Discrimination Law Association

THE DISCRIMINATION LAW ASSOCIATION

RESPONSE TO:

THE BAR DRAFT EQUALITY AND DIVERSITY CODE FOR THE BAR

Introduction: The DLA

1. The Discrimination Law Association ('DLA') is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

2. The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of over 400 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the

main, persons concerned with discrimination law from a complainant perspective.

3. We are a company limited by guarantee.

The Draft Code

4. The DLA welcomes the Draft Equality Code and congratulates the drafters of it for their efforts.

5. We endorse a great many of the recommendations contained within the Code. There are some areas which we consider could be usefully improved or expanded upon and we make suggestions for the same below.

6. We would be delighted to meet with those involved in the final drafting process if this would be considered useful.

Section 1: Action Areas

A. Recruitment: Pupils and Tenants

1. We consider that express reference should be made to the fact that discrimination by barristers on the ground of sex, race, disability, sexual orientation and religion or belief in recruitment is unlawful.

2. We consider that there should be a specific reference to sexual orientation and religion and belief (or non belief).

3. By way of example only, paragraph 1.13 should expressly state that questions about sexual orientation and religion and belief should be avoided as they will almost always be inappropriate.

4. Guidance on avoiding discrimination on these grounds can be found in the *ACAS Codes* (Sexual Orientation and the Workplace; Religion or Belief and the Workplace).

5. **Paragraph 1.2:** We particularly welcome the Code's specific recommendation as to the inclusion of positive action statements in advertisements by the express encouragement of applications from those who are under-represented in Chambers. We also consider that the Code should include guidance that the DDA permits positive discrimination so that discrimination in favour of disabled persons is lawful[1] and may be considered appropriate where they are underrepresented in Chambers.

6. In addition, we consider that the guidance should include guidance on making reasonable adjustments in relation to the 'application' stage of the recruitment process (not merely interview) which may require application forms to be provided in a particular format etc.

7. **Paragraph 1.5:** The Code recommends that shortlisting is carried out by reference to 'relevant' criteria. We recommend that it should be made clear that such criteria should be determined *in advance* of the recruitment process (it would be good practice to draft a 'job or post description' and a 'person specification' to achieve this). It is very bad practice to agree the criteria once the applications have been seen. Such an approach has the advantage too of allowing the application forms to be drafted in a way which allows candidates to address the criteria.

8. **Paragraph 1.16:** The DLA notes that Chambers' are encouraged to monitor and review the success rate of applicants for pupillage (by reference to gender, race etc). We recommend that in addition to the duty to monitor and review, chambers should be advised to take steps

[1] Because, of course, non - disabled people do not have rights conferred upon them under the DDA. See, the DRC Draft Employment Code which condones the same.

to *redress* observed discrepancies so as to achieve the aim of diversity in Chambers.

9. **Paragraph 1.21:** The DLA notes that paragraph 1.21 contains a complete prohibition on private arrangements for taking pupils. We endorse in general terms the Code's attempt to proscribe private arrangements. However, we are aware that this blanket restriction may adversely affect members of the overseas bar who seek to gain experience in the UK but do not seek, unlike UK based applicants, to be remunerated either at all or at the level approved by the General Council of the Bar for UK pupils. Such "overseas" applicants can often be established practitioners who are able to fund their pupillages privately or may be eligible for Commonweath and/or other funding for the completion of training which is relevant to practice in their home countries. It is also worthy of note that the General Council of the Bar affords Commonwealth applicants "special admission to the Bar of England and Wales to train in the UK (including 2 years practice at the Bar of England and Wales) on the undertaking that such trainees will return to their home countries after the prescribed period. Such applicants may indeed have private funding and their attempts to make use of the special admission procedure could be thwarted to an overly restrictive approach to private pupillage arrangements.

10. The DLA therefore recommends that the prohibition on private arrangements for pupillage be dissapplied in respect of the training of members of an Overseas bar seeking to gain work experience at the UK Bar and to return to their home countries thereafter.

11. **Paragraph 1.28:** We consider that the recommendation that 'references and assessments in relation to the candidates' demonstrated abilities and potential be obtained from a wide range of sources' be considered carefully. There is a danger (a real one at the Bar) that 'contacts' are collected and that the networking which can exclude certain groups is relied upon to benefit candidates from certain

backgrounds. There should be no replication of the now discredited 'secret soundings' that we saw in the old Silk (and judicial appointment) competitions. For starter tenants, the assessment of evidence demonstrating that they meet the criteria should be principally by objective assessment; by the production of advices or pleadings for example. Where referees are relied upon they should be limited in number (say, three) and should be selected by the candidate themselves.

12. **Paragraphs 1.32-1.34:** The Code creates an exception to the requirement that the selection of Tenants be by way of an open competition (as described at paras. 1.1-1.18). The established practitioner exception permits chambers to recruit without advertisement where the potential recruits are "established practitioners with particular experience or expertise in the fields in which Chambers practises". It is suggested that such recruitment might be justified in terms of Chambers' "business needs" and "the skills of those recruited". The DLA accepts that there might in certain circumstances be a business need for this kind of recruitment. However, it is our view that the threshold set for the circumstances in which this exception might apply is set too low in the Code as currently drafted.

13. The DLA recommends that the established practitioner exception should only apply where potential candidates are "exceptional candidates with significant experience or expertise in the fields in which Chambers practices."

14. In addition, we consider that the possibility for indirect discrimination – at least – occurring in non - advertised recruitment should be very clearly stated and it should be made clear that such recruitment will usually not be justified. Approaches by barristers, singular or in groups, are usually made by barristers who are known to individuals in chambers. Where Chambers are dominated by one group defined by

reference to race, gender or class then the danger of indirect discrimination is very real. Unless a 'real business need' can be demonstrated in the particular case, such recruitment is likely to be unlawful.

15. **Para.s 1.36 – 1.39 Further Guidance.** We consider that links to the EOC; CRE; DRC and ACAS Codes should be included.

B. Fair Access to Work

16. **Paragraph 1.41:** The DLA welcome the guidance that procedures should be in place to ensure that patterns of instruction and briefing are transparent and open to scrutiny but are concerned that this is qualified by the expression 'where appropriate'. It is difficult to see when it would not be appropriate. We suggest that the words 'where appropriate' be deleted.

C. Maternity, Paternity and Parental Leave

17. **Paragraph 1.57:** The DLA welcome the requirement that Chambers have written policies on maternity, paternity and parental leave.

18. We are concerned that the Code recommends that such a policy should include particulars of rent free periods etc of maternity and paternity leave but in the case of 'parental leave' only 'if appropriate' (second bullet point). We consider that it would always be appropriate and these words should be deleted. Of course, 'parental leave' may be particularly relevant for partners in same sex relationships (where a female partner may be neither the child bearing partner or the 'father') and provision for benefits relating to only 'maternity' and 'paternity' may be itself discriminatory on grounds of sexual orientation.

19. **Paragraph 1.59:** Similarly the Code recommends that 'men; should be given one month's leave on the birth of a child for whom they have or share responsibility. This should not be limited to men. Women in

same sex relationships should enjoy the same entitlement where their partners give birth – provision otherwise is discriminatory.

20. **Paragraph 1.60:** The provision on adoption leave is unclear. Is an adopting parent to enjoy 6 months or one months leave? We consider that in such circumstances (and to ensure no discriminatory assumptions are applied) an adopting parent should be entitled to claim 6 months leave.

21. **Paragraph 1.63:** We consider that it should be made expressly clear that disadvantaging a woman during maternity leave (by not keeping her informed of opportunities etc) will be unlawful.

D. Flexible and Part Time Working

22. **Paragraph 1.68:** We recommend that in addition to the reasons given for the importance of retaining women at the Bar, it should be stated that it is a matter of constitutional importance. This is because the loss of women from the Bar reduces the number available for judicial appointment.

E. Harassment

23. **Paragraphs 1.74:** The DLA consider that the definition of harassment sets the threshold a little too high. Firstly, intention will usually be *irrelevant*, most particularly in the field of sexual harassment where the EC Code of Practice applies: "The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive. Sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute sexual harassment if sufficiently serious. It is the unwanted nature of the conduct which distinguishes sexual harassment from friendly behaviour, which is welcome and mutual." At paragraph 2.19 there is no link to the definition of sexual harassment. The key issue is

whether the conduct is unwanted not whether offence was intended and this should be made more explicit in our view. Secondly, we consider that it should be made explicitly clear that conduct which might amount to harassment where it is grounded in sex, race, disability, sexual orientation, or religion or belief (or non belief) is particularly objectionable and unlawful.

24. **Paragraph 1.79:** Whereas there are examples of the kind of behaviour which may amount to harassment, there is no specific reference is made to harassment based on race, disability, religion or belief or sexual orientation. We consider that such examples should be given.

25. **Paragraph 1.80:** We consider that it is appropriate to include within the identified persons who might be harassed not just members/pupils and staff but also those temporarily in Chambers, for example, mini pupils and work experience trainees. In addition harassment of those using Chambers as service users (solicitors; clients etc) *must* be included. There has been at least one widely reported racial harassment (racist abuse) case involving a barrister and outdoor clerk and there may be others that have not received such publicity.

F. Complaints and Grievances

26. **Paragraph 1.83:** We consider that the Code should recommend any grievance procedure should be brought to the attention of those temporarily based in chambers in addition to staff, members and pupils, for examples mini pupils and work experience trainees (who might be particularly vulnerable to, for example, harassment).

27. **Paragraph 1.93:** We consider that the actions included under the 'remedies' heading should include disciplinary action and even expulsion in appropriate cases (subject of course to the severity of any discrimination/harassment found).

G. Service Provision

28. We consider that the service provision section requires significant revision:

    (a) It contains no reference to discrimination in service provision where it is connected to race (unlawful under Section 20 RRA); sex (unlawful under Section 29 SDA); sexual orientation and religion or belief. There is no explanation for these omissions. We are aware of at least one high profile case in which a barrister was alleged to have racially abused an outdoor clerk. There should be no complacency about the possibility of discrimination on all objectionable grounds in service provision and express guidance should be provided.

    (b) The guidance on disability,

        i. Should ensure that 'disability' is explained as meaning the legal concept of disability under the DDA (such concept is highly controversial and has no autonomous meaning);

        ii. Should be clearer. We consider that this section is a little dense. We accept this is a complex area of law but as currently drafted it is difficult to work through; not clearly ordered; a little inconsistent and repetitive. For example paragraph 1.106 states that certain duties are owed to 'a disabled person' (and the bullet points thereafter repeat the same). In fact as is properly described in 1.114 the duty is to disabled people at large and thus is anticipatory in nature. We consider that examples would be useful in this area (and we address this further below).

        iii. Should be reviewed for legal accuracy. In paragraph 1.106 it is said that a failure to make a reasonable adjustment can be justified – this requires further clarification following the decision of the CA in *Collins* and the HL in *Archibald*. (which we appreciate have been recently decided).

H. Staff in Chambers

29. This section is extremely brief. Whilst it is appropriate to refer back to earlier chapters, we consider that express reference should be made to e.g harassment; disability discrimination; discrimination during the currency and post employment – even if in brief. The danger otherwise is that the message maybe sent that regulation in relation to staff which deserves a discrete – but short - chapter is less prominent an issue. This is plainly not so.

Section 2: Legal and Regulatory Framework

30. We consider that further work is required on this Chapter for reasons of legal accuracy. We give some examples below.

31. **Paragraph 2.1:** We consider that the opening paragraph is misleading. It suggests discrimination requires treatment on objectionable 'grounds'. As later described, indirect discrimination; victimisation and disability discrimination does not require the same.

32. **Paragraph 2.7:** As mentioned above, where 'disability' is mentioned it should be made clear that reference is being made to the legal concept of 'disability'.

33. **Paragraph 2.17:** The 'key concepts' we consider are misleadingly described. As to (a) the objectionable grounds should actually be listed for clarity (i.e. not merely 'such as gender and race'). As to (b) the suggestion that the seminar example would be discriminatory if it is arranged 'when it is known that a particular group… will find it difficult to attend' is misleading. Indirect discrimination does not require that the 'discriminator' *knows* of the potential discriminatory impact. This is important because the indirect discrimination provisions require proactive consideration (not merely a reactive response where the discriminatory impact is 'known').

34. **Paragraph 2.18:** It should be made clear that an absence of 'intention' is not a defence to indirect discrimination (as well as direct and victimisation).

35. **Paragraph 2.24:** This paragraph is a little misleading. 'Positive discrimination' is not unlawful where the basis of the treatment is not outlawed by the anti discrimination legislation (e.g. class; educational background) and positive disability discrimination is not unlawful (non disabled persons have no rights to complain of discrimination and positive discrimination is condoned and may be encouraged by e.g. DRC Code).

36. **Paragraph 2.27:** This paragraph is misleading. Where there is a difference in treatment; race etc an inference of unlawful discrimination *will* (not 'may be') be drawn unless a satisfactory non discriminatory explanation is provided post the burden of proof changes.

37. **Paragraph 2.30:** This paragraph is misleading. The burden of proof changes apply not merely to race and sex but all prohibited grounds (see: Regulation 29 Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661; Regulation 29 Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660) **.**

General Comments

38. We have not been asked to make comment on the model policies. And have not done so. We would be happy to do so if that would be welcome.

39. As stated above, the DLA supports the existence of a draft Code and compliments its authors for drafting an excellent working document.

40. We consider that value would be added to the practical usefulness of the code by the inclusion of more **practical examples**. Practical examples can be found in the Codes issued by the statutory

Commissions (and the draft Codes before Parliament in the case of disability and currently being consulted on in relation to race) which could be usefully adapted for the Bar's Code.

41. We also consider that the Code should recommend training **in equal opportunities; diversity and the impact of this Code** of all barristers and staff/clerks where they have responsibilities which fall within scope of Code. We consider this crucial to the successful implementation of the Code.

Conclusion

42. We welcome this draft Code and appreciate the opportunity to comment upon it. We would be delighted to meet with the drafters to discuss any aspect of this response if that would be helpful.

Discrimination Law Association

03 July 2004