

# Going Public: Diversity Disclosures by Large UK Law Firms

By Dr Steven Vaughan

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Dr Steven Vaughan, CEPLER's Director of Education - [s.vaughan@bham.ac.uk](mailto:s.vaughan@bham.ac.uk) or  
Lesley Griffiths, the CEPLER Administrator - [l.griffiths.1@bham.ac.uk](mailto:l.griffiths.1@bham.ac.uk)

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# GOING PUBLIC: DIVERSITY DISCLOSURES BY LARGE U.K. LAW FIRMS

*Steven Vaughan\**

## INTRODUCTION

The Legal Services Board (LSB) has been the parent regulator of legal services in England and Wales since 2009. Born of the wide-ranging reforms introduced by the Legal Services Act 2007 (LSA), the LSB is tasked with promoting the regulatory objectives contained within the LSA, including “encouraging an independent, strong, diverse and effective legal profession.”<sup>1</sup> In July 2011, the LSB introduced a rule requiring the collection of data on workforce diversity and the publication of that data by the legal profession. This was the first—and indeed, is the only—direct regulatory intervention taken with regard to diversity in the legal profession.<sup>2</sup> The LSB’s reporting rule forms the heart of this Article.

Three arguments are put forward in this Article. The first is that the LSB’s rule was not necessary, as the majority of large law firms in the United Kingdom were already disclosing, without regulatory intervention into the market, some diversity data. The second is that, even if there were good grounds for the LSB’s rule, it was likely to face significant challenges. This is for three reasons: (1) scholarship on diversity in legal practice paints the issue as complex, multifaceted, and nuanced (something not easily amenable to change via a reporting rule); (2) there is little evidence from the fields of corporate social responsibility and corporate governance to suggest that reporting rules have significant impact on the behaviors of regulatees; and (3) the work on demand-side diversity pressures in the legal profession suggests that clients will not hold firms accountable.

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\* Lecturer in Law, University of Birmingham; Director of Education, Centre for Professional Legal Education and Research. I am very grateful to Catherine Price, Lloyd Brown, and Alastair Young for their research assistance on different aspects of this Article over the last four years. I am also grateful for feedback on an earlier draft of this Article from participants at *The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective* Symposium held at Fordham University School of Law, and for comments from Chris Handford (Legal Services Board), Richard Moorhead (University College London), and Crispin Passmore (Solicitors Regulation Authority). The usual disclaimer applies. For an overview of the symposium, see Deborah L. Rhode, *Foreword: The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective*, 83 FORDHAM L. REV. xxxx (2015).

1. Legal Services Act, 2007, c. 29, §§ 1(f) & 3(1) (U.K.), available at [http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga\\_20070029\\_en.pdf](http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf).

2. “Direct” as opposed to the general equality and diversity obligations imposed via the various codes of professional conduct.

The third argument in this Article is that the operationalization of the LSB's reporting rule has left much to be desired. The aggregated diversity data presented by the regulators is blunt and lacks statistical sophistication, and the regulators have done little with the data they have gathered. There has been little significant change in the behaviors of law firms with regard to the diversity make-up of their firms since the introduction of the reporting rule, but it is still early. There has been, however, significant improvement in the disclosure of diversity data on the individual law firm level (a more than 25 percent increase on firms ranked 11–15 and 51–100), and, in particular, with regard to the disclosure of data on the socioeconomic background of those working in the legal sector (whereas previously the disclosures were largely focused on gender and ethnicity). These three arguments are underpinned by two separate empirical data sets on law firm public diversity disclosures: one gathered for this Article in late 2010 from law firm websites (i.e., before the LSB's reporting rule had come into operation) and the second gathered from law firm websites for this Article in the summer of 2014 (i.e., after the rule had been in effect for three years). While it may be too early to form a definitive rule on the impact of the reporting rule, it is nevertheless important to take stock of where the rule came from, why it was introduced, and what has happened thus far.

The remainder of this Article unfolds in five parts. Part I begins by setting out the empirical data that was gathered in 2010 in which large law firms reported on workforce diversity data. Part II then charts the introduction of the LSB's reporting rule. Part III looks at why we regulate and challenges the introduction of the LSB's rule against some of the common reasons for state intervention into the market. Part III also draws on corporate governance literature explaining why transparency and reporting are promoted and argues that these justifications simply do not apply in the context of large law firms. Drawing on the wide literature on diversity and inclusion in the legal profession, this part also challenges the potential for a simple reporting rule to address the complex issue of diversity in the legal workplace. Part IV considers how the LSB's reporting rule has been operationalized. Finally, Part V sets out the empirical data gathered from law firm websites in 2014. It compares this data with that gathered in 2010.

While I am not in favor of a reporting rule as a response to the issues of equality and diversity in the profession, the rule is admittedly a step in the right direction in that it signals the interest of the regulators in moving toward better and greater equity and inclusion. It is also important to note that the regulators do not offer up the reporting rule as a panacea, but as one part of a response. The scope of the rule, however, and its operationalization could be better implemented. As such, the final part of this Article offers up five potential changes that would make the LSB's approach to diversity more effective.

## I. THE STATE OF PLAY IN 2010

This part presents an overview of the diversity profile of the legal profession in 2010 together with the results of a review conducted in late 2010 of the websites of the top sixty-nine U.K. law firms with regard to their disclosure, or non-disclosure, of workforce data. Data was collected from law firm websites (where the vast majority of workers are solicitors, as compared with other legal professionals) for two reasons: first, solicitors represent the largest branch of the legal profession in the United Kingdom;<sup>3</sup> and, second, law firm websites were—and are—far more developed and held far more data than the websites of, say, barristers' chambers. As such, this Article primarily focuses on solicitors, law firms, and the regulator of those lawyers, the Solicitors Regulation Authority (SRA). It is worth noting here that the regulators, the LSB and the SRA, have responsibility for, and are interested in, more than 10,000 law firms in England and Wales. As such, this Article is but a snapshot of what we see happening in the largest of firms.

### A. *The Make-Up of the Profession*

In 2010, the data collected by the various regulators of the legal profession on diversity was thin (in that it did not cover all of the characteristics protected by the Equality Act 2010<sup>4</sup>), ad hoc (in that no good reasons were given as to why certain data was and was not collected), and different for each regulated community. So, for example, while the (then) Institute of Legal Executives collected data on socioeconomic status,<sup>5</sup> the Law Society and the Bar Council did not. Most regulators of the legal profession collected data, at that time, on gender, ethnicity, and age. The data that was available suggested that, at entry level, the profession largely reflected the population with regard to certain characteristics: women comprised 59.1 percent of newly qualified solicitors, compared with 25 percent in 1978–79;<sup>6</sup> and 22.1 percent of new qualified solicitors were black, Asian, or minority ethnic (BAME), compared with 13 percent in 1998–99.<sup>7</sup> However, the data that was available also suggested a clear lack

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3. As of July 31, 2013, there were 127,676 solicitors with practising certificates in England and Wales. See LAW SOCIETY, TRENDS IN THE SOLICITORS' PROFESSION: ANNUAL STATISTICS REPORT 2013, at 2 (2014). At the end of 2012, there were 15,585 practicing barristers. See *Practising Barrister Statistics*, BAR STANDARDS BD., <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics> (last visited Jan. 12, 2015).

4. Equality Act, 2010, c. 15, § 4 (U.K.), available at [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf). The following characteristics are protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. *Id.*

5. The institute is currently known as the Chartered Institute of Legal Executives.

6. LAW SOC'Y, TRENDS IN THE SOLICITORS' PROFESSION: ANNUAL STATISTICAL REPORT 2010: EXECUTIVE SUMMARY 7 (2011), [http://www.lawsociety.org.uk/policy-campaigns/research-trends/annual-statistical-report/documents/annual-statistical-report-2010---executive-summary-\(pdf-392kb\)/](http://www.lawsociety.org.uk/policy-campaigns/research-trends/annual-statistical-report/documents/annual-statistical-report-2010---executive-summary-(pdf-392kb)/).

7. See *id.*

of diversity in more senior positions.<sup>8</sup> What was also striking was that data was collected on different types of regulated individuals (solicitor, barrister, legal executive, etc.) rather than on the entire legal workforce (i.e., there was no robust data on the diversity make-up of the whole legal workforce, regulated and unregulated).<sup>9</sup>

### B. Law Firm Disclosures in 2010

In late 2010, data was gathered from the websites of the top sixty-nine U.K. law firms for the purposes of this project.<sup>10</sup> Table 1 below sets out which firms had diversity sections on their websites, which firms disclosed diversity data on those websites, and which firms gave a named diversity contact on their websites.

<b>Table 1: 2010 Law Firm Diversity Disclosures</b>			
<b>Firm Ranking</b>	<b>Percentage with Diversity Section on Website?</b>	<b>Disclosure of Diversity Statistics?</b>	<b>Named Diversity Contact?</b>
1–10	100%	90%	80%
11–25	87%	53%	40%
26–50	68%	52%	20%
51–69	74%	26%	16%

As can be seen, most firms had diversity sections on their websites (78 percent overall). What is also evident is that a majority (if a bare majority) of firms were already, prior to the introduction of the LSB's reporting rule, disclosing diversity data (51 percent overall). As Table 1 shows, firms were less likely to disclose diversity data the further down the rankings list they are placed (i.e., the smaller they are and the less money they make). Table 2 sets out, for those firms that did disclose diversity data, whether that data applied to the entire workforce (i.e., LSA-approved

8. LEGAL SERVS. BD., INCREASING DIVERSITY AND SOCIAL MOBILITY IN THE LEGAL WORKFORCE: TRANSPARENCY AND EVIDENCE ¶ 4 (2010) [hereinafter LSB CONSULTATION PAPER], available at [http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/diversity\\_consultation\\_publish.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/diversity_consultation_publish.pdf).

9. The unregulated legal services sector in England and Wales is far greater than the regulated sector. For an overview, see LEGAL EDUC. & TRAINING REVIEW, SETTING STANDARDS: THE FUTURE OF LEGAL SERVICES EDUCATION AND TRAINING REGULATION IN ENGLAND AND WALES 77–114 (2013), available at <http://www.letr.org.uk/wp-content/uploads/LETR-Report.pdf>.

10. All data are on file with the *Fordham Law Review* and available upon request.

persons/“lawyers” and non-approved persons) and whether the diversity data was stratified by role (i.e., percentage data for partners, associates, non-fee earners, etc.).

<b>Table 2: 2010 Workforce Diversity Data</b>		
<b>Firm Ranking</b>	<b>Data for Whole Workforce?</b>	<b>Stratified by Role?</b>
1–10	100%	100%
11–25	88%	100%
26–50	92%	100%
51–69	100%	100%

Two matters are of particular interest. The first is that of the thirty-five firms that disclosed diversity data, only two firms disclosed data solely for their authorized workforce (i.e., solely for their qualified legal personnel). The second is that when firms presented their diversity data stratified by role, the level of granularity varied significantly. For example, then Herbert Smith LLP had eleven separate role categories,<sup>11</sup> whereas Bird & Bird only had two (“Fee-earner” and “Support”).<sup>12</sup> This variation in approach meant that comparing firms was rather challenging, and so devalued the overall potential impact of the data.

Table 3 sets out, for those firms that did disclose diversity data, which data was disclosed. For ease of comparison, the column headings in Table 3 are those characteristics on which data is required to be collected for the purposes of the LSB’s reporting rule. These largely mirror the so-called protected characteristics taken from the Equality Act 2010,<sup>13</sup> and so were accepted diversity strands at the time this data was collected.

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11. Namely: Partner; Associate; Consultant; Of Counsel; Trainee Solicitor; Non-legal management staff (Support Group Heads); PSL; Trainee legal executive (Paralegal); Secretarial; Other non-legal (Support); and Other legal. *See* HERBERT SMITH LLP, 2010 DIVERSITY STATISTICS (2010) (on file with the Fordham Law Review).

12. *See* BIRD & BIRD, DIVERSITY STATISTICS (2010) (on file with the Fordham Law Review).

13. Together with “class background” (or “socioeconomic background”), which is not a protected characteristic for the purposes of the Equality Act 2010. Equality Act, 2010, c. 15, (U.K.), *available at* [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf).

<b>Table 3: The Diversity Data Disclosed in 2010</b>				
<b>Firm Ranking</b>	<b>1-10</b>	<b>11-25</b>	<b>26-50</b>	<b>51-69</b>
<b>Age</b>	33%	75%	46%	33%
<b>Gender</b>	100%	100%	100%	100%
<b>Disability</b>	78%	13%	38%	100%
<b>Ethnicity</b>	100%	100%	100%	100%
<b>Religion</b>	22%	25%	15%	33%
<b>Sexual Orientation</b>	22%	38%	23%	0%
<b>Class Background</b>	0%	0%	0%	0%
<b>Caring Responsibility</b>	0%	0%	0%	0%

All the firms that disclosed diversity data provided information on gender and ethnicity. The extent to which firms disclosed data for the other characteristics was much more fragmented. Firms were more likely to disclose data on age and disability than they were on religion and sexual orientation. This is perhaps unsurprising. As is seen in Table 3, no firm disclosed data on the socioeconomic backgrounds of their employees (e.g., whether or not those employees attended a fee-paying school), nor on caring responsibilities. However, a number of firms did disclose data on staff with flexible working arrangements, including seven out of nine of the firms ranked 1–10.

The stand-out from the top 10 was Eversheds. In 2010, the firm disclosed data on age, gender, ethnicity, disability, religion, and sexual orientation, each split into six job “families” (partners, senior associates, etc.).<sup>14</sup> Linklaters was the only firm to disclose data (on gender and ethnicity) for its vacation scheme students (those who would be “summer associates” in U.S. law firms).<sup>15</sup> As will be shown later on in this Article, the LSB’s reporting rule applies only to the employed legal workforce. As such, vacation students are without its scope. This is a missed opportunity, particularly as the existing evidence suggests that the ability to secure legal

14. See EVERSHEDES, STATISTICS (2010) (on file with the Fordham Law Review).

15. See LINKLATERS, 2010 CORPORATE RESPONSIBILITY REPORT: DIVERSITY STATISTICS (2010), available at <http://www.linklaters.com/pdfs/cr/DiversityStats0909.pdf>.

work experience is directly linked to core issues of diversity and inclusion.<sup>16</sup>

The reasons are not clear why certain law firms were publishing diversity data at the end of 2010 and others were not. A number of justifications are possible. One explanation from the associated literature is prompting by clients;<sup>17</sup> another is the unprompted desire of firms to mirror their clients (who would, as is discussed below, have reporting obligations under company legislation); a third is the potential “business case” idea linked with lateral hires;<sup>18</sup> and a fourth could be the Law Society’s “Diversity and Inclusion Charter.” After enactment of the LSA, the Law Society is the representative body of solicitors in England and Wales. In 2009, they launched a Diversity and Inclusion Charter,<sup>19</sup> which was piloted in 2010. Signatories agree to strive toward the best practice with regard to recruitment and progression, to share examples of practical things they have done on diversity, to report workforce data and their work on diversity, and more generally, to work together on diversity matters.<sup>20</sup> This is in many ways comparable to the “Pledge for Change” operated by the American Bar Association.<sup>21</sup> Table 4 sets out, for those firms that disclosed diversity data,<sup>22</sup> the percentage that also disclosed their membership in the Law Society’s Diversity and Inclusion Charter and the percentage that disclosed their membership in other diversity and inclusion organizations.<sup>23</sup>

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16. See Andrew Francis & Hilary Sommerlad, *Access to Legal Work Experience and Its Role in the (Re)Production of Legal Professional Identity*, 16 INT’L J. LEGAL PROF. 63, 66–67 (2009).

17. See Joanne P. Braithwaite, *Diversity Staff and the Dynamics of Diversity Policy-Making in Large Law Firms*, 13 LEGAL ETHICS 141, 147 (2010).

18. See the comments made earlier about disclosure of flexible working arrangements. This, I would suggest, was done in an effort to make those firms look “family friendly” to potential lateral hires or other future employees.

19. See *Diversity and Inclusion Charter*, LAW SOC’Y, <http://www.lawsociety.org.uk/Advice/Diversity-Inclusion/Diversity-Inclusion-Charter> (last visited Jan. 23, 2015).

20. See *Charter Signatories: Diversity and Inclusion Charter Statement*, LAW SOC’Y, <http://www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion-charter/charter-signatories> (last visited Jan. 23, 2015).

21. Comm’n on Disability Rights, *Pledge for Change: Disability Diversity in the Legal Profession*, ABA, [http://www.americanbar.org/groups/disabilityrights/initiatives\\_awards/pledge\\_for\\_change.html](http://www.americanbar.org/groups/disabilityrights/initiatives_awards/pledge_for_change.html) (last visited Jan. 12, 2015).

22. In the 26–50 range, two firms stated on their website that they were signatories of the Law Society Charter but did not disclose any workforce data (in breach of the Charter’s reporting obligations on firms). The same was true of one firm in the 51–69 range.

23. These other organizations included: Opportunity Now, Stonewall, Employers’ Forum on Disability, Employers Forum on Belief, Working Families, Interlaw Diversity Forum, and Diversity Works for London.



<b>Table 4: Disclosed D&amp;I Organization Memberships in 2010</b>		
<b>Firm Ranking</b>	<b>Membership of the LS Diversity and Inclusion Charter Disclosed?</b>	<b>Other D&amp;I Organization Memberships Disclosed?</b>
1–10	44%	100%
11–25	25%	75%
26–50	23%	38%
51–69	33%	0%

It is difficult, using the data in Table 4, to argue that the Law Society's Diversity and Inclusion Charter was driving workforce diversity disclosures in 2010. Despite this, the general prevalence by firms toward disclosing membership in some diversity organization suggests that soft law measures may have been having some effect (at least on the largest firms in England and Wales). This goes to the question of whether the LSB's reporting rule was a necessary intervention into the market.

The preceding review of the data gathered in 2010 can be summed up as follows. At that time, a bare majority of large law firms were disclosing workforce diversity data on their websites. There was no regulatory obligation on them to do so. Where these firms disclosed diversity data, almost every firm included data for both regulated and non-regulated members of their organizations. While all the firms that disclosed data did so for gender and ethnicity, disclosure against other diversity strands (age, religion, disability, sexual orientation, etc.) was far more ad hoc. With this historical snapshot in mind, the following section sets out the background and history of the LSB's reporting rule and the exact contours of what the rule requires.

## II. THE LSB'S REPORTING RULE

In December 2010, the LSB issued a consultation paper addressing "proposals to increase diversity and social mobility in the legal workforce."<sup>24</sup> The LSB stated that it was considering "how best" to meet its "regulatory objective on diversity" under the LSA and had, to that end, reviewed existing academic literature, commissioned further research, undertaken stakeholder engagement, and established a Diversity Forum.<sup>25</sup> This work had highlighted the following to the LSB, which is worth repeating in full (for reasons which will become apparent later on):

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24. See LSB CONSULTATION PAPER, *supra* note 8.

25. *Id.* ¶ 3.

- The lack of comprehensive data on the make-up of the existing legal workforce across the full range of diversity strands, particularly at the level of individual firms or chambers;
- While there is a significant investment of resources and effort in diversity initiatives, particularly at entry level, there is no systematic evaluation of their impact and effectiveness;
- The statistics that are available in relation to the gender and ethnicity of solicitors and barristers at different levels of seniority illustrate that while the profession is relatively diverse at entry level in relation to these characteristics, the picture at the more senior levels is still one of white male dominance. This view is supported by qualitative studies. Therefore retention and progression for women and black and minority ethnic (BAME) practitioners is a significant issue;
- Corporate consumers of legal services are increasingly demanding information about an organization's performance in relation to equality and diversity and using this as a criterion for purchasing decisions.<sup>26</sup>

As a result, the Board of the LSB had established a number of “immediate priorities” for approved regulators to address during 2011, including “gathering an evidence base about the composition of the workforce to inform targeted policy responses” and “promoting transparency about workforce diversity at entity level.”<sup>27</sup> The LSB had also concluded that requiring action to improve the representation of particular groups in their workforce was not the way forward.<sup>28</sup> No reason is given for this, though one may suspect that such requirements (e.g., quotas) would have been too controversial.<sup>29</sup> As a “first step” toward achieving its statutory obligations in the context of diversity, the LSB initially intended to introduce a rule requiring transparency by entities about their diversity make-up.<sup>30</sup> Its consultation ran for twelve weeks and ended on March 9, 2011.

The LSB's response to the reporting rule consultation exercise was published in July 2011.<sup>31</sup> In it, the LSB states that “[t]he proposal to publish data at entity level was controversial in consultation.”<sup>32</sup> Despite

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26. *Id.* ¶ 4.

27. *Id.* ¶ 6.

28. *Id.* ¶ 7.

29. Linklaters has become the first magic circle firm to set gender targets. See Katy Dowell, *Linklaters Becomes First Magic Circle Firm to Set Gender Diversity Targets*, LAWYER (June 9, 2014), <http://www.thelawyer.com/analysis/the-lawyer-management/linklaters-becomes-first-magic-circle-firm-to-set-gender-diversity-targets/3021618.article>. This mirrors, to some extent, moves at the E.U. level to consider introduction of quotas for numbers of women on company boards. See *Women on Boards: Commission Proposes 40% Objective*, EUROPEAN COMM'N (Nov. 14, 2012), [http://ec.europa.eu/justice/newsroom/gender-equality/news/121114\\_en.htm](http://ec.europa.eu/justice/newsroom/gender-equality/news/121114_en.htm) (last visited Jan. 11, 2015).

30. LSB CONSULTATION PAPER, *supra* note 8, ¶¶ 7–8.

31. LEGAL SERVS. BD., INCREASING DIVERSITY AND SOCIAL MOBILITY IN THE LEGAL WORKFORCE: TRANSPARENCY AND EVIDENCE (2011) [hereinafter LSB RESPONSE DOCUMENT], available at [http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/decision\\_document\\_diversity\\_and\\_social\\_mobility\\_final.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/decision_document_diversity_and_social_mobility_final.pdf).

32. *Id.* ¶ 8.

this, the board of the LSB had decided to proceed. Six reasons were given for this. Five of these, I would suggest, are problematic for different reasons. The first reason given by the LSB is that workforce transparency will allow “consumers . . . to identify where the diversity profile of a particular firm varies from what might be expected when compared with competitors.”<sup>33</sup> In principle, this makes sense. However, such a reason implies that the data presented by firms will be capable of direct comparison. This is simply not the case. Such uniformity is neither required by the LSB nor by the SRA. Different firms are able to publish diversity data in different ways and in different places. In their guidance on the LSB’s reporting rule, the SRA states that:

The SRA has not prescribed the manner or format in which a firm is required to publish a summary of their workforce data. It could be published on the firm’s website, at the firm’s offices or in one of the firm’s publications. It is only a summary of the data that needs to be published and firms can present the data in a variety of ways.<sup>34</sup>

The second reason given by the LSB as to why they had decided to proceed with the reporting rule was that such would allow “regulators to identify where the variation from what might be expected is so great that regulatory questions may need to be asked.”<sup>35</sup> This, however, presupposes the quality of the data offered by the regulated community and, I would suggest, makes a rather poor and tenuous link between the complex, nuanced matter of diversity in the legal profession and “bare” numbers. This matter is further explored in the section that follows below.

The third reason given by the LSB is that a reporting rule might raise awareness of barriers to particular groups.<sup>36</sup> This must be right. However, what is more problematic is the idea that disclosing data might assist in “highlighting and stimulating challenges to the more intractable cultural barriers that seem to lie behind areas of limited progress,” the LSB’s fourth reason for action.<sup>37</sup> No evidence was offered up on how a reporting rule might change cultural barriers. Indeed, it would be interesting to gather further data to understand whether the LSB’s reporting rule had increased the sense of personal responsibility of law firm partners in the context of diversity<sup>38</sup> and/or the extent to which any cultural change had occurred as a result of the introduction of the rule.

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33. *Id.*

34. *Diversity Data Collection: Publishing Diversity Data*, SOLICITORS REGULATION AUTH., [http://www.sra.org.uk/diversitydata/?301#Collection\\_5](http://www.sra.org.uk/diversitydata/?301#Collection_5) (last visited Jan. 11, 2015).

35. LSB RESPONSE DOCUMENT, *supra* note 31, ¶ 8.

36. *Id.*

37. *Id.*

38. Certainly, the United Kingdom’s Parliamentary Commission on Banking Standards found such a sense of personal responsibility lacking as part of the United Kingdom’s pre-crash banking culture. See Parliamentary Commission on Banking Standards, *Banking Commission Publishes Report on Changing Banking for Good*, U.K. PARLIAMENT (June 19, 2013), <http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/changing-banking-for-good-report>.

The penultimate reason given by the LSB for introducing a reporting rule was that it would encourage “focus[] on the whole legal workforce rather than just the profession.”<sup>39</sup> The academic work on diversity in this area has focused almost exclusively on regulated lawyers. However, and as shown by Table 2, the overwhelming majority of firms that, in 2010, disclosed diversity data did so for *both* their regulated and their unregulated workforce. At the same time, on a regulatory level, the only use of “diverse” in the LSA is in the context of a diverse profession (not a diverse legal workforce). Let me be clear, diversity and inclusion is about more than the legal profession and about more than regulated lawyers. However, the LSB did not set out in their consultation response document why it was appropriate for them, as a regulator with set powers under the LSA, to impose a diversity rule that applied to the entirety of legal employers and employees.

The final reason given by the LSB for the introduction of their reporting rule was that it was important to “ensur[e] that data is available at the level at which recruitment, retention and promotion decisions are made.”<sup>40</sup> Such data is certainly vital. However, such data does not exist as a result of the LSB’s rule. This is because the rule, and its enactment by the LSB’s daughter regulators, does not require such data to be collected or reported. Data is not required to be collected or reported on vacation students/summer associates/work experience students.<sup>41</sup> Similarly, we have no idea what percentage of potentially eligible, for example, female associates make partnership in any given firm in any given year.

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The LSB’s reporting “rule” is set out as statutory guidance in Annex B to their July 2011 consultation response document.<sup>42</sup> Under section 162 of the LSA, the LSB has the power to issue guidance, among other matters, for the purpose of meeting the regulatory objectives. The LSB, when exercising its functions, may have regard to the extent to which an approved regulator has complied with any guidance so issued.<sup>43</sup> For those interested in new governance and the pluralization of post-legislative norms,<sup>44</sup> this is a matter worthy of further study.<sup>45</sup>

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39. LSB RESPONSE DOCUMENT, *supra* note 31, at ¶ 8.

40. *Id.*

41. In 2010, Linklaters was the only firm to provide such data (on gender and ethnicity) as to the diversity make-up of its vacation scheme attendees. *See* LINKLATERS, *supra* note 15.

42. LSB RESPONSE DOCUMENT, *supra* note 31, at Annex B.

43. Legal Services Act, 2007, c. 29, § 162(5) (U.K.).

44. *See, e.g.*, Linda Senden, *Soft Post-Legislative Rulemaking: A Time for More Stringent Control*, 19 EUR. L.J. 57 (2013); Joanne Scott, *In Legal Limbo: Post-Legislative Guidance As a Challenge for European Administrative Law*, 48 COMMON MKT. L. REV. 329 (2011).

45. The norms shaping diversity disclosures by law firms include statutory guidance, (ordinary) guidance, practice notes, online tools, standard forms, Q&As, et cetera, all backstopped by legislative provisions in the LSA and the Equality Act 2010.

The LSB's statutory guidance required the approved daughter regulators of the legal profession to submit to the LSB, by January 2012, their plans on how they were going to meet the LSB's expectations with regard to the collection and publication of workforce diversity data.<sup>46</sup> In its guidance, the LSB sets out a "suggested approach" made up of four limbs: (1) a requirement on firms and chambers to conduct a diversity monitoring exercise; (2) the recommended use of a model diversity questionnaire; (3) a requirement for firms and chambers to publish workforce data; and (4) a joined-up, consistent approach across each of the regulators.<sup>47</sup>

The focus of this Article is on diversity workforce data disclosed by law firms. As a consequence of the LSB's statutory guidance, firms regulated by the SRA are now required to annually collect, report, and publish data about the diversity make-up of their workforce.<sup>48</sup> The requirements apply to all firms regulated by the SRA, including sole practices and "alternative business structures."<sup>49</sup> Everyone working at the firm should be covered by the workforce diversity data collection exercise, including owners of the firm and all other qualified and non-qualified staff. Firms are required to input their aggregated diversity data into the organization diversity data section on the SRA's website (known as "mySRA"). Firms are also required to publish a summary of their workforce diversity data. Having set out the history and content of the diversity data reporting rule, the following part examines in further depth some of the reasons that lie behind the rule's introduction.

### III. REASONS FOR REGULATING, REASONS FOR REPORTING

The LSB's reporting rule was, in part, introduced to help the LSB meet its regulatory objective to "encourag[e] an independent, strong, diverse and effective legal profession."<sup>50</sup> The SRA described the rule as a "key element" of its own work toward achieving the same objective.<sup>51</sup> This suggests that a reporting rule is capable of encouraging an independent, strong, diverse, and effective legal profession. This is doubtful. In this section, the underpinning aims and objectives of the LSB's reporting rule are examined using scholarship on diversity in the profession, the "goods" of transparency and accountability, empirical work from the field of corporate social responsibility, and work on demand-side pressures in the

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46. LSB RESPONSE DOCUMENT, *supra* note 31, at Annex B, ¶ 9.

47. *Id.* at Annex B, ¶ 12.

48. See *Diversity Data Collection: Quick Guide*, SOLICITORS REGULATION AUTH., <http://www.sra.org.uk/diversitydata> (last visited Jan. 11, 2015).

49. Alternative business structures are firms where a non-lawyer either is a manager of the firm or has an ownership-type interest in the firm. See *Alternative Business Structures*, LAW SOC'Y (July 22, 2013), <https://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures>.

50. Legal Services Act, 2007, c. 29, § 1(f) (U.K.).

51. SOLICITORS REGULATION AUTH., DIVERSITY IN THE LEGAL PROFESSION: WORKFORCE DATA FOR SOLICITORS FIRMS 2012 ¶ 3 (2013), available at <http://www.sra.org.uk/documents/sra/equality-diversity/diversity-in-profession.pdf>.

legal profession. Each of these different areas pushes at the introduction and use of the LSB's rule.

#### A. Diversity and Inclusion in the Legal Profession

To date, research into diversity among solicitors and law firms in England and Wales has focused on a number, but not all, of the diversity strands. Namely, while there is a robust body of research on female lawyers, BAME lawyers, and—to a lesser extent—lawyers from socially and economically deprived backgrounds, there is very little academic work on disability, age, sexual orientation, or religion among the legal workforce.<sup>52</sup>

Michael Shiner's longitudinal study of half of all undergraduates in England and Wales who were due to complete their law degrees in 1993 showed that BAME students, those from socioeconomically deprived backgrounds, and those who had studied at "new" universities,<sup>53</sup> gained entry into the legal profession at a low rate which could not be statistically explained by the standard of their educational qualifications.<sup>54</sup> His work also showed slight bias against women in the allocation of training contracts (that is, the award of employment necessary to qualify as a solicitor) and against disabled students and mature students.<sup>55</sup> It is a real disappointment that Shiner's longitudinal study has not carried on and that we in England and Wales lack a comparator for the "After the JD" study in the United States.<sup>56</sup>

Recent work by the Law Society of England and Wales has shown that women solicitors earned on average thirty percent less than men across all areas of private practice during 2013.<sup>57</sup> However, challenges in the retention and progression of female and BAME lawyers are thought to derive not from direct discrimination, but instead lie in a series of barriers across the lifetime of the relevant lawyer, from initial schooling via university education through work experience/internships and the seeking

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52. For example, *Discriminating Lawyers*, a monograph published in 2000 on discrimination in the legal profession, covers ethnicity, gender, class, age, and university education but says nothing whatsoever on sexual orientation or religion (and only the briefest of cursory comments about disability). See generally PHILIP A. THOMAS, *DISCRIMINATING LAWYERS* (2000).

53. In the United Kingdom, the term "new universities" refers to former polytechnics, central institutions, or colleges of higher education that were given university status after 1992.

54. Michael Shiner, *Young, Gifted and Blocked! Entry to the Solicitors' Profession*, in *DISCRIMINATING LAWYERS*, *supra* note 52, at 87, 118.

55. See *id.*

56. See *After the JD*, AM. BAR FOUND., <http://www.americanbarfoundation.org/publications/afterthejd.html> (last visited Jan. 23, 2015).

57. LAW SOC'Y, *PRIVATE PRACTICE SOLICITORS' SALARIES 2013: THE LAW SOCIETY'S PC HOLDER SURVEY 2013*, at 4 (2014), <https://www.lawsociety.org.uk/policy-campaigns/research-trends/fact-sheets/documents/private-practice-earnings-2013/>.

of employment and career progression.<sup>58</sup> Over time, rhetoric in relation to diversity in the profession has moved from considerations of exclusion and discrimination toward subordination and differentiation.<sup>59</sup> Qualitative research commissioned by the Legal Services Board in 2010 in relation to the career patterns of female and BAME lawyers highlighted a number of themes impacting retention and progression, including the “legacy of the profession’s white, male elitist origins and the significance of cultural stereotypes.”<sup>60</sup> Earlier work by Sharon Bolton and Daniel Muzio argued that while access to the profession may have become meritocratic over time, “internal (or organizational) closure regimes—which dictate access to partnership and certain prestigious segments of the profession—are still dominated by informal and gendered criteria which facilitate the exclusion of women solicitors.”<sup>61</sup>

More recently, research has been undertaken looking at class and social mobility within the legal profession. A report by the Sutton Trust highlighted that more than 50 percent of the partners in elite law firms had enjoyed private education.<sup>62</sup> Over two-thirds of High Court judges have similarly been privately educated.<sup>63</sup> In the wider U.K. population, this figure is a mere 7 percent.<sup>64</sup> Rolfe and Anderson have identified that preferences by law firms for students from elite universities (Oxford, Cambridge, etc.) resulted in a less diverse workforce as students at newer universities tend to be from a lower social class—and are also more likely to be BAME.<sup>65</sup> Their view is that a culmination of inequalities pre- and post-entry into university leads to barriers for those from lower social classes, a conclusion supported by the Law Society’s review into class in the legal profession.<sup>66</sup> Louise Ashley interviewed 130 solicitors at leading law firms on diversity initiatives with particular emphasis on schemes that sought to open access to firms for future solicitors from socioeconomically

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58. See ROSALINE SULLIVAN, LEGAL SERVS. BD., BARRIERS TO THE LEGAL PROFESSION 2 (2010), [http://www.legalservicesboard.org.uk/what\\_we\\_do/Research/publications/pdf/literature\\_review\\_on\\_diversity2.pdf](http://www.legalservicesboard.org.uk/what_we_do/Research/publications/pdf/literature_review_on_diversity2.pdf).

59. See HILARY SOMMERLAD & PETER SANDERSON, GENDER, CHOICE AND COMMITMENT: WOMEN SOLICITORS IN ENGLAND AND WALES AND THE STRUGGLE FOR EQUAL STATUS 1–14 (1998).

60. HILARY SOMMERLAD, LISA WEBLEY, DANIEL MUZIO, JENNY TOMLINSON & LIZ DUFF, DIVERSITY IN THE LEGAL PROFESSION IN ENGLAND AND WALES: A QUALITATIVE STUDY OF BARRIERS AND INDIVIDUAL CHOICES 19, 39 (2010), [http://www.legalservicesboard.org.uk/what\\_we\\_do/Research/Publications/pdf/lisb\\_diversity\\_in\\_the\\_legal\\_profession\\_final\\_rev.pdf](http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lisb_diversity_in_the_legal_profession_final_rev.pdf).

61. Sharon C. Bolton & Daniel Muzio, *Can’t Live with ‘Em; Can’t Live Without ‘Em: Gendered Segmentation in the Legal Profession*, 41 SOC. 47, 49 (2007).

62. SUTTON TRUST, THE EDUCATIONAL BACKGROUNDS OF LEADING LAWYERS, JOURNALISTS, VICE CHANCELLORS, POLITICIANS, MEDICS AND CHIEF EXECUTIVES 2 (2009).

63. See NIDA BROUGHTON ET AL., SOC. MKT. FOUND., OPEN ACCESS: AN INDEPENDENT EVALUATION 13 (2014), <http://www.smf.co.uk/wp-content/uploads/2014/07/Open-Access-an-independent-evaluation-Embargoed-00.01-030714.pdf>.

64. *Id.*

65. Heather Rolfe & Tracy Anderson, *A Firm Choice: Law Firms’ Preferences in the Recruitment of Trainee Solicitors*, 10 INT’L J. LEGAL PROF. 315, 322 (2003).

66. See generally SUMITRA VIGNAENDRA, SOCIAL CLASS AND ENTRY INTO THE SOLICITORS’ PROFESSION (2001).

deprived backgrounds. Her research suggests that while diversity strategies do little to change organizational cultures, some progress can be made if there is recognition of “both the depth of professional prejudice within the sector and the reality of educational inequality across the U.K.”<sup>67</sup> In later work, Ashley and Laura Empson argue that clients find it difficult to judge the relative or absolute quality of work in knowledge intensive service industries and, as such, image becomes an important proxy for quality in those firms.<sup>68</sup> For law firms, this tends to have detrimental impact on those seeking access from lower socioeconomic backgrounds.

What is clear, from the above review, is that the issue of diversity in the legal profession is complex and nuanced, made up of a number of barriers, direct and indirect, over the lifetime of a would-be law firm partner. What is less clear is how a workforce data reporting rule can hope to change ingrained behaviors, unconscious biases, and long-standing practices of working. A reporting rule is, it is suggested, a rather blunt tool for tackling such a problem. Such a rule also assumes that disclosure is a good in and of itself and has the potential to lead to greater, and/or better, accountability. These two matters are discussed in the following section.

### *B. Transparency, Accountability, and Corporate Reporting*

The SRA has said that the “main purpose” in collecting workforce diversity data is “to achieve transparency about the workforce diversity of individual firms.”<sup>69</sup> In the LSB consultation paper, the LSB stated that, “transparency about diversity is important because it makes firms and chambers accountable for their decisions.”<sup>70</sup> Indeed, the principle of “transparency” is so important to the LSB that it used the term forty-four times in its consultation paper. There are two key flaws with the LSB’s statement. First, the link between transparency and accountability is in no way clear, neither generally nor in this specific instance. Second, accountability can take a variety of forms,<sup>71</sup> and it is not clear to what form of accountability the LSB refers.

As Elizabeth Fisher argues, “while the principle [transparency] tends to be perceived as overarching, non-interventionist, and straightforward in its application, the implementation and application of it are anything but.”<sup>72</sup> The review in this Article of the data generated and analyzed as a

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67. Louise Ashley, *Making a Difference? The Use (and Abuse) of Diversity Management at the UK’s Elite Law Firms*, 24 WORK EMP. & SOC. 711, 711 (2010).

68. Louise Ashley & Laura Empson, *Differentiation and Discrimination: Understanding Social Class and Social Exclusion in Leading Law Firms*, 66 HUM. REL. 219, 221 (2013).

69. SOLICITORS REGULATION AUTH., DIVERSITY IN THE LEGAL PROFESSION: WORKFORCE DATA FOR SOLICITORS FIRMS 2012, ¶ 2 (2013) [hereinafter APRIL 2013 SRA REPORT], <http://www.sra.org.uk/documents/sra/equality-diversity/diversity-in-profession.pdf>.

70. LSB CONSULTATION PAPER, *supra* note 8, ¶ 10.

71. Joan Loughrey, *Accountability and the Regulation of the Large Law Firm Lawyer*, 77 MOD. L. REV. 732, 734–35 (2014).

72. Elizabeth Fisher, *Transparency and Administrative Law: A Critical Evaluation*, 63 CURRENT LEGAL PROBS. 272, 273 (2010).



consequence of the LSB's reporting rule shows this argument to be equally valid in the context of diversity reporting in the legal profession. What should, in theory, be a simple matter has, in its operation, become anything but straightforward. In her work, Fisher highlights thirteen separate reasons that have been given by other scholars as to the importance of transparency.<sup>73</sup> She argues that because the principle can serve such a wide range of normative ends, it can become what Jerry Mashaw calls "a placeholder for multiple contemporary anxieties."<sup>74</sup> At the same time, there is the potential for transparency to be used by different actors engaging in "blame avoidance" activities.<sup>75</sup> There is, then, a question as to the extent to which a reporting rule was introduced by the LSB to shift the "blame" for the longstanding issue of a lack of diversity in the legal profession onto other shoulders.

When making something transparent, there is a corresponding need to understand why something may be hidden.<sup>76</sup> As was shown above, the bare majority of large U.K. law firms disclosed some diversity data in 2010, prior to the introduction of the LSB's rule. Why the others did not is not known. It would, however, seem unlikely that "bad" numbers—i.e., a lack of workforce diversity—was acting as a bar to disclosure, given how poorly those firms that did disclose were doing.

Transparency has been one of the central organizing principles of the work on corporate social responsibility and corporate governance for the last twenty-five years.<sup>77</sup> Corporate governance is progressing in response to the changing needs of both business operations and societal pressures;<sup>78</sup> and this is particularly true in relation to the disclosure of timely, transparent data on matters affecting stakeholders. As an example, there is now greater pressure on corporate firms to disclose data relating to their non-financial commitments, the social aspect of which encompasses diversity within the work place.<sup>79</sup>

There is some empirical evidence to suggest that companies modify their behavior as a result of being required to go public with financial and "non-financial"—i.e., environmental, social, and ethical impacts—data,<sup>80</sup> and

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73. See *id.* at 276–77.

74. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCE 115 (Michael W. Dowdle ed., 2006).

75. See, e.g., Christopher Hood, *What Happens When Transparency Meets Blame-Avoidance?*, 9 PUB. MGMT. REV. 191 (2007).

76. See Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 68 LAW & CONTEMP. PROBS. 21, 26 (2006).

77. For the starting point, see ADRIAN CADBURY, COMM. ON THE FIN. ASPECTS OF CORPORATE GOVERNANCE, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE 33 (1992).

78. See generally LORRAINE TALBOT, PROGRESSIVE CORPORATE GOVERNANCE FOR THE 21ST CENTURY (2013).

79. Brian Cheffins, *The History of Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE (Mike Wright, Donald Siegel, Kevin Keasey & Igor Filatotchev eds., 2013).

80. See, e.g., Anil R. Doshi, Glen W.S. Dowell & Michael W. Toffel, *How Firms Respond to Mandatory Information Disclosure*, 34 STRATEGIC MGMT. J. 1209 (2013).

some data which suggests a correlation between companies that value corporate social responsibility and their market value.<sup>81</sup> There is also literature to suggest that the disclosure of information, while of a great benefit to large firms,<sup>82</sup> is also becoming increasingly important to the institutional corporate governance models of small and medium-sized enterprises (SMEs).<sup>83</sup> However, there is very limited empirical data to show how companies have modified their behaviors as a direct consequence of having to disclose diversity data.<sup>84</sup> Calvert Investments' 2013 diversity report showed that 39 percent of the companies in the U.S. S&P 100 do not publicly disclose employee demographic data.<sup>85</sup>

### C. Demand Side Diversity Pressures

In their 2010 consultation, the LSB acknowledged that different levers can influence business behavior. They listed: regulatory requirements; highlighting the moral case for change; and commercial incentives.<sup>86</sup> On the latter, they refer to the potential for "corporate or individual consumer demand for a diverse workforce."<sup>87</sup> While there is such a potential, the evidence suggests it is, in practice, very low. In her work on demand side diversity pressures in legal services, Joanne Braithwaite argues that "relying upon client pressure to drive change is a profoundly weak strategy at the best of times."<sup>88</sup> Even if client pressures were an effective driver of change, is a diverse legal profession something we want capable of being purchased? Michael Sandel asks, "Do we want a society where everything is up for sale? Or are there certain moral and civic goods that markets do not honor and money cannot buy?"<sup>89</sup> The answer to his first question may be "yes," if this is the only way to secure a diverse legal workforce.

## IV. THE OPERATIONALIZATION OF THE LSB REPORTING RULE

In September 2013, the LSB published a review of the progress made in the context of its diversity collection and reporting rule.<sup>90</sup> In the report the

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81. Andrea Beltratti, *The Complementarity Between Corporate Governance and Corporate Social Responsibility*, 30 GENEVA PAPERS 373 (2005).

82. See Ans Kolk, *Sustainability, Accountability and Corporate Governance: Exploring Multinationals' Reporting Practices*, 18 BUS. STRATEGY ENV'T 1, 7 (2008).

83. See Ngozi Ijeoma & Raymond A. Ezejiofor, *An Appraisal of Corporate Governance Issues in Enhancing Transparency and Accountability in Small and Medium Enterprises (SME)*, 3 INT'L J. ACAD. RES. BUS. SOC. SCI. 162, 175-76 (2013).

84. For the best data available, see CALVERT INVS., EXAMINING THE CRACKS IN THE CEILING: A SURVEY OF CORPORATE DIVERSITY PRACTICES OF THE S&P 100 (2013), available at <http://www.calvert.com/NRC/literature/documents/BR10063.pdf>.

85. See *id.* at 3.

86. LSB CONSULTATION PAPER, *supra* note 8, ¶ 11.

87. *Id.*

88. Joanne P. Braithwaite, *The Strategic Use of Demand-Side Diversity Pressure in the Solicitors' Profession*, 37 J. LAW & SOC. 442, 465 (2010).

89. MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 202 (2012).

90. LEGAL SERVS. BD., DIVERSITY DATA COLLECTION AND TRANSPARENCY: A REPORT ON REGULATORS' PROGRESS AGAINST LSB GUIDANCE ISSUED UNDER SECTION 162 OF THE LEGAL

LSB sets out that “[w]e believe that to achieve real change [on diversity in the legal profession], right across the profession, changes need to be made in the way the profession itself makes decisions.”<sup>91</sup>

This must be right. Here, the LSB puts forward four decision types which may impact diversity in the legal profession: work allocation and rewards; measurements of success and commitment; individual business relationships; and client expectations.<sup>92</sup> These are certainly relevant. However, the LSB goes on to say that “[o]ur strategy on diversity is to shed light on performance by requiring law firms and chambers to collect and publish information on the make-up of their workforce.”<sup>93</sup> It is in no way clear, either in the LSB’s report or more generally, as to how a reporting rule on diversity does, or can, impact the four types of decisions that the LSB says have critical impacts on diversity in the profession.

The LSB’s review of actions taken as a result of the introduction of its reporting rule was said to have “found that the concept of collecting and publishing data has been widely accepted as a means to stimulate action.”<sup>94</sup> It is not said, however, who has so accepted. The LSB also reported that “regulators have moved away from thinking primarily about diversity initiatives and are building upon historical data sources where they exist.”<sup>95</sup> This, it is suggested, is a mistake. The LSB’s reporting rule can be seen as suggesting a preference for quantitative over qualitative data, which ignores both the limits of quantitative data, as discussed above, and the need for context and reflection (matters that qualitative reporting affords). As is set out later in this Article, there should be qualitative reporting in addition to quantitative reporting. This is something the LSB accepts,<sup>96</sup> but it is not reflected in the scope of the rule itself.

Regarding future steps, the LSB has acknowledged, in its 2013–2014 Annual Report, that “a great deal of work is still needed to ensure sufficient collection and publication of data across the profession and that regulators need to do more to challenge firms in this area.”<sup>97</sup> Five action points were in harmony with the seven regulators of the legal profession, including “adopting innovative data collection strategies to improve response rates” and the “identification of diversity as a risk issue across regulatory work streams.”<sup>98</sup> The content of the LSB’s reporting requirement was not set out as a matter requiring further work. This, it is submitted, was a mistake, and

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SERVICES ACT 2007 (2013) [hereinafter LSB SEPTEMBER 2013 REPORT], [http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_news/PDF/2013/20130930\\_Diversity\\_Data\\_Collection\\_And\\_Transparency\\_Report.pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2013/20130930_Diversity_Data_Collection_And_Transparency_Report.pdf).

91. *Id.* ¶ 4.

92. *Id.* ¶ 5.

93. *Id.* ¶ 7.

94. *Id.* ¶ 11.

95. *See id.*

96. Email from LSB to author (Oct. 17, 2014, 12:37 PM) (on file with the Fordham Law Review) (acknowledging that regulators will likely need further qualitative information).

97. LEGAL SERVS. BD., ANNUAL REPORT AND ACCOUNTS FOR THE YEAR ENDED 31 MARCH 2014, at 20 (2014), [http://www.legalservicesboard.org.uk/news\\_publications/publications/pdf/20140610\\_LSB\\_Annual%20Report\\_2014.pdf](http://www.legalservicesboard.org.uk/news_publications/publications/pdf/20140610_LSB_Annual%20Report_2014.pdf).

98. *See id.*

five suggestions for regulatory reform are set out in the conclusions to this Article.

The LSB has, however, set out that some of the weakest performance regarding the operationalization of its reporting rule was seen in the use of the data gathered, in particular regulators failing to adequately analyze the information given to them.<sup>99</sup> This is explored in the following section in the context of the SRA. In its September 2013 review of the reporting rule, and its 2013–2014 Annual Report, it seems that the LSB is allowing its daughter regulators some leeway in the initial years of the rule’s operation.

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Since the introduction of the LSB’s reporting rule, the SRA has published two reports on the associated law firm workforce diversity disclosures. The first of these concerned workforce data for 2012 and was published in April 2013.<sup>100</sup> In the first year of the implementation of the LSB’s rule, the SRA took on “most of the burden” of data collection by commissioning a specialist online survey company to undertake a one-off diversity survey on its behalf.<sup>101</sup> This company collected the data from participating law firms (on which, more later) and then sent that data back to those firms. This approach seems relatively magnanimous on the part of the SRA. However, it no doubt negatively impacted a large number of firms that already—as set out above—had their own systems in place for data collection and reporting.<sup>102</sup> These firms reported that the aggregated data given back to them by the SRA was “less helpful” than the data they had previously been collecting for themselves.<sup>103</sup> In the SRA’s 2012 data collection exercise, 9408 law firms participated.<sup>104</sup> These firms had a combined workforce of 221,845 people, but only 93,074 individuals completed the survey.<sup>105</sup> This is a response rate of 42 percent. Despite this, diversity data from almost 100,000 people is a useful starting point.<sup>106</sup> However, the SRA seems to have done little with this data. Their April 2013 report has only the most basic of descriptive statistics, splitting survey respondents into “authorised” and “non-authorised” persons for each survey question.<sup>107</sup> What is particularly striking, given the overwhelming evidence, as discussed above, of diversity differences between entry level and senior members of the legal profession, is that the data for “authorised” persons is lumped together. So, for example, the SRA’s April 2013 report tells us that 50 percent of all “authorised” respondents were female, but tells

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99. *See id.*

100. *See* APRIL 2013 SRA REPORT, *supra* note 69.

101. *See id.* ¶ 7.

102. *See id.* ¶ 14.

103. *See id.*

104. *See id.* ¶ 18.

105. *See id.*

106. By contrast, the Bar Standards Board, the regulator of barristers in England and Wales, had a mere five percent completion rate for its first diversity data-gathering exercise. *See* LSB SEPTEMBER 2013 REPORT, *supra* note 90, ¶ 13.

107. *See* APRIL 2013 SRA REPORT, *supra* note 69, ¶ 22.

us nothing about the level of seniority or status of those respondents (e.g., how many female solicitors were also partners).<sup>108</sup> There is also no cross tabulation such that, for example, we have no idea how many BAME “authorised” persons attended state/independent/fee-paying schools. This lack of sophistication, this lack of even the most basic stratification, makes the data in the SRA’s April 2013 report almost meaningless.

The SRA’s second report, published in May 2014, for 2013 workforce data is somewhat better.<sup>109</sup> Here, firms were asked to report the workforce data they had themselves collected. Over 1000 law firms failed to report their workforce data to the SRA by the extended February 25, 2014 deadline,<sup>110</sup> and were reported to Supervision (the SRA’s team that, among other matters, investigates breaches of regulation or misconduct leading to enforcement action).<sup>111</sup> The SRA’s Q&A on the LSB’s reporting rule clearly states that lack of compliance will be followed by enforcement action.<sup>112</sup> The majority of non-complying firms were said by the SRA to have complied following the referral to Supervision.<sup>113</sup>

The SRA’s second diversity data gathering exercise had a much higher reporting rate: overall, up to 79 percent of staff gave some diversity data to their firms.<sup>114</sup> Response rates varied significantly for the different categories of data set required to be collected: 65 percent of those filling in the survey responded to a question about university education, compared with 79 percent responding to the question concerning gender.<sup>115</sup> The second data collection exercise also saw a 10 percent increase in the number of respondents selecting the “prefer not to say” option for one or more survey questions.<sup>116</sup> In their second report, the SRA split “authorised” respondents into two categories: “Solicitor Partner or Equivalent” and “Solicitor and Other Lawyer.”<sup>117</sup> This is an improvement on the first report. So, for example, the May 2014 report shows that while just under 60 percent of “Solicitors or Other Lawyers” are female, only 30 percent of “Solicitor Partners or Equivalent” are female.<sup>118</sup> There is, however, still no cross tabulation in the SRA’s report. As a result, there is the potential for

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108. *See id.* ¶ 28.

109. SOLICITORS REGULATION AUTH., DIVERSITY IN THE LEGAL PROFESSION: WORKFORCE DATA FOR SOLICITORS’ FIRMS 2013/14 (2014) [hereinafter MAY 2014 SRA REPORT], <http://www.sra.org.uk/documents/SRA/equality-diversity/diversity-legal-profession-2013.pdf>.

110. *See id.* ¶ 10.

111. *See Supervision*, SOLICITORS REGULATION AUTH. (Aug. 21, 2014), <http://www.sra.org.uk/solicitors/supervision.page>.

112. *See Diversity Data Collection: Q&A*, SOLICITORS REGULATION AUTH., [http://www.sra.org.uk/diversitydata/?301#Collection\\_6](http://www.sra.org.uk/diversitydata/?301#Collection_6) (last visited Jan. 11, 2015) (Question 24).

113. *See SRA Progress on Equality and Diversity 2013*, SOLICITORS REGULATION AUTH. (July 2014), <http://www.sra.org.uk/sra/equality-diversity/reports/equality-diversity-progress-report-2013.page>.

114. *See* MAY 2014 SRA REPORT, *supra* note 109, ¶ 13.

115. *Id.* ¶ 18.

116. *Id.* ¶ 37.

117. *Id.* ¶ 4.

118. *Id.* ¶ 27.

the data to give misleading signals. On ethnicity, the SRA report shows how 15 percent of “Solicitors or Other Lawyers” are BAME, and that 13 percent of “Solicitor Partners or Equivalent” are BAME.<sup>119</sup> Given that around 12 percent of the U.K. workforce is from an ethnic minority background,<sup>120</sup> this data seems to suggest that BAME lawyers are adequately represented at the highest levels in law firms. This is, however, not the case. Around one-third of BAME private practice solicitors work in very small law firms (2–4 partner firms).<sup>121</sup> The 2013 Annual Statistical Report produced by the Law Society shows that BAME solicitors continue to be more likely to be sole practitioners and remained underrepresented at partnership level in other firms.<sup>122</sup> While over one-third of white European private practitioners were partners in 2013, the proportion for BAME groups did not exceed one-quarter.<sup>123</sup> This picture of BAME representation in law firms is far more accurate than that provided by the SRA. It is suggested that the SRA, in its annual reports on the workforce diversity data collection exercises, moves toward: (1) the level of granularity found in the Law Society’s annual statistical reports; and (2) the level of qualitative data found in the annual reports produced on the Law Society’s Diversity and Inclusion Charter.<sup>124</sup> In this respect, there is much the SRA can learn from the Law Society. What both the SRA and Law Society fail to do, however, is to engage in any real statistical analysis. So, to give one simple example, it would be useful to cross-tabulate BAME representation with socio-economic background: Is it that BAME partners in large law firms are more likely than not to have attended fee-paying schools? Having reviewed the operationalization of the LSB’s reporting rule, and the SRA’s implementation of that rule, the following part looks at how the U.K. top 100 law firms were reporting on diversity issues in 2014.

#### V. DIVERSITY DISCLOSURES IN 2014

In the summer of 2014, data on workforce diversity disclosures was gathered for this Article from the websites of the top 100 U.K. law firms.<sup>125</sup> This was done to understand the changes in diversity data disclosure and reporting between 2010—i.e., before the LSB’s reporting rule—and 2014. However, drawing direct comparisons between the situation before and after the regulatory requirement to collect and report workforce data is

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119. *Id.* ¶ 29.

120. See BUSINESS IN THE COMMUNITY, BENCHMARKING TRENDS ANALYSIS REPORT (2012), <http://opportunitynow.bitc.org.uk/research-insight/research-articles/benchmarking-trends-analysis-2012>.

121. LAW SOC’Y, *supra* note 3, at 29.

122. *Id.*

123. *Id.* at 28.

124. See, e.g., LAW SOC’Y, DIVERSITY AND INCLUSION CHARTER: ANNUAL REVIEW 2013 (2013), available at <http://www.lawsociety.org.uk/support-services/practice-management/Diversity-inclusion/documents/Diversity-and-inclusion-annual-report--December-2013>.

125. As ranked by the trade publication *The Lawyer*. See *The Lawyer UK 200*, LAWYER (2014), <http://www.thelawyer.com/analysis/intelligence/uk-200-2014-premium>. All data are on file with the *Fordham Law Review* and available upon request.

challenging. This is because, as set out in Table 3 above, so few firms published diversity data in 2010 across multiple diversity strands. At the same time, this direct comparison is also hindered by the fact that law firms move up and down the rankings and merge with other firms. As such, the top ten in 2010 looks different from the top ten in 2014. Despite this, some form of comparison is still instructive: like firms are being compared against like, and the data set out below highlights some interesting developments.

Table 5 sets out the percentage of firms disclosing workforce diversity data in 2014, compared with firms in 2010.

<b>Table 5: Workforce Diversity Data Disclosures (2014 and 2010)</b>		
<b>Firm Ranking</b>	<b>Disclosure of Workforce Diversity in 2014</b>	<b>Disclosure of Workforce Diversity in 2010</b>
1–10	90%	90%
11–25	87%	53%
26–50	52%	52%
51–100	46%	16%

There are, then, many more firms disclosing workforce diversity data in 2014 than in 2010. In this regard, the reporting rule has had some success. However, we were unable to find workforce diversity data for a number of large U.K. law firms on their websites, despite the regulatory requirement to publish. In total, we were unable to find disclosed data for 42 firms out of the top 100. Our research over the summer of 2014 was particularly laborious, challenging, and frustrating. Different firms report in different ways and in different parts of their websites. As noted earlier in this Article, this discretion is permitted. At the same time, most law firm websites are particularly hard to navigate.<sup>126</sup> Accepting that the inability to find disclosed workforce data might be due to researcher error (and not to non-compliance with the LSB's reporting rule), we contacted, via email, each of the firms for which we could not see the relevant statistics. From forty-two emails sent to firms, twelve responses were received (as of December 9, 2014). Three Scottish law firms set out, quite rightly, that

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126. Although, it must be said, they are far better than those of the SRA and LSB.

they did not need to comply with LSB's reporting rule.<sup>127</sup> Two further firms emailed copies of their workforce diversity data but did not set out where that data was published. We remain unable to find that data on their websites. One firm highlighted researcher error (in providing us a direct website link to its data)—here, the data was found under the “About Us” section of the firm’s website and did not appear when a search of the website was undertaken for the term “diversity” (a matter we come back to in the conclusion of this Article). One firm replied that “we don’t publish our data on diversity at the moment although we intend to prior to the deadline for doing so.”<sup>128</sup> Three other firms said the data was being updated, either on a general level or because of a law firm merger. This is perfectly acceptable under the rules, although it does make data gathering more challenging. Here, the SRA says that: “Firms should publish their diversity data annually at a time which is convenient to the firm. The SRA does not have a set date by which the publication should be made, but firms should be able to demonstrate annual publication on a cycle that suits the firm.”<sup>129</sup>

For 30 firms out of the top 100, however, we were unable to find diversity data on the firms’ websites and our request, via email, for such data went unanswered. In terms of the data disclosed, our 2014 review showed that more firms were disclosing data on more characteristics than in 2010, but also that a number of firms in the top 100 failed to disclose data on all of the characteristics covered by the LSB’s reporting rule. This data is currently being further analyzed and will form the basis of a future paper.

#### CONCLUSION

This Article has reviewed the history and early years implementation of the LSB’s reporting rule on diversity in the legal profession. It has challenged the need for the rule’s introduction and critiqued how the rule has thus far been operationalized. While we have seen greater disclosures by firms of greater amounts of data, there are still large gaps in that disclosure and the regulators’ use and analysis of the data has been questionable.<sup>130</sup> There have, however, so far been only two reporting cycles for the LSB’s rule. It is possible that the rule will, in time, lead to change in the legal profession and that this Article and its arguments are somewhat premature. This latter point notwithstanding, there are a number of improvements that could be made to the current regulatory approach by

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127. It is not clear whether any solicitors governed by the SRA work at these firms. It is also not clear the extent to which the LSB’s reporting rule could, or should, cover SRA-governed solicitors working for firms outside of England and Wales.

128. Email from Firm to Alastair Young, Student Researcher, Univ. of Birmingham (Sept. 5, 2014, 9:51 AM) (on file with the Fordham Law Review).

129. See *Diversity Data Collection: Publishing Diversity Data*, SOLICITORS REGULATION AUTH., [http://www.sra.org.uk/diversitydata/?301#Collection\\_5](http://www.sra.org.uk/diversitydata/?301#Collection_5) (last visited Jan. 11, 2015).

130. It is understood that the SRA is to launch an online diversity tool that will allow firms to compare their diversity statistics against their competitors (e.g., firm X against all firms with > Y partners). This is a useful step in the right direction.



the LSB to legal services diversity data collection and reporting. Five modest suggestions for change are offered for consideration.

The first change would require firms to have a section on their website headed “Diversity” (and then a subheading titled “Diversity Statistics”) and to store their workforce data here for each year. There is little point in a rule that requires the disclosure of data if finding that data is overly arduous for third parties. The second proposed change would be a new requirement on firms to report, qualitatively, on the diversity and inclusion initiatives they have in place and to provide an assessment of their impact.<sup>131</sup> While quantitative data can be useful, context and commentary are also important. The third proposed change would require firms to present their data in a uniform manner and to cross-tabulate that diversity data (e.g., how many of their partners are female and attended fee-paying schools; how many of their associates are BAME and disclose their sexual orientation).<sup>132</sup> The LSB has accepted that “aggregated data is still not available in a way that allows detailed analysis *across* the legal profession.”<sup>133</sup> The same is true even *within* the solicitor’s branch of the profession, due to the lack of uniform reporting. The fourth proposed change would be a requirement on firms to give data on recruitment, retention, and promotion decisions. This was a core organizing principle of the LSB’s consultation exercise,<sup>134</sup> but it is not reflected in the reporting rule. Transparency is as much about making clear exercises of power as it is about anything else.<sup>135</sup> As such, it would be instructive if data were made available on, for example, the diversity makeup of vacation students/work experience students and on the pool of those eligible for promotion (and those who were then promoted). Fifth, there is much that the LSB and the SRA (and, indeed, the other regulators of the profession) can learn from the Law Society with regard to the presentation and interpretation of workforce diversity data.<sup>136</sup> Regulatees have every right to be wary of data gathering where that data is not then adequately assessed or understood. As Fisher suggests, transparency is dependent on the quality of the information.<sup>137</sup> It is also similarly dependent on the quality of the data analysis.

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131. This is already required of signatories to the Law Society’s Diversity and Inclusion Charter. *See supra* note 20 and accompanying text.

132. There are justified concerns that such an approach to intersectionality could lead to the identification of individuals at smaller firms.

133. LSB SEPTEMBER 2013 REPORT, *supra* note 90, ¶ 13 (emphasis added).

134. *See* LSB RESPONSE DOCUMENT, *supra* note 31, ¶ 8.

135. CHRISTINA GARSTEN & MONICA LINDH DE MONTOYA, *TRANSPARENCY IN A NEW GLOBAL ORDER* (2008).

136. It is striking that the SRA’s “thematic study” on equality and diversity, published in April 2013, is so much better (in terms of data analysis and approach) than the SRA’s workforce data reports. Is this, perhaps, an example of a lack of communication within the SRA? *See* SOLICITORS REGULATION AUTH., *THEMATIC STUDY OF COMPLIANCE WITH PRINCIPLE 9: ENCOURAGING EQUALITY OF OPPORTUNITY AND RESPECT FOR DIVERSITY* (2013), <http://www.sra.org.uk/documents/SRA/equality-diversity/thematic-study-compliance-principle-9.pdf>.

137. Fisher, *supra* note 72, at 281.