

Rule 6 – Equality and diversity

Solicitors’ Code of Conduct 2007

Professional Ethics

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Rule 6 – Equality and diversity

Introduction

Rule 6 is designed to prevent discrimination within your firm or in-house practice. The rule does not apply to overseas practice but solicitors practising overseas must comply with 15.06 (Equality and diversity) and 1.02 (Integrity).

The duties contained in this rule are in addition to, and not in substitution for, your obligations to comply with anti-discrimination legislation.

Rule 6 – Equality and diversity

6.01 Duty not to discriminate

- (1) You must not in your professional dealings with employees, partners, members, directors, barristers, other lawyers, clients or third parties discriminate, without lawful cause, against any person, nor victimise or harass them on the grounds of:
 - (a) race or racial group (including colour, nationality and ethnic or national origins);
 - (b) sex (including marital status, gender reassignment, pregnancy, maternity and paternity);
 - (c) sexual orientation (including civil partnership status);
 - (d) religion or belief;
 - (e) age; or
 - (f) disability.
- (2) You must take such steps, and make such adjustments, as are reasonable in all the circumstances in order to prevent any of your employees, partners, members, directors or clients who are disabled from being placed at a substantial disadvantage in comparison with those who are not disabled.

6.02 Evidence of breach

Where there has been a decision of a court or tribunal of the United Kingdom in proceedings to which you are a party, that you have committed, or are to be treated as having committed, an unlawful act of discrimination then that finding shall be treated as evidence of a breach of this rule.

6.03 Equality and diversity policy

If you are a principal in a firm, or a member or a director of a recognised body, you must adopt and implement an appropriate policy for preventing discrimination and harassment and promoting equality and diversity within your firm. You must take all reasonable steps to ensure that all employees, partners, members and directors are aware of, and act in compliance with, its provisions and that it is made available to clients, the Solicitors Regulation Authority and other relevant third parties where required.

6.04 In-house practice

If you have management responsibilities in in-house practice you must use all reasonable endeavours to secure the adoption and implementation of an

appropriate policy for preventing discrimination and promoting equality and diversity within your department. You must take all reasonable steps to ensure that all staff within that department are aware of, and act in accordance with, its provisions.

6.05 Waivers

In spite of 22.01(1), the Board of the Solicitors Regulation Authority shall not have power to waive any of the provisions of this rule.

6.06 Meaning of terms

For the avoidance of doubt, unless otherwise defined in the rules, the terms used in this rule shall have the meanings assigned to them in law.

Guidance to rule 6 – Equality and diversity

1. The information which follows is by way of clarification and guidance. Those parts which deal with legal issues are intended only to provide an overview of the law and not an interpretative explanation or redefinition of it. This is to guide you and is not intended to lay down a binding course of action.

Duty not to discriminate – 6.01

The scope of the rule

2. You must, as a matter of general law, comply with the requirements set out in legislation in relation to discrimination and you should be aware that the provisions contained in this rule are in addition to, and not in substitution for, your legal duties.
3. This rule places two distinct requirements upon you:
 - (a) not to discriminate against, without lawful cause, nor victimise or harass, in the course of your professional dealings, those groups of people, and in those circumstances, set out in 6.01(1); and
 - (b) to make reasonable adjustments to prevent employees, partners, members, directors or clients who are disabled from being at a disadvantage in comparison with those who are not disabled.
4. You should be aware that, whilst the provisions contained in this rule are based upon legislative provisions, this rule goes beyond the scope of the legislation in a number of key areas and in particular in relation to age discrimination.

In particular you should note that it requires you to refrain from discriminating against all of those persons referred to in 6.01(1) in all of the circumstances referred to. There is no limitation in this requirement to discrimination occurring only in particular circumstances. Thus, for example, whilst the law dealing with age discrimination currently applies only in relation to employment and vocational training, this rule applies

to all of a solicitor's professional dealings, including those with barristers, other lawyers, clients or third parties.

Please note, however, that the provisions relating to reasonable adjustment for disability set out in 6.01(2) are limited to an adjustment for clients, employees, partners, members and directors.

5. The following points should be noted:
 - (a) Discrimination based on age is now included in this rule, as are requirements not to discriminate on the basis of civil partnership status, gender reassignment, pregnancy, maternity and paternity.
 - (b) This rule does not address, but you should nevertheless be aware of, discrimination-related employment issues such as those which relate to fixed-term and part-time workers, the requirements for flexible working, and provisions relating to participation in, or abstention from, trade union activities.
 - (c) Although this rule does not address issues set out in the Human Rights Act 1998 you should be aware of these, especially if you are working in the public sector.
 - (d) Whilst this rule does not apply to overseas practice, nevertheless you should be aware of the provisions set out in regulation 11 of the Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005/2467) in relation to employment wholly or partly outside Great Britain and its applicability to sex discrimination and equal pay.
 - (e) Although they are not specifically dealt with in this rule, nevertheless you should be aware of the provisions of the Racial and Religious Hatred Act 2006 in so far as they affect your practice.
 - (f) The terms "employer" and "employment" in this guidance are used in their normal everyday sense and not as defined in rule 24 (Interpretation).
 - (g) The term "without lawful cause" means that the discrimination has taken place in circumstances which are not dealt with in notes 11, 12 and 13 below where there is a permitted exception within the law or where circumstances are such that it is possible to justify why the discrimination has taken place.

What is discrimination?

6. Discrimination occurs when one person is treated less favourably than another is treated, or would be treated, in the same or similar circumstances without legitimate reason.
7. The grounds upon which a person must not be discriminated against are:
 - (a) race or racial group (including colour, nationality and ethnic or national origin);
 - (b) sex (including marital status, gender reassignment, pregnancy, maternity and paternity);

- (c) sexual orientation (including civil partnership status);
- (d) religion or belief;
- (e) age; or
- (f) disability.

These terms have the same meaning in this rule as they have in law.

8. In particular you should note that:
- (a) discrimination on the grounds of race or racial group includes discrimination on the basis of colour, nationality and national or ethnic origin;
 - (b) sex discrimination includes discrimination against:
 - (i) a married person on the grounds of their marital status;
 - (ii) a person who is about to undergo, is undergoing or has undergone gender reassignment;
 - (iii) a woman on the grounds of pregnancy or maternity; and
 - (iv) a man on the grounds of paternity;
 - (c) you are subject to the provisions of the Equal Pay Act 1970;
 - (d) sexual orientation applies equally to those who are heterosexual as it does to those who are lesbian, gay or bisexual; discrimination based on sexual orientation includes discrimination against a person because they are in a civil partnership; it should also be noted that discrimination can be on the grounds of perceived sexual orientation as well as actual sexual orientation;
 - (e) disability is widely defined and includes stress related illnesses (which do not need to be “clinically well-recognised” to be capable of founding a claim), progressive illnesses (such as HIV and cancer) from the time of diagnosis, illnesses which would be substantial if not controlled by drugs (such as insulin-dependent diabetes) and conditions such as learning disabilities or dyslexia which restrict a person’s ability to interact or communicate;
 - (f) religion or belief includes philosophical beliefs similar to a religion (for example humanism); and
 - (g) age means any age, not just old age and can include discrimination based on the age of others, e.g. a person’s spouse. It should also be noted that discrimination can be on the grounds of perceived age as well as actual age.
9. Discrimination can take a variety of forms including direct discrimination, indirect discrimination, harassment, victimisation, less favourable treatment and failure to make an adjustment. A brief summary of each of these is set out below although you should rely upon the meanings assigned to them by law when interpreting your duties under this rule.
10. (a) Direct discrimination occurs where one person treats another less favourably by reason of:

- (i) race or racial group (including colour, nationality and ethnic or national origins);
- (ii) their sex (including marital status, gender reassignment, pregnancy, maternity and paternity);
- (iii) sexual orientation (including their civil partnership status);
- (iv) religion or belief;
- (v) age; or
- (vi) disability,

and, in respect of age discrimination only, it cannot be shown that the treatment in question was justified.

To treat a person less favourably for other reasons, for example because they have not performed adequately, will not generally be regarded as discrimination amounting to professional misconduct unless the true reason for the treatment is, or includes, one of the matters referred to above.

- (b) Indirect discrimination occurs where a provision, criterion, practice, requirement or condition (as appropriate) which is applied to everyone has the effect of placing at a disadvantage a particular person, or group of people, by reason of:
 - (i) race or racial group (including colour, nationality and ethnic or national origins);
 - (ii) sex (including marital status, gender reassignment, pregnancy, maternity and paternity);
 - (iii) sexual orientation (including civil partnership status);
 - (iv) religion or belief; and
 - (v) age,

and it cannot be shown that to apply that provision, criterion, practice, requirement or condition in that way is a proportionate means for achieving a legitimate aim.

Note that the provisions relating to indirect discrimination are not applicable to discrimination on the grounds of disability.

In direct discrimination can occur whether or not the person applying the provision, criterion, practice, requirement or condition intended to discriminate against the person or group of people affected.

- (c) Harassment occurs when one person subjects another to “unwanted conduct that has the purpose or effect ... of creating an intimidating, hostile, degrading, humiliating or offensive environment” (section 4A(1) of the Sex Discrimination Act 1975, as amended by the Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005/2467)), in other words threatening, abusive or insulting behaviour, words or actions which violate the other person’s dignity or create a humiliating, intimidating or hostile environment. Harassment may involve physical acts or verbal and non-verbal communications and gestures. Harassment can also occur where it has the defined effect upon the victim,

notwithstanding the harasser's intention – it is the effect which the harassment has upon the victim that is important. For example, remarks made humorously or without malicious intent can still constitute harassment if that is the effect which they had upon the person being harassed.

In determining whether harassment has occurred you should be aware that a series of minor acts or comments can constitute harassment as can a one-off act of sufficient severity. However, the acts complained of must be capable of amounting to harassment.

You should also be aware of the provisions of section 4A(1)(b) of the Sex Discrimination Act 1975 in respect of sexual harassment.

- (d) Victimisation occurs when a person is treated less favourably because he or she:
 - (i) has asserted a right not to be discriminated against on one of the prohibited grounds set out in 6.01;
 - (ii) has assisted another to assert a right not to be discriminated against on one of the prohibited grounds set out in 6.01; or
 - (iii) has given evidence in a tribunal or court relating to the assertion of such a right.

The protection applies only to assertions made in good faith.

- (e) Less favourable treatment, as used in relation to disability discrimination, occurs when a person with a disability is treated in a detrimental way in circumstances when a person without that disability would not be so treated. Thus, for example, charging more to a disabled client than a client without a disability because their disability means that more time is required to obtain instructions could constitute less favourable treatment, as could offering less favourable terms or refusing to act.
- (f) Failure to make reasonable adjustment is another concept used in relation to disability discrimination. You are under a duty to take such steps (adjustments) as are reasonable in all the circumstances to ensure that employment arrangements, arrangements for partners, members, directors and clients, the premises from which your business is undertaken and the service provided, do not put at a substantial disadvantage a person with a disability when compared with a person without that disability, without justification.

The following points should be borne in mind when making a reasonable adjustment:

- (i) the duty to make the adjustment stands alone and requires no other form of less favourable treatment or intention to discriminate;
- (ii) the duty is a positive one – it requires that you take active steps to ensure that a person with a disability can access employment opportunities or services as if they did not have that disability;

- (iii) the cost of making the adjustment is one which must be absorbed by you, where it is reasonable to do so, and not passed on to the disabled client by way of a disbursement, additional charge or less comprehensive service;
- (iv) the duty is to make a reasonable adjustment – if the adjustment is not reasonable then you may not be under a duty to make it;
- (v) the fact that the cost of the adjustment exceeds the charges or profits from the matter in question does not of itself make the adjustment unreasonable. A more relevant factor is the resources of the firm;
- (vi) an adjustment does not have to be a physical adjustment – it may simply be a change to working practices such as visiting a client at home if they are unable to access your premises; and
- (vii) an adjustment is not always a one-off action – it may need to be made on numerous occasions, for example employing the services of a British Sign Language Interpreter when advising a client with profound hearing loss. So long as the adjustment continues to be reasonable, its cost must be absorbed by you.

Permitted exceptions and justifiable discrimination

11. There are situations in which it is permitted to discriminate without breach of the legislation or this rule. In some instances this will be by way of specific exceptions to the legislation, whilst in others it will depend upon the nature of the discrimination and the extent to which it can be justified. Although a brief explanation is given below, in both cases you should rely upon the meanings assigned to them by law when interpreting your duties under this rule.
12. There are permitted exceptions to the legislation variously referred to as Genuine Occupational Qualifications (GOQs) and Genuine Occupational Requirements (GORs). These apply in relation to discrimination on the basis of race, sex, sexual orientation, religion or belief, and age. The exception to the concept of GOQs and GORs is discrimination on the grounds of disability. This relies upon whether it can be shown that the discrimination in question was reasonable.
13. In certain circumstances you may be able to justify discriminating against a person even though it is on one of the prohibited grounds set out in 6.01.
 - (a) Direct discrimination cannot be justified other than in relation to age discrimination (where it must be a proportionate means of achieving a legitimate aim).
 - (b) With regard to indirect discrimination, it may be possible for you to show that a provision, criterion, practice, requirement or condition which is applied to everyone, but which places a person or group of people at a disadvantage, is justified. To do so, you would need to show, amongst other things, that:

- (i) it was imposed other than for the purposes of discriminating;
- (ii) it was appropriate and necessary to achieve the required aim; and
- (iii) the means of achieving that legitimate aim were appropriate and necessary.

Dealing with clients and third parties

14. You are generally free to decide whether to accept instructions from any client provided that your refusal to act is not based upon any of the grounds in 6.01. You should also note 11.04 (Refusing instructions to act as advocate) which limits the circumstances in which you can refuse to act as an advocate and 2.01 (Taking on clients) which deals with taking on clients.
15. You should instruct barristers on the basis of their skill, experience and ability and it is unlawful to instruct them, or avoid instructing them, on the basis of any of the grounds in 6.01, or to request or encourage a barrister's clerk to do so.
16. You should normally comply with a client's request to instruct a named barrister (subject to your duty to discuss the suitability of that barrister for a particular type of work). Where a client's instructions as to the choice of barrister are based on any of the grounds in 6.01, you should encourage the client to modify their instructions. If they refuse to do so, you should cease to act for them as aiding an unlawful act is prohibited.
17. In relation to the instruction of a barrister, in addition to the requirements of this rule, you are subject to provisions relating to the giving, withholding or acceptance of instructions contained in:
 - (a) section 26A(3) of the Race Relations Act 1976;
 - (b) section 35A(3) of the Sex Discrimination Act 1975;
 - (c) section 7A(3) of the Disability Discrimination Act 1995;
 - (d) regulation 12(4) of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660);
 - (e) regulation 12(4) of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661); and
 - (f) regulation 15(4) of the Employment Equality (Age) Regulations 2006 (SI 2006/1031).
18. If you maintain lists or databases of contractors, agents and other third parties who are regarded as suitable to be instructed by others within the firm, you should ensure that those lists or databases:
 - (a) are compiled on the basis only of their ability to undertake work of a particular type; and
 - (b) do not contain any discriminatory bias based on any of the grounds in 6.01.

Partners and partnerships

19. In relation to a position as partner in a firm, you should not discriminate against partners or potential partners. In addition to the provisions of this rule, you should note that you are subject to provisions as to discrimination in relation to a position as partner contained in:
 - (a) section 10 of the Race Relations Act 1976;
 - (b) section 11 of the Sex Discrimination Act 1975 as amended by section 1(3) of the Sex Discrimination Act 1986;
 - (c) sections 6A, 6B and 6C of the Disability Discrimination Act 1995;
 - (d) regulation 14 of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660);
 - (e) regulation 14 of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661);
 - (f) regulation 14 of the Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005/2467); and
 - (g) regulation 17 of the Employment Equality (Age) Regulations 2006 (SI 2006/1031).

20. You should also comply with the various provisions which prohibit discrimination after the end of a professional relationship and which apply to both staff and partners. This means, for example, that you should exercise care when giving a reference for someone so as to ensure that you do not permit that reference to be in any way discriminatory or to appear to have been influenced by issues of a discriminatory nature.

Evidence of breach – 6.02

21. Whilst decisions of unlawful discrimination by an employment tribunal are not binding on either the Solicitors Regulation Authority or the Solicitors Disciplinary Tribunal (which must determine whether an allegation of professional misconduct involving discrimination is well founded), such decisions are admissible in evidence in conduct investigations and disciplinary proceedings. The Solicitors Regulation Authority and the Solicitors Disciplinary Tribunal must still determine whether an allegation or decision of discrimination against you amounts to professional misconduct. The starting point for this will be that the decision represents a strong indication that misconduct has taken place and it will be for you to show why, despite the decision, there has not been misconduct.

Equality and diversity policy – 6.03

22. (a) In order to encourage you to abide by the provisions of this rule, and to assist you in ensuring that partners, members, directors and employees do so too, it is a requirement that your firm adopts and implements an appropriate written policy for promoting equality, preventing discrimination and dealing with any instances of discrimination which might arise.

- (b) To be appropriate the policy must:
- (i) be in writing;
 - (ii) include such provisions as are relevant to your firm (having regard to its nature and size);
 - (iii) as a minimum, deal with the following core items:
 - (A) how the firm plans to implement, communicate, monitor, evaluate and update the policy;
 - (B) how the firm intends to ensure equality in relation to employees, partners, members, directors, clients and third parties and the means by which it will monitor, evaluate and update any procedures and policies in relation to this;
 - (C) how complaints and disciplinary issues are to be dealt with;
 - (D) a requirement that all employees, partners, members and directors comply with the provisions set out in 6.01;
 - (E) a commitment to the principles of equality and diversity and to observing legislative requirements;
 - (iv) not contain any additional items which would conflict with the core items.
- (c) In adopting and implementing that policy you should be aware that:
- (i) account must be taken of the size and nature of your firm and any policy which you adopt and implement should contain provisions which are relevant to your firm;
 - (ii) you must ensure that all partners, members, directors and employees are aware of, and act in compliance with, the provisions contained in the policy. A policy which is not brought to their attention will not be an appropriate policy.

In order to demonstrate that the policy has been brought to the attention of employees, partners, members and directors in an effective manner, you may wish to give consideration to providing staff with training and information about complying with equality and diversity requirements. Where a client, the Solicitors Regulation Authority or other relevant third party requests a copy of the policy to be provided to them, you must do so within a reasonable period of time; and
 - (iii) since the equality and diversity needs of your practice may change from time to time, you should monitor the continuing appropriateness of your policy and make such changes as are necessary.

In-house practice – 6.04

23. If you are practising in-house then it is likely that you will not have the same opportunity to formulate, adopt and implement measures for preventing discrimination and promoting equality and diversity, as a principal in a firm. You may, however, have an opportunity to influence

those measures which are implemented, especially within your own department.

24. If you are practising in-house then you are required to use your best endeavours to secure the adoption and implementation of an appropriate policy for preventing discrimination and promoting equality and diversity within your department. You should also ensure, so far as you are able, that employees within your department are aware of, and act in compliance with, its provisions. However, where you are unable to do so, no burden of professional misconduct will be placed upon you.
25. If there is an allegation of misconduct based upon discrimination on any of the grounds listed in 6.01, and you have management responsibility, you will be required to show good reason why you were unable to secure the operation of an appropriate policy.
26. In all other respects you will be required to abide by the terms of this rule to the same extent as a solicitor in private practice.