BAR STANDARDS BOARD

REGULATING BARRISTERS

Report on the complaints and disciplinary processes consultation

Introduction

1.1 In July 2007, the Complaints Commissioner (Robert Behrens) published the report "A Strategic Review of the Complaints and Disciplinary Processes of the Bar Standards Board" ('the Review') following nine months of evidence-based research into nearly all aspects of the complaints system. The Commissioner made 65 recommendations for change which were presented to the Bar Standards Board ('the BSB'). The Review was published against the background of the passage of the Legal Services Bill through Parliament. The resulting Legal Services Act 2007 ('the Act') makes provision for the creation of the Office of Legal Complaints ('OLC'), which will have statutory responsibility for dealing with complaints about the service provided by barristers. The Act does not remove responsibility from the BSB for dealing with professional misconduct and these powers will remain with the BSB after the Act comes into force in about 2010. The BSB believes that the recommendations contained in the Review are compatible with the terms of the Act and the proposed changes are likely to put the BSB in a position whereby the transition to involvement of the OLC will not require further radical overhaul of the Bar's complaints system.

1.2 In order to manage the project of consultation on and implementation of the recommendations, the BSB created the Strategic Review Implementation Steering Group ('the Steering Group'), consisting of 10 members and chaired by Sue Carr QC. The BSB accepted the 65 recommendations in principle and, in line with the Commissioner's report, directed that a number of them should or might be subject to consultation. The BSB issued a public consultation paper on 12 December 2007 seeking views on the relevant recommendations. The consultation period formally closed on 29 February 2008. In total, 42 responses were received and the list of those who responded is at Annex 1.

Executive Summary

1.3 The BSB and the Steering Group carefully considered the responses to the consultation and the following decisions have been made on the recommendations addressed in this report:

- The BSB has determined that it is reasonable for the Commissioner to determine the route that a complaint should take based on the strategic objectives and criteria. The detail of the strategic objectives and criteria have been amended based on the responses to the consultation and the final version is at paragraphs 2.18 and 2.19 below;

- Whilst the BSB has decided that the concept of 'Improper Behaviour' remains valid, it believes that further consideration needs to be given to the general principles underpinning the concept, the level of guidance needed to support the concept, and the implications it will have on the wider principles of the Code of Conduct. The BSB has therefore decided not to introduce 'Improper Behaviour' as part of the Review, but has asked the Steering Group to give further consideration as to whether and how this recommendation should be taken forward and to report back to the BSB later in the year;

- Although the BSB believes that allowing the Commissioner to adjudicate on non-disciplinary complaints is a proportionate, flexible and speedy method of resolving complaints, it has decided not to implement this recommendation due to the likely increase in staffing costs, and bearing in mind that these complaints will be transferred to the OLC in 2010. Instead, the BSB has

decided that the Commissioner should have the power to refer complaints of IPS directly to an Adjudication Panel without reference to the Complaints Committee;

- In light of the BSB's decision not to implement the recommendation that the Commissioner be able to adjudicate on non-disciplinary complaints, the issue of an appeal against such adjudication becomes obsolete. Appeals against decisions by the Adjudication Panel will be dealt with in accordance with the current Adjudication Panel appeal process;

- The BSB has decided to proceed with implementation of the recommendation on Determination by Agreement based on the supportive responses to the consultation, and the views of staff that no additional staffing resources will be required;

- The BSB has decided to proceed with implementation of the recommendation that the Complaints Committee be rebalanced in order to increase the proportion of lay membership as a method of increasing consumer confidence. It will also explore the options for increasing the participation of lay members in the day-to-day work of the Committee. The BSB will keep the efficacy and costs of implementing this recommendation under review;

- The BSB has decided to accept the recommendations that Informal Hearings and Summary Procedure Hearings be abolished and replaced with one Disciplinary Tribunal jurisdiction with three and five person panels;

- The BSB has agreed with the proposal to create more flexibility in sentencing for the Disciplinary Tribunal. It therefore has decided to introduce the option of suspended sentences. Additionally, the fine limit will be increased to £15,000 and a further sanction of the requirement to take and pass a professional ethics test will be introduced.

1.4 The next stage for implementation of the recommendations that the BSB has accepted is that detailed proposals as to how they will operate will be prepared and then considered by the Standards Committee in June. Following approval, the amendments to the relevant Annexes to the Code (in particular, Annexes J and K) will be drafted and then approved by the BSB in November. Both the detailed proposals and the draft amendments to the Code will be available for review on the website in summer 2008. The period of July through November will involve detailed preparation for implementation. It is anticipated that the recommendations addressed in this report will be implemented by the end of November.

Layout of the report

1.5 The issues addressed in the consultation paper were organised into eight sections by topic. This paper is organised into the same topic sections as the consultation paper. Each section starts with the recommendations relevant to the topic and lists the questions that were asked in the consultation document. The sections then begin with an introductory paragraph summarising the total responses to the topic, and where appropriate, how many responses were broadly supportive of the proposals and how many were not supportive. Thereafter are summaries of each response that addressed the topic, in the order of the list of respondees at Annex 1. The end of each section includes the BSB's conclusions and decisions on each of the topics and recommendations.

2. Strategic objectives and criteria for determining the route of a complaint

Recommendation 32: *"The Bar Standards Board should consult on and develop clear strategic objectives for regulating compliance with the Code and set criteria for determining the circumstances in which disciplinary action for professional misconduct should be taken."*

Recommendation 38: *"The Commissioner's powers should be extended to allow decisions to be made (where necessary drawing on advice from the Complaints Committee) as to which route a hybrid case should follow but with provision to allow the route to be changed if full investigation reveals factors affecting the initial decision."*

Q.1 Do you agree that the strategic objectives and criteria for deciding action are reasonable and cover all the relevant issues?

Q.2 Is it reasonable and acceptable to allow the Complaints Commissioner to determine, based on the strategic objectives and criteria for taking action, the route by which a complaint will be determined?

2.1 The proposals relating to these recommendations are detailed in the consultation paper (see paragraphs 3.2 – 3.10). Of the responses to the consultation paper, 23 addressed these proposals and of these, 22 were broadly supportive of the proposals and one was not supportive; additionally, one response opposed the Commissioner determining the route of a complaint. A number of the responses suggested additional strategic objectives and/or criteria, and suggested clarification or amendments to the proposals.

2.2 Gray's Inn submitted that it is clear that the strategic objectives and criteria are designed to protect the public and consumers of legal services; however it is also important for barristers to have confidence in the system and to believe they are being fairly regulated.

2.3 The South Eastern Circuit agreed with the proposals, but submitted that for non-disciplinary matters, it should be taken into account whether the conduct complained of is a mere technical breach of the Code. Decisions as to whether to prosecute should be based on the same criteria used by the Crown Prosecution Service as set out in the Code for Crown Prosecutors, and in particular, decisions to prosecute should only be made once both the evidential and the public interest tests have been satisfied. It answered affirmatively to question 2, so long as reasons are provided for that decision.

2.4 The PPC and the LSC broadly agreed with the strategic objectives, but submitted that they fail to take sufficient account of the interests of the Bar. They suggested an additional objective: "To ensure that complaints against barristers are dealt with fairly, expeditiously and consistently". They also suggested an amendment to a criterion so it reads, "Whether the alleged behaviour is likely, *if established*, to bring the Bar's reputation into disrepute." This takes into account both the need for the allegation to be proved, as well as not giving the impression that a finding could be "kept under wraps" to prevent it bringing the profession into disrepute.

2.5 However, the PPC and LSC disagreed with the Commissioner, rather than the Committee, making the decision as to which route a "hybrid" complaint should take. It would be wrong in principle for the decision as to whether conduct discloses a *prima facie* case of misconduct to be taken without the involvement of members of the profession. Whilst the Commissioner's views should be taken into account, the Committee should ultimately make the decision. They endorse the extension of the Commissioner's role to enable him to adjudicate on non-disciplinary matters, but do not agree that he should be able to decide on the disposal of a case that may involve an element of professional misconduct.

2.6 The YBC broadly agreed with the strategic objectives, but made the following additional comments on the proposed criteria:

- They questioned whether a barrister's intention is relevant to provision of IPS, as this should be judged objectively;
- If a breach of the Code is committed unintentionally and without *mens rea*, the complaint is not made out and should be dismissed;
- Previous convictions should only be relevant when considering sentence and should not be considered when evaluating the seriousness of a complaint.

2.7 The PNBA broadly agreed with both the strategic objectives and the criteria, but suggested that "and fair" be inserted into the fourth objective. It also suggested that in cases where the Commissioner had sought advice from a member of the Committee as to the appropriate route for a complaint, that Committee member should not play any further role in the disciplinary process.

2.8 COMBAR, whilst agreeing with the proposed strategic objectives, made the following comments on the proposed criteria:

- It is unclear what "behaviour [that] represents a risk to the public" refers to;
- As "absence of suspicion of dishonesty" is a circumstance for the matter to be dealt with as a non-disciplinary matter, reference should be made to this in the criteria for taking disciplinary action;
- The above should refer to "allegation of dishonesty", rather than a "suspicion", as the former is a matter of fact and the latter is subjective.

2.9 TECBAR submitted that the strategic objectives give the perception that they are primarily consumer-focused and there is a risk that they will not carry the confidence of the profession. TECBAR did agree with question two, so long as the criteria are amended so as to not be overly consumer focused.

2.10 The ChBA considered the objectives appropriate, though believed that the objective of promoting access to, and the proper administration of, justice seems remote from the complaints process. The criteria for deciding action appears to only apply to complaints that disclose professional misconduct, and it is implicit that the Commissioner will have the discretion not to proceed with minor breaches of the Code and only to deal with any associated IPS/IB issues. They understood from the paper that the Commissioner will not have the jurisdiction to make a finding of misconduct, but believed that the detail of "option 3" described on page 18 of the paper needs clarification as a matter of priority. The ChBA has reservations about the extent to which a barrister's previous disciplinary record should be used as a criterion, as it should only be relevant at the sentencing stage. Subject to these comments, it is reasonable for the Commissioner to determine the route by which a complaint will take.

2.11 The CPS submitted that the strategic objectives and criteria seemed reasonable for the self-employed Bar, but noted that the paper did not deal with employed barristers. The employer should have primacy in dealing with certain issues and there should be further work to decide the correct division of roles and responsibilities between the Commissioner and an employer. It is reasonable for the Commissioner to decide the route, but there should be some clarification on the application of the criteria (e.g. whether they would all have the same weight). The Commissioner should be able to decline to consider a complaint against an employed barrister when the employer has not first considered it.

2.12 The LSO agreed that the objectives are reasonable, and that it is reasonable for the Commissioner to decide the route of a complaint. She suggested an additional objective of "maintaining public confidence in the profession", and two additional criteria:

- Whether the barrister has acted in good faith and in the best interests of those he/she represented;
- Whether the alleged behaviour is likely to diminish the trust the public and consumers of legal services put in the profession.

2.13 The NCC, Consumer Panel, OISC, and CIMA agreed with the proposals in the consultation paper.

2.14 Three Chambers agreed with the proposals: Doughty Street Chambers, Arden Chambers, and Falcon Chambers. Comments included that the Commissioner must have adequate support and guidance to assist him/her in making a decision and that this decision should be taken after the complaint is investigated and all relevant information obtained. The criteria for deciding the route of a complaint should be provided to both the parties so they may make representations on the issue.

2.15 A lay vice-chair of the Complaints Committee ('CC') suggested an additional objective: "To promote public confidence in the efficacy and fairness of the complaints and disciplinary process".

2.16 Two lay CC members, two COIC lay members, and a former COIC Tribunal chair agreed with the proposals, but additional comments included that: it will be challenging to communicate this to complainants; the criteria relating to a breach appearing to be unintentional should instead be that the breach "does not include a suspicion of intent"; the Commissioner's decision can be changed if new information comes to light.

2.17 A QC stated that the consultation paper failed to make any clear statement about the need for the proposed procedures to be fair to the barrister who is the subject of the complaint or disciplinary process. Additionally, a barrister stated that a fundamental objective of the BSB ought to be to improve its reputation and obtain the respect of the Bar.

<u>Conclusion</u>

2.18 The BSB took into account the responses and in particular the view that barristers need to have confidence in the regulatory system. It has agreed that the strategic objectives for regulating compliance with the Code are:

- To act in the public interest;
- To protect the public and consumers of legal services;

- To promote access to, and the proper administration of, justice;
- To maintain high standards of behaviour and performance of the Bar;
- To provide appropriate and fair systems of redress for those who receive poor service;
- To provide appropriate and fair systems for the barrister who is the subject of the complaint or disciplinary process;
- To promote public and professional confidence in the complaints and disciplinary process;
- To ensure that complaints are dealt with fairly, expeditiously, and consistently.

2.19 The BSB has agreed the following criteria as the basis of the decision as to whether a complaint can be dealt with by the Commissioner as a 'non-disciplinary' matter:

- Whether the alleged behaviour represents a risk to the public or has wider implications for the regulation of the Bar;
- Whether the alleged behaviour is likely, if established, to bring the Bar's reputation into disrepute;
- The level of seriousness of the alleged breach of the Code;
- Whether the alleged behaviour includes an allegation of dishonesty;
- Whether the alleged behaviour is ongoing;
- Whether the alleged breach was intentional;
- The impact of the alleged breach and whether there are lasting consequences;
- Whether the alleged behaviour is likely to be repeated;
- Whether the conduct is a technical breach of the Code that could be dealt with by imposition of an administrative warning or fine;
- Whether the barrister has acted in good faith and in the best interests of those he/she represented;
- The barrister's previous disciplinary record.

2.20 Whilst the PPC and LSC expressed reservations about the Commissioner deciding the route that a complaint should make, the BSB has decided that it is appropriate for the Commissioner, with assistance from members of the Complaints Committee when required, to decide the route that a complaint should take. The BSB will develop guidance for the Commissioner and the Committee on the application of the objectives and criteria.

2.21 Although concerns were raised by the YBC and ChBA about previous disciplinary findings being taken into account as a factor in deciding which route a complaint should take, the BSB has decided they are relevant and should be taken into account. As previous findings will affect the potential sanction that may be imposed, it is important for these to be considered, as the different routes will end in different types of sanction. Additionally, in order to assess whether a complaint is a technical breach of the Code that could be dealt with by imposing a warning or fine, previous findings must be taken into account (see paragraph 901.5 of the Code of Conduct).

2.22 Finally, the BSB notes the points made by the CPS in relation to employed barristers and has agreed that there should be formal discussions with the Employed Barristers Committee of the Bar Council to clarify the Commissioner's approach to dealing with complaints against employed barristers.

3. Introduction of Improper Behaviour

Recommendation 30(a): "*The Bar Standards Board should introduce new, non-disciplinary, powers to address 'Improper Behaviour' towards non-clients. A finding of 'Improper Behaviour' would not include any powers to recommend that a barrister pays compensation to a non-client."*

Recommendation 30(b): *"Matters of 'Inadequate Professional Service' and 'Improper Behaviour' should not give rise to formal disciplinary findings and any outcomes would be disclosed only in relation to applications for silk or judicial office."*

Q.3 Do you agree with the proposals for the introduction of a new concept of Improper Behaviour?

Q.4 If so, do you agree with the definition of Improper Behaviour as set out in paragraph 3.24 above?

Q.5 Do you agree with the proposed sanctions for Improper Behaviour and the proposals for the disclosure of Improper Behaviour findings?

3.1 The proposals relating to Improper Behaviour ('IB') are detailed in the consultation paper (see paragraphs 3.12 – 3.32). The responses to the consultation document show that this proposal was the most controversial, with strong views expressed both supportive and not supportive of the recommendations. Several responses to the consultation document only addressed this issue. Of the 34 responses on this recommendation, 18 were clearly supportive of the proposal, whilst the remaining 16 ranged from strongly opposed, to having concerns, to providing comments but not asserting a strong view. Several responses included suggestions for an alternative name and these appear at the end of the section.

3.2 COIC submitted that this proposal has generated the most comment, with Inner Temple's Bar Liaison Committee and Middle Temple Hall Committee strongly opposing the proposal. The other two Inns did not go this far, but expressed reservations. The lack of empirical evidence to support this proposal undermined the case for introducing it and further research and consultation should be carried out before any decision is taken.

3.3 The South Eastern Circuit supported the new concept, because in their experience, when a complaint made by a third party has merit, but may fall short of professional misconduct, the Complaints Committee tends to refer it to a Tribunal. The new concept would act as a "safety valve" by ensuring that minor matters are not exaggerated into misconduct. It did not believe that the new concept will give rise to any more complaints than are already made. It agreed with the proposed sanctions, save for the requirement of completion of additional CPD hours, which seemed irrelevant. It was firmly of the view that neither a finding of IPS or IB should be disclosed in applications for QC or judicial appointments.

3.4 The PPC and LSC strongly opposed the proposal for IB. They agreed with the aims expressed by the BSB, but were not satisfied that there are deficiencies in the current system that warrant the creation of a new concept. The Complaints Committee already have the power, where the barrister's conduct has given rise

to concern but does not disclose a *prima facie* case of professional misconduct, to require the barrister to apologise to the complainant or to be given advice as to future conduct. They submitted that these rules were developed to ensure that the full disciplinary process was not invoked when the case did not warrant it and if these rules are not sufficient, they are not operating in the way they were intended. The BSB has not provided any statistics to support the proposal and the proposed definition of IB does not provide any guidance as to what conduct it would include. If the concept is introduced, it is not appropriate to include the sanction that a barrister must complete CPD, as additional CPD will not improve behaviour. All that is required is the ability to direct a barrister to apologise or to be given advice as to future conduct. Should the concept be introduced, a finding should not go on the barrister's record at all, but if it is to be recorded, it should be treated in the same way as IPS.

3.5 The YBC supported the intention of IB to apply to minor instances of professional misconduct so that the Commissioner could deal with these cases, rather than the Committee or a Tribunal. However, the new concept must not be allowed to have the effect of extending the ambit of the complaints procedure beyond what would be a breach of the Code and the definition should be amended to take this into account. A finding should not be made public to prevent a small mistake made at the start of a barrister's career from blighting his/her professional development.

3.6 The PNBA opposed the introduction of the new concept. A complaint that is insufficiently serious to amount to misconduct should not form the basis of any action by a regulatory body, but it could be subject to warnings. It raised potential difficulties over a client's right to confidentiality and legal professional privilege in investigating such a complaint. It further suggested that in the absence of specific standards and guidance, adjudication would be purely subjective. Finally, it is likely that an advocate would feel inhibited in carrying out his/her professional duty to the client for fear of such complaints, as it may be in the client's interest for the advocate to undertake a vigorous cross-examination of witnesses or to stand up to a Judge.

3.7 COMBAR disagreed with the new proposal, as it is inconsistent with "light touch" regulation and the definition is vague. Any finding, if it is introduced, should not be disclosed in applications for QC or judicial office.

3.8 TECBAR supported the proposal, however, it suggested that rather than create a new concept, the current definition of IPS could be expanded to cover complaints by non-clients.

3.9 The PABA was strongly opposed to the new proposal, on the basis that there is no demonstrable need for it, the concept is too broad, and that the existing complaints system has met with approval from the LSO.

3.10 The LCLCBA opposed the new concept, as it believed that the definition is unacceptably vague. There are no established duties between a barrister and a non-client and no objectives standards by which it can be determined whether a barrister's conduct fell short of what was to be reasonably expected. In the absence of clear standards and guidance, it is inappropriate to create an offence and sanctions for failure to comply. If the conduct in question is not a *prima facie* breach of the Code, it should not be prosecuted.

3.11 The ChBA did not support the proposals. If a breach of the code is sufficiently serious, the Committee or a Disciplinary Tribunal should deal with it as misconduct. If it is not sufficiently serious, it should not proceed. The ChBA believed that it is creating a new jurisdiction, despite the statement in the consultation paper that this is not intended. The proposed definition creates new offences that do not fall under any particular paragraph of the Code, nor amount to "bringing the profession into disrepute". If the findings are truly non-disciplinary, then a reference to the Bar Quality Assurance Panel may be an appropriate sanction. It is not clear what evidence shows there is a need, and short of a compelling reason for introducing a new procedure, it would be better not to complicate the existing system.

3.12 The CPS agreed with the proposal, as it will provide some redress for non-clients of self-employed barristers outside the formal disciplinary process. For employed barristers, the type of conduct that would be categorised as IB may often be dealt with by the employer's internal disciplinary procedure and more thought needs to be given to the role of the Commissioner in these circumstances. The Commissioner should not deal with a complaint of IB against an employed barrister until the employer's complaints procedure has been exhausted and the Commissioner should be able to dismiss such a complaint where it has been resolved by the employer's complaints process. It broadly agreed with the definition of IB, but believed there is a subjective element to it. The sanctions are appropriate for the self-employed Bar but there should be more discussion with the employed Bar.

3.13 The LSO's response was neither clearly supportive nor opposed to the proposal. She expressed a number of concerns about the concept, and in particular, the lack of clarity as to how the definition distinguishes IB from professional misconduct. A lack of clarity in this area raises the risk of complainants making allegations that their complaint of professional misconduct was wrongly dealt with as IB and the BSB should put in place safeguards to address this concern. She suggested that repeated acts of IB might justify disciplinary action.

3.14 The Consumer Panel and the NCC strongly welcomed this proposal. The NCC believed that the use of the word "significantly" in the definition set the test too high and suggested it be removed. A finding of IB should be registered on a barrister's disciplinary record and disclosed to the public - to not do so weakens the incentive for barristers to behave properly towards non-clients. Both organisations submitted that there should be the option for financial redress to the complainant because the complainant may have suffered financial loss, distress, or inconvenience.

3.15 The OISC and CIMA were also supportive of the proposal. CIMA endorsed the concept as a "complaints driven" rather than a "system driven" approach and believed that it would bring additional flexibility and fairness to all parties.

3.16 BMIF did not agree with the proposal and endorsed PNBA's response on this topic. The concept is ill defined and the remedies are available elsewhere. It could have the impact of compromising a barrister's duty to his or her own client and give rise to civil claims. If barristers are concerned about the possibility of a complaint of IB, they may be hindered from performing to the best of their ability. Claims emanating from this concept would create an additional burden for BMIF, which could mean increased premiums for barristers.

3.17 Three chambers provided supportive responses to the proposed concept. Doughty Street Chambers agreed on the basis that it would allow for non-disciplinary action to be taken in certain circumstances, whereas previously the system forced the BSB into taking disciplinary action. It also agreed with the inclusion of the word "significantly" in the definition, along with the intention that the new concept will not expose barristers to action that is not already covered by the Code. Arden Chambers and Falcon Chambers agreed with the definition, but not with the proposed sanction of requiring completion of additional CPD. Falcon Chambers suggested that criteria should be developed for IB so as to act as a safeguard to prevent it being used for frivolous or vexatious reasons.

3.18 One lay member of the Complaints Committee (vice-chair), five COIC lay members, and a former COIC Disciplinary Tribunal chair supported the proposal. The Committee member submitted that the new concept is necessary, as the Committee sees a few examples each year of the type of behaviour that could be dealt with by the concept, such as rudeness. Compensation should be available to complainants in this area, albeit at a lower level than IPS. A COIC lay member believed that findings of IPS and IB should be disclosed to promote transparency. A second COIC lay member strongly supported IB as she has long been concerned that rudeness to a Judge is treated as professional misconduct and therefore in a more serious category than poor service to a client. She suggested that a further sentencing option of "formal censure" be created. A third COIC lay member agreed with the proposal, but cannot align it to a "non-disciplinary" offence and suggested that it be at the discretion of the panel as to whether a finding be disclosed.

3.19 Six individual barristers (including three QCs) responded strongly in opposition to the IB proposal. Comments included that it is vague and nebulous; complaints made by other professionals can be dealt with via the Bar Quality Assurance Panel; there is a danger of opposing litigants trying to use it as a weapon to influence the outcome of a case; and it is the responsibility of Judges to control the behaviour of advocates. Concern was also expressed at the proposal of IB becoming registered on a barrister's record. A further concern was raised about the proposal that IB complaints would be dealt with by a member of staff preparing the draft report for the Commissioner to send to the parties. If the draft report is favourable to the complainant but is based on a misapprehension as to the barrister's duties, it would raise the complainant's hopes. He suggested that the draft report only be sent to the party to whom it is adverse.

3.20 Of the responses both supportive and opposed to IB, a number suggested alternative names:

- Inappropriate Professional Conduct (SE Circuit)
- Inadequate Professional Behaviour (Consumer Panel & OISC)
- Unprofessional Behaviour (COIC lay member & PPC/LSC)
- Unacceptable Professional Behaviour (PPC/LSC)

<u>Conclusion</u>

3.21 The BSB acknowledges the considerable disquiet regarding the proposal on IB that has been expressed by a range of respondents. It has also taken into account the almost equal number of supportive views submitted. It is clear from some of the responses that the consultation paper did not make the concept sufficiently clear – the proposed new concept was never intended to create a new or expanded jurisdiction to deal with complaints, but was intended to provide more flexible means to deal with complaints of conduct that may be a

breach of the Code, but do not, in the interests of proportionality, warrant consideration by a Disciplinary Tribunal. The BSB notes the accurate submission by the South Eastern Circuit that the new concept would act as a "safety valve" to ensure that minor matters that do merit consideration are not elevated to professional misconduct.

3.22 The BSB believes that the concept of IB retains significant validity and should not be dismissed out of hand. However, it accepts that within the current rules there are some mechanisms that can provide reasonable avenues by which such complaints can be addressed as long as those avenues are used to proper effect. Whilst the BSB is committed to ensuring that these mechanisms are utilised in appropriate cases, it does not believe they are sufficient and believes that further consideration needs to be given to the development of a flexible approach to dealing with complaints of conduct that may be a breach of the Code, albeit a minor one.

3.23 The BSB also notes the number of responses that suggest that only anecdotal rather than empirical evidence has been put forward in support of the development of the new concept. The BSB reaffirms its commitment to taking an evidence-based approach to regulation. In giving its preliminary approval of the recommendation, the BSB relied on the evidence and statistics put forward in the Review that there were structural gaps in the current system that prevent flexible and proportionate responses to complaints by non-clients (see page 38 of the Review). The BSB has taken into account the responses to the consultation and accepts that some of the profession would like to see more evidence to support the introduction of the new concept. It therefore agrees that it should obtain further statistics and examples of real complaints that would have been appropriate for consideration as IB.

3.24 The BSB also accepts, as was pointed out in many responses, that further thought needs to be given to the general principles underpinning the concept of IB, the level of guidance that would be needed to make the concept effective and also how the concept will affect the wider provisions/principles of the Code. The BSB also agrees that the offence could be more aptly named, perhaps as "Inappropriate Professional Behaviour".

3.25 In light of all these factors, the BSB has decided that the concept of IB will not be introduced as part of the Strategic Review changes scheduled to be implemented in the autumn of 2008. The Board has decided, given that a comprehensive review of the Code of Code of Conduct and its underlying principles is currently being conducted, that the Steering Group should liaise with those tasked with conducting the Code review and report back to the Board, later in the year, on whether or how this recommendation should be taken forward.

3.26 In the meantime, the BSB considers that more detailed guidance needs to be issued to the Complaints Committee on how it can use its current powers more effectively to address the type of complaints that might be covered by IB; it may even be necessary to amend the current procedural rules to make the current avenues more effective. The Steering Group has been asked to look into these issues and report back to the Board.

4. Extension of Commissioner's powers to adjudicate

Recommendations 33: *"The Commissioner's powers should be extended to adjudicating on service complaints and to make non-binding recommendations for resolution without reference to the Complaints Committee. The powers would be exercised in accordance with Bar Standards Board policy on regulating compliance."*

Recommendation 34: *"The Commissioner's powers of adjudication should be limited to recommending an apology, return of fees and compensation (the latter two should only apply to direct clients)."*

Q.6 Should the Commissioner be able to make non-binding recommendations for the disposal of non-disciplinary complaints and relevant hybrid cases?

Q.7 Is it reasonable to allow non-disciplinary complaints to be determined on paper based on the Commissioner's views and any advice he has sought?

Q.8 Is the process for the Commissioner's adjudication as described above a reasonable one?

Q.9 Contrary to the Commissioner's suggestion, should a full draft of the Commissioner's report, including the conclusions and recommendations, be disclosed to the parties prior to the issue of the final report?

Q.10 Could the process outlined for the Commissioner's adjudication be changed in any way to make it more effective or fairer to the complainant and/or the barrister?

4.1 The proposals for the extension of the Commissioner's power to adjudicate on non-disciplinary complaints are detailed in the Consultation Paper (see paragraphs 3.33-3.44). Of the 27 responses that addressed these recommendations, 20 were clearly supportive of the proposals and 7 were either not clearly supportive or were opposed.

4.2 COIC, and in particular Lincoln's Inn and Gray's Inn, expressed concerns about the Commissioner assuming greater powers, as it will require more detailed briefings from staff and therefore may increase the cost of the system.

4.3 The South Eastern Circuit supported the proposals but suggested that there must be constant review of the system to ensure that the balance of fairness is retained. Depending on how the system functions, and the number of non-binding recommendations subject to review, consideration should be given to making the recommendations binding and subject to appeal. The Complaints Committee should play a supervisory role during the preparation of reports before they go to the Commissioner to ensure that specialist advice in the relevant area of practice is always available. The draft report should be issued initially so that the parties are able to make representations prior to the final resolution.

4.4 The PPC and LSC agreed with the proposal for the Commissioner to make non-binding recommendations, subject to their comments in section 2 above. Whilst they would not oppose distributing the draft report to the parties before it is

finalised, they suggested that this step would prolong the process and increase the burden on staff.

4.5 The YBC broadly supported the proposals; however, disagreed with the suggestion that the draft report be disclosed to the parties prior to the final report. This is an unnecessary extra step adding to the cost of the BSB and the time commitment of the barrister. Additionally, there would be the risk that this step could lead to a lack of thoroughness in investigation and preparation of the report. The report should be non-binding and the barrister would have recourse to a review and the complainant to the Ombudsman.

4.6 The PNBA suggested that the proposal raised potential difficulties, including: lack of clarity about how factual disputes would be resolved; lack of clarity as to the role of the Committee member who may provide advice to the Commissioner; the proposal that the Commissioner be able to award the return of fees and compensation is not in line with other regulators and should be a matter for the Courts; and the barrister should have the right to a full appeal, rather than just a review. The full draft report should be disclosed to both parties for comment.

4.7 COMBAR agreed with the Commissioner adjudicating on non-disciplinary complaints, but suggested that because the consequence of such findings could seriously affect a barrister's career, consideration should be given to giving the barrister the option to consent to the Commissioner adjudicating on a complaint. Although the barrister must be given the opportunity to challenge the allegations, it could undermine the report if the Commissioner's findings or recommendations were changed as a result of submissions on the draft report. The findings should be published to both parties, who should be given the opportunity to make submissions on sanction.

4.8 TECBAR supported the proposals, but opposed providing the parties with a copy of the draft report, as it adds to the administrative burden, costs, and length of the process. It would be unacceptable if the new process required a substantial increase in the staff in the Secretariat to deal with low-level complaints. The process should be kept under constant review to ensure that efficiency and fairness are maintained.

4.9 The ChBA supported the proposals, but believed that the Commissioner should also be able to make findings in minor cases of misconduct where they are associated with non-disciplinary offences. The Commissioner must have access to expertise in the relevant area of law, and should only determine cases on paper where he or she believes it appropriate. The parties should be able to comment on the draft conclusions and this is likely to reduce the number of cases going to review. Consideration must be given to how matters of evidence are dealt with when there is a dispute as to facts.

4.10 The CPS agreed with the proposals, as it should streamline the process. Whilst it is suggested that a member of staff would prepare the report for approval by the Commissioner, it is not clear how this would work in practice. It is unclear whether the parties will have to agree to this route or whether it will be imposed without agreement. The full draft report should be disclosed to allow the parties to comment on it, including the conclusions and recommendations. The proposal that complainants not be given a right of review, as they are able to approach the LSO, will complicate and lengthen the process for the complainant.

4.11 The LSO neither clearly supported nor opposed the proposals and suggested that the Commissioner may want to retain the discretion to hear oral submissions in some cases. If staff are expected to conciliate a complaint, they must be suitably trained, supervised, and provided with clear guidance. The BSB should be sensitive to the difficulties of some complainants in presenting their complaint. The full draft report should be disclosed to the parties for comment.

4.12 The Consumer Panel and the NCC supported the proposals. The NCC agreed that this proposal would create more proportionality and flexibility, and increase the speed at which complaints are resolved.

4.13 The OISC and CIMA believed that the proposals are reasonable. The OISC noted that whilst the proposals would give the BSB more tools to deal with complaints efficiently and proportionately, the new proposals did not seem to simplify the process. It suggested that the different processes for dealing with complaints be publicised. Both organisations suggested that the full draft report should be disclosed to the parties for comment. CIMA also noted that there should be a provision for periodic reviews of the Commissioner's decisions by an independent party to ensure transparency and consistency.

4.14 Arden Chambers, Doughty Street Chambers, and Falcon Chambers supported the proposals, including the full draft report being disclosed to the parties. Doughty Street Chambers was concerned about timescales, as barristers often feel that complaints take a great deal of time to resolve and the stress of an ongoing complaint should not be under-estimated. The proposal that staff prepare the reports for the Commissioner might cause delays if the process is not adequately resourced. Safeguards should be in place to ensure that the Commissioner receives appropriate specialist legal input in appropriate cases before making a decision. Most complaints require some specialist legal input in order to provide a context within which to assess the conduct of the barrister and clear criteria should be developed to indicate when legal input should be sought. Falcon Chambers suggested that there should be a published target timescale for this process.

4.15 Three lay members of the Complaints Committee broadly supported the proposals. One suggested that the full draft report should be provided to the parties; however, they should only be allowed one round of submissions, set to a strict deadline. Another preferred the Commissioner's approach to disclosure of the draft report, as complainants may have difficulty understanding why the conclusions may change in the final report.

4.16 Two COIC lay members, and a former Disciplinary Tribunal Chair provided supportive responses. They agreed that the full draft report should be provided to the parties prior to the final report. One expressed concern about the proposal that the draft report is prepared by a member of the BSB staff, and suggested that the report be prepared by a lay member to ensure that the process is independent.

4.17 Four COIC lay members disagreed with implementation of Recommendation 33. Their experience of Adjudication Panels indicated that complainants are reasonably satisfied that complaints are being considered by an independent panel and this proposal would reduce that satisfaction. The Commissioner alone, or with assistance, would not be able to produce the same type of reasoned decision that is currently produced by four members of an Adjudication Panel.

The cost of additional staff time would be substantially higher than the cost of Adjudication Panels. If the proposals are introduced, the full draft report should be provided to the parties. Additionally, communication during the complaint should not solely be in writing, but an attempt should be made to bring the two parties together for conciliation. The following alternative suggestions to the proposals were made:

- Retain Adjudication Panels in their present form;
- Complaints that are currently considered by an Adjudication Panel should be put before the proposed 3-person disciplinary panel, which is able to hear oral submissions from both parties.

Conclusions

4.18 The BSB acknowledges the supportive responses from a number of parties of the general principle of the Commissioner being given the power to adjudicate on non-disciplinary complaints as a speedier and more flexible way to resolve complaints. However, it also acknowledges the concerns expressed about the potential costs of the proposal, including the need for increased staff. Since the end of the public consultation, there have been detailed discussions with staff regarding the practicalities of the implementation of this recommendation. It is clear from these discussions that the extension to the Commissioner's powers would require an increase in staff. In considering whether this additional expenditure is warranted, the BSB has taken into account that, with the introduction of the OLC in 2010, responsibility for the determination of IPS cases will transfer to that body. The BSB remains of the view that extending the Commissioner's powers to allow the role to adjudicate is not only valid, but one that could bring improvements to the system. However, it is difficult to justify the increase in costs, given that the new powers would be applicable for less than two years. For this reason, the BSB has reluctantly decided that it will not extend the Commissioner's powers and will retain the system of using Adjudication Panels to decide IPS cases.

4.19 However, there are improvements that can be made to streamline the current system. The BSB has decided that it is reasonable for the Commissioner to have the discretion as to the route that a complaint should take. Therefore, it has decided that the Commissioner should be able, after the investigation of a complaint, to refer a complaint of IPS only directly to an Adjudication Panel without consideration by the full Committee. In taking this decision, the Commissioner would be entitled to seek the views of one or more members of the Complaints Committee if he required specialist advice. The BSB believes that this approach will reduce the amount of time taken to resolve most complaints of IPS only. The Committee would still retain the power itself to refer cases to an Adjudication Panel, so that in complex or appropriate cases, the Commissioner could refer cases of IPS to the Committee for consideration.

4.20 There will need to be a detailed review of the Adjudication Panel and Appeal Rules (Annex P to the Code of Conduct) to ensure that they are streamlined. The Steering Group has been asked to report to the BSB how this review should be taken forward to ensure that the relevant stakeholders' views are taken into account. The BSB believes that this solution will keep the cost of the process for IPS complaints down, whilst allowing for a relatively easy transition of service complaints to the OLC in 2010.

5. The right to appeal adjudications by the Complaints Commissioner

Recommendation 35(b): *"An appeal mechanism against the Commissioner's findings should be introduced which gives a barrister and, perhaps, the complainant the ability to appeal. The appeal panel's decision should be final and binding. A failure to comply with the panel's decision should expose the barrister to disciplinary action. The appeal panel should have a lay majority and consist of three members with a senior barrister, not necessarily a QC, acting as Chair."*

Q.11 If a barrister accepts the Commissioner's recommendations should this be the end of the matter or should complainants be given a right to a review if they disagree with the Commissioner's recommendations?

Q.12 Is a lay majority for the review panel reasonable? Would a lay chair of the review panel be more appropriate than a barrister chair?

Q.13 If the chair of the review panel is to be a senior barrister, is 15 years' practising experience sufficient seniority?

5.1 The proposals for a review of the Commissioner's adjudication are detailed in the Consultation Paper (see paragraphs 3.45-3.51). Of the 26 responses that addressed this recommendation, a range of views were provided as to who should have the right of a review, the scope of the review, and the proposed composition of the panel.

5.2 The South Eastern Circuit believed that if a barrister accepts the Commissioner's recommendation, it should be the end of the matter. The barrister must be entitled to the right of review, as a barrister may face a decision with which he or she does not agree, but non-compliance will result in disciplinary action. A complainant has the right to approach the LSO, and a lay majority should allay concerns that the profession is protecting its own members. A lay majority would maintain public confidence in the system, but a barrister chair is essential to ensure that decisions take into account expert knowledge and experience of barristers' work. A barrister chair (of a minimum of 20 years' call and within the relevant discipline), with two lay panel members would provide balance. Where a complaint is in respect of a QC, the chair should be a QC.

5.3 The PPC and LSC believed that if the barrister accepts the recommendation, it should be the end of the matter, as the complainant is entitled to approach the LSO. If the review panel is to have a lay majority, the chair should be a barrister of 15 years' practising experience.

5.4 The YBC agreed that the matter should end if the barrister accepts the recommendation, as the complainant is able to approach the LSO. A barrister majority on the review panel, particularly in cases of IPS, would be preferable as the issues may be highly technical and the outcome may affect parallel court proceedings. However, 15 years' practising experience for the chair is excessive, as the minimum experience for a judge is only 10 years, and the BSB recently removed the requirement that Committee chairs have a minimum length of practice. The guiding principle is that the best person for the job should be appointed.

5.5 The PNBA submitted that the barrister's acceptance of the recommendation should be the end of the matter. A barrister chair was appropriate for the review

panel, and there should not be a set majority of lay or barrister members, but the three-person panel should be flexible, so long as there was always one barrister and one lay member. It submitted that barrister members were better able to adjudicate on IPS, and lay members better able to adjudicate on IB (should the concept be introduced). Finally, the chair could be 15 years' practising experience, subject to suitable training prior to appointment and/or judicial experience.

5.6 COMBAR believed that it is not necessary to give the complainant a right of review. The review panel should comprise two senior barristers and a lay chair; however, if the chair is to be a barrister, it should be a QC.

5.7 TECBAR agreed that the complainant should not be given a right of review within the Bar's disciplinary process, as the complainant is entitled to approach the LSO. However, if a barrister disagrees with a decision that carries a sanction, and failure to comply with the sanction carries the threat of disciplinary action, the barrister should have the right to appeal the decision/sanction. A lay majority for the review panel is appropriate, but the chair should be a senior barrister of 15 years' or more experience (not necessarily a QC) to ensure a uniformity of approach and to provide a solid legal framework for the review. The barrister chair should undergo a selection and training programme to ensure that the objectives are fully realised.

5.8 The ChBA submitted that it would be preferable for the BSB to provide a right of review for the complainant as well as the barrister, as the LSO will primarily be reviewing whether the process conducted by the BSB is defective. A lay majority is reasonable, provided that the barrister member is qualified and experienced to deal with the subject matter of the complaint. The chair should be a barrister of at least 15 years' practising experience, since the process will be conducted according to the rules and the panel will have to have an appreciation of its jurisdiction, function and powers.

5.9 The CPS suggested that the complainant should be given the right of review, as it is not appropriate for the complainant to only be able to approach the LSO. The review panel should have a lay majority and it may secure more confidence if the chair is a lay member. If the chair is a barrister, 15 years' practising experience is sufficient.

5.10 The LSO believed that complainants should be given the same right of review as barristers, as only allowing barristers a right of review would give rise to problems of public perception. The panel should consist of a lay majority and a lay chair.

5.11 The NCC suggested that the Commissioner's decision be binding on barristers and that neither the barrister nor the complainant have a right of review. The Commissioner would only adjudicate on non-disciplinary matters and there are sufficient safeguards in place to ensure that complaints are dealt with fairly. If there is to be a review process, there should be a lay majority on the panel and it is unnecessary for the chair to be a barrister.

5.12 The Consumer Panel suggested that because a single person would make the decision, it should be open to review for the barrister, but a lay chair would give more confidence to the complainant.

5.13 The OISC agreed that it is not necessary for complainants to have a right of review because they can approach the LSO. If there is a significant rise in complainants contacting the LSO, the BSB should look at this issue again, however, until that happens, it is not necessary to build another review into the process. The review panel should have a lay chair to promote consumer confidence, but there must be a barrister on the panel to ensure there is sufficient knowledge and expertise.

5.14 CIMA submitted that if a barrister accepts the Commissioner's recommendations, the matter should end, as the complainant is entitled to approach the LSO. It supported a lay majority and a lay chair for the review panel.

5.15 Arden Chambers submitted that a barrister's acceptance of the recommendations should be the end of the matter and the complainant should not be given a right of review. They strongly disagreed with the proposal for a lay majority, as the purpose is professional regulation of the Bar and one should be judged by one's peers. Although there must be a balance between the interest of the barrister and the complainant, the balance should be in favour of fairness to the barrister. They accept that there should be lay involvement, but not in the majority and the Chair should be a barrister of at least 20 years' practice.

5.16 Doughty Street Chambers believed that complainants should not be given a right of review. The panel should have a lay majority, and there will be a reduced involvement of barristers at an earlier stage. It is important to have a QC as the chair to retain the confidence of the Bar and for the decision to command the respect of the barrister.

5.17 Falcon Chambers believed there should be a right of review available to both parties. It is reasonable to have a lay majority on the review panel, but unnecessary to have a lay chair. Whilst they agreed 15 years' seniority is sufficient to be a chair, more senior members of the Bar may not agree and therefore proposed that the chair be 20 years' seniority.

5.18 A lay vice-chair of the Complaints Committee was neither for nor against the proposals. Whilst not giving the complainant a right of review would reduce consumer confidence, if a complainant were given the right of review, this would be the continuation of Adjudication Panels with a different name. If the complainant refers the matter to the LSO, who recommends reconsideration, it would cause a delay of several months. Unless there has been evidence of difficulties with lay chairs of Adjudication Panels, a barrister chair would be a backwards step.

5.19 A lay Complaints Committee member believed that allowing the complainant a right of review is a good idea, as it would help to provide the complainant with closure. A lay chair and a lay majority would carry weight for complainants to feel that they have been dealt with fairly. A second Complaints Committee lay member is uncomfortable with the proposal that the barrister is allowed a review but the complainant is not, as a review can provide a final determination, whilst the LSO is not able to make a final determination. He believed that the review panel should have a lay majority and a lay chair; however, if the chair is to be a barrister, 15 years' practising experience is sufficient.

5.20 A COIC lay member suggested that it is unfair to allow a barrister to have a review of the decision, whilst the complainant is only allowed a review of the

process by the LSO. Whilst he understands the independent nature of the Commissioner's role, it is likely that a lay complainant will have difficulty appreciating it. Both the barrister and the complainant should be given the choice of adjudication by the Commissioner or by panel, with the advantages in time and complexity being pointed out. If both parties agree to adjudication by the Commissioner, the outcome should be binding. Alternatively, the review requested by the barrister should be limited to the same considerations as those of the LSO. The review panel should have a lay chair with a lay majority. Another COIC lay member submitted that the chair of the review panel should be a barrister who specialises in the relevant area of law. A third COIC lay member supported the option for the complainant to appeal and believes that this is an omission. A fourth lay member believed that the complainant should be able to appeal the decision of the panel to two lay members and one barrister, with a lay member as the chair. A fifth lay member submitted that complainants should not be given a right of review, as they have the LSO, but that should a barrister seek a review, the panel should have a lay majority, and a lay chair may give it more credibility. A final COIC lay member suggested that it is not necessary to give complainants a formal right of review and suggested that for the barrister's review, it may be perceived as more fair if the chair is a lay member, but if it is a barrister, 15 years' experience should be sufficient. He submitted that the current composition of Adjudication Panels (two barristers and two lay members) has worked effectively.

5.21 A former COIC Tribunal Chair agreed that only the barrister should have the right of review and that the complainant can approach the LSO. A lay majority on the panel is reasonable, but the Chair should be a barrister.

5.22 A QC submitted that it should be the end of the matter if the barrister accepts the Commissioner's recommendation. The review panel should not have a lay majority, as it is contrary to the principle of self-regulation that a binding decision could be agreed by the lay members and rejected by the professional members. As the original decision will have been made by a lay person (the Commissioner), it would undermine the confidence of the profession if the lay members could out-vote the barrister members in the review. Fifteen years' seniority is appropriate.

Conclusions

5.23 As a result of the BSB's decision not to implement the recommendation that the Commissioner have the power to adjudicate on complaints, the issue of a review mechanism for the Commissioner's decision becomes obsolete. These complaints will now be referred directly by the Commissioner to an Adjudication Panel, and any decision by the Adjudication Panel can be appealed in accordance with the Adjudication and Appeals Rules (Annex P to the Code of Conduct). As mentioned in paragraph 4.20 above, these rules will be reviewed to ensure they are appropriately streamlined.

6. Introduction of Determination by Agreement

Recommendation 36: *"A new mechanism, known as 'determination by agreement', for dealing with cases of professional misconduct should be introduced by extending the Complaints Committee's powers to allow it to adjudicate on allegations of misconduct, with the agreement of the barrister, and make final determinations leading to a disciplinary finding."*

Recommendation 37: *"The Complaints Committee's sentencing powers should be limited and the maximum sanction should be a fine of £5,000."*

Q.14 Does the Determination by Agreement process provide appropriate proportionality and flexibility to the existing system?

Q.15 Do you consider that that the new process might have a negative impact on complainants? If so, do you consider there are any ways this impact can be addressed within the proposed new process?

Q.16 Do you think that Determination by Agreement will work in practice? If not, are there any revisions to the process that you would recommend?

Q.17 Are there any alternatives to Determination by Agreement?

Q.18 Is it right that barristers who consent to Determination by Agreement should receive a reduced sentence than if the case was determined before a Disciplinary Tribunal?

Q.19 Should the Committee report be made available to the Disciplinary Tribunal when sentence is determined?

6.1 The proposals for the new process of Determination by Agreement ('DBA') are detailed in the Consultation Paper (see paragraphs 3.52-3.73). Of the 25 responses addressing these recommendations, most were supportive of the proposals and many comments about ensuring that the process is fair to all parties were provided.

6.2 The South Eastern Circuit submitted that the success of this proposal depends on a number of factors, including:

- Filtering complaints through the Commissioner and Committee to ensure that this arm of the process is not overburdened;
- Ensuring the detailed procedure is managed in a flexible, speedy and efficient manner by keeping the number of written exchanges to an appropriate level;
- Engaging complainants in the process so that they are more likely to be satisfied with the process and the outcome;
- Quality outcomes that are robust, fair, and unimpeachable.

The process should have a positive impact on complainants as they have the opportunity to be more involved in the process; however, if the outcome is such that the barrister challenges the report and it proceeds to a hearing, complainants may become disenchanted. As the process is primarily paper based, complainants who are less articulate may be disadvantaged, and therefore the administrative arrangements should be flexible to account for this. Consideration should be given to allowing the barrister and the complainant to "break out" of the process and proceed to mediation under the supervision of the Committee or the Commissioner. Barristers who consent to DBA should receive a reduced sentence than what they may have received at a Disciplinary Tribunal, as DBA would only apply to relatively minor issues so there would not be any risk to regulatory standards. Committee reports should not be made available to the Disciplinary Tribunal routinely, but only on application in specific circumstances so that the barrister is entitled to object to its production.

6.3 The PPC and LSC agreed that cases where a sentence of suspension or disbarment is a prospect, the matter is unsuitable for DBA. Additionally, it would only be appropriate where the facts are not in dispute, as there would be no fair means of resolving them. They welcomed the intention to find a speedy, proportionate and flexible alternative to formal hearings, but had reservations about how the proposal would work in practice. There is no opportunity for the barrister to mitigate, and there may be unfairness in those investigating also acting as judge and jury. They expressed concern that barristers will not agree to DBA, because it requires them to give up the ability to represent themselves in person to a panel. The risk of a negative impact on complainants is less serious because many of the matters that would be dealt with in this way would be own-motion complaints. It is not easy to conceive of alternatives other than some form of mediation or conciliation. They also had concerns about offering a reduced sentence in DBA cases, because it is likely to leave the complainant dissatisfied and it would put undue pressure on the barrister to agree when he or she is innocent of wrongdoing. Finally, as cases involving suspension or disbarment would be excluded, the discount is unlikely to be much of an incentive. The report should not play any part in the Disciplinary Tribunal's view on sentencing, as the Tribunal should make decisions based on the evidence it has heard as part of formal submissions.

6.4 The YBC agreed with the proposals for DBA and did not think it would have a negative impact on complainants. It welcomed the opportunity for a reduction in sentence by an "early guilty plea". The report should not be disclosed to a Tribunal because rejection of the Committee report should not be considered an aggravating factor in sentencing; instead, acceptance should be a mitigating factor.

6.5 The PNBA believed that the proposals would potentially improve the existing system and would not have a negative impact on complainants. It is clearly more appropriate for cases that do not involve a significant dispute as to the facts, as it is not clear how such disputes could be resolved. Safeguards should be put in place to ensure that there is no communication between the Committee member who participates in the investigation and the members of the Committee to whom the draft report is presented. As the process involves few of the rights of a fair hearing, it would be unreasonable to regard a failure to agree the report as an aggravating feature in sentencing, and therefore it should not be disclosed to the Tribunal.

6.6 COMBAR submitted that the proposals will potentially improve the existing system without having a negative impact on complainants. It agreed with the suggestion that the barrister be asked to consent to the process before it is undertaken. It is unclear precisely who would be responsible for the preparation of the report: a member of staff or a member of the Committee. It is also unclear what is meant by the suggestion that the Committee can "take no further action" on receipt of the report. COMBAR did agree that consenting to DBA should be treated as a mitigating factor, but did not think that failure to agree the report should be treated as an aggravating factor.

6.7 TECBAR agreed with the submissions made by the South Eastern Circuit, but submitted that the report should not be disclosed to the Disciplinary Tribunal, even routinely, as the case before the Tribunal could involve different evidence than that which was before the Committee.

6.8 The ChBA supported the proposals, but was concerned about Article 6 compliance, and believed there should be a full right of appeal available that would require the informed consent of the complainant. There may be a negative impact on complainants, as it may appear as collusion between the prosecution and the defendant unless the complainant is able to give informed consent. It questioned whether this process would be speedier and less costly than the current Summary Procedure. If the barrister pleads guilty, they should be given a reduced sentence, but the report should not be made available to the Disciplinary Tribunal, as it is not relevant to sentence.

6.9 The CPS expressed concern about whether DBA is fair and proportionate because the process does not secure the agreement of the complainant and therefore may have a negative impact on the complainant. Complainants are likely to feel dissatisfied with a system that does not allow them to give a view as to how their complaint should be handled, when the barrister is able to give such a view. Further consideration should be given to seeking the agreement of the complainant. It is appropriate for the barrister to be given a reduced sentence as a benefit for agreeing the Committee's determination, and the report should be made available to the Disciplinary Tribunal.

6.10 The LSO was concerned that complainants will lack confidence in DBA as there are limited opportunities for their contribution. Although the Committee will consider the report, even with an increase in lay membership, it will be barrister dominant. When considering whether a case is appropriate for DBA, it should be considered whether there is a risk to the public and/or any lasting, adverse consequences for the complainant. The title "Determination by Agreement" is likely to alienate complainants, as their agreement is not sought. If the complaint is deemed appropriate for DBA, the complainant should be contacted for his or her comments prior to a final decision. The report prepared for the Committee should be sent to the complainant for comments after the conclusions have been drawn up. If cases of IPS can be dealt with in this way, the complainant should be given the opportunity to accept or decline the Committee's recommendations. Parity between lay and barrister members on the Committee, and a lay chair would boost consumer confidence in this process, but overall, DBA is not workable in practice from a consumer perspective. A reduction in sentence as a result of agreement would have a negative effect on consumer confidence. The report should be disclosed to the Tribunal provided it has been disclosed to the parties and any comments provided are also made available to the Tribunal.

6.11 The NCC supported DBA, but the key issue is the extent of lay input in the decision-making process. An important safeguard is that lay members on the Committee have an effective blocking power if the majority disagree with the report. A linked recommendation is to re-balance the lay and barrister composition of the Committee and ensuring that the lay members have the skills, confidence, and opportunity to make their views known. It was concerned about offering barristers a reduced sentence if DBA is accepted, as sentencing should take into account maintaining consumer confidence. The BSB should develop and publish a policy statement on reductions in sentence, including examples.

6.12 The Consumer Panel supported the introduction of this procedure with assurances that it will be open and transparent and not give rise to a "behind closed doors" or "plea bargaining" approach to misconduct. The process should be reviewed after a year to ensure it is fulfilling its objectives. To avoid a

perception of the agreement being too “cosy”, the report that would be seen by the complainant should include a “reasons why” section.

6.13 The OISC submitted that the proposal is a reasonable way to address disciplinary proceedings where the facts are not in dispute. Complainants must be allowed adequate input into the process through opportunities to comment and vigorous efforts made to explain the process to them. There must be a balance between preventing a perception of too much leniency towards barristers and encouraging barristers to agree to DBA. To maintain credibility, barristers should not receive a reduced sentence as a result of agreement. Rather, they should face heavier penalties at the Tribunal if they refused DBA without good reason. Sanctions imposed through DBA should be given the same weight as sanctions imposed by a Tribunal and they should be published in the same way.

6.14 CIMA supported the proposal, including a limited range of sanctions that can be imposed. The impact on complainants is likely to vary from case to case. It is unclear whether there will be a procedure to allow the Committee to reconsider its decision if the complainant objects.

6.15 Arden Chambers believed that DBA does not have a light enough touch and more emphasis should be put on conciliation. The procedure is skewed too much in favour of complainants. It could be made to work, but it puts unreasonable pressure on the barrister to comply, particularly if failure to agree is treated as an aggravating factor by the Tribunal. A preferable alternative procedure would be alternative dispute resolution and/or mediation.

6.16 Doughty Street Chambers agreed with the proposal, but believed there should be clear criteria available to all interested parties indicating when a complaint may be suitable for DBA. A barrister member of the Committee should prepare the report in all cases as it involves an allegation of misconduct with serious ramifications. If a member of staff and a Committee member prepare the draft report, it would not be accurate to describe it as the provisional findings of the Committee. Whilst it is important that the report be provided to both parties for comment prior to a final decision, it should be made clear to complainants that they cannot introduce new aspects to their complaint at this stage. Complainants would not be negatively impacted, as they would be given the opportunity to comment. Given the proposal for heavy involvement of staff, it must be adequately resourced to prevent delays. Barristers who agree should be given a reduced sentence, but this presupposes that the Committee would be able to determine what sentence a Tribunal would have imposed. The report should be made available to the Tribunal, as it is an incentive for barristers to agree; however, they would be able to make representations on why they did not agree to avoid disadvantage.

6.17 Falcon Chambers agreed that the proposal would provide more flexibility than the current system, but complainants may see it as lawyer-based. The process should be carefully explained, emphasising lay involvement and the seriousness of the proceedings. It should work well in practice and there is not a clear better alternative. There should not be room for “plea-bargaining” in professional regulation, but the report should be made available to the Tribunal when sentencing.

6.18 A Complaints Committee lay member supported the proposal in principle. The factual part of the report should be sent to both parties, as sending it to the

barrister only could make a complainant suspicious. A reduction in sentence for agreement is not in the interests of justice, but the arguments in favour are pragmatic. The Tribunal should have the report at the outset to reduce cost and time by covering the same ground again.

6.19 A COIC lay member supported the proposal for own motion complaints, but not for third party complaints unless the complainant is given the opportunity to reject the Committee's conclusions. Rather than the report being considered by the full Committee, a sub-Committee could be formed to consider the cases and rejection of the sub-Committee's decision could be reviewed by the full Committee rather than a Tribunal. The sentence should only be reduced on agreement if the complainant is the BSB, as it would have a negative impact on complainants. A second COIC lay member believed that the part of the report relating to findings of fact should always be sent to the complainant. It would not have a negative impact on complainants provided that they are able to bring issues that have been omitted to the Committee's attention. The Tribunal should always take into account the barrister's reasons for rejecting the Committee's recommendations before determining sentence. A third COIC lay member did not support the proposal because, if self-regulation is to be transparent, there should not be the option for an internal discussion regarding the outcome of a third party complaint. A fourth lay member fully supported the proposal, but suggested that when a complaint is sent to the barrister for comment, he or she could be invited to accept fault and describe mitigating circumstances. The Commissioner could then decide on a penalty that is less than if it had gone to a Tribunal, and could include an apology or some sort of censure or reprimand. Very serious or complex cases or where there had been significant financial loss by the complainant would not be appropriate for this treatment, and if a barrister challenges the complaint, it should go to a panel. A fifth lay member agreed with the proposal and believed it is a significant positive improvement on the current system. Whilst it is possible that complainants may believe they have been negatively impacted, it is unlikely as the cases will not have a dispute of facts and are likely to be primarily own-motion complaints. The BSB should give a commitment to the parties that the process will be completed by a specific date and ask the parties to assist in achieving that objective. Acceptance of the report should not lead to a reduced sentence, as the sentence should be determined by the nature of the offence and the perpetrator's attitude towards it, not when it is admitted. The report should be made available to the Tribunal as it could shed light on why the defendant opted for a hearing.

6.20 A former Disciplinary Tribunal Chair agreed with the proposals outlined in the consultation document.

6.21 A barrister respondent agreed with the proposal and did not believe it will have a negative impact on complainants. The sentence should be reduced on acceptance of the report and the report should not be made available to the Tribunal for sentencing, as it would be unfair to treat this as an aggravating factor. The report could be considered in relation to costs after all other issues have been considered.

<u>Conclusions</u>

6.22 The BSB has considered the responses in relation to this recommendation, along with the views of staff that implementation would not require any additional staff resources, and has decided to accept this recommendation and proceed to the preparation of the detailed proposals for the process. The BSB is of the view

that implementation will provide an improvement to the system by allowing cases where there is no dispute as to the facts to be determined and concluded more speedily.

6.23 Some responses raised concerns about whether the procedure would be compliant with Article 6 of the Human Rights Act. The BSB has taken the view that as the process requires the consent of the barrister for a finding to be made against him or her, there is no inherent unfairness for the barrister in the procedure. It therefore believes that the process is compliant with Article 6, as a barrister is entitled to reject the Committee's findings and proceed to a Disciplinary Tribunal hearing as though the Committee had not made any findings. As a result, the BSB does not believe that it is necessary or appropriate to have an appeal mechanism against a finding that is made with a barrister's consent.

6.24 The BSB notes the concerns that DBA may have a negative effect on complainants, as there are limited opportunities for complainants to contribute. It therefore agrees with the suggestion that there should be clear criteria developed and communicated to relevant parties as to when a complaint may be suitable for DBA. The BSB will also ensure that the procedure and reasoning are explained clearly to the parties at an early stage in order to manage expectations. Additionally, complainants will be informed that the Committee will issue a DBA report only after consideration and that the decision to issue a report will only be taken with the agreement of the majority of the lay members present at a meeting. Finally, the BSB accepts the point made by the LSO that the title "Determination by Agreement" might alienate complainants, as their agreement has not been sought. It has therefore decided that a more appropriate name for the process would be "Determination by Consent" ('DBC').

6.25 Barristers who accept DBC will receive a sanction based on the likely range described in the Indicative Sanctions Guidance (see Recommendation 47(a)) for the specific offence. The Indicative Sanctions Guidance will address issues of mitigating and aggravating factors, along with the issue of an early guilty plea. An early guilty plea, whether through the DBC procedure, or the Disciplinary Tribunal procedure, will be treated in the same way. Additionally, refusal to accept DBC will not be treated as an aggravating factor at a Disciplinary Tribunal and the BSB will not make the report available to the Tribunal in any submissions on sentencing. This will prevent any perceived unfairness, in that there will be no pressure on the barrister to agree to DBC in order to receive a reduced sentence. The benefits of agreeing to DBC for barrister defendants who intend to plead guilty to the charges at an early stage will be to have the matter resolved quickly and without the need for attendance at a disciplinary hearing.

6.26 The BSB noted the interesting proposal that a sub-Committee of the Complaints Committee consider DBC reports and that the Committee could review rejection of the sub-Committee's decision, but ultimately rejected this proposal, as a Tribunal rather than the Committee should make the final decision on contested charges.

7. Composition of the Complaints Committee

Recommendation 20: *"The composition of the Complaints Committee should reflect a more even balance between barrister and lay members. Over a four year period the barrister membership should be reduced by one-third and, under terms of rigorous open competition, the lay membership should be doubled."*

Q.20 Do you agree with the principle of rebalancing the Committee to increase the lay membership?

Q.21 If yes to Q20, do you believe that reducing the barrister membership by one third and doubling the lay membership over a four-year period will accomplish the objectives set out in paragraph 3.79 above?

Q.22 Do you consider that immediate steps should be taken to alter the balance of the Committee by administrative action?

Q.23 Do you have any suggestions for additional ways to increase the participation of lay members in the work of the Committee?

7.1 The issue of rebalancing the Complaints Committee is addressed in the Consultation Paper (see paragraphs 3.74-3.82). Of the 27 responses addressing this recommendation, only four were not supportive. A number of comments were submitted on the mechanics of rebalancing and the timescales.

7.2 The South Eastern Circuit did not agree with the principle of rebalancing the Committee to increase lay membership. Cost must be borne in mind when assessing the degree of adjustment to achieve the objectives of openness and transparency and lay members are expensive. The statistics referred to suggest that the lack of confidence by consumers is largely anecdotal. The current system works well, subject to the appointment of appropriate lay members.

7.3 The PPC and LSC agreed with the Commissioner's recommendation. It is important to address any perception by complainants that the system is unfairly stacked against them, but it is also important to ensure that complaints are investigated and considered by those with appropriate knowledge of barrister's work, pressures they are under, and the Code of Conduct. An overnight change would be too drastic, but a gradual rebalancing of the Committee will give the opportunity for training new lay members, and consideration as to the composition of barrister members to ensure that the relevant specialisms and levels of seniority are represented. In the meantime, a re-grouping of the Committee to increase the number of lay members at individual meetings may provide an indication that the BSB is responding to this area of concern.

7.4 The YBC agreed with the Commissioner's recommendation to rebalance the Committee. It may be possible to reduce the numbers of Committee members (and save costs) if the new processes function as hoped. It is not necessary to take immediate steps to rebalance the Committee. Lay members may be able to assist with preparation of reports in less technical cases, with the assistance of a member of staff and a barrister member.

7.5 The PNBA agreed with the Commissioner's recommendation. It should be done incrementally with an adequate process of selection, training (including diversity training) and induction.

7.6 COMBAR agreed with the Commissioner's proposals, and immediate steps to rebalance, so long as the Committee is able to handle the workload, as at present it is barrister members who prepare the Committee reports.

7.7 TECBAR agreed with the principle of rebalancing the Committee in the interests of openness and transparency, but it is important to consider the cost implications versus necessity and proportionality. Rebalancing of up to a third may be more proportionate, so that the Committee is 40 barrister and 24 lay members in 2012. It should be reviewed regularly to ensure it meets the demands of the system, as a reduction of barrister members, and their pro-bono contribution, may be counterproductive. The exact make-up of the Committee can be considered later, following agreement in principle to the objectives.

7.8 The ChBA accepted the principle of rebalancing the Committee, but maintaining a barrister majority. Complainant dissatisfaction may stem from their hope of receiving compensation, when it is rightly not available for misconduct. Immediate steps should not be taken to rebalance the Committee. Lay members should be required to "sponsor" a complaint by reviewing the papers and supplying observations in advance of the meeting as it would provide a second, lay view on individual complaints.

7.9 The CPS submitted that rebalancing the Committee will help to instil confidence in the independence of the Committee. Whilst it is important that a significant proportion of the Committee is barristers, the Commissioner's recommendation is appropriate, and it would be beneficial for work to begin immediately.

7.10 The LSO agreed with rebalancing the Committee, but disagreed with the Commissioner's proposal, as it will retain barrister dominance on the Committee. At a minimum, there should be parity between lay and barrister members and there should be a lay chair.

7.11 The NCC welcomed the Commissioner's proposal, but it does not make the process sufficiently independent, as consumers will not have confidence in a system as long as there is a majority of barristers on the Committee. Whilst it is important to retain the expertise of barristers on the Committee, there should be a lay majority. Additionally, the large size of the Committee is not conducive to efficient and effective proceedings.

7.12 The Consumer Panel strongly endorsed the principle of rebalancing the Committee to increase lay membership, but felt that the timetable suggested (over 4 years) is unduly lengthy. In order to build consumer confidence in the procedures, a more significant change is required. There should be a lay chair of the Committee, or a change in the officerships so that there is a barrister chair and two lay vice chairs.

7.13 The OISC agreed with the principle of increasing lay membership, but submitted it should be done in a gradual way to ensure the Committee's capacity to make decisions is not compromised. The four-year period seems reasonable.

7.14 The LSC agreed with rebalancing the Committee and the BSB should move to a majority of lay members with a lay chair, plus a significant number of barrister members and access to additional barristers if required. The LSC would support the BSB in demonstrating to the public and other stakeholders its commitment to independent scrutiny.

7.15 CIMA supported rebalancing the Committee to enhance public confidence and heightened independence. They queried a four-year increase, as the aim is to implement the other recommendations by autumn 2008.

7.16 Arden Chambers did not agree with rebalancing the Committee as there is sufficient lay representation and it did not accept the underlying premise relating to consumer confidence. However, should there be change, it should be at the ratio of 3 barristers to 1 lay member.

7.17 Doughty Street Chambers believed that the current membership of the Committee does not sufficiently reflect the importance of lay members' participation in the process, both for the useful perspective they provide, and ensuring complainant confidence. However, the Commissioner's proposal takes the matter too far. It is important to have sufficient barristers on the Committee to provide input into the processes and to reflect a range of specialisms. Drawing on specialists outside the Committee will not promote consistency. It is also important to have enough barristers on the Committee to retain the confidence of the Bar, which will be necessary in encouraging barristers to accept DBC. The ratio should be in the region of 2 barristers to 1 lay member and the change should be phased in over time.

7.18 Falcon Chambers supported the Commissioner's proposal and the objectives behind it, though it should be implemented incrementally to prevent an undue strain on the Committee. Lay participation could be increased by utilising them as much as possible in the work of the Committee. There should be an induction programme that includes visits to chambers, Inns, and the BSB Complaints Department to create a better understanding of the system in which barristers operate.

7.19 A lay vice-chair of the Committee welcomed increased involvement of lay members in reviewing dismissal letters and other matters and suggested that this be included in the job description. Another lay member of the Committee agreed with rebalancing the Committee, but suggested something in between immediate action and a four-year implementation. There does not seem to be opportunities for lay member training after induction and lay members should be given the opportunity to meet with the lay vice chairs to discuss issues of principle. A third Committee lay member agreed with rebalancing the Committee, but has not noticed that lay members lack confidence in contributing the discussions.

7.20 A COIC lay member agreed with the Commissioner's proposal and taking administrative action immediately to increase lay attendance. Participation of lay members could be increased by using them as members of sub-groups. A second COIC lay member agreed with the principle of rebalancing and suggested that rather than a barrister member preparing the Committee report alone, it could be prepared in conjunction with a lay member. A third COIC lay member agreed with the Commissioner's proposal and although it would be good to have an equal balance of barrister and lay members, he acknowledged that the vast majority of preparatory work is conducted by barrister members. Implementation of this recommendation should begin immediately. Lay members could undertake reports on some complaints, and lay members could provide assistance to the barrister member in the review of a complaint.

7.21 The Honourable Mr Justice Lindsay did not agree that the ratio between barrister and lay members should be changed. By careful selection, the barrister

members of the Committee reflect the views of experienced members of the profession and they have an interest in maintaining the reputation of the Bar. They also are in the best position to know what can be properly and fairly expected of barristers and are the best arbiters of what is good practice at the Bar. In his experience in the Employment Appeal Tribunal, and in membership of disciplinary committees, the perception that the Committee is seen as lacking independence is groundless and it would be wrong to base a change upon it.

7.22 A former Disciplinary Tribunal Chair agreed with the Commissioner's proposals.

7.23 One QC submitted that the balance of lay and barrister members should not be altered. It is wrong to impose extra burdens on barrister members by reducing their numbers, as it is extremely time consuming to write a Committee report. A second QC submitted that whilst there can be no objection to the principle of increasing lay membership, it is vital that the conduct of any professional is judged by a panel consisting of a substantial proportion of their peers, and often one's peers are more critical than lay members. The willingness of barristers to provide *pro bono* work should not be exhausted by overstretching resources.

Conclusions

7.24 The BSB is committed to increasing consumer confidence in the Complaints Committee decision making process and has decided to implement this recommendation in the way described by the Commissioner: namely a gradual change in the composition of the Committee to allow for an increased proportion of lay members to barrister members but with barristers continuing to make up the majority of the Committee. The current composition of the Committee is 54 barristers and 12 lay members. The BSB has agreed to implement this recommendation by reducing the number of barristers by four per year, and increasing the number of lay members by three per year from 2009 to 2013 – the end result will be a Committee of 38 barrister members and 24 lay members. However, during the four year period, the BSB will keep the changing composition of the Committee under review. If necessary, based on how effectively the Committee is working, consumer perceptions and costs, adjustments may need to be made to the way in which a better balance on the Committee is achieved.

7.25 The BSB strongly agrees with the submission made by the PPC and LSC that it is important to address any perception by complainants that the system is stacked against them. The BSB also recognises the importance of retaining sufficient depth, range and availability of legal expertise within the Committee. On balance, the BSB considers that implementing the Commissioner's recommendation will adequately address the needs of complainants, barristers and the Committee.

7.26 The BSB notes the concern raised about retaining a majority of barrister members on the Committee. At this time, the BSB believes that it in order for the Committee to work in an effective and timely manner, it is necessary to have a significant number of barrister members on the Committee who have experience of a wide variety of specialisms. To do this and prevent the Committee increasing in size, it will be necessary to retain the barrister majority. However, the requirement that complaints cannot be dismissed without the agreement of the majority of lay members present gives the lay members significant influence in the decision making process and acts as an effective counter-balance to the barrister majority. It should also be noted that the BSB has already implemented

the Commissioner's recommendation to remove the requirement that Chair of the Complaints Committee is a barrister of at least 20 years' practising experience. The new requirement is now that the "best person for the job" should be appointed, who could be a lay member.

7.27 The BSB acknowledges the concerns about costs that were raised in a number of responses and it is clear that implementing the recommendation will involve increased costs. The BSB considers that the role of the Complaints Committee is central to the complaints process and that the increased costs are warranted. However, the BSB is committed to reviewing the cost implications on an annual basis and to considering whether there are other cost effective means to achieve the objective of the recommendation.

7.28 The BSB recognises that the composition of the Committee will need to revisited post 2010 when the new processes have bedded down and the impact of the introduction of the OLC has been assessed as, at that point, the Committee will only be tasked with addressing complaints of professional misconduct.

7.29 The BSB is also committed to increasing the participation of lay members in the day-to-day work of the Committee and will consider the options for changes in lay involvement, in particular the proposal that lay members also be asked to "sponsor" individual complaints and assist barrister members in the production of reports on complaints. They are already being increasingly utilised in the drafting of dismissal letters to lay complainants.

8. Composition and jurisdiction of Disciplinary Tribunals

Recommendation 39: *"The Bar Standards Board should abolish Informal Hearings and Summary Hearing panels."*

Recommendation 40: *"Disciplinary Tribunals should deal with all disciplinary cases but should be constituted differently according to the seriousness of the alleged offence. Where a case is likely to lead to a sentence of three months' suspension or less, the Tribunal should be constituted under a three-person panel chaired by a QC with one barrister and one lay member. Where a case appears to warrant a higher sanction including disbarment, the matter should be referred to a five-person panel chaired by a Judge with two lay members and two barrister members."*

Recommendation 41: *"The decision as to which type of panel the case should be heard by should be taken by the Complaints Committee at the time of referral."*

Recommendation 42: *"Where a three-person panel considers, after making a determination of guilt, that its sentencing powers are not sufficient, it should be able to refer the case to a five-person panel for sentence only."*

Q.24 Do you agree that the Informal Hearing and Summary Procedure jurisdictions should be abolished and replaced with one Disciplinary Tribunal jurisdiction with three and five person panels?

Q.25 Should the maximum sentence for a three person panel be the same as the current maximum sentence for a Summary Procedure panel (ie a fine or three months' suspension)?

Q.26 Should directions for Disciplinary Tribunal cases be agreed on paper, except in cases where the judge directs (having considered written submissions) that an oral hearing is required?

8.1 The proposals for Disciplinary Tribunals are detailed in the Consultation Paper (see paragraphs 3.83-3.94). Of the 20 responses that addressed these recommendations, all were supportive of the proposals.

8.2 The South Eastern Circuit agreed with the proposals.

8.3 The PPC and LSC agreed with the proposals, but suggested that if the introduction of a three-person Disciplinary Tribunal will have the powers of the Summary Procedure panel, the proposed change will make no appreciable difference.

8.4 The YBC agreed with the proposals, as the old system would be unnecessarily complicated in light of the increased filtering at an early stage.

8.5 The PNBA agreed with the proposals, subject to the new procedures being conducted fairly, and in the case of adjudication by the Commissioner, there is a full appeal process.

8.6 COMBAR agreed with the proposals.

8.7 TECBAR agreed with the proposals and noted that Directions Hearings chaired by High Court Judges should be reserved for cases which are particularly complex and where the directions are in dispute.

8.8 The ChBA and the CPS agreed with the proposals.

8.9 The NCC welcomed the proposal to streamline the disciplinary process; however, they queried the extent to which this proposal will achieve this, as the flowchart of the proposed new process is more complex than the flowchart of the current processes.

8.10 The Consumer Panel supported the introduction of three and five person panels, but was concerned about a barrister majority with no lay member veto.

8.11 The OISC agreed with the proposals.

8.12 CIMA agreed with the proposals, though queried the timeliness of having two separate panels for hearing and sentencing, and sentencing only.

8.13 Arden Chambers, Doughty Street Chambers, Falcon Chambers, a lay member of the Complaints Committee, and three COIC lay members agreed with the proposals.

8.14 A QC agreed with the proposal for 3 and 5 person panels, but not with the proposal that a 3 person panel should have the power to refer a case to a 5 person panel for sentencing, as it would mean that the issue of guilt on a serious charge will be decided by panel designed for less serious cases.

<u>Conclusions</u>

8.15 In light of the overwhelmingly supportive responses to this area of the consultation, the BSB has decided to accept the recommendations that Informal Hearings and Summary Procedure Hearings be abolished and replaced with one Disciplinary Tribunal jurisdiction with three and five person panels. The three person panel will have the same sentencing powers as the current Summary Procedure Panel, and the directions for Disciplinary Tribunal cases will be agreed on paper unless a Judge directs that an oral hearing is required. These recommendations will proceed to preparation of detailed proposals as to how the system should operate. Preparation of the proposals will involve more detailed discussions with COIC about their role in the new system, in order to come to an agreement about the support they will provide at the different stages.

9. Sentencing options

Recommendation 43: *"The Bar Standards Board should review the current sentencing options with a view to creating greater flexibility in sentencing and adding suspended sentences to the list of available sanctions."*

Q.27 Do you agree with the proposals to add additional sentences to the current range available including increasing the maximum fine limit or making it unlimited?

Q.28 Do you have any additional suggestions for further sentences?

9.1 The proposals for additional sentencing options are detailed in the Consultation Paper (see paragraphs 3.99-3.106). Of the 19 responses that addressed this recommendation, almost all were broadly supportive of the concept of expanding the range of sanctions that can be imposed so that the Tribunal has greater flexibility in sentencing.

9.2 The South Eastern Circuit did not agree that suspended sentences should be available to tribunals. There is no need because it requires a subsequent offence for the sentence to take offence and most barristers find the original conviction to have had a considerable deterrent effect. Suspended sentences will cause considerable complications of when and how to implement them, e.g. nature and seriousness of subsequent offence, and whether to implement in whole or part. The increase in the limit for compensation after a finding of IPS to £15,000 is too high and submitted that £10,000 is reasonable. It is reasonable for a defendant to be ordered to take the Professional Conduct and Ethics Test and that there be conditions on practice until such a test is passed. Costs applications both or and against the defendant should continue to be allowed.

9.3 The PPC and LSC agreed with the proposal for suspended sentences, particularly where a fine or suspension might otherwise be imposed. Fines should have a limit that is in line with other professions. The proposal for the requirement to pass the Professional Conduct and Ethics test is reasonable, but it would be wrong in principle to treat a failure to pass the test (as opposed to a failure to take the test) as non-compliance with a sanction and therefore professional misconduct. Whilst it would be cause for serious concern if a barrister fails to pass the test, and that a person should not be able to practise until he or she is able to pass it, it cannot be misconduct to fail a test. It would be inappropriate for the requirement to pass such a test to be a stand-alone sanction, instead it should be coupled with another sanction, for example, as part of a conditional suspension from practise. The Tribunal should be able to impose conditions on the renewal of the barrister's practising certificate as an

alternative to immediate suspension (for example, carrying out further CPD or passing the ethics test).

9.4 The YBC strongly supported the introduction of suspended sentences, particularly in cases of first offences by newly qualified barristers. It is not necessary to restrict suspended sentences to exceptional circumstances. In some circumstances, particularly complaints involving newly qualified barristers, reference to the Bar Quality Advisory Panel would be an appropriate response. However, as it is a non-disciplinary body, there could not be any enforcement once a reference is made. The YBC also agreed with the proposal submitted by the PPC that there should be conditions on the renewal of a practising certificate as an alternative to immediate suspension.

9.5 PNBA believed that the primary purpose of sanctions in professional regulation is to protect members of the public and to uphold the reputation of the profession. Panels should be able to impose conditions on practice to promote greater flexibility. Fines as a sanction are questionable as they are punitive in nature and other regulators do not possess such powers. If fines are to be retained, they should only be used as a lesser sanction than suspension or disbarment and fines should have a limit.

9.6 COMBAR agreed with the sentencing proposals and suggested that the maximum fine be £15,000. If a higher fine were considered appropriate, it would be likely that the barrister should be subject to suspension.

9.7 TECBAR believed there should be the option to suspend a sentence, particularly where it involves suspension from practice. There should a maximum limit on fines of £10,000, especially bearing in mind that a finding at a tribunal will have an effect on one's practice. It disagreed with the recent increase in compensation from £5,000 to £15,000, and believed that a more appropriate amount for compensation would be £10,000. It has no objection to a Professional Conduct and Ethics Test. The ability to award costs for and against the defendant should be retained.

9.8 The ChBA agreed with the proposals and welcomed the introduction of suspended sentences, but did not consider there should have to be exceptional circumstances. The current fine limit is adequate after adjustment for inflation and there should be an upper limit. Findings of misconduct are published on the website and this in itself is a significant punishment and deterrent.

9.9 The CPS agreed with the proposal for additional sentences, including a maximum fine limit, as unlimited fines are unlikely to be justified in the context of the proceedings.

9.10 The LSO was concerned that under the sentencing proposals, the Committee would be able to give suspended sentences in DBC cases and this option should only be available to the Disciplinary Tribunal. Also, the current fine limits are out of date and the cap should be not less than £15,000.

9.11 The NCC welcomed proposals to extend the range of sanctions, including suspended sentences and the Professional Conduct and Ethics Test. The proposal to increase the fine limit is welcome and it should be high enough to act as a credible deterrent and to send a signal that the BSB will not tolerate misconduct. One option might be to follow the principle applied in competition law, where the regulator can fine a percentage of turnover.

9.12 The OISC agreed that additional sentences should be added, but did not have any proposals.

9.13 CIMA advised that the maximum fine that CIMA's Investigation Committee may impose for Consent Orders is £2,000 for members and the Disciplinary Committee may impose unlimited fines on members.

9.14 Arden Chambers agreed with the proposal to add additional sentences, including the Professional Conduct and Ethics Test. They broadly agreed with the proposal to add suspended sentences, but were concerned that a sentence should only be suspended in exceptional circumstances – this should be at the discretion of the Tribunal. They strongly disagreed with the proposal to increase the maximum fine, as the fact that it has not been increased in 17 years pre-supposes that it was the appropriate maximum in 1990, which they did not accept. The current level of £5,000 is substantial and would be a serious penalty for all but the highest earning barristers and it is the current maximum fine that can be imposed by a magistrates' court. If an offence deserved a greater penalty, a fine would not be appropriate. An additional sentence could be to order the defendant to be supervised by a senior barrister, either within or outside of chambers.

9.15 Doughty Street Chambers agreed with the sentencing proposals on the basis that the maximum fine limit is increased and a tentative limit of £15,000 was suggested. Absent a ceiling on fines, it would be difficult to maintain consistency in sentencing. There could be a power to waive the usual ceiling and impose a higher fine if it was made clear that this could only be done in exceptional circumstances and reasons provided.

9.16 Falcon Chambers agreed that additional sentences should be added to the current range, and that the maximum fine limit be increased, but limited. There could be a partial suspended sentence, so that a part of the sentence would be effective immediately, and part suspended.

9.17 A lay member on the Complaints Committee agreed with the sentencing proposals, including the proposed aptitude test. A barrister should be required to pass one, not just expected to. There should be the power to impose unlimited fines, but coupled with guidance that, save in extraordinary circumstances, this should not exceed £20,000. Additionally, there should be the option to order that any reasonable and appropriate training course should be undertaken, even if it exceeds the CPD requirements, in order to focus on a particular area of deficiency.

9.18 A COIC lay member did not see any reason for a limit on fines to be set, but each panel must set out full details of its reasons for arriving at an amount. A second COIC lay member queried whether a suspended sentence would always go on a barrister's record and suggested that the maximum period for a suspended sentence should be 18 months, not two years. The new fine limit should be £8,000, and increased annually at the rate of inflation plus 1%.

9.19 A former COIC Disciplinary Tribunal Chair suggested that Tribunals should be given the power to award compensation for professional misconduct of up to £15,000.

<u>Conclusions</u>

9.20 The BSB has considered the helpful responses on this issue and has decided to expand the sentencing options for Disciplinary Tribunals. The expanded options will include the ability for the Tribunal to impose suspended sentences. It is noted that there will be an element of complexity to suspended sentences, but nonetheless, the BSB believes it is appropriate for such an option to be open to a Tribunal to permit flexibility and proportionality in sentencing, albeit that it may not be used frequently. The rules will not state that suspended sentences should only be applied in exceptional circumstances, as this will be a matter for the individual panel to consider; however, the BSB and COIC will work together to develop detailed guidance as part of the Indicative Sanctions Guidance on the appropriate application of suspended sentences.

9.21 Having considered the range of views expressed as to the appropriate maximum level for fines (if any), the BSB has also decided to increase the maximum fine that can be imposed by a Disciplinary Tribunal to £15,000. It believes that this is an amount which can act as a credible deterrent and which is in line with other professional regulators. The BSB considers that a higher fine limit will provide tribunals with greater flexibility and thus potentially avoid the need for unnecessary use of the power to suspend from practice, but agrees with COMBAR's submission that if a fine higher than £15,000 is considered necessary then it is likely that a suspension would be appropriate.

9.22 Additionally, the BSB agrees that the expanded sentencing options will include making an order that a barrister take and pass a professional conduct and ethics test. Consideration in the detailed proposals will be given as to how to deal with barristers who take the test, but do not pass.

9.23 The BSB noted with interest the suggestions that the BSB and/or the Disciplinary Tribunal should be able to refer barristers to the Bar Quality Advisory Panel ('BQAP') as a response to a complaint. However, the BQAP is run by the Bar Council and therefore falls outside the BSB's remit. The BSB must also respect the Bar Council's stated desire to ensure that the BQAP is kept entirely separate from the complaints and disciplinary system. However, the BSB proposes to explore with the Bar Council whether it might be possible for a one-way referral mechanism to be put in place that might assist in providing a proportionate response to concerns raised about barristers.

10. Other comments

10.1 A number of responses provided additional comments on areas that are not addressed above and these are summarised below. Following each comment is a paragraph with the BSB's response.

10.2 COIC suggested that there will be an urgent requirement for the BSB and the Inns of Court to determine and agree the extent of COIC's administrative support to the new complaints and disciplinary procedure. As there is no formal agreement or protocol in place currently, it is important that there is absolute clarity on both sides as to the level of support that COIC will provide under the new arrangements. Secondly, COIC notes that there is a fundamental issue as to costs and resources, as there is no assessment in the Strategic Review or the consultation document of how implementation will impact costs and staff recourses. It is not clear how the revised arrangements will affect the number of Tribunals that COIC supports. Additionally, whilst they applaud the emphasis on the requirement for increased training across the board, it is unclear who will

provide and co-ordinate this proposal and how it will be resourced. If COIC's administrative role increases and requires additional staff resources, the Inns are likely to reduce their annual subventions to compensate.

10.3 The BSB agrees that it is necessary to have discussions and agreement as to the nature and extent of COIC's administrative support to the complaints and disciplinary system. Preliminary discussions have already taken place about the need to establish a clear protocol, and it has been agreed that it would be most appropriate for this protocol to be established after the new processes have bedded down. However, the BSB is committed to consulting with COIC, and in particular on issues that effect COIC's administrative support for the complaints and disciplinary system. As noted in paragraph 8.15 above, the BSB will have further discussions with COIC during the development of the detailed proposals on the new procedures for the single Disciplinary Tribunal jurisdiction.

10.4 As to the issue of costs, the BSB believes it has addressed it as much as it is able at this stage. Of the recommendations addressed in the consultation document that the BSB has decided to accept, the only one that has been deemed to have costs implications is rebalancing the Complaints Committee. As mentioned in paragraph 7.27 above, the BSB believes these costs are warranted.

10.5 The South Eastern Circuit made the following additional comments:

- It important to know what the costs of implementation are likely to be before any recommendations are implemented. Where there are changes that have substantial cost implications, the changes should take place in stages to test if they warrant additional expenditure;
- All changes should be kept under constant review and be flexible to allow for modification where problems are identified;
- As many complaints arise in the context of publicly funded work, there should be a greater representation on the Committee of those with experience of such practise, as a proper understanding of the realities and practical difficulties faced by practitioners is crucial to assessing the merits of a complaint. Additionally, the Sponsor member for a complaint should always have experience of the discipline related to the complaint. If one is not available, someone should be co-opted.

10.6 The BSB accepts that the changes should be kept under constant review and allow for flexibility when problems arise. It is therefore committed to monitoring the impact of the new processes and the implementation of user-satisfaction surveys and the Independent Observer (see Recommendations 18(a) and 4) should assist with this. Statistics and reports on how the new procedures are functioning will be prepared from time to time and published on the BSB's website.

10.7 The BSB notes the South Eastern Circuit's point about the composition of the Committee and recognises the importance of having a Committee that consists of members from a wide variety of practice areas. The BSB will take the point into account during the next phase of recruitment for the Committee.

10.8 TECBAR submitted that whilst the proposals are generally welcomed, they present challenges, including the costs of the new system, as there is no evidence-based comparison of cost versus benefit. Additionally, it is necessary to keep the new system under review to ensure that increases in expenditure are justified.

10.9 The BSB's response to these points is summarised in paragraphs 10.4 and 10.6 above.

10.10 The ChBA suggested that there may be scope for employing the Bar Council's BQAP as a cheaper option for disposing of some less serious complaints.

10.11 The BSB refers to its conclusions in relation to BQAP at paragraph 9.22.

10.12 The CPS suggested that the consultation document seemed primarily focused on the self-employed Bar. Most employed barristers will be subject to internal complaints procedures through their employer and the Commissioner should be able to dismiss a complaint where he or she is of the opinion that the employer has satisfactorily resolved it. Where a complaint is made directly to the Commissioner concerning an employed barrister, the Commissioner should be required to inform the barrister's employer, as it may be more appropriate for it to be investigated by the employer. Additionally, where a finding against an employed barrister is made, it should be disclosed to the employer, even when such a finding would not otherwise be published.

10.13 The BSB agrees that there should be a formal policy in place as to how complaints against employed barristers will be handled in the first instance. It will therefore work in conjunction with the Bar Council's Employed Barrister Committee to establish a clear policy in this area. The BSB agrees that where a finding has been made that is publishable in accordance with the BSB's policy, the employer should be informed. However, as confidentiality plays an important part in complaints handling, the BSB only believes it is appropriate to disclose information to the employer that BSB has deemed to be publishable.

10.14 Arden Chambers is concerned that the nomenclature used in the disciplinary process equates disciplinary offences with criminal behaviour, and suggest that the word "allegations" be used instead of "charges" and "sanction" instead of "sentence". Additionally, where complaints arise from management issues, the complaints procedure should not be invoked against individual barristers, but there should be a procedure for a complaint against chambers. Members should not be subject to unnecessary pressure or penalty for taking on responsibility within chambers, as it discourages participation in chambers administration. In the absence of a substantiated basis for *personal* misconduct, complaints should not lie against heads of chambers or members of a management committee, but they should lie against chambers as a whole. In the absence of such a change, there must be clarification as to who should be the subject of a complaint when the responsibility for administration of chambers is collective. Finally, they raised a number of concerns about who would be responsible for deficiencies in an internal chambers complaints procedure, and how a complaint from a client to the BSB about a chambers complaint procedure would be dealt with. The heads of 4 Pump Court and 42 Bedford Row endorsed Arden Chambers' comments about chambers administration.

10.15 The BSB agrees that it is more appropriate for the word "sanction" to be substituted for the word "sentence" and will ensure that when the regulations for the new procedures are drafted, this change will be included. However, it continues to believe that in relation to professional misconduct, it is appropriate to refer to "charges", whereas in relation to issues of inadequate professional service, it is appropriate to refer to "allegations". Secondly, the issue as to

clarification of the responsibility of Heads of Chambers under the Code of Conduct has been referred to the Standards Committee for consideration, as this issue falls outside the scope of implementation of the Review.

10.16 A COIC lay member submitted that a current cause of complaint by both barristers and complainants is the delay in a hearing to settle a case. It will be a challenge to the new system to remove this complaint, and there should be early and regular reviews to ensure that this is achieved.

10.17 The BSB agrees that resolving complaints swiftly is an important issue to address and a number of the recommendations in the Review are intended to make the system more efficient. These recommendations include the development of Key Performance Indicators and performance targets, and reviewing policy and practice in setting hearing dates (Recommendations 2 and 28). The timeliness for resolution of complaints will be monitored and reports published from time to time.

10.18 Another COIC lay member suggested that the BSB should request information from chambers about complaints that were satisfactorily resolved in chambers, as there is currently no information available about complaints that have been resolved in this way.

10.19 The BSB believes that this is a valid point and has referred the issue to its Quality Assurance Committee for further consideration.

10.20 One barrister responded with grave concerns about the way the BSB's complaints and disciplinary system is operated and submitted that the BSB spends an inordinate amount of time on equality and diversity issues. He was concerned that the BSB does not have its own complaints procedure.

10.21 The BSB respectfully disagrees with the assessment that the BSB spends too much time on equality and diversity issues and reaffirms encouraging diversity of one of its central aims. The BSB notes the helpful suggestion that it should have its own complaints procedure and is committed to developing a complaints policy that will be publicly available.

11. Conclusions

11.1 The BSB would like to thank all those who took the time to consider the issues in the consultation paper and submit a response. The responses have all been taken into account in the BSB's consideration of which of the former Commissioner's recommendations should be implemented.

11.2 The next step is for detailed proposals to be prepared on the recommendations that the BSB has decided to implement, then drafting the amendments to the relevant regulations to support the new complaints and disciplinary processes. It is hoped that the recommendations described in this paper, along with the rest of the recommendations in the Review, will be implemented towards the end of 2008.

Annex 1

Inns of Court	Council of the Inns of Court (COIC)
Circuits	South Eastern Circuit
Bar Council Committees	Legal Services Committee (LSC) and Professional Practice Committee (PPC) Young Barristers Committee (YBC)
Specialist Bar Associations	Professional Negligence Bar Association (PNBA) Commercial Bar Association (COMBAR) TECBAR Public Access Bar Association (PABA) London Common Law and Commercial Bar Association (LCLCBA) Chancery Bar Association (ChBA)
Other organisations	Crown Prosecution Service (CPS) Legal Services Ombudsman (LSO) National Consumer Council (NCC) BSB Consumer Panel Office of the Immigration Services Commissioner (OISC) Legal Services Commission (LSC) Chartered Institute of Management Accountants (CIMA) Bar Mutual Indemnity Fund (BMIF)
Chambers	Arden Chambers Doughty Street Chambers Falcon Chambers 4 Pump Court 42 Bedford Row
Individuals	David Caplin (Complaints Committee lay vice-chair) Annie Hitchman (Complaints Committee lay member) Graham Donald (Complaints Committee lay member) David Hall (COIC lay member) David Madel (COIC lay member) Peter Thompson (COIC lay member) Bill Henderson (COIC lay member) Sophia Lambert (COIC lay member) John Bligh (COIC lay member) The Honourable Mr Justice Lindsay His Honour Christopher Barnett QC (former COIC Disciplinary Tribunal Chair) Geraint Jones QC (Tanfield Chambers) Michael Kent QC (Crown Place Chambers) Leolin Price QC (10 Old Square) Antony Edwards-Stuart QC (Crown Office Chambers) Julian Reed (9 Park Place) David Osborne (Rougemont Chambers) Ian Millard (Rougemont Chambers) Alistair Mitchell (49 Chambers)