



REGULATING BARRISTERS

**STANDARDS COMMITTEE**

**REVIEW OF THE CODE OF CONDUCT**

**INITIAL CONSULTATION PAPER**

**June 2007**

**REVIEW OF THE CODE OF CONDUCT**  
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# **BAR STANDARDS BOARD**

## **STANDARDS COMMITTEE**

### **REVIEW OF THE CODE OF CONDUCT**

#### **INITIAL CONSULTATION PAPER**

#### **PART I: INTRODUCTION**

1. In its strategic plan for 2006-2008, the Bar Standard Board (BSB) committed itself to reviewing the Code of Conduct of the Bar of England and Wales (“the Code”). The Code sets out the regulatory and ethical rules which bind barristers. The aim of the review is to ensure that the rules governing barristers are fit for purpose in setting out the standards required of barristers to meet the needs of the public and to ensure the proper administration of justice. The BSB has asked its Standards Committee to take the lead in carrying out this review.

#### **The Bar Standards Board**

2. The Bar Standards Board came into existence on 1<sup>st</sup> January 2006 following a decision to separate the regulation of the Bar from the representative functions of the Bar Council. The Board has a lay Chair, Ruth Evans, and 7 of its 15 members are lay members. The barrister members of the Board are not and may not be members of the Bar Council. All members were appointed in accordance with Nolan principles. A full list of the members of the Board is at [Appendix 1](#).
3. The Bar Council has delegated to the Board all of its regulatory functions including, without limitation, responsibility for: (i) qualifications and conditions for entry to the profession; (ii) all aspects of training; (iii) the setting of standards for those practising at the Bar; (iv) the determination, amendment, monitoring and enforcement of rules of professional conduct; and (v) investigation and prosecution of complaints against barristers and students.
4. In regulating the Bar, the overriding aim of the Board is to act in the public interest and to protect the interests of the consumers of barristers’ services. It does so through a partnership of lay and Bar input and through consultation with all stakeholders. The Bar Standards Board is committed to proportionate, risk based regulation, and to regulation that is evidence-based. The Board’s strategic objectives relate to (i) protecting consumers (ii) access to justice (iii) independent regulation (iv) excellence and quality (v) diversity.
5. As will be clear, the Code forms a central part of the Board’s responsibilities. It contains rules which set out the ethical duties of barristers and also the other requirements with which they must comply

in order to practise as barristers. The Code, as a whole, has not been reviewed for many years (though individual aspects of it have been reviewed and amended). A number of the provisions have been subject to criticism and others will need amendment in the light of the Legal Services Bill. The Board has, therefore, decided to commence a review of its provisions through the Standards Committee and a Working Group jointly led by a barrister and a lay member of the Board.

6. The review of the Code is a major undertaking and will not be completed quickly. The Board has decided that the review should be conducted in a series of tranches, each focussing on a distinct area of the Code. Each area will be the subject of detailed consultation and consideration. A timetable for the review can be found at paragraph 92 and a detailed programme for the review will be published once the initial comments on this consultation paper have been considered.
7. In this paper, the Standards Committee invites views and supporting evidence on which aspects of the Code should be reviewed, whether there are any gaps which should be filled and on the priorities. The paper is structured as follows:
  - (1) A description of the Code in its present form with a brief outline of its provisions;
  - (2) A description of the major issues surrounding the rules governing barristers which the review will need to address;
  - (3) A discussion about whether the structure of the Code needs to be changed;
  - (4) A description of the areas of the Code that the Board intends to examine, together with a brief discussion of the major issues in each area and an indication of the Board's view as their priority;
  - (5) A discussion about the format of the Code.
8. The Board is currently undertaking a number of projects which will have an impact on the Code. These are set out at [Appendix 2](#), which also indicates how they link with the work of this review.
9. Consultees are welcome to comment upon all or only some of the issues set out in this paper. At this stage, however, respondents are not asked to consider detailed proposals or to provide detailed comments. The key purpose is to identify the agenda for the review. Any suggestions are welcome but it is helpful if, where feasible, respondents can make use of evidence to support their views. Further consultation papers will seek the views of respondents on detailed proposals in respect of the various areas of work.

## **Responses to this Consultation Paper**

10. A list of those to whom this consultation paper is being sent is attached at Appendix 3. This list is not meant to be exclusive. Responses are welcomed from anyone who has evidence or views about the questions raised in this paper.
11. The BSB will summarise the responses in publishing its decisions following this review. It will also publish responses on its website. If you do not wish your response to be published, please make that clear when you reply to us.
12. Responses should arrive no later than 15<sup>th</sup> September 2007 and should be sent to Oliver Hanmer, Bar Standards Board, 289-293 High Holborn, London WC1V 7HZ ([OHanmer@BarStandardsBoard.org.uk](mailto:OHanmer@BarStandardsBoard.org.uk))

## **PART II: BACKGROUND TO THE REVIEW**

### **The Existing Code and Legislative Background**

13. The professional conduct of barristers is regulated by three principal sources: the law of England and Wales, directions regarding practice before particular courts, and the Code of Conduct of the Bar of England and Wales. In addition, the Code incorporates by reference written standards for the conduct of professional work and other guidance to which barristers are required or encouraged to have regard.
14. The Code was first published by the Bar Council in 1981 in the light of recommendations made by the Benson Commission on Legal Services. It is now in its 8<sup>th</sup> edition and is published in loose leaf form. Amendments are promulgated regularly and notified to the profession. The current version of the Code can be found in the Standards and Guidance section of the BSB website at [www.barstandardsboard.org.uk](http://www.barstandardsboard.org.uk)
15. Amendments to the Code were formerly made by the Bar Council. Now the Bar Council has delegated its regulatory powers to the Bar Standards Board. However, any alteration of the rules as to the conduct required of barristers in exercising any right of audience or right to conduct litigation does not have effect unless approved by the Secretary of State for Constitutional Affairs. Every barrister who exercises before any court a right of audience has a statutory duty to comply with those rules of conduct which overrides any inconsistent obligation which he may have (other than under the criminal law).
16. The Code applies to all barristers whenever called to the Bar. It applies to international work and to barristers whether they are practising in England and Wales or elsewhere. A failure by a barrister to comply with the Code may constitute professional misconduct. The Code is currently divided into eight main sections. They deal with the following main topics:
  - (1) The rules governing what individuals have to do in order to practise as a barrister – including the requirements to complete pupillage, undertake continuing professional development, the “three year” rule requiring newly qualified barristers to work in an office of a more senior lawyer and the prohibition on practising in partnership or through a company (paras 201 – 205). This section also governs non-practising barristers offering legal services (para 206).
  - (2) The fundamental principles, including the duties of integrity and independence and those owed to the client and the court. The section also deals with non-discrimination and gifts and commissions and prohibits the handling of clients’ money (paras 301-307).

- (3) The rules governing self-employed barristers and, in particular, the restrictions on what work they can do and who they can work with, the duty to be insured with the Bar Mutual Indemnity Fund (BMIF), the duties to administer their practices and chambers appropriately (including their in-house complaints systems) and the rules governing fees (paras 401-406).
- (4) The rules governing employed barristers, by whom they may be employed and their right to conduct litigation (paras 501-504);
- (5) The rules governing acceptance and refusal of work and when a barrister can withdraw from a case. These include the “cab-rank” rule and the rules concerning conflicts of interests (paras 601-610);
- (6) The rules governing the conduct of work by barristers, including their duties to the lay client (including confidentiality), their duties to the court and to third parties. It also includes rules governing advertising and comment to the media (paras 701-710);
- (7) Miscellaneous rules governing pupillage, working in charitable advice centres and dual qualification (paras 801-808);
- (8) Compliance provisions which permit the BSB to inspect chambers and to invoke the complaints and disciplinary procedures (paras 901-905).

17. Annexes to the Code provide detailed rules which, amongst other things:

- (1) Modify other provisions of the Code in respect of international work;
- (2) Provide detailed rules for undertaking public access work;
- (3) Provide the standard arrangements governing the relationship between barristers and solicitors in respect of fees;
- (4) Provide for foreign lawyers to work in Chambers; and
- (5) Govern the complaints and disciplinary system.

18. The Code is supplemented by the following guidance:

- (1) The Written Standards for the Conduct of Professional Work, which amplifies the Code and provides guidance on a number

of areas of difficulty, for example, interviewing witnesses and handling documents received in error;

- (2) The Equality and Diversity Code, which provides advice and guidance on complying with statutory and Code requirements;
- (3) The Practice Management Standards and Guidance, which deal with the administration of Chambers;
- (4) Miscellaneous guidance provided from time to time by the BSB on particular issues of concern.

### **Reasons for the Review**

19. The Bar Standards Board has decided to undertake a full review of the Code of Conduct. There are a number of reasons for this:

- (1) it is sensible for a new regulatory body to review at an early stage the regulatory rules inherited from its predecessor to satisfy itself as to whether and to what extent those rules are adequate to protect the public interest;
- (2) the landscape for the supply of legal services is changing with the passage of the Legal Services Bill and the genesis of the Legal Services Board, in particular:
  - (i) the arrival of Alternative Business Structures (ABSs) will present new regulatory challenges; and
  - (ii) the Bill contains a number of regulatory objectives to which we must have regard.
- (3) there have been suggestions from the Office of Fair Trading and others that certain parts of the Code contain rules that may be anti-competitive.

### **What is expected of a barrister?**

20. It is crucial to establish what is expected of a barrister in order to have an idea of what the Code should contain. The Bar Standards Board has identified the following key values that underpin professional excellence in the provision of barristers' service:

#### *Access to Justice*

Consumers should have access to a choice of barristers suitable for their needs and whom they can instruct without inappropriate restrictions.



### *Independence*

Clients must be confident that barristers will provide unbiased advice which is in their best interests; and courts must be able to rely on barristers to act with independence in the interests of justice.

### *Integrity*

Barristers must command the confidence of their clients, their colleagues, judges and the public at large in their standards of conduct.

### *Quality and value for money*

Clients and courts must be confident that barristers will provide excellent legal representation and advice at a price which represents value for money.

### *Diversity*

The Bar should reflect the diversity of our society both in its composition and in ensuring that its practices promote the equality of opportunity and are free from discrimination.

### *Redress*

Clients must be confident that when things go wrong, they will be put right and that action is taken to reduce the risk of recurrence

21. These values should permeate the Code and in our consultations we will be testing proposals to see how compatible they are with these values.

### **PART III: FORM OF THE CODE AND AREAS TO BE REVIEWED**

22. This section will deal first with the way in which the Code is drafted. It will then look at the individual areas for review.

#### **1. Drafting of the Code**

23. At present the Code is drafted as a relatively short set of rules. Some of these are very precise (eg the qualification requirements in Part II). Others are more general and would benefit from substantially more commentary than is currently provided in the Code. For example, there is an overriding duty not to knowingly or recklessly mislead the court. This rule is surrounded by a substantial amount of case-law and guidance on what constitutes misleading the court, none of which is obvious from the Code. It is not unusual for the BSB to receive complaints about barristers who, the complainant argues, mislead the court by putting forward an opposing case based on facts which they do not believe to be true. One of the most regular category of calls that the Bar Council's ethical advice section receives from barristers is about what constitutes misleading the court. While a Code cannot cover every possible situation, there is obviously something to be said for providing more detail. Similarly, there is a general duty not to engage in conduct which brings the profession into disrepute, but there is no published guidance on what conduct falls within this category. For both lay people and barristers this is unsatisfactory.

24. Moreover, the Code is drafted in a legalistic way. A number of key concepts (such as the definition of "legal services" and of "professional client") are in the Definitions section. A non-lawyer looking at the Code will not find it easy to navigate it or understand exactly what is and is not permitted.

25. Possible alternative ways of drafting the Code are as follows

##### *a) Core Principles*

26. Core principles can set overriding principles of conduct. The existing Code may be thought to contain some: the duty to the court and the duty to act in a client's best interest, for example. The values for the profession set out at paragraph 20 above could form the basis of the core principles.

27. Such core principles would have the effect of rules. Disciplinary charges could refer simply to breach of one or more of them. Other regulators (such as the Solicitors Regulation Authority and the Financial Services Authority) have found it useful to draft their Codes in this way. Core principles may be said to define the values of the profession. Their advantages are that:

- (1) They are accessible to consumers
  - (2) They provide fundamental principles against which other rules can be interpreted
  - (3) Reference back to core principles can provide guidance on subjects not covered by the rules and avoid reliance on loopholes in rules
28. A disadvantage of core principles may be that they are broadly worded and it may not in any given case be straightforward to determine whether they have been breached. There is often scope for ambiguity. If notwithstanding the existence of core principles there remains a need for a body of rules, it may be questioned whether core principles are necessary.

*b) Guidance*

29. At present the Code is drafted as a set of rules, without formal guidance. The Standards Committee regularly gives non-binding guidance to barristers on matters relating to professional practice and regulation. The advantage of guidance is that it can be read together with the rule and offers assistance in its interpretation. The disadvantage is that guidance may often need to be updated, perhaps in the light of changes in the law. It would be possible to provide rules together with a commentary.

*c) A Combination*

It would obviously be possible to provide a combination of core principle, other rules and guidance, whereby there were a hierarchy. A number of core principles could be established which could be bolstered by some specific rules (for example, requiring insurance cover, pupillage etc) and by guidance about the interpretation of the principles and rules. This could provide a satisfactory way of defining barrister's duties and avoid an unduly legalistic approach to the interpretation of the Code.

Plain English

30. It is envisaged that the Code will be written in plain English. It is important that consumers can understand the rules that govern the conduct of any barrister they instruct. However, many words in the Code have a particular legal meaning that is well understood by lawyers, if not by lay people. There is a danger that changing words to make them clearer may have the effect of changing this meaning. This will need to be carefully considered in the drafting.

31. Decisions on the form of the Code will clearly influence the drafting of it and of amendments. We therefore seek early views on what, if any changes are necessary.

**Q.1: Should the structure of the Code be amended to adopt a structure of core principles supported by more detailed rules and guidance?**

**Q.2: If so, are the values set out at paragraph 20 an appropriate starting point for those principles?**

**Q.3: Are there other values that ought to be including within the principles?**

**Q.4: Are there other points that need to be considered in considering the structure of the Code?**

## **2. The areas of the Code to be reviewed**

32. In order to simplify the task of deciding which areas of the Code in particular need to be reviewed, the Code has been broken down into the following sections:

- (1) Quality and entry requirements
- (2) Business structures and the restrictions on the work that barristers can undertake;
- (3) The rules governing acceptance of work and client care and customer service;
- (4) The duties of employees and the administration of Chambers;
- (5) Maintaining independence, integrity and the duties to the court;
- (6) Employed Barristers and Non-practising Barristers offering Legal Services.
- (7) The Disciplinary Rules

33. In each section, this paper seeks to set out the areas of the Code that the Committee believes needs to be reviewed and why. Comments are sought on these areas and whether there are other provisions or principles that should be reviewed.

### **3A Quality and Entry Requirements**

34. The requirements that must be met in order to practise as a barrister are as follows:
- (1) Possession of a degree of at least a lower second class;
  - (2) If that degree is not in law, completion of the Common Professional Examination;
  - (3) Successful completion of the Bar Vocational Course;
  - (4) Successful completion of Pupillage;
  - (5) If the individual wishes to practise as a self-employed barrister, to offer services to the public (for example as an employee of a solicitor) or to exercise rights of audience in the higher courts, he or she must practise for at least three years from the office of a “qualified lawyer” who must have been in practice for at least 6 years and have held full rights of audience for at least two years. This is referred to as the “three year rule”. The reason for this is that it is thought to be important that barristers in the early years of their careers should have access to an adequate infra-structure to support their practice and to advice from a more senior practitioner;
  - (6) In the first three years of practice undertaking at least 15 hours compulsory professional development (CPD) and 12 hours thereafter.
35. The aim of these requirements is to ensure that barristers are sufficiently trained so that the public can be assured that they will receive the right standard of service and representation from a barrister.
36. It is for consideration whether these requirements are effective in ensuring that those practising as barristers have the necessary competencies to perform their role now and in the future, not only on entry to the profession but throughout their practising career, and that the requirements are proportionate to the risk they seek to mitigate. In particular:
- (1) Almost 2000 people commence the Bar Vocational Course and will, in theory, compete for around 550 pupillages (although it must be remembered that a substantial proportion of that 2000 do not intend to practise in England and Wales). This suggests that the pupillage requirement represents a substantial barrier to entry to the profession (though, equally, it must be added that there is no evidence of under-supply in the market as it stands);

- (2) There have been anecdotal suggestions that the quality of the BVC is not challenging;
- (3) It is not clear that the training will meet the needs of a new environment in which ABS firms may be providing a wider range of services;
- (4) There is no assessment of the quality of pupil-supervisors;
- (5) There is no assessment of how successfully an individual has completed pupillage – very few people are not certified by their pupil supervisor as having completed it satisfactorily;
- (6) The “three year rule” does not require any assessment – the “qualified person” must simply practise from the same office;
- (7) The “three year rule” and the pupillage training requirements represent substantial barriers to practice, particularly in the employed Bar and in solicitors’ offices, where there are relatively few people with full rights of audience.
- (8) It is not clear that the CPD requirement is effective in ensuring that barristers maintain their core skills.
- (9) There is no formal requirement for appraisal or re-validation of barristers’ performance once they are fully qualified.

These questions cover a very substantial part of the Board’s work. They impinge on the work of the new Education and Training Committee, which will be reviewing the Bar Vocational Course and many of the other requirements for training. They will also be highly relevant for the Board’s review of quality. We propose to work with the Education and Training Committee and the Quality Assurance Committee to review these requirements and will publish a timetable in due course.

### **3B. Business structures and the restrictions on the work that barristers can undertake**

#### **Business Structures**

37. The Code currently permits barristers (assuming that they have complied with the practising requirements) to practise under the following circumstances:
  - (1) As self employed practitioners either on their own or from Chambers with other barristers (and with limited categories of other practitioners, such as foreign lawyers and retired judges);

- (2) As employed lawyers offering advice to their employers only (or on a contract for services provided that it is to single “employer”);
  - (3) As employees of solicitors and legal advice centres to offer services to clients of their employers;
  - (4) In association with foreign lawyers (including partnership) provided that such association is not with an English solicitor.
38. This means that barristers cannot practise as barristers in the following circumstances:
  - (1) As partners with each other;
  - (2) As partners with other English lawyers;
  - (3) As partners or directors with non-lawyers or as employees of firms owned either wholly or partly by non-lawyers;
  - (4) In any form of incorporated structure.
39. These rules are justified on the following grounds:
  - (1) The protect a barrister’s independence from outside influences; and
  - (2) If barristers were to go into partnership then they would be prevented from appearing against each other and, particularly in the provinces and niche areas, this might severely restrict access to advice for consumers.
40. On the other hand, it could be said that:
  - (1) The rules restrict the ability of barristers to seek investment and develop their practices (and indeed take advantage of tax advantages of incorporation) – and cause considerable problems for barristers wishing to work with international law firms abroad;
  - (2) Barristers might wish to give senior clerks or practice managers a greater stake in their practice than is presently possible.
  - (3) The rules restrict the ability of barristers who are not in self-employed practice to offer services which they are well-qualified to offer;

- (4) The market will adjust to any changes following any relaxation of the rules.
41. The rules against practising as a partner or co-owner with a member of another profession apply also to solicitors. The proposals in the Legal Services Bill are likely to permit ABSs in which lawyers and non-lawyers will be able to work together as owners or managers of firms offering legal services. The Bar Council has already published a consultation paper which seeks its members' views on how the Bar should respond to these proposals. It is clearly right that the Board should examine the implications as well.
42. There are a number of models that need to be examined:
  - (1) Barristers providing services through partnerships or companies of which the owners, partners or directors are all barristers offering services similar to those provided today;
  - (2) Barristers providing services in partnership or in companies with other lawyers offering (a) similar services to those currently provided or (b) a wider range of services, similar to those of solicitors, for example through employees;
  - (3) Barristers providing services in partnership or in companies with non-lawyers (as owners, managers or employees) where those services are (a) similar to those provided currently or (b) of a substantially wider range.
43. It would be possible for the BSB to permit the full range of these options now, subject to approval from the Lord Chancellor: it would not need statutory change, although the rules of many other professional bodies would also have to change. Any of these changes would have profound consequences for the way in which the Bar operates. The complications are even greater when associations with other non-legal professions, or the provision of different kinds of service are involved. The Legal Services Bill gives very little indication of the type of regulatory regime to be put in place for such associations. This will be a matter for the LSB in due course. It is of interest that Sir David Clementi has suggested that it would be sensible to concentrate first on associations between lawyers and between lawyers and lay people.
44. It is, therefore, proposed that the Board should restrict its consideration initially to consideration of partnerships or other business structures involving barristers, other lawyers and lay people.

#### Restrictions on Work

45. The Code of Conduct imposes a number of limitations on the work that self employed barristers can undertake. These include:



- (1) Restrictions on accepting instructions directly from lay clients;
  - (2) A prohibition on conducting litigation or inter partes work;
  - (3) A prohibition on collecting evidence and the restrictions on talking to witnesses;
  - (4) A prohibition on undertaking the general management of a lay client's affairs;
  - (5) A prohibition on handling clients' monies;
  - (6) A prohibition on providing advice in police stations.
46. These prohibitions do not apply to employed barristers. This is because employed barristers have been treated as being akin to solicitors. They are either "low risk" in that the employer is able to make a judgement about the sort of legal work that he or she wishes them to undertake or because they are employed in solicitors' offices under the regulatory control of the Solicitors Regulatory Authority (and hence their clients are protected by the Compensation Fund in the event of dishonesty).
47. For self-employed barristers, the prohibitions are thought to be justified for a number of reasons:
- (1) They permit barristers to concentrate on their core advocacy skills;
  - (2) Barristers are not trained to undertake the full range of work that solicitors are;
  - (3) Additional and more expensive regulatory requirements might be needed (particularly if barristers were to handle clients' money);
  - (4) By distancing the barrister from the client they preserve the barrister's independence.
48. Against this, it may be argued that they inhibit what barristers can do and may adversely affect competition. It is strongly arguable that they place barristers at a disadvantage against solicitors. They may also work to make barristers more remote from clients and less able to understand clients' cases and interests. Our view is that these restrictions need review and should be looked at as part of our review of the structures within which barristers can offer their services.

49. The restrictions on who may instruct a barrister are currently being considered by a working group. The results of that work will be taken into account in this review.

#### *Other Reserved Activities*

50. Under the present law, barristers are able to conduct reserved work in the fields of conveyancing, probate and immigration work. They may also act as Commissioners for Oaths. Of these, immigration work is not thought to cause a problem for barristers: the Immigration Services Commissioner has never suggested that the way in which barristers carry out the service causes a problem. It is likely, however, that the Legal Services Board may require the BSB to look at the way in which the other services are provided.
51. In practice, it is thought that very few barristers undertake conveyancing or probate work. Self-employed practitioners are able to draw the necessary documents but are not able (because of the restrictions in paragraph 401 of the Code) to undertake the ancillary work associated with domestic conveyancing or administering an estate (dealing with the other side, holding clients' money etc). Employed barristers may do so on behalf of their employers or for clients of solicitors where, of course, they will be supervised. There is no training on the BVC in either topic.
52. It is possible that in the future some barristers may wish to offer conveyancing or probate services. We propose to review our rules in this area as part of our review of business structures and restrictions on the work a barrister may undertake.
53. We see the restrictions on work and the restrictions on business structures as a key part of the review, which should be addressed as a high priority. We propose to issue a consultation paper which will examine the following areas:
  - (1) Whether a relaxation of the restrictions on barrister's work and in relation to business structures would affect access to justice as has been suggested;
  - (2) What would be the implications for clients?
  - (3) What changes or amendments to the rules on conflicts of interest would be needed;
  - (4) Whether the restrictions on the work that can be done by barristers are justified;
  - (5) If those restrictions are relaxed, what additional training or regulatory protection is needed?

- (6) How far the International Practice Rules need to be amended in the light of this;
- (7) What are the implications for the “cab-rank” rule?
- (8) Would the organisation, not just individual lawyers, need to be regulated?
- (9) Would regulatory authority over lay partners or owners need to be held by the BSB?

**Q.5: Are the questions at paragraph 53 the rights ones to ask? If not, what other areas should be considered?**

**Q.6: Is the BSB right to look only at the question of business structures involving barristers, other lawyers and lay people at this stage?**

### **3C Acceptance of Work and Instructions and Client Care**

#### Acceptance of Work

- 54. It is a clear requirement of any democratic justice system that members of the public should have access to legal advice and representation. This is particularly important where they are accused of unpleasant or serious crimes or are in conflict with the Government or other authority or are not wealthy. As a profession with particular rights to appear in the courts, it is very strongly arguable that this imposes a duty not to pick and choose cases but to ensure that the public has proper access to legal services of the quality that they need
- 55. The present position is that barristers are subject not only to the duty in section 17(3) of the Courts and Legal Services Act 1990 not to refuse advocacy services on inappropriate grounds, but under a positive duty to accept work if it is within their expertise, at an appropriate fee and they are free to do it. This is the “cab-rank” rule, set out at paragraph 602 of the Code. Obviously there are exceptions to this rule to prohibit barristers accepting work where they are subject to a conflict of interest, the matter is outside their competence etc (see paras 603 and 604 of the Code).
- 56. A number of issues concerning the acceptance of instructions are currently being addressed by the Standards Committee. Its review covers the following areas:
  - (1) The introduction of a standard term contract between barrister and instructing solicitor and the possible conflict between the contract terms and Code;

- (2) The requirement to document instructions and acceptance;
  - (3) Public access instructions;
  - (4) The requirement to ensure that fees are agreed;
  - (5) Conflicts of interest checks;
  - (6) Priority between competing briefs;
57. The remit of the review of acceptance of instructions as outlined above will cover a number of the principles of the acceptance of instructions. This work is well advanced and changes to the Code are expected to be considered by the Board in the autumn, in advance of the outcome of the wider review.
58. The fundamental issue of the merits of the cab-rank rule is not included in the work on acceptance of instructions. The cab rank rule has a number of advantages:
- (1) It preserves the barrister's independence of his or her client which is essential to the proper performance of a barrister's professional duties.
  - (2) The fact that a barrister is obliged to act for any client means that the acceptance of instructions cannot be taken to suggest any personal approval or endorsement of the client or his opinions or conduct.
  - (3) It facilitates access to justice.
59. However, the cab-rank rule may be subject to the following criticisms:
- (1) In requiring barristers to represent people they disapprove of or achieve results which go against their profoundly held beliefs, it could be said to be contrary to barristers' human rights;
  - (2) There are many exceptions to the rule and it has been suggested anecdotally that the rule is more honoured in the breach than the observance – certainly there have been very few prosecutions in front of Tribunals for breach of the rule.
  - (3) If the point above is true, there is little evidence that clients have difficulties finding barristers of a suitable level to represent them and it may be that the rule is disproportionate;

60. We will review whether the cab-rank rule remains appropriate for the Bar as part of this consultation. This issue will be of particular importance in the light of concerns about ABSs.
61. A further issue arises over legally aided work. Paragraph 604 contains a provision which deems legally aided work to be a reasonable fee, unless otherwise deemed by the Bar Council. The Bar Council decided that the remuneration levels of the graduated fee schemes in criminal and family work were not reasonable in 2003 and 2001 respectively. It is arguable that, in the light of the Carter recommendations and other developments, the BSB should look at this question, if only to clarify the status of legally aided work.

### Client care and customer service

62. Certain fundamental principles of client care are expected of all practising barristers. They include duties:
  - (1) To be courteous and act promptly, conscientiously, diligently and with reasonable competence;
  - (2) Not to undertake tasks which they know they are not capable to handle, or they do not have adequate time to prepare for or to perform and cannot discharge within the time requested;
  - (3) To preserve the confidentiality of their lay client's affairs;
  - (4) To inform clients if they believe that their best interests are not being served by their solicitor and to advise them that those interests may be better served if they obtained alternative representation;
  - (5) To keep records of fee notes and provide them to clients on request;
  - (6) To have a complaints system and deal appropriately with complaints.

In addition, barristers who undertake public access work are required to send a client care letter setting out fully what they will undertake and the basis on which fees are charged.

63. Barristers' relations with clients are, in most cases, different from those of solicitors. The overwhelming majority of lay consumers deal with them through solicitors, while most commercial clients are highly sophisticated and able to impose their own service standards. On the other hand, it is arguable that many consumers are confused about the relationship between their solicitor and their barrister and are unsure of what a barrister's role is or what level of service and speed they can

expect. It may be arguable that all barristers should provide written client care letters and that there may be other service standards which should be imposed by the Code.

64. Good client care is a crucial feature of any profession providing services. The Bar should aspire to the highest standards of service and it needs to take notice of its consumers. We think that some research may be necessary to ascertain consumers' needs from barristers.

**Q.7: Are there other issues in connection with the acceptance and refusal of work that ought to be considered?**

**Q.8: Are there other aspects of client care that ought to be considered?**

### **3D Duties of Employees and the Administration of Chambers**

65. The current code is largely silent on the relationship between a head of chambers or an individual barrister member of chambers and the employees of chambers such as clerks, practice managers and administrative support staff. The present obligations are limited to requiring a head of chambers to ensure that:

- (1) Chambers are administered competently and efficiently and are properly staffed;
- (2) All employees and staff are competent to carry out their duties and do so in a correct and efficient manner.

66. Thus, where an administrative mistake arises (for example, a double booking), the barrister is responsible for that, even though the fault is actually the clerk's. Where a clerk acts dishonestly or incompetently, it is for Chambers to take appropriate action having regard to the relevant principles of employment law. The Bar Council operates a voluntary arbitration scheme for resolving disputes between barristers and clerks.

67. The advantage of this approach is that it applies the normal principles of employer and employee. The disadvantage is that it can be difficult to blame a junior member of Chambers for administrative failings in the clerks' room over which, indeed, the Head of Chambers him or herself may have little control.

68. It is likely to be disproportionate for the BSB to impose requirements about who Chambers should and should not employ or to have any regulatory authority over individual clerks and employees. However, it is for discussion whether there ought to be some power, akin to that held by the Law Society, to prohibit Chambers from employing individuals who have, for example, acted dishonestly or criminally in the course of their employment.

69. Further questions arise as to duties with regard to colleagues. At the moment, there are no formal duties to colleagues beyond the general duty on Heads of Chambers to treat all members fairly and equitably and to take reasonable steps to ensure that members are insured with the BMIF and complete their CPD requirements. However, it is arguable that this leaves a considerable gap in the following circumstances:
- (1) Where a barrister appears to have a health problem which affects his or her ability to practise competently;
  - (2) Where a barrister accepts a piece of work which is beyond his or her competence;
  - (3) Where a barrister's behaviour or work falls below that normally expected of a barrister – eg bullying within Chambers, delay or where the Chambers complaints procedure discloses poor work.
70. Heads of Chambers have their own remedies in this field: they can expel individuals from Chambers or deal with the matter informally. They are under no duty, however, to report this to the BSB. Nor have they any duty to take action which might help the barrister improve or adjust his or her behaviour. This may well be compatible with the fact that all barristers are self-employed, but it does not sit well with a situation where Chambers are increasingly looking like firms or brands. Nor is it consistent with modern good practice in other professions.
71. The Bar Council issued guidance recently on reporting professional misconduct which encouraged barristers to bring issues to the attention of the Complaints Committee if they considered that a barrister had committed serious misconduct. This was the subject of considerable debate.
72. It is suggested that this is an area which needs to be reviewed, but that there is little evidence yet of there being cause for concern or a major area of risk. Moreover, the regulatory regime governing ABSs may clarify the duties of principals with regard to their colleagues and employees. It is proposed, therefore, that this area should not be reviewed immediately but put off to a later stage.

**Q.9: Do you agree that the regulatory position with regard to employees and colleagues needs to be reviewed? Is it correct that this can wait until a later stage in the review?**

### **3E. Maintaining Independence, Integrity and Duties to the Court**

#### **Maintaining Independence**

73. The Bar's independence is one of its essential features. Clients must have access to advice and representation which is fearless and in their best interests. Equally, judges rely on barristers' integrity to advise them about the law and to ensure that proper disclosure is made. It is argued that independence is supported by a number of provisions of the Code:
- (1) By prohibiting barristers from acting in cases where, as a result of the connection with the client or another party, their independence might be prejudiced (paragraph 603(d) of the Code);
  - (2) By prohibiting referral fees and other forms of payment for work from those who can instruct barristers; and
  - (3) By prohibiting gifts or other inducements which might be thought to affect a barrister's independence. This is currently being reviewed by the Standards Committee;
  - (4) By limiting the circumstances in which barristers can advertise or comment to the media.
74. It has been suggested that the prohibition on referral fees and payment for work are anti-competitive because:
- (1) They hamper the way in which a barrister is able to obtain instructions or develop business relationships;
  - (2) They place barristers at a relative disadvantage compared to other legal professionals, such as solicitors, who are permitted to pay a commission for the referral of work.
  - (3) The ability of the Bar to compete with other legal professionals and to build commercial arrangements free from unduly restrictive barriers is fundamental to promoting access to the profession.
75. It has also been suggested that the restrictions on advertising (particularly the ban on advertising success rates) and on commenting to the press on current cases in which the barrister is involved may be disproportionate. We propose to look at these at the same time.
76. While the issue of independence is an important question, we do not believe at the moment that there is an urgent need to review this. We would propose that it be considered at a later stage in the review.



## Integrity

77. Barristers are required to act with integrity, both in their personal lives and in their professional lives. Generally, the BSB takes the approach that it is less concerned about barristers' conduct of their private affairs unless that conduct is actually criminal or might involve use of the title to obtain a dishonest advantage. This can mean that conduct which a number of people would regard as "sharp" or disreputable goes unremarked. It may be appropriate to consider this.
78. The Code also requires barristers not to discriminate (para 305). This is supplemented by comprehensive guidance. Our understanding is that this complies with the relevant legislation. We will continue to monitor good practice in this area and to amend the Code if necessary. We do not propose to include it specifically in this review.

## Duties to the Court

79. The Code sets out certain duties to the court and the proper administration of justice that are expected of all practising barristers. They represent ethical standards which barristers must follow. They include duties:
- (1) Not knowingly or recklessly to mislead the court;
  - (2) Not to coach witnesses;
  - (3) Not to advance contentions which are not properly arguable;
  - (4) To ensure that the court is informed of all relevant decisions and legislative provisions whether favourable or otherwise;
  - (5) Not to adduce evidence otherwise than from the client or devise facts to advance the client's case;
  - (6) Not to make statements or ask questions which are merely scandalous or intended to vilify or annoy a witness or some other person;
  - (7) Not to impugn the character of a third party unless they have given that party the opportunity to answer that allegation;
  - (8) Not to suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersions on the conduct of any person unless such allegations go to a matter in issue which is material to the client's case and appear to be supported by reasonable grounds;

(9) Not to act where there is a conflict of interest.

80. The duties are extensive but may not be inclusive of all situations. It is clearly important that the Code properly reflects modern litigation practices and that the defined duties cover all common eventualities. It could be argued, for example, that a lack of a requirement to assist litigants in person has a detrimental affect on the effective administration of justice. Given the importance of ensuring that the balance between a barrister's duties to the court, the administration of justice and to third parties, it is proposed that this is included in the review of the Code, though at a later stage of it.

**Q.10: Do you agree that these duties should be reviewed? Is it right to leave this to later in the review?**

**Q. 11: Are there other parts of the Code which affect independence which should be reviewed?**

### **3F Employed Barristers and Non-Practising Barristers offering Legal Services**

#### Employed Barristers

81. Employed barristers are treated as practising barristers, have similar rights and are subject to broadly similar duties. They are able to undertake a wider range of services than the self-employed Bar. Equally, they do have concerns that the practising requirements may place undue barriers in their way and that some of the rules (eg paragraph 503, limiting their ability to work under a contract for services) are unnecessarily restrictive.

82. The BSB considers that these concerns can be addressed in the mainstream of the work set out above. In particular, the work on quality may address the concerns about the practising requirements, while the work on business structures is likely to deal with concerns about the environments in which employed barristers may practise.

#### Non-Practising Barristers offering Legal Services

83. In England and Wales only relatively few legal services are reserved to lawyers – rights of audience in the higher courts, rights to conduct litigation, conveyancing, and probate are the principal examples (non-lawyers undertaking immigration work are regulated by the Immigration Services Commissioner). Anyone can provide legal advice or appear in tribunals even if they have no qualification at all. Sir David Clementi looked at the issue in his review of the regulation of legal services and took the view that it was not necessary to regulate this area further, though the Legal Services Bill contains powers to enable the range of reserved legal services to be expanded.

84. As has been indicated, only a relatively small percentage of those who are called to the Bar actually practise as barristers, whether as self-employed or employed barristers. This is likely to be because the small number of pupillages available effectively prevents them from meeting the requirements for practice. Many of them still provide legal services, for example as employees of solicitors. A number also will wish to offer legal services in ways which are not permitted by the Code (for example, as employees of non-lawyers offering services to other clients, or in partnership).
85. The position and status of these barristers has caused considerable debate in recent years. The approach taken by the Code of Conduct since 2000 has been that such people are entitled to offer legal services in the same way as any other member of the public is but, in doing so, should not hold themselves out as barristers. There has been an exception granted to barristers who were called before 2000 to use the title subject to providing a “health warning” as to their status<sup>1</sup>. Their status, so far as the Code is concerned is that they are “non-practising barristers”. Many non-practising barristers are concerned that these rules effectively prevent them making use of a qualification that they have worked towards.
86. Non-practising barristers remain subject to the disciplinary jurisdiction of the BSB but only the basic rules about behaving honestly and not bringing the profession into disrepute apply to them<sup>2</sup>. This leaves it arguable that the BSB is limited in its sanctions against non-practising barristers who offer poor service to the public – particularly in what may be thought to be areas of particular risk – eg employment tribunals.
87. This issue has been the subject of frequent reviews in recent years. Moreover, many of the discussions elsewhere in this paper are likely to affect existing non-practising barristers. This is particularly the case in respect of the likely consultations on the qualifications requirements and on the structures of practice. For these reasons, it is suggested that the BSB should not look at this issue again immediately, but await the results of its work on the other issues.

**Q.12: Are there other aspects of the rules governing employed and non-practising barristers which should be reviewed?**

**Q. 13: Do you agree that a review of the rules governing non-practising barristers should wait until later in the review?**

### **3G      Disciplinary Rules**

88. Although they do not strictly relate to the duties of barristers, the rules governing the complaints procedure and disciplinary hearings form part

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<sup>1</sup> See Para 206

<sup>2</sup> ie Para 301

of the Code. The Complaints Commissioner is undertaking a review of the system and it is likely that a number of issues will need consultation in the light of that. Nevertheless there are a number of issues which will not be covered by the review. These include:

- (1) The standard of proof required in disciplinary tribunals, which currently remains the criminal standard. This is now unusual within professional bodies;
- (2) The level of evidence that the Complaints Committee needs to take into account before referring a matter to a Tribunal;
- (3) The procedures governing Fitness to Practise.

89. It is proposed that these issues should be considered in the context of the implementation of the Commissioner's review.

**Q. 14: Do you agree that the Complaints and Disciplinary Rules need review? Is it appropriate to carry this out in the context of the Commissioner's review?**

### **3H Other Issues**

90. This paper has sought to cover most of the main areas in the Code that are likely to benefit from review. Nevertheless, there may be others that we have missed. We would be grateful for suggestions about these.

**Q. 15: Are there other areas of the Code that ought to be considered?**

### **The Timescale for the Review**

91. The Code is a complex document and a full review of it will take some years to complete. As has been indicated, the Board proposes to deal with the issues outlined here in tranches and will implement change gradually. This consultation paper seeks views on:

- (1) The scope of the review;
- (2) Whether the issues outlined here are the right ones;
- (3) Whether changes are needed to include core principles, guidance etc;
- (4) Whether the format of the Code needs to be altered (see paras 95-101 below).

92. The Board proposes to undertake the review in three phases:

### **Phase 1 - 2007**

In 2007, work will commence on:

- (1) Business structures and the restrictions on the work that barristers can undertake. It is proposed to issue a consultation paper by the end of 2007.
- (2) The introduction of core principles/secondary rules, if so decided following this consultation.
- (3) The rules governing acceptance of work and client care and customer service.
- (4) The Complaints and Disciplinary rules.

### **Phase 2 – 2008**

In 2008, work will commence on:

- (1) Maintaining independence and the duties to the court.
- (2) The format of the Code will be considered, drawing from the results of the questionnaire at Appendix 4

### **Phase 3 – 2009**

In 2009, work will commence on:

- (1) The duties of employees and the administration of chambers.
- (2) Non-practising barristers.

93. As has been suggested, the other matters set out in the paper will be dealt with through our reviews of Quality and of the BVC. The on-going work set out in Appendix 2 will be incorporated in to each of the phases as appropriate.

94. A detailed timetable for the review will be produced in the autumn of 2007 once the responses to the consultation paper have been considered.

**Q. 16: Does this order appear to you to reflect appropriately the urgency and importance of these areas?**

## **PART IV - FORMAT OF THE CODE**

95. The format in which the Code is published needs to be considered also. At present the Code is published in a loose-leaf file, roughly in A5 size. Three copies are sent automatically to all Chambers (on the basis of one for the Head of Chambers, one for the clerks' room and one for the Chambers' library). Single copies are sent to sole practitioners. Individual copies can be bought for £25. The Code is also published on the Bar Standards Board's website and can be downloaded from there free of charge. Originally, copies were sent to every self-employed barrister, but this proved to be prohibitively expensive. The Bar Council also licenses the Code to be published in practitioner handbooks, such as Archbold. Copies of the Code are also sent to courts, to BVC course providers and to members of the public who wish to pay for a copy.
96. The advantages of the present system are:
- (1) They give self-employed barristers access to a hard copy of the Code at Chambers.
  - (2) The size makes it relatively easy to transport the Code to court.
  - (3) The loose-leaf format enables it to be readily updated. This enables updates to the Code to be distributed to barristers as they occur.
  - (4) The website, in practice, ensures that barristers have ready access to the Code should they need it.
97. The disadvantages are:
- (1) In practice, the hard copy of the Code does not get to every barrister;
  - (2) Employed barristers only have access to the Code via the web;
  - (3) It is not always easy for busy practitioners to keep their Codes up to date;
  - (4) Some concerns have been expressed that the version on the web is not easy to search.
98. Possible alternative approaches for publishing the Code include:
- (1) A bound copy (either in paperback or hardback), which could be supplemented regularly by updates;

- (2) On CD-rom;
- (3) On the website only.

99. A bound copy of the Code is likely to be easier to handle than present version, but it will be more difficult to update and the supplements might get lost. It will be no cheaper than the existing version. A CD-rom will be considerably cheaper and would enable copies to be provided to all barristers. On the other hand, it will get out of date and would need to be supplemented by new CDs. It relies on all barristers (and other users) having ready access to a computer. While this is likely to be the case for the vast majority of barristers and other professional users, it is still not universally true.
100. Our preliminary view is that there will continue to need to be some hard-copy versions of the Code of Conduct. It will also be essential to keep the Code on the website – this is also the easiest way of checking the most up to date version. We seek views, however, on whether hard copy versions should continue to be sent to Chambers or whether, instead, CD-roms should be sent, as a matter of course to all barristers.
101. A detailed questionnaire about the format of the Code is attached to this document at [Appendix 4](#). It can also be completed on the website.

## **List of Questions**

### **Drafting of the Code (paras 23 - 31)**

- Q.1: Should the structure of the Code be amended to adopt a structure of core principles supported by more detailed rules and guidance?**
- Q.2: If so, are the values set out at paragraph 20 an appropriate starting point for those principles?**
- Q.3: Are there other values that ought to be included within the principles?**
- Q.4: Are there other points that need to be considered in considering the structure of the Code?**

### **Business Structures (paras 37 - 53)**

- Q.5: Are the questions at paragraph 53 the rights ones to ask? If not, what other areas should be considered?**
- Q.6: Is the BSB right to look only at the question of business structures involving barristers, other lawyers and lay people at this stage?**

### **Acceptance of Work and Client Care (paras 54 - 64)**

- Q.7: Are there other issues in connection with the acceptance and refusal of work that ought to be considered?**
- Q.8: Are there other aspects of client care that ought to be considered?**

### **Duties of Employees and the Administration of Chambers (paras 65 – 72)**

- Q.9: Do you agree that the regulatory position with regard to employees and colleagues needs to be reviewed? Is it correct that this can wait until a later stage in the review?**

### **Maintaining Independence, Integrity and Duties to the Court (paras 73 - 80)**

- Q.10: Do you agree that these duties should be reviewed? Is it right to leave this to later in the review?**
- Q. 11: Are there other parts of the Code which affect independence which should be reviewed?**



**Employed Barristers and Non-Practising Barristers offering Legal Services (paras 81 – 87)**

**Q.12: Are there other aspects of the rules governing employed and non-practising barristers which should be reviewed?**

**Q. 13: Do you agree that a review of the rules governing non-practising barristers should wait until later in the review?**

**Disciplinary Rules (paras 88 - 89)**

**Q. 14: Do you agree that the Complaints and Disciplinary Rules need review? Is it appropriate to carry this out in the context of the Commissioner's review?**

**General**

**Q. 15: Are there other areas of the Code that ought to be considered?**

**Q. 16: Does this order appear to you to reflect appropriately the urgency and importance of these areas?**