



CRIMINAL BAR ASSOCIATION RESPONSE
TO BAR STANDARDS BOARD CONSULTATION
ON THE STRUCTURE OF SELF-EMPLOYED PRACTICE

INTRODUCTION

1. In February 2008 the Bar Standards Board (“BSB”) published its first consultation paper on the implications of the Legal Services Act 2007 for the regulation of the Bar in England and Wales. Much of that paper was concerned with issues relating to practice in the new business structures permitted by the Act and to the regulation of business entities and their members. Part V of the paper, however, also raised questions regarding the structure of self-employed practice. It is to aspects of that latter topic that the BSB returns in its recent consultation paper issued in August 2009. The deadline for responses is 25th September 2009.

2. In preparing our response to the current paper we have considered the responses of both the Bar Council Working Group and the Criminal Bar Association to the broader consultation paper of February 2008 referred to above.

EXECUTIVE SUMMARY

3. The BSB Consultation Paper poses 9 specific questions, which we answer in detail below.
4. The BSB proposes relaxing the Code of Conduct in certain respects in order to permit (within limits) barristers to undertake or engage in activities which have hitherto been prohibited under the Code and in addition a limited relaxation in respect of the prohibition on the sharing of office facilities.
5. In summary, the proposed changes are
 - (i) To allow self-employed barristers to share office facilities with other persons or entities;
 - (ii) To allow self-employed barristers to collect evidence and take witness statements for use in court;
 - (iii) To allow self-employed barristers to attend interviews of suspects at police stations;
 - (iv) To allow self-employed barristers to have conduct of correspondence on behalf of their client.
6. In considering the desirability of the proposed changes we have taken as our guiding principle the imperative of safeguarding the interests of the client and the interests of justice.
7. The Bar Code of Conduct has historically been designed to ensure that barristers concentrate only on advisory and advocacy services. A member of the public who uses a barrister's services knows that they are retaining a specialist who is an expert both in the area of law in which s/he practices and in the art and skill of advocacy. It is of very significant importance, and unquestionably in the public interest, that the special skills and expertise of the Bar in those fields is preserved

and not diminished by diversification into areas which do not fit comfortably with the Bar's core functions.

8. The fact that barristers specialise exclusively in the provision of advisory and advocacy services also means that they can be regulated in an economical way by the BSB.
9. We are acutely aware of the fact that in recent years practitioners at Criminal Bar have faced unprecedented challenges. The Crown Prosecution Service has followed a well-publicised policy of shifting work from the self-employed Bar to in-house advocates. That trend continues unabated. Similarly, there has been a very significant increase in the volume of work undertaken by HCAs employed by (or associated with) firms of solicitors conducting criminal defence work. In addition, there is relentless downward pressure being applied to the already low level of fees paid to the Criminal Bar in publicly funded cases. Against this background, potential new sources of income through extending the scope of permissible practice will be a welcome prospect for many at the Criminal Bar.
10. We are, therefore, of the view that objective consideration should be given to any proposals to allow barristers to undertake tasks and functions which are reasonably incidental to the core functions which they currently perform, provided that the proposed changes are not inconsistent with the over-riding objective of protecting the public interest and the interests of justice.
11. Against that background, we are broadly in favour of all but one of changes proposed by the BSB in their consultation paper, subject to some important caveats which we express in the body of our answers below.

**Question 1: Do you agree with the proposals in paragraph 8?
In particular do you agree with the text of paragraph 403.2 of
the Code of Conduct suggested in Annex A?**

12. The BSB proposes to allow barristers to share office facilities with others provided that:
 - (i) There is no business sharing arrangement, and nothing is done that might create the impression of such an arrangement;
 - (ii) There is no general referral arrangement or understanding between the barrister and the other person or persons.
 - (iii) Prior notification of the details of the arrangements for sharing facilities or premises and the other persons involved in them, has been given to the BSB.

13. The proposal currently advanced by the BSB is the least radical of a range of business arrangements considered in the first BSB consultation in February 2008. To our mind it involves nothing more radical than permitting economies to be achieved through more efficient use of office space and facilities. It is common for many criminal sets to have considerable office capacity spare for long periods each day since the members of the set will be deploying their advocacy skills in courts the length and breadth of the country. There is an inescapable logic in seeking, where appropriate, to make more efficient use of costly facilities. Sharing of office facilities is far from uncommon in the commercial world and the potential advantages are too obvious to require enumeration.

14. Of course, where premises are shared, there would have to be systems in place to preserve the confidentiality of private and privileged information that counsel have. There might have to be

separate phone and computer systems; coded door locks or storage cupboards; and so on

15. What are the potential dangers? Most obvious is the risk of compromise to the independence of the barrister through the adoption of referral arrangements "by the back-door" between the barrister and those he permits to share his office facilities. The BSB recognises the need to monitor closely what happens and proposes that those entering into office sharing will be required to keep records of cases referred to the barrister by the others sharing his office and vice versa.
16. Whilst we regard the proposals to monitor arrangements as necessary and proportionate we question how easy or effective such policing by the BSB will be. To take but one example, how would the BSB guard against the informal arrangement between barrister and solicitor that permitted the solicitor to use the barrister's office space and facilities for a nominal charge on the understanding that the solicitor sent him all his Crown Court cases? Will the BSB be looking at whether the facilities are provided at a commercial rate? What if the solicitor in exercise of his judgement decides, as he may, that the barristers at the set where he shares office space, are the finest advocates in the country and so wishes to send them all his cases? Would the set risk censure in those circumstances because they enjoy a de facto monopoly over that particular source of work?
17. We fear that, whilst the proposed monitoring is laudable and well intentioned, it will be ineffective against those determined to bend the rules.
18. Subject to the concerns expressed above we see that there may be very real advantages in permitting office sharing for those who wish to take advantage of it and no countervailing argument of sufficient

weight to convince us that it ought not be permitted in the public interest. Accordingly, we support the proposal in paragraph 8.

Question 2: Do you agree with the proposals in paragraph 11?

19. The BSB proposes to include a new paragraph 403.3 in the Code of Conduct so as to dis-apply restrictions (1) to (3) in the new proposed paragraph 403.2 (i.e. those restrictions which require complete separation of business and prohibit referral arrangements where barristers share office facilities with other person or entities).
20. The purpose of the proposed amendment is to allow self-employed barristers to share office facilities with entities which are set up by barristers for the specific purpose of facilitating block contracting or other procurement with purchasers of legal services. The establishment of such entities may well be essential if the self-employed Bar is to be able to compete for block contracts and the like.
21. We have some reservations about the wording of the proposed paragraph 403.3 of the Code. It would allow self-employed barristers to share office premises with Special Purpose Vehicles (SPVs) “*controlled*” by barristers. The question obviously arises, “What does *controlled* mean?” Would it allow, for example a 49% non-barrister shareholding? The exact nature of SPVs is as yet undecided and so we are unable to conclusively say that this rule change would necessarily be apt to achieve the intended purpose.
22. With the above caveat in mind, we support the proposal in principle. Indeed, we see an amendment of this type as essential if the Bar is to be able to compete on a level playing field with others vying for work from purchasers of legal services.

Question 3: Do you agree with the proposals in paragraph 16?

23. Paragraph 16 proposes that self-employed barristers should in future be permitted to investigate and collect evidence and to take witness statements in both civil and criminal cases. However, a barrister will be precluded from acting as an advocate in the case if there is reason to think that s/he might be called as a witness or their conduct in collecting evidence otherwise impugned.
24. The justification for the existing prohibition is based on the argument that if a barrister collected evidence his or her duty to the court might be compromised if the evidence (or how it was obtained) was called into question in the proceedings or if it might be thought that the barrister had coached a witness.
25. In fact, in modern practice it is not uncommon for a barrister, particularly for those at the Criminal Bar, to be forced by circumstance to take a witness statement from a witness at court (where no other lawyer is available at court). Such conduct is, of course, already permitted under the current rules.
26. We can see no compelling argument why barristers should not be permitted generally to take witness statements. That broad statement of view is subject to the caveat that a barrister ought not to act as an advocate in the case if there appears to be a real risk that s/he might be called as a witness or if there is a real risk that their conduct in collecting evidence might otherwise be impugned or called into question in the proceedings.
27. The BSB is alive to this point and includes in its draft amended paragraph 401(b)(iii) a prohibition on a barrister providing advocacy services in a case where one or more of the risks identified in paragraph 24 above are present.

28. Permitting barristers not just to take witness statements but also to “collect evidence” necessarily increases the opportunity for the barrister to become professionally embarrassed if he also intends to act as the advocate in the case. This fact may lead many to question whether it is wise for them to act as both an evidence collector and advocate but that would not be a proper or sufficient basis for opposing the proposed amendment of the Code.
29. There is likely to be considerable cost and court time wasted if an advocate finds him/herself professionally embarrassed in the middle of a hearing because of exercising such a dual role. We are, therefore, of the view that the drafting of the wording of paragraph 401(b)(iii) requires careful consideration. We believe that the threshold should be set low in that the barrister should not act as an advocate if there exists a real risk (as opposed to a theoretical or fanciful risk) that their position may become compromised because they have taken witness statements or otherwise “collected evidence”. We respectfully suggest that the current wording of the proposed amended paragraph 401(b)(iii), *“where it appears likely that the barrister will be called as a witness...etc”* is an insufficient safeguard against the eventuality it seeks to avoid.

Question 4: Do you agree with the proposals in paragraphs 17-19?

30. The BSB proposes to allow self-employed barristers to attend at police station interviews providing that the barrister is not then involved in the subsequent advocacy of the case and that any barrister who attends a police station interview must have undergone appropriate training and supervision until he has gained sufficient experience.

31. We have considerable doubt as to whether this is a function which fits comfortably with the Bar's core functions. It is something for which barristers are not currently well equipped to undertake. There is nothing in the BVC or pupillage that would adequately prepare a barrister to discharge this important function. It does not seem to us that this is a function that is reasonably incidental to the Bar's core functions and areas of expertise. Indeed, it can properly be argued that it is wholly incompatible with a barrister's primary function as an advocate since if s/he were to attend upon a suspect in interview s/he would, thereafter, be precluded from offering his lay client the benefit of his key area of expertise i.e. advocacy.
32. We are also concerned that if the amendment is made as proposed that junior members of the Bar may come under pressure (whether overt or otherwise) to undertake this work when, given a free choice, they would choose not to. Attending interviews in the small hours of the morning is understandably not at the top of the list of popular functions for solicitors. The junior Bar may be seen as a convenient way for a solicitor to shift an unpopular (and poorly paid) job sideways. One of the objectives of the Legal Services Act is to encourage an independent, strong, diverse and effective legal profession. We fear this proposal may, inadvertently, have a tendency to militate against that objective.
33. If, notwithstanding the comments made above, the BSB decides to press ahead with the proposed amendment we strongly support the proposal that a barrister should not be permitted to attend police station interviews until they have undergone appropriate training and a period of initial supervision. As we noted above, neither the BVC nor pupillage provides any relevant training to equip the barrister to properly discharge such a role. It is essential that, if barristers are to take on such a task, they undergo training to enable them to perform

that task to the standard of excellence for which the Bar is renowned in its established areas of practice.

34. We regard it as beyond argument that any barrister who attends a police station interview should be precluded from playing any role in the advocacy in the case. The conduct of a police interview and the advice offered to a suspect before and during the interview by his legal adviser is often a live and contentious issue in a criminal trial. It would be wholly inappropriate for someone who is distinctly liable to become a witness in respect of the advice s/he offered the suspect or in respect of the conduct of the interviewing officers to be involved in any way in advocacy of the case. The risk of professional embarrassment and consequential compromise of the trial is sufficiently stark and obvious to justify the proposed blanket prohibition.
35. It is perhaps interesting to note in this context that solicitors who attend police station interviews are not, by their rules of professional conduct, prohibited from acting as an advocate in proceedings which may follow, even though the reasoning which underpins our firm conclusion that it is undesirable to do so applies with equal force to the solicitor advocate.
36. We are, therefore, in principle opposed to amending the code to permit barristers to attend police station interviews. If, notwithstanding the views expressed in this document, the BSB decides to proceed with the proposal we would strongly endorse the need for the accompanying restrictions on conducting advocacy where a barrister has attended the police station interview.

Question 5: Do you agree with the proposals in paragraphs 20-30?

37. The BSB proposes to remove the current restrictions on self-employed barristers conducting correspondence.
38. The prohibition on barristers from undertaking correspondence appears historically to have been based on the grounds that barristers are not trained to undertake this sort of work and lack the resources to do so.
39. It is suggested at paragraph 19 of the Guidance for Barristers that conducting correspondence tends to be part of running an office and administrative operation and that the modern requirements of conducting correspondence (such as retaining multiple copies of letters and operating 52 weeks a year) are beyond barristers and/or chambers.
40. In our view, the above concerns no longer have application today for the following reasons:
 - (i) Barristers are of course highly skilled at drafting letters: we are aware that criminal barristers often draft letters for the attention of the opposite party or the court which are then simply transposed by solicitors onto their headed paper and forwarded;
 - (ii) The vast majority of barristers now use computers in order to create and store their written work; and
 - (iii) Chambers are increasingly computerised and run an administrative operation for very close to, if not the full, 52

weeks of the year.

41. We would recommend that barristers wishing to conduct correspondence on behalf of a client should attend a suitably accredited training course. Such a course is unlikely to need to be very extensive but would cover the essential topics to ensure that the barrister is properly equipped to safeguard both his own position and that of his client.
42. Finally, as an additional safeguard, we consider that the BSB should issue guidance on the conduct of correspondence to ensure that barristers are properly informed as to:
 - (i) How to avoid entering into inappropriate communications with an opposite party;
 - (ii) How to establish appropriate systems for managing communications;
 - (iii) How to adopt appropriate procedures to compile, preserve and store files of correspondence.
43. For the above reasons, we support the BSB's proposal that a self-employed barrister be permitted to undertake correspondence.

Question 6: Do you agree with the text of paragraphs 401(b) (ii) and (iii) of the Code of Conduct suggested in Annex A?

44. The proposed amendments to the Code of Conduct are set out in paragraphs 401(b) (ii) and (iii). Paragraph 401 (b) (ii) concerns the prohibition of the conduct of litigation and inter-partes work. The amendment is a narrow one and seeks to permit (but not oblige) a barrister to conduct correspondence of an inter-partes nature.

45. Paragraph 401 (b) (iii) concerns the prohibition of the investigation or collection of evidence for use in any Court. The amendment is one that would permit such investigation/collection but prevent the barrister from appearing as an advocate in the case 'where it appears likely that the barrister will be called as a witness or that his conduct in gathering evidence may be impugned'.
46. Our view as to the conduct of inter-partes correspondence is set out in paragraphs 38 to 43 above. It is that, provided the barrister has appropriate systems and resources in place for the management of correspondence and has suitable guidance and experience, there ought to be no prohibition on that barrister conducting correspondence where it is in the interests of the lay client. Provided sufficient guidance is given there is no good reason to prevent that which is likely to save the lay client expense, prevent the duplication of work and lead to the more efficient conduct of cases before the courts. We agree with the text of paragraph 401 (b) (ii) and consider the wording of paragraph 401A.1 below.
47. Paragraph 401 (b) (iii) as regards the investigation and collection of evidence sets the test too low in our view. It does not provide for the position where it did not appear likely to the collecting/investigating barrister at the outset of a contested case that issues might arise as to his conduct but there was, objectively, a real risk that such issues would arise. We suggest that the words "where it appears likely that the barrister will be called as a witness or that his conduct ..." should be replaced with the words "where there is a real risk that the barrister will be called as a witness or that his conduct...". Subject to that amendment we agree with the text.
48. Paragraph 401 (b) (iii) as it relates to the conduct of work in a police station requires additional text. We set out our concerns as to the dangers of criminal trials being disrupted where a barrister who acted

in the police station appears for the defendant (or one of the defendants) above. In our view even the test of 'real risk' would not safeguard against such a position - the frequency in which the conduct of an interview becomes an issue in a criminal trial suggests that it is always a 'real risk'. It is our view that the text should read:-

(b) Must not in the course of his practice:

...

- (iii) attend at a police station without the presence of a solicitor to advise a suspect or interviewee as to the handling and conduct of police interviews unless the barrister has complied with such training requirements as may be imposed by the Bar Standards Board in respect of such work.
- (iv) provide advocacy services in any criminal proceedings in which he has attended at a police station for any defendant in connection with those proceedings or any associated proceedings.

Question 7: Do you agree with the text of paragraphs 401A.1 of the Code of Conduct suggested in Annex A?

49. We suggest that paragraph 401A.1 (a) (ii) should read "*he has adequate systems, training, experience and resources ...*" Subject to that addition we agree with the proposed amendment.

Question 8: Do you agree that guidance is necessary as suggested in paragraph 30? If so, what do you suggest should be the content?

50. We believe that guidance is always necessary where the profession enters new territory, to ensure clarity both for members of the profession and their clients. The matters set out below is by no means an exhaustive list; owing to the fairly short period allowed by way of response to the consultation paper an exhaustive list is impossible. We suggest that the following should be considered for inclusion.
51. Correspondence:
- (a) Guidance as to when it would not be in the lay client's best interests for the barrister to engage in correspondence,
 - (b) There should be a protocol for managing and storing documentation, setting down the minimum standards required. Demonstration that these standards are adhered to might be considered to be part of a chambers' assessment for Bar Mark or other quality assessments.
 - (c) There should be guidance on minimising the risk of professional embarrassment to prevent, where possible, barristers being required to give evidence where correspondence has been conducted.
 - (d) There should be minimum standards of service set for those who decide to undertake the conduct of correspondence.
52. Collecting Evidence:
- (a) The barrister should maintain an audit trail,
 - (b) There should be guidance on maintaining independence,

- (c) There should be guidance as to good practice in interviewing witness and taking a witness statement,
- (d) The guidance should include indications as to how to assess whether evidence is likely to be disputed or otherwise impugned and give guidance on what steps to take when that risk becomes apparent.

53. Attendance at police station:

- (a) We consider this to require more than mere guidance. If the Bar is to enter the field of police station advice it should do intending to provide the very best service possible. To do otherwise would damage the reputation of the bar as a centre of expertise and excellence.
- (b) There should be appropriate training run by an approved service provider in the first instance. Qualification should be followed by a period of supervision by a qualified and experienced individual who would be required to sign off the trainee as suitable for police station work before such work could be undertaken - in a manner similar to (but far shorter than) the way in which the first six months of pupillage are undertaken.

Question 9: The proposals in paragraph 16 and those in paragraphs 20 to 30 apply to both civil and criminal work. Do you think that different provisions would be appropriate in those types of work? If so, what should the differences be?

54. It is often noted that special considerations apply to barristers conducting criminal trials and as a result special protections are often thought necessary. In some cases that is indisputable. However, the

proposals in the consultation paper as to the broadening of permissible activities are narrow ones. To some extent the taking of witness statements by barristers in criminal trials is permitted. The drafting by barristers of documents that are incorporated into solicitors' letters is also commonplace. We see no need for any special protection in these cases for those conducting criminal as opposed to civil trials.

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