1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board (BSB) consultation on the Proposed Amendments to the Equality Rules.[1]

2. The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

    - Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
    - Inspiring and supporting the next generation of barristers from all backgrounds
    - Working to enhance diversity and inclusion at the Bar
    - Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
    - Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
    - Sharing barristers' vital contributions to society with the public, media and policymakers
    - Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
    - Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

    To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

3. As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

[1] Bar Standards Board consults on revised proposals to promote equality, diversity and inclusion at the Bar- https://www.barstandardsboard.org.uk/static/8245b4b1-4593-4fc2-8524971ef73abf2e/equalityrulesconsultationfinal.pdf

Our qualification to comment

4. The Bar Council welcomes the opportunity to contribute to the BSB's consultation on amendments to the equality rules. The Bar Council has considerable experience on equality, diversity and inclusion (EDI) at the Bar, gained through:

   i. Supporting members of the profession, law students, and chambers' employees who believe they have experienced or observed discrimination, bullying and harassment; and
   ii. Advising and supporting barristers and their employees in Equality and Diversity (E&D) policy development, compliance with the current BSB E&D Rules, E&D good practice, and in considering allegations of discrimination, bullying and harassment. Those we advise include heads of chambers, chambers' Equality & Diversity Officers (EDOs), practice managers and clerks, Inns' employees, and other members of the profession.

5. Our expertise and understanding is based on:

   i. Research within the profession. This includes quantitative research via Barristers' Working Lives (our biennial survey of all barristers which includes specific questions on the experience/observation of discrimination, bullying and harassment[2]), as well as qualitative research via focus groups and interviews (for instance snapshot reports on women at the Bar, race at the Bar, young barristers and employed barristers).
   ii. Training we deliver in equality & diversity. During these sessions participants often discuss the challenges of implementing EDI in a chambers context. They specify what is and what is not workable and effective.
   iii. Consultancy work with chambers which has included data analysis, action planning and policy development.
   iv. Our helplines (including Talk to Spot, our pupillage helpline, the Equality & Diversity helpline, and the Ethical Enquiries Service).
   v. Running networks including the EDO Network (regular meetings with those responsible for delivering equality, diversity and inclusion at the Bar).
   vi. Working with the BSB as our regulator, whilst respecting its regulatory independence.

6. Given our depth and breadth of practical experience, the Bar Council would have welcomed an opportunity to provide feedback to the BSB earlier on in the development of the BSB's proposals. We could have done so whilst continuing to respect the BSB's independence.

[2] This has enabled us to track the numbers of those reporting experience of and observing bullying and harassment since 2011

Our position

7. The Bar Council is deeply committed to supporting and improving EDI at the Bar. We do not disagree with the challenges identified by the BSB.[3]

8. However, we do not fully support the BSB's proposals, especially in relation to the new proposed Core Duty 8. Nor do we wholly endorse the BSB's outcomes-based approach to EDI. We believe the proposed approach lacks the clarity required for robust, effective and enforceable regulation. We are also concerned that the proposals as set out could lead to protracted disputes and litigation between the regulator and regulated barristers. It remains unclear whom the BSB would sanction for failures to comply with proposed new Equality Rules – an individual barrister, or every member of a chambers. The position of employed barristers is also unclear. We are concerned that the proposed regulations may hinder progress in this important area.

9. We do not consider that the BSB has demonstrated the rationale for such a significant change in the regulatory framework of EDI. We think the current rules would benefit from review e.g. enhancing the EDO role, and that a proper focus on enforcement could address the challenges the BSB has identified in the consultation document. The BSB has not evidenced deficiencies in the existing regulatory framework. There is an absence of examples of where it has been frustrated by the regulations it currently works under. Equally, the BSB has not provided evidence to support its contention that the proposed changes will achieve its stated objectives. The consultation paper lacks sufficient analysis and evidence generally to support the proposed approach. Available evidence indicates that such a change is not required to address the BSB's EDI concerns. The BSB has recognised that the employed bar is more diverse than the self-employed bar without recognising that it has achieved this diversity whilst subject to CD8 as it is currently framed.[4] We are concerned that the absence of an impact assessment attached to the proposals, means insufficient thought has been given to the impact of, for example, the removal of training requirements, abolition of the EDO role, and a move to outcomes-based regulation requiring 'reflective' engagement by barristers.

10. We believe that the BSB has also failed to adequately explain what is meant by 'outcomes-based,' 'reflective,' 'equality', 'diversity' or 'inclusion' in the context of regulating a predominantly self-employed profession. There is also a lack of clarity between the terms "advancing" and "promoting."

11. Overall, we observe that the proposals have generated a negative response from the Bar, even where there is support for what the BSB is seeking to achieve.

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[3] BSB Consultation paragraph 2 (a)-(d)

[4] The employed Bar has become more ethnically diverse than the working age population of England and Wales. See table 9 on page 16 of the Bar Council's 2023 Life at the Employed Bar report https://www.barcouncil.org.uk/static/28e5c2f2-8931-4e95-ab7f91a777466367/ef579e61-dc27-4279-9743fbde5b4c2ef3/Life-at-the-Employed-Bar-report-Feb-2023.pdf

Lawfulness of the proposals

12. We have serious concerns about the lawfulness of the BSB's proposals. We believe that the proposals are unlawful and would be open to challenge if introduced. Details of our concerns are set out later in this response, but it is important to explain at the outset in summary why we believe the proposals are unlawful.

a) Firstly, we believe the proposed new core duty (CD8) ("PCD8") would be inconsistent with the obligation placed on the BSB by 28(2)(a) of the Legal Services Act 2007, namely that *the approved regulator must, so far as is reasonably practical, act in a way - (a) which is compatible with the regulatory objectives.* Our view is that the adoption of PCD8 would be incompatible with the regulatory objectives and accordingly be unlawful.
b) Secondly, it is our view that the BSB's proposal in relation to PCD8 is not proportionate, and its adoption would be inconsistent with the principle that regulatory activities should be proportionate. Section 28(3)(a) LSA places an obligation on the BSB to have *regard to – (a) the principles under which regulatory activities should be … proportionate*. The proposal is not proportionate, and its introduction would accordingly, in our view, be unlawful.
c) Thirdly, also in relation to the LSA, we believe that the adoption of PCD8 is unlikely to be consistent with the obligation imposed on the BSB by s28(3) LSA to have *regard to the principles [that] … regulatory activities should be transparent… and targeted only at cases in which action is needed*. We believe that PCD8's adoption would be open to challenge as inconsistent with s28(3)(a) LSA.
d) Fourthly, it is our view that PCD8 would seek to negate rights conferred by primary legislation, namely the Human Rights Act 1998 and Equality Act 2010, and would act in a way which is incompatible with the will of Parliament. We believe that an obligation on barristers to 'advance' the ill-defined and politically contested concept of EDI is likely to result in breaches of the Human Rights Act 1998 by reason of the limitations it would impose on barristers' freedom of expression and, worse, the pressure it would impose on barristers to advocate for contested political positions.
e) The adoption of PCD8 would likely result in breaches by the BSB of its obligations under the Equality Act 2010 in the form of discrimination against barristers in connection with protected beliefs inconsistent with the BSB's views on EDI.
f) The Equality Act 2010 does not in our view provide a legal power to impose PCD8 on barristers. Indeed, the adoption of PCD8 may itself demonstrate a breach of the Public Sector Equality Duty by the BSB, which seems to have failed to recognise its potential to result in breaches of the Equality Act 2010.
g) The proposals in relation to accessibility go beyond what is required of barristers under the Equality Act 2010. We believe that, if the proposals were to be introduced, directions made by the BSB in relation to the proposals would be challengeable by way of judicial review since the BSB would be seeking to enforce regulations which would go beyond the requirements of the Equality Act.

If introduced, the BSB's proposals could subject barristers to requirements whose ultimate enforcement would be unlawful.

13. Overall, we believe that the BSB's proposals are unlawful and are not compatible with the Legal Services Act 2007, the Human Rights Act 1998 and the Equality Act 2010. We are unaware whether the BSB has considered any of the relevant provisions of these Acts of Parliament in developing its proposals; none of these fundamental pieces of legislation have been addressed in a meaningful way in the BSB's consultation document.

Progress on EDI at the Bar

14. Based on the BSB's consultation document, it would be too easy to assume that the Bar is not making any progress with respect to equality and diversity. However, the BSB's own diversity data report shows steady progress. This should be acknowledged. Barristers' disclosure of their protected characteristics to the BSB/Bar Council is improving in all areas (albeit that there remains a lack of disclosure in respect of socio-economic background [a non-protected characteristic]). Both the BSB and Bar Council (and through us, members of the Bar), now have access to high quality data which provides evidence of progress in specific areas. This data also enables more targeted activity in relation to all protected characteristics as required.

The data tells us that:

(i) Women's representation is increasing within each category (pupils, juniors and Silks). Women made up 40.6% of the Bar in 2023.

(ii) The number of barristers from an ethnic minority background is also increasing on average 0.5% per annum (and was 16.9% in 2023[5]). Notably 22.4%[6] of pupils are from an ethnic minority background.

We observe that the Bar (Bar Council, Specialist Bar Associations and the Inns of Court) have been willing to publish uncomfortable data that many others might be tempted to bury (for example, the Chancery Bar's Voice of Women research). This demonstrates that the Bar wants to understand, debate and address EDI issues head on.

15. We acknowledge the Bar does have EDI issues to tackle, and these can be evidenced by our own research into:

- Pupillage attainment
- Inequality in earnings by sex
- Race discrimination; and
- Bullying and harassment

16. However, it is also important to acknowledge that progress is being made. The statistics do not always reflect the efforts made by many across the Bar (including individual barristers, the Inns of Court, Circuits, Specialist Bar Associations and employers) to improve outcomes for all under-represented groups.

[5] This compares to the population of England & Wales 18.3% - Asian; Black; Mixed; Other (Census 2021)
[6] BSB Report: Diversity at the Bar 2023

Examples of some of the work underway at the Bar includes:

- Coaching and mentoring pupillage applicants from under-represented backgrounds
- Funding internships and offering additional mini pupillages to those from under-represented groups
- Providing financial support to women returners
- Analysing and seeking to understand and address differences in earnings
- Programmes like Talk to Spot and campaigns like 'All Rise' to tackle bullying and harassment
- Ongoing work by the Inns of Court to improve access to their buildings, and efforts with HMCTS to address access to courts for disabled barristers and court users.

17. It would be a mistake to conclude any lack of progress is down to a lack of effort on the part of the Bar – and to assume that redrafting the regulations as proposed would lead to any greater effort with any more significant impact. Indeed, we suggest that some of the changes proposed may be detrimental to EDI, and that risk is neither acknowledged nor assessed by the BSB.

Experience of other sectors

18. We note that the Financial Conduct Authority (FCA) has decided ***not*** to move forward with data-gathering proposals and diversity-target-setting regulations – similar to those proposed by the BSB – following a consultation earlier this year. The FCA have stated that they received a significant number of responses from firms voicing concerns about the cost of compliance and of potential 'over-reach' by the regulator. We also note that the Treasury Committee had also expressed concern about the proposals in its recent report, *Sexism in the City*, in which it recommended that the FCA and Prudential Regulation Authority (PRA) drop their prescriptive plans for "extensive data gathering and target setting" which in its view would likely be treated as another 'tick-box' compliance exercise.

19. Earlier this year we spoke to the Solicitors Regulation Authority (SRA) about the application of Principle 6. This Principle is similar to, though more limited than, the BSB's positive reframing of the proposed Core Duty 8. Principle 6 states 'You act …in a way that encourages equality, diversity, and inclusion'. The SRA also outlines what individuals and firms must do (e.g., data collection) and should do (e.g. strategy and targets) in their own EDI regulations governing solicitors. We understand that to date the SRA has not sought feedback on the effectiveness of these regulations, nor has it enforced Principle 6. We understand that there is no requirement to proactively demonstrate compliance at an individual solicitor level. This raises concerns about the enforceability of a core duty that is framed in this way. It raises the prospect that it is mere 'virtue signalling.' This is unhelpful to those who wish to tackle discrimination and support diversity and inclusion at the Bar.

Questions asked in the BSB Consultation

Question 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)

20. No. PCD8 is a radical departure from the present core duty 'You must not discriminate unlawfully against any person' ("the existing CD"). The existing CD is simple to comply with, effectively requiring barristers to comply with legal prohibitions against discrimination which are settled and well understood. The existing duty protects the interests of consumers in material ways in which PCD8 does not.

21. PCD8 would amount to the imposition on all barristers individually of a duty more onerous than the public sector equality duty created by s.149 of the Equality Act 2010. That duty requires public bodies and those exercising public functions to have "due regard" in the exercise of their public functions to the need to attain three objectives, including the advancement of equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. (s. 149(1)(b)). This is an inappropriate model for the professional regulation of barristers:

- Barristers do not exercise public functions. They are private individuals pursuing a professional role.

- In having due regard to the need to attain the specified objectives in the course of discharging public functions, those subject to the public sector equality duty will generally be publicly funded; so that where, in their judgment, due regard to those objectives requires expenditure (including the dedication of time and effort to their attainment), the cost will be met out of public funds. PCD8, by way of contrast, supposes that the costs of compliance with it must be met out of the pockets of individual barristers.

- PCD8 lacks the element of judgment, afforded to public bodies under the public sector equality duty, as to what regard must be given to the specified objectives when discharging public functions[7]. PCD8 would simply require of barristers that they act in a way which does advance EDI. The element of "due regard" is absent (since barristers have no public functions to perform).

- Compliance with the public sector equality duty, including the judgment of what due regard requires, is determined not by an external regulator[8] but by internal self-assessment by the public bodies concerned. For example, self-assessment by HMCTS has not yet led to the Court Estate being generally accessible to disabled individuals; no doubt due to budgetary constraints. PCD8 will, we suppose, be enforced against barristers by the BSB. Budgetary constraints on those expected to comply with it will not, it appears, be a relevant consideration.

[7] https://www.equalityhumanrights.com/guidance/public-sector-equality-duty/technical-guidance-public-sector-equality-duty-england, at pp. 22-25.

[8] Save for the courts via judicial review

22. We understand and share the desire of the BSB to achieve further progress in the areas of EDI, but we have serious concerns that:

- PCD8 is unhelpful as it lacks clarity as to what barristers are supposed to do and what compliance would look like. Quite apart from the unfairness and inappropriateness of barristers facing disciplinary action in relation to alleged breaches of unclear and potentially contradictory obligations, successful enforcement is likely to prove difficult, rendering PCD8 counter-productively toothless. By contrast with the other Core Duties in respect of which the Code of Conduct provides detailed rules outlining what is required, in these proposals the only rule currently included in relation to CD8 would be removed;

- The lack of clarity about what the proposed core duty requires by way of compliance will result in wasted time and effort. This could reduce overall commitment to EDI initiatives and hinder progress in this area.

- The BSB's suggested rationale for removing the existing CD8, that the prohibition is already enshrined in the Equality Act, ignores the utility of a regulatory duty which can be enforced outside the forum of litigation.

Lack of clarity / competing rights

23. By way of initial observation, there is a divergence within the BSB consultation paper between descriptions of PCD8 as being to "promote" EDI, and to "advance" EDI. This confusion is unhelpful.

24. The divergence can be seen in paragraph 3 of the consultation which introduces the proposal to amend the core duty with the language of promotion, with the next paragraph then quoting the new PCD8, that barristers "must act in a way that "advances equality, diversity and inclusion". The language of promotion is then returned to in paragraph 24 which states "we propose to broaden Core Duty 8 to include a positive duty to "promote equality, diversity and inclusion".

25. To promote an objective is to support or actively encourage it. Conversely, the language of advancement signifies securing actual improvement or progress towards it. They are very different things, the latter being significantly harder to achieve. It is also more difficult to measure and verify both in terms of identifying actual progress and the causative effect of actions. It is also important to note that the regulatory objectives under the LA07 distinguish between "promoting"[9], "improving"[10], "protecting"[11] and "encouraging"[12]. In this respect the regulatory objective that the BSB has cited in support of its position that PCD8 is within its regulatory aims[13] is "**encouraging** an

[9] LSA07 s.1(1)(a), (d), (e), (h), (i).
[10] LSA07 s.1(1)(c).
[11] LSA07 s.1(1)(a), (d).
[12] LSA07 s.1(1)(f).
[13] Equality Rules Consultation FAQs, 7.10.2024.

independent, strong, diverse and effective legal profession", not "promoting" or "advancing" it.

26. There is little further guidance about whether "promotion" and "advancement" are in fact intended to mean different things from the Consultation Paper. Proposed ethical outcome oC8 adopts the language of advancement ("Those regulated by the Bar Standards Board act in a way that advances equality, diversity and inclusion") but the only concrete example given of what this entails is "taking reasonable steps to ensure equality of opportunity for everyone regardless of their protected characteristics and socio-economic status".

27. If what is meant by "advancing" is that barristers must take steps that are reasonable to promote equality of opportunity, this is what any new core duty should state. However, if it is something else more akin to achieving actual changes in terms of diversity and inclusion, this needs to be spelt out and careful consideration given as to how that can be achieved, measured and verified in terms of outcome and the causative effect of actions.

28. Here it is relevant to have regard to the EHRC Technical guidance[14] on the public sector equality duty. That guidance explains that advancement involves removing or minimising disadvantages suffered by people who share a relevant protected characteristic associated with that protected characteristic. It involves taking steps to meet the needs of people who share a relevant protected characteristic that are different from the needs of people who do not share it. It also involves encouraging people who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such people is disproportionately low. Section 149 EqA does not impose an obligation on public authorities to advance equality. It does not even impose an obligation on public authorities to advance equality of opportunity (as distinct from outcome). It imposes a duty on authorities to pay due regard to the need to advance equality. Therefore section 149 is a duty of process and not of outcome. PCD8 takes away that element of 'due regard' and requires actual advancement of those aims. A duty to promote is at least closer to a duty to have due regard.

29. The lack of clarity as to whether advancement or promotion is the aim is further illustrated within the Consultation Paper which states at paragraph 28 (with emphasis added): "Compliance with the proposed core duty and equality rules is **not necessarily** to have achieved equality of outcome, but to have taken reasonable steps **and to have demonstrated progress over time**". As the emphasised words demonstrate, it seems that it will not be enough to have demonstrated the taking of reasonable steps to ensure equality of opportunity, but that actual progress towards achieving equality of outcome (if not its actual accomplishment) will be required. If PCD8 is read as requiring advancement of equality and diversity within the profession, there should be achievable goals which a barrister can reach.

[14] https://www.equalityhumanrights.com/guidance/public-sector-equality-duty/technical-guidance-public-sector-equality-duty-england-0

30. We note that in the "Frequently Asked Questions" (FAQ) published in October 2024, the BSB challenges the suggestion that PCD8 is unprecedented, referring to the requirement for an applicant for silk to demonstrate "an understanding of diversity and cultural issues, [to] respect the needs and cultural wishes of others and [to be] proactive in addressing the needs of people from all backgrounds and **promoting** diversity and equality of opportunity" [emphasis added]. The FAQs go on to state that "That's broadly aligned with what our proposed core duty is seeking to require too." We do not think that what is required of applicants for silk should become a core duty of all barristers. But as the analysis set out above shows, it is not clear that that is the intended effect of PCD8, not least because of the significant difference between "advancement" and "promotion" and the lack of clarity in the consultation paper.

31. It is also important to recognise that equality, inclusion and diversity are themselves imprecise concepts and are susceptible to wide ranging interpretation; save in relation to the prohibition against unlawful discrimination and to some extent in relation to equality of opportunity. The most basic comment in case law on equality is that it involves treating like cases alike and unlike cases differently (see *Matadeen v Pointu* [1999] 1 AC 98, 109). This allows for measures to be taken to ensure that people are not treated less favourably (non-discrimination) but also that they have an equal opportunity to achieve (see e.g. the duty to make reasonable adjustments in the case of persons with disabilities under sections 20 and 21 of the Equality Act 2010). It should be noted that positive action in relation to protected characteristics is permitted but never required by the EqA and will (except in relation to disability), be unlawful if it falls outside the parameters established by ss158 and 159 EqA.

32. PDC8 risks a potential breach by the BSB of its obligations under s149 EqA as is risks imposing a duty to advance outcomes-based 'diversity' which would increase unlawful discrimination by barristers and chambers seeking to increase diversity by (for example) discriminating in favour of applicants from under-represented groups. As set out above, the EqA permits some positive action but applies a very high threshold as regards recruitment and promotion and there is a real risk that an outcomes-driven approach may result in unlawful action. The same is true of the proposal's apparent support for the EDI agenda generally which goes well beyond the legal requirements imposed by the EqA and may result in discrimination against those holding views regarded as non-'inclusionary', albeit entirely legal and themselves protected by the EqA.

Clarity regarding concepts

33. The lack of clarity of the concepts of EDI may be seen from paragraph 27 of the Consultation Paper. This comes under the heading "'Equality, Diversity and Inclusion' – What do we mean?" (thus, demonstrating that there is no clear or established definition which can relied on), and describes these three distinct concepts as "a principle that serves as the foundation for a set of values and behaviours that form our proposed Core Duty 8 and the Equality Rules" and which is "more than the sum of its parts". From an equality perspective (and particularly a public sector equality duty perspective) this notion makes some sense, albeit that it remains vague and the reference to it being more than the sum of its parts begs the question what additional elements are intended to be included. The problem is that it cannot be transposed simply from a public sector

duty context to the private sector of the Bar, especially given the lack of clarity as to what is meant.

34. The first limb, equality, is defined as "equality of opportunity" extending to recruitment, retention and progression within the bar, as well as barriers in access to services. But the intention appears to be to extend this to socio-economic status: see paragraph 7 of the Consultation Paper. Currently socio-economic status is neither a protected characteristic nor something for which there is an established or unitary definition. The difficulties of definition of socio-economic status are exemplified by the fact that contextualised recruitment specialists such as RARE (now a provider to the Pupillage Gateway) must keep their algorithm under constant review in response to demographic shifts to ensure that only candidates who have faced a significant level of disadvantage relative to their peers are flagged within recruitment processes. The Bar Council has been attempting to find and create with others a unifying definition but progress on this has been slow, partly due to the diversity of opinion on the method by which it could be objectively defined.

35. The second limb, diversity, is much more loosely defined as "ensuring that the profession is reflective of the population it serves including, **but not limited to**, characteristics covered by the Equality Act and socio-economic background. It also means ensuring the profession is able to serve diverse clients" (emphasis added). It is unclear what other characteristics it is intended to encompass within this definition, and the reference to socio-economic background suffers from the difficulties of definition alluded to above. Nor is it clear what it means for the profession to be "reflective of the population."

36. Furthermore, adopting this definition of diversity, if PCD8 is understood as a duty to advance that objective, it will require barristers to actually secure a more diverse profession than currently exists; rather than, for example, taking steps to promote diversity through taking reasonable steps to that end. There is a practical absurdity in creating an individual duty on barristers actually to achieve a more diverse profession (rather than to encourage or promote the taking of reasonable steps, which an individual might be able to take to encourage or promote a more diverse profession). This absurdity is even more pronounced in the context of barristers employed within organisations which themselves are subject to the public sector equality duty, in that the obligations on the individual employed barristers will be greater than those on the public body they work for.

37. As for the final limb, inclusion, the Consultation Paper definition states "this refers to creating a respectful environment and culture where people feel valued and are able to participate and reach their full potential." To avoid complete subjectivity and unnecessary uncertainty in relation to when this standard of respect is not achieved the BSB would have to provide guidance akin to the EHRC'S Codes and Technical Guidance on harassment.

PCD8 and the impact on practice

38. The Consultation Paper makes it clear that PCD8, like the existing CD8, will apply "when practising or otherwise providing legal services" (paragraphs 3-4 & 32). The statement in the FAQs that 'Core Duty 8 is largely focused on practice management' and ensuring that chambers have appropriate practices is problematic as is not reflected in the text of the provision itself and the statement is not obviously compatible with the Consultation Paper. Further, the Core Duties all apply at least where barristers are 'practising or otherwise providing legal services' (eC2). 'Practising' is defined in Part 6 of the BSB Handbook as 'the activities, including business related activities, in that capacity, of a practising barrister'. No examples are provided, however, which would assist barristers in understanding what is required from them outside the organisation of chambers. If it is nothing then it is not, in truth, a Core Duty. Furthermore, with the exception of CD1 and as set out in the Code of Conduct, the Core Duties are not subject to any order of precedence; see gC1. If it is intended that PCD8 is to apply to practice management, but not the provision of legal services, this needs to be expressly and clearly set out. If it is intended to mostly or largely only apply to practice management, then this needs to be expressly and clearly set out, and the exceptions expressly and clearly identified.

39. To put this in context, there is a marked tension between the concept of inclusion and a barrister acting as an advocate for a client in an adversarial legal system. Would PCD8 be breached if a witness were subjected to a robust but appropriate cross-examination and were not made to feel valued, able to participate and able to reach their full potential? We are told in FAQs and interviews that is not the case, but this is not reflected in the relevant drafting.

40. It is not a sufficient answer to this problem, as is put the FAQ, to highlight that PCD8 would not affect rC28 and rC29. Both of these determine whether or not a barrister should provide or withhold services to clients and prospective clients. They do not impact on **how** to provide those services.

41. Similar uncertainty and tension would exist between the other objectives that PCD8 will require barristers to advance, and their duties to clients and the court. Obvious examples, which have already given rise to litigation in the employment context, concern religious or other protected beliefs e.g. concerning gender identity and/or sexual identity. Managing and addressing these conflicts involves difficult and nuanced questions where views will differ significantly as to the right course to take. These are matters that should be controlled by the relevant court or tribunal, not by a core duty on barristers.

42. In these circumstances we are concerned about the introduction of a new core duty which does not provide clear guidance as to how these objectives are to be advanced where they come into conflict with other duties, and further consider that no such guidance could properly (or lawfully) be provided on this in any event. These concerns are especially acute in circumstances where a failure to get the balance right could result in disciplinary proceedings against a barrister, and where the perception of a

member of the public (or another barrister obliged to report serious misconduct) may lead to barristers being reported to the BSB.

Enforcement

43. There will be a particular difficulty in taking effective enforcement action in respect of PCD8, given the lack of clarity and the difficulties we have set out above. Paragraph 31 of the consultation paper states that: "It is important…that the BSB is able to take action against behaviour which works against equality, diversity and inclusion". The negative manner in which this is expressed implies that the BSB will only take enforcement action where barristers are shown to have taken steps to prevent or frustrate equality, diversity and inclusion. It is not clear to us whether this is intentional or not.

44. This is especially so given that paragraph 31 then goes on to state the BSB's belief that "it should be a core expectation of all practising barristers **that they demonstrate an appropriate commitment**, through their practice, to equality, diversity and inclusion" (our emphasis). The emphasised words suggest that enforcement action is intended to be taken where an appropriate commitment has not been demonstrated and give rise to concern that an "appropriate commitment" is incapable of precise definition. This is especially so given the wider lack of clarity over whether this is to be a commitment to "promoting" or "advancing," and in respect of the concepts of equality, diversity and inclusion themselves.

45. This is not ameliorated by the statement in the BSB's FAQ document that "a failure to act in a way that advances equality, diversity and inclusion would **involve** not taking reasonable steps to meet the 'equality outcomes' set out in the proposed General Equality Rules, and a failure to take reasonable steps to meet the requirements set out in the 'Specific Requirements' section of the Equality Rules…As long as a barrister does **whatever is within their sphere of control** to ensure their place of practice meet these requirements, they will **likely** be compliant with the Core Duty". This requirement also fails to recognise that (1) individual barristers are not empowered to ensure such matters given the collective nature of chambers, and (2) the power relationships which operate at the Bar mean that it is unlikely that many junior barristers, in particular, will be in a position to take meaningful steps to ensure these ends.

46. As stated above, if the PCD8 is to be limited to a requirement to promote equality etc. (as indicated by the outcomes guidance), this should be stated within PCD8 itself. However, the fact that the FAQ document only says that there will be a lack of compliance in not taking such steps, goes on to say that barristers must do everything within their sphere of control to advance the objectives, and then concludes by saying that this is only *likely* to mean a barrister is compliant offers very little assurance in respect of the concerns we have addressed above.

47. If, as we fear, this means that the proposed CD8 proves extremely difficult to enforce, we consider there is a serious risk that this will be a toothless core duty without the possibility of successful enforcement action. That would send a counter-productively negative signal to the profession and the public as to the importance placed upon EDI at the Bar.

Potential unlawfulness and conflicts with other core duties

48. The BSB is a delegated creation of the LSA07. Under that statute the regulator and its delegates can only act within the powers conferred on the regulator by the Act and for the purposes conferred by the Act. The powers of the BSB cannot go wider than the purposes conferred in section 1 under the regulatory objectives. Further, all action taken by the regulator must be consistent with the regulatory objectives. Those objectives are set out in section 1. There are also professional principles which the Regulator must promote and maintain adherence to by its barristers/ authorised persons. These include that authorised persons should act with independence, and in the best interests of their clients.

49. Specifically, the power of the regulator under section 1(1)(f) is limited by and to the objective of encouraging, among other things, a diverse legal profession. But a power to encourage something is not the same as a power to require something.

50. It is accepted that the General Council of the Bar is a public authority, in respect of its public functions, subject to the public sector equality duty in s149 of the Equality Act 2010. This duty is delegated to the BSB and requires the regulator in the exercise of its functions to have due regard to the equality objectives in section 149. But that duty is concerned with how it must approach the exercise of its functions. Its relevant function here is to encourage a diverse legal profession. In giving that encouragement, it must of course have due regard to the equality objectives in section 149. But that does not mean it can go beyond its relevant function, one of encouragement. Having due regard to the public sector equality objectives does not trump or override the statutory limitation on its proper function.

51. It is also at least unclear how the proposed new core duty will be compatible with the further regulatory objective in LSA 2007 s. 1(1)(h), namely "promoting and maintaining adherence to the professional principles". Those professional principles include (s.1(3)(g)(h)) the principles that "authorised persons should act in the best interests of their clients" and should "comply with their duty to the court to act with independence in the interests of justice".

52. Mr Neale, Director General of the BSB has said (Legal Futures 27 September 2024: Neil Rose Blog) that:

> "The central proposal is to replace core duty 8, under which barristers "must not discriminate unlawfully against any person", with a requirement to "act in a way that advances equality, diversity and inclusion"

Mr Neale explained that "the key question" raised by the consultation was "what regulatory framework is going to promote a shared objective to enhance the diversity and inclusiveness of the profession" (note again the confusion between promotion and advancement).

53. One criticism is that the new duty could prevent barristers from representing people whose views conflict with EDI, contrary to the cab-rank rule. Mr Neale has however

reportedly said: "The new duty in no way cuts across the cab-rank rule, which remains in place. As a regulator, we have always been strongly supportive of the cab-rank rule and the principle that barristers should represent clients without discrimination and indeed should not themselves be identified with clients' causes."[15] The FAQ document similarly asserts that PCD8 "would not affect the "cab rank" rule or the duty not to discriminate". But it is wholly unclear how, or to what extent this new core duty can be subordinated to other, non-core rules of conduct or practice.

54. Indeed, it is difficult to see how it does not cut across the independence of the Bar and is not inconsistent with the role of a barrister in an adversarial system of justice, as illustrated by the following three examples.

Example 1: a barrister acting for a company accused of discrimination would have to act in such a way as to advance equality. What if the client does not want to advance equality but wants to avoid having to pay compensation in a case whose determination against the client might advance equality?

Example 2: a barrister's client's interests are not served by suggesting a represented disabled person be given procedural adjustments in court proceedings which would cost the client in terms of additional brief fees for the barrister. In that situation a barrister who acts in the best interests of their client might not be advancing equality for the disabled person. The other legal representative may be failing in their duty to aid their client but under PCD8 as drafted the barrister who does not insist that the client volunteers to make reasonable adjustments in the court or tribunal procedure would be in breach because they would not be advancing equality.

Example 3: cross examination by a barrister in a sexual offence trial where it is necessary to act in a manner which may not advance equality (without unnecessarily aggressive cross examination)? Could PCD8 have a chilling effect on the ability of criminal defence barristers to defend their clients?

55. Further, it is possible that PCD8 could conflict with Core Duty 2 by creating a tension between the barrister's interests in, e.g., advancing a profession which is reflective of the population as regards age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, socio-economic status and any number of other unlisted characteristics, and their obligations to clients. Crucial here is the fact that PCD8 is not limited to the encouragement of equality [of outcome] but includes an outcomes-based focus on the advancement of diversity which is not constrained by considerations of ability or aptitude.

56. It is at least possible that barristers will feel under pressure to act in ways which may not serve their clients' best interests. By way of example, a barrister may feel compelled to use junior barristers who will provide a more diverse team irrespective of relative skills or other relevant attributes, and irrespective of client preferences (this is to be

[15] https://www.legalfutures.co.uk/latest-news/new-equality-duty-will-not-impact-cab-rank-rule-says-bsb-chief

distinguished from a situation in which the client insists on diversity as an important element of a counsel team). While it is unlikely that a barrister would knowingly jeopardise their own work product by seeking to include another barrister for reasons other than merit, this may not be relevant in a case where there is a larger counsel team. Even if barristers act in a robust way to defend the second core principle, many may do so at the cost of anxiety and uncertainty as to their position under the Code of Conduct.

57. It is at also possible that PCD8 would conflict with Core Duty 2 in the context of media comment. The BSB Code of Conduct currently states that:

'The ethical obligations that apply in relation to your professional practice generally continue to apply in relation to media comment. In particular, barristers should be aware of the following - Client's best interests: Core Duty 2 and Rules C15.1-.2 require a barrister to promote fearlessly and by all proper and lawful means the lay client's best interests and to do so without regard to their own interests.'

58. It is entirely predictable that barristers who are associated with litigating controversial positions (such as those known for representing gender critical feminists) will find themselves accused of breaching PCD8 by reason of their 'non-inclusionary' public approach by reason of public comments made in connection with their cases. It is equally possible that a barrister's approach to cross-examination, while otherwise appropriate and professional, could be categorised as insufficiently 'inclusive.' We noted this tension between the core duties at paragraph 39.

59. Core Duties 3 and 5 may come under pressure in a similar fashion to Core Duty 2 if barristers feel pressurised to prioritise diversity over aptitude etc in the selection of counsel teams, or to apply self-censorship to their advocacy of a client's cause or their contributions to law reform or (in a professional capacity) to public debate. Such self-censorship may be inconsistent with communicating honestly and with integrity and public awareness that barristers are hampered in their freedom of expression about important issues such as equality, diversity and 'inclusion' is likely to diminish the trust and confidence which it places in barristers.

60. The obligation to advance EDI, which goes beyond an obligation merely to comply with the EqA, is capable of amounting to an 'external pressure' which may compromise barristers' ability to advocate a client's case or, as above, to contribute to law reform or (in a professional capacity) to public debate. And whereas the Code of Conduct recognises, and makes provision for the fact, that Core Duty 1 may be in tension with other Core Duties, there is no such recognition as regards PCD8.

61. An obligation on barristers to 'advance' the ill-defined and sometimes politically contested concept of EDI is also likely to result in breaches of the EqA 2010 and the HRA. As to the first of these, the view that EDI (however defined), or aspects of it, is/are not a public good(s) to be pursued, is one which is likely to be protected by Article 9 ECHR and as a protected belief by the EqA, and whose expression would be protected by Article 10 ECHR. There is no credible justification for imposing on barristers what

might amount to limitations on speech or obligations to advocate for contested political positions. The BSB (via delegation from the General Council of the Bar) will be a public authority in connection with its exercise of regulatory functions and would be acting unlawfully by limiting the expression of lawful views. Even if no action is taken against a barrister, Article 10 can be breached by the deterrence of free expression.

62. The BSB would also breach its obligations under s29 EqA if it were to discriminate against barristers because of their protected beliefs in the exercise of its regulatory functions. Such discrimination would take the form of the threat or initiation of disciplinary action or the imposition of sanctions. On the one hand, taking disciplinary action against a barrister because of racist public pronouncements would likely be justified by the fact that race discrimination is generally unlawful, widely condemned and likely to bring the profession into disrepute. On the other hand, taking disciplinary action against a barrister because of the expression of views which are entirely lawful, albeit not in conformity with a particular concept of 'progressiveness,' would almost certainly amount to unlawful discrimination because of belief (or a lack thereof).

Regulatory guidance and the need for clear rules

63. The complexity and breadth of the PCD8 would demand detailed and specific guidance. This creates a real practical problem pointing up our overall objection. Who is it that will produce this detailed and specific guidance? There is an expectation in the consultation paper that it is the Bar Council. However, this guidance would need to be produced by the BSB, not least because it would be impossible for the Bar Council or others to accurately guess the scope and content of the duty, and how it would interact with other regulatory principles as it is currently proposed. Further, the Bar Council's view and guidance would have no interpretative value. There is no role for the Bar Council, in short, to produce any guidance on how the new duty would operate. The most the Bar Council could do would be to provide best practice encouragement for barristers. However, we already do that. Conversely, we fear that the amount of guidance which the BSB would have to produce on this would wholly undermine the feasibility and use of PCD8. There is a risk, for example, that if the BSB produces detailed guidance on how the new duty would operate, any such expectation may not be compatible with its own independence or role as a regulator.

64. Without the necessary very clear guidance there will also be an argument that PCD8 would be ultra vires because no boundaries would be being placed on what otherwise appears to be a duty of very vague scope. As presently stated, it appears to apply to all functions of a barrister and requires particular outcomes to be achieved. The words of the current PCD8 cannot be read down without doing extreme damage to the language which the BSB has chosen to adopt, so as to confine or define its ambit. For instance, PCD8 cannot be read down in order to maintain the independence of the Bar. A differently worded Core Duty would be required.

65. Section 28(3) LSA provides that the BSB 'must have regard to– (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed'. The adoption of PCD8 in its current form would involve the BSB in unnecessary conflict with barristers about

matters of ideology which have very little relevance to the proper functions of a regulator. It would also expose to the possibility of regulatory action barristers who were acting lawfully and in accordance with their other regulatory obligations but who did not comply with unparticularised and unclear obligations to advance diversity by reference to numerous and not fully particularised characteristics, or to advance undefined and possibly highly contested concepts of 'inclusion'. This cannot reasonably be regarded as consistent with the principle that regulatory activities should be proportionate.

66. One of the standards the International Bar Association applies in its analysis of threats to and support for an independent Bar in a country is whether there are clear and transparent rules concerning, amongst other things, disciplinary proceedings and disbarment.[16] The standards referred to there are not met by the currently worded proposed core duty. It does not constitute a clear and transparent rule of discipline because it is neither comprehensible (read alongside the other regulatory objectives in the Act and other Core Duties in the Code) nor will its meaning and limits be accessible (without a great deal of guidance limiting its scope and defining the boundaries between independent practice and this proposed duty). As currently drafted, and as addressed in detail above, PCD8 is not clear nor transparent.

67. The IBA points out:

> "Where regulations governing disciplinary proceedings and disbarment are not comprehensible and transparent, … lawyers are more exposed to targeted disciplinary action and arbitrary disbarments. **Disciplinary proceedings can become a powerful weapon in the hands of governments or third parties with direct or indirect influence over professional regulatory mechanisms.** Lawyers around the world are subject to arbitrary disbarment or targeted disciplinary proceedings in a number of jurisdictions, mainly for bringing cases against the government or representing causes or clients that are unpopular with the existing regime." (emphasis added).

68. The vagueness of PCD8 would mean that barristers could be subject to indirect influence affecting their independence. An allegation that a barrister is not acting to advance equality would be easy to make. The IBA notes that one of the indicators of threat to the independence of the Bar is vague regulations on disciplinary proceedings and disbarment.

69. The IBA also comments (page 21) that the mere fact that there is external involvement in the regulatory scheme does not necessarily threaten the independence of the profession, *as long as this does not have an impact on the ability of lawyers to carry out their professional duties in accordance with the rule of law*. Without the required level of detailed guidance from the BSB discussed above, PCD8 runs the risk of threatening the independence of the profession. As the IBA states: "In assessing independence, one should consider not only the degree of self-regulation as correlative to the independence of the legal profession, but also examine the impact it has on the ability of lawyers to carry out their duties in an independent and impartial manner." In this

[16] See IBA Presidential Task Force - Report on the Independence of the Legal Profession September 2016

regard, we note that the BSB has not published any risk assessment which it has conducted into the potential effects of its proposals.

Question 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)

70. Given its breadth, which we have commented on in Q1 above, we do not consider that there are examples of conduct which would not be captured by PCD8.

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

71. The concerns identified under Q1 above apply as much to the employed Bar as the self-employed Bar. However, the lack of clarity for how employed barristers are expected to comply with PCD8, in the absence of any guidance or Equality Rules, and notwithstanding the issues identified with those at Q1 above, will make it even harder for employed barristers to avoid regulatory breaches or to be confident of their regulatory compliance.

72. Employed barristers are likely to have responsibilities to their employers wider than the provision of legal services. It is not clear whether the BSB's proposal that PCD8 applies "when practising" is expected to cover the entirety of an employed barrister's job description or not. This is a particularly important clarification since for employed barristers working in-house, rather than within organisations whose primary function is to provide legal services (solicitors' firms, etc.), their employer is also their client, in whose best interests they are required to act.

73. The priority areas identified by the BSB (recruitment, retention, and progression) relate to the Equality Rules, which at present do not apply to employed practitioners. However, it seems likely that these would be areas of particular interest to the BSB when considering regulatory compliance across the profession. Unless it is the BSB's position that in relation to these areas employed barristers are not "practising," which is not understood to be the case, then there are difficulties with how their involvement in recruitment (including involvement in internal promotions) will be treated. Employed barristers may share decision-making with colleagues who are not the subject of the same or a similar duty. The focus on advancement and outcomes suggests that an employed barrister involved in a recruitment exercise that was otherwise fair and compliant with the Equality Act, but which didn't go any further than that, could be disciplined by their regulator. This would seem to be the case even where the employed barrister's view was overridden by other colleagues and even where they had no power over the issue whatsoever. In this respect it is vital to remember that employed barristers are usually more limited in their ability to control or have an impact on their environment / employer than barristers are in relation to controlling or having an impact on their chambers.

74. As set out at Q1 above, advancement has a different meaning to promotion or encouragement. If PCD8 requires advancement of its objectives, the BSB will be holding barristers to a higher standard than solicitors doing the same roles within employed practice, who are required to encourage equality, diversity and inclusion. Not only could this create tension in terms of how work is completed at these organisations, but it could also lead to differential treatment within the workplace, for example, allocation of work.

Question 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)

75. It is noted that the BSB has incorporated outcomes into the Bar Code of Conduct for a number of years now, and it appears that the BSB is of the view that the concept of an 'outcomes based approach' is more likely than a rules based approach to 'eliminate discrimination' at the Bar, or rather, to "achieve culture and behaviour change in the profession [which are]... based on the changes in culture and processes we wish to see within the profession."

76. As stated above, the Bar Council welcomes the BSB's commitment to the aim of securing a more equal, diverse and inclusive culture at the Bar in relation to equality and diversity. However, what is not apparent from the Consultation Paper is the extent to which the BSB has reviewed (quantitively, rather than qualitatively) whether the Bar and barristers understand the management concept of 'outcomes' as a method of goal achievement; and perhaps more relevantly, the extent to which barristers' working practices (knowledge, skill set, experience, and perhaps more importantly, opportunity) equip them to take any, or any effective, steps towards or achieving compliance with something as nebulous as an outcome.

77. The Bar Council notes the work that the SRA has undertaken to introduce a more outcomes-based approach for the code of conduct regulating solicitors. However, the fundamental difference between barristers and other legal services providers, which does not appear to be readily acknowledged in the consultation paper, is the fact that most barristers are self-employed. It seems that the BSB does not address or want to engage with issues that could arise when individual barristers attempt to apply what is essentially a corporate goal-management tool in the present consultation paper.

78. In terms of defining outcomes, Forbes magazine[17] explains how 'outcomes-based management' works "[it] utilizes the knowledge and experience of employees and partners to find the right solution for the problems and [to ensure the] outcome is met." It continues "this approach focuses people and teams on concrete result, not the process required to achieve it. Leaders define outcomes and, along with managers, set parameters and guidelines. Employees, then, have a high degree of autonomy to use their own unique talents to reach goals their own way." The description of co-operative

[17] https://www.forbes.com/sites/katevitasek/2023/01/12/outcome-based-management-what-it-is-why-it-matters-and-how-to-make-it-happen/

working towards a shared outcome doesn't work well in the context of a profession which is majority self-employed, where most barristers do not work within an organisation with a corporate identity; do not have fellow 'employees'; do not necessarily work in teams; do not have appraisals with line managers or anyone who has managerial control over their work output or conduct. Collaborative working with colleagues is usually limited to work on cases or sitting on management committees, not on matters of 'office management,' which is seen as the remit of chambers' employees. In most chambers' employees are few in number. They are nothing like the large law firms with hundreds or thousands of salaried employees and compliance teams to which the Solicitors Regulation Authority have expressly targeted their amended equality rules.

The challenge of reflection

79. Numerous points in the consultation paper (e.g. paragraphs 25, 36, 37, 44, etc.) suggest that in order to comply with the new duties and rules, barristers will need to 'reflect'. For example, the consultation paper says: "As such, we would expect each barrister to reflect on what is needed in order for them to meet the rules in their own practice." The Bar Council is again concerned that this is not realistic or practical given the way most self-employed barristers work.

80. Self-reflection and outcomes-based goal achievement is typically, in the UK, used within the health and care sectors. For example, medical consultants are required to undertake self-reflection with respect to their clinical work. This forms part of the regular appraisal involving department heads or more senior consultants, with feedback being given. This appraisal and feedback structure is mostly absent from the working arrangements of barristers. This means barristers would be expected to 'personally reflect' in isolation, not knowing if their reflections are accurate.

81. In a working environment where the stress and pressure of work is often relentless, where the subject matter of the work can be psychologically disturbing, and where the expectations of clients and the public are exceptionally high, the idea of loading a further duty of this nature, without structures for feedback or context, is unfair, and potentially discriminatory to those with existing mental health disabilities.

82. Barristers are far more likely to comply with clear, unambiguous, requirements – i.e. 'do this training' 'read this guidance and certify compliance' – than requirements for them to self-reflect to consider whether they have taken reasonable steps to achieve outcomes. Rule-based regulation could ensure a base level of knowledge and understanding which would support further change. Those leading change (e.g. heads of chambers and EDOs) can only move the profession in the desired direction if as many individual barristers as possible understand why change is needed.

83. Attainment of the knowledge and information needed to support the ambitions of the consultation document can only practicably be achieved through compulsion. This is because any scheme that is either voluntary, or is not reinforced by some degree of compulsion, will result in only part of the cohort receiving the necessary information. The experience of EDOs shows that individuals who are time poor or ambivalent to the

aims of the training will find a way to avoid it. Therefore, the Bar Council considers that because the 'reflective approach to considering whether reasonable steps have been taken to achieve outcomes' is unlikely to be adopted, the BSB's proposals, including the removal of the leadership provided by EDOs, will not – in fact – move the profession more quickly to the desired change.

84. Barristers and chambers are already extremely busy with compliance related activities. The BSB needs to be mindful not to overburden them further.

85. In summary, the idea of 'outcomes' is simply too vague a concept to be workable in the context of a system that is attempting to regulate individuals, rather than corporate entities. The idea of moving away from anything that could be viewed as a 'tick box' exercise is to be welcomed. However – as with the response to Q2 - the answer may be to identify clearer prescriptive rules rather than outcomes (see below Q6).

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

86. Yes.

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

87. No. The Bar Council welcomes the approach taken to the content of the individual proposed 'outcomes' (a)-(d). The comments made in relation to Q2 above, noting the difficulties with enforcement that will flow from the use of the amorphous concepts set out in the proposed new PCD8, are repeated here in general in relation to the individual proposed outcomes. Barristers would be required to ("must") take "reasonable steps" to "meet" (not 'promote') the outcomes set out. The Bar Council believes that the four outcomes proposed are not sufficiently specific and measurable to enable compliance to be effectively monitored, particularly (c) ensure access to your services; and (d) promote an inclusive culture.

Question 7: Regarding Policies:

Question 7(a): Do you agree with the list of required policies in Recommendation 3?

88. We agree with the BSB's proposal to mandate the following policies in chambers/BSB regulated entities:

a) Equality, diversity and inclusion policy
b) Anti-harassment and bullying policy
c) Reasonable adjustment policy
d) Flexible working policy
e) Parental leave policy

With the addition of bullying to (b), this reflects the current position. While welcoming this aspect, we note that this 'rules based' approach is inconsistent with the 'outcomes' and 'reflective' approach otherwise taken in the proposals.

89. We do not agree that chambers should be required to have an:

f) Allocation of unassigned work policy

90. Allocation of unassigned work is only one element of ensuring fair access to and distribution of work in chambers. The Bar Council has built extensive expertise in this area – both in terms of (i) earnings data analysis across the whole profession; and (ii) work within chambers to audit and address unequal earnings outcomes experienced by different groups. In our experience a focus on unassigned work is too limited and risks reinforcing a tick box approach to this issue (something we know the BSB is keen to avoid). Further, in some chambers the proportion of unassigned work is very low, in others the practice area means there is a high proportion of returns, in both cases to focus purely on unassigned work would divert clerks and chambers' attention away from tackling more significant other work distribution inequalities.

91. There is no evidence the current regime requiring monitoring of unallocated work addresses inequality in work distribution/issues in access to work. We believe the BSB should consider a broader policy objective (fair work distribution) which covers all aspects of the distribution of work, including but not limited to marketing opportunities, led work, practice development and earnings monitoring. This would be more meaningful and have a positive impact on outcomes.

92. As one EDO told us:

> I have been an EDO under two different chambers directors, and they have both informed me that they have gone to great efforts to try and devise a way of monitoring unassigned work in a way that will provide a comprehensive report. They have met with diary management software providers to request an additional function on the system. We realised that getting data that would be meaningful was almost impossible and that it was diverting attention from ensuring we have other systems in place and a culture that fosters fair distribution of work.

7b. Do you agree that a non-prescriptive approach to the required policies will result in a more reflective and meaningful approach?

93. No. For most self-employed barristers the focus is their practice over administering others/their chambers. There is no evidence 'reflection' as to the content of policies will lead to better quality policies/a more considered approach at the self-employed Bar.

94. The BSB should continue to provide basic policy templates covering the minimum standards required (areas to be covered) in an updated guidance document [Supporting Information for chambers and entities]. We know from discussions with EDOs that these minimum requirements are vital to getting support for policies and interventions within chambers. It should be left to chambers to enhance policies in line with good practice/the needs of their practice/set, and with reference to policy guidance and templates in these areas provided by the Bar Council on its ethics hub.

95. Further, the BSB should mandate that all EDI policies are available to members via an intranet or regularly updated and published members' handbook. Members should not have to request policies from chambers management, clerks or colleagues to access them.

96. Chambers and barristers need clear regulatory guidance i.e. named policies covering specific provisions to enable them to comply with BSB regulations. The Bar Council cannot provide advisory guidance where regulations are unclear, and compliance is open to interpretation.

Question 7(c): How can we ensure that this approach is appropriately targeted to the needs of different practices? (Recommendation 4)

97. Where regulations are clear, and a framework for compliance is provided, there should not be any problem for different types of practice or different types of chambers set up. The only policy which would be irrelevant to sole traders would be in relation to fair distribution of work. Policies which govern how they interact with clients and employees would remain relevant but would necessarily need to be proportionate to the size and type of practice.

98. In this area as with others, clear, specific expectations are essential to reduce the burden on sole practitioners and others of creating policies from scratch. Paragraph 46 of the consultation document suggests use of model policies has been rejected. However, we would argue that for sole practitioners and micro-chambers or micro-BSB entities, the risk of box ticking is offset by the risk of unintentionally getting it wrong or lacking capacity to write something from scratch.

Question 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)

99. No. We understand that the BSB believes publication of data internally and/or externally will increase transparency, where a lack of transparency is assumed to prevent progress on EDI. It is unclear whether the BSB believes the publication of data will be used by individual members to hold their own chambers to account, or to enable them to 'reflect' on their individual actions to promote EDI. The proposals will achieve neither. The BSB should understand that most chambers will not be able to publish sensitive data even internally (where there is competition between self-employed barristers) or where there is a risk of individuals being identified. The focus should instead be on collecting and analysing information at a higher level of generality.

Collecting and analysing management data

100. We would like to see a completely different approach to EDI data – neither the existing model (a survey every three years) nor the proposed model (an annual data collection exercise). Data should instead be collected and held on chambers systems (e.g. Lex, which can be adapted for this purpose with required personal data protections). Data can then be pulled for analysis by staff as required rather than collected and disposed

of on a regular basis. Chambers should be asked to keep data on protected characteristics up to date with periodic reminders to members and employees (as in other organisations) to update their data when their circumstances change (e.g. an acquired disability, or members retiring).

101. An EDO officer informed us:

> "Our chambers collects data every three years and due to confidentiality, there are characteristics that we simply cannot publish data on."

102. The priority should be encouraging chambers to generate high quality management information for use and discussion internally. We recommend the regulation is changed to encourage chambers to collect and analyse data in the following areas (as proposed below):

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

Instead of (c) unallocated work, we would like to see distribution of work/earnings included in this list. We know from our work with chambers of all sizes that proper scrutiny of earnings internally can reveal where members need more support, where there may be bias creating differential outcomes and where interventions would be most effective.

Using BSB data

103. We also note that the BSB has data collection capacity through its own database system (personal data collected during ATP), and this data could be used to analyse diversity data broken down by chambers if it wanted. If the regulator published (and celebrated) aggregated data on the most diverse chambers in different practice areas (e.g. ten most diverse sets per practice area), this would achieve the BSB's aim of providing transparency to the public/clients/aspiring barristers, and perhaps encourage chambers to promote disclosure to 'get on the list.' No regulation is required to facilitate this.

Complaints data

104. We are very concerned about the potential impact of a requirement to collect and share data on client complaints by protected characteristic. Based on our experience of the profession, and given the size of most chambers, the number of complaints they receive every year is relatively small. It would be impractical to analyse this type of data for patterns or draw any robust conclusions from it.

105. Further, we are concerned that complainants would be reluctant to provide protected characteristics information, and asking for information about protected characteristics could have a chilling effect on complaints.

106. While we understand and share the BSB's desire to improve access to justice, we believe that collecting this information at an individual practitioner level is impractical and will not achieve the desired objective.

Question 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)

107. No. Increasing the number of characteristics risks creating additional confusion for chambers and their members. Chambers face a significant challenge in persuading their members, employees and others to complete monitoring forms, and they already fear that partial disclosure rates distorts analysis. Additionally, it is difficult to frame questions about characteristics effectively, and the risks of false disclosures or confusion over the questions increase as more are added. Work done to collect data on and better understand socio-economic background has demonstrated these challenges, where there is a low level of reporting and low confidence in the numbers.

108. The regulations should focus on the characteristics protected by the Equality Act and on improving data collection and analysis on them, rather than considering moving beyond that framework.

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

109. In preparing this response we considered whether publishing data (mostly redacted to meet the <10 rule) would provide clients and applicants with the information they need (e.g. to select a diverse chambers to instruct or to apply to). There is a difficulty related to publishing data on the wider range of protected characteristics. Given the small size of most chambers (most include fewer than sixty members), the chances of any group sharing a protected characteristic other than sex being larger than ten is very small. This means in most categories (protected characteristics and socio-economic background) chambers will be unable to publish the data they collect.

110. In this context, our conclusion is that clients and applicants would defer to checking the published information about members - now found on most chambers' websites - to establish how diverse it is. Chambers should be free to publish (as a matter of good practice) as much data as they wish (subject to the rule of ten and with the explicit permission of members and employees). There is no need for regulatory oversight of this.

111. The regulatory focus should be on analysis, specifically encouraging chambers to collect and analyse data. Effective analysis leads to better EDI outcomes. In our experience of working with chambers, those chambers with less transparency (e.g. on sensitive data like earnings) have similar outcomes to those chambers where there is

greater transparency, if they undertake regular analysis of their data. In other words, it is data collection and analysis that supports better EDI outcomes, not publishing.

Question 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)

112. Yes. We already encourage the use of data to develop and review action plans, and the inclusion of EDI programme process and outcome targets. We have guidance on this available to the Bar on our ethics hub.

113. We believe it would be helpful if the regulations contained more information about what should be included in an action plan. For example, an action plan should reference:

- analysis of earnings and plans to tackle disparities
- training requirements for members and employees (e.g., minimum 3 hours EDI training per year)
- recruitment
- retention (perhaps focussing on vulnerable groups e.g., new parents or returners
- progression (e.g., silk path programmes)

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

114. No. We believe formal EDI training is essential, including in fair recruitment, understanding EDI rules in practice, tackling bullying and harassment, unconscious bias etc.

115. It is vital for anyone that is involved in recruitment at the Bar, whether it be for pupillage, tenancy or staff hire, to be trained on “fair recruitment”. This is not something that is taught on the BPTC nor is it something that is taught as part of our pupillage education and training. If chambers are to invest in pupils and new tenants, then it is not onerous for them to train those concerned with recruitment to ensure fairness.

Question 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)

116. No. There is no evidence this approach will be successful. All barristers can benefit from EDI training and, as we have already stated, it is unreasonable to expect every barrister to be able to identify the training they need. We consider that a basic level of EDI training is essential to everyone.

117. We would recommend the BSB mandate a minimum number of hours of EDI training per annum. In our experience, training makes the biggest difference to tackling inequality, and in promoting diversity and inclusion. It starts (and maintains) conversations about these critical issues. It provides a voice/shines a light on the experience of those who have faced discrimination as well as challenges the thinking of those who have perhaps never faced discrimination or felt excluded in the workplace. It

ensures that everyone in the profession has a basic level of information about the issues, the impact of behaviours and the expectations of regulations. A basic minimum requirement for EDI training provides the information and discussion needed to take a reflective approach as to any additional training needed. Of course, there are many ways in which such training can be undertaken, including podcasts and online training, and examples of such a variety of training methods should be identified.

118. We have heard from EDOs that the lack of training requirement is particularly challenging when they are trying to get the more resistant members to engage. It is the people who most need and would benefit from training who need a regulatory push. Hoping this group will 'reflect' to the point of volunteering for training is unrealistic.

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

119. Yes. We agree that chambers should be required to conduct an accessibility audit and publish the results **but only on the basis that an accessibility audit by self-assessment will comply with this requirement**. We agree published information should include barriers to access, available reasonable adjustments and chambers' reasonable adjustments policy. BSB guidance must state clearly what is required of barristers in self-employed practice with respect to any accessibility audit.

120. The option of self-assessment would ensure the cost of outsourcing an access audit is not a barrier for any chambers/BSB entity. A test of proportionality should be applied to the audit report, dependent on the size of chambers. We believe it is reasonable to require the accessibility audit is reviewed and updated every 5 years.

121. The Bar Council has provided guidance on conducting an accessibility audit since 2019. This guide is available at no cost to the user on our ethics and practice hub.[18]

Question 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)

Question 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.

We answer questions 15 and 16 together below

122. We do not agree with the BSB's proposal.

123. We do agree that the Bar needs to make progress on making chambers more accessible. The Bar Council is deeply committed to disability inclusion at the Bar. The ability to circulate within chambers to the same extent as others is important to pupils,

[18] https://www.barcouncilethics.co.uk/

barristers and their employees alike. For pupils, in particular, this is key to enjoying a fair and equal pupillage. However, the proposed regulation change goes too far and risks being counterproductive.

124. Our proposal is that together with the audit, chambers should be required to prepare an accessibility plan setting out how it would comply with a request for reasonable adjustments across different disabilities in the event of a relevant request. This too may be self-assessed and subject to a test of proportionality.

125. The BSB proposal sets requirements going well beyond Equality Act obligations and to which a longstop date is attached that we do not consider to be legally or practically feasible. In any event, any timeframe would need to take account of the legal, financial, and practical obstacles that a chambers may have in meeting the standard, including the steps required to adapt listed buildings and the length and terms of some chambers' leases.

126. For example, we draw attention to the fact that most sets of Chambers rent their accommodation as commercial tenants and do not own the freehold of the building they occupy. Some have long leases with no provision to terminate before the end of the contractual term. Their lease terms normally include tenants' covenants governing their inability / or ability (subject to landlord's consent) to make alterations to their premises (as is standard in any commercial lease). The provisions of the Equality Act 2010 Sch 21, paragraph 3 and the Equality Act 2010 (Disability) Regulations 2010 reg. 14, operate to modify a tenant's covenants in a lease which prohibits alterations in a case where the relevant alteration is to be made to comply with a duty to make reasonable adjustments (i.e. not to modify by reference to "full" accessibility as defined in this Consultation). In a reasonable adjustment case, this statutory modification enables a tenant to request their landlord's consent (as if their covenant was originally of a kind which enabled them to make alterations with landlord's consent not to be unreasonably withheld). Their landlord may withhold their consent if they have (or consider they have) reasonable grounds to do so and/or to impose conditions for the grant of that consent. In the event of a dispute as to what is or is not reasonable by way of alteration, the tenant's fact specific proposals relating to the subject premises and the landlord's fact specific objections have to be resolved through an application to the court and trial. Those proceedings will run to the court timetable. They are likely to include detailed expert evidence from building surveyors on each side, for example.

127. In our view the legal test for reasonable adjustments should be applied, i.e. (a) effectiveness; (b) practicability; (c) resources including cost. We believe this is a proportionate test and consistent with a chambers' legal obligations under the Equality Act. The regulator should not impose a higher threshold and that should be made clear in the regulations and regulatory guidance.

Question 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)

128. No. We do not agree that the removal of the EDO position would ensure everyone in chambers would take full and personal responsibility for EDI in chambers. In fact, we think the opposite will happen. In the absence of an EDO, there is a real risk that nothing will happen. We have seen 'mainstreaming' fail in other sectors and we see the proposal to remove the EDO role as a sign of a serious misunderstanding within the consultation document of the way chambers and barristers work. EDOs (and DDOs) play a critical role in delivering EDI at the Bar.

129. In practice, EDOs (and DDOs) perform three roles in chambers. First, ensuring regulatory compliance, and being a first point of contact for the BSB in this respect. Second, acting as EDI experts, so that other members of chambers have a point of advice and consultation on EDI issues which otherwise they would have no specialist knowledge of. Third, acting as EDI 'champions', often going above and beyond regulatory requirements. As the consultation itself identifies, EDI is a hugely complicated and involved issue. The idea that every single barrister could and should become an expert in it is absurd. If EDOs are abolished, the best result would be that barristers delegated responsibilities to specified individuals (or committees) – which would amount to EDOs in all but name. The worst result would be that in the absence of a mandated delegation there was none – which would almost inevitably amount to lack of action and/or expertise. Furthermore, we would expect that the usefulness of having a specialist point of contact in relation to regulating EDI matters would be clear and obvious.

130. Given the power, influence and benefits of EDOs and the EDO network, the Bar Council would like to see regulations which reinforce and enhance, rather than remove the role. If the BSB is concerned that junior members from under-represented groups are disproportionately undertaking this role on behalf of the Bar, we propose that, rather than abolishing it, the BSB use regulation to strengthen EDOs' position, authority and ability to act in chambers. To do this, the regulations could specify:

(i) a minimum call level
(ii) more than one EDO per set, or a minimum ratio (e.g. one EDO per every 30 members or part thereof
(iii) EDO training (similar to the Advanced E&D course run by the Bar Council)
(iv) an EDO place on a board level committee (e.g. management committee or similar).

Question 18: Do the prescriptive requirements within the rules:

Question 18 (a): enable barristers to take a reflective approach to achieving the equality outcomes?

131. As stated above, we do not believe that the proposals as currently drafted create the best regulatory environment to support progress on EDI at the Bar. Barristers need clear, understandable rules, and detailed guidance to ensure they can comply. The regulator needs to set out minimum expectations and to be clear on what will constitute a breach and when it will take enforcement action. We do not believe that an

outcomes-based, reflective approach is achievable at a majority self-employed Bar, where individuals, not entities or organisations, are being regulated.

Question 18(b): ensure specific, measurable and timely action is taken to address disparities?

132. As above, we do not think the proposals as currently drafted will create a context for specific, measurable or timely action.

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

Question 19(a): barristers within chambers and entities?

133. No. Much remains wholly unclear, such that barristers cannot know with confidence what is minimally required of them.

134. These recommendations could prove to be so onerous that they would particularly discourage sole practitioners and those working in "micro entities" (with fewer than five members or that employ less than five barristers) from entering into or continuing this form of practice. They could also stifle innovation, requiring so much valuable time to be consumed in regulatory compliance that the continuation of sole practice or in micro-entities becomes unviable.

135. Having a 'one size fits all' approach to some of the proposed requirements risks having a disproportionate impact on smaller entities and sole practitioners.

136. We question whether there is scope for the BSB to consider phased roll outs, for example, making sole practitioners or micro entities exempt from these rules for the first few years of practice.

137. As acknowledged at paragraph 52 in the consultation, there is a danger that data for small BSB entities cannot be reported due to the fact they can only supply employee data on a voluntary basis. Our concern here would be that the policy could result in inadvertent GDPR breaches as they attempt to fulfil their regulatory requirements. Sole practitioners and micro entities are highly unlikely to have any HR function to assist with this.

138. Recommendation 6 which proposes action plans may also discourage the growth of existing small entities and the formation of new small ones by making it too difficult to recruit new members. Whilst this may work for larger chambers and entities, the same policy would have little or no relevance to a two/three-person entity.

Question 19(b): sole practitioners

139. It is encouraging that the BSB states that it proposes to treat sole practitioners proportionately, depending on the nature of their practice. It is to be hoped that the same proportionate approach might be extended to micro-entities. However, this

flexibility may also create uncertainty as to how far they ought to go and whether they will have gone far enough to avoid regulatory action.

Question 19(c): employed barristers?

140. No. In relation to the proposed CD8 we consider that the answer is clearly "no" for the reasons set out in relation to Q1 and Q3 above.

Question 20: Are any of the requirements on sole practitioners disproportionate?

141. For many sole practitioners, the requirement to have formal documented policies such as those in the recommendation 3 list, would seem onerous and unnecessary. However, where a sole practitioner employs staff these policies, with the exception of unassigned work, should form part of their employer responsibilities. In short, they would probably have them anyway. For those with staff, the list at 'recommendation 3' (without (f)) would appear to be appropriate.

142. We have already made clear our position on complaints data. Adding to sole practitioners reporting requirements with details regarding complaints would add a disproportionate amount of work to a sole practitioner. It would also risk providing skewed data, for example, where a practitioner has received a single complaint. Also, the policy for the reporting of spurious complaints is unclear.

143. For sole practitioners, conducting and publishing a disability audit would appear a requirement that is disproportionate to the potential risk, especially as many work from home. Some do not have websites either, so it is not clear how the requirement for publication would be met.

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

144. See full answer above (paragraphs 119 to 127). In contrast to adjustments, we note that much of the court estate, including court rooms, cells and robing rooms, remains woefully inaccessible. This represents a greater barrier to the participation of disabled barristers than the inaccessibility of some parts of chambers; particularly in circumstances where barristers are working online more and going into chambers less.

Question 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?

145. Yes. As stated in our response above, we believe that some of the proposals will be difficult to comply with and will be difficult to enforce. They will not ultimately lead to the outcomes we all want.

146. We believe it would be more effective to put in place minimum standards then ensure they are rigorously enforced. The proposed outcomes-based 'reflective' approach may be appropriate in other professional settings such as healthcare, but we do not believe

it is appropriate for the Bar, where most barristers are self-employed, many work in small chambers, and some are sole-practitioners.

147. In addition, as stated above, the proposal to end the requirement for chambers to have an EDO risks no one taking responsibility for compliance within chambers. We are very concerned that the real implication of this would be a reduction in action on EDI issues.

148. An absence of prescription around training will lead to a reduction in training which could set the Bar back on EDI issues. The removal of an EDO would compound this issue as it is often this individual in chambers who raises the issue of training of members and staff. If the role of EDO is to be retained but the lack of prescription regarding training forms part of the amended rules, then this will make it harder for an EDO to persuade chambers that resources should be allocated to training.

149. Members of chambers and entities do not have very much time to think about regulatory requirements. Setting out minimum requirements for compliance will support them and ensure progress can be made across the Bar.

150. There is a risk unenforceability of these proposals will result in those who lack commitment to achieve improved diversity and inclusion, will do less than they are already.

151. Overall, the regulations are a mix of less clarity in some areas (specifically the change to the core duty, removal of training requirement) and more prescription in others (e.g. the monitoring and publication proposals). It would be better if the proposals were simplified into:

1. Comply with the Equality Act (or face regulatory action);
2. Have specified policies (including access audit and plan) in place and follow them;
3. Retain and support the role of EDOs; and
4. Undertake EDI training (a minimum number of hours per year)

Question 23: How can we effectively gather and incorporate feedback from those affected by the new rules to ensure continuous improvement? What mechanisms should be in place to evaluate the effectiveness of the new rules in achieving their intended outcomes?

152. The Bar Council receives constant feedback and information about the impact of regulation through close contact with barristers and spending time in chambers. For example, we understand the impact of changes to recruitment practices because chambers have fed back to us that recent interventions have resulted in a reduction in recruitment of people from underrepresented groups. This feedback has led to us considering if differential outcomes were the result of bias or some other factor. This is a good example of the need for data analysis, iterative, small changes and regular reviews, rather than wholesale changes based on assumptions.

153. EDOs would be an effective focus group/resource which BSB could seek feedback from making the retention of EDOs even more important.

154. The BSB's supervision of action plans would be an effective tool in assessing the effectiveness of the rules, as would analysis of complaints made to the BSB.

155. The BSB should use the data it collects to review progress, with the benefit that relying on unduly burdensome returns from chambers would be unnecessary. It is important to consider appropriate and realistic time-frames – progress also needs to be measured every 5 years as significant change will not happen immediately.

156. Outcomes data needs to be properly contextualised. There are many outcomes which the Bar as a profession can influence, but not all will be within the control of the Bar and these uncontrollable external factors need to be disaggregated from Bar-specific outcome measures.

Bar Council
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For further information please contact:
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ