Bar Council response to the Bar Standards Board's (BSB) "The regulation of non-professional conduct" consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the BSB consultation paper entitled "The regulation of non-professional conduct".[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. The Bar Council welcomes the opportunity to respond to the Consultation. The regulation of non-professional conduct also raises important issues about the extent to which the profession should regulate the conduct of unregistered barristers. Because many unregistered barristers either use their professional title in social media channels, or are identifiable though internet searches as being barristers, this Consultation presents a timely opportunity to take another look at deferral of call.

Question 1: Overall, have we struck the right balance between the public interest in preserving public confidence in the profession and individual barristers and a barrister's rights which are guaranteed under the Human Rights Act 1998 and the European Convention on Human Rights?

[1] BSB 2022, "The regulation of non-professional conduct" consultation

5. The Bar Council considers that, in relation to those barristers described in Question 1 as set out in para 38 of the Consultation (whose conduct has led to indictment/ charge or conviction for (non-minor) criminal offences), the balance has been struck in the right place.

6. In relation to conduct not leading to indictment/ charge or conviction for (non-minor) criminal offences, the Bar Council considers that the balancing of the interests and the justifications for potential regulatory interest, are capable of minor improvement, as more fully set out below.

Question 2: Do you have any observations on the questions we are proposing to ask when considering whether we have a regulatory interest in non-professional conduct?

7. As regards Question 1, set out in para 38 of the Consultation (and more completely in Annex 1 to the draft Guidance on the regulation of non-professional conduct), the Bar Council has no observations to make.

8. As regards Question 2, set out in para 40 of the Consultation (and with better sub-paragraph numbering in Annex 1 to the draft Guidance on the regulation of non-professional conduct) the Bar Council is satisfied that this broadly encapsulates the "test" for "regulatory interest" identified in the case law referred to in paragraphs 32 and 33 of the Consultation. For the sake of greater fidelity to the Code of Conduct, it suggests that Question 2 could be better expressed as follows:

"Is the conduct:

a. conduct which is, or is analogous to, conduct that could breach relevant standards of the BSB Handbook that apply to ~~practising~~ barristers <u>when practising or otherwise providing legal services</u>; and

b. sufficiently relevant or connected to the practice or standing of the profession such that it could realistically:
   i. ~~affect~~ <u>diminish</u> public trust and confidence in the barrister or the profession; or
   ii. be reasonably seen by the public to undermine the barrister's honesty, integrity and independence

taking into account the context and environment in which it occurred?"

The first suggested amendment clarifies that, in order to be of regulatory interest, non-professional conduct must involve a potential breach of standards of conduct required of

practising barristers in their professional lives, or must be analogous to such conduct. The suggested language tracks more closely the description of such standards in rC2. The second amendment aligns the wording of the Question with the description of conduct offending CD5 as set out Part 2.B of the Code.

Question 3: Are the case studies included in our draft guidance helpful?

9. The Bar Council considers that the use of case studies in the draft guidance is extremely useful, and positively welcomes it.

10. It has some observations on the case studies themselves.

    10.1. Case Study 3:

        (a) In the third paragraph, fifth line: *"…duty to the court **and** to act with honesty and integrity …"* (not alternatives!)

        (b) Fourth paragraph: *"A barrister's failure to comply with a court order could call into question their commitment to their overriding duty to the court and to the administration of justice. …"*

    10.2. Case Study 4:

        (a) We question whether the conduct described – though undoubtedly reprehensible, and of regulatory interest under CD5 – amounts to a breach of (or is sufficiently analogous to a breach of) rC8, which specifies that:

            "You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4)".

            That rule, and the associated guidance (gC14-gC25), apply at all times and not merely when practising or otherwise providing legal services. But wanton sexist abuse, even of the extreme kind described in Case Study 4, does not appear to us to involve dishonesty, nor does it show a want of independence. Also, as a matter of ordinary language, integrity, although a somewhat nebulous word, engages (we think) notions of truthfulness, trust-worthiness, moral consistency and self-reliance in moral judgment, and compliance with the criminal law; but not otherwise adherence to any particular set of moral positions. We do not think as a matter of language that offensiveness, in any degree, connotes a lack of integrity.

(b) But in the context of the Code, regard must now be had to what was said on the subject of "integrity" in *Ryan Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin). At [33-39] the Court said this:

> "[33] The standards that give substance to the obligation to act with integrity must themselves be drawn from some legitimate source – they must stem from legitimate construction of the rules made in exercise of the [regulatory] power. … [W]e accept and agree with the point made in *Wingate* that the Tribunal is a body well-equipped to act in the manner of a professional jury to identify want of integrity. Yet when performing this task, the Tribunal cannot have *carte blanche* to decide what, for the purposes of the Handbook, the requirement to act with integrity means. **The requirement to act with integrity must comprise identifiable standards.** There is no free-standing legal notion of integrity in the manner of the received standard of dishonesty; no off-the-shelf standard that can be readily known by the profession and predictably applied by the Tribunal. **In these circumstances, the standard of conduct required by the obligation to act with integrity must be drawn from and informed by appropriate construction of the contents of the Handbook, because that is the legally recognised source for regulation of the profession**.
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> [34] … **the contents of the Handbook, considered in the round, are the best guide to the occasions and contexts where members of the solicitors' profession ought to be held to a higher standard**. **Looking to the rules and the interpretation of those rules is also necessary to ensure the requirements of legal certainty are met.** The Tribunal cannot and does not have liberty to act outside the rules made under [the regulatory power]. Those rules must be construed coherently; the standards that emerge must be sufficiently predictable. This approach to the meaning of the requirement to act with integrity facilitates a principled approach to the important point raised by the circumstances of this appeal: the extent to which it is legitimate for professional regulation to reach into personal lives of those who are regulated.
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> [35] The material part of the Handbook is the 2011 Code of Conduct. … The ethical standards providing the content of the obligation to act with integrity are to be found in this material. The Tribunal's task when the complaint is … a breach of the requirement to act with integrity, is to identify by reference to the contents of Handbook (in all likelihood,

primarily, the contents of the 2011 Code of Conduct) whether and if so what ethical standards emerge that are relevant to the misconduct alleged…

[36] In this judgment, we limit our comments to the circumstances of the Appellant's case. Allegation 1.2 concerned his treatment of a work colleague outside working hours. We consider the relevant part of the 2011 Code of Conduct to be the part titled "You and Others", and in particular Chapter 11, "Relationships with Third Parties". … The material obligation arising from Chapter 11, **which on the facts of this case informs the content of the requirement to act with integrity, is the obligation, whether acting in a professional or personal capacity, not to take unfair advantage of others**. The Tribunal's finding that the Appellant had not acted in abuse of his position of seniority or authority puts the present case outside that requirement…

…

[38] Given the detailed findings the Tribunal had made as to the events of the evening, we consider the Tribunal was clearly right to conclude that no abuse of authority had occurred. However, the Tribunal then fell into error by categorising those events as it had assessed them, to be a breach of Principle 2 [sc. the requirement to act with integrity]. In the context of the course of conduct alleged in Allegation 1.2, the requirement to act with integrity obliged the Appellant not to act so as to take unfair advantage of Person A by reason of his professional status. On the findings made by the Tribunal, that had not happened. In the premises, the Tribunal's final statement that the Appellant had "fallen below accepted standards" is not coherent. Whatever "standards" the Tribunal was referring to as ones which identified what, in the circumstances of this case, the obligation to act with integrity required, were not ones properly derived from the Handbook.

[39] There is one further matter to note. **Our analysis is premised on the need to define the content of the obligation to act with integrity, which might otherwise be an obligation at large, by reference to the standards set out in the Handbook.** Confining the obligation in this way preserves the legitimacy of the regulatory process by maintaining the necessary and direct connection between the obligation to act with integrity and rules made in exercise of the [regulatory power]. Yet the approach we have taken in this case is not any form of permission to

expand the scope of the obligation to act with integrity simply by making rules that extend ever further into personal life. **Rules made in exercise of the power … cannot extend beyond what is necessary to regulate professional conduct and fitness to practise and maintain discipline within the profession.**"

(Emphasis added in **bold.**)

(c) What emerges from that is that the standards of behaviour required under the rubric of "integrity" – whether required of barristers only when practising or otherwise providing legal services, or at all times – must be derived from a careful construction of the Handbook, and specifically the Code; and must yield clear **identifiable standards**. But we do not think there is anything in the Code, or in the guidance given in the Handbook, that could be construed as requiring, in order to maintain their integrity, that barristers must refrain from offensive behaviour, or from other reprehensible or discreditable conduct, at all times. (We note the proposed revised guidance in gC25. But that is expressed in terms of conduct likely to be treated as (materially here) a breach of CD3, the duty to act with honesty and integrity. CD3 itself does not apply other than when practising or providing legal services. It does not therefore provide a basis for requiring barristers to refrain from offensive behaviour at all times.)

(d) In short, we do not think that the reference to integrity in rC8 can be understood as requiring barristers to refrain from offensive behaviour at all times. There is nothing elsewhere in the Handbook that could be construed to that effect, that could give that content to that notion of integrity. Proper regard must be had to the outcome in *Ryan Beckwith*: which was that the conduct there concerned (consensual sex, in a non-professional context outside working hours, between a partner in a firm and a more junior member of the firm), though "inappropriate", did not involve a breach of the Solicitors' Code. Lack of integrity does not extend to inappropriate conduct in a non-professional setting.

(e) The appeal in the Case Study to CD 3 is similarly doubtful. As noted, CD3 itself does not apply other than when practising or providing legal services. The relevant question here is therefore whether the conduct described is sufficiently analogous to a want of integrity in the conduct of a barrister's practice, or in the provision of legal services. We doubt that it is: wanton sexist abuse, even of the extreme kind described in Case Study 4, does not appear to us sufficiently analogous to any of the examples of

such lack of integrity in the professional context described in rC9, or in gC18-gc21. See further paragraphs 11 to 14 below. We repeat what is said above about our understanding of the content of the ethical standards implied by the words "integrity or "lack of integrity" in a professional Code of Conduct. To the extent that gC25.4 suggests – but we do not think it does – that seriously offensive or discreditable conduct towards third parties done in the non-professional sphere amounts to, or is in some way analogous to, a breach of CD3 in the conduct of one's practice, we think it wrong. (But we do not doubt that it may engage CD5.)

(f) The specific duty to not to discriminate *unlawfully* (rC12) arises only when practising or providing legal services. Unlawful discrimination in that rule clearly corresponds to what is unlawful under the Equality Act 2010. But the Act is confined in its operation to the prohibition of unlawfully discriminatory treatment in specified contexts and relationships – notably (for present purposes) in work and education, including, so far as barristers concerned, in relation to pupillage and tenancy: see s.47 of the Act. We do not think that the conduct described in Case Study 4 is analogous, or sufficiently analogous, to the sort of conduct that will constitute unlawful discrimination under the Act. True it is that that conduct might well raise doubts about the barrister's commitment to complying with their legal and professional duties in the contexts and relationships governed by the Act. But we do not think that doubt is sufficient in itself to attract regulatory interest in expressions of opinion outside the professional context. The conduct under consideration must be analogous to a breach of duty in the contexts and relationships governed by the Act. Thus a non-practising barrister employed as a manager in a company and who discriminates unlawfully in *that* work environment might fall within limb a. of the test set out in paragraph 8 above (although whether such conduct would satisfy limb b. is more moot). But we do not think that mere abuse or offensiveness, no matter how gross, is analogous to a breach of rC12.

(g) We therefore think that regulatory interest in the conduct described in Case Study 4 can be justified only on the basis that it might well constitute a breach of CD5 (therefore satisfying limb a. of the test set out in paragraph 8 above), but will be of regulatory interest only where if it also meets the test set by limb b. We do not think there is advantage in seeking to justify regulatory interest in such behaviour on the basis that it is somehow analogous to breaches of other standards of behaviour, applicable only in

the professional context. Such justification is unnecessary: the potential (here, likely) breach of CD5 is sufficient, provided limb b. is also satisfied.

(h) We also think that there is merit in a single, clear justification for regulatory action in relation to expressions of opinion, belief or point of view which are subject to the qualified protection afforded by Article 10 ECHR.

(i) We would therefore suggest that the Case Study be re-expressed in terms confining the justification for regulatory interest to the potential breach of CD5, thus (third and fourth paragraph):

> *"The barrister's conduct is of a nature that means it would be likely to diminish trust and confidence in the barrister and in the wider profession, which could be a breach of CD5, a standard that applies both in the barrister's professional life and in private and non-professional conduct; and is moreover sufficiently relevant or connected to the practice or standing of the profession such that it could realistically affect public trust and confidence in the barrister as a barrister or in the profession".*

We would retain the fifth paragraph.

10.3. Case Study 5.

(a) We again think here that the undoubted regulatory interest here is over-justified, and in terms that are questionable.

(b) Rules CD5 and rC8 (both of which apply at all times) are justifiably invoked. As to the latter, sexual assault by a barrister could reasonably be seen by the public to undermine the honesty and integrity of the barrister, since barristers must be seen in their conduct to act strictly within the criminal law. (With regard to what is said in sub-paragraphs 10.2(a)-(d) above, we think that there is sufficient elsewhere in the Code to give *that* content to the notion of "integrity".) The engagement of CD5 is obvious.

(c) But the appeal to CD3 is again doubtful. Although we do think that action in breach of the criminal law can be said to involve a "lack of integrity", CD3 itself does not apply other than when practising or providing legal services. The question here is whether the conduct described is sufficiently analogous to a want of integrity in the conduct of practice, or in the provision of legal services. We doubt that it is: sexual misconduct, even of the criminal kind described in Case Study 5, does not appear to us

sufficiently analogous to any of the examples of such lack of integrity in the professional context described in rC9, or in gC18-gc21. See our general observations on the use of analogical reasoning at paragraphs 11 to 14 below. To the extent that gC25.4 suggests – but we do not think it does – that seriously offensive or discreditable conduct towards a third party done in the non-professional sphere betokens, or is in some way analogous to, a breach of CD3 in the conduct of practice, we think that wrong. (But we do not doubt that CD5 is engaged.)

(d) We would therefore suggest that the Case Study be re-expressed in the following terms (second third and fourth paragraphs):

> *"The barrister's conduct in sexually assaulting A would be likely to constitute a breach both of CD5 and Rule C8, standards that apply both in the barrister's professional life and in private and non-professional conduct.*
>
> *This conduct, if proved, might well amount to the commission of a criminal offence, conduct which is incompatible with the high standards of integrity expected of the profession. Non-consensual sexual conduct, such as in this case, would diminish public trust and confidence in the barrister and undermine that barrister's integrity. This conduct is also likely to diminish the trust and confidence which the public places in the profession, because all barristers must be, and be seen to be, law-abiding citizens in order to maintain that trust and confidence.*
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> *Further, if no regulatory interest were taken in this conduct by the BSB in this case, there would likely be a negative effect on the trust and confidence placed in the profession, and in the BSB as a regulator, by allowing a barrister who has so conducted themselves to continue to practise at the Bar without some form of regulatory action. Therefore, we are likely to have a regulatory interest in this conduct. "*

(e) We note the potential problem that any disciplinary proceedings here will apply the civil standard of proof, whereas criminal conduct would otherwise have to be proved to the criminal standard. But that is not a problem for this consultation.

10.4. Case Study 6.

(a) We have no observations to make on this Case Study.

10.5. Case Study 7.

(a) Various opinions have been expressed on this Case Study, including by employed barristers.

(b) The first concern is that the scenario presented is rather unrealistic. It is to be supposed that a company director (coincidentally a barrister) will have disclosed to a wide audience information confidential to the company. Assuming that the information disclosed was indeed, and obviously, confidential, commentators have observed that this is implausible – unless perhaps the barrister was inebriated. Such conduct would (on that assumption) lead forthwith to the loss of the directorship.

(c) The second concern is that the Case Study proceeds by drawing an analogy between the duty of confidentiality owed by directors to their company, and the duty that a barrister owes to keep the affairs of each client confidential (CD6). It is open to question whether the analogy is sufficiently close: see further the general observations at paragraphs 11 to 14 below. The barrister's duty is comprehensive and very strict (and is reinforced by considerations of legal professional privilege): it applies to *all* affairs of each client. Barristers will be in no doubt about what information they must keep secret. But information about the affairs of a company, including about operation and future business plans, are likely to be more various: some such information may be confidential, but other information will not be. There may be differences of opinion, or a comprehensible misunderstanding, about what and how much information of that description is and should remain confidential. The facts of the scenario do not make clear whether the disclosure was deliberate and/or made with clear knowledge of the confidential character of the information. (Inebriation could also be complicating factor in the equation.)

(d) Further, and following from that, the Case Study implicitly raises the question about whether *any* disclosure of confidential information, in any context, by a barrister is to be treated as analogous to a breach of CD6. We think that only a highly-nuanced and fact-sensitive answer to that question can be given. While unauthorised disclosure by a doctor (coincidentally a barrister) of medical records represents a close analogy with breach of CD6, we wonder whether (for example) the disclosure of commercially-sensitive information, accidentally or with an insufficient appreciation of its confidentiality, by a barrister working in industry (e.g. of client lists, or

of previous orders) is sufficiently analogous to a breach of CD6 to generate a regulatory interest on the part of the BSB.

(e) For these reasons we have some doubts about the usefulness of this Case Study. It raises many questions that cannot easily be answered about whether and when, in these or similar circumstances, the BSB will have a regulatory interest. Depending on further detail of the underlying facts of this scenario, or similar ones, it might well be that there is no sufficient regulatory interest.

(f) We therefore suggest that it is omitted.

(g) However if the BSB remains of the view that the Case Study is useful, we think that the underlying facts could be "tightened up", as indicated above.

(h) There is again a degree of over-justification of regulatory interest in the Case Study. While CD5 and rC8 remain (potentially) applicable, reliance by way of analogy on CD3 is again of doubtful validity (for reasons previously expressed). Whether there is an appropriate i.e. sufficiently close analogy with breach of CD6 is the subject of the doubts set out above. The same doubts may be expressed about the invocation by way of analogy of rC15.5. But we do not think there is any valid analogy between the breach of confidence described in Case Study 7 and breaches of any of the standards set out in Rules rC15.1-15.4 (or in CD2). While a director of a company has a duty to act in the best interests of the company, so too do many agents owe such a duty to their principals/ clients. Is it to be suggested that any time there is an allegation that a (perhaps non-practising) barrister, acting in some other agency capacity, has failed to promote sufficiently the interests of a client, the BSB might have a regulatory interest because the failure is analogous to a breach of CD2? We doubt that to be the case. Analogies with relevant standards that apply to practising barristers when practising or otherwise providing legal services need to be examined *very* critically (see paragraphs 11 to 14 below).

(i) If the Case Study is to be retained, we suggest the following text (second, third and fourth paragraphs):

> *"The barrister's failure to respect their duty of confidentiality (in their capacity as a company director) might, depending all on the circumstances, be sufficiently analogous to conduct which could be a breach of the BSB Handbook*

if it occurred whilst the barrister was practising (see, for example, CD6 and Rule C15.4 on the barrister's duty to keep the affairs of each client confidential, as well as CD5 and Rule C8).

If a barrister (who was known to be both a company director and a practising barrister, as in this case) breached their duty of confidentiality as a company director by disclosing what they knew or should have known to be confidential and commercially sensitive information, this could *call into question the barrister's commitment to keeping the affairs of their professional clients confidential.*

In this case, the barrister's breach of their duty of confidentiality might also – depending on the audience's appreciation of the breach of confidence – have the effect of diminishing public trust and confidence in them as a barrister, and in the profession generally.

Consequently, we might have a regulatory interest in this conduct."

11. Reviewing the Case Studies overall, although we differ very little from the BSB on its conclusions as to where there might be a potential regulatory interest, we have detected some willingness to justify those conclusions on grounds that appear to us over-broad, which give very doubtful content to the notion of "integrity" in the non-professional sphere, and which rely on questionable analogies between the non-professional conduct in issue and breaches of conduct rules applicable in the professional sphere. We repeat that we consider any use of such analogies must be scrutinised closely and critically. Further, it is our view that there must be a close analogy not just between the non-professional conduct and breach of a conduct rule applicable in the professional sphere in the abstract, but also that the context of the non-professional conduct must be closely analogous to the context in which the professional rule might be broken.

12. Thus in Iteshi v BSB [2016] EWHC 2943 (Admin) the barrister in question had, as a result of instituting vexatious proceedings of their own in the employment tribunal and Employment Appeal Tribunal, been the subject of a Restriction of Proceedings order. In AB (a barrister) v BSB [2020] EWHC 3285 (Admin) the barrister had been found to have misled a court in their own private litigation, and to have launched a series of meritless applications, leading to the imposition of an order in the nature of a civil restraint order.

13. In the latter case, Bourne J said at [74-75]:

> "[74] It seems to me that, applying the guidance, conduct in a person's private or personal life is in general not likely to be treated as a breach of CD5 but

nevertheless can be so treated for good reason. The reason could be that the conduct, though personal or private, clearly is or is analogous to conduct which contravenes other provisions of the Code.

[75] **In the present case the relevant conduct involved acts and omissions in, or closely connected with, court proceedings. There is no doubt at all that conduct such as misleading a court, disobeying court orders and wasting or misusing the court's time to the detriment of other court users would be professional misconduct if committed in the course of a barrister's professional practice.** In my judgment it was open to the tribunal to rule that conduct of that kind was professional misconduct though committed in a personal capacity, if in fact it infringed a provision such as CD5 or rC8, as in *Iteshi*"

14. It seems to us that the first two sentences of para [75] (quoted above) illustrate where analogies with conduct rules may be made: not just where the conduct in issue is abstractly analogous to conduct which would breach a provision of the Code, but also that that conduct arises in a factual context which is sufficiently similar to the context in which the rule of professional conduct would be broken: in AB (a barrister) *"in, or closely connected with, court proceedings"*. The further one moves from the factual context in which the professional conduct rule is intended to apply, the more difficult and dangerous it is to apply the rule "by analogy" to non-professional conduct.

Question 4: Do you have any general comments or feedback on our draft guidance on the regulation of non-professional conduct?

15. No. Subject to the observations we have on the Case Studies, we consider the draft guidance well drafted.

Question 5: Do you consider our proposed drafting changes to the non-mandatory guidance provisions in the BSB Handbook assist in clarifying our approach to the regulation of non-professional conduct?

16. Yes, subject to two qualifications.

17. The first is this: The proposed draft gC25.5 identifies as conduct which is likely to be treated as a breach of CD3 and/or CD5 "seriously offensive conduct towards others". (For reasons set out at paragraph 10.2 above in relation to Case Study (4) we think only CD5 and rC8 are potentially engaged.) We would prefer this guidance to identify, rather, "**gratuitously** offensive conduct towards others", for the following reasons.

17.1. The question of whether, and when, offensive conduct towards others will engage [CD3 and/or] CD5 is likely to arise most commonly in relation to communications amounting to expressions of opinion etc. which are subject to the qualified protection of Art. 10 ECHR.

17.2. The freedom to express opinions, whether in social or more traditional media, or indeed in other environments, can only be curtailed to the extent necessary in a democratic society (including, presumptively, any limits set by the criminal law). Public debate – including the right to hold and express opinions and to receive and impart information and ideas – must be allowed without interference by public authority, subject only to that limit.

17.3. That does of course permit, in general, the expression of ideas and opinions that others will find offensive, often highly offensive; and also in ways that are offensive. Indeed some non-criminal expressions of opinion are likely to be, or take forms, very seriously offensive to others. Extreme, and extremely unpopular, expressions of view, in gratuitously offensive terms, are permitted to members of the general public, provided they do not infringe the criminal law.

17.4. Should barristers be held to different standards, and should their freedom of expression be further curtailed? We think that further restriction can only be justified to the extent necessary (i) to protect and maintain confidence in the administration of justice; and (ii) to defend the standing, public confidence in and reputation of barristers or the profession. The former consideration serves to explain and justify the many limits on what a barrister can say in court, or can write or permit to be written in court documents. But outside the context of legal process, we think that only objective (ii), of maintaining the standing, public confidence in and reputation of barristers and the profession, could justify restriction on what a barrister might say or write.

17.5. At the same time, barristers should be able to participate fully in all forms of public engagement and debate open to the general public. We do not think there ought to be any further limit on the *subject-matter* on which they can engage, or the views they can express on that subject-matter. Thus if barristers choose to express positive views, on particular subjects, that the majority of or widespread sections of the public might find abhorrent, they should nonetheless be permitted to do so. Although it might be said that the expression of such views by a barrister risks diminishing the standing, public confidence in and reputation of other barristers or the profession, we doubt that such an argument could be sustained: the public is capable of understanding that the expression of such views by a single barrister or small number of barristers does not reflect the views of the entire profession,

any more than the expression of such views by a civil servant in a private capacity would be understood as affecting the standing of the civil service as a whole. In any event, we think that in such circumstances, the barrister's Art. 10 rights should here trump any tenuous possibility of harm to the profession.

17.6. The freedom to express opinion must therefore include the opinion to express "wrong opinion" i.e. opinions not shared by the vast majority of the population. Assertion of fact however is subject to different considerations. If a barrister were to assert the truth of facts known to be false, or without caring whether they are false (though they are), that would be tantamount to dishonesty; which is liable to be treated as a breach of rC8 and/or CD5. Dishonesty apart, however, we do not think that the assertion of questionable facts should attract regulatory interest, even if those facts were subsequently established to be indisputably false.

17.7. What can be of regulatory concern is the *manner* of expression of opinion by a barrister: and the BSB seems to recognise this at paragraph 10 of its draft Guidance on the regulation of non-professional conduct. Members of the profession have a reputation for reasoned and courteous, if robust, argumentation; and that reputation is deserving of protection. While we do not think that barristers expressing themselves in their private lives can be held to the standards expected in a court-room – indeed there must be allowance for the rhetorical techniques and flourishes of the pub – we also do not think that mere abuse, or wholly unnecessary rudeness, can be acceptable in a barrister. Such conduct does at least risk diminishing the trust and confidence that the public places in the barrister or the profession, certainly where the barrister is identifiable as such, and the manner of expression is capable of reaching a wide audience.

17.8. We think therefore that there is an important distinction to be drawn between the subject-matters on which a barrister may express themselves, and the manner in which they choose to do so. The former should be subject only to the limits of the general law. As to the latter, a minimal standard of courtesy and respect for the feelings of others, though not required of the general public, *is* required of barristers. While there should probably be some "margin of appreciation" in manner of expression, to reflect the general robustness and incivility of public debate, there comes a point at which manner of expression will cross the line of what is acceptable from barristers. We think that line lies at the deployment of mere abuse, or wholly unnecessary rudeness, which is divorced from the purpose of expressing, with legitimate robustness, an opinion, belief or point of view.

17.9. We have tried various verbal formulae to capture that distinction and that line of unacceptability.

17.10. We do not think it useful to refer in this context to deliberateness or intention, because a barrister courteously expressing an extremely unpopular view is likely to recognise that it will be seriously offensive to many. It would be unrealistic to say that the barrister did not intend it to be offensive, or was not being deliberately offensive, though knowing full well that it would be found by others seriously offensive.

17.11. We think therefore that the best formula is to refer to conduct which is "**gratuitously** offensive conduct towards others"; reflecting the idea that conduct, though highly offensive, which serves to convey an opinion, belief or point of view, and also the strength of conviction with which it is held, is legitimate; but that offensive conduct which goes beyond what is necessary for those purposes may well cross the boundary into professional misconduct.

17.12. But if that is thought too obscure or allusive, another formulation might be "seriously **and unnecessarily** offensive conduct towards others".

18. The second qualification is this: the proposed gC25.7 identifies as conduct which is likely to be treated as a breach of CD3 and/or CD5 "unlawful *discrimination, victimisation or harassment*". We wonder why the drafting does not – following the pattern of gC25.1-3 – simply refer to "breaches of rC12"; since rC12 identifies rather more fully the conduct which amounts to "unlawful *discrimination, victimisation or harassment*". But we do question whether this was a deliberate change of drafting pattern. If it is, we do not understand what it is intended to achieve that a reference to "breaches of rC12" would not achieve.

Question 6: Do you have any general comments or feedback on any of the proposed drafting changes to the non-mandatory guidance?

19. Other than the specific observations set out in paragraphs 17 and 18 above, we have no general comments. The proposed drafting changes usefully improve the current guidance.

Question 7: Do you have any feedback or comments on the new Social Media Guidance?

20. With reference to paragraph 10 of the draft new Guidance, we note that the defined term is "practice" not "practising".

21. We question the suggestion in paragraph 13 that "… your conduct on social media may demonstrate a lack of integrity…" on the basis that we do not consider that offensive but non-criminal conduct does connote a lack of integrity, at least in the relevant, regulatory

sense: see paragraph 10.2(a)-(d) above. (We do however recognise that criminal behaviour on social media might connote a lack of integrity.)

22. In relation to paragraph 16, first bullet:

    22.1. we would prefer a reference to "gratuitously offensive" in place "seriously offensive", for reasons which we have tried to explain at paragraph 17 above.

    22.2. We suggest that the reference to rC8 be omitted, because we doubt that offensive, discriminatory, harassing, threatening or bullying behaviour involves or could reasonably be perceived as involving either dishonesty, a want of independence, or a lack of integrity in the relevant, regulatory sense (unless a breach of the criminal law is in play): see paragraph 10.2(a)-(d) above.

    22.3. But we do not doubt that CD5 will be engaged by gratuitously offensive, harassing, threatening or bullying behaviour (including "discriminatory conduct" which meets any of these descriptions). Such conduct does not merit protection under Art. 10 ECHR, and the profession is entitled to expect a higher standard of its members.

23. In relation to paragraph 16, third bullet, we would not accept that all communications over social media risk breach of confidentiality. There are private messaging systems within social media platforms that are as secure as email or text. But if the point made is that "where confidentiality cannot be guaranteed", the medium should not be used to communicate confidentially with a client, we would agree.

24. Paragraph 19 of the Guidance is extremely problematic. The suggestion appears to be that lawful/ non-criminal expressions of opinion, belief or point of view on certain *subject-matters* which are liable to alienate members of the public who identify themselves as members of a particular group, may infringe CD5. We think that the correct ethical position and the relevant distinctions are as set out in paragraph 17 above: there are no subject-matters of opinion, belief or point of view, in principle protected by Art. 10 ECHR, that should be "off-limits" to barristers; but that the communication of them must be expressed in terms, or in a manner, that is not gratuitously offensive. If these conditions are met, CD5 will not be infringed, even though some members of the public, even a large number, are offended and alienated by the views expressed. Freedom of expression to this extent trumps any offence caused by the expression of opinion. (Communications that are criminal, or outwith the protection of Art 10 ECHR (see paragraph 18 of the Guidance) are, fairly obviously, in a different category; and CD5 is likely to be engaged.)

25. As to paragraph 20.b, we doubt that the "type" of speech engaged – whether "mere gossip" or "debate in the public interest" – or the mode of publication, or what is enigmatically described as "the broader context", could affect in any way whether a social media message did or did not infringe CD5. But we accept and endorse the reference to the manner of expression. We suggest that the first sentence of this paragraph is omitted. We agree with the second sentence.

26. As to paragraph 20.c, we are cautious of the suggestion that the impact (or asserted impact) on particular individuals might influence whether conduct on social media amounts to professional misconduct. The focus should be on whether the *conduct of the barrister* infringed relevant standards. While CD5 invites attention to whether relevant conduct is "likely to diminish the trust and confidence which the public places in you or in the profession", it is well established that this relates to the intrinsic character of the conduct and is a matter of objective assessment – not something on which evidence is invited or permitted.

Question 8: Are the case studies in our draft Social Media Guidance helpful?

27. As in relation to the draft Guidance on the regulation of non-professional conduct, the Bar Council considers that the use of case studies in the draft Social Media Guidance is extremely useful, and positively welcomes it.

28. It has some observations on the case studies themselves.

    28.1. Case Study 1:

        (a) We caution against any assumption that all barristers use LinkedIn in a professional capacity. Some, perhaps most, do join and use it to advertise their services and network for business purposes, which we agree is part of "practising". But others do not use it for that purpose, using it rather only for the private messaging of friends and colleagues (barristers, solicitors, and other business-people). We doubt that such use is, or is always, use in a professional capacity.

        (b) Regardless of the way in which barristers otherwise use LinkedIn, the use of the platform for private messaging raises further doubt as to whether such use is necessarily in the course of practice. Depending on the content of the message, some private messaging might well fall within the Handbook definition of practice i.e. "activities including business related activities, in that capacity, of a practising barrister". But other private

messages – e.g. one organising a social meeting after work at a pub – will not. They may have nothing to do with the practice of a barrister.

(c) The content of the "seriously offensive private messages" referred to in the Case Study is not disclosed. Suppose they were, in *precis*, along the following lines:

> "Since we connected on this platform, I have been informed of your appalling conduct with the regard to the wife of my friend, X. I consider your conduct, and you, to be disgusting, underhand and dishonest. You are a sleaze. Please do not try to contact me on this platform, or any other."

We doubt that such messages would be considered to have been sent in the capacity of a practising barrister.

(d) In short, we think that whether any particular use of a social media platform (including LinkedIn) falls within the definition of "practice" raises a case- and fact-specific question, which cannot be answered simply by reference to the business-related character of the platform.

(e) We have already raised (at paragraph 17) our concern about the use in gC25.5 of "seriously offensive conduct" as a touchstone of or guide to what is likely to involve a breach of CD3 and/or CD5. The example message set out above could well involve seriously offence to the recipient, especially if there was another interpretation to be put on that person's conduct with the regard to the wife of X. But, although likely to be "seriously offensive" to its recipient, we do not think that the message is "gratuitously offensive": it is, in conveying the sender's wish not to be contacted and why, sufficiently measured in its manner of expression. Thus, we do not think it could be misconduct, even if "seriously offensive".

(f) We also do not think that offensive private messaging is ever likely to involve a breach of CD3, for the reasons we have sought to express at paragraph 10.2 (Case Study 4). In our view, the conduct in question is worthy of regulatory interest for the potential breach of CD5 alone.

(g) If the messages were not sent in the course of practice, then the test for regulatory interest in non-professional conduct, encapsulated in the Question set out at paragraph 8 above, would require consideration of limb b. of that test. Depending on precisely what the "seriously offensive

private messages" contained, as private messages they might not constitute conduct "sufficiently relevant or connected to the practice or standing of the profession…".

(h) We think that the Case Study would be improved by at least an indication of the content of the messages sent. That would resolve at least some of the doubts and queries indicated above (whether in the course of practice, whether gratuitously offensive, whether in fact that disclosed any want of integrity on the part of the sender).

(i) Alternatively, the Case Study could be re-expressed as follows:

> *"The BSB receives a report that a barrister has sent grossly abusive private messages on LinkedIn to a person with whom the barrister had recently "connected" on the platform (but did not know offline).*
>
> *Although this conduct occurred on a professional social networking platform, which the barrister joined and used in a professional capacity (e.g. to advertise their services and network), we would have to consider whether the private messages themselves were also sent in a professional capacity. If they were, that would mean that the provisions of the BSB Handbook that apply when 'practising' or 'otherwise providing legal services' are relevant. The conduct involves grossly abusive communication for which the barrister might be regarded as in breach of the duty not to behave in a way which is likely to diminish the trust and confidence the public places in them or the profession (CD5). If the messages were however not sent as part of or in the course of the barrister's practice, the BSB's regulatory interest would further depend on the factors set out in the Guidance on the Regulation of Non-Professional Conduct."*

28.2. Case Study 2.

(a) We have no observations to make on this Case Study. We agree with its analysis.

28.3. Case Study 3

(a) We have minor comments on this Case Study.

(b) Because this Case Study involves non-professional conduct, we do not think that reference to the "discriminatory" aspect of the behaviour is

helpful. No breach of rC12 is or could be alleged, because that rule applies only when practising or providing legal services. In any event, the conduct is not on any view, *unlawfully* discriminatory. There is no sufficient analogy with a breach of rC12, both for that reason and for the reasons we have set out in paragraph 10.2 above (Case Study 4). Although the conduct can be termed "discriminatory" in a broad sense, that does not engage any relevant part of the Code.

(c) We do think that the conduct identified is gratuitously offensive (if that is the appropriate test), as well as threatening. We therefore do not doubt that CD5 is potentially engaged. We are more doubtful that rC8 is engaged, because we do not think (for reasons copiously explained above) that offensive conduct connotes a lack of integrity. But the threats made to transgender women might – depending on their terms – be something that *"could reasonably be seen by the public to undermine your … integrity"*.

(d) Because this Case Study involves non-professional conduct, a reference to the test for regulatory interest as set out in the Guidance on the Regulation of Non-Professional Conduct would, we think, be appropriate (noting, particularly, the need to satisfy limb b. of that test).

28.4. Case Study 4.

(a) We agree with the BSB's analysis in this Case Study.

(b) We note with particular interest and approval that the Case Study mentions specifically *"the manner in which"* the barrister expressed a political view. We think that the critical matter: see paragraph 17 above. Even expressions of a political nature, if made in a gratuitously offensive and/or abusive manner, might bring CD5 into play and constitute professional misconduct.

Question 9: Are there any other potential equality impacts that you think we should be aware of?

29. None to the knowledge of the Bar Council.

Bar Council
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For further information please contact

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