

### Summary of decision

The purpose of this summary sheet is to provide a high level and accessible synopsis of the Legal Services Board's ("the LSB") decision. Readers are recommended to read the formal decision notice below for further detail. **This summary is not and should not be taken as a formal part of the LSB's decision notice under the Legal Services Act 2007 ("the Act").**

The LSB's decision is to grant in full the application from the Bar Standards Board ("the BSB") to make changes to its regulatory arrangements to remove a restriction on the reporting by chambers and BSB entities of diversity data relating to sexual orientation and religion or belief unless all members of the workforce provide consent.

Following the assessment of the BSB's application, the LSB has concluded that the changes do not meet the refusal criteria in the Act.

## Decision notice

### **The Bar Standards Board's application for approval of changes to its regulatory arrangements in respect of the publication of sexual orientation and religion or belief data by chambers and BSB entities.**

The Legal Services Board (“**LSB**”) has granted an application from the Bar Standards Board (“**BSB**”) for approval of changes to its regulatory arrangements in respect of the publication of sexual orientation and religion or belief data by chambers and BSB entities.

1. This notice sets out the decision taken, including a brief description of the changes.
2. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (“the Act”) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements. The Bar Council is an approved regulator and the BSB is the regulatory arm to which the Bar Council has delegated its regulatory functions. The notes at page 7 of this notice explain the statutory basis for the decision.
3. The chronology for the LSB's handling of this application is also set out below.

### **Chronology**

- The LSB confirmed receipt of an application from the BSB on 11 June 2019.
- The 28 day initial decision period for considering the application ends on 8 July 2019.
- This decision notice is effective from 4 July 2019.
- The decision notice will be published on the LSB's website by 8 July 2019.

### **Background**

4. On 11 June 2019 the BSB submitted an application to the LSB for the approval of changes to its regulatory arrangements by amending rule rC110.3(s) of the BSB Handbook in respect of the publication of sexual orientation and religion or belief data by chambers and BSB entities.
5. The current rules only allow for publication of sexual orientation and religious belief data with the consent of all of the individuals<sup>1</sup> which supply the data. This means that sexual orientation and religious belief data is treated differently to data collected on the other diversity characteristics, where there are no restrictions on publication unless there is a real risk that individuals could be identified<sup>2</sup>.

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<sup>1</sup> Individuals include 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.

<sup>2</sup> BSB Handbook Equality Rules Supporting Information document states that chambers should aim to publish diversity data as required by rc3(3)(s)(iii) unless there are fewer than ten members of chambers, or fewer than ten individuals with a particular protected characteristic, except if there is consent from all those to whom the data in question relates.

6. The BSB introduced the equality rules in the BSB Handbook in 2012. At that time it was felt that imposing additional restrictions relating to the publication of sexual orientation and religious belief data would promote the disclosure of diversity data, in light of the sensitivity around the disclosure of this type of data and the Bar's lack of familiarity with diversity monitoring.
7. In March 2016, the BSB was asked to consider reviewing its rules surrounding diversity data monitoring by the Bar Council, via the protocol for ensuring regulatory independence. The BSB state the request was made with a view to supporting a culture of openness and transparency at the Bar.
8. Following the request, the BSB spent time working independently on its understanding of good practice in diversity monitoring and to assess whether or not a rule change may be feasible. This included consideration of the LSB Guidance for legal services regulators on encouraging a diverse workforce,<sup>3</sup> issued in February 2017 under section 162 of the Act.
9. The relevant diversity outcomes were most recently set out in the LSB's Summary report on the legal services regulators' progress against diversity outcomes<sup>4</sup>. The outcomes are as follows:
  - Outcome 1: The regulator continues to build a clear and thorough understanding of the diversity profile of its regulated community (beginning at entry), how this changes over time and where greater diversity in the workforce needs to be encouraged.
  - Outcome 2: The regulator uses data, evidence and intelligence about the diversity of the workforce to inform development of, and evaluate the effectiveness of, its regulatory arrangements, operational processes and other activities.
  - Outcome 3: The regulator collaborates with others to encourage a diverse workforce, including sharing good practice, data collection and other relevant activities.
  - Outcome 4: The regulator accounts to its stakeholders for its understanding, its achievements and plans to encourage a diverse workforce.
10. The BSB issued a consultation in April 2018 which sought views on the proposed amendment, which intends to bring the reporting of sexual orientation and religion or belief data in line with the reporting of all other diversity characteristics. Both sexual orientation and religion or belief are protected characteristics set out under the Equality Act 2010.
11. Eight organisations and 31 individuals responded to the consultation. Each organisation and 18 individual respondents supported the proposed rule change.

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[https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/2017/S162\\_Guidance\\_For\\_Regulators\\_On\\_Encouraging\\_A\\_Diverse\\_Profession.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/S162_Guidance_For_Regulators_On_Encouraging_A_Diverse_Profession.pdf)

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[https://www.legalservicesboard.org.uk/Projects/Diversity\\_Of\\_Legal\\_Profession/pdf/20190122\\_Diversity\\_Summary\\_report\\_legal\\_services\\_regulators\\_progress.pdf](https://www.legalservicesboard.org.uk/Projects/Diversity_Of_Legal_Profession/pdf/20190122_Diversity_Summary_report_legal_services_regulators_progress.pdf)

Respondent organisations included the Bar Council, FreeBar, Stonewall, two of the specialist bar associations and three chambers.

### **Proposed changes**

12. The BSB's proposal is to remove paragraph (i) from rC110.3(s) of the BSB Handbook. The effect of the deletion will be to remove the current restriction on the reporting of diversity data relating to sexual orientation and religion or belief unless all members of the workforce provide consent.
13. In addition to the rule amendment the BSB intends to delete paragraph 34 of its guidance document Supporting Information – BSB Handbook Equality Rules<sup>5</sup> and replace it with a new text as set out in Annex C of its application. The guidance is not a regulatory arrangement and as such, does not require the approval of the LSB.
14. Chambers and BSB entities run their data collection and publication processes on a three-yearly cycle. They were required to publish their first summary of anonymised diversity data by 31 December 2012. If the application is approved, 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 rC110(3)(r) of the BSB Handbook<sup>6</sup>.

### **Key issues considered in the assessment**

15. The LSB welcomes the BSB's proposal which seeks to enhance diversity data publication within the Bar. This is intended to assist in enabling the BSB to have a greater understanding of the diversity profile of the profession and inform its activities in promoting a more diverse profession.
16. It is noted that the BSB has had regard to the LSB guidance referenced in paragraph 8 above.
17. Having considered the BSB's rule change application and supporting documents, the LSB makes the following key points in relation to the application.

#### Diverse profession

18. The BSB set out in its application its view that the proposed change will encourage an independent strong, diverse and effective legal profession. It considers that the change should:
  - increase levels of sexual orientation and religion or belief data publication by chambers and BSB entities
  - improve disclosure rates of such data and lead to greater transparency of diversity within the barrister profession

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<sup>5</sup> [https://www.barstandardsboard.org.uk/media/1977492/bsb\\_equality\\_rules\\_handbook\\_2019\\_update.pdf](https://www.barstandardsboard.org.uk/media/1977492/bsb_equality_rules_handbook_2019_update.pdf)

<sup>6</sup> [https://www.barstandardsboard.org.uk/media/1665979/bsb\\_equality\\_rules\\_for\\_bsb\\_authorized\\_bodies\\_2015.pdf](https://www.barstandardsboard.org.uk/media/1665979/bsb_equality_rules_for_bsb_authorized_bodies_2015.pdf)

- improve its understanding of the diversity profile of the profession and inform its own activity to promote a diverse profession
- encourage the recruitment and retention of diverse workforces by chambers and entities.

19. The LSB noted that sexual orientation and religion or belief data is already collected by the BSB from individual barristers through MyBar (the online system through which barristers renew their practising certificates) and so the change may not have a great impact on the BSB's understanding of the profile of the profession. However, the LSB considers that greater reporting by chambers and BSB entities is likely to improve publicly available data about chambers and entities which could assist in encouraging the recruitment and retention of diverse workforces by chambers and entities. The LSB also understands the BSB's intention to promote and embed the principles of equality and diversity within chambers and entities through the publication of diversity data.

### Consultation

20. The BSB's consultation identified benefits and drawbacks of the proposal and sought views on the proposed change as well as seeing whether a different approach was favoured by consultees. The consultation received 39 responses, of which, 13 individuals did not support the change. Some of those arguing against the change felt that the proposal was an intrusion into privacy.
21. The BSB identified some of the potential risks associated with the proposal. In particular it highlighted the possibility of political attention and protests associated with chambers and BSB entities publishing the religion of their members. It concluded that in today's climate such protests were unlikely.
22. Having considered the responses and evidence, the BSB concluded that the change was appropriate because it supports openness and transparency but still protects the identity of individuals by prohibiting disclosure in cases where individuals might be identified by requiring consent to publish where fewer than ten people have a certain characteristic within chambers or BSB entities.
23. The LSB is satisfied with the BSB's conclusion that the proposed rule maintains appropriate measures to protect the identity of individuals in circumstances where they may be identifiable.

### Guidance & Impact

24. The LSB notes that the BSB is considering producing examples of situations where non-publication may be appropriate even in circumstances where there is no risk of individuals being identified. The LSB would welcome such guidance being produced to help chambers and BSB entities ensure they comply with the relevant rules.

25. The LSB is assured by the BSB's commitment to keep the change under review, including by reviewing complaints and misconduct data to see if any unacceptable risks emerge as a result of the change.

### **Decision**

26. The LSB has considered the BSB's application against the criteria in paragraph 25(3) of Schedule 4 to the Act. It accordingly grants the application in full.
27. **Annex A** to this decision notice contains the amended section of the BSB's Handbook that is approved by the LSB.

*Notes:*

1. The LSB is required by Part 3 of Schedule 4 to the Act to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements.
2. Paragraph 25(3) of Schedule 4 to the Act explains that the LSB may refuse an application setting out a proposed change to the regulatory arrangements only if it is satisfied that
  - (a) granting the application would be prejudicial to the regulatory objectives
  - (b) granting the application would be contrary to any provision made by or by virtue of this Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator
  - (c) granting the application would be contrary to the public interest
  - (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator
  - (e) the alteration would enable the approved regulator to license persons under Part 5 [of the Act] to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or
  - (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.
3. The designation requirements referred to in paragraph 2(b) above are set out in paragraph 25(4) of Schedule 4 to the Act and are
  - (a) a requirement that the approved regulator has appropriate internal governance arrangements in place
  - (b) a requirement that the applicant is competent, and has sufficient resources to perform the role of approved regulator in relation to the reserved legal activities in respect of which it is designated, and
  - (c) the requirements set out in paragraphs 13(2)(c) to (e) of Schedule 4, namely that the regulatory arrangements are appropriate, comply with the requirements in respect of resolution of regulatory conflict (imposed by sections 52 and 54 of the Act) and comply with the requirements in relation to the handling of complaints (imposed by sections 112 and 145 of the Act).
4. In accordance with paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules<sup>7</sup> about the manner and form in which applications to alter regulatory arrangements must be made. Amongst other things, the rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles. They also require applicants to provide information about each proposed change and details of the consultation undertaken.
5. If the LSB is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.

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<sup>7</sup> LSB's Rules for applications to alter regulatory arrangements – Version 2 April 2018  
[https://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/New%20folder%20\(2\)/FINAL\\_Rules\\_for\\_applications\\_to\\_alter\\_regulatory\\_arrangements.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/New%20folder%20(2)/FINAL_Rules_for_applications_to_alter_regulatory_arrangements.pdf)

## Annex A – rules rC110.3(q-s) of the BSB Handbook

The BSB has applied to amend rules rC110.3(q-s) of its Handbook, as follows. If the application is granted, the amendment will remove the additional restriction on the publication of sexual orientation and religion or belief data, by chambers and BSB entities.

- . 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](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 . i 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 . ii subject to the foregoing, include anonymised data in relation to each characteristic, categorised by reference to the job title and seniority of the workforce.