

## **Amendments to the Bar Code of Conduct – Equality and Diversity provisions**

### **For approval by the Legal Services Board**

This application is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications. The BSB wishes to provide the information below to support its application.

Any queries about this application should be made to:

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### **1. The proposed alterations**

- 1.1 This application relates to new equality and diversity provisions in the Code of Conduct which were approved by the Bar Standards Board on 15 March 2012. These changes arise from the Equality Act 2010 and guidance issued by the Legal Services Board (LSB) under section 162 of the Legal Services Act 2007 setting out expectations that Approved Regulators require firms and chambers to conduct a diversity monitoring exercise which will give every individual in their workforce (both lawyer and non-lawyer), an opportunity to self-classify against the following characteristics: age, gender, disability, ethnic group, religion or belief, sexual orientation, socio-economic background and caring responsibilities.
- 1.2 In August 2011, the BSB set up a Data Collection Project Board (DCPB) to agree an approach to implementing the LSB's requirements. Data Protection Act (DPA) experts were also instructed to produce draft rules and guidance. The data monitoring rules and the main equality rules have also been subject to scrutiny by the Standards and Equality and Diversity committees.
- 1.3 A consultation was issued in November 2010 on the main equality and diversity (E&D) rules. The BSB has considered the consultation responses in detail and has developed rules and a detailed implementation plan.

### **2. Details of existing equality and diversity arrangements**

- 2.1 The current equality and diversity provisions in the Code of Conduct (the Code) include a general requirement not to discriminate unlawfully. In addition to this requirement, chambers are required to:
- Appoint an equal opportunities officer – this simply means appointing someone to the role, no further work is required by the Code; and
  - Have a written equal opportunities policy setting out the policy adopted by chambers in relation to each of the action areas in the 2004 Equality and Diversity Code for the Bar.
- 2.2 The E&D Code for the Bar was originally developed in 1995 to assist barristers and their employees to apply good equal opportunities practice in the development and running of chambers. This code was updated in 2004 to take into account increasing awareness of equality issues and to reflect developing law, particularly disability and age equality legislation. The E&D code is not mandatory but rather good practice guidance.
- 2.3 The BSB's 2009 chambers monitoring pilot study revealed that reliance on non-mandatory guidance in the E&D code has not been effective as well as revealing significant areas of non-compliance with the equality provisions in the Code. The BSB has concluded that its regulatory regime needs to be strengthened in order to meet the BSB's regulatory and public equality duties

### **3. Nature and effect of the proposed alterations**

#### E&D provisions in the Code of Conduct

- 3.1 The new E&D rules (**annex 1**) in the Code require chambers to:
- a. Have an E&D policy accompanied by a written implementation plan;
  - b. Appoint an Equality and Diversity officer;
  - c. Ensure that from 2013 the member with lead responsibility for chambers' selection panels undertakes fair recruitment training;
  - d. Ensure that from 2014 all members of selection panels are trained in fair recruitment;
  - e. Use fair and objective selection criteria
  - f. Gather and review numbers and percentages of staff, barristers, pupils and assessed mini-pupils (broken down by race, gender and disability) in relation to:
    - i. Applications for assessed mini-pupillages, pupillages, employed roles and membership of chambers; and
    - ii. Allocation of unassigned work

- g. Ensure the fair distribution of work amongst pupils and members of chambers;
- h. Have a written anti-harassment policy;
- i. Have a parental and adoption leave policy which covers:
  - i. The right to return;
  - ii. The extent to which a member is required to contribute to chambers rent and expenses while on leave;
  - iii. The process for dealing with grievances under the policy and;
  - iv. The policy review process
- j. Offer members 6 months' free of chambers rent where rent is paid on a flat rate basis;
- k. Have a flexible working policy and;
- l. Have a reasonable adjustments policy.

#### Guidelines

- 3.2 Guidelines developed alongside the main E&D provisions in the Code as well as the data collection rules will assist chambers and barristers in understanding and implementing the changes. The data collection guidance is attached at **annex 2**.
- 3.3 The guidelines accompanying the main E&D provisions in the Code will contain best practice advice and will be of particular use to Heads of Chambers, Equality and Diversity Officers and those involved in recruitment and selection panels. The guidelines will also contain sample policies (i.e. anti-harassment and reasonable adjustments policies) that chambers will be able to adapt for their own use.

#### Data collection rules

- 3.3 A project board has been established to take forward the work on establishing the LSB's requirements. The board agreed to implement the requirements through the introduction of new rules in the Code of Conduct which will place a duty on barristers to ensure that their chambers appoint a Diversity Data Officer (DDO) with responsibility for ensuring:
  - That the Members of chambers' workforce are invited to provide diversity data in respect of themselves to the DDO using the model questionnaire developed by the LSB for the purposes of this project;
  - That such data is anonymised and that an accurate and updated summary of it is published on chambers' website in the first instance by 31 December 2012 and thereafter every 3 years;
  - If chambers does not have a website, that such data is made available to the public on request;

- That published summaries exclude data relating to the characteristic of sexual orientation and religion or belief, unless there is consent from each of the members of the workforce;
- That published data excludes data in relation to any characteristic where there is a real risk that individuals could be identified, unless all affected individuals consent;
- That anonymised data in relation to each characteristic is categorised by reference to job title and seniority of the members of the workforce;
- That chambers has in place a written policy statement on the collection, publication, retention and destruction of diversity data which includes an explanation that the provision of diversity data is voluntary
- That effective systems and controls are in place to ensure that any diversity data is provided is collected and held securely and in accordance with the Data Protection Act 1998.

#### Definition of workforce

- 3.4 The project board decided that “Workforce” in this context should include, (as agreed by the LSB), barristers, pupils chambers’ staff and clerks.

#### Data Protection

- 3.5 The Project Board sought advice on the data protection implications of this project. The advice received set out concerns that even anonymised data could identify individuals in protected groups of fewer than 10 people. The DCPB therefore decided that there should be an exemption from publication at chambers level for chambers of fewer than 10 people, save where individuals collectively consent to publication. Guidance accompanying the data protection rules (set out in annex 3) will provide further detail on the publication requirements relating to groups where there are fewer than 10 people in particular protected characteristic in larger chambers.

### **4. Why we wish to make the alterations**

- 4.1 The BSB wishes to emphasise the importance and priority of equality and diversity to the profession. For this reason the BSB has decided to amend the main Code now in advance of the new Handbook coming into force along with the data collection provisions. Bringing in both sets of provisions at the same time will also assist in educating the profession and communicating the changes as a package.
- 4.2 Incorporating provisions from the best practice guidelines contained in the E&D code into the main Code will emphasise that the new rules are not merely good practice but need to be complied with in the same way as any other code provisions.
- 4.2 The existing arrangements do not accurately reflect what is required by the Equality Act 2010. It is a requirement of this Act that the BSB eliminates discrimination and promotes equality in relation to the protected characteristics of:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion/belief
- Sex
- Sexual orientation

4.3 The data monitoring rules have been introduced in response to the LSB's statutory guidance issued in July 2011.

4.4 The proposed code amendments facilitate and promote the regulatory objectives enshrined in the 2007 Act. See section 5 below.

## **5. The regulatory objectives**

### Protecting and promoting the public interest

5.1 Safeguarding the public interest has been one of the primary concerns of the BSB as it seeks to facilitate the objectives of the 2007 Act. Implementing the new equality and diversity provisions should encourage a more diverse and in turn effective Bar.

### Supporting the constitutional principles of the rule of law

5.2 The proposed Code amendments do not have any adverse impact on this regulatory objective.

### Improving access to justice

5.3 When developing any new rules concerned with the provision of legal services, the BSB has at the centre of its focus the need to ensure those services are as accessible as possible – improving access to justice.

5.4 The proposed amendments (particularly in relation to recruitment in chambers and equality monitoring) should ensure that chambers recruit the best people and increase diversity in their workforce. It is hoped that the new rules should improve in particular BME and female recruitment rates in areas where such groups are currently under-represented.

5.5 Increasing the diversity of the Bar should hopefully lead to more choice for consumers who are instructing through solicitors and also those who are instructing barristers directly through the public access scheme.

5.6 The reasonable adjustment policy should also assist in improving access to justice. Although making reasonable adjustments is a legal requirement, having a reasonable adjustments policy in place is not. Requiring chambers to put a reasonable adjustments policy in place should encourage them to

think about the issues in more detail and it should also be readily available to clients. This should promote better access generally and also ensure the removal of any barriers, physical or otherwise which could make it difficult or impossible for disabled customers or visitors to use barristers' services.

#### Protecting and promoting the interests of consumers

- 5.7 The BSB considers that the amendments to the Code in relation to equality and diversity generally and also the data monitoring rules will highlight the importance of equality and diversity to the profession. In doing so the BSB hopes to encourage a more diverse workforce which will assist in understanding the diverse needs of consumers, thereby protecting and promoting their interests.

#### Promoting competition in the provision of services

- 5.8 The BSB considers that the above amendments will not have any adverse effects on promoting competition in the provision of services.

#### Encouraging an independent, strong, diverse and effective legal profession

- 5.9 The code amendments and the data collection requirements together should encourage an independent, strong, diverse and effective legal profession.
- 5.10 The new rules should assist barristers and their employees to apply good equal opportunities practice in the development and running of chambers. Although progress on diversity at the Bar has been achieved in recent years, further progress and improvements could be made, and the new rules should help address this.
- 5.11 The aim of the changes is ultimately to ensure that no barrister is prevented from achieving his or her potential at the Bar by unfair recruitment practices or unnecessary barriers to progress. For example the adoption of flexible working policies should assist those barristers who have left the Bar and wish to return to work or change working practises due to the desire to spend more time with their families.
- 5.12 Gathering information from the profession on its diversity make up will also give the BSB a more comprehensive evidence base on which to test future equality and diversity initiatives.

#### Increasing public understanding of the citizen's legal rights and duties

- 5.13 The BSB considers that the above amendments will not have any adverse impact on increasing public understanding of the citizen's legal rights and duties.

#### Promoting and maintaining adherence to the professional principles

- 5.14 The proposed amendments intend to enhance rather than erode the high standards of professional conduct associated with the Bar. By incorporating provisions from the voluntary E&D code into the main Code, compliance with them will become mandatory. This should strengthen the regulatory regime and reflect recent changes in legislation.

## **6. The better regulation principles**

### Transparency

- 6.1 A consultation paper was issued on the new equality and diversity rules in November 2010. A summary of responses was published last year. There was no requirement to consult on the proposed data collection rules, as the LSB consulted on the proposals separately.
- 6.2 A communications strategy is being developed to ensure there is publicity around the main E&D rules, as well as the data collection rules. A decision was taken to combine both sets of rule changes at once so that communication and education needs can be addressed at the same time. Implementation of the communications strategy has already begun and includes guidance, protocols on publication, press releases, articles in the legal press and targeted mail and email shots.

### Accountability

- 6.3 As the regulator for the Bar, the BSB is accountable for any changes that are made. The BSB believes that the new arrangements will help to promote equality and diversity within the Bar and assist us to meet our regulatory objectives, in particular encouraging an independent, diverse and effective legal profession.

### Proportionality

- 6.4 The BSB carefully considered all of the options for achieving policy objectives before developing the attached rules. The BSB also considered the practical implications the new regime will have on the profession. The new rules are likely to place an increased burden on practitioners, particularly on those practising in areas such as family, crime and other publicly funded areas of law where BME and female practitioners are over represented. The equality impacts were specifically considered during the consultation process and by a working group. The working group considered that conducting a full equality impact assessment was not necessary. It was agreed however, that although the new rules were likely to place a greater burden on those chambers undertaking publicly funded work, mitigating actions such as producing guidance that will contain sample policies that can be adapted by practitioners to suit their circumstances. Any remaining impact would be justified in achieving the legitimate aim of assisting the BSB in meeting its duties under the Equality Act and “in encouraging an independent, strong, diverse and effective legal profession.”

## Consistency

- 6.5 The new regime compared to the current position will be more aligned with the Equality Act 2010. Incorporating what was guidance into rules that need to be complied with by everyone should also lead to more consistent practices across chambers.

## Targeting

- 6.6 The new rules will be systematically reviewed to ensure they are working effectively and also as a means to identify any issues that may arise. Monitoring will be undertaken through the BSB's Chambers Monitoring Programme. Compliance with the equality rules will be a priority for the new monitoring programme and the detail will be refined once the programme has achieved Board approval.
- 6.7 After levels of compliance have been identified through the monitoring regime, an incremental approach to addressing non-compliance will be adopted. In the first instance the BSB will assist non-compliant chambers to meet their obligations and put in place appropriate systems for data collection. To do so the BSB will request further information to assess the extent and nature of non-compliance and then work constructively with them where non-compliance is identified. This would include agreeing an action plan with the chambers to achieve compliance with a reasonable timescale. Only those chambers who fail to agree and implement an action plan will be subject to further enforcement action.
- 6.8 The new rules have been included in the provisions of the Code that fall within the current paragraph 901.1 of the Code and will therefore allow for administrative rather disciplinary penalties (i.e. warnings/fines) to be imposed. This means breaches of the new rules will only amount to professional misconduct if the breach is a serious one taking into account the nature and extent of the failure to comply, whether it has occurred in combination with other breaches of the Code and whether there has been a history of non-compliance. Rule 901.5 of the Code allows the BSB to treat any serious failure to comply as professional misconduct. Therefore the BSB will always have the ability to escalate the matter and use full enforcement measures if this is considered necessary in the circumstances.

## **7. Desired outcome**

- 7.1 The BSB is always seeking ways in which to improve and provide for better regulatory practice. The desired outcome is for the BSB to align its rules more closely with current legislation and also to highlight the importance of equality and diversity to the profession. The new rules will make previous equality and diversity provisions in guidance, mandatory which in turn should lead to better practice in relation to equality issues.

## **8. Other regulators**

- 8.1 All of the other approved regulators were invited to provide comments on the equality and diversity consultation paper. The responses that we received from other regulators have been carefully considered and taken into account in the final version of the rules.

## **9. Date of implementation**

- 9.1 The BSB would like to have both the general E&D rules and the data collection rules in place for September 2012.

## **10. Consultation processes undertaken**

- 10.1 The LSB consulted separately on the proposals relating to data collection and it was agreed that a further BSB consultation was not necessary. The BSB did however consult on the general E&D rules in November 2010.
- 10.2 A summary of responses to the consultation was published in 2011. There have been some changes to the rules compared to the version that were consulted on. Some changes have merely resulted from adapting the rules to fit the 8<sup>th</sup> edition of the Code of Conduct rather than the version of the Code that was consulted on in January 2011.
- 10.3 Some other significant changes include, adding “assessed” to mini pupils so that the member with lead responsibility for the selection of those on assessed mini pupils undertakes recent and appropriate training in fair recruitment and selection processes. This was added as a result of working group discussions where it was agreed that as assessed mini-pupillages often lead to pupillages, it is more important to ensure that selection of mini-pupils for such places is fair. Assessed mini pupils have also been included in the rule requiring chambers to regularly review and gather numbers and percentages of various categories of people in chambers for the reasons set out above, as were staff. Staff were added to mirror the LSB’s data collection requirements which cover employees of chambers in addition to barristers.
- 10.4 Under the original proposed rules chambers were also required to review the allocation of work. This has been amended to the allocation of “unassigned work” because it was acknowledged that if work comes into chambers with a particular barrister’s name on it then there is no opportunity for a clerk to discriminate in the allocation of that piece of work.
- 10.5 The review required by Chambers initially consisted of collecting and analysing data broken down by race and gender, but disability was added to that list after a large number of consultation responses stated that disability should also be monitored.
- 10.6 A new rule was also added on the recommendation of the BSB’s E&D committee which requires chambers to produce a reasonable adjustments policy aimed at supporting disabled clients, barristers and visitors to

chambers. Although making reasonable adjustments is a legal requirement, having a policy in place is not and the committee felt there was value in requiring chambers to have such a policy, which could be inspected by either the BSB or clients and employees.

#### Reasonable steps

- 10.7 There was some concern raised in the consultation about what would constitute reasonable steps for barristers, in particular there were concerns about the practicality of junior barristers enforcing this policy. The obligation to take reasonable steps was discussed by the Standards Committee and whether this obligation should in fact apply to everyone, or whether it should be defined more narrowly. The committee agreed that the obligation should apply to all self-employed barristers; however guidance should be developed for junior barristers. Guidance on reasonable steps will therefore be included in the guidelines and what this would mean for barristers dependent upon their position in chambers. The guidance expands upon rule 409 of the Code which sets out that the steps that would be reasonable for a barrister to take, will depend upon the circumstances and could include (but are not limited to), the arrangements in place in their chambers for the management of chambers and the role they play in those arrangements.
- 10.8 In terms of enforcement action, the initial focus would be on the head of chambers and/or the management committee in the first instance. Whether action is taken against other individuals will be dependent upon the circumstances and the steps that would be considered reasonable in relation to their particular role in chambers.
- 10.8 The consultation paper and response are published on our website and can be found at the following link:

[Equality and Diversity Code provisions - Bar Standards Board](#)

### **11. Other explanatory material**

- 11.1 The Board considered recommendations of the E&D Committee and the Standards Committee on the main E&D provisions in the Code. Minutes of that Board meeting can be found at:

[Minutes](#)

- 11.2 The Board further considered recommendations from the Project Board and E&D Committee in relation to the data collection rules in its March meeting. Minutes of that Board meeting will be available at the following link:

[Minutes](#)

