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Response to the Bar Standards Board consultation on **regulation of non-professional conduct use of social media by barristers**

Question 1

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?

Sex Matters is the campaign for clarity on sex in law and policy in the UK. We are particularly concerned with the protection of freedom of expression (Art 9) and freedom of belief (Art 10) in relation to sex and gender (the expression of so called "gender critical" beliefs). We have detailed comments and objections to Case Study 3 in the proposed social media guidance (see reply to question 8, below).

The proposed guidance does not reference the relevant cases in relation to "gender critical" belief:

- *Scottow v CPS [2020] EWHC 3421 (Admin)*
- *R (on the application of Miller) v The College of Policing [2020] EWHC 225 (Admin), HRLR 10*
- *Forstater v CGD Europe [2021] ICR 1, EAT*
- *R (on the application of Miller) v The College of Policing [2021] EWCA Civ 1926, [2022] HRLR 6, CA*
- *Bailey v Stonewall and Garden Court Chambers [2022]*

In Miller the High Court identifies gender-critical beliefs as "expressions of opinion on a topic of current controversy… which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons".

In Forstater the Employment Appeal Tribunal finds them to be "worthy of respect in a democratic society" and covered by the protected characteristic of "religion or belief" in the Equality Act 2010.

Any new guidance must have regard to these cases, and to the broad protection given by Article 10 of the European Convention on Human Rights. It must not invent an extra-legal prohibition against "misgendering" for barristers.

More broadly, the current silencing of feminists and others with gender-critical beliefs is a demonstration of how regulatory systems can be subverted and misused to compel and constrain speech, through policing "offence", and conversely how freedoms must be protected.

We are concerned that the proposed BSB guidance and social media guidance significantly increases the scope of the BSB's role in investigating and disciplining barristers for their conduct outside of work, beyond criminal conduct or abuse of public position, to broader and vaguer conduct that may be viewed as "acts of discrimination" or "offensive".

This will increase the number of complaints the BSB receives from the public, subjecting barristers to infringement of Article 10, via the chilling effect of continual investigation.

Freedom of expression may be "subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society" etc. nevertheless includes views that offend, shock or disturb. In Handyside *v* United Kingdom (1979–80) 1 EHRR 737, the European Court of Human Rights said at [49]:

> "Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued." The Court has recently reiterated that the exceptions found in Article 10(2) must be 'construed strictly, and the need for any restrictions must be established convincingly' (Mariya Alenkhina and others v Russia (No.38004/12, judgment of 3 December 2018), [198])."

We do not think the approach being proposed by the BSB is proportionate. The BSB has not convincingly established a need for these restrictions. The justification given at **paragraph 23** of the proposed guidance states only that the current guidance "does not reflect modern society

and the broad types of conduct that can occur in a barrister's non-professional life that might realistically affect the individual in a professional context".

This is inadequate justification for a restriction of rights under Art 10(2).

In particular we are concerned about the broad approach to "discrimination". **Paragraph 23** of the proposed guidance refers to "discrimination" and **paragraph 24** to "harassment, and acts of discrimination outside of a work context". It is not clear whether these paragraphs refer to unlawful discrimination and harassment or to a broader notion, that goes beyond conduct and relationships covered by the Equality Act 2010, or to potential claims that are no more than accusations.

Paragraph 27 says "The case law is clear that the closer non-professional conduct is to professional practice, the greater the justification for regulatory interference on the basis that the conduct might reflect on how the individual might behave in a professional context or have an impact on public trust and confidence in the profession." This suggests that behaviour that does not meet the tests for civil discrimination or harassment, or criminal harassment would be subject to censure as "non-professional conduct" on the basis of what it supposedly says about how the individual might behave in a professional situation. This would certainly have a chilling effect.

While recognising the special status of lawyers as intermediaries between the public and the courts, this is an unjustified impingement on their freedom of expression.

Our experience is that complaints to employers and to professional regulators are weaponised and used as tools for political battles and personal grievances. Even where people are cleared of complaints, "the process is the punishment".

Question 4

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

We are concerned about the proposal for C25 (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. This will give rise to large numbers of complaints.

The risk this opens up is illustrated by the case of Miller (above), which concerned the application of similarly expansive perception-based guidance for police recording of non-crime

hate incidents. Mr Miller had posted 31 tweets asserting that transgender women are men, an assertion which deeply offended “Mrs B”, a trans-identifying male (i.e. someone who would describe himself as a "transgender woman"). Mrs B complained to the local police who visited Mr Miller at work, and recorded his tweets as a “non-crime hate incident”.

In an echo of the BSB proposed approach, Humberside police stated they had spoken to Mr Miller to help him “understand the impact [his] comments could have on others and to prevent any possible escalation in the future”.

The High Court found this conduct to be unlawful. It noted that “some involved in the debate [on sex and gender] are readily willing to label those with different viewpoints as ‘transphobic’ or as displaying ‘hatred’ when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.”

The complainant “Mrs B” genuinely felt that Mr Miller’s tweets were seriously offensive. It appears that the people who drafted Case Study 3 might agree with Mrs B. This is a problem both with case study 3, and with the subjective and expansive nature of the overall guidance that allowed it.

Question 8

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

Case study 3 is, in our view, seriously biased, and does not identify a behaviour that breaches *any* reasonable standards. It illustrates the problem with the guidance as we set out in our answer to question 4.

Put in ordinary language case study 3 describes this:

1. A barrister frequently tweeting about their views on a topic which is a debate on a question of public interest
2. A person responding to the barrister’s tweets, challenging their views
3. The barrister responding to that person with several tweets
4. The barrister accurately referring to that person’s sex
5. The barrister “threatening” the person.

The case study states that the barrister could be in breach of CD5 and/or *could reasonably be seen by the public to undermine the barrister's integrity* for (1) "targeting" the other person, (2) "misgendering" them and (3) "threatening" them.

This case description leaves out the only important part of the barrister's behaviour: the nature of the threat. Of course if a barrister threatens to assault someone, or to expose their private information on social media, that would (already) fall under CD5, regardless of the other details of the case study. But if they threaten to block someone, report them to Twitter, sue them for defamation, or some other lawful action available to all users of social media, it would not.

Responding to someone who addresses you and challenges your views is not "targeting them". Accurately referring to someone's sex is a matter of freedom of belief and freedom of expression.

Some people believe that if a man puts on women's clothes and makeup, changes his name and pronouns, takes hormones and/or has surgery he becomes a woman. Other people believe that if a man simply says he identifies as a woman, based on a subjective feeling, then he is a woman. Many people do not share either of these beliefs. They hold the ordinary belief in biological sex. They believe that a person who is born male remains male, even if he identifies as a woman, and irrespective of his habits of dress or presentation, or what cosmetic surgery he may have had. Like the barrister in case study 3, this is sometimes termed being "gender critical".

UK law reflects the "gender critical" position: see (Corbett v Corbett [1971] P 83, R v Tan [1983] QB 1053, CA, and Bellinger v Bellinger [2003] 2 AC 467, HL, and confirmed again by the Employment Appeal Tribunal in Forstater v CGD Europe [2022] ICR 1: "The Claimant's belief that sex is immutable and binary is, as the Tribunal itself correctly concluded, consistent with the law" (para.114).

There is no criminal act or civil tort of "misgendering". As the cases of Miller and Forstater demonstrate, ordinary people have protection for their freedom of expression in saying that men cannot be women (and vice versa). These protections must also include academics, lawyers and other professionals who need these words in order to discuss and debate facts and laws. As Alice Sullivan and Judith Suissa of UCL set out: "The view that 'it is transphobic to acknowledge natal sex as even potentially relevant' leads to demands that are fundamentally antithetical to academic freedom."[1]

[1] Judith Suissa and Alice Sullivan (2021). 'The Gender Wars, Academic Freedom and Education'. *Journal of Philosophy of Education*, 55: 55–82.

Paragraph 18 of the social media guidance following the case study mentions extreme or grave forms of hate speech, but falls to note that in Forstater v CGD Europe [2022] ICR 1, the EAT found that expression of gender-critical beliefs does not approach the extreme or grave forms of hate speech covered by Article 17 of the European Convention on Human Rights.

Paragraph 19 of the social media guidance provides a broad and vague provision against "conduct which might demonstrate how a barrister perceives certain groups (e.g. where a barrister expresses discriminatory views) might alienate members of the public who identify themselves as part of that group and make them feel uncertain about engaging a barrister or trusting that the profession will act in their best interests."

This goes well beyond the definition of discrimination in the Equality Act 2010. It is clear that there is a group of people who profess to believe that "trans women are women" and will declare themselves to be offended and alienated by anyone who declares the opposite. It is not the role of the BSB to police the speech of barristers (including avoiding stating the law clearly) to avoid offending this group.

If the guidance is agreed in this form by the BSB it will paint a target on the back of gender-critical barristers who express their views in public, it will impinge on their freedom of expression and have a chilling effect on debate on legal and public policy issues, as barristers will be barred from contributing to public and academic debate.

In Miller in the High Court, Jodie Ginsberg, then CEO of Index on Censorship, which campaigns for and defends free expression worldwide, noted the impact of the expansive guidance by the College of Policing:

> "Police actions against those espousing lawful, gender critical views – including the recording of such views where reported as 'hate incidents' – create a hostile environment in which gender critical voices are silenced."

This guidance would have a similar effect on barristers. Ultimately, the Court of Appeal found that the College of Police guidance which led Humberside Police to visit Mr Miller was unlawful. The Court of Appeal held:

> [68] The concept of a chilling effect in the context of freedom of expression is an extremely important one.
>
> [70] Comparatively little official action is needed to constitute an interference for the purposes of Article 10(1) […] The Court emphasised that the protections of Article 10 are wide, and that the threshold for interference is necessarily low, particularly where the speech or

> expression in question is political in nature, or relating to debates in the public interest.
>
> [76] Mr Miller belongs to a group of people who could easily be stigmatised for their opinions and be subject to complaints by those offended by his views. He is able to contend that [the 2014 Guidance] violated his rights as he was required to modify his conduct because of them or risk having a "non-crime hate incident" being recorded against him; and he is member of a class of people who risks being directly affected by the measure.

The BSB guidance in its present form would be similarly vulnerable to Judicial Review.

We consider that the BSB should recognise that gender-critical views are, in fact, "political" views and as such attract the highest level of free speech protection, as recognised in Case Study 4.

Question 9

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

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.

Our approach

Barristers are bound by their duties "not to behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession at all times."

The draft guidance interprets this in a way that presents gender-critical speech as inherently unprofessional, offensive and discriminatory.

The case of Allison Bailey v *Garden Court Chambers and Stonewall* [2022] highlighted how complaints against individual barristers can be used to try to silence them and prevent them expressing gender-critical ideas in public.

The BSB's proposed new guidance would infringe on freedom of expression, and promote discrimination against people who express honest and straightforward statements about the two sexes.

About Sex Matters

Sex Matters is a human-rights organisation campaigning for clarity about sex in law, policy and language.

Sex Matters is a not-for-profit organisation campaigning for clarity on sex in law and policy in the UK. Our priorities are to:

- **establish clarity about the law** – sex is a protected characteristic, and the Equality Act 2010 protects single-sex services: clear guidance for organisations is needed
- **support people to speak up**: it should not take courage to say that sex is real, binary, immutable and important – but right now it does
- **empower organisations** to adopt sound, fair and transparent policies that reflect material reality and protect everybody's human rights.

Sex Matters is a UK-based not-for-profit organisation. We have a singular mission: to re-establish that sex matters in rules, law, policy, language and culture in order to protect everybody's human rights. We campaign, advocate and produce resources to promote clarity about sex in law, policy and institutions.

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