

Guide to the Implementation of Maternity, Paternity and Parental Leave Policies Under Barristers Practice Management Procedures

Introduction

The Bar Council first published guidance on maternity policies in May 1992. The trigger for that guidance was Section 35A of the Sex Discrimination Act 1990, enacted by Section 64 of the Courts and Legal Services Act 1990, which made it unlawful for a barrister or barristers clerk to discriminate against women pupils and tenants on grounds of sex. Since that guidance it has become usual for sets of chambers to adopt maternity policies. There are some, though, who have come to the idea late, pressed into it by BARMARK and the realisation that the requirements of Practice Management Standards include such policies as part of the proper business management of chambers.

Mainstreaming

The Bar Council has adopted a policy of “Mainstreaming” Equal Opportunities. This term of art refers to the process of introducing consideration of Equal Opportunities issues at each stage in the decision making process. It means that the potential both for discrimination, whether direct or indirect, and the positive furtherance of equality of opportunity objectives, is brought into account at each stage when decisions as to the structure of the profession are made. The idea is that Equal Opportunities should not be a matter that is simply bolted on to an existing structure to be considered separately, and often too late to effect real change. Barristers’ chambers are encouraged to adopt a similar approach in their decision-making in order to ensure that discriminatory practices do not inadvertently build up. It is particularly important to bear in mind that equality of opportunity is not achieved just by affording access to a system of working practices that have been built up to suit the background and lifestyle of a particular group who have had a traditional preponderance in the profession without taking proper account of the diversity of our society and other working practices which may better reflect the needs of others.

Why do we need these policies in Chambers?

A. Fairness

It is essential to a modern, multiracial, multicultural democracy that its justice system should reflect the social, gender, racial and cultural diversity of the society that it serves. It is axiomatic that a justice system, and its component parts including the pool of advocates, should be organised in a fair way. Many at the Bar may feel that they have, over the years, developed a heightened sense of what is fair. That can be misleading, however. Achievement of true equality of treatment cannot rest on a gut feeling of fairness but requires active steps to be taken to ensure that working practices really are permitting and encouraging equal access and opportunity.

B. Compliance

Discrimination on grounds of race or sex is unlawful under the Race Relations Act 1976 and the Sex Discrimination Act 1975. Their effect is summarised in the *Equality and Diversity Code for the Bar*. Discrimination on grounds of disability is prohibited by the Disability Discrimination Act 1995. Discrimination on grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability, religion or political persuasion is professional misconduct in breach of paragraph 305 of the Bar Code of Conduct.

Whilst a breach of the *Equality Code for the Bar* is not in itself professional misconduct, the Code provides an evidential standard against which allegations of discrimination may be judged.

Barristers need to remember that they are responsible for the actions of their clerks.

C. Commercial Advantage

The Bar needs to retain and justify its position as the best provider of advocacy services. Discriminatory working practices that have the effect of limiting access to the profession reduce the pool of talent available to the Bar. That is to its long-term disadvantage. The Bar needs to be able to recruit and keep the most able practitioners in order to provide excellence and to justify its existence in the public interest.

Contrary to the belief of some, discriminatory working practices are no longer acceptable to solicitors, government prosecuting authorities and lay clients. In the near future the effective implementation of equal opportunity policies will be essential for chambers wishing to achieve

accreditation under schemes such as BARMARK or the Community Legal Service Quality Mark. Such accreditation will soon be a condition of being instructed by the LSC and various other sources of work. Even where it is not a condition the proper implementation of practice management standards will be a marketing advantage.

Implementing Policies

Each set of chambers should have its own equal opportunities policy statement and programme for implementation. This is not a matter of simply copying out a Bar Council model, nor is it a matter of simply buying it off the shelf from an outside consultant. Each set of chambers should work out for itself how to draw up and implement an effective equal opportunities policy in the context of its own structure and environment. The starting point for this process will be the Equality and Diversity Code for the Bar.

The policy will need to be realistic and workable. There is no point in producing a policy that requires so many forms to be filled in that it will be ignored. The policy must be capable of being embraced by chambers as a whole. Auditors for accreditation bodies such as BARMARK tend to look for a working consensus rather than a perfect theory. The Bar Council Equality and Diversity Advisors are happy to assist chambers where help is needed. They have put together a pack of model policies collected from a wide variety of chambers. These are available for general use to give sets an idea of the scope and content of a good policy. They should not be adopted wholesale but used as the basis for policies meeting the individual needs of chambers.

Some may be tempted to think that they have always managed perfectly well in dealing with these matters on an ad hoc basis relying on the fact that no one has complained. However, with the publication and subsequent revision of the Practice Management Guidelines most sets of chambers now appreciate the need for a more structured approach to the management of chambers. Dealing with matters on an ad hoc basis is no substitute for a proper equal opportunities policy with express provision for maternity, paternity and parental leave. An ad hoc approach creates an atmosphere of doubt and confusion in which individuals are required to raise personal matters and fight their own particular corner on an individual basis and in circumstances where they may feel vulnerable. An established policy that is thought out calmly and dispassionately and

properly distributed and operated creates certainty and stability. It affords a basis on which people can plan their futures.

In order to ensure that the policy is implemented properly, chambers will need to monitor the implementation of its policy, set up a proper grievance procedure for dealing with any problems that arise and also set up a system of training so that both members of chambers and clerks understand the framework within which they are being expected to operate and what is expected of them. Some suggestions for training are contained in the Guide to the Implementation of Equal Opportunities Policies under BARMARK. Further copies are available from the Bar Council Equality and Diversity Advisers.

Frequently Asked Questions

The new Equality and Diversity Code for the Bar suggests a rent-free period for maternity leave of six months. Didn't it used to be three months?

It is correct that the revised Equality and Diversity Code suggests an increase in the rent-free period offered to tenants taking maternity leave. A three-month period was felt to be too short to allow the flexibility that is required. Many women wish to return to full time practice within six months and some even within three months, but some will wish to take a longer period. A policy should allow the flexibility for a longer period. It should be borne in mind that some of the period may be taken before the birth. It has proven to be counterproductive to provide for too short a period and to run the risk of obliging women to return too early. At the same time a constructive attitude to work during maternity leave should be encouraged to permit women to “keep their hand in”, feel a continuing part of chambers and have a sense of commitment to chambers and to the Bar.

The suggested period of six months reflects trends outside the Bar. A six month maternity period is now the norm in other professional situations. In other professions those on maternity leave have a continuing right to income from a partnership or employment during maternity leave rather than a mere reduction in payment of chambers rent. The Bar needs to be aware not only that other professions are adopting the longer period for the reasons indicated above but also that the longer period reflects what is being offered by the professions in competition with the Bar for talent.

People in our chambers are all earning well and can make their own provision so do we really need a policy. Wouldn't it be patronising to women/fathers ?

The fact that somebody has a high level of earnings does not reduce the need for maternity/paternity/parental leave policies. The three reasons set out above namely fairness, compliance and commercial advantage still call for a maternity/paternity/parental leave policy even if the individuals concerned are “high earners”.

Does the Equality and Diversity Code for the Bar require us to waive contributions to a mortgage where chambers have purchased their own premises?

No it does not. Where chambers have purchased a property it remains a matter for them to decide how contributions should be made by members of chambers and how the asset acquired should be divided. In determining those matters, however, chambers will want to take into account the three driving factors of fairness, compliance and commercial advantage that apply just as much to mortgage repayments (both of interest and capital) as to rent. Whatever the approach decided upon it is important that it be established in a written and agreed policy so that everybody knows where they are.

What if our chambers collects contributions from members of chambers as a percentage of earnings, and so if somebody is not working during maternity leave their contribution will automatically go down?

A chambers with a percentage of earnings as the basis for contribution will probably want to have a different structure for its maternity leave from a chambers with a fixed contribution. The fact that the contribution is assessed as a percentage of earnings does not necessarily mean, however, that there needs to be no adjustment to reflect the particular circumstances of maternity leave. The aim of a maternity policy is to achieve fairness within chambers and the maintenance of morale and the ability to practice for those affected. If they can be maintained then there is less chance of losing talent from the Bar or to another set of chambers. It will be in chambers' interest to consider matters such as cash flow,

particularly in the period after maternity leave where income from previous earnings is likely to drop significantly as a result of the absence. This will ease the burden for those affected and encourage a sense of commitment to chambers.

There is a separate issue that high flat rate contributions may deter women from returning to work part time as they may have difficulty in making payments to chambers from a reduced income.