



The Bar Standards Board Consultation

'Equality, Diversity and Inclusion'

RESPONSE OF THE CRIMINAL BAR ASSOCIATION

November 2024

Introduction

1. The CBA represents the views and interests of practicing members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

The CBA fully supports initiatives that will improve EDI at the Bar. It also agrees that there is considerable further work that needs to be done to achieve a Bar that is truly reflective of the society which it serves. However, The CBA believes that taken overall the proposals as set out in BSB Consultation rather than promote EDI they will in fact undermine its advancement and as such, the proposals are largely resisted for the reasons set out below.

Consultation questions

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

We strongly disagree.

The CBA supports the principles set out in paragraph 27 of the consultation paper. However, our view is that the proposed change is not the appropriate mechanism to achieve the underlying aims.

We have read both the Bar Council response and that of the South Eastern Circuit and agree with the concerns they have raised regarding this proposed significant change; it would place an unclear, unworkable, and unenforceable obligation on barristers. In doing so, we believe, the proposal would undermine the objective that the amendment intends to achieve.

Specifically, from the perspective of the Criminal Bar, we raise the following:

- The cab-rank rule, one of the fundamental tenets of the Bar, helps protect the right of all to be represented however odious their behaviour or beliefs may be to others. It also protects the barrister who is providing their representation; it is well-known by the public at large that barristers are simply doing their job and are not to be associated with their client's case or cause. It is unclear how the proposed CD8 would be compatible with the cab-rank rule and specifically how it would sit with representing many of those who come before the criminal courts, for example those charged with hate crimes.

- Barristers have, under Core Duties (2 and 7), an obligation to act in the best interests of their client and to a competent standard. The imposition of new CD8 would negatively impact the ability of criminal barristers to act in such a way where their client holds views perceived to be at odds with EDI.

2. Are there examples of conduct, both within and outside of a barrister's practice, that should be prohibited but are not captured by this duty? (Recommendation 1)

As set out in answer to question 1, we believe that proposed CB8 is fundamentally flawed in part as it is so poorly defined that it is unclear what would or would not be captured. We are also concerned that this question appears to suggest wider encroachment of the regulators remit outside of a barrister's practice.

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

As set out above in answer to Question 1, we do believe that the proposed CD8 is not appropriate for any barrister whether employed or not. We note and adopt the concerns raised in the Bar Council report.

The CBA's membership, although not limited to the self-employed Bar, is predominantly made up of their number. However, our concerns flagged above re Question 1 would apply equally to those Criminal Barristers working in-house. Those working within HMG (whether CPS/SFO or other departments) may themselves be subject to other responsibilities as civil servants and as such there is no need for an extension of obligations upon them. Those working in defence firms (or as private prosecutors) must (within the rules of the court and law) act in their best interests of their client whether or not their client may have been charged with crimes (or hold views) which would run contrary to the principles of EDI.

4. **Do you agree that the Equality Rules should take an outcomes-based approach, supported by prescriptive requirements that enable barristers to meet the outcomes?**

(Recommendation 2)

No; we believe that such an approach fundamentally misunderstands the factors affecting EDI at the Criminal Bar and the ability of individual barristers, or even chambers to control outcomes.

The publicly funded Bar is the most diverse within the profession and therefore its constituents help uplift the statistics of other areas. However, over recent years the number of criminal barristers has declined very significantly, such that now there are in fact insufficient barristers to cover all the cases before the courts¹. Those leaving the profession have disproportionately been women. The reasons for this exodus are largely due to factors beyond barristers' control namely:

- Funding: the chronic underfunding of the criminal bar (both in CPS and Defence fees paid through LAA), has led to many leaving for a better paid and more stable income stream. This has had a disproportionate impact on those with caring responsibilities, and therefore women, as the remuneration is simply not sufficient to cover the childcare costs required to enable barristers to meet their court and other professional obligations.
- Court sitting hours and obligations beyond the court day:
 - The CBA, along with other bodies such as Bar Council, have long fought for a protocol to cover sitting hours (for example the BC proposal in 2017). This has been resisted by the judiciary and although the CBA Wellbeing protocol² is being piloted on the SEC this continues to meet resistance and there is no guarantee that it will be adopted nationally. For many of those leaving the Bar, and in particular women with caring responsibilities, the long hours (and often uncertain hours) are a big contributing factor to their decision. The criminal courts are far less predictable than their civil counterparts and criminal practitioners also

¹The National Audit Office found that, last year, 1,436 criminal cases could not proceed when originally listed due to the absence of counsel and see also the result of the CBA RASSO survey <https://www.criminalbar.com/resources/news/cba-rasso-survey-results-12-02-24/>

² <https://www.criminalbar.com/wellbeing/cba-wellbeing-protocol/>

spend a far greater percentage of their time in court than other areas of practice. The impact on diversity therefore is considerable.

- Warned lists – the CBA has argued for the removal of warned lists for decades. They require barristers to keep weeks of their diary free with no guarantee that the trial will in fact come in. This has a significant impact on those with caring responsibilities as it imposes a requirement to pay for childcare to cover the period whether or not it will be needed and, more importantly, with the costs involved regardless of whether any earning will be received. This alone has been a big contributing factor to many women choosing to leave the criminal Bar.
- Judicial bullying: Judicial bullying has long been a contributing factor in decisions to leave the Bar. It is well documented that the primary (though not only) targets of such bullies have been women and non-white barristers, and particularly those at the more junior stage of their career. It is yet another/final straw leading to many leaving the bar. Again, the Bar have tried hard over the years to address these issues and pressed for firmer action, but the calls to action have not been acted upon quickly enough or robustly enough by the judiciary, which is why the Bar Council has commissioned the report by Harriet Harman into the problem.

Why is this relevant to EDI outcomes? As is clear, whatever action taken by criminal practitioners whether individually or collectively, the biggest factors impacting EDI are remuneration and the working environment, neither of which are within their control. The CBA, (and BC and other SBAs) have long pointed out these issues to HMG/Judiciary and demonstrated the adverse effect these problems have on diversity, with little effect. Women in particular have voted with their feet and simply left the Criminal Bar and often, the Bar.

Any measure which seeks to measure progress by outcome ignores the actuality of life at the criminal bar. That is not to say there are not steps which the Bar could and should do, most of which are already being done. Barristers (through SBAs like the CBA, BC, the Inns and

Circuits and chambers) invest considerable amounts of their free time training barristers, pupils and students in EDI.

We agree with the concerns raised by both the Bar Council and the South Eastern Circuit on this point.

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

Although for the reasons set out above, we disagree that an outcome focused approach should be followed, we agree that these are the correct priority areas.

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

As above, we strongly disagree with an outcome focused approach and therefore do not advocate for further outcomes being included.

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? (Recommendation 4)

a) Yes, we do. We note and agree with the concerns raised by the BC and SEC response regarding the allocation of unassigned work and that this is but one narrow aspect of fair work distribution which might better be addressed by a wider policy covering all areas. In our view, whilst we do not object to the inclusion of a policy for non-allocated work per se we note that monitoring should already be in place. We would be concerned if this were to lead to any outcome focused measurement regarding the policy.

b) No, we do not agree. The BSB should continue to adopt a prescriptive approach, containing minimum standards expected though giving chambers the flexibility to then build on those according to their particular set up.

c) If the approach contains prescriptive minimum standards (see b above) this could and should apply to all types of practice.

8. Will the requirements on monitoring and data analysis provide sufficient transparency for individual barristers to hold their chambers or entity to account? (Recommendation 5)

We have read the responses of the Bar Council and the South Eastern Circuit and agree with the concerns they have raised regarding this proposal. Furthermore, it seems as if this proposal in some way seeks to make up for the proposed removal of EDOs (see our response below to question 17), but in our view it is no substitute, and ignores the way in which barristers, and specifically chambers, operate.

9. Should the data collection requirements include characteristics beyond those currently protected and socio-economic background? If so, which additional characteristics should be considered and why? (Recommendation 5)

This question assumes already an extension to include socio-economic background. Whilst we would not object per se to the inclusion of some sort of matrix to cover socio-economic background factors, this would add to the burden already placed on chambers and would need standardise questions to be meaningful. We believe that chambers are better placed concentrating on the protected characteristic to begin with. We would object to any wider extension of data collection.

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

No, we strongly oppose this issue as it will lead to a reluctance for members from minority groups to respond and/or respond accurately. Even within a large chambers', there may only be one of a certain group which then brings the publishing of data beyond the statistical to the individual. We believe it is more important for it to be analysed by chambers (with the assistance of EDOs) so that measures can be taken to address areas of underrepresentation.

- 11. Do you agree that clearer links between action plans and data will lead to more effective implementation of equality measures? What additional steps could enhance this linkage? (Recommendation 6)**

Yes. Collection of accurate data is critical for an evidence-based approach to how equality measures are being implemented and what measures need to be included in any action plan.

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

No, we do not agree. EDI training, including on fair recruitment, is critical for all barristers and we would advocate for an extension of the current rules to include all barristers (not just those directly involved in fair recruitment). Given the way chambers operates the training should go beyond the reading of guidance. We do not consider it too onerous but rather an essential component of training (in the way that Ethics training and other EDI training is).

- 13. Will the proposal to replace prescriptive training with a more reflective approach lead to more purposeful CPD activities to build the skills required to meet the Equality Outcomes? (Recommendation 8)**

No. Those practising at the Criminal Bar are under a considerable amount of pressure, both in terms of workload and, in many cases, financially. It is essential that the Bar continues to progress and grow in terms of inclusivity and that all barristers have completed a basic level of EDI training. Training is the best way to tackle inequality, and to promote diversity and inclusion. It is unrealistic to expect each individual to be able to identify the training they need; those who are most in need of training are likely to be the most resistant if it is not prescriptive.

We recommend that the BSB mandate a minimum number of hours of EDI training per annum.

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

We agree with the BC response and the concerns raised therein. It is agreed that chambers should be required to conduct an accessibility audit and that the results of that audit should be published. However, that is on the basis that an accessibility audit by self-assessment would comply with this requirement.

It is also essential that the BSB guidance sets out clearly what is required of barristers who are sole practitioners and do not operate out of chambers. There are many criminal practitioners who operate from their home addresses or rent individual rooms in multi occupancy office spaces.

We believe that it is reasonable for the accessibility audit to be reviewed and updated every 5 years.

15. Do you agree with our proposed requirements to improve access to premises of chambers and entities for disabled people? Please explain your answer. (Recommendation 10)

No, not as proposed. We do agree that that reasonable steps should be taken to ensure that premises from which practices are conducted should be fully accessible to all. Efforts should be taken to ensure that individual visitors are asked in advance whether reasonable adjustments are required for their visit, we consider that this approach would increase inclusivity.

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.

As set out above, whilst we agree that reasonable steps should be taken the requirements as set out are not a proportionate means of achieving those outcomes. We do not consider that the 5-year timescale is practicable due to issues that may arise with listed buildings and leasing requirements and arrangements.

17. Do you agree with the proposal to remove the mandatory requirement to appoint Equality and Diversity, and Diversity Data Officers? If so, how could chambers and entities manage these responsibilities moving forward? (Recommendation 11)

We strongly disagree with this proposal. Whilst it is true that there are many dedicated EDOs who go above and beyond in promoting EDI within chambers, that is not a reason to abolish them. It is also understandable that very junior members appointed to undertake such a complex and onerous role places feel that undue pressure upon them. Rather than abolish this role the BSB should seek to strengthen and support the role of the EDO.

We support and adopt the proposals by the BC in their response that the BSB specify:

- i) A minimum call level
- ii) More than one EDO per set, or a minimum ratio
- iii) EDO training
- iv) An EDO place on a board level committee or a board member assigned the role of EDO

We note that it is thanks to the work on the EDOs that much progress has been made over the years in EDI. They are the people that those in chambers feel able to turn to raise issues rather than necessarily taking it straight to the HoC or Head Clerk/CEO/DO. To remove them would, in our view, be the significant retrograde step and run contrary to the very changes the BSB purports to see occur.

General Questions

18. Do the prescriptive requirements within the rules:

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

No. We do not believe that the prescriptive requirements as drafted enable barristers to take a reflective approach to achieving the equality requirements. An outcomes-based approach is not conducive to ensuring that EDI progress is made, nor will it achieve that objective. The regulator needs to set out clear rules and detailed guidance to ensure compliance. It must be made clear what will constitute a breach and when enforcement action will be taken.

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

No. We do not think that the proposals will ensure specific, measurable or timely action.

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

a) barristers within chambers and entities

No. The proposals as drafted are at best unclear. It is impossible for barristers to decipher what is minimally required of them.

The recommendations remove much of the guidance and the result is far more onerous burden on barristers. This would particularly impact small sets of chambers. We agree with the BC comment that having a 'one size fits all' approach to some of the proposed requirements risks having a "disproportionate impact on smaller entities and sole practitioners".

b) sole practitioners

We are encouraged that the BSB proposes to treat sole practitioners proportionately, depending on the nature of their practice. However, this also risks causing a greater level of uncertainty regarding compliance.

c) employed barristers?

No. The regulations do not provide clarity as to what is expected from employed barristers.

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

Yes, we agree with the response of the Bar Council, as set out in paragraphs 141 -143.

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

We agree that the Bar needs to make progress on making chambers more accessible, the court estate also needs to become more accessible. Inaccessibility is a barrier to equal participation by wheelchair users and barristers with physical disabilities. The CBA is committed to disability inclusion at the Bar.

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?

Yes. As outlined above, we consider that some of the proposals will be difficult to comply with and difficult to enforce. We agree with the observations made by the Bar Council.

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?

The CBA receives information and feedback from criminal barristers regarding the impact of regulatory changes to working practices. We consider that the role of EDOs within chambers are of crucial importance and should be an effective resource to the BSB.