

Summary of responses: Sexual Orientation (SO) and Religion and Belief (RB) consultation

Respondents

Eight organisations responded:

- The Bar Council
- The Chancery Bar Association (ChBA)
- The Commercial Bar Association (COMBAR)
- 23 Essex Street Equality and Diversity Committee
- FreeBar
- Hardwicke Chambers
- Matrix Chambers
- Stonewall

31 individuals (the vast majority of whom were barristers) responded, either by email or by responding to an online questionnaire.

Additionally, Marc Mason of the University of Westminster and Steven Vaughan of University College London responded, referencing their research into the experiences of LGBT+ practitioners at the Bar in support of a rule change. That research was also cited by some other respondents.

In summary, every organisation that responded to the consultation supported the proposed rule change. A majority of individual responses also supported the rule change.

General comments

The Bar Council was ‘delighted’ to see the BSB’s proposals to amend the SO/RB reporting obligations as it had previously shared with the BSB the concerns of many chambers that the current rules prevent chambers from demonstrating their commitment to diversity. It felt that the proposed rule change was a “necessary step” towards a more diverse and more transparent Bar.

FreeBar restricted its comments to the SO proposal, which it strongly supported for reasons of enhanced disclosure and transparency, but for the more fundamental reason that this will promote the Bar as a visibly inclusive workplace.

Stonewall also restricted its comment to the SO proposal, which it supported. It also made some recommendations about treating gender identity as a protected characteristic and changes to the standard E&D monitoring form, which were endorsed by FreeBar.

23 Essex Street and COMBAR supported the proposals and endorsed the response from FreeBar. COMBAR additionally endorsed the Bar Council’s response. Hardwicke Chambers and Matrix Chambers also supported the proposals.

Question 1: Do you agree with the proposed change to the diversity data monitoring rule above? Please explain your answer.

The Bar Council strongly supported treating SO/RB in the same way as other protected characteristics. Chambers are already required to collect data in this area so the proposed change is only a small extension to the BSB rules and would help to assess and analyse the diversity of the workforce at the Bar, increase levels of data publication and promote transparency and disclosure rates. It is also likely to help chambers attract, maintain and retain a truly diverse workforce.

The Bar Council acknowledged that the security concerns noted in the consultation paper were valid, but felt the real fear is one of prejudice against approaching such chambers because of that chambers' particular diversity characteristics. Treating SO/RB differently suggests that there is something to hide in respect of these characteristics, which cannot be allowed to be the case.

Whilst agreeing with the proposed rule change, the ChBA observed that the risks identified should be minimal but that chambers should retain discretion where there is a real risk of security issues or business disruption.

The Bar Council noted that the proposed rule change retains protection for individuals by preventing publication of data that would identify individuals unless those who might be identified gave their consent.

FreeBar stated that the current rules perpetuate the unhelpful suggestion that chambers are not inclusive workplaces and prevented chambers from being able to demonstrate a commitment to diversity and workplace inclusion. The current low response rates on SO data make it difficult to assess the true extent of participation by LGBT+ individuals across the Bar and in addition to improving this, the proposed rule change would send a message about the Bar's view of sexual orientation. That message would be that identification as LGBT+ can be a source of pride rather than something that should be hidden from publication. In any event, individuals would still have the opportunity to 'prefer not to say'.

Stonewall felt that the current rules risk stigmatising LGBT+ members of the profession and offered accounts from LGBT+ employees outlining the personal and business impact of visibility and LGBT+ role models in the workplace. It stated that best practice in this area has moved on since the rules were introduced in 2012 and the need for additional protection to be afforded to SO data has significantly reduced. It was nevertheless important to take steps to avoid 'outing' individuals, even if additional consent is sought. One way of publishing data to avoid identification of individuals if numbers were low would be to aggregate 'heterosexual' and 'non-heterosexual' data.

Matrix Chambers noted that it had been unable to fully benefit from the expertise of Stonewall through their Workplace Equality Index, as they have been unable to share SO data. At a practical level, they noted there may be many reasons why barristers do not respond to diversity data surveys in chambers, including workload, timing and a lack of understanding of the importance of the data. But a barrister who does not respond is effectively blocking the reporting of SO/RB data, as it means chambers will not have the permission of the whole workforce. They felt that rather than protecting barristers with characteristics related to SO/RB, restricting collection of these data may actually be having the reverse effect.

Of the 31 individual responses, 18 were supportive and 13 were against. Those in favour cited some of the arguments made above and a number explicitly agreed with FreeBar. Among the arguments against were that SO/RB were sensitive and private matters and that

asking for such information to be disclosed (as is the case already) was an intrusion into privacy. Some responses seemed to assume that the BSB was proposing to make the declaration of one's SO/RB to chambers compulsory. Some felt that the proposals would make members of chambers less likely to declare their SO/RB and that some would feel vulnerable to being outed, particularly if there were one or two individuals falling into a particular category. Some felt that the data were not relevant to lay clients. One respondent believed that the Bar is not as committed to diversity as the consultation assumes and that these proposals might lead to unfavourable treatment for some.

In relation to RB data, one respondent suggested that any change should only be done if we monitor whether it led to an increase in discriminatory requests on the basis of RB. Another suggested that in a chambers where members have names that are commonly associated with certain religious groups, the publication of RB data would make it easy to 'triangulate' who they are. If clients object to being represented by someone of a certain religion then discrimination could result (and similar issues could arise in relation to SO data).

Question 2: Would the suggestions at paragraph 15 be appropriate and sufficient guidance for chambers and BSB entities?

The Bar Council agreed, subject to removing the final bullet point ["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."] It stated that the only exceptional circumstance should be the possible identification of individuals.

The ChBA was broadly supportive, subject to three observations:

- Any requirement to update policies or data collection should only apply as part of the normal 3-yearly publication rule;
- The guidance is silent as to who should make the decision about whether there is a "real risk" of identifying an individual and what principles they should apply; and
- It is not clear what would constitute 'exceptional circumstances' in the final bullet point. Security or business threats may be a "justifiable reason" but not necessarily a truly "exceptional circumstance". The former is more appropriate if there is guidance on what a "justifiable reason" would be and chambers should keep records of what that was.

FreeBar and 23 Essex Street agreed that it was unclear how a chambers might have 'justifiable reasons' for not publishing SO data where there was no risk of identifying individuals. As such, a generally-worded carve-out could undermine the rule change so the BSB should make clear that it would expect compelling and "exceptional reasons" to avoid publication.

Matrix Chambers supported the proposed guidance. Hardwicke agreed with the proposed guidance but suggested that examples of justifiable reasons for not publishing should be provided to make sure that it is clear it will only be in exceptional circumstances (eg where there is a real and credible security threat) that publication maybe withheld.

Among individual responses to this question, of which there were 25, seven objected for reasons given above (and two raised concerns about compatibility with data protection legislation). Among the 18 responses that were supportive, five felt that the proposals should go further. Two individuals felt that the 'less than 10' rule was too cautious, given the likely low numbers in chambers and three individuals were unable to think of any justifiable reason other than identification of individuals why data should not be published.

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.

The Bar Council agreed with the suggested benefits and challenges and along with FreeBar felt that the benefits considerably outweigh any potential disadvantages.

The ChBA also agreed (noting that requiring chambers to re-run collection and publication exercises would be unduly burdensome.) However, Matrix Chambers felt that administrative tasks such as re-running data collection and amending policies would be worthwhile if doing so was in pursuit of a more equal Bar.

The individual responses broadly agreed, with a small proportion raising concerns mentioned under earlier questions.

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.

The Bar Council agreed that different considerations apply to the publication of SO and RB data, but felt that the same approach should nevertheless be taken. It saw no reason why SO and RB should be treated differently to the other characteristics.

The ChBA suggested that the BSB consider the preservation of anonymity in circumstances where a religious belief is particularly associated with certain ethnicities or surnames and a search of chambers website might lead a person (possibly erroneously) to assume that a person has a particular characteristic. This could be dealt with in guidance as to what might constitute a “justifiable reason” for withholding publication.

Hardwicke said it “would not object” to a trial period in which those completing diversity questionnaires are asked specifically whether they object to the publication of any specific part of the data, even in anonymised form. That would enable someone who objected to RB data but not SO (for example) to identify this in the questionnaire.

Matrix supported treating both characteristics the same, subject to feedback from external stakeholders in relation to the RB restrictions being supportive.

The individual responses offered no suggestions as to how SO and RB might be treated differently, save for the one concern mentioned above about identifying RB from surname.