

## Bar regulator to impose new diversity and inclusion duty

September 2024

**Barristers** could come under greater pressure to prove their commitment to equality, diversity and inclusion (EDI) under proposals unveiled by the Bar Standards Board today. However, the bar's representative body warned against 'radical change', saying the proposed new duty could have 'unintended detrimental consequences'.

Under core duty 8 in the BSB Handbook, barristers practising or otherwise providing legal services 'must not discriminate unlawfully against any person'. The BSB wants to replace this with a **new duty** that states: '**You must act in a way that advances equality, diversity and inclusion**'.

Solicitors Regulation Authority principles already require solicitors to 'act in a way that encourages equality, diversity and inclusion'.

The BSB's consultation document states: 'It is important that every barrister sees this as a duty that applies to them in their professional role, and that the **BSB** is able to **take action against behaviour which works against equality, diversity and inclusion**.

'The current core duty requires barristers not to "discriminate unlawfully". However, in order to achieve the culture change needed, we believe the duty needs to go further. We believe it should be a core expectation of all practising **barristers** that they **demonstrate an appropriate commitment**, through their practice, to equality, diversity and inclusion. This will form the basis of our future regulatory action in this area and will be central to **achieving behaviour and culture change across the profession**.'

The consultation document also sets out proposed new Equality Rules focused on 'specific outcomes' and requirements to achieve them.

BSB director general Mark Neale said the organisation wants **to ensure the bar is inclusive and represents the society it serves**. 'Regulation alone cannot achieve that, but regulation can help by supporting barristers to challenge practices which work against diversity and inclusion', Neale said.

Bar chair Sam Townend KC said an **effective regulatory framework on EDI** was essential and '**evidence-based**' regulations must provide clarity to barristers and chambers. However, 'It is also essential that any proposals for change are compliant with the law and have **adequately considered enforceability**, otherwise important provisions to improve EDI could be meaningless', Townend added.

'Much of the progress made on EDI in chambers is thanks to the voluntary work of [equality and diversity officers] and we are keen to make sure that any regulatory changes do not undermine that work. Radical change is certainly disruptive and may **have unintended detrimental consequences**.'

## SUMMARY

### 1 . The « radical change » -

Barrister – new duty - : ‘You must act in a way that advances equality, diversity and inclusion’ (≠ must not discriminate unlawfully against any person’)

### 2. Its aim/ purpose

- achieving behaviour and culture change across the profession.
- the bar is inclusive and represents the society it serves.

**Limit** : have unintended detrimental consequences.’

### 3. How would this work ?

the BSB is able to take action against behaviour which works against equality, diversity and inclusion.  
they demonstrate an appropriate commitment  
effective regulatory framework on EDI was essential and ‘evidence-based’ regulations  
adequately considered enforceability

## COMMENTARY

### 1. « Considered enforceability » - How can this new regulation be applied ? => « unintended detrimental consequences »

→ Pb : How can it be possible to evaluate whether barristers / chambers have promoted diversity / equality and inclusiveness ?

→ Chambers will need to implement measures to comply with regulation – What measures ? Need of additional resources → staff specifically dedicated to evaluate and promote diversity effort = voluntary staff performing this task more likely from diversity will have additional tasks and won’t have enough time for the advancement of their career.

→ external audit

→ to promote disabled access by publishing an « accessibility audit » or certificate

→ annually collect, analyse and publish monitoring data

-> « regulation » means penalties for non compliance. Barristers will be under the supervision of BSB and penalised (fines ...) for failing to « prove / demonstrate an appropriate commitment » ==> potentially destroying their reputation and career (they could be perceived / labelled as racist...)

→ vagueness of scheme is worrying → who and how the BSB can decide if there is a breach of this new duty ? Arbitrary and loss of independence / freedom of chambers = more coercive way of reaching that aim = switch from « must not discriminate unlawfully against any person » to « you must act in a way that advances equality ...)

Solutions?

-> quotas – affirmative action , positive discrimination → SCOTUS backtracked on affirmative action in uni

→ Positive action = what is now in practice

## **2. BSB and its political activism**

The aim of the regulation : « to ensure the Bar is as inclusive as possible and truly representative of the society it serves »

→ it is not a public service but private practice => no obligation to be representative of the society = Should business owners be more representative of the society ?

With this regulation, barristers will be under a professional duty to become social engineers

This introduction of this new duty is evidence of the political activism of the BSB who forces the profession to accept and promote a partisan view of social justice.

They go beyond what is strictly necessary to assure that its users receive a competent and efficient service

The BSB's message seems to encourage barristers to stop treating everyone on merit but to advance diversity instead.