

Consultation on Proposed Amendments to the Equality Rules

Response from the Lawyers' Christian Fellowship

The Lawyers' Christian Fellowship (LCF), first formed as the Lawyers' Prayer Union in 1852, has for more than 170 years sought to unite and equip Christian lawyers to serve well within in the law and share the gospel with members of the legal profession. The LCF has a membership of approximately 1,000 lawyers and law students, with a network of regional groups across the UK and international links which are particularly strong in East Africa and Europe. We want to see society served by our legal system, bringing people justice in substance as well as by proper process, and helping the vulnerable. The LCF is supportive of the principles of equality & diversity, but wishes to raise some concerns about the proposed new rules, particularly as they relate to issues of religious belief and conscience, as well as access to justice.

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. We do not agree with the new CD8, for the following reasons.

Insufficient clarity

- The LCF is concerned that the new Core Duty lacks clarity. The current CD8 is quite clear, stating 'You must not discriminate unlawfully against any person'. The meaning of 'discriminate unlawfully' is set out in the Equality Act 2010 and elaborated in extensive case-law. It is also a duty not to do certain things. Both of these factors mean it is straightforward for everyone to understand and comply with. By contrast, the proposed new Core Duty 'You must act in a way that advances equality, diversity and inclusion' is vague, open-ended and ill-defined. None of the key words – equality, diversity or inclusion – are defined in law or elsewhere in the Bar Handbook or guidance. 'Act in a way that advances' is open-ended; no barrister will ever know if they have done enough to comply with such an ongoing, never-ending duty.

Lack of coherence with other duties

- It is not clear how the proposals interact with other Core Duties or parts of the Bar Handbook. For example, how does the proposed CD8 sit alongside CD2 – 'you must act in the best interests of each client'? Take for example a disability discrimination case in the employment tribunal. If the new CD8 is brought in, will a barrister be in breach of it for defending any client who is subsequently found to have discriminated unlawfully on the grounds of disability? Or take another example of acting for a Christian, Muslim or Jewish client who believes that same-sex relationships are sinful and defending her well-established right in law to believe that and manifest the belief. Would that be taken under the new CD8 to be failing 'to act in a way that advances inclusion'? The new proposals create serious ethical and professional dilemmas for barristers, and could have a chilling effect on access to justice. We note the recent [FAQs](#) document published by the BSB seeks to clarify that the new proposed CD8 is not intended to affect the 'cab rank rule' or duty not to discriminate, and is 'largely focused on practice management'. However, this is a mere assertion. It is not clear on the face of the proposed language, nor is there any explanation for how these duties will actually interact or be interpreted together in practice.

Overly broad and expansive

- In addition, the clarification that the proposed CD8 is 'largely focused' on practice management must mean that it is not solely restricted to such matters. Indeed, the breadth of the proposed new

rules on their face gives rise to concerns that they could overreach into barristers' private lives, including the exercise of their faith as Christians. For example, we are concerned that a barrister attending a church where the teaching was not regarded by the BSB as advancing equality, diversity and inclusion (because, for instance, it reserved certain leadership or ministry roles to men, or taught traditional views on sexual ethics) might be considered to have breached the rules.

Risk of undermining existing work on equality, diversity and inclusion

- LCF members share with other members of the Bar a general support for the principle of non-discrimination and promotion of voluntary positive action to improve the diversity of the Bar and enable as wide as possible a range of people to become barristers and build a thriving practice. The use in the proposed new CD8 and Rules of much more contested and vague terms such as 'equality, diversity and inclusion' is liable to promote controversy and reduce support for this ongoing work.
- There is growing concern across the whole of society ([public](#), [private](#), [third sector](#) and [academia](#)) that equality and diversity initiatives which are too heavily pushed, top-down or enforced can be counter-productive. The BSB proposal does not appear to be based in evidence about what is most effective in creating and maintaining a genuinely diverse culture and the widest possible access to the profession. There is a risk that the rules may be seen as interfering with the true independence of advocates, affecting the UK's position as a forum of choice for dealing with international disputes. Finally, there is potential for different chambers to interpret the new rules in different ways. It is possible that the revised policies of different chambers may conflict with religion and belief (one of the nine protected characteristics in law) and therefore lead to reduced equality, diversity and inclusion.

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, as above we consider the duty is too broad.

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

We believe that the same principles should apply to the Employed Bar as for the Independent Bar.

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)

No. We do not agree with this approach.

The proposals lack internal coherence and consistency in this regard. There is an attempt to define 'equality, diversity and inclusion' in paragraph 27 of the consultation document. In relation to equality this is said to mean 'equality of *opportunity*', presumably as opposed to equality of outcome. This is a definition the LCF would agree with; it is in line with the Equality Act 2010 and extensive case-law. It is also realistic in a highly competitive profession such as the Bar made up of many individual self-employed practitioners and entities, which inevitably will give rise to significant discrepancies in outcome regardless of how fair the playing field can be made to be.

However, the consultation then confuses this definition in paragraphs 28 and 29 by saying that 'compliance with the proposed Core Duty and Equality Rules is not *necessarily* to have achieved equality of outcome, but to have taken reasonable steps and *to have demonstrated progress over time.*' This introduces equality of outcome by the back door. The rules are then described as 'outcomes-focused', which inevitably makes equality of outcome the goal, in practice if not by intention or design.

The proposed wording of the General Equality Rules is then itself contradictory, referring to 'equality outcomes' in the overall requirement and then 'equality of opportunity' in subparagraph (a). Further, the proposed subparagraphs (a) and (d) – 'advance equality of opportunity' and 'promote an inclusive culture' are highly subjective, vague and ill-defined. It is difficult to understand how an effective and measurable 'outcome' could be identified for either of these.

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

The LCF agrees that these are the areas in which further work to ensure genuine equality and diversity should be prioritized. However, voluntary forms of positive action and cultural change are much more likely to be effective than imposing a broad new duty. It is dangerous to try and change culture by the imposition of detailed rules or duties because it will lead to the letter of the regulations being observed rather than their spirit. What is needed is an approach that encourages barristers to desire to achieve each of these goals. As the Apostle Paul wrote in Romans 12:2, true change happens when a person is "transformed by the renewing of [their] mind". This is rarely, if ever, achieved by outcomes-based regulatory requirements which easily become tick box exercises. This is what the new BSB approach is in danger of creating.

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

We note that there is little attention paid to religion or belief, as opposed to other protected characteristics. Barristers should not be required to act in a way which conflicts with their deeply held religious beliefs or goes against their conscience. These concerns could be met by a principle of reasonable accommodation which does not require barristers to act contrary to their conscience where alternative representation of equal ability is available instead.

7. Regarding policies:

a) do you agree with the list of required policies in Recommendation 3;

We agree with the list but reiterate that equality, diversity and inclusion policies must include all protected characteristics including religion or belief. Often there is very little thought given to religion or belief and the need for reasonable accommodation as explained above.

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

Yes. However, the current recommendations taken as a whole are over prescriptive and are likely to lead to a tick box exercise that will not in fact achieve the aim of changing attitudes.

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

We are concerned that the BSB's proposed approach will be unduly onerous for small sets of chambers and sole practitioners which may have a detrimental effect on equality and diversity because small sets of chambers/sole practitioners tend to be made up of a disproportionate number of barristers from an ethnic or religious minority.

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)

There is a danger that monitoring and data analysis will be incompatible with the requirements of GDPR, especially within smaller chambers or entities.

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)

No.

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

In order not to compromise GDPR principles, the LCF believes that publishing equality monitoring data should only apply to large sets of chambers or other entities, where individual data cannot be identified.

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)

In theory the LCF agrees with this, but in practice this will be very difficult for a smaller chambers or entity. Take, for instance, a chambers of 15-20 people where the data shows a disparity of income; this might simply be because those with a higher income are working harder, are more senior or are simply more capable and therefore in demand. There may be no way, even long term, to design an action plan which would remove or reduce this disparity. Any attempts to do so may create a danger of work being unlawfully deflected from the high earners merely to meet BSB equality of outcome targets. This would be highly unfair and would undermine the purpose and spirit of the proposed new rules.

12. Do you agree with the proposal to remove the prescriptive requirement to undertake training on 'fair recruitment'? (Recommendation 7)

The concern we have here is that a move from a focus on fair recruitment principles and processes to a focus on outcomes will encourage chambers and other entities to engineer their recruitment to fit the outcomes desired by the BSB. This would be unmeritocratic, counter-productive and unfair.

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)

Yes, subject to the broader concerns set out above, we support this.

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

Yes.

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)

Yes.

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.

It is reasonable and proportionate provided that the five-year review period and the exception of reasonable justification are maintained.

17. 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 have no response on this question.

General Questions

18. Do the prescriptive requirements within the rules:

a) enable barristers to take a reflective approach to achieving the equality outcomes? No

b) ensure specific, measurable and timely action is taken to address disparities? No

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

a) barristers within chambers and entities

b) sole practitioners

c) employed barristers?

No, for the reasons set out above in response to question 1.

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

Potentially yes.

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

Yes, as long as the caveats are maintained.

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?

As already outlined in our answer to question 1, the LCF has deep concerns with the lack of precision in these proposed rules and the impact they could have on those with deeply held religious or conscientious beliefs who seek to live out those beliefs at the Bar.

There is a real danger that this new core duty could be used to exclude barristers from practice because they attend churches or other places of worship which hold to doctrines or religious practices that are deemed incompatible with CD8, even though those doctrines or practices are entirely lawful and mainstream expressions of the world's major religions.

There is also a danger that the outcomes-based approach will lead to unlawful 'positive' discrimination in practice, even where that is not intended, because of the incentives it will create for barristers and chambers/other entities.

Where what is being sought is deep, long-term cultural change and a shift in attitudes there is a limit to what can be achieved by imposing more extensive rules (however 'outcome-based' or reflective they are intended to be). The risk of these regulations is that they are likely to lead to a tick box exercise and fail to achieve the intentions of the BSB, whilst at the same time making the whole area of equality, diversity and inclusion more contentious and controversial than it currently is, and thereby reducing support.

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?

If, contrary to the views of the LCF expressed in this consultation, the BSB is still minded to bring in these new rules in a similar form to that proposed there should be an extensive consultation again within 3 years as to whether they have achieved their aims or create unintended consequences, and if the feedback is negative there should be a reversion to the current status quo.