

***‘For now we see through  
a glass, darkly’  
examining diversity  
disclosures by UK law  
firms through a critical  
race perspective.***

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This paper is based on the academic submission by the author to a  
module entitled *‘Educational Practices for Social Justice and Equity’*  
(EPSJE) which forms part of the author study on an Ed.D  
programme at the University of Birmingham. In due course, this  
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# ***'For now we see through a glass, darkly': examining diversity disclosures by UK law firms through a critical race perspective. '***

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## **Introduction**

This paper evaluates a current initiative of the super regulator of the solicitor and barrister arms of the legal profession, the Legal Services Board, namely the mandatory publication of workforce diversity statistics by both law firms and barristers chambers. One of the main aims of the initiative is creating data sets that will allow for inequalities within the legal profession *'on gendered, raced and classed lines'* (Sommerlad *et. al.*, 2009, p6). to become more readily identifiable This paper will critically explore the origins and development of this initiative, as well as evaluating its scope and effectiveness. The paper recognises the merit of the diversity reporting rule in that it represents the first step in a broader programme of measures to address issues of inequality. However, it goes on to argue that the ideological underpinning of the LSB diversity reporting rule, which demonstrates an over reliance on the *'power of numbers'* (Gillborn, 2010), is flawed. By dealing with diversity and inequality in this way, there is a *'de-situation'* (Reay, 2012) away from the real reasons for lack of diversity within the legal profession, which are better situated around notions of habitus and lack of social and cultural capital (Bourdieu, 1968). As such we see, as the title of the paper suggests, a *'poor reflection'* of the diversity issues that are inherent within the legal profession.

## **Origins and historical development**

In one of our EPSJE seminars, we were asked to consider what phrases and images are usually connected with our individual professional contexts. When considering my own discipline, law, some typical images sprang to mind – namely a legal profession dominated by white, rich, upper class and male professionals. These images were confirmed by my fellow classmates as images they too typically associated with the legal profession. But are these accurate pictures?

The title of this paper is taken from Corinthians 13:12 and the analogy to poor reflections in a mirror is a particularly apt one given that diversity and equality have been key issues for the legal profession in England and Wales for a number of years. Research has been undertaken to explore class and social mobility within the legal profession, which showed that over half of partners in elite law firms had been privately educated (Sutton Trust, 2009). Law firms show a persistent bias for recruiting students from elite and redbrick universities which in turn results in a workforce that is less diverse as students from a lower social class (who also are more likely to be BAME) are more likely to attend a newer university and, as such, do not form part of the usual recruitment pool (Rolfe & Anderson, 2003, p322). This is borne out by the Law Society's own review into class in the legal profession which concluded that there are barriers within the legal profession for those from lower social classes that are the aggregation of inequalities arising both pre- and post- university (Vignaendra, 2001, cited in Vaughan, 2015, p2314).

#### *Emergence of the diversity reporting rule*

However, the legal profession has taken steps to address diversity and equality issues. The Legal Services Board (LSB) was formed in 2009 as the parent 'super regulator' of legal services in England and Wales. The Legal Services Act 2007 (LSA), the legislation which gives effect to the LSB, sets out the regulatory objectives of the LSB, one of which (contained in section 29 of the LSA), is '*encouraging an independent, strong, diverse and effective legal profession*' (as cited in Vaughan, 2015, p2301). The LSB has been keen to emphasise its commitment to this regulatory objective. In 2009, David Edmonds, then chairman of the LSB, stated that:

*'One focus of the LSB...is on "promoting access to a diverse profession"...Promoting a legal workforce that is open to the widest pool of talent is recognised across the sector and government as a priority area. We believe that fair access to the profession, as well as retention and progression of lawyers within it, is critical'* (Sullivan, 2010, p2)

With this focus in mind, in 2009, the LSB funded a research project undertaken by Westminster, Leeds and Leicester universities to investigate the experiences of women and BAME lawyers (hereafter the 'Diversity Report'). The researchers interviewed lawyers, potential lawyers and lawyers who had left the profession, in addition to diversity managers and non-lawyers at firms from the North of England and London. The qualitative study looked to '*examine the processes which produce differential opportunities and career patterns in the solicitors' profession and at the Bar...[it] is designed to capture the meanings that actors*

*attached to their choices, and the experiences that inform them, rather than provide a statistical description of the consequences of career choices'* (Sommerlad *et. al.*, 2010, p 20).

The Diversity Report found that whilst more than half of new solicitors were women and about a fifth are black and minority ethnic (BAME) trainees, diversity quickly evaporated in the upper echelons of the legal professions, resulting in 75% of partners in law firms still being men and only 5% being from BAME backgrounds. The same was true at the Bar, with roughly equal numbers of male and female practitioners being called to the Bar, but that the QC (Queens Silk) level, the most senior rank of barrister, remained dominated by 90% men. (Passmore, 2010).

In addition, the Diversity Report concluded that the legal profession is *'segmented and stratified on gendered, raced and classed lines, suggesting that the opportunities available to young lawyers are not equally distributed'* (Sommerlad *et. al.*, 2009, p6). Despite advances being made in recognising inequality and preliminary *ad hoc* initiatives at addressing the same (such as equal opportunities and recruitment policies, charters and guidance (Passmore, 2010)), the Diversity Report determined that the legal profession was still perceived as *'inherently masculine in character in the sense of its working patterns and general culture and, further, characterised by (possibly unwitting) biases against non-white professionals and those drawn from lower socio-economic groups'* (Sommerlad *et. al.*, 2009, p6)

### *Recommendations for change*

On the basis of both their own empirical findings and following an extensive review of academic and policy literature, the authors of the Diversity Report made a number of proposals for improving diversity in the legal profession. These ranged from providing financial support for candidates from lower-socio economic and BAME backgrounds to providing flexible working programmes with built in clear transparent work allocations and promotion strategies (measures clearly linked to a redistribution model of social justice). Additional proposals were aligned more to a model of social justice based on recognition, such as supporting outreach programmes and developing formal mentoring/support networks, to providing better diversity training and requiring reform of qualification pathways into the law only after completion of equality impact assessment processes (Sommerlad *et. al.*, 2009, p8). However, out of all of the recommendations of the Diversity Report, only one has been formally implemented by the LSB to date, namely the recommendation *'requiring the disclosure, and monitoring, of diversity data within firms and across specialisms'* (Sommerlad *et. al.*, 2009, p8).

## **Implementation and initial aims of the LSB diversity reporting rule**

In order to implement the diversity disclosure and monitoring recommendation of the Diversity Report, the LSB first undertook further consultation and commissioned a further report (LSB, 2010). The findings of this additional report hi-lighted to the LSB:

*'The lack of comprehensive data on the make-up of the existing legal workforce across the full range of diversity strands...there is no systematic evaluation of the impact and effectiveness...the statistics that are available [are] supported by qualitative studies...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'* (LSB, 2010, p 4)

It is interesting to note that even at this early stage, a familiar neo-liberal narrative has started to creep into the rationale for the LSB diversity reporting rule. Unlike the Diversity Report rationale, which is grounded in the need for accessible and transparent data to allow for implementation of the other proposals to tackle diversity it recommends (Sommerlad *et. al.*, 2009, p8), instead the needs of the market becomes a driving force. In addition, there seems to be a perception that only full quantitative statistics are reliable and the lack of the same is preventing *'impact and effectiveness'* (a position that is in of itself flawed and not supported by critical race theorists such as Gillborn, which is explored later in this paper).

The LSB also established a 'Diversity Forum' as part of its ongoing consultation on the implementation of the diversity reporting rule, at which stakeholder engagement was encouraged. As a result of this further research and consultation process, the LSB published a response in July 2011 (LSB, 2011) in which it concluded that despite the diversity data reporting rule being *'controversial'*, that it had decided to proceed with implementation as planned. Vaughan suggests the controversy maybe because diversity reporting could be seen as a pre-cursor to implementation of more direct action in the forms of quotas (2015, p2309), although this is not explicitly acknowledged by the LSB. The LSB gave six reasons for the diversity reporting rule. This paper adopts the framework for analysis of the LSB justifications take by Vaughan (2015, p2310) and looks to critique the 5 rationales most closely aligned with social justice from a critical race perspective, to offer an understanding of social justice being demonstrated and the suggestions being made as to how inequality can be most effectively addressed:

- **The diversity reporting rule allows *'regulators to identify where the variation from what might be expected is so great that regulatory questions may need to be asked'* (LSB, 2011, p8)**

This rationale is most problematic. The LSB itself in its early commissioned work recognised that inequalities and lack of diversity within the legal profession are unlikely to occur ‘as a result of overt discrimination but instead barriers to entry and progression occur over the lifetime of individuals seeking a career in law from initial education, to training, to gaining experience within a law firm’ (Sullivan, 2010, p2). Having recognised that diversity is nuanced and complex, for the LSB to then make a link to raw statistical data alone as evidence for regulatory intervention is both clumsy and tenuous (Vaughan, 2015, p2310). Quantification in this manner as a method of providing evidence for policy change and the emphasis on the reliability of quantitative data demonstrated by the LSB shows an over reliance on the ‘power of numbers’. This is not uncommon: as Gillborn reflects ‘numbers carry a special kind of influence in contemporary policy debates, where statistics are generally equated with scientific rigour and objectivity’ (2010, p272). Is it a case that by publishing diversity data in this way, that the LSB hope academics and commentators will feel less able to challenge the broad sweeping statistics being published that offer little as to the nature of inequality itself and that fail to recognise the complexity of diversity issues in the first place? (Gillborn, 2010, p272).

- **A diversity reporting rule raises awareness of barriers to particular groups and in doing so promotes ‘hi-lighting and stimulating challenges to the more intractable cultural reason for action’ (LSB, 2011, p8).**

The possible cultural barriers to females and those from lower-socio and BAME backgrounds were acknowledged in the original Diversity Report, which reflected upon the extent to which the real reasons for lack of diversity and equality in the legal profession are better situated around notions of habitus and cultural capital (Bourdieu, 1968). There is no evidence that any cultural change has taken place as a result of the introduction of the LSB diversity reporting rule (Vaughan, 2015, p2310). This is unsurprising as statistical data does little to recognise that inequality is socially constructed and replicated throughout history (Reay, 2012). We carry our social histories and backgrounds with us and the field into which females and those from lower-socio economic and BAME backgrounds are entering (law) is activating habitus in different ways in different candidates. For example, BAME individuals may not have the sufficiency of cultural capital (or social capital depending on where they completed their schooling and degree) to navigate the field of law in an equal manner (Sommerlad *et. al.*, 2009, p11). As commented on by Gillborn:

*‘by seeking to treat...inequality as the result of discrete and predictable processes and...by focusing on how much inequality is associated with particular...identities (including class, gender, race, family structure and maternal education), such research can give the impression that the problem arises from those very identities – rather than*

*being related to social processes that give very different value to such identities, often using them as a marker of internal deficit and/or threat'* (Gillborn, 2010, p272).

- **It is important to 'ensur[e] data is available at the level at which recruitment, retention and promotion decisions are made' (LSB, 2011, p8).**

Again by placing an over emphasis on a '*contemporary wisdom*' of collecting and publishing data in order to improve diversity by being more aware of it, there is a '*de-situating*' towards the real reasons of lack of diversity (Reay, 2012). The fallacy of this rationale is made even more clear by Vaughan, who argues that the relevant data required for this rationale to be applicable is not even produced as a result of the LSB diversity reporting rule (2015, p2311). This is because the implementation guidance on the LSB diversity reporting rule issued by the professional bodies (the SRA and the Bar Standards Board ('BSB')) does not require data on key recruitment, retention and promotion decisions to be collected or reported upon, meaning such data falls outside the scope of the rule itself. There is also the issue of whether collecting data on point of entry into the profession and promotion thereafter is unsound as questions of diversity arguably need to be addressed at a far earlier stage. This is because, other than the habitus of home, education is the only other mechanism of generating the cultural capital required for individuals to be able to navigate the complex field of law in a more equal manner (Bourdieu, 1968). A diversity data reporting rule in this way does little more than recycle inequalities rather than tackling it head on as it '*simply moves the inequalities round from one part of the system to another*' (Reay, 2015, p3).

- **Publication of workplace diversity statistics allows '*consumers...to identify where the diversity profile of a particular firm varies from what might be expected when compared with competitors*' (LSB, 2011, p8);**

Notwithstanding again the creep of the neo-liberal subtext, this rationale is based on the presumption that comparisons can be made between the diversity data published by different firms. Vaughan points out that such direct comparison by consumers is just not possible as the guidance produced by the governing body for solicitors (the Solicitors Regulation Authority, or 'SRA') does not require consistency on publication of diversity data, as different firms can publish diversity data in numerous varied ways and in various places on their websites (2015, p2310).

### **Operation and Effectiveness**

So has the LSB diversity reporting rule been a success? The answer to that question depends somewhat on the measure of success being used. Transparency and accountability are two possible measures, as the LSB itself recognised that '*transparency about diversity is*

*important as it makes firms and chambers accountable for their decisions'* (LSB, 2011, p 10 as cited in Vaughan, 2015, p2315). This argument is, however, misguided as it fails to recognise that any quantitative data reported through such a rule is not neutral and as such can be neither entirely transparent or an effective ground for accountability. As recognised by Carpentier:

*'quantitative data should therefore be considered not only as the illustration or evidence of the construction of the...system, but also as active instruments of planning, control and monitoring of such construction: therefore they are informative but not neutral.(...) Quantitative data are social constructs....'* (2008, p704 as cited in Gillborn, 2010, p272).

The measures of transparency and accountability fall at the first hurdle with regards to the 'successes' of diversity disclosures by the BSB regarding the Bar. In its first diversity data gathering exercise, the BSB reported a dire 5% response rate from chambers and barristers (LSB, 2013, p13). Vaughan points out that there is *'significant non-compliance'* with the LSB diversity reporting rule which in turn leads to an examination of whether *'the Bar of England and Wales...does not reflect the society it serves'* (2016, p22).

In relation to solicitors, since the LSB's diversity reporting rule was implemented, the SRA has published two reports on the disclosures made by law firms pursuant to the enactment of the rule. The first SRA report, published in April 2013, had a response rate of 42% but the categorisation of reported respondents ('authorised' and 'non-authorised' (SRA, 2013, p13)) is very basic and does little to lend itself to any meaningful analysis of diversity statistics disclosed. As reflected upon by Vaughan *'this lack of sophistication, this lack of even the most basic stratification, makes the data...almost meaningless'* (2015, p2320).

The second SRA report, published in May 2014, is more nuanced and is grounded on a higher response rate of 79%. There is some evidence within this report of different sub-categories within main categories (for example, 'authorised' respondents are now split into 'Solicitor Partner or Equivalent' and 'Solicitor and Other Lawyer' sub-categories) (SRA, 2014, p4). Whilst this does allow for some deeper analysis, it does give inaccurate indications. For example, Vaughan points out that analysis of BAME diversity statistics in the SRA 2014 report seems to suggest that BAME lawyers are sufficiently represented at partner or above level some law firms. However, this runs contrary to the more detailed analysis on this published by the Law Society in 2013 (Law Society, 2014 as cited in Vaughan, 2015, p2321). As recognised by Gillborn, in their role as promoting use of quantitative research, it is vital that the LSB and the other professional bodies in law *'recognize their responsibility to be critically reflexive about the claims they make on the basis of available data'* (2010, p272).

## Conclusions

It is easy to forget that the diversity reporting rule was not itself offered by the LSB as the 'panacea' to deal with all issues of diversity and equality within the legal professions (Vaughan, 2015, p2302). The rule has also only been subject to three reporting cycles to date (analysis of the third cycle of data obtained in 2015 published in April 2016 falls outside the scope of the timing of this paper) and so further impact of the same may still yet emerge. However, by choosing to formally implement through regulation only one recommendation from a programme of proposals to address a lack of diversity and equality, the LSB opens itself up to criticisms of its ideological standpoint. A diversity reporting rule is too much of a *'blunt tool'* to deal with the wider social constructions of inequality that persist within the legal profession (Vaughan, 2015, p2315). In addition, the LSB's over emphasis on quantitative data collection and publication is flawed in that critical race theory demonstrates that potentially *'statistical methods themselves encode particular assumptions which, in societies that are structured in racial domination, often carry biases that are likely to further discriminate against particular minoritized groups'* (Gillborn, 2010, p254).

In its 'Diversity Data, Collection and Transparency Report, the LSB stated that *'the concept of collecting and publishing data has been widely accepted as a means to stimulate action'* (2013, p11). A critical race theory lens suggests that this is a fundamentally mistaken belief. Whilst statistical data may *'reveal hidden realities about the world'*, equally it is not a 'special' form of data and so, in relation to legal diversity which contains the inequality 'domination' outlined earlier in this paper, it is no less likely to lead to *'false interpretations and misleading arguments'* (Gillborn, 2010, p254). Returning to the title of this paper, the LSB diversity reporting rule has not as yet offered up a mirror to which to reflect upon more clearly (or 'less darkly' to continue the analogy) on the problems of diversity and inequality within the legal profession. It remains to be seen whether future reporting cycles, in conjunction with other initiatives, will actually bring about the changes within the legal profession that this paper and other academics agree are so desperately required.

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