession, to better understand good practice in the area of diversity monitoring and consider the feasibility of amending the rules. With regard to SO monitoring, those with whom we engaged include representatives of FreeBar⁵, a leading advocate for LGBT+ rights and Stonewall. These engagement activities have established that, since the equality rules were initially implemented, the desire for extra protection in relation to SO data from those groups has reduced. This engagement revealed a growing desire to promote the diversity in SO that already exists within the profession.
11. We recognise that whilst our rules treat RB data in the same way as SO data, consideration must be given to whether different approaches should be taken to each protected characteristic. This is because different risks and issues may arise. In relation to RB monitoring, those with whom we engaged include senior experts from the Faiths Forum for London⁶ and faith-specific lawyers’ networks. Our engagement activity to date suggests that a rule change would give greater recognition of faith at the Bar and would help to increase anti-discriminatory practice within chambers relating to RB identity. However, we recognise there may be risks associated with declaring the religion of members of the Bar, even in anonymised form (for example, if a particular religion were particularly well represented at a chambers, it may attract political attention and be seen as making

⁴http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/S162_Guidance_For_Regulators_On_Encouraging_A_Diverse_Profession.pdf

⁵ An LGBT+ inclusive Bar network.

⁶ A London-based interfaith forum that provides a platform and channel for communication between faith communities, regional authorities, business and educational institutions.

the Chambers a possible focus of protests). One would hope that such a risk would be unlikely and, while this risk is also theoretically present in the case of SO data, it may be thought that in today's climate such protests might be less likely.

12. The BSB has considered the proposal from the point of view of the regulatory objectives and concluded that amending the monitoring rules in the Handbook may help to promote “an independent, strong, diverse and effective legal profession”⁷. However, we remain open minded and may agree a different approach for each of the two protected characteristics. The potential removal of the publication restrictions that apply specifically to SO and RB may help to foster a more progressive culture in the profession, and help to improve transparency about the profile of people who practise at the Bar. Any rule change would be aimed at making improvements to culture and openness at the Bar in order to support members of certain diversity groups who wish to be more visible.
13. The course of action we are considering is:
 - a. amending the existing rules, which place specific restrictions on the publication of SO and RB data by chambers and BSB entities, thereby potentially taking a consistent approach across all diversity characteristics; and
 - b. producing updated guidance for chambers and BSB entities on the publication of diversity monitoring data, which will provide information on how to deal with sensitive personal data.

Part II: The proposed change to the current rule

14. If it is agreed that rule (s.ii) above, which is focused generally on preventing the identification of individuals, offers sufficient protection, without the need for an additional rule targeted at SO and RB, our aim would be to revise the rule in a way that proportionately addresses the rights of individuals to remain unidentified whilst balancing the need to increase openness and transparency of diversity at the Bar. Therefore, the proposed change is that Handbook rule rC110.3 should be amended through the removal of part (s.i) either wholly or in part:

q. The Diversity Data Officer shall invite members of the workforce to provide diversity data in respect of themselves to the Diversity Data Officer using the model questionnaire in Section 7 of the BSB's Supporting Information on the BSB Handbook Equality Rules (https://www.barstandardsboard.org.uk/media/1596730/bsb_equality_rules_handbook_june_2014.pdf);

.r The Diversity Data Officer shall ensure that such data is anonymised and that an accurate and updated summary of it is published on chambers' or BSB

⁷ <https://www.barstandardsboard.org.uk/about-bar-standards-board/what-we-do/the-regulatory-objectives/>.

entity's website every three years. If chambers or the BSB entity does not have a website, the Diversity Data Officer shall make such data available to the public on request;

.s The published summary of anonymised data shall:

- ~~.i exclude diversity data relating to the characteristics of sexual orientation and religion or belief, unless there is consent from each of the members of the workforce; and~~
- .ii exclude diversity data in relation to any characteristic where there is a real risk that individuals could be identified, unless all affected individuals consent; and
- .iii subject to the foregoing, include anonymised data in relation to each characteristic, categorised by reference to the job title and seniority of the workforce.

Question 1: Do you agree with the proposed change to the diversity data monitoring rule above? Please explain your answer. (See also question 4 below)

15. The proposed rule change would be accompanied by guidance, which we propose will make reference to, at minimum, the following requirements:

- The need for chambers and BSB entities to update their Diversity Data Collection policies in line with the rule change, and ensure that they comply with the General Data Protection Regulations (GDPR);
- Chambers and BSB entities should take particular care when processing sensitive personal data such as that relating to SO and RB. Chambers and entities must satisfy themselves that members of the workforce who give consent for data publication are made fully aware of what publication entails, particularly if data falls into the “less than 10” category;
- If an individual withdraws their consent, and their SO or RB data is in a “less than 10” category, the relevant published data must be removed immediately from the chambers’ or entities’ website; and
- In exceptional circumstances, and even if there is no risk of individuals being identified, chambers and entities may have justifiable reasons for not publishing SO and/or RB data.

Question 2: Would the suggestions at paragraph 15 be appropriate and sufficient guidance for chambers and BSB entities? Please explain your answer.

Potential benefits and challenges of the suggested rule change

16. The proposed change has the potential to have a number of direct benefits to the equality and diversity of the profession, but there are also a number of potential challenges to the implementation of the proposed new rule. Below is a table containing those identified so far:

Potential benefits	Potential challenges
<ul style="list-style-type: none"> ● Increased levels of data relating to SO and RB published by chambers and BSB entities; ● Improved transparency about the profile of chambers' workforces; ● Consistent approach for monitoring across all diversity characteristics; ● Promoting increased disclosure rates for diversity data within chambers and entities and across the profession; ● The potential for chambers and entities to attract and retain a more diverse workforce; ● Maintaining every individuals' right to anonymity, while only giving the right to object to publication where an individual's anonymity is at risk; ● Promoting greater visibility of the diversity of the profession; ● Greater transparency of information for consumers about providers' own commitment to diversity; ● An extra route by which chambers can signal that it takes its equality and diversity responsibilities seriously; ● Improve wellbeing at the Bar through the effect of culture change and openness about SO and RB. 	<ul style="list-style-type: none"> ● All chambers will have to amend their Diversity Data Collection policies; ● Chambers may need to re-run part of their data collection processes to ensure that individuals directly affected by the new publication requirements are aware of the significance of giving or withholding consent; ● Data protection risks if chambers/entities do not revise their policies and practices in line with the GDPR; ● Members of the workforce may wish to give consent for their RB data to be published but not their SO data, or vice versa, giving rise to some administrative complexity; ● Chambers which have a high proportion of members from a certain religion or who are LGBT+ may fear that this might have security implications.

Question 3: Do you agree that there are potential benefits and challenges as described above? Are there any additional potential benefits or challenges to the proposed rule change? Please explain your answers.

Part III: Considering additional options

Taking different approaches to sexual orientation and religion or belief

17. As the current monitoring rule in question applies to both SO and RB, this consultation examines how the rule applies to both characteristics at the same time. However, we recognise that the sensitivities and issues relating to each category are, or may be, different. Therefore, we would like your views on whether the rules should be amended in the same way for both characteristics or whether a different approach to each characteristic should be taken.
18. For example, the restriction on publication could be lifted from one characteristic, but remain unchanged for the other. The accompanying BSB guidance would be amended accordingly.
19. Whilst this option could take different matters into account, it could undermine some or all of the potential benefits set out at paragraph 16 for the characteristic where data publication remained restricted.

Question 4: (a) Do you think that different considerations apply to the publication of, respectively, SO and RB data?

(b) Should different approaches be taken to the publication of each set of data?

(c) If so, how should the approach differ for each characteristic?

Please explain your answers.

Part IV: About this consultation

How has this consultation been developed?

20. We have considered the issue of how SO and RB monitoring could be amended within chambers and BSB entities. We have done this through engagement with the Bar Council, BSB staff, Board members, stakeholder groups and members of

the profession.

21. The change being considered will not directly affect those at the employed Bar, as the equality rules in the BSB Handbook only apply to self-employed practitioners. We do, however, recognise that issues of diversity, inclusivity and public perception affect the Bar as a whole and we welcome the views of employed barristers.
22. We are extremely grateful to the various external stakeholders who have given up their time and expertise in an effort to provide external challenge and fresh perspectives on our internal thinking.

How we will use this consultation

23. This consultation will be used to explore the impact of this potential rule change, from the perspective of anyone who is interested in, or affected by, the issue, but we would particularly welcome the views of those listed below.
24. Once we have considered your views on the proposed rule change, we shall evaluate them by reference to our regulatory objectives and other statutory obligations.

Who should respond to this consultation?

25. We are particularly interested in hearing from:
 - Self-employed barristers;
 - Employed barristers;
 - Members of chambers' business management, including clerks and administrative staff;
 - Members of the judiciary;
 - Bar special interest networks and associations; and
 - Students: current law students, BPTC students and anyone interested in a career at the Bar.
26. There are a number of different ways of engaging with the consultation process and responding – see Part IV of this document for more details.

Part V: How to respond to this consultation

27. The deadline for this consultation is **5 July 2018**. You do not need to wait until the deadline to respond to this consultation.
28. A response does not need to be a comprehensive written document, although it can be if you wish. It can also be short-form answers to the very specific questions that we have posed. It is, however, far more useful to us (and we are better able to take your views into account) if you are able to address the questions that we have posed specifically, rather than, for example, simply stating your general view.
29. That said, we want to hear your views on all of the questions posed and will take into account all responses received, whatever their form or content.
30. You do not have to respond to this consultation in writing. If you would like someone from the BSB to meet or telephone you or the organisation that you represent, to listen to and accurately record your views, then, as far as possible, we shall try to accommodate this request. Please contact us by email, telephone or post as soon as possible if you would like to do this.
31. Whatever form your response takes, we will normally want to make it public and attribute it to you or your organisation, and publish a list of respondents. If you do not want to be identified by name as a respondent to this consultation please make that clear in your response.
32. Please send your response, or otherwise get in touch, as follows:

E-mail: equality@barstandardsboard.org.uk

Tel: 0207 611 1305

Equality & Access to Justice Team

The Bar Standards Board

289-293 High Holborn

London WC1V 7HZ

Next steps following the end of the consultation

33. The consultation will close on **5 July 2018**. Once the consultation has closed we will collate and analyse all responses. We will use them to determine the potential for, and merit in, the suggested rule change. If we decide to go ahead with a rule change, we will finalise the drafting of the new rule.
34. If the rule changes, we will amend and update the relevant guidance on the BSB website.

Appendix 1: About the BSB

About the BSB and what we do

35. The Bar Standards Board is the regulator of barristers in England and Wales. We are also responsible for setting the education and training requirements for those who wish to practise as barristers in England and Wales.
36. We are responsible for the Code of Conduct ([the Handbook](#)) which sets out how barristers must work once they are qualified. We monitor how well barristers are meeting our practising requirements.
37. If they breach the Code of Conduct, we can take enforcement or disciplinary action against them. Through our activity, we protect the public interest and consumers, and help uphold the rule of law and the proper administration of justice. You can find out more about us on our [website](#).

Strategic context and our approach as a regulator

38. Along with other legal services regulators, such as the Solicitors Regulation Authority⁸ (SRA) and CILEx Regulation⁹, our regulatory objectives are:
 - protecting and promoting the public interest;
 - supporting the constitutional principle of the rule of law;
 - improving access to justice;
 - protecting and promoting the interests of consumers;
 - promoting competition in the provision of legal services;
 - encouraging an independent, strong, diverse and effective legal profession;
 - increasing public understanding of citizens' legal rights and duties; and
 - promoting and maintaining adherence to the professional principles.
39. [Our Strategic Plan 2016-19](#) and the accompanying annual business plans which support it, set out our strategic aims for ensuring that we are best placed to achieve our regulatory objectives. Our strategic aims include:
 - regulating in the public interest;
 - supporting barristers and those we regulate to face the future; and
 - ensuring a strong and sustainable regulator.

We are a risk- and evidence-based regulator. This means that our approach must focus on identifying potential risks which could prevent us from meeting our Regulatory Objectives¹⁰. We use evidence to prioritise the risks that we focus upon,

⁸ The body responsible for regulating solicitors.

⁹ The body responsible for regulating legal executives.

¹⁰ <http://www.legislation.gov.uk/ukpga/2007/29/section/1>

and then review our effectiveness in achieving the desired outcomes to inform future adjustments to our regulatory approach.