

‘Encouraging a diverse profession’

Consultation on revised guidance for regulators on encouraging a diverse profession

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I have been interested in diversity reporting and the legal profession since 2010. Over that time, I have produced three research papers that speak to various aspects of the LSB’s 2011 diversity statutory guidance.¹ Two of these papers interrogate a dataset I created of diversity disclosures made by the top 100 UK law firms on their websites in 2010 and 2014 (i.e. before and after the rule was introduced). The third paper is a review of how 160 randomly sampled barristers’ chambers reported diversity data on their websites in 2015. All three papers also speak to how the largest front line regulators, the Solicitors Regulation Authority and the Bar Standards Board respectively, have implemented the LSB’s reporting rule.

The following are my responses to Questions 1, 3, 4 and 6 of the LSB’s September 2016 consultation on its diversity statutory guidance.

Consultation Question 1: Is the proposal to switch the focus of the guidance to outcomes beneficial to encouraging the diversity of the profession?

The Problem with Numbers

Numbers alone are not enough. Even a cursory glance at some of the relevant diversity statistics on the profession shows little action (by the front line regulators and their regulated communities) over the past five years that has had a meaningful impact. Namely, while we might know more today than we did 5 years ago (because of increased data collection and disclosure) the worlds behind those numbers (who does what and where and how in the legal profession) have barely spun on their axis. The profession continues to not reflect the society it serves.

An approach to diversity monitoring and reporting which obliged front line regulators (and, in turn, regulatees) to speak qualitatively (and publicly) to what they are doing to improve diversity, and to the effectiveness of those initiatives, would be a welcome step forward: “What are you doing to make a positive difference on diversity and how effective have these measures been?” A number of large firms and chambers already disclose such measures, but the approach is ad hoc. To give one example of good practice, the law firm Simmons & Simmons uses a colour coding approach in its diversity reporting (red, amber, green) to denote success with its diversity goals. The willingness of that law firm to ‘red light’ some of its less successful, or not yet achieved, policies and approaches is to be commended.²

A related matter goes to the value placed on statistics, and the seeming preference for quantitative over qualitative data. Much more qualitative research could and should be done to understand how women and minority legal services professionals experience the

¹ Steven Vaughan, ‘Going Public: Diversity Disclosures by Large UK Law Firms’ (2015) 83(5) Fordham

² <http://www.simmons-simmons.com/en/About-Us/Corporate-Responsibility/Inclusion-and-Diversity>>

profession. In this regard, the Bar Standards Board's January 2016 programme to better understand perceived barriers to women's progression and retention at the Bar is a positive step forward.³ A cohort series, like that undertaken by The Law Society some years ago,⁴ which tracks individuals over their career would be a powerful insight into diversity (and other matters) in the profession and is worth exploring further.

Complexity

One of the LSB's four regulatory standards is 'outcomes focused regulation'.⁵ The LSB says that one aspect of this standard means that, "regulators should only have detailed rules or requirements where they have clear evidence and analysis that justifies such an approach."⁶ It is clear that the rules by which the front line regulators have operationalized the LSB's reporting rule, and indeed the content of the LSB's own 2011 statutory guidance, are not outcomes focused. They are instead in large part detailed, complex, lengthy, and prescriptive. My research suggests various instances of confusion where the drafting of the front line regulators' reporting rule requirements leaves much to be desired.

The outcome in this instance is a more diverse profession, and the LSB has decided that one of the ways to achieve that outcome is via diversity data collection and disclosure. It would make more sense (i.e. it would better align to an outcomes focused approach) were the LSB to par back the detail of its statutory guidance and instead: (a) put the onus on the front line regulators to put forward programmes to the LSB for approval which will use diversity data collection and disclosure as one (but not the only) means of better understanding and then improving diversity in the profession; and (b) take a more proactive stance (whether by means of success criteria or otherwise) in judging to what extent the regulators are meeting their statutory and regulatory obligations in the context of diversity.

Consultation Question 3: To what extent are regulators already demonstrating achievement of the outcomes? If they are not, why do you think is this?

The LSB's diversity reporting rule has been pointed to by the regulated communities as one of the areas of significant cost of regulation.⁷ Such cost may well be perfectly appropriate if diversity in the profession is thought important. However, regulatees have every right to feel anger with regulators who do not use the diversity data they have been required to produce. As set out above, disclosure of numbers is not an end in itself, but a means by which to reflect on, and encourage, greater diversity in the profession. The BSB does not even require the chambers it regulates to send the data they have collected back to the BSB. The SRA's initial reports on the diversity of the solicitor's branch, on the back of the diversity data it collated, were unsophisticated and said very little. Some progress has been made (see, for

³ <https://www.barstandardsboard.org.uk/regulatory-requirements/regulatory-updates-2015/december-2015/women's-experiences-at-the-bar/>

⁴ See: Shiner, M. & Newburn, T. (1995), *Entry into the Legal Professions: the Law Student Cohort Study, Year 3*, London: The Law Society; Shiner, M. (1997), *Entry into the Legal Professions: the Law Student Cohort Study, Year 4*, London: The Law Society; Shiner, M. (1999), *Entry into the Legal Professions: the Law Student Cohort Study, Year 5*, London: The Law Society.

⁵ LSB, *Developing regulatory standards: Summary of responses and decision document* (London, April 2011)

⁶ LSB, *Regulatory standards 2014/15: An update report on the performance of legal services regulators* (LSB, February 2015) p9

⁷ <https://research.legalservicesboard.org.uk/wp-content/media/In-depth-study-into-the-cost-of-regulation-version-2-for-publication.pdf>

example the SRA's recent online diversity comparison toolkit),⁸ but much more could and should be done with the data collected. The SRA has recently put £25,000 towards initial analysis of some of the data it holds, and this is a welcome step.

It is not clear, at all, what pro-active steps have been taken by the regulators as regards diversity and the profession other than the operationalization of the LSB's diversity data rule. What happens instead is that each regulatory/policy change/decision is evaluated to see whether it has negative EDI impacts. This is reactive. What is lacking is anything proactive: doing X to encourage greater diversity. The lack of impetus seems to be for a number of reasons, including:

- (i) a sense that a lack of diversity is a pipeline problem over which the regulators and the profession have no control (e.g. social deprivation, schools attended, universities attended, social and cultural capital) – more on this below;
- (ii) the complexity of the issue; and
- (iii) the lack of desire to implement hard regulatory responses (e.g. quotas).

It is often said that the diversity 'problem' is with retention and promotion rather than with entry. Fingers are pointed, for example, at the (relatively balanced) number of women trainee solicitors and pupil barristers, in comparison with the (very imbalanced) number of women law firm partners and QCs. Such a worldview is inaccurate as it downplays the importance of work experience in gaining access to the legal profession. The LSB's reporting rule would have greater weight were it widened to include the collection and reporting of, and commentary on, data on law firm vacation schemes, mini pupillages in chambers and (and perhaps most importantly) on 'informal' work experience.⁹ Linklaters, a magic circle law firm, is a notable beacon of good practice in this area and reports annually on its graduate recruitment applicants.¹⁰ It is disappointing that the current consultation does not include reflection on the importance of vacation schemes, mini pupillages, work experience etc.

It is equally disappointing that the current consultation does not reflect on the fact that the profession is not required to present data or commentary on how promotion decisions are made. This was a core organizing principle of the LSB's consultation exercise on the reporting rule,¹¹ but it is not reflected in the 2011 statutory guidance. Transparency is as much about making clear exercises of power as it is about anything else. If the front line regulators were to require regulatees to make public, qualitative disclosures on their approach to diversity, inclusion of promotion decisions within that sphere of obligation would be helpful.

Compliance and Enforcement

I am also concerned at if/how the regulators are enforcing compliance with the existing rules. In 2014, I found that 30 law firms out of the top 100 (30%) did not publish any diversity data on their websites. My request via email to each non-compliant firm for such data went unanswered. In 2015, I found that 69 chambers from a random sample of 160 chambers (43%) did not publish any diversity data on their websites. Even when firms and chambers do publish data, how they do so is often ad hoc and incomplete (and, as such, not

⁸ <https://www.sra.org.uk/diversitytool/>

⁹ Such would also be consistent with the stated interest of the LSB, in the 2011 Guidance, in the entire legal workforce and not merely on regulated legal professionals. see: LSB, Increasing Diversity and Social Mobility in the Legal Workforce: Transparency and Evidence (Legal Services Board 2011) Annex B (hereafter, the 'LSB 2011 Guidance')

¹⁰ http://www.linklaters.com/pdfs/cr/Diversity_Statistics_2015.pdf

¹¹ LSB 2011 Guidance, p8

in compliance with the relevant rules set out by their regulators). What is less clear is what the SRA and BSB do by way of enforcement of how they have operationalized the LSB's reporting rule. Vague comments are made, but little of note or substance. Greater clarity, and action, on enforcement might be another means by which the LSB judges the success, or otherwise, of the front line regulators on progress with its statutory guidance.

Consultation Question 4: How can the LSB ensure that the data the regulators collect continues to be comparable?

As a first point, the assumption that the existing data is comparable is questionable. This is because of various issues of inconsistency and wildly varying response rates between protected characteristics and between regulators.

Consistency

Imagine I am a consumer of legal services interested in the diversity of my legal services provider. I might want to compare and contrast the workforce make-up of various possible providers. If I did, I would find such incredibly hard and incredibly frustrating. Different firms and chambers report diversity data in different ways and on different parts of their websites. This discretion is permitted by the regulators. I would suggest this is a mistake. While various forms of prescription may seem at odds with outcomes focused regulation, forms of good practice on reporting (location, content, style etc) could easily be promulgated.¹²

To give just one example, the law firm Norton Rose Fulbright gives aggregated disability data for everyone in its London office for the year 2014 (i.e. for the entire office workforce, and not broken down into partners/associates/trainees/ staff etc);¹³ CMS Cameron McKenna gives disability data broken down into partners, associates, trainees, 'other legal', secretaries and business services but *only* for the year 2011;¹⁴ and a whole raft of other firms provide no data whatsoever on disability. The front line regulators are equally poor when it comes to how they present the diversity data of their respective regulated communities on their own websites: such data is often hard to find, in a variety of locations and lacking in finesse.

A Matter of Timing

One of the reasons a reporting rule might be thought useful is that it allows for a baseline of diversity to be established, and progress to be measured against that baseline. However, asking for diversity data on a time series basis may lead to an amount of data being produced and published, but such data may well be meaningless. For example, if a law firm publishes a diversity report (with various numbers) in 2012, and then again in 2013, 2014, 2015 (etc) but does not also comment on whether those numbers have changed and/or

¹² The SRA and BSB both give a small number of examples of how to report diversity data, but these are, I would suggest, not enough.

¹³ <http://www.nortonrosefulbright.com/uk/corporate-responsibility/diversity-and-inclusion/our-statistics/>

¹⁴ <http://www.cms-cmck.com/Hubbard.FileSystem/files/Publication/fa57a9a2-86ba-4395-bc35-9bc94b3ae57c/Presentation/PublicationAttachment/812b462f-ab3f-4c28-82c4-3dc1783e7894/Social%20Mobility%20and%20Diversity%20Statistics%202011.pdf>

what has been done by that firm to improve diversity, then those reports offer up only imperfect snapshots of diversity (and nothing may actually change). Indeed, in the real world, what happens is that firms and chambers publish a report in (say) 2012 and then remove that 2012 report from their website when they publish the 2013 report. Such does not allow third parties (clients, consumers, regulators, academics and others) to track progress. This may well be because little change is occurring.

Response Rates and Data Spread

A number of the front line regulators struggle to collect data from their regulatees on many of the characteristics protected by law and on socio-economic background. In direct contrast to the approach taken by the SRA, the BSB does not require chambers to send to it the diversity data those chambers collect. My research shows that barristers may be more willing to disclose certain characteristics to their chambers (via an internal diversity questionnaire) than to their regulator. In not requiring chambers to send on their collected diversity data, the BSB is not able to paint as full a picture of the Bar as it might otherwise be able to do. At the same time, the LSB could usefully use response rates as one of the success criteria by which it will come to judge progress made by the front line legal services regulators in relation to the reporting rule.

Consultation Question 6: Will the proposed guidance: (d) encourage a more diverse profession?

The greatest challenge in answering this question is what is meant by 'diverse'. Imagine a world where there is gender parity in the legal profession at all levels. Would we be content with this parity if say, those women were all white, or all privately educated, or all heterosexual (etc)? Intersectionality is the idea that we, as individuals, have multiple forms of identity which may be related to overlapping or intersecting systems of oppression, domination, or discrimination. At the moment, the operationalization of the LSB reporting rule by the front line regulators takes a thin and rather linear, characteristic-by-characteristic approach to diversity which accounts for none of the challenges or nuances in double or multiple forms of difference. There are challenging issues of data protection when it comes to the reporting of cross tabulated characteristics, but some high level form of analysis is almost certainly possible (and not currently undertaken). It should also be incumbent on regulators to speak to what they perceive a diverse profession to look like.

I am also concerned that the language in proposed Outcome 3 ('The regulator collaborates with others to encourage a diverse profession, including sharing good practice, data collection, and other relevant activities') seems to imply that the burden of diversity lies with representative bodies, lawyers, firms, chambers etc and not with (in any respect) the regulators. I am sure this was not the intention behind the drafting. Clearer language may be:

'The regulator will encourage a diverse profession, through (for example) collaboration with others, including sharing good practice, data collection, and other relevant activities'