



Response of The Criminal Bar Association to the Bar Standards Board Consultation Paper on 'Development of authorisation to practise arrangements'

Introduction

1. The Criminal Bar Association represents nearly 4,000 self-employed and employed barristers practising in criminal law. Affiliated to the Bar Council, it frequently responds to consultation papers from government departments and other bodies on law reform and proposals that affect its members.
2. This is the response of the CBA to the BSB's Consultation Paper "Development of authorisation to practise arrangements" of March 2010. The CBA has had the opportunity to consider in draft the response of the Professional Practice Committee of the Bar Council ('the PPC') and broadly agrees with its conclusions and responses. This Draft Response, which begins with a summary of the CBA's position before considering in turn each of the 24 questions put by the Consultation Paper, concentrates in particular upon areas that affect its core membership of self-employed criminal practitioners. References to paragraph numbers are to those of the Consultation Paper, save where otherwise stated.

Summary

3. The CBA agrees with the BSB that there are areas in which further regulation is necessary in order to protect and better inform consumers of legal services. In particular, it is important that barristers with a limited entitlement to practice are subject to greater regulation in order to protect clients and employers who may not be aware of their status.
4. Notwithstanding the CBA's sympathy with the BSB's objectives in its further review of the Code of Conduct, it has particular concerns that the suggested amendments risk unduly penalising those barristers guilty of no more than administrative oversight, particularly since practising without a certificate is now a criminal offence (under s 14 of the Legal Services Act 2007 ("LSA 2007")). For this reason, the CBA suggests that it would be appropriate to allow barristers a 'grace'

period after renewal applications become due. It also disagrees with the suggestion that a late application to renew a practising certificate should be made a disciplinary offence; and suggests that appeals against BSB decisions not to backdate registration should be permitted in certain circumstances.

5. The CBA agrees with the BSB's suggestion that barristers with a limited entitlement to practice should be required to provide disclaimers about the limitations of their entitlement to practise wherever their client or employer is at risk of considering them to be practising barristers. The CBA nevertheless agrees with the PPC that the designation 'barrister not entitled to practise' is one apt to mislead and suggests, rather, that such barristers be permitted to describe themselves as 'partially qualified barristers'.

Part III: Development of an authorisation to practise regime

Proposal 1 – annual renewal of authorisation to practise

Q1. Do you agree with the arrangements described in Proposal 1? Do you have any suggested alternatives and/or improvements to the proposal?

Q2. Do you think it is reasonable for barristers who do not comply with the practising requirements in a timely manner to no longer be authorised to practise (and therefore be removed from the Barristers' Register)?

Q3. Do you agree that it is not necessary to have an appeal mechanism against withdrawing authorisation to practise and removal from the Register?

Q4. Is it appropriate to have a one month grace period?

6. The CBA welcomes the BSB's suggestion that all barristers permitted to provide legal services of any kind be required to have entries on the barristers' register detailing their entitlement to practise or provide legal services. In the light of this development, the CBA agrees that it is necessary to ensure that the process of renewing practising certificates is tightened.
7. The CBA's concern, one widely reflected amongst its membership, is that barristers are not put at risk of unduly onerous sanctions for their failure to make timely applications to renew their practising certificates. This is a particular concern now that any barrister practising without a certificate will be committing a criminal offence. There are a number of reasons why such applications might be late. Barristers might be abroad for lengthy periods or they might be ill.

Even where this is not the case, failure to make timely renewal applications cannot be considered anything other than an administrative oversight.

8. The CBA also notes that not all barristers practice from large and efficient chambers with administrative systems in place that guard against such failures. Some, indeed, are sole practitioners. While this does not excuse late applications for renewal, such barristers are at greater risk of late applications to renew for the reasons cited above.
9. It is on these grounds that the CBA submits that it is essential that a 'grace' period is instituted that permits barristers to practice for at least a month after the date on which their applications are due. Such a period would make it unlikely that barristers will commit the offence of practising without a certificate out of mere carelessness. In addition, the CBA agrees with the suggestion of the PPC that reminders should be sent to all barristers two months before renewal applications fall due.
10. The CBA also agrees with the PPC that breaches of the authorisation rules should not constitute professional misconduct. Administrative failings are properly distinguishable from misconduct and it is right to ensure that findings of misconduct reflect serious failures to comply with the Code of Practise. The CBA notes that the withdrawal of a practising certificate on the grounds of failure to comply with the renewal process will have the extremely onerous affect of withdrawing from a barrister his means of earning a living. In addition, barristers in those circumstances would commit a criminal offence were they to practise without a certificate. These sanctions surely provide sufficient deterrence and penalties.
11. The BSB has suggested a means by which barristers removed from the Register through administrative error can apply to have their registration backdated, a suggestion the CBA wholeheartedly supports. The CBA suggests that this proposal does not go far enough. There will inevitably be barristers who apply for registration but whose applications are mislaid or not received by the BSB, for example by unprinted faxes or undelivered mail. If such barristers are able to demonstrate that they applied for registration before the end of the grace period, it would be right for their registration to be backdated.
12. The CBA is particularly concerned that the process of registration is fair because of the seriousness of the consequences to barristers affected. Unregistered barristers, even unknowingly unregistered, will commit criminal offences. Barristers removed from the register will be unable to earn a living.
13. As an organisation devoted to due process, the idea of administrative decisions against which those affected cannot appeal is abhorrent to the CBA. Not only does it leave barristers affected with no means of

redress, it insulates decision makers against scrutiny. For this reason, the CBA is strongly opposed to the suggestion that decisions on whether to restore barristers to the Register should not be subject to appeal.

Proposal 2 – monitoring CPD compliance

Q5. Do you agree with the arrangements described in Proposal 2? Do you have any suggested alternative and/or improvements to the proposal?

14.The CBA agrees with the arrangements described in Proposal 2.

Q6. Do you think that Proposal 2 provides adequate regulatory safeguards for users of legal services?

15.The CBA does not agree that it would be appropriate to state that a barrister has not completed his or her CPD requirement prior to a finding of misconduct. There is a process by which the BSB frequently prosecutes barristers who repeatedly fail to comply with these requirements. Barristers may have acceptable grounds for not having completed them, for example through ill health. The BSB considers that it would be unfair to publish barristers' non-compliance before it has had an opportunity, in a disciplinary hearing, to consider their defences.

16.The CBA points out that, where a barrister has been subject to such a disciplinary finding, the finding will be available to the public in any event.

Q.7 Do you think that non-compliance with the CPD requirements should result in automatic refusal of renewal of authorisation to practise?

17.No. The CBA agrees with the BSB that this would be a disproportionate response to non-compliance, especially in view of the disciplinary sanctions to which such barristers are liable.

Q.8 Do you think that noting on a barrister's individual entry on the Register that compliance with the CPD requirements is outstanding would provide more incentive to comply with the requirements in a timely manner?

18.Yes.

Delegation of renewal applications

Q.9 Do you foresee any problems in the proposals for the administration of barristers' practices? Will they present difficulties for chambers or employers? If yes, how could any problems or difficulties be resolved?

19.The CBA is strongly in favour of continuing to permit chambers to complete and return the renewal form; and of continuing the chambers' discount scheme. The ability of chambers to renew on behalf of their members encourages compliance and is an efficient means of allowing timely registration. However, the CBA agrees that it is important for barristers to sign registration forms, whether submitted individually or by chambers.

20.The CBA also asks that there be a means by which 'signatures' can be rendered electronically. It does not expect that this reform would be unduly complicated or expensive to initiate.

Part IV – Barristers without full entitlements to practise

Q.10 Do you agree that the transitional arrangements under rule 1102 should be brought to an end?

Q.11 Do you agree that no other changes need to be made to the rights of employed barristers in categories 2(b) and (c) above?

21.The CBA answers "yes" to both questions.

Proposed Change 1

Q.12 Do you agree that if individuals have not provided the necessary information to allow the BSB to determine their level of authorisation, it should be assumed that they are not authorised to exercise a right of audience? If not, please explain why.

22.Yes.

Proposed Change 2

Q.13 Do you agree that barristers' authorisations and permissions should be listed on practising certificates and on the Barristers' Register? If not, please explain why.

23.Yes.

Rights to conduct litigation

Q.14 Do you agree that employed barristers should only be authorised to conduct litigation if they comply with all the requirements to do so?

24.Yes.

Other reserved legal activities

Q.15 Do you agree that all barristers with practising certificates should be authorised to provide reserved instrument activities, probate activities and the administration of oaths? If not, what should be the basis for deciding which barristers should be authorised to carry out those activities?

Q.16 Do you agree that all barristers with practising certificates should be authorised to provide immigration advice and services? If not, what should be the basis for deciding which barristers should be authorised to carry out those activities?

25.The CBA answers “yes” to both questions.

Q.17 Do you think additional rules are needed to regulate these activities?

26.No.

Part V – Barristers not permitted to practise

Those who supply legal services to the public

Q. 18 Is clearer guidance on holding out and requiring a client or potential client to sign a disclaimer in a prescribed form an adequate safeguard to ensure that members of the public are properly informed of the status of barristers who are not permitted to practise?

Q. 19 If you disagree, please explain why and provide details of alternative proposals to protect the public in these circumstances.

Q. 20 Do you agree that the disclaimer should only be given when an individual has reason to believe that the client knows they are a barrister? If not, please explain why.

Q. 21 If you consider that the disclaimer should be given in all cases when a barrister without practising rights provides legal services to the public, is there a risk that this would undermine the prohibition on holding out as a barrister and if so how could this risk be mitigated?

27. The CBA shares the BSB's concerns that the term 'non-practising barrister' is apt to mislead members of the public and employers. The barristers whom this section concerns – those who have been called to the Bar but have not completed pupillage – are not subject to the same rigorous standards of fully qualified barristers and yet are permitted to provide legal services. Thus, it is essential that their clients and employers are fully aware of their status, the extent of their professional education and the limitations upon their provision of legal services.

28. For these reasons, the CBA welcomes the BSB's recommendation that wherever employers and/or clients are at risk of considering that they are dealing with qualified barristers, they are provided with disclaimers detailing the limitations upon their ability to practise, their status and the extent of their education.

29. The CBA does not consider that the term 'barrister not permitted to practice' is either accurate or helpful, however. Any member of the public or employer aware that they are dealing with a 'barrister' must, under the BSB's proposal, be provided with a disclaimer. Thus, there is no risk of their being misled into believing that such a barrister is fully qualified and subject to the Code of Conduct. The proposed term is misleading because such barristers will, in those circumstances, be providing some legal services. In addition, most of them will have completed and passed the Bar Vocational Course. On these grounds, the CBA prefers the term 'partially qualified barrister'.

Q. 22 Do you agree with the above proposals for revised arrangements for barristers registered under paragraph 206 or 808 of the Code? If not, why not and what alternative proposals would you suggest?

30. Yes.

Those who are employed by a firm that is regulated by another approved regulator

Q. 23 Do you agree that the arrangements described in paragraph 137 are an adequate safeguard to the public? If not, please explain why and give alternative suggestions?

31.Yes.

Those who supply legal services to their employer only

Q. 24 Do you agree that a barrister who is not permitted to practise should be allowed to describe themselves as a "barrister who is not permitted to practise" to their employer or potential employer only?

32.The CBA agrees that employers at risk of considering that they are employing a 'barrister' are provided with the same disclaimer as members of the public to whom partially qualified barristers might provide legal services. For the reasons argued above, however, it is suggested that the description should be 'partially qualified barrister'.

Part VI – Conclusions

Equality and diversity impact

Q. 25 Are any of the proposals likely to have a greater positive or negative effect on some groups compared to others? If so, how could this be mitigated?

33.The CBA does not believe that the proposals will have such a negative effect and has seen no evidence that they might. In the event such evidence becomes available, the CBA would welcome a further opportunity to comment on how such effects might be alleviated.

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