



RESPONSE ON BEHALF OF FREEBAR TO BSB CONSULTATION ON A POSSIBLE CHANGE TO DIVERSITY MONITORING RULE

Introduction

1. FreeBar welcomes the BSB's consultation and the opportunity to comment on the BSB's proposals to remove the restriction on the publication by Chambers and BSB entities of sexual orientation monitoring data. (This response does not comment on the BSB's associated proposal in relation to religion or belief, on which FreeBar takes no position.)
2. In broad summary, FreeBar supports the proposed change to the current rule, not only in the interests of enhanced disclosure and transparency, but for the more fundamental reason that this will promote the Bar as a visibly inclusive workplace for barristers and staff.

About FreeBar

3. FreeBar was launched in February 2016. It is a charitable organisation that aims to foster inclusion and support for LGBT+ people who work at and for the Bar.
4. FreeBar's charitable purposes are the promotion of equality and diversity for the public benefit by:
 - (1) the elimination of discrimination on grounds of sexual orientation or gender identity;
 - (2) advancing education and raising awareness of equality and diversity;
 - (3) promoting activities to foster understanding between people of different sexual orientations and gender identities; and
 - (4) cultivating a sentiment in favour of equality and diversity;among current and prospective barristers and people who work alongside them.

5. FreeBar aims to achieve these purposes through (among other means):
 - (1) connecting LGBT+ people and allies and providing a forum of mutual support;
 - (2) raising awareness of LGBT+ equality and diversity issues specific to the Bar; and
 - (3) sharing best practices on workplace inclusion.
6. Approximately 203 barristers and Chambers staff have signed-up for FreeBar's mailing list, which distributes information that may be of interest to LGBT+ people and their allies. The organising activities of FreeBar are conducted by a smaller sub-set of members who have expressed an interest in doing so. Both the mailing list and participation in organising work are open to anyone who supports FreeBar's purposes.
7. FreeBar is currently in the process of establishing a website. Its costs in that regard have been generously supported by financial contributions from the Criminal Bar Association, COMBAR, the LCLCBA, the Legal Practice Management Association and Brick Court Chambers. This document is filed on behalf of FreeBar alone.

Question 1: Do you agree with the proposed change to the diversity data monitoring rule above? Please explain your answer.

8. FreeBar agrees with the proposed change.
9. FreeBar is concerned that the current effective prohibition on publication of sexual orientation monitoring data (absent unanimous consent) means that barristers and staff in Chambers who identify as LGBT+ are rendered invisible, both to other existing members of Chambers and staff and to those who may have an interest in joining Chambers as prospective pupils/trainees or staff, as well as to users of Chambers services such as prospective clients. This tends to perpetuate the unhelpful perception that Chambers are not inclusive workplaces that welcome LGBT+ individuals.
10. A study, believed to be the first of its kind, was published in September 2017 by researchers at the University of Westminster and University College London

seeking to conduct an empirical exploration of the experiences of LGBT+ barristers in England and Wales.¹ One of the issues identified in the study was that, according to the BSB, only 31.8% of the Bar gave a response to the sexual orientation monitoring questions in the BSB's diversity monitoring exercise in 2016 (even though "*prefer not to say*" is counted as a response). This contrasted with much higher response rates in relation to gender and ethnicity. It is reasonable to infer that one of the reasons for the low response rate in relation to sexual orientation is the fact that currently such data is not currently published on a Chambers-by-Chambers basis.

11. FreeBar believes that one way in which Chambers can make clear, both internally and to outsiders, that it takes diversity and workplace inclusion seriously is through the commitment shown by its members and staff to the diversity monitoring exercise. At present, however, the non-publication by Chambers of sexual orientation monitoring data prevents Chambers from being able to demonstrate that commitment. Equally, this prevents interested parties (including existing members and staff, prospective pupils/trainees, new staff recruits and potential clients) from forming a judgement about whether low response rates in a given set of Chambers may cast doubt on that set's commitment to workplace inclusivity.
12. Either way, the publication of data concerning sexual orientation by Chambers is likely to result in improved response rates. It would, of course, remain open to respondents to choose "*prefer not to say*" as their preferred response. Such a response would, in itself, constitute useful data.
13. The current low response rates concerning sexual orientation also renders it difficult to assess the true extent of participation by LGBT+ individuals across the Bar as a whole. The aggregated data published by the BSB for 2016 suggests, for example, that there are no women with the rank of QC who identify as gay or lesbian. This is not true, and it may well be that other aspects of the data currently available underestimate the contribution made by LGBT+ individuals to the life of the Bar. Alternatively, if accurate data were available

¹ Marc Mason and Steven Vaughan, *Sexuality at the Bar: An Empirical Exploration into the Experiences of LGBT+ Barristers in England & Wales*. Copy available at <https://www.scribd.com/document/359839399/Sexuality>.

and suggested that LGBT+ individuals were under-represented at the Bar, this would be a cause of concern and would justify further work being undertaken to remedy the situation. Either way, the importance of high quality data is apparent, and this too militates in favour of changing the rules in a way that is likely, in FreeBar's view, to result in improved response rates.

14. Apart from the utility of the proposed rule change in increasing the quality of the data available, both for individual Chambers and across the Bar as a whole, FreeBar believes that the proposed rule change is also significant in the signal it sends as to the Bar's view of sexual orientation. The current rule, though it may originate in a concern to protect vulnerable individuals, risks giving the impression that identification as LGBT+ is not a matter fitting for open publication. The proposed rule change, by contrast, is capable of sending the signal that LGBT+ identification can be a source of pride. FreeBar believes that this is likely to promote culture change at the Bar and continue the necessary process of rendering the Bar an inclusive place to work for barristers and those who work alongside them who identify as LGBT+.

Question 2: Would the suggestions at paragraph 15 be appropriate and sufficient guidance for chambers and BSB entities? Please explain your answer.

15. FreeBar agrees with the proposed guidance in paragraph 15 of the consultation, save that it is not presently clear to FreeBar how a Chambers might have "*justifiable reasons*" for not publishing sexual orientation data even if there is no risk of individuals being identified. It would be unfortunate if a vaguely worded carve-out of this kind were used to undermine the proposed rule change. The guidance should make clear, therefore, that the BSB will require any compelling justification for the non- publication of sexual orientation data based on "*exceptional reasons*".

Question 3: Do you agree that there are potential benefits and challenges as described above? Are there any additional potential benefits or challenges to the proposed rule change? Please explain your answers.

16. FreeBar agrees with the potential benefits identified by the BSB in the table at paragraph 16 of the consultation. Although there may also be potential

challenges, these are largely of an administrative nature, and FreeBar firmly believes that the potential benefits far outweigh the potential challenges.

Question 4: (a) Do you think that different considerations apply to the publication of, respectively, SO and RB data? (b) Should different approaches be taken to the publication of each set of data? (c) If so, how should the approach differ for each characteristic?

17. As set out above, FreeBar's response is limited to the publication of sexual orientation data. FreeBar takes no position on publication of data relating to religion or belief.

Other matters

18. Although falling outside the scope of the present consultation, FreeBar supports the suggestions which it understands will be made in Stonewall's response in relation to the need for the Code of Conduct to identify gender identity as a protected characteristic, and regarding the collection of data about gender identity at the Bar.

19. FreeBar also supports the views expressed by Stonewall as to how the BSB's current diversity data questionnaire may be better expressed in accordance with prevailing best practice.

20. If the BSB would like any further information or clarification from FreeBar in relation to this response, please contact Conall Patton of One Essex Court at cpatton@oeclaw.co.uk.

4 July 2018