



The Law Society

**Legal Services Board consultation Increasing
diversity and social mobility in the legal
workforce: transparency and evidence**

Law Society response

March 2011

SUPPORTING
solicitors

Legal Services Board consultation on Increasing diversity and social mobility in the legal workforce: transparency and evidence

Response to the consultation

Introduction

This response has been prepared by the Law Society, the representative body for more than 140,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession, and lobbies regulators, government and others.

The Law Society welcomes the opportunity to comment on this consultation and the Legal Services Board's (LSB's) proposals to increase diversity and social mobility in the legal workforce. The Law Society is committed to supporting the profession and to play a leading role in the elimination of discrimination and the promotion of equality of opportunity and diversity in all our activities as a representative body and an employer. We believe a diverse and inclusive legal profession benefits everyone with opportunities to develop and recruit the best talent and better understand and meet the needs of its clients. This commitment is demonstrated, for example, through the Law Society Diversity and Inclusion Charter which is the flagship diversity initiative of the legal profession, and which currently has 180 firms signed up to it. In 2009-10 there were 82 firms signed up to the Charter and this represented 25% of all solicitors in private practice (Law Society Diversity and Inclusion Charter Annual Report 2010).

The Law Society agrees with the LSB's proposal that firms should be required to conduct surveys about the diversity of their workforce as a regulatory obligation. We believe that it is important for diversity data to be sought in order to build up a more comprehensive evidence base about the diversity make-up of the legal workforce. Although we recognise that progress has been made, certainly by solicitors, in engaging in equality and diversity initiatives, a requirement to conduct surveys about the diversity of the workforce in each entity may speed up progress.

However, we are strongly opposed to the part of the LSB's proposal to the effect that diversity data should be published at entity level. Data on equality and diversity is sensitive data under the Data Protection Act 1998 and it is important to ensure that consideration is given to how it is stored and used. The publication of data can, even if conducted anonymously, result in individuals being identifiable. In our view, the only way publication of data can ensure anonymity of individuals is for firms not to publish individual data sets but to instead publish subsets of information on sectors i.e. commercial law, sole practitioners, in-house lawyers, corporate in-house lawyers etc as trends, and also trends for the entire sector. We urge the LSB to consider this part of their proposal further.

We have provided further comments by answering the questions, which are attached.

Q1: What are your views on our assessment of what diversity data is currently collected? Are there any other sources of data that we should be aware of?

The Law Society is committed to principles of equality and diversity, and in supporting the profession to eliminate discrimination and promote equality of opportunity and diversity. This is demonstrated by the progress that has been made by the Law Society in this area. The LSB's assessment in the consultation paper about what diversity data is available, highlights what diversity data is currently being collected and, in relation to solicitors, this assessment is an accurate reflection of what is available.

The paper outlines that the Law Society's REGIS database includes information on the age, gender and ethnicity of practising certificate holders. It is significant to note that ethnicity data is known for approximately 88% of practising certificate holders, and can be broken down by size of firm and level of seniority, and this is an example of the progress that has been made by the Law Society in collecting diversity data. The paper recognises the Law Society Diversity and Inclusion Charter, which is the flagship diversity initiative of the legal profession. It is a public commitment by providers of legal service to develop and implement best practice in equality, diversity and inclusion, and currently around 180 firms have signed up to the Charter. In 2009-10, when there were 82 firms signed up to the Charter, this represented 25% of all solicitors in private practice. There are now 180 firms signed up and so we are expecting this figure to increase to about 30% of all solicitors in private practice. The paper also outlines that we promote a protocol on Legal Procurement, which is the first Protocol under the Charter, and is a commitment by purchasers of legal services to take into account the equality, diversity and inclusion work of providers of those services when awarding contracts. We have also published practical tools to support implementation of this, including a model questionnaire and procurement checklist.

Q2: What are your views on our assessment of what the available diversity data tells us?

The Law Society recognises that the available diversity data highlights that there are issues on equality and diversity that need to be resolved within the sector. The assessment in the paper on the available diversity data highlights several main themes. Firstly, we agree with the assessment that women and BME solicitors are well represented at the entry level of the profession but that it is much less clear progress is being made on retention and progression. Furthermore, we agree with the assessment that the socio-economic background of a solicitor has an impact on what sort of firm they work in. Anecdotally, evidence has been provided through research conducted by the Law Society that the socio-economic background of white males is advantageous and certain social activities, associated with a high socio-economic status, can become a factor in awarding training contracts and career development opportunities. We also agree that there is evidence of significant pay differentials.

It is clear that the data most readily available generally covers ethnicity and gender. It is not so clear that there is comprehensive data available on disability, sexual orientation, religion or belief, caring responsibilities, gender reassignment and socio-economic background, as noted in the paper. However, the Law Society Diversity and Inclusion Charter Annual Report illustrates that over 90% of signatories monitor ethnicity, gender, age and disability. With only nearly 60% of signatories monitoring sexual orientation and religion and belief, these are clearly strands some signatories are not yet monitoring. However, many have indicated their intention to begin data

collection in this area and so we are expecting more data to become increasingly available on these other areas of diversity in the future.

Q3: Is there other diversity research we should be aware of, that we did not take account of in our review of existing literature?

This is only briefly mentioned in the paper, but we believe that another potentially valuable source of information the LSB should consider are the diversity reports, published by the Law Society. In 2009/10 the Law Society undertook three separate surveys in order to understand the issues and barriers faced by some groups within the legal sector. The surveys covered black and minority ethnic (BME) solicitors, lesbian gay and bisexual (LGB) solicitors and women solicitors. The findings of the reports revealed a number of themes running across all three reports, highlighting the need to address issues around equality and diversity more broadly within the legal sector. This diversity research would be worthwhile for the LSB to consider in their review of existing literature.

Q4: Are there any other existing diversity initiatives run by approved regulators which are not reflected in our outline of current initiatives?

Not that we are aware of.

Q5: What are your views on the immediate priorities for 2011 we have identified? If you disagree with our priorities in relation to equality and diversity, what should they be (bearing in mind the regulatory objectives, the Equality Act obligations and the Better Regulation Principles?)

The Law Society recognises the importance of having priorities on encouraging diversity, and believes the immediate priorities for 2011 set by the LSB are generally sound. We agree that a wider evidence base on the composition of the workforce is desirable in order to better facilitate evidence based policy and also that impact assessing current diversity initiatives is an important activity. We believe though that this is primarily a matter for the Approved Regulators themselves. We do not agree that diversity data should be published at entity level (this is outlined in questions 31 and 32).

Q6: Do you agree that a more comprehensive evidence base is needed about the diversity make-up of the legal workforce?

The Law Society's commitment to principles of equality and diversity, and the progress we have made in this area, means that we strive to continually achieve a more comprehensive evidence base of the diversity make-up of solicitors. On this basis, we agree that a more comprehensive evidence base on the diversity make-up of the legal workforce is desirable. One of the Principles in the proposed new SRA Handbook, due to be published in April 2011 for implementation of Outcomes-Focused Regulation (OFR) in October 2011, is "encouraging equality of opportunity and respect for diversity".

Q7: What are your views on our proposal that in principle approved regulators should impose regulatory requirements on the entities they regulate, requiring them to publish data about the diversity make-up of their workforce?

The Law Society agrees that it is desirable for more data to be collected about the diversity make-up of the legal workforce. We have recognised that there are indeed some issues to be resolved within the sector, and have produced a number of incentives for firms to employ and retain a diverse workforce and to demonstrate a commitment to diversity. Many firms are currently actively engaged in initiatives to increase diversity and there is an increasing willingness and acceptance of firms that equality and diversity is an important area to consider. However, although progress has been made under the voluntary system currently in place and firms are making voluntary improvements, we believe that faster progress could be made if there was a requirement to conduct appropriate surveys. This is a matter which Approved Regulators can be expected to take forward.

We feel that the part of the LSB's proposal to the effect that legal service providers will be required to report the results of their diversity surveys to their regulator is misguided. There is anecdotal evidence to suggest that many solicitors do not want, and would not feel comfortable with, their diversity data being attached to their names on the roll. There is a general reluctance in the profession to provide data to the regulator, which is primarily caused by concern over how it will be used and whether the publication of this data may have an adverse impact on business. Anecdotally, we are aware that some BME solicitors anglicise their names for "marketing" purposes and to avoid any perceived targeting of ethnic minority solicitors by the regulator. This reluctance of the profession to diversity data being held by the regulator is something that the LSB needs to consider further. It is also relevant that the LSB takes into account that solicitors have been willing to provide diversity data to the Law Society. Many firms are currently actively engaged in initiatives to increase diversity and we have worked hard to build up trust with firms in developing effective diversity management practices.

We are opposed to the part of the LSB's proposal to the effect that diversity data should be published at entity level and this is outlined further in questions 31 and 32.

Q8: What form should the evaluation of existing initiatives take? Should there be a standard evaluation framework to enable comparisons between initiatives?

We believe existing initiatives could be evaluated by using the Equality Impact Assessment framework. This standard evaluation tool can be used for any policy, service, practice, initiative or activity making it a robust process to rely on. Impact Assessments can also be supplemented using consultation interviews with managers of the initiatives and participants, should additional qualitative data be useful.

Q9: What are your views on our position that regulatory requirements on entities to take specific action to improve performance (including targets) are not appropriate at this stage?

We agree that it is inappropriate to make it a regulatory requirement for entities to take specific action to improve performance and this requirement would be robustly opposed by the profession. We believe client led demand will quicken the pace of culture change and we suggest that any targets should be on how effectively entities

engage with equality and diversity activities, initiatives and monitoring. Encouraging entities to understand and make full use of the new positive action legislation is an important and effective mechanism to achieve change.

Q10: Do you think we should issue statutory guidance to approved regulators about diversity data collection and transparency?

We do not think that the LSB should issue statutory guidance to regulators on the collection of data about the diversity make-up of the legal workforce as a regulatory obligation, unless voluntary measures have been tried and failed, and the LSB can demonstrate that the issuing of statutory guidance would be a proportionate use of their powers. We do not agree with the LSB's proposal to the effect that diversity data should be published at entity level.

Q11: What are your views on our proposal to agree standard data categories with approved regulators, to ensure comparability of diversity data within the legal workforce and with external datasets?

We believe that the proposal to agree standard data categories with regulators is an important one. As the Law Society has already worked to establish the diversity monitoring protocols, we suggest that this could be used as the standard monitoring framework. This monitoring form has been developed with the profession and is in a format which many solicitors are familiar with. Standard data categories are important to enable like for like comparison of data sets. Without this, it will be difficult to compare the results of diversity monitoring across the profession.

Q12: Do you have any comments about our proposals in relation to the individuals the data collection and transparency requirements should cover?

We agree that any steps to build up a picture of the diversity make-up of the legal workforce should extend to the entire legal workforce. There is anecdotal evidence to suggest that minority groups have no choice but to accept paralegal and other support staff roles, when in fact training contracts would have been more suitable. On this basis, we believe it is important everyone in the legal profession should be involved in diversity monitoring.

Q13: Should the framework include the collection of information on in-house lawyers?

We agree that it would be beneficial for the diversity make-up of all those working in the legal sector to be established, including in-house lawyers.

Q14: What impact do you consider these new regulatory requirements will have on regulated entities?

The Law Society has considered the impact on the profession of the LSB's proposal, particularly as the profession is in the process of undergoing substantial regulatory change. We note that there will be a resource impact of these proposals on regulated entities, however we do not believe that this will be burdensome. The desirability of a

more comprehensive evidence base on the diversity make-up of the legal workforce outweighs the small resource impact this will have on firms.

Q15: What are your views on our proposal that in general firms and chambers should be required to collect data from their workforce annually, while smaller firms and chambers (fewer than 20 people) should only be required to collect the data every three years?

We agree with the proposal that in general firms should collect this data annually, while smaller firms should collect this data every three years.

Q16: What are your views on our proposal that data should be collected about all the protected characteristics listed above, plus socio-economic background? If not, on what basis can the exclusion of one or more of these characteristics be justified?

In light of the new public sector equality duty, we agree that all the protected characteristics should be monitored. Collecting data on all of these protected characteristics would enable proposals to be effectively targeted so meaningful and effective action can take place.

Q17: Do you think data should be collected anonymously or enable individuals to be identified (please explain the reason for your answer)?

We strongly believe that data should be collected anonymously. It is likely that making individuals readily identifiable would not be something that would be supported by the profession. The result of making individuals identifiable, and this is particularly true when considering more sensitive areas such sexual orientation and religion and belief, is that it is likely that a large proportion of individuals simply would not complete the monitoring. Therefore, it is essential that any data collection is anonymous which raises particular issues when considering the publication of diversity data, and this is discussed in questions 31 and 32. Furthermore, data on equality and diversity is sensitive data under the Data Protection Act 1998 and it is important to ensure that consideration is given to how this data is stored and used.

Q18: Is there a way of integrating data collection with the practising certificate renewal process that still achieves our objective of transparency at entity level?

Integrating data collection with the practising certificate (PC) renewal process can only be done effectively if confidence increases in the regulators, particularly in how they deal with, and use, equality and diversity data. We believe that solicitors are wary of providing this sort of information to be on the roll and are nervous of how it will be used, who will manage it and what safeguards will be in place to protect it.

Even if, however, confidence in the regulators did increase it is difficult to see how data collected within the PC renewal process could remain anonymous. It is possible that a separate and anonymous diversity form could be included in the PC renewal process, although further thought would need to be given to the practicalities of how this could work. However, a further disadvantage to integrating data collection with the PC renewal process is that information will not be captured about the entire legal

workforce, which is one of the main aims of the LSB. It does not seem to be the case that integrating data collection with the PC renewal process is a viable option going forward and further thought needs to be given on how this information could be collected.

Q19: Do you have any suggestions on how to improve the model questionnaire?

This model questionnaire could be improved by utilising the Law Society Monitoring Protocol format. As the Law Society monitoring protocol format is already established, we suggest this could become the standard form to be used across the legal profession. Not only are a large percentage of solicitors familiar with this, but solicitors have been involved in its development.

Q20: What are your views on the proposed categorisation of status in the model questionnaire?

Whilst appreciating the model questionnaire is intended to cover all types of legal professional with regard to ABSs, we think it would be helpful to have some additional categories to capture those regulated by the SRA but who are not solicitors.

Q21: What are your views on the proposed questions about job role as set out in the model questionnaire? Do you have suggestions about additional/better measures of seniority? Do you have suggestions on a category of measure to encompass a non partner senior member of staff i.e. CEO who holds an influential or key role in decision-making of an organisation?

We advocate here utilising the monitoring categories from the Law Society Monitoring Protocol. These measure seniority across protected characteristics in a way which is aligned to solicitor's practices. Barristers etc could utilise a part of the questionnaire designed to capture their unique professional set up as this is radically different to solicitors and would not be genuinely comparable.

Q22: Do you have any suggestions about how to measure seniority in the context of an ABS?

Working on the presumption that ABSs will have a corporate structure and job titles which reflect mainstream corporate norms, seniority could be measured by the type of work undertaken, number of employees managed and the management level as defined by the organisation.

Q23: Should we collect additional information, such as that suggested in paragraph 129?

We believe that it would be helpful to have as sophisticated a data set as possible and on this basis the possibilities outlined in this paragraph seem reasonable to collect.

Q24: Do you have views on our proposed approach to collecting data on disability?

We noticed that the section on disability in the proposed questionnaire does not capture respiratory conditions. It also does not capture one of the most important elements, which is whether a firm has made reasonable adjustments to ensure that the respondent is able to continue working with the equivalent ease of co-workers. The knowledge of how many individuals in the profession have a disability is useful, but equally important is the data on how individuals manage their condition whilst retaining employment in the legal sector. This would reflect the social model of disability and provide key data on whether firms are responding appropriately in terms of making reasonable adjustments. Anecdotal evidence suggests that practice varies widely and disability is a key area, when considering diversity and social mobility, to focus on. This is because, generally, disability management practice and understanding of the social model of disability within the legal sector are not as advanced as the thinking around gender and, to a certain extent, ethnicity.

Q25: What are your views on our proposed approach to collecting data on sexual identity?

We agree that the section on sexual identity in the proposed questionnaire is adequate and note that this is also the same as Stonewall's recommended approach. We understand the issues around sexual orientation and sexual identity, however it should be noted that the Equality Act 2010 refers to sexual orientation, and this is the term that people have become used to hearing. Introducing a separate concept of sexual identity, with sophisticated levels between attraction and sexual activity, is probably a step too far for the sector as a whole at this moment, when only a minority of firms have started to monitor sexual orientation. Within the Diversity and Inclusion charter only around 50% of firms monitor sexual orientation but we expect more signatories to implement this within the next year, therefore we would advise introducing the concept using phrases and wording which are familiar to people.

Q26: Do you think we should follow the Census approach to collecting data on religion and belief? If not, what alternative approach do you suggest?

When considering the Equality legislation, one does not have to be a fully practising member of a religion to qualify under the Equality Act 2010, and therefore we believe it is justifiable to use the Census fields.

Q27: Do you think a question should be included in the model questionnaire on gender reassignment? If not, what other means should be used to build an evidence base in relation to gender reassignment issues in the legal workforce?

As gender reassignment is a protected characteristic under the Equality Act 2010 and therefore will form part of the current gender equality duty and the future equality duty coming in April 2011, it should be included in the questionnaire.

Q28: If a question is included on gender reassignment, do you agree with our proposed question?

We agree that a question should be included on gender reassignment and that the proposed question is reasonable.

Q29: What are your views on our proposed approach to include a question on caring responsibilities?

Discrimination by association is introduced by the Equality Act 2010 and *Coleman vs. Attridge (Attridge Law (a Firm) v Coleman* [2007] IRLR 88) was specifically on caring responsibilities, therefore in line with this Act it seems a sensible proposition to include a question on caring responsibilities.

Q30: What are your views on our proposed approach to measuring socio-economic background?

There is no set system of measuring socio-economic background and therefore we agree that the proposed approach seems reasonable. Although this is not supported by the Equality Act 2010 or public duties, it is an important field to capture as we know from research that socio-economic status has an effect on the award of training contracts and career development.

Q31: Do you have any comments about our proposed approach to publication requirements?

There are important issues surrounding the anonymity of the individuals who complete diversity monitoring. Data on equality and diversity is sensitive data under the Data Protection Act 1998 and it is essential that thorough consideration is given to how this data is stored and used.

We understand that it is difficult to balance the publication of this type of data with the right of individuals to remain anonymous. However, we strongly believe diversity data should be collected anonymously, as outlined in question 17, in part due to the sensitive nature of this data. The publication of individual data sets has a high probability of leading to non-compliance if individuals feel they could be identifiable by this information. This has the resulting possibility that engagement around diversity monitoring would be lost with the profession, which has certainly been built between the Law Society and its members. On the basis that the publication of this data should ensure the anonymity of individuals, we suggest that firms should not publish individual data sets which could result in individuals being identified. Instead, firms might provide subsets of information on sectors i.e. commercial law, sole practitioners, in-house lawyers, corporate in-house lawyers etc as trends and also trends for the entire sector. There is a possibility that this approach to publication may mean more diversity information is disclosed by individuals, if they were satisfied that the publication of their data would be anonymous.

Q32: Do you have any views on special arrangements that should be considered for firms and chambers of all sizes when publicising information at different levels of seniority?

There is a strong possibility that, even in an anonymised data set, an individual is identifiable from entity-level data. For example, if there are only a small number of people in an organisation or if there are a small number of people at a certain level of seniority in an organisation. We believe it will be impossible to publish the diversity data sets by seniority of small firms unless all small firms are grouped together when publicising the information and results are in trend format. Anonymous responses could be analysed separately, but the LSB's current proposal will certainly be met with general resistance by the profession. The rights of the individual, and possible impact identifiable diversity information may have on them, has to be paramount.

Q33: What are likely to be the main impacts on regulators when implementing this framework?

We would expect there to be a number of potential impacts on regulators, if they were to implement this framework, and we have outlined some of these below:

- Regulators will have to improve their understanding and performance around equality and diversity (for example, in regard to disproportionate interventions, disproportionate problems with PII renewals, disproportionate numbers of female and BME solicitors leaving the profession).
- Regulators will have to produce more robust Equality Impact Assessments and should be discouraged from relying on value based judgements and/or assumptions without the necessary evidence.
- Regulators will have to communicate work, including highlighting the benefits of data collection, with the sector to gain goodwill around supplying this data.
- Regulators will have to demonstrate their management of the data and reassure members who feel that the regulators do not always demonstrate equality in the actions they take and conclusions they reach.
- Some additional resources may be required for Equality and Diversity teams within regulators.
- Better joint working with Membership organisations will be needed to produce a rich diversity census and to hold effective consultations and debates.
- The regulatory community will need to have a carefully constructed timeline for implementation taking into account the goodwill that already exists around some of this work and to incentivise firms to provide the data.