



The Law Society

Bar Standards Board consultation on Proposed New Equality and Diversity Conduct and Practising Rules

Law Society Response

March 2011

supporting
solicitors

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Response to the consultation

Introduction

This response has been prepared by the Law Society, the representative body for more than 140,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession, and lobbies regulators, government and others.

The Law Society welcomes the opportunity to comment on the Bar Standards Board's (BSB's) consultation on the Proposed New Equality and Diversity Conduct and Practising Rules. We support the proposals outlined by the BSB, both in relation to the proposed new Conduct rules and proposed new Practising rules. We particularly agree that, on the basis that there has been non-compliance of barristers in relation to the current equality provisions, proposing mandatory equality provisions seems to be the most appropriate way forward for the BSB.

We do not believe that these new regulatory requirements will place a financially onerous burden on chambers. However, in our view, it should be the responsibility of barristers to establish the best training methods on equality and diversity for their chambers, rather than the BSB to mandate training. This would be both resource and time intensive for the BSB, where a better approach would be for the BSB to provide support and guidance for chambers on this issue.

We have provided further comments by answering the consultation questions, and these are outlined below.

a) Do you agree that the new regulatory equality provisions should be integrated within the Code of Conduct?

Yes. We agree that that these new regulatory equality provisions should be included within the Code of Conduct.

Integrating these new regulatory equality provisions within the Code of Conduct will ensure that equality and diversity policies, monitoring and effective implementation plans are developed in the medium to long term (present to 2013). We note that there is evidence of significant non-compliance with the current equality provisions in the Code of Conduct and that the current non-mandatory guidance has not been effective in addressing equality and diversity issues. On this basis, we believe that integrating equality provisions with the Code of Conduct would be a much more effective method of ensuring equality provisions are addressed by the profession. As a breach of the new equality provisions would mean a breach of the Code of Conduct, the equality provisions are much more likely to be taken seriously by the profession.

b) Do you agree that the proposed new Conduct Rules should apply to all practising barristers including employed barristers and those who are managers or employees of recognised bodies?

Yes. We believe that embedding equality and diversity within an organisation requires all parties to be able to identify discrimination and to have knowledge of the steps that can be taken to reduce the risk of unfair bias or discrimination. Also, all parties must be able to promote equality of opportunity within their work place, and this will help to ensure that the best individuals for positions within chambers are not removed from consideration merely on the basis of prejudice.

In our view, ensuring that all staff clearly understand the business benefit of equality and diversity, both in terms of managing chambers and in winning business, is essential to ensure that good equality and diversity practices develop and are accepted in the long term as a key part of effective business performance.

c) Do you agree that the obligations should apply not just to a barrister's own chambers or other place of business but also to any ProcureCo through which s/he obtains business?

Yes. The Equality Act 2010 requires primary organisations to take reasonable steps to ensure that agents working on their behalf do not discriminate. There is now a clear line on third party and vicarious liability for acts of discrimination outlined in the Equality Act 2010. Therefore the approach taken by the BSB would be beneficial to barristers and their partners/suppliers in assisting them to fulfil this legislative requirement. In addition, taking this approach to any ProcureCo companies is in line with current best practice on equality and procurement and effective contract management. This should be encouraged, to assist the sector to develop robust equality and diversity practices including acknowledging the role of equality as central to overall business performance and not just HR/Personnel type issues.

d) Do you think it is appropriate that the proposed rules place a personal obligation on all self-employed barristers to take all reasonable steps to ensure that the rules are complied with as opposed to putting the onus only on Heads of Chambers or those with the responsibility for the administration of chambers?

Yes. We believe that advancing equality and diversity should be the responsibility of all barristers. Also, all barristers should seek to promote good practice in regard to equality and diversity, including taking all reasonable steps to ensure that the rules are complied with.

e) Do you agree with the proposed requirement that from 1 January 2013 that the member/s of chambers with lead responsibility for the recruitment of tenants, pupils, clerks and mini-pupils and at least one member of every selection panel except in unforeseen and exceptional circumstances, who may be the same person, must have received recent and appropriate training in fair recruitment and selection processes?

Yes. It is important that there is an understanding of how bias and discrimination can occur in the recruitment process, from setting eligibility criteria to interviews and the selection process. Having fair recruitment and selection processes is crucial for

chambers to achieve a diverse range of applicants with the most relevant and appropriate skills.

We have noted the BSB's proposal that they will produce guidance for chambers, on how to develop fair and objective selection criteria and effective interviewing techniques, and agree that it is essential that this guidance is provided.

i. Do you believe the 1 January 2013 deadline to be realistic and achievable?

Yes, we believe that this deadline is achievable. There are already excellent and effective on-line equality and diversity, disability equality and unconscious bias training courses. These are available at a low cost and will allow even the smallest chambers and self-employed barristers to meet their commitments with little financial impact. However, if the BSB are going to impose a deadline, it is important that they consider the implications of this including whether they are willing to impose sanctions for non-compliance. As noted in the consultation, the current guidelines on equality training have been largely ignored by the profession. One possible approach for the BSB would be for them to require chambers to report on the completion of E&D training.

ii. Do you think the Bar Standards Board should regulate the training undertaken for this purpose?

No. We do not believe that the BSB should regulate training as this would be both resource and time intensive for the regulator. Moreover, it should be the responsibility of barristers to find delivery methods of training to suit their individual chambers. Instead of mandating training, the BSB could publish a set of learning objectives that must be covered by any training undertaken and offer support and guidance to the profession on training.

f) In light of the Neuberger recommendation that all barristers involved in selection be trained, would you agree with a requirement that by 1 January 2014 every member of all selection panels involved in the recruitment of tenants, pupils, clerks and mini-pupils must be trained in fair recruitment processes?

Yes. In our view, the requirement and the timeframe are reasonable.

g) Do you agree with the proposed requirement that chambers recruitment and selection processes use objective and fair criteria?

Yes. This is standard recruitment practice and should be embedded within the culture of selection panels.

h) Do you agree with the proposed requirement that chambers must collect and analyse the actual numbers and percentages of barristers and pupils in chambers from different groups on an annual basis and that these groups must include as a minimum race and gender?

Yes. We agree with this requirement and support the proposal that chambers should collect data on equality and diversity. It is essential that diversity data is collected in

order to build up an evidence base of the diversity make-up of the work force. In addition to race and gender, we propose that disability is added to this framework.

i. Do you agree that this should be done annually?

Yes. We agree that annual collection of data is reasonable.

ii. Do you think that data should also be gathered on disability?

Yes. As noted above, we believe that data should be gathered on disability. Also that, over time, monitoring should be expanded to capture all protected characteristics outlined in the Equality Act 2010.

i) Do you agree with the requirement that all chambers must collect equalities data on applications for mini-pupillage, pupillage, and starter tenancies and analyse the success of different groups at each stage of the selection process on an annual basis and that these groups must include race and gender as a minimum?

Yes, we agree with this requirement. In our view, collecting this data is essential to build up an evidence base of possible discriminatory recruitment practices.

i. Do you agree that this should be done annually?

Yes. We agree that annual collection of data is reasonable.

ii. Do you think that data should also be gathered on disability?

Yes. As noted above, we believe that data should be collected on disability. The profession needs to be made aware that disability is an important area that requires monitoring.

j) Do you agree with the proposed requirement that chambers that take pupils must regularly review the allocation of work to pupils, tenants in their first three years and members returning from parental leave?

Yes. This is important in identifying whether certain groups are being disadvantaged by not being allocated appropriate work, or are missing out on development opportunities due to work being allocated in an improper manner.

i. Do you agree that this data should be required to be broken down by race and gender only?

We believe that the data collection should be broader and there should be monitoring across all the protected characteristics outlined in the Equality Act 2010. Monitoring race, gender and disability is a basic level of monitoring and the BSB should be encouraging barristers to engage with best practice. At the Law Society we are considering how we can ensure that additional monitoring covers all protected characteristics and are committed to ensuring that members take a best practice approach to equality and diversity monitoring. We are keen to work with the BSB to promote the importance of robust equality and diversity data for policy formulation purposes, attracting and winning business, and effectively managing diverse workforces within a changing legal sector landscape.

k) Do you agree with the proposed requirement that all chambers must have a policy on parental and adoption leave?

We believe that the proposal that all chambers should have a policy on parental and adoption leave is reasonable, as this offers some clarity to those taking the leave and/or returning to work on what they can expect. To some extent this will also protect chambers from discrimination claims arising from the need to take parental or adoption leave. This is provided that chambers comply with the terms set out in their policy document and apply the policy in an equal manner to all those who use it. It should be noted that some guidance from the BSB might be necessary to assist chambers in understanding how to mitigate any impact on fee generating business.

l) Do you agree with the proposed requirement that chambers must offer their members a minimum of 6 months parental leave, or leave following adoption?

We do not see any reason for chambers to go beyond statutory requirements. As proposed, EU regulations would consider 14 weeks a reasonable time period, and there is no reason for chambers to extend this without evidence that it would tackle discriminatory outcomes. Furthermore, additional strain on fee generation would not be welcomed by barristers.

i. If not, would you agree with a requirement that chambers must offer members a minimum of three months parental leave or leave following adoption?

This seems to be reasonable as a minimum requirement. Chambers wishing to provide an extended period of parental/adoption leave would then be able to use this as a means to promote themselves as operating flexible and family friendly working conditions.

m) Do you agree with the proposed requirement that where rent is paid on a flat rate basis, parental leave must be rent free?

No. We think that this would be difficult as those in practices who do not operate flat rate rent would be at a disadvantage. Also chambers could change the way they operate rents to avoid the impact of having a rent free parental/adoption leave period.

i. Would you agree with a rule requiring that the parental leave period must be rent free irrespective of whether the chambers rent is calculated as a percentage of fees earned or is a flat rate payment?

Yes. However, we note that the BSB may wish to consider ensuring that the period of rent free leave does not exceed the 14 week period suggested in the EU Directive.

n) Do you agree with the proposed requirement that any member or pupil must have the right to return to her /his chambers as a tenant following a period of parental or adoption leave?

Yes. This is paramount to ensuring discrimination does not occur. This would ensure that those taking parental/adoption leave do so in the knowledge that they can return to their chambers following this period of leave. Without the right to return, the proposals around parental/adoption leave are largely meaningless.

i. Do you agree that this right to return should continue for a period of at least a year?

Yes. There should also be some flexibility so that if the period of leave were likely to exceed 6 months, chambers would be allowed to have “short-term” tenants if it were necessary for business performance.

o) Do you agree with the proposed requirement that chambers must have written policies permitting members of chambers (male or female) to take career breaks and work flexible hours, or part time, or partly from home?

Yes, this proposal seems reasonable. However, the BSB should not dictate the terms and/ or provisions of policies but rather provide some guidance to chambers on the business benefits and how to effectively manage flexible working.

p) Do you think that compliance with the any of the new regulatory requirements will place a financially onerous burden on chambers?

In our view, these new regulatory requirements will not place a financially onerous burden on chambers. However, this is provided that the BSB do not prescriptively mandate training on equality and diversity but provide support and guidance for chambers who want to go beyond compliance and develop best practice in equality and diversity.

i. If so can you provide evidence of how the particular requirement might burden chambers financially and what revisions might be made to mitigate or remove such a burden?

N/A

q) Do you think that the guidance is useful in understanding what is required by the new regulatory rules?

Yes. We believe that the new guidance is useful, as it will provide clarity to the profession on what is required of them.

r) Are there any areas not covered by the regulatory requirements and/or guidance which you think need to be covered?

No. Not at the present time.

