LEGAL SERVICES BOARD

To:	Board		
Date of Meeting:	13 July 2011	**Item:**	Paper (11) 53

Title:	Increasing diversity and social mobility in the legal workforce: transparency and evidence – update following consultation and decision document for approval
Workstream(s):	Workstream 2F: Developing a Workforce for a Changing Market
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Status:	Protect

Summary:

This paper provides an update on the outcome of the recent consultation on creating a more comprehensive evidence base about the diversity and social mobility of the legal workforce, and promoting transparency at entity level. It recommends modifications to the proposal to address concerns raised by consultees, and invites the Board to agree to publish the decision document and s.162 guidance attached at **Annex A**.

Risks and mitigations	
Financial:	None.
FoIA:	Initial assessment of exempt text is highlighted.
Legal:	None.
Reputational:	None.
Resource:	Resource currently considered sufficient.

Consultation	**Yes**	**No**	**Who / why?**
Board Members:	✓		David Wolfe and Nicole Smith have reviewed and commented on this paper (but not the decision document at **Annex A**).
Consumer Panel:	✓		Proposals were discussed with the Panel in October 2010.
Others:	N/A.		

Recommendation(s):

The Board is invited:

(1) to note the update on the consultation and subsequent developments

(2) to agree in principle to publish the decision document and s.162 guidance attached at **Annex A** (subject to resolution of concerns raised by the Information Commissioner's Office (**ICO**) (see paras 39-40) being addressed to the satisfaction of the Chairman and the Chief Executive, and any minor amendments being approved by the Chief Executive).

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Executive Summary

1. In December 2010, we published a consultation paper setting out: the Board's priorities for action to increase diversity and social mobility in the legal workforce; a suggested approach to diversity data collection and publication; and a model diversity monitoring questionnaire. We received 27 responses.
2. There is widespread support for the proposal to gather a better evidence base about the diversity of the workforce. The main areas of dissent concern:
   - the proposed requirement for entities to publish a summary of the results
   - whether all protected characteristics plus socio-economic background should be included at this stage.
3. This paper makes proposals to modify the approach to address the concerns raised by consultees. The proposal is to set out a high level expectation of Approved Regulators (**AR**), backed by statutory guidance under s.162 of the Act. We also propose that firms/chambers should not, at this stage, be required to publish summary data about sexual orientation and religion or belief.

Recommendations

4. The Board is invited:

   (1) to note the update on the consultation and subsequent developments
   (2) to agree in principle to publish the decision document and s.162 guidance attached at **Annex A** (subject to resolution of concerns raised by the ICO (see paras 39-40) being addressed to the satisfaction of the Chairman and the Chief Executive, and any minor amendments being approved by the Chief Executive).

Background

5. In November 2010, the Board agreed the following priorities for action to encourage a more diverse legal workforce:
   - gathering an evidence base about the composition of the workforce to inform targeted policy responses
   - evaluating the effectiveness and impact of existing diversity initiatives
   - promoting transparency about workforce diversity at entity level as an incentive on owners/managers to take action (both in terms of 'peer pressure' and better information for corporate and individual consumers and potential employees, which they can use to inform their choice of law firm).
6. The Board agreed the following first steps towards meeting these priorities:

- a consultation setting out our thinking on how to achieve transparency and common data categories, which could be formalised as guidance under s.162 following the consultation, if appropriate
- a letter from the Chief Executive to ARs setting out the Board's immediate priorities and requesting proposals about how ARs intend to meet them.

7. The letter was sent, and consultation paper published, on 15 December 2010. The consultation ran until 9 March 2011, 27 responses were received from a variety of ARs, representative bodies, diversity interest groups and individual providers. All responses have been published on our website.
8. Since the consultation closed, we have continued to engage with ARs and stakeholders, including a workshop with diversity managers from a range of city law firms, and a workshop with diversity interest groups. The agreed notes from these workshops have been treated as additional consultation responses.

Key issues emerging from consultation

9. Responses fell broadly into one of three categories:
   - Those who disagreed with our proposed approach – for example, those who interpreted it as 'social engineering', thought we were advocating a move away from the principle of appointment/promotion on merit, or thought our proposals paid too little regard to the right to personal privacy
   - Those who expressed full or partial support for our priorities in principle, but disagreed about the way in which we propose to approach them – for example, those who were sceptical about the potential of transparency to drive change, or who felt that data would be better collected centrally by ARs rather than imposing an obligation on firms or chambers
   - Those who supported our approach and/or wanted us to go further – for example, those who felt we should consider setting targets or require specific action of firms or chambers.
10. The majority of respondents agreed that ARs should ensure there is a more comprehensive evidence base across the full range of protected characteristics. Many consultees (including The Law Society) supported a regulatory requirement on entities to conduct diversity monitoring, and Bar Standards Board (**BSB**) is already planning to impose a requirement on chambers to conduct monitoring covering gender, ethnicity and disability. Solicitors Regulation Authority (**SRA**) has made clear that its first priority is the collection of a more comprehensive evidence base about individual solicitors through the practising certificate renewal process, although it is actively exploring how a requirement on firms to monitor could be implemented as well. The Bar Council agrees that a better evidence base is needed, but considers this should be done through the practising certificate renewal process and supplemented by surveys/qualitative research rather than putting an obligation on chambers.
11. There was much less consensus about our proposal for a regulatory requirement for transparency at entity level. Some strong objections were expressed by consultees – particularly concerns about sexual orientation and religion and belief, mainly because these characteristics were regarded as potentially 'hidden' and ones which individuals may not be comfortable disclosing to colleagues. There was a concern that a publication requirement (particularly for small

organisations) could lead to individuals being 'outed' inadvertently because small numbers of people in a category could lead to others deducing the characteristics of an individual. Consultees also felt that monitoring against some of these protected characteristics could be seen as a 'step too far' in organisations where the value of monitoring was not already accepted, and that it could erode good will and co-operation from the profession.

12. Many respondents questioned whether we were placing too much reliance on transparency as a means of driving action (and asked for evidence that this has been effective in other contexts). Concerns were also raised about 'data protection issues'.

13. We are clear that transparency is not the whole answer to the diversity challenge, and it remains to be seen what impact it has in practice. The research (including the original qualitative study we funded last year) seems clear that some of the most important barriers are cultural, and therefore not easily eliminated. Although we recognise the limitations of our proposals, they represent a realistic and achievable first step. The proposals have a number of advantages as a regulatory intervention:

    - they are straightforward and in the Executive's view could be implemented relatively quickly
    - they impose a relatively small additional regulatory burden on the regulated community, but could have a significant impact
    - they aim to shift accountability to regulated entities which have the power to drive change (in culture and processes) (this could be said to be an example of 'co-regulation', which the Government has supported in the recent BIS consultation paper, 'Transforming Regulatory Enforcement: Freeing Up Business Growth')
    - they build on work already done by the Black Solicitors Network and The Law Society, which has resulted in a significant number of large solicitors firms (and some barristers chambers) voluntarily publishing their diversity data
    - they complement work being done by professional bodies, interest groups and individual providers, which is necessarily limited in its impact by the resources available.

14. The consultation responses that presented the strongest objections give the impression of reacting to a different proposal than the one that we made. For example, a great deal of concern is expressed about 'invasion of privacy' and data protection issues, including the possibility of individuals being identifiable from summary data because of the small numbers and therefore having sensitive personal data disclosed against their wishes. These objections do not appear to acknowledge that we have never proposed any element of compulsion on individuals, either to complete the survey or to disclose anything they do not wish to disclose.

15. Another misconception is that the Board is making the case for positive discrimination or 'social engineering' which will undermine the principle of recruitment and promotion based on merit alone. The consultation in fact explicitly stated the Board's view that it did not consider it appropriate or proportionate at this stage to impose regulatory requirements on entities to take specific action (e.g. targets) to address a lack of diversity. Clearly, some consultees saw the

proposal to impose a simple requirement to monitor diversity and publish the results as the first step on a 'slippery slope' towards more directive measures, or feared that it would result in a system of 'informal targets'. In fact, the purpose of monitoring is not to restrict the ability of firms or chambers to appoint or promote whichever individuals they consider the best. The purpose is to provide firms with an indication of potential barriers that are preventing particular groups from being appointed or promoted, some of which it might be within their power to remove (such as encouraging applications from particular groups or revising their processes and training to ensure they operate in a way which does not put any particular group at a disadvantage).

16. We recognise that a number of consultees simply disagree with our approach and regard our involvement in equality and diversity matters as undesirable regulatory creep. As set out in our consultation paper, we have a clear locus to take action in this area. Our challenge is to engage those who are sceptical and respond to their concerns in a way which is not dismissive. We will seek to do this through suitable speaking engagements and media work focused beyond those who are naturally sympathetic.

17. There was also a strong message from a number of consultees (including those who supported our approach) that we should articulate a broader strategy, and set out our expectations about what should happen once the more comprehensive evidence base is assembled – for example, we might set out an intention to review the impact of the proposals and consider more stringent requirements if insufficient progress has been made, or set out the further work we might expect ARs to do to address equality and diversity issues such as:

    - research on equal pay
    - encouraging more flexible working and better childcare provision
    - promoting access to work experience and internships for disadvantaged groups
    - purchaser-focused initiatives (e.g. work with GC100)' which have been used in the US.

18. Some of the work we have been involved with following the Milburn report on Fair Access to the Professions is a good example of our broader focus and we will highlight this publicly. The forthcoming launch of the Internships Code will be a good opportunity to press ARs to demonstrate a public commitment to social mobility. The work on developing a social mobility toolkit for ARs and professional bodies is also progressing under the leadership of Professions for Good.

Responses from ARs to Board's priorities

19. The responses received to the letter sent to ARs alongside the consultation were limited. All ARs submitted consultation responses, but only three (SRA, BSB and Association of Costs Lawyers (**ACL**)) submitted responses to the letter requesting them to set out how they propose to address the Board's priorities. We have followed these responses up with further bi-lateral meetings with SRA and BSB to explore the issues in more detail. Following a reminder letter, we have also now received responses from the Master of Faculties (**MoF**), Intellectual Property Regulation Board (**IPReg**) and Council for Licensed Conveyancers (**CLC**).

20. SRA has demonstrated a willingness and commitment to work with us to address our priorities, and is in discussions with a range of firms through its supervision pilot about the best approach to implementing data collection and publication at entity level. SRA is also clear that it must collect diversity data at individual solicitor level (via the practising certificate renewal process) across all eight protected characteristics, which it sees as essential in order to meet its Equality Act obligations. It highlights that imposing an entity requirement in addition would result in the same information being asked for twice.

21. The BSB highlighted the proposed revised Equality and Diversity provisions in its Code of Conduct, which will require chambers to collect (but not publish) data on gender, ethnicity and disability. It is clearly of the view that this is sufficient, and objects to the proposed publication requirement and coverage of all protected characteristics plus socio-economic background. It stated that we had provided insufficient information about our requirements to enable them to propose how they would implement them, and posed a series of detailed questions. In more recent discussions, there is an acceptance that despite reservations, a pilot of the data collection exercise will be run with 40 chambers (with half told that a summary of the data will be published and half told that it will not be published, to assess whether publication acts as a disincentive on individuals to disclose information).

22. Both SRA and BSB expect to complete their pilots by the autumn and will then make proposals to us about implementation. They are in separate discussions to ensure a consistent approach to the collection and publication of data as far as possible, which is encouraging. [redacted] [s.36(2)]

23. It is encouraging that both The Law Society and The Bar Council were supportive of gathering a more comprehensive evidence base, with The Law Society supporting a regulatory requirement on entities to collect the data. While neither of the largest professional bodies supported a regulatory requirement to publish, both recognised the importance in principle of transparency – although they think it should be encouraged rather than required. This suggests that there is sufficient agreement in the profession with the spirit of our proposals to enable successful implementation, underlined by the fact that diversity data is already published voluntarily by a significant number of larger solicitors' firms and some barristers' chambers.

24. A number of the smaller ARs highlighted that, given the small numbers in their regulated communities, their ability to affect or influence the diversity profile of the legal profession as a whole is limited.

25. Costs Lawyer Standard Board (**CLSB**) passed our request to ACL. It confirmed that the only information it holds about costs lawyers is their sex, and recognised that its existing data set is inadequate for the purpose of examining diversity among costs lawyers. It made no proposals about how it will improve this data set. It stated that it has no proposals in relation to transparency at entity level as it only regulates individuals.

26. CLC plans to increase the range of data it collects from its regulated entities, and incorporate collection of this through the annual returns process. However, CLC disagrees that publication at entity level will affect change and does not propose to require entities to publish their diversity data. Our understanding is that CLC only plans to publish aggregate data (i.e. not broken down by entity).

27. The MoF does not propose to introduce a requirement to publish data at entity level. It currently only collects data on the gender of notaries, but has expressed a willingness to collect a wider range of information which is 'useful but not unnecessarily intrusive' as part of the practising certificate renewal process this autumn. MoF does not consider it appropriate to require the collection of data about the wider workforce. It thinks the relevant unit for assessing diversity in the notarial profession is the notary him or herself as a sole practitioner, and not the shared staff in the firm of solicitors (nor the very small support staff working for a notary not in such a firm).

28. IPReg has expressed its view that the proper focus of regulatory requirements in relation to equality and diversity is the profession itself, rather than the wider workforce – arguing that Legal Services Act 2007 ('**the Act**') does not support the wider remit. It has committed to requiring attorneys, as part of their practice fee demands which will go out end 2011/early 2012, to provide diversity statistics based on 'the census matrix' (although it is not clear precisely how this differs from the scope of our proposed model questionnaire). IPReg has not committed to requiring transparency at entity level.

Proposed approach

29. Having considered the consultation responses and subsequently discussed the key issues with a range of stakeholders, the Executive has considered how the approach could be modified to address the concerns raised. Two key changes are proposed:

    - Clearly stating the Board's expectations without being prescriptive about how ARs should go about implementing them
    - Focusing the publication of diversity on a smaller number of protected characteristics initially (see para 32).

30. The overall approach proposed is similar to the approach the Board has taken on referral fees:

    - setting a clear expectation that ARs should ensure diversity data is collected from the whole workforce and published
    - setting out guidance on how that task might be achieved
    - ensuring that the guidance has statutory force under s.162 of the Act, enabling us to assess the extent to which it has been taken into account
    - planning further work to assess implementation.

31. It is proposed that the Board's expectation of ARs should be that detailed plans are finalised and implementation begins by March 2012. By the end of 2012, we expect that:

    - every individual in the legal workforce is given an opportunity to self-classify against all protected characteristics (except gender reassignment), plus socio-economic background

- where ARs regulate entities, published summary data is available at firm/chambers level about all characteristics except sexual orientation, religion/belief and gender reassignment
- diversity data is collated by ARs and published to give an aggregate view of the diversity make-up of each branch of the profession.

32. [redacted] [s.36]. The guidance reflects the proposal set out in the consultation paper, with appropriate modifications (i.e. a regulatory requirement on entities to survey all their staff using the model questionnaire and publish the results on their website). However, it will be open to ARs to propose different approaches to meeting these expectations (for example, a reasonable alternative proposal might be the central collection of the data by the AR, and summary data published by the AR broken down to entity level). We will need to assess alternative proposals on a case-by-case basis to ensure they still achieve the Board's expectations.

33. We will expect periodic collection of the data and updating of published summary data. The time period for this might vary depending on the arrangements a particular AR decides to put in place. For example, if an AR is collecting data about authorised persons annually through the practising certificate renewal process, it might decide that the firm-based collection and publication exercise for the wider workforce might only be needed every three years. It may be that individual employers wish to update their diversity profile more frequently, particularly updating published data to reflect progress they have made through recruitment and promotions.

34. We have set out in the decision document our thinking about when we will review the implementation of these arrangements, when we will expand the scope to cover gender reassignment and publication against all protected characteristics, and other areas of potential future work.

35. The responses to the consultation do not change our view that the publication of summary data about all the protected characteristics is desirable in principle. However, in the Executive's view, focusing on publication about a smaller number of protected characteristics initially addresses the strongest objections expressed in the consultation responses about publication – these objections focused primarily on sexual orientation and religion/belief. Conceding this point is a pragmatic approach which is likely to lead to more successful implementation of our proposals in the short term. In our judgement, including sexual orientation and religion/belief is likely to attract controversy and strong opposition from the profession, which is likely to undermine progress with implementing monitoring as a regulatory requirement. There was also a consensus that monitoring gender reassignment at this stage is unlikely to yield any data of much value, because numbers are likely to be small and organisations in the sector may not have a culture where individuals are comfortable being open about transgender issues.

36. However, it is important that we do not send a signal that we regard these three protected characteristics as less important than the others. We propose,

therefore, to make clear our expectation that in due course monitoring and publication should take place against all protected characteristics, once routine monitoring is better established and we start to see cultural change that results in a greater acceptance of openness about these characteristics.

37. Where the smaller ARs regulate entities, it is proposed that we reaffirm our expectations in relation to transparency at entity level and ask implementation plans to be finalised by March 2012. Where ARs do not regulate entities (i.e. MoF, CLSB and IPS), our expectation should be that data is collected through the practising certificate renewal process and published at aggregate (AR) level.

Data protection issues

38. We have previously taken legal advice from our internal legal team to explore the data protection issues raised by some stakeholders. The advice was that if individuals are not compelled to disclose the information and are given full information about the way in which the data will be used and the form in which it will be published, then the data can be disclosed lawfully with consent to use it in the way described. However, given the degree of concern expressed on this issue by consultees, we wrote to the ICO and had a meeting to discuss our proposals with the ICO's Lead Solicitor on 4 July.

39. On the basis of the information we supplied, ICO raised some potential data protection concerns about our approach. The proposals concern the processing of 'sensitive personal data' for the purposes of the Data Protection Act 1998 (**DPA**). In order to comply with the DPA, the requirement must be lawful, fair and comply with the relevant processing conditions set out in the DPA. In order to demonstrate fairness, we need to strike an appropriate balance between the public interest in requiring publication and the right to privacy for individuals. The main concerns were:

    - that we should demonstrate that our proposals are lawful by setting out more clearly the reasons for imposing the requirement and the statutory basis for doing so
    - that we should demonstrate fairness by being clearer in the preamble to the model questionnaire what we mean by anonymity and the potential limits to anonymity (for example, if there are small numbers of individuals in a category)
    - that we should consider introducing a cut-off so that if there were less than 10 individuals in a particular category, publication of the exact number of individuals would not be required (i.e. state 'less than 10')
    - whether consent could always be given freely in an employer-employee relationship
    - what reassurance individuals would be given by the data controllers (individual firms and chambers) about the security of their data and retention periods.

40. We are confident that we can provide additional reassurance on these concerns, and will be writing to the ICO setting out our responses in detail. The Board is invited to agree the recommendations subject to these concerns being addressed to the satisfaction of the Chairman and the Chief Executive.

41. Some of the concern expressed by ARs appears to relate to the adequacy of the systems firms and chambers have in place to control the data. However, responsibility for safeguarding personal data lies with the firm/chambers as a data controller. If some entities choose not to comply with their legal obligations under the DPA, this is a matter of concern, but is not an argument against imposing the regulatory requirement in the first place (if we and ARs consider it an appropriate and proportionate means of supporting the regulatory objectives).

42. We also recognise that the voluntary nature of the data collection exercise, coupled with the publication requirement, may have the effect of limiting the data that individuals are willing to disclose. This may mean that the evidence base gathered is incomplete and/or skewed by the reluctance of some individuals to disclose the data. While this is clearly a risk, in the Executive's view, the principle of transparency should be our initial priority. If we can achieve transparency at entity level, it is likely that over time individuals will become more accepting of the value of diversity monitoring (transparency will mean entities are likely to take action, which will emphasise that monitoring is effective). As attitudes change over time, it is likely that more individuals will be willing to disclose the data and its reliability will increase.

Next steps and implementation

43. A draft summary of the responses / decision document / s.162 guidance is attached at **Annex A**. The Board is invited to approve the document for publication, subject to any minor amendments following the meeting being approved by the Chief Executive.

44. SRA and BSB are working on pilots and will come back to us with proposals for implementation by the end of the year. It is likely that they will propose a phased implementation (for example, starting with larger firms/chambers), and perhaps different requirements for small firms/chambers and/or proposals relating to publication (for example, using an asterisk or '<10' where there are small numbers of individuals in a category in the published summary data). We should clearly consider reasonable proposals from ARs about how best to implement the proposals, providing they do not dilute the impact of the principles of comprehensive data collection and transparency to an unacceptable degree.

45. The Executive proposes that by March 2012 all ARs should be requested to finalise their detailed plans for collecting a comprehensive evidence base and achieving transparency at firm/chambers level, and begin implementation. The first cycle of data collection and publication should be completed by the end of 2012.

46. In the event that some ARs decide not to take appropriate action to meet the Board's expectations, we would seek to reach agreement informally about the appropriate way forward. In the event that this is not possible, we would need to consider the full range of levers available to drive change, including:

    - using the rule approval process to highlight the Board's view of what is required to meet the regulatory objectives (rule changes may be required to implement the proposals outlined above)
    - pressing for action through applications for designation as a Licensing Authority (**LA**) or to expand the range of reserved activities that an AR or LA is able to regulate

- considering the use of enforcement powers (for example the use of the power to censure could potentially be a suitable tool).

47. We will need to make clear our expectation of ARs that where regulated entities do not comply with a regulatory requirement to collect data and publish a summary of results, remedial action will be taken (including, ultimately, the use of formal enforcement powers such as rebukes and fines if compliance cannot be secured through less formal means).

Stakeholder handling

48. We have been working to build support for our approach with a wide range of stakeholders over the past two years, including diversity interest groups, city law firms, other regulators and purchasers such as Crown Prosecution Service and Legal Services Commission. We have also received significant media coverage – for example, through an op-ed in May 2010, and around the publication of our research in October and the publication of the consultation paper in December. We were successful in getting a range of diversity groups to sign up to a letter to the Editor supporting our proposals, which was published in the print editions of both the Guardian and the Independent in December 2010, as well as online.

49. In relation to the impact of the proposals on small firms, we have engaged with a representative of the Society of Asian Lawyers who is a sole practitioner. The draft Equality Impact Assessment (attached at **Annex B**) considers concerns raised about the impact of our proposals on small firms, in which BME lawyers are disproportionately likely to practice.

50. The Chairman has recently written to Jonathan Djanogly MP (Parliamentary Under-Secretary of State for Justice) highlighting our proposals and the links to the Government's work on increasing diversity in the judiciary and increasing social mobility more generally. We have suggested that he might give a public expression of support at a suitable stage in the summer or early autumn.

51. The Chief Executive has written to Alan Milburn, who has been appointed Independent Reviewer on Social Mobility and Child Poverty by the Government, to update him on our work to increase social mobility (including the education review and data collection and transparency proposals). We remain engaged in the work co-ordinated by Department for Business, Innovation and Skills to take forward the recommendations of the report of the Panel on Fair Access to the Professions, including the development of the social mobility toolkit which is being led by Professions for Good.

52. We plan a press release to coincide with the publication of the decision document. We plan also to write to the senior partners of the top 100 law firms and top 60 barristers chambers (the same list the Black Solicitors Network invites to participate in its diversity league table), and will encourage diversity interest groups to support us publicly.

Conclusion

53. We have moved the debate significantly in two years. A continued focus on putting in place comprehensive data collection as a basis for evidence-based policy, and a focus on transparency as a means of putting the onus on firms and chambers to take action, should provide a solid foundation for future action by ARs and the profession itself.