



CONSULTATION ON THE BSB EQUALITY RULES

Response: November 2024

A response from the Bar Association for Commerce Finance and
Industry

INTRODUCTION

The Bar Association for Commerce, Finance and Industry (BACFI) was founded in 1965 and provides representation, education and support to employed and non-practising barristers. BACFI is a Specialist Bar Association affiliated to the Bar Council but operating independently to represent barristers practising outside chambers. Our membership includes not only barristers working in commerce, finance and industry, but also barristers working in other employed settings, such as solicitors' firms, the public sector and not-for-profit organisations. Employed and dual capacity barristers make up about 20 per cent of the practising Bar.

BACFI is keen to play its part as a representative organisation in helping to shape the development of the Bar of England and Wales, by representing the views of its members and pressing for appropriate change. BACFI actively supports the principle of "One Bar", whilst recognising that there are differences in practising arrangements and the environment in which barristers practise.

GENERAL REMARKS

BACFI is grateful for the opportunity to respond to the Bar Standards Board's (BSB) Consultation on the Proposed Amendments to the Equality Rules¹, published in September 2024. Your objective of encouraging a diverse and inclusive legal profession is one we strongly share, and many of our members have worked towards this goal throughout their careers.

1.

Proposed changes to the Equality Rules

The Bar Council's report on Life at the Employed Bar² found that the employed Bar is more diverse, offers greater flexibility and work/life balance, and reports greater wellbeing, than the self-employed Bar.³ For example, the report found that 48.6 per cent of barristers at the employed Bar are women, compared with 36.8 per cent at the self-employed Bar. The employed Bar also reported greater percentages of barristers who are disabled, primary carers, from an ethnic minority, and who have flexible work arrangements.

Barristers employed in large commercial organisations, law firms or the public sector will often have the benefit of mature Human Resource departments (sometimes global in nature, needing to satisfy a number of varying jurisdictional requirements), DEI programs and policies and procedures that underpin clear equality and inclusivity value statements. The workplace as a whole and in particular hiring managers, are held to account for meeting those value statements, including against performance management objectives. This is of course not the case for all employed barristers. Structural differences driving flexibility also play a part for employed barristers who have actively chosen to practice in the employed sector. In general

¹ Published in September 2024. Link: <https://www.barstandardsboard.org.uk/static/8245b4b1-4593-4fc2-8524971ef73abf2e/equalityrulesconsultationfinal.pdf>

² Report published by the Employed Barristers' Committee of the Bar Council in February 2023. Link: <https://www.barcouncil.org.uk/static/28e5c2f2-8931-4e95-ab7f91a777466367/ef579e61-dc27-4279-9743fbde5b4c2ef3/Life-at-the-Employed-Bar-report-Feb-2023.pdf>

³ For completeness we note that the report did not find the employed Bar is a utopia. It highlighted room for improvement on topics such as visibility, career progression, and judicial appointments.

employed barristers will benefit from a regular salary and pension, paid holiday leave, flexible working arrangements and different types of work/practice enabling flexibility, amongst other factors.

Structural factors, at the same time, dilute an employed barrister's ability to drive change in the workplace. Decisions about recruitment, training, promotions, facilities access, etc. would rarely be in the hands of the employed barrister alone. They would normally be subject to organisation-wide policies, budget considerations, HR requirements, domestic and foreign employment laws, and other factors which are outside the employed barrister's control. Additional rules therefore seem unnecessary to drive change at the employed Bar, and they would also be difficult to implement in an employed setting. We therefore welcome BSB's proposal to continue to confine the Equality Rules to barristers in chambers and entities.

2.

Proposal to amend Core Duty 8

Many employed barristers have formal or informal responsibilities towards other staff and will often already be required (and potentially measured upon) their actions in driving diversity, equality and inclusion (DE&I) down through their organisation, engaging the Core Duties as they do so. These responsibilities can include recruiting, training, allocating work, supervising, and making pay and promotion decisions, amongst other things.

While there is always more to be done, the current Core Duty 8⁴ seems to be serving the employed Bar well. We are concerned that the proposed new duty⁵ would create a number of unintended consequences:

1. It is not clear how the negative duty, not to discriminate against persons with protected characteristics under the Equalities Act 2010, reconciles with a positive duty to advance DE&I. The Equalities Act 2010 does permit positive action in limited circumstances, described at section 159. However, the proposed positive duty could be understood to go far further than the legislation permits. For example, would it require recruitment or promotion of persons with certain characteristics, even when they are less qualified than other candidates?
2. Employed barristers have to work within the limits of what their employer will support. For example, they may have to respect foreign legal requirements or internal policies which do not allow the opportunity to "advance" DE&I to the standard BSB might wish. For example, in some parts of the USA, there is a trend against proactive DE&I initiatives, which may restrict what barristers in US law firms or corporations can achieve. It is right that BSB sets standards appropriate for the UK national context and should not import standards set elsewhere. However, as currently formulated, the proposed new duty sets an absolute and high standard without sufficiently recognising that an employed barrister's powers are sometimes constrained by factors outside their control.
3. The proposed new duty would expose employed barristers to an unmanageable risk of complaints. It is unfortunate that sometimes people are disgruntled with decisions taken

⁴ "You must not discriminate unlawfully against any person."

⁵ "You must act in a way that advances equality, diversity, and inclusion."

in an employment context. They may use the tools at their disposal to seek recourse, such as internal HR policies and employment law. The Core Duties may already provide one such tool, to some extent.⁶ However a positive duty to advance DE&I places an impossibly high burden on employed barristers taking day to day decisions relating to staffing matters. To defend themselves against a potential complaint, employed barristers would have to keep personal notes of conversations in a level of detail not expected of any other employee. Even a successfully defended complaint could be highly damaging to a person's career and wellbeing.

4. It is not always clear what "advancing" DE&I means, when presented with actual fact patterns. This is particularly the case bearing in mind intersectionality, because we all carry not one background but many. For example, should a working class male be hired, to advance socio-economic mobility, or should a privately educated female be hired to advance gender equality?

We do not think that those problems can be addressed merely by guidance or lists of outcomes. It would be impossible for them to cover all fact patterns, and it would be open to a disciplinary tribunal to interpret the Core Duty by reference to its plain language.

The root of the problem is the word "advances" which would be contained in the proposed Core Duty. The Legal Services Act 2007 includes the regulatory objective of "*encouraging an independent, strong, diverse and effective legal profession*". For solicitors, that regulatory objective is tracked in the SRA Principles which require a solicitor to act "*in a way that encourages equality, diversity and inclusion.*"⁷ We would prefer BSB to leave the current Core Duty 8 unchanged, and to focus its attention on enforcing the rules that already exist. However, if BSB did insist on change, then we prefer the less concrete standard of "encourage" rather than "advance". This ensures consistency with the statutory regulatory objective.

FURTHER CONSULTATION AND CONTINUED ENGAGEMENT

BACFI is grateful to the BSB for providing an opportunity to comment on this subject and looks forward to engaging with BSB in future on this and other topics.

Bar Association for Commerce Finance and Industry

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⁶ For example, Core Duty 3 "You must act with honest and integrity" and Core Duty 5 "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession" may be relevant.

⁷ SRA Principle 6.