

**RESPONSE ON BEHALF OF COMBAR TO LSB CONSULTATION PAPER:
“INCREASING DIVERSITY AND SOCIAL MOBILITY IN THE LEGAL
WORKFORCE: TRANSPARENCY AND EVIDENCE”**

(A) Introduction

1. This is the response of the Commercial Bar Association (COMBAR) to the above LSB consultation paper. COMBAR now has over 1,200 members and represents the interests of barristers who either specialise in commercial law or whose practice includes a substantial proportion of such work. In addition to individual members, 36 of the leading sets at the commercial Bar are chambers (i.e. corporate) members of COMBAR.

2. This response has been prepared by the Equality & Diversity Committee of COMBAR and concentrates on the issues of greatest relevance to practitioners at the Commercial Bar.

(B) Response to questions in Annex A of the Consultation Paper

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?

The assessment of the diversity data that is currently collected appears to be pretty comprehensive.

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

We agree in large part with the LSB's assessment of the available diversity data. However, it appears from the analysis that the LSB is lacking data which may be useful in assessing equality and diversity issues in relation to progression and retention at the Bar. The only data relevant to the Bar which is referred to concerns those called to the Bar and pupil barristers, then there is only a reference to the percentage of judges who are women or BME. The data in relation to pupil barristers is very limited: it is not provided in relation to gender and in relation to BME pupil barristers is only a snapshot. The data does not therefore provide any indication as to progress in relation to either women or BME pupil barristers.

We are concerned that any assessment of the data in relation to these issues will be deficient and/or incomplete without any data in relation to the make-up of senior practising barristers. Without such information any analysis produced will almost certainly be more revealing of and useful to the solicitors' profession and render the assessment of data unbalanced and inadequate with respect to retention and progression at the Bar.

See further response to questions 19 and 20 below.

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?

Not as far as we are aware.

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

COMBAR is not an approved regulator; it is a Specialist Bar Association which is recognised by the Bar Council. It therefore seems appropriate to give some information about initiatives of the COMBAR Equality and Diversity Committee.

COMBAR Recruitment Committee and law fairs

The Recruitment Committee is a sub-group of the Equality and Diversity Committee, which aims to provide information to students from all backgrounds to enable them to make an informed career choice. It does this primarily by providing them with information about a career at the Commercial Bar by production of a booklet called "What is the Commercial Bar" (also reproduced on the COMBAR website) and, where possible, an opportunity to hear from or talk to a practising barrister about life at the Commercial Bar.

The cornerstone of the work of the Recruitment Committee is organising COMBAR's representation at Law Fairs. COMBAR has for a number of years been sending representatives annually to approximately 12-15 law fairs held at universities across the country which are not traditionally attended by the Bar. COMBAR is often the sole representative of the Bar attending such law fairs. These are attended on a voluntary and unpaid basis by individual barristers who are members of COMBAR.

COMBAR members also attend university recruitment events and give presentations and seminars on a voluntary and unpaid basis. The Recruitment Committee also works to identify and make the most of opportunities to provide information to students and academic and careers staff.

COMBAR Parental Leave/Career Break Advice Scheme

The COMBAR E&D Committee is also currently piloting a Parental Leave/Career Break Advice Scheme for a 12-month trial period. It is in effect an informal mentoring scheme. COMBAR members from a range of sets of chambers and of different levels of call, all of whom have successfully returned to independent practice following parental leave or a career break, have volunteered to be a point of contact for those about to take/return from parental leave or a career break and to provide advice and support. The scheme is intended to provide confidential practical advice both while practices are being wound down in the lead up to parental leave/career breaks and also prior to and upon members' return to independent practice.

COMBAR menu of options of suggested positive action which can be taken to try to address unjustifiable under-representation of women and BME groups in chambers

In order to assist COMBAR chambers to take steps to address unjustifiable under-representation of women and BME groups in chambers COMBAR has published on its website a list of different steps which chambers can take individually or by participating in schemes organised by COMBAR and others.

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)?

The immediate priorities appear to be reasonable and sensible.

We understand the position adopted at present by the LSB as to the setting of target and putting actions plans in place. However, we are very sceptical that change will come about solely as a result of transparency and clarity and/or voluntarily on the part

of individual chambers or firms. Paragraph 8 of the Executive Summary (page 3) simply states *“If change does not happen we will listen further to the arguments and consider evidence of the use of the (voluntary) use of targets by firms and chambers...”*. It is unclear when such a review might occur and also how the LSB is proposing to measure levels of “change”.

We are therefore concerned that the LSB should (i) propose a timetable for the review of its current position and (ii) be clear as to what in its view will or will not constitute (sufficient) “change”.

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

Yes. See also responses to questions 2 above and 19 and 20 below as regards ensuring comprehensive evidence in relation to the Bar.

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?

We agree with this proposal.

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

This is a difficult question. How are these initiatives to be evaluated? It is impractical at this stage to evaluate the initiatives on the basis of (ultimate) results, so how else are they to be evaluated? It is likely that the individuals who run the different existing initiatives will have the greatest and most useful input as to how they are to be evaluated.

For example, COMBAR’s experience of attending law fairs at universities has been that very little information about the Bar (let alone the Commercial Bar) is made available to students either before or during their time at university. From the feedback given to the COMBAR E&D and Recruitment Committees, we consider it important that COMBAR continue to attend such events to ensure that some information is provided to students, who it appears would otherwise not have access

to any real information about a career at the Bar at all. It has also become increasingly clear to the Committees that attendance at such law fairs alone is insufficient.

Unfortunately, it is too early in COMBAR's Parental Leave/Career Break Advice Scheme pilot to provide any useful feedback which may assist in its evaluation or the broader evaluation of such initiatives.

We have concerns (i) about the feasibility of evaluating existing initiatives and (ii) that it may divert resources away from the main task. Any such evaluation is likely to be lengthy and expensive and may not ultimately be of any practical use. It is hoped that this consultation will result in constructive and practical responses from those running the existing initiatives, so that before undertaking what is likely to be a large, time-consuming and expensive task the parameters of any evaluation are clearly thought through and set out.

While a standard evaluation framework may be useful in theory, it is likely to be difficult to fashion and unlikely to be easy to compare the different initiatives, for example in so far as they relate to different equality and diversity issues at different stages. If a standard evaluation framework is only possible at a very high or abstract level, we consider that it may be of little practical use.

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?

See response to question 5 above. We would reiterate that we are highly sceptical that any real change or progress will be made without regulatory enforcement.

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

Yes.

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?

We agree that this would be a sensible approach.

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

No.

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

Yes, if practicable. Without such information it will not be possible to identify whether (and if so which) individuals are moving in-house, and at what stage, as opposed to leaving the profession altogether. It is also unclear from the paper whether, for example, the Treasury Solicitors and the CPS are considered to be “in-house”. This is of particular importance as the larger of such entities offer pupillage and other training to lawyers, and as such it would be important for their information to be collected.

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

None, other than those already identified in the consultation paper.

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 small firms and chambers (fewer than 20 people) should only be required to collect data every three years?

It may be necessary to clarify (for ease of implementation) whether the threshold figure of 20 people includes, for example, members of chambers and staff. We would also question the assumption or argument made in the Paper that smaller entities have lower turnover of staff and lawyers.

On balance we consider that such information should be collected from the smaller entities, as only collecting data every three years will lead to inefficiencies and to difficulties in making direct comparisons with the annual data collected for all other entities. Also for small entities the task of collating the data would of course be much quicker.

If the LSB maintains its position in relation to smaller entities we would suggest that it would be sensible to keep this proposal under review, such that if the cost in terms of time and resources is minimal that requirements on smaller chambers or firms are then brought into line with those of the larger entities.

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 of these characteristics be justified?

We agree with the proposed list including pregnancy and maternity, caring responsibilities and socio-economic background.

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

We refer to paragraph 149 of the Consultation Paper, which in the context of gender reassignment refers to the surveys being anonymous, responding being optional and there being absolute clarity as regards the purpose for which information will be used. It is our strong view that anonymity should be preserved and this, along with the importance of maintaining entity-level responsibility for the collection of such data, militates in favour of collecting the data anonymously.

Question 18: Is there a way of integrating data collection with the practising certificate renewal process?

Not applicable, see response to question 17 above.

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

We consider that question 2 needs to be more tightly drafted.

Questions 2(a), 2(b) and 2(d) do not apply to barristers but do not have the option of answering “not applicable”. This is likely to lead to inexact data. Either the option of “not applicable” should be given in each question or the questions should be split up between solicitors, barristers, ABS, in-house.

We consider that question 2(c) of the model questionnaire is not clearly drafted and is not going to provide the desired information. It is our understanding that this question is an attempt to obtain information about, for example, a barrister's seniority, instead of using the QC benchmark (as to which see further response 20 below). However, chambers are structured in any number of different ways and decisions can be made formally as well as more informally. Committees (including management and practice development committees) do not necessarily take strategic decisions about securing business and can include very junior members of chambers. Such positions are unpaid whatever the level of seniority, which may not be the case in firms, and, with the exception of Head of Chambers, do not attract status. Also in some chambers the Head of Chambers and/or senior/successful silks may make the important decisions, within or without any committee system, whether by virtue of their influence and/or experience and/or level of financial contribution or otherwise. The fact that this question is not safely going to elicit the desired information has an impact as regards questions 20 and 21 below.

Question 6(b), we would suggest separating out the last entry in the table so that it reads as follows:

Other, for example disfigurement (specify if you wish)	
Prefer not to say	

It is not understood why in question 7 of the model questionnaire the option "Prefer not to say" is 7(a) at the top of the answers, whereas in all the other questions it is the last option. It is likely in our view that if this option is given at the top it will increase the likelihood of respondents answering "Prefer not to say".

For comments in relation to question 11 of the model questionnaire please see response to question 29 below.

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

We would strongly urge the LSB to reconsider its viewpoint not to include QC in the data collection. It is the only real indicator of career progression at the Bar. The LSB

has emphasised throughout its Consultation Paper that one of the key issues to be addressed is retention and progression. There is no other useful way of measuring seniority (and hence retention and progression) within a set of chambers (see response 19 above) or at the Bar other than QC. This is particularly acute in respect of the Commercial Bar, where successful practitioners would expect to take silk within 15 to 20 years of call and if a practitioner does not take silk within/near to that period their career is likely to stagnate or decline.

While it is obviously right that chambers do not control the appointment of QCs in the same way that solicitors' firms control the appointment of partners, the analysis may well be more nuanced than this in relation to the Bar. It is not to be assumed or accepted that a set of chambers has no role to play in relation to its members successfully being appointed QC. It is our view that chambers have an indirect but important role to play in the progression of their members. For example data needs to be obtained and monitored from chambers to ensure a fair and equal distribution of chambers' work at all levels of call, also different chambers may provide different levels of support for example to those taking parental leave or to disabled members, there may also be issues concerning fair and equal marketing opportunities for all members of chambers, as well as the important matter of exposure/access to potential referees for the application process.

At the very least there should be a category to record the number of years' call or qualification if any usable data is to be collected to enable sensible and productive analysis of, at the very least, retention at the Bar. However, we agree that post-qualification experience alone will not assist in analysing progression at the Bar and hence our views in relation to the importance of collating the data as to QC appointment. Such information could and perhaps should also include the number and make-up of those applying for silk and the number and make-up of successful applicants.

A recent article in Legal Week (<http://www.legalweek.com/legal-week/news/2029716/ccs-popham-named-honorary-qc-120-strong-silk-round>) states that "The number of women awarded QC status rose again this year to 27 from 20 in 2009-10 and 16 in 2008-09. The number of female applicants, however, decreased to

41 from 46 in 2009-10” (see also the information published on the MOJ website: “QC’s in England and Wales – comparative statistical information 2010-11”: <http://www.justice.gov.uk/news/docs/queens-counsel-statistics-2010-11.pdf>).

The position at the Commercial Bar is particularly marked, for example out of this year’s 30 successful applicants who are COMBAR members 6 were women and 24 were men. In relation to 2009-10 out of 33 successful applicants who are COMBAR members 5 were women and 28 were men.

As set out in response to question 2 above, the lack of data at present about seniority at the Bar is evident. It is our view that in the absence of information as to QC, the analysis of collected data will inevitably be flawed, unbalanced and limited. This is evident from the analysis in the consultation paper itself at paragraphs 41 to 47, which includes very little information in relation to progression at the Bar (in fact it is noted that figures as to QC are used in the graph at paragraph 45 in any event, to obvious and startling effect).

While the QC benchmark may not be the perfect measure for a number of reasons, it is our view that it is far worse to leave it out. It is particularly important in terms of pool of candidates from the Bar for future judicial appointment. As the Paper expressly acknowledges (at paragraph 23 on page 8) the Advisory Panel on Judicial Diversity has made a specific recommendation that the Bar Council, the Law Society and ILEX do further work to improve the diversity profile of members of the profession suitable for judicial appointment. We consider that as a very first step equality and diversity data as to progression within the legal profession should at least include QC, especially where no other option is practicable.

The collation and analysis of such data is essential. Without it there would be no marker at all with which to assess progression at the Bar. We feel very strongly that it would be a serious mistake not to include this categorisation of status.

Question 21: What are your views on the proposed questions about job role 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 hold an influential or key role in decision-making of an organisation?

See above responses to 19 and 20.

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

Not at the present time. It would of course be sensible to review the level, success and structures of ABS to ensure that at an appropriate time any necessary amendments are made to reflect the role/structure of ABS.

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

In relation to the additional information that may be collected, at present we would support collecting information as to size and type of firm/chambers and practice area. These two issues are important in our view as it would be useful to be able to discern whether there are trends in relation to practice areas and how equal and diverse the profession is in its component parts. For example, it has traditionally been more common for more women to practise and succeed in family law than in commercial law. It may also highlight specific issues in relation to retention and progression.

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

We consider that the proposed approach seems sensible given the advice already taken from EHRC and ONS by the LSB.

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

We consider that the proposed approach seems sensible given the advice already taken from Stonewall and ONS by the LSB.

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?

We consider that the proposed approach seems sensible. While it might be better in isolation to adopt the BHA alternative question format, on balance it would be more helpful to be able to compare the data collected with general population data.

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?

Given question 17 above, we assume that in order to comply with the legislation (as interpreted by the Ministry of Justice and the LSB) that the inclusion of this question is dependent on the questionnaire being anonymous. In so far as the inclusion of such a question complies with legislation we would be in favour of including it.

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

Yes.

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

We agree that such questions should be included. However, the justification and usefulness of simply assuming that the respondent will have some caring responsibilities if they have children (see paragraph 153 on page 40) is not understood. It is commonly, but not always the case, that the mother undertakes larger caring responsibilities for children (especially in the first 10 years) than the father. Also as presently drafted the question seems somewhat out of balance especially when viewed immediately next to a question about other forms of caring which asks about specific hours. Some practitioners may on their return to work regularly take a number of hours or days off a week to care for their children. It is our view that the question ought to be framed to include a similar time provision for the primary carers of children.

We consider that it is necessary to include the following further questions to ensure clarity, accuracy and usefulness: (i) as to whether the individual considers him or herself to be the primary carer of their child/children and (ii) if so how many hours a week are spent caring for such children.

Finally, in our view the width of the current bands of hours is too great. There is a great deal of difference between spending 1-2 hours as opposed to 19 hours a week

undertaking caring responsibilities. Perhaps 1-10, 10-20, 20-30 or in excess of 30 would be more appropriate.

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

We consider that the proposed approach seems sensible given the advice already taken from the Sutton Trust and the Bar Council by the LSB.

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

No, other than that they seem sensible.

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

No.

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

Only those already identified in the consultation paper.