SUMMARY OF ADVICE TO CBA EXECUTIVE OFFICERS

RE: ARTICLE 11 ECHR

1. The Executive Officers of the CBA have taken advice from Richard Clayton QC, Daniel Stilitz QC, Sean Jones QC, Thomas de la Mare QC, Michael Ford QC, and Faisel Sadiq, on the extent to which Article 11 ECHR affords a barrister observing the CBA's "days of action" with a defence to an application for wasted costs/disciplinary action by the BSB. The headline points in what is a complex area are as follows.

2. Participation in the "days of action" is very likely to be a form of association fully engaging Article 11.1 ECHR, which protects every person's right of association, including (but not limited to) the right to join a trade union and the right to strike: *Ognevenko v Russia* (2019) 69 EHRR 9. Barristers, even though self-employed, still have the right to associate to advance their common goals and aims.

3. Whilst it is possible under Article 11.2 ECHR to regulate or to impose restrictions on the right to associate or to strike, any restrictions on association (including, in particular, criminal or disciplinary/penal sanctions for striking) are to be construed strictly; only convincing and compelling reasons can justify restrictions on the freedom of association. Any restrictions on the right to strike would need to be:

    a. in accordance with law, which is open to doubt (the present costs rules and regulatory system not being designed for industrial action); and

    b. necessary in a democratic society, as well as proportionate in result, the justificatory burden for which will fall on the state.

4. The judiciary, HMCTS, the MOJ, and the BSB are all public authorities for the purposes of the Human Rights Act 1998: s.6(3). It is therefore unlawful for them to act in a way that is incompatible with Article 11 ECHR.

5. For the judiciary/BSB automatically to impose punitive or disciplinary measures against barristers who take part in the "days of action" would likely be unlawful.

6. Sanctioning a barrister for taking part in the strike could only be an exceptional course and would first require an exacting factual analysis as part of any justification/ proportionality assessment. That analysis would also embrace the actions of the relevant public authorities. The Article 11 right of association (including the right to strike) would be a very weighty consideration on any such assessment.

7. The LCJ's statement(s) failed to refer to the judiciary's obligation to act compatibly with Article 11 ECHR. Crown Court judges may want to reflect on this omission before relying upon the LCJ's statement(s). For example, if a judge lists a hearing for a date that they are aware counsel will not attend due to their observance of the "days of action", this may well be relevant to an Article 11 ECHR analysis (whether in a wasted costs context or the BSB disciplinary context).

8. The BSB's statement also failed to refer to its obligation to act compatibly with Article 11 ECHR. The BSB is obliged to have regard to Article 11 before taking any action against a barrister observing the "days of action" and in the design of any sanction.

9. In light of these omissions, it would be reasonable for barristers contemplating observing the "days of action" to be cautious before taking the LCJ's and BSB's statements at face value.

10. It does not appear that the advice that will be given by the Bar Council's Ethical Enquiries Service will have regard to the impact of Article 11 ECHR on the obligations of counsel. Accordingly, there is the potential for the advice received by those approaching the Ethical Enquiries Service to differ from that provided to the CBA.