



The Planning & Environment Bar Association

PROPOSED AMENDEMENTS TO THE EQUALITY RULES CONSULTATION BY THE BAR STANDARDS BOARD

RESPONSE FROM THE PLANNING AND ENVIRONMENTAL BAR ASSOCIATION

Introduction

1. This consultation response is provided on behalf of the Planning and Environmental Bar Association ('PEBA'). PEBA is a specialist bar association comprising practising barristers who specialise in the areas of planning, the environment, local government, and related matters in England and Wales. PEBA members advise and act for clients in all of these areas of law, including landowners, developers, local authorities, Government departments, statutory agencies, non-governmental organisations, charities, and private individuals. PEBA members appear as advocates in all levels of the courts and tribunals, and at planning inquiries and hearings, local plan examinations, and development consent order examinations. Membership of PEBA is open to all barristers who have a significant part of their practice in the fields of planning, the environment, and local government law. PEBA is a non-political entity.
2. This submission has been seen by and is endorsed by Tom Cosgrove KC, Chair of PEBA, by Melissa Murphy KC, Vice-Chair of PEBA, and by the PEBA Committee including Victoria Hutton the Equality and Diversity officer.
3. This submission responds to questions 1, 7(a), (b), 15, 16, 17 and 18. PEBA has focused on the questions which it considers are most relevant to its members. As can be seen from the below, PEBA generally agrees with the draft representations of the Bar Council, dated 15 November 2024 ('BCDR') and these are referenced below.
4. Questions 15 and 16 relate to recommendation 10 which is the BSB's recommendation with regards to accessibility of premises. PEBA considers that, given the expertise of its members, it is particularly well placed to comment on that recommendation and does so below.
5. The consultation document states (at para.1): 'The Bar should be a profession open to people from any background who have the aptitude, with equal opportunities to progress for everyone.' PEBA wholeheartedly agrees with this goal.
6. PEBA considers that a core part of its role is to do what it can as a specialist bar association to ensure that the planning and environmental bar is 'open to people from any background who have the aptitude, with equal opportunities to progress for everyone'.
7. PEBA has an appointed equality, diversity and inclusion ('EDI') officer, however responsibility for furthering the achievement of equal opportunities does not stop with that officer and is the concern of the entire committee.
8. PEBA has taken and is taking a series of active steps to further equal opportunities. This ranges from outreach events to students and others who are interested in the planning and environmental bar (the most recent of these took place in November 2024), supporting a mentoring program for people with backgrounds which are underrepresented at the bar, and commissioning focused research into the inequality of earnings at the planning and



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environmental bar with a view to using this as a platform to consider how PEBA can best support chambers' in addressing these issues.

9. PEBA agrees that: (a) unequal outcomes in recruitment, work distribution and progression, (b) inconsistency in making reasonable adjustments and offering flexible working, (c) reports of bullying, harassment and victimization, and (d) failure to create an inclusive culture are key challenges for the bar (list provided at para.2 of the consultation document).
10. However, PEBA shares many of the concerns of the Bar Council with regards to the proposed changes to amend the Core Duty to include a positive duty on barristers to 'act in a way that advances equality, diversity and inclusion' ('PCD8'). PEBA has considered the BCDR and makes the following comments in light of them.
11. PEBA is concerned to note that the view of the Bar Council is that the proposals are unlawful for a number of reasons (paras 12-13 and 48-62 of the draft representations). PEBA has not taken its own advice on this issue but considers that the matters raised by the Bar Council are serious ones and that they should be carefully considered by the Bar Standards Board.
12. PEBA notes the Bar Council's comments on progress on EDI at the Bar (paras 14-17 of the BCDR). PEBA considers that the efforts it has made to promote equality diversity and inclusion chime with those mentioned by the Bar Council.
13. With regards to the specific questions asked by you:

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)

14. Paragraph 31 of your consultation document states:

'We propose that the Core Duty be amended to make it a proactive duty to 'act in a way that advances equality, diversity, and inclusion'. It is important that every barrister sees this as a duty that applies to them in their professional role, and that the BSB is able to take action against behaviour which works against equality, diversity and inclusion.'
15. PEBA considers that PCD8 as currently drafted enables the BSB to take action against behaviour which works against equality, diversity and inclusion.
16. PEBA agrees with the comments of the Bar Council that PCD8 would impose duties more onerous than those included under s149 of the Equality Act 2010. It shares the concerns of the Bar Council set out at paragraph 21 of their draft representations.
17. We also share the concerns of the Bar Council that it is unclear as to what compliance with the PCD8 would require. This is not clear from the consultation document. This may well mean that effective enforcement would be difficult and the core duty would ultimately be ineffective. In light of this the intention behind the PCD8 may well not be realised.
18. At paragraphs 25-3 the BCDR highlights the difficulty that the requirements to 'promote' and to 'advance' are different things. PEBA agrees that this adds to the confusion that it is unclear what would need to be done to satisfy the proposed new Core Duty. Similarly PEBA agrees with paragraphs 33-37 with regards to concerns over a lack of clarity regarding the concepts of EDI.
19. PEBA agrees that there is a risk that the PCD8 could in practice conflict with a barrister's duty to the Court and to their clients (raised at paragraphs 39-42 and 53-60 BCDR). PEBA particularly

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agrees that concerns surrounding the conflict between PCD8 and existing Core Duties 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.' (para.42 BCDR).

20. If PCD8 is to be adopted then there will be a need for clear guidance as to how it should be complied with where it conflicts with other duties. Though, as the Bar Council highlights it is difficult to see how such guidance could be drafted (paras 63-69 BCDR).
21. The Bar Council is correct to highlight that a lack of clarity over what would be required by individual barristers is likely to mean that enforcing any new Core Duty would be extremely difficult (paras 43-47 BCDR).

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

22. PEBA supports the proposed requirement for barristers chambers to have mandatory policies as listed in paragraph 6(a)-(e) of the consultation document.
23. However, PEBA shares the concerns of the Bar Council that a requirement for an 'Allocation of unassigned work policy' risks a too-narrow approach being taken by chambers. As the Bar Council notes (at paragraph 90-20 BCDR), the allocation of unassigned work is just one aspect of the fair allocation of work and focus on this alone risks a 'tick box approach' to an overly narrow issue. As the Bar Council highlights a broader policy objective which covers all aspects of work distribution including marketing opportunities, led work, practice development and earnings monitoring as well as unallocated work distribution is likely to be more impactful.

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

24. PEBA agrees with the Bar Council that there should continue to be policy templates covering the minimum standards required. Further, that those policies should be readily accessible by all members (paras 93-96 BCDR).

Question 10: Do you agree with our proposed requirements to improve access to premises of chambers and entities for disabled people?

Question 11: Is the requirement, set out in Recommendation 10, a proportionate means of achieving the equality outcomes of the 'General Equality Rules'?

25. Whilst PEBA acknowledges that the lack of access to premises can pose significant barriers to the recruitment and progression of disabled barristers, PEBA considers that recommendation 10 is unworkable. On that basis PEBA does not agree that it is proportionate means of achieving the equality outcomes of the 'General Equality Rules'.
26. The BSB consultation document refers to the need for planning permission (see paragraph 61) but does not refer at all to the need for listed building consent ('LBC') under section 7 and 8 the Planning (Listed Buildings and Conservation Areas) Act 1990. A proposal to alter a listed building in a way that affects its character or appearance as a building of special architectural or historic interest requires LBC. Effecting such works without LBC is a criminal offence (see section 9).

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27. Further, in considering applications for planning permission decision makers are required to comply with ss66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990. These provide, as relevant:

Section 66(1) 'In considering whether to grant planning permission or permission in principle for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

Section 77(1) 'In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.' (subsection 2 includes the Planning Acts).

28. The Court of Appeal has confirmed that these statutory duties amount to a decision maker giving 'considerable importance and weight' to harm to the setting of a listed building and also to harm to the character and appearance of conservation areas (*Barnwell Manor Wind Energy Limited v East Northamptonshire District Council* [2014] EWCA Civ 137).

29. National policy tests set high bars for harm to heritage assets. The current version of the National Planning Policy Framework provides, *inter alia*:

'205. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.

206. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of:

- a) grade II listed buildings, or grade II registered parks or gardens, should be exceptional;
- b) assets of the highest significance, notably scheduled monuments, protected wreck sites, registered battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional

207. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:

- a) the nature of the heritage asset prevents all reasonable uses of the site; and
- b) no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
- c) conservation by grant-funding or some form of not for profit, charitable or public ownership is demonstrably not possible; and
- d) the harm or loss is outweighed by the benefit of bringing the site back into use.

208. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.'

30. It is possible that some accessibility works would not require planning permission as they would not fall within the ambit of "building operations" or they will be works for the improvement or alteration of a building which affect only the interior of the building or do not materially affect

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the external appearance of the building (they would not therefore be ‘development’ for the purposes of s55(2) of the Town and Country Planning Act 1990). However, many would. Where works do not require planning permission they are likely to require listed building consent where the building is listed, even where the works are purely internal or small in scope. Many chambers within the Inns of Court (and no doubt, outside of the Inns) are listed. The need for listed building consent is not recognised at all in the BSB Consultation Document.

31. In light of the statutory duty and policy context (set out above) it will be very hard for all chambers to get listed building consent (and planning permission, where required) in time to meet your proposed five-year deadline, or indeed at all.
32. We note that the premise of the BSB’s consultation on access to premises is that the case for applications for permission for building alterations would be strengthened if the BSB imposed the proposed a regulatory requirement in relation to the accessibility of premises. PEBA considers that this premise is seriously flawed and that such a regulatory requirement is unlikely to assist. PEBA considers that it is unlikely that a local planning authority would take into account the BSB’s proposed regulatory requirement, or give it weight if it was taken into account, because it has expressly been created, outside the normal planning system, to seek to influence decision-making. This is the purpose stated expressly in the BSB consultation document. It is possible that this will be regarded as an illegitimate attempt to influence the system from outside.

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)

33. PEBA has an EDI officer and considers that it is important that there is someone on the PEBA committee who is tasked with driving forward the objective to ensure that the planning and environmental bar is ‘open to people from any background who have the aptitude, with equal opportunities to progress for everyone’. PEBA’s positive experience of the benefits of having an EDI officer means that it has considerable sympathy with the Bar Council’s strong objection to the removal of mandatory requirements on chambers to appoint these officers (paragraphs 128-130 BCDR).

Question 18: Do the prescriptive requirements within the rules: (a): enable barristers to take a reflective approach to achieving the equality outcomes? (b): ensure specific, measurable and timely action is taken to address disparities?

34. PEBA agrees with the response of the Bar Council in that it does ‘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