



Bar Council Equality and Diversity Guides Discriminatory Instructions: Guidance for Chambers

Under the Equality Act 2010 (“EqA”) it is unlawful for anyone (including solicitors, clients and clerks) to select counsel on the basis of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, or sexual orientation. These are all protected characteristics.

1. Under section 47(6) EqA, a person must not, in relation to instructing a barrister:
 - (a) discriminate against a barrister by subjecting the barrister to a detriment;
 - (b) harass the barrister;
 - (c) victimise the barrister.
2. This replaces provisions in previous equality legislation (including the Sex Discrimination Act 1975 and the Race Relations Act 1976) which prohibited discrimination by any person against any person in relation “to the giving, withholding or acceptance of instructions”
3. Discrimination can be:
 - (a) Direct – treating someone less favourably because of a protected characteristic; or
 - (b) Indirect – applying a provision, criterion or practice which puts those who share a protected characteristic at a particular disadvantage compared to those who do not.
4. Indirect discrimination can be “objectively justified” by showing that the provision, criterion or practice was a proportionate means of achieving a legitimate aim. For example, asking to instruct a QC in chambers may be indirect age discrimination, but it could easily be justified by the need for someone with suitable experience to handle the case. Requiring a fluent Turkish speaker may also amount to indirect race discrimination, but could be justified if much of the paperwork was in Turkish. Direct discrimination cannot be justified (unless it is direct age discrimination), except by way of an ‘occupational requirement.’ It is difficult to conceive of any occupational requirement which would arise in the context of legal instructions.
5. Barristers and their clerks along with instructing solicitors should note the BSB Handbook https://www.barstandardsboard.org.uk/media/1933294/bsb_handbook_version_3.3.pdf which states:
 - *CD8 You must not discriminate unlawfully against any person*

- *rC12 You must not discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender re-assignment, sexual orientation, marital or civil partnership status, disability, age, religion or belief, or pregnancy and maternity*
- *rC89 Taking into account the provisions of Rule rC90, you must take reasonable steps to ensure that:*
 - .6 all non-authorised persons working in your chambers (irrespective of the identity of their employer):*
 - .c are made clearly aware of such provisions of this Handbook as may affect or be relevant to the performance of their duties;*
 - .d do nothing which causes or substantially contributes to a breach of this Handbook by any BSB authorised individual or authorised (non-BSB) individual within Chambers, and all complaints against them are dealt with in accordance with the complaints rules;*
- *rC110 You must take reasonable steps to ensure that in relation to your chambers or BSB entity:*
 - .3 the following requirements are complied with:*
 - Fair access to work*
 - .i if you are a self-employed barrister, the affairs of your chambers are conducted in a manner which is fair and equitable for all members of chambers, pupils and/or employees (as appropriate). This includes, but is not limited to, the fair distribution of work opportunities among pupils and members of chambers;*

6. Particular examples of discriminatory instructions might include a request from solicitors to barristers' clerks for a female barrister to prosecute a rape case, or for an Asian barrister to advise/represent Asian clients. In such situations, all of the following would be unlawful under the EqA:
 - (a) For a solicitor to give instructions to a female barrister because of her sex, thereby treating a comparable male barrister less favourably;
 - (b) For a solicitor to give instructions to a barrister because he is Asian, thereby treating a comparable non-Asian barrister less favourably (for the purposes of the EqA, 'race' includes colour, nationality and ethnic or national origins);
 - (c) For a female barrister to accept instructions, knowing that she is being instructed for reasons related to her gender, and where a comparable male barrister in chambers will be denied an opportunity to gain experience or otherwise suffer a detriment; and
 - (d) For a barrister's clerk to comply with a client's request to allocate work to an Asian barrister, or suggest someone on the basis that they are Asian.

7. It would be equally unlawful in relation to any of the above for the instructions to be given to a male or non-Asian barrister to the detriment of a female or Asian colleague (or in relation to any of the other protected characteristics). Chambers should also be aware that, as employers, they can be liable under s. 109(1) EqA for any acts of unlawful discrimination by their clerks. Aiding, instructing, causing or inducing an act of unlawful discrimination act may also be unlawful under ss. 111-112 EqA.

8. Requests by solicitors of the kind outlined above would also be in breach of their own professional obligations, set out in the Solicitors Regulation Authority Handbook 2011. Members of the Bar risk being in breach of the Bar Code of Conduct, which prohibits discrimination. The new Bar Standards Board Guidelines on the Equality and Diversity Provisions of the Code of Conduct provides, in Section 7, for non-discriminatory allocation of work within chambers. Paragraph 13 of Section 7 advises as follows:

“Should the solicitor refuse to modify or withdraw the request and continue to insist on a discriminatory allocation of work, the work should be politely refused, the clerk should make a full note of the incident immediately, and the solicitor should be reported to his or her professional disciplinary body.”

9. Such requests are often justified by the claim that it is what the client/complainant wants. It may be, however, that a solicitor making such a request does not really have instructions to discriminate, nor does the solicitor wish to discriminate. It may be that the solicitor has a client who is very worried and anxious about the hearing. It may be that the solicitor has chosen to ask for a female counsel when what they really want is a sensitive counsel. A sensitive counsel may be male or female.

Example

A solicitor makes a request for a male barrister to a set of Chambers he regularly instructs. The clerk follows Chambers policy and first asks the reason for that particular requests. The solicitor explains that what he wants is an aggressive cross-examiner. As the real problem has been identified, the clerk is then able to recommend counsel on a fair basis. Tackling the matter in this way ensures it is dealt with amicably and fairly.

10. Chambers who have adopted a positive approach to dealing with these issues have found that rather than creating problems for themselves they have been able to improve their working relations with solicitors and provide a better service to clients by providing counsel better suited to the needs of the client.
11. As well as the above guidance, Chambers would benefit from having a policy in place along the following lines:
 - i. Where the client/solicitor has stated to the chosen barrister or it is apparent that the choice of barrister is discriminatory or where this has been stated or is apparent to the clerk, then steps should be taken to ensure that the discrimination is dealt with. The stages of dealing with this problem are normally to:
 - (a) Ask the solicitor why the choice has been made;
 - (b) Identify the root cause of the problem – for example it may be that the client believes there are ‘genuine’ reasons for the particular choice of barrister and it will have to be considered whether the choice is nevertheless discriminatory;

- (c) Share the problem (another person in the clerks room or in chambers may well be able to help to diffuse the position and identify the real problem);
 - (d) Keep a proper note;
 - (e) Be polite but firm, clear and fair.
- ii. Where the solicitor/client insists on a discriminatory allocation of work then instructions should be refused.
- iii. Simultaneously, where the clerk is made aware that a discriminatory allocation is proposed there should be a mechanism for chambers to be informed so that an informed decision can be made, (whether through the Head of Chambers or the Chambers Equality Officer). The clerk should be made aware of the procedure and that Chambers are at risk if the clerk does not ensure that chambers are kept informed.

If you require additional assistance, or have any queries on discriminatory instructions, Bar Council can offer advice. Please contact: Equality@barcouncil.org.uk

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