

Equality Analysis (EA) – New Handbook

Date of Assessment	April 2013
Assessor Name & Job Title	Ewen Macleod, Head of Professional Practice
Name of Policy/Function to be Assessed	Review of the BSB Code of Conduct: Part II of the new BSB Handbook.
Aim/Purpose of Policy	<p>The structure of the Code of Conduct (<i>the Code</i>) has been amended in order to make it more user friendly and to specify more clearly the regulatory outcomes that the BSB is seeking to achieve. The Code of Conduct is now part of the new BSB Handbook (Part II).</p> <p>This analysis seeks to compare Part II of the new Handbook (including the Core Duties) with the current Code of Conduct, highlighting all significant policy changes that have taken place.</p>

1. Evidence

What evidence will you use to assess impact on equality?
<p>The main sources of evidence used to assess the equality impact are as follows:</p> <ul style="list-style-type: none"> • Bar Barometer • Biennial survey 2011 • Bar Council statistics • The BSB Report on the Diversity of Barristers Subject to Complaints <p>In addition to this, we have consulted extensively on the proposals, the most recent of which was released in March 2012. This included an updated version of the Code of Conduct and the BSB's plans for authorising entities (not covered in the current application), authorising self employed barristers to undertake litigation (see separate equality analysis) and a number of proposals relating to supervision and enforcement (also covered by separate equality analysis).</p> <p>No equality issues had been raised in the responses to the previous consultations on the Code. The March 2012 consultation posed a number of specific questions relating to the issues raised in an interim equality analysis that was published alongside the consultation. We also sought specific input from consumer groups and the BSB's Equality and Diversity Committee. The key issues raised are discussed below.</p>

2. Impact on Equality

Consider whether the evidence listed above shows the potential for differential impact, either

adverse or positive, for different groups. If there are negative impacts, explain how you will attempt to mitigate these. Mitigating actions can be described in more detail in your Action Plan (Section 4).

Race

The Core Duties – unregistered barristers:

This change may have an impact on BME barristers who are overrepresented in unregistered barrister numbers (Bar Council Statistics 2010).

However despite this potential impact it is suggested that the approach can be justified on grounds of public protection as it fulfils a legitimate aim and regulatory objective of protecting and promoting the interest of consumers. It is also deemed as necessary in the light of the changing legal market. It is also possible that BME clients are overrepresented as clients of unregistered barristers, in which case there would be a benefit to this group of the added protections.

Part II Section C (Conduct Rules) – Rule II.C3.R15: the cab rank rule:

As regards race, the changes could affect immigration clients who may have English as a second, or third language or who may have mental health difficulties caused by ill treatment in their home country. There is a risk that such clients will also be viewed as “difficult” or expensive and may be more likely to be turned away. The effect of no longer deeming legal aid fees to be proper fees in immigration and other civil cases may be that barristers turn down such work. In the event of a complaint it would ultimately be a disciplinary tribunal which decided whether the fee was proper and whether the barrister was in breach of the rule.

The impact of these proposals is largely on access to justice for the above groups. Although female and BME barristers are disproportionately affected by legal aid work, we do not believe that these proposals have a detrimental effect on barristers as they will be free to reach their own decision about the appropriateness of fees.

Rules II.C4.R3 and R4: reporting serious misconduct:

The Core findings of ‘The Report on the Diversity of Barristers subject to Complaints 2007-2011’ included that:

- BME barristers are more likely than white barristers to have external complaints referred to disciplinary action; and
- BME barristers are more likely than white barristers to have complaints upheld following a referral to disciplinary action.

This means that BME barristers may be disproportionately affected by the duty to report serious misconduct. The Bar Standards Board has commissioned an external agency to review its professional conduct complaints processes. This will inform any action that the BSB takes to mitigate the findings of the report.

The Biennial Survey of the Bar shows that the more junior members of the Bar are more likely to be female and BME. Concerns were expressed by

respondents to the consultation that our proposals for reporting misconduct would impose a disproportionate impact on the young Bar. They disagreed with our interim analysis that any negative effects would be outweighed by the positive impact in the public interest. The BSB's Equality and Diversity Committee had similar concerns about protections for whistle blowers. As a result, we have amended our proposals to allow 'protected' conversations to be had with the Bar Council Ethics Helpline and those providing advice to it, in order to provide support to those considering whether to report their own or others' misconduct.

In the light of the policy change described, the BSB continues to believe that any negative impact will be outweighed by the positive impact in the public interest through the introduction of provisions which require reporting of misconduct (which may include bullying, victimisation or other breaches of the equality and diversity provisions in the Code). The BSB considers that there is a clear public interest in introducing this rule as it meets with our regulatory objective of protecting and promoting the interest of consumers.

Rules II.C5.R6 – II.C5.R13 associations with others and outsourcing.

By removing the restriction on sharing premises barristers may be able to save on costs which could have potential positive impacts for those disproportionately affected by changes to legal aid, such as female and BME barristers. The change will allow these barristers to work in new and innovative ways.

The BSB has been careful to ensure there are sufficient safeguards in place as a result of removing restrictions to ensure that clients' interests are not adversely affected.

International practising rules:

One of the key changes to the IPRs is likely to have a positive impact on race, as clients whose professional adviser is either authorised in another member state of the European Economic Area, Scotland or Northern Ireland will now be able to rely on the Cab-rank rule. The rule does not currently apply to foreign work this is a significant extension of its application. The application of the cab rank rule to foreign work was the subject of much debate in previous consultations. The BSB did consider whether the cab-rank rule should apply to instructions from any foreign lawyer but after considering all views, the BSB concluded that, on balance, that this would be a step too far. This was in part due to concerns that requiring barristers to act for foreign lawyers about whom nothing may be known and who may be subject to regulatory regimes of varying standards, could place barristers in difficult situations where they would be obliged to accept the work under the cab rank rule. Barristers in such circumstances might not be able to obtain reliable information on which to base their advice or might come under pressure to act in unprofessional ways. The cab rank rule restricts a barrister's normal commercial freedom to decide for whom they are prepared to act. In any case, the 'non-discrimination rule' would continue to apply.

	<p>However, not all foreign lawyers are unknown quantities. In particular, foreign lawyers who are authorised by other Member States of the EEA, or who practise in Scotland or Northern Ireland, are subject to familiar regulatory regimes of an appropriate standard. Indeed, it would be incompatible with EU law for the BSB to distinguish between instructions from lawyers authorised in different Member States. On this basis the BSB decided to extend the cab-rank rule as described above.</p>
Gender	<p><u>The Core Duties – unregistered barristers:</u></p> <p>This change may have a greater impact on men as there are slightly more male unregistered barristers, than female.</p> <p>However despite this potential impact it is suggested that the approach can be justified on grounds of public protection as it fulfils a legitimate aim and regulatory objective of protecting and promoting the interest of consumers. It is also deemed as necessary in the light of the changing legal market.</p> <p><u>Part II Section C (Conduct Rules) – Rule II.C3.R15: the cab rank rule:</u></p> <p>The effect of no longer deeming legal aid fees to be proper fees in immigration and other civil cases may be that barristers turn down such work. In the event of a complaint it would ultimately be a disciplinary tribunal which decided whether the fee was proper.</p> <p>As set out above, the impact of these proposals is largely on access to justice for the above groups. Although female and BME barristers are disproportionately affected by legal aid work, we do not believe that these proposals have a detrimental effect on barristers as they will be free to reach their own decision about the appropriateness of fees.</p> <p><u>Rules II.C4.R3 and R4: reporting serious misconduct:</u></p> <p>The Biennial Survey of the Bar shows that the more junior members of the Bar are more likely to be female and BME. The issues in relation to reporting misconduct are discussed in relation to race above. In addition, the BSB's Equality and Diversity Committee felt that women might be disproportionately likely to report misconduct (either their own or someone else's). The mitigating action and the BSB's conclusion is discussed above.</p> <p>The Report on the Diversity of Barristers subject to Complaints 2007-2011 also found that male barristers are subject to a larger proportion of internal complaints than their proportion at the Bar, but the difference on the basis of gender is not as pronounced as the difference on the basis of ethnicity. This means that male barristers could be disproportionately affected by the duty to report serious misconduct. As discussed above, the Bar Standards Board has commissioned an external agency to review its professional conduct complaints processes. This will inform any action that the BSB takes to mitigate the findings of the report.</p>

	<p>Rules II.C5.R6 – II.C5.R13 associations with others and outsourcing.</p> <p>By removing the restriction on sharing premises barristers may be able to save on costs which could have potential positive impacts for those disproportionately affected by changes to legal aid, such as female and BME barristers. The change will allow these barristers to work in new and innovative ways.</p> <p>The BSB has been careful to ensure there are sufficient safeguards in place as a result of removing restrictions to ensure that clients' interests are not adversely affected.</p>
Disability	<p><u>Part II Section C (Conduct Rules) – Rule II.C3.R15: the cab rank rule:</u></p> <p>The Bar Council's Disability Sub Group (DSG) have warned that making exceptions to the cab rank rule affects those vulnerable clients who may be viewed as "expensive" or "difficult" because they can more easily be turned away. As costs of reasonable adjustments cannot be passed to the client, barristers may be less inclined to take on disabled clients requiring heavy or costly support. However, as discussed above, the BSB does not feel it is the regulator's role to make a judgment about the appropriate level of fee in a case – it will be for a disciplinary tribunal to consider any complaint against a barrister for breach of the cab rank rule.</p> <p><u>Web based publication:</u></p> <p>The new Code will be principally web based. This may adversely impact on some disabled people, older people and others who may have limited access to the internet. Copies of the Code will be made available in alternative formats for these groups.</p>
Age	<p><u>Part II Section C (Conduct Rules) – Rule II.C3.R15: the cab rank rule:</u></p> <p>There is also a potential age impact where barristers are dealing with young clients who may require extra support – see discussion above.</p> <p><u>Rules II.C4.R3 and R4: reporting serious misconduct:</u></p> <p>There is a risk that this provision might have a disproportionate impact on younger barristers who may feel uncomfortable reporting misconduct by more senior colleagues.</p> <p>However, in the light of mitigating action discussed above, the BSB considers that any negative impact will be outweighed by the positive impact in the public interest through the introduction of provisions which require reporting of misconduct (which may include bullying, victimisation or other breaches of the</p>

	<p>equality and diversity provisions in the Code). The BSB considers that there is a clear public interest in introducing this rule as it meets with our regulatory objective of protecting and promoting the interest of consumers.</p> <p><u>Rules II.C5.R17-R18: administration of chambers</u></p> <p>As with reporting misconduct, we believe there is a risk that this provision might have a disproportionate impact on younger members of the Bar who are more likely to be junior and therefore may be more likely to feel uncomfortable exercising such responsibility where it relates to a senior member of chambers. However we consider that there is a considerable positive impact on equality in requiring all barristers to ensure compliance with for example the Equality and Diversity provisions of the Code, giving all people in chambers a collective interest in promoting the aims of the Code. To safeguard against the possibility that more junior members feel burdened by this proposed change, the rules and associated guidance will make clear that individual responsibility will be relative to the individual's position in chambers.</p> <p><u>Web based publication:</u></p> <p>The new Code will be principally web based. This may adversely impact on some disabled people, older people and others who may have limited access to the internet. Copies of the Code will be made available in alternative formats.</p>
Sexual Orientation	We have not identified any specific impact in relation to sexual orientation
Religion/Belief	<p><u>Rules II.C4.R3 and R4: reporting serious misconduct:</u></p> <p>Among more junior members of the Bar, barristers with no religious affiliation are also over represented.</p> <p>However, the BSB considers that any negative impact will be outweighed by the positive impact in the public interest through the introduction of provisions which require reporting of misconduct (which may include bullying, victimisation or other breaches of the equality and diversity provisions in the Code). The BSB considers that there is a clear public interest in introducing this rule as it meets with our regulatory objective of protecting and promoting the interest of consumers.</p>
Gender Reassignment	We have not identified any specific impact in relation to gender reassignment
Pregnancy/ Maternity	We have not identified any specific impact in relation to pregnancy or maternity

Marriage and Civil Partnership	We have not identified any specific impact in relation to marriage and civil partnership
Other Identified Groups	We have not identified any specific impact in relation to other groups

How does the policy advance equality of opportunity?
The analysis above highlights a number of areas where the BSB's proposals offer opportunities for new ways of working that might bring benefits to specific groups.

How does the policy promote good relations between different groups?
N/A

3. Summary of Analysis

Now you have considered the potential impacts on equality, what action are you taking? (Mark 'X' next to one option and give a reason for your decision)		
a. No change to the policy (no impacts identified)	Your analysis demonstrates that the policy is robust and the evidence shows no potential for discrimination. You have taken all appropriate steps to advance equality and foster good relations between groups.	
b. Continue the policy (impacts identified)	Continue with the proposal, despite any adverse impacts, provided it is not unlawfully discriminatory and is justified.	x
c. Adjust the policy and continue	Take steps to remove barriers, mitigate impacts or better advance equality before continuing with the policy.	
d. Stop and remove the policy	There are adverse effects that are not justified and cannot be mitigated. The policy is unlawfully discriminatory.	
Reason for decision:		
The reasons and justifications for proceeding with the individual changes have been set out in detail		

in section 2. In general the BSB has considered all changes against the regulatory objectives in the Legal Services Act 2007 and has decided to proceed based on a detailed analysis of the positive and negative impacts on these objectives.

4. Action Plan for Improvement

Give an outline of the key actions that need taking based on any challenges, gaps and opportunities you have identified. Include here any action to address negative equality impacts or data gaps.

Action Required	Desired Outcome	Person Responsible	Timescale
Establishment and ongoing monitoring regime to assess equality impacts of the new Handbook (in relation to barristers and their chambers).	Through ongoing monitoring and evidence gathering the BSB should be able to assess the impact of any changes. The BSB can then use this information to identify and address any issues.	Ewen Macleod, Head of Professional Practice and Oliver Hanmer, Head of Quality	Monitoring regime to be established prior to the launch of the new Handbook with ongoing monitoring continuing after the implementation of the Handbook.
The BSB has plans to commission wider consumer research over to time to assess whether the outcomes in the Handbook are being met for different segments of the market. Firstly, we plan to ask stakeholders to participate in workshop to agree a methodology that will be credible as we segment the market using the Oxera Framework as a starting point.	An evidence base about the impact that the new Handbook is having on different types of consumer and the extent to which desired outcomes are being met.	Amanda Thompson, Head of Strategy and Communications and Ewen Macleod, Head of Professional Practice	The first stage (stakeholder workshop) will inform subsequent work – we intend to have commissioned work by mid to late summer
Commission a review of the BSB's professional conduct complaints process in the light of diversity data of complainants from 2007-2011.	To ascertain whether there is any evidence to suggest that the BSB complaints system disproportionately over-represents BME and male	Sara Down, Head of Professional Conduct	Final report to be submitted to the Board in September 2013

	barristers; to ensure fairness and transparency in the complaints system (if applicable) over an agreed implementation period; and to take forward ideas for addressing any disproportions in BME and male barristers over an agreed implementation period.		
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