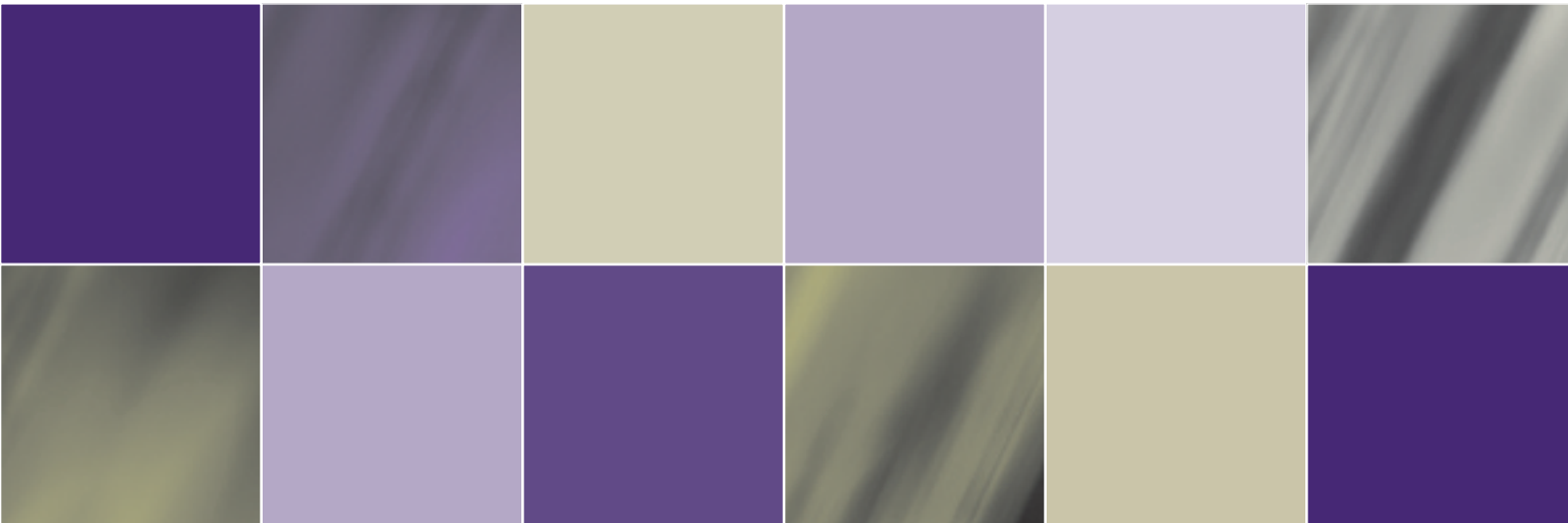


A Strategic Review of Complaints and Disciplinary Processes



Report by
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Complaints Commissioner

A Strategic Review
of Complaints and
Disciplinary Processes
of the Bar Standards Board

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Complaints Commissioner
Bar Standards Board

July 2007

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Over a thousand people have contributed to the consultation and research carried out for this Review. They include: hundreds of complainants and the barristers they complained about; independent individuals and representatives of stakeholder organisations who made constructive responses to the Issues and Questions Paper; Bar Standards Board officers, committee members and prosecutors and COIC-appointed tribunal members and judges, and the staff of the Bar Standards Board complaints and investigations team who resource the system with professionalism, skill, and good humour. I am very grateful to every one of these people who gave of their time freely and whose experiences and ideas are embedded in this Report.

I owe special thanks to a number of colleagues who supported the Review at various times. These include Mark Stobbs, Julie Myers and Jennifer Sauboorah, Roy Ross, Paul Hope, Paul Kempton, Des Aherne and Scott Graves all at the Bar Standards Board. Additionally, Dr Debora Price at London University provided outstandingly useful survey evidence which under-pins the recommendations. Dr Trevor Robinson provided sound advice on costing the recommendations. Professor Kim Economides and Professor Stephen Wilkes, both at the University of Exeter, guided my reading on legal ethics.

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Robert Behrens
July 2007

Executive summary and list of recommendations

The strengths of the system

The current complaints and disciplinary processes have been developed by the Bar Council (and now the Bar Standards Board) over the last ten years. They give complainants access to a system incorporating equitable decision-making and elements of good practice. These features have been commended time and again by the independent Legal Services Ombudsman who has a statutory responsibility to oversee the complaints arrangements. As they stand, the processes are reasonably coherent, cost-effective and work well.

The need for change

The arrangements are not, however, state-of-the-art – far from it. There are weaknesses that need to be addressed as a matter of priority. Of these, the most significant are ineffective communications with complainants and prospective complainants, a lack of proportionality in decision-making rules and inadequate processes leading to a system which is inaccessible to some complainants and internally disjointed.

The current complaints and disciplinary processes would need reforming even without the new era heralded by the legal services legislation. This is not a suggestion of failure. On the contrary, it is an invitation to build responsibly and creatively on existing strengths at a time of unprecedented change. The Bar Council has protected the integrity of decision-making relating to complaints and professional misconduct through the period of self-regulation. The Bar Standards Board now has the responsibility of developing the system and communicating its fundamentals in a way consistent with the principles of consumer and public interests.

An evidence-based approach to change

The recommendations set out below are:

- Evidence-based – they emerge from extensive consultation with barristers, complainants and other stakeholders;
- Incremental – in the light of the quality of existing decision-making and the further change planned in the move away from self-regulation scheduled for 2010-11;
- Compatible with the Clementi-inspired legal services legislation though entirely separate from it. The recommendations stand on their own merits;
- In line with good practice in relation to regulation and complaints handling and consistent with the distinctive features of the Bar.

There are no guarantees of success or simplistic formulae for achieving the necessary balance between consumer and public interests. However, progress can be made by retaining the pillars of the present decision-making arrangements but additionally listening to and communicating more effectively with consumers and service users, and taking prompt action to make the system less complex, less inaccessible and more obviously proportionate, independent and transparent.

What follows is a programme for radical action, culture change and judicious investment. Complainants and barristers and the public deserve nothing less.

Recommendations

Chapter 6	R – 1	The aims and objectives of the complaints and disciplinary system should be succinctly defined in plain English, posted prominently on the Bar Standards Board website, and be incorporated, wherever possible, into information describing the system and in communications with users.
	R – 2	The Bar Standards Board should consult on and develop a targeted set of key performance indicators for the complaints and disciplinary system which will provide service standards that can be publicly communicated. Performance against these indicators should be reviewed regularly, published on the website and reported in the Complaints Commissioner's and the Bar Standards Board's Annual Reports.
	R – 3	Decisions emerging from the complaints system should be subject to regular audit by either the Bar Standards Board's new Performance and Best Value Committee, an external auditor or some other appropriate mechanism.
	R – 4	The Bar Standards Board should give serious consideration to appointing a "Lay Observer" with responsibility for checking all aspects of the system to ensure that it is operating in line with the agreed objectives and procedures. The "Lay Observer" could be tasked with attending an agreed number of Complaints Committee meetings and tribunals as well as spot-checking files, particularly on dismissed cases.
	R – 5	The Bar Standards Board should ensure that the complaints database is fit for purpose. Once the current upgrade has bedded down, a review of the database should be conducted to assess the efficacy of its upgraded capabilities and general performance.
	R – 6 (a)	An expanded Complaints Commissioner's Annual Report should become the principal vehicle for disseminating information to the public and the profession about the outcomes of complaints and highlighting areas for improvement and issues of concern for practitioners.
	R – 6 (b)	The Complaints Commissioner should hold an Annual Open Meeting associated with the publication of the Annual Report.
	R – 7	The Bar Standards Board should develop a discrete area of its website devoted to complaints and disciplinary issues to inform the profession of relevant case law, policy and trends in complaints handling. It should also make more use of Counsel magazine to set out details of complaint outcomes with wider implications for the profession.
R – 8	The Bar Standards Board should liaise with the Bar Council to ensure appropriate feedback on complaints handling is provided on a regular basis and also to develop creative, cost-effective mechanisms for providing effective feedback to the profession.	
Chapter 7	R – 9	All public information and material provided to complainants and barristers should be reviewed and where appropriate re-written, to ensure it is clear, informative and accessible.
	R – 10	The Bar Standards Board should produce a range of "branded" information leaflets, written in plain English and in user-friendly formats covering all aspects of the system.

R – 11	The Bar Standards Board should develop and implement an 'outreach strategy' designed to promote wider public understanding of and dialogue about the complaints and disciplinary system.
R – 12	The current informal arrangements for telephoning the complaints department should be established on a formal basis in the form of a telephone Help-Line. This should be appropriately resourced and information about its availability widely disseminated.
R – 13	Staff resourcing the Help-Line should be given allocated time to operate the Help-Line and not be expected to answer calls while dealing with other tasks. They should receive appropriate training and technological back-up.
R – 14	Complainants with special needs who are unable to make a complaint in writing should continue to be able to do so by telephone, and where appropriate should be able to meet with a member of the complaints team. The availability of this service should be disseminated more widely.
R – 15	The Complaints Form should be reviewed and re-drafted to make it clearer, simpler and more accessible.
R – 16	Complainants should be able to complete and submit complaints on-line. The Bar Standards Board should ensure that this facility is made available through the current improvements to the IT and website facilities.
R – 17 (a)	The Bar Standards Board should ensure information leaflets are available on tape, in Braille, in large format easily downloadable from the web-site.
R – 17 (b)	The Bar Standards Board should carry out further research and consultation to ensure that the complaints system is accessible to all sections of the community.
R – 18 (a)	Short questionnaires should be sent to both complainants and barristers at the conclusion of each case to provide basic information about user satisfaction.
R – 18 (b)	More detailed surveys of user and barrister opinion should be commissioned at intervals of no more than three years.
R – 19	The current reliance on significant <i>pro bono</i> contributions from barristers should be retained but will need to be reviewed after the introduction of the Legal Services Act.
R – 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.
R – 21 (a)	The Standing Orders of the Bar Council should be changed so that from 2010, the requirement that the Chair of the Complaints Committee should be a barrister "of at least 20 years' practising experience" is removed. The existing knowledge, skills and attributes competencies should be retained and developed.
R – 21 (b)	The quorum for the Complaints Committee meeting should be changed to be more proportionate to the possible attendance at any one meeting.
R – 22	A uniform template for Complaints Committee reports should be developed and members expected to use it.

	R – 23	The Complaints Commissioner and Complaints team should develop a more professional case management approach to the allocation of files to sponsor members so that there is a more explicit and prior agreement with sponsors about the time taken to prepare and report.
	R – 24	Members of the Complaints Committee should be consulted about and subject to performance standards. All members should receive constructive feedback from the Committee officers on an annual basis.
	R – 25	On request, the Complaints Committee should disclose sponsors' notes taking into account any Data Protection issues or matters of sensitivity. The identity of the sponsor should not be disclosed.
	R – 26 (a)	Consideration should be given to inviting a member of the prosecuting panel to attend Complaints Committee meetings in a non-voting capacity and on a rota basis to provide general advice on prosecution issues.
	R – 26 (b)	The Complaints Committee should produce more detailed minutes of the reasons for referring cases to disciplinary action in order to provide prosecutors, and if necessary the parties in a case, with a greater understanding of the Committee decision. This is particularly important where the Committee's decisions differ from sponsors' conclusions or recommendations.
	R – 27	The current balance of barrister-lay representation on disciplinary tribunals should be maintained.
	R – 28	Policy and practice on setting dates for hearings should be reviewed in the light of a small number of abuses of the arrangements. The current provisions in the Code requiring attendance by a barrister on the date scheduled should be used more rigorously to enforce timely prosecution of cases.
Chapter 8	R – 29 (a)	Where complainants make a complaint to the Bar Standards Board, and have not previously referred it to Chambers, the Commissioner should have the power, where appropriate, to refer the complaint back to Chambers on a formal basis for the matter to be investigated.
	R – 29 (b)	Chambers should be required to report back to the Commissioner on the outcome of a complaints investigation within a stipulated period of time.
	R – 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.
	R – 30 (b)	Matters of "Inadequate Professional Service" and "Improper Behaviour" should not give rise to formal disciplinary findings and any outcomes would be disclosable only in relation to applications for silk or judicial office.
	R – 31	Once a decision has been taken to investigate a complaint, but before an investigation is commenced, Bar Standards Board complaints staff should agree with the complainant the detail of the complaint and set out the aspects to be investigated.
	R – 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.

	R – 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.
	R – 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).
	R – 35 (a)	Adjudication Panels should be abolished.
	R – 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.
	R – 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.
	R – 37	The Complaints Committee's sentencing powers should be limited and the maximum sanction should be a fine of £5,000.
	R – 38	The Commissioner's powers should be extended to allow decisions to be made (where necessary drawing on the 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.
	R – 39	The Bar Standards Board should abolish Informal Hearings and Summary Hearing Panels.
	R – 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 month's 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.
	R – 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.
	R – 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.
	R – 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.
Chapter 9	R – 44	Induction, training and where appropriate mentoring programmes should be developed for Complaints Committee members to ensure they are sufficiently familiar with the objectives of the Complaints system, its processes and the various roles and responsibilities within the system.

R – 45	The Bar Standards Board should develop information and guidance packs for all decision-makers in the system which includes general information about the operation of the system as well as specific guidance and policies relevant to the performance of individual roles.
R – 46	The Bar Standards Board should explore what support can be given COIC for the induction and training and mentoring of Tribunal members.
R – 47 (a)	The Bar Standards Board should liaise with COIC to produce comprehensive Indicative Sanctions Guidance setting out the parameters for sentencing and giving guidance as to the level of appropriate sanctions. To facilitate this, the Bar Standards Board should extend to COIC the use of internal staff and Committee resources to support the initiative.
R – 47 (b)	The Bar Standards Board should work with COIC to develop specific written guidance for the Chairs of Disciplinary Tribunals which covers their role and responsibilities with particular emphasis on the need to encourage and respect lay participation.
R – 48 (a)	The Bar Standards Board should develop a sentencing database that records all sentences imposed by the Committee or the Tribunal and which allows relevant reports to be prepared showing comparative outcomes in similar cases.
R – 48 (b)	The Bar Standards Board should develop a public system for providing and accessing information on previous sentencing decisions.
R – 48 (c)	The Bar Standards Board should disseminate a quarterly bulletin to all Committee and Tribunal members and members of the prosecution panel setting out relevant information on decided cases.
R – 49 (a)	All members of the complaints and investigations teams require, as a matter of urgency, updated job descriptions, and annual performance and development plans related to key performance indicators and a related business plan.
R – 49 (b)	There should be an urgent review of staffing needs and resources, taking into account the implications and costs of implementing this Review.
R – 50	Revised induction and development based on an assessment of corporate and individual needs should be introduced for all staff.
R – 51	The Bar Standards Board should resource the development, dissemination and review of staff guidance and policy on the operation of all aspects of the complaints system including objectives, administrative processes and the expected service standards.
R – 52 (a)	The Bar Standards Board should propose to the Inns of Court that the current 'Ethics and Advocacy' course be extended to include a section on complaints handling and the relevant powers of the Bar Standards Board.
R – 52 (b)	The Bar Standards Board should liaise with relevant CPD providers to develop a separate accredited CPD course designed to equip heads of chambers, and those responsible within chambers for handling complaints, with the information and skills necessary to deal with complaints under the designated system.

Chapter 1 Introduction

The Review and its background

I took up post as Complaints Commissioner to the Bar Standards Board in June 2006 with the specific additional task of carrying out this Review. This was a tall order. The advantage was, however, that the work of the Review was rooted in the real experiences of complainants and the barristers about whom they complained.

The Terms of Reference of the Review are set out at Appendix 1. I was asked to examine the Bar Standards Board's current complaints and discipline system and recommend changes to ensure that the processes are: objective and fair to both complainants and the barristers they complain about; customer focused and reflecting wider good practice; and compliant with the aims and objectives of the relatively new Bar Standards Board.

The essential background is that in 2003 and 2004, Sir David Clementi conducted a wide-ranging review of the regulatory and complaints handling arrangements of the legal services professions.¹ This led to a number of radical recommendations for altering the way in which the various professions are regulated. As a result, a draft Legal Services Bill was promulgated by Government in mid 2006 and legislation based on this is currently making its way through Parliament. The Bill sets out a new framework for the regulation of barristers which has wide ranging implications for the future regulation of the Bar. In essence, the framework constitutes a shift from self-regulation to what academics call 'regulated self-regulation' under the general supervision of a new Legal Services Board.²

Although Parliamentary inquiry and debate has been a continuous background to the Review, the legal services legislation and the Review are only tangentially linked. There are two reasons for this. The provisions of the Bill, when enacted, do not come into operation until 2010-11. Even then, the Bar Standards Board will retain much of its current role including its responsibility for overseeing allegations of professional misconduct by barristers. Where the legislation does impact on the Review is that it heralds the end of self-

regulation in two or three years time and the potential transfer of service complaints handling responsibilities to a new central body (the Office for Legal Complaints). This requires planning for a seamless transition to the new arrangements, and it also cautions against fundamental changes in advance of 2010-11.

Review methodology

The Review was evidence-based, transparent and outward-focussed. It began with desk research mapping current processes, and then explored the views of stakeholders, particularly complainants and defendants. It also canvassed the views of external organisations noted for good practice and with experience of complaints handling, disciplinary processes and regulatory management.

There was a wide range of written material available for scrutiny. A range of stakeholders were consulted regarding their views on the current system and ideas for improvement. An Issues and Questions Paper was published on 18 September 2006. It attracted press coverage and led to 18 substantive responses. These responses included submissions from representative organisations of barristers, consumer groups including the Bar Standards Board's new Consumer Panel, the Legal Services Ombudsman and a number of other regulators. The submissions greatly informed the thinking of the Review, and are now published in their entirety at www.barstandardsboard.org.uk.

In addition to the Issues and Questions Paper, extensive survey work was undertaken. An independent study of user and barrister satisfaction with the complaints system was commissioned in August 2006 from Dr Debora Price of the School of Social Science and Public Policy at Kings College, London University. The purpose of the study was to provide quantitative (statistical) evidence of user and barrister satisfaction with the system for making complaints against members of the Bar of England and Wales, both to evaluate current levels of satisfaction and to provide a baseline for future evaluation. There were four stages to the London University study:

- A review of previous research into satisfaction with the Bar Standards Board complaints system and the measurement of user satisfaction more generally;
- A series of in-depth interviews with administrators, investigators and lay and solicitor complainants to develop the survey questions;
- A pilot survey was undertaken of all complainants and barristers whose cases had been closed in July 2005;
- A final survey was sent to all individual complainants and barristers who made or were subject to complaints during a 13-month period, with a covering letter explaining the importance of the survey. A second mailing took place a few weeks later. There followed a comparison of survey data with anonymised administrative records.

All parts of this project were carried out on a confidential basis and survey participants were assured of anonymity.³ The study covered a period when the Bar Council was responsible for complaints and when that function was transferred to the Bar Standards Board.

The survey sample consisted of all individual cases which were finally closed by the Bar Standards Board between 1 August 2005 and 31 August 2006. From the Bar Standards Board perspective, there were no live cases included in the survey sample.⁴ The final sample included 584 cases, although some of these had multiple complainants, and some multiple barristers. As the survey was a census of all concluded cases in the 13-month period, no random sampling strategies were needed.

Surveys were sent to 622 barristers of whom 45 were found to be ineligible for the study⁵ leaving an effective sample of 577. Responses were received from 322 barristers, a response rate of 56 per cent. Surveys were sent to 593 complainants of whom 49 were ineligible, leaving an effective sample of 544. Responses were received from 305 complainants, a response rate of 56 per cent.

For a postal survey of this kind, 56 per cent is considered to be an excellent response rate⁶ and sufficient to provide reasonably reliable evidence of the feelings of those affected by the process.

The Review also included a survey of Bar Standards Board committee and the Council of the Inns of Court (COIC) tribunal members, members of the prosecuting panel and Judges involved in the system. This survey was launched in October 2006 with the valuable support of COIC. It was conducted under the guarantee of confidentiality and anonymity and elicited a response rate of nearly 54 per cent of the 323 people approached (see below, Table 1). Sixteen respondents were subsequently interviewed on the basis of their questionnaire responses.

Throughout the Review there was valuable dialogue with Bar Standards Board staff in the complaints and investigation teams to elicit ideas and to discuss emerging findings. Altogether three staff sessions were held, including a workshop held off-site in central London.

Information and views were also sought from stakeholders and fellow regulators in addition to

Table 1: Survey of Bar Standards Board Committee and COIC tribunal members

	Total sent out	Responses received	Percentage Responses
Complaints Committee – Lay members	10	10	100
Complaints Committee – Barrister members	51	27	53
COIC – Lay members	25	18	72
COIC – Barristers	85	46	54
COIC – QC (Panel Chairs)	28	15	54
Prosecutors	69	38	55
Directions Judges	40	17	42
Other	15	3	20
TOTAL	323	174	54

formal submissions to the Issues and Questions Paper. Working visits were arranged to sets of chambers, a circuit outside London, the Inns of Court and to observe a Disciplinary Tribunal. There were also valuable visits to the Office of the Legal Services Ombudsman in Manchester, the Legal Complaints Service in Leamington Spa, the General Medical Council and the Council of Health Care Regulatory Excellence, both in London. In addition there were helpful exchanges of ideas with members of the British and Irish Ombudsman's Association and the International Bar Association which is currently commissioning a draft Guide for Establishing and Maintaining Complaints and Discipline Procedures.

The need for change

The current complaints and disciplinary processes have been developed by the Bar Council (and now the Bar Standards Board) over the last ten years. They give complainants access to a system incorporating equitable decision-making and good practice that one would expect to see in the regulation of a profession built on justice and the representation of clients. These features have been commended time and again by the Legal Services Ombudsman who has a statutory responsibility to oversee the complaints arrangements.⁷

Since 2006 the independence of the complaints handling arrangements has been strengthened by transferring responsibility for them to the Bar Standards Board. This is a new body created to separate out regulatory functions from representative responsibilities, which remain with the Bar Council. The separation of the functions was a key feature of the Report of Sir David Clementi commissioned by the Lord Chancellor.⁸ It strengthens the accountability of the profession by removing the conflicts of interest inherent in a representative body overseeing regulatory matters. Notwithstanding the effectiveness of these arrangements, including the creation of the Bar Standards Board, the evidence suggests an overwhelming case for building on this effectiveness with considered, incremental reforms.

The current arrangements are reasonably coherent, cost-effective and have worked extremely well over the last ten years. They are not, however, state-of-the-art –

far from it. There are weaknesses that need to be addressed. Of these the most significant are: effective communications with complainants and prospective complainants; a lack of proportionality in decision-making rules and sub-optimal processes leading to a system which is inaccessible to some complainants and internally disjointed.

The current complaints and disciplinary processes would need reforming even without the new era heralded by the Legal Services Bill. This is not a suggestion of failure. On the contrary, it is an invitation to build responsibly and creatively on existing strengths at a time of unprecedented change. The Bar Council has protected the integrity of decision-making relating to complaints and professional misconduct through the period of self-regulation. The Bar Standards Board now has the responsibility to develop the system and communicate its fundamentals to complainants and potential complainants in a way consistent with consumer and public interests.

The strategy for change: planning for 2010-11

It has been suggested that, given the recent creation of the Bar Standards Board itself, "insufficient time has passed to be able to comment on the effectiveness of the Bar Standards Board in handling complaints compared to its predecessor."⁹ It has also been suggested that it would be better to await the larger changes in 2010-11 associated with the implementation of the Legal Services Act before changing the Bar Standards Board's arrangements.¹⁰

While noting these views, a key challenge is to move into the new era of 'regulated self-regulation' under the new Legal Services Board without dislocation to the service that complainants and barristers have every right to expect. As the National Consumer Council put it in evidence:

*"it is important to provide the best possible redress arrangements for consumers until the new organisation [the Office for Legal Complaints] is in place, so the consultation exercise is welcome in this context. Further, as an approved regulator, the BSB will continue to have responsibility for disciplining barristers in the post-Clementi landscape."*¹¹

I agree. Although the immediate horizon is two to three years ahead and not longer, evidence-based action now will strengthen the Bar Standards Board as a credible, independent ring-fenced regulator both in the short and longer terms. The proposals set out in the subsequent chapters address existing weaknesses but nothing that is proposed is incompatible with the key reforms contained in the Legal Services Bill. In this sense, delay until 2010 would not be productive.

The structure of the report: planning for 2010-11

The chapters which follow are divided into two parts. In Part One (Chapters 2-5) the current position is assessed. Chapter 2 uses the Bar Standards Board's regulatory principles as the basis for constructing a benchmark against which to assess the current system. Chapters 3 and 4 draw extensively on the surveys commissioned and on submissions to the Issues and Questions Paper consultation to set out the strengths

and weaknesses of the existing arrangements. Chapter 5 reviews this evidence and, using the benchmarking criteria, maps out the broad thrust of the action that needs to be taken, highlighting some underlying themes.

Part Two covers the changes that need to be made in the light of existing weaknesses. Chapters 6-9 are constructed so that each addresses areas of weakness identified in Part One. Chapter 6 makes recommendations to strengthen the clarity of purpose and accountability of the system. Chapter 7 makes recommendations to build user confidence in the system. Chapter 8 sets out significant recommendations for improving the system itself by making it more proportionate and flexible. Chapter 9 makes recommendations for improving the support the system should give to the people who operate it. Finally, in Chapter 10, I map out the key elements of the next stage of the process as the Bar Standards Board considers the Review's recommendations and moves towards implementation.

Endnotes

- 1 Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales Final Report*, December 2004.
- 2 Robert P Kaye, 'Regulated (Self-) Regulation: A New Paradigm for Controlling the Professions?' *Public Policy and Administration*, vol.21, No 3 Autumn 2006.
- 3 The research was carried out at all times in accordance with the ethical standards of the British Sociological Association and the Social Research Association.
- 4 Although in some cases a reference to the Legal Services Ombudsman may not yet have been finally concluded.
- 5 Deceased, moved with no forwarding address, part of a multiple (and so counted twice) or complaint had been re-opened.
- 6 The usual response from a postal survey is about 15% - 20%, and the response rate in the pilot study was about 30%.
- 7 See, for example, *Striving for Excellence. Annual Report and Accounts of the Legal Services Ombudsman for England and Wales 2005-2006*, pp.48-9.
- 8 Sir David Clementi, *op.cit.*, 2004.
- 9 *The Professional Practice Committee of the Bar Council*, 6 December 2006, para 1, p.1.
- 10 Interview with a Chambers Director, 20 March 2007.
- 11 *Complaining about barristers*, Response by the National Consumer Council, November 2006, Introduction.

Chapter 2 Benchmarking excellence

Assessing the system

In this Review extensive evidence has been collected from complainants, barristers, members of committees and tribunals, and Bar Standards Board office-holders and staff. This has provided an important insight into the views of those who use and operate the system. However, the Bar's complaints and discipline system is not "an island entire of itself".¹ Any assessment of the merit and utility of the system must be placed in a context and depends on comparison with general principles and consideration of the arrangements of other regulators.

Care has been taken therefore to adopt a comparative approach so that lessons from the experience of other regulators can be assessed and taken into account. As a result, and emerging from the dialogue launched with the Issues and Questions Paper, there has been constructive engagement with a number of regulators.

In general terms, the good practice of regulators has been distilled into a now widely recognised set of principles of strategic regulation (see below pp 21-24). These principles carry with them the assumption that they can be generally applied to all regulators. In this sense, the principles can be used as a benchmark of general excellence against which to assess the strengths and weaknesses of the Bar Standards Board. This is the approach used – with caution – in this Review.

It is important, however, to be clear about the distinctive features of the Bar as a profession. These must mediate the application of general principles. Any proposals for change will not be credible unless they also reflect these characteristics.

The current arrangements and the complainants who use them

In order to benchmark the system it is important to understand how it currently operates and therefore the

processes are briefly summarised below and set out in the flow chart at Figure 1 below.

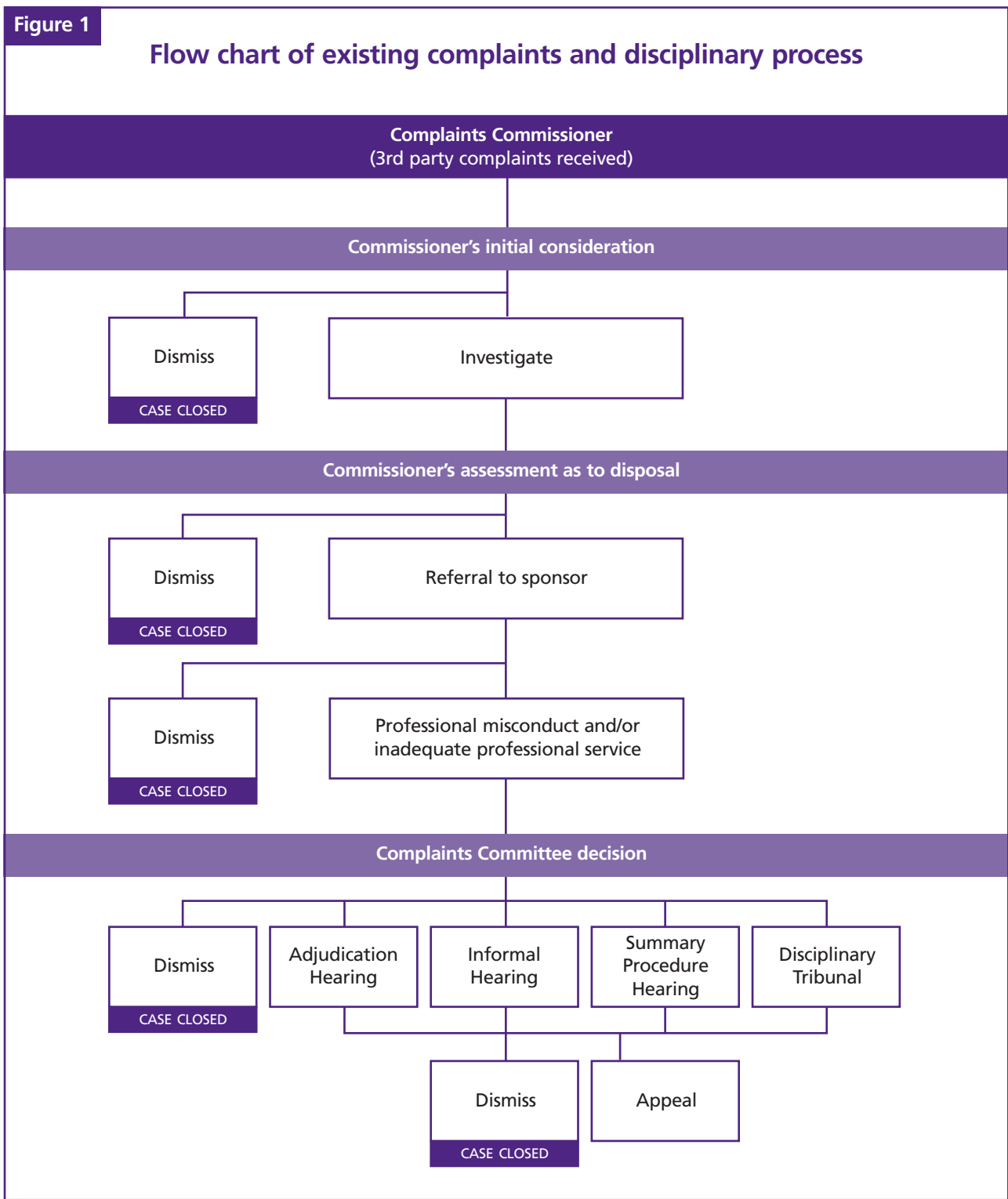
All complainants are entitled to complain directly to the Bar Standards Board and, while barristers are required to have a complaints procedure in place, the Bar Standards Board does not currently stipulate that this process must be used.

Complaints received from third parties (as opposed to those raised at the Bar Standards Board's own motion) are considered first by the Complaints Commissioner. As Commissioner, I must decide whether the complaint reveals prima facie evidence that the barrister has either breached a provision of the Code of Conduct (professional misconduct) or has failed to provide an adequate service to his or her client (Inadequate Professional Service).

If the complaint does not reveal prima facie evidence, or is not a matter that falls within the Board's jurisdiction, I must dismiss it. If there appears to be some evidence of either professional misconduct or inadequate professional service, I refer the matter to investigation by Bar Standards Board staff. The results of the investigation are presented to me and I either dismiss the complaint or refer it to a barrister member of the Complaints Committee for advice.

If I agree with advice from the barrister member (designated in this context as a 'sponsor') to refer the case to the Committee, he or she prepares a report outlining the facts and recommending what further action, if any, should be taken. The sponsor member will be responsible for presenting the case at the Committee meeting and sponsors' "notes" are circulated in advance of meetings.

The Committee is chaired by a practising barrister of at least 20 years' call and has four vice-chairmen, two of whom are lay members and two practising barristers. The other members consist of both barristers and lay representatives: the total current membership is 65 with 50 barrister members, 10 lay members and five office-holders. The Committee is divided into two



groups with half the membership attending each of the fortnightly meetings. A minimum of two lay members are required to be present at each meeting and no case can be dismissed unless the majority of the lay members in attendance agree. The Committee has a range of options for dealing with complaints. It can: dismiss the case; decide to take no further action; give formal written advice to the barrister; order that

the barrister attend on the Chairman of the Committee for advice to be given; impose a non-disciplinary warning or fine for certain breaches; or refer the matter for further action to one of four panels with different jurisdictions as set out below. All panels are appointed independently by the Council of the Inns of Court and that body is responsible for the recruitment and training of panel members.

The four panels are:

- **Adjudication Panels:** which deal only with cases of Inadequate Professional Service. The panels consist of two lay members and two barristers and have powers to require the barrister to apologise, order a reduction in the barrister's fees and/or order payment of compensation to the client of up to £5,000. The parties normally do not attend hearings and decisions are made on the papers. Panel decisions are not disclosed to the public and do not, for most purposes, form part of a barrister's disciplinary record.
- **Informal Hearings:** which are designed to deal with minor misconduct, with or without Inadequate Professional Service. Informal Hearing panels also consist of two lay members and two barristers. In relation to proven misconduct, they have the power to give advice as to future conduct or admonish the barrister. In relation to Inadequate Professional Service they have the same powers as adjudication hearing panels. The barrister is expected to attend. Panel decisions are not disclosed to the public, but do form part of the barrister's disciplinary record. It should be noted that in recent years no references to Informal Hearings have been made and they have effectively fallen into disuse.
- **Summary Procedure Hearings:** which are designed to deal with cases of professional misconduct, with or without Inadequate Professional Service, where there is no dispute on the facts (therefore no oral evidence is required) and the "offence" does not warrant a sentence of more than three months' suspension. The barrister must agree to the matter being heard by Summary Procedure. If not, the case will be referred to a Disciplinary Tribunal. Summary Procedure panels consist of a Chair, who must be a QC, one barrister member and one lay representative and the barrister is required to attend the hearing. The panels' sentencing powers are extensive and range from taking no further action through to suspension from practice for a period of up to three months. The panels can also impose fines of up to £500 per charge and have the same powers in relation to Inadequate Professional Service as Adjudication panels. Findings of professional misconduct are posted on the Bar Standards Board's website and

are included in the barrister's disciplinary record to which the public have access.

- **Disciplinary Tribunals:** which are designed to deal with cases where there is a dispute of fact and/or the level of seriousness is such that a sentence of more than three months' suspension or disbarment from practice might be warranted. Tribunal panels consist of five people: a Chair, who must be a Judge, two barrister members and two lay representatives. The defendant barrister is required to attend and witness evidence can be taken under oath. The Tribunals' sentencing powers extend through the full range of powers available to other panels but also include the power to suspend a barrister from practice for more than three months or disbar the barrister permanently from practice. Findings of professional misconduct are posted on the Bar Standards Board's website and are included in the barrister's disciplinary record to which the public has access.

Appeal mechanisms for barristers are available from each of the panels (except findings of professional misconduct by Informal Hearings) but differ according to which panel heard the original case. Adjudication Panel and Informal Hearing Panel decisions relating to findings of Inadequate Professional Service can be appealed through internal Council of the Inns of Court mechanisms. Appeals from Summary Procedure and Disciplinary Tribunal Panel decisions are made to the Visitors of the Inns of Court (an independent mechanism operated under the auspices of the Judges of the High Court).

If complainants are dissatisfied with the manner in which the Bar Standards Board has handled their complaints, they are entitled to make a complaint to the Legal Services Ombudsman. The Ombudsman's powers are set out in the Courts and Legal Services Act 1990. She can look at issues of process, make findings that the Bar Standards Board has acted unreasonably, recommend payment of compensation and the reconsideration of a complaint. She does not have the power to overturn disciplinary findings.

To conclude this section, it is important to understand who complainants are, and what sort of cases are likely to lead to complaints.

As Table 2 below shows, it is criminal and family law litigants who are most likely to complain to the Bar

Standards Board. About a fifth of complainants are in prison at the time they make a complaint. Seventy one per cent of complainants are male, about 25 per cent define themselves as a member of a minority ethnic group, and 23 per cent say that they have a disability.² In general, then, many complainants are socially disadvantaged and not necessarily representative of wider society or the wider client base of the profession. Commercial clients are largely absent in the complainant profile despite being, in financial terms, one of the largest sectors using the profession. This is perhaps not surprising given that such clients are more likely to rely on the ability not to instruct a poor performing barrister rather than take the matter up with the regulator.

Distinctive features of the Bar and the Bar Standards Board

There are at least five distinctive features of the Bar as a profession which need to be borne in mind and are directly relevant to the nature of its regulation.

- The Bar is mainly (but not exclusively) a self-employed profession. In this sense it is different from doctors, nurses, teachers and even solicitors. Allegations of poor service or performance are not made against corporate bodies (hospitals, schools and solicitors firms) but against individual members of the profession.
- Barristers are not, in general, governed by overarching contractual obligations to “pay-masters” in the way, for example, doctors are subject to contracts with Primary Care Trusts (PCTs). In consequence the Bar Standards Board, unlike the General Medical Council (GMC) does not share the supervision of professional behaviour with other bodies.
- Chambers are distinctive in the sense that they are collections of self-employed individuals operating without employment contracts and with very limited corporate responsibility. It is therefore difficult for Chambers to take ‘corporate’ responsibility for the actions of individual barristers such as offering an apology, paying compensation

Table 2: Comparison of survey respondents with administrative data

Lay complainants	Administrative data	Barrister respondents	Complainant respondents
Criminal defendant(s)/prisoner(s)	24%	29%	34%
Family law litigant(s)	16%	20%	20%
Invalid complaint	10%	–	–
Other – not defined	8%	–	–
Other civil litigant(s)	34%	46%	31%
Other member(s) of the lay public	7%	–	–
Not answered	–	–	3%
More than one type	–	–	3%
Other	–	5%	9%
	100%	100%	100%
In prison at time of complaint	18%	n/a	16%
	28%	32%	35%
Outcome of Complaint		(calculated for respondents from administrative data)	
Dismissed by commissioner	64%	64%	60%
Dismissed by conduct committee	16%	18%	20%
Charges brought	16%	14%	17%
Withdrawn	4%	4%	3%
	100%	100%	100%

or returning fees. This makes Chambers different from firms of solicitors where the firm can take corporate responsibility regardless of an individual solicitor's stance or culpability.

- Barristers have a unique relationship with clients in which solicitors often act as the third party intermediaries. In effect this means that barristers are responsible to two 'clients' – solicitors and lay clients. Long-standing rules limiting direct contact with lay clients³ (now changed in a small number of Public Access inter-actions) have created a culture of distance from lay clients and consequent reserve about resolving complaints directly with lay clients themselves.
- Barristers have a responsibility to the Court and the justice system as well as to their lay client. A barrister has an overriding duty to the Court to act with independence in the interests of justice: "he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court."⁴ He (or she) must promote by all lawful means the lay client's best interests and owes a duty to a lay client over a professional client or other intermediary.⁵ However, he (or she) must not compromise professional standards in order to please the client, the Court or a third party.⁶ All of this means that the legitimate actions of a barrister may not appear to a lay client to be in their own best interest. This duality of loyalty, which is not unique to barristers, creates complexities in the relationship with lay clients and needs to be respected.

In addition, as the regulator of the Bar, the Bar Standards Board is unusual in two important respects. First, until 2010-11 and the implementation of the provisions of the Legal Services Act, it carries responsibility for both resolving complaints of poor service made against barristers and allegations of professional misconduct. Most other regulators only take direct responsibility for issues of professional misconduct and either do not deal with issues of poor service or have separate independent mechanisms for doing so (Annex 1). Secondly, barristers appear prominently and honourably in other regulatory systems as paid advocates and legal advisers. By contrast, when it comes to barristers participating as advocates and decision-makers in the system overseen by the Bar Standards Board, there is a long and

continuing tradition of *pro bono* or voluntary contribution. There are instances of the Bar Standards Board paying for advice and advocacy but these instances are exceptional.

The point of describing these distinctive features is not to claim that general regulatory principles cannot therefore apply to barristers (as some barristers assert) but to demonstrate that they must be applied with regard to structural features which lie at the heart of the operation of the profession.

Principles of strategic regulation and good practice in complaints handling

In the last decade concerns about bureaucratic regulatory practice and severe detriments to individual lay clients, particularly in the delivery of public services (e.g. the scandals associated with Shipman, and the Bristol Royal Infirmary and Alder Hey Hospital), have promoted impetus for a more 'strategic' or 'quality' approach to regulation. In this approach, championed particularly by the Audit Commission and also the Better Regulation Executive, customer or user perspectives of service delivery feature prominently, together with proportionality and the targeting of resources to encourage exemplary professional behaviour.⁷ These ideas complement other long-accepted principles including the independence of regulatory action, transparency, accountability and the importance of consistent decision-making.⁸

The Bar Standards Board has incorporated these principles into its Strategic Plan 2007-2009 which is based on five strategic objectives: Protecting Consumers; Access to Justice; Independent Regulation; Excellence and Quality; and Diversity. It is committed, under the Plan, to regulating in a way which is:

- Proportionate;
- Accountable;
- Consistent;
- Transparent; and
- Targeted.

The Strategic Plan combines the importance of consumer perspectives and commitment to consumer protection with a determination to promote excellence and quality within the profession.

What is interesting and important in the context of a discussion of regulatory principles is that the principles of good practice in complaint handling complement and sometimes overlap the principles of strategic regulation, as Table 3 below demonstrates.

The benchmarks against which the Bar Standards Board complaints and discipline system has been assessed in this Review are based on the principles of strategic regulation, the Bar Standards Board's own principles and (in the absence of specific, published objectives for the Bar Standards Board's own complaints handling system) recognised good practice in complaints handling. This compilation is set out in Table 4 below.

The regulatory principles set out here are not useless abstractions or examples of pious moralising. They are benchmarks against which to measure progress in developing exemplary complaints and disciplinary arrangements.

However, measuring progress and mapping future direction are not simple, mechanistic activities. First, as a submission from the South Eastern Circuit of the Bar made clear, "There is a risk that 'transparency' is becoming a convenient and over used term in regulatory and disciplinary circles."¹³ I agree. Principles need reasonable precision in their articulation in order to be useful.

Secondly like all general principles, the Bar Standards Board's regulatory principles embody elements of ambiguity about what they mean in practice.¹⁴ For example, and centrally, how do we really know that a

system "holds the confidence of all stakeholders" and what if (as is the case) stakeholders differ in their views?

Thirdly, as with most sets of principles, the interpretations of individual regulatory principles are sometimes in tension with one another. For example, what should be the balance in any changed arrangements between professional expertise and lay representation in the light of the principles of consistency on the one hand (which might point towards profession-led decision-making) and accountability on the other (which might point towards an emphasis on independent lay members)? There is no simple answer to this question and, indeed, there may be more than one legitimate answer.

Fourthly, as has already been stated, any reforms indicated by the application of principles need to begin from an appreciation of how the profession operates and how this differs from the operation of other professions. And finally, setting out a regulatory principle does not absolve its exponent from the challenge of defining the appropriate level of resources to be invested in it. Here, there is always a risk of unnecessary 'gold plating' when what is really required is setting high but deliverable standards and the allocation of specific resources to enable them to be achieved.

Having set out the benchmarks against which the system should be judged, I now turn to the strengths and weaknesses of the current arrangements.

Table 3: Regulatory objectives and principles of good complaint handling¹¹

Bar Standards Board Regulatory Objectives	Principles of good complaint handling
Accountability	Clarity of purpose
Proportionality	Proportionality
	Accessibility
Transparency	Flexibility
Targeting	Openness and transparency
Excellence, Quality and Consistency	Efficiency
Independent	Quality Outcomes

Table 4: Combined Benchmarking Principles¹²

Regulatory and complaint handling principles	Description
Clarity of Purpose	The objectives, role, intent and scope of the system should be clearly stated and communicated.
Accountability	Actions and decisions must be capable of justification and be subject to public scrutiny.
User perspective	The system should take into account the needs of users and be clearly focussed on the experience of those for whom the service is provided.
Proportionality	The processes and outcomes should be appropriate to the circumstances and risks posed, avoid unnecessary bureaucracy and balance the needs of users with the need for effective regulation of the profession.
Accessibility	The system should be free, open and available to all who need it.
Flexibility	The system should be responsive to the needs of individuals and differing circumstances.
Transparency	The operation of, and outcomes from, the system should be communicated openly and clearly and be subject to public scrutiny.
Targeting	The system should be focused on identified problems and prioritise activity which gives rise to the most serious risks.
Quality	The system should ensure that it can achieve quality outcomes by providing appropriate redress, safeguarding the public and contributing to the continuous development of the profession.
Consistency	The application of the processes and decision-making should be consistent and predictable in order to be fair to all and give stability and certainty to those being regulated.
Efficiency	The system should operate in a manner that ensures effective administration and speed of resolution within agreed service delivery standards.
Independent	The system should ensure decisions are taken in the public interest and safeguards against undue partisan influences from the profession.

Endnotes

1 John Donne, "No man is an island, entire of itself; every man is a piece of the continent, a part of the main." *Devotions Upon Emergent Occasions*, 1624.

2 Survey of Complainants and Barristers, 2006, para. 105, p.52.

3 *Code of Conduct of the Bar Council of England and Wales*, 8th Edition, 2005, para. F2.

4 *Code of Conduct of the Bar Council of England and Wales*, 8th Edition, 2005, para 302.

- 5 Ibid, para 303(a), 303(b).
- 6 Ibid, para 307(c).
- 7 Audit Commission 22/85/04 para 2.6 Written Evidence to Tenth Report of Committee on Standards in Public Life, *Getting the Balance Right Implementing Standards of Conduct in Public Life*, Cm 6404, January 2005.
- 8 See, for example, *A Modern Approach to Inspecting Services*, Audit Commission 2004, and *Independent Regulators, The Better Regulation Task Force*, London 2003.
- 9 *Bar Standards Board Strategic Plan 2007-2009*.
- 10 Bar Standards Board, London, 2007.
- 11 *Bar Standards Board, Strategic Plan 2007-2009. Guide to principles of good complaint handling*, British and Irish Ombudsman Association, 2007.
- 12 *BSB Strategic Plan 2007-2009, 2007; Principles of Good Regulation, Better Regulation Taskforce, 2003; Guide to principles of good complaint handling*, The British and Irish Ombudsman Association, 2007; *The Government's Policy on Inspection of Public Services*, Office of Public Service Reform, 2003; *Principles of Good Administration*, Parliamentary and Health Services Ombudsman, 2007.
- 13 The South Eastern Circuit, 29 November 2006, p.9.
- 14 Conal Condren, *The Status and Appraisal of Classic Texts: An Essay on Political Theory, Its Inheritance and the History of Ideas*, New York, 1985.

Chapter 3 The strengths of the current system

Introduction

One key purpose of the Review was to consult the profession, complainants and wider stakeholders to ascertain their views about the appropriateness of existing arrangements. What follows in this Chapter and in Chapter 4 is an account of those views, divided into strengths and weaknesses dependant on the principles set out in Chapter 2. There is, of course, a subjective element to this analysis, particularly as what is for some a strength is for others a weakness. For this reason the division into strengths and weaknesses can be somewhat arbitrary. Nevertheless, the consistency of views expressed within stakeholder groups is striking, and there are rich insights in the evidence submitted.

At the same time what is also striking is the strong divergence of opinion between complainants on the one hand and barristers complained about on the other. This was a clear finding in unpublished research conducted in 2002¹, and there is no indication that the divergence of views has diminished in the interim period.

Two initial comments are required about the evidence in both this Chapter and the next one. First, strengths and weaknesses are inter-related. For example, the quality of decision-making or more particularly the composition of decision-making panels and the extent of independent voices within the system, seem to have a direct impact on user perspectives and the confidence of complainants in the system. Secondly, perception counts for a great deal and the same ‘facts’ are viewed differently from different positions. The evidence reveals marked divergences of perceptions amongst stakeholders. There is not only a divergence between complainants and barristers complained about. There is also a divergence between consumer groups and organisations that represent barristers.

It is also the case that not all barristers agree about the strengths of the system, nor do all complainants agree about its weaknesses. These divergences and

differences of view emphasise the subjective element of opinion, and the complexity of the issues under review.

Comparative efficiency and effectiveness

In her response to the Issues and Questions Paper, the Legal Services Ombudsman referred to the “relative simplicity” of the present system, its “accessibility and its comparative efficiency”:

“Within its terms of reference, the system works well. In successive annual reports I have acknowledged ... the efforts which the Bar Council have made to refine the complaints handling arrangements.”²

The filter system

Part of the system’s efficiency is said by many, including Gray’s Inn, to derive from the existence of the office of Complaints Commissioner, an office which has existed for ten years. It is occupied by a non-lawyer able to draw on legal advice “who will look at the complaint from the perspective of the consumer and decide whether there appears to be a case to answer”:

“The Commissioner acts as an important filter for those complaints which are obviously ill-founded, vexatious or trivial, so that the [Complaints] Committee can concentrate on considering the merits of those complaints which appear to have substance. This is plainly beneficial to the efficiency of the disciplinary system and is in the public interest.”³

It is this filtering process which the Professional Practice Committee of the Bar Council believes:

“is an extremely important safeguard for the whole disciplinary process. The potential for the Committee to become buried under a large number of unmeritorious complaints leads to

the real possibility that the complaints which should be pursued are overlooked. We support the continuation of a rigorous filter system.”⁴

The filter system has contributed to a relatively swift disposal of cases. Thus, using the sample of all cases which had reached a conclusion between 1 August 2005 to 31 August 2006, cumulative handling times are set out in Table 5.

Table 5: Cumulative percent of cases concluded within time bands⁵

Less than one month	27.0
Less than three months	41.2
Less than six months	61.3
Less than eleven months	79.6
Eleven months or more	100.0

These outturns do not prevent both barristers and complainants from agreeing that complaints take too long to handle.⁶ However, they bear healthy comparison with case handling by other regulators,⁷ who do not have the task of combining the handling of both poor service and disciplinary cases in one system. Critically, the turn-round times have enabled the complaints team to operate consistently without a substantial backlog of unallocated complaints, something which has been a feature of other systems.⁸

Table 2 on page 20, tracks the point in the system when a complaint is dismissed. As respondents to the Issues and Questions Paper made clear, initial decisions of the Commissioner have a big impact on the ‘through-put’ in the system, and the average complaint handling times. In Chapter 6, I deal with the need to audit this decision-making more closely. In summary, the role of the Complaints Commissioner within the system has repeatedly been identified as a significant strength in the system both for its efficiency as well as its contribution to independence.

Value for money

The outturns set out above are delivered in the context of the relatively low financial costs involved in running the system. This is something which is widely recognised and to which attention was drawn in a number of submissions.⁹ In evidence to the Parliamentary Joint Committee on the Draft Legal Services Bill, the Bar Council estimated that current costs of complaints handling amount to about

£500,000. The cost per complaint is estimated at £640 in comparison to £933 for a complaint made to the Law Society,¹⁰ which handles significantly more complaints.

It has been noted in evidence that “Anecdotally there is a belief that the Bar Council investigations staff are overstretched.”¹¹ There is some truth in this belief but the principal reason for the relatively low financial costs of the current arrangements lies elsewhere – in the *pro bono* contribution of legal professionals to the system.

The *pro bono* or voluntary contribution of barristers to the operation of the complaints and discipline system is extensive. It has been estimated to be worth in excess of £4 million per year. Almost all barrister contributions to the system are made on a *pro bono* basis. This contributes significantly to a saving on regulatory costs and is in marked contrast to arrangements in other regulatory systems¹² (see Annex 1). There is, of course, the question of whether this *pro bono* activity is compatible with a modern regulatory approach.

In the view of the consumer group, Which?, the resulting system “relies too heavily on volunteers” to meet the needs of the modern consumer:

“One of the key problems with the Board’s complaints process is the voluntary nature of the input from barristers. A modern, independent and efficient complaints system should not have to rely on the good will of volunteers but professional complaints handlers. At the very least, the barristers involved should be recruited, as lay representatives should also be, through a formal Nolan-type procedure.”¹³

These are important points which need consideration. However, the Which? submission juxtaposes ‘professional complaints handlers’ with the voluntary contribution of barristers, and infers that the former are more conducive to an independent and efficient complaints system than the latter. In fact, of course, the Bar Standards Board system relies on barristers and lay members together with professional complaints handlers in the form of Bar Standards Board staff. Further, barrister members of committees and lay members, are selected under Nolan rules of fair and open competition.

Despite the concerns expressed by consumer groups, based on the evidence submitted to this Review (see below pages 27-28, 54-56) and my experience of the

system, there can be no doubt that the *pro bono* contribution to the system by barristers is a strength that gives value for money and unprecedented access to expert advice of the highest quality. I deal with issues relating to its continuity and efficiency in Chapter 7.

The Code of Conduct

The Code of Conduct of the Bar Council of England and Wales is an exemplary document and its existence is a substantial strength in underpinning the efficacy of the complaints system. It provides a clear and public framework against which to assess the behaviour and performance of barristers. Inevitably, issues arise about its interpretation but it allows for consistent standards to be applied to the profession. As one respondent put it, the Code: "is modern and well developed and requires of practising barristers that they discharge their duties both in the interests of their clients, and independently – in the interests of the Court."¹⁴

Of course, the Code is not perfect and is subject to constant revision. It is now in its 8th Edition¹⁵ and the Bar Standards Board has recently launched a comprehensive review of the content and form which may lead to substantial changes. Nevertheless, it provides a sound basis for effective decision-making and carries authority with the overwhelming majority of barristers. The Annexes dealing with the Complaints and Disciplinary processes are comprehensive. The Complaints Rules (Annex J) create a system with careful checks and balances: no charges may be brought against a barrister without *prima facie* evidence and no complaint may be dismissed by the Complaints Committee without the consent of a majority of lay members present.¹⁶ The rules stipulate that disciplinary hearings are held in public, unless specifically ordered otherwise, and also provide for significant presence of lay representation at every stage in the system.

Quality outcomes and decision-making

Another undoubted strength of the current system is the high calibre of people involved in the system. A large number of submissions paid tribute to the quality of the Bar Standards Board's decision-making processes. In part this is due to the characteristics of those who sit on decision-making committees and

tribunals, part is due to staff professionalism, and part to the authority of the Code of Conduct and the rules and procedures it sets out.

As far as those sitting on decision-making committees and tribunals are concerned, with the exception of the judiciary, they are recruited under Nolan rules of fair and open competition. Interestingly, there is very little awareness of the existence of these recruitment arrangements amongst stakeholders and consumer groups. Barristers bring legal knowledge, rigour and professional experience to their roles as members of the Complaints Committee, and members of tribunals.¹⁷ In relation to the judicial input to the system, the Bar has unprecedented access to this level of expertise which substantially strengthens the quality of disciplinary decisions. As the South Eastern Circuit pointed out: "The high level of judicial representation on the tribunals is unique. This provides decision-makers of the highest standards this country has to offer."¹⁸ It protects the interests of both barristers and complainants and is particularly important where Disciplinary Tribunals hear complex cases.¹⁹

The combination of highly skilled and competent decision-makers and an authoritative Code of Conduct, has led to the endorsement of Bar Standards Board decisions in the overwhelming majority of cases where a complainant approaches the Legal Services Ombudsman.

Table 6: Legal Services Ombudsman satisfaction with Bar Council/BSB handling of cases referred to her 2001-2006²⁰

Fiscal Year	Percentage
2001	92.9
2002	88.4
2003	86.8
2004	78.7
2005	88.0
2006	84.0

The Legal Services Ombudsman drew attention to these results in her submission to the Review as an important strength in the current arrangements²¹ and it has been noted that they have been obtained through a professional, non-submissive relationship with her office.²²

The contribution of the Complaints Committee – and of its officers and staff – constitutes a very significant element in the effectiveness of decision-making. I attend as an observer the fortnightly meetings of the Committee and have seen for myself the analytical and disinterested way in which members review cases. I have never seen the Committee split on barrister – lay member lines and robust debate is joined with barristers and lay members on both sides of an argument. The Committee’s composition and process may need adjustment (Chapter 7) but the Committee represents outstanding value to the Bar Standards Board, to complainants and to the profession.

In the context of the above evidence, it is important to note that 69 per cent of barristers were ‘very satisfied’ with the outcome of the complaint against them. This is lower than the MORI survey result in 2002, but only slightly so.²³

Staffing

Bar Standards Board staff responsible for operating the system work closely with me and sometimes for me, but they do not report to me. They not only support my work but some also support and resource the Complaints Committee while others support the prosecution process, and my office is entirely independent from both of these functions. Given the sensitivities of these accountabilities, the two teams (complaints and investigations) work to a high standard and have a breadth of experience. They deal with heavy caseloads in an efficient and professional manner and this professionalism is reflected in the high percentages of cases judged to have been handled satisfactorily when reviewed by the Legal Services Ombudsman. In addition they also act as the inter-face with complainants and defendant barristers, many of whom are understandably stressed by the realities of the regulatory process. There are also a small number of vexatious complainants to deal with.

In the survey of barristers and complainants, barristers were very positive about Bar Standards Board staff dealing with the complaint against them. More than 80 per cent thought staff were either ‘excellent’ or ‘good’ at being helpful and almost all thought staff were polite.²⁴ If the complainant satisfaction with service from staff was lower, more than 60 per cent still considered they received a good service.²⁵

Independence

The high degree of independence within the current system is a strength that appears to be widely unacknowledged by domestic commentators. However, this feature of the system is clearly noted as radical by colleagues in the International Bar Association whose members report little or no experience of involving independent elements in their national systems set up to discipline barristers. Independence is a thread that runs throughout the Bar Standards Board system: starting with the Complaints Commissioner, through to the lay representation on the Complaints Committee (and their power of veto) and culminating in the independence of disciplinary panels and their lay input. The creation of the Bar Standards Board itself in 2006 constituted a landmark separation of regulatory issues from the representation of the profession and underpinned further the independence of the system.

The Legal Services Ombudsman has acknowledged that:

“the Bar Council, in creating the Bar Standards Board and in the composition of its Conduct [now Complaints] Committee and Adjudication Panels, has gone a very long way to demonstrate the independence of the complaints-handling system.”²⁶

The Complaints Commissioner, who receives and screens all third-party complaints against barristers, has full operational independence from the Bar Standards Board. As the current holder of this office, I am required by the constitution of the Bar Council to be a non-lawyer and this helps to ensure that decisions are taken in the absence of any vested interest in the profession.

The Complaints Committee, which decides whether or not further action on complaints should be taken, has two lay Vice-Chairs who serve alongside two barrister Vice-Chairs and a barrister Chair. The Complaints Committee has a minority of lay members but this minority has access to a veto to ensure that no case can be dismissed without its agreement.

These independent features are described in submissions as significant, perfectly adequate²⁷ and “extremely valuable.”²⁸ Their presence is “an important safeguard now well-established.” The safeguards are two-fold. One is the identification of “conduct which

may be unacceptable to the public but which, over the years, has been thought to be acceptable by the Bar.” Another is to remind barrister members of the Complaints Committee that “behaviour that they consider amounts to a technical breach of the Code would not be considered by the public at large to amount to professional misconduct.”²⁹

In summary, the lay elements contribute to a system which, from the perspective of one Circuit, is not only compliant with Article 6 of the European Convention on Human Rights but also constitutes a model of independent regulatory arrangements.³⁰

Conclusion

The current system has clear and undoubted strengths even if they are not always perceived as being so by complainants and external commentators. The evidence indicates that the system is: relatively efficient and properly codified; represents value for money; has high quality decision-making and robust features of independence within the system. One significant challenge is to ensure that these strengths are sufficiently communicated to allow them to be fully recognised by all parties.

Endnotes

- 1 *Final Report, Bar Council Complaints System*. Research Study Conducted for General Council of the Bar, Mori, September 2002.
- 2 Legal Services Ombudsman, 23 November 2006, Question 1, para 1.
- 3 The Honourable Society of Gray's Inn, 20 November 2006, Q.1.
- 4 The Professional Practice Committee of the Bar Council, 6 December 2006, p.8.
- 5 Source: *Survey of Complainants and Barristers*, 2006, Table 18, para. 75, p.34.
- 6 *Survey of Complainants and Barristers*, 2006, para 76, p.34.
- 7 See timeliness data in *Legal Services Complaints Commissioner Annual Report and Accounts 2005-6*, p.25.
- 8 *Actions Not Words. Consumers Matter: Legal Services Complaints Commissioner Annual Report and Accounts 2005-2006*, p.47.
- 9 Legal Practice Management Association, Q.1: The South Eastern Circuit, 29 November 2006, Q.1, para 2; Falcon Chambers, 20 November 2006, Q.1.
- 10 Supplementary memorandum by the General Council of the Bar (Ev01a), Analysis of Costs in RIA and PWC financial analysis, Draft Legal Services Bill, Volume 11: Evidence, HC 1154-11, HL Paper 232-11, 3 August 2006, pp.63-4.
- 11 Colonel DH Hills, MBE, The Honourable Society of Lincoln's Inn, 20 November 2006, para 9.
- 12 The South Eastern Circuit, 29 November 2006, p.5.
- 13 Which?, p.1, para.5.
- 14 The South Eastern Circuit, 29 November 2006, Conclusions, p.12.
- 15 Adopted by the Bar Council on 18 September 2004.
- 16 The Honourable Society of Gray's Inn, 20 November 2007, p.2.
- 17 Falcon Chambers 20 November 2006, Q.1, p.1; Marc Beaumont 9 October 2006, p.3; Legal Practice Management Association, Q.1.
- 18 The South Eastern Circuit, 29 November 2006.
- 19 The Professional Practice Committee of the Bar Council, 6 December 2006, para 11, p.4.
- 20 Sources: Annual Reports of the Legal Services Ombudsman for England and Wales, 2004-5, 2005-6, and administrative data.
- 21 Legal Services Ombudsman, 23 November 2006, Q.1, p.2.
- 22 Mr John McGoldrick, Young Street Chambers, 20 November 2006.
- 23 *Survey of Complainants and Barristers*, paras 97 and 98, p.47.
- 24 *Ibid*, Figure 9, p.31.
- 25 *Ibid*, Figure 9, p.31.
- 26 Legal Services Ombudsman, 23 November 2006, Q2, para 1.
- 27 The Honourable Society of Gray's Inn, 20 November 2006, Q2; Mr Marc Beaumont, 9 October, 2006, Q.2,p.3.
- 28 The Professional Practice Committee of the Bar Council, 6 December 2006, para, 7,p.3.
- 29 *Ibid*, para, 9, p.4: para.7, p.3.
- 30 The South Eastern Circuit, 29 November 2006, Q2.

Chapter 4 Weaknesses and areas for improvement

Introduction

Chapter 3 set out the context in which any weaknesses in the system should be viewed. This chapter now addresses the weaknesses themselves. The issues covered represent not only specific identified weaknesses but also areas where the system is adequate but could still be improved. Part Two of the Report will deal with how these issues can be addressed.

Clarity of purpose and accountability

The current system is effective in creating detailed processes and ensuring that complaints are handled in accordance with these processes. However, one of its weaknesses is that it is “process” driven rather than based on outcomes. Relatively little attention is paid to the purpose of the system, its objectives or the quality of its outcomes.

What working principles there are have been derived from the outcome of the scrutiny of the Legal Services Ombudsman and long years of successful operation of the Code of Conduct’s rules on complaints and discipline. The creation of the Bar Standards Board has led to higher level regulatory objectives but these have not yet been translated into practical and specific objectives for the complaints system.

As a result, and in practice, decision-makers in the complaints system are generally clear about the need to operate in an impartial manner, be fair to complainants and barristers complained about, and also mindful of a duty to protect the public from professional misconduct and inadequate professional service. However, decision-makers are less clear about the application of risk assessment and proportionality to the resolution of cases.

The current complaints system lacks well-developed levels of accountability for performance. The oversight of the Legal Services Ombudsman (LSO) ensures that overall performance is generally in line

with high expectations but the data provided to the LSO focuses on the initial handling of complaints and does not extend to a detailed analysis on the outcomes of disciplinary cases. The only other external requirement to report on performance is the provision of information to the Office of the Immigration Services Commissioner in relation to relevant immigration advice complaints but this only covers a handful of cases per year. The main vehicles for providing public information on complaints performance are the Commissioner’s and the Bar Standards Board’s Annual Reports. In this context individual managers monitor the performance of their teams but are not required to report regularly on or justify performance. As a result performance management of the system and of individuals can take on an imprecise and impressionistic flavour.

There is also very limited feedback to the profession regarding complaints outcomes and lessons that can be learnt to improve the performance of the profession. These issues are addressed further in Chapters 5 and 9.

The weaknesses described above have an impact on complainant confidence in the system and make it difficult to measure the impact of any operational changes.

User perspectives and user confidence

Notwithstanding the independent features of the system described in Chapter 3, the current arrangements do not carry the full confidence of complainants. This lack of confidence stands at the heart of the divergence of views about the system between complainants and barristers. In one submission, the Bar Standards Board Consumer Panel drew attention to the 2002 MORI Survey commissioned by the Bar Council which showed a “great disparity of views” about the fairness of the system between complainants and barristers. The Panel commented that it was “striking how a Complaints system which failed to attract the

confidence of lay consumers could be so warmly lauded by representatives of those complained against.”¹

The 2006 Survey of Barristers and Complainants broadly mirrors the findings of the 2002 MORI research. A clear contrast is revealed again when the views of complainants and barristers about current arrangements are compared (Figure 2). When asked how satisfied they were with the outcome of a complaint, 77 per cent of complainants were very dissatisfied with the outcome compared with 69 per cent of barristers who were very satisfied.²

Figure 3 overleaf shows that those in prison at the time of making a complaint are even more likely to be very dissatisfied with the outcome of their complaint.

Here, as shown in Figure 4 on page 34, it is important to note that the findings about general levels of complainant dissatisfaction tend to be at their most acute where a complaint is dismissed by the Commissioner at first consideration. Where charges are brought dissatisfaction levels are still significant but markedly lower.³ In any event, 70 per cent of

complainants say that they had low expectations of their complaint succeeding because “lawyers will always look after their own.”⁴

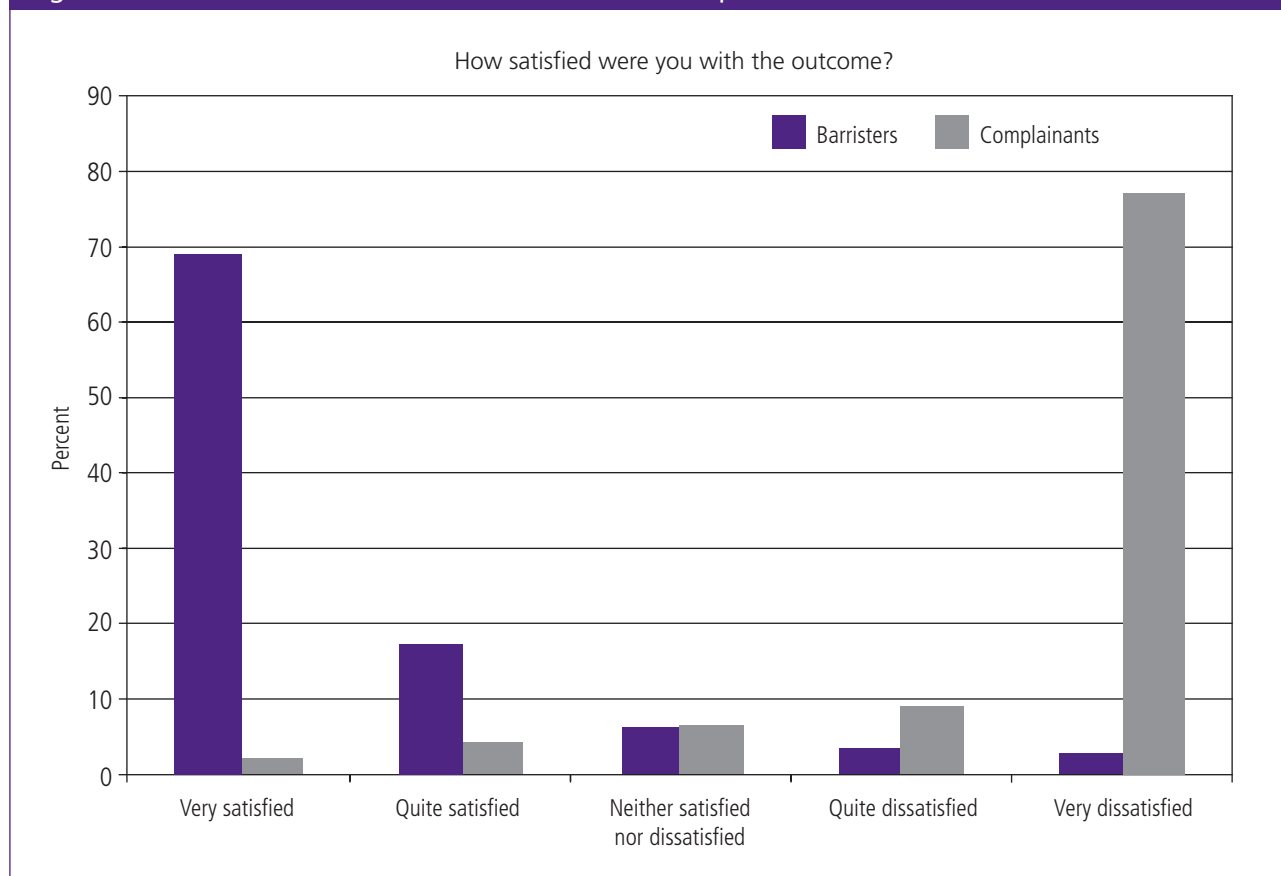
Perceptions of independence

Part of the reason for the dissatisfaction expressed by complainants is explained by a finding that 74 per cent of complainants agree or strongly agree with the statement that “the whole system is stacked against the person complaining.”⁵

This general view of complainants was reiterated by the National Consumer Council who made clear that the perceived lack of independence from the profession;

“undermines consumer confidence. Consumers will not have confidence in a complaints system where lawyers judge their own. The composition and operation of the Conduct Committee fails this test. The requirement that a complaint cannot be dismissed without the consent of the majority of lay members present is helpful, but it is an insufficient safeguard since the imbalance of barrister members

Figure 2: Satisfaction with outcome: barristers and complainants



present at meetings risks squeezing out the voice of lay members.”⁶

There is also some support for this proposition from Which? and the Legal Practice Management Association.⁷

Taking into account all the evidence presented in this Review, it is clearly a weakness that the high degree of independence within the system (Chapter 3, pp 25-29) has not been successfully communicated to those who use the system or represent users.

Before moving on, it is important to register a note of caution (from the South-Eastern Circuit) about accepting uncritically the views of complainants that the system lacks independence. It is pointed out that a proportion of complainants are motivated by extraneous or questionable motives. These include a desire for substantial financial recompense or – in the cases of counsel on the opposing side – furthering an underlying litigation grievance.⁸ There is also the possibility of “malice”:

“The complainant, it should be remembered, has already had what is presumed to be a fair hearing at first instance and has had the opportunity (at least) to appeal. Disappointed lay clients (especially in the criminal field) will often grasp at every last straw and the competence or otherwise of their counsel is usually the last.”⁹

I examine user expectations below, but the point about the adversarial nature of the Court system bringing complainants to the complaints process with pre-existing negative experiences has merit. However, and paradoxically, it should be noted that while there are low expectations of a complaint succeeding, a large majority of complainants (86 per cent) come to the system expecting to get a fair hearing of their complaint.¹⁰

User expectations

Given the high level of dissatisfaction expressed by complainants, it is important to look at what expectations users bring with them. In the quantitative research, complainants were given a list of 24 motives,

Figure 3: Satisfaction with outcome: those in prison at the time of complaint compared with those who are not

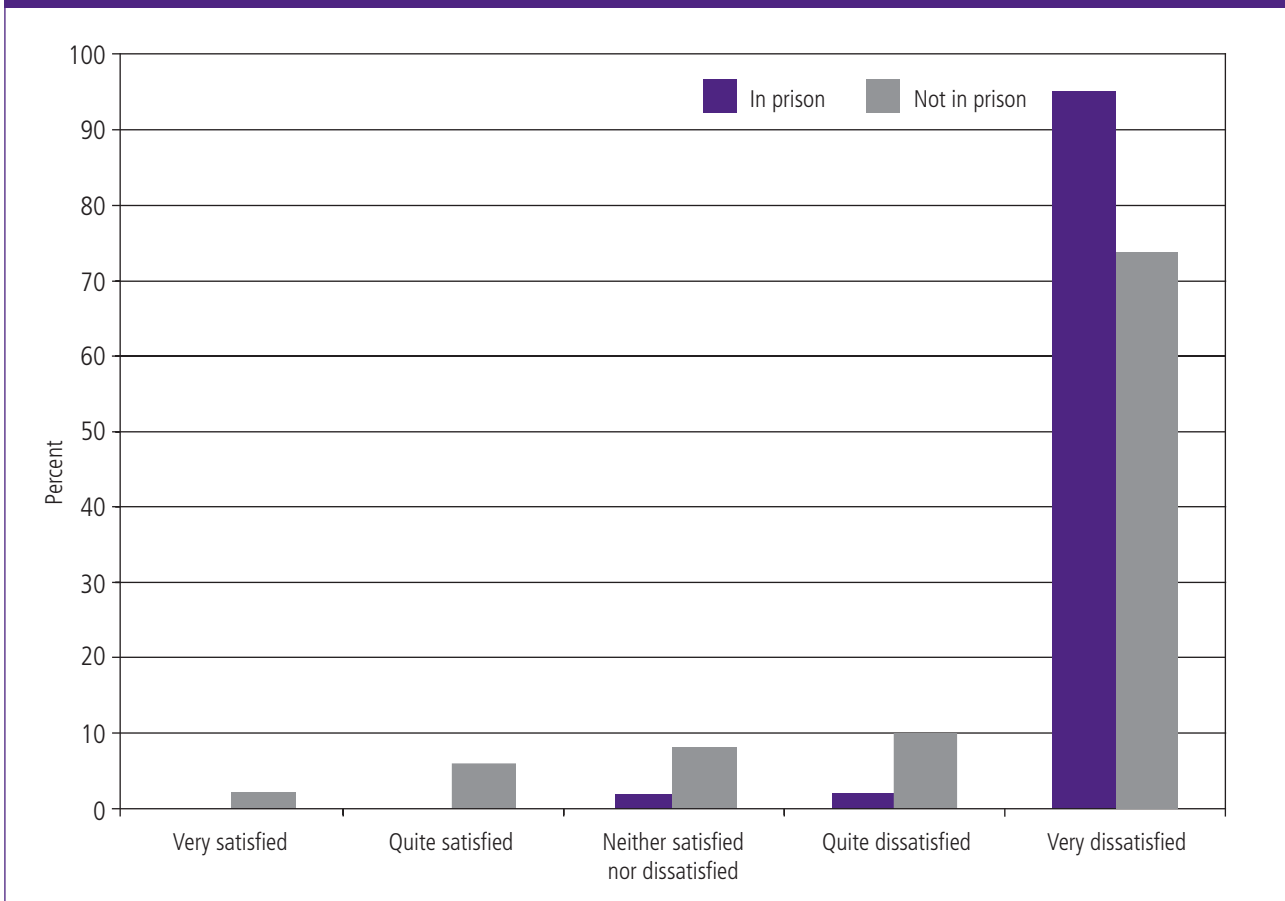
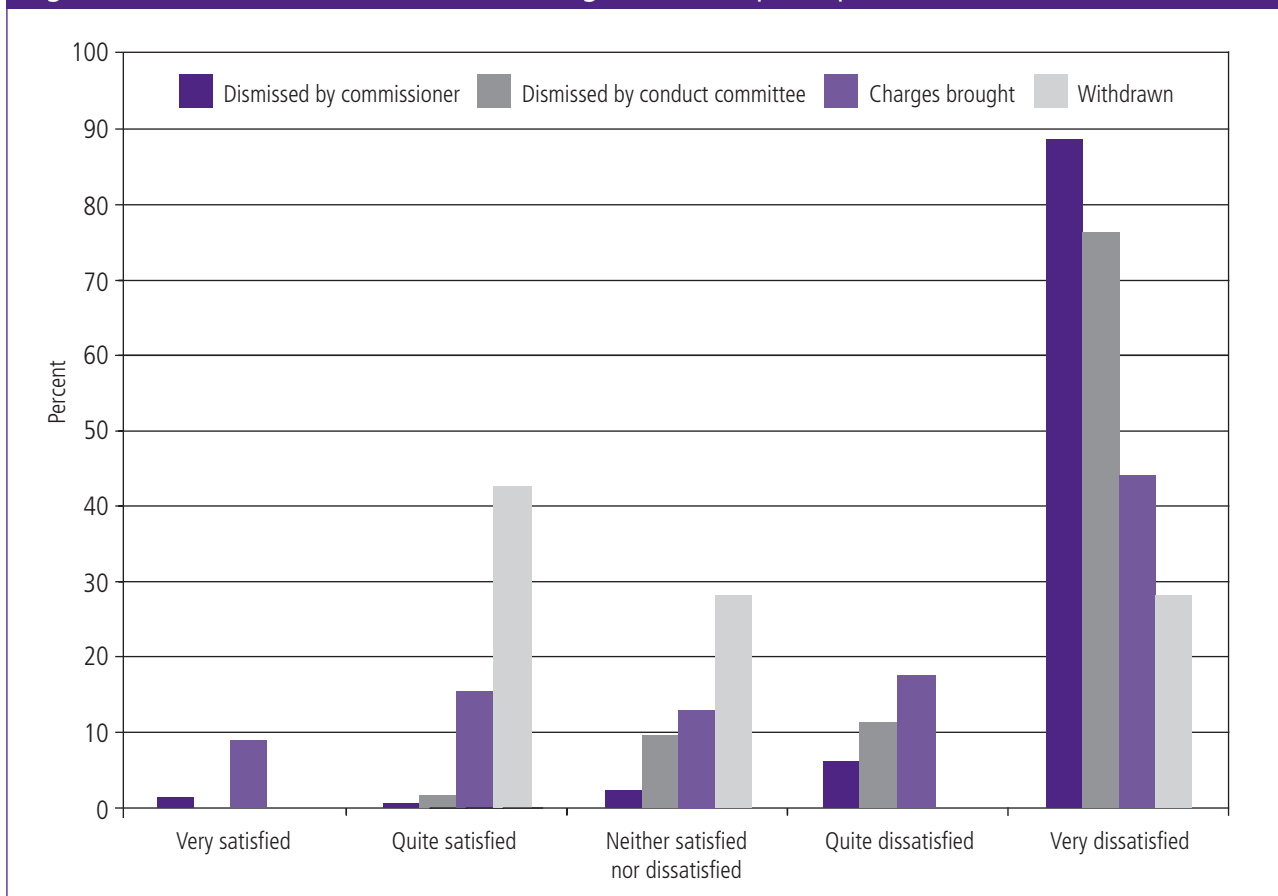


Figure 4: Satisfaction with outcome according to how complaint proceeded



drawn from wider research into user satisfaction, from previous attitudinal research for the Bar Council conducted by MORI (2002) and from qualitative interviews with complainants in advance of the quantitative study. They were asked to select those motivations for making a complaint which applied to themselves. The most cited motivations included:

- A finding that the barrister was at fault (1);
- The barrister to realise that he/she could not do this to people (2);
- Have the complaint go on the barrister’s record (4);
- Force the barrister to apologise to me (9).

Some of the motivations attributed to complainants by barrister organisations in submissions to the Issues and Questions Paper¹¹ came lower on this list though they still feature as important:

- Award me compensation (12);
- Help to get the decision in the case changed (13);
- Make the barrister give back or reduce fee (15).

As far as process is concerned, what most complainants want, but do not get, is to meet with

someone investigating the complaint to talk to them about it. Sixty six per cent of complainants strongly agreed with this ‘want’ and a further 17 per cent agreed.¹² Not only do complainants want this meeting, but most expect it.¹³

Three simple but important observations can be made about these expectations. First, in a system which rejects more than half of all complaints at first instance, expectations of finding that the barrister was at fault or ‘forcing’ the barrister to apologise are unlikely to be realisable (however laudable they might be). Secondly, a number of reported expectations – help in getting the decision in the case changed, compensation of £100,000 or more¹⁴ – are simply outside the scope of the system as it currently stands. Thirdly, even in terms of process, complainant expectations – to meet with an investigator – are currently highly unlikely to be met.

The conclusion must be that a central weakness of the system is its failure to inform complainants and prospective complainants with sufficient clarity or vigour what the system can provide and what it cannot.

Proportionality and flexibility

Evidence was received during the Review pointing to a lack of proportionality in the current arrangements in three key respects. First there is the issue of the relatively low level of local complaints resolution. Secondly, there is the issue of complexity which militates against a proportionate and flexible response to complaints. Thirdly, there is a strong view that the system does not provide sufficient mechanisms for dealing with complaints outside of the formal disciplinary processes.

Local resolution (chambers complaints handling)

One of the weaknesses identified in the current system is the low use of local resolution to deal with complaints. This results in some complaints being considered by the regulatory authority when they could be resolved in Chambers.

The view of the Bar Standards Board Consumer Panel is that, "Perhaps the single major weakness is the failure of the system to ensure there is a proper Complaints procedure in place in every set of Chambers". This is said to be essential:

- "For the speedy and early resolution of every complaint;
- To allow for early mediation, or failing that, investigation;
- To facilitate early learning from such complaints to improve practice;
- To retain a degree of informality wherever possible;
- To ensure responsibility for dealing with complaints lies firmly with the Head of Chambers."¹⁵

Not all chambers are said to have inadequate arrangements, but the "low level of consumer awareness and the absence of in-house complaints procedures in some chambers" is a concern.¹⁶ This is not a view confined to consumer bodies. One submission from a set of chambers noted that:

"It would be simpler if a uniform, consistent and simple complaints structure were imposed on all Chambers. Allowing discretion as to the framework utilised is ultimately not helpful and is counter-productive. The introduction of a single structure would not be difficult to justify given the present climate on client redress."¹⁷

These concerns are underlined by evidence in the

Survey of Complainants and Barristers. This found that lay complainants to the Bar Standards Board are not, in general, aware of their right to complain directly to barristers' chambers.

Eleven per cent of complainants did not know whether the barrister they complained of worked from a set of chambers or not, more than half of complainants said they had no contact with chambers prior to submitting their complaint, and more than 70 per cent of barristers said that they had had no approach (see below Figure 5).¹⁸ There is a clear mismatch here between complainants and barristers over whether or not a complaint was reported to chambers. This may reveal poor reporting methods within chambers where there is generally a great deal of discretion exercised about what is registered as a complaint and where (as earlier research found) lay clients telephoning are likely to be told that chambers cannot deal with lay clients directly.¹⁹

Finally, and to reiterate the point about poor communication between complainants and barristers, Figure 6, shows the mechanisms by which complainants find out about the Bar Standards Board complaints procedures. The salient point here is that only a tiny percentage of complainants hear about Bar Standards Board procedures from either barristers' chambers or barristers themselves. The Law Society, solicitors and the Internet are the three most recorded sources of this information.²⁰

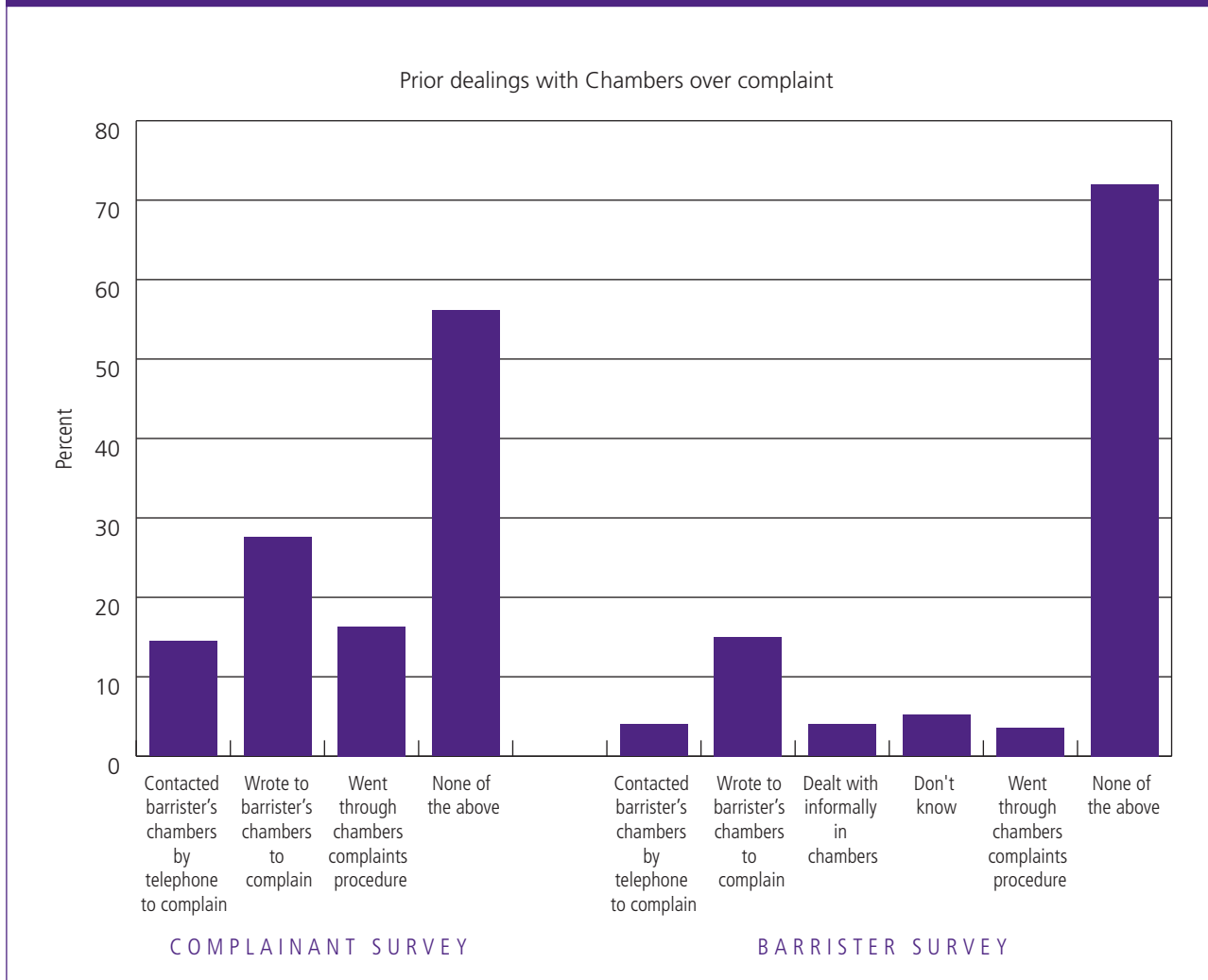
Complexity and accessibility

A number of submissions drew attention to what is thought to be the excessive complexity of the existing arrangements. For the National Consumer Council:

"...the complaints process involves at least three and potentially five separate stages (in-house complaints procedure, Complaints Commissioner, Conduct Committee, disciplinary panel, ombudsman). There are then four types of disciplinary panels and tribunals that have different, but sometimes overlapping, remits. Altogether, this appears an overly convoluted set of arrangements for dealing with five hundred or so consumer complaints."²¹

Which? and the Bar Standards Board's own Consumer Panel agree. Which?'s view was that: "While the Bar Council has not had such widespread

Figure 5: Contact between complainant and barrister's chambers prior to complaint to the Bar Standards Board



criticism of its complaints handling as the Law Society...[the] process is far too complicated and bureaucratic" and is not particularly accessible.²² It is, they say, not clear that all the stages are necessary and either the Complaints Commissioner could refer complaints directly to tribunals or the Complaints Committee might deal with all but the most serious issues referred to it.²³

For the Bar Standards Board Consumer Panel, "The current system is something of a 'maze' – it is far too complex given the relatively small number of cases handled a year. The system should be simple, transparent and independent, and seen to be so, in order to win consumer confidence."²⁴

Part of the reason for this perception of complexity is said to be the system's "inability to screen out [service] complaints from disciplinary issues, and to have the former dealt with speedily, without any need to show

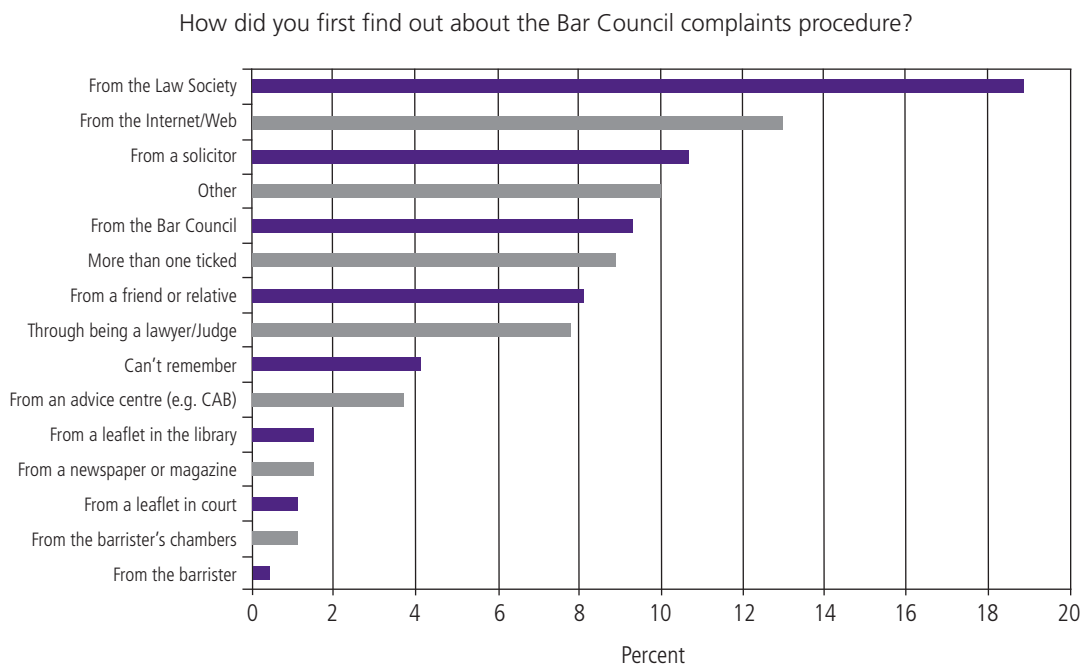
misconduct. Often a complainant will simply want an apology, explanation or admission of error (and possibly compensation) without having to attribute misconduct to anyone."²⁵

As things stand, "The whole process is likely to appear very daunting to consumers" and even stress inducing. This is particularly the case for complainants with less developed literacy skills who "often feel 'out-gunned' by both the technical knowledge and fluency in persuasive advocacy, which a prolonged legal training and years of practice have honed to near perfection."²⁶

The Survey of Complainants and Barristers tends to provide supporting evidence for these comments.

As Table 7 below shows, most complainants find the whole process both difficult to pursue (72 per cent) and stressful (62 per cent). About one quarter of

Figure 6: Percentages: how did you first find out about the Bar Standards Board complaints procedure?



complainants disagreed with the statement “I found having to put everything in writing relatively easy”. And nearly half of complainants (46 per cent) found the explanations from the Bar Standards Board difficult to understand. As Table 8 shows, more than a third of complainants found the procedures being followed by the Bar Standards Board either ‘very confusing’ or ‘quite confusing’, in contrast to two thirds of barristers who found the procedures ‘not at all confusing’.

Misunderstanding about the complaints and disciplinary processes is notably higher amongst disabled and minority ethnic complainants. Minority ethnic complainants were also less likely to experience Bar Standards Board staff as polite. This was also the experience of women complainants. Those who identified themselves as disabled found the complaints form more difficult to fill in and were more likely to have wanted to meet someone investigating the case.²⁷

Table 7: Respondents’ attitudes towards pursuing a complaint

	Agree strongly	Agree	Neither agree nor disagree	Disagree	Disagree Strongly	Total
It's difficult to pursue a complaint when you're not a lawyer	55%	17%	16%	7%	5%	100%
It was very stressful having to put together evidence to support my complaint	41%	21%	20%	11%	8%	100%
I found having to put everything in writing relatively easy	23%	40%	13%	16%	8%	100%
The explanations I received from the Bar Standards Board were easy to understand	11%	35%	23%	15%	17%	100%

Table 8: Ease of filling in complaint form and how confusing are the procedures

How easy did you find the complaint form to fill in?		How confusing did you find the procedures being followed at the Bar Standards Board?	
		Complainants	Barristers
Very difficult	7%	Very confusing	12%
Quite difficult	12%	Quite confusing	26%
Neither easy nor difficult	47%	Not very confusing	32%
Quite easy	25%	Not at all confusing	30%
Very easy	10%		67%
Total	100%		

Further evidence of the perception that Bar Standards Board procedures are confusing is revealed by Table 9 below, when complainants were asked whether their case had been concluded. Since only complainants whose cases had been concluded were included in the Survey, it was of some concern that nearly a third of complainants suggested that this was not the case.²⁸

Table 9: Understanding of whether a case has concluded

As far as you are aware do you believe that your complaint has been finally decided one way or another?		
	Frequency	Percent
Yes	181	69%
Some elements have finally been decided	10	4%
No	49	19%
Not sure	13	5%
Don't know	4	2%
More than one box ticked	4	2%
Total	261	100%

Given the views set out above, the complexity of the system is a weakness that needs to be acknowledged.

Alternative mechanisms for dealing with complaints

Another apparent weakness, linked to complexity and expressed by many barristers and participants in the system, is the relative lack of alternative mechanisms outside of formal disciplinary action to deal with complaints. Over half the barristers

surveyed considered that the current system leaves the Bar Standards Board no choice but to bring charges.²⁹ Nearly 80 per cent of barristers charged thought the complaint did not warrant disciplinary proceedings and 90 per cent thought there should be some other method of determining complaints.³⁰ This was also a common theme in the responses from committee and tribunal members who expressed a high level of concern that trivial or minor cases are finding their way through the system and being referred to disciplinary panels.

More than a third of barristers surveyed suggested mediation as a way forward and nearly a quarter were supportive of some form of executive decision-making.³¹ Nearly half of all respondents in the survey of committee and tribunal members supported the view that, in appropriate circumstances, cases should be determined by executive decision-making.

Further, as Commissioner, I deal with numerous complaints emanating from a variety of “non-client” sources where the complainant’s motivation is often resolution of the issue rather than a disciplining of the barrister. In such cases, if the matter is to be dealt with at all under the Complaints Rules, there is no option but for it to be addressed by disciplinary action even if the breach of the Code is minor. In this regard, it is interesting to note that over 70 per cent of barristers thought that the charges they faced did not warrant disciplinary action.³² There is a gap here in the current rules that needs to be addressed.

These views provide compelling evidence that there are structural gaps in the current system that can prevent flexible and proportionate responses to complaints and may create a level of “over-prosecution” at the expense of complaints resolution.

Delays

Despite the relatively good record on case completion that the Bar Standards Board has in comparison to other regulators, (see above, Chapter 3, pp. 25-29), evidence was received in responses to the Issues and Questions Paper that this record is not good enough.³³ According to the South Eastern Circuit “delays of weeks or months can occur, and are extremely corrosive” for barristers because “a career is effectively put on hold pending its outcome.”³⁴ Falcon Chambers agreed that the investigative process can sometimes be long and bureaucratic.³⁵ However, the submission from Gray’s Inn noted that delay “which often occurs” from initial consideration to disciplinary charge was “almost impossible to eliminate, particularly if the complainant is normally given the final word before the matter goes to the Committee”.³⁶

However, the evidence indicates that the dissatisfaction with delays relates mainly to the time taken to complete the full disciplinary process and not necessarily to the initial consideration of complaints which, as detailed in Chapter 3, has a relatively good performance record.

Barristers and complainants surveyed were inclined to agree that a complaint took too long to resolve. As Table 10 below shows, half of the barristers did not understand why the case took the time it did to resolve, and just over half the complainants thought the complaint took much too long to resolve, most of them feeling this strongly.

In general terms, as shown in Table 11, dissatisfaction with time to resolution increased as the length of the case increased. Where the case took less than a month to resolve 42 per cent of complainants were (perhaps unreasonably) still dissatisfied with the time taken,

rising to 62 per cent for cases taking less than eleven months, and 76 per cent for cases taking eleven months or more. This provides clear evidence that it is the cases that go on to disciplinary action which cause the greatest dissatisfaction in terms of delays.

Absence of support for decision-makers and staff

Committee and tribunal members

The survey of committee and tribunal members revealed deficits in the ability of the Bar Standards Board to support decision-makers in their various roles.

Currently, there are no Bar Standards Board agreed criteria for the content of training of committee and tribunal members. This leads to inconsistencies in the training provided and gaps in provision. A proportion of committee and tribunal members commence work without any formal induction.

A common theme in responses to the survey is the less than systematic training available. Only a third of respondents reported that they had received any training at all. Of those who had received training only a quarter found the training to be satisfactory. As one Complaints Committee member commented:

“I have operated in a vacuum – left to get on with it – without any training.”

A revised, improved induction programme is now available for new Complaints Committee members, but the research indicates that many members want and need something more rigorous.

Responses to the survey also show that there are related concerns about the lack of availability within

Table 10: Dissatisfaction with time taken to resolve complaints: complainants and barristers

The complaint took much too long to resolve: Complainants		I understand why the case took the time it did to resolve: Barristers	
Agree strongly	36%	Disagree strongly	13%
Agree	17%	Disagree	36%
Neither agree nor disagree	29%	Neither agree nor disagree	22%
Disagree	10%	Agree	17%
Disagree strongly	8%	Agree strongly	12%

Table 11: Dissatisfaction with length of complaint process by actual time taken to resolve complaint

The complaint took much too long to resolve (complainant view):

	Agree strongly	Agree	Neither agree nor disagree	Disagree	Disagree Strongly	Total
Actual time for complaint to resolve:						
Less than one month	25%	17%	29%	12%	17%	100%
Less than three months	28%	17%	25%	22%	8%	100%
Less than six months	25%	14%	44%	8%	10%	100%
Less than eleven months	43%	19%	28%	9%	2%	100%
Eleven months or more	56%	20%	16%	4%	4%	100%
All	36%	17%	29%	10%	8%	100%

the system of information that can ensure consistency in decision-making. Ad hoc guidance is provided on emerging issues in a variety of forms but there is no Bar Standards Board policy manual on complaints and discipline or criteria for establishing or reviewing policy. Further, there is no guidance on sentencing decisions or comparative information on previous sentencing decisions for tribunal members.

Time and again, committee and tribunal members pointed to the paucity of available information about policy issues, previous decisions, sentencing guidelines, and the outcome of cases and legal developments. Only a third of committee and tribunal members believed they had sufficient information to be confident that their decisions were fair and consistent. In addition, half of the lay members of the Complaints Committee and just under half of the barrister members felt this way, together with just under half of the prosecutors.

The most common concern of disciplinary panel members is the lack of guidance on sentencing policy and information about previously decided cases. Half of barrister members, a third of lay members and a half of QC Chairs of panels thought that there was insufficient information available to them to ensure that their decisions are fair and consistent with previous decisions.

Bar Standards Board staff

As I pointed out in the previous chapter, the Bar Standards Board complaints and discipline staff teams work effectively and to a high standard. However, staffing issues within the teams have been insufficiently prioritised as the Bar Standards Board has focused on

creating itself as a ring-fenced regulator. Through no fault of their own, therefore, the teams have had to operate in the context of staffing resource decisions made on a short-term basis, and often without induction, development or adequate written guidance.

Despite repeated encouragement from the Legal Services Ombudsman, there are no formal indicative targets for complaints handling. Members of staff are therefore not subject to performance targets and do not have individual performance plans. Instead, there is a responsible culture in the teams of 'doing what has to be done'. Work is completed due to the professional behaviour of staff but inevitably this leads to imbalances in workloads between colleagues.

Performance appraisal is embryonic and development plans, where they exist, are not regularly monitored other than during the annual appraisal round. In general, there is a lack of clarity about how the roles of individuals fit into the wider performance of the system, and responsibilities accrue on an *ad hoc* basis.

Given the sensitivity of the tasks involved, there is inadequate training and development in key areas of project management, complaints handling and service delivery. In practice, skills development in these areas hardly exists.

As far as formal staff guidance is concerned, this is available but is relatively limited and does not cover all aspects of the system. At the time of writing there is, for example, still no published policy on unacceptable behaviour by complainants and this makes the position of staff dealing with challenging complainants more difficult than it needs to be. Written guidance for staff

is provided on an *ad hoc* basis through a variety of formats but there is no central mechanism for retaining, producing or updating it. There is a tendency for staff to rely on individually created “desk notes” to assist. There is also a reliance on the historic knowledge of those who have worked in the teams for many years. While this has been effective in the past, it does leave gaps and carries with it the danger of misunderstandings or out-dated approaches becoming embedded in the system.

Conclusion

There are clearly weaknesses in the current system and areas that require improvement. Those weaknesses relate principally to: a lack of clarity regarding the objectives of the system; a lack of complainant confidence in a system which presents itself to users as complex and sometimes inaccessible; a relative lack of proportionality and flexibility in the complaints handling processes; and deficiencies in the level of support and guidance provided to all people involved in operating the system.

Endnotes

- 1 Bar Standards Board Consumer Panel, 23 December 2006, para.5, pp1-2.
- 2 *Survey of Complainants and Barristers*, 2006, para 97.
- 3 *Ibid*, para. 99, p.49.
- 4 *Ibid*, para. 70.
- 5 *Ibid*.
- 6 *Complaining about barristers*. Response by the National Consumer Council November 2006, p.3.
- 7 Which? November 13, 2006; Legal Practice Management Association, 21 November 2006, Q.1.
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- 10 *Survey of Complainants and Barristers*, 2006, para.70.
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- 13 *Ibid*. Table 15, p.29.
- 14 *Survey of Complainants and Barristers*, 2006, para 40.
- 15 Bar Standards Board Consumer Panel, 23 December 2006, paras 7-8, p.2.
- 16 *Complaining about barristers*. Response by the National Consumer Council November 2006, p.1.
- 17 Mr John McGoldrick, Young Street Chambers, 20 November 2006.
- 18 *Survey of Complainants and Barristers*, 2006, para. 34, pp.12-13.
- 19 *Ibid*, paras 34,33, pp.12-13.
- 20 *Ibid*, para.38, p.15.
- 21 *Complaining about barristers*. Response by the National Consumer Council November 2006, pp.3-4.
- 22 Which? November 13, 2006, p.1.
- 23 *Ibid*, p.2.
- 24 Bar Standards Board Consumer Panel, 23 December 2006, para 11.
- 25 *Ibid*, para. 12, p.3.
- 26 Which? November 13, 2006, p.2; Bar Standards Board Consumer Panel, 23 December 2006, para. 4. Legal Services Ombudsman, 23 November 2006, Q1., p.2.
- 27 *Survey of Complainants and Barristers*, 2006, paras. 105-117.
- 28 *Ibid*, para. 61, pp.26-7.
- 29 *Ibid*, para 87.
- 30 *Ibid*, para.
- 31 *Survey of Complainants and Barristers*, 2006 para 88.
- 32 *Survey of Complainants and Barristers*, 2006 para 87.
- 33 Legal Practice Management Association, 13 November 2006; Falcon Chambers 30 November 2006.
- 34 The South Eastern Circuit of the Bar, *op.cit*, p.6.
- 35 Falcon Chambers, *op.cit*, p.1.
- 36 The Honourable Society of Gray's Inn, 20 November 2006.

Chapter 5 The way forward

Introduction

Having analysed the strengths and weaknesses in Chapters 3 and 4, the challenge is to find ways to improve the system bearing in mind the Bar Standards Board's regulatory principles and the evidence presented to the Review.

The views of complainants are important in deciding the way forward but they cannot be the only determinant of change. They need to be set alongside other imperatives, particularly the Bar Standards Board's responsibility to regulate in the public interest and the responsibility barristers have to their clients and the administration of justice. Change for the sake of change would be irresponsible and the way forward must be to build on the strengths of the system while recognising and eliminating the areas of weakness.

Clarity of purpose and accountability

Evidence was provided in the Review that the Bar Standards Board needs to create clear objectives for the complaints system which will allow for better clarity of purpose, provide a framework for accountability, and be the basis upon which the Bar Standards Board can explain its complaints and discipline system to prospective complainants and the wider public. To this end, specific objectives for the system need to be agreed along with clear service standards. Organisational and individual performance should be monitored against these objectives and standards. This will facilitate more effective feedback to the profession to allow learning from the complaints process.

Addressing user perspectives and user confidence

There is a significant absence of complainant confidence in the system which needs to be addressed as a matter of priority. Seeking to ensure that complainants have more confidence in Bar Standards Board's processes is not necessarily the same issue as the quality of services provided. The decision-making

can be recognised to be of high quality (it is) but if communication is not effective (it is not), users will not understand what is happening or why and their confidence will be undermined. One of the major challenges is to ensure that complainants, and also barristers, are fully aware of how the system operates and what they can legitimately expect from it.

It is not clear how susceptible complainant views are to being changed, particularly given that (as barristers rightly tell me) they start from a position of dissatisfaction. However, the reality is that relatively limited steps have been taken to address complainant concerns since the Bar Council became aware of the extent of dissatisfaction following the MORI research in 2002. Given that similar views have emerged in this Review, it is clear that ways must be found to address the main issues that have been raised.

Seeking to build complainant confidence and addressing negative perceptions is integral to consumer satisfaction. Professions which ignore evidence about the extent of public dissatisfaction risk experiencing a decline in public trust,¹ and an associated decline in public cooperation.²

Confidence in the system needs to be bolstered by: making it more understandable; creating an outreach strategy; improving accessibility; adjusting the composition of the Complaints Committee; and reducing delays.

Proportionality and flexibility

As Chapter 3 showed, a key theme of many submissions is the rigour and relative effectiveness of existing arrangements, particularly in terms of the quality of decisions and the level of expertise available at relatively low cost. Nevertheless, the system could be more flexible and should address issues in a more proportionate manner that allows for enhanced resolution outside the formal disciplinary processes. Again the challenge is to balance the needs of complainants with the need to regulate the profession effectively.

Table 12: Key recommendations

Regulatory and complaint handling principles	Key actions	Chapter
Clarity of purpose	<ul style="list-style-type: none"> ■ Define and communicate aims and objectives of system. 	6
Accountability	<ul style="list-style-type: none"> ■ Introduce service standards and performance indicators. ■ Introduce mechanisms for auditing the system and the decisions taken. ■ Provide greater feedback to the profession. 	6
User perspective	<ul style="list-style-type: none"> ■ Increase understanding of the system by more effective communication of information and contact with external stakeholders and complainants. ■ Provide enhanced mechanisms for submitting complaints. ■ Ensure user satisfaction is monitored as an integral part of the system. ■ Increase confidence by adapting the composition of the Complaints Committee and creating a more holistic approach to referral and prosecution. ■ Reduce delays in progressing disciplinary action for professional misconduct. 	7–9 7
Proportionality	<ul style="list-style-type: none"> ■ Allow for executive and committee determination of complaints under revised arrangements. ■ Develop the system to allow for resolution of service complaints by chambers and the Complaints Commissioner. ■ Introduce the ability to determine misconduct issues by agreement with the barrister without need for a formal hearing. ■ Extend the powers available to deal with complaints from “non-clients” by means other than disciplinary action. 	8
Accessibility	<ul style="list-style-type: none"> ■ Improve accessibility (see User perspective above). ■ Review accessibility to ensure that all groups in the community have equal access. 	7
Flexibility	<ul style="list-style-type: none"> ■ Introduce alternative mechanisms for dealing with complaints (see “Proportionality” above). 	8
Transparency	<ul style="list-style-type: none"> ■ Provide better information about the system. ■ Allow for greater disclosure of the Complaints Committee and Disciplinary Tribunal decision-making processes. 	7
Targeting	<ul style="list-style-type: none"> ■ Create defined criteria for assessing whether disciplinary action is necessary. 	8
Quality outcomes	<ul style="list-style-type: none"> ■ Build on current recruitment processes to ensure fair and effective methods are used. ■ Enhance the current methods of providing training, guidance and support for those charged with operating the system. ■ Regularly monitor origin of users by gender, ethnicity and disability. ■ Provide an Annual Open Meeting for “participants” to review performance. 	9
Consistency	<ul style="list-style-type: none"> ■ Create improved mechanisms for communicating information about previous decisions to all parties involved. 	9
Efficiency	<ul style="list-style-type: none"> ■ See Clarity of purpose, Accountability and Targeting above. 	6-9

To this end there should be increased emphasis on the responsibility of barristers and chambers for resolving complaints, a streamlining of the processes to reduce the complexity in the range of hearings available, and alternative mechanisms for determining complaints.

Support for quality outcomes

I am satisfied that the quality of the decision-making process within the complaints system is of a high standard. However, these outcomes are achieved in spite of the relatively inadequate quality of the support mechanisms provided to staff and committee and tribunal members responsible for operating the system. Much greater attention and resource needs to be devoted to the recruitment of committee and tribunal members as well as the quality of induction, training and guidance available. Bar Standards Board staff must be much more effectively supported and developed to ensure continued high standards.

Programme for change

Table 12 above outlines the key recommendations for change. The recommendations are set out in detail in the chapters which follow. The recommendations are not about utopian embellishment (or 'gold-plating') without regard to cost. What is needed is an evidence-based, radical but incremental and costed programme of change, building on existing strengths in a way which is directly relevant to the needs of barristers and complainants alike. I set out the steps to achieve this in Chapter 10.

Endnotes

1 *Survey of public attitudes towards conduct in public life 2006*, prepared by IPSOS MORI Research. The Committee on Standards in Public Life, September 2006.

2 Trust in public institutions – new findings: national quantitative survey, Audit Commission, MORI Social Research Institute, 2003.

Chapter 6 Clarity of purpose and accountability

Introduction

The current complaints system has numerous strengths which have been identified and explored in previous chapters, but one of its significant weaknesses, as previously stated, is that it is “process” and not “outcome” driven.

A fundamental factor in developing an open and accountable complaints system is that it should be clear about what it does and accountable for how it does it. What is achieved should be measurable. This is important for promoting public confidence in the system and addressing perceptions of bias. Such reform has the added advantage of allowing potential weaknesses in the system to be routinely identified.

Aims and objectives

For any system to operate effectively it must be based on a clear purpose and supported by agreed objectives. Although the Bar Standards Board has set higher level regulatory objectives for its wider functions, the complaints system is still operating without specific and agreed objectives. As the Bar Standards Board’s own Consumer Panel suggested in their evidence: “It would be helpful to have the objective[s] of the complaints procedure clearly set out on the website and on all guidance notes.”¹

I agree. The starting point for achieving greater clarity of purpose and promoting understanding of the system is setting specific objectives for the complaints and discipline system that communicate the purpose of the system, reflect the regulatory principles, balance consumer and public interests and provide a policy framework for the operation of the system and the measurement of its effectiveness. The public and the profession are more likely to understand and have confidence in the system if its purpose and objectives are clearly stated.

Recommendation 1:

The aims and objectives of the complaints and disciplinary system should be succinctly defined in plain English, posted prominently on the Bar Standards Board website, and be incorporated, wherever possible, into information describing the system and in communications with users.

Service standards and key performance indicators

Setting and communicating objectives is a necessary but not sufficient condition for accountability. Those tasked with operating the system must be aware of the objectives and work in line with them. In addition, both corporate and individual performance in relation to the objectives should be monitored, assessed and reviewed in the light of agreed standards.

Part of the problem with the lack of complainant confidence in the system is that either complainants do not know in advance what to expect from their engagement with the Bar Standards Board or they have (perhaps) expectations of the system which cannot be met. To some extent this can be addressed by the recommendations for outreach work in Chapter 7 but a public commitment to an appropriate number of agreed, realistic and explicit standards of service for the operation of the complaints system should serve to demystify what the case handling process can provide.

What is needed here is the development of a very small number of key performance indicators (KPIs) that reflect the essential performance of the system. It is acknowledged that where used uncritically and to excess, indicators of this kind can generate counter-productive or perverse performance incentives. However, there is considerable learning on this subject and the application of limited, realistic indicators will enhance the system’s public accountability.

Without tying the hands of the Bar Standards Board, consideration should be given to setting KPIs regarding:

- Average turnaround times in case handling at each stage of the process – in my experience, excessive speed in dismissing cases can be a symptom of inadequate decision-making;
- Percentage of cases successfully prosecuted – bearing in mind concerns expressed about ‘over-regulation’; and
- Percentage of complainant satisfaction at various stages of complaint handling.

If KPIs are established and published they will constitute the core material for informing the Bar Standards Board business plan and evaluating trends in the complaints system. This will help ensure that the processes are consistent with objectives, resources are properly deployed and corrective action is taken where necessary. The effectiveness of the system should not only be assessed in terms of its outcomes but also in terms of value for money. Performance against targets should be monitored and reviewed regularly.

Recommendation 2:

The Bar Standards Board should consult on and develop a targeted set of key performance indicators for the complaints and disciplinary system which will provide service standards that can be publicly communicated. Performance against these indicators should be reviewed regularly, published on the website and reported in the Complaints Commissioner’s and the Bar Standards Board’s Annual Reports.

Auditing the system

Experience of the system indicates there is also a need for more systematic auditing of the operation of the processes. For example, currently, cases that I dismiss at first instance are reviewed by the Legal Services Ombudsman only if the complainant chooses for this to happen. The majority of complainants do not refer their complaint to the Ombudsman. While I may have investigated the complaint thoroughly and taken advice from a barrister member of the Complaints Committee, dismissals of this kind should be subject to periodic validation.

Recommendation 3:

Decisions emerging from the complaints system should be subject to regular audit by either the Bar Standards Board’s new Performance and Best Value Committee, an external auditor or some other appropriate mechanism.

Recommendation 4:

The Bar Standards Board should give serious consideration to appointing a “Lay Observer” with responsibility for checking all aspects of the system to ensure that it is operating in line with the agreed objectives and procedures. The “Lay Observer” could be tasked with attending an agreed number of Complaints Committee meetings and tribunals as well as spot-checking files, particularly on dismissed cases.

Essential supporting technology

An essential prerequisite for monitoring performance is the availability of effective information technology resources that can deliver comprehensive information about how the system is functioning and provide a range of statistics to measure performance.

Unfortunately, the complaints database that the Bar Standards Board inherited from the Bar Council is not capable of providing the necessary data to allow for effective performance monitoring. In the past, calls for a more effective and efficient complaints database were not necessarily given the attention or resources that were needed. However, in the latter days of the Bar Council’s responsibility for complaints handling, resources were allocated to upgrading the database. After a prolonged delay, at the time of writing, the upgrade is underway and by the time this report is published should be almost complete.

The upgrade will allow the Bar Standards Board to have access to more comprehensive data covering the full breadth of the system and should facilitate the provision of enhanced performance management information. However, the capacity of the database will still need to be kept under careful review to ensure that it remains fit for purpose in light of the future need to provide relevant information to the Legal

Services Board and the Office for Legal Complaints. A close watching eye needs to be kept on whether the upgrade, when implemented, meets both current and future needs.

Recommendation 5:

The Bar Standards Board should ensure that the complaints database is fit for purpose. Once the current upgrade has bedded down, a review of the database should be conducted to assess the efficacy of its upgraded capabilities and general performance.

Feedback to and learning for the profession

One of the functions of a complaints system, albeit secondary to the central purpose of protecting the interests of the public, is to contribute to the profession's agenda to continuously improve. This can be achieved by providing feedback to the profession about its performance, and setting out areas for improvement. In this way, the regulator operates pre-emptively to change behaviour and to seek to reduce the likelihood of conduct giving rise to a complaint. In a profession made up of mostly self-employed individuals this is not an easy task. The credibility of the regulator within the profession will be improved where it contributes to professional development and does not confine itself to a policing role.

Currently the only regular information made available to the profession regarding the outcome of complaints is the Bar Standards Board's Annual Report, the Commissioner's Annual Report and the list of disciplinary findings posted on the website. While the latter is an important resource both for the profession and for the public, it is not an effective tool for contributing to the collective learning of the profession and it cannot provide information about trends or identify areas of concern.

A creative approach needs to be taken to this issue given the disparate nature of the profession. One suggestion for providing an avenue for feedback was made during an interview with a director of a large chambers with a good reputation for dealing with complaints. The director commented that it "would be useful [for the Bar Standards Board] to operate

'in-house' chambers sessions on complaints handling in order to learn about trends."

Recommendation 6 (a):

An expanded Complaints Commissioner's Annual Report should become the principal vehicle for disseminating information to the public and the profession about the outcomes of complaints and highlighting areas for improvement and issues of concern for practitioners.

Recommendation 6 (b):

The Complaints Commissioner should hold an Annual Open Meeting associated with the publication of the Annual Report.

Recommendation 7:

The Bar Standards Board should develop a discrete area of its website devoted to complaints and disciplinary issues to inform the profession of relevant case law, policy and trends in complaints handling. It should also make more use of Counsel magazine to set out details of complaint outcomes with wider implications for the profession.

Recommendation 8:

The Bar Standards Board should liaise with the Bar Council to ensure appropriate feedback on complaints handling is provided on a regular basis and also to develop creative, cost-effective mechanisms for providing effective feedback to the profession.

Clarity of purpose and accountability are essential features of effective complaints and discipline management. The recommendations I have made will strengthen the coherence of the present arrangements. They will also create the right context for addressing user confidence in the system. It is to this issue that I now turn.

Endnotes

- 1 Bar Standards Board Consumer Panel, 23 December 2006, para 20.

Chapter 7 Addressing user perspectives and user confidence

Introduction

Chapter 4 set out the weaknesses in relation to user perception and confidence. This Chapter deals with ways in which those weaknesses can be addressed. One of the hallmarks of an effective complaints system is that it is well publicised through the provision of user-friendly and accessible information. It is important that users and potential users are provided (at the time when they need it) with information about the manner in which complaints will be handled, the criteria for acceptance, the range of available outcomes and the standard of service that can be expected.

It is therefore significant that the survey of complainants and barristers pointed to deficits in the provision of information to complainants, confusion over the procedures and the absence of any serious attempt to manage expectations. The gap between expectations and outcomes is an important cause of user dissatisfaction. Managing the expectations of both complainants and barristers and providing appropriate information to all parties should be features of the complaints system.

It is also important that the system itself is as accessible to complainants as possible. The survey of complainants found weaknesses in processes which made the system appear arcane. Improvements here are relatively simple to achieve but the response of users will need to be monitored carefully.

Finally, there are issues of delay and transparency to be addressed – all of which have a bearing on user confidence.

Making the system understandable

Better, simpler descriptions of the system

The Bar Standards Board publishes a leaflet for complainants entitled “How to Complain” and also information sheets for barristers subject to disciplinary action. The former is newly revised and available on the website but the latter are not. Explanations of the system are also provided in the standard letters sent to the parties at each stage of the process. However, the reported lack of understanding and confusion amongst complainants and some barristers indicates that this current flow of information is inadequate.

In the course of the Review, exemplary examples of effective information leaflets for complainants were received from other regulators and complaints organisations. Public information for all potential complainants must be easy to obtain, written in plain language and laid out in user-friendly formats. It should explain clearly the criteria for accepting complaints, include step-by-step guides to the relevant features of the system, the service standards which can be expected in terms of speed and the conduct of Bar Standards Board staff. There should also be clarity about what constitutes unacceptable behaviour by complainants themselves. Although the use of standard letters is inevitable, the contents of these letters should be reviewed to ensure clarity and promote understanding.

Recommendation 9:

All public information and material provided to complainants and barristers should be reviewed and, where appropriate re-written, to ensure it is clear, informative and accessible.

Recommendation 10:

The Bar Standards Board should produce a range of “branded” information leaflets, written in plain English and in user-friendly formats covering all aspects of the system.

An outreach strategy

There is a need for the development and implementation of an outreach strategy to promote wider public understanding of the complaints and disciplinary system. The challenge is to institutionalise the dialogue begun by the Issues and Questions Paper so that exchanges are on-going and there is a continuing dialogue about the difficult balance between consumer and public interests. This is a constructive path which should lead to policy debate and wider public understanding of the system.

In undertaking outreach work of this kind, the Bar Standards Board should also heed the constructive contribution of the Bar Council’s Professional Practice Committee (PPC) which regretted:

“that there is not a greater exchange of views between the two Committees [the Complaints Committee of Bar Standards Board and the Professional Practice Committee] in order to assess what the problem areas of conduct are and what the advice given to the Bar should be.”¹

Dialogue with consumer groups to promote wider public understanding and the exchange of ideas is not a substitute for dialogue across the regulatory divide with the representative bodies of the Bar Council.

Recommendation 11:

The Bar Standards Board should develop and implement an ‘outreach strategy’ designed to promote wider public understanding of and dialogue about the complaints and disciplinary system.

Making the system accessible

Making a complaint

Complaints by telephone: Complainants are currently able to telephone the complaints department, discuss

potential complaints and receive advice on their situation and information on the procedure for making a complaint. This facility is neither advertised nor formally resourced and operates on an informal basis. Talented staff provide the service with skill and dedication but without training or appropriate technological back-up.

Where a complainant needs support in making a complaint he or she can meet a member of the Bar Standards Board Complaints team or an appropriately qualified consultant and give details of the complaint without personally completing the complaints form. This is an important service insufficiently publicised.

Recommendation 12:

The current informal arrangements for telephoning the complaints department should be established on a formal basis in the form of a telephone Help-Line. This should be appropriately resourced and information about its availability widely disseminated.

Recommendation 13:

Staff resourcing the Help-Line should be given allocated time to operate it and not be expected to answer calls while dealing with other tasks. They should receive appropriate training and technological back-up.

Recommendation 14:

Complainants with special needs who are unable to make a complaint in writing should continue to be able to do so by telephone, and where appropriate should be able to meet with a member of the Complaints team. The availability of this service should be disseminated more widely.

The complaints form: In light of the difficulty expressed by complainants in completing the complaints form, it should be redrafted. In the course of the review good examples of clear, simple, complaints forms were received from a number of regulators and these should be studied in revising the existing form.

Recommendation 15:

The Complaints Form should be reviewed and re-drafted to make it clearer, simpler and more accessible.

On-line submission of the complaints form: The survey evidence made clear the importance of the Internet in informing complainants of the existence of the Bar Standards Board. A complaints form can already be downloaded from the Bar Standards Board's website, but it has then to be completed and submitted by post or by attachment to an e-mail. On-line completion and submission is standard practice in complaints handling and the Bar Standards Board should provide this facility.

Recommendation 16:

Complainants should be able to complete and submit complaints on-line. The Bar Standards Board should ensure that this facility is made available through the current improvements to the IT and website facilities.

Accessibility for all users

The Bar Standards Board has a responsibility to ensure that the service provided by the complaints system is accessible to all potential users and can accommodate the special needs of different groups in the community. The data provided by the survey regarding accessibility was relatively limited but amongst the groups that identified themselves as disabled and from minority ethnic backgrounds, the level of misunderstanding about the processes was higher.²

Improving the general level and content of information available and putting greater emphasis on presentation and the use of plain language should address this level of misunderstanding. The Bar Standards Board already offers to provide information in Braille or on tape but special arrangements are made only after such a request is received. As a first step these basic facilities should be available on request.

Also, no provision is currently made for information to be available in large print and again this should be remedied. Barriers relating to language may also be a factor in the level of misunderstanding. Further

research should be carried out to establish what additional services may be needed in this area.

Recommendation 17(a):

The Bar Standards Board should ensure that all information leaflets are available on tape, in Braille, in large format easily downloadable from the web-site.

Recommendation 17(b):

The Bar Standards Board should carry out further research and consultation to ensure that the complaints system is accessible to all sections of the community.

Ongoing surveys of service users

More generally, it is important that the system is kept under continuous review and that feedback is regularly obtained from the public, the profession and other stakeholders as to how the system is operating. There is a need to incorporate surveys of complainant and barrister satisfaction into routine complaint handling. This will enable the Bar Standards Board to ask questions pertinent and relevant to individuals and groups and facilitate easy reporting of different experiences.³ It is interesting to reflect on whether, if such mechanisms had already been in place, some of the weaknesses highlighted in this report might have been identified at an earlier point.

Recommendation 18(a):

Short questionnaires should be sent to both complainants and barristers at the conclusion of each case to provide basic information about user satisfaction.

Recommendation 18(b):

More detailed surveys of user and barrister opinion should be commissioned at intervals of no more than three years.

Promoting user confidence – independence and effectiveness

Pro bono work

The *pro bono* or voluntary contribution of barristers to the operation of the complaints and discipline system is, as set out in Chapter 3, extensive.

The decision for the Bar Standards Board is whether, two years before the implementation of the Legal Services Bill, to forgo the undoubted expertise and acknowledged decision-making competence brought to the system by the existing combination of legal professionals, lay members and professional complaints handlers, and replace it with new-made arrangements which might conceivably make the system appear more independent.

In the context of the rigour with which individual decisions are made in the current system, and given the need to look again at the composition of decision-making bodies after the implementation of the Legal Services Act in 2010-11, there is little attraction to ending the present *pro bono* arrangements at this time.

But there are serious issues to address immediately. Clearly, *pro bono* activity can only operate on the basis of a number of hitherto, largely unwritten working assumptions. These include:

- That barristers themselves recognise the contribution their work makes to consistent decision-making and are content to make the commitment in sufficient numbers to facilitate selective competition;
- The voluntary nature of activity does not compromise the quality or disinterested nature of the barrister contribution;
- That the regulator recruits where practicable on the basis of Nolan rules of fair and open competition and with clear role specifications supported by appropriate induction and written guidance;
- That the nature of the *pro bono* activity is not so onerous as to act as a disincentive to the recruitment of exemplary individuals.

These underpinning conditions are largely in place, though not entirely so. There is work to be done to improve the recruitment and induction processes, particularly in the light of the submission from the

Under Treasurer of Lincoln's Inn that there is "considerable weakness" in the new Tribunal's Appointments Board set up under the auspices of COIC.⁴ There is also a need to: specify more formally roles, responsibilities and expectations; provide written guidance; and provide constructive feedback where (very occasionally) performance does not match the high standards required.

My judgement is that, notwithstanding the paragraph above, the current *pro bono* arrangements serve the complaints and disciplinary system well, and that now is not the time to substitute entirely new arrangements, but there will need to be a further review in due course. This would look at the impact of the reforms proposed in this Review and also at the impact of the institutions created by the legal services legislation in 2010-11. What the profession will need to consider is whether it will be content to continue contributing in *pro bono* fashion to the revised system. On the basis of listening to what barristers now say, it would be dangerous to assume that this will automatically follow.

Recommendation 19:

The current reliance on significant *pro bono* contributions from barristers should be retained but will need to be reviewed after the introduction of the Legal Services Act.

The Complaints Committee

The contribution of the Complaints Committee – and of its officers and staff – constitutes a very significant element in the effectiveness of decision-making.

However, there are issues of user confidence, rooted in the perception of bias in the system and the perception of a lack of independence that need to be addressed. In this regard some adjustments should be made as outlined below.

The composition and operation of the Committee

The composition of the Complaints Committee takes its essential character from the need to have sufficient numbers of barrister members with expertise across the broad range of cases which come before the Committee. The recruitment of barrister members on the basis of fair and open competition is a time-

consuming and resource intensive activity but the manifest commitment to Nolan principles is an essential safeguard.

The number of barrister members, currently 50, is probably excessive but originates from the vital role that barrister members play in acting as sponsor members for individual complaints. During the course of the Review, a number of submissions were made, proposing variously the abolition of the Committee, the relegation of its barrister members to the position of advisers to an entirely lay committee or the replacement of its barrister chair.⁵

However, I have not been provided with any compelling evidence that would warrant such radical change, particularly given the successful changes brought about in 2004 to increase the number of lay members of the Committee and in 2006 to introduce two lay vice-chairs as officers of the Committee. Nevertheless, there are issues of independence, effectiveness and transparency that can be addressed and may assist with increasing user confidence.

In my opinion, and after having attended Complaints Committee meetings for the last year, the size of the Committee is too large to be as effective as it might be. The total current membership is 65 with a quorum of a quarter of the members. The Committee meets on a fortnightly basis and its members appear at alternate meetings. This means average attendances of about 25. This is a large number of people and can sometimes mean that discussions, while of a high calibre, may not be as focused as might be the case with a smaller group.

When surveyed, Complaints Committee members had mixed views about the relative balance of barrister and lay members. Lay contributions are considered important and seriously encouraged by the Chair and officers of the Committee but some lay members feel somewhat isolated given the preponderance of barrister members. I believe there is merit in moving towards a more even proportion of barrister and lay members on the Committee. This could be achieved by increasing the number of lay members and, over a period of time reducing barrister membership providing that this does not impact on the range of expert advice required to deal with cases. In Chapter 8 I set out proposals for adapting the current system which, it is hoped over time, will reduce the level of

detailed work required by barrister members and therefore the number needed to support the system.

There is also merit in removing from the Standing Orders of the Bar Council the requirement that the Chair of the Complaints Committee should be a barrister “of at least 20 years’ practising experience”, but retaining the competencies in relation to knowledge, skills and attributes. This is not a criticism of individual barristers or indeed of the present Chair who performs his responsibilities with outstanding skill, dedication and forbearance. Nor is it a suggestion that a barrister should not be the Chair of the Committee. It is instead designed to open up competition and allow the possibility that a suitably qualified lay person could take on the role. Removing the requirement of 20 years practising experience would put the open competition for the Complaints Committee Chair in line with the revised rules for other Chairs of Bar Standards Board committees where the emphasis is now rightly on skills not legal qualifications.

Finally, because the Committee works on a rota basis with only half the members likely to attend any one meeting, it would be sensible to lower the quorum, presently set at a quarter of the entire Committee. One or two meetings have recently been inquorate when half of the relevant team has in fact been present.

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.

Recommendation 21 (a):

The Standing Orders of the Bar Council should be changed so that from 2010, the requirement that the Chair of the Complaints Committee should be a barrister “of at least 20 years’ practising experience” is removed. The existing knowledge, skills and attributes competencies should be retained and developed.

Recommendation 21 (b):

The quorum for the Complaints Committee meeting should be changed to be more proportionate to the possible attendance at any one meeting.

Sponsor members of the committee

The main role of a barrister sponsor is to receive cases from the Complaints Commissioner where there appears to be prima facie evidence of professional misconduct or inadequate professional service and prepare a report and recommendation for the Complaints Committee. I pay tribute to the exemplary work I have seen and the outstanding advice I have received. The overwhelming majority of sponsor reports are thorough and authoritative, and delivered in a timely manner.

However, a very small number of reports fall short of the high standards expected and there are occasions when delay can be significant. This delay has occasionally attracted criticism from the Legal Services Ombudsman who has awarded compensation to the complainant where there is significant and avoidable delay. The development of an agreed template for all reports and the introduction of explicit service standards may help to assist with speeding up the provision of reports and the maintenance of high standards.

Delays and individual instances of poor performance should not be accepted as an inherent part of the voluntary system but I recognise there are sensitivities here. As one Committee member suggested: “Where the BSB is so dependent on the good will of its members, discipline and time constraints become difficult to impose.”

I do not agree that the issue should be presented in these terms. If the system is to retain its hard-won reputation for excellent decision-making, the performance of Committee members must be underpinned by a more explicit contractual understanding between the Chair and Committee members about service standards. This a logical development flowing from an increase in the number and complexity of cases referred in recent years.

The Chair of the Complaints Committee has an arduous responsibility and has addressed rare cases of lapses in service provision with discretion and integrity. This practice needs to be supported by the introduction of more formal arrangements.

Recommendation 22:

A uniform template for all Complaints Committee reports should be developed and members expected to use it.

Recommendation 23:

The Complaints Commissioner and Complaints team should develop a more professional case management approach to the allocation of files to sponsor members so that there is a more explicit and prior agreement with sponsors about time taken to prepare a report.

Recommendation 24:

Members of the Complaints Committee should be consulted about and subject to performance standards. All members should receive constructive feedback from the Committee officers on an annual basis.

Transparency

There are issues about the transparency of the Committee that need to be addressed. A paradox relating to the Committee’s operation is that because its proceedings are not in public, and sponsor reports are not disclosable to the parties in a complaint, assessments of the Committee’s undoubted merit in decision-making have to be circulated second or third hand.

I agree with the assessment of the Professional Practice Committee of the Bar Council that Committee meetings should not be open to the public “any more than any prosecuting body such as the Crown Prosecution Service does so.”⁶ However, the current prohibition against disclosing any part of the sponsor’s notes seems excessively cautious and can lead to unnecessary suspicion regarding Committee decisions.

Clearly there may be issues of sensitivity and data protection that might prevent full disclosure of individual notes. In addition, Committee decisions are taken collectively and therefore it would be inappropriate to disclose the identify of the author of the report. But, in most cases, disclosure would not undermine or compromise the Committee’s work.

Recommendation 25:

On request, the Complaints Committee should disclose sponsors’ notes taking into account any Data Protection issues or matters of sensitivity. The identity of the sponsor should not be disclosed.

Disciplinary Tribunals

The evidence indicates that there is relatively little user criticism of the Tribunal process with nearly 60 per cent of barristers considering that the Tribunals are fair.⁷ This is an encouraging finding. Nevertheless, the research shows there are areas where the Disciplinary Tribunal Process could be improved and this would add to user confidence in the system.

Liaison between Prosecutors and the Complaints Committee

Under the current process there is relatively little liaison between the barristers tasked with prosecuting Disciplinary Tribunal cases and the Complaints Committee. As one lay disciplinary panel member commented:

“there is a level of disconnect between the Committee decision and the prosecutor’s views of how a case should be presented.”⁸

The Complaints Committee has a wide range of professional expertise available to it, but not all members have direct experience of prosecuting cases

and therefore may not be fully conversant with the pertinent issues related to presenting a tribunal case. Prosecutors only become involved in a case following a Committee referral. In most cases this is the right approach given that the sponsor member remains available to provide any assistance necessary. It is only if the prosecutor considers there is a fundamental weakness in the case which might affect the chances of a successful prosecution, that the matter is referred back to the Committee. Unfortunately, this occurs more often than perhaps it should and might be avoided if there was input from a prosecutor at the Complaints Committee stage.

In responding to the survey of committee and tribunal members, prosecutors commented that greater contact between themselves and the Complaints Committee would be helpful. This view was also echoed by members of the Disciplinary Tribunal panels. The prosecuting panel members have indicated a willingness to provide advice and assistance on specific issues relating to the presentation of evidence at Tribunals and this resource should be utilised by the Complaints Committee.

Recommendation 26(a):

Consideration should be given to inviting a member of the prosecuting panel to attend Complaints Committee meetings in a non-voting capacity and on a rota basis to provide general advice on prosecution issues.

Recommendation 26 (b):

The Complaints Committee should produce more detailed minutes of the reasons for referring cases to disciplinary action in order to provide prosecutors, and if necessary the parties in a case, with a greater understanding of the Committee decision. This is particularly important where the Committee’s decisions differ from sponsors’ conclusions or recommendations.

Lay involvement in disciplinary tribunals

Under the current system, lay representation is in the minority on disciplinary panels with panels consisting

of either three or five members with one lay representative on the former and two on the latter. The evidence gathered during this Review indicates some support for lay majorities on all panels. The call for such a change is fuelled by two concerns: complainant perception of bias; and the reported tendency of some barristers to dominate panel discussions and inhibit the full involvement of the lay members.

These concerns are genuine but the evidence in favour of changing the balance of lay representation on disciplinary panels is neither compelling or conclusive. In general, lay majorities on disciplinary panels are unusual and were only present in the panels of three out of the eight other regulators contacted (See Annex 1). The concerns raised have to be balanced by the views expressed by barrister members of Tribunals that some lay members are insufficiently briefed on the substantive issues of cases. These are not personal criticisms. Rather, they reflect deficiencies in the current system relating to training, policy and guidance and provision of information to panel members which are discussed in Chapter 9.

In the absence of clear evidence that a change in balance is necessary, I consider the deficiencies in the current support mechanisms should be addressed before further consideration is given to increased lay input on Tribunals. The recommendations in Chapter 9 should go a long way to increasing the confidence of lay representatives and ensuring their full participation in decision-making.

Recommendation 27:

The current balance of barrister-lay representation on disciplinary tribunals should be maintained.

Delays

The research conducted for the Review shows that all parties involved are dissatisfied with the extent of delays relating to disciplinary tribunal processes. To some extent, delay is inevitable since preparing for, arranging and attending hearings is a time-consuming business. The survey of committee and tribunal members and prosecutors indicated that barristers, and

sometimes complainants, are given too much leeway when providing responses to enquiries and setting dates for hearings. Currently, hearing dates are generally set at the convenience of the barrister. While this may be appropriate given the nature of work at the Bar, the reality is that this gives a small number of barristers an excuse to delay proceedings without good reason and sometimes by many months.

Recommendation 28:

Policy and practice on setting dates for hearings should be reviewed in the light of a small number of abuses of the arrangements. The current provisions in the Code requiring attendance by a barrister on the date scheduled should be used more rigorously to enforce timely prosecution of cases.

Another issue that gives rise to delays is the length of time it can take to arrange and convene disciplinary panels. Responsibility for this lies with the Council of the Inns of Court (COIC). The current system operates on the basis that Bar Standards Board staff identify a suitable date for a hearing and COIC then attempts to convene a panel for the date requested. However, this is not always possible and COIC face considerable challenges in finding suitable Judges to preside over Directions Hearings and to Chair Disciplinary Tribunals.

By necessity, the judicial offices give the Bar's requirement for judicial time a relatively low priority and it can often be difficult to find Judges who can sit. This leads to the cancellation of prospective hearing dates with the consequent need to re-establish availability and request a new date. In some cases such situations lead to delays of several months.

Concerns have been raised by the former Department for Constitutional Affairs, and some respondents to the survey of committee and tribunal members, regarding the continued use of Judges to Chair Disciplinary Tribunals and preside over Disciplinary Tribunal directions Hearings (case management hearings). The Bar Standards Board set up a working group to look into this issue and representations were made to the Lord Chancellor and Lord Chief Justice

that the current involvement of Judges in the system should be retained. Their involvement provides another crucial element of independence and, as the Bar carries out the bulk of the advocacy work in the higher courts, the judiciary can provide a unique perspective and assist in maintaining standards.

However, it is important that judicial time is used effectively and not taken up with dealing with minor cases that do not warrant judicial involvement. Proposals in Chapter 8 for reforming the disciplinary mechanisms are intended to reduce the number of cases referred to Disciplinary Tribunals. This should alleviate, to some degree, the problems experienced by COIC and the concerns raised by the former Department of Constitutional Affairs.

Publication of hearing dates

Finally, several respondents to the Issues and Questions Paper and to the survey of committee and tribunal members raised the issue of the publication of hearing dates. Disciplinary hearings are required to be held in public unless a specific order has been made otherwise. However, the Bar Standards Board does not currently provide the public with accessible information about when hearings are due to take place. This is unacceptable: it undermines user confidence and is not in line with the principle of transparency. Discussions are currently ongoing about this issue. By the time this report is published, it is hoped that an agreed policy will be in place providing for advanced notice of hearings to be published on the Bar Standards Board website.

Endnotes

- 1 The Professional Practice Committee of the Bar Council, 27 November 2006, para 3.
- 2 Survey of Complainants and Barristers, 2006, paras 105-117.
- 3 Survey of Complainants and Barristers 2006, para 125 (ii).
- 4 Colonel DH Hills MBE, The Honourable Society of Lincoln's Inn, 20 November 2006, paras 7 and 8.
- 5 Which? 31 October 2006; *Complaining about barristers*. National Consumer Council, November 2006, p.4.
- 6 Professional Practice Committee of the Bar Council, 27 November 2006, para 12, p.4.
- 7 Survey of Complainants and Barristers 2006, para 93.
- 8 Follow up interview with lay member of disciplinary panel.

Chapter 8 Proportionality and flexibility

Introduction

The recommendations in this Chapter propose building on and developing the acknowledged strengths of the system – the filter role of the Complaints Commissioner, the mix of barrister and lay representative decision-makers, and the independence of disciplinary panels. The changes proposed have been subject to scrutiny by an eminent human rights barrister and are incremental in nature.

In general, and as previously stated, the areas that need to be addressed are:

- The relative over-emphasis on disciplinary action as opposed to complaint resolution;
- The complexity of the system given the relatively small number of complaints being handled; and
- The need for a proportionate or risk-based approach to complaints handling and disciplinary action to counter-act the suggestions of ‘over-regulation’.

Chambers complaints handling

One key to proportionality is the possibility of effective resolution of a complaint at a local level. As the evidence in Chapter 4 shows, there is limited use and awareness of chambers’ complaints procedures.

The lack of use of local complaints procedures means that some complaints are not being resolved at the most appropriate level and may be unnecessarily subject to prolonged procedures. Also, less significant complaints are not filtered out before being referred to the Bar Standards Board Complaints team. This represents a clear weakness in the proportionality of complaints handling.

In 2005 a working group, chaired by Sue Carr QC, was established to review the effectiveness of

chambers’ complaints handling. The working group’s research showed variable practice in handling of complaints. The subsequent report¹ made a number of recommendations which will be implemented shortly to clarify and disseminate knowledge of the responsibilities chambers have in this area.

The Bar Standards Board’s complaints procedure needs to build on this work and to develop its relationship with chambers. Not all complaints are suitable to be resolved through chambers, but complainants should be encouraged to contact chambers first. Such an approach is consistent with the procedures outlined in the Legal Services Bill, which requires local consideration of complaints before they are considered by the Office for Legal Complaints.

Recommendation 29 (a):

Where complainants make a complaint to the Bar Standards Board, and have not previously referred it to Chambers, the Commissioner should have the power, where appropriate, to refer the complaint back to chambers on a formal basis for the matter to be investigated.

Recommendation 29 (b):

Chambers should be required to report back to the Commissioner on the outcome of a complaint investigation within a stipulated period of time.

Complexity

Previous chapters have set out the evidence which shows that complainants, some barristers and also some stakeholders view the system as overly complex and difficult to understand. These views cannot be dismissed and clearly have some merit.

There are currently four different panels to which a complaint can be referred following consideration by the Complaints Committee: adjudication; informal; summary; and disciplinary with each covering different, but sometimes overlapping, jurisdictions and subject to different processes.

The reason for retaining this number of panels is not clear and it is not surprising that users are confused. There is a need to streamline the disciplinary processes and to this end, it seems reasonable to extend the jurisdiction of the current Disciplinary Tribunal to deal with all formal disciplinary cases and abolish the Summary Procedure jurisdiction as well as Informal Hearings, particularly as the latter has fallen into disuse.

Complaints of poor service – a new concept of Improper Behaviour

Under the current complaints rules, a barrister can be charged either with professional misconduct or Inadequate Professional Service. Inadequate Professional Service (IPS) relates exclusively to complaints raised by direct clients of a barrister. The processes for dealing with IPS complaints can result in a barrister being required to apologise, return fees or pay compensation.

However, as described in Chapter 4, these processes do not apply to complaints from “non-clients” thus forcing disciplinary action to be taken in cases where the circumstances do not necessarily warrant it but no alternative is available.

It would therefore seem reasonable and proportionate that IPS should be supplemented with a power to address, via non-disciplinary action, ‘Improper Behaviour’ towards non-clients. This would bridge the gap in the current arrangements and allow such complaints to be dealt with in a similar manner as IPS.

The additional power would not include the ability to recommend that a barrister pays compensation to a non-client. However, it would allow some complaints from non-clients to be dealt with more effectively and allow the Commissioner to recommend an apology be given.

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 disclosable only in relation to applications for silk or judicial office.

The current complaints system is heavily weighted towards taking disciplinary action and such action, once instigated dominates all other issues. Such an approach may be appropriate where the regulator is only responsible for disciplinary oversight of the profession (as is the case with many regulators) but it is problematic where a regulator (i.e. the Bar Standards Board) is also tasked with dealing with service complaints.

One unintended consequence of the emphasis on disciplinary action is a perception amongst complainants that their concerns are marginalised. A successful prosecution of a barrister for professional misconduct is an important outcome for many complainants but there can be a disconnection between the disciplinary action and their complaint which may not end up being directly addressed. In addition, the current approach encourages barristers to look at complaints strictly in terms of the potential breach of the Code and not in relation to the impact it has had on the complainant.² The evidence therefore indicates that the system needs to be refocused in order to place greater emphasis on resolving service complaints. My recommendations in this regard are set out below under “Revisions to the System”.

Agreement of the complaint with the complainant

To be able to determine the level of seriousness of a case, and to give complainants confidence in the process, it is important that those investigating the complaint fully understand its nature and extent. At present, the system relies on Bar Standards Board staff, the Commissioner and the sponsor member to interpret the complaint based on the information provided on the complaint form; it is even possible for each to have a slightly different interpretation of the complaint.

About 40 per cent of complainants surveyed had the impression that the complaints team did not understand the detail of their complaint and over 50 per cent felt that the person making the decision in their case did not have all of the relevant facts and material.³

Therefore, formally agreeing the complaint with the complainant, once a decision has been taken to investigate, would be highly beneficial. It will add to the initial time taken to process complaints but it may well save time over the course of the investigation by removing ambiguities which had they been addressed at the beginning could have led to swifter or more effective case resolution. Verification of a complaint in this manner is good practice; it involves the complainant and will address concerns that, occasionally, investigations are commenced without a clear appreciation of the complaint. It will also prevent complainants adding to their complaints over the course of an investigation.

Recommendation 31:

Once a decision has been taken to investigate a complaint, but before an investigation is commenced, Bar Standards Board complaints staff should agree with the complainant the detail of the complaint and set out the aspects to be investigated.

Risk and alternative mechanisms

A clear need identified in the Review is for the introduction of mechanisms in addition to, or instead of, disciplinary action, to deal with complaints in a

proportionate manner. The Bar Standards Board is committed to the principle of risk-based regulation. However, the current system is not generally based on an assessment of the risk the barrister complained of poses to the public nor does it address satisfactorily the issue of whether the action taken in the circumstances is proportionate.

At present all complaints, unless dismissed in the early stages, must go through an often, lengthy process culminating in a formal hearing. Even service complaints cannot be determined without a hearing. All of this generates criticism of unnecessary delay in resolving cases, particularly minor ones. The processes currently take too little account of the level of seriousness of the behaviour complained of and this is detrimental to both barristers and complainants alike.

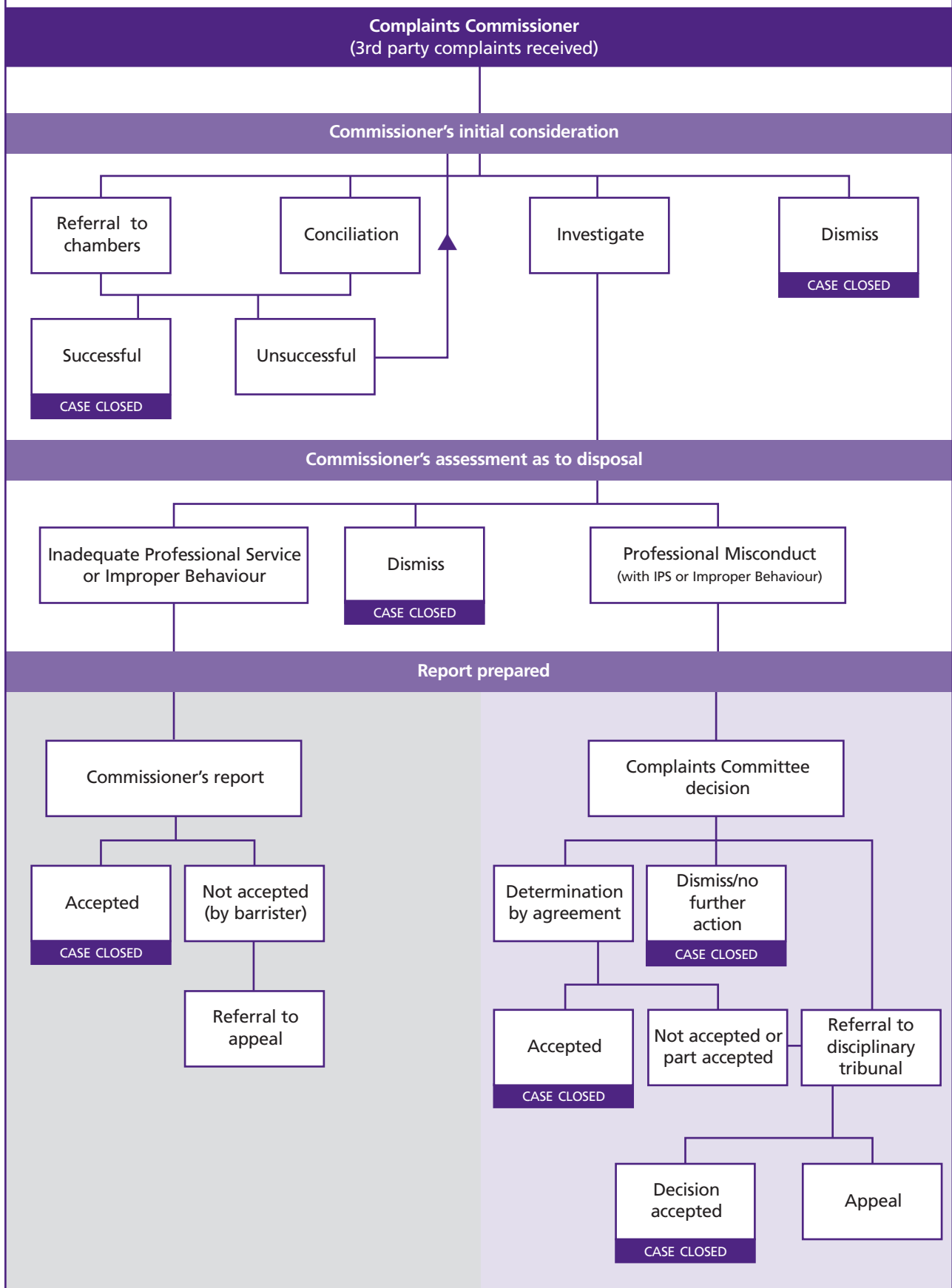
I recognise that the Bar Standards Board has public interest responsibilities for regulating the behaviour of the profession and that it would be entirely wrong for serious breaches of the Code to be dealt with other than by disciplinary action. However, where the barrister's alleged behaviour does not represent a serious breach of the Code or a risk to the public and where the complainant's motivation is for recognition of poor service (whether or not accompanied by financial compensation), then mechanisms should at least be available for the matter to be disposed of by means other than formal proceedings. There is both barrister and complainant support for this proposition.

Revisions to the system

In order to address the issues raised above, I propose that some significant adaptations are made to the system. The aim is to use adjustments derived from the evidence to make the present system more proportionate in its decision-making, less focused on disciplinary action, less complex and more understandable to users. The proposed adaptations leave in place the core structures. These include: the current system of a common portal for the reception of all complaints through the Commissioner; the Commissioner's powers to dismiss complaints that do not reveal prima facie evidence of Inadequate Professional Service or professional misconduct; most of the current powers of the Complaints Committee; and the Disciplinary Tribunal process.

Figure 7

Flow chart of revised complaints & disciplinary process



An overview of the proposed changes is set out at Figure 7.

The adaptations focus principally on extending the powers of the Commissioner to allow him or her to adjudicate on, and finally determine, complaints of IPS and Improper Behaviour (subject to appeal). In addition the powers of the Complaints Committee should be extended to allow it to make final determinations in some cases of professional misconduct with the agreement of the barrister.

The precise details of the implementation of the recommendations regarding changes to the system will need to be determined by the Bar Standards Board in the consultation with users and stakeholders. However, the recommendations below have already been assessed for human rights implications and no problems have emerged. (In the absence of a specific recommendation for change, it should be assumed that the current provisions remain operational.)

Policy on regulating professional misconduct

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. The power of the Complaints Committee to take “no further action” should be used more readily and be based on clear criteria set by the Bar Standards Board related to the seriousness of the case and the risks to the public caused by the barrister’s conduct.

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.

Modified route for dealing with service complaints

I believe the Commissioner’s powers could usefully be extended to adjudicate on complaints of poor service and make non-binding recommendations for

resolution without reference to the Complaints Committee. The Commissioner should be constrained by the proposed Bar Standards Board policy on regulating compliance (Recommendation 32 above) but should retain the ability to seek expert advice from members of the Complaints Committee, or any other member of the profession, where the facts or circumstances of the case warrant it.

Recommendation 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.

The new powers would operate in line with the process set out below (subject to consultation and agreement on the detail). The modified route for dealing with complaints of poor service and improper behaviour would operate as follows:

- **Conciliation:** Where appropriate, informal conciliation should be attempted. Such conciliation should be carried out by Bar Standards Board staff under the auspices of the Complaints Commissioner and involve only issues that can be quickly and easily resolved between the parties.
- **Investigation:** If conciliation is considered inappropriate or proves unsuccessful, the matter should be investigated in order to obtain sufficient information to be able to determine, on the balance of the evidence, the outcome of the complaint. Where necessary, the complainant and/or the barrister should be interviewed.
- **Preparation of a report:** Appropriately qualified Bar Standard Boards staff should prepare, for the Commissioner’s approval, a report setting out the results of the investigation and conclusions as to the merits of the case. The report should be disclosed to both the complainant and barrister for comment prior to the Commissioner’s conclusions being added.

- **Adjudication:** If the Commissioner concludes a complaint should be upheld in whole or part, the report should include non-binding recommendations for action to resolve the complaint. The Commissioner’s powers of adjudication should be limited to recommending an apology (applicable to all complaints regardless of the status of the complainant), return of fees and compensation (only applicable to direct clients)
- **Resolution:** The final report should be issued to both parties and the barrister invited to accept any recommendations made. The barrister should not be under an obligation to accept the Commissioner’s recommendations and if he or she is not prepared to do so, the case should be referred to an appeal panel for final determination. If the barrister accepts the Commissioner’s recommendations then he or she should be able to treat the matter as finally determined.
- **Appeals:** A right to appeal the Commissioner’s findings should be given to the barrister and consideration should be given to the complainant also having 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.
- **Referral to Ombudsman:** These proposals do not and cannot affect complainants’ ability to complain to the Legal Services Ombudsman.

Taking into account the above process, I also recommend:

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).

Recommendation 35 (a):

Adjudication Panels should be abolished.

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.

Disciplinary action — allegations of professional misconduct

In relation to cases of professional misconduct, the evidence indicates that the current jurisdiction of Disciplinary Tribunals should remain in place subject to some changes to its composition. However, in order to allow more flexibility and proportion in the system, I propose that the Complaints Committee should be given the power to determine misconduct cases by agreement with the barrister without the need for a formal hearing (“determination by agreement”). Such a power would apply to third party complaints and those instigated at the Bar Standards Board’s own motion.

The initial decision as to whether a case should be subject to a “determination by agreement” would be taken by the Commissioner following investigation and be based on agreed criteria set by the Bar Standards Board. The criteria would take account of the level of seriousness of the complaint, the potential sanction that might be imposed and whether the complexity makes it appropriate for disposal by agreement. If a case is unlikely to lead to a suspension or disbarment, then it would be suitable for “determination by agreement” subject to ascertaining whether the barrister would, in principle, be prepared to accept a Committee determination.

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.

“Determination by agreement” process

The “determination by agreement” process should operate, subject to consultation on the detail, in the manner described below.

- **Investigation:** The complaint would be investigated as under the current system and on completion, the Commissioner would assess whether the case is appropriate for “determination by agreement”.

The Commissioner, based on the criteria set by the Bar Standards Board and sentencing guidance (Recommendation 32), would make an initial assessment as to whether the complaint is suitable for “determination by agreement”. If the case is likely to lead to a suspension or disbarment, the current arrangements should apply unchanged whereby a sponsor member of the Complaints Committee prepares a note for consideration by the full Committee and the matter is referred, if appropriate, direct to a Disciplinary Tribunal.

- **Report preparation:** Where “determination by agreement” is considered appropriate a full report of the investigation should be prepared. Responsibility for preparing the report should lie principally with the Commissioner and Bar Standards Board staff with advice being available from the Committee. In complex cases, sponsor member preparation should be used but in all cases the report should be referred to a member of the Complaints Committee for consideration and presentation to a Committee meeting.
- **Consideration by the Complaints Committee:** The Committee should have the power to dismiss “determination by agreement” cases or take no further action. It should also have the power to

approve or amend the report or refer the matter direct to a Disciplinary Tribunal. The decision to dispose of a case via an agreed determination should be by majority vote and dismissals should be subject to the consent of the majority of lay members present.

- **Sentencing powers of the Committee:** The Committee’s sentencing powers should be limited and the maximum sanction should be a fine of £5,000.

Recommendation 37:

The Complaints Committee’s sentencing powers should be limited and the maximum sanction should be a fine of £5,000.

- **Resolution:** Once approved, the “determination by agreement” report should be formally issued to the barrister and, where applicable, the complainant. If the report contains findings of professional misconduct and the barrister is prepared to accept the Committee’s determination, the case should be treated as finally determined. The findings should be formally registered as a “determination by agreement” and treated as a disciplinary finding for the purposes of the barrister’s record.

If a barrister is not prepared to accept the Committee’s determination the matter should be referred to a Disciplinary Tribunal for final determination. The Committee’s report should not be made available to the Tribunal until the sentencing stage but if the Tribunal’s conclusions accord with the Committee’s determination, this could be treated as an aggravating factor when determining sentence.

Hybrid cases (complaints combining poor service and professional misconduct)

A significant number of complaints include issues of both poor service and professional misconduct. In some cases the professional misconduct is minor and the poor service element is the dominant feature. In others the dominant element is the professional misconduct. It seems reasonable in the former cases where alleged poor service is predominant that, based on agreed criteria set by the Bar Standards Board, it

should be treated as a matter of poor service only and left for adjudication by the Commissioner under the process described above.

Where the misconduct is more serious, it would be reasonable for both the service and misconduct issues to be referred to the Complaints Committee either for “determination by agreement” or for referral to a Disciplinary Tribunal.

In light of the above process, I recommend:

Recommendation 38:

The Commissioner’s powers should be extended to allow decisions to be made (where necessary drawing on the 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.

Disciplinary hearings

In light of the above recommendations, there is little need to retain a number of different types of disciplinary hearings. Most cases where there is no dispute on the facts would be eminently suitable for “determination by agreement” and, as previously stated the Informal Hearing jurisdiction has already fallen into disuse.

Therefore, one Disciplinary Tribunal for all disciplinary cases should be introduced, but should be constituted differently according to the seriousness of the alleged offence.

I therefore recommend:

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 month’s 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.

Sentencing options

A number of members of disciplinary panels and Judges have criticised the scope of the current sentencing options and commented that the options can inhibit a panel from taking practical steps to deal with a case or restrict their discretion to impose an appropriate combination of sanctions.

The introduction, in 2005, of a new warnings and fines system has provided some level of increased flexibility. Panels do not appear to be fully aware of their powers in this regard. This needs to be addressed.

Further, proposals to extend the power to order an apology in cases of professional misconduct (currently only available in cases of Inadequate Professional

Service) are likely to be agreed in the near future. However, given the concerns raised by disciplinary panels, the current range of sentencing options needs to be reviewed to ensure it is comprehensive and flexible; in particular attention should be paid to providing adequate powers to suspend sentences.

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.

Conclusion

The significant but incremental changes proposed above should help to streamline the system and ensure that greater emphasis is placed on complaints resolution in warranted cases as well as making the system more proportionate and flexible. While the changes may take some time to bed down and appear at first sight to create some complexity, they should assist with speeding up the processes, lowering the level at which cases are determined, and ensure that complaints are handled within a structure that takes account of the risk to the public.

Endnotes

- 1 *The Effectiveness of Chambers Complaints Handling Bar Council*, November 2005.
- 2 *Survey of Complainants and Barristers, 2006*, para 48.

- 3 *Survey of Complainants and Barristers 2006*, paragraph 19 of the Executive Summary.

Chapter 9 Quality outcomes: resourcing people for excellence

Introduction

Other Chapters have touched on the issues of training, guidance and support for those responsible for operating the complaints and disciplinary system. Given the central importance of these ‘systemic supports’ and their role in promoting the effectiveness of individual decision-makers, they warrant separate consideration.

Creating a flexible and proportionate structure for the complaints system is essential but any system is only as good as the people who operate it. People are the key to success and it is important that the most appropriate and skilled individuals are recruited, properly equipped and resourced to perform their roles. As shown in Chapter 4, there are weaknesses in these areas and considerable attention needs to be paid to the issues.

The calibre of the people involved in operating the Bar’s complaints and discipline system is extremely high. It ranges from distinguished Judges, to experienced and senior barristers, to lay representatives eminent in their own fields and highly experienced staff within the Bar Standards Board. The ambition of the Bar Standards Board must be to continue to attract this level of quality. To do so, recruitment and selection must be excellent, and the quality in skills and experience of those selected must be matched by the quality of the support and guidance provided.

Committee and Tribunal Members

Recruitment

Responsibility for recruitment lies with an appointments panel of the Bar Standards Board in the case of Complaints Committee members, and with the Council of the Inns of Court (COIC) in the case of disciplinary

panels. This is a sensible division of responsibilities ensuring critical distance between the Bar Standards Board as prosecutor and the independent tribunals. In recent years more rigorous recruitment processes have been put in place for Committee and disciplinary panel members. Recruitment is now generally based on agreed competencies and mostly complies with Nolan rules of fair and open competition. Interestingly, this important fact is not widely known and has not been routinely disseminated.

There are, however, issues emerging from the Review about the recruitment of barristers and lay members for the Complaints Committee and disciplinary panels which need addressing.

First, and generally, continuing attention needs to be paid to all recruitment processes to ensure that they are in line with good practice and rigorous enough to identify those with the appropriate experience and skills. While this may make recruitment more onerous and will certainly have cost implications, it is important if confidence in the system is to be maintained. The fact that the barristers involved with operating the system provide their services on a *pro bono* basis is not a reason for down-grading essential recruitment processes.

Secondly, evidence from the Under Secretary of Lincoln’s Inn, who was responsible during most of the Review period under the President of COIC, for the convening and appointment of Disciplinary Tribunals and other hearing panels, has pointed to the difficult challenges faced by the Tribunals Appointments Board (TAB) in recruiting sufficient numbers of appropriately skilled silks and barristers to sit on hearings and tribunals.¹ This is an important issue and the Bar Standards Board as regulator has a responsibility to offer assistance and support to COIC to ensure that it can recruit the high calibre of panel members needed.

Thirdly, there is one exception to the open recruitment processes described above and that is in relation to the recruitment of prosecutors. The Bar Standards Board relies on a panel of barristers, acting on a *pro bono* basis, to prosecute cases in front of disciplinary tribunals. The calibre of the prosecutors is very high indeed and they are of immense value to the system. 'Recruitment' to the prosecutors' panel is via voluntary application and submission of a CV. There are requirements that prosecutors are of at least seven years' call, have direct experience of prosecution work and have a clean disciplinary record. No concerns have been raised in this Review about the standard or performance of prosecutors.

While the current processes for obtaining the services of prosecutors are not based on Nolan rules there appears to be no priority for such rules to be applied in the particular circumstances. The prosecutors are instructed in the same way as any other barrister acting in a case (albeit on a *pro bono* basis). They hold no official office within the Bar Standards Board and are not performing an independent role. It would, in my view, be overly bureaucratic and unnecessary to apply the Nolan rules to what is simply a list of appropriately qualified barristers prepared to undertake prosecution work for the Bar Standards Board.

Training, support and guidance

It is essential that Complaints Committee and tribunal members are provided with appropriate training, support and guidance in order to allow them to perform to the high standard expected and to ensure continued consistency in decision-making. Decision-makers need to be able to understand their own role, the roles of others and how the system works in terms of its aims and objectives.

Currently "training" at some level is provided for some participants but it is clear from the evidence that the provision is not always adequate or sufficiently comprehensive to equip decision-makers to perform their roles with the level of confidence they would like.

The Code of Conduct is detailed and supported by extensive guidance for barristers as to how they should behave in the discharge of their professional duties. However, this detail is not mirrored in terms of guidance for committee and tribunal members about how to carry out their duties or how to approach relevant decision-making. There is a general lack of

structured policy, guidance and information about previous decisions across the system.

Guidance and support, whether in the form of formal training or other mechanisms for learning, are essential. Without them there is a risk of: a lack of understanding of the processes at all levels; inadequate investigation and presentation of cases; and inconsistent or poor quality decision-making. While these risks do not appear to have impacted on the operation of the current system, this is not a reason to fail to address the gaps identified in the training and support provided. The level of guidance and support will differ according to the roles played and therefore the system needs to cater for all needs through the provision of a range of support facilities including guidance notes, policy documents, briefings and training courses.

Therefore guidance and policy resources need to be created which provide participants with comprehensive information on all aspects of the work of the Complaints Committee and tribunals.

Recommendation 44

Induction, training and where appropriate mentoring programmes should be developed for Complaints Committee members to ensure they are sufficiently familiar with the objectives of the Complaints system, its processes and the various roles and responsibilities within the system.

Recommendation 45

The Bar Standards Board should develop information and guidance packs for all decision-makers in the system which includes general information about the operation of the system as well as specific guidance and policies relevant to the performance of individual roles.

Recommendation 46:

The Bar Standards Board should explore what support can be given to the COIC for the induction and training and mentoring of Tribunal members.

Prosecutors

Until recently, little formal support or guidance was provided to prosecutors but this situation has been remedied. An Information and Guidance Pack for new prosecutors has been produced which incorporates general information about the role of the Bar Standards Board and the operation of the complaints system as well as specific guidance on the prosecutors' functions. It is a comprehensive and useful tool which provides an effective template for the development of similar packs for other committee and tribunal members.

Further, each new prosecutor is now given an individual briefing on their role and the complaints system. It is still too early to assess whether this increased support will be successful in assisting prosecutors to perform their functions and the situation will need to be kept under review.

Disciplinary Panel Members and Chairs of Tribunals

One of the strengths of the current system is the level of independence in decision-making which is incorporated at each stage of the process. The Bar Council rightly handed responsibility for the appointment of disciplinary panels to COIC, a body independent from the regulator. COIC is responsible not only for convening panels but also for providing them with the necessary support and training.

The resources available to COIC are limited and it is commendable that it is able to provide a reasonable level of support and training for panel members. Nevertheless, the evidence indicates that the current arrangements do not fully meet the needs of panel members. In this regard the Bar Standards Board should assist COIC in supporting panel members. The Bar Standards Board has a responsibility to assist COIC in supporting panel members. Clearly the provision of improved training and support for disciplinary panel members has implications for COIC's resources and therefore the issue as to how recommendations which

impinge on COIC's functions should be funded will be a matter for negotiations between the Bar Standards Board, the Bar Council and the Council of the Inns of Court.

Chairs and members of tribunals also need guidance on sentencing policy and previously decided cases. A number of other regulators (including the General Medical Council and Association of Chartered Certified Accountants) have produced and published what is known as "Indicative Sanctions Guidance": a comprehensive policy document setting out the sentencing process in disciplinary cases and providing guidance as to the factors that need to be considered when imposing sentence. Such guidance helps to promote consistency and, through publication, ensures transparency in the sentencing process. A similar document should be developed for use by COIC disciplinary panels.

However, it is important that the independence of COIC is not compromised and it would be inappropriate for the Bar Standards Board to determine policy on sentencing. Given the level of resources available to COIC it would also be inappropriate to place full responsibility on that body for developing and producing sentencing guidance. This will be a substantial task and one that will require significant input of resources. In the circumstances, it would seem reasonable that the initial development of sentencing guidelines and policy should fall to the Bar Standards Board with COIC retaining final approval of the contents and responsibility for communicating the information.

Recommendation 47 (a):

The Bar Standards Board should liaise with COIC to produce comprehensive Indicative Sanctions Guidance setting out the parameters for sentencing and giving guidance as to the level of appropriate sanctions. To facilitate this, the Bar Standards Board should extend to COIC the use of internal staff and Committee resources to support the initiative.

Recommendation 47 (b):

The Bar Standards Board should work with COIC to develop specific written guidance for the Chairs of Disciplinary Tribunals which covers their role and responsibilities with particular emphasis on the need to encourage and respect lay participation.

There has also been a clear call from not only disciplinary panel members but also other decision-makers for the provision of precedent information in relation to disciplinary sentences. A “sentencing log” is currently maintained by the investigations team but its format means that is of limited use to panel members. The development of Indicative Sanctions Guidance should provide some assistance to panels but a database of previous sentences needs to be developed so that panels can compare like for like cases and ensure consistency. The list of disciplinary findings posted on the website is not adequate for this purpose.

The provision of precedent information is not a matter that would affect the independence of COIC. Accordingly responsibility for this can fairly lie with the Bar Standards Board.

Recommendation 48 (a):

The Bar Standards Board should develop a public sentencing database that records all sentences imposed by the Committee or the Tribunal and which allows relevant reports to be prepared showing comparative outcomes in similar cases.

Recommendation 48 (b):

The Bar Standards Board should develop a public system for providing and accessing information on previous sentencing decisions.

Recommendation 48 (c):

The Bar Standards Board should disseminate a quarterly bulletin to all committee and tribunal members and members of the prosecution panel setting out relevant information on decided cases.

Staff

While most staff have excellent knowledge of their own area of work and their team’s role, consultation revealed concern about limited knowledge of how individuals’ roles fit into the wider system. It is important that all staff have a complete understanding of the wider processes and work within the office to ensure that there is a joined up and holistic approach to complaints handling.

New staff need rigorous induction covering all aspects of the system. This should include attending committee meetings and disciplinary hearings. Currently induction is provided but it is not standardised, tends to be narrowly limited to the work of one team and is not consistently monitored to ensure the expected learning has been achieved.

Dealing professionally, on the telephone and sometimes face-to-face, with demanding complainants is a challenging and sensitive job. It requires underpinning with strategies for successful service delivery and dealing with difficult customers as well as negotiation skills. Some training of this nature has been provided to some staff but there needs to be greater emphasis on ensuring that individual staff members are properly equipped to deal with such situations and sufficiently supported in carrying out their roles.

Recommendation 49 (a):

All members of the complaints and investigations teams require, as a matter of urgency, up-dated job descriptions, and annual performance and development plans related to key performance indicators and a related business plan.

Recommendation 49 (b):

There should be an urgent review of staffing needs and resources, taking into account the implications and costs of implementing this Review.

Recommendation 50:

Revised induction and development based on an assessment of corporate and individual needs should be introduced for all staff.

Recommendation 51:

The Bar Standards Board should resource the development, dissemination and review of staff guidance and policy on the operation of all aspects of the complaints system including objectives, administrative processes and the expected service standards.

Barristers and complaints

Given the small number of barristers who are subject to a complaint, let alone disciplinary action (less than one per cent), it is not surprising that the large majority appear to have little working knowledge of the Bar Standards Board complaints system. However, all barristers have an obligation under the Code to have in place an appropriate procedure for dealing with complaints. It is therefore important that the profession knows how to deal with complaints and is aware of the responsibilities and powers of the Bar Standards Board in this area.

Suggestions were put forward during the Review by both individual barristers and chambers that a course on complaints handling should be developed and designated as a mandatory constituent of the New Practitioners Continuing Professional Development programme. However, this programme is already overloaded and introducing a separate mandatory course is unlikely to be practicable. Instead, training should be made available for barristers by extending the current Inns of Court 'Ethics and Advocacy' course to include a specific section on complaints handling. Consideration should also be given to developing a standard CPD course on dealing with complaints and the complaints system for Heads of Chambers and those responsible for handling complaints within chambers.

Recommendation 52 (a):

The Bar Standards Board should propose to the Inns of Court that the current 'Ethics and Advocacy' course be extended to include a section on complaints handling and the relevant powers of the Bar Standards Board.

Recommendation 52 (b):

The Bar Standards Board should liaise with relevant CPD providers to develop a separate accredited CPD course designed to equip Heads of Chambers, and those responsible within chambers for handling complaints, with the information and skills necessary to deal with complaints under the designated system.

Endnotes

- 1 Colonel DH Hills MBE, The Honourable Society of Lincoln's Inn, 20 November 2006, paras 7 and 8.

Chapter 10 Towards implementation

In this Report, I have set out recommendations to develop the current system based on good regulatory practice and in light of the concerns raised in the extensive consultation and research conducted. The recommendations are wide-ranging. It is now for the Bar Standards Board to consider the Report and decide in principle whether or not to proceed along the lines I have suggested. Having made that decision, and on the assumption it is a positive one, the Board should create an Implementation sub-committee. This sub-committee would draw up a detailed and fully costed Implementation Plan, drawing on stakeholder views (which it should seek) on how the recommendations should be implemented. I believe it is both sensible and realistic to aim for an implementation date of Spring 2008.

This Report clearly has implications for the costs of the system and the staffing required to operate it. Together with the legal opinion I sought on the human rights implications of the recommendations, I am presenting to the Bar Standards Board an outline indicative implementation costing. Both documents will be useful to the Implementation sub-committee in constructing its detailed plans.

In the interests of proportionality the recommendations shift some of the burden of the operational work in running the system from the voluntary members of the Complaints Committee to the Commissioner and Bar Standards Board staff. This is deliberate and (I believe) necessary. It strikes the appropriate balance between utilising the expert services of committee and tribunal members on the one hand, and executive action (guided by Bar Standards Board policy) on the other. I believe this is the right approach and is, in any event, in line with the way other regulators operate (Annex 1).

The move to more proportionate decision-making will not work without some increase in staff capacity, particularly at the more senior end. Any additional staff

will need suitable skills and experience to be able to deal with the higher level of executive responsibility involved. However, real costs savings will be made by speeding up the process and reducing the number of cases that need to be referred to expensive disciplinary action. Further, the number of staff needed to deal with tribunal cases is likely to reduce.

The current staff structure splits the handling of complaints into two distinct teams: complaints and investigations. The former deals with a complaint up until the Complaints Committee stage and the latter deals with all cases that are referred for further action. I do not consider that this split is the most effective way to operate. It is a feature of the disjointed system I described earlier. It creates a cultural divide that encourages the treatment of one complaint as two separate matters and a duplication of effort that is not justified. In fact, of course, a case is one continuous process, and greater integration of the staff teams will facilitate the possibility of a more flexible approach to the allocation of staff resources together with the possibility of a more broadly-based work experience for everyone involved.

A better resourced, joined-up, more proportionate system, more explicit about its aims and objectives, will serve both consumer and public interests. Complainants will be better informed about what the system can and cannot provide for them. They will find procedures easier to access. With greater clarity and precision about the route their complaint will follow and greater transparency in decision-making, complainants should find the system less complex and arcane. By adjusting the balance of barrister expertise, independent lay members and professional complaints-handlers in decision-making complainants should also have more confidence in the independence of the system.

Barristers have nothing to fear from any of the above. It will leave the pillars of the existing system in place with their emphasis on the integrity and independence of individual decisions. There will be two explicit gains.

One is more effective feedback to the profession about the lessons learned from case resolution. The second is the removal of the legitimate fear of over-regulation, the over-emphasis on disciplinary action and the costs and time associated with it.

Annex 1: Comparison of processes – Regulators

Profession	Name	Service Complaints jurisdiction	Service complaints – Executive decision-making?	Service complaints Panel Decisions	Professional Misconduct – Ability to Practise only?	Professional Misconduct – referral Committee?	Professional Misconduct – referral Committee Lay Majority	Professional Misconduct – Executive/ referral Committee disposal powers?	Professional Misconduct – Disciplinary panels – lay majority?	Pro bono assistance?
Solicitors	Solicitors Regulatory Authority	No*	Yes (Hybrid cases)	Yes (Appeals & hybrid cases only)	No	No	N/A	Yes (adjudicator disposal & consent orders under consideration)	No	No
Doctors	General Medical Council	No*	N/A	N/A	Yes	Yes (Appeal function only)	No	Yes (Committee can order nfa**, advice, warning)	No	No
Dentists	General Dental Council	No* (to be introduced)	N/A	N/A	No	Yes	No	Yes (Committee can order nfa, advice, warning)	No	No
Opticians	General Optical Council	No*	N/A	N/A	No	Yes	No	Yes (formal warning & nfa)	No	No
Architects	Architects Registration Board	Yes	No	Yes	No	No	No	Yes (Confidential letter)	Yes	No
Accountants	Institute of Chartered Accountants	No (mediation/ conciliation offered)	N/A	N/A	No	Yes	No	Yes (Assessor & Committee can take nfa, impose caution or dispose by consent order)	No	No
Insolvency	Insolvency Practitioners Association	No	N/A	N/A	No	Yes	No	Yes (Committee can take nfa, issue warning or dispose by consent orders)	Yes	Yes
Psychologists	British Psychological Society	No	N/A	N/A	No	Yes	No	Yes (nfa)	Yes	Yes

* Separate body used to handle service complaints

** nfa = no further action

Annex 2: Comparison of processes – complaints services

Profession	Name	Referral back to profession	Conciliation	Executive determinations/ recommendations	Panel/ committee determinations/ recommendations
Solicitors	Legal Complaints Service	Yes (formal requirement)	Yes	Yes	Yes
Legal Services	Legal Services Ombudsman	No	No	Yes	No
Dentists (Private)	Dental Complaints Service	Yes (informal requirement)	Yes	No	Yes
Financial Services	Financial Services Ombudsman	Yes (informal requirement)	Yes	Yes	No
Central Government	Parliamentary Ombudsman	Yes (informal requirement)	No	Yes	Yes
Local Government	Local Government Ombudsman	Yes (formal requirement)	No	Yes	No

* Separate body used to handle service complaints

** n/a = no further action

Annex 3: List of responses to the Issues and Questions Paper

Organisation	Date of Submission
Professor G R Evans, Faculty of History University of Cambridge	08.10.06
Mr Marc Beaumont, Windsor	09.10.06
Which? Consumers' Association	31.10.06
Falcon Chambers, London	20.11.06
The Law Society	20.11.06
The Honourable Society of Gray's Inn	20.11.06
Colonel David Hills – Under Treasurer, The Honourable Society of Lincoln's Inn	20.11.06
The Royal Pharmaceutical Society of Great Britain	20.11.06
The South Eastern Circuit of the Bar	20.11.06
The Standards Board for England	20.11.06
Mr John McGoldrick, Young Street Chambers, Manchester	20.11.06
Able Bishop & Co – Solicitors, Bury St Edmunds	21.11.06
The Legal Practice Management Association	21.11.06
The Legal Services Ombudsman for England & Wales	23.11.06
The National Consumer Council	11.06
4 Pump Court, Temple, London	01.12.06
The Professional Practice Committee of the Bar Council	06.12.06
The Bar Standards Board Consumer Panel	23.12.06



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