

**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

## **Review of the Code of Conduct – Consultation Report**

**The Bar Standards Board's response to the consultation paper on the proposed new Code of Conduct for the Bar**

## INTRODUCTION

- 1.This report summarises the responses to the Bar Standards Board's (BSB) consultation paper 'Review of the Code of Conduct' published in January 2011. It also responds to some of the comments made by respondents and explains how the Board's policy position has evolved in light of the consultation and recent developments in the BSB's overall regulatory strategy.
- 2.The consultation closed on 21 April 2011 and responses have been given careful consideration by members of the BSB's Practising Rules Working Group, by the Professional Practice Team and by members of the Board.
- 3.32 responses were received to the consultation. A list of respondents is at annex 1. The original consultation report is available at:

### [Code of Conduct for the Bar](#)

- 4.Since the publication of the Code Review in January 2011 the Legal Services Board (the LSB) has consulted on its Regulatory Standards Framework, which sets out the LSB's view of regulatory best practice. In the light of this, the BSB has taken the opportunity to revise the Code further based on the four cornerstones of legal regulation to which the LSB refer to in their framework. These are:
  1. Outcomes focused regulation;
  2. A risk identification framework
  3. Proportionate supervision; and
  4. An appropriate enforcement strategy
- 5.The BSB has been carefully considering the implications of this new framework and how the Code could be adapted to take account of it. This will involve some restructuring of the Code, including combining the Conduct and Practising Rules, and an increased emphasis on high level rather than detailed rules. The majority of the policy points arising from the January, consultation remain relevant and are discussed below.
- 6.The other major development is that in April 2011, the Board decided that it should undertake the regulation of certain kinds of Alternative Business Structures and of Legal Disciplinary Practices (LDPs) and barrister only entities. The Board is now developing a system of entity regulation. That will be based on and supplement the existing system of regulation for individual barristers.
- 7.The work on the Code has therefore been combined with the entity regulation project. The intention is to produce a new BSB Handbook which will contain all the rules applying to individual barristers and to those entities which are regulated by the BSB. A consultation document to be issued in January will cover both the new Code and the rules for entities and will contain drafts of most sections of the proposed new Handbook. The consultation will run for a period of three months.

## **NEXT STEPS**

8. Following the end of the consultation period, the BSB will consider the responses and incorporate revised rules into a draft Handbook for submission to the Legal Services Board as part of its application to become a Licensing Authority. The aim is to make this submission by late summer or early autumn. Once LSB approval for the rule changes has been obtained, a decision will be made as to whether to go ahead with the changes to the rules which affect only individual barristers in advance of obtaining approval to be a Licensing Authority as that process will take considerably longer. The alternative is to defer the introduction of the new Handbook until entity regulation is introduced.
9. These developments mean that it is no longer intended to introduce the new Code in the first quarter of next year as had been previously proposed. Some amendments will however be made at that time to deal with immediate concerns.

## ANALYSIS OF CONSULTATION RESPONSES

### Summary Policy Decisions

10. The following is a summary of policy decisions taken by the Board in response to the consultation. Where an issue will be subject to further consultation in the forthcoming code/entity regulation consultation, this has been highlighted in the body of the report.

#### Media comment

- **The rule prohibiting media comment will be removed and this will be replaced by guidance. This change will be made in early 2012.**

#### Reporting misconduct

- **The Compliance Rules will retain the rule which places a positive duty on barristers to report serious professional misconduct of other members of the Bar;**
- **Guidance will define what amounts to serious misconduct and the circumstances in which a barrister is obliged to report such conduct by another barrister. The guidance will also underline that a barrister's obligation will always be to maintain their own independence and form their own view.**

#### Bankruptcy

- **Bankruptcy will be deleted from the list of examples of conduct which would usually be regarded as conduct likely to diminish the trust and confidence which the public places in the barrister or the profession.**

#### Unregistered barristers

- **All core duties will apply to unregistered barristers. As this is a significant change from previous proposals, there will be a further opportunity to comment on it, in response to the forthcoming code/entity regulation consultation;**
- **Revised guidance for unregistered barristers and on holding out as a barrister will be issued alongside the new Code;**
- **Unregistered barristers who provide legal services to potentially vulnerable clients (small businesses and charities) will be required to provide an explanation of their position and obtain written confirmation that this explanation has been provided. A model explanatory note for clients will be issued alongside the new guidance.**

#### Undeeming of legal aid fees

- **Barristers will be required to make their own decisions on whether a proposed legal aid fee is a proper professional fee. It would not be appropriate for the BSB, as a regulator to take a general view of whether particular fees are, or are not, proper professional fees.**

#### Shared responsibility for Chambers management

- **Members of chambers will be collectively responsible for the administration of chambers;**
- **What is required of individual members will depend on their position in Chambers. Guidance will be produced to help, in particular, junior barristers to understand the nature of their personal responsibilities;**
- **Disciplinary action would only be considered in the event of a continuing failure or of a complaint about a serious failure.**

#### Three year rule

- **Barristers subject to the three year rule will continue to be required to have the same principal place of business as a qualified person.**

#### Dual qualification

- **Barristers who are dually qualified will be allowed to practise as barristers even if they also practise as a solicitor.**

#### Web based publication

- **The Code will be principally web based. For those who have disabilities and cannot access the internet, hard copies will be made available.**

## **FORMAT OF THE NEW CODE**

11. Part 2 of the consultation paper discussed the basic structure and the proposed new framework for the revised Code. This included bringing all relevant rules into the Code rather than having some in Annexes or as separate regulations. It also included setting out guidance in the section on Conduct Rules, but not in other sections. The introduction to the Code made it clear that both guidance contained in the Conduct Rules and guidance issued by the Board from time to time should be taken into account when interpreting and applying the Rules and will be taken into account in considering any allegation of a breach of a Core Duty or a rule.

### *Structure of the Code*

12. Generally the structure of the Code and the inclusion of all relevant rules were welcomed but there were comments about difficulty in finding relevant sections and, in particular, about potential confusion between rules and guidance in the Conduct Rules.

13. Daphne Perry, a Plain English consultant provided a useful response on the accessibility, structure and clarity of the draft Code of Conduct. In particular attention was drawn to the need to distinguish between particular sections of the Code, and the need for a simple numbering system, that would allow the reader to easily identify which part of the Code they need or are examining.

14. The Inner Temple Bar Liaison Committee stated that generally there should be a clearer separation (possibly with clear headings, subheadings and an index) within the Code.

15. Respondents generally felt that bringing all the rules together in one consolidated document will benefit barristers and users of their services.

### ***BSB Response***

16. In the light of the comments on the structure of the Code and developments in relation to entity regulation the revised version of the Code which will be consulted on in January 2012 has made a number of changes to the structure. This is not only to make the Code more user-friendly overall but also to incorporate entity specific rules. Further detail on the changes will be available in the forthcoming consultation.

### *Use and status of guidance*

#### **Q1: Do you agree with the approach adopted for guidance in the new Code?**

17. Guidance forms a central part of the Conduct rules in providing interpretation and amplification of how the Core duties and Rules will apply in practice. The BSB will also produce guidance from time to time on good practice and the kinds of issues which barristers should consider when seeking to apply the rules in various circumstances.

18. Nearly all respondents (approximately 81%) agreed with the approach adopted for guidance in the new Code. Those who agreed did however, state that the BSB should ensure that guidance issued at a later stage be properly communicated to the profession. Some respondents commented that merely including the guidance on the

BSB website would be an insufficient means of communication and dissemination on its own.

19. The remaining respondents were concerned about the interaction and distinction between the rules and guidance, noting that their categorisation is not always easy to appreciate. In particular that the guidance has an ambiguous status within the Code and as a result it may be difficult to judge when to follow the guidance and when it might be permissible to depart from it.
20. The Inner Temple Bar Liaison Committee as well as a few others pointed out that there is a danger that guidance which is located amongst the rules maybe perceived to have a higher status than guidance issued separately, at a later date, in other locations. They suggested that the guidance should be located separately to the rules.

### **BSB Response**

21. The BSB understands the concerns raised about the interaction and distinction between the rules and guidance. As part of the work on revising the Code the BSB has taken respondents' comments into consideration and some changes to the presentation of guidance will be made. Respondents will be invited to comment on the changes, as part of the consultation due to be issued in January.

### *Application of the new Code*

**Q2: Do you agree with the approach to the application of the Rules?**

**Q3: In particular, do you agree with the approach to the dis-application of Rules relating to barristers employed by or managers of a Recognised Body not regulated by the Bar Standards Board?**

**Q4: Do you think our approach to regulatory conflicts is sufficient?**

**Q5: The Board does not believe that there are any regulatory conflicts. Do you agree or are there any conflicts that we have not identified?**

22. The draft Code consulted on in January 2011 aimed to make it clear which parts of the Code would apply to various categories of barristers. The Board also proposed a new rule in relation to barristers who are managers or employees of Recognised Bodies regulated by another approved regulator. The rule reflected section 52 of the Legal Services Act 2007 (the 2007 Act), which provides that where there is a regulatory conflict between the rules of the entity regulator and the rules of the regulator of the individual authorised person, the rules of the entity regulator will take precedence.
23. The majority of respondents agreed with the BSB's approach to the application of the rules and in particular to the dis-application of Rules relating to barristers employed by or who are managers of a recognised body, not regulated by the BSB. No further regulatory conflicts were identified by respondents.
24. The Bar Association for Commerce, Finance and Industry (BACFI) expressed the view that all barristers who provide legal services should be fully regulated. BACFI are concerned that there is a real regulatory risk in not applying most of the Core Duties to

barristers without practising certificates who offer legal services. The User Group expressed similar concerns.

### ***BSB response***

25. The application of the rules is being developed in light of comments received and also because application of the rules will be extended to entities. The revised draft which will be consulted on in January, will aim to set out clearly how and to whom the rules apply.

26. In the light of comments from BACFI and the User Group, it is now proposed to apply all the Core Duties to all barristers irrespective of whether they hold practising certificates. Further details of the amendments will be included in the January 2012 consultation.

27. Regulatory conflicts will become more significant with the introduction of entity regulation and the January 2012 consultation will address these issues further. The BSB will, however continue to work with other approved regulators to ensure that regulatory conflicts are identified and managed appropriately. The proposed approach to the disapplication of rules to managers and employees of bodies regulated by a different Approved Regulator will be adopted.

### **CONTENT OF THE NEW CODE**

28. Part 3 of the consultation paper looked at specific parts of the draft Code in more detail. Some of the sections contained in the draft Code were not consulted on in this consultation as they reflected the content of the current rules (eg the Bar Training Regulations). The remaining sections were consulted on in more detail.

#### *Introduction*

29. Very few comments were received on the wording of the introduction in the draft Code. The need for further clarity was raised through general comments on the structure of the Code. A proposed new introduction will be included in the revised version of the Code, which consultees will have the opportunity to comment on as part of the January 2012 consultation.

#### *The Conduct Rules*

#### Media comment

**Q7: Do you agree that there should be no rule prohibiting media comment, and that guidance should be provided instead?**

30. Barristers are currently prevented from expressing a personal opinion to the press or other media, or in any public statement on the facts or issues arising in any anticipated or current proceedings in which they appear. The Board reviewed the rule and proposed not to replicate it in the new Code, but to replace it with guidance to barristers about how to exercise their professional judgement. The Board concluded that the continuation of the prohibition was not necessary and that guidance on the need to consider issues such as the interests of the client, duties to the court and maintaining independence would be a more proportionate way of managing the risks.

31. Respondents were divided on this issue. Of those who commented, approximately 64% agreed that the rule should be replaced with guidance and 36% disagreed. Those that disagreed were concerned by the rationale put forward in removing the rule, in particular because such an approach is adopted by the Solicitors Regulation Authority (SRA). The responses pointed out that there are vital differences between the solicitors and barristers professions and that solicitors are the part of the profession that deals with the public more frequently so approaches to media comment could not and should not be applied in the same way.
32. Respondents generally felt that barristers would come under pressure, possibly from their clients, to provide comment to the media and in the course of doing so, provide their own personal opinion, which could ultimately put barrister's actual and perceived independence at risk.
33. The Bar Council's Professional Practice Committee (PPC) provided a particularly detailed response to this issue. They observed that in the absence of a specific rule, the client would run the risk that the barrister might express in a media comment or public statement, personal opinions which were inimical if not hostile to the position taken by the client in the case. To avoid this risk the client would have to make an inquiry about the barrister's personal views before instructing him, which would bring its own difficulties. The PPC like other respondents identified that barristers may come under greater pressure to provide media comment and run the risk of becoming personally identified with the client's case or cause, which could potentially change the public's perception of barristers, as well as damaging the independence of the profession.
34. The Criminal Bar Association (CBA) was concerned about the proposal as the protection the current rule affords is particularly valuable to those working within the criminal justice system. Criminal barristers will often find themselves instructed in cases which attract strong media comments and arouse public hostility. The existing rule protects barristers from allegations that their independence has been compromised.
35. Albion Chambers identified three specific risks as a result of removing the rule:
1. Barristers will come under pressure from their clients to make media comments;
  2. Some barristers may seek to build their own profile by making media statements;
  3. The rule has the potential to create the risk of a 'race to the bottom' in standards, where lawyers seek to outdo each other in the media.

### ***BSB Response***

36. The BSB has thoroughly considered responses on this issue; however it remains of the view that the rule prohibiting media comment should be replaced with guidance. The BSB considers the existing rule as currently drafted serves a very limited purpose, and that a total prohibition in these limited circumstances is disproportionate.
37. The existing rule only prohibits statements of opinion to the media, rather than general statements to the media. The majority of concerns expressed by respondents therefore apply equally to the existing rule. For example the current rule would allow a barrister to state that "my client says he is innocent" but stating "in my opinion my client is innocent"

would not be permissible until the trial was over. Nevertheless many of the concerns reflect real potential risks to clients or barristers. The new guidance will suggest that a barrister should be very careful about expressing a personal opinion to the media, for the very reasons highlighted in the consultation responses and should do so only if it would be in the client's interests. It will also underline the importance of maintaining the barrister's independence.

38. As this change removes a prohibition which the BSB considers no longer to be justified, the amendment will be made early next year, subject to LSB approval. The BSB will monitor the position in relation to media comment in light of the change and of the concerns expressed by respondents.

#### *Specific questions on the Conduct Rules*

**Q8: Do you have any comments on the revised drafting of the Conduct Rules?**

**Q9: In particular, do you agree with the drafting of the rules in relation to:**

- a) A duty to report misconduct**
- b) A duty to co-operate with the regulator and Legal Ombudsman**
- c) Equality and Diversity**
- d) The application of the Conduct Rules to self employed and employed practising barristers**
- e) Applying CD2 to barristers without practising certificates ('unregistered barristers')**

#### *Drafting of the Conduct Rules*

39. Various drafting comments were received on the Conduct Rules. The BSB has considered all such comments and the revisions will appear in the revised Code being consulted on in January 2012 as appropriate.

#### *Reporting misconduct*

40. The BSB issued a consultation paper specifically on the Conduct Rules in March 2009. This paper sought views on whether a positive duty should be introduced which requires barristers to report the professional misconduct of other members of the Bar. The position adopted in this paper was that such a duty should not be used, as the duty could be used as a litigation tactic. Responses broadly supported this stance, however in light of responses from consumer organisations, the Board re-opened the debate on whether such a duty was necessary and appropriate for the Bar.

41. As a result of those discussions the Board resolved to include a positive duty to report in the Compliance Rules. Whilst the Board accepted the inclusion of such a requirement would be controversial, they could find no compelling argument that the Bar is in so unique a position as to justify the absence of the provision. Respondents were invited to comment on the drafting of the rules in relation to this provision.

42. Approximately 35% of respondents continued to disagree with the proposal for there to be a duty to report professional misconduct. In general it was felt that a barrister should not be placed at risk of professional misconduct themselves in cases where s/he is reluctant to report a fellow barrister because there is uncertainty about whether the alleged misconduct is serious or not.
43. One respondent suggested that there should be a caveat to the rule so there is only a duty to report if it is in the interests of the administration of justice to do so. Others were concerned that the duty to report could be used as a litigation tactic and in general it was felt that there needed to be either clearer definitions of what constitutes 'serious misconduct' or clearer guidelines as to when the duty to report would arise i.e. should it only arise at the conclusion of a case so not to prejudice the interests of the client?
44. The Young Barristers' Committee (YBC) were concerned the duty to report may cause difficulties for young and inexperienced barristers in particular, who may not always recognise serious misconduct. The Committee suggested that the Code should expressly recognise the seriousness of any breach by a barrister of the duty to report misconduct will depend, in part, on that barrister's seniority and experience.
45. The CBA was particularly concerned about this proposal, as they felt it did not take the nature of the Criminal Bar into account. They suggested that the duty seems to ignore the first port of call in relation to any misconduct in court – the trial judge. Similarly if the misconduct concerns serious misconduct, in chambers, unconnected to any particular case, the barrister should report this to the head of chambers and not the BSB. The CBA as well as another respondent stated that reporting misconduct within chambers particularly where the perpetrator is a senior member of chambers can put more junior members in a very difficult position.
46. The Commercial Bar Association (Combar), considered that the new rules would operate against the public interest and produce uncertainty and disruption with little benefit. Combar pointed out that, as the "definitions" in the proposed rule 7 are non-exhaustive, the rule must therefore be read against the wider duties imposed on a barrister in the conduct of a case i.e. not to make any misleading statements/not to abuse your role as an advocate etc. Combar are concerned that any of the wider principles are potentially capable of being broken in a "serious way" by a barrister's opponent in litigation, which would give rise to the duty to report. In this instance Combar have stated that the opponent may make a counter-accusation of a tactical complaint, thereby obliging the BSB to conduct an investigation, which will ultimately mean both barristers will be deflected from the pursuit of their clients' interests.
47. The Equality and Diversity committee of the Bar Council commented specifically on misconduct that might arise as the direct result of a temporary or permanent impairment which may qualify as a disability. Such instances may raise questions about the barrister's fitness to practise and reasonable adjustments must be considered in circumstances where the barrister is disabled. The Committee said that under the current drafting there is a conflict where chambers are bound to report such matters but, for example, would wish to secure through informal routes the barrister's voluntary withdrawal from practice for treatment. The Committee recommended that in cases of fitness to practise barristers be exempt from reporting the misconduct where they are

able to secure a satisfactory outcome in respect of the barrister member who is not fit to practise.

48. There were also questions raised by a respondent as to whether there would be an obligation to investigate the misconduct before reporting, whether the obligation to report overrides the wishes of the client, and if there is any discretion to delay reporting until, for example, the conclusion of the litigation in which it arose.

### **BSB Response**

49. The proposal on the duty to report misconduct was specifically consulted on as part of the Conduct Rules consultation. Following this consultation, the Board decided that there should be a positive duty to report in the new Code, forming part of the Compliance Rules. The purpose of this consultation was to seek views on the drafting of the rules, as opposed to the proposal itself. Despite this and as a result of some respondents continuing to disagree with the proposal, the BSB revisited this issue. The BSB also sought the views of a User Group. The User Group agreed with the Board's decision to include a positive duty to report in the Compliance Rules, as it would ultimately serve consumer interests.

50. The BSB remains of the view that there should be such a rule and therefore this has been reflected in the revised draft which will be the subject of consultation in January 2012. It is in the public interest that serious misconduct should be reported so that the matter can be investigated and appropriate steps taken. In some instances, another barrister may be the person best placed to report such misconduct. BSB guidance already encourages barristers to report serious misconduct. The Board considers that the time has now come to make this a duty. It has reviewed whether there should be an exemption if reporting would not be in the interests of the reporting barrister's own client but has concluded that the client's interests should not outweigh the interests of justice and the public interest. The rule is anyway subject to the barrister's duty to keep the affairs of each client confidential. As regards the timing of reports, in practice the necessary investigation of any complaints would mean that no action is likely to be taken until after the conclusion of the hearing in question. The Board agrees that if there is an immediate concern during a court hearing, the appropriate course would be to inform the judge. This will be covered by guidance. Guidance will also be provided to assist barristers in determining what constitutes serious misconduct. It will also underline that a barrister's obligation will always be to maintain their own independence and form their own view and should not be compromised by the fact that the client may want his barrister to make such a report about another barrister.

51. The Board recognises that the new duty will require barristers to take difficult decisions. In doing so, they will have to exercise their professional judgement guided by consideration of the public interest. In the event of a complaint that a matter has not been reported when it should have been, the Professional Conduct Committee will take all relevant circumstances into account, and will only bring a case against the barrister if it concludes that it would be in the public interest to do so.

### *A duty to co-operate with the Legal Regulator and Legal Ombudsman*

52. The Board included a positive duty to co-operate with the regulator and Legal Ombudsman following responses received to the Conduct Rules consultation which was issued in March 2009. As a result of our approach to entity regulation, this proposal has been developed further in the revised Code, further details of which will be in the forthcoming consultation.

### *Equality and Diversity*

53. Following on from the consultation on the Conduct Rules in 2009, the draft Code introduced a positive duty on all practising barristers to take reasonable steps, to ensure that, at their place of work, there is in force a written statement of policy on equality and diversity and a written plan for implementing that policy.

54. The Inner Temple Bar Liaison Committee commented that the wording of the rules suggests a more onerous duty than that proposed in the consultation paper. The YBC thought that 5.4G would benefit from a specific reference to the fact that very junior barristers (i.e. pupils and those within the three year rule), are unlikely to find themselves in breach of rule 5.2 by sheer virtue of their low status in the hierarchy of chambers. Similarly the Equality and Diversity Committee of the Bar Council acknowledged that the provision may lead employed barristers and junior barristers to be concerned about their ability to challenge senior members of their organisation to put in place equality policies and implementation plans. The committee suggested the use of fuller guidance with examples to explain what is expected by way of reasonable steps by barristers with different practising status with differing levels of seniority and by barristers who maybe away from their place of work due to illness, disability, maternity or caring responsibilities.

55. The CBA suggested that the duty should be on the management committee and the head and deputy head of chambers, rather than individual members.

### ***BSB Response***

56. As well as being consulted on as part of the review of the Code, equality and diversity provisions were also subject to a separate consultation process conducted by the Equality and Diversity Committee of the Bar Council. Further information on how the equality and diversity rules will be taken forward will be available in the feedback report to the equality and diversity consultation.

*The application of the Conduct Rules to self employed and employed practising barristers and applying CD2 to barristers without practising certificates ('unregistered barristers').*

57. Respondents agreed with the content of the rules and how they applied to self employed and employed barristers.

58. The issue of unregistered barristers is discussed further below in response to question 15 of the original consultation paper.

## *Bankruptcy*

59. The draft Code included bankruptcy as an example of conduct which would usually be regarded as conduct likely to diminish the trust and confidence which the public places in the barrister or the profession and hence likely to be a breach of Core Duty 4. Responses to the consultation suggested that the reasons for bankruptcy varied greatly and that there should be no presumption that it breached Code Duty 4. The Board accepts that bankruptcy is of a very different nature to the other examples listed and has decided to delete it from the list of examples. Bankruptcy will still have to be reported to the BSB. The Professional Conduct Department will consider the circumstances and pursue the matter if appropriate. This is how bankruptcy is dealt with currently.

## *The Practising Rules*

**Q10: Do you agree with the proposed approach to the drafting of the Practising Rules?**

**Q11: Do you have any specific drafting comments?**

**Q12: Are there any omissions or unnecessary additions within the Practising Rules?**

60. The Practising Rules set out the business and practice standards and requirements contained in the existing Code. Much of the content replicated the terms of the existing rules but the layout was markedly different. The new Practising Rules sought to bring together into one section all of the existing rules relating to the requirements to practise as a barrister, as well as the administrative requirements.

61. Respondents generally agreed that bringing the rules together in one consolidated document will benefit barristers and users of their services.

62. Changes have been made generally to the structure of the Code and the Practising Rules will be integrated into the main body of the Code of Conduct. Further detail and the revised draft will be available in the forthcoming consultation.

## *Authorisation to practise*

**Q13: Do you agree with the above proposal to link CPD requirements to the renewal of practising certificates?**

**Q14: Do you have any comments on the way in which the authorisation to practise arrangements have been reflected in the Code**

63. The Board consulted in March 2010 upon proposals for the introduction of an authorisation to practise regime, in order to reflect section 13(2) of the Legal Services Act 2007 (individuals wishing to provide reserved legal services must be authorised to do so by the relevant approved regulator).

64. Following the authorisation to practise consultation the Board decided to link compliance with annual CPD requirements, to the annual renewal of practising certificates, as this would help to underline the importance of CPD. Therefore barristers who persistently fail to comply with CPD requirements could be refused authorisation to continue to practise. This is reflected in the practising certificate rules that provide one of the grounds on

which the BSB may refuse to renew a practising certificate is if the barrister has not complied with the CPD requirements applicable to him.

65. The majority of respondents had no further comments on the way in which the authorisation to practise requirements had been reflected in the Code, although there was still some disagreement with the linking of CPD to the renewal of practising certificates.

### ***BSB Response***

66. The new Practising Certificate Rules which will replace the current annexe D of the Code of Conduct were approved by the Board and by the LSB in August 2011. The Board has decided that the proposal to link CPD to renewal will remain, however the policy for the exercise of discretion in refusing renewal will be developed and published in the light of the recommendations from the current review of CPD which closed in October 2011.

67. In the interim, the Board has decided that the BSB will not use its discretion to refuse to renew a practising certificate on these grounds whilst the CPD review is taking place. Instead it will require barristers to state in their applications for renewal whether or not they have complied with the CPD requirements and to explain the reasons for any failure. This will help to underline the importance of CPD compliance. Any disclosed failure will be followed up in the current way i.e. through the complaints process (which can ultimately result in suspension) but in the meantime the barrister's practising certificate will be renewed.

### *Unregistered barristers*

**Q15: Do you agree with the new proposals in respect of unregistered barristers?**

**Q16: Do you think that the proposals provide adequate safeguards for clients and potential clients?**

**Q17: Do you think that rule 87 should apply to clients which are small businesses and other organisations as well as to clients who are individuals?**

**Q18: Do you have any comments on how these new proposals are reflected in the Practising Rules?**

68. The authorisation to practise consultation paper discussed those barristers who have been called to the Bar of England and Wales, but are not permitted to practise either because they have not completed pupillage or because they have not complied with the three year rule and therefore cannot provide services to the public as a barrister. Many such barristers do not provide legal services; others do. The consultation was concerned only with those barristers who do not have practising certificates but who do provide certain unreserved legal activities. Historically, people within this group were known as 'non-practising barristers (NPB).' The BSB recognised the term NPB could cause confusion to the public and to employers, therefore the Board proposed in the consultation paper to change the terminology to 'barristers not permitted to practise.' Respondents generally disagreed with the new proposed title arguing that it would be more confusing and misleading than the current arrangements.

69. In light of the responses, the Board reviewed its original proposed terminology and decided to opt for the title of '**unregistered barrister**,' as such a title links in to the operation of the Barristers' Register. Specifically the Board proposed that:

- Core duties 2 and 4 (integrity and honesty, and not lessening public trust) should apply to all barristers (only when supplying legal services in the case of Core Duty 2)
- All barristers should be required not to mislead their clients about their status (Practice Rule 86)<sup>1</sup>
- Barristers without practising certificates should be required to provide potentially vulnerable clients to whom they provide legal services with an explanation of their position (Practice Rules 87 and 88) and to get written confirmation that this explanation has been given.

70. The Board particularly welcomed views on whether it is desirable, as proposed in rule 87, to require a detailed explanation to be given and written confirmation obtained in the case of small businesses, charities and other organisations as well as to individuals.

71. The Board also proposed that barristers registered under rule 206 of the Code (i.e. barristers called before 31 July 2000) will be permitted to continue to hold themselves out as barristers and will be subject to the same rules and guidance as unregistered barristers. The rule 206 category will be closed to new entrants.

72. The majority of respondents (approximately 93%) agreed with the new proposals in respect of unregistered barristers.

73. Two respondents expressed strong disagreement with the proposals. The Bar Association for Commerce Finance and Industry (BACFI) expressed concerns about the proposals for unregistered barristers. Their main concern is that the suggested disclosure provisions would be very difficult, if not impossible to police and enforce. They suggest that the only long term solution is to defer call to the Bar until pupillage has been completed and a more general solution would be to fully regulate all barristers providing any form of legal services. BACFI also stated that the guidance at Annex 2 on holding out is difficult to follow and feel many be inclined to ignore it. The User Group expressed similar views on the first point but accepted that the proposed safeguards were appropriate if a more fundamental change was ruled out.

74. Another respondent, a barrister who practises under Rule 206.1, expressed concerns about how the proposals would affect those in his position. He suggested that he would be required to call himself an unregistered barrister and considered that this would be unjust and discriminatory.

75. In relation to the proposals providing adequate safeguards for clients and potential clients, whilst the majority of respondents agreed that the proposals would provide the safeguards necessary, BACFI believe that the large numbers of unregistered barristers presents a significant regulatory risk to the profession and are concerned that there has been no information provided as to how enforcement would be carried out other than

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<sup>1</sup> This rule is also relevant to how pupils describe themselves

through the present system of dealing with complaints. The only proper safeguard, in their view is full regulation. Similarly Gray's Inn expressed uncertainty, as to whether classifying barristers as unregistered barristers will supply the degree of protection that a 100% effective pupillage regime would supply. They are concerned that there may be some disappointed or disaffected unregistered barristers who are able to evade any form of enforcement of professional standards. Gray's Inn as well as other respondents suggested that a standard form of wording could be suggested which unregistered barristers could provide to lay clients.

76. Although the YBC agreed with the proposals in respect of unregistered barristers, they stated it would be simpler if the additional requirement for a written explanation (rule 87) were of general application to all unregistered barristers (rather than just those who are self-employed or who work for unregulated employers) regardless of the nature of their client. A general rule would be easier for unregistered barristers to apply and easier for the Board to enforce. The CBA took a similar view.
77. The majority of respondents (approximately 87%) also agreed that rule 87 should apply to small businesses and charities as well as to individuals on the basis that, such small organisations can be as unaware of the consequences of instructing an unregistered barrister as individuals. The User Group also took this view.
78. The YBC and the CBA stated that rather than distinguish between those groups that are more vulnerable from those who are not, the rule should simply apply to all clients of an unregistered barrister for the sake of consistency, ease and reduction of all risk.
79. Similarly, PPC expressed concern at the administrative burden and possible factual difficulty in identifying which clients fall within the categories of client to which rule 87 is made to apply. The Committee did not accept that larger businesses are likely to have experience of the legal market which enables them to understand, or even be aware of; the matters set out in the consultation paper and hence did not accept that the regulatory risk is different in relation to such businesses. The Committee is of the view that a single consistent message and procedure ought to be adopted in relation to all clients.
80. BACFI disagreed with the application of rule 87 to clients which are small businesses and charities. They state that these types of organisation usually need low cost legal services and the type of disclaimer suggested could deter many from using unregistered barristers. In their view the holding out provisions and the duty not to mislead provide adequate safeguards.

### ***BSB Response***

81. The regulation of this group of barristers has a long and chequered history and has been the subject of numerous consultation exercises. Following one such exercise, the BSB decided that it would be disproportionate to defer Call until after pupillage, which would have meant that only those who had done pupillage would be able to call themselves barristers. Instead it introduced the register of practising barristers so that the public could check whether a barrister was entitled to practise. The BSB has also ruled out prohibiting barristers without practising certificates from providing unreserved legal services as that would deprive them of the opportunity to use skills that they had worked hard to obtain, when others with no such skills were allowed to supply these services.

82. The aim of the recent consultations has been to develop regulatory arrangements which enable such barristers to provide unreserved legal services in a way which protects the interests of their clients. The BSB is pleased that the majority of respondents agreed with the new proposals.

83. As explained earlier in the report, the BSB has decided to apply all the core duties to all barristers. This will increase the protection for their clients. Unregistered barristers will also be subject to the rules about not misleading their clients about their status and about co-operating with the regulator. They will be subject to disciplinary action if they breach the core duties or the rules which apply to them.

84. In light of the concerns voiced by BACFI in their consultation response and following a meeting between representatives from BACFI and the BSB it was decided that guidance for unregistered barristers and guidance on holding out should be revised and a model explanatory note for clients will also be developed. With regards to the application of rule 87 to small businesses and charities, although some respondents commented that the application of this rule should be extended to all clients and not just small businesses and charities, the BSB is of the view that this would not be a proportionate response and could place an undue burden on unregistered barristers providing legal services to clients who would not normally need this protection. Rule 86 which requires barristers not to mislead clients about their status will still apply. The BSB is therefore maintaining the position set out in the consultation paper that the rule should apply to clients which are small businesses and other organisations as well as to clients who are individuals. It considers that many small organisations will be no more knowledgeable than individuals and would therefore benefit from the extra protection. The Board accepts that it may not be easy for the barrister to determine whether a particular client falls into this category but if in doubt, the barrister should comply with the rule.

#### *Dual authorisation*

**Q19: Do you think that the prohibition on dual authorisation should continue?**

**Q20: If not, should there be any restrictions or safeguards introduced, and if so, what should they be?**

**Q21: Do you agree that the information which a dual qualified barrister is required to give if he wishes to call himself a barrister even though he is not practising as a barrister should be limited to explaining that he is not practising as a barrister?**

85. The current Code prohibits a person who is a member of another authorised body and entitled to practise from also being a practising barrister (i.e. a person cannot be both a practising barrister and a practising solicitor). The Board sought views on whether the prohibition remains appropriate and necessary given the changing shape of the provision of legal services.

86. Most respondents considered that the prohibition on dual authorisation should continue – or at least until such time there is clear consensus between all approved regulators to deal with regulatory conflicts. Respondents commented that keeping the prohibition in place will prevent duplication of regulation and confusion for members of the public to the services that are being provided and by whom.

87. The Law Society in particular stated that although the changes brought about by the 2007 Act will allow clients to access a variety of services from a single providing entity, they do not believe however, that dual practice of individuals is necessary or desirable in the contexts of these changes, and in consideration of the risk of client detriment and public confusion.

88. A few respondents took the opposite view, arguing that there was no reason to prevent a person practising as both a barrister and a solicitor. They would be subject to both sets of rules but that was not an uncommon situation. Barristers working in solicitors' firms were already in that position. Regulatory conflicts very rarely raised problems. Clients would not be disadvantaged and could complain to the Legal Ombudsman if there were difficulties.

89. Respondents also generally agreed with the information a dual authorised barrister is required to give he wishes to call himself a barrister even though he is not practising as a barrister should be limited to explaining that he is not practising as a barrister.

### ***BSB Response***

90. Although the majority of respondents supported the continuation of the prohibition on dual authorisation, the BSB has concluded that it is no longer justified. Barristers, who choose to hold two practising certificates would have to pay 2 sets of fees, comply with two rule books, but that is a matter for them. Barristers who are managers or employees of entities regulated by the SRA are already subject to the SRA's rules as well as those of the BSB. It would make little difference if they were also to choose to practise as a solicitor. There would be no impact on clients. Similarly if an employed barrister was also a solicitor, it would have little impact on the employer. The situation for self-employed barristers is rather different. If they wanted to practise also as solicitors, they would have to be insured as both a barrister and a solicitor and would be subject to monitoring by both the SRA and the BSB and make returns to both organisations. There would no doubt also be complications as regards internal Chambers administration. Dual authorised barristers would be allowed to undertake litigation but that will be an option for all practising barristers in future. Clients would be protected by the various rules and enforcement regimes and would normally complain to the Legal Ombudsman if there was a problem so they would not have to ascertain which regulator to approach. In practice, it is unlikely that self-employed barristers would want to incur the additional costs and administrative burdens of dual authorisation, but the BSB is of the view that, that is not a justification for retaining the prohibition. In the forthcoming code/entity regulation consultation, the BSB will therefore be proposing its removal.

### *Undeeming of legal aid fees*

### **Q22: Do you agree with how it is proposed to deal with legal aid fees for the purpose of the cab rank rule?**

91. Paragraph 604(b) of the current Code states that a self-employed barrister is not obliged to accept instructions under the cab rank rule, amongst other things, other than at a fee

which is proper in the circumstances. It also states that legal aid fees shall be deemed to be proper fees unless the Bar Council determines otherwise. The Bar Council decided in 2001 in relation to family graduated fees and in 2003 in respect of criminal graduated fees that they were no longer deemed to be at a proper professional fee. Accordingly barristers are not obliged to accept instructions where fees are offered on that basis if they consider that the fee is not a proper one under the terms of paragraph 604(b).

92. The proposed new rule 77 is silent on whether legal aid fees are to be considered proper professional fees, as the Board does not think this is the kind of economic decision it, as a regulator, should take. The consultation paper proposed that, as in relation to privately funded work, barristers will have to make their own decision as to whether a proposed legal aid fee is a proper professional fee and be prepared to defend that decision if challenged. It will be continue to be open to the Bar Council to offer guidance.
93. There was some disagreement (approximately 26% disagreed) as to how it is proposed to deal with legal aid fees for the purpose of the cab rank rule. Respondents generally called for a workable definition of what constitutes a proper fee in the Code, guidance on the issue, or at least a reference in the rules that would allow the barrister to rely on guidance issued by the Bar Council.
94. The Inner Temple Bar Liaison Committee in particular said that the BSB should clearly state whether it agrees with the Bar Council's guidance or not, as the current proposal allows the Bar Council to issue guidance on one hand but leaves open the possibility that a barrister who follows that guidance may nonetheless be disciplined, which could lead to uncertainty and unfairness. YBC highlighted that the lack of certainty could put younger barristers at risk because they will be under the greatest pressure to accept legal aid fees.
95. The PPC of the Bar Council stated that no rules of professional regulation should be drafted in a way which makes it compulsory or appears to make it compulsory for a professional to undertake work which is so poorly paid that it would be uneconomic for him to do so. The PPC accepts that the BSB would not wish to 'simply adopt' the view taken by the representative body, but nevertheless considers it invidious to expose a profession to the risk of being held to be in breach of the cab rank rule for refusing to carry out work that the professional's own representative body has collectively decided is not properly remunerated under a particular public fee scheme.

### ***BSB Response***

96. The BSB remains of the view that it would not be appropriate for it to take a general view of whether particular kinds of fees are, or are not, proper professional fees. That does not come within its role. It would also not be appropriate for it to endorse guidance issued by the representative body on the subject. This position will be maintained in the revised code.
97. The Board recognises that the proposed new rules will create some uncertainty but believes that in practice the change is smaller than might appear at first sight.

98. The responses to the consultation suggest that there is some misunderstanding about the present position in relation to fees for public funded work and hence some misunderstanding of the implications of the proposed new rule.

99. The current position is that in relation to many areas of work, there is no guidance on whether or not proposed fees are to be regarded as proper professional fees. That has always been the case in relation to privately funded work. For legal aid fees, the effect of the deeming provision in paragraph 604(b) of the present Code is that such work is deemed to be offered at a proper rate unless the Bar Council has determined otherwise. In the absence of a Bar Council determination, barristers may not turn down work under the cab-rank rule on the basis that the legal aid fees proposed are not proper fees. In relation to those publicly funded fees where the Bar Council has made a determination, the effect is only they are not automatically held to be proper. Undeeming the fees does not mean that they are necessarily to be regarded as not being proper. On the contrary, it is for barristers themselves to consider in relation to such fees, as in relation to proposed fees for privately funded work, whether they are proper fees before deciding whether they would be justified in refusing instructions on these grounds. If they do so, they must be prepared to justify their decision in the event of a complaint. In practice, complaints on these grounds are very rare indeed.

100. The effect of the new rule is that no fees will be deemed to be proper. For all types of funding, if a barrister considers that the fee is inadequate, he will have to satisfy himself that refusal of instruction is justified under the terms of the rule, and be prepared to justify that decision if there is a subsequent complaint.

101. The Professional Conduct Department will consider any complaint against a barrister of refusing to accept work on the facts and circumstances of the case in question. If the case is referred to the Professional Conduct Committee, one of the tests which the Committee will apply, as it does in all cases, is whether it would be in the public interest to bring a charge against the barrister. One factor to be weighed in the balance is reliance by the barrister on any guidance issued to the profession by the Bar Council. However, this cannot be a determinative factor. It is essential that there is no blurring between the regulatory functions of the BSB and the representative functions of the Bar Council.

*Shared responsibility for Chambers management*

**Q23: Do you agree that all members of Chambers should be collectively responsible for the administration of Chambers?**

**Q24: If so, do you agree with the approach proposed?**

102. The current Code at paragraph 404 places specific and direct obligations on Heads of Chambers and certain others in respect of the administration of Chambers. The role of Head of Chambers and the management and administration of Chambers have changed

markedly in recent years and, with the potential for new business arrangements for the provision of legal services, these are likely to develop further. The Board were of the view that the new rules need to reflect the reality of practice administration within Chambers.

103. The proposal in the consultation paper was to recognise that each Chambers will have its own administrative structure and that all members of Chambers have a contribution to make to the efficient management of Chambers.

104. Approximately 33% of respondents generally felt that the obligation to administer chambers should remain with the Head of Chambers or those who have consented to and been elected/appointed to manage. The responses highlighted a concern that the BSB's proposal could lead to a great deal of unfairness, particularly for those members who for various reasons may have no say in the administration of chambers.

105. The Law Society stated the proposal is unsatisfactory as solicitors and clients need to know who is responsible for the administration of chambers, as a number of problems can be traced to poor chambers administration. The Law Society as well as other respondents are concerned that the proposal that all members should be collectively responsible could lead to a situation where there is no one who is actually responsible for ensuring chambers is run properly.

106. Whilst the YBC agreed with the approach, they sought greater safeguards for young barristers who will usually be unable practically to ensure that their Chambers comply with their obligations under the relevant practising rules.

107. The PPC suggested that the solution would be to couch the rules in such a way as to make all those who are directly concerned with the administration of chambers collectively responsible, instead of all members, and to make those persons who are responsible for matters such as E&D and pupillage specifically responsible for ensuring that proper arrangements are made for dealing with those matters. The E&D committee agreed with the proposal but suggested that the Head of Chambers should be given an oversight duty taking ultimate responsibility given there is a risk that no one will act to ensure compliance.

### ***BSB Response***

108. Whilst recognising the concerns expressed, the BSB considers that a degree of shared responsibility appropriately reflects the nature of Chambers in which a group of self-employed individuals work together. It also leaves Chambers free to decide how to administer themselves, subject to ensuring compliance with the underlying requirements for effective administration. The BSB has therefore concluded that it should retain the proposed approach and this is reflected in the revised draft which will be published as part of the forthcoming consultation. Nevertheless it acknowledges the concerns expressed, particularly by young tenants of Chambers who may not be in a position to have much influence on the administration of Chambers. To help address this concern the BSB will produce guidance, including specific guidance for junior barristers who under the guidance, could discharge their collective responsibility by using any available procedures for raising concerns with an appropriate person. The guidance will also make

clear the responsibilities of the Head of Chambers and others with specific management responsibilities within Chambers.

109. In most cases, if monitoring reveals that there has been a failure to comply with a requirement as to the management of Chambers, the BSB's approach is to seek to get Chambers to remedy the problem. Only in the event of a continuing failure, or of a complaint about a serious failure, would disciplinary action be considered. In that event, the Professional Conduct Committee would take into account the seriousness of the breach and its potential consequences, who knew or should have known about it, and who was in a position to have done something about it. In considering whether to bring a charge against individual barristers, the Professional Conduct Committee would have to reach a view on whether there was a reasonable prospect that the BSB could prove that there was some action which it would be reasonable for them to have taken in their personal circumstances, taking account of the guidance, and if so, whether it would promote the regulatory objectives to bring a charge.

110. Further consideration is given to whether Chambers should be required to have a Head of Legal Practice and Head of Finance and Administration in the forthcoming code/entity regulation consultation.

#### *Three year rule*

**Q25: Do you agree that the existing requirement for barristers subject to the three year rule to have the same principal place of business as a qualified person should remain?**

111. The Practising Rules continue the "three year rule" which requires that a barrister of less than three years' standing may only supply legal services to the public or exercise any right of audience if the barrister's principal place of practice has a qualified person who is readily available to provide guidance.

112. Nearly all respondents agreed that the requirement for barristers subject to the three year rule to have the same principal place of business as a qualified person should remain, for reasons of public protection. It is much easier for an inexperienced person to obtain informal advice and guidance when they need it if they work in the same place as the person advising them. This should therefore remain the norm. The relevant provisions in the rules will therefore remain. Where it is not possible for the qualified person to work in the same place, then a waiver may be obtained subject to the applicant demonstrating that suitable alternative arrangements providing for regular contact have been put in place.

#### *Practising Certificate Rules and Compliance Rules*

**Q26: Do you have any comments on the Practising Certificate Rules?**

**Q27: Do you have any comments on the content and drafting of the Compliance Rules?**

113. The Practising Certificate Rules were approved in August 2011 with minor amendments to the version that was published as part of the Code Review in January 2011.

114. The Compliance Rules draw together the rules in the existing Code that place specific compliance requirements on barristers. This section of the Code also includes the definition of professional misconduct and identifies the circumstances in which breaches of the Code may be subject to administrative sanctions such as warnings and fines, rather than being treated as misconduct.

115. Respondents mostly had no comments on the content and drafting of the Compliance Rules. The Inner Temple Bar Liaison Committee however, raised some interesting points. The Committee has suggested the addition of a rule requiring barristers to permit the BSB to contact their Head of Chambers, (within 14 days for example) from the date of the second ignored letter in the case of CPD compliance (and possibly other) issues. The response highlighted that a number of the Committee members have considerable experience of COIC Disciplinary Tribunals in various capacities. In the Committee's experience the vast majority of complaints about failure to comply with CPD requirements have, at their root, a catastrophic personal trauma, which results in the barrister focusing time and energy on keeping their practice afloat and more often than not ignoring correspondence from the BSB. The Committee believe that alerting the Head of Chambers or barrister's colleagues, will lead to the resolution of CPD cases in a more sensitive, cheap and efficient way and also at an earlier stage.

### ***BSB Response***

116. As regards notifying the Heads of Chamber when a barrister fails to respond to correspondence from the BSB, the BSB has previously contacted Chambers with a list of those who have not complied with CPD requirements. This proved to be an effective method of dealing with non-compliance and so the BSB will investigate the possibility of re-instating this practice.

117. The consultation paper left open the question of the circumstances in which administrative sanctions can be imposed for breaches of rules or regulations. The list of rules which can be dealt with in this way in the event of minor breaches has grown up over the years and lacks a consistent basis. The BSB concluded that there should be a review of the policy on this subject in the context of entity regulation and as a result this will be considered in greater detail in the revised code/entity regulation consultation.

### **RELATED CODE ISSUES**

118. Part 4 of the consultation paper dealt with a number of related projects and issues the Board is undertaking that impact on the shape and content of the Code and invited comment where necessary. The related topics included:

- The policy for the period for disciplinary and related findings should be published
- Entity regulation
- Quality assurance of advocates
- Referral fees

*Publication of disciplinary and related findings*

**Q28: Do you agree with the purposes of publication and disclosure? Do you consider that any other purposes are served by publication?**

**Q29: Do you agree with the concerns identified? Can you identify any further concerns?**

119. The consultation paper set out the current practice in relation to the period for which disciplinary and related findings should be published, or available on request to regulators or particular bodies having a particular interest in relevant issues. The paper set out why the Board considers publication of disciplinary and related findings is important, including that it might serve a number of purposes consistent with the regulatory objectives set out in section 1 of the 2007 Act (i.e. protecting and promoting the public interest, and that of consumers).

120. The paper also highlighted the Board's concerns, including countervailing data protection concerns, so that information relating to individual barristers is not published or disclosed for longer than is necessary to secure the regulatory objective and ensuring all information which is available to the public should be published on the Board website.

121. The majority of respondents agreed with the broad approach set out by the Board. The Law Society, stated that it is important that the disclosure provisions mirror those of other regulators in the legal sector. The Society suggested an additional provision which would enable the BSB to disclose the full history of a barrister to other regulators. The reason for adding this provision being that barrister may seek employment in solicitors' offices or a role in an ABS firm and as such, regulators considering their authorisation or conduct should have full knowledge of their disciplinary history.

122. The SRA commented that they rely on their publication policy which sets out the circumstances under which they may seek to publish a regulatory decision, provided it is in the public interest to do so. This approach is adopted as the SRA state it would be impractical to list out every scenario and decision type definitively to say categorically when a particular decision will or will not be published. The SRA have recommended that the BSB's approach is based upon similar criteria including the importance of decision information in supporting consumers to make informed choices about their legal service provider, and the importance of maintaining public confidence in the effectiveness of our regulatory system.

123. The YBC agreed with the purposes of publication and disclosure identified by the Board and additionally identified that publication and disclosure will have the effect of operating both as part of any punishment imposed on any barrister who is disciplined and, likewise, as part of the deterrent that prevents misconduct from occurring in the first place. The PPC of the Bar Council added the purpose of promoting public confidence in the Bar.

*The nature of findings involved*

124. The Board considered that the extent of publication and disclosure should be influenced by the nature and seriousness of the relevant findings, which were categorised in the following way in the consultation paper:

*Publication of findings of professional misconduct*

**Q30: Do you agree with the Board's proposal as to the publication of findings of professional misconduct? If not, why not?**

125. Such findings will be made as a result of complaints being made, whether by third parties or the Complaints Committee itself and are potentially the most serious findings as sanctions can range up to disbarment. The consultation proposed the following publication policy:

- For professional misconduct findings for which a sentence of up to three months' suspension is imposed publication will be for 5 years from the date of first publication.
- For professional misconduct findings for which a sentence of between three months' and 12 months' suspension is imposed, publication will be for 10 years from the first date of publication.
- For professional misconduct findings for which a sentence of disbarment or of in excess of 12 months' suspension is imposed, publication will continue indefinitely.

126. Respondents largely agreed with the Board's proposal on publication of findings of professional misconduct. The Law Society acknowledged that the publication of regulatory decisions wherever possible helps to ensure that regulation is transparent and to fulfil the regulatory objectives set out in section 1 of the 2007 Act. However the Law Society are specifically in favour of the publication of certain regulatory decisions on the basis that they would be made using the criminal standard of proof i.e. beyond reasonable doubt. Given the seriousness of the consequences of such publications to a barrister's or other professional's career, the Law Society do not believe that the civil standard of proof should be used in this context.

127. The CBA did not agree with the proposals put forward, stating that some aspects of the proposed length of publication of findings are not commensurate with the level of penalty imposed, and unnecessarily lengthy publication periods would not assist the public good whilst severely prejudicing the barrister subject to the finding. The CBA suggested alternative publication lengths, those being:

- For professional misconduct findings for which a sentence of up to three months' suspension is imposed publication should be for 2 years.
- For professional misconduct findings for which a sentence of between three months' and less than 12 months' suspension is imposed, publication should be for 5 years.
- For professional misconduct findings for which a sentence of 12 months or more suspension is imposed, publication should be for 7 years.

128. The CBA did agree that it is in the public interest that a penalty of disbarment should be published for life.

129. Albion Chambers agreed in broad terms but suggested alternative timeframes for publication similar to the CBA. Conversely 7 Bedford Row disagreed as they thought all cases of disbarment or suspension should be published in perpetuity, as they are the two most serious sanctions against a barrister, of which the public should be entitled to know indefinitely.

*Disclosure of findings of professional misconduct*

**Q31: Do you agree with the Board's proposal as to the disclosure of findings of professional misconduct?**

130. The Board proposed that it will disclose information relating to a barrister's disciplinary history indefinitely, even where this information is no longer being published, to the following bodies (or their successors) ("the Named Bodies") on request to:

- The Judicial Appointments Commission;
- The QC Appointments body
- The Inns of Court (in respect of a barrister's application to be a pupil supervisor, on an application by a former barrister for re-admission to the Bar)

131. The Board further proposed that it will not, once the publication period for a disciplinary finding has expired, disclose that finding to any other person or body without the consent of the barrister concerned.

132. Almost all respondents agreed with the Board's proposal as to the disclosure of findings of professional misconduct.

*Publication and disclosure of interim suspension orders*

**Q32: Do you agree with the Board's proposals as to the publication and disclosure findings of interim suspensions? If not, why not?**

133. Interim suspensions will be imposed only where the barrister concerned has been convicted of an indictable offence, or convicted by an approved regulator for misconduct. Such orders come to an end once the underlying complaint has been finally disposed of, and any sanction imposed.

134. The Board proposed to publish, and disclose on request, all current interim suspensions. Once an interim suspension has come to an end, it will no longer be published or disclosed.

135. Almost all respondents agreed with the Board's proposal. The PPC of the Bar Council agreed only in part, stating that an interim suspension may well be followed by formal disciplinary proceedings and a disciplinary sanction, further suspension from practice or disbarment. In such a case the PPC consider that the fact of an interim suspension, and its length should continue to be published and disclosed as potentially being relevant to the decision of the Tribunal on the substantive penalty. In the rare case where an interim suspension comes to an end without any other disciplinary sanction, the interim suspension should not be published or disclosed after its conclusion.

*Publication and disclosure of conditions imposed by Fitness to Practise panels*

**Q33: Do you agree with the Board's proposals as to the publication and disclosure of conditions imposed by Fitness to Practise panels? If not, why not?**

136. Restrictions can be imposed on conditions of practice under the Fitness to Practise Rules. Such restrictions are rare and imposed only where there is a medical reason to restrict practice, determined by a specialist Medical Panel

137. The Board proposed to publish, and disclose on request, all current conditions or restrictions imposed by Fitness to Practise panels. Once such conditions or restrictions have come to an end, their existence will no longer be published or disclosed.

138. All respondents except the Professional Conduct Committee of the Bar Council supported the Board's approach or provided no comment. The Complaints Committee suggested that the approach adopted by the General Medical Council should be adopted as opposed to the approach set out in the consultation paper, the approach being:

- Restrictions and conditions expressed in such a way that they do not reveal that the barrister has a medical problem should be published and disclosed as proposed; but
- Restrictions and conditions expressed in such a way that they do reveal that the barrister has a medical problem (i.e. "provided he continues his psychiatric treatment") should not be published or disclosed.

*Publication and disclosure of findings of Inadequate Professional Service (IPS)*

**Q34: Do you agree with the Board's proposal as to the publication and disclosure of findings of IPS? If not, why not?**

139. IPS findings are only available where the lay client has complained about the service provided by the barrister. Since October 2010 the Legal Ombudsman has been determining complaints of this nature and has its own publication and disclosure policy. The Board has historically not published findings of IPS, and disclosed them only to the QC Appointments body and the Inns of Court on request.

140. The Board proposed not to publish current or historic findings of IPS, but did propose to continue disclosing historic findings of IPS to the Named Bodies on request.

141. Respondents generally agreed with the Board's proposed approach.

*Publication and disclosure of findings of 'fixed penalty' (para 901.1) findings*

**Q35: Do you agree with the Board's proposal neither to publish nor disclose findings under para 901.1? If not, why not?**

142. These are breaches covered by paragraph 901.1 of the Code, which are generally administrative and/or low level breaches, and sanctioned by a written warning and/or fine. Historically these findings have never been published, and never been disclosed to third parties

143. The Board proposed that it will continue neither to publish nor disclose findings under paragraph 901.1.

144. All respondents agreed with and supported the Board's proposed approach.

*Publication and disclosure of 'No Further Action' determinations*

**Q36: Do you agree with the Board's proposal as to the publication and disclosure of NFA determinations? If not, why not?**

145. These are determinations by the Professional Conduct Committee that there is a sustainable case of professional misconduct against a barrister, but that it is not in the public interest to pursue the matter at a Disciplinary Tribunal. NFA determinations are made with the agreement of the barrister concerned. Historically these findings have been disclosed to various named parties and to enquirers on request, but are not otherwise published.

146. The Board proposed that it will continue neither to publish nor publicly to disclose determinations of NFA. The Board did however propose that it will disclose determinations of NFA to the Named Bodies indefinitely.

147. Whilst most respondents (approximately 90%) agreed with the proposed approach, some respondents stated that if a determination is made that no further action is needed, then this represents a recognition that it is not in the public interest to pursue the matter at disciplinary tribunal and in the same way it should then not be in the public interest for such a determination to be disclosed.

*Other powers to publish and disclose findings*

**Q37: Do you consider that there should be a residual power in the Professional Conduct Committee, or in some other body, to publish or disclose findings where there is good reason to do so? If so, why?**

148. The Board considered the possibility that, additionally there should be an express power retained by the Complaints Committee, or some other body to publish or disclose additional information where there is a good reason. The Board welcomed views on this as it did not envisage any circumstances in which such a power would be needed.

149. The majority of respondents thought that there should not be such a residual power in the Professional Conduct Committee or any other body. The Law Society commented that there would need to be clear guidance and criteria about the circumstance in which the Professional Conduct Committee would publish findings and as the BSB cannot envisage circumstances in which it will be necessary, it will be difficult to provide such guidance. Therefore the Law Society believes that the proposal not to give such a residual power is appropriate.

150. Gray's Inn thought that there should be one but limited only to legal proceedings, as it could be during the course of litigation by or against the barrister accused of misconduct that authoritative disclosure of such findings might become relevant and, thus, subject to appropriate safeguards, such findings should be capable of disclosure.

151. The PPC thought there should be such a power as it is not possible to legislate for all foreseeable circumstances, and findings may be relevant in other disciplinary proceedings for example. The PPC suggested the Chairman of the Bar or the BSB itself should hold such a power rather than the Professional Conduct Committee.

152. The Professional Conduct Committee itself thought there should be a residual power as there needs to be some flexibility in the policy, for example to give the BSB discretion to correct positively misleading assertions made by a barrister that he has never had any findings against him.

**Q38: Do you have any further comments to make on the Board's proposed publication and disclosure policy?**

153. No further comments as to the proposed publication and disclosure policy were made.

***BSB Response***

154. Work on the issues discussed above will take place separately from the main Code Review, over the course of the next few months. Respondents have provided very useful comments on the disclosure of disciplinary findings and related matters. The BSB will give thorough consideration to all of the responses when taking this work forward.

*Referral fees*

155. The LSB issued guidance to Approved Regulators on referral fees in May 2011. More recently the subject has been debated in Parliament and new legislation on the subject is awaited. In the meantime, the revised code which will be consulted on mirrors the existing provisions which ban the payment or receipt by self-employed barristers of referral fees.

*Additions to the new Code*

156. Since the consultation paper was published, various changes to the existing Code have been made or have or about to be put to the LSB. These will be incorporated into the new Code. The more important changes concern:

- Quality assurance of criminal advocates
- New contractual terms
- Payment of pupils

157. These have all been the subject of separate consultations.

158. There has also been a consultation on the international practising rules on which there will be a separate feedback report. The final version of the new rules will be included in the forthcoming consultation.

## **OTHER ISSUES**

159. Part 5 of the consultation paper looked at issues such as publication of the new Code as well as equality and diversity issues.

### *Publication of the new Code*

#### **Q39: Do you agree that the Code should be principally web based?**

160. The Code of Conduct is currently available in both loose-leaf hard copy and online on the BSB's website. Copies are automatically sent to all Chambers and individual copies can be bought for £25. The Code can be downloaded free of charge from the BSB's website. Any amendments to the Code are, once approved, immediately included in the on-line version.

161. The consultation paper proposed that we should move to a web based version of the Code with hard copies made available upon request and upon payment. A web based version will be readily available for barristers and members of the public alike and will aid navigation as it can contain links to related guidance or other provisions of the Code.

162. The majority of respondents agreed that the Code should be principally web based, however they were suggestions that the commencement date of any amendments should be readily apparent on the website with earlier versions of the Code readily available as well.

163. The E&D committee supported the proposal with the provision it must be accessible to disabled users.

164. A minority of respondents commented that not all barristers (or anyone who may require access to the Code), may have access to the internet and in any event as the Code is long and complex it could be difficult to peruse online. These respondents suggested hard copies should be provided to chambers/others as it would be easier to find relevant provisions and to understand them in their proper context by using hard copies. There was also a suggestion that the presence of a hard copy is a way of visibly reminding practitioners of the Code.

### ***BSB Response***

165. The BSB will go ahead with making the Code principally web-based. This will make it easier to keep the Code up-to-date and to provide links to related guidance and other documents. Hard copies will be available but will normally have to be paid for. Free copies will be provided for those who have disabilities which make it difficult to use the internet, and lay users who do not have access to the internet will be able to obtain relevant excerpts on request.

166. The web based version of the Code will be Disability and Equality Act compliant to ensure it is accessible to all kinds of users. Furthermore the BSB will ensure previous versions of the Code, as they were on a particular date will be available on the website.

*Equality and Diversity*

- Q40: Do you think that the new Code of Conduct gives rise to any negative consequences for any group and, if so, how could they be mitigated?**
- Q41: Does the Code provide opportunities to promote greater equality, and if so, how?**
- Q42: Do you have any other comments on equality and diversity issues that may arise from the new Code of Conduct?**

167. BACFI commented that some of the proposals contained in the Code will have a detrimental effect on the standing of non-practising barristers and employed barristers. Similarly the CBA is concerned that the new proposals in relation to the duty to report misconduct could disproportionately affect younger barristers. The YBC expressed a similar concern.

***BSB Response***

168. The BSB will undertake further work to establish the potential equality and diversity impacts of the new Code, particularly for the groups identified by respondents above, by carrying out a detailed impact assessment.

## **ANNEX 1: LIST OF RESPONDENTS**

### Individual Barristers

Alloway, T

Dillon, T

Halpern QC, D

Purves, G

Todd QC, R

Valentine, J

Anonymous respondent

### Chambers

1 Hare Court

2-3 Gray's Inn Square

7 Bedford Row

Albion Chambers

Blackstone Chambers

Crown Office Chambers

Garden Court Chambers

Gray's Inn

Queen Square Chambers

### Bar Associations

Bar Liaison Committee (Inner Temple)

Chancery Bar Association

Commercial Bar Association

Criminal Bar Association

Lincoln's Inn Bar Representation Committee

The Bar Association for Commerce, Finance and Industry

Professional Negligence Bar Association

Bar Council and Bar Standards Board

BSB Professional Conduct Committee

BSB Education and Training Committee

Equality & Diversity Committee of the Bar Council

Professional Practice Committee of the Bar Council

Young Barrister's Committee

Other

Feingold, D (Tax consultant)

Perry, D (Plain English Consultancy)

Solicitors Regulation Authority

The Law Society of England and Wales