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Nottingham Law School

Encouraging a Diverse Legal Profession: response to the LSB

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1. Introduction and contact details

Nottingham Law School (NLS) is the law faculty of Nottingham Trent University¹ (NTU) in the United Kingdom. NTU, which has its origin in the Nottingham Government School of Design, opened in 1843, and is a statutory Higher Education Corporation (HEC) established under the Education Reform Act 1988. Its powers are specified in section 124 of that act. The university title and degree-awarding powers were granted under the Further and Higher Education Act 1992. NTU began to offer a law degree in 1964. NLS has 106 teaching staff (excluding hourly paid lecturers) and more than 3,000 full time, part time and distance learning students including:

- undergraduate students on a variety of LLB law degrees and a solicitor apprenticeship;
- postgraduate GDL, LPC and BTC students whose courses are accredited as pre-qualification routes by the Bar Standards Board (BSB) and Solicitors Regulation Authority (SRA);
- SQE preparation students;
- trainee trade mark attorneys on a course accredited as the sole national prequalification course by the Intellectual Property Regulation Board (IPReg);
- students on LLM programmes; and
- Ph D and professional doctorate candidates.

NLS also provides CPD activity and bespoke programmes for law firms and similar organisations, including courses for trainee solicitors. Many students participate in work placements and in NLS Legal, which operates as a “teaching law firm” regulated by the SRA.

This response is convened by the school’s research Centre for Legal Education which has a track record of research into legal and professional education, ethics and regulation in over twenty countries worldwide and for the BSB, SRA, CILEx Regulation, IPReg and the Legal Services Consumer Panel and Legal Services Board (“LSB”). Publications with particular significance in this area are the 2013 Legal Education and Training Review report² and our more recent access to justice report to the LSCP and LSB.³ The response group comprises colleagues with significant practitioner experience as well as those with expertise in discrimination law, legal professional regulation, employability and in Equality, Diversity and Inclusion (EDI).

References are given as endnotes to streamline reading of the main text.

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2. Diversity in the legal professions

... 'access to justice' means the equal chance to study and practice law. ... access to justice correlates with access to the profession ... because in a just society there should be no discriminatory barriers, and the legal profession ... should reflect society as it is composed of diverse constituencies and groups.⁴

2.1 Statutory obligations

The Equality Act 2010 (“the 2010 act”) covers a list of defined protected characteristics (ss4-12),⁵ and in ss 158 and 159 it permits certain kinds of affirmative action. Its s1, creating a public sector duty regarding socio-economic inequalities, is in force in Wales (and Scotland), but not in England. The LSB and front-line regulators do, therefore, have a separate obligation in relation to socio-economic inequality in their activities in Wales (and, in the case of IPReg, Scotland), which involves compliance with devolved legislation.⁶ Welsh devolution involves other issues, such as differences in education structures (there is, at the time of writing, no solicitor apprenticeship in Wales) and rights to use the Welsh language.⁷

However, in the context of the protected characteristics, there are specific obligations on the Bar in connection with offers of pupillage and tenancy (s47). In any event, by s 149, a “public authority” must:

in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

By Schedule 19, such public authorities – in the context of England and Wales – include the LSB; higher and further education institutions; certain officials of the Inner and Middle Temple in their capacity as a local authority; and, in relation to their public functions:

- The Chartered Institute of Patent Attorneys;
- The Council for Licensed Conveyancers;
- The General Council of the Bar;
- The Institute of Chartered Accountants in England and Wales;
- The Institute of Legal Executives [now the Chartered Institute of Legal Executives];
- The Institute of Trade Mark Attorneys [now the Chartered Institute of Trade Mark Attorneys]; and
- The Law Society of England and Wales.

Organisations representing notaries and costs lawyers are not mentioned.

For the purposes of this consultation, however, it is important to note that the obligations on legal professions and their regulators under Legal Services Act 2007 (“LSA”), are more extensive. LSA, s 1(1)(f) creates a regulatory objective of “encouraging an independent, strong, *diverse* and effective legal profession” in England and Wales (s212) [our italics]. The LSB must, by s 3:

so far as is reasonably practicable, act in a way—

- (a) which is compatible with the regulatory objectives, and
- (b) which the [LSB] considers most appropriate for the purpose of meeting those objectives.”

Approved regulators, in their regulatory functions, have a mirroring obligation (s28). This obliges all regulators to pay attention to socio-economic inequality in England as well as

Wales, and to other matters, such as gender identity, gender expression, and accent,⁸ beyond the protected characteristics of the 2010 act.

2.2 Recognition, redistribution and affirmative or transformative approaches to increasing diversity

We think the focus of many of the diversity initiatives by the legal professions has been about increasing opportunities and reducing bias at the point of qualification. That is, they are about **redistribution** of opportunities and, sometimes, affirmative action. Whilst these are admirable, they do not necessarily address the whole picture and may in some circumstances move barriers to different parts of the system. For example, replacement of the training contract for solicitors with qualifying work experience that can be stitched together in up to four different jobs, internships and placements, was described as moving power “from employers to students”.⁹ However, if employers are reluctant to recruit from this group on qualification, the bottleneck has simply been moved from one place to another:

[w]ider range of choice is both an important opportunity to support diversity, since it will enable students to chart more flexible pathways, and a risk. It will make the routes to qualification harder to navigate, especially for those students without access to good advice, and a tiered system may become quickly apparent, because some legal employers will give continued (or possibly increased) currency to traditional pathways, through which high performing candidates have been recruited for many years.¹⁰

Whilst there are a number of diversity schemes, targeted generally, or, in law, at school and university students, or supporting qualification into a profession, there is no single definitive source of such schemes (although there are some attempts to create one).¹¹ It seems likely, therefore, such lists are incomplete and, in particular may not pick up smaller scale or regional opportunities¹² or be available for all the regulated legal professions. Although some access schemes are country wide, others may be more easily accessed by those in urban areas, especially London. Many aspiring lawyers are not portable:¹³ they have caring¹⁴ and other responsibilities. Their financial and other constraints mean that they commute even to university. We recommend, therefore, that regulators are specifically asked to report not only on *what* they are doing, but *where* they are doing it.

Redistribution of opportunities lends itself to negative liberty (removal of external constraints) and affirmative action. We invite the LSB and front-line regulators to think also about positive liberty, **recognition** of difference and transformative action enabling individuals and groups to exercise such opportunities. Positive liberty, in this context, is the work of removing or ameliorating the effect of internal constraints and barriers such as confidence, a perception that “the law is not for me”, the effect of weak schooling and finance and portability constraints:

...telling someone that they are ‘free’ to take up an opportunity that they cannot afford, did not know about or would not be recruited for renders the concept of freedom nugatory. In treating personal barriers as (merely) questions of capacity, the effect is to place blame for the incapacity on the individual, irrespective of its causes, whether these are social, political or economic or exacerbated by the academy, the regulator or the profession.¹⁵

It would be possible for the regulators to facilitate thinking about outreach and mentoring activities that support individuals to overcome such barriers in a more holistic and systematic way. Organisations such as Aspiring Solicitors,¹⁶ the Black Law Network,¹⁷ Bridging the Bar,¹⁸ Girls Network¹⁹ and Pathways to Law²⁰ do some of this work but cannot address the whole of the country or reach all possible potential lawyers.

For those already committed to a legal career, including law students, mentoring schemes are offered by affinity groups, for example, the Black Solicitors Network,²¹ Society of Asian Lawyers,²² and IP Inclusive.²³ Some law firms offer scholarships for aspiring lawyers from disadvantaged groups.²⁴ We note also that support schemes and scholarships for those interested in a career in access to justice work, whilst not necessarily targeted at this demographic, may be attractive to those experiencing socio-economic inequality.²⁵ We also note that such schemes are often targeted at entrants to the Bar and solicitors' profession only. The smaller professions, often with a much broader demographic, may have more accessible non-graduate and earn-while-you-learn qualification structures but, with the exception of IP Inclusive, do not necessarily offer explicit diversity access and mentoring provision in the same way.

The deliberately supportive and work-based structure of the apprenticeship -and its funding - may be attractive to those with experiencing socio-economic inequality in particular and apprenticeships have been used by way of affirmative action. Specific legal sector apprenticeships, as we noted above at 2.1, are not currently available in Wales. City Century, for example, provides apprenticeships in City law firms and conducts outreach across the country.²⁶ However, as we note in our answer to Q4a below, the removal of funding for some apprenticeships will have an adverse effect on diversity.

It has been noted, over years, that those from under-represented groups may experience difficulty in assimilating to the traditional culture of the legal professions once they have succeeded in entering it.²⁷ We therefore discuss issues, in our response, not only **getting in**, but to **getting on**, **getting out** and **getting back**.

If diversity is a strength, enabling greater trust in the professions, and an ability to communicate with and engage with the British public as a heterogeneous group, as well as a wider range of understandings and skills,²⁸ there are advantages in understanding and deploying the strengths brought by members of different groups. This may challenge the status quo. However, an approach which provides **recognition** of difference and works transformatively has the potential to strengthen the professions overall. There is an analogy here with the movement in education towards inclusive assessment.²⁹ Rather than making ad hoc and after the event adjustments for some individuals and not others, one seeks to design the assessment proactively from first principles so that it is open to as many as possible. Principles and examples of such practices are freely available and expertise in the further and higher education sector – and in some contexts in professional education – could assist regulators in assessment design.³⁰

Clearly, as law is a normative system, there are limits, especially in the field of ethics, for example, but regulators could, when considering competence statements and assessments, for example, build challenging of assumptions and **recognition** of difference into their plans as an integral part of the design, rather than by after the event equality impact assessment. This extends to assessments and the shape of competence statements and similar frameworks. To the extent that the latter are technical and task based, it is possible that they are comparatively neutral. Where they are based around attitudes, it is possible that these are affected by historical and unintended bias reflecting a traditional legal culture that is no longer appropriate:

Criteria of merit assume that there are objective measures and predictors of technical work performance independent of culture and normative attributes. But I argue that no such measures exist; job allocation is

inevitably political in the sense that it involves specific values and norms which cannot be separated from issues of technical competence.³¹

3. General responses

Q1a. Do you agree that these proposed outcomes will help to address the barriers to encouraging a diverse legal profession? Are there any further, or alternative, outcomes we should consider?

Yes, in part. The proposed outcomes may serve as an anchor point for further action. They are short and capable of adoption by front line regulators.

While the statutory obligation refers to a “profession”, a challenge for the LSB is that there is not a single profession in England and Wales, and that the professions are, by a different regulatory objective, mandated to compete with each other: “promoting competition in the provision of services” (LSA, s 1(1)(e)). Their diversity data, and the challenges they face in achieving greater diversity, are not homogenous.

In some respects, the Outcomes are configured to identify barriers to encouraging a diverse legal profession. The barriers have shifted over time, and the advantage of the configuration of Outcomes 1 and 2 is the focus on data collection and research. Some challenges in this area are often subtle in nature, and it will be necessary to track the shifting nature of the barriers over time. The data generated should then provide a focus (and foundation) on which to base regulatory action and to address the issues identified. Full engagement should take place with those already engaged in such research, in universities, other research groups and in the professions.

It also has to be recognised that diversity in the professions is a multifaceted issue, encompassing barriers to entry and cultural and organisational factors that may point to a latent exit trajectory. Data collection must, therefore, not focus only on **getting into** the professions,³² but on **getting on** (post-qualification employment, promotion, work allocation, mentoring and support etc.)³³ and also, **getting back** into the profession for those who leave. The experiences of those who leave or do not join can inform future action and are significant in understanding the pressures behind **getting out**, and the extent to which they are the result of lack of **recognition**, or of bias and discrimination. There is some work in this field, but it is not sector wide.³⁴

Q1b. Do you agree that the proposed outcomes should be pursued by regulators through a set of specific expectations?

Yes, provided consistent monitoring and accountability is built into the system. Given that a budget will be required to track the impact of the outcomes (and the success of the core and enhanced expectations), specific expectations will support investment in diversity and inclusion operations and, potentially, enforcement actions, if necessary.

Q1c. Do you agree that the proposed structure of core and enhanced expectations under the general outcomes offers an effective way to set a clear minimum standard for all regulators, while also encouraging regulators to consider additional steps, where appropriate?

To some extent, and subject to the comments we make on individual outcomes below. There is a risk of a regression to the mean, whereby professions devote what may be limited resources to compliance with the minimum standard and are not “nudged”, by the LSB or in competition with other front-line regulators, to what may be a higher standard (with or without expectations of accountability). It is possible that further guidance will be necessary to support the flexibility associated with the concept of the enhanced expectation.

At first glance, the enhanced expectations appear to be aspirational and in nature in support of the core objectives. However, there is also an implication that the enhanced expectations will be utilised when evidence indicates the presence of an intractable barrier or other issue. Greater clarity on the extent to which a regulator can move towards an enhanced outcome of its own volition, or on evidence, would be helpful, given the inevitable budgetary impact involved.

4. Outcome 1

Outcome	Summary of expectations
Outcome 1: Strategic, evidence-based and collaborative action	<p>Core expectations: regulators must implement high-quality diversity data monitoring, identify barriers through research and engagement, and publish strategic action plans with measurable goals. Collaboration with others in the sector is essential to harmonise data and share best practices.</p> <p>Enhanced expectations: regulators should also consider taking further steps to support a strategic, evidence-based and collaborative approach, including through horizon scanning, increased accountability, and involving stakeholders in shaping regulatory activities.</p>

Q2a. Do you agree with the proposed outcome 1?

Yes, subject to the following comments.

A fundamental benchmark for all professions is the demographics of the country – those being served by the profession and those who serve it as legal professionals. This will differ by region, and we recommend that evidence is collected and presented from a regional perspective wherever possible.

As indicated above, we think it is also important that data is captured, systematically and not only across all professions and regions (and across both private practice and in-house sectors) but also from those who leave.

Furthermore, some diversity data is relatively flat, in that it is quantitative in nature (perhaps obtained on practising certificate renewal) and may be limited in aspect. The consultation recognises the need for a qualitative approach to supplement the quantitative data. Regional diversity issues appear to be relatively underexplored, and the dominance of London as a legal centre may obscure persistent diversity and inclusion barriers in particular pockets, in both location and sector. Initiatives may also be London-focused and not able to translate into the remainder of the country without pro-active attention. Equally, however, small scale and local activity must be captured: it may be transferable to other regions and professions

or deliverable at scale. Practising certificate data analysis, together with associated diversity information, could provide a rich source of evidence on demographic shifts in work type and geographical location against various characteristics. A thematic analysis of the data could provide useful material to assist regulators in targeting additional support and resources.

The opportunity for collaboration should be embraced. Within the legal professions it is important to harmonise data (and to track trajectories between professions). Outside the legal professions, including the medical professions, where similar barriers exist, there is the opportunity to learn from initiatives that have had a demonstrable effect. If similar benchmarks, questions and analysis are agreed across all the front-line regulators, this will streamline response and facilitate comparability. The results will highlight differences between professions that can lead to further investigation. Some of those differences may also derive from non-obvious factors (for example, whether the demographics of patent attorneys correlate with those taking science subjects at university, or those of notaries with membership of the Church of England). Given the more limited resources of the smaller front-line regulators, collaboration in research design and implementation could provide not only harmonisation, but economies of scale.

Q2b. Do you agree that the proposed expectations will help regulators to pursue Outcome 1? Are there any further expectations beyond those we have included that would support regulators to pursue this outcome?

To some extent, subject to the following comments.

To ensure consistency across different regulators there should be an overarching framework and clear expectations that can be understood and used by each profession in a similar way. How each profession then approaches its implementation needs to be contextual, as their activities (albeit with significant overlaps in litigation, advocacy and conveyancing), culture and membership already differ significantly.

While collaboration is key and important, the core expectation seems to focus on only collaborating *within* the sector (see our answer to Q2a). We note that para 45 of the consultation document states that in other sectors such as health and social care, universal success factors for effective interventions have been found. It may be important to collaborate outside the sector, especially as some of the reasons for a lack of diversity occur before entering the sector (for example, in school and university) and other sectors may have identified means of addressing or ameliorating these factors. Research already carried out by universities or commissioned by law firms – such as the recent Bridge Group report on effective practice in socio-economic inclusion – provides useful insight.³⁵ Charities and other organisations offering access and diversity schemes, sometimes on a cross-sector basis, should also be involved. While diversity issues affect different countries in different ways, collaboration with authorities in broadly similar countries (e.g. Scotland, Northern Ireland, the Republic of Ireland) should also be considered.

Q2c. Are there any enhanced expectations that would be better placed under core expectations under Outcome 1? Are there any core expectations that would be better placed under enhanced expectations under Outcome 1?

Horizon scanning should be a core expectation. The legal, regulatory and cultural landscape of England and Wales is constantly changing. Individual lawyers will automatically keep

abreast of changes to the law in their substantive fields but may miss the implications of, for example *For Women Scotland Ltd v The Scottish Ministers*.³⁶ Treating this obligation only as an enhanced expectation could lead to failure to engage with it and its implications in full, leaving individual lawyers feeling unsafe and unsure of their place within the profession. Further, accountability seems to be a necessary correlate of activity, if the regulators wish to facilitate change.

Involving stakeholders, in particular from the affected groups, is, we think, a necessary component of developing a credible, effective and fully informed response that cannot be dismissed as well-meaning tinkering by those who are already privileged. This should be core.

5. Outcome 2

Outcome	Summary of expectations
Outcome 2: Fair regulatory approaches and decision-making	<p>Core expectations: regulators must ensure equality considerations in all regulatory policies, provide equality impact assessments during consultations, and support fair disciplinary processes through training, data analysis, and remedial plans. They should also safeguard wellbeing for those involved in enforcement.</p> <p>We have deemed all expectations developed under this outcome to be core. This is because the core expectations are all fundamental to the pursuit of fair regulatory approaches and decision-making. However, we encourage responses to our consultation that identify suitable enhanced expectations that can support the pursuit of this outcome which regulators should also consider adopting.</p>

Q3a. Do you agree with the proposed outcome 2?

Yes, in part. The focus should be transformative, considering both **redistribution** and **recognition** of difference as an integral part of design at the outset. As we indicated in section 2.2, equality impact should be core – separate assessments, especially if ex post facto, run the risk of being sidelined or ignored.

Integrating equality impact within the regulatory consultation process should also enable the professions to integrate the requirements within their own operational frameworks. In this respect, it may be helpful to consider additional wording to refer to a fair and compassionate enforcement strategy consistent with the maintenance of professional standards and ethical conduct. Inevitably, disciplinary processes result in negative wellbeing impacts for those involved. However, equality impact assessments should consider ways in which the process can be rendered fair and compassionate to the individuals concerned, especially when there is evidence that certain groups, such as junior solicitors, may lack sufficient funds or insurance to instruct representatives to protect their interests.³⁷

Guidance might be helpful here to identify the kinds of policies and processes that could be engaged. Some will be obvious, but others, such as the impact of biased work allocation processes on the career progression of women and other groups,³⁸ may require highlighting.

We note the comments at paragraph 104 of the consultation paper. There is a risk that the SRA's current approach to disciplinary and enforcement undermines a healthy and inclusive

professional environment. Many cases have been reported which seem to involve disproportionate action against individuals who have been wrongly accused or have made genuine mistakes (and there has been no detrimental impact).³⁹ We are also concerned about examples of those who make errors of judgement, particularly those at early stages of their career, where the error in judgement has, in whole or in part, been caused by long working hours, billable target pressures, mental health pressures and/or fear of losing their employment.⁴⁰ Whilst dishonesty or misconduct needs to be dealt with, (publicly) ending careers and causing significant personal distress⁴¹ - often over very lengthy periods of time - particularly in less serious cases where there appear to be significant mitigating circumstances, including remorse and insight, appears to be unfair and/or disproportionate, as there is a lack of trust and confidence in the system. The LSB, front-line regulators and disciplinary bodies should be concerned to address systemic issues and problematic cultures. To the extent that there appears to be a culture of going after the low hanging fruit, this will build a culture of fear and could inhibit transparency and openness, none of which are conducive to a healthy and professional environment and are likely disproportionately to impact some groups more than others. Reported cases, for example, often seem to involve young women.⁴²

Data analysis of the disciplinary process, including structural issues, such as the makeup of disciplinary tribunal staff and membership is also required. The most recent figures published by the SDT point to a significant age and marginal gender disparity between the members of the tribunals and the practising profession, with some limited improvement in racial diversity.⁴³ In addition, internal disciplinary processes within law firms and other entities should mirror the need for balance and a commitment to fair and compassionate decision making.

This outcome, like outcome 4 below, can be configured as a governance risk, and appropriate resources allocated to training, data collection and analysis as a result.

Q3b. Do you agree that the proposed expectations will help regulators to pursue Outcome 2? Are there any further expectations beyond those we have included that would support regulators to pursue this outcome?

Yes, however, the need to support fair disciplinary processes through training, data analysis, and remedial plans, as well as the need to safeguard wellbeing, will be more challenging.

First, although initiatives such as that pursued by the GMC in relation to diversity issues relating to Fitness to Practice Referrals, the context of the legal sector, within the private sector for the most part, must also be considered. Second, there will be a need to fund large scale studies of disparity in disciplinary referral and action. Given the nature of self referral and firm referral in the legal sector, within compliance plans, there should be a requirement to facilitate some form of self reflection on the part of a referring employer, for example, of EDI requirements. Perhaps this could include consideration of similar cases and action taken. This requirement for compliance offices could be part of training, with a suitable audit of reactions to it. The GMC noted a reluctance on the part of organisations to invest in interventions to track evidence or evaluate good practice.⁴⁴

Third, there should be a requirement to engage with those who have been involved in the regulatory process. This is difficult as they may not wish to cooperate with any part of the disciplinary process and, as the Solicitors' Disciplinary Tribunal notes, there is "low

engagement in this area”. However, agreed outcomes may, in the first instance, provide useful data for analysis in terms of diversity impact, wellbeing, and support. This should extend beyond the protected characteristics listed in the 2010 act.

Finally, there is a disparity within the disciplinary sector which relates to socio-economic inequality and a lack of funded independent legal advice for non-owner lawyers. This issue has been an issue for many years, exacerbated by the removal of cover for defence costs of disciplinary tribunals for all solicitors from 2010. Whilst there is limited support available in the form of guides,⁴⁵ there is a systemic inequality of arms inherent in some regulatory action against lawyers, as noted in evidence submitted in an SRA commissioned report on the first year of the SRA Standards and Regulations 2019.⁴⁶ The fact that disciplinary defence costs are usually excluded from professional indemnity policies perpetuates a situation in which the wellbeing of those involved in a disciplinary action cannot be safeguarded. This potential lack of equality in terms of financial and legal resources, however, is a latent diversity problem associated with the disciplinary context.

Q3c. Are there any enhanced expectations we could set for regulators to pursue Outcome 2?

Consideration should be given to cross-disciplinary collaboration on successful interventions in promoting fairness in disciplinary contexts.

6. Outcome 3

Outcome	Summary of expectations
Outcome 3: Accessible, flexible and inclusive pathways into and through the profession	<p>Core expectations: regulators must ensure qualification routes and training standards promote diversity while maintaining professional standards. They should publish clear information on costs and outcomes to aid informed choices.</p> <p>Enhanced expectations: regulators should also consider publishing disaggregated outcomes data, gathering data on education backgrounds, and encouraging firms to offer inclusive training and work experience opportunities.</p>

Q4a. Do you agree with the proposed outcome 3?

Yes, however we must recognise that there are significant factors that create different diversity impacts before entry into a professional qualification route (whether that begins at 16 or later). Outreach work by organisations such as those we mentioned in section 2.1 and by individual affinity groups and representative bodies, front-line regulators, schools and colleges and by individual firms and lawyers, is necessary to raise awareness of the existence and nature of the different professions and to encourage a perception that joining one of them is possible for them. This inhibits them from taking the first step, let alone competing with more privileged peers who already have the knowledge, cultural and social capital to consider legal practice as a career. Such schemes may, as we have said above,

be piecemeal, and not straightforward to locate, but they can be transformative for individuals who find them:

I never seriously considered law when I was at school. To be honest, it felt like something reserved for other people - the kind who went to Oxbridge or came from families that just expected them to become barristers or judges. That didn't feel like me. ...

Law is not just for those with connections or a particular postcode. It's for anyone with commitment, resilience and a desire to make a difference. It strengthened my motivation and reminded me that I *do* belong in this space.

These schemes used to feel like insider knowledge - something people just knew about if they were already in the loop. But now I feel much more prepared to apply.⁴⁷

It is also noted that the removal of apprenticeship funding for those under 21 is a backwards step in terms of improving accessible routes into the legal profession.⁴⁸ This is all the more pertinent as SRA SQE data indicates that apprentices out-perform those on the more traditional routes and are more likely to be experiencing socio-economic inequality.⁴⁹

As we have said above, diversity access schemes exist, and individual employers may be attentive to diversity issues in recruitment: the challenge for the individual aspiring lawyer is finding out that such schemes exist, how to apply for them and whether they operate in their own region.

“Professional standards” should be carefully interrogated to ensure they do not embed inappropriate biases. Inclusive assessment approaches should be adopted, as far as possible.

The issue of flexibility and inclusivity of those wishing to return to legal practice, or the legal profession, is also of relevance to Outcome 3. If **getting in** and **getting on** are important, **getting back** is also an issue, especially given the potential attrition rate amongst newly qualified lawyers.⁵⁰ There is a potential role for regulators to interrogate the rationale behind a move away from the law at the point at which a practising certificate, or equivalent, ends. Much will depend on the individual, but centralised data beyond exit interviews with employers or other entities would be useful. The same is true of a return to the profession. Often, the language may be one of a career break in terms of **getting back** recruitment, but it is important to understand some of the obstacles associated with navigating a way through the profession, especially for those charting a way back, potentially after experiencing issues which may be linked to a protected characteristic under the 2010 act.

Flexibility should also be promoted between different legal professions, and so the harmonisation of data and its collection, especially in this area, should be considered as an essential element. The same is true for those working in house, who may not always appreciate that they have developed some of the knowledge and skills central to legal practice. They do not perceive themselves as lawyers but may also fall within a demographic linked to the statutory protected characteristics and other inclusivity imperatives, such as socio-economic origin.

Q4b. Do you agree that the proposed expectations will help regulators to pursue Outcome 3? Are there any further expectations beyond those we have included that would support regulators to pursue this outcome?

Yes, to a certain extent, however research has found the importance of role modelling, visibility and representation in increasing diversity within different sectors.⁵¹ Ensuring regulators refer to and use such data, can help those who are marginalised see a pathway to the legal professions. We are aware, from our experiences with students, and our research on accent bias at the Bar⁵² that students (and others) opt out, or self-limit because of their own feelings that they are unlikely to be successful in applications or will not “fit in”.

Further, beyond the core expectation to “publish clear information on costs”, an enhanced expectation might include “taking steps to reduce costs”. At present, clear information on the real costs of qualification tends to (quite understandably) simply discourage those of lower means. For example, for criminal law, it has been demonstrated via quantitative research that lack of funding for the SQE negatively affects student intentions to work in legal aid firms, “particularly among working class respondents”.⁵³ Whilst there are some schemes that seek to reduce or ameliorate this, for some, as we have said above, these can be challenging to locate. They will also not reach those who have already been put off.⁵⁴ Reporting on availability, scope and take-up of diversity schemes would be helpful, but will require liaison with the various organisations, some of which are outside the legal sector, to provide a complete picture.

More work could and should be done around parity of routes into the legal profession not only in terms of cost and standards, but on status. There continues to be stigma and negative hierarchical implications of routes such as CILEX, for example. The impact of the *Mazur* case has reinforced this.⁵⁵ As CILEX has a strong profile amongst those experiencing socio-economic inequality in particular,⁵⁶ this has a direct impact in terms of improving diversity within the legal professions.

As to paragraph 75 of the consultation paper – the decision not to authorise; regulate or even require SQE preparation courses somewhat waters down this point. In addition, when making relevant information publicly available this needs to be nuanced to take EDI into account. There appears to be a lack of publicly available data around those self-funding the SQE and who do not have the benefit of being supported by large firms that have dedicated teams to support trainees/SQE candidates.⁵⁷ It is noted that those self-funding the SQE also incur costs for travel, and potentially accommodation.

As we have noted elsewhere, there is an issue about London-centricity of diversity scheme offerings. Regulators could help with encouraging further initiatives that have a wider reach and wider participation. Collaboration between regulators could assist in the creation of shared diversity schemes supporting both **getting in** and **getting on** in all professions.

Q4c. Are there any enhanced expectations that would be better placed under core expectations under Outcome 3? Are there any core expectations that would be better placed under enhanced expectations under Outcome 3?

All of them:

All published data should be disaggregated as far as possible. At the **getting in** stage, such data should show application, offer and appointment so that the potential for disparity in

conversion rates can be examined. This would prevent employers (in which we include chambers in relation to applications for tenancy) publicising EDI progress in terms of application – which is comparatively easy to achieve - whilst glossing over EDI differentials in actual employment. Such data should not be limited to protected characteristics but also include socio-economic and educational background. This would help to assuage concerns that employers are ticking the EDI ‘box’ by hiring juniors from the same social strata with single EDI characteristics e.g. ‘female’ or ‘ethnic minority’. This blurring by employers of the concept of social mobility with that of workforce diversity has been described as “ a cunning substitute for meaningful organisational change in relation to the class profile of its recruits”.⁵⁸ Ashley puts it even more pithily: “It seems that in the City, people can be different as long as they are the same”.⁵⁹

Large commercial law firms have, as we have noted, established and well publicised EDI outreach initiatives. However, as noted above, the extent to which these initiatives feed through to the hiring stage (i.e. final interview) remains an open question. There is a power imbalance between firms’ recruitment professionals (many of whom are driven/incentivised to prioritise EDI) and partners (who may have other concerns), with the latter typically having the final say on who gets hired. More robust safeguards than simply requiring partners to undertake unconscious bias training (the efficacy of which, as we noted in our answer to Q5a below is disputed) will be required if recruitment practices are to become truly equitable. Additional longitudinal data on recruitment in law firms, especially at the 18-month to two-year point, may be instructive as to the potential volatility in long term retention rates post qualification to track any pattern of **getting in** but perhaps not staying in (**getting out**).

Despite guidance from professional bodies,⁶⁰ unpaid work experience continues to proliferate at the regional (mostly the small firms) and high street levels. Law firms are exploiting the grey area around unpaid internships to avoid financially compensating work experience participants. This activity goes largely unseen, promoted – as it is – informally via solicitors’ own networks and/or law school contacts. Irrespective of their legality, short unpaid experiences are inequitable. We note that the LSB, Bar Council, ICAEW and Law Society have subscribed to cross-professional best practice guidance on internships.⁶¹ Clear guidance from the LSB to the legal sector as a whole on expectations would also be welcome. A related point is that while all of the legal professions require some work experience as a precursor to qualification, it is not always necessary that it is paid: qualifying work experience for the solicitors’ profession is a case in point.

Many large legal graduate recruiters now offer insight, mentoring and/or work experience schemes targeted at groups historically underrepresented in the legal professions. We have noted above some examples of firms doing so by partnership with specialist third-party organisations and charities.⁶² Still, too much of this outreach/recruitment activity focuses on undergraduates, and those in their first two years of study. It is less likely to involve non-graduate professions and routes, although we recognise that there is some activity with schools. Students from marginalised groups, including those with caring responsibilities and those taking on significant employment obligations to fund their studies, are less likely to be alert to the conventions of early careers recruitment in the legal sector or to have the luxury of time to engage with prospective employers at this major point of transition. Employers who are serious about advancing social mobility would thus be well-advised to introduce

additional entry points to the graduate recruitment process in the final year and for students self-funding the SQE (and other professional qualifications).

In their outreach activity and materials, large law firms make much of their organisational ‘cultures’. An approach emphasising **recognition** of difference would lead to examination and change in traditional cultures. However, the research suggests that pre-existing cultural capital is constructed and rewarded in “fields within fields” and that hiring managers prioritise recruiting to the “specific cognitive, social and moral contours”⁶³ of their existing teams.⁶⁴ This raises the possibility that candidates lacking prior, privileged exposure to professional environments are being sold a ‘dummy’. Even in a context emphasising **redistribution** of opportunity, if employers were to shift the focus and provide more opportunities for candidates to gain insight into the functioning of individual teams/departments (e.g. in the form of short videos), this might enable them to perform better in recruitment processes, particularly the latter stages.

The Bar has also developed multiple resources to support EDI initiatives,⁶⁵ but the extent to which they make a difference at the point of recruitment to pupillage and tenancy is variable. In a recent report, the Bar Council noted, “we see a pattern of inequality of outcome at all stages of recruitment and progression” despite evidence showing increased diversity.⁶⁶ The work of charities such as Bridging the Bar points to a need for support for candidates seeking pupillage beyond initiatives from individual barristers or sets of chambers.

Q4d. Are there any additional expectations, either core or enhanced, we should set under Outcome 3 to reduce barriers faced by authorised persons when moving between and/or re-entering the professions (e.g., following a prolonged absence from practice for health, caring or other reasons)?

While everyone has the possibility of having a prolonged absence, this disproportionately impacts women.⁶⁷ There needs to be an understanding of their needs upon their return alongside assurance that they will be supported. Initiatives such as the Law Society’s Back to Law Ambassadors scheme,⁶⁸ and Inner Temple’s returners programme⁶⁹ should be supplemented through systematic and sector-wide qualitative data collected from those returning to, or transferring between professions. It is possible that experience of discrimination may lead some lawyers to transfer not only between employers, but between professions: this should be explored. Attention to returners and transferees should appear in the statement of the core expectations.

Supporting those **getting back** into the professions also involves possible subsidies for returners’ courses, or reduction in practising certificate fees for the first year after return. Consideration should also be given to a quality mark for legal recruiters and HR professionals within the sector in relation to EDI based recruitment for those returning to the legal professions after a break.

7. Outcome 4

Outcome 4: Professional conduct and competence	<p>Core expectations: regulators must embed duties in codes of conduct to prevent discrimination and promote respect, supported by guidance and competence frameworks requiring ongoing development in equality and inclusion. Regulators must also introduce additional conduct and competence standards for managers to foster healthy and inclusive workplace cultures.</p> <p>Enhanced expectations: regulators should also consider encouraging and supporting firms to adopt inclusive leadership practices and strategic plans for diversity.</p>
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Q5a. Do you agree with the proposed Outcome 4?

Thirteen years ago, the Legal Education and Training Review made the following recommendation (our italics):

Recommendation 9

Learning outcomes should be developed for post-qualification continuing learning in the specific areas of:

- Professional conduct and governance
- Management skills (at the appropriate points in the practitioner's career. This may also be targeted to high risk sectors, such as sole practice).
- *Equality and diversity (not necessarily as a cyclical obligation)*⁷⁰

This has not been implemented across the sector, although the BSB requires fair treatment training of members of selection panels;⁷¹ and regulators may require EDI training of their own staff.⁷² To the best of our knowledge, none of the front-line regulators have implemented the LETR recommendation. We are aware that there are mixed views on the efficacy of “unconscious bias” training, and that there is a risk that such explicit activities are superficial in delivery; treated as a mere “tick box”; become stigmatising or counterproductive. It is also important that they are delivered by and engage with those with real experience of the issue. However, efforts should be made to ensure that training resources are made freely available to all firms so that there is not a financial impact for small firms, legal aid practices, etc., that have limited resources and budgets.

We agree (paragraphs 101 and 102 of the consultation paper) that there are different approaches to reflection (including whether the term “reflective practice” refers to “reflection in action” by contrast with “reflection on action”).⁷³ Clarity of definitions will be key. The legal professions’ competence statements already contain references to reflective activities, as do those approaches to continuing competence that use a cyclical model rather than relying simply on inputs. We recommend the considerable work done by Dr Michele Leering in this context in the context of the legal profession.⁷⁴

Q5b. Do you agree that the proposed expectations will help regulators to pursue Outcome 4? Are there any further expectations beyond those we have included that would support regulators to pursue this outcome?

Policies, statements and outcomes will be effective only if underpinned by full understanding of EDI, and where those responsible for them are rendered accountable for their impacts not only on individuals but also on the professions and their public perception. Otherwise, nothing will change and the promises of this activity will be empty.

Given that data collection and enforcement may be challenging, there is a missing, and essential, element in the Core Expectations: a link to specific EDI risk and governance

issues. Any EDI strategy will need to fulfil a dual purpose, in terms of reducing litigation risk associated with employment contracts and conduct issues. Until EDI is configured as an organisational risk with budget allocation and individual conduct and professional compliance obligation, the potential for it to become isolated within overall strategy plans is significant. The specific requirements for managers in relation to EDI should link to decisions made on available data, including, to the extent that it is possible, the extent to which EDI policies have been successful in terms of recruitment and progression, as well as scrutiny as a result of complaint or other litigation. Configuring EDI as a specific governance risk, with associated remedial action, may move the dial towards the core expectation as a positive duty to “prevent discrimination”, with the need to review based on evidence, which may result in greater financial spend to meet the demands of greater financial scrutiny. The recognition of the integration of EDI as both a governance risk and a conduct obligation is implicit, but explicit articulation may assist organisational buy in. It may also help regulators to obtain additional data on EDI as a thematic governance risk within different contexts in terms of profession, location, and work type.

Q5c. Are there any enhanced expectations that would be better placed under core expectations under Outcome 4? Are there any core expectations that would be better placed under enhanced expectations under Outcome 4?

Encouraging and supporting authorised firms to promote diversity in leadership and inclusive leadership practices needs to be core. We know that the demographics of the senior levels in the professions are not yet consistent with those of the professions as a whole.⁷⁵ This means that those charged with the implementation of diversity policies in legal services organisations may not have the full experience and understanding required unless they have the resources to buy it in (or are able to create such policies collaboratively with their workforce). This will inhibit them from creating, revising and maintaining such policies, without help. A default whereby members of the less privileged groups are expected to take on the (additional) workload of responsibility for diversity should, however, also be avoided. Leadership from the LSB, front line regulators and affinity groups will be needed to help individuals and organisations implement good policy at their local level.

8. Final questions

Q6a. Do you agree our proposed timelines for implementation are achievable?

We have no comments on this point.

Q6b. Are there any reasons why a regulator would not be able to meet these milestones? Please explain your answer.

We have no comments on this point.

Q6c. Do you have views on whether and how the LSB could take additional steps to support compliance with the proposed statement of policy (e.g., through either formal or informal outputs, such as guidance and/or other relevant resources)?

We have made some suggestions in our text above.

Q7a. Have you identified any equality impacts (both positive and negative), we haven't considered which, in your view, may arise from our proposed statement of policy?

Qualitative data collection is key but must be designed and operationalised in a meaningful - and often trauma-informed - way to avoid harm to the groups under investigation.

We know that much work around equality tends to fall to women, racially minoritised, disabled and other marginalised communities. It will be necessary to ensure that members of such groups are not expected to take on the (whole) workload of data collection and EDI initiatives, though their involvement is crucial.

Although transferees into the professions are mentioned, they could be from outside England and Wales. It will be important to understand the experiences of those qualified outside the jurisdiction.

Q7b. Do you have any evidence relating to the potential impact of our proposals on specific groups with certain protected characteristics, and any associated mitigating measures that you think we should consider?

We have no comments on this point other than to say that the obligations under the LSA are not limited to those with the "protected characteristics" listed in the 2010 act.

Q7c. Are there any other wider equality issues or impacts that we should take into account and/or any further interventions we should take to address these in our proposed statement of policy/

We have made proposals that relate to wider issues in our responses above.

Q8. Do you have any comments on the potential impact of the draft statement of policy, including the likely costs and anticipated benefits?

No.

Q9a. Do you have any comments on how the LSB, either independently and/or in partnership, might develop further measures alongside the proposals set out in the consultation to encourage a diverse profession?

As we said above in answer to Q 2b, work with other agencies, including those already working in diversity in the legal (and other) professions will be of benefit. This extends to work with those researching into the field, in law and elsewhere to investigate approaches taken by other professions, legal and otherwise, in the UK and elsewhere.

Q9b. Do you have any views on whether the LSB could take additional steps alongside setting expectations for regulators in the draft statement of policy to encourage a diverse profession? If yes, please share your reflections on the most appropriate and potentially effective routes the LSB could take to achieve this.

Facilitate joint activity and collaboration between the regulators, using its convening power.

Q9c. Do you have any further comments on our proposals that you would like to share?

The key to fully inclusive legal professions, in all their policies, practices and activities, goes beyond mere before the event or after the event regulation. It requires reflection, introspection, attention to what has worked elsewhere, and a willingness to embrace **recognition** of difference. Important as it is, this involves culture change that goes beyond **redistribution** of opportunities.

9. Closing comments

Thank you for the opportunity to respond to this consultation. If we have raised any points that you would like us to clarify or expand, please do not hesitate to contact us.

10. Endnotes

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