



BACFI Response to BSB Consultation Paper on New BSB Handbook and Entity Regulation

Introduction

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed and unregistered barristers practising principally in the commercial private sector.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members. BACFI actively supports the objective of an independent and high quality bar, accessible to all.

We have not attempted to answer all the questions in this Consultation Paper but only ones where we have comments or can contribute a useful view.

Part 1

Handbook and Entity Regulation.

Q1-4: Presentation of Code; Relationship between Outcomes, Rules and Guidance; balance between rules and guidance; any rules unnecessarily prescriptive.

On the whole BACFI welcomes this redraft of the Code of Conduct. It is laid out logically but it is still extremely long and complicated and in this respect not really an improvement on its predecessor.

The presentation of the Code could be improved by adding page numbers to the Contents section. Although this will be an online Code, there will be hard copies used. Similarly, the top of each page should carry the Section number. The lettering and numbering of different sections can be confusing especially the cross referring between the Code and the Scope of Practice rules. We would recommend that Plain English specialists with some experience of regulatory codes be consulted.

Our specific comments on the rules are contained in the answer to Q 27.

Q5: Do you agree with the addition and purpose of the two new Core Duties?

Whilst we do not disagree with the purpose of the new Core Duties, we feel that they are more appropriate as Rules as they do not have the same fundamental importance as the other Core Duties. In particular, number 10 seems out of place.

Q6: Do you agree that all Core Duties should be applied to unregistered barristers?

Yes. As outlined in our reply to the previous Consultation, we believe that all the Core Duties should be applied to unregistered barristers. We would go further and propose that there should be a registration scheme for unregistered barristers providing legal services, together with recognition of their status as barristers. These unregistered barristers will have more obligations than in the past and we feel it is important that they receive some rights in return. It must be made absolutely clear which Rules apply to unregistered barristers and the Guidance for such barristers, to which BACFI has contributed, will be vital and must be well publicised. BACFI would like to discuss further with the BSB how the regulation of unregistered barristers will work in practice.

Q7 and 8: Do you agree with replacing the current prohibitions on sharing premises and associations with a more outcomes focussed rule and guidance?

We agree that current restrictions should be removed. However we have some concern about paragraph B 17.b. Many legal departments outsource functions, normally to regulated law firms, but there may be other instances of outsourcing. We assume that this requirement regarding contractual arrangements will not apply to individual barristers in their capacity as General Counsel.

Q9: Do you think we need to include a separate business rule in the Handbook?

This does not seem necessary but if the SRA has a similar rule perhaps consideration should be given to matching their rule to avoid entities that are able to do so choosing the BSB as their regulator to get round these requirements.

Q10: Do you agree that the current prohibition on managing clients' affairs should be maintained? If not, how do you think the risks could be mitigated?

We are not entirely sure what "managing clients' affairs" entails. However many in-house barristers have management roles and some self employed consultants may get involved in certain aspects of the management of their clients' business as well as their legal requirements. We suggest that the rule that a barrister may not undertake work for which he is not competent should be sufficient to cover this issue.

Q11: Referral fees.

We cannot think of any. We strongly support the decision to continue to ban referral fees.

Q12: Do you think that a barrister should be obliged to report his own failure to comply with applicable rules?

This is difficult because on many occasions a barrister will not realise he has not complied and therefore risks being punished twice – for the original failure and for the failure to report. We believe that if this rule is retained then there should be mitigation for those who do self report. We are also concerned that this requirement may lead to a significant increase in the number of investigations which the BSB has to manage, leading to an increase in costs and delays in resolving cases. Many barristers may feel it is safer to report rather than risk being penalised for an unreported infringement. We feel that the current system of guidance offered by the Bar Council (see below) may be a better way of dealing with this issue.

Q13: Failure to comply with the duty to report misconduct.

We are concerned about the duty to report misconduct of other barristers. Heads of Chambers, members of the Bar Council Professional Practice committee and those on the list published by the Bar Council of barristers willing to give advice to others, frequently give guidance and advice to other barristers on ethical and regulatory issues. These valuable sources would inevitably be restricted if the proposed rule is adopted. Other regulators do not impose such a stringent rule, relying on the basic duty to co-operate with the regulator.

Q14: Do you agree that the prohibition on dual authorisation should be removed?

We agree.

Q15: Effect of removal on clients.

Clients are protected in any event by SRA / BSB rules. Do clients really care about the capacity in which their lawyer is practising?

Q16: Do you agree that rules on insurance for employed barristers should be replaced by guidance?

Agreed. The client has rights against the employer in these circumstances.

Q22: Proposed arrangements for the management of chambers and entities.

The rules surrounding the regulation and management of entities should reflect the size, activities and the market the entity is serving. For example a small organisation providing services to businesses should not need the same level of regulation as an organisation providing services to consumers.

We would like to see the guidance which the BSB is proposing to issue on the management of entities before commenting further but would make the point that companies must in any event comply with the provisions of the Companies Act 2006 and the guidance should not conflict with these obligations.

Q23: Public and licensed access rules to be made less detailed.

Agree.

Q24: Should licensed access be retained?

As 60% of the Bar are Public Access authorised the need for Licensed Access and the complex rules surrounding it could probably go.

Q25: Disclosure of previous convictions on sentence.

Agreed.

Q26: Arrangements for acceptance of instructions.

Agreed.

Q27: Any other comments on the Code.

Specific comments are as follows:

Introduction (page 3)

It would be helpful to state right at the beginning that phrases in italics are defined terms and that definitions can be found on page X. This may not be necessary in the online version but would be a benefit for those using a hardcopy.

Parts I and II

It is confusing to have an Introduction and Application section in both parts.

It is absolutely vital that any barrister can tell at a glance which rules apply to him. Where unregistered (and, in some respects, employed) barristers are concerned, the Handbook contains no less than 3 separate and differently worded "explanations" of who is affected.

The CP executive summary, para 7b on page 6 states clearly "it is proposed that all core duties be applied to unregistered barristers in order to increase protection for clients". This is simple and clear.

But in the Introduction to the draft Handbook itself, at para 6 on page 5, the message is expanded to read:

"6. Subject to paras 7, 8 and 9 below, this Handbook applies to the following categories of person:

- 6.1. (a) barristers who hold a practising certificate.
- (b) [pupils]
- (c) all other barristers who do not hold a practising certificate but who have been called to the Bar..."

Finally, Part B of the Code under "Application" really racks up the confusion:

"1. Who?

1.1. Section C (Core Duties) of this Part II: applies to all BSB regulated persons except where stated otherwise.

1.2. Section D (Conduct Rules) of this Part II

(a) applies to all BSB regulated persons apart from unregistered barristers except where stated otherwise.

(b) the guidance on Core Duties and rules 2,3,17,18,21 and 32-37 (and associated guidance to those rules) also applies to unregistered barristers."

We find the whole of Part II B confusing.

Part II D Rule 52 is too vague and the guidance is not helpful in terms of the cross references to other rules.

Part II E Rule 18 makes no references to employed pupillages.

In another vital aspect the drafters have departed from the simple approach illustrated in (E5) R46.3 (to take one related rule). Unfortunately (E5) R45.1 (a) actually starts off with cross references in parentheses, which detracts from the fundamental message. This should begin simply "You are not acting as a barrister." After this, cross references may be necessary but they should be introduced with a simple description of the exception, so that barristers can quickly tell whether they are affected or not. If they are, they will need to open another page of another window (Part II, section B, rule 10) to search for details!

R 45.1 (d) suffers similarly.

Thus Rule 45.1 could read:

45.1 You must explain to the client:

(a) that you are not acting as a barrister (unless you were called before July 2000 and are subject to the old Rule 206 – see Rule 10 Scope of Practice Rules, Section B, Part II.);

(b) ...

(c) ...

(d) whether you are covered by professional negligence insurance, or not.

Part III

Rule B 9.2 /9.3 – this needs a cross reference to the section on Unregistered barristers where the need to give certain information to the client is spelled out.

Rule B 10.4 It appears that 206 barristers (although they have more obligations than other unregistered barristers), are subject to the same requirements to give notice etc. although Rule 45 of Part II E5 excludes them from the requirement of 45.1 (a).

Rule B 11.2 This rule is not specific enough and means that the reader will have to check back to sections D and E of Part II and any other conditions which may have been imposed by the BSB.

Rule B 11.4 is difficult to understand and clearly does not cover organisations regulated by the SRA.

B5 Rule 27.3 and 5. This is confusing as a client of the BSB authorised body will also be a member of the public. The same comment applies to Rules 31.3 and 31.5.

C4 Rule 19. If a barrister had a right of audience on 31st July 2000 then why would he not have a full Practising Certificate?

Q28: Self certification procedures for conduct of litigation.

Q29: Supervision for those under 3 years call.

Q30: Supervision prior to authorisation.

Q31: Second 6 month pupils conducting litigation.

We agree with the proposals for self-certification with the recommendation that self employed barristers under 3 years call should not be allowed to conduct litigation without supervision. We do not consider that pupils in the second or third six months should be authorised to conduct litigation, even in the company of their pupil master. This is simply far too high a risk for clients. Conduct of litigation is one of the “showcases” of the legal profession and one in which lay clients place the greatest degree of trust. Litigation requires, we would suggest, considerable “back office” support for correspondence and out of court activity which many Barristers’ Chambers would ordinarily not be able to provide. Solicitors receive specialist training for litigation, unlike Barristers.

In relation to employed barristers, who have for some time been authorised to conduct litigation, is it intended that the three year supervision requirement (Part III Rule B 16) will apply to those supplying litigation services only to their employer (see Annex I para 1 (c) of the current Code which requires only one years standing of the right to conduct litigation)? Will such barristers supplying services only to their employer need three years standing in order to exercise a right to conduct litigation without supervision from a qualified person? Those under 3 years call and pupils would be able, of course, to assist an authorised individual.

We agree that a period of supervision prior to authorisation is not necessary.

Q32: Introduction of litigation authorisation for individuals prior to introduction of entity regulation.

Agreed. If there are indeed suitably qualified and inclined individual barristers, then they should not be obliged to wait for authorisation whilst entity regulation is considered for approval.

Q33: Litigation extension to PC Fee.

Q34: Annual litigation fee.

Currently employed barristers do not pay an additional Practising Certificate Fee for the right to conduct litigation. We suggest that as employed barristers have been able to conduct litigation for several years it is not appropriate to charge an additional fee.

Q35: Prohibition on barristers holding client money.

We agree the prohibition should continue, subject to the exemption for managers of bodies regulated by other approved regulators.

Q40–50: Entity regulation.

We have only one additional comment on entity regulation.

As mentioned in Responses to earlier Consultations there are many practising barristers who provide services to law firms and companies as consultants or interim legal managers. Because of Inland Revenue or client requirements these services have to be provided through a company. Although most of the services provided will be unreserved there may be occasions when these barristers have to perform reserved services through their company vehicle. We would be concerned if such arrangements had to be registered as entities thus incurring double regulatory fees for the individual barrister and his company.

Q51–54: BSB approach to risk assessment.

We comment here that impact and probability are common and well understood tools for risk assessment. It is hoped that the BSB will be able to reduce the necessity for expensive monitoring by working (initially at least) on the assumption that Chambers and entities can and should be competent to create and maintain practical risk registers for themselves. With the exception of “size”, the factors suggested for assessing impact and probability seem sensible. Size is not, perhaps, an appropriate measure where the risks of individual practice are involved. The Law Society long ago recognised the particular risks associated with sole practitioners and we suggest that the BSB’s approach to risk generally might be informed by discussions with the Bar Mutual.

Part 2: Supervision and enforcement.

Q1,2,3: Supervision of entities.

We have concerns about the costs of monitoring and supervision generally. BACFI has in the past accepted in principle that the PCF should be the same for all practising barristers. However if in the future the PCF is going to include the costs of monitoring and enforcement of chambers and entities then our position may well change. Generally, employed barristers present a low level of risk and should not be expected to contribute to the costs of entity monitoring and enforcement. The SRA has agreed that in-house solicitors present a much lower risk and such solicitors do not pay the firm element of the Practising Fee.

Q4: Enforcement Policy.

This seems reasonable in relation to individual barristers.

Q5: Greater use of administrative sanctions.

Agreed.

Q6: New maximum level of fines.

Agreed subject to mitigation for self reporting.

Q7 and 8: Civil standard of proof / publication.

Agreed.

Q10 and 11: Disciplinary tribunals conditions on authorisations to be published.

Agree.

**Q14: Do you agree with the proposed approach to the regulation of non-
authorised employees and to disqualification?**

This is a back door way of regulating unregistered barristers without all the benefits which go with registration. These conditions apply to all employees whether they are barristers or not and shows the need for some sort of registration of unregistered barristers.

Q20: Referrals to interim panel.

Agree.

Q21: Intervention for individual barristers.

Agree.

Q22: Fines.

Agree.

Q23: Factors to be included in the fines policy.

There should be discounts for self reporting and admissions of failures. In relation to para 133 c) iii this is too vague.

Q24: Disciplinary cases involving entities.

We question whether COIC is the best body to discipline entities. Para 137 recognises this and suggests widening the composition of tribunals. We believe that tribunals should consist of those with expertise in business regulation.

Q25 and 26: Disciplinary appeals.

Agreed.

Conclusion

We would be happy to discuss any aspect of this Response with the BSB.

BACFI
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