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| To: | Board | |
| Date of Meeting: | 25 April 2012 | Item: Paper (12) 28 |

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| Title: | Diversity and social mobility report on Approved Regulators' plans |
| Workstream(s): | Developing a changing workforce for a changing market (see Business Plan 2012/13) |
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| Status: | Protect |

Summary:

This paper sets out our analysis of the action plans received from regulators in response to our guidance issued under section 162 of the Act ahead of formal publication of our assessment together with the final plans. On the whole, regulators have embraced the data collection part of the exercise but those that regulate entities have been less willing to push responsibility for collection and publication on to firms and in some cases risk delivery of the objective to promote transparency at an entity level. Further detail on the issues is provided at **Annex A**.

The Board is provided with a summary of the contents of the action plans together with our assessment of each plan (**see Annex B**). Copies of the plans and the full detailed assessment are available to Board members on request and will also be available at the meeting.

Recommendation(s):

The Board is invited to:

- (1) Endorse our analysis of the regulators' action plans
- (2) Agree to publish our formal assessment of the plans
- (3) Agree our proposal to return with a report early in 2013

Risks and mitigations

Financial: None

Legal:

The BSB, CLC and IPREG have cited issues with data protection as a reason not to require entity level publication (in certain circumstances) and have taken a different view to ours in respect of explicit consent for data to be used as intended.

Reputational:

Our decision to issue guidance on diversity data collection and transparency requirements was widely publicised and it is therefore likely that the LSB will be judged on the outcome of the exercise. Some of the regulators may also put forward the view that we have misunderstood the data protection issues.

Resource: No current risks

| Consultation | Yes | No | Who / why? |
|------------------------|------------|-----------|--|
| Board Members: | X | | Nicole Smith has read and commented on the paper |
| Consumer Panel: | | X | |

Freedom of Information Act 2000 (Fol)

| Para ref | Fol exemption and summary | Expires |
|---|--|----------------|
| 12 and the first sentence of paragraph 21 | s36(2)(b) and (c) - intended to promote a free and frank exchange of views for the purposes of deliberation by the Board and otherwise (likely to) prejudice the effective conduct of public affairs | |

LEGAL SERVICES BOARD

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Diversity and social mobility report on regulators action plans

The Issue

1. In July 2011 the Board issued statutory guidance under section 162 of the Legal Services Act (the Act) requiring regulators to meet the following objectives:
 - Gathering an evidence base about the composition of the workforce to inform targeted policy responses and to be used as a benchmark to evaluate 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)
2. Our guidance suggests that participation in the survey is voluntary for individuals and that completion of the model questionnaire itself provides explicit consent for the data to be used in the ways set out (i.e. to be published in summary form and provided to regulators).
3. As required by the guidance, regulators have now submitted action plans to us setting out their approach to delivering these objectives. A summary of the plans together with our assessment is provided at **Annex B**.
4. We have had ongoing discussions with the regulators regarding their approach and set out any specific concerns following receipt of the plans.
5. We have also written to the regulators with our initial assessment of the plans and the timetable for publication of the formal assessment. This provided an opportunity for them to revise the plans ahead of the Board discussion and publication of the final plans and assessment. We received an updated plan from the SRA on 10 April.
6. Our overall assessment is that while good progress has been made some have taken an extremely restrictive view of the data protection risks which may preclude delivery of the second of the two objectives outlined above. We are also concerned that this guidance or general messaging may in effect undermine any reporting and publication requirements placed on employers, particularly where firms or chambers are already collecting and publishing data of their own volition.
7. The BSB is proposing to introduce rules that require chambers to collect and publish data in accordance with our guidance. However, the accompanying guidance threatens the ability of chambers to publish data where the number of people within any category is less than 10. The draft guidance advises that this information should not be published unless specific consent is obtained *after* the exercise from those individuals affected (in addition to the explicit consent

provided when filling out the form). Combined with the decision to exempt chambers with less than 10 employees from the requirement to publish data, it is likely that a significant proportion may not be able to publish. Furthermore, aggregated data published by the BSB will only include barristers and will not reflect the wider workforce.

8. The smaller regulators such as CLC and IPREG have taken a similar approach to publication of small numbers but the CLC will be preparing the summaries itself in such a way as to maximise firms' ability to publish. While it will not require publication, IPREG will encourage its firms to publish wherever possible.
9. The SRA has taken the decision to require firm level publication from 2013 and will publish aggregated data in 2012. We consider this position to be acceptable. The key issue now is ensuring that a sensible position is taken with regards to data protection and that any accompanying SRA guidance does not provide unnecessary restrictions that will discourage firms from publishing.
10. More detail on the issues is provided at **Annex A**.
11. The regulators that do not regulate entities have all taken an approach which should deliver the objective of gathering an evidence base for their regulated community with all individuals being given the option to complete the survey. Aggregated data will be published by the Faculty Office, CLSB and ILEX Professional Standards.
12. [REDACTED]
13. We will also continue to encourage regulators to push greater responsibility on to firms to consider issues such as data protection in their individual circumstances rather than risking unnecessary restrictions by taking a blanket approach.

Recommendations

14. The Board is invited to:
 - Endorse our analysis of the regulators' action plans
 - Agree to publish our formal assessment of the plans and to increase our communications activity in this area
 - Agree our proposal to return with a report on progress early in 2013

Background

15. Regulators were required to submit action plans by January 2012 and begin implementation by March 2012 in order to deliver the objectives set out in the

guidance by the end of 2012. We have now received action plans from all of the regulators and have completed our review¹.

16. This paper sets out the findings of that review and the proposed content of our formal assessment. A summary is provided at **Annex A**.
17. The Board is not required to approve the plans as such but is asked to endorse our analysis so that a formal assessment can be published alongside the plans themselves as soon as is practicable after the Board discussion. Copies of the formal assessment tool can be made available to Board members on request along with copies of the plans themselves. Copies of all documents will also be available at the Board meeting.

Objectives of diversity guidance

18. The objectives of the guidance do not only focus on data collection. We know from the data available that the picture at the point of entry to the profession is far better than it is at the later stages and that issues therefore exist in relation to progression and retention of women and ethnic minorities while data on social mobility is limited altogether. One of the key objectives in promoting entity level publication is to make transparent the link between the decisions that firms make on recruitment and progression and diversity.
19. Transparency will provide everyone with the opportunity to hold individual firms to account for the decisions they take, while offering each and every firm the opportunity to explain their approach and the outcomes they deliver as they see fit.
20. The way that regulators choose to promote transparency is a decision for them but our section 162 guidance sets out a suggested approach for delivering the objectives.
 - Regulators to require firms and chambers to conduct a diversity monitoring exercise which will give every individual in their workforce (both lawyer and non-lawyer) an opportunity to self-classify against a number of characteristics²
 - Regulators to recommend that regulated entities use the model questionnaire to allow the data to be aggregated and used to build a picture of the diversity profile of the legal workforce as a whole
 - Where they regulate entities, regulators should require firms and chambers to publish summary data about their workforce in relation to certain characteristics³
 - Regulators to collate firm and chambers level diversity data and publish to give an aggregate view of the diversity make-up of each branch of the profession
 - Regulators to set periodic approach to collection and publication exercise, taking into account the regulatory and administrative burden on the profession

¹ IPREG has submitted a draft plan but we are awaiting the final version

² your job role, age, gender, disability, ethnic group, religion or belief, sexual orientation, socio-economic background, caring responsibilities

³ Publication in respect of all surveyed characteristics (see footnote 2) with the exception of religion or belief and sexual orientation

21. [REDACTED] There is specific provision within section 162(5) of the Legal Services Act 2007 for us to have regard to the extent to which a regulator has complied with any guidance issued by the LSB under section 162. So our approach to section 162 guidance has been for regulators to “comply or explain”. Specifically, paragraph 13 of the guidance states,
“To justify an approach [that departs from the guidance] the Board would expect an approved regulator to establish evidentially the extent to which it has concluded that the departed approach is the most appropriate way of acting compatibly with the Regulatory Objectives and is in accordance with the Better Regulation Principles and regulatory best practice.”
22. Therefore, if regulators decide to depart from the proposed approach set out in the statutory guidance we will need to look very closely at the way in which they choose to deliver the objectives of the guidance.
23. At the current time, we have made an assessment of the extent to which regulators have adopted the proposed approach in the guidance and our view of whether they will deliver the objectives. We have already raised concerns with them and have seen some change in approach. Publication of the formal assessment is the next stage in that process.
24. As early as possible in 2013, we will look at whether the regulators have delivered their action plans and the extent to which the objectives of data collection and transparency are being met. This will then form an ongoing review process.

Next Steps

25. We have already written to the regulators setting our initial views of the action plans and any particular areas of concern. We also informed them of our intention to publish the completed assessment tool after the Board discussion. Regulators were provided with the assessment tool template in December 2011.
26. Subject to the Board’s endorsement of our analysis we will publish a final version of the assessment tool for each of the regulators as soon as is practicable after the Board meeting. This assessment will be published alongside the regulators final action plans and will be the first published commentary on the approach.
27. We are expecting an application from the BSB for approval of changes to its regulatory arrangements in respect of its new Equality and Diversity requirements (including data collection and publication). Our assessment makes clear that we will want to thoroughly consider the proposed guidance as part of the application. Board engagement will be sought on this application.
28. The timetable set out in the guidance is for implementation from March 2012 and for the expectations to be achieved by the end of 2012. Individual timetables based on the action plans are provided at **Annex B**.
29. We therefore propose to complete a review of implementation as early as is possible in 2013. This will look at response rates, uptake of publication requirements and whether the regulators have kept to their proposed action plans. Over time we propose to conduct an annual exercise whereby we consider the data to see whether the data collection and transparency requirements are having a real impact on diversity and social mobility. It will not

be until 2014 that we can see whether the SRA has delivered the transparency requirement. Where approved regulators have diverted from the guidance, this is also the point at which we would consider progress against the regulatory objective of promoting a diverse profession.

Further Information on Key Issues

Publication of personal data

30. The concerns regarding data protection are not new and the Board will recall the proposal to publish data at entity level was controversial in consultation⁴. However the Board decided that it was right to proceed due to the following benefits of transparency at entity level:
- The ability for consumers (including end users, bulk purchasers and referrers) to identify where the diversity profile of a particular firm varies from what might be expected when compared with competitors
 - The ability for regulators to identify where the variation from what might be expected is so great that regulatory questions may need to be asked (for example if there were no women solicitors at all in a medium sized firm)
 - Raising awareness of the impact of barriers to particular groups at a firm/entity level and therefore encouraging firms and chambers to take action
 - Highlighting and stimulating challenges to the more intractable cultural barriers that seem to lie behind areas of limited progress
 - Focusing on the whole legal workforce rather than just the profession
 - Recognising the variety or make up of the workforce at different firms and ensuring that data is available at the level at which recruitment, retention and promotion decisions are made.
31. The Board will also recall that our guidance recommends that certain categories (religion or belief and sexual orientation) are exempt from firm publication⁵ so the categories we are referring to in respect of entity publication are:
- Job role
 - Gender
 - Age
 - Disability
 - Ethnic Group
 - Socio economic background
 - Caring responsibilities
32. As set out in the consultation response, we consider that a requirement for informed consent by the individuals at the point of disclosure will act as a powerful safeguard to protect the privacy of individuals who are not willing for information about their characteristics to be disclosed. Our view has not changed.
33. In developing our response to consultation, we also sought advice from the Information Commissioner's Office (ICO) on potential data protection issues arising from the publication of diversity data. The ICO provided advice that any data collection and publication requirement needs to be lawful, fair and carried

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http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/decision_document_diversity_and_social_mobility_final.pdf, paragraphs 8 & 9

⁵ Both collection and publication of transgender data is exempt

out in accordance with the relevant processing conditions set out in the Data Protection Act 1998 (DPA). In our view, the principles that we are advocating (data collection and transparency at entity level) can be implemented in a way which is compliant with the DPA, without risking delivery of the objectives. This is demonstrated by those firms that are already publishing as well as the LSB's own panel of legal advisers who are required to collect and publish diversity data. This exercise has shown that it is possible to publish data where there are less than ten people in a particular group.

Regulatory burden

34. Another of the concerns raised through the action planning process has been the potential burden of data collection and publication requirements on the regulated community. Our view is that the requirement for firms to collect and publish data is simple but potentially very effective.
35. Two years ago the LSB completed its own paper-based data collection exercise. We had a 75% response rate and the information was published in summary form on our website. We will soon complete a repeat exercise, this time online using the Survey Monkey software.
36. We are not suggesting that rules are required to enforce data to be collected and published; that is a decision for the regulator and only the BSB has decided to introduce the requirements through rules (which the Board will shortly be asked to determine through the usual process for approving changes to regulatory arrangements). Nor are we suggesting that regulators should micro-manage the detail or immediately start enforcement of the requirements.
37. Discussions with the SRA and IPREG have largely centred on the extent to which they will „encourage’ firms to collect and publish data given their decision to implement the requirement using existing regulatory arrangements. We will look closely at the impact of this encouragement on uptake of the regulatory requirements as implementation begins and we will report back to the Board at that point.