



CBA Response to Bar Standards Board Three Year Strategy Consultation

7th December 2021

Introduction

1. The CBA represents the views and interests of practicing members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, at the heart of criminal justice in this jurisdiction, is maintained.
4. The Regulatory Objectives of the BSB are:
 - Protecting and promoting the public interest;

- Supporting the constitutional principle of the rule of law;
 - Improving access to justice;
 - Protecting and promoting the interests of consumers
 - Promoting competition in the provision of services;
 - Encouraging an independent, strong diverse and effective legal profession
 - Increasing public understanding of citizens legal rights and duties, and
 - Promoting and maintaining adherence to the professional principles.
5. We agree, generally, with the aims of the BSB over the next three years although we do not believe that at present the BSB has understood or considered sufficiently the threats to those regulatory objectives which are current and ongoing within the Criminal Bar.
 6. The Bar Council's Wellbeing Consultation Response analysis ¹ yielded very worrying and disturbing trends within the criminal barrister group over and above any other practitioners.
 7. The Wellbeing analysis demonstrated that barristers working in the criminal bar reported significantly lower overall wellbeing than all other practice areas, with just under 50% reporting they felt down or in low spirits and only 40% reporting they found their workload manageable. Further those barristers who reported being in employed practice only were found to have significantly higher overall wellbeing than other those who were self-employed in chambers.
 8. The Wellbeing findings also showed that those barristers called to the bar more recently had lower levels of wellbeing than those called to the bar before them; with those called to the bar before 1990 having significantly higher wellbeing than all other call categories. As regards working outside of London those barristers working in the greater London region

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file:///C:/Users/User/AppData/Local/Temp/Working%20Lives%202021%20wellbeing%20analysis-1.pdf

reported higher average wellbeing than other regions, and significantly higher than barristers in the north-east (who had the overall average lowest wellbeing), the north west, south east and the multiple / national category.

9. In term of diversity those who are female, from the 'young' bar and low income had the lowest reported wellbeing. Those from a diverse background, women or those with caring responsibilities appear to be likely to suffer most.
10. The Bar Council has considered the Wellbeing consultation report and analysis and has considered the changes that must be made² to do this the Bar Council has set out these targets:

“While the report indicates Psychological Wellbeing (PWB) is the best predictor of job satisfaction ratings, we are more limited in the interventions we can make as this is related to the totality of someone’s own experience. Where we can make the most meaningful difference is in Supportive Work Environments (SWE) and workplace culture at the Bar which is where this action plan focuses. We therefore clearly need to prioritise:

- Workload management, particularly in crime;
- Low/inadequate incomes;
- Tackling bullying and harassment

11. The response from the Bar Council accepts that it needs “to target support towards more junior members of the profession; and recognise there are particular challenges for women, those on circuit and in lower income groups”. In doing so the Bar Council recognises that:

“We will also continue to promote initiatives that support wellbeing across chambers - not just in the support made available via e.g. wellbeing officers, access to helplines and counselling, in the promotion of healthy working practices and social support (supporting PWB), but also in the way chambers support individual barristers re:

- Practice management - support and development (addressing workload and income);
- Flexibility (work-life balance);
- Inclusive cultures (zero tolerance on bullying and harassment); and
- Tackling unhealthy/excessive perfectionism”

² <https://www.barcouncil.org.uk/uploads/assets/eca14697-0d1a-44f1-8485f1c6db391882/Wellbeing-at-the-Bar-Working-Group-Response-Wellbeing-Research-2021.pdf>

12. The Criminal Bar Association has responded urgently to the risks and threats to the Criminal Bar and is seeking the adoption of the CBAs Wellbeing Protocol which for convenience set out here:

THE WELLBEING PROTOCOL³

COURT LISTING

1. *Listed trials or other substantial hearings should ordinarily not take place before 10am and the court day should ordinarily end no later than 4.30 pm.*
2. *If the court intends to sit either later or earlier, then it should only expect to do so in exceptional circumstances. Enquiry must be made as to whether and to what extent this is consistent with practitioners' commitments.*
3. *Shorter non-trial hearings may be listed by the courts with a view to being concluded by 10, in order to assist counsel's availability.*

BREAKS

4. *Trials involve intense concentration, and there should be breaks, in addition to lunch breaks. Courts should not ordinarily sit for longer than 1.5 hours without a break.*
5. *Lunchbreaks are a necessity. The Court should rise for a full hour at lunch time, ideally between 1 and 2. Significant variations should not be made by the Judge without warning, nor without good reason.*

³ <https://www.criminalbar.com/wellbeing/cba-wellbeing-protocol/>

6. *Lunch breaks should be used for lunch. The length of the lunch time adjournment should be adjusted upwards from one hour to accommodate any additional work required over that period, so as to allow advocates sufficient time to have a break as well as undertake such work.*

7. *For trials lasting longer than one day sensible time markings should be provided for the second and subsequent days to allow for any conferences or work that needs to be undertaken relating to the trial before it commences so that it does not have to be done outside of the ordinary work hours.*

8. *When listing or adjourning a case every effort will be made to accommodate prior commitments, where possible in order that practitioners do not spend time on cases they are then unable to attend, and defendants are able to retain continuity of counsel.*

9. *The courts will, where the interests of justice permit, make allowances for advocates to deal with other matters by video link or other remote means to maximise efficiency in trial counsel being present.*

OUT OF COURT WORKING HOURS

10. *Advocates work is not limited to that undertaken in the court room. Sufficient time should be allowed for advocates to complete work requested/directed by the Court and hearings should be given appropriate time markings to accommodate this without the advocate having to work for excessive amounts of time outside of the ordinary work hours.*

11. *Enquiries should be made with the advocate in question regarding how long such work will realistically take in order that their other commitments and input from third parties (if required) can be accommodated. Unrealistic orders cannot be appropriately complied with, and therefore will not be. Where a barrister takes the view that they cannot realistically comply with an order, they remain under a duty to inform the court of that fact in good time.*

EMAILS

12. Emails should ideally only be sent during work hours. Where that is not possible advocates may send their emails when is convenient to them. However, there is no need to read or respond to an email after 6pm or before 9am, nor at weekends. This includes emails received from the Court/Judges.

13. There should be no expectation of a response if an advocate is on leave.

14. Email recipients are encouraged not to “reply all” unless necessary.

RESPECT

15. All court users are entitled to be treated by all concerned with courtesy and respect. Verbal aggression is a form of abuse and should never be justified. Criminal barristers are entitled to be treated with that same courtesy and respect.

13. The CBA believes that for the BSB to achieve their stated aims over the next three years and to adhere to its regulatory principles there needs to be a move away from a regulatory role of negatively enforcing standards (via sanctions or disciplinary action) to appreciating that the Criminal Bar needs positive support and protection. The factors put forward which require the BSB to act and provide positive support to assist the practitioners through the positive adoption of CBA well-being protocol are:

- I. Increasing demands from the courts to sit long hours
- II. Increase in ‘contactability’ through devices
- III. Increasing pressure and demands on courts which is transferred to the Bar (who are expected to respond whatever the hour)

- IV. Highest level of vulnerability applies junior practitioners/pupils
- V. No protection for pupils within BSB regulations
- VI. Transfer of practitioner pressure to pupils
- VII. Barrister's family life and caring responsibility's ignored entirely or having to be argued for before the court
- VIII. Barristers with health and mobility problems forced to explain repeatedly and openly in court about private issues
- IX. Different judges having varied views as to CVP attendance – which turns a system which could enhance practitioner's work flexibility into a system that hinders

14. The issues set out above are some of the many reasons why the underpaid Criminal Bar is demoralised. These issues also make the Criminal Bar a very unattractive career which is why the membership of the Criminal Bar is aging, why so many are considering other areas of legal work and why retention of experienced women practitioners is poor.

15. For the Criminal Bar to become part of a profession that reflects the diversity of the population there must be an attractive career for all people from all backgrounds and not just those who come from a better off (financially) background.

16. The use of technology and remote hearings are part of the answer to assist people with mobility issues and caring responsibilities to remain in practise. Adopting a more flexible approach to hearings through the use of remote hearings and the adoption of the CBA Wellbeing Protocol will allow more people from a more diverse background, more women with children, more people with caring responsibilities and more people with mobility issues to join and remain part of the Criminal Bar.

17. If the BSB fails to grasp the opportunity to support the Criminal Bar in adopting the CBA's Wellbeing Protocol then retention of talented practitioners will remain a pipe dream. If this does not happen then entry into Silk and the Judiciary will remain, largely, the province of white male practitioners without mobility problems.

18. Lastly these concerns are not the exclusive province of the CBA. Recently the reality the Government has repeatedly stated that RASSO cases must be given

urgent priority in clearing the backlog. But Sue Hemming⁴ from the CPS cited the alarming statistic cited that they have lost between 22%-25% of their rape panel advocates over the last three years as a result of barristers moving away from criminal work. This, along with mounting reports of trials and other hearings being aborted because of a lack of advocates in court, the evidence is clear that the crisis in human capacity at the criminal bar is manifestly hurting the most vulnerable in our society. The CBA urges the BSB to play its part in working with the profession to support Criminal Practitioners and work with the CBA to achieve the universal adoption of the Wellbeing Protocol.

The Criminal Bar Association

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⁴ CBA Conference November 2021