

Consultation response

BSB: New BSB Handbook

Overview

1. **The BSB should take enforcement action where achievement of the outcomes has been frustrated due to the actions or omissions of a barrister.**
2. **There should be a stronger emphasis on vulnerable clients within the mandatory elements of the Handbook.**
3. **The BSB should take steps, such as producing a short summary of the key Handbook requirements, to help clients understand what they are entitled to expect from a barrister.**
4. **The Panel considers separate business structures to be undesirable in general. The BSB should take a view about such structures at the authorisation stage, as we are sceptical that information rules will mitigate consumer confusion risks.**
5. **The prohibition of barristers managing client affairs should be removed.**
6. **It should be mandatory for barristers to have their own insurance cover in place should they not be covered by their employer's insurance. We support the proposed third party payment service, although we raise issues around monitoring and enforcement gaps between the BSB and FSA regimes. The service should be run by a single and independent not for profit organisation.**
7. **Interest earned while client money is held by the payment service should be returned to clients. If this is impractical, the interest could be pooled and given to a cause benefiting all consumers, such as public legal education initiatives.**
8. **Serious misconduct should always be reported to the BSB, leaving it to the BSB to decide whether it would be in the public interest to pursue matters further.**
9. **The civil standard of proof should apply to all disciplinary proceedings. Public protection is undermined if the BSB is unable to act due to the evidentiary burden being disproportionate. This would leave consumers at risk of harm and undermine confidence in the BSB. Other professions are moving to the civil standard; lawyers are not a special case.**
10. **Administrative sanctions and fines should be published to create peer pressure and cement public confidence.**

The proposals

11. The Bar Standards Board (BSB) has consulted previously on a number of separate, but related, issues:
 - The review of the BSB's Code of Conduct;
 - The introduction of an entity regulation regime; and
 - The relaxation of the current prohibition on the conduct of litigation by barristers.
12. This consultation draws these different elements together in order to have one clear publication that summarises its new approach across the board. Some proposals have changed since they were originally consulted on; in particular the Code of Conduct has changed significantly in structure and presentation and its reach has been extended to apply to all BSB regulated persons.
13. There is a separate consultation addressing the compliance and enforcement aspects of the BSB's proposed entity regulation regime.

The Panel's response

14. The Panel responded to the last two consultations referred to above (the first preceded the Panel's existence). We also responded to consultations on the public access rules, review of CPD and authorisation to practise arrangements, which are linked to the present exercise. The analysis below does not repeat the points we made in response to these earlier consultations, which still remain our views.
15. For the sake of transparency, it is important that we state at the outset that this includes decisions made by the BSB, which key proposals in this current consultation

exercise flow from, with which we disagree. These policy decisions include:

- The BSB's decision not to regulate multi-disciplinary practices, which we still consider is unduly cautious; and
 - Unregistered barristers – we remain of the view that only persons holding a practising certificate should be able to call themselves barristers in order to avoid misleading consumers.
16. The current consultations are substantial documents covering a wide range of issues. Given our limited resources, we have focused our response on areas of concern. Therefore, it is important for us to state at the outset that we welcome key decisions which the BSB has made to extend choice for consumers, such as enabling barristers to conduct litigation. We also support many of the new features being consulted on, such as the proposals around risk-based regulation including the focus on consumer vulnerability within this.

Presentation to consumers

17. Clients need to be clear what they can and cannot expect of their barrister. This means that the Handbook serves as guide for consumers about the duties of barristers as well as a document aimed at barristers. Therefore, we welcome steps to make the code more user-friendly, to simplify and remove rules, and the use of outcomes to help explain what the mandatory elements are intended to achieve.
18. However, it remains unlikely that all but the most persistent clients will refer to the Handbook itself. We therefore encourage

the BSB to consider how best to inform consumers about what they should expect and the protections they have when using the services of a barrister. This might take the form of a short, simple document that sets out the key elements of the code that is made available on the BSB's website or information that barristers are required to give to clients at the time of engagement.

19. There are many options for achieving this, and we do not wish to be prescriptive. Our key point is that the BSB itself, as well as barristers, have a responsibility to help clients to understand the role of barristers and what can be legitimately expected of them. This is important given the often stressful situations in which clients deal with barristers. Such knowledge would help clients to get the most from their interaction with barristers and help minimise disputes.

Relationship between outcomes, core duties, rules and guidance

20. The Panel welcomes the move towards outcomes-focused regulation, although we take a balanced view as to the benefits and risks. On the plus side, it frees up those being regulated to innovate and deliver better services to consumers. It provides a catch-all safety net to capture practices that fall between gaps in rules. Perhaps the greatest intended benefit is to reinforce the right cultural behaviours, by requiring judgements to be made and responsibility taken by individual practitioners and senior managers to ensure the objectives behind regulation are fully embedded within their thinking and everyday practices. On the risk side, paralysis might ensue if there is too much uncertainty about what professionals can and cannot do. The scope for different

interpretation of outcomes-focused rules creates challenges for enforcement. However, on balance the Panel considers that the benefits outweigh the risks and that outcomes-focused regulation can be made to work in the legal services market.

21. The BSB's proposal is to make the core duties and rules mandatory, with the outcomes intended to be descriptive and help explain the rationale for and aid the understanding of the rules. The BSB would not bring misconduct charges or impose fines for breach of the outcomes alone.
22. The litmus test should be whether each outcome is adequately captured within the core duties and rules. If the outcomes are purely descriptive of the mandatory elements, as seems intended, then it should be the case that non-delivery of an outcome, where this relates to an act or omission by a barrister, will have involved a breach of the core duties or rules. For example, if clients are not adequately informed as to the terms on which work is to be done (section D3) this should be seen as a failure to provide competent service to clients (core duty 7). It is of key importance that the BSB is prepared to enforce on the basis of the breach of the core duties alone, as to do otherwise would defeat the purpose of outcomes-focused regulation.
23. In our view, the Handbook is not entirely successful in this. Sometimes the outcomes appear to go wider than the core duties and rules, with the rules in particular potentially not covering all poor behaviours that could lead to the outcomes not being achieved. One of the benefits of outcomes-focused regulation is that lawyers cannot solely focus on compliance with specific rules, but

instead must consider the wider intent of regulation. Another key advantage of this approach is that the outcomes are worded from the client perspective and so make it clear to barristers what it is they need to achieve to fulfil the core duties. This leads us to conclude that it would be appropriate for the BSB to take enforcement action where achievement of the outcomes has been frustrated due to a barrister's actions.

Vulnerable consumers

24. We would like to see a strong emphasis on vulnerable clients within the mandatory elements of the Handbook. This should go beyond the discrimination provisions in section D2 of the Handbook to require barristers to cater for the particular needs of vulnerable client groups. For example, the Intellectual Property Regulation Board's code includes the following guidance: *"Extra care should be taken when dealing with potentially vulnerable clients such as private individuals and in particular where there may be risk factors related to a person's circumstances (e.g. bereavement, illness or disability etc.) which increase the likelihood of the client being at a disadvantage or suffering detriment."*
 25. We applaud the BSB for building consumer vulnerability considerations into its new risk framework; this needs to be translated into explicit code requirements for barristers. The Panel recently wrote to the BSB to ask it to consider adopting a British Standard on consumer vulnerability, which should assist you in developing appropriate provisions.
- ### Separate business rule
26. The Panel has previously commented on the separate business rule when the SRA applied to become a licensing authority. We said that the rule's main purpose is to prevent solicitors from avoiding regulation by establishing a separate entity to conduct unreserved activities. It is vital to retain the rule given the existing reserved activities are very narrowly defined. Without the rule, the logical response of solicitors would surely be to establish unregulated entities to carry out the majority of their work and sub-contract the small reserved element to separate regulated entities. This might be acceptable if the list of reserved activities was based on consumer needs, but this is patently not the case given what we know about the history of why the activities were reserved. Should the separate business rule be removed, consumers would lose the protections they currently enjoy without any proper analysis of whether these protections should be retained.
 27. The BSB considers that the new Handbook includes sufficient safeguards – in relation to criteria for authorisation, associations with others and outsourcing – to mitigate the risks to consumers. The risks identified by the BSB, especially with regard to consumer confusion, mirror those identified by the Panel in its response to the SRA.
 28. The BSB's decision to be niche regulator focusing on advocacy would appear to make it more likely for entities to wish to establish separate businesses from which to deliver other types of legal activity to consumers. The Guidance statement on page 121 of the consultation document states that the factors which the BSB will

take into account when assessing applications include the nature and extent of non-reserved activities which the entity is intending to provide. Also, paragraph 34.1 states that the BSB may impose licence conditions in terms of the non-reserved activities to be carried on. However, we can find no specific reference within the authorisation regime in relation to establishing *separate* business structures to carry out non-reserved activities. Should the Handbook not include a separate business rule, considerations of the risks to consumers identified by the BSB should be an explicit part of the authorisation process.

29. We are satisfied that the Handbook section on associations with others should provide adequate information to clients about such arrangements, although we note the limited effectiveness of information requirements and the historic degree of non-compliance with other information provision rules, e.g. on complaints-handling. Furthermore, it will be difficult to break the assumptions held by consumers that all legal work is regulated.
30. In short, we consider the risks to consumers of separate business structures to be high and consider them undesirable in general. We think it is vital that the BSB take a view about proposed business structures at the authorisation stage and impose licence conditions as appropriate. Once a licence is granted, active supervision on information and other requirements is also needed.

Managing client affairs

31. Self-employed barristers may not currently 'undertake the management administration or general conduct of a lay client's affairs'. The BSB proposes to retain this prohibition

due to risks that a barrister's independence may be compromised, there might be a greater risk of conflicts of interests or that barristers might work in areas outside of their competence, and the scope of a barrister's practice might go beyond what the BSB has capacity to regulate.

32. The consultation lists these risks but does not offer any explanation for why they might transpire. Nor is there any discussion of the potential benefits to consumers of lifting this restriction and thus no cost/benefit analysis. There would seem to be clear benefits for consumers in terms of a one-stop shop and greater competition with solicitor practices. Should the litigation restrictions be relaxed managing client affairs would be one of the few remaining activities that barristers could no longer carry out. The restriction has greater significance for competition in this context. Neither are we convinced that the risks are as great as the BSB suggests. The Panel considers that the arguments are similar to those in relation to the litigation developments and sees that the BSB could manage the risks in much the same way, for example through appropriate training, management systems and insurance.

Reporting misconduct

33. We welcome the previous decision that the revised code will include a positive duty on barristers to report serious misconduct and support also the proposed extension to place a duty on barristers to report any personal failure to comply with the rules applicable to them.
34. Our concern is with the proposed rule that serious misconduct by another barrister must only be reported where it is in the

public interest to do so. We challenge the BSB to list some circumstances when it would not be in the public interest to report serious misconduct. In our view, this offers a convenient get-out clause for barristers to hide behind. It also potentially places the barrister in an invidious position of weighing up public interest considerations and will no doubt produce inconsistent approaches.

35. The simplest approach, and that most likely to foster public confidence, is to require all cases of serious misconduct to be reported. It would then be for the BSB in its role as guardian of standards to decide whether it would be in the public interest to proceed. It would do this by applying consistent and transparent criteria in each case.

Insurance and holding client money

36. The Panel notes that rules on insurance for employed barristers will be replaced by guidance. The guidance states that employed barristers should consider whether they need to take appropriate cover available on the open market. The wording of this particular piece of guidance should be more explicit. It should state unambiguously that where a barrister is not covered by their employer's insurance they must ensure they have in place appropriate cover themselves. It is the responsibility of the barrister to ensure that cover is in place. This raises the issue of how consumers would be compensated should a barrister breach this regulatory requirement.
37. The BSB is considering authorising a third party to provide a payment service for holding client money, something which the Panel supported further investigation of in a previous consultation response.

Technology exists to allow a payment service to operate a pooled bank account with virtual sub-accounts in the names of individual clients. Clients could pay directly into the relevant account and barristers and entities would not have control over moving the money. The scheme is similar to that used by the French bars, with some differences.

38. The consultation document sets out a number of requirements which any such payment service would need to meet in order to address risks. The Panel supports the principle of establishing separate accounts for holding client money and considers it could have a number of advantages, particularly in minimising any risk to consumers that funds could be misappropriated from successful court awards, for example.
39. However, we would like to see more evidence of how any such scheme would work and be monitored in practice. For example, the BSB states that it would need to be satisfied that a payment service provider has systems and checks in place to verify instructions to release funds and deal with instructions relating to the payment account. Any such system is likely to be complex in the way it operates in practice and the BSB has stated that the operation of any scheme would be designed by the provider. We would therefore like to see evidence that the BSB has considered and will put in place specialised monitoring arrangements, such as setting aside time and funds for training staff to understand and work with the payment service system, in order to ensure effective monitoring takes place.

40. The BSB sets out in the consultation document that any payment service provider would be monitored by the BSB but would also have to comply with Financial Services Authority (FSA) regulations under the Payment Services Regulations 2009 (PSRs). This is a regulatory requirement and will mean that service providers are dual-regulated. However, it adds a further layer of complexity and the Panel is concerned that this could create 'enforcement gaps' where the FSA and the BSB each rely on the other to take action. The FSA have stated they take a complaints-led approach to the conduct of business supervision of payment service providers. However, consumers of legal services may be unaware that they can complain to the FSA if something does go wrong plus this could also cause intelligence to fall through the gaps. There is nothing in the consultation document about whether the BSB will work together and share information with the FSA in order to stop this from happening. We would like to see this point addressed.
41. For these reasons the Panel also considers it is important that any such scheme is run by a single not-for-profit organisation which is independent and subject to full scrutiny by the BSB. Large numbers of small providers could create further difficulties in effective monitoring and therefore place consumers at risk.
42. There appears to be some anecdotal evidence that under the scheme used by the French bars client money may in some cases be held for excessive amounts of time. There may be added incentives for

this where interest payments are retained by either the provider or the scheme. In order to mitigate against this risk the BSB could consider introducing limits on the amount of time client money can be held for after the conclusion of a case. Interest earned while the money is held should be returned to the client. If this is impractical, the interest might be pooled and given to a cause that would benefit all consumers, for example to public legal education initiatives.

43. The Panel notes that the FSA PSRs are intended to protect consumers in the event of insolvency of the payment service provider. The BSB intends to ensure that further insurance requirements are in place to mitigate risk due to fraud or negligence of the service provider, and that as barristers or entities would not hold client money themselves consumers should be protected in the event of insolvency of the barrister. For these reasons no compensation fund would be put in place. The Consumer Panel supports this but underlines that the BSB must have effective monitoring and enforcement procedures in place to ensure the insurance requirements are met.

Special bodies

44. The Panel will be responding to the LSB's consultation on regulating special bodies shortly. We suggest it may be premature for the BSB to conclude that amending its rules for special bodies is unnecessary before being able to consider responses by special bodies and others to this exercise. The Act enables special bodies to request 'special treatment' from licensing authorities so such changes were envisaged when the regulatory architecture was being designed.

Standard of proof

45. The BSB is proposing to move to a civil standard of proof (balance of probabilities) for administrative sanctions, but to retain the criminal standard (beyond reasonable doubt) for the Determination by Consent procedure and Disciplinary Tribunals. While we welcome the use of the civil standard for administrative sanctions, we are disappointed that the criminal standard will remain for the other procedures.
46. The underlying purpose of disciplinary proceedings is public protection, which could be frustrated if the BSB is unable to take action, or is unsuccessful in so doing, because the evidentiary burden is disproportionate. Cases prosecuted using the criminal standard of proof are likely to take longer and be costlier. A failure to enforce rules could leave consumers at continued risk of detriment and undermine public confidence in the regulatory system. Whilst the impact on the practitioner concerned must also be considered, disciplinary action would not affect the person's liberty. In other professional services sectors, such as medicine and accountancy, the civil standard of proof is regularly used in serious cases that have a major impact on individuals and businesses. The SRA Board has rejected the argument that lawyers require a higher standard of proof in their disciplinary proceedings, whilst we note that CILEX and the CLC use the civil standard.

Publication of decisions

47. The BSB is proposing that administrative sanctions and fines should be recorded but not be published. Findings and sentences

resulting from the use of the Determination by Consent procedure will be published to the same extent as such publication would have taken place following a finding and sentence following a Disciplinary Tribunal.

48. We consider that administrative sanctions and fines should be published. This is unlikely to have a major influence on consumer choice, but the effect of publication on a barrister's reputation among peers could serve as an effective deterrent against the behaviours leading to such sanctions. Publication of these sanctions reinforces the importance of professional ethics and would further cement public confidence in the BSB. The proposed widened scope for administrative sanctions – every breach of the Handbook would potentially be capable of being dealt with administratively and the increase in maximum fine amounts – makes the case for publication stronger than in the past.

June 2012