

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

Jenny Hart
Consultation Co-ordinator
Legal Services Board
One Kemble Street
London
WC2B 4AN

Sent by email only

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Dear Jenny,

LSB consultation: Encouraging a diverse profession

I am writing in response to the above consultation on behalf of the Bar Standards Board (BSB).

The BSB shares the LSB's commitment to promoting diversity in the legal profession. We also agree that simply collecting data, which was the focus of the LSB's original statutory guidance, is not sufficient to bring significant progress in this area. However, as the LSB suggests in its consultation, it is important that the frontline regulators are free to determine their own targeted approaches to promoting diversity, whilst collaborating where mutually beneficial. The substance of the proposed guidance is broadly helpful in promoting our shared agenda. However from the BSB's perspective but such guidance may not be necessary.

For the purposes of answering the questions set out in the consultation, we have assumed that further statutory guidance is a necessary intervention by the LSB and focused on the merits of the draft guidance.

Question 1: Is the proposal to switch the focus of the guidance to outcomes beneficial to encouraging the diversity of the profession?

Yes. If correctly used, outcomes focused guidance would enable the LSB to identify common diversity themes across the legal services market. It would allow enough flexibility for each regulator to approach the task of encouraging diversity in the most appropriate way for the profession it regulates. A flexible approach may enable new and creative approaches to regulation to develop, which may ultimately redefine what is thought of as "best practice" and enable sharing of experiences between regulators. The BSB agrees that the outcomes described by the LSB are desirable and we would expect any equality objectives set by the BSB to be compatible with these outcomes. However, it will be important to recognise that progress will be incremental and may take time. Also, different regulators (and their regulated professions) will be at different stages of maturity in their response to these issues. We

therefore think that the regulators need to have the freedom to design their own approach in response to their particular circumstances. We note that the LSB has provided some “illustrative examples” of evidence that a regulator might use to demonstrate progress. We agree strongly with the suggestion that regulators should not feel restricted by these, and should be confident in providing alternative evidence where appropriate.

Question 2: Will the proposed guidance allow regulators the opportunity to develop their own approaches to addressing diversity issues in the legal services profession?

Yes. The legal services market is not homogeneous, and there are significant differences between different sectors. The variations in size, business structure, and practice of the various legal professions within the market means that the regulators may face unique challenges. A bespoke approach to the regulation of each profession within the legal market would be easier to manage and more effective.

This proposal is broadly in line with the approach that the BSB is taking in any event, as we develop our new equality objectives and seek to be more effective in this area.

Question 3: To what extent are regulators already demonstrating achievement of the outcomes? If they are not, why do you think is this?

The BSB collects data across a range of protected characteristics. It is collected at least annually from: students studying on the bar professional training course; those called to the Bar; pupil barristers; and practising barristers. The data for practising barristers are further analysed by seniority and by employed/self-employed status. The response rate for the data is over 90% for age, gender, and ethnicity. The response rate for other protected characteristics is lower at 30-35%, but that rate is rising year on year.

The data are analysed and reported annually in the BSB’s Diversity Data Report. They are also used to inform and direct policy, in line with the BSB’s approach as an evidence-based regulator. Equality impact assessments are used alongside these data to consider carefully the possible effects of any new BSB policy or initiative. The BSB also draws on its analysis of these data to inform a number of corporate publications, such as the Risk Outlook and the BSB’s Equality Objectives.

The BSB regularly engages stakeholders in its work, in the form of professional bodies, the voluntary and community sector, and specific interest groups. Where appropriate, the BSB has already demonstrated an eagerness to work alongside other organisations where similar diversity themes are identified. Examples of this include the forum on cross-cultural communication in the legal profession, which included attendees from a number of regulators and stakeholder groups, and a social mobility roundtable on the possible effects of proposed changes in how barristers are trained.

Question 4: How can the LSB ensure that the data the regulators collect continues to be comparable?

We agree with the statement that the previous five years of data collection should not be made redundant by formally changing suggested areas of data collection, however the substance of data collection should be able to evolve over time based on changing circumstances. Where possible, the regulators should agree common standards to ensure comparability of data across the professions, but some regulators may wish to collect data in different levels of granularity (for example to better track progression, or to address additional characteristics such as gender reassignment).

Question 5: Given the LSB's proposal to assess regulator performance in this area, what would be the most effective way to carry this out? How long should we allow regulators to implement changes before any potential future performance assessment?

We think it is reasonable for the LSB to ask the regulators what they are doing to promote diversity and to reflect on the impact that work is having. The BSB would aim to do this through its own equality objectives in any event. As above, it is important to recognise that change can take time. We believe that a distinction needs to be drawn between entry to the professions and progression within the profession. The diversity of entrants to the profession can demonstrate equality of access, whereas subsequent progress may be affected by the equality of opportunities for practitioners once they have entered. Given the complex and lengthy processes required to gain entry to the legal profession, the diversity of those who are able to enter the profession merits specific attention. The BSB is currently considering this issue, and is in the process of receiving feedback on its Future Bar Training consultation.

Whilst we would seek to promote diversity at the point of entry (where we will be able to track the impact of changes to our training requirements) progress towards diversity in the profession as a whole can only be measured by looking at trends over time. Comparison of the change in diversity over an extended period (i.e. 5 years) can demonstrate whether current policies are moving things in the right direction. Membership of a profession inherently spans the length of people's careers, so underrepresentation of a certain group may be more indicative of former regulatory regimes than current. It is also important to note that some of the challenges to improving diversity in the profession are societal, for example inequalities in the accessibility of good education (primary to undergraduate) will impact the diversity of the profession, but are beyond the control of the regulators.

We agree that the LSB should give the regulators at least 18 months to respond to any new guidance. Whilst it is important to have activities in place to encourage a diverse profession, it may take significantly longer for some of these activities to have an impact.

Question 6: Will the proposed guidance: (a) deliver better services for consumers? (b) support innovation in legal services? (c) allow regulators to encourage business-led diversity initiatives? (d) encourage a more diverse profession?

Broadly yes. As regulators move away from collecting data towards better analysis of that data and introduction of targeted policies to improve diversity, a more diverse profession should emerge over time. This should have a positive impact on services for consumers. An outcomes focused approach will enable regulators to be innovative in how they respond to this agenda, which in turn may promote innovative responses by the professions, although it is not clear that the guidance will directly promote innovation in legal services.

Business-led diversity initiatives would be sufficiently encouraged by the proposed outcomes, in particular outcomes 3 and 4. Encouraging diversity by highlighting the business benefits is an effective way to incentivise businesses to commit to diversity, without requiring regulators to be too heavy handed. However the "business case" should not be exclusively relied on. Regulators should focus on why diversity in the legal profession is in the public interest.

Yours sincerely,

Amit Popat

Head of Equality and Access to Justice

Bar Standards Board
289-293 High Holborn, London WC1V 7HZ
DX240 LDE To2076111444 Fo207831 9217
www.barstandardsboard.org.uk