

# Consultation response

## BSB: Development of authorisation to practise arrangements

### Overview

1. **Only persons holding a practising certificate should be able to call themselves barristers. The problems highlighted in the consultation will not be finally resolved while individuals are called to the Bar, and thus obtain the title of barrister, before they have completed the full training requirements that permit them to practise.**
2. **To avoid misleading consumers, non-practising barristers should continue to be prohibited from describing themselves as barristers in connection with the supply of any legal services.**
3. **Should the BSB pursue solutions within the existing regime, the Panel welcomes the proposed additional safeguards, in particular getting clients who know that the person is a barrister to sign a written disclaimer clarifying that the provider is not permitted to practise as a barrister and what this means in terms of a reduced level of consumer protection and quality assurance.**
4. **Non-practising barristers should be required to adhere to all the core duties and be subject to the BSB's disciplinary arrangements, with consumers able to complain about their conduct.**
5. **The proposals for the development of an authorisation to practice regime, in parts 2-4 of the consultation, are sensible measures to correct the more obvious flaws in the current arrangements.**

### The proposals

6. The Bar Standards Board (BSB) is consulting on proposals for new authorisation to practise arrangements to provide greater clarity for both the Bar and for users of their services on what is meant by 'practising as a barrister'.
7. Comments are invited on three topics:
  - The introduction of an authorisation to practise regime – a strengthened approach to the practising certificate renewal process so that it is more directly linked to compliance with the criteria that must be met in order to practise as a barrister (e.g. barristers must declare on the renewal form that they have obtained adequate indemnity insurance cover).
  - The regulatory arrangements for barristers who do not have full practising entitlements – there are a number of categories of barristers who have different or limited entitlements to practise, which creates uncertainty and confusion both for the profession and the public. For example, barristers not holding practising certificates may provide non-reserved activities (such as will-writing) to the public as long as they do not 'hold themselves out' to be barristers. Different requirements for three categories of barristers who are not entitled to practise are proposed.
  - The relationship of the above to the Barristers' Register – this will provide the public face for the new authorisation

to practice regime and will reflect individual barristers' practising entitlements.

### The Panel's response

8. Following some preliminary remarks about consumer engagement, we consider issues around non-practising barristers first, as this is of most concern to consumers.

### Consumer engagement

9. One reason for the proposed changes is to address consumer confusion, so it is imperative to test them with consumers. The BSB should carry out research with users as consumer bodies cannot second-guess public expectations about what a barrister does, or assess what employers will understand by terms such as "barrister not permitted to practice".
10. The Panel is surprised to note that major consumer bodies, such as Citizens Advice and Which?, are not included in the list of consultees. Further, the National Consumer Council and Welsh Consumer Council ceased to exist as of September 2008 having been replaced by Consumer Focus. We hope that the BSB will refresh its stakeholder lists and seek a diversity of consumer views in all consultations.

### Barristers not permitted to practise

11. The consultation document reports there are over 20,000 barristers who are not permitted to practise. This includes:
  - Those who are eligible to obtain a practising certificate and to practise as barristers, but choose not to, for example because they have pursued a different career or they have retired.
  - Those who are not allowed to practise as barristers because they do not have

a practising certificate, either because they are not eligible for one (because they have not completed pupillage), or because they have not applied for one but are nonetheless legitimately offering non-reserved legal services to an employer or to the public.

- Those who are not eligible to obtain practising certificates (because they have not completed pupillage or complied with the three-year rule) but are not offering legal services.

12. The consultation focuses on the middle category – individuals who have attained the status of barrister and offer legal services (particularly those who offer legal services to the public), but are not entitled to obtain a practising certificate because they have not completed pupillage.

### Restrictions on non-practising barristers

13. Non-practising barristers are not permitted to describe themselves as barristers in connection with the supply of legal services. The Panel considers it vital to retain this restriction. The primary concern is the risk of consumers being misled about what the term "non-practising barrister" implies. Consumers are likely to make false assumptions about the quality of legal advice and the standards of regulation to which such persons are subject. For example, non-practising barristers are not required to follow many code requirements, carry insurance or complete annual CPD.
14. The BSB states that it does not wish to reopen the debate on deferral of call. However, the Panel submits that the concerns identified in the consultation will not be fully resolved while the situation exists where individuals are called to the Bar, and thus obtain the title of barrister, before they have completed the full training requirements that permit them to practise.

15. We consider that persons should only be allowed to call themselves barristers if they hold a practising certificate. Protection of title for barristers is in the consumer interest due to the critical importance of advocacy services and the high level of skill needed to provide them. Advocacy, rather than other reserved or unreserved legal activities, is the key feature which, in the eyes of the public, defines what barristers do. Therefore, this activity should underpin regulation on who should be able to call themselves a barrister.
16. The issue assumes greater importance following the extension of the public access scheme. At present, the vast majority of clients will find a barrister through solicitors, who are better able to unpick the subtle differences in terminology. However, as more clients select a barrister directly, often in response to advertising, it is even more important that professional titles are unambiguous in their meaning.

### Safeguards

17. The BSB has developed a set of proposals for three discrete types of barristers:
  - Those who supply legal services to the public and are not in a regulated firm.
  - Those who are employed by a legal services firm that is regulated by another approved regulator and supply legal services to clients of their employer.
  - Those who supply legal services to their employer only.

### *Supply legal services to the public*

18. Should the BSB pursue solutions within the existing deferral of call regime, the Panel welcomes the proposed additional safeguards, in particular getting clients who know that the person is a barrister to sign a

written disclaimer clarifying that the provider is not permitted to practise as a barrister and what this means in terms of a reduced level of consumer protection and quality assurance. We agree that failure to do this should be treated as a disciplinary offence.

19. On balance, the Panel does not consider that the disclaimer should apply to clients who are unaware that the person is a barrister as this could end up creating more confusion instead of bringing clarity. So long as the provider is not seeking to obtain a commercial advantage by describing themselves as a barrister, it does not make sense for that person to have to declare that they are not permitted to practise. However, an exception may be required for services which are similar to advocacy, such as representation in tribunals, as here the temptation for 'holding out' is greater.
20. The Panel considers that non-practising barristers should be subject to additional requirements in the Code. As a minimum, these should include adherence to all of the core duties and consumers should be able to complain about their conduct to the BSB. All barristers listed on the Register enjoy advantages due to the status this provides. It follows that the Register is undermined if the entry requirements are too weak or if it offers false assurance.

### *Supply legal services to clients of their employer*

21. This category of non-practising barrister presents less of a risk to the public as these persons are regulated elsewhere. The Panel agrees that such persons should not be permitted to call themselves barristers as this would cause confusion and an unfair competitive advantage. This becomes more salient once alternative business structures are introduced as it would allow non-law firms employing non-practising barristers to provide services directly to clients.

22. Nevertheless, as with the first category of non-practising barrister, a client may be aware that a person is a barrister, even though the barrister has not directly held himself out as such. The written disclaimer safeguard should also apply here.

### *Supply legal services to their employer*

23. The Panel does not agree with the BSB's proposal to allow barristers who supply legal services to their employer only to describe themselves as 'barristers not permitted to practise'. We are concerned that small employers in particular will not appreciate the regulatory subtleties and consider it unfair that such barristers have an advantage in the labour market by using a term that implies a level of training and standards that is not required in practice. The BSB should consult with employers' organisations to pursue this further.

### **Development of an authorisation to practise regime**

24. The proposals in Parts 2-4 are dealt with briefly as the Panel considers these are sensible proposals to correct obvious flaws.
25. The introduction of the Barristers' Register is a welcome development as it provides consumers with a clear reference point to check whether someone is permitted to practise as a barrister. The Register communicates to consumers that the regulator is content that a professional is fit to practise. This makes it important to link renewal of practising certificates with key compliance requirements, such as having adequate insurance cover and completion of sufficient hours of CPD.
26. In particular, we agree that breach of the BSB's authorisation rules should generally constitute professional misconduct. The BSB must send a clear signal about the

importance of complying with such rules. We also agree that an appeal mechanism would be unnecessary.

27. Welcome too are proposals to list barristers' authorisations and permissions on the Register so it is clear what reserved legal activities they are entitled to undertake. It is concerning that the BSB has little data on the extent to which barristers currently provide other reserved legal activities and encourage it to collect such information in the renewal process. However, this issue exposes a more fundamental question, which we explore above, about which activities professionals called a 'barrister' should be authorised to undertake.

### **Barristers without full entitlements to practise**

28. The proposals in this section are sensible. It clearly makes sense for the BSB to know more about the activities of these barristers and for the public to be able to find out what activities they are entitled to undertake.
29. The Panel does not have a view at this time as to whether the BSB should authorise barristers to provide other reserved legal activities on an individual basis or continue to allow all barristers who are permitted to practise to exercise these rights.

## **May 2010**