

Amendments to the Bar Standards Board Handbook – Publication of sexual orientation and religion and belief data by the profession.

For approval by the Legal Services Board

This application is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications. The BSB wishes to provide the information below to support its application.

Any queries about this application should be made to:

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Summary

1. This application relates to the publication by chambers and BSB entities of data on sexual orientation and religion or belief (SO and RB data). The current rules to which this application relates are found at rC110.3(q-s) of the BSB Handbook¹.
2. This application follows a consultation paper issued by the BSB in April 2018 (**Annex A**), which sought views on removing current restrictions on the publication of SO and RB data by chambers and BSB entities, thereby adopting a consistent approach across all diversity characteristics²; and on publishing updated guidance for chambers and BSB entities on the publication of diversity monitoring data.
3. The consultation was prompted by a request from the Bar Council, via the protocol for ensuring regulatory independence, to remove those restrictions and amend associated guidance on the publication of diversity data. Subsequent to and independently of the Bar Council's request, the BSB undertook work throughout 2017 and in early 2018, to better understand good practice in diversity monitoring and to assess the feasibility of the proposed rule change.
4. Following the consultation and having carefully deliberated on the issues raised by respondents, the BSB decided that current restrictions on the publication of SO and RB data should be removed.

¹https://www.barstandardsboard.org.uk/media/1974165/bsb_handbook_january_2019.pdf

² Gender, race, disability, age, socio-economic background and caring responsibilities.

Existing arrangements and proposed changes

Proposed rule change (see deletion in bold):

- . 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 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.

The current position

5. The current rules prevent the publication of SO and RB data unless every member of the workforce³ consents. This approach treats SO and RB data differently to data collected on the other diversity characteristics, where the requirement is simply to exclude such data where there is a real risk that individuals could be identified, unless all affected individuals consent.
6. Guidance on the current rules is provided in the BSB Handbook Equality Rules Supporting Information document.⁴ It indicates that where there are fewer than ten

³ "Workforce" means staff, barristers, pupil barristers and assessed mini-pupils in the case of a chambers; and employees, managers, pupil barristers and assessed mini-pupils in the case of BSB entities.

⁴https://www.barstandardsboard.org.uk/media/1977492/bsb_equality_rules_handbook_2019_update.pdf

members of chambers, or fewer than ten individuals with a particular protected characteristic, rule rC110.3.s.ii comes into force to prevent publication of the relevant data unless there is consent from all those who could be identified.

7. When the equality rules of the BSB Handbook were introduced in 2012, it was felt that imposing additional restrictions relating to the publication of SO and RB data would promote the disclosure of diversity data, given sensitivities about the disclosure of SO and RB status and the Bar's lack of familiarity with diversity monitoring.
8. This cautious approach was in line with 2011 Legal Services Board (LSB) statutory monitoring guidance⁵ and broadly supported by respondents to the BSB's consultation on the introduction of its equality rules⁶, including Stonewall and the Equality and Human Rights Commission.

Evidence in support of the proposed rule change

The regulatory objectives

9. The proposed rule change will “encourage an independent, strong, diverse and effective legal profession”: Streamlining data monitoring practices across all diversity characteristics, by removing the additional restriction on the publication of SO and RB data, should increase levels of SO and RB data publication by chambers and BSB entities, improve disclosure rates for SO and RB data, and lead to greater transparency about diversity within the barrister profession. This will improve our understanding of the profile of the profession, inform our activity to promote a diverse profession, and contribute to the recruitment and retention of a diverse workforce by chambers and entities.
10. In turn, the proposed rule change will contribute to the regulatory objectives of “Protecting and promoting the public interest” and “Protecting and promoting the interests of consumers”. A diverse legal profession is in the interests of consumers and the public: the legal profession is integral to the fair administration of justice. A representative profession may be more effective at understanding and meeting the diverse needs of consumers and may promote public confidence in the profession.
11. The BSB considers that the proposed rule change will not have any adverse impact on the other regulatory objectives, namely “Supporting the constitutional principles of the rule of law”, “Promoting competition in the provision of services” and “Increasing public understanding of citizens’ legal rights and duties”.

LSB guidance

12. In February 2017, the LSB issued guidance under section 162 of the Legal Services Act: “Guidance for legal services regulators on encouraging a diverse workforce.”⁷ The

⁵https://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/decision_document_diversity_and_social_mobility_final.pdf

⁶https://www.barstandardsboard.org.uk/media/938865/equalities_consultation_paper_041110x.pdf

⁷http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/S162_Guidance_For_Regulators_On_Encouraging_A_Diverse_Profession.pdf

guidance removes prescription around the way that Approved Regulators should approach the collection and publication of SO and RB data; and encourages them to adopt approaches to diversity data monitoring that are most appropriate for their regulated communities and that best meet the LSB's diversity outcomes.

13. In *Diversity: summary report on the legal services regulators' progress against diversity outcomes*⁸, the LSB noted the consultation on SO and RB data and expects to see the results soon.

Limitations of the current rules

14. We rely on paragraphs 29 to 32 of this application.

The consultation process

15. Our consultation sought respondents' views on the proposed rule change, its potential benefits and disbenefits, and associated guidance. It also sought views on whether a different approach should be taken to SO and RB data respectively.
16. The potential benefits of the proposed rule change, as identified in our consultation, include:
- a. A consistent approach for monitoring across all diversity characteristics.
 - b. Increased levels of SO and RB data publication by chambers and BSB entities, which might contribute to improvements in transparency and disclosure rates.
 - c. Greater visibility of the diversity of the profession and an extra route by which chambers and BSB entities can signal that they take matters of equality and diversity seriously, which might help them to attract and retain a diverse workforce, thereby improving diversity within the barrister profession overall.
 - d. Maintaining individuals' right to anonymity by only giving the right to object to publication where an individual's anonymity is at risk.
 - e. Greater transparency of information for consumers about legal service providers' commitment to diversity.
 - f. Culture change and openness within the barrister profession, which might contribute to improved wellbeing.
17. The potential disbenefits include:
- a. The requirement that all chambers and BSB entities will have to amend their diversity data collection policies, and ensure they do so in line with data protection legislation.
 - b. Individuals may give consent for their RB data to be published but not their SO data, or vice versa, giving rise to some administrative complexity.
 - c. Chambers and BSB entities 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.
 - d. Security risks for chambers or BSB entities with a high percentage of people who are LGBT+ or from a particular religious group.

⁸https://www.legalservicesboard.org.uk/Projects/Diversity_Of_Legal_Profession/pdf/20190122_Diversity_Summary_report_legal_services_regulators_progress.pdf

18. Eight organisations and 31 individuals responded to the consultation; a full summary of the responses is at **Annex B**. Two academics offered their research into the experiences of LGBT+ barristers in support of the proposed rule change⁹.
19. Every organisation and 18 individual respondents supported the proposed rule change. Respondent organisations included the Bar Council, FreeBar¹⁰, Stonewall, two of the Specialist Bar Associations and three chambers. Support stemmed from a desire to promote a more diverse and more transparent barrister profession; and the belief that the current rules prevent the Bar from demonstrating inclusivity. Some felt that the current rules stigmatise those of minority SO and RB status. Stonewall recognised that the current rules may have represented good practice when they were introduced but that good practice has moved on considerably since then.
20. A minority of individual respondents (13 of 31) were against the proposed rule change. Some submitted that SO and RB are private matters and that asking for such information to be disclosed (as is already the case) was an intrusion into privacy. Some respondents wrongly assumed that the BSB was proposing to make the declaration of SO and RB status to chambers compulsory. Some submitted that the proposed rule change would reduce disclosure rates, especially if there were a small number of individuals in a specific category. Some submitted that SO or RB data is not relevant to lay clients. One respondent submitted that the Bar is not inclusive and that the proposed rule change may lead to unfavourable treatment for some.
21. All organisation respondents were supportive of the proposed guidance at paragraph 37. Many respondents found it difficult to envisage circumstances where it would be inappropriate to publish SO and RB data as long as there was no real risk of identifying individuals. Some advised against giving chambers an excuse to avoid publication. Others endorsed the need to exercise discretion in certain circumstances where there was a risk to security or significant disruption of business. One respondent suggested that where members of a workforce have names that are commonly associated with certain RB groups, the publication of RB data would make it possible (whether accurately or not) to 'triangulate' who they are. That may be a good reason not to publish. We will consider producing examples of situations where non-publication may be appropriate. Another respondent suggested that reasons for failing to publish data should be recorded; we propose to include guidance that such chambers may be asked to explain what they have done as part of our supervision activity.
22. 18 individual respondents were supportive of the proposed guidance and five of those respondents felt that it should go further. Two respondents felt that the 'fewer than ten' rule is too cautious, given the likely low numbers in chambers; and three individuals were unable to think of any justifiable reason for not publishing data, other than the identification of individuals.
23. Individual responses offered no suggestions as to how SO and RB data might be treated differently, save for one concern about the possibility of identifying RB from individuals' surnames. The Bar Council accepted that different considerations apply to SO and RB data but felt that the same approach should nevertheless be taken. The Chancery Bar Association advised the BSB to consider preserving anonymity where RB status is associated with certain ethnicities or surnames. This may be dealt with in the

⁹https://westminsterresearch.westminster.ac.uk/download/2d666d9fb5a6dba5a7ba41a9f96b4d9997e1efcc6bc559df8dddde94ffc16b56d/211166/sexuality_at_the_bar_sept2017.pdf

¹⁰ An LGBT+ inclusive Bar network.

guidance on examples of situations where non-publication may be appropriate. Matrix Chambers supported treating SO and RB data in the same way, and Hardwicke Chambers submitted that it was open to enabling affected individuals to state whether they consent or object to the publication of any specific part of their data (e.g. to consent to the publication of their SO data but not their RB data).

Stakeholder engagement

24. Throughout 2017 and in early 2018, the BSB engaged several specialist organisations and members of the barrister profession, to better understand good practice in diversity monitoring and to consider the feasibility of the proposed rule change.
25. Regarding SO monitoring, those with whom we engaged include representatives of FreeBar and Stonewall. These engagement activities established that, since the equality rules were introduced, the desire for extra protection in relation to SO data from these groups has reduced; and revealed a growing desire to promote the diversity in SO that already exists within the barrister profession.
26. We considered whether our equality rules should continue to treat RB data in the same way as SO data. Relating to RB data, those with whom we engaged include senior experts from the Faiths Forum for London¹¹ and faith-specific lawyers' networks. These engagement activities suggest that the proposed rule change would give greater recognition of faith at the Bar and would help to increase anti-discriminatory practice within chambers and BSB entities relating to RB identity.
27. We recognise that there may be risks associated with declaring the religion of members of the Bar, even in anonymised form (for example, if a particular religion was well represented at a chambers or BSB entity, it may attract political attention leading to protests). We hope that such a risk would be unlikely and, while it theoretically applies to SO data as well as RB data, in today's climate such protests are unlikely.

Summary of our reasons for supporting the change

28. Having carefully considered the available evidence and remaining open to an alternative approach to SO data and RB data respectively, we seek to introduce the proposed rule change for the following reasons:
 - a. The change will support openness and transparency about diversity at the Bar, and our ability to better fulfil the regulatory objectives;
 - b. The proposed rules will continue to protect the identity of individuals by prohibiting disclosure in cases where individuals might be identified (including requiring consent where fewer than ten people have a certain characteristic within chambers or a BSB entity);
 - c. The proposed rules will not require any individual to disclose their SO or RB status to anyone;
 - d. From the perspective of clients and prospective barristers, there is a potentially positive impact of demonstrating that the barrister profession is diverse and inclusive;
 - e. The proposed rules will emphasise the BSB's commitment to diversity in the profession;
 - f. The proposed rules will extend and streamline data monitoring practices with which chambers and entities are familiar; and

¹¹ A London-based interfaith forum that provides a platform and channel for communication between faith communities, regional authorities, business and educational institutions.

- g. In line with most of the responses to the consultation, the potential benefits of the rule change outweigh the potential challenges.

The problem that the BSB is seeking to solve

29. In the interests of openness and transparency about diversity within the barrister profession, we believe that chambers and BSB entities should be required to publish SO and RB data, unless its publication risks the identification of individuals and the affected individuals, who are likely to be of SO or RB minority status, do not consent; and/or unless exceptional circumstances apply (e.g. a demonstrated threat to security or business continuity).
30. The current rules are not aligned to this belief and restrict the ability of the barrister profession to be open and transparent about SO and RB diversity. This is evidenced by our supervision activity, which has shown fairly high levels of awareness of, and compliance with, the diversity monitoring rules. Most chambers have published summarised diversity data, but almost none of these summaries contain SO and RB data because consent has not been given by all members of the workforce.
31. This is appropriate where, for example, fewer than ten members of a workforce have a particular SO or RB status and those individuals do not consent to the publication of their data. However, a consequence of the current rules is that a straight/heterosexual member of a workforce, whose identity is not at risk of being revealed by the publication of SO data, might veto the publication of all SO data. Similar situations might arise for RB data.
32. This shows the excessive restrictiveness of the current rules, which have the following negative impacts:
- a. *For chambers and BSB entities.* The current rules restrict the ability of chambers and BSB entities to be transparent about the SO and RB diversity of their workforce, and to demonstrate their commitment to equality for those of any SO and RB status. In turn, this might restrict their ability to attract and retain a diverse workforce.
 - b. *For the barrister profession.* The restrictions on chambers and BSB entities creates a cumulative restriction on the profession's ability to demonstrate SO and RB diversity, and a commitment to equality for those of any SO and RB status. These restrictions are evidenced by our supervision activity (para.30).
 - c. *For the BSB.* The lack of SO and RB data on the barrister profession limits our ability to identify and respond effectively to perceived or actual issues facing SO and RB cohorts within the profession; and to demonstrate our commitment to "Encouraging an independent, strong, diverse and effective legal profession".
 - d. *For the public, including clients and prospective barristers.* The lack of SO and RB data on the barrister profession might have a negative impact on the public perception of the profession and on the probability of individuals from diverse backgrounds applying to join it.

Impact of the proposed rule change

33. If approved, the proposed rule change will extend and streamline data monitoring practices in chambers and BSB entities across all of the diversity characteristics, by removing the current restriction on the publication of SO and RB data. Existing anonymity protections will apply across all diversity characteristics, to prevent the publication of data if doing so would create a real risk of the identification of individuals.

34. We accept that individual barristers are already asked to provide SO and RB data to the BSB, through the Authorisation to Practise process and that, as part of our activity to encourage a more diverse profession, we publish an aggregated version of this data in our annual Diversity at the Bar reports. However, the Equality Rules of the BSB Handbook aim to promote and embed the principles of equality and diversity *within* chambers and entities. Specifically, the rules on diversity data monitoring and publication provide a route for chambers and entities to:
- a. Promote the disclosure of diversity data;
 - b. Be transparent about the diversity of their workforce and signal their commitment to diversity and inclusion;
 - c. Create a valid evidence base upon which to develop and implement anti-discriminatory policies, procedures and action plans; and
 - d. Contribute to the recruitment and retention of a diverse workforce.
35. In line with these outcomes, the proposed rule change will increase transparency about SO and RB diversity within chambers and entities, by removing the restriction on the publication of said data. In turn, this will promote the disclosure of said data, strengthen and inform activity to increase diversity by chambers and entities, and contribute to the recruitment and retention of a diverse workforce.
36. The proposed rule change will not have a direct impact on members of the employed Bar, because the equality rules of the BSB Handbook only apply to self-employed practitioners and BSB entities.
37. In line with the consultation, the proposed rule change will be accompanied by guidance (**Annex C**), including the following minimum requirements:
- a. The need for chambers and BSB entities to update their diversity data policies and ensure that they comply with data protection legislation.
 - b. Chambers and BSB entities should take care when processing sensitive personal data such as that relating to SO and RB. They must satisfy themselves that members of the workforce who give consent for data publication are made fully aware of what publication entails, particularly if fewer than ten people fall into a particular category of data.
 - c. If an individual withdraws their consent to the publication of their diversity data, and they are one of fewer than ten people whose data falls into an SO or RB category, the relevant data must be removed immediately from the chambers' or BSB entities' website; and
 - d. 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.
38. Regarding point a. chambers and BSB entities are already familiar with the processes that will apply to SO and RB data if this application is accepted, and the change will not require chambers and BSB entities to re-run their data collection and publication processes other than in the normal three-yearly cycle required by the BSB. They will be able to do so if they wish.
39. Regarding point d. we will consider producing examples of situations where non-publication may be appropriate and will consider including guidance that chambers and BSB entities which do not publish SO or RB data may be asked to explain what they have done as part of our supervision activity. Non-publication may be appropriate

where, for example, a chambers or BSB entity has a high representation of a particular SO or RB status, creating a security threat or attracting protests. The circumstances in which these risks might occur are likely to be extremely limited. They might be linked to the area of law in which a chambers or entity specialises, to a high-profile case or to a high-profile member of its workforce.

The Better Regulation Principles

Transparency

40. The proposed rule change promotes openness and transparency about diversity in the barrister profession, and was included in a consultation paper issued in April 2018.
41. A communications strategy will ensure that there is publicity around the proposed rule change and publication of the guidance.

Accountability

42. As the regulator for the Bar, the BSB is accountable for any changes that are made. The BSB believes that the proposed rule change will help to meet our regulatory objectives.

Proportionality

43. The BSB carefully considered submissions for and against the proposed rule change and remained open to a different approach for each of the two diversity characteristics (SO and RB), throughout the consultation process.
44. The BSB feels that the proposed rule change is a proportionate way of promoting openness and transparency at the Bar, and an “independent, strong, diverse and effective legal profession”; and of balancing these aims with the need for anonymity.

Consistency

45. The proposed rule change will streamline data monitoring practices across all diversity characteristics and remove what is, on balance, an unnecessary and outdated restriction on the publication of SO and RB data.

Targeting

46. The proposed rule change will be kept under review. Data, including complaints data and reports of misconduct, will be reviewed to see if there are any unacceptable risks emerging. Consideration will be given to any further steps required to address any risks identified.

Date of implementation

47. If this application is approved, we seek for the proposed rule change to be made live as soon as reasonably practicable. Whilst they will be able to do if they wish, chambers and BSB entities will not be required to re-run their data collection and publication processes other than in the normal three-yearly cycle required by the BSB. Chambers and BSB entities were required to publish their first summary of anonymised diversity data by 31 December 2012.

Annexes

Annex A – BSB consultation.

Annex B – Summary of consultation responses.

Annex C – Associated guidance.