

Consultation on The BSB Equality Rules

1. Do you agree with the new positive Core Duty (CD8) (and consequential amendments) which goes beyond the duty not to discriminate unlawfully? (Recommendation 1)

No. The FSU is concerned that the proposed new CD8 will allow for expression-based discrimination against clients, applicants and colleagues in the name of ill-defined and controversial principles underpinning the concept of Equality, Diversity and Inclusion (EDI).

As it stands, the proposal is unnecessary, unlawful and unworkable in light of existing law and professional ethical standards required of barristers.

In particular, we believe the BSB proposals will mandate (or at least systemically encourage) an aggressive, proselytising approach to EDI, potentially leading to a breach of individual barristers' rights and the degradation of the Bar as a profession and as a public service.

This systemic risk arises from three features of the proposals:-

1. An undefined duty to "promote" EDI – which is effectively indistinguishable from a duty to propagandise.
2. A requirement to go beyond what is uncontroversially prescribed by law, and potentially into the "promotion" of politically contentious ideas.
3. The absence of any safeguards on the rights to freedom of belief and expression.

Examples taken from the consultation document show how, taken together, these factors are likely to have a negative effect.

In paragraph 5 of Annex B it is proposed that the BSB

work with stakeholders to develop guidance on fair recruitment and selection processes that are more specific and in depth, covering anti-racist recruitment practices, as well as promoting inclusion for those who share other characteristics.

'Anti-racism' is not simply the rejection of unlawful racial discrimination. It is a controversial political ideology popularised by Ibram X. Kendi. However, anyone taking their duty seriously to "promote" equality beyond the requirements of existing law might reasonably understand, from this passage and from CD8 more generally, that polemical anti-racism is exactly the sort of active advocacy required by the BSB.

An "anti-racist" approach to the protected characteristic of race – or any other polemical approach to EDI – would not only exceed the requirements of the Equality Act, but would be likely to breach them: for instance by creating a hostile atmosphere for those whose religious or philosophical beliefs put them at odds with this approach. The BSB's proposals do not consider how this conflict of duties should be addressed. Indeed, they make no material mention of the rights to freedom of belief and of expression.

It is therefore telling that the "Equality Rules" (Recommendation 2, after para 38 in the consultation) state that the proposed equality outcomes, which underlie CD8, must be met for "those who share particular protected characteristics and/or socio-economic status". It is not clear which protected characteristics the new CD8 will apply to, or should be prioritised,

or on what basis and at what cost for those with other protected characteristics. We infer, however, that in the BSB's view the particular protected characteristic of religious or philosophical belief is outweighed by the new equality duties and so need not be taken into account.

Whether intentional or not, this is a serious error that should be corrected. Recent judgments relating to the Equality Act 2010 make it clear that EDI policies are liable to infringe belief and speech rights if they are not carefully drafted and implemented.

To ensure consistency with the Equality Act and, in the case of the BSB as a public authority under the Human Rights Act 1998, to guarantee that the proposals are compatible with Articles 9, 10 and 14 of the European Convention on Human Rights, we propose the following changes:-

The duty to promote

The proposals do not define what it means to "promote" or "advance" equality, diversity and inclusion. But these terms necessarily imply the championing of a cause, which we believe could be inconsistent with competing protections for other religious and philosophical causes. To insist that barristers "promote" a cause that they do not believe in would be an example of compelled speech, which is prohibited by Articles 9 and 10 of the Convention.

By straying outside the guardrails of existing law, the BSB risks putting barristers on a collision course with a host of competing rights. We suggest this risk should be minimised by confining the new duties to practical steps which in the BSB's view will suffice to comply with barristers' existing obligations under the Equality Act.

At the very most, the additional duties and rules imposed on barristers should go no further than equivalent duties imposed on public authorities by the public sector equality duty (PSED) – that is to say, a 'due regard' duty. However, we query the legality of this approach too: the 'necessity' of such a measure under Articles 9(2) and 10(2) of the Convention would be questionable given that Parliament did not deem it necessary to extend the PSED beyond the public sector.

Belief and expression rights

As set out above, the omission of safeguards for rights of belief and expression is a major oversight. It is plainly foreseeable that the heightened EDI duties proposed will provoke a defensive and risk-averse response to any perceived questioning of EDI values. A prudent barrister would respond in no other way.

It is also likely that barristers will self-censor out of fear that their statements could be interpreted as failing to advance EDI principles, irrespective of their own beliefs.

At the very least, the rules must make it clear that compliance with the new duties is without prejudice to barristers' existing obligations wrt protected beliefs; and that the BSB's implementation of the new rules will be subject to its obligation not to act incompatibly with Articles 9 and 10 of the Convention.

Even those amendments may be insufficient, however. Discussion of EDI matters by barristers will inevitably constitute political, and indeed informed, speech. It will therefore

merit the highest protection under the Convention and the common law. As barristers are, by virtue of their job, capable of disagreeing well, any regulatory code purporting to protect them from opinions legitimately expressed by colleagues would almost certainly be disproportionate. It is inconceivable that the BSB could lawfully penalise any expression of an opinion on the grounds that it failed to “promote” EDI, even if the opinion called for the wholesale rejection of EDI values.

We therefore suggest that accommodating Articles 9/10 limitations on the BSB’s power to police the new duties would require more than an exception to the ‘promote’ duty. This problem goes to the heart of the ‘promote’ duty and, in our view, is another reason why it is unworkable.

Politicisation and pluralism

The expectation that barristers act as champions for a particular conception of EDI, beyond what the law requires, will inevitably lead to politicisation of the atmosphere in chambers. The FSU has dealt with many workplace disputes arising from centrally-imposed, politically contentious initiatives – which in our experience tend to poison workplace cultures and can lead to long and exhausting disputes. We believe such diversions would mar the Bar’s collegial culture and the service it provides to the public.

This risk could be mitigated by narrowing or removing entirely the ‘promote’ duty (as set out above) and by making it clear that steps to achieve equality cannot be rigidly prescribed. In particular, oC8 should allow barristers some latitude to debate openly in chambers the best conception of equality to pursue, and how. For example, a barrister should be free to propose, in contrast to the “anti-racist” approach, the alternative belief of “race-blindness” as promoted by Martin Luther King Jr. It should be made clear that engaging in such debate will not be penalised.

We accept that encouraging a ‘free for all’ on EDI matters may lead to heated political debates and undesirable distractions. We therefore suggest a proportional approach – the more that the BSB requires or encourages barristers to move beyond the law and into contentious territory, the more it must emphasise the need to tolerate a plurality of views. This would avoid the toxicity that arises when an employer or regulator mandates that a controversial viewpoint be accepted as orthodoxy.

We note also the following issues with the proposals:–

Censorship and access to justice

For the reasons set out above, if the proposed CD8 comes into force, it is unlikely that any barrister will be willing to take the risk of representing someone holding unfashionable beliefs. This is because CD8 will apply to barristers “when practising or otherwise providing legal services”. No attempt is made to limit the duty to more obviously relevant matters of practice management.

Under the new code, for example, a claimant such as Sean Corby, who expressed a belief in favour of ‘race-blindness’ as opposed to “anti-racism”, would not have found someone to represent him in his discrimination case. As a result, a court would not have had the opportunity to find that his beliefs are legitimate and protected under the Equality Act 2010 (*Corby v Advisory, Conciliation and Arbitration Service* ET/1805305/2022).

Conflict with BSB duties

Even those barristers prepared to comply with this new discriminatory mandate will be in a difficult position if they do. Barristers are subject to multiple other duties and rules under the BSB's Code of Conduct including, famously, the 'cab rank rule' which holds that they must accept a client if the instructions offered are appropriate for their seniority, experience and field of practice, and if proper remuneration is provided. This is, explicitly, irrespective of "any belief or opinion which [they] may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client".

How will barristers reconcile the cab rank rule with the proposed CD8? How will they maintain their independence (CD4) and act in the best interests of their client (CD2) while adhering to CD8?

In short, if the proposed CD8 comes into force, barristers will be placed in an untenable position regarding current professional ethical standards.

2. Are there examples of conduct, both within and outside of a barrister's practice, that should be prohibited but are not captured by this duty? (Recommendation 1)

No. We consider Recommendation 1 to be too proscriptive for the reasons set out in our response to Q1 and would not recommend that further examples of conduct, within and outside a barrister's practice, should be prohibited.

3. Is our approach to the proposed Core Duty appropriate for those at the Employed Bar? (Recommendation 1)

No for the reasons set out in our response to Q1.

4. Do you agree that the Equality Rules should take an outcomes-based approach, supported by prescriptive requirements that enable barristers to meet the outcomes? (Recommendation 2)

The FSU does not agree, for much the same reasons given in our response to Q1.

Although the issues identified by the BSB, such as those relating to the recruitment and retention of female and ethnic minority barristers, are important and should be addressed, the causes of unequal outcomes are complex and multi-factorial – going beyond the reach of the profession to society at large. Demanding certain outcomes at the expense of fundamental human rights, tolerance of different religions and beliefs and the principle of meritocracy is unacceptable.

The BSB, more than any other regulator, should be able to tackle disparities in ways that do not breach the law.

5. Have we identified the correct priority areas (*recruitment, retention, and progression*)? (Recommendation 2)

While these areas are important, we do not consider the prescriptive measures proposed by the BSB necessary or proportionate for the reasons set out in our responses to Q1 and Q4.

6. Are there any further outcomes we should seek to achieve through the Equality Rules? (Recommendation 2)

We do not consider equality of outcome an appropriate goal in relation to diversity initiatives for the reasons set out in our response to Q4. We therefore do not believe that the achievement of any further outcomes should be pursued.

7. Regarding Policies:

7a. Do you agree with the list of required policies in Recommendation 3?

Since the Equality Rules currently require that chambers and entities have policies a-e in place, we do not have any comment on the additional requirement to have a policy on “Allocation of unassigned work”.

7b. Do you agree that a non-prescriptive approach to the required policies will result in a more reflective and meaningful approach?

While a non-prescriptive approach may allow for more individualised policies that can be tailored to a particular practice, it can also lead to inconsistency and variability in the quality of such policies, potentially undermining efforts to standardise best practices across the profession.

7c. How can we ensure that this approach is appropriately targeted to the needs of different practices? (Recommendation 4)

Although we do not wish to comment specifically on this question, we reiterate that any guidance issued in relation to these policies should highlight the importance of freedom of speech and belief. It should also highlight the need to avoid vague principles that invite subjective interpretations which might stifle open discourse among barristers, chambers staff and clients, or encourage unlawful practices.

8. Will the requirements on monitoring and data analysis provide sufficient transparency for individual barristers to hold their chambers or entity to account? (Recommendation 5)

Expanding data collection could risk infringing privacy and free expression and encouraging barristers to adopt unlawful or draconian practices that ensure their data conforms to the required equality outcomes.

9. Should the data collection requirements include characteristics beyond those currently protected and socio-economic background? If so, which additional characteristics should be considered and why? (Recommendation 5)

Please see response to Q8.

10. Do you agree with our proposed requirement on publishing equalities monitoring data? Please explain your answer. (Recommendation 5)

Please see response to Q8.

11. Do you agree that clearer links between action plans and data will lead to more effective implementation of equality measures? What additional steps could enhance this linkage? (Recommendation 6)

No comment.

12. Do you agree with the proposal to remove the prescriptive requirement to undertake training on 'fair recruitment'?

No, insofar as it is to be replaced with “outcome-focussed recruitment” as expressed in Recommendation 8. The FSU is concerned that this proposed rule will infringe barristers’ Article 9 and 10 rights which include freedom from compelled speech/compelled manifestation of a belief.

13. Will the proposal to replace prescriptive training with a more reflective approach lead to more purposeful CPD activities to build the skills required to meet the Equality Outcomes? (Recommendation 8)

Please see response to Q8.

14. Do you agree with our proposals in relation to the conduct of an accessibility audit and publication requirements? (Recommendation 9)

No comment.

15. Do you agree with our proposed requirements to improve access to premises of chambers and entities for disabled people? Please explain your answer.

(Recommendation 10)

No comment.

16. Is the requirement, set out in Recommendation 10, a proportionate means of achieving the equality outcomes of the 'General Equality Rules'? Please explain your answer.

No comment.

Do you agree with the proposal to remove the mandatory requirement to appoint Equality and Diversity, and Diversity Data Officers? If so, how could chambers and entities manage these responsibilities moving forward? (Recommendation 11)

We don't disagree with removing the mandatory requirement, but have no comment on how chambers and entities should manage these responsibilities moving forward.

18. Do the prescriptive requirements within the rules:

a) enable barristers to take a reflective approach to achieving the equality outcomes?

No comment.

b) ensure specific, measurable and timely action is taken to address disparities?

No comment.

19. Is there sufficient clarity on what is expected under our new proposals from:

a) barristers within chambers and entities?

No comment.

b) sole practitioners c) employed barristers?

No comment.

20. Are any of the requirements on sole practitioners disproportionate?

No comment.

21. Are our proposals to improve disability access proportionate? Please explain your answer.

No comment.

22. Do you foresee any specific problems that barristers, chambers or entities might face in complying with these proposed rules? How might these problems be mitigated?

CD8 would have a chilling effect on internal discussion within pupillage committees as to how best fair recruitment should be achieved. All good pupillage committees are dedicated to recruiting the candidates with the greatest potential, regardless of background, but there is room for debate as to how this can be achieved. For example, one set of chambers implemented a special mini-pupillage and guaranteed-interview scheme to encourage underrepresented applicants. The scheme has been a great success, but beforehand there was legitimate debate as to whether the creation of a separate track for the underrepresented was fair to other candidates. That constructive challenge resulted in additional protections for applicants who did not meet the underrepresented criteria, ensuring that the strategy for increasing diversity 'levelled up' rather than 'levelled down'. Under the proposed new rules, pupillage committee members would have felt too afraid to engage in the legitimate debate that took place and the result would have been a worse outcome for all candidates.

This risk might be mitigated by an express carve-out protecting barristers' lawful speech that seeks to challenge conceptions of equality, diversity and inclusion and their "promotion".

23. How can we effectively gather and incorporate feedback from those affected by the new rules to ensure continuous improvement? What mechanisms should be in place to evaluate the effectiveness of the new rules in achieving their intended outcomes?

No comment.

Which of these groups best reflects you:

A) Registered barrister

B) Unregistered barrister who has previously practised

- C) Unregistered Barrister who has never practised
- D) Law student
- E) Education and training provider
- F) Legal services consumer/member of the public
- G) Representative of legal consumers
- H) Other legal professional
- I) Legal services representative body
- J) Other ✓

Are you responding in an individual capacity or as a representative of your organisation?

Individual response

Organisational response ✓

We will normally publish responses to consultations. If you would prefer to remain anonymous, please tell us.

I would prefer my response to remain anonymous

I am happy for my name and/or the name of my organisation to be published ✓

Your Name (if you are happy to be quoted in our consultation response)

The name of your organisation (if you are happy for your organisation to be quoted in our consultation response)

The Free Speech Union