The Council of the Inns of Court

Response to the BSB Consultation on Proposed Amendments to the Equality Rules

Response from the Council of the Inns of Court

(on behalf of the Inns of Court)

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INTRODUCTION

1. This response represents the joint views of the Inns of Court.

2. Rather than answer each question in detail, we have sought to encapsulate our views on the primary issues addressed in the consultation document, before dealing with the questions themselves. We hope this is helpful in providing an overview of the issues and in identifying some aspects which are not fully covered by the questions as presented.

3. COIC and the four Inns of Court are each committed and engaged in encouraging and supporting initiatives to ensure equal opportunities and access to the profession for all. We have played an important part in improvements in recent years, but we know that much remains to be done. As regulator, the BSB is also an important actor in this area, however we see significant problems with the approach taken in this instance. Most importantly, the regulatory case for the current proposals is not made out; it does not satisfy the tests of proportionality and targeting; there is a significant risk of unintended consequences which would undermine the intended outcomes; and there is no evidence-based impact assessment of the likely costs and benefits of the proposals as opposed to alternative options which might be more evidently proportionate.

PRIMARY ISSUES

4. In our view the 3 main issues which underpin the consultation are:

- How the profession encourages equality insofar as it affects:
    - Recruitment
    - Work distribution and progression.
    - Reasonable adjustments
- How the profession recognises and deals with bullying, harassment and victimisation.
- How access to professional accommodation impacts on equality.

5. The question which arises is how to address these issues in a way which is proportionate, targeted, consistent and represents good regulatory practice.

6. Our headline conclusions are that:

- The issues of recruitment, distribution, progression and reasonable adjustments are real, and the profession should take them seriously. They also differ, one from another, and therefore cannot be sensibly tackled by the single main change proposed by the BSB.
- There is no evidence based assessment of the extent to which the proposed regulatory action would deliver the outcomes sought, nor any impact assessment of the proposals and alternative options.
- The BSB proposals extend beyond legal requirements and its own regulatory functions.
- The proposed amendments to the core duty and the new proposed General Equality Rules impose duties beyond legal requirements on each individual barrister without

clear justification; are unworkable; unacceptably risk *removing* existing protections; and are disproportionate.

- The proposed changes to improve access are neither necessary, nor proportionate, nor reasonable. They would result in counter-productive adverse impacts.

- The new rules are unnecessary, because the objective is better achieved by professional guidance in line with the existing law, amplified by existing standards.

7. Insufficient regard has been afforded to the relevant regulatory framework, specifically s.1 and s.28 Legal Services Act 2007. Of particular relevance in this context is Section 28(3): (3)

The approved regulator must have regard to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and

(b) any other principle appearing to it to represent the best regulatory practice.

DETAILED DISCUSSION

Regulatory Issues

8. The BSB in discharging its regulatory functions must have regard to the principles set out in Section 28, sub-section 3 of the Legal Services Act. Two of the principles that we particularly highlight in relation to this consultation are that regulatory activities should be proportionate and targeted only at cases in which action is needed. While encouraging equality and diversity is rightly one of the BSB's aims, before proposing regulatory change it should demonstrate that regulatory interventions under the current requirements have been attempted and failed.

9. The proposed changes take a "one size fits all" approach, presenting a preferred solution, and only then asking consultees whether the approach is proportionate, as opposed to evidencing proportionality and targeting through analysis of evidence and impact assessment of a range of options.

10. A more appropriate approach to regulatory change would be to:

- Clearly state and differentiate the problems which the change seeks to address;
- Provide evidence which connects the problems to shortcomings in the current regulatory requirements, by demonstrating how supervision and regulation have so far been used to tackle the issues and failed;
- Provide options for change (including non-regulatory measures), with impact assessments in relation to their likely benefits and costs, including those which are long term and indirect;

- Propose the most proportionate and targeted approach to achieving the desired outcomes.

  This approach to regulatory change weaves the question of proportionality and targeting through the development and consideration of options.

11. A considerable amount of relevant guidance on impact assessment of policy change is available on gov.uk. It emphasises the importance of considering the risks of disproportionate burdens on small businesses, such as many chambers (and the Inns, in terms of employee numbers and turnover).

12. We recognise that the reported views about a lack of formal structures set out in §17 of the consultation are valid and relevant in some settings. However, the evidential basis for moving from this to changing the rules which apply to all is unclear. We also note that 'It is important that … BSB is able to take action against behaviour which works against equality, diversity and inclusion' (§31), but the document contains no evidence that it has tried and failed to do so with existing regulatory tools. In the absence of a systematic approach to proposed regulatory change based on good practice, we conclude that there should be no changes to the Rules at this stage.

Broader points

13. We accept the accuracy and pertinence of the research set out in §21 of the consultation. We welcome the review into bullying and harassment established by the Bar Council and chaired by Harriet Harman KC. We expect the outcome of Ms Harman's work to shed valuable light on the root causes of some of the issues and believe that it would be more appropriate to consider proposing any regulatory

change after this is published rather than in advance of it.

14. §19 records a process of engagement with stakeholders, but neither the consultation paper itself, nor annexe 2 records the evidence relied upon. As might be expected, a range of views were expressed during BSB's stakeholder engagement.

15. Our concern gains force because it is unclear what the finding in §20 is based upon. Given the nature of the EDI challenge, increasing diversity at entry point would not, even in an ideal of systems, result in swift changes at the most senior levels. The imposition of the test imposed in §20 of representation, *"at senior levels of the Bar"* thus lacks discernible logic. It appears to us that, objectively viewed, the picture is to be one of gradual improvement, albeit that we would like to see the pace of change increase.

16. In our view, the challenge of stopping unacceptable behaviour and encouraging equality starts with investigating the ways in which those issues manifest themselves in different practice areas of the profession, and at different career stages. The consultation itself seems to recognise this: in §21 there is evidence that publicly funded work may have fewer barriers to state pupils, and ethnic minority entry (although there is no analysis of any crossovers in categories, so the evidential position is not entirely clear). Equally, there is no doubt that bullying is a problem and that it should be tackled. As §6 of the Bar Council Report referenced at footnote 9 of §21 makes clear (but the consultation does not), the problem of bullying is also most likely in criminal and family law (thus, largely publicly funded) sets of chambers.

17. The profession needs to tackle inequality in recruitment and progression, but there is little or no evidence that they are the *same* problem. They are not, therefore, to be

treated as susceptible to the same answers. Equally, discrimination, harassment and victimisation often arise separately in different contexts, and the best way to combat them may be to tackle them individually. Recruitment and retention *can* be adversely affected by discrimination, harassment and victimisation, but those are not the only challenges; and discrimination, harassment and victimisation can arise in contexts other than recruitment and progression.

18. The consultation does not acknowledge the well evidenced extent to which barristers and Inns contribute to EDI by providing training, support and funding of work to improve diversity. In our view, that contribution is essential to attracting diverse candidates and has played a significant part in improvements in recent years. Our concern is that by its narrow focus, the consultation misses the more important strategic overview of a complex system which has resulted in measurable improvements.

19. We therefore agree with the consultation that continued culture change and improvement is crucial. We also agree that such change can not be achieved through regulation alone. The BSB can no doubt play a part in supporting the development of a more inclusive culture in parts of the profession – to do so effectively involves engaging the profession and supporting leadership from within by respected figures who believe passionately in the importance of inclusion and can clearly articulate the benefits of an inclusive culture.

The Proposed New Core Duty

20. In our view, the proposed Core Duty is unworkable for 3 reasons:

- The proposed *"proactive duty"* is too uncertain;
- The CD is inconsistent with the proposed guidance;
- The definitions of EDI are themselves unclear.

21. Consequently, COIC and the four Inns of Court have significant concerns in relation to the proposed Core Duty 8, which seeks to impose obligations relating to 'diversity' which (unlike the Equality Act 2010) are broadly expressed and untargeted.

22. Imposition by BSB of the proposed Core Duty 8 would exceed the requirements of s.149(1)(a) Equality Act 2010 (the Act) which requires a public authority, in the exercise of its functions to have "due regard." The Act does not place an obligation upon outcomes. S.158 and 159 Equality Act 2010 in relation to positive action, enable actions which are "proportionate" but do not impose duties. While there may be a regulatory case for going beyond this standard, the case is not made out and as presently formulated, it is wholly unclear what action the proposed positive obligation is intended to require. This is particularly problematic in respect of 'inclusion', which can be a contested concept.

23. While barristers (and others) can rightly be expected to achieve standards above the minimum requirement of legal compliance, the consultation document does not evidence the proportionality or targeting of enshrining this in a non-specific Core Duty, nor does it explore issues of potential conflicts with other obligations, such as the 'cab rank' rule. Guidance may be appropriate and helpful in enabling those subject to the Duty to assess how to manage such apparent conflicts, but the

underlying issue is the proportionality and targeting of the requirement in the first place.

24. We disagree with the suggestion that the existing rule C12 "*serves no useful purpose as a rule"*. To suggest that observing the law as a professional duty in this important area is not useful is, in our view, misguided.

Lack of proportionality and clarity

25. The proposed CD 8, Ethical Outcome oC8 and General Equality Rules encompass several different expectations, including advancing EDI; preventing unlawful discrimination and other unlawful conduct; and taking steps to ensure equality of opportunity, including in respect of protected characteristics under the Act and socio-economic status. Each presents regulatory and practical difficulties. As a whole they raise serious questions in relation to proportionality.

26. The explanation of EDI in §27 states, *Equality – by this we mean equality of opportunity.* The explanation goes on to read *including,* ***but not limited to*** *characteristics covered by the Equality Act and socio-economic background* [our emphasis]. §28 introduces the different concept of *equality of outcome*. The proposed Ethical Outcome and General Equality Rules refer variously to *equality of opportunity* and *to equality outcomes.* Both encompass protected characteristics and socio-economic outcomes. While laudable as an aspiration, this breadth of definition is not sufficiently targeted or proportionate for a regulatory requirement.

27. The closest statutory obligation is to advance such equality (s149 (1) (b) Equality Act 2010 – the public sector equality duty). In the statutory framework, equality of opportunity is assessed by contrasting the treatment of those with a protected characteristic and those without. The proposed new rule and guidance introduce

different considerations across a much broader and undefined range of characteristics, and the statutory test is thus incapable of application. It is unclear what would replace it.

28. We are concerned that the proposed changes ignore the carefully calibrated protected characteristics set out in the Equality Act 2010. That statutory scheme would be replaced by an undefined list of considerations, which elevate at least the issue of socio-economic status to parity with legal requirements.

29. We agree that socio-economic status is an important consideration when attempting to improve diversity. It is unfortunate that the consultation does not set out the basis upon which this non-protected characteristic would be defined, identified, or measured. Gathering and interpretation of data on socio-economic status is particularly challenging. The concept is nuanced and multi- factorial. For this reason, relevant duties in the Equality Act do not bear on individuals and it would be inappropriate for the CD to do so.

30. Whilst it might be argued that other CDs are expressed in general terms, unlike equality issues, they do not sit alongside statutory obligations with a clear framework of definitions and case law. We note that the consultation states that (a) guidance on the proposed new CD will be developed by looking at the new Equality Rules (§33) and (b): implementation of all new rules would have to be concluded within a year (§13). It appears that the CD would be in place absent complete guidance. Given the nature of the proposed requirements, it would be inappropriate to impose them without a complete set of guidance developed in collaboration with the profession.

Lack of targeting

31. We disagree with the proposition in §28 that the proposed rules would promote, *"a reflective approach"* that would, *"enable cultural change"*. Rather, their untargeted nature risks diverting attention from building on existing good practice in those chambers which already place considerable focus on EDI as they work out what is now required, while those who do not fully grasp the importance of the issue might simply continue to disregard the change, absent clarity about what is expected.

32. Implementation inside a year require enormous change, placing a burden on all Chambers and practitioners, but that burden would be felt unequally because individuals and Chambers have different resources. And while §13 says that supervision would precede enforcement, that is neither a promise nor a commitment but rather a representation of intent. Nor do we think it could be adhered to, even with the best of intent: the regulatory approach would have to be followed in the event of a barrister making a report under rC66.

33. One example to illustrate the potential problem is the risk of a referral to the BSB of someone holding 'non-inclusionary' but entirely lawful views which are not in conflict with other Core Duties. This would potentially create a very real dilemma and risk harm to individuals.

The Proposed New Equality Rules

Inconsistency

34. The wording used to encapsulate the proposed new requirements is inconsistent. The obligation in the proposed new CD is to act in a way that **advances** EDI: the proposed outcome oC8 requires barristers also to take steps to **prevent unlawful discrimination** and other unlawful conduct, and to take **reasonable steps to ensure equality of opportunity** for everyone, regardless of their protected characteristics and socio-economic status.

35. The obligation in the proposed Equality Rules is to take **reasonable steps to *meet* equality outcomes** for all those with protected characteristics or who share (undefined) socio-economic background. These outcomes are: to eliminate unlawful conduct; advance equality of opportunity in recruitment, retention and progression; prevent bullying, harassment and victimisation and have systems in place to respond to them; ensure equal access to services; and to promote an inclusive culture.

36. These rules will represent the minimum standard that must be met (§37). That being so, we are unsure why the proposed new CD is necessary at all. Because of the inconsistency of what is required by the different regulatory instruments, we are concerned that a barrister might act to advance EDI and take the steps required, and still be in breach of the minimum standard set by the proposed Equality Rules.

37. §37 makes clear that the way in which every barrister must meet the minimum standard will differ. The outcomes are prescriptive as to the end point, but there are no way marks. In our view, no barrister could be confident of demonstrating

"reasonable steps" without understanding what is reasonable in concrete terms. While this might be a characteristic of outcome-based regulation, in the context of a duty to advance a desired outcome, it is particularly problematic.

Lack of targeting

38. The responsibility for solving this conundrum is on individual barristers. It will, we think, be perfectly possible for a barrister to have reflected upon what reasonable steps are, and taken those steps, and still be in breach. That is not a sensible or workable outcome.

39. We are concerned about the burden and impact of the proposed changes on the most junior members of the profession, and we foresee a series of disciplinary proceedings, which will in due course clarify the various undefined and subjective usages in the proposed new CD and Equality Rules, at considerable personal, financial and institutional cost.

40. §31 of the consultation references the professional statement. We believe that this agreed and defined statement of what is required from barristers as regards pursuing equality and failing to tolerate discrimination can be utilised to formulate guidance, which can be promptly issued and which can then be assessed as the BSB and the profession work together to obtain the evidence base required for the type of far-reaching changes currently proposed.

41. The proposed new Equality Rules seem to be untargeted; determining the way in which they were to be met and assessing whether they had been met would be arbitrary; we do not think their effects have been fully considered. Most importantly, the outcomes must be met by every individual, regardless of their role in the

management of chambers, the size of chambers or their own status and seniority within the profession.

Access to Accommodation

42. We treat this topic separately because of the impact it would have on the Inns of Court, but it exemplifies many of our wider concerns about proportionality, targeting and unintended consequences.

Disproportionality

43. The proposals on accessibility seek to legislate for barristers in a way that Parliament has not intended and extend far beyond the obligations imposed upon other professions. Thus this aspect of the proposals is one where the absence of an impact assessment is most evident, even though the related costs and benefits could be more reliably quantified than in respect of other proposed changes. Such an assessment would, of course include the impact on the Inns. Absent such an assessment, it is impossible for the requirements of section 28 of the Legal Services Act to be demonstrably met.

44. In terms of the *necessity* of the proposed change, although not subject to regulation by the BSB (other than as AETOs) barristers' chambers are subject to obligations set out in the Equality Act 2010, including the duty to make reasonable adjustments in the same way as most other commercial premises. This, we consider, sets out an appropriate basis for securing accessibility to barristers' premises in a way which does not impose greater obligations on barristers and their landlords than apply to other similar businesses and organisations. Our starting point therefore is that the proposed duty set out in the consultation is unnecessary and risks reaching beyond the ambit of the BSB.

45. In terms of proportionality and reasonableness, the Consultation Paper sets out at §§60-62 what the BSB considers necessary to discharge the proposed new duty. This

appears to include, at least as a starting point, a requirement to make *"significant changes"*, including *"structural changes to the building"* or to relocate (or at least consider relocating) to alternative premises if a Chambers' current accommodation cannot be made accessible within five years.

46. Many Chambers operate from buildings within one of the four Inns of Court, constructed in the 19th century or earlier and statutorily listed for special historic and architectural interest. Like many other historic buildings used for commercial purposes, the age, condition and listed building protections mean that a significant proportion of the accommodation within the Inns can not meet the full accessibility standards of a modern building.

47. While the consultation refers to planning permission (§ 61), it does not refer to the need for listed building consent (LBC), which is more likely to arise in respect of works to improve accessibility. To secure listed building consent for the sort of accessibility works envisaged presents a very considerable hurdle. As relevant Historic England guidance emphasises '*The Equality Act does not override other legislation, such as listed building or planning legislation …* '.

48. The consultation document suggests that the case for the necessary permissions might be strengthened by imposing a regulatory requirement. Given that statutory obligations are already in place and are taken into account, there is no prospect that a regulatory requirement on an individual professional would provide any additional weight.

49. By way of example of the practical difficulties, even if the necessary permissions were obtainable, installation of a lift and provision of level access and accessible toilet facilities in all areas of a historic building would be a multi-million pound

project requiring long term planning: securing permissions, securing funding, preparing specifications, securing quotations, decanting occupants and doing the building work itself. It would render a building unoccupiable during the work.

50. Major structural works of this type would be beyond the legal requirement to make reasonable adjustments and would extend beyond the five years envisaged in the proposals as a timeline for change. It is thus unrealistic and disproportionate to expect the *"significant"* structural changes which seem to be envisaged at §62.

51. In some circumstances, structural change may be possible to improve access to some but not all areas within a building. Such alteration may well fall within the scope of what would be a reasonable adjustment under the Equality Act and make a material difference for the better. Such incremental progress should not be undervalued in a drive to meet the full accessibility which the proposals seek.

52. Of course, improving accessibility throughout chambers is important, but we suggest that the outcome sought is met through compliance with existing legislative duties to which chambers (and the Inns) are subject. Practical steps include long term planning for major access improvements when other structural work needs to be carried out, arrangements for securing partial access, and the use of accessible floorspace within each Inn for individual meetings or events as necessary.

53. All four Inns have taken (and continue to take) considerable steps and have spent significant funds on improving accessibility within the constraints of what is possible. This has taken the form, by way of example, of the introduction of external lifts, ramps and accessible toilet facilities.

54. §67 states that *Where members of Chambers and entities have made reasonable efforts to make their premises accessible, and where there are justifiable reasons that would prevent moving premises (for example affordability, support provided by the Inns etc.), we will not take enforcement action*. The clear implication is that Chambers in premises which are not fully accessible, and which cannot be made so within five years, should move premises unless they cannot afford to do so, or face enforcement action. This is neither proportionate nor reasonable. It would be likely to place a considerable financial burden on the individual chambers, both in terms of the costs of relocation and, if that relocation is to premises outside one of the Inns, through foregoing the preferential lease terms that the Inns offer to barrister tenants.

55. The absence of an impact assessment, and of option evaluation, is a significant gap in the rationale for this aspect of the proposals. Even assuming that there would be sufficient suitable and fully accessible premises available outside the Inns (which itself does not appear to have been assessed), Chambers entering into commercial multi-year leases, would be subject to significant new risks. Members (including junior tenants with debts and lower level of earnings) would likely be required to enter into cross-indemnity agreements resulting in personal liability on a commercial building.

56. None of these likely consequences of the proposed changes are in accordance with the regulatory objectives, specifically

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(f) encouraging an independent, strong, diverse and effective legal profession;

(h) promoting and maintaining adherence to the professional principles;

Unintended and unforeseen impacts

57. The proposed changes on accommodation and disability pose significant risk of placing a financial drain on the Inns, either as a result of required capital expenditure or reduced income (or both). This would reduce funding for scholarships and outreach activities.

58. The Inns do not make profits. Money they raise via rents are largely put into means tested scholarship funding, outreach and the maintenance and improvement of their estates for the benefit of the profession. Together the Inns provide over £7 million in funding scholarships and prizes and in outreach to under-represented groups. They also directly subsidise the Bar Council's work in these areas. The level of current funding would become unsustainable if large capital projects were required or the rental income declined. The impact on funding of outreach and scholarships would play out in a reduction of diversity, contrary to the stated aims of the consultation.

59. Equally, although the Inns charge commercial rents, they do not, in other respects, behave like commercial landlords. They are more willing to assist Chambers in difficulty. The flexibility of the Inns' lease terms is particularly important to the viability of sets of Chambers relying upon publicly funded work, often for disadvantaged groups, such as those Chambers giving advice and representation in welfare, housing and immigration matters. In the absence of any impact assessment, it would appear that the potential adverse impact on publicly funded chambers and thus on access to justice has not been considered.

60. The impact of any significant reduction in Chambers occupying the Inns would vary. In some it might result in a range of other commercial tenants taking space,

who did not have to meet requirements beyond compliance with legal obligations, thus creating an entirely perverse outcome. Where Inns are subject to Royal Charter, too many non-Barrister tenants/ residents would bring them into conflict with their Charter obligations. In all cases a shift from commercial to residential tenants would be subject to gaining permission for change of use and would adversely impact rental income as residential rents are lower, per square foot/square metre, than equivalent commercial rents.

61. The Inns contribute positively to regulatory objectives through maintaining a professional community of barristers, pupils and students. Weakening of the community of the Bar would have a particularly adverse impact on pupils and junior tenants, who benefit significantly from exchanging views and good practice outside Chambers. This is especially important in ensuring high ethical standards and access to outstanding legal research through the Inn libraries.

The Questions

62. We turn now to answer each question, briefly.

Recommendation 1.

> We propose to replace the current CD8 with the following duty:
>
> *CD8 You must act in a way that advances equality, diversity and inclusion.*
>
> And to amend the Ethical outcome oC8 to reflect the positive duty:
>
> *oC8 Those regulated by the Bar Standards Board act in a way that advances equality, diversity and inclusion, and take steps to prevent unlawful discrimination and other unlawful conduct in their practice. This includes taking reasonable steps to ensure equality of opportunity for everyone regardless of their protected characteristics and socio-economic status.*
>
> It is proposed to remove rC12 entirely.

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

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?

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

Q1. No. The BSB should consider supplementing the existing core duty with guidance along these lines: "*Your approach to not unlawfully discriminating, harassing or victimising any other barrister or member of staff, should be demonstrably in line with the Professional Statement in respect of all practice-based decisions affected by equality, diversity and inclusion".* We do not agree that any duty needs to extend beyond practice issues, because behaviour outside the professional arena is also

regulated, and sufficiently so. We do not agree that the new obligations should extend beyond decisions – the current formulation is unclear, and hence unenforceable and unfair.

If our approach in response to Q1 were adopted, Qs 2 and 3 would become redundant. However, regarding the proposals as presented in the consultation document and given the extensive and undefined reach of the proposed Core Duty, our concern is it goes beyond a proportionate and targeted approach, rather than that it omits anything which should be captured. As regards the employed bar, in the absence of guidance we consider that the proposed approach creates even more potential uncertainty and confusion, particularly as regards the scope of activity covered.

Recommendation 2.

We recommend that the BSB adopt the following outcomes-based Equality Rules:

'General Equality Rules'

Barristers in self-employed practice and BSB entities must take reasonable steps to meet the following equality outcomes for those who share particular protected characteristics and/ or socio-economic background:

a) eliminate unlawful discrimination and advance equality of opportunity, particularly in relation to recruitment, retention, and progression.
b) prevent bullying, harassment, and victimisation, and have systems in place to respond to such behaviour;
c) ensure equal access to your services; and
d) promote an inclusive culture.

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?

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

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

Q4. No. Because the outcomes are prescriptive the obligation proposed is too uncertain:

- The consultation allows no adequate understanding of socio-economic background; or promoting; or inclusive culture.

- The prescriptive outcomes include both eliminating unlawful discrimination and ensuring equal access but suggest that these outcomes go beyond an individual's responsibility for their own practice. The latter obligation would, it appears, obligate barristers to leave chambers.

- Given the absolute nature of the outcomes, it is impossible for us to envisage what is intended by the use of the words, *"must take reasonable steps"* in respect of them.

  The *"inclusive culture"* criterion is so subjective as to be a prosecutor's charter. We do not understand why the professional statement was not used as the basis for guidance on this topic.

Q5. No. The consultation implicitly suggests that because all three issues are important, they can and should be treated in the same way, together. We disagree. Different barristers are affected unequally by different things, including the acts of third parties – clients, solicitors and judges. In that context,

the consultation putting the focus only on Chambers is unhelpful and obscures the issues.

Q6. We believe this is the wrong question. The right question is *"how can we best advance adherence to the Professional Statement in terms of Equality?"* The answer includes not overreaching and not creating subjective criteria which become a professional obligation. In order to answer the question, the BSB should create an impact assessment for all these proposals. At that stage, we would welcome mandatory CPD on equality. Both the circuits and the Inns currently provide such training, in addition to commercial providers.

Recommendations 3 and 4.

Recommendation 3

We propose to require barristers to have the following mandatory policies that govern their practice and enable appropriate grievances to be raised:

a. Equality, diversity and inclusion policy
b. Anti-harassment and bullying policy
c. Reasonable adjustment policy
d. Flexible working policy
e. Parental leave policy
f. Allocation of unassigned work policy

Recommendation 4
We propose that the BSB should no longer prescribe the content of policies and would instead provide guidance on the development of appropriate policies linked to action plans.

7. Regarding policies:

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

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

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

Q7: If the obligations are clear – as they would be if the proposed new CD and Equality Rules were abandoned, and the protections now in place maintained, we agree that policies supporting the duties imposed regarding EDI should be in place, and that chambers should develop their own.

Absent that clarity, the issue of policies becomes a guessing game. The absence of any policy or any particular provision will always be capable of disciplinary report or challenge: imposing a professional obligation to comply with such a moving target is not something we can support.

Recommendation 5.

Equality monitoring and analysis

Subject to GDPR requirements, we propose to expand our requirements on equality monitoring and publication to ensure transparency and accountability on how well barristers in self-employed practice and entities are meeting the equality outcomes in the 'General Equality Rules'. We propose that the BSB adopt a rule with the following wording:

take reasonable steps annually to collect, analyse* and publish the following equality monitoring data18 internally, disaggregated by protected characteristics and socio-economic background (and make this available to the BSB on request)

For those practising in chambers and BSB entities:

a. characteristics of the workforce in the chambers or entity (this must also be published externally);
b. applications to become a member of the chambers or entity;
c. distribution of work and the allocation of unassigned work in the chambers or entity;
d. any complaints of bullying, harassment, and victimisation within the chambers or entity; and
e. workforce feedback, which demonstrates how inclusive the culture is within the chambers or entity.

For all self-employed barristers and BSB entities:

a. types of complaint from clients disaggregated by protected characteristics of complainants and those subject to complaints;
b. any other equalities monitoring data you feel is pertinent to demonstrating how you meet the 'General Equality Rules'

*consider the reasons for any disparities in the data

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

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?

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

Q8: The proposed rule seeks to mandate the collection of data that goes beyond current protected characteristics. It adds an undefined characteristic. We are uncertain how that is to be measured, or whether it should thus stand alone. The evidence upon which this decision could be based seems to us to be lacking.

In our view, the BSB ought not to expand professional obligations beyond existing legal requirements, without providing extensive evidence as to why it seeks to do so; how that characteristic is to be defined; and why.

It appears from §47 that the BSB has speculated about potential effects of non-protected characteristics, and that there is research showing socio-economic background *does* have an effect. If the BSB wishes to research further, we would support professionally conducted research. However, the effect of the proposed rule is to make participation in research about which Chambers have no input or say, a compulsory obligation. We do not support that.

Moreover, the data to be published ought to be specified. In our view, the consultation conflates the issue of unassigned work with a far more generalised "distribution" issue, which cannot be defined or understood from the material provided.

In our view, publishing complaints is fraught with difficulty, and we find it difficult to discern its purpose. If the complaints are properly resolved will that be made clear?

Will multiple dismissed complaints be accounted for? Is it the BSB's view that this will lead to the redetermination of complaints?

A proportionate approach would, in our view, be more defined – perhaps the number of complaints under each head together with the number of complainants. We do not support compulsory workforce feedback: bad workplaces can pressurise anyone, and good ones will spend too much time and resource on the precise words used.

It seems to us that this regulatory overreach is a separate matter of principle about which the BSB should have consulted separately.

Q9. No.

Q10. No. Instead there ought to be a joint approach agreed by all stakeholders as to how to obtain the data that would support any changes to CDs or Rules and that research should be made available to all before the BSB next proposes changes. That way, a fully informed and transparent consultation can take place.

Recommendation 6.

We propose that chambers and entities (and sole practitioners, where relevant) must have a written 'action plan' that is *specific and measurable to address any disparities identified through analysing the data*, which would enable the chambers or entity to implement the policies in Recommendation 3 and to achieve the equality outcomes set out in Recommendation 2.

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?

Q11. Once proper data is obtained, and *"disparities"* properly defined, we would support this recommendation. At present we do not, because we do not believe it will achieve anything. It is impossible to discover what the consultation

currently means: in respect of any protected characteristic, we do not know whether what is being measured is a disparity in terms of calls to the bar, applicants to chambers, only BPTC students or university students as well. We do not know whether characteristics such as religion, and characteristics such as disability are being treated alike, even though the equality outcomes may be different, and reasonable adjustments mean different things in respect of different characteristics.

Recommendations 7 and 8.

Recommendation 7

We propose the removal of the mandated "fair recruitment training" requirement, to be replaced with an outcome- focussed requirement, expressed as below in Recommendation 8

Recommendation 8

In line with our outcomes focused approach, we recommend that the BSB adopts the following rule in relation to training:

Barristers must take reasonable steps to ensure that:

a. they have the required knowledge and skills to meet the equality outcomes.

b. those employed in their chambers, entity, or practice have the required skills to enable the equality outcomes to be met.

The BSB may at any time set minimum requirements for training for the profession (or individual barristers following supervision activity or other regulatory intervention) if it is required to meet the equality outcomes set out in the 'General

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

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?

Q12. In line with our reasoned approach above, we consider this unnecessary and unworkable.

Q13. In terms of a personal practice then, if aligned with the professional statement as set out above, this is something we would support. In terms of making all barristers responsible for everything their Chambers does, we do not agree, for the reasons already explained. Recommendation 8b. is disproportionate.

Further, the reservation of further, general, powers is not something we can support, because it appears to propose a power to introduce new requirements without consultation. That is a recipe for distrust and litigation. It is inconsistent with a cooperative approach to the profession and we very much regret it is even being considered.

Recommendation 9.

We propose that barristers in self-employed practice and entities should conduct and publish an accessibility audit in relation to disability, reviewed every five years. In light of this audit, you must take reasonable steps to:

a. develop and publish a plan for accessibility. This plan must include specific measures that are time bound to address identified barriers to access.

b. clearly publish on your website:

i) where there are barriers to access for members of the public, and your workforce;

ii) available reasonable adjustments that can be made to any existing barriers to increase accessibility.

iii) your 'Reasonable Adjustment' policy.

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

Q14. No. These matters are provided for in legislation. Unlike making breaches of legislation about discrimination (which of course covers disability as a protected characteristic) a professional matter, which we support, we do not understand why it is considered proportionate or necessary to deal with this by way of rules. The work required is enormous and would impact individuals and Chambers. Some Chambers would have in-house expertise. Others would have to buy it in. An audit is too onerous. A plan is equally efficacious and more proportionate.

Nor do we understand the need for a 5-year review. That requirement could depend on a substantial change in Chambers or the wider world, such as moving premises or the development of new technology/equipment.

Recommendation 10.

We are considering whether it would be proportionate to introduce the below requirements on accessibility of premises for chambers and entities.

- we expect you to take reasonable steps to ensure that premises from which you conduct your practice are fully accessible* to all. Where full accessibility is not in place, you would be required to have a written plan that is reviewed each year (and made available to the BSB on request) to ensure that the premises from which you operate will be fully accessible as soon as practicable, and in any event within five years of the Equality Rules coming into force unless there is a reasonable justification for not being able to achieve this. This applies even when no current pupils or tenants have any mobility impairments.

- where chambers and entities operate from premises that are not fully accessible and do not expect premises to be accessible within five years, this must be reasonably justified.

**Pupils and tenants who are mobility impaired are able to fully integrate into chambers. There is independent access to enter and exit the building, and move within the building to independently access toilets, communal areas, a conference room, and clerks' room.*

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

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

Q15. We do not consider that what is proposed is a proportionate means of achieving the objective to which it is directed, again for the reasons set out above. The BSB's regulatory remit does not extend to chambers, except insofar as they are AETOs.

Q16. No. The proposed requirement is not proportionate and risks unintended consequences, as set out in paragraphs 43-61 above.

Recommendation 11.

We propose to remove the mandatory requirement to appoint an Equality and Diversity, and Diversity Data Officers (EDO and DDO roles).

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?

Q17. If there were to be guidance referencing the professional statement, we would agree. Chambers could then determine who was responsible for what issues, and committees could issue a simple notice of compliance. Otherwise, we do not agree because the BSB would make individual barristers professionally responsible for something for which they are not, in fact, responsible. We do not believe it is part of the BSB's role to compel barristers to organise their working practices in any particular way, and this is regulatory overreach.

General Questions

18. Do the prescriptive requirements within the rules:

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

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

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?

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

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

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?

Qs 18-19**:** No, for the reasons explained above. However, we agree that mandatory training would encourage reflection.

Q20: We think this is the wrong question. The BSB's task is to regulate in a way which permits the profession to comply. We do not agree that its task is to carve out exceptions to a standard that individual practitioners cannot meet. Nor do we understand why the BSB would think it necessary to do so, whilst simultaneously making the junior tenant in a set of hundreds of barristers liable for the default of every other member of Chambers.

To us, this question suggests a lack of preparedness and thought, and we would prefer there to be more time taken in thought and preparation.

Q21. No, for the reasons set out in paragraphs 43-61 above. It is unfortunate that no impact assessment has been carried out in this respect.

Q22. Yes and we have set these out above.

Consultation Question

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?

Q23. We do not believe that it is targeted or proportionate for the BSB to run a 5-year experiment, the benefit of which is that it obtains some information, and the burden of which is imposed on individual barristers.

We do not believe that the evidence for the experiment justifies it, and nor do we believe that the experiment should be based upon new rules, rather than guidance. In our view, the quality of the evidence obtained from a cooperative approach and carefully considered guidance is likely to far exceed that gained from imposing obligations to achieve non-statutory, ill-defined and occasionally contradictory objectives.