

INCREASING DIVERSITY AND SOCIAL MOBILITY IN THE LEGAL

WORKFORCE: TRANSPARENCY AND EVIDENCE

Response on behalf of the Master of the Faculties to consultation paper on proposals to increase diversity and social mobility in the legal workforce

We welcome the opportunity to respond to this consultation by the Legal Services Board ('LSB').

The paper introduces two main proposals. The first is for approved regulators to collect information on a fairly regular basis (perhaps annually) on the personal characteristics of the practitioners that it authorises, probably by way of requiring them to complete a questionnaire, a draft of which is included with the paper. The second is the creation of a regulatory rule that firms must publish data on the diversity characteristics of its partners or members and workforce (ie not only those who are authorised to carry out reserved legal services).

While supportive of the good intentions expressed in the paper to promote greater diversity in the legal workforce we have concerns with these proposals. In relation to collecting personal data on notaries, we envisage that this will have a cost implication. It will be necessary for members of Faculty Office staff to process the questionnaires. Bearing in mind the small economy of scale which operates in this office we consider this to be no minor consideration. We are not content simply to employ extra staff because this will have to be recouped by increasing the practising certificate fee, which has doubled since the establishment of the Legal Services Board and is set to continue to rise. Average notarial income is not such that such increases can continue without being checked. It has to be borne in mind that the level of the notarial appointment fee and practising fee can have an effect on diversity. If it becomes uneconomic to practise as a notary because of increasing regulatory burdens and costs, the first to cease to practise are likely to be those who work part-time, whether in semi-retirement or because of caring responsibilities or because of a lifestyle decision, and sole practitioners. Unlike the solicitor and barrister professions there is no requirement for the new notary to become a 'trainee' or 'pupil' in a pre-existing firm, and so new notaries are not barred from entry into the profession because they fail to obtain the sponsorship of a firm's partners or chamber's recruitment committee. Increasing practice and regulatory costs may price out of the profession those who do not practise in established firms of solicitors in urban centres and bring about a contraction of the notarial profession both geographically and in terms of pluralism.

There is also the practical difficulty in anonymising this information. We have to say that this is very difficult if the current registration side of the Faculty Office is to be combined with collecting personal data (such as at the time of the annual renewal of practising certificates). Can we suggest that a more sensible idea would be for the LSB perhaps in conjunction with one of the larger regulators to develop a method of getting legal practitioners to submit such information by checking boxes on an online portal. Each legal practitioner could then be given a code at the point of being issued with the practising certificate to complete their forms online. We do not however have

the resource capabilities of developing such a provision ourselves but it may be that the SRA would have little difficulty in setting up an online register. That would appear to avoid the likely lack of confidentiality which in turn might discourage full answers and cooperation from those asked to complete the survey.

In relation to your proposal that firms be required to publish information (probably in an anonymous form) about the personal characteristics of them and their employees we have a principled objection. For large firms over 50 persons it might be possible for the veil of anonymity to remain intact. However, any smaller and any such requirement is likely to be viewed as intrusive. While popular attitudes to eradicating discrimination are generally advanced in the UK, there is a large constituency of people who resent being asked personal questions, especially if that information is going to become publicly available. Legitimate objections will be raised if the publishing requirement was to be made irrespective of the type of firm. Also, later in our response to this consultation we point out that nearly all notaries are sole-practitioners in their notarial capacity (although many operate in firms of solicitors) and it makes very little sense to make those notaries and their secretarial support subject to publishing requirements.

We are not absolutely confident that by gathering information about diversity, although necessary to properly identify the extent of the problem, will point towards practical solutions to promote diversity,. We cannot foresee a time where it will be appropriate for regulators to impose quotas on what number of people with particular diversity characteristics will become legally authorised or are employed by such practitioners. Instead if more should be done it needs to be by way of assisting disadvantaged persons to obtain the legal qualifications and work experience necessary to become authorised and set up an office or gain employment in one, by way of big firms offering grants to help pay for the cost of tuition fees, taking part in outreach programmes and other similar initiatives.

Our responses to your questions now follow.

Question 1: 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?

Response: We are aware of no other sources of data.

Question 2: What are your views on our assessment of what the available diversity data tells us?

Response: Your conclusions appear to be reasonable.

Question 3: Is there other diversity research we should be aware of, that we did not take account of in our review of existing literature?

Response: We are not aware of any.

Question 4: Are there any other existing diversity initiatives run by approved regulators which are not reflected in our outline of current initiatives?

Response: We are not aware of any.

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)?

Response: We agree that the LSB's objective to gather information about the diversity of the profession is sensible in principle. However we are concerned about the resource implications of conducting such research. Please see our introduction to our response to the consultation paper.

Question 6: Do you agree that a more comprehensive evidence base is needed about the diversity make-up of the legal workforce?

Response: We would agree that a more comprehensive evidence base would improve the accuracy of the information on the composition of the legal workforce along the categories which have been formulated under the general 'diversity' umbrella. We do not however see that this will necessarily help suggest practical remedies to improve diversity in 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?

Response: It might be sensible for firms with a medium to large workforce (say 100 persons or more) to publish information about the diversity of their employees and partners or members. However, it would seem a nonsense to apply this to small high-street practices or sole-practitioners and their secretarial support. We feel that small firms may have too small a workforce for publicly available non-anonymised information to be useful. To draw conclusions about small firms (some of which may be family businesses or contain just a couple of staff) may not be helpful.

For the sole practitioners and smaller firms such requirements would be burdensome and, possibly, anti-competitive.

It is also worth noting that the majority of notaries in England and Wales practise as sole-practitioners in their capacity as notaries. In addition there are a small number of notarial firms, mainly located in the City of London. Approximately 80% of notaries are also solicitors and as such work in offices that are subject to the regulation of the SRA. This means that there are very few pure notarial 'entities' (taken as meaning bodies containing more than one member as staff) as such. We would like these nuances to be taken into consideration when devising information gathering models. Much of the employed workforce in the legal offices in which notaries practise are employed by the firm of solicitors.

Question 8: What form should the evaluation of existing initiatives take? Should there be standard evaluation framework to enable comparison between initiatives?

Response: We do not support a standard pattern of evaluation of existing diversity initiatives. Comparing what is an essentially atomised pattern of sole-practitioner notaries who are largely also in practise as solicitors, with firms of solicitors is not an exercise in comparing like with like.

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?

Response: We agree that it is not sensible to set quotas and targets for the numbers of authorised persons and their employees on the basis of gender, ethnicity and other factors. Such an exercise would cause unfairness and absurd results which would outweigh any positive benefits. The Faculty Office also sees a conflict with its duty as a regulator to ensure that all notaries are properly qualified and of good reputation and probity.

Question 10: Do you think we should issue statutory guidance to approved regulators about diversity data collection and transparency?

Response: This really would depend on how prescriptive the guidance was. We are aware from our experience of the other LSB initiatives that although the term ‘guidance’ is used, it will be the case that such guidance is binding on approved regulators.

Question 11: 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 other external datasets?

Response: We do not have an objection to this proposal as such. However, such data categories would have to accommodate the particular characteristics of the notarial profession and the relationship of notaries with entities in which they share offices or practise as solicitors.

Question 12: Do you have any comments about our proposals in relation to the individuals the data collection and transparency requirements should cover?

Response: Can we assume that firm-level transparency requirements will not cover notaries who operate within firms of solicitors where the relevant entity will be the firm and where the SRA will complete the assessment?

Question 13: Should the framework include the collection of information on in-house lawyers?

Response: There are very few notaries who practise outside legal firms in banks and other non-legal institutions but we see practical difficulties if the information gathering was to extend any further than the in-house legal department itself. We assume that it is your intention to limit information gathering to the practitioner and publishing requirements will relate to that in-house department only.

Question 14: What impact do you consider these new regulatory requirements will have on regulated entities?

Response: We do not consider it disproportionate to request notaries to complete a short questionnaire. However any further research or publishing requirements may well be disproportionate, especially for small firms and sole-practitioners (see also question 7 above).

Question 15: 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?

Response: This does not go far enough. Small firms should be exempted for reasons given elsewhere in this paper.

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?

Response: It is sensible to rely upon the list of protected characteristics from the Equality Act 2010. However although there may be a general public understanding that these characteristics should be protected in modern Britain, we anticipate that many notaries would question the pertinence and relevance of requests for their personal information under these categories (on whatever anonymised basis). It should be remembered that just because a diversity category should be protected it does not follow that it will have any bearing on that person's legal practice or entry into a legal profession, and many people will find such questions an annoyance or unnecessarily intrusive.

Question 17: Do you think that data should be collected anonymously or enable individuals to be identified (please explain the reason for your answer)?

Response: Bearing in mind the relatively small size of the notarial profession (no more than 880) and the close working relationship between the Faculty Office and the officers of the two representative societies, we consider that anything short of a guarantee of anonymity would discourage responses to a questionnaire containing highly personal information. There is little point in conducting the research unless at least a third of those invited to respond do so and they must be reassured that there is no danger of exposure.

Question 18: Is there a way of integrating data collection with the practising certificate renewal process that still achieves our objective of transparency at entity level?

Response: If information had to be gathered by questionnaire it would be a large cost-saving to the Faculty Office to post the questionnaire with the forms for the annual renewal of practising certificates. Please see our general objections to this proposal at the foot of this set of responses.

we would prefer that replies be sent to the LSB to collate. That would avoid the risk of the approved regulator identifying the authorship of the particular response while dealing with the corresponding application for a practising certificate.

Question 19: Do you have any suggestions on how to improve the model questionnaire?

Response: You need to make it clear whether a practitioner who is authorised by more than one approved regulator needs to complete the questionnaire more than once. We would have thought that this would be necessary because that person might have, for example, a different employment relationship as a solicitor compared to his or her capacity as a notary, and so the answers to question 1 and 2 would change.

Question 20: What are your views on the proposed categorisation of status in the model questionnaire?

Unless given very explicit guidance there is a danger that a legal practitioner responding to this question who is authorised by more than one regulator will conflate the roles in which he or she is acting (see above).

Question 21: 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?

Response: We have no specific comments.

Question 22: Do you have any suggestions about how to measure seniority in the context of an ABS?

Response: We have no comment.

Question 23: Should we collect any additional information, such as that suggested in paragraph 129?

Response: The size and type of the firm would seem to be an important variable, but we assume that gathering information on these does not belong in the questionnaires which are instead seeking information about individuals.

Question 24: Do you have any views on our proposed approach to collecting data on disability?

Response: We do not have any comments.

Question 25: What are your views on our proposed approach to collecting data on sexual identity?

Response: We do not have any comments.

Question 26: Do you think we should follow the Census approach to collecting data on religion and belief? If not, what alternative approach do you suggest?

Response: If data for this category is considered to be relevant and likely to have a bearing on becoming qualified to carry out reserved legal services or be employed by such a person, the Census model is probably a good model. However, we question the appropriateness of such questioning. It could be regarded by some as intrusive and an invasion of privacy.

Question 27: Do you think a question should be included in the model questionnaire about 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?

Response: We have no specific comment, subject to appropriate safeguards as required by the Gender Recognition Act 2004.

Question 28: If a question is included on gender reassignment, do you agree with our proposed question?

Response: See our answer to question 27.

Question 29: What are your views on our proposed approach to include a question on caring responsibilities?

Response: Surely the question should be “Do you have a child or children under the age of 18 that you take an active role in caring for”. It does not follow that a person who has had a child also has caring duties. Some biological parents have little or no contact with their children.

Question 30: What are your views on our proposed approach to measuring socio-economic background?

Response: It is essentially a crude way of measuring socio-economic background, but probably necessarily so.

Question 31: Do you have any comments about our proposed approach to publication requirements?

Response: We strongly disagree that firms with less than at least 20 staff should be required to publish anonymised diversity information. We feel that for smaller firms such publishing requirements would necessarily intrude on rights of privacy. It certainly should not extend to sole practitioners. It may be the case that the privacy of practitioners and their employees will be protected with the right to ‘prefer not to say’ provided that this is an option. But having a right to ‘prefer not to say’ might render the exercise useless.

Is it also possible that making it compulsory for firms to publish the diversity characteristics of their members could allow members of the public electing to choose a firm which most suits their own particular prejudices? By way of example, it is a requirement of the Master of the Faculties that the name of a notarial practice must

contain the name or names of one or more present or former principals together with, if desired, conventional references to the firm and to such persons, or be a firm name in use on 1st January 1989, or the name of a firm of qualified legal practitioners of which a notary is a partner, or one approved in writing by the Master. The Master received an application for the name of a notarial practice which did not contain the full name of the notary where the grounds were that the notary feared that his or her business would suffer because of he or she had an Asian name. The concern there was that publishing the ethnicity of the notary would lead to a detrimental effect on new business. It does not follow that with increased public transparency, the consumer will necessarily pick the most diversity friendly option.

Question 32: Do you have any views on special arrangements that should be considered for firms and chambers of all sizes when publicising sensitive information at different levels of seniority?

Response: If there is any way to work out whose personal information has been published, clearly so. The smaller the numbers, the more acute this concern.

Question 33: What are the main impacts likely to be on approved regulators when implementing this framework?

Response: We introduced our response to the consultation paper with our principal concern that conducting research would place a disproportionate resource burden on Faculty Office resources.

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15th March 2011

