



The Regulation of Non-Professional Conduct – BSB response

Introduction

1. Between July 2022 and October 2022, the BSB undertook a public consultation on our proposals to clarify where we think the boundaries lie in the regulation of conduct that occurs in a barrister's non-professional life and on social media. The consultation paper can be found [here](#). This report summarises the responses received and the BSB's response to the same.

The consultation

2. To provide clarity about when we may have a regulatory interest in social media use and non-professional conduct, we consulted on newly developed guidance on the regulation of non-professional conduct (**Non-Professional Conduct Guidance**), revised social media guidance and proposed changes to guidance in the BSB Handbook (gC25 to gC28).
3. The consultation asked a series of questions about our proposals, including whether we had struck the right balance between the public interest in preserving public confidence in the profession/the individual barrister, and a barrister's individual rights which are guaranteed under the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR). We also sought general feedback on our proposals and on a number of case studies that we had developed for inclusion in both the Non-Professional Conduct Guidance and revised Social Media Guidance.
4. We received 26 responses to the consultation. Of the responses, 15 were from individual barristers or groups of barristers, three were from other legal professionals, two were from representative or regulatory bodies within the legal profession (the Bar Council and the Solicitors Regulation Authority (**SRA**)), three were from Specialist Bar Associations (the Chancery Bar Association, Personal Injuries Bar Association and the South Eastern Circuit), two were from campaigning organisations (Sex Matters and Behind the Gown), and one was from a barrister organisation (Clerksroom).
5. Not all respondents answered all of the questions. A significant proportion of responses received (six) solely or predominantly responded to the consultation in order to raise issues with one of the case studies that had been included in the revised Social Media Guidance which addressed misgendering on social media – these six responses came from one of the campaigning organisations, three individual barristers/groups of barristers, and two other legal professionals.
6. In responding to certain questions, some respondents gave general feedback rather than (or in addition to) direct replies to the consultation questions. Throughout this paper, where such comments are relevant to other questions, they have been included in the summary of responses to those questions. However, this paper does not seek to summarise each individual point that has been raised by respondents and much of the feedback can be grouped together by theme.

7. We are very grateful to all those who took the time to respond to the consultation. The responses have greatly assisted us in developing our final guidance and have led to a range of changes which we have set out in this paper.

Guidance on the Regulation of Non-Professional Conduct

Q1: Overall, have we struck the right balance between the public interest in preserving public confidence in the profession and individual barristers and a barrister's rights which are guaranteed under the Human Rights Act 1998 and the European Convention on Human Rights?

8. While this question was intended to relate to the draft Non-Professional Conduct Guidance specifically, some responses also addressed (or only addressed) the BSB's revised Social Media Guidance. In some cases, it was not clear whether comments respondents made related to the draft Non-Professional Conduct Guidance specifically, or to the BSB's approach to non-professional conduct in general.
9. Of the 26 responses received, nine broadly agreed that the BSB had struck the right balance, 16 disagreed, and one response said that it was difficult to determine and would depend on how the Non-Professional Conduct Guidance was applied in practice.

*"It is difficult to answer this question in the abstract because we understand that the question of whether the right balance is struck in any particular case will depend on a risk assessment and balancing exercise before a decision is made."*¹

10. The responses that expressed general agreement with the BSB's position were from two legal regulatory/representative bodies, two individual barristers, two other legal professionals, one barrister organisation, one Specialist Bar Association, and one campaigning organisation.

*"In our view, the right balance appears to have been struck. As we note below, the position in respect of barristers who commit criminal conduct remains effectively the same. We agree that there is no need for change and the balance is in the right place. We also think that the BSB has more or less struck the right balance in relation to non-professional non-criminal conduct, subject to our comments below."*²

*"Both guidance documents make clear that barristers' ECHR rights may be engaged by proposed regulation. Until the guidance is applied in practice it is difficult to properly assess whether the right balance has been struck. However, the guidance acknowledges a potential tension, and emphasises the nexus that must exist between the non-professional conduct and professional practice before a regulatory interest exists. As such, an appropriate balance appears to have been articulated."*³

11. The majority of the responses that disagreed with the BSB's position (13) were from individual barristers or groups of barristers, but also included a campaigning organisation, a Specialist Bar Association, and other legal professionals. There was a range of reasons why those respondents disagreed with the BSB's position. Some thought the new Non-Professional Conduct Guidance was unnecessary, and others thought that there should not be any regulation of a barrister's conduct in their personal or private life. One respondent felt that the draft Guidance was not sufficiently precise to ensure that its application would be compatible with barristers' human rights – in particular, their rights to freedom of expression (Article 10) and respect for their private lives (Article 8).

¹ Personal Injuries Bar Association.

² South Eastern Circuit.

³ Behind the Gown.

12. Four responses expressed concern that the BSB had not provided evidence that changes to the current regime were necessary.

“Although the balance may be struck where the non-professional conduct is of a criminal nature, the proposal in respect of non-criminal conduct is wide and there does not appear to be an evidence basis for this extension of scope or indeed its likely impact/effectiveness.”⁴

“I would be interested to know what is the nature and extent of the data relied on by the BSB in support of:- the proposition that in general the public’s confidence in the Bar is at such a low ebb that it requires to be bolstered; the proposition that the remedy for the public’s lack of confidence in the Bar is the regulation of a barrister’s private life; and the proposition that the regulation of a barrister’s private life would not be regarded as a disproportionate interference with his human rights.”

13. Five responses argued that the changes amounted to an unwarranted and significant expansion of the BSB’s role. Three responses argued that the risk of the actions of a single barrister damaging public confidence in the profession as a whole was very low, and therefore the BSB’s position was not justifiable. Other issues raised were that the changes would impact on the wellbeing of the profession (mentioned in two responses), and that the existing rules were sufficient to achieve the BSB’s stated objectives (mentioned in two responses).

“The amendment to the guidance represent a significant expansion of the BSB’s regulatory function, for which no clear need has been identified.”

“We think the circumstances in which non-criminal conduct, carried out outside the professional context, could seriously be said to diminish public confidence in the profession as a whole (as opposed to confidence in that particular barrister) are likely to be very limited.”⁵

“It will expose more barristers to complaints made in bad faith and will undermine the good functioning and wellbeing of the profession both as a whole and as individuals.”

14. Many of those who felt that the correct balance had not been struck expressed concerns that the proposed approach would breach a barrister’s human rights, in particular by having a chilling effect on barristers’ rights to freedom of expression (Article 10). This concern was mentioned in eight consultation responses that disagreed with the BSB’s approach. Several highlighted particular areas where the BSB’s approach could risk impacting on areas where barristers should be able to express themselves, such as around areas of public policy, criticism of the judiciary, or the expression of ‘gender-critical’ views.

“As regards regulatory intervention in relation to social media use and freedom of expression as protected by Article 10 of the ECHR and the HRA, I am against any such intervention as disproportionate, unless the individual wrongly professes to express opinions which are his own as representative of the Bar as a profession.”

“The rights of the barrister under Articles 9 and 10 ought to be given much greater weight as compared to confidence in the profession.”

⁴ Personal Injuries Bar Association.

⁵ Chancery Bar Association.

BSB's response

15. The project was initiated in part due to an increase over several years in the number of complaints/reports involving barristers' conduct occurring outside of practice or the provision of legal services (for example, conduct on social media in a personal capacity) through which it was recognised that our existing guidance may not always reflect the circumstances in which we would have a regulatory interest in such conduct. The intention of the project was to clarify, to both the public and the profession, the factors that would be taken into account when considering whether the BSB had a regulatory interest in conduct occurring outside of practice.
16. We do not consider that in developing the new Non-Professional Conduct Guidance we are seeking to expand our regulatory remit. Our proposals do not include any changes to the existing Core Duties and Conduct Rules or to the way they currently apply to barristers. The Guidance is informed and underpinned by the current BSB Handbook and is consistent with our existing regulatory practice and case law. The Guidance therefore seeks to clarify, rather than shift, our regulatory approach to non-professional conduct, and offer guidance on how regulated persons may comply with the terms of the BSB Handbook which they are already subject to. The guidance reflects how we approach our regulation of the Bar and the types of conduct we may have a regulatory interest in.
17. In developing the Non-Professional Conduct Guidance, we had regard to case law, a diversity of academic opinion, and the approach taken by other legal, non-legal and international regulators. We also conducted consumer research in 2021 to gather views from consumers of legal services on the extent to which barristers' conduct in their personal/private lives would affect their decision to instruct them on a legal matter.
18. We have addressed our response to concerns about the impact of our proposals on barristers' freedom of expression (Article 10) in the questions about the revised Social Media Guidance below. However, in the light of more general concerns about the human rights impact of our Non-Professional Conduct Guidance, we have made a number of revisions to the draft Guidance, including to acknowledge that other human rights (beyond Article 8 and Article 10) may be engaged in certain cases. We have also sought to clarify the circumstances in which the BSB may have a regulatory interest in non-professional conduct on the basis of its proximity to the profession.
19. We consider the final Non-Professional Conduct Guidance strikes the right balance between the proper regulation of the profession and the rights of individual barristers. The Guidance makes clear that each case needs to be considered on its individual facts and much will therefore depend on the analysis that is undertaken on a case-by-case basis.

Q2: Do you have any observations on the questions we are proposing to ask when considering whether we have a regulatory interest in non-professional conduct?

20. The questions we had developed in order to identify whether we have a regulatory interest in non-professional conduct were:

Question 1:

Has the barrister been:

- a. Charged with an indictable offence in England and Wales;*
- b. Charged with a criminal offence of comparable seriousness elsewhere; or*
- c. Convicted of, or accepted a caution for, any criminal offence other than a minor criminal offence⁶ (subject to the Rehabilitation of Offenders Act 1974 (as amended))?*

Question 2:

Is the conduct:

- a. conduct which is, or is analogous to, conduct that could breach relevant standards of the BSB Handbook that apply to practising barristers; and*
- b. sufficiently relevant or connected to the practice or standing of the profession such that it could realistically:*
 - a. affect public trust and confidence in the barrister or the profession; or*
 - b. be reasonably seen by the public to undermine the barrister's honesty, integrity and independence*

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

21. Eight consultation responses gave specific observations on the BSB's proposed questions for considering regulatory interest – the remainder of the consultation responses either did not provide any observations or referred to more general comments they had made elsewhere.
22. None of the responses disagreed with the first question regarding the BSB's regulatory interest in criminal conduct.
23. However, we received a number of responses that provided feedback on the second question regarding the BSB's regulatory interest in non-criminal conduct.
24. One respondent highlighted the need for more precision, and suggested that we develop an exhaustive list of non-professional conduct that the BSB may have a regulatory interest in, beyond criminal conduct.
25. Several responses said that the second question was confusing or insufficiently clear – in particular, two respondents had concerns about the reference to conduct that is

⁶ As defined in Part 6 of the BSB Handbook.

“analogous to conduct that could breach relevant standards that apply to practising barristers”. Some thought that wording could be seen as an attempt to bring in rules of the BSB Handbook that do not technically apply to barristers at all times.

26. Another response stated that the document should make it more clear that the second question was an alternative to the first question (rather than both questions needing to be answered in the affirmative, before we would establish a regulatory interest). Respondents also felt that, as drafted, the second question was not easily understood or helpful, as it did not identify the type of conduct the BSB might be interested in.

“The use of the phrase “analogous to” is perhaps slightly confusing, as it suggests that the BSB could have an interest in regulating conduct which was not in fact a breach of any applicable rules or duties.”

“We agree with the first question, as to the commission of a criminal offence. We have some concern as to whether the second question is expressed in a sufficiently helpful way.”⁷

27. Two respondents (including the Bar Council) put forward suggested revisions to the second question which aligned the wording with the relevant Core Duties in the BSB Handbook, while one of those respondents also suggested drafting another subsection to the second question, listing the factors we would take into account when determining whether the conduct is sufficiently relevant or connected to the practice or standing of the profession.
28. One response stated that the BSB’s current position struck a better balance and that the expansion of our regulatory role was unwelcome, and another response stated that more regard should have been given to barristers’ rights to free speech.

“The current guidance that “we are unlikely to treat conduct in a barrister’s private or personal life as a breach of the BSB Handbook unless it involves an abuse of professional position (or involves criminal conduct that is more than a minor criminal offence)” strikes the correct balance.”

BSB’s response

29. We do not consider it is possible or desirable to construct a question or guidance that prescribes all types of non-professional conduct in which the BSB might be interested. Guidance needs to be flexible enough to adapt to different contexts and changes in societal norms that may emerge in the future. The purpose of the Non-Professional Conduct Guidance is to provide greater clarity on the BSB’s approach to considering whether we will have a regulatory interest in non-professional conduct when read alongside the BSB Handbook and the guidance contained within that, and any other relevant guidance.
30. However, on reflection and in light of the helpful responses received, we agree that the previous drafting of the second question in the Non-Professional Conduct Guidance was insufficiently clear.

⁷ Chancery Bar Association.

31. We have re-drafted the second question as follows:

Is the conduct sufficiently relevant or connected to the practice or standing of the profession such that:

- i. it is likely to diminish public trust and confidence in the barrister or the profession; or*
- ii. it could reasonably be seen by the public to undermine the barrister's honesty, integrity or independence?*

In determining whether the conduct is sufficiently relevant or connected to the practice or standing of the profession, we will take into account:

- a) The nature of the alleged conduct; and*
- b) The context and environment in which the conduct is said to have occurred.*

32. The amendments to the second question are designed to remove ambiguous concepts such as “analogous conduct”. Although it stems from case law, we agree that it is not particularly clear or helpful, and might be interpreted as seeking to apply rules of the BSB Handbook which do not technically apply to a barrister outside of practice or the provision of legal services.
33. The amendments also align the wording of the second question more closely with the Core Duties and Conduct Rules in the BSB Handbook, whilst providing a new subsection which indicates the factors that we will take into account when assessing whether conduct is “sufficiently relevant or connected to the practice or standing of the profession”.
34. As there were no concerns about the first question (concerning criminal conduct) we will adopt that question in the form we consulted on, without amendment.

Q3: Are the case studies included in our draft guidance helpful?

35. Ten consultation responses said that the case studies included in the draft Non-Professional Conduct Guidance were helpful or mostly helpful, while six said they were unhelpful.
36. One respondent thought that the case studies were helpful to an extent, but they were weighted towards conduct that was arguably independently unlawful. Some invited more case studies covering situations which may be less easy to identify as situations where the BSB would be interested.
37. Some respondents raised concerns that the case studies generally invoked the Core Duties or Conduct Rules in a way that they felt was not genuinely or sufficiently engaged by the actions described in the case studies themselves, particularly in relation to “integrity”.

“We are concerned that the case studies frequently invoke core duties (in particular, CD3) and rules as a basis for the BSB claiming a regulatory interest in non-professional conduct, in circumstances where those core duties and rules are unlikely to be properly engaged.”⁸

⁸ South Eastern Circuit.

38. Four consultation responses stated that more case studies should be included, for example covering gendered bullying or a barrister's right to participate in a protest, or to illustrate areas that did not fall under criminal conduct but would still engage the BSB's interest.

"I don't believe the case study (Case Study 3) about non-payment of a debt is very useful. Arguably, non-payment of a debt should not have sanctions beyond potential insolvency."

"Case Study 5 – I would hope the BSB, on receiving such a report, would question A's motives in reporting an alleged sexual assault to the BSB but not to the police. It is not the job of the BSB to police the criminal law. I cannot see how a barrister's conduct at a nightclub could be sufficiently connected to a barrister's status / functions as a barrister to justify the BSB's intervention."

"The BSB needs to include a case study which provides an example of gendered experiences, ideally of a male barrister offensively criticising a female barrister for sharing their views about sexual violence trials or the gendered nature and experiences of the law."

BSB's response

39. We have taken on board all the helpful feedback received about the draft case studies in the Non-Professional Conduct Guidance and have amended or developed new case studies which take into account that feedback.

Q4: Do you have any general comments or feedback on our draft guidance on the regulation of non-professional conduct?

40. Eleven consultation responses gave specific observations on the BSB's draft Non-Professional Conduct Guidance – the remainder of consultation responses either did not provide any observations or referred to more general comments they had made elsewhere.

41. Two responses stated that they generally agreed with the BSB's position.

42. Four responses raised concerns that the draft Guidance could restrict barristers freely expressing their views. Two of these responses particularly highlighted concerns about the ability of barristers to express views on public policy.

"I am also concerned that the BSB should not seek to regulate the right of barristers to express views about the state of government, funding, legal aid, and the courts. This guidance may be misused to suggest that such views are incompatible with the duty of the barrister to the court, when plainly that is wrong."

43. Two responses argued that there needed to be more clarity on how the BSB would treat reports from "interested parties" – ie those holding views in conflict to those held by the barrister who was the subject of a report – who could use the BSB's enforcement processes to stifle views with which they disagreed.

44. The response from the SRA stated that their own guidance clarified that the closer any behaviour is to the individual's professional activities, workplace or relationships, and/or the more it reflects how they might behave in a professional context, the more seriously they would be likely to view it – but that where conduct is sufficiently serious to call into

question whether the individual meets the high personal standards expected of a member of the profession they would take action, even where there is no such connection.

BSB's response

45. We value all the feedback provided through this consultation and have revised the final Non-Professional Conduct Guidance to take into account much of this feedback.
46. We respond to concerns about our regulatory impact on barristers' freedom of expression in relation to the questions about the revised Social Media Guidance below.
47. We agree with the SRA that there may be cases where the conduct is so serious that it calls into question whether the individual can meet the high standards expected of the profession, even if it is unrelated to professional practice. We have sought to emphasise this point in the final version of the Non-Professional Conduct Guidance. However, we consider that the second question that we will ask when assessing whether we have a regulatory interest in non-professional, non-criminal, conduct also adequately captures this type of serious conduct. This is because we consider that conduct which is particularly serious (such as dishonesty or discrimination) is likely to be sufficiently relevant or connected to the practice or standing of the profession.

BSB Handbook Guidance (gC25 to gC28)

Q5: Do you consider our proposed drafting changes to the non-mandatory guidance provisions in the BSB Handbook assist in clarifying our approach to the regulation of non-professional conduct?

48. Sixteen consultation responses gave views on whether the proposed drafting changes to the BSB Handbook guidance (at gC25 to gC28) helped clarify our approach – the remainder of responses either did not provide any observations or referred to more general points they had made elsewhere. Of the sixteen responses, ten agreed or broadly agreed that the BSB's drafting changes clarified the approach to non-professional conduct, whereas six disagreed.
49. Of the ten that agreed that the drafting changes helped to add clarity, one stated that further detail in the guidance to explain the threshold for regulatory intervention would be helpful, and another commented that the BSB Handbook as a whole was difficult to navigate.
50. The Bar Council, although broadly supportive of the changes, suggested that the concept of "seriously offensive conduct towards others" (captured in gC25.5) should be changed to "gratuitously offensive conduct towards others", as this was more likely to be an effective definition to pick up when barristers' actions were likely to harm the reputation of the profession.

"We think therefore that the best formula is to refer to conduct which is 'gratuitously offensive conduct towards others'; reflecting the idea that conduct, though highly offensive, which serves to convey an opinion, belief or point of view, and also the strength of conviction with which it is held, is legitimate; but that offensive conduct which goes

beyond what is necessary for those purposes may well cross the boundary into professional misconduct.”⁹

51. Different challenges to the concept of “seriously offensive” conduct as an appropriate yardstick against which to measure barristers’ conduct were also raised in other consultation responses. For example, some respondents argued that whether conduct was “seriously offensive” was too subjective to constitute the threshold for potential regulatory interest and would be open to abuse.

“It might be worth noting the potential for the BSB’s processes to be used by individuals as a way of advancing political disagreements or causes. The BSB should be clear that it is alert to this possibility and will ensure that it does not get involved in such cases.”

“We are concerned about the proposal for gC25 (5) which states that ‘Conduct which is likely to be treated as a breach of CD3 and/or CD5 includes (but is not limited to)... seriously offensive conduct towards others’. This is a subjective criterion and the social media guidance encourages it to be interpreted broadly.”¹⁰

52. Of those that argued the drafting changes did not help with clarity, one stated that the changes to gC26 (which gives an example of a potential abuse of professional position) in particular did not help to clarify the BSB’s approach and they suggested that the example of using professional notepaper could be updated to better reflect modern ways of working.
53. Two respondents stated that the previous guidance was sufficient and changes should not be made.
54. Concern was also expressed that the drafting changes would not represent merely a clarification of the BSB’s approach but would represent an expansion of the BSB’s powers.

BSB’s response

55. Our response to the concerns about whether our proposals amount to an expansion of our regulatory remit is set out above.
56. As regards the concerns raised about “seriously offensive” conduct, we note that this is an existing feature of the BSB Handbook and does not appear to be a source of difficulty in cases that we deal with.
57. Many respondents suggested that “seriously offensive” conduct was too subjective and could be open to abuse. However, we note that the idea of conduct being assessed according to a level of offensiveness already exists in the criminal law (see s127(1)(a) Communications Act 2003) and that case law confirms that whether the appropriate threshold is met is determined by reference to whether reasonable people would consider the communication to be “grossly offensive” (see eg Collins v Director of Public Prosecutions [2006] UKHL 40). “Seriously offensive” is therefore assessed objectively.
58. We do not consider that a threshold based on conduct meeting a certain level of offensiveness, which is more than mere offensiveness, is either unique, subjective, or

⁹ Bar Council.

¹⁰ Sex Matters.

unclear. We would expect decision-makers to consider the question through the eyes of a reasonable person (ie objectively), which is necessary in any event when considering the public impact under CD5 and/or rC8.

59. We also note that our current approach is consistent with that of other regulators, as "seriously offensive" is also used, for instance, in guidance published by the SRA and the Consultative Committee of Accountancy Bodies.
60. We considered alternative formulations suggested by some respondents, but did not consider they were appropriate. For example, the Bar Council suggested that we adopt the concept of "gratuitously offensive" instead. However, we felt that this was insufficiently clear, could create evidential issues in terms of establishing whether or not something was "gratuitous", and pitched the conduct at a threshold that was perhaps higher than the BSB felt was appropriate.
61. However, it must be stressed that retaining the phrase "seriously offensive" does not mean that all conduct which is arguably seriously offensive will be the subject of an investigation and/or other enforcement action. Any report of potentially seriously offensive conduct will first be assessed by the BSB's Contact and Assessment Team to determine whether it discloses evidence of a potential breach of the BSB Handbook, and if so, it will be risk assessed to ensure any proposed enforcement action is appropriate in the circumstances and that any interference with a barrister's human rights is justified.
62. In relation to the feedback received on our proposed amendments to gC26, we considered introducing a more modern example of how an abuse of professional position could arise in relation to use of a chambers email address but decided not to. This was because we recognised that the profession often uses professional email accounts for personal reasons and did not want to imply through amended guidance that this would be prohibited.
63. We have also amended the revised version of gC27 that we consulted on to:
 - amend the reference to "factors" to "questions". This is because the original intention had been to produce a set of factors, but we have developed a set of questions instead; and
 - amend the reference to "private or personal life" to "non-professional life". This change has been made to capture conduct that may occur in different professional capacities (which may include political or academic roles, for example) but which may not be regarded as purely "private or personal". This also aligns the terminology more closely with our Non-Professional Conduct Guidance.

Q6: Do you have any general comments or feedback on any of the proposed drafting changes to the non-mandatory guidance?

64. Three consultation responses expressed general views on the BSB's proposed drafting changes to the BSB Handbook guidance – the remainder of consultation responses either did not provide any observations or referred to points they had made in response to other consultation questions elsewhere.

65. Of these three responses, two stated that they supported the changes, whereas the remaining response expressed opposition to the changes. Of the two responses that supported the changes, one drew particular attention to the changes to gC27, while the other stated that the updated BSB Handbook guidance was an improvement over the previous guidance. The response that opposed the changes stated that they displayed insufficient regard to section 13 of the HRA and Article 9 rights (freedom of thought, belief and religion).

*"We particularly welcome the re-drafting of gC27 to make clear that certain core duties and rules apply at all times and may therefore be relevant to non-professional conduct. As an additional matter, we think it might be useful if gC27 included a reference to the Social Media Guidance in addition to the Guidance on the Regulation of Non-Professional Conduct. In part, this is because social media use appears to generate a large proportion of complaints regarding registered barristers' non-professional conduct."*¹¹

"[The proposed change is] chilling, profoundly worrying, and pays insufficient regard to s13 of the Act and Article 9."

BSB's Response

66. We have decided not to include reference to the Social Media Guidance in the re-drafted gC27 because gC27 is primarily concerned with our approach to non-professional conduct, whereas the Social Media Guidance applies to both professional and non-professional life.

Social Media Guidance

Q7: Do you have any feedback or comments on the new Social Media Guidance?

67. Nineteen consultation responses gave specific observations on the revised Social Media Guidance – the remainder of the consultation responses either did not provide any observations or referred to points they had made elsewhere in response to other consultation questions. Four of these responses expressed support for the changes, and/or argued that revised Social Media Guidance was valuable. The remaining fifteen either expressed concern with elements of the Social Media Guidance or opposed it generally.
68. The most common issue raised by responses that opposed the Social Media Guidance was that it would impact on barristers' freedom of expression (raised in five responses) and/or that the guidance endangered, or should have paid more attention to, barristers' rights under the HRA (raised in four responses). A further – otherwise supportive – response also gave the view that the BSB should have paid more attention to barristers' rights under the HRA when drafting the revised Social Media Guidance.

"Yes. We are concerned at the scope of the BSB's interest in barristers' private lives and cultural debates online as expressed in the social media guidance and case studies. It is concerning that the BSB seeks to restrain barristers from expressing views, beliefs or opinions on social media (in a non criminal/lawful way) on subjects which some

¹¹ South Eastern Circuit.

people/groups may find offensive as opposed to the manner in which they express such unpopular views.”¹²

“Paragraph 15 and 16’s reference to a non-exhaustive list of the guidance is unsafe for the reasons already given in answer to question 1 and which I will not repeat. This lack of safety is especially serious in the context of something that directly restricts a person’s fundamental right to freedom of expression.”

“If this guidance is passed in this form the BSB will be swamped with complaints about any barristers who continue to exercise their article 10 rights in discussing this issue in the public domain. And it will have a chilling effect.”

69. Some responses (including one which was generally supportive of the new Guidance) set out concerns that the “seriously offensive” test was too vague or open to abuse (the BSB’s response to this is set out in our reply to Q5 above). Another issue (raised in three consultation responses) was that “interested parties” may seek to use the BSB’s enforcement processes improperly to stifle barristers’ expression of views with which they disagreed.

“The potential result of the proposed changes is that barristers and their regulator are going to be distracted into litigating intractable social issues, sometimes at the behest of individuals whose motives are dubious.”¹³

“In my view the guidance should make clear that the BSB will address the possibility that complaints are made for ulterior purposes when considering whether (a) the non-professional conduct complained of might have an impact on the public’s trust and confidence in the barrister, as opposed to a section of the public; and (b) whether regulatory steps (or further steps) are objectively appropriate or necessary.”

70. Some responses raised issues with particular sections of the revised Social Media Guidance.

“Paragraph 19 is even more concerning, to the point of deeply disturbing, in that it suggests that the BSB is arrogating to itself the power to police the content of people’s views that they may express. This is plainly unsafe, and plainly incompatible with Article 10.”

“The non-exhaustive list in Paragraph 16 of examples of conduct on social media that may amount to misconduct is far too broad, particularly when we see how easy to frame almost any kind of conduct as falling within these allegations.”

“In paragraph 20, I would suggest adding a paragraph (d), explicitly stating that the BSB will take into account the evident intention of the barrister when making the statements giving rise to the alleged misconduct.”

71. Other issues raised in responses that disagreed with the revised Social Media Guidance were that it needed to do more to highlight and address the misogyny and bullying faced by women at the Bar on social media (raised in two responses) and that the BSB had not provided any evidence that the changes were necessary (raised in two responses).

¹² Personal Injuries Bar Association.

¹³ Personal Injuries Bar Association.

“We believe the BSB has a duty to ensure that female barristers do not experience harassment and bullying on social media by male barristers, as this forms an extension of the abuse experienced by women offline in the legal profession, [see the IBA report 2019]. We invite the regulator to highlight the link between online misogyny and women who speak out on issues such as those identified above, so that members of the profession with an online presence are, at the very least, cognisant of the problem.”¹⁴

“What evidence is there that increasing the scope of regulatory span will either (i) discourage such behaviour or (ii) improve public trust and confidence in the Bar? There does not seem to be an evidence basis for the extension of this scope or its likely impact/effectiveness.”¹⁵

BSB’s Response

72. In relation to the concerns that the revised Social Media Guidance violates barristers’ rights to freedom of expression, we recognise that barristers are entitled to express their views in exercise of their Article 10 rights (however unpopular those views may be). In general terms, we do not have a regulatory interest in the opinions, beliefs or views of barristers where those views are afforded protection by Article 10, and we have sought to emphasise that in the amendments we have made to the revised Social Media Guidance in the light of this consultation.
73. However, Article 10 is a qualified right and if barristers express themselves in such a way that might engage the BSB Handbook (for example, if what they say is discriminatory), then that may nevertheless engage our regulatory interest. There are different levels of seriousness which will affect how individual cases are handled and this will be accounted for when we undertake a proportionality assessment which is necessary to justify any proposed regulatory interference with a barrister’s Article 10 rights.
74. We have therefore sought to re-emphasise in the revised Social Media Guidance that the BSB is more likely to have a regulatory interest in relation to the *manner* in which a view is expressed, as opposed to the *substance* of the view itself (although there may be instances where a view is such that we nevertheless have a regulatory interest in it – such as racist or homophobic material).
75. We have made further revisions to the revised Social Media Guidance in light of all of the feedback received. Our amendments seek to:
- acknowledge that barristers may want to participate in online debate and discussion on a range of matters;
 - acknowledge that other human rights (beyond freedom of expression and the right to private life) may be engaged in certain cases, e.g. Article 9 (the right to freedom of thought, conscience and religion);
 - amend the way we define “social media”;
 - highlight the risk that, when using social media, content initially posted to a small audience could be made available to a wider audience than originally intended;

¹⁴ Behind the Gown.

¹⁵ Personal Injuries Bar Association.

- clarify the basis on which a barrister's criticisms of the judges, judiciary or justice system may amount to a potential breach, to ensure consistency with European Court of Human Rights case law; and
 - incorporate further examples of social media use which *may* amount to a breach of the BSB Handbook *depending on the circumstances*, which are:
 - i. Posting material online that is dishonest; and
 - ii. Sharing communications or hyperlinks to content posted by others which is itself seriously offensive, discriminatory, harassing, threatening or bullying, without making it clear that the barrister disagrees with the content (given this may be taken as an endorsement).
76. We note the concerns raised about the treatment of women on social media. This is a form of potentially discriminatory, harassing and bullying behaviour which is already captured in the revised Social Media Guidance. However, to acknowledge this particular issue we have developed a new case study which seeks to address gendered bullying on social media.

Q8: Are the case studies in our draft Social Media Guidance helpful?

77. Twenty-three consultation responses expressed views on whether the case studies in the updated Social Media Guidance were helpful – of these 23 responses, 13 stated that they were not helpful, and ten stated that they were helpful or were mostly helpful. Three responses stated that adding more case studies would be helpful.
78. The case study which proved most controversial was Case Study 3, which related to misgendering on social media (six responses solely or predominantly were submitted to express concerns about this particular case study). Responses which disagreed with this case study commonly focused on the rights of barristers (including those with “gender-critical” beliefs, which may be protected philosophical beliefs under the Equality Act 2010 (EqA)) to freedom of expression. Some concerns were expressed that “misgendering” should not be seen as a regulatory issue or that the language used in the case study (such as the concept of “misgendering”) was contested and that including it in the Guidance was not appropriate.
79. Five responses argued that Case Study 3 should be updated to distinguish between the “threatening” element of the case study (which most of these five responses saw as a valid basis for BSB involvement) and the “misgendering” element (which most of these five responses did not agree should be a basis for BSB involvement).
80. Five responses argued that the fact that Case Study 3 raised “misgendering” as an issue showed that the BSB itself was promoting a “gender ideology” which they either saw as false or something the BSB should avoid taking a stance on.

“It needs to be reworked to distinguish between the making of comments that are not accepted by everyone (i.e. gender critical views) and the commission of an offence (threatening someone). Further, until misgendering, misogyny, and misandry are offences, the reference in the example to misgendering is not a breach of the CDs.”

“You appear to equate ‘deliberate misgendering’ with ‘threatening’ and both are likely to be considered ‘seriously offensive’. This makes no sense. A direct threat to an individual is inevitably a regulatory matter. For ‘deliberate misgendering’ to be a regulatory matter there would have to be far more detailed consideration of the context in which this was done, including the direct contact made by the person claiming offence.”

“The use of the word ‘misgendered’ in the case study (for referring to someone male as ‘he’ or as a ‘man’) indicates that the BSB itself subscribes to ideas about gender which are extremely controversial, contrary to basic facts about humans, and in some respects positively dangerous.”

“We consider that the approach being adopted in case study 3 is misguided, because it has potential to allow political opponents in ‘culture wars’ debates to weaponise the regulated status of a barrister in order to raise complaint and cause difficulty for individuals.”¹⁶

“The BSB may wish to ask itself whether it is advisable for the BSB, as impartial regulator, to become involved in the ‘culture wars’, let alone attempt to police them.”

81. Other criticisms of the case studies in the revised Social Media Guidance included:

- they were unhelpful because they did not explain in sufficient detail the nature of the barrister’s behaviour;
- one of the case studies related to professional conduct, which would be subject to the BSB’s existing rules;
- they referred to private messaging, which should not properly be regarded as “social media use”; and
- the case studies referred to too many different types of conduct so that it was unclear what aspect(s) of the conduct would make a difference between there being, or not being, a potential breach of the BSB Handbook.

BSB’s Response

82. We have amended or developed new case studies in the revised Social Media Guidance which take into account all of the feedback.
83. In relation to Case Study 3, we recognise that the case study we consulted on grappled with a complex issue and we are sensitive to the strength of feeling on both sides of the gender debate. We are also familiar with the emerging case law on the issue of “gender-critical” views and the fact that such views are capable of amounting to a protected philosophical belief under the EqA (see Forstater¹⁷ and Bailey¹⁸).
84. We are, however, also mindful of the rights of transgender people not to be discriminated against, harassed or victimised on the basis of gender reassignment, which is also protected under the EqA. Further, the BSB’s Public Sector Equality Duty includes the

¹⁶ Personal Injuries Bar Association.

¹⁷ Forstater v CDG Europe and others [2022] ICR 1.

¹⁸ Bailey v Stonewall Equality Ltd and others 2202172/2020 ET.

need to “foster good relations between persons who share a relevant protected characteristic and persons who do not share it”.

85. The decision in Forstater (which many respondents cited) warned that “misgendering” a transgender person on a particular occasion, gratuitously or otherwise, *may* amount to *unlawful* harassment in arenas covered by the EqA.
86. However, having reflected on the consultation responses, we recognise that Case Study 3 raised complex issues and that the law in this area continues to develop. Whether or not such (or similar) conduct might be regarded as a breach of the BSB Handbook will depend on an intricate analysis of the facts of the case, which does not lend itself well to a case study that is designed to provide guidance based on generalities. Further, given the fast-changing nature of the issues involved, it is undesirable to offer guidance to the profession through a case study that may quickly become outdated.
87. We have therefore decided to remove Case Study 3 from the final guidance. However, there may be individual cases that we become aware of that raise analogous issues in which we decide there is a regulatory issue. While we are clear that we do not have a regulatory interest and will not take enforcement action against a barrister *because of* the belief they hold, the case law recognises an important distinction between the protection afforded to the belief itself and the manner in which they express that belief (see, for example, Page¹⁹ and Mackereth²⁰). If a barrister expresses a belief in a way that is particularly objectionable (such as through the deployment of discriminatory slurs or unnecessary and abusive behaviour), the BSB may be interested. However, any case will need to be assessed carefully on its particular facts.

Equality Impacts

Q9: Are there any other potential equality impacts that you think we should be aware of?

88. Seven consultation responses gave specific observations on potential equality impacts – the remainder did not provide any observations or responses to this question or referred to points they had made elsewhere in response to other consultation questions. Some consultation responses were centred around respondents’ concerns about barristers’ freedom of expression being restricted, particularly in relation to the expression of “gender-critical” views. These responses stressed that case law has established that “gender-critical” views may amount to protected philosophical beliefs. It was argued that the proposed guidance would lead to or encourage discrimination and/or harassment against barristers with protected “gender-critical” beliefs.
89. Concerns were also expressed about the impact on barristers’ freedom to express their views on matters of public policy and to engage in protests (such as in relation to legal aid funding).

“You appear to have had no regard to the protected characteristic of philosophical belief, and particularly the impact of these proposals on those with protected gender-critical beliefs.”

¹⁹ Page v NHS Trust Development Authority [2021] EWCA Civ 255.

²⁰ Mackereth v the Department for Work and Pensions and another [2022] EAT 99.

“This guidance encourages discrimination and harassment of people with gender critical viewpoints, and more broadly discrimination on the basis of belief of people with any belief that may be judged by some to be offensive.”²¹

“Barristers are already suffering under the weight of pre-judged BSB action against those who are exercising their right to protest legal aid funding. It is cruel and unnecessary to add yet another layer of rules.”

BSB’s Response

90. The BSB recognises that gender-critical views are capable of amounting to a protected philosophical belief (as per Forstater) under the EqA. We also recognise that a protected philosophical belief could include the belief that a person can change their sex or gender.
91. We have updated our Equality Impact Assessment in light of the feedback received through this consultation. There are limits on our ability to assess the equality impacts of our approach to the regulation of non-professional conduct and social media use on philosophical beliefs (and particularly gender-critical views) because: (a) the number of barristers who have declared their religion/belief to the BSB and who have been involved in cases concerning non-professional conduct is very low; (b) the BSB does not hold data on the different types of philosophical beliefs that may be held by members of the Bar (which may be declared as an “other” religion/belief); and (c) this is part of a developing area of law.
92. Nevertheless, we are satisfied that our approach is unlikely to have an unlawful negative equality impact on those with philosophical beliefs. We do not take regulatory action *because of* a barrister’s belief. Action may be taken because the barrister’s conduct (perhaps in the manner in which they have expressed that belief) may be a breach of the BSB Handbook. Barristers should be capable of expressing their philosophical beliefs in a manner that does not breach the standards set out in the BSB Handbook. In any event, the guidance we have developed is a proportionate means of achieving a legitimate aim (ie the proper regulation of the Bar in the public interest).

²¹ Sex Matters.