

FOIL

FORUM OF INSURANCE LAWYERS

the voice of the wider public interest

A Response by the Forum of
Insurance Lawyers to the LSB
consultation on Increasing diversity
and social mobility in the legal
workforce: transparency and
evidence.

February 2011

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FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL has over 3000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This response has been drafted following consultation with the membership.

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The LSB Consultation on Increasing diversity and social mobility in the legal workforce: transparency and evidence.

Introduction

FOIL and its member firms are firmly committed to the development of “an independent, strong, diverse and effective legal profession” as envisaged in the Legal Services Act 2007. We are fully in support of the statutory obligations on the Legal Services Board and Approved Regulators to eliminate unlawful discrimination, harassment and victimisation; advance equality of opportunity between different groups; and foster good relations between different groups.

The issues raised in the consultation paper are very thought provoking and will be obviously be considered carefully by bodies such as ourselves and all firms seeking to improve and maintain true equality of opportunity.

FOIL believes that the issues of diversity and social mobility are complex and multi-layered. We note that the LSB itself does not underestimate the scale of the challenge: that there is no silver bullet. We note, and endorse, the LSB’s recognition that the proposals contained in the consultation are not the whole answer.

The focus in the consultation paper is on the actions of individual organisations: firms, ABS and chambers. Whilst it is true to say, as the LSB does, that it is the firm or chambers that recruits the workforce, establishes the culture, trains and promotes employees and allocates work, the further conclusion drawn by the LSB that “it is therefore the firms and chambers that are best placed to drive action” should be treated with some caution. The issues that affect diversity and social mobility go far beyond individual firms and chambers, and far beyond the legal profession itself. The issues range across all manner of social concerns such as education, social aspiration and university entrance criteria; personal issues such as expectations of life and life/work balance; and economic issues including commercial pressures and client expectations and SLAs. For example, just as there are clients which expect the law firms they instruct to have diverse workforces, there are also clients which expect regular out-of-hours access to their legal teams, creating challenges within firms in balancing the personal requirements of their workforce with a need to deliver what clients demand.

As the data on other professions included within the consultation paper show, diversity issues are also of concern within other professions, particularly when looking at promotion and retention. These are also the same issues that are being raised in the current debate on women in the boardroom. Whilst individual firms clearly have a role to play, against this broad background of concern it must not be assumed that the problems can be solved entirely by legal firms and chambers, whatever the regulatory requirements placed upon them.

FOIL does not intend to respond to all of the questions in the consultation but has linked its further comments below to particular sections of the consultation, as requested.

Question 5

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)?

Question 6

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

Question 7

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 focus of the proposals in the consultation is on transparency. FOIL endorses the intention and the aims behind the proposals but has concerns over the exercise in practice. From the data quoted in the paper it seems that individuals are generally willing to provide details on their gender and ethnicity but that it can be much more difficult to obtain data on more sensitive diversity issues such as sexual orientation, religion or belief and gender reassignment. We note that an anonymous survey of the self-employed Bar in 2008 resulted in a response rate of only 35%. In that survey an assumption was made that those who responded, and those who answered the questions, were representative of all of those who did not respond or who left questions unanswered. This seems a very broad assumption to be made, and FOIL would question the reliability of that approach.

The problems seem likely to be exacerbated when the data is being sought within individual entities. As the consultation paper notes it is acknowledged within the provisions of the Equality Act that some organisations with 150 or more

employees "may not be ready to ask about the more sensitive characteristics such as sexual orientation or religion or belief". How much more is that likely to be an issue when data is being gathered in much smaller entities, and when the information is being analysed by colleagues and published on the internet? FOIL is concerned that the data and statistics that will be produced by the surveys being proposed will not, in reality, be statistically robust enough to form the basis of policy decisions, culture change, and commercial decisions.

It is noted in paragraph 53 that research shows that one of the problem issues arising in an examination of diversity and social mobility is "the lack of transparency of some key procedures and practices in some organisations". FOIL believes that a focus on this type of transparency, which is within the hands of leaders and managers, would be more effective in changing behaviour at entity level, more reliable, and more appropriate, than transparency on the highly personal characteristics of individuals.

FOIL believes that it would be more appropriate to focus on the actions and attitudes of firms on diversity and social mobility, with a view to this leading to greater genuine diversity (whether made public or not); rather than focussing on a public declaration of the degree of diversity which individuals within the organisation are willing to disclose, in the hope that that will provide sufficiently reliable information to prompt appropriate action by firms and clients.

On the issue of data FOIL suggests that the LSB consider introducing the model questionnaire on a voluntary basis, with an evaluation exercise, to enable the practical issues and implications to be explored and understood. This would provide a standard process for use by the profession and, if successful, would enable the initiative to be truly led by market forces, as firms choosing to participate would presumably benefit as anticipated, in terms of recruitment and client response.

As the SRA has recognised in the recent changes made to the draft Code of Conduct, there is a difference between 'equality' and 'equality of opportunity'. The latter, which should lead naturally to the former, should be the focus of the LSB and the Approved Regulators. The publication of diversity data is a rather crude tool in achieving change, for the reasons highlighted above. In using data on individual firms to prompt reform there is a danger that the actions that firms choose to take will also be crude, when what is most needed in this sensitive area is a thoughtful, careful approach that ensures that all members of the legal workforce are treated fairly. FOIL cautions against measures which fail to

recognise the full complexity of the situation, and which encourage knee-jerk solutions, which are likely to be to the long term detriment of the profession and the individuals which work within in.

Question 9

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?

For the reasons given in this response FOIL does not believe that it is appropriate to require all firms at this stage to gather and publish data as proposed. It therefore agrees with the LSB's position, and considers that further regulatory requirements to take specific action, including targets, are also not appropriate at this stage.

Question 10

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

FOIL believes that if statutory guidance is to be issued, the LSB should consider introducing the model questionnaire on a voluntary basis, with an evaluation exercise, to enable the practical issues and implications to be explored and understood. This would provide a standard process for use by the profession and, if successful, would enable the initiative to be truly led by market forces, as firms choosing to participate would presumably benefit as anticipated, in terms of recruitment and client response.

Question 16

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 these characteristics be justified?

As the consultation paper notes it is acknowledged within the provisions of the Equality Act that some organisations with 150 or more employees "may not be ready to ask about the more sensitive characteristics such as sexual orientation or religion or belief". How much more is that likely to be an issue when data is being gathered in much smaller entities, when the information is being analysed by colleagues and published on the internet? FOIL is concerned that the data and statistics that will be produced by the surveys being proposed will not, in reality, be statistically robust enough to form the basis of policy decisions, culture change, and commercial decisions.

As information is already much more readily available on gender and ethnicity and, in general, individuals are willing to provide information on those diversity

issues, FOIL would suggest that if data is to be obtained at entity level and published on the internet it should initially be limited to those issues.

Question 17

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

In paragraph 115 of the paper the possibility of obtaining information through the practicing certificate process is raised. Whilst this clearly has limitations FOIL would endorse the benefits of this approach set out in paragraph 116. On the disadvantages set out in paragraph 117, although a survey conducted as an adjunct to practice certificate renewal would not be anonymous it would be conducted at arms' length, which may encourage information to be revealed that individuals would be reluctant to disclose within their firms or chambers. It must be remembered that even within sizable organisations true anonymity may be illusory.